
(1996) 10 AHC CK 0010
In the Allahabad High Court
Case No : Regular First Appeal No. 6 of 1978

Canara Bank

APPELLANT

Vs

Pradeep Steel Rerolling Mills (P.) Ltd. and Others

RESPONDENT

Date of Decision : 14-10-1996

Acts Referred:

Contract Act, 1872 — Section 126, 127

Citation : (1996) 10 AHC CK 0010

Hon'ble Judges : Maithli Sharan, J;Brijesh Kumar, J

Bench : Division Bench

Advocate : Vishan Singh, for the Appellant; D.C. Sinha, for Res. No. 1, V.L. Verma, O.P. 1, 2 and 4 and A.P.S. Gaur, O.P. No. 1, for the Respondent

Final Decision : Allowed

Judgement

Brijesh Kumar, J.—This first appeal is preferred against the judgment and decree dated 5.10.77 passed by the Civil Judge, Malihabad, Lucknow, in Regular Suit No. 82 of 1975. The Plaintiff/Appellant had filed a suit for recovery of a sum of Rs. 17,49,397.31 from the Defendants. The Defendant No. 1 is M/s. Pradeep Steel Re-rolling Mills Pvt. Ltd. sued through its Managing Director, Keshav Prasad. Defendant No. 2 is Keshav Prasad Vaid who has been the Managing Director of the Company. The Defendant Nos. 3 and 4, namely, Naval Kishore Vaid and Sri Jugal Kishore Vaid, respectively, were the Directors of the Company, Defendant No. 1. The Defendant Nos. 2, 3 and 4 were sued as guarantor for the repayment of loan advanced to the Defendant No. 1, the Company. Defendant No. 2, Naval Kishore Vaid, since dead, his heirs are on the record as Respondent Nos. 3/1 to 3/4.

2. The points raised in this appeal, mainly relate to questions of law, involving very little of facts. The bare necessary facts are that Defendant No. 1, namely, M/s. Pradeep Steel Re-rolling Mills Pvt. Ltd., applied to the Plaintiff, namely, the Canara Bank, Vidhan Sabha Marg, Lucknow, for advancing loan and other credit facilities. The Plaintiff had granted the loan and the facilities to Defendant No. 1.

The Defendant No. 1, in consideration of the loan and the facilities, extended by the Plaintiff, executed a hypothecation agreement. Certain overdraft facilities were farther given later on for which another hypothecation deed was executed by Defendant No. 1. Defendant Nos. 2, 3 and 4 also executed separate guarantee deeds for repayment of loan and the amount on account of overdraft facilities given to Defendant No. 1 upto a maximum limit of Rs. twenty lacs. Under the agreement, they made themselves jointly and severally liable to pay the entire bank dues, along with the Defendant No. 1. Cash credit limit is said to have been increased later on executing necessary documents. On nonpayment of dues outstanding against the Defendants, the Plaintiff filed a suit against the Company, namely, Defendant No. 1 and its three Directors as guarantors who stood surety for repayment of the amount due. A number of issues were framed by the trial court. The suit was decreed as against Defendant No. 1 alone but it was dismissed as against Defendant Nos. 2, 3 and 4. The Appellant has challenged the dismissal of its suit as against Defendant Nos. 2, 3 and 4 who, according to the Appellant, are equally liable jointly and severally along with the Company, Defendant No. 1, for the payment of outstanding amount, hence the suit should have been decreed as against them also.

3. The main defence taken on behalf of the Defendants was that the guarantee deeds were executed without any consideration after the loan had been advanced, hence they were invalid. The other plea on which the cause was defended was that the guarantee deeds were not tripartite but were entered into between the guarantor and the Bank alone, leaving aside the principal debtor, hence on that court too the guarantee deeds were invalid and inoperative. Issue No. 3 was framed by the trial court to the following effect:

3. Whether the guarantee executed by Defendant Nos. 2, 3 and 4 is not valid and binding?

The issue was decided in favour of the Defendants and against the Plaintiff/Appellant. The learned Counsel for the Appellant has challenged the findings recorded by the trial court on issue No. 3. The guarantee deeds executed by Defendant Nos. 2 to 4 are exhibits 7, 8 and 9 on the record. Learned trial court has found that guarantee deeds do not bear the signature of the borrower, namely, M/s. Pradeep Steel Re-rolling Mills Pvt. Ltd., hence it remained contract between the Plaintiffs Bank on one hand and Defendant Nos. 2, 3 and 4 on the other, separately. The learned trial court, while considering the above question, has placed reliance upon a decision of Madras High Court in *Periannianna Murrakayar v. Banians and Co.* (1926) 49 Mad 156, wherein it has been held that in order to constitute a contract of guarantee there must be a third contract by which the principal debtor expressly or impliedly request the surety to act as such. The trial court, on the ground that there was no signature of the principal debtor on the guarantee deed held that it was nothing but a waste paper, in the eyes of law.

