
(2005) 04 AP CK 0100
In the Andhra Pradesh High Court
Case No : CCCA No. 100 of 1995

C.N. Sundaram

APPELLANT

Vs

Chennai Finance Company Limited and Others

RESPONDENT

Date of Decision : 06-04-2005

Acts Referred:

Contract Act, 1872 — Section 127, 128, 133, 139, 62

Citation : (2005) 4 ALD 850 : (2005) 5 ALT 60 : (2005) 2 APLJ 350 : (2006) 3 CivCC 422 : (2006) 1 RCR(Civil) 546

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : P.M. Gopal Rao, for the Appellant; A. Suryanarayana, for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

N.V. Ramana, J.—This appeal is directed against the judgment and decree dated 14-11-1994 passed by the IV Additional Judge, City Civil Court, Hyderabad, in O.S. No. 322 of 1989.

2. The appellant is Defendant No. 7 and Respondent No. 1 is the plaintiff. The appeal, as against Respondent Nos. 2 to 7, who are Defendant Nos. 1 to 6, was dismissed for default, vide order of this Court dated 31-12-2001. They were also set ex parte in the suit before the Court below. For the sake of convenience, the parties shall be referred to as arrayed in the suit.

3. The plaintiff, which is a finance company, claims to have advanced a loan amounting to Rs. 1,50,000/- to Defendant No. 1, which is a partnership firm, vide cheque dated 3-11-1986, for purchase of a bore rig, and that Defendant Nos. 2 to 5, who are partners in Defendant No. 1 along with Defendant Nos. 6 and 7 stood as guarantors to the loan amount, and executed loan documents agreeing to repay the loan amount with interest at the rate of 25% per annum, and that Defendant No. 4 also addressed a letter dated 23-5-1987 to that effect.

As Defendant No. 1 having taken the loan amount, and as in spite of receiving the legal notices, Defendant No. 1 and Defendant Nos. 2 to 5 being its partners, and Defendant Nos. 6 and 7, having stood as guarantors, failed to repay the loan amount, the plaintiff filed the suit for recovery of a sum of Rs. 1,02,175-50 ps. from the defendants with interest thereon at the rate of 25% per annum from the date of suit till realization.

4. Defendant No. 7, who contested the matter, filed his written statement contending that he has not received any consideration from the plaintiff and that he is only a guarantor. He contended that as per Clause 9 of the agreement date 31-10-1986 Ex.A1, his liability to repay the amount under the agreement would arise only in the event Defendant No. 1 committing default or failing to repay the amount. While denying execution of the promissory note Ex.A3, jointly and severally along with other defendants, he contended that he only stood as witness to the indemnity bond Ex.A2, executed by Defendant No. 2. According to him, as per the recitals of Clause 6 of the agreement Ex.A1, the liability to repay the loan amount would expire in five months from the date of its execution, i.e. by March, 1987, but the plaintiff made material alteration to the contents of Clause 6, by typing May, 1987 on a different typewriter, as if to indicate that the agreement would mature on May, 1987. At any rate, he contended that even if the validity period of the agreement is taken to be upto May, 1987, the legal notice dated 27-3-1987 got issued by the plaintiff would be premature, and hence the very agreement is void. He contended that the plaintiff, instead of enforcing the liability against Defendant No. 1 in May, 1987 as contemplated by Clause 6 of the agreement, had violated the terms thereof by allowing more time to repay the loan amount, on the basis the Ex. A13, letter dated 23-5-1987, executed by Defendant No. 4 on behalf of Defendant No. 1 without the consent of Defendant No. 7, and by accepting amounts on different dates thereafter. He thus contended that the agreement Ex. A1, between Defendant No. 7 and plaintiff stood discharged in May, 1987 after the expiry of the five month period, and prayed that the suit be dismissed.

5. Having regard to the rival pleadings, the Court below framed only one issue, namely whether Defendant No. 7 stood discharged from the liability as pleaded by him.

6. The plaintiff examined P.W. 1 and marked documents Exs.A1 to A14, while Defendant No. 7 examined himself as D.W.I and marked no document.

7. The Court below considering the evidence on record, and particularly the fact that Defendants No. 7 had signed several documents, held that he is not discharged from the liability, and accordingly answered the issue in favour of the plaintiff and against Defendant No. 7.

