

(1976) 03 MAD CK 0086

In the Madras High Court

Case No : Appeal No"s. 779 of 1970 and 520 of 1972 against decree of the Court of the Sub. J., Coimbatore in O.S. No. 67 of 1968

Seth Dhanoomal Parsaram

APPELLANT

Vs

P. Kuppuraj and Another

RESPONDENT

Date of Decision : 16-03-1976

Acts Referred:

Contract Act, 1872 — Section 129, 130, 131

Citation : AIR 1977 Mad 274 : (1977) 1 MLJ 86

Hon'ble Judges : Ratnavel Pandian, J; Ramaprasada Rao, J

Bench : Division Bench

Judgement

Ramaprasada Rao, J.—The first and the second defendants in O. S. No. 67 of 1968 on the file of the Subordinate Judge of Coimbatore are the appellants in A. S. No. 520 of 1972. This is an appeal filed in forma pauperis, After the presentation of the appeal, the second appellant dies and the learned counsel for the first appellant has filed a memo to that effect and stated that he is one of the sons of the second appellant and he may be recognised as his legal representative. He would also say that he might be brought on record as the legal representative of the deceased second appellant as representative of his estate. We accept the memo.

2. The plaintiff instituted the suit on the foot of four promissory notes. The borrowing were almost consecutively made by the first defendant as the principal debtor and guaranteed by his father the second defendant. They were consecutive in the sense that the borrowings were on the 12th, 13th, 16th and 27th of August 1966. Exhibits A-1 and A-2 are the promissory notes admittedly signed by the first appellant on the 12th and the 27th of August 1966. The consideration paid thereunder is also admitted. Exhibits A-3 and A-4 are two other promissory notes in which the signature of the first defendant is admitted but the consideration said to have been paid thereunder is denied. The plaintiff, however, on the basis of the above four promissory notes filled the present action

seeking to recover a sum of Rs. 46,898-24. In the plaint itself he concedes that a sum of Rs. 5,000/- was paid towards Exhibit A-1 debt on 30-3-1967 and no further amounts were paid under the other three promissory notes. The plaintiff also would rely upon Exhibit A-5, the letter of guarantee executed by the second defendant and seeks for a decree against both the first defendant as the principal debtor and against the second defendant as surety.

3. The first defendant's case is that he had dealings with the plaintiff for a considerable length of time and he would admit liability only as under Exhibits A-1 and A-2 but would deny that he executed the promissory notes exhibited as Exhibits A-3 and A-4. His case is that the plaintiff might have used the promissory notes which the first defendant kept with the plaintiff notwithstanding the fact that they have been discharged and the plaintiff has used such discharged promissory notes and filled up the blanks therein and created Exhibits A-3 and A-4. In this sense the first defendant denied liability to pay any amount under Exhibits A-3 and A-4. After a considerable length of time, the first defendant filed an additional written statement stating that in Exhibits A-3 and A-4 there are certain material alterations and such alterations of the data in the promissory notes would not entitle the plaintiff to sue on them. The second defendant's (guarantor's) case is that Exhibit A-5 was given at a time when the family was joint and that there was a partition in the family in 1954 and the plaintiff was informed that the letter of guarantee, Exhibit A-5 executed by him would not ensure to any of the transactions that might be entered into between the plaintiff on the one hand and the first defendant on the other after the disruption of the family in 1954. According to him as Exhibits A-1 to A-4 are promissory notes under which monies were borrowed long after the family became divided, Exhibit A-5 cannot be pressed into service by the plaintiff so as create a liability as against the second defendant as a surety for the first defendant.

4. The following issues were framed by the trial Court:

1. Whether the discharge pleaded by the first defendant true?
2. Whether the pronotes dated 13-8-1966 and 16-8-1966 are not true?
3. Whether the interest claimed is usurious and excessive?
4. Whether the second defendant is not liable for the suit claim under the letter of joint and several liability as pleaded by him?
5. To what relief is the plaintiff entitled? Additional issues framed on 3-12-1969:
6. Whether they are material alterations in respect of all the promissory notes?
7. Whether there were blanks in the suit promissory notes and the blanks have been filled up by the plaintiff?

5. The Court below found that the discharge pleaded by the first defendant is not true and Exhibits A-3 and A-4 do not suffer by any material alteration which is

demonstrative therein, that the interest claimed is not excessive, that there was no material alteration in respect of the promissory notes and the second defendant was liable as a surety under Exhibit A-5. It is as against this, the present appeal (A. S. No. 520 of 1972) has been filed.