4. The trial court has also recorded a finding that loan and overdraft facilities

were provided by the Plaintiff/Appellant to the Defendant No. 1 even prior to execution of the guarantee deed, therefore, it was a guarantee deed executed later without any consideration, hence not valid. It is observed by the trial court itself that consideration in the guarantee agreements are that the Plaintiff would pay something to the principal debtor. It is also observed that such a promise made would be sufficient consideration but in the present case the loan and facilities had already been extended by the Bank and the guarantee agreement was entered into after a lapse of 26 days. In this situation, according to learned trial court, illustration (C) of Section 127 of the Indian Contract Act was attracted which provides and reads as follows : "A sells and delivers goods to B. C. afterwards, without consideration agrees to pay for them in default of B. The agreement is void." According to trial court exactly the same factual situation is prevailing in the present case as indicated in the above quoted illustration. The guarantee agreement, thus, has been held to be void and not enforceable. The trial court has, in its judgment, referred to a decision in Nanak Ram v. Mehi Lal AIR 1877 All 487, in which the guarantor had executed a separate guarantee bond after the money had already been advanced. The guarantor was not a party to the agreement. The bond was held to be void for want of consideration.

5. We may first take up the question as to whether it is necessary that there must be a tripartite agreement so as to bind the guarantor for repayment of the dues. According to the trial court, the principal debtor, creditor and the guarantor all should have entered into the agreement. Learned Counsel for the Appellant has submitted that it is not necessary that there must always be a written agreement between the principal debtor and the surety as well. Such an agreement can also be inferred or there can be an implied request on the part of the principal debtor to the guarantor which would satisfy the requirement. Reliance has been placed upon a decision in AIR 1937 19 (Oudh) . It is a Division Bench decision of the Oudh Chief Court. It was held that for a contract of surety, there should be concurrence of the principal debtor, the creditor and the surety but it is not necessary that there must always be evidence to prove such an agreement. An implied request on the part of the principal debtor can be inferred from the facts and circumstances which would be sufficient compliance of the requirement. In that case, the principal debtor was present at the house of the surety when the surety had written a letter to the creditor taking upon himself, the responsibility of repayment in case of any difficulty in payment of the amount by the debtor to the creditor. The implied request on the part of the principal debtor was inferred and the surety was held to be responsible for making the payment. In the case of Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , the Hon"ble Supreme Court has observed that a contract of guarantee requires concurrence of the principal debtor, the surety and the creditor, the surety undertaking an obligation at the request express or implied of the principal debtor. It is, thus, clear from the observation of the Hon"ble Supreme Court that implied request can also be inferred on the part of the principal debtor and It would not always be necessary that he must sign the

agreement of surety. Similar view has also been taken in a decision, Prasanjit Mahtha Vs. The United Commercial Bank Ltd., , holding that the request on the part of the principal debtor may be implied as well. As a matter of fact in the case of Periannianna Murrakayar v. Banlaons and Co. (supra), which has been relied upon by the trial court, it has been held that a valid contract of suretyship should be at the request "actual or constructive of the principal debtor". Thus such a request or agreement can be construed from the facts and circumstances of the case. In one of the Division Bench decisions of this Court in U.P. State Bridge Corporation Ltd. v. M/s. National Building Construction Company Ltd. 1993 LCD 275, it has been held that an implied request of surety by the principal debtor would be sufficient for a contract of guarantee. It need not be an express request. The legal position, which thus emerges from the decisions referred to above, is that for the purpose of contract of guarantee u/s 126 of the Contract Act, it would not always be necessary that there must be an express request on the part of the principal debtor to the guarantor, in undertaking the guarantee of payment, or must be a party to the agreement. An inference of implied request would meet the legal requirement.

6. We may now examine the deeds of guarantee; Exhibits 7, 8 and 9 in the light of the legal principle indicated above. The Defendant No. 1 had stood surety for repayment of dues of M/s. Pradeep Steel Rerolling Mills Pvt. Ltd. by executing Ext. 7. The agreement was signed by Keshav Prasad Banarsi Das Vaid, namely, the Defendant No. 1 as guarantor. In this connection, the fact which cannot be lost sight of is that Keshav Prasad Vaid is the Managing Director of M/s. Pradeep Steel Re-rolling Mills Pvt. Ltd., the Defendant No. 1. The next exhibit, namely, Exhibit No. 8 is a contract of guarantee entered into between the creditor and Naval Kishore Vaid. Naval Kishore Vaid was the Director of the debtor Company, so was the case with Jugal Kishore who too was a Director of the borrowing Company and entered into the agreement Ext. 9. All these three agreements were entered into between the Defendant Nos. 2 to 4 on the same date, namely, 25.9.72 separately. M/s. Pradeep Steel Re-rolling Mills is a Private Limited Company. Such Companies Act through its Directors or Managing Directors. As indicated earlier, the Defendant Nos. 3 and 4 are directors while Defendant No. 2 is the Managing Director of the Company. Normally they would sign the agreement for and on behalf of the Defendant No. 1. As indicated earlier all the agreements were entered into on the same date. So far the creditor Bank is concerned, all the agreements were signed by its Branch Manager Sri B.V.N. Baliga. All the conditions of the three contracts, entered into between the creditor Bank and the Defendant Nos. 2 to 4 are the same, including the maximum limit of the loan, the rate of interest and other conditions as well. Such circumstances, as indicated above, are enough to establish an implied request on behalf of the principal debtor to the surety to take guarantee for repayment of the dues. In one of the decisions referred to above, Raja Jagannath Bakhsh Singh v. Chandra Bhukhan Singh and Anr. (supra), the mere circumstance, which was taken into consideration for inferring implied consent, was that the principal

debtor was present at the house of the surety when the surety had written a letter of guarantee to the creditor.

