

(1977) 09 MAD CK 0009

In the Madras High Court

Case No : O.S.A. No's. 49 of 1975 and 68 of 1976

Gopilal J. Nichani

APPELLANT

Vs

Trac Industries and Components Ltd., Madras and Others

RESPONDENT

Date of Decision : 07-09-1977

Acts Referred:

Contract Act, 1872 — Section 128

Tamil Nadu Relief Undertakings (Special Provisions) Act, 1969 — Section 4, 6

Citation : AIR 1978 Mad 134

Hon'ble Judges : P. Govindan Nair, C.J.;Varadarajan, J

Bench : Division Bench

Advocate : G. Ramaswami, P. Sivaramakrishnayya and T.K. Seshadri, for the Appellant; M.R. Krishna Iyer, M.R. Narayanaswami, for C. Harikrishnan, Bhaskara Shankar, S. Raghavan and R. Mahesh, for the Respondent

Judgement

P. Govindan Nair, C.J.—We propose to dispose of these appeals by a common judgment, because the main questions involved in these

appeals centre round the interpretation we have to place on Section 4(b) of the Tamil Nadu Relief Undertaking (Special Provisions) Act 1969

(Tamil Nadu Act 21 of 1969) (hereinafter referred to as the Act), and Section 128 of the Indian Contract Act, 1872.

2. The appeal in O. S. A. 48 of 1975 is from the order of Sethuraman J. in Appln. No. 1849 of 1973 in C. S. 155 of 1973, on the file of this

Court dismissing the suit filed against a relief undertaking as defined in Section 2 (4) of the Act and against the sureties who guaranteed the debt

due from the relief undertaking.

3. O. S. A. No. 68 of 1976 is an appeal fry the guarantor of a debt due from a relief undertaking against whom insolvency proceedings were

commenced to adjudge him as insolvent by the creditor. Suryamurthy J. held that the petitioning creditor seeking to adjudge the guarantor is not seeking to recover a debt and therefore Section 4 (b) of the Act has no application. The learned Judge on the preliminary point raised by the guarantor held that the insolvency petition taken against him was maintainable. It is as against this order, the latter appeal has been preferred by the guarantor.

4. The first question we will consider is about the interpretation of Section 4 (b) of the Act. The section is in these terms:--

The Government may, if satisfied that it is necessary or expedient so to do for the purposes specified in Section 3, direct by notification, that all or

any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which any relief

undertaking is a party or which may be applicable to any relief undertaking, immediately before the date with effect on and from which the relief

undertaking was declared a relief undertaking, shall be suspended in operation or that all or any of the rights, privileges, obligations and liabilities

accruing or arising thereunder before the said date, shall be suspended or be enforceable with such modifications and in such manner as may be

specified in such notification.

It was contended on behalf of the appellant in O. S. A. 68 of 1976 and by the respondents in O. S. A. 49 of 1975, that on the basis of the words

in Section 4 (b) of the Act that the Government by notification may direct the suspension of the contracts--one of the matters mentioned In the

section--and since the contract is suspended, the sureties who are contended to be parties to the contract could also get the benefit of the

suspension of the contract. In other words, it was submitted that a plain reading of the section would mean that the very foundation of the contract

has ceased to exist, though temporarily, and on the basis of that contract, no action can be taken against the guarantor. Counsel relied on two

decisions of the Supreme Court in support of the contention that the words used in the material provisions of the statute must be interpreted

according to their plain meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or

object of the Act can arise.

We shall now extract the the judgment in Kanai Lal Sur Vs. Paramnidhi Sadhukhan, , the learned Judges have observed as follows--

Mr. N. C. Chatterjee, for the appel-lant, has contended that the object in en acting the relevant Thika Tenancy Acts and Ordinances is absolutely

clear. It is a piece of welfare legislation and as such its operative provisions should receive a beneficent construction from the Courts. If the scheme

of the Act and the object underlying it is to afford full protection to the Thika tenants, says Mr. Chatterjee, courts should be slow to reach the

conclusion that any class of Thika tenants are excluded from the benefit of the said Act."" Counsel also relied on the observations of Barons of the

Exchequer in the famous Hey don"s case. (1584) 76 ER 637. Referring to this argument, the Supreme Court observed as follows (at p. 910)--

However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of

construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one

construction only, then it would not be open to the courts to adopt any other hyothetical construction on the ground that such hypothetical

construction is more consistent with the alleged object and policy of the Act.