6. Mr. Sivamani, learned counsel for the appellants repeated the various contentions raised before the trial Court. However, he does not keenly press the contention that the promissory notes, Exhibits A-1 and A-2 have been discharged. His main contentions, however, are threefold. Firstly he would say that Exhibit A-5 ceased to be operative after there was a disruption in the family of the defendants in the year 1964 and if at all it was effective it could have been so effective only for all such debts and transactions entered into between the first defendant and the plaintiff between 31-1-1949 which is the date of Exhibit A-5 and 1954 which is the year when there was partition in the family. In this context, he would say that Exhibit A-5 has become a stale guarantee. Secondly he would say that no written notice has to be given, though contemplated in Exhibit A-5, by the second defendant to the creditor in order to avoid his contractual obligation thereunder as under the provisions of the Contract Act, there is no such statutory mandate prescribed. Thirdly he would faintly refer to the contention that there are material alterations in Exhibits A-3 and A-4 and relying upon the evidence of D.W. 1 he would contend that excepting for the amount due and payable under Exhibits A-1 and A-2, if at all they are payable, no further amounts are due.

7. We have already referred to the fact that the plea of discharge has not been pressed before us. It therefore follows that the plaintiff is entitled to a decree straightway on the foot of the promissory notes Exhibits A-1 and A-2. The question is, whether the interest claimed is excessive. There was no serious argument on this aspect either, before us. The plaintiff would therefore be entitled to the balance of the principal and the interest due under Exhibit A-1 and A-2 as found by the trial Court.

8. The next contention of the learned counsel, which as we said was a feeble one, is that there were material alterations in the promissory notes Exhibits A-3 and A-4. The principle underlying material alteration is well-settled. It presupposes that there was a writing to which the executant of the negotiable instrument was a party and that writing was given the go-by by a conscious covert or overt act on the part of the creditor resulting in a material alteration of the instrument. By establishing that a negotiable instrument has been altered in a superfluous sense will not suffice to prevent the creditor from instituting an action on such an altered instrument. The debtor complaining of material alteration should not rest content by establishing that there was a formal alteration which is innocuous and superfluous, but he should also further establish that there was a material alteration in the sense that what is sought to be put in Court was not the contract between the parties and was not what was intended between the parties at or about the time when it was executed. This is

the underlying principle behind the concept of material alteration. If this is so, it is for us to consider whether, in the instant case, the defendants have established such a material alteration. The defendants have give varied and inconsistent versions. In the original written statement filed no such plea was taken. But by way of an after thought and a late stage an additional written statement was filed setting up this plea. Even before the plaintiff came to Court, there were notices which were exchanged between the parties. Even in the said notices the plea of material alteration is not, either expressly or by necessary implication, set out. There the defendants case was that the plaintiff might have utilised certain discharged blank promissory notes which were kept with him without being taken a return thereof, and it was in this light, he challenged the implementability of Exhibits A-3 and A-4.

9. In the witness box he trotted out the story that the contents of Exhibits A-3 and A-4 have been materially altered.

10. We shall now take up the last contention whether in the instant case it could be said that the plea of material alteration could be sustained. We have already traced the inconsistent stand of the defendants at various stages. Primarily the first defendant's evidence was that he executed Exhibits A-3 and A-4 in blank forms and that the instruments were filled up later by the plaintiff to his advantage. The first defendant admits that he has long-standing dealings with the plaintiff. In such circumstances it would be difficult to believe that the plaintiff could have extracted signatures on blank forms from the first defendant to be used at a later stage for his benefit. In the notice which passed between the parties, under Exhibit A-9, the first defendant would admit liability under Exhibits A-1 and A-2. There he did not set up a plea of discharge even. As regards the promissory notes Exhibits A-3 and A-4, he denied execution. He would say that he had borrowed several thousands of rupees for his business and repaid all of them leaving a balance of Rs. 15,000/- and that the discharged promissory notes have always been in the custody of the plaintiff and in all of them the dates have not been put in. The lower Court examined Exhibits A-3 and A-4 microscopically. In fact a magnifying glass was brought by the first defendant's counsel for examination of the instruments. He did not find any traces of the dates being scored out and new date being written up thereon. The first defendant, besides asserting that there was an alteration of the date, did not cause the examination of an expert to scrutinise it. We examined the instruments ourselves. They are in the usual printed form and the blanks therein are also filled up in the usual manner. Conspicuously Exhibits A-3 and A-4 do not differ from Exhibits A-1 and A-2. We have already stated the necessary criteria to invoke the principle of material alternation. The alterations if discovered should shake the very foundation of the instrument and it cannot be said to be one to which the executant was a concurring or consenting party. There is no such element in this case. The plea of material alteration is not whispered in the notice and it was not taken up until at a late stage of the trial also. In these circumstances, we concur with the trial Court and Exhibits A-3 and A-4 are

