
(1979) 03 KL CK 0021

In the High Court Of Kerala

Case No : C.C. No. 1021 of 1976 in C.P. No. 17 of 1973

The Wandoor Jupiter Chits (P) Limited

APPELLANT

Vs

Valapra Mayin and Others

RESPONDENT

Date of Decision : 09-03-1979

Acts Referred:

Contract Act, 1872 — Section 128, 133, 134, 135, 140
Kerala Debt Relief Act, 1977 — Section 10, 11, 12, 13, 19(1)
Presidency Towns Insolvency Act, 1909 — Section 45
Provincial Insolvency Act, 1920 — Section 44

Citation : (1979) 03 KL CK 0021

Hon'ble Judges : M.P. Menon, J

Bench : Single Bench

Advocate : N. Madhavan, for the Appellant; M.P. Balagopalan Nambiar, for the Respondent

Judgement

M.P. Menon, J.—This is a claim by the Official Liquidator for the balance due from a prized subscriber of one of the kuries of the Wandoor Jupiter Chits (P) Ltd., now in liquidation. The 1st Respondent is the subscriber, and Respondents (2) and (3) are his sureties. All the three claim discharge u/s 3 of the Kerala Debt Relief Act, 1977 (Act 17/77). The 1st Respondent is undoubtedly a "debtor" as defined in the Act, and there is not much of a dispute that he is entitled to discharge. Respondents (2) and (3), it is equally clear, do not come within the definition; out it is contended on their behalf that the discharge of the principal debtor would enure to their benefit also, though not directly u/s 3 of Act 17/77. It is argued that the effect of Section 3 is to wipe out the debt altogether, and that when the debt itself is gone, there is nothing a creditor could enforce against the sureties. The liability of the sureties depends on the existence of the debt and their guarantee vanishes when the debt disappears. The Full Bench decision of the Madras High Court in A.L.S.P.Pl. Subramania Chettiar (decd.) and Another Vs. Moniam P. Narayanaswami Gounder, and the decision of this Court in Mani v. Kochouseph 1965 KLT 1266 are cited in support.

2. Counsel for the Liquidator understandably opposes the above formulation, because if accepted, it would sound the death-knell of a large number of pending claims, involving a large number of other defaulted subscribers. According to him, the decision in *Velappa Kumar v. Kosamattom Chit Fund* and Anr. 1978 KLT 10 supports his stand.

3. The real question is as to how the provisions of Act 17/77 operate on an existing contract of guarantee, and this can best be answered by first referring to those provisions themselves.

4. The Act is a short one consisting of 13 sections. It has been placed on the statute book "to provide relief from indebtedness to certain persons in the State of Kerala". u/s 2(3), debt means:

any liability in cash or kind, whether secured or unsecured, due from or incurred by a debtor on or before the date of commencement of this Act, whether payable under a contract, or under a decree or order of any court, or otherwise, and subsisting on that date.

but does not include liabilities of the kind referred to in Clauses (6) to (n). Sub-section (4) of Section 2 defines "debtor":

(4) "debtor" means any person whose annual income does not exceed three thousand rupees, from whom any debt is due, but does not include --

(i) any person from whom debt or debts exceeding three thousand rupees (excluding interest) is or are due;

(ii) a firm registered under the Indian Partnership Act, 1932, or a company as defined in the Companies Act, 1956, or a corporation formed in pursuance of an Act of Parliament of the United Kingdom or of any special Indian Law.

Explanation. -- For the purposes of this clause, the term "person" shall include a family;

Section 3 is the key provision, and it reads:

Discharge of debt. -- Notwithstanding anything contained in any other law for the time being in force, or in any contract or other instrument having force by virtue of any such law, or in any decree or order of court, with effect on and from the commencement of this Act

(a) every debt and the interest thereon payable by a debtor to a creditor shall be deemed to be wholly discharged;

(b) no civil court shall entertain any suit or other proceeding against a debtor for the recovery of any debt or part of a debt or any interest thereon;

