
(2002) 11 KL CK 0030
In the High Court Of Kerala
Case No : A.S. No. 22 of 1992

Syndicate Bank

APPELLANT

Vs

Narayana Iyer

RESPONDENT

Date of Decision : 27-11-2002

Acts Referred:

Contract Act, 1872 — Section 128, 141

Citation : (2004) 2 CivCC 343 : (2004) 1 CTLJ 373 : (2003) 3 KLT 726 : (2004) 2 RCR(Civil) 79

Hon'ble Judges : Kurian Joseph, J;G. Sasidharan, J

Bench : Division Bench

Advocate : S.R. Dayananda Prabhu and G. Sivakumar, for the Appellant; C.S. Ananthakrishna Iyer A.T. James, Antony Dominic and A.M. Shaffique, for the Respondent

Judgement

G. Sasidharan, J.—A.S.22/1922 is filed by the plaintiff in O.S. 528/1982 on the file of the Principal Sub Judge, Kottayam. A.S.608/1996 is an appeal filed by the first defendant in the above suit. These two appeals are disposed of by this common judgment and the parties will be referred to in this judgment as they are referred to in the suit.

2. The first defendant was the Managing Director of M/s. Kottayam Textiles Limited, a Company incorporated under the Companies Act. At the time of institution of the suit there was only one defendant in the suit and the Company was subsequently impleaded as additional second defendant. The bank filed the suit against the defendants for realisation of an amount of Rs. 11,26,026.51, the amount outstanding as due to the bank in a loan transaction. The suit was decreed by the trial Court allowing realisation of the amount with interest at the rate of 21.65% per annum from the date of suit till realisation and costs of the suit. There is a direction in the judgment that the execution of the decree will stand postponed till the claim filed by the plaintiff before the Commissioner appointed under Act 27 of 1985 is disposed of. There is also direction that credit

shall be given to the first defendant of any amount which the plaintiff might realise in terms of Act 27 of 1985.

3. A.S.22/1992 is filed by the plaintiff challenging the direction in the judgment of the trial Court that execution of the decree will stand postponed till the claim filed by the plaintiff before the Commissioner appointed under Act 27/1985 is disposed of. The other appeal is filed by the first defendant by contending that he is not at all liable for the payment of the amount. According to the first defendant, since the entire assets and the plant and machinery of the second defendant had vested in the State free of all encumbrances u/s 4(1)(2) of the Act 27/1985 it has become impossible for the first defendant to realise the amount from the second defendant after paying the amount to the bank as per the terms of the agreement of guarantee. The contention that the bank cannot proceed against the first defendant, the surety for realisation of the amount without exhausting the remedies against the principal debtor is also raised by the first defendant.

4. The case of the plaintiff is that the second defendant availed itself of various financial facilities from the plaintiff bank and the first defendant in his capacity as the Managing Director of the second defendant signed documents and acknowledgment of liability on the reverse of the demand promissory note on 12.5.1977 and 31.12.1977. In addition to that, on 29.7.1976 the first defendant executed a deed of guarantee in his personal capacity in favour of the plaintiff guaranteeing repayment of all and every sum due to the plaintiff on any account of the second defendant upto a limit of Rs. 28,20,000/-. Ext.A8 is the deed of guarantee executed by the first defendant in favour of the plaintiff bank in which it is stated that the first defendant agreed to pay and satisfy the bank on demand all and every sum of money which is due to the bank from the principal debtor. Ext.A9 is a letter given by the first defendant to the bank in which it is stated that since it was felt necessary for the first defendant to guarantee the credit limits to the Company in his personal capacity up to a limit of Rs. 28,20,000/- as per the guarantee bond Ext.A8, he was furnishing his personal properties towards security on the strength of which the bank would continue to extend the credit limits to the Company. There is also statement that the first defendant deposited documents of title of his property to create an equitable mortgage with the bank. The property the document in respect of which was deposited with the plaintiff bank is the property mentioned in the plaint.

5. When money was due from the second defendant, the Kottayam Textiles Limited, that company was declared as a relief undertaking under the Kerala Relief Undertakings Act, 1962 with effect from 28.4.1978. The bank was not in a position to initiate steps for realisation of the amount from the Kottayam Textiles Limited since no action could be taken because all remedies in relation thereto were suspended statutorily. That was the reason for filing the suit originally against the first defendant alone. Subsequently the Kerala Sick Textile Undertakings (Acquisition and Transfer of Undertakings) Act, 1985 (Act 27/1985)

came into force. As per the provisions of the Act, every sick textile undertaking and the right, title and interest of the owner in relation to every sick undertaking shall stand transferred to the State Government. By virtue of the provisions of the Act, Kottayam Textiles Limited ceased to be a relief undertaking and therefore, it was impleaded as additional second defendant in the suit.