validly drawn up instruments which have been admittedly signed by the first defendant and which do not suffer from any legal infirmity. We also agree with the trial Court on issue No. 7 that there were no blanks in the suit promissory notes and they have not been filled up by the plaintiff. It is no doubt true that on a cursory examination of the instruments, we find that the rate of interest has been added therein. But that by itself cannot lead to the inference that the instruments have been materially altered, for, this induction of the rate of interest in a different style and writing is found in Exhibits A-1 and A-2 also. In so far as the name of the payee is concerned, it is not the first defendant's case that the payee should not be a person other than the plaintiff. Even here, the first defendant cannot further his self-serving assertion regarding the material alteration. The plaintiff, in the witness box, was asked about it and he denied it and when the first defendant was in the box he was questioned whether he would execute a promissory note without date, he could say that he was not in the habit of signing such promissory notes. All these factors taken together belie the defence of the first defendant that the instruments Exhibits A-3 and A-4 suffer from material alteration.

11. Then the next question is whether the plaintiff on whom the burden shifted after the defendants went into the box has proved that he paid the consideration under the promissory notes. In the case of proof of such passing of considerations under negotiable instruments, the burden of proof being ambulatory, shifts from one side to the other. The plaintiff in this case who examined himself as P.W. 1 produced his accounts. Though they are in Sindhi language he caused a translation of it to be done and Exhibit A-13 is a true translation of the entries in English pertaining to the transactions which the first defendant had with him on the four dates in question. These are reflected in his day book Exhibit A-12, the entries in which are, however, kept in Sindhi Language. Exhibit A-13 establishes that on the four crucial dates, the plaintiff advanced Rs. 10,000/-. In the day book there is a reference to the contract to pay interest at the rate shown in the instrument. The day book also contains a credit entry for Rs. 5,000/- which was paid by the first defendant on 30-3-1967. It is very curious that the first defendant did not challenge the regularity and propriety of the accounts, then it is reasonable to presume that the reliance placed by the trial Court on the account books kept by the plaintiff was justified. Further the first defendant summoned from the Income Tax Department the returns filed by the plaintiff as regards his business income. Having summoned, he did not use them in the sense he did not cross-examine the plaintiff regarding such returns. No doubt the plaintiff would honestly admit when he was in the box that the return submitted by him to the Income Tax Department did not contain his debtors' names. That would not tilt matters in so far as the first defendant is concerned. Again, it is not in dispute that the first defendant was doing business in his own name as well as under the trading style of P. Kuppuraj and Company. Whilst he took the precaution of producing his own account books of his firm. The borrowings, as we said, were in the course of fifteen days. It was quite

possible that the borrowings made under Exhibits A-3 and A-4 were for the purpose of the firm's business and they find a place in the said accounts. The non-production of the firm's accounts by the first defendant has to be taken note of in the peculiar circumstances of this case. It was in that light the trial Court rightly observed that merely because Exhibits B-7 and B-9 which are the account books relating to the personal business of the first defendant did not contain entries regarding receipt of Rs. 10,000/- each under Exhibits A-3 and A-4, they cannot belie the plaintiff's version. We therefore find that all the four promissory notes are supported by consideration and the first defendant agreed to repay the same together with the agreed rate of interest.

12. The next contention of Mr. Sivamani is that the second defendant should be exonerated as his obligation as a surety was dissolved as soon as there was a partition in the family in 1964. For this purpose it is necessary to examine the security bond itself. Exhibit A-5 is a letter couched in general terms, and is executed by both the defendants. The second defendant along with the first defendant has agreed to stand surety for the first defendant's transactions, whatever may be the nature of the transactions. By way of illustration, however, ordinary instruments under which transactions are effected and borrowings made, such as promissory notes, hundies, letters of credit, overdrafts etc. do find a place in Exhibit A-5. But the principal bargain between the parties appears to be that the second defendant would be a surety for all the transactions of whatever nature which the first defendant would do with the plaintiff. Again it was made clear that the liability so undertaken by the second defendant along with the first defendant should hold good till both of them jointly cancel the obligation as above by sending registered notice to the plaintiff and by obtaining an acknowledgment thereof.

