

(1982) 07 KAR CK 0004

In the Karnataka High Court

Case No : Regular First Appeal No. 139 of 1974

H. Mohamed Khan and Others

APPELLANT

Vs

Andhara Bank Ltd. and Others

RESPONDENT

Date of Decision : 16-07-1982

Acts Referred:

Contract Act, 1872 — Section 126, 145

Citation : AIR 1983 Kar 73 : (1985) 57 CompCas 618 : (1983) ILR (Kar) 252

Hon'ble Judges : P.A. Kulkarni, J;K. Jagannatha Shetty, J

Bench : Division Bench

Advocate : M.S. Gopal, for the Appellant; B.S. Pramesha Rao and M.S. Bhujenga Rao, for the Respondent

Judgement

Jagannatha Shetty, J.—This appeal has been preferred by the legal representatives of the original defendant-3 challenging the judgment and decree dated March 22, 1974, made against them in O.S.No.86 of 1969 by the Second Additional Civil Judge, Bangalore City.

2. Respondent-1, Andhra Bank Ltd. since nationalised and now called as the Andhra Bank Ltd. since nationalised and now called as the Andhra Bank ("the Bank") sued defendants 1 to 3 to recover a sum of Rs. 1,63,330/- on the following allegations :

That defendant-1 Seth Menghraj Parasuram ("Parasuram") was having financial accommodation with the Bank under various sets of accounts. As security for the amounts advanced he has endorsed promissory notes and other securities in favour of the Bank executed in his favour of his customers. On April 4, 1966, defendant-2 Abdul Jabbar executed a promissory notes in favour of Parasuram along with a consideration receipt agreeing to pay on demand to him or to his order the sum of Rupees 1,20,000/- together with interest thereon at the rate of one per cent per mensem. For valuable consideration received, that promissory note was also endorsed in favour of the Bank. The Bank has thus become the holder in due course and is entitled to recover the amounts due under the said

On Demand Promissory Note. Defendant-3 Mohamad Khan has stood guarantee for payment to the extent of Rs.75,000/- of the amount that might be advised by Parasuram to Jabbar and executed a letter of guarantee in that behalf. Parasuram has also assigned that letter of guarantee in favour of the Bank and Mohamad Khan is therefore liable to pay as guarantor to the extent of Rs.75,000/- and interest thereon.

3. Parasuram in his written statement has set up a short and simple defence. He has disowned the liability to pay the suit claim based on the promissory note and the receipt on the ground that he has endorsed the same in favour of the Bank for collection. In regard to the alleged letter of guarantee by Mohamad Khan, which was said to have been assigned in favour of the Bank, he feigned his ignorance and said that he was not even aware of it.

4. Abdul Jabbar in his written statement has roundly denied the execution of the suit promissory note and the consideration receipt relied upon by the Bank. He has also stated that he was not aware of any letter of guarantee executed by Mohamad Khan in favour of Parasuram.

5. Mohamad Khan in his written statement contended that he has neither executed the letter of guarantee in favour of Parasuram, nor was aware of the execution of the suit promissory note by Jabbar nor its assignment in favour of the Bank. He has however explained some circumstances which according to him might have been utilised or exploited by Parasuram. He has two sons who were partners in a firm called "National Beedi Works" and that firm had monetary transactions with Parasuram who was a money-lender. In order to help the sons in their trade, he had agreed to become a guarantor for the said firm for the moneys advanced or to be advanced by Parasuram. With that object in view he signed in 1960 some printed blank forms and one of that blank forms might have been used by Parasuram to convert it into the letter of guarantee in question. Jabbar was on hostile terms with him ever since 1960. Jabbar initiated insolvency proceedings against him and unsuccessfully fought out the litigation with vengeance up to the Supreme Court. In the premises it was impossible for him to execute the said letter of guarantee on behalf of a person who wanted to have him adjudicated as an insolvent.

6. Arising out of these pleadings, the court below framed, among others, the following issues:

1. Whether the plaintiff proves that the second defendant borrowed Rupees 1,20,000/- from the first defendant under the pro note dated 4-4-1966 with a consideration receipt to secure the loan taken from the first defendant ?

2. If so, whether the plaintiff proves that the third defendant executed the letter of guarantee for Rs.75,000/- to secure a part of the loan advanced by the first defendant to second defendant?

3. Whether plaintiff proves the assignment of the same by the first defendant to

the plaintiff?

7. In support of the plaintiff's case, K. Venkatappa Iyya, the Accountant of the Bank has been examined as P.W.1. On behalf of the defendants, Abdul Jabbar and one of the sons of Mohamad Khan have given evidence as D.W.1 and D.W.2. The suit promissory note, the consideration receipt and the letter of guarantee have been marked as Exts.P-6, P-7 and P-10. These are the only documents upon which the claim of the Bank was rested.

