(1976) 02 AP CK 0001

In the Andhra Pradesh High Court

Case No : Appeal No. 39 of 1973

Vasireddi Seetharamaiah APPELLANT

Vs

Srirama Motor Finance Corporation, Kakinada and Another RESPONDENT

Date of Decision : 16-02-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 137, 139, 140, 141
Evidence Act, 1872 — Section 34

Citation : AIR 1977 AP 164

Hon'ble Judges : Ramachandra Rao, J;Jayachandra Reddy, J

Bench : Division Bench

Advocate : T. Ananthababu, for the Appellant; T.H.B. Chalapathi, for the Respondent

Judgement

Ramachandra Rao, J.—The second defendant in O. S. No. 5/1969 on the file of the Court of the Subordinate Judge, Kakinada is the appellant. The suit was filed by Sri Rama Motor Finance Corporation Kakinada against the two defendant E. John Cyriac and Vasireddi Seetharamaiah, for recovery of a sum of Rs. 31,516-81 Ps. due on a promissory note dated 10-9-1965 executed by the defendants for Rs. 49,817/- payable with interest thereon at 12% per annum, and for a charge on the lorry bearing Registration No. APV 5313. The plaintiff alleged as follows: The defendants borrowed the sum of Rs. 49,817/- from the plaintiff on 10-9-1975 and executed the promissory note. The first defendant entered into a hire-purchase agreement on the same date with the plaintiff firm in respect of a new lorry bearing Registration No. APV 5313 agreeing to pay the pronote amount in 24 monthly instalments, the first installment being Rs. 2092 payable on 10-10-1965, the other instalments of Rs. 2075/- payable on the 10th of each succeeding month and the last installment being payable on 10-9-1967. The plaintiff paid cash consideration of Rs. 40,000/- to M/s. Sri Ramadas Motor Transport (P) Ltd., Kakinada, towards the price of the Chassis of the lorry Rs. 9642/- towards finance charges, Rs. 75/- towards stamp duty, and Rs. 100/-

towards deposit, in all aggregating to Rs. 49817/-. The second defendant joined in the hire-purchase agreement as a guarantor and executed the suit pronote along with the defendant. The first defendant paid only nine instalments, and thereafter defaulted in payment of the amount. The plaintiff therefore sued for the recovery of the balance of the amount payable under the hire-purchase agreement after giving credit to the payments made, and a sum of Rs. 5,000/- out of Rs. 10,000/- received by them from the Insurance Company towards repairs. The defendants delivered the vehicles to M/s. Prakash Automobiles, Motor Workshop at Visakapatnam, for repairs and the said workshop retained the vehicle claiming a lien over the same for the repair charges due to them which the defendants failed to pay. The plaintiff gave a notice on 4-11-1967 and another notice through a lawyer on 7-3-1968 and filed the suit for recovery of a sum of Rs. 31,516-81 Ps.

2. The first defendant remained ex parte.

3. The second defendant filed a written statement contending as follows. The second defendant did not borrow any money under the suit promissory note but executed the same as a collateral security for the hire-purchase agreement for the lorry purchased by the first defendant and he (D-2) stood as a guarantor for the first defendant in the hire-purchase agreement. The second defendant did not admit, that only nine instalments were paid, and also the statement of account filed along with the plaint. The plaintiff never made any demands on the second defendant for payment of the instalments. The plaintiff and the first defendant were colluding together to the defendant of the second defendant and the suit filed with a view to harass him. The plaintiff allowed the first defendant to ply the vehicle and utilise the income. When the first defendant (the hirer) committed the default in payment of the instalments, the plaintiff should have recovered the money either by seizure or otherwise and informed the same to the second defendant , which they never did. The plaintiff kept quiet without seizing the vehicle when the default was committed by the first defendant. The vehicle met with an accident and the value of the vehicle dwindled to the detriment of the 2nd. The plaintiff was negligent in not proceeding to seize the vehicle. The insurance company paid Rs. 10,000/- to the plaintiff which should go in part payment of the debt. The plaintiff having received Rs. 10,000/- from the Insurance Company, did not pay the amount to the repairer and get back the vehicle; and allowed it to remain in open space exposing it to sun and rain which resulted in rapid deterioration. It is the plaintiff that committed breach of the agreement in not taking prompt action to recover the vehicle. The plaintiff was therefore precluded from enforcing the agreement and making the second defendant liable as guarantor.

