
(1998) 01 MAD CK 0010
In the Madras High Court
Case No : O.S. Appeal No. 276 of 1997

Thanga Sundaram

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 29-01-1998

Acts Referred:

Contract Act, 1872 — Section 133, 134, 135, 139, 141

Citation : (1998) 01 MAD CK 0010

Hon'ble Judges : Shivaraj Patil, J;M. Karpagavinayagam, J

Bench : Division Bench

Advocate : N. Thayagarajan, for the Appellant; V. Rangarajan, for the Respondent

Judgement

Shivaraj Patil, J.—Heard the learned counsel for the parties. This appeal is by the defendant No.2 in C.S.No.1218 of 1993 aggrieved by

the order dated 2.4.1997 made by the learned single Judge on the Original Side in Application No.4161 of 1996.

1a. In this appeal we refer to the parties by the rank assigned to them in the suit for convenience and understanding.

2. The few facts which are necessary for disposal of this appeal are the following:
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The plaintiff Central Bank of India filed suit C.S.No.1218 of 1993 to recover a sum of Rs.3,12,076.69 including interest at the rate of 24.75% per

annum towards Cash Credit Account No.1 and a sum of Rs.2,33,456.18 including interest at the rate of 24.75% per annum towards Cash Credit

Account No.II and a sum of Rs. 8,229.66 including interest at the rate of 24.75% per annum towards Over Draft facility as against Supply of Bills.

Thus, the plaintiff in all, claimed a sum of Rs. 5,53,762.53 from the defendants 1

and 2 together with future interest at the agreed rate from the date of plaint till the date of realisation. The defendant No.1 was the principal borrower and the defendant No.2 was the surety and also a mortgagor of the immovable property. Summons was served on the defendant No.2. When he was not represented, he was set ex parte. Thereafter, on the basis of the compromise memo filed, entered into between the plaintiff and defendant No.1, a compromise decree was passed on 28.4.1995 wherein the defendant No.1 agreed to pay a sum of Rs.6,22,365/- with interest at 14% p.a. and further agreed to pay the entire amount on or before 30.9.1995. The plaintiff thereafter, when the defendant No.1 failed to pay the amount as agreed, as per the preliminary decree before 30.9.1995, made Application No.4161 of 1996 for passing final decree. The defendant No.2 resisted the said Application on the ground that he was not a party in the compromise memo and that the terms entered into between the plaintiff and the defendant No.1 amount to entering into a fresh contract to which the defendant No.2 was not a party. However, the learned single Judge by the order under appeal rejected the contentions advanced on behalf of the defendant No.2 and allowed the Application. Hence, the appeal.

3. The learned counsel for the defendant No.2, the appellant herein, urged that in view of the compromise entered into between the plaintiff and the defendant No.1 a compromise decree was passed on 28.4.1995 to which the defendant No.2 was not a party, the defendant No.2 who was a surety stood discharged as per Section 135 of the Indian Contract Act.

4. Per contra, the learned counsel for the plaintiff submitted that the defendant No.2 was not merely a surety, but he was also a mortgagor; as per the Letter of Guarantee executed by the defendant No.2 in favour of the plaintiff, it is not open to the defendant No.2 to fall back on Section 135 of the Contract Act to resist the claim of the plaintiff. He invited our attention, in particular, to Clauses 2 and 9 of the said Letter of Guarantee. He further submitted that the defendant No.2 having not challenged the preliminary decree dated 28.4.1995 was not entitled to resist the application made by the plaintiff for passing final decree.

5. We have considered the submissions made by the learned counsel for the parties.

6. It is not disputed before us that the defendant No.2 was not only a surety but was also a mortgagor to discharge the loan amount due from the defendant No.1 to the plaintiff Bank. Clauses 2 and 9 of the Letter of Guarantee read thus:-

2. It is also agreed that any admission or acknowledgment in writing by the principal debtor of the amount of indebtedness of the principal debtor or otherwise in relation to the subject matter of this guarantee or any judgment or award obtained by you against the principal debtor shall be binding on me/us and I/we accept the correctness of any statement of account served on the principal debtor which is duly certified by any Manager or Officer of the Bank and the same shall be binding and conclusive as against me/us also, and I/we further agree that in making an acknowledgment or making a payment he shall be treated as my/our duly authorised agent for purpose of Indian Limitation Act of 1963.....

9. I/we hereby consent to your making any variance that you may think fit in the terms of your contract with the principal/s to you determining enlarging or varying any credit to him/them it to your making any composition with him/them/it and or promising to give him/them/it time or not to sue him/them/it and to your parting with any security you may hold for the guaranteed debt I/we also agree that I/we shall not be discharged from my/our liability by your releasing the principal/s or any act or omission of yours the legal consequences of which may be to discharge the principal/s or by any act of yours which, would, but for this present provision be inconsistent with my/our rights as sureties or by your omission to do any act which but for this present provision your duty to me/us would have required you to do. Though as between the principal/s and myself/ourselves I/we am/are sureties only. I/we agree that as between yourselves and me/us, I/we agree that as between yourselves and me/us, I/we am/are principal debtor/s jointly with him/them/it and accordingly I/we shall not be entitled to any of the rights conferred on sureties by Sections 133,134,135,139 and 141 of Contract Act.

8. As can be seen from the Clause 9 extracted above, the defendant No.2 specifically agreed that he shall not be entitled to any of the rights conferred on sureties by Sections 133, 134, 135, 139 and 141 of the Contract Act. It is not disputed that this Letter of Guarantee was executed

by the defendant No.2. In the light of this specific clause contained in the Letter of Guarantee, excluding the application of Section 135 of the

Contract Act, the defendant No.2 cannot now turn round and say that he has got right u/s 135 of the Contract Act. It is not a case where any

fraud was played on the defendant No.2 or that the Letter of Guarantee executed by him was not voluntary. When the defendant No.2 by his own

voluntary act has given up his rights, if any, available u/s 135 of the Contract Act, in our view, as rightly contended by the learned counsel for the

plaintiff, the contention of the defendant No.2 that he was not liable to pay money due to the plaintiff or that the property mortgaged by him was

not available for sale to realise the amount due to the plaintiff Bank under the decree ,is not sustainable.

9. The learned counsel for the plaintiff Bank" cited few decisions in support of his submissions. Since the learned counsel for the defendant No.2

did not contend that Clause 9 of the Letter of Guarantee was invalid or unenforceable, it is unnecessary for us to refer to those decisions. We must

also notice that although the compromise decree was passed on 28.4.1995, it would be effective and operative so long it holds the field. Though

the defendant No.2 was party to the said decree, he did not challenge the same. He only tried to resist the Application No.4161 of 1996 made by

the plaintiff in the final decree proceedings. Under the circumstances, the learned single Judge was right in overruling the objections of the

defendant No.2 and allowing the application made, by the order under appeal. We do not find any valid or good ground to differ with the

conclusion arrived at by the learned single Judge and no other point arises for consideration. Thus finding no merit in this appeal. We dismiss it. No

costs.