8. The trial Court decreed the suit holding that Jabbar has executed the promissory note Ext. P-6 and the consideration receipt Ext. P-7 in favour of Parasuram who in turn has endorsed the same in favour of the Bank. The Court also held that Mohamad Khan has executed the letter of guarantee Ext. P-10 and it was, a continuing guarantee for the liability of Jabbar to the extent of Rupees 75,000/- and the right to recover the amount thereunder was validly assigned by Parasuram in favour of the Bank. The court, however, has limited the liability of the legal representatives of Mohamad Khan to the extent of Rs.1,02,100/- with liberty to the Bank to recover that amount only from the assets of the guarantor in the hands of his legal representatives.

9. Being aggrieved by the Judgment and decree the legal representatives of Mohamad Khan have appealed to this Court. The other defendants have been impleaded as respondents 2 and 3, but none on their behalf has appeared before us.

10. The sole point that arises for our consideration in this appeal is, whether Ext. P-10 was proved to have been executed by Mohamad Khan in favour of Parasuram? And, whether Parasuram has validly assigned that guarantee in favour of the Bank?

11. On the first part of the question, the evidence produced on behalf of the Bank is practically of no use. Venkatappa Iyya (P.W.1) is a total stranger to Ext. P-10. He has also not stated when exactly Ext. P-10 was entrusted to the Bank. The Bank has maintained a register of documents received from its customers, but in that register Ext. P-10 has not been entered. All that P.W.1 has stated was that the Bank has accepted, Exts. P-6, P-7 and P-10 as documents evidencing loan transactions between Jabbar and Parasuram.

12. Parasuram has not entered into the witness-box. After filing his written statement, he kept himself away from the Court. As stated earlier, his case in regard to Ext. P-10 was not in favour of the Bank. He behaved like an astute gentleman although, in our opinion, he was not. He said that he was not aware of the execution of Ext. P-10 by Mohamad Khan. In other words, he did not even recognise the alleged assignment of Ext.P-10 in favour of the Bank. He has, however, admitted his endorsements on Ext. P-6 and Ext. P-7.

13. Abdul Jabbar (D.W.1) has gone a step further. His case was one of total denial of the execution of all the suit documents. With regard to Ext. P-10 he has

agreed with the allegations of Mohamad Khan. He has stated that he was on inimical terms with Mohamad Khan ever since 1962 as there was an insolvency case pending as between them. He has also stated that Mohamad Khan did not execute any form of the type of Ext. P-10 for and on his behalf. Nazir Mohamad Khan (D.W.2) is one of the sons of Mohamad Khan. He appears to be more frank and straight forward than the other two witnesses. He had admitted the signature and also the Urdu writing in Ext. P1-10 as that of his father. In cross-examination, however, he has explained that his father might have signed Ext. P-10 as guarantor for National Beedi Works and at any rate not for the amount stated thereunder. In other words, he has denied the contents and genuineness of Ext. P-10.

14. Having considered the evidence of the parties, we will now have a close look at the contents of the deed Ext : P-10. Even the very appearance of it does not inspire any confidence. Ext. P-10 is in a printed letter. It does not bear any date. Almost all the dotted lines are kept blank; neither the unwanted are struck off nor the necessary are filled in. Same is the position in regard to some printed words and letters.

The first sentence in that letter reads :

"In consideration of your giving credit and advancing money to Sri. K.S. Abdul Jabbar"

Then there are dotted lines followed by the printed sentence :

"I/we hereby guarantee to you the prompt payment of all moneys that may be due to you by the said"

"From this date at any time or times hereafter on account of advances made by you on Hundis, Pronotes, Demand Drafts, Bills, etc., drawn or discounted or endorsed or accepted by the said or on any account whatsoever provided my/our liability shall be limited to the sum of Rs.75,000/- (seventy five) (in Urdu)"

There then follows some printed paragraphs with dotted lines in between. The letter concludes :

"for all money due by him/them and that this guarantee shall continue in force until it is terminated by a proper notice in writing served on you at by esteemed post and that no other manner of service of notice shall be adopted or binding. If for any reason whatsoever you desire to close the transaction I/we undertake to pay you on demand the balance standing to his/their debit at the time, together with interest up to date, on payment.

Yours faithfully, Sd/- (H. Mohamad Khan)"

On the back of the letter, we find the following endorsement :-

"Pay to the Andhra Bank Ltd., or order.

For Menghraj Parasram, Sd/- Proprietor."

The first unusual feature in this letter is that the ink with which Rs.75,000/- was written is quite different from the ink used for the signature of Mohamad Khan. The other astounding contradiction is in the Urdu writing within the bracket that followed the figures "Rupees 75,000/-". That Urdu writing reads "Rupees seventy five".