8. Heard the learned Counsel for the appellant and the learned Counsel for the respondent.

9. The learned Counsel for the appellant submitted that the appellant did not

receive any consideration under the agreement Ex.A1 and the suit pro note Ex.A3. As per contents of Clause 6 of the agreement Ex.A1, the agreement is valid for five months from the date of its execution, and as the agreement was executed on 31-10-1986, it is valid upto March, 1987, but the plaintiff made material alteration to Clause 6 of the agreement Ex.A1, by typing the expiry date of the agreement, as May, 1987 on a different typewriter. As the material alteration made by the plaintiff sought to extend the period of agreement beyond the period agreed for, the learned Counsel for the appellant contended that the agreement stood invalidated. In support of his submission that u/s 133 of the Indian Contract Act, 1872 any material alteration or variance in the terms of contract, made without the consent of the surety, would discharge him from the liability arising therefrom, and the right of the plaintiff to proceed against the surety would be affected, placed reliance on judgment of the Apex Court in *Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others*, . He contended that the appellant signed the indemnity bond Ex.A2, executed by Defendant No. 2, only as a witness and not as a guarantor. The letter dated 23-5-1987, Ex.A13, addressed by Defendant No. 4 to the plaintiff is not to the knowledge of the appellant, and as such, the contents thereof, basing on which, the plaintiff had unilaterally extended time for repayment to the principal borrower, is not binding on him. in view of the unilateral extension of time by the plaintiff on the request made by Defendant No. 4 under Ex.A13, to which he is not a party, and in view of acceptance of payments after the due date, the learned Counsel contends that the appellant stood discharged from the agreement Ex.A1, as by the execution of Ex.A13, a new agreement has come into existence, which is enforceable only against Defendant No. 4. He submitted that if Defendant No. 1 failed to repay the loan amount, the plaintiff ought to have proceeded against the hypothecated property and other defendants, but the plaintiff by allowing the other defendants to sell the hypothecated property, had violated the conditions of the agreement Ex.A1. He, thus contended that the appellant is not liable to pay any amount under the suit pro note as he stood discharged upon the coming into existence of Ex.A13, which created a new contract between Defendant No. 4 and the plaintiff, and prayed that the suit be dismissed and the appeal allowed.

10. Per contra, the learned Counsel for the respondent submitted that the appellant has signed the agreement Ex.A1 and also pro note Ex.A3 and executed other documents agreeing to repay the loan amount jointly and severally in the event of Defendant No. 1 failing to repay the loan amount. He denied the contention of the appellant that he signed the indemnity bond, Ex.A3 and other document as guarantor, and contended that he signed them only as a witness. As the appellant and other guarantors agreed to repay the loan in the event the principal borrower failed to repay the loan amount, the appellant cannot contend that he is not liable to pay any amount as he has not received any consideration under the agreement Ex.A1 and pro note Ex.A3. He contended that the letter Ex.A13 is continuation of the agreement Ex.A1. Ex.A13 neither cancelled Ex.A1 nor it created a new contract, nor discharged the principal borrower and other

sureties and guarantors from the liability arising out of agreement Ex.A1. He denied there is any material alteration or variance made by the plaintiff in the agreement Ex.A1. He submitted that even assuming that typing of May, 1987 is a material alteration, no prejudice having been shown by the appellant that such material alteration had affected him adversely, he cannot have any grievance. In this context, he placed reliance on the judgments of the Apex Court in *Anirudhan v. Thomco's Bank*, AIR 1968 SC 746 and *Kalianna Gounder Vs. Palani Gounder and Another*, . Ex.A13, executed by Defendant No. 4 is merely continuance of the agreement Ex.A1 whereby on the request made by Defendant No. 4. He relied on the judgment of the Apex Court in *Citi Bank N.A. Vs. Standard Chartered Bank and Others*, . He submitted that the appellant had not unilaterally extended the time for payment, it is only on the request made by Defendant No. 4, the plaintiff extended the time. Defendant No. 4 and other defendants, including the appellant being party to the agreement and the suit pro note, and having signed all the documents, now cannot contend that Ex.A13 is not binding on him, and that he stood discharged from the liability of repaying the loan amount as the plaintiff acted upon it, and more so when the appellant and other sureties agreed to repay the loan amount jointly and severally. He submitted that the plaintiff can proceed against either the hypothecated property or any one or all of the sureties and the appellant cannot contend that the plaintiff should first proceed against the hypothecated property and other sureties, and in support of this contention, he placed reliance on the judgment of the Apex Court in *State Bank of India Vs. Messrs. Indexport Registered and others*, and of the Division Bench of this Court in *Andhra Bank v. A Goel*, 1990 (3) ALT 210.

