

(1999) 07 KL CK 0051
In the High Court Of Kerala
Case No : S.A. No. 701 of 1996

C.K. Aboobacker

APPELLANT

Vs

K.P. Ayishu

RESPONDENT

Date of Decision : 30-07-1999

Acts Referred:

Contract Act, 1872 — Section 140, 145

Citation : (1999) 07 KL CK 0051

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : A.K. Basheer, for the Appellant; R. Bhaskaran, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—This case reveals an unfortunate feud between a son and mother. The mother, Plaintiff was a surety for the Defendant, her son for a loan of Rs. 75,000 availed of from a bank to purchase a Jeep. As security, the Plaintiff had to mortgage her property. The Defendant, the principal debtor committed default. This resulted in a suit filed by the bank. The suit was obviously decreed. That led to execution of the decree against the Defendant as well as the Plaintiff. The Plaintiff had to pay Rs. 10,000 at one instance to avert sale of the property offered as security. The Defendant did not pay back that amount to the Plaintiff. Therefore, the suit was filed to recover the said amount. The suit was decreed and the Defendant is assailing the concurrent decree.

2. It is an admitted case that the Defendant did not pay the entire amount due in terms of the said decree to the bank, but paid only a part. It is further admitted that no amount is now due from the Defendant towards the said decree debt. Obviously, the decree debt had been paid, except to the extent the Defendant discharged the liability, by the Plaintiff on payment of the said Rs. 10,000 and other subsequent payments. Consequently in spite of Ext. B-2 that there was an understanding, between the parties that the guarantor was liable to pay the amount the suit was decreed. The decree was confirmed by the lower appellate Court. It is in the above circumstances, this S.A., mainly raising a substantial

question of law centered around Section 140 of the Indian Contract Act, 1872. It is contended that as the amount claimed in the suit does not satisfy the entire liability, the Plaintiff is not entitled in terms of the said Section to be subrogated and that without paying the entire debt, the guarantor cannot realise a portion of the debt paid, from the principal debtor, as he has not performed "all that he is liable for" in terms of Section 140.

3. In support of these contentions, the Appellants relied on the decisions reported in *Darbari Lal and Anr. v. Mahbub Ali Mian and Ors.* AIR 1927 All 538 (2) *Carr Lazarus Phillips and Others Vs. Alfred Ernest Mitchell and Others*, and *Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others*, . It is held in the first among the three decisions that a guarantor is liable to pay whole of the indebtedness of the principal debtor. This preposition can never be disputed. In the second decision, it is held that a guarantor can get back the security only on payment of the entire amount due in terms of the transaction. That also is beyond doubt. The Supreme Court has held in the third decision that a guarantor will step into the shoes of the creditor when the guarantor discharges his obligations in terms of the contract. What is to be considered is whether these three decisions have any bearing on substantial question of law involved in the case.

4. In answer to the contention, it is contended by the Respondent that Section 140 has no application to this case. What is sued for is only an amount paid in part towards the decree debt. Another suit is still pending between the parties claiming the amount paid subsequently, for the satisfaction of the decree debt. In such circumstances, the real provision applicable is Section 145 of the Contract Act.

5. Whichever be the provision applicable to this case, there can only be one conclusion. It is true that in terms of Section 140, a guarantor will get invested with all the rights which the creditor had only "upon payment or performance of all that he is liable for". A guarantor is liable for any payment or performance of any obligation only to the extent the principal debtor has defaulted. If the principal debtor has paid a substantial portion of the loan amount, the guarantor need pay only the balance. In other words, all that a guarantor is liable for is, the reminder left after adjusting the payment made by the principal debtor. The decision cited by the Appellant as indicated above, are not sufficient, to drive this Court to a different conclusion in this case. Therefore, there arise no situation for answering the substantial question of law involved in the case in favour of the Appellant. Moreover, Section 145 makes it clear that in every contract, there is an implied promise by the principal debtor to indemnify the surety and on its basis, the latter is entitled to recover from the former, whatever sum, the latter had rightfully paid under the contract of guarantee. There is no contention that the guarantor has made any payment wrongfully . So, Section 145 also enable the Plaintiff to get a decree in the same terms as was granted by the Courts below. The S.A. therefore fails. Dismissed. No costs.