

(1985) 02 MAD CK 0037
In the Madras High Court

Kishan Gopal Jhavar by Power Agent Shivchand Daga	APPELLANT
Vs	
Ramanarayan Bhattad and Others	RESPONDENT

Date of Decision : 26-02-1985

Acts Referred:

Citation : (1985) 98 LW 494 : (1985) 2 MLJ 1

Hon'ble Judges : M.N. Chandurkar, C.J

Bench : Division Bench

Judgement

M.N. Chandurkar, C.J.—These revision petitions are directed against the orders of the City Civil Court at Madras, which on the face of them appear to be extremely unusual, having regard to the facts of the case and the nature of the decree in question. Admittedly the first defendant who is the first respondent in C.R.P.No. 1605 of 1984 and the sole respondent in C.R.P.No. 1606 of 1984, was not granted leave to defend a summary suit which was filed by the plaintiff in this Court. His request for unconditional leave was rejected by the Master, by the learned Single Judge and by a Division Bench of this Court. The matter was taken to the Supreme Court by the first defendant. On September 11, 1978, the Supreme Court made an order as follows:

Counsel for the appellant (first defendant) agrees to furnish a bank guarantee for Rs. 83,375/- before the Registrar, Madras High Court, within five weeks from to-day. Leave to the defendant to appear and defend is, hereby granted but it will stand revoked if the bank guarantee above-mentioned is not furnished within five weeks from to-day. Bank guarantee to be renewed every six months so long as the suit is pending. The written statements to be filed within three months after the bank guarantee is furnished.

With these observations, the first defendant's appeal was allowed. A bank guarantee for a sum of Rs. 83,375/- was given in the form of a letter of guarantee dated 16.10.1978 by the Central Bank of India in favour of the Registrar of the High Court, Madras on account of Shri K. Ramanarayan Bhattad, 127, Angappa Naicken Street, Madras-1 (first defendant). This bank guarantee

was renewed from time to time.

2. The suit proceeded to trial and a decree was Dassed on 6.2.1984 as follows:

1. that he first defendant do pay plaintiff Rs. 75,000/- with interest at 6% from date of plaint till payment;

2. that the first defendant shall have the amount paid by defendants 2 to 6, 8 and 9 to the plaintiff to discharge the decree;

3. that the first defendant shall have indemnity for the sum of Rs. 75,000/-with interest at 6% and pro costs.

4. that defendants 1 to 6, 8 and 9 do pay plaintiff Rs. 6,004/- (Rupees six thousand and four only) as and for the costs of the suit as taxed.

After the decree was passed, the plaintiff filed I.A.No. 5746 of 1984, praying that the Central Bank of India which furnished the bank guarantee should be directed, to deposit the entire amount covered under the bank guarantee, to be credited to the suit so that it should be paid over to the plaintiff and a prayer was also made that after the money was received, the payment of the same should be ordered to be made to the plaintiff.

3. An application, I.A.No. 4529 of 1984, also came to be made by the first defendant in which he stated that an adjustment of Rs. 75,000/- which was made under an agreement between the first defendant on one side and defendants 2 to 7 and 9 on the other was binding on the plaintiff and therefore it was for defendants 2 to 7 and 9 to pay the amount to the plaintiff. According to the first defendant, the decretal amount has to be paid by defendants 2 to 7 and 9 to the plaintiff and not by the first defendant. The first defendant contended that it was just and equitable that the plaintiff should proceed against defendants 2 to 7 and 9. On these grounds, the first defendant sought the cancellation of the bank guarantee executed by him in favour of the plaintiff in respect of the suit. Both these applications were disposed of by the I Additional Judge, City Civil Court, Madras. The learned Additional Judge took the view that while disposing of the suit, the court, on assessment of the evidence, had come to the conclusion that by reason of the agreement Exhibit B-I, defendants 2 to 7 and 9 were liable to pay the amount covered by the decree to the plaintiff and therefore it was but fair and appropriate that the plaintiff should execute the decree at the first instance against defendants 2 to 7 and 9. The trial Court noticed that it was not the case of the plaintiff that it was impossible to realise the amount from defendants 2 to 7 and 9 or that they were not possessed of any means to satisfy the decree. The trial Court then observed:

In that context the bank guarantee which was furnished under orders of the Supreme Court to grant leave to the petitioner-first defendant to- defend the suit which was filed as an under Chapter one cannot be held to be a guarantee to be continued till the disposal of the matter either In first appeal or in appeal upto the Supreme Court. Now that defendants 2 to 7 and 9 are primarily liable to

satisfy the decree and there is no allegation that these defendants have no means to satisfy the decree. I feel it will be in the interest of justice to grant the relief prayed for by the petitioner (first defendant).