11. In the background of the rival contentions, the only question that falls for consideration in this appeal is whether in view of execution of Ex.A13 on the request made by Defendant No. 4, the liability of the appellant to repay the loan amount stood discharged under Ex.A3?

12. Ex.A1 is the agreement. It was executed on 31-10-1986. An amount of Rs. 1,50,000/- was paid by the plaintiff to Defendant No. 1 vide Cheque No. 0730631, dated 3-11-1986, and in that regard a separate receipt was also issued by Defendant No. 1. A reading of the contents of Clause 6 of the agreement Ex.A1, would disclose that the transaction is for a period of five months and the hirer (Defendant No. 1) promised and undertook to repay the entire amount of Rs. 1,50,000/-, and though the amount was to be paid by March, 1987, in the gap left for filing the date of expiry, it is typed on a different typewriter as May, 1987. The typing of May, 1987, according to the appellant, is a material alteration, and this has affected him adversely. The appellant signed Ex.A1 as a guarantor. The fact, whether typing of May, 1987 instead of March, 1987 is a material alteration adversely affecting the right of the plaintiff to sue the appellant, has to be considered in the wake of the contents of Clause 6 of the agreement Ex.A1 that "transaction is for a period of five months". When Clause 6 of the agreement Ex.A1, clearly states that the transaction is for a period of five months, it means that it is valid for a period of five months from the date of its

execution, and as the agreement was executed on 31-10-1986, the agreement obviously should expire by March, 1987, but that by itself does not absolve the appellant of his liability of repaying the loan amount, for the limitation for filing the suit by the creditor for recovery of the amount from the principal guarantor and the guarantors would start running from the day the five month period expired, and as such, typing of May, 1987 instead of March, 1987, cannot be treated as a material alteration, adversely affecting the right and interest of Defendant No. 1 under Ex.A1, and more so when the appellant failed to show as to what is the prejudice that is caused to him by such an alteration. In this context, reference be made to the observations of the Apex Court in *Kalianna v. Palani Gounder* (supra), wherein it was observed:

A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state. But if the alteration merely expresses that which was implied by way law in the deed as originally written or which carries out the intention of the parties already apparent on the fact of the deed, it is not material provided that the alteration does not otherwise prejudice the party liable thereunder.

13. Even if it assumed that typing of May, 1987 instead of March, 1987 is a material alteration, the same does not cause any prejudice to the appellant, for the said alteration merely extends the limitation period for the plaintiff to file suit against his debtors, and in the instant case, the suit having been laid on the strength of Ex.A1, much before the expiry of period of limitation in 1989 from March, 1987, the alteration from March, 1987 to May, 1987 cannot be treated as a grave alteration, materially and adversely affecting the right and interests of the appellant.

14. Though the appellant contends that he has signed the documents as a witness and not as a guarantor, a close scrutiny of Exs.A1, A2 and A3, would disclose otherwise. In all these documents, the appellant signed as a guarantor and not as a witness, and in fact, in all the documents, he agreed to repay the loan amount along with the principal borrower and other guarantors, on demand the loan amount taken by the principal borrower, and it be would apt to reproduce the contents of the pronote Ex.A3, which reads:

On demand we Shri Venkatrama Borewells, a firm registered under the Indian Partnership Act, 1932 situated at 36/106, Sainikpuri, Defence Colony, Secunderabad - 594, duly represented by its Managing Partner Mr. Sunkara Aravind S/o. S. Veembhadm Rao, aged about 26 years, resident of 36/106, Sainikpuri, Defence Colony, Secunderabad - 594, and Mr. E. Subrahmanyam S/o. Sri. E.V.S. Sharma, aged about resident of 8-3-402/1, Yellareddyguda, Hyderabad and Mr. C.N. Sundamm S/o Sri. C.S. Narayan, aged about 33 years, resident of 12-2-460/19, Jeevan Kalyan Nagar, Mehdipatnam, Hyderabad - 28, the undersigned jointly and severally promise to pay Chennai Finance Co., limited, 5-9-22/1, Shapoorwadi, Adarshnagar, Hyderabad - 500 463, or order at Hyderabad, the sum of Rupees One Lakh Sixty Two Thousand and Five Hundred

only together with interest at twenty five per cent per annum for value received.

