

(2007) 09 AP CK 0046

In the Andhra Pradesh High Court

Case No : S.A. No. 918 of 1998 and Cross Objections SR No. 50818 of 1999

Kurnool Chit Funds (Petitioner) Ltd. by its Managing Director
S. Venkata Ramaiah

APPELLANT

Vs

P. Narasimha

RESPONDENT

Date of Decision : 07-09-2007

Acts Referred:

Contract Act, 1872 — Section 126, 128, 133, 134, 135
Negotiable Instruments Act, 1881 (NI) — Section 36

Citation : AIR 2008 AP 38 : (2008) 1 ALD 574 : (2008) 1 ALT 795 : (2008) 3 BC 575

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : K. Rathangapani Reddy, for the Appellant; A. Bichaiah, for the Respondent

Final Decision : Dismissed

Judgement

G. Yethirajulu, J.—This second appeal is preferred by the plaintiff in O.S. No. 638 of 1989 on the file of the II Additional District Munsif, Kurnool. The suit was filed by the plaintiff for recovery of Rs. 13,935/- with interest and costs against the defendants 1 to 4. The amount relates to a chit transaction. The 1st defendant joined as a member of the chit group of Rs. 40,000/- agreeing to subscribe Rs. 1,000/- per month for a period of 40 months and, thus, he executed an agreement on 23-12-1985. D1 became the successful bidder in the 19th auction held on 27-9-1987 agreeing to forego a sum of Rs. 7,420/-.

2. The defendants 2 and 3 and V. Lakshman Raju stood as sureties for payment of future installments by D1. The said Lakshman Raju died on 17-4-1988 leaving D3 and D4 as his legal representatives of his estate in their hands. The 1st defendant received a chit amount of Rs. 32,580/- on 27-10-1987 from the plaintiff and he was due to pay a sum of Rs. 20,000/- as on the date of the chit amount. The defendants 1 to 3 and the deceased-V.Lakshman Raju executed a

promissory note on 27-10-1988 agreeing to repay the amount with joint and several liability with interest at 12% per annum. The defendants became due to pay a sum of Rs. 11,500/- with interest thereon. On 12-12-1987, a sum of Rs. 857-75 ps was endorsed on the back of the suit promissory note, which was signed by the borrower and the sureties as they failed to pay the amount. The suit against the 1st defendant was dismissed for default on 31-7- 1990. A petition covered by I.A. No. 210 of 1992 for condoning the delay in filing the application to set aside the dismissal order against the 1st defendant was filed, but the said application was dismissed by the Court on merits on 12-12-1994.

3. The plaintiff did not prefer any revision against the default order. The suit against D3 was also dismissed on 11-6-1990 but on the application of the plaintiff, the suit was restored against D3 and he contested the matter, D2 and D4 remained ex parte. It was the contention of the learned Counsel for the plaintiff during the pendency of the suit, D1 died and as he has no properties, he did not take steps to bring the legal representatives of the 1st defendant on record. But the Court below observed that the plaintiff has not placed any record or document before the Court to prove that D1 has no properties and when actually D1 died, P.W. 1 did not whisper any word with regard to the death of D1.

4. Though, D2 and D3 and the deceased surety V.Lakshman Raju executed suit promissory note along with D1, they are not liable to discharge the suit amount jointly or severally in the absence of principal borrower on record. Though the plaintiff is at liberty to recover the amount from either of the borrower under Ex.A3, but he must sue against the borrower and the sureties as the suit against D1 is not in existence, the sureties cannot be made liable to pay the suit debt with joint or several liability. The suit is bad for non-joinder of parties.

5. Accordingly, the suit was dismissed against all the defendants. Being aggrieved by the same, the plaintiff preferred A.S. No. 12 of 1996 on the file of the District Judge, Kurnool and the appeal was allowed but without costs by setting aside the decree and judgment of the trial Court making the defendants 2 to 4 liable to pay the amount. Being aggrieved by the same, the plaintiff preferred the present appeal against the denial of the costs by the appellate Court and the defendants 2 to 4 preferred cross objections as both the appeal and the cross objections arose out of the same judgment. Both the matters are clubbed and this order has been passed.

6. The learned Counsel for the respondents drew the attention of this Court to certain judgments in favour of his contention that in the absence of the principal borrower, the sureties cannot be made liable.

7. In *State Bank of Hyderabad v. Nagabushanam and Anr.* 1985 (2) APLJ 3, a learned Single Judge of High Court held that if the default of the principal borrower is not either proved or established, the question of its enforcement against the surety does not arise. Consequently, Section 36 of the Negotiable Instruments Act, which reads, that every party to a negotiable instrument is

liable thereon to a holder in due course, until the instrument is duly satisfied, lays down a principle, with which there can be hardly any quarrel, and the stress which was laid on that point by the learned Counsel for the appellant is of little or no consequence in the adjudication of the case before the Court and the construction will have to be with reference to the joint executant of a particular document accompanied by another document or documents. In which case, it has to be seen whether even if the promissory note is executed more than one person and in the accompanying document of guarantee there is a recital that the rest of the persons were merely guarantors, then in which case the sureties will not be made liable, if the promissory himself defaults.

8. In *Chattanatha v. Central Bank of India* 1965 SC 1856, the Supreme Court held as follows:

That interpreting the language of the promissory note in the context of the other two documents, it was manifest that the status of B With regard to the transaction was that of a surety and not of a co-obligant, that the Bank was a party to the contract of guarantee, namely the letter, which was contemporaneous with the promissory note, that the Bank was also a party to the contract of hypothecation executed by the company, in which it was stated that the Bank had agreed to open a cash credit account in favour of the company and that, therefore, the requirements of Section 126 of the Contract Act were satisfied and B had the status of a surety and not of a co obligant in the transaction of overdraft account opened in the name of the company by the Bank.

9. In the case covered by the decision, the bank instituted the suit for recovery of the balance from all the defendants. The plea of the defendants 2 and 3 is that they executed the promissory note as sureties and they are not co-obligants but the High Court did not accept their plea against the said judgment, they went to the Supreme Court and the Supreme Court gave the above finding. On behalf of the plaintiff, P.W. 1 deposed about D1 entering into the chit agreement, execution of the promissory note by D1 to D3 and one V. Lakshman Raju standing as guarantors for the future liability of D1, payment of the amount by D1 etc.

10. D.W.1 who is D3 deposed that he stood as surety regarding the chit amount paid to D1 and his liability in case of default to be committed by D1 in the payment of the amount. D1 and his father V.Lakshamn Raju, who is one of the sureties died in the year 1998 leaving behind him his wife and three sons including him and his other two brothers namely Satyanarayana Raju and Sreedhar Raju. He further stated that unless all the remedies against D1 are exhausted he is not liable to pay the suit debt. The appellate Court observed that all the legal representatives of the surety Lakshamn Raju were not impleaded as party to the suit. The appellate Court also observed that the suit is not bad for non-joinder of other legal representatives of late Lakshman Raju. The estate of V.Lakshman Raju is sufficiently represented by D3 who is one of the sons, and D4 that is the wife of late Lakshman Raju. When the estate is sufficiently

represented by the legal representatives on record, the non impleading of other legal representatives cannot be a ground for dismissal of the suit. The lower Court erred in holding that due to non-impleading of other legal representatives, the suit is liable to be dismissed for non-joinder of parties.

11. The appellate Court further observed that the suit against the principal borrower was dismissed for non-payment of batta and for non-service of summons to him on 31-7-1990. The appellate Court further observed that Section 137 of the Indian Contract Act would show that mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. The appellate Court further observed that on perusal of Sections 128, 133, 134, 135 and 137 of the Contract Act, the liability of the surety is co-extensive with that of the principal debtor and his liability is not discharged on account of the omissions and commissions on the part of the creditor in not suing the principal debtor for the reasons best known to him, except as provided under Sections 133, 134, 135 and 137 of the Indian Contract Act in the absence of a contract to the contrary. From the commentary of the text books on Contract Act even if the creditor fails to sue the principal debtor the liability of the surety is not discharged and in such case, it cannot be said that merely because the suit was filed against the principal debtor was dismissed for non-payment of batta, it cannot be said that the liability of sureties was discharged or they are released of their liability by the creditor. He further observed that mere dismissal of the suit against the principal debtor does not mean that his liability does not exist and as such the liability of the sureties is discharged and it is not co-extensive. Where the creditor has obtained a decree against the surety and the principal debtor, the surety has no right to restrain the execution against him, until the creditor has exhausted his remedies against the principal debtor.

12. The learned Judge further observed that the cumulative effect of the documents filed by the plaintiff demonstrate that D3 is a guarantor and if the default on the part of the principal borrower is not either proved or established the question of its enforcement against the surety does not arise. Therefore, the facts of the decision cited by the counsel for the respondents are different from the facts of the present case. Since the sureties undertook to discharge the debt along with the principal debtor with joint and several liability, the finding of the lower Court that the suit is not maintainable against the sureties cannot be accepted and the lower Court erred in holding that the sureties are not liable to discharge the suit debt as Ex.A3-promissory note was executed as a collateral security and with the dismissal of the suit against the principal debtor, his liability ceased to exist. As the suit against the D2 and D4 was decreed ex parte, the order became final and D4 is also liable to discharge the suit debt, the decree has to be passed against the D3. Accordingly, the appeal was allowed without costs.

13. The learned Counsel for the Cross-objectors submitted that though the liability of the sureties are coextensive, so long as the liability of the D1 continues. But when once D1 got rid of the liability on account of dismissal of the suit for default against him, the liability of the sureties no longer in existence.

14. Therefore, the lower Court was right in dismissing the suit against the sureties. In *N. Narasimahaiah and Others Vs. Karnataka State Financial Corporation and Others*, , the Karnataka High Court while dealing with the provisions of State Financial Corporation Act and Section 128 of the Indian Contract Act held as follows:

In respect of a loan advanced to an Industrial concern, repayment of which has been guaranteed by a surety, the State Financial Corporation need not first proceed against the borrower (Industrial concern) and only when it is unable to recover the dues from the industrial concern, it can enforce the liability of the surety. Section 128 of the Indian Contract Act provides that the liability of the sureties is co-extensive with the liability of the principal debtor unless it is otherwise provided by the contract. It is not necessary for a creditor, before proceeding against the surety to demand payment from the principal debtor or sue the principal debtor, unless it is expressly stipulated for the surety may be proceeded against, without first proceeding against the principal debtor. It cannot be said that the State Financial Corporation should first proceeding against the industrial concern (borrower) and only if it is not able to recover the amount from the principal debtor, the creditor can proceed against the sureties.

15. In *State Bank of India Vs. Messrs. Indexport Registered and others*, , wherein the Supreme Court held as follows:

If the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree.

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 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 had to be taken during trial and not after the decree while execution is being levied.

16. A surety is a person who comes forward to pay the amount in the event of the borrower failing to pay the amount, unless it is held by a competent Court through a decree that he is not liable to pay the amount due to the creditor and when he denies the liability it becomes difficult for the creditor to realise the amount. In the event of a decree in favour of the creditor against the principal borrower, the wings of the decree can also be extended against the sureties as their liability is co-extensive with the principal debtor. When once there is a decree, the creditor is at liberty to proceed either against the principal borrower or sureties provided that the remedy of the surety is available for recovery of the amount against the principal debtor after payment of the amount to the creditor. But in the present case, the suit against the principal debtor is dismissed for default and the decision became final. Therefore, under law, there is no liability surviving against D1 for realization of the amount due to the creditor. When once the liability of the principal debtor is extinguished, the sureties' liability gets automatically terminated.

17. Therefore, without making the principal debtor liable for payment of the amount to the creditor, the sureties cannot be made liable for recovery of the amount. When once the suit is decreed against the principal debtor and the sureties with joint and several liability, it is the option of the decree holder to go against any one of them irrespective of the fact whether he is principal debtor or a surety. Therefore, I have no hesitation to find that there is perversity in the judgment of the appellate Court in reversing the judgment of the trial Court and I am inclined to set aside the same. The appeal has been preferred only for the purpose of recovery of the suit costs. When the appellate Court exercised the discretion and passed such order, the plaintiff cannot insist that the suit should be decreed with costs. In the cross objections, D3 disputed his liability and this Court accepted his plea that he is not liable to pay any amount in view of the dismissal of the suit for default against the D1. In the result, the cross objections are allowed by setting aside the judgment of the appellate Court in A.S. No. 12 of 1996 and confirming the decree of the trial Court in O.S. No. 683 of 1989. Consequently, the Second Appeal No. 918 of 1998 for recovery of the costs is dismissed. Each party shall bear their own costs.