With the above observation, the trial Court made the order that the bank guarantee furnished by the first defendant will stand cancelled. Consequently the application made by the plaintiff-decree-holder came to be dismissed. These orders are now challenged by the plaintiff in these two revision petitions.

4. The plaintiff's contention is very simple. According to him, he is not entitled to enforce the bank guarantee and the trial Court is bound to enforce the bank guarantee and have the amount payable under the bank guarantee appropriated towards the decretal amount in accordance with the decree. The learned Counsel appearing on behalf of the first defendant, however, vehemently contended that the order of the Supreme Court merely required a bank guarantee to be given and to be renewed every six months so long as the suit is pending. The argument is that since the suit is now no longer pending and has been disposed of, the bank guarantee cannot be given effect to. In a summary suit to which Order 37 of the CPC applies, it is usual that the defendant is asked to deposit a certain amount when conditional leave is granted. (See also *Girdharilal Mahadulal Agarwal Vs. Shah Nagji Acholdas*, . When a bank guarantee is allowed to be furnished as a condition precedent for granting leave to defend a summary suit, it is obvious that the bank guarantee is to be furnished in lieu of an amount which the Court has discretion to direct to be deposited in cash before leave to defend the suit is granted. Order XXXVII, Rule 3(5), Code of Civil Procedure, provides that the Court may grant leave to defend the suit unconditionally or upon such terms as may appear to the Court or Judge to be just. It can hardly be disputed that where one of the conditions for granting leave to defend a summary suit is that the defendant should deposit some amount in cash, then in case the suit is decreed, such deposit is liable to be appropriated towards the decretal amount. (See also *Gopalaiyar Vs. Tiruvengadam Pillai*, late a minor by his Guardian and maternal uncle Kendasami Pillai, but now declared a major by Order of this Court dated this 22nd December 1916 and Another, . The Bank guarantee which is a substitute for cash deposit cannot be treated in any different manner and the very purpose of putting a condition of furnishing bank guarantee before leave to defend a summary suit is granted is that the plaintiff's interest is to be safeguarded and when the suit is decreed, the plaintiff has the right to enforce the bank guarantee. Now, undoubtedly the Supreme Court has directed that a bank guarantee will be given and renewed every six months so long as the suit is pending. This does not however mean that the moment the suit has come to an end, the bank guarantee automatically lapses or that the liability under the bank guarantee comes to an end.

5. Undoubtedly the bank guarantee has to be construed on the terms of the instrument of guarantee. A guarantee may provide for a period covered by the suit itself or there may be a guarantee which may make provision for the course

of litigation even in the appellate court; or a guarantee may be given covering the entire period of litigation between the commencement of the suit and the final conclusion of the litigation by the highest court like the Supreme Court. We are in the instant case not concerned with the contingency as to whether a guarantee given during the pendency of the suit will also ensure to the benefit of the decree-holder if and when the matter is taken in appeal to the first appellate Court or later on to the second appellate Court. There can be a guarantee which is given during the pendency of the suit and the suit may be dismissed in the trial Court but may be decreed in the appellate Court. The question as to whether the guarantee given during the pendency of the suit enures to the benefit of the plaintiff who has failed in the trial Court but has succeeded in the appellate Court will depend upon the manner in which the bank guarantee is worded. It could also not be disputed that so far as contracts of surety and bank guarantee are concerned, they have to be strictly construed. It appears that it was argued before the learned Additional Judge on the basis of some authorities that the bank guarantee must be treated as having lapsed the moment the suit comes to an end and in that context the learned Additional Judge seems to have observed that the bank guarantee which was furnished under the orders of the Supreme Court to grant leave to defend the suit cannot be held to be a guarantee to be continued till the disposal of the matter in the first appeal or in the appeal to the Supreme Court. With respect, it is difficult to understand these observations. The learned Additional Judge was not dealing with a claim for enforcement of the bank guarantee, as a result of the decision of the appellate Court or of the Supreme Court, in further appeal. The learned Additional Judge was merely concerned with the execution proceedings in respect of a decree which is granted by the said Court, and that decree was in a suit to defend which the first defendant had been given leave on the express condition that he will furnish a bank guarantee. The nature of the order which is made by the learned Additional Judge defeats the very purpose for which the order of bank guarantee is made, when leave is granted to defend a summary suit. If a bank guarantee is treated as having lapsed the moment the suit comes to an end, then when the claim has been decreed, the whole exercise of granting conditional leave becomes futile because the very object of granting conditional leave is to safeguard the interest of the plaintiff in case the plaintiff succeeds in the suit and to see that the plaintiff is not deprived of the fruit of the decree which he obtains.