(c) all suits and other proceedings (including appeals, revision petitions, applications for review, proceedings for attachment and execution proceedings) pending at such commencement against any debtor for the recovery of any debt

shall abate:

Provided that nothing in this clause shall apply to --

(i) the sale of any movable property conducted and concluded before the commencement of this Act;

(ii) the sale of any immovable property confirmed before such commencement:

Provided further that where a suit or other proceeding is instituted jointly against a debtor and any other person, nothing in this section shall apply to the maintainability of such suit or other proceeding in so far as it relates to such other person;

(d) every debtor undergoing detention in a civil prison in execution of any decree for money passed against him by a civil court in respect of any debt shall be released;

(e) every movable property pledged by debtor before commencement of this Act shall stand released in favour of such debtor and the creditor shall be bound to deliver possession of such property to the debtor;

(f) every mortgage executed by a debtor in favour of a creditor shall stand redeemed and the creditor shall be bound to deliver possession of the mortgaged property to the debtor.

Explanation I. -- In this section, the term "suit" shall not include a claim to a set off made in a suit instituted by a debtor

Explanation II. -- For the purposes of this section, a suit in which a decree in respect of a debt is prayed for shall be deemed to be a suit for the recovery of the debt notwithstanding that other reliefs are prayed for in such suit, and a decree shall be deemed to be a decree in respect of a debt notwithstanding that other reliefs are granted in such decree:

Provided that a suit or decree for possession of land shall not be deemed to be a suit for recovery of, or a decree in respect of, a debt by reason merely of mesne profits being also prayed for or included in such suit or decree.

Explanation III. -- Nothing in this section shall debar a decree-holder from enforcing reliefs other than in respect of a debt, where the decree contains independent reliefs.

Explanation IV. -- Nothing in this section shall be construed as entitling any debtor to the refund of any part of any debt or interest thereon already repaid by him or recovered from him before the commencement of this Act.

Section 4 enables a debtor entitled to delivery of possession under Clauses (e) and (f) of Section 3 to apply to the Tribunal (appointed under the Act) for such delivery, and also provides for an appeal to the Appellate Authority against orders passed by the Tribunal. Sections 5 and 6 deal with appointment of

Tribunals and Appellate Authorities, and Section 7 with their powers. While Section 8 prohibits appearance of legal practitioners in proceedings before the above two authorities, Section 9 engrafts a new rule regarding burden of proof. Section 10 bars the jurisdiction of civil courts in respect of matters to be dealt with by the Tribunal and the Appellate Authority. Section 11 is in the following terms:

Act to over-ride other laws, contracts, etc. -- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Code of Civil Procedure, 1908 (Central Act 5 of 1908) or in any other law for the time being in force, or in any custom, usage or contract, or in any decree or order of a court or other authority.

Section 12 confers rule-making power on the Government, and Section 13 relates to repeal.

5. Broadly stated, a "debt" is a liability in cash or kind subsisting on 13th January 1977, which is deemed to be the date of commencement of the Act. And any person whose annual income is Rs. 3,000 or less, and whose indebtedness does not in the aggregate exceed the same figure, is a debtor. Section 3(a) provides that every debt payable by a debtor to a creditor shall be deemed to be wholly discharged; and the consequences of this declaration are the subject-matter of the other clauses. Clause (b) provides that no civil court shall entertain any suit or other proceedings for recovery of a debt from a debtor. Of course, the institution of suits and other proceedings as such is not prohibited because, whether, a suit is one for the recovery of a debt, and whether the Defendant is a debtor or not, is a matter of pleading and evidence. When once the court is satisfied that the requirements of Clause (b) are met by the facts of the case before it, it will have to dismiss it as not maintainable. While Clause (b) thus relates to suits or proceedings to be instituted after the commencement of the Act, Clause (c) covers pending suits and other proceedings of the same character, and it is provided that all of them shall abate. Explanation II is apparently intended to give some clue as to when a suit or other proceedings can be treated as one "for the recovery of a debt", within the meaning of Clauses (b) and (c). But what is significant to note is that both Clauses (b) and (c) refer only to suits or other proceedings against a debtor, and Explanation II can also therefore apply to such cases only. In other words, Clauses (b) and (c) do not, in terms, inhibit institution or continuation of suits or other proceedings against sureties, who are not by themselves persons coming within the meaning of the term "debtor". Whether the disability to proceed against the principal debtor will automatically import a like disability in the matter of proceeding against the sureties also, by reason of the provisions of Chapter VIII of the Contract Act, which counsel call "the general law", or for any other reason, is a different matter; what appears to be clear is that on the language of the two sub-clauses, and that alone, suits or other proceedings against sureties do not become non-maintainable, in spite of the principal debtor's discharge.