7. In view of the discussion held above, in our view, the finding recorded by the trial court that the contract of guarantee was bad as it was not a tripartite agreement, is not correct. The agreement of guarantee is valid and binding.

8. The next question, which falls for consideration, is whether or not the illustration (C) of Section 127 of the Contract Act is attracted to the facts of the case. According to findings recorded by the trial court, the advance had already been made to the principal debtor and the contract of guarantee was entered into later, after a lapse of 26 days, without any consideration, hence such a contract was void.

9. Learned Counsel for the Appellant has vehemently challenged the finding recorded by the trial court. It is submitted that the contract of guarantee was a continuing contract. It is submitted that the trial court erred in construing the contract of guarantee only in respect of the payments which, it is said, had already been made prior to entering into the contract. It was a contract in regard to the dues as were standing at the time when the contract was entered into as also in regard to the dues which may fall due in future. Such contracts of guarantee are continuing contracts, hence the finding of the trial court is liable to be set aside. It may also be pointed out here that on behalf of the Appellant the finding recorded by the trial court that the advance had already been made 26 days prior to entering into agreement has also been challenged as incorrect.

10. Sri Vishal Singh, learned Counsel appearing on behalf of the Appellant, has placed reliance upon a decision in AIR 1940 346 (Oudh) . It was a case where the agreement was construed as a continuing agreement. Illustration (C) of Section 127 of the Contract Act would not be applicable to such continuing agreement. Yet another case, which has been relied upon, in Chakhan Lal and Others Vs. Kanhaiya Lal and Others, . The question that requires examination is as to whether the agreements Exts. 7, 8 and 9 are continuing agreements or not. A perusal of Exhibits 7, 8 and 9 very clearly indicates that it was a continuing agreement which had covered not only outstanding dues but dues which might fall due in future as well. The relevant part of the agreement reads as follows:

...the Guarantor both hereby agree to indemnify the Bank against all loss and to pay and satisfy to the Bank on demand "the general balance" due from the Borrower and the expression "general balance" shall be deemed to include all and every the sum and sums of money which are now or shall at any time be owing to the Bank in any of its offices on any account whatsoever....

The maximum limit of total enforceable liability was indicated as Rs. twenty lacs. There was no time limit indicated in the agreement for making the advances. So the limit, which was imposed, was about the liability to the extent of 20 lacs for which the guarantor had taken the guarantee to pay on demand "the general balance" which, according to terms of the agreement, included all sums of

money that was owned by the principal debtor to the Bank or which borrower might at any time be owing on any account whatsoever. Such an agreement is a continuing agreement. It did not only cover the amount which had already stood due but which might accrue due at any time in the "general balance". The guarantor was liable to make payment of the general balance which may vary from time to time upto the limit of Rs. 20 lacs. The advance made and amount due at the time of the agreement was much below than Rs. 20 lacs. Therefore, further advances could still be taken by the principal debtor. It is a sufficient consideration for an agreement of guarantee for payment of "general balance" which also included amount which was advanced earlier. It was only a part of the general balance. There could still be future advances which would constitute a valid consideration for the agreement of guarantee. We are, therefore, of the view that the finding of the trial court on the second count is also not sustainable. The illustration (C) of Section 127 of the Contract Act is not applicable in the case of a continuing contract of guarantee covering future dues as well.

11. Learned Counsel for the Appellant submits that P.W. 1 the Branch Manager of the Plaintiff/Appellant, on the basis of the statement of account, had stated in his statement that such transaction had taken place only on 26.9.72. It is submitted that earlier a request, etc. may have been made for making payment but actual payment was made only after the agreement had been entered into. It is submitted that this part of the statement of Sri Baliga, P.W. 1. goes unchallenged, hence the trial court should have accepted the same. We, however, feel that it is not necessary to go into that aspect since we have already held that the agreement of guarantee was a continuing agreement which had undertaken the payment of amount standing due in the general balance.

12. In view of the discussion held above, we allow the appeal with costs and set aside the judgment and decree passed by the trial court in so far it dismissed the suit of the Plaintiff/Appellant against Defendant Nos. 2 to 4. The suit is hereby decreed as against Defendant Nos. 2 to 4 also who shall "be liable separately and jointly with Defendant No. 1 as well to pay the sum decreed by the trial court.