If the intention of the guarantor was to assure the payment of Rs.75,000/- on behalf of Abdul Jabbar and executed a letter of guarantee in that behalf. Parasuram has also assigned that letter of guarantee in favour of the Bank and Mohamad Khan is therefore liable to pay as guarantor to the extent of Rs.75,000/- and interest thereon.

15. Parasuram in his written statement has set up a short and simple defence. He has disowned the liability to pay the suit claim based on the promissory note and the receipt on the ground that he has endorsed the same in favour of the Bank for collection. In regard to the alleged letter of guarantee by Mohamad Khan, which was said to have been assigned in favour of the Bank, he feigned his ignorance and said that he was not even aware of it.

16. Abdul Jabbar in his written statement has roundly denied the execution of the suit promissory note and the consideration receipt relied upon by the Bank. He has also stated that he was not aware of any letter of guarantee executed by Mohamad Khan in favour of Parasuram.

17. Mohamad Khan in his written statement contended that he has neither executed the letter of guarantee in favour of Parasuram, nor was aware of the execution of the suit promissory note by Jabbar nor its assignment in favour of the Bank. He has however explained some circumstances which according to him might have been utilised or exploited by Parasuram. He has two sons who were partners in a firm called "National Beedi Works" and that firm had monetary transactions with Parasuram who was a money-lender. In order to help the sons in their trade, he had agreed to become a guarantor for the said firm for the moneys advanced or to be advanced by Parasuram. With that object in view he signed in 1960 some printed blank forms and one of that blank forms might have been used by Parasuram to convert it into the letter of guarantee in question. Jabbar was on hostile terms with him ever since 1960. Jabbar initiated insolvency proceedings against him and unsuccessfully fought out the litigation with vengeance up to the Supreme Court. In the premises it was impossible for him to execute the said letter of guarantee on behalf of a person who wanted to have him adjudicated as an insolvent.

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consideration receipt to secure the loan taken from the first defendant?

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21. Being aggrieved by the Judgment and decree the legal representatives of Mohamad Khan have appealed to this Court. The other defendants have been impleaded as respondents 2 and 3, but none on their behalf has appeared before us.

22. The sole point that arises for our consideration in this appeal is, whether Ext. P-10 was proved to have been executed by Mohamad Khan in favour of Parasuram? And, whether Parasuram has validly assigned that guarantee in favour of the Bank?

23. On the first part of the question, the evidence produced on behalf of the Bank is practically of no use. Venkatappa Iyya (P.W.1) is a total stranger to Ext. P-10. He has also not stated when exactly Ext.P-10 was entrusted to the Bank. The Bank has maintained a register of documents received from its customers, but in that register Ext.P-10 has not been entered. All that P.W.1 has stated was that the Bank has accepted, Exts. P-6, P-7 and P-10 as documents evidencing loan transactions between Jabbar and Parasuram.

24. Parasuram has not entered into the witness-box. After filing his written statement, he kept himself away from the Court. As stated earlier, his case in regard to Ext. P-10 was not in favour of the Bank. He behaved like an astute gentleman although, in our opinion, he was not. He said that he was not aware

of the execution of Ext.P-10 by Mohamad Khan. In other words, he did not even recognise the alleged assignment of Ext.P-10 in favour of the Bank. He has however, admitted his endorsements on Ext. P-6 and Ext. P-7.

25. Abdul Jabbar (D.W.I) has gone a step further. His case one of total denial of the suit documents. With regard to Ext. P-10 he has agreed with the allegations of Mohamad Khan. He has stated that he was on inimical terms with Mohamad Khan ever since 1962 as there was an insolvency case pending as between them. He has also stated that Mohamad Khan did not execute any form of the type of Ext. P-10 for and on his behalf Nazir Mohamad Khan (D.W.2) is one of the sons of Mohamad Khan. He appears to be more frank and straight forward than the other two witnesses. He has admitted the signature and also the Urdu writing in Ext. P-10 as that of his father. In cross-examination, however, he has explained that his father might have signed Ext. P-10 as guarantor for National Beedi Works and at any rate not for the amount instead thereunder. In other words, he has denied the contents and genuineness of Ext. P-10.

26. Having considered the evidence of the parties, we will not have a close look at the contents of the deed Ext. P-10. Even the very appearance of it does not inspire any confidence. Ext. P-10 is in a printed letter. It does not bear any date. Almost all the dotted lines are kept blank; neither the unwanted are struck off nor the necessary are filled in. Same is the position in regard to some printed word and letters.

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Then it follows in these terms :

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If the intention of the guarantor was to assure the payment of Rs.75,000/- on behalf of Abdul Jabbar, one fails to understand why he has written in Urdu "Rupees seventy five" instead of Rupees seventy five thousand. These figures and writings are mutually destructive.