Similar observations are found in the decision in Tribhuban Parkash Nayyar Vs. The Union of India (UOI), , the Supreme Court has observed as

follows--

The object and purpose of a preamble to a statute is well settled and at the bar before us there was no serious dispute on this point. A preamble is

a key to open the mind of the legislature, but it cannot be used to control or qualify precise and unambiguous language of the enactment. It is only

when there is a doubt as to the meaning of a provision that recourse may be had to the preamble to ascertain the reasons for the enactment and

hence the intention of the Parliament. If the language of the enactment is capable of more than one meaning, then that one is to be preferred which

comes nearest to the purpose and scope of the preamble. In other words, preamble may assist in ascertaining the meaning, but it does not affect

clear words in a statute. The courts ere thus not expected to start with the preamble for construing a statutory provision nor does the mere fact that

a clear and unambiguous statutory provision goes beyond the preamble give rise

by itself to a doubt on its meaning.

5. Counsel on behalf of the respondents invited our attention to the decision of the Supreme Court in *R.L. Arora Vs. State of Uttar Pradesh and*

Others, , the following observations occur (at p. 1236, para. 9):

In approaching the question of construction of this clause, it cannot be forgotten that the amendment was made in consequence of the decision of

this court in *R.L. Arora Vs. State of U.P.*, , and the intention of Parliament was to fill the lacuna, which, according to that decision, existed in the

Act in the manner of acquisitions for a company; nor can it be forgotten that Parliament when it enacted the Amendment Act was aware of Article

31(2) of the Constitution which provides that land can only be acquired compulsorily for a public purpose and not otherwise. It could not therefore

be the intention of Parliament to make a provision which would be in contravention of Article 31(2), though it may be admitted that if the language

used is capable of only one construction and fails to carry out the intention of Parliament when making the amendment, the amendment may have to

be struck down if it contravenes a constitutional provision. Further, a literal interpretation is not always the only interpretation of a provision in a

statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide

whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the

statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention

of the law making body which may be apparent from the circumstances in which the particular provision came to be made. Therefore, a literal and

mechanical interpretation is not the only interpretation which courts are bound to give to the words of a statute; and it may be possible to control

the wide language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and

the circumstances in which it might have been enacted"".

A similar provision, though not an identical provision, as contained in Section 4 (b) of the Act, came up for consideration and interpretation before

the Supreme Court in *Inderjit C. Parekh and Others Vs. Shri V.K. Bhatt and Another*, . Their Lordships negatived, the argument that was

advanced, that the words used therein would cover persons other than the relief undertaking. With reference to the provisions of Section 4(1)(a)

(iv) of the Bombay Relief Undertaking (Special Provisions) Act, 1958, the Supreme Court observed as follows (at P. 1185, para 7)--

Thus, neither the language of the statute nor its object would justify the extension of the immunity so as to cover the individual obligation and

liabilities of the directors and other officers of the undertaking, If they have incurred such obligations or liabilities as distinct from the obligations or

liabilities of the undertaking, they are liable to be proceeded against for their personal acts of commission and omission. The remedy in that behalf

cannot be suspended nor can a proceeding already commenced against them in their individual capacity be stayed. Indeed, it would be strange if

any such thing was within the contemplation of law"".

6. We may in this connection also refer to the decision of the Bombay High Court in Ramchandra B. Loyalka Vs. Shapurji N. Bhowndree,

Beaumont C. J. speaking for the Bench, after referring to the nature of a contract of guarantee and after having said that a contract of guarantee

will involve two contracts, namely, one between the creditor and the principal debtor and the second between the creditor and the guarantor,

observed that in order that it must become a contract of guarantee as distinguishable from a contract of indemnity, there must be a third contract

between the principal debtor and the surety, either express or implied. We shall quote the words of the learned Chief Justice :

Of course, the contract need not be embodied in a single document, but I think there must be a contract or contracts to which the three parties

referred to in Section 126 are privy. There must be a contract, first of all between the principal debtor and the creditor. That lays the foundation for

the whole transaction. Then there must be a contract between the surety and the creditor by which the surety guarantees the debt, and no doubt

the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my

opinion, the case is one of indemnity. In order to constitute a contract of guarantee, there must be a third contract, by which the principal debtor

expressly or impliedly requests the surety to act as surety"".

In these cases, we are concerned admittedly with contracts of guarantee, A

contract of guarantee is a separate contract between the creditor and the guarantor, and we see nothing in the Act and particularly in Section 4 (b) which either suspends such a contract or the obligations arising therefrom. It is impossible to read Section 4 (b) of the Act, particularly when it is read with reference to the object of the Act, in any other manner. We therefore negative the contention advanced before us that Section 4 (b) is attracted and any application or suit concerning the guarantor cannot be proceeded with.