6. Equally untenable is the ground which the learned Additional Judge has given for discharging the bank guarantee, when the learned Additional Judge holds that it is fair and appropriate that the plaintiff should execute a decree in the first instance against defendants 2 to 7 and 9. If the learned Additional Judge has merely read the decree, he would have noticed that primarily the decree is against the first defendant. The decree says, "that the first defendant do pay plaintiff Rs. 75,000/- with interest 6% from the date of plaint till payment." When the plaintiff has in his favour a decree worded as above, it is difficult to see how any question of fairness or appropriateness can fall for consideration. The

right of the plaintiff-decree holder is governed exclusively by the form and content of the decree and if under the decree the liability is created against the first defendant to pay Rs. 75,000/- with interest it was extremely improper on the part of the learned Additional Judge to deprive the plaintiff-decree-holder of his right founded on the decree by making him to execute the decree against other defendants. A careful perusal of the decree will also show that the decree-holder has not been given any right to execute the decree against defendants 2 to 7 and 9 directly. The obligation cast by Clause (2) of the decree is on the first defendant when it says, "that the first defendant shall have the amount paid by defendants 2 to 6, 8 and 9 to the plaintiff discharge the decree. Thus, the obligation being cast on the first defendant by the decree, the trial Court was not justified in directing the plaintiff to proceed against the other defendants. When we came to Clause (3) of the decree, it is clear that even that clause contemplates that the primary liability to pay the decretal amount is on the first defendant. When Clause (3) reads, "that the first defendant shall have indemnity for the sum or Rs. 75,000/- with interest at 6% and pro costs", it obviously contemplates that when the plaintiff-decree-holder has executed the decree against the first defendant, the first defendant is entitled to avail of the provision in Clause (3) of the decree which, while containing the right of the first defendant to be reimbursed, also is a repository of the obligation of the other defendants to compensate the first defendant for the sum of Rs. 75,000/-. In my view, the learned Additional Judge -has fallen into a serious error when, in the order made by him, he tried to modify the rights which had crystallised in the form of a decree.

7. The two decisions on which the learned Counsel for the first defendant has relied are clearly distinguishable. In *Pannaji Devichand Vs. Basappa Virappa Bellary*, , the surety bond by its express terms referred only to the appeal in the High Court. In that case the suit was decreed in the plaintiff's favour, the defendants had filed an appeal to the High Court, the High Court confirmed the decree of the trial Court and the appellants then filed an appeal by leave to the Privy Council. The decree of the High Court was reversed by the Privy Council and the suit was dismissed with costs. What had happened earlier was, when the defendants filed the first appeal, the plaintiff had filed an execution application for executing the decree of the trial Court. The decree-holder had recovered the decretal amount. When the judgment-debtors applied to the High Court for stay of execution, the High Court had ordered that the plaintiff should be allowed to execute the decree on furnishing security to the satisfaction of the trial Court. He had furnished two sureties and the question was whether those sureties would become liable for restitution when the suit was dismissed by the Privy Council. On those facts, the High Court held that the liability of the sureties could not be extended to the decision given by the Privy Council reversing the decision of the High Court.

8. Similar are the facts of the decision in *M. Paramasivam Pillai Vs. A.V.R.M.S.P.S. Ramasami Chettiar and Another*, . In that case it was held that the defendant's

surety was not liable as the terms of the surety bond were absolutely explicit and its language could not extend the liability of the surety to the contingency which was not referred to in the surety bond, namely, there being a Letters Patent Appeal against the appeal filed by the defendant.

9. Both these decisions are wholly inapplicable to the facts of the present case. As already pointed out, we are not now concerned with the enforcement of the bank guarantee consequent upon any liability being fastened as a result of a decision of the appellate Court. The bank guarantee in this case was expressly given on account of the first defendant by the Bank to the trial Court and it is being enforced by the trial Court, when the decree has been passed by the trial Court against the first defendant.

10. In the result, therefore, the orders of the learned Additional Judge are set aside. The application of the first defendant being I.A.No. 4529 of 1984 must therefore stand dismissed and the application made by the plaintiff-decree-holder being I.A.No. 5746/84 will have to be allowed. The trial Court is directed to enforce the bank guarantee and credit the amount recovered in pursuance of the bank guarantee to the account of the decree in O.S.No. 2259 of 1981 and pay the same to the plaintiff-decree-holder, unless there are any orders to the contrary by any appellate Court. The Civil Revision Petitions are allowed and the petitioner will get the costs of these petitions from the first defendant, one set.