6. There are then the two provisos appearing between Clauses (c) and (d) of Section 3. The first is a proviso to Clause (c) alone, and deals with concluded sales of movable and immovable property. But the second is a proviso to the whole Section ("nothing in this section shall apply"), and should therefore limit the sweep of Clauses (a), (b) and (c) also. It lays down that where a suit or other proceeding is instituted jointly against a debtor and another person, such suit or proceeding can continue against the other person. As already seen, a debtor is defined as a person whose annual income and indebtedness do not exceed Rs. 3,000. When this definition is read into the second proviso aforesaid, what we get, for instance, is that if a suit is filed against two persons one of whom is a person whose income and indebtedness do not exceed Rs. 3,000 and the other a person outside that limit, the suit against that other person can continue. Such a person may be a surety, a co-obligor or one falling any other description, but the proviso says that the suit or proceeding as against him can continue. The language of the proviso, again, does not make a distinction between sureties and others who may be covered by the words "any other person" used therein. Thus, while Clauses (b) and (c) refer only to suits and other proceedings against a debtor alone, the second proviso covers cases where such suits or other proceedings are against a debtor and another person (who is himself not a debtor), even if he be a surety as in this case. If that is so, it is not possible to hold that the scheme of Section 3 is to provide for the discharge of the surety also, the moment the principal debtor gets a discharge thereunder; on the other hand, the proviso permits entertainment and continuation of proceedings against such sureties, notwithstanding Clauses (a) to (c), and also "notwithstanding anything contained in any other law for the time being in force".

7. It is argued that when the proviso leaves intact the "maintainability" of the class of suits or proceedings covered thereby, it only means that such suits or proceedings are not liable to be dismissed for the sole reason that the principal debtor is discharged, but that they are still to be disposed of applying the "general law" that the sureties' liability cannot survive the extinguishment of the debt itself. It is difficult to accept such an interpretation of the proviso because if the legislature had really intended that the sureties should also stand absolved following the discharge of the principal debtor, it could not have provided for institution and continuation of proceedings against them as an empty ritual, to end up with no decree or other fruits of litigation for the creditor.

8. Turning to the decisions cited, Velappa Kumar's case 1978 KLT 10 does not appear to support the large proposition advanced on behalf of the liquidator. That was a case where a decree had been passed against the principal debtor and the surety before the commencement of Act 17/77. The executing court turned down the surety's plea that after the discharge of the principal debtor u/s 3 of the Act, the former had no further liability to pay the decree debt. Narendran, J. repelled the challenge to this decision, following the view of the Madras High Court in *Nellore Co-operative Urban Bank v. Mallikarjunayya* AIR 1948 Mad 252. It was held that as a result of the decree the original debt had merged in the judgment

and that all the Defendants thereafter stood on an equal footing. The decree must rule with regard to all matters adjudicated upon, since the effect of a decree is to conclusively determine the rights and liabilities as between the parties, and such rights and liabilities cannot be modified except by appeal, review, etc., or by other procedure known to law. This rule is of limited application and has to be confined to cases where decrees have been passed before 13th January 1977; it cannot be applied to situations like the present, when the principles of Section 128 and other provisions of Chapter VIII of the Contract Act could still operate, subject of course to the provisions of Act 17 of 1977 itself.