15. As the appellant (C.N. Sundaram), promised to pay jointly and severally to the plaintiff an amount of Rs. 1,62,500/- along with interest at twenty five per cent per annum for the value received, he now cannot be allowed to contend that he is not liable to repay the amount as he has not received any consideration. Be that as it may, u/s 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. When once a person offers to be a surety, his liability to repay the debt is co-extensive with that of the debtor and other co-sureties, until the debt is cleared or repaid or the creditor has consented for his discharge from repaying the loan amount. In the case of decrees, the decree-holder is always at liberty to proceed either against the principal debtor, or one or all of the sureties without proceeding against the hypothecated property. In this context, a reference to the judgment in *State Bank of India v. Indexport Registered* (supra) would be apt, wherein the Apex Court answered the question whether the decree-holder is entitled to proceed against only the hypothecated property, the principal debtor, or one or all the sureties, in the following manner:

Where the money decree was against all the defendants including the guarantor and a mortgage decree against one of the defendants who had mortgaged the shop with the plaintiff bank, so far as the said shop was concerned and the decree did not put any fetter on the right of the decree holder to execute it against any party whether as a money decree or as a mortgage decree, the decree holder would be entitled to proceed against the guarantor first for the execution of the decree. Moreover, it is the right of the decree holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract". If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. In such a case, when the said decree had become final all pleas as to the rights which the guarantor had to be taken during trial and not after the decree while execution is being levied.

16. In *Andhra Bank v. A. Goel*, (supra) the Division Bench of this Court held that one of the promisors of the promissory notes is also equally liable for the amounts thereunder, even though he has not received directly any consideration, and that even assuming that he is treated as a co-obligant, even then, in view of Sections 127 and 128 of the Contract Act, his liability is co-extensive with that of the principal debtor, and therefore, he is also liable on that account. The law on the aspect of the right of the creditor to proceed against the hypothecated property or the principal debtor or one or other co-sureties being clear, the appellant having offered as surety, now cannot be allowed to contend that the plaintiff ought to have first proceeded against the hypothecated property, the

principal borrower and other co-sureties.

17. The crucial question that now remains to be considered is whether in view of the letter Ex.A13, addressed by Defendant No. 4 to the plaintiff, the appellant stood discharged from the liability of repaying the loan amount under Ex.A1. In the instant case, admittedly, as per Clause 6 of the agreement Ex.A1, the agreement is valid for a period of five months. The agreement was executed on 31-10-1986, and if the validity of the agreement is taken at five months, the agreement would obviously expire by the end of March, 1987, but it is contended that the date of expiry of the agreement was typed as May, 1987, and it constitutes a material alteration, affecting the right and interest of the appellant adversely. The principal borrower and other guarantors, including the appellant, signed the agreement agreeing to repay jointly and severally the loan amount within five months. It is the case of the appellant that his liability to repay the loan amount under the agreement, is limited for a period of five months, and at any rate, would not extend beyond the five month periods and would automatically terminate after five months. If one accepts the contention of the appellant that his liability to repay the loan amount under the agreement Ex.A1 is limited to only five months, then if the principal borrower fails to repay the loan amount within five months, as already observed above, the limitation for filing the suit for recovery by the creditor against the principal borrower and the guarantors, would begin from the day the five month period expires. But, before expiry of May, 1987 admittedly, Defendant No. 4 addressed a letter dated 23-5-1987 Ex.A13 to the plaintiff informing that due to partnership problems, they could not repay the loan amount and defaulted, and that they made payment of Rs.30,000/- on 16-5-1987 towards interest and principal, and that as per the discussions he had with the plaintiff on 9-2-1987, he (Defendant No. 4) and Mr. S. Srimannarayana (Defendant No. 3) agreed to repay the total loan amount due with interest at the rate of Rs.25,000/-commencing from 15-2-1987. While informing so, Defendant No. 4 undertook that they, the remaining partners, as per the understanding, i.e. myself (Defendant No. 4) and Mr. S. Srimannarayana (Defendant No. 3), promise to pay the outstanding as per the schedule given below:

- (1) 1-6-87 - Rs.35,000/- together with outstanding interest.
- (2) 1-7-87 - Rs.25,000/- together with outstanding interest.
- (3) 1-8-87 - Rs.25,000/- together with outstanding interest.
- (4) 1-9-87 - Rs.25,000/- together with outstanding interest.
- (5) 1-10-87 - Rs.25,000/- together with outstanding interest.
- (6) 1-11-87 - Rs.25,000/- together with outstanding interest.