13. If the contents of Exhibit A-5 do reflect the nature of the obligation undertaken by the second defendant as surety, it is for consideration whether there could be any snap in such an obligation itself continuing after a partition in the family as between the second defendant and his son. Under S. 126 of the Indian Contract Act, a contract of guarantee is one to perform the promise or discharge the liability, of a third person in case of his default. That such a contrary has been forged between the plaintiff on the one hand and the defendants on the other is clear. The status of the second defendants in the said contract is as a surety, whilst that of the first defendant is that of the principal debtor. This guarantee which was reflected in Exhibit A-5 is a continuing guarantee which extends, to a series of transaction. This is what is provided for in S. 129 of the Contract Act. Section 130 of the Act provides that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor. What is urged by the learned counsel for the appellants is that unlike other sections there is no parenthetical clause "In the absence, of any contract to the contrary" in S. 130 of the Contract Act, and therefore, the strict compliance of the prescription in Exhibit A-5 that the continuing guarantee could be revoked by only a written notice with acknowledgment due to the creditor is

not strictly enforceable and such notice could be given as provided for in S. 130 orally also to the creditor. No prescription of any enactment could be interpreted on the basis of the text of another section in it unless the Courts are compelled to do so by reason of certain peculiar circumstances which might compel them to adopt such a procedure. But generally each section is independently active on its own and does not depend for its existence on interpretation on another section. S. 131 no doubt provides for "a contract to the contrary". Such a provision therein is understandable because the Act said that the death of the surety would operate as a revocation of the continuing guarantee unless there is a contract to the contrary. But the language in S. 130 is so simple that it is unnecessary to read between its lines and to invoke something which is not necessary for the occasion, S. 130 in terms refers to a notice to the creditor. It says that a continuing guarantee may at any time be revoked as to future transactions by notice to the creditor. The act having left the position at that it is open to the parties to provide as to the manner in which notice to the creditor under S. 130 could be given. If therefore the parties think of laying down particular method by which such a notice for revocation of the guarantee under S. 130 has to be given, then such a contract is a binding contract and it cannot be easily brushed aside on a priori consideration. The lower Court in this case found that the story of the first defendant that the creditor was informed of the partition in the family in 1964 and thereby was put on notice of the fact that the contract of guarantee under Exhibit A-5 would be no longer in force, remained only as a bare contention without being substantiated. No letter has been produced expecting the reply notice given by the second defendant under Exhibit B-2 in 1967, when for the first time the theory that the creditor was put on notice of the partition of the joint family was set up. The Court below therefore rightly disbelieved the communication of any such intention to snap the legal obligation under the contract of guarantee at any time prior to the institution of the suit. We find that the second defendant as surety did not comply with the specific prescription as regards the notice under Exhibit A-5 and the story of the defendants that the creditor was put on notice of the partition in the family in 1964 and the consequential breaking off of the contract of guarantee is one which cannot stand scrutiny at all. The decision in Union of India (UOI), Ministry of Food and Agriculture (Dept. of Food), New Delhi Vs. Pearl Hosier Mills and Others, is of no relevance at all. In that case the Court was considering the ingredients of S. 133 of the Contract Act. Section 133 says that any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges principal debtor and the creditor, discharges the surety as to transaction subsequent to the variance. In that situation, the Punjab High Court said the provisions of S. 133 are not subject to a contract to the contrary between the parties to the contract because the section itself is in unqualified terms. This decision is not apposite for the purpose of our discussion.

14. We therefore hold that the second defendant, on the date of the institution of

the action continued under the continuing guarantee to be a surety for all the obligations and transactions in which the plaintiff was involved and which the plaintiff was involved and which he had with the plaintiff. Appeal No. 520 of 1972 is therefore dismissed with costs and the appellants shall pay the Court fee due to Government.

15. In A. S. No. 779 of 1970, Mr. Balakrishnan's contention is that the lower Court ought not to have passed an instalment decree and permitted the defendants to pay the decree amount in monthly instalments of Rs. 500/- each. The plaint claim was Rs. 46,898-24 and having regard to the magnitude of the claim, the learned Sub-ordinate Judge ought not to have passed the instalment decree. We are not here going into the question as to the circumstances under which the instalment decree came to be passed as it is unnecessary to do so. It is common ground that from the 21st of Sept., 1970 to this date, no instalment has been paid as directed by the Court below. This itself is sufficient proof that the defendants are not anxious to pay even the admitted amount by taking advantage of the instalment decree made by the Court below. Having regard to the wilful default committed by the defendants in the matter of paying the decree amount and obeying the orders of the court, we set aside this part of the judgment and decree the suit with costs in the usual manner.

16. App. No. 779 of 1970 is allowed with costs and App. No. 520 of 1972 is dismissed with costs and the appellants in App. No. 520 of 1972 will pay the court fee due to Government on the appeal memorandum thereon.

17. Order accordingly.