9. The Full Bench case in *A.L.S.P.Pl. Subramania Chettiar (decd.) and Another Vs. Moniam P. Narayanaswami Gounder*, arose under the Madras Agriculturists' Relief Act 4 of 1938. That Act provided for the scaling down of debts payable by agriculturists, and the question arose whether a non-agriculturist surety would be liable for the entire debt after the principal debt was scaled down. A Bench of that Court consisting of Wadsworth and Pathanjali Sastri, JJ. had earlier held, in *Al. Sp. S. Rm. Subramanian Chettiar Vs. Chinnamuthu Batcha Rowther and Another*, , that the discharge of the principal debtor brought about by operation of law, and not by any voluntary act of the creditor, would not enable the surety to claim discharge pro tanto. Observations to this effect were there in the *The Nellore Co-operative Urban Bank Ltd. Vs. Akili Mallikarjunayya*, also, decided by Patanjali Sastri and Thyagarajan, JJ. Referring to the proposition that the creditor could not proceed against the surety where the principal debt itself had vanished, their Lordships observed:

The liability of the surety postulates the existence of the liability of the principal debtor only in the sense that the creditor should not by any agreement, act or omission of his destroy that debt. If he does so, the surety's liability is gone (section 134 contract Act). But if the debt of the principal is discharged by operation of law, it has been held that the surety is not discharged -- See *Al. Sp. S. Rm. Subramanian Chettiar Vs. Chinnamuthu Batcha Rowther and Another*, .

But the Full Bench did not agree with the view in *Al. Sp. S. Rm. Subramanian Chettiar Vs. Chinnamuthu Batcha Rowther and Another*, and held that the surety's liability would also be proportionately diminished, when the liability of the agriculturist -- principal debtor was scaled down. Section 19(1) of the Act provided that where a decree for repayment of a debt had been passed before its commencement, the court, on the application of the judgment-debtor who was an agriculturist, was bound to "amend the decree" or "enter satisfaction" as the case may be in accordance with the provisions of the Act; and Panchapakesa Ayyar, J. who spoke for the Full Bench considered the above as "clinching", because the question of entering of satisfaction could arise only when the debt was satisfied or extinguished. That meant that the scheme of the Act was to extinguish part of the agriculturist's debt, and not merely to make that part unenforceable; and if that was so, Section 128 of the Contract Act would operate

to reduce the surety's burden also, as his liability was accessory and secondary. After stating that Section 133 and other allied provisions of the Contract Act "do not exhaust the modes of discharges of a surety", the Full Bench proceeded to state:

Section 140, Contract Act, says that the surety, on discharging a debt would only get all the rights which the creditor had against the principal debtor. So if the creditor could not recover any portion of the debt from the principal debtor, owing to scaling down under the Madras Agriculturists' Relief Act, it follows that the surety could not also recover that portion of the debt. That would be very unjust to the surety and would land him in unexpected and unmerited loss by the Madras Agriculturists' Relief Act intervening and scaling down the debt. The Madras Agriculturists' Relief Act in our opinion, therefore, to prevent such injustice to the surety, intended to extinguish the portion of the debt affected by scaling down and not merely to bar the remedy. By doing so it did not confer any benefit on the nor agriculturist surety but only relieved him from an extra burden and loss which would have been thrown on him if the debt was not extinguished and he was made liable to bear the loss of the difference by virtue of Section 140, Contract Act.

10. In AIR 1944 277 (Nagpur) , Puranik, J. had taken a different view by holding that the liability of the surety and the liability of the principal debtor were separate, though arising from the same transaction. The default of the principal debtor imposed a liability on the surety to pay the full amount, and notwithstanding legislative intervention to reduce the burden of the former, the latter was bound by his contract with the creditor, the statute operating only on the contract between the creditor and the principal debtor. Pollock and Mulla ("Indian Contract Act and Specific Relief Acts" -- Ninth Edition) has this to say on the rival views:

