
(1988) 02 KL CK 0017
In the High Court Of Kerala
Case No : C.R.P. No. 867 of 1984-H

V. Velayudhan

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 17-02-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, Order 21 Rule 38, 51

Citation : AIR 1989 Ker 38 : (1988) 64 CompCas 52

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : P. Ramakrishnan Nair, for the Appellant;

Final Decision : Dismissed

Judgement

K.T. Thomas, J.—What is the position of a guarantor (or even a surety) vis-a-vis the creditor -- has he any obligation in a fiduciary capacity to account to the creditor? If he has, he is not entitled to advance a plea of "no means", when the decree-holder takes out execution proceedings for his arrest and detention. The petitioner is one of the judgment-debtors. The Court below spurned down his plea that he has no means to pay the decree debt on the reasoning that he, being the guarantor, is in a fiduciary capacity to account to the decree-holder.

2. The State Bank of India ("the bank" for short) advanced a loan to one Krishnan on a guarantee given by the petitioner for the due repayment of the loan. The bank filed a suit and obtained a decree against Krishnan as well as the petitioner. Krishnan died in the meanwhile and the bank proceeded against the petitioner in execution. The decree-holder prayed for issuance of a warrant of arrest against the petitioner. It was resisted by the petitioner contending that he has no means to pay the decree debt. The Court below, by the impugned order, held that such a plea is not available to him. The short order of the lower Court is extracted below : --

"Petition filed under Order 21, Rule 38 for arrest of the respondent to realise the

decree debt. The respondent being a guarantor by virtue of Clause (c) of the proviso to Section 51 of the Code of Civil Procedure, the plea of no means is not available to the respondent. Hence arrest respondent by 12-4-1984."

3. Learned counsel contended that the Sub Judge was obviously wrong since a guarantor (or even a surety) has no fiduciary obligation. The liability of such person is not different from any other judgment-debtor and hence execution of the decree by arrest and detention in prison cannot be ordered unless the Court is satisfied that he has the means to pay atleast some substantial portion of the decree debt, according to counsel. It was confessed, during the time of arguments, that despite best efforts a decision or authority could not be traced in support of the view that a guarantor has no obligation in a fiduciary capacity. So, the question has to be considered unaided by any case-law as such.

4. Section 51 of the CPC enumerates the different modes for executing a decree. The proviso to the section contains some limitations in execution of a money decree by arrest and detention of the judgment-debtor. The proviso together with the relevant Clause (c) is extracted below :

"Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied.

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account".

5. Obligation to account to the decree- holder is the first requirement of the clause, and every judgment-debtor whether he is a principal debtor or a mere guarantor or a surety has the said obligation to the decree-holder in accordance with the nature or circumstance in each case. Learned counsel cited the decision in Prem Ballabh Khulbe Vs. Mathura Datt Bhatt, wherein a partner in a firm was found to be having no obligation in a fiduciary capacity to account to the other partners. In that case, a decree was passed in favour of one of the partners in a firm against some other partners including the Managing Partner. It was held that in the absence of special circumstances, a partner cannot be regarded as a trustee for the other partners. On the facts, and in principle, the observations in the said decision have no bearing on the question involved in this case.

6. A guarantor's liability is based on an undertaking or promise to perform the thing or the act in the event of non-performance by the principal obligor. A guaranty itself is an undertaking by one person that if another person fails to perform or fulfil an obligation the guarantor would perform it. It is in the nature of a warranty that the thing guaranteed to be done shall be done despite the non-performance of it by another for whom the guarantee is made. It involves a liability to account to the person who first acted on the strength of the guarantee.

7. When can we say that a person is bound "in a fiduciary capacity" to account?

The term fiduciary is derived from Roman Law. It means "as a noun, a person holding the character of a trustee or a character analogous to that of a trustee. As an adjective it means "of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence". (Vide Black's Law Dictionary. Fifth Edition). A person having duty, created by his undertaking to act primarily for another's benefit in matters connected with such undertaking has fiduciary obligation. The expression fiduciary capacity is not restricted to technical or express trusts, but includes also such offices or relations involving the imparting of a confidence on the strength of which one person has acted. When a guarantor gives an undertaking to another for advancing money to a third person, the guarantor knows that the other person would not advance money without such a guarantee. In other words, the money is advanced on the strength of the confidence reposed in the guarantor of the performance promised or undertaken. In that view, the position of a guarantor is very much near to that of a trustee, albeit some features of dissimilarities between the two.

8. In *K. P. Ambady v. Balan* AIR 1959 Ker 273, the liability of a guarantor and a surety was considered vis-a-vis Clause (c) of the proviso to Section 51 of the Code of Civil Procedure. Varadaraja Iyyenger, J. considered the nature of the liability of a surety, who guaranteed the safe return of certain articles which were under attachment and which were taken by the principal debtor. It was held that the surety who guaranteed the return of the articles has the obligation in a fiduciary capacity and hence he is liable to be proceeded against under Clause (c) of the proviso to Section 51 of the Code of Civil Procedure. The learned counsel has made the following observation in the above context.

"Indeed it is unnecessary for the purpose of Clause (c) that there should be an express trust. It is enough there is a quasi-trust or a fiduciary position involving a liability to account in relation to another party."

9. In that case, the principal debtor was also held to be under an obligation in a fiduciary capacity. But that distinction is too tenuous to side-line the effect of the salutary observations made by the learned Judge which affords useful support to the view taken by me.

For the aforesaid reasons, I am not inclined to interfere. Hence I dismiss the Civil Revision Petition.