27. A contract of guarantee is defined in Section 126 of the Contract Act in these terms :

"A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of default. The person who gives the guarantee is called the "surety" the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor".

It is clear from the above definition that contract of guarantee involves three parties, the creditor the surety and the principal debtor. A contract of guarantee must therefore involve a contract to which all those three parties are privy. Their express participation or implied assent to have such a contract must be proved by the person who wants to rely upon it.

In Ramchandra B. Loyalka Vs. Shapurji N. Bhowmagree, Beaumont, C.J., speaking for the Bench of the Bombay High Court observed at pages 316 and 317 :

"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. Both 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. Unless that element is present, it is impossible in my view to work out the rights and liabilities of the surety under the Contract Act. Section 145 provides that in every contract of guarantee

there is an implied promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship".

These observations reflect the true legal position with regard to a contract of guarantee.

28. From the analysis of the evidence on record, it will be seen that there is hardly any evidence to show that Ext.P-10 was executed by Mohamad Khan in favour of Parasuram. The plaintiff Bank has not produced any evidence to show that the letter of guarantee was executed by Mohamad Khan. Parasuram in whose favour it was said to have been executed has not testified to its contents. Abdul Jabbar (D.W.1) who could have turned the tide in his favour by acknowledging its execution has an aversion to it. Mohamad Khan, the alleged author of it has also disowned it.

There is not even an iota of evidence to indicate that there was a privity of contract between Mohamad Khan and Jabbar. On the contrary, the evidence on record indicates that ever since 1962, the relationship between Abdul Jabbar and Mohamad Khan was anything but cordial. Their relationship was so much strained that Abdul Jabbar was trying to have Mohamad Khan adjudicated as an insolvent. It is in evidence that in 1962 Abdul Jabbar and another filed an insolvency petition against Mohamad Khan and others. Ext.D-4 is that insolvency petition in I.C.No.4 of 19677. The court dismissed that petition against Mohamad Khan. Challenging that order, Abdul Jabbar preferred an appeal to this court. This court also dismissed the appeal as seen from Ext.D-6 which is a certified copy of the order of this court. Abdul Jabbar thereupon took up the matter to the Supreme Court and he was unsuccessful there also as seen from the certified copy of the order Ext.D-7. Having regard to this strained relationship, we cannot but conclude that Mohamad Khan would not have volunteered to execute Ext. P-10 in 1966. Any conclusion to the contrary would be nothing but non sequitur.

29. There is yet another circumstance to rule out the liability of Mohamad Khan. Ext.P-10 is admittedly undated and there is no other acceptable evidence to show that it was executed on a particular date. We cannot, therefore, regard it as a letter of guarantee executed by Mohamad Khan on any particular date. With this element of uncertainty, the guarantor cannot be held liable to pay the suit claim based on a promissory note of a particular date. Besides, there is no perspicuity in the terms of deed, and the contradiction, in particular, in the amount expressed in figures and letters would make anybody to feel that all is not well with the guarantee letter. The explanation of Mohamad Khan in the premises that the blank form signed by him for the use of his children in respect of their firm of "National Beedi Works" must have been exploited by Parasuram appears to be more probable.

30. In the conclusion that we have reached, it is unnecessary to record a finding on the next part of the question as to whether Ext. P-10 was validly assigned by Parasuram in favour of the Bank. We may, however, say a word about it. Ext.

P-10 is not a negotiable instrument. The Bank is not its holder in due course. The Bank at best could claim it by way of an equitable assignment. The Bank in order to sue upon it, must prove such assignment with absolute terms. But no such proof is forthcoming in this case. Parasuram is the prime witness in that regard. But unfortunately he has kept himself away from the witness in that regard. But unfortunately he has kept himself away from the witness box, Nazir Mohammed Khan (D.W.2) the son of Mohamad Khan has denied its execution and genuineness. The sole testimony of Venkatappa Iyya (P.W.1) who is an utter stranger to Ext.P-10 does not advance the case of the Bank. There is thus no evidence to prove that the Bank has become the assignee of Ext.P-10.

31. In the result and for the reasons stated above, the appeal is allowed and the judgment and decree of the court below so far as they are against the appellants, are set aside. The rest of the decree, however, is kept undisturbed.

The appellants are entitled to the costs from Respondent-1, both here and below.

32. Mr. Pranesh Rao, counsel for Respondent-1 seeks a certificate for appeal to the Supreme Court. Considering the judgment that we have pronounced. We do not think that it involves any substantial question of law of general importance needing to be decided by the Supreme Court.

33. The certificate prayed for is therefore refused.

34. Appeal allowed.