18. Though the letter Ex.Ai3 is purported to have been addressed by Defendant No. 4 on behalf of himself and Defendant No. 3, it does not contain the signature of Defendant No. 3. Except the signature of Defendant No. 4, and two witnesses,

no signatures, either of the principal borrower or of the other guarantors, including the appellant, who signed the documents pertaining to the loan transaction, namely Ex.A1, A2 and A3, are found in Ex.A13. The letter Ex.A13 addressed by Defendant No. 4 to the plaintiff, though refers to the agreement Ex.A1, if one goes by the contents and the tenor of the letter, it becomes clear that it creates a new contract in between the plaintiff and Defendant Nos.3 and 4, for except Defendant No. 4 on his behalf and on behalf of Defendant No. 3, no other persons, who are parties to the, agreement under Ex.A1, A2 and A3, have agreed to repay the loan amount taken by the principal borrower under Ex. A1, A2 and A3. Here it is relevant to notice that u/s 139 of the Indian Contract Act, 1872, if the creditor does any act, which is inconsistent with the rights of the surety, or omits to do any act, which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged. A reference in this context be made to the observations made by the Madras High Court in S. Perumal Reddiar Vs. Bank of Baroda and Others, , which read as under:

The true rule applicable to the contract of guarantee is that if there is any agreement between the principal with reference to the contract guaranteed, the surety ought to be consulted. If the alteration is to the disadvantage of the surety, or its unsubstantial nature is not self-evident, the surety can claim to be discharged. The contract of the surety should not be altered without his consent and the creditor should not undertake to alter the contract and then say, that though the contract had been altered, it was not done to the disadvantage of the surety, especially when such alterations were made with respect to material particulars regarding the contract of guarantee affecting the surety.

19. In The Indian Bank, Madras Vs. S. Krishnaswamy and others, , Indian Bank advanced a loan to mill, and the plaintiff stood as surety, at that point of time, the Government took over the mill, and a fresh agreement between the Government and the mill was entered into, which was not made known to the surety, and in those circumstances the surety pleaded that he is discharged from liability. Upholding the plea of the plaintiff, the Madras High Court held that it is well settled that u/s 62 of the Contract Act, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. Similarly, u/s 133 of the Contract Act any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. The intendment of the provisions of Section 133 of the Contract Act is, like any other contracting party, the surety cannot be bound to do something for which he has not contracted. Even if the principal debtor and the creditor has expressly agreed to vary the terms of the original contract, and in fact, had varied the terms of the original contract, yet such variance of the terms of the original contract, cannot bind the surety unless he had assented to the new terms or variance of the original contract, made by the principal debtor and the creditor, inasmuch as upon variance of the terms of the original contract,

made by the principal debtor and the creditor, the original contract, stood dissolved.

20. In the instant case, the agreement under Ex.A1 is for a period of five month and if the plaintiff intended to extend the agreement beyond the five month period, should have before acting on the letter Ex.A13 addressed by Defendant No. 4, which sought to the extend the period under Ex.A1, A2 and A3 beyond the period of five months, ought to have brought the same to the notice of the principal debtor and other sureties, and taken their consent, but the plaintiff did not do so, and instead proceeded to act unilaterally on the basis of the letter Ex.A13, addressed by Defendant No. 4, who is one of the guarantors under Ex. A1, and having acted upon it, the plaintiff not only granted time, but also accepted the repayment schedule mentioned therein and even accepted payments, upto the end of 1987. Since the conduct of the plaintiff in acting on the basis of the letter Ex. A13 is not in accordance with the conditions of the agreement Ex. A1, A2 and A3, and sought to extend the period of agreement beyond the period agreed for under Exs.A1, A2 and A3, the plaintiff having regard to the provisions of Section 139 of the Indian Contract Act, 1872, can safely be presumed to have discharged the principal borrower and other guarantors, including the appellant and excluding Defendant No. 4, from the liability under, Exs.A1, A2 and A3.

21. In the result, the appeal is allowed. There shall be no order as to costs.