6. The plaintiff had already lodged a claim before the Commissioner appointed under Act 27/1985. All the assets belonging to the Company vested with the State of Kerala by virtue of the provisions in the above Act. It is stated that the assets vested with the State of Kerala included the properties which were hypothecated to the plaintiff bank as security for the loan availed of by the second defendant. The Act provides for payment of compensation to the undertaking and an amount of Rs. 41,10,533/- was fixed as the amount payable to the second defendant. The above amount has to be disbursed by the Commissioner appointed as per the provisions of the Act. It is also open to the plaintiff bank to claim the amount due to them from the Commissioner appointed under the provisions of the Act and as pointed out earlier, the plaintiff bank had already lodged a claim before the Commissioner. The learned Sub Judge referring to the decision of a Division Bench of this Court in *Radha Thiagarajan v. South Indian Bank Ltd.* (ILR 1987 Ker 370) found that the execution of the decree had to be postponed till the claim filed by the plaintiff before the Commissioner appointed under Act 27/1985 is disposed of. That was a case in which on the basis of principle of justice and equity the Division Bench found that since the claim filed by the bank under the Nationalisation Act was pending disposal the execution of the decree had to be postponed. The submission made by the learned counsel appearing for the plaintiff is that in the circumstances of that case the Court found that the execution of the decree had to be postponed and the fact that there was such a postponement of execution of decree in that case has no relevance in the present case. It is pointed out that in the decision which came up for consideration before the Division Bench the decree passed against the sureties was for realisation of an amount of Rs. 84,514.32 with interest and the amount of compensation the Company had to get was Rs. 26,05,000/-. In the present case the decree is allowing realisation of an amount of Rs. 11,26,026.51 with interest at the rate of 21.65% per annum from the date of suit till realisation together with costs of the suit. The suit was filed in the year 1982 and it is submitted that the total amount now realisable from the defendants in the suit goes up to more than Rs.50 lakhs. On pointing out the above fact the submission made by the learned counsel appearing for the plaintiff is that the trial Court was not right in postponing the execution of the decree by saying that the Division Bench of this Court in *Radha Thiagarajan's* case (supra) postponed the execution of the decree..

7. The liability of the principal debtor and the surety is joint and several and the creditor can either proceed against the principal debtor or the surety or both of them simultaneously. The law on this point is settled and the Supreme Court in *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving*

Mills Ltd. (2001) 5 SCC 54 : 2002 (2) KLT (SC) 86) held that the right of the creditor to recover money from the guarantors arises out of the terms of the deed of guarantee which are not in any way superseded or brought to naught merely because the creditor may not be able to recover money from the principal debtor. The Supreme Court in the above decision referred to another decision in Punjab National Bank Vs. State of U.P. and Others, wherein also the same view was expressed by the Supreme Court. There the Supreme Court said that even as per the provisions of the Nationalisation Act the liability of the principal borrower does not come to an end. In the light of the above position of law accepted by the Supreme Court, it is not possible even to say that as per the provisions of the Nationalisation Act the liability of the principal borrower comes to an end.

8. The learned counsel appearing for the first defendant argued that if the first defendant is made liable for payment of the amount he will not be in a position to realise the amount from the principal debtor for the reason that all the assets have vested with the Government as per the provisions of the Act.. The first defendant is a person who had been a guarantor and it was on the guarantee furnished by the first defendant that the loan facility was made available to the second defendant. That being the position, it is not open to the first defendant to say that he should not be made liable for the plaint claim for the reason that he will be left with no remedy for realisation of the amount from the principal borrower. The liability of the guarantor to pay the amount to the creditor will not depend upon the possibility of the guarantor being able to realise the amount from the principal borrower after discharging the liability to the creditor. We are not in a position to accept the submission made by the learned counsel appearing for the first defendant that this is a fit case in which the execution of the decree has to be postponed till the settlement of the claim by the Commissioner.

9. In the circumstances stated above, we find that postponement of the execution of the decree in this case is not justifiable. So, the direction in the judgment that the execution of the decree has to be postponed has to be vacated. We do not find any merit in the appeal, A.S.608/1996 since the guarantor cannot contend that the creditor has no right to proceed against him for realisation of the amount when the principal debtor is not being proceeded with. Now the decree passed is against the principal debtor also and as we have said earlier as stated in the decision of the Supreme Court referred to above, the provisions of the Nationalisation Act will not discharge the principal borrower from the liability for payment of the amount. The above appeal filed by the first defendant is liable to be dismissed.

A.S.608/1996 is dismissed. A.S. 22/1992 is allowed vacating the direction in the judgment and decree of the trial Court that the execution of the decree will stand postponed till the claim filed by the plaintiff before the Commissioner appointed under the provisions of Act 27/1985 is disposed of. The order made by this Court

in C.M.P.1927/1992in A.S.22/1992 will continue to be in force. The execution Court will be free to make orders for proceeding against the shares. The parties are directed to suffer their respective costs in these appeals.