The opinion of the Madras Full Bench is to be preferred, in view of the plain words of Section 128, whereby the liability of the surety is co-extensive with that of the principal debtor. The judgment of the Court is, however, remarkable for the curious interpretation placed upon Section 140 and the complete failure to mention Section 145, The Court considers that to hold the surety liable in solidum would be unjust, as he has no recourse against the principal debtor, inasmuch as Section 140 confines his rights against him to those the creditor has. With respect, this is to misread Section 140, which is an enabling section, and does not purport to confine the rights of the surety to those possessed by the creditor. The talk of imposing a burden is a misconception: the right of recourse against the principal debtor is provided by Section 145. But the existence of this right of indemnity provides a good reason for scaling down the liability of surety as well as of principal debtor. This may be illustrated by reference to the difficulties involved in the contrary Nagpur view. On that view, the surety is liable in full. Section 145 enables him, however, to recover what he has paid from the principal debtor. The object of the Debt Relief Act is therefore

defeated, unless the principal debtor makes a fresh application to the Board. The difficulty was envisaged, but was not faced in *Nellore Co-operative Urban Bank v. Mallikarjunayya*, before the Full Bench had in *Subramania v. Narayanaswami* overruled *Subramaniam v. Batcha Rowther*. In Madras, in view of the Full Bench decision, the problem remains only in the case in which the creditor has obtained a decree against principal debtor and surety, before any application is made to a Conciliation Board. In Nagpur, it is an abiding difficulty, involving the possibility of multiplicity both of applications to the Board, and of law suits, before liability can be determined. On the Madras view, the law is at least clear: the loss caused by scaling down falls upon the creditor. On the Nagpur view it is uncertain whether the surety or the principal debtor bears the loss, apparently the latter in the absence of any fresh proceeding under the Debt Relief Act, so that the wheel has come full circle, and the intention of the legislature seems in danger of being defeated.

11. It was therefore natural that *Mani v. Kochouseph* 1965 KLT 1266 preferred the Madras view, but not without specifically referring to the effect of Section 145 of the Contract Act. The provisions of Madras Act 4 of 1938 and Kerala Act 31 of 1958 were analogous. Section 7(i) of the Kerala Act, in particular, contained a provision for amending the decree or entering satisfaction in respect of decrees passed before its commencement, a circumstance the Madras Full Bench had considered clinching, for drawing the inference that the effect of the Act was to extinguish the debt in part. Gopalan Nambiyar, J. (as he then was), who spoke for the Division Bench in *Mani's* case, observed:

On a consideration of the analogous provisions of the Madras Agriculturists' Debt Relief Act 4 of 1938, it has been held by a Full Bench of the Madras High Court in *A.L.S.P.Pl. Subramania Chettiar (decd.) and Another Vs. Moniam P. Narayanaswami Gounder*, that if the liability of the principal debtor is sealed under the provisions of the Act, the liability of the surety is also to that extent reduced. It appears to us, that Section 128 of the Indian Contract Act sketches the ambit of liability of the surety when it enacts that the liability is co-extensive with that of the principal debtor. It has nothing to do with the consequences of recovery of the debt. Such being the scope and intendment of the section, we feel that a statutory reduction or extinguishment of the principal debtor's liability will operate as a pro tanto reduction, or extinguishment of the surety's debt. A reduction or extinguishment of the debt, is quite different from its unenforceability against the principal debtor by operation of the law of Bankruptcy or the statute of Limitation.

It appears to us, that to hold otherwise, would be to altogether deny the benefit of the ameliorative provisions of the Act to the agriculturist-debtor. On any other view, it would be open to the creditor to recover the debt as scaled down from the agriculturist debtor, and the balance from the surety, and the latter in his turn could seek re-imburement from the principal-debtor (vide Section 145 of the Indian Contract Act). Such a construction would completely nullify the

benefits of the ameliorative legislation to indebted agriculturist.