4. The plaintiff filed a rejoinder stating that the suit pronote and the hire-purchase agreement were parts of the same transaction, and that the second defendant was a co-executant of both the pronote and the hire-purchase agreement. As soon as the plaintiff learnt that the vehicle was with the repairer,

Prakash Automobiles at Visakhapatnam, the plaintiff wanted to seize the vehicle but Prakash Automobiles refused to part with the vehicle claiming a lien, for their repair charges. The plaintiff attempted to contract the first defendant but he could not be found and he clandestinely removed the vehicle and therefore it could not be recovered. The non-seizure of the vehicle would not affect the liability of the first or the second defendant. The collusion between the plaintiff and the first defendant is denied. On the other hand, it is averred that the defendants were in collusion with Prakash Automobiles and prevented the plaintiff from taking possession of the lorry. Out of the sum of Rs. 10,000/- received from the Insurance Company, a sum of Rs. 5,000/- was paid to the first defendant towards repair charges; for the balance of Rs. 5,000/- credit was given to him, and only for the balance, the suit was filed.

5. The second defendant filed an additional written statement traversing the several allegations in the rejoinder.

6. The learned Subordinate Judge framed the following issues :-

(1) Whether the payment of Rs. 5000/- alleged by the plaintiff to the first defendant is true, valid, enforceable and binding on the second defendant ?

(2) Whether the plaintiff has committed breach of the terms of the hire purchase agreement and is not entitled to claim the suit amount ?

(3) Whether the plaintiff is negligent in enforcing the terms of the hire-purchase agreement for recovery of the amount due under the hire-purchase agreement and is not entitled to claim the suit amount by enforcing the personal liability against the second defendant ?

(4) Whether the payments pleaded by the first defendant are true ?

(5) Whether the account filed by the plaintiff is true, valid, genuine and binding on the second defendant ?

(6) To what relief ?

Additional issues:

(1) Whether this Court has no territorial jurisdiction to try this suit ?

(2) Whether the second defendant''s liability ceased on account of plaintiffs failure to seize the lorry?

(3) Whether the suit as framed is not maintainable ?

7. On behalf of the plaintiff, the Accountant of the plaintiff firm was examined as P.W. 1 and for the 2nd defendant, he examined himself as D.W. 1. The suit pro-note and the hire-purchase agreement were marked as Exs. A-1 and A-2 the copy of the account filed with the plaint as Ex. A-3, the notice issued to by the plaintiff on 4-11-1967 as Ex. A-5, and the notice sent through lawyer on 7-3-1968 as Ex. A-8. For the defendants, as many as 38 documents were filed

and marked as Exs. B. 1 to B. 38.

8. The learned Subordinate Judge, on a consideration of the evidence recorded the following findings:

9. Issue No. (1). The payment of Rs. 5,000/- by the plaintiff to the 1st defendant was true, valid and binding on the 2nd defendant.

10. Issue No. (2) The plaintiff did not commit breach of the terms of the hire-purchase agreement and was entitled to claim the suit amount.

11. Issue No. (3) The plaintiff was not negligent in enforcing the terms of the hire-purchase agreement and was-entitled to claim the suit amount by enforcing the personal liability against the 2nd defendant.

12. Issue No. (4) The payments made by the 1st defendant were true.

13. Issue No, (5) The account filed by the plaintiff was true, valid and binding on the 2nd defendant.

14. Additional Issue No. (1). The lower court had territorial jurisdiction to entertain the suit.

15. Additional Issue No. (2). The 2nd defendant''s liability did not cease on account of any failure on the part of the plaintiff to seize the lorry.

16. Additional Issue No. (3). The suit based on the pronote and the hire-purchase agreement (Exs. A-1 and A-2 respectively) treating the same as one and the same transaction of hire purchase agreement, was maintainable.

17. On the aforesaid findings, the suit was decreed against both the defendants for the sum of Rs. 31,268-31 Ps. after giving credit to the disallowed amounts i.e. deposit of Rs. 100/- stamp fees Rs. 73.50 and traveling expenses of the plaintiffs representatives of Rs. 75/- with interest at 6 per cent per annum with proportionate costs.

18. The first contention raised by Sri. T. Anantababu the learned counsel for the appellant (3rd defendant) is that the plaintiff should have given credit to the full amount of Rs. 10,000/- received by them from the Insurance Company towards repair charges of the lorry and that the payment of Rs. 5,000/- to the 1st defendant has not been established.