7. We shall now take the question of interpretation of Section 128 of the Indian Contract Act. No other section of the Contract Act or and general principle has been relied on before us on behalf of the guarantor. We shall extract Section 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.

The section talks of only one thing and that is about the liability of the guarantor as being co-extensive as that of the principal debtor. The word co-

extensive is an objective for the word "extent" and it can relate only to the quantum of the principal debt. This question has been dealt with and

discussed at length in a Full Bench decision of this court in A.L.S.P.Pl. Subramania Chettiar (decd.) and Another Vs. Moniam P. Narayanaswami

Gounder, . That was a case arising out of a reference made by Subba Rao J. (as he then was) on the question whether a non-agriculturist surety

would be liable for the entire debt even though the principal debt was scaled down under the provisions of the Tamil Nadu Agriculturists Relief

Act. In this decision, reference was made to the well-known principle that a guarantee is not put an end to by reason of the debt becoming

unenforceable against the principal by reason of matters happening subsequently, and that a surety is liable though the claim against the principal is

barred by the statute of limitation or by reason of the bankruptcy of the principal. No doubt, there is the provision in Section 45(4) of the

Presidency Towns Insolvency Act expressly enacting that the fact the principal debtor has become an insolvent did not affect the liability of the

surety. But this provision in the statute does not deterect from the principle that we have stated above. The liability of the guarantor arising as it doe

from an independent contract, even in cases where the guarantor is a privy to

the contract between the principal debtor and the creditor, stands on a different footing, and unless we are able to say that by necessary implication that liability is also affected by some conduct of the principal debtor or any agreement between the principal debtor and the creditor, attracting the provisions of Sections 133, 134 or 135 of the Contract Act, the principle laid down in A.L.S.P.Pl. Subramania Chettiar (decd.) and Another Vs. Moniam P. Narayanaswami Gounder, , will not extend to a case where temporarily the liability of the principal debtor has been suspended and has therefore become unenforceable. A reference to Section 7 of the Act indicates that it is only a suspension and the liability is not affected at all, Section 7 of the Act specifically provides that in computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in Clause (b) of Section 4, the period during which it or the remedy for the enforcement thereof was suspended, shall be excluded. It is, therefore, clear that there is no extinguishment of the principal debt, and the contract between the guarantor and the creditor stands absolutely unaffected by the passing of the notification u/s 3, declaring a particular undertaking as a relief undertaking, with great respect we are unable to agree with the reasoning of Sethuraman J. in Appln. No. 1849 of 1973 in C. S. 155 of 1973. The suit has been instituted after the notification, Section 6 of the Act provides for a stay of the pending proceedings against the relief undertaking. But the suit as against the relief undertaking having been instituted after the notification is not maintainable. The dismissal of the suit as against the relief undertaking must therefore stand. But the dismissal of the suit as against the guarantors cannot be sustained. The suit as against them must proceed. In the other judgment which is under appeal in O. S. A. 68 of 1976, Suryamurthy J. has held that the action taken to adjudge the surety as an insolvent is not an action for recovery of the debt, and in this appeal, a determination of this question, is unnecessary. If a suit against the guarantor would lie, we have no doubt that proceedings for adjudging the guarantor as insolvent would equally lie.

8. In the result, O. S. A. 49 of 1975 is allowed to the extent that the suit shall proceed as against the guarantors only. O. S. A. 68 of 1976 is dismissed. We direct the parties to bear their respective costs in these appeals.

(7-9-1977) :--

9. These appeals were disposed of by a common judgment dated 1st Aug. 1977. In O. S. A, 49 of 1975, we held that the suit as against the guarantors was maintainable but it was not maintainable against the relief undertaking and accordingly dismissed the suit as against the relief undertaking. These cases have now been posted before us again at the request of counsel for the appellants in O.S.A. No. 49 of 1975 because of the apprehension apparently felt by him that the dismissal will preclude any action against the relief undertaking if and when the ban imposed by the notification is removed. There is no need for any such apprehension. But we do not mind clarifying the position. We make it clear that the dismissal of the suit as against the relief undertaking is only in the reference to the state of affairs obtaining at the time of judgment. If the ban is ever removed, certainly an action would be maintainable subject to the provisions regarding limitation and in light of the provisions in Section 1 of the Act to which we have referred.

10. The other point raised in the case relates to costs. The matter has been concluded by the judgment and we are unable to make any alteration in the judgment regarding costs.