12. The Madras and Kerala decision seem to rest on three foundations. The first is the specific provision in the respective statutes for amending decrees and entering satisfaction, evincing a legislative intention to extinguish the debts, and not merely to render them unenforceable. The second is an evaluation of the scope and ambit of Sections 128 and 145 of the Contract Act, defining the extent of the surety's liability and the nature of the indemnity available to him. And the third is the anxiety to give full effect to the ameliorative measure forged by the legislature, because to take a different view would have been permitting the surety to recover his loss from the indebted agriculturist. As regards the last, it has already been noticed that the protection afforded by the Madras Full Bench to indebted agriculturists, is not available in cases where decrees have been passed before the commencement of the Act, because the amendment of the decree or the entering of satisfaction u/s 19(1) would protect them only from the creditors and not from the sureties, who would still be liable for the whole amount, on the authority of the Nellore Cooperative Urban Bank case AIR 1948 Madras 252 and who could consequently enforce their indemnity against the principal debtors. This is the position under Kerala Act 31/58, and even under Act 17/77, in view of Velappa Kumar's case 1978 KLT 10. The theory that the surety's liability will become zero when the principal debtor's liability disappears, also admits of exceptions, not only in bankruptcy and in the case of barred debts, but in certain other spheres also. It has been held, for instance, though not uniformly, that where a minor contracts a debt, the surety will himself become the principal debtor, and that a company director who guarantees a contract by the company which is ultra vires that company, remains liable to the creditor. Even so, if the Provisions of Act 17/77 are clearly analogous to those of Kerala Act 31/58, the decision in Mani (1965 KLT 1266) will be clearly binding. But are they?

13. Act 17/77 does not wipe out all the debts of a person whose annual income does not exceed Rs. 3,000. If his debts exceed the said figure, the whole of such liability remains unaffected. One should have thought that in any scheme for relieving indebtedness of poorer sections of the society, the more indebted a person is, the more will be his need for relief. But such is not the combined effect of Section 2(4) and Section 3. The legislative attempt is not to extinguish larger debts in part and efface smaller ones altogether, as under Madras Act 4/38 or Kerala Act 31/58. The second proviso to Section 3 which saves suits or other proceedings instituted jointly against a debtor and another is so far as they relate to such other, seems to be more appropriate to treating the principal debtor's contract and the surety's contract as separate, though arising from the same transaction. The circumstance that Clauses (a), (b), (c), (e) and (f) of Section 3 operates in terms, only on the rights and obligations of the debtor and creditor, leaving all others unaffected, also points to this. There is no provision for amendment of decrees or the entering of satisfaction; proceedings in execution of decrees simply abate. Even the return of immovable properties

under Clause (f) has to be ordered by the Tribunal, and not by the court. Act 17/77 is thus a hybrid; it is not one made in the moulds of Madras Act 4/38 or Kerala Act 31/58.

14. The rule in bankruptcy has always been that the discharge of the insolvent will not discharge the surety. The creditor can prove for the full amount of the debt, and then recover from the surety the amount of the deficiency after receipt of the dividends out of the debtor's estate. This principle has been statutorily recognised in Section 44 of the Provincial Insolvency Act, 1920, Section 45 of the Presidency Towns Insolvency Act, 1909 and in Section 45 of the Insolvency Act, 1955. Is it not possible to think that Act 17/77 has borrowed and adopted this principle? In any event, a discharge by operation of law cannot be equated to a discharge by act of parties under Sections 134 and 135 of the Contract Act, and one has to look at the law itself to appreciate and assess its true impact. The law in this case i.e., Act 17/77, it seems to me, strikes a different note by virtue of the provisions of Section 3 already examined.

15. The question still remains, and a disconcerting question at that, whether the above interpretation will not fall foul of the whole legislative object. I have already referred to the limited nature of the relief held out by the Act to indebted persons. The *The Nellore Co-operative Urban Bank Ltd. Vs. Akili Mallikarjunayya*, had also attempted to answer this question by suggesting that contingent and future liabilities of debtors like those arising from indemnity claims of sureties, were outside the view of the Act with which the court there was concerned. That apart, if it is possible to hold, as I have done, that the legislature has addressed itself to the question of the surety's liability in Section 3 of the Act, and has indicated its will in that regard, it is the duty of the court to give effect to it irrespective of the consequence of so doing.

16. In my view, a surety is not entitled to claim discharge when the principal debtor is discharged u/s 3 of Act 17/77. It follows that the claim has to be decreed against Respondents (2) and (3), as prayed for, and I do so. The parties will bear their own costs.