19. Sri. T.H.B. Chalapati, learned counsel for the plaintiff (1st respondent) contended that out of Rs. 10,000/- received from the Insurance Company Rs. 5000 was paid to the 1st defendant for repair charges, and for the balance of Rs. 5000 credit was given in the account filed with the plaint.

20. Admittedly there is no receipt evidencing the payment of Rs. 5000/- to the 1st defendant. The evidence is only oral. P. W. 1 the Accountant of the plaintiff-firm stated as follows:-

The said lorry was involved in an accident and the Insurance Company paid Rs. 10,000/- out of which D-1 is given Rupees 5,000/- for repairs.

In Cross-examination, he stated as follows:-

We got Rs, 10,000/- towards the insurance. We paid Rs. 5000/- to D-1 for repairing the lorry."

"We did not repair it. We got Rupees 10000 towards the repair charges. We paid Rs. 5,000/- by a cheque to T.V. Ranga Rao, I cannot now say to whom the amount was paid exactly. We sent the amount to D-2 for repairs of the lorry. We did not give it to Seetharamaiah. The cheque count(sic) are there, There is nothing to show the payment to Defendant No. 1.

21. This evidence of P.W. 1 is wholly unsatisfactory. At one stage, he stated that the amount was paid to the 1st defendant and later stated that it was paid to one T.V. Ranga Rao but he could not say to whom the amount was paid. Ultimately he admitted that there was nothing to show the payment to the 1st defendant. Even in the first notice (Ex. A-5), there was no reference to the payment of Rs. 5,000/- to the first defendant towards repair charges. The lower court was inclined to accept the payment of Rs. 5,000 to the 1st defendant solely on the basis of the entry in the ledger account (Ex. A-4) of the plaintiff. We do not think this entry by itself is sufficient to establish that the sum of Rs. 5,000/- was paid by the plaintiff to the 1st defendant. This payment is not supported by any receipt or voucher. The cheque counter-foil has not been produced to show to whom the money was paid.

22. The plaintiff admittedly received the amount of Rs. 10,000/- from the Insurance company towards the repair charges of the lorry which was involved in an accident. It is for the plaintiff to establish by satisfactory evidence, that the said amount was utilised or paid to the 1st defendant for repairs to the lorry, As the evidence adduced by the plaintiff is not satisfactory, we are inclined to hold that the payment of Rs. 5000/- to the 1st defendant towards the repair charges was not established. The finding on issue No. 1 of the lower court is therefore set aside, and it is held that the payment of Rs. 5,000/- by the plaintiff to the 1st defendant was not true. If so, the plaintiff is not entitled to claim the said amount from the 2nd defendant.

23. A contention was sought to be raised by Sri T. Ananta Babu, that the 2nd defendant was not liable for the insurance premia paid by the plaintiff for insuring the lorry. But later, the learned counsel submitted that be was not pressing the said point.

24. The main contention which is strongly urged by the learned counsel for the appellant is that the 2nd defendant as a guarantor is discharged from the liability as the plaintiff was negligent in not seizing and selling the vehicle promptly when default was committed by the 1st defendant in payment of the certain instalments.

25. The learned counsel relies on Sections 139 and 141 of the Indian Contract Act, and submits that the conduct of the plaintiff in not taking steps to seize the vehicle and sell it was inconsistent with the rights of the surety as he had omitted to perform the duty cast on him and thereby the lorry was lost and therefore the 2nd defendant''s eventual remedy against the principal debtor was impaired and the security was lost and hence the 2nd defendant stood discharged from his obligation as surety under the hire purchase agreement.

26. Sri T.H.B. Chalapathy on the other contended that the plaintiff had done all that he could under the terms of the contract, by giving notice to the defendants about the default committed by the 1st defendant and calling upon them to pay the debt, that the lorry which was involved in an accident was lying in the workshop of M/s. Prakash Automobiles at Visa-khapatnam for repairs, that they were claiming a lien over the lorry for the repair charges and therefore the plaintiff could not have taken any steps for the seizure of the lorry, and that the lorry was available on the date of filing of the suit and also till the filing of the written statement by the 2nd defendant but no steps were taken by them to pay the amount and enforce the remedy which was open to him against the 1st defendant and the lorry.

27. Sections 133 to 135 and 139 and 141 of the Indian Contract Act (hereinafter called the Act) enumerