(1955) 08 AP CK 0012

In the Andhra Pradesh High Court

Case No : Civil Revision No. 96/4 of 1954

Madiraj Chiranjivrao	APPELLANT
Vs	
Venkateshwarrao	RESPONDENT

Date of Decision : 09-08-1955

Acts Referred:
Contract Act, 1872 — Section 124, 126, 135, 145, 55

Citation : (1955) 08 AP CK 0012

Hon'ble Judges : Palnitkar, C.J;Bilgrami, J

Bench : Division Bench

Advocate : Syed Shah Ali Hussaini, for the Appellant;

Final Decision : Allowed

Judgement

Bilgrami, J.—This case has been referred to the Division Bench by our learned brother Ansari J., as it gives rise, in his opinion, to an important paint of law regarding which he has doubts as to the correctness of the view taken in some of the decisions of different High Courts which he has cited in his judgment.

2. The facts and circumstances which have led to this reference are that the revision petitioner, a decree-holder applied for execution against respondent No. 2 G. Raghalu who by execution of a bond undertook to stand surety of respondent No. 1 at the timer of attachment before judgment. Under this bond he promised to pay, if the defendant (respondent No. 1) failed to do so, the decretal amount with costs if the suit was decreed. The principal debtor, i.e., the defendant was not a party to this bond; it was executed in the name of the court.

The surety Raghulu objected that the bond was not enforceable by the decree-holder because it was without consideration and the judgment-debtor who was the principal debtor was not a party to it and it was given without his request or consent. The learned Additional Judge, City Small Cause Court took the view that a contract of guarantee is a tripartite agreement to which the principal debtor must be a party.

There must be a contract between him and the creditor and a contract between the surety and the creditor, for the bond to be enforceable at the instance of creditor against the surety. He found by the material on record that the judgment-debtor was not only not a party to the agreement, Hut it was executed without his knowledge or consent, and held therefore that the bond could not be enforced by the decree-holder against the surety, and dismissed his application.

Ansari J., before whom the revision petition against this order came up for hearing in Single Bench, expressed an opinion that this view is incorrect & the section of the Contract Act which defines the contract of guarantee does not contain any words which can be construed to mean that the principal debtor''s being a party to the contract is necessary; the reference to the liability of the principal debtor is with the object of distinguishing this class of contract from the contracts of indemnity. Since there were certain decisions which contained observations expressing a contrary view he referred this case to the Division Bench.

3. Before expressing our opinion, we shall discuss the decisions which have given rise to the doubt in the mind of the learned judge who heard the case in the Single Bench and made this reference. In -- ''Mahabir Parsad v. Sri Narayan'', AIR 1918 Pat 345 (A) it was held that where there is a contract between surety and the creditor which is not a collateral undertaking but creates original liability as between these two parties, the contract is of indemnity and not one of surety. In - K.V. Periyamianna Marakkayar and Sons Vs. Banians and Co., the question was of the rights of the surety against the principal debtor.

It was held that unless the principal debtor was a party to the contract or it was made at his request, actual or constructive, principal debtor is not liable to the surety. Krishnan J. discussing the essential elements and nature of the contract of guarantee observed as follows : (p. 553)

Such a contract is a tripartite contract to which the surety, the principal debtor and the creditor are all parties. Such a contract results only when at the instance of the debtor the surety guarantees payment to the creditor. Section 126 of the Act which defines a contract of guarantee though it does not say expressly that the debtor should be a party to the contract clearly implies three parties to it, namely, the surety, the principal debtor and the creditor. Otherwise it will be a contract of indemnity.

In -- AIR 1937 19 (Oudh) , the question under consideration was whether a certain letter of a person, sued as a surety to the creditor requesting him to lend money to the principal debtor made him a surety and liable to the creditor. It was observed that for a contract of surety, there must be a concurrence of the principal debtor; on the facts of the case it was held that the letter was written at the implied request of the principal debtor.

AIR 1934 163 (Nagpur) , was a case in which the suit was against brokers as sureties. The plaintiff in that case had sought to fasten liabilities on them as sureties because according to the custom of the market the broker used to collect the money from the purchasers and pay to the vendor. It was held that it was not sufficient to constitute the broker as surety. It was observed however that a contract of surety presupposes a principal debtor and no such contract can be made before the sale when there was no principal debtor in existence.

4. In our opinion, it is not necessary in this case to decide whether to constitute a contract of guarantee under S. 126, Contract Act, it is necessary that the principal debtor be a party to this agreement or that the agreement between the surety and the creditor be made at the request, express or implied, of the principal debtor. Though it appears to us to be well established by the rulings cited above and other decisions that the distinction between a contract of indemnity as defined in S. 124 and contract of guarantee as defined in S. 126, is that in the former there is no necessity of the principal debtor being a party, or the surety having entered into the contract at this express or implied request, whereas in the latter it is necessary.

The distinction between the two kinds of contracts is important because in the case of a contract of guarantee the guarantor who has paid the creditor under the contract is entitled to sue the principal debtor and claim reimbursement under S. 145, Contract Act, which runs as follows :

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

This section does not apply to the contract of indemnity as is plain from the wording. The reason for this is obvious. It is contrary to the principles of equity and justice that a person who is not a party to the contract (and the contract was) entered into without his consent or request express or implied, should he made liable by that contract under any circumstances. Where a creditor wishes to proceed against the surety as in this case, it makes no difference whether the contract is held to be a contract of indemnity or guarantee.

If it is held as the contract into which the surety has entered owing to the principal debtor not being a party or owing to the contract not having been entered into by the surety at his express or constructive request, the only result will be that on making the payment undertaken to the creditor the surety will nut be able to claim the amount from the principal debtor under S. 145. None of these rulings which have been cited before us by the learned counsel of the respondent purports to lay down, that against a surety who executed a bond in the name of the court, or of the decree-holder, the contract is unenforceable on that account, either in execution proceedings or otherwise, unless the principal debtor''s prior request or consent as to his being a party is established.

If the bond is in the name of any individual as the creditor, it is enforceable in execution proceedings by virtue of the provisions of S. 145, Civil P. C. provided it is under the order of the court. If it is a sort of undertaking given to the court, S. 145, Civil P. C. will not apply, but nevertheless the court can enforce it under its inherent powers as laid down in -- ''Ramamurthi v. Sagiraju'', AIR 1949 Mad 152 (E). See also in this regard - AIR 1943 189 (Privy Council) and -- ''Raghubar Singh v. Jai Indra'', AIR 1919 PC 55 (G).

5. The necessity of the principal debtor being a party or his consent or request may be important and decisive for determining whether the contract is of guarantee or indemnity, but for enforcing it against a surety the question has no relevance. It was held by the Calcutta High Court in a case where a bond was given in the name of the Court under S. 55(4), Civil P. C. that the court can at its discretion enforce it even though owing to the compromise of the suit, he would have been under S. 135, Contract Act, absolved from all liability.

It was observed that though the ultimate beneficiary was the decree-holder but since the bond was in favour of the court, the surety cannot take advantage of an act of the decree-holder in compromising the suit. '' B. Jang Bahadur Singh and Others Vs. Basdeo Singh and Others, and -- ''Appanna Nair v. Isac Mackadam'', AIR 1920 Mad 355 (I), are cases in which such a bond has been enforced.

6. For the reasons set out above, the view taken by the court below in our judgment was not correct, and its rejection of the decree-holder''s application on that basis was wrong. We, therefore, allow this revision petition, set aside the order under revision and direct the court below to dispose of the application according to law.

Palnitkar C.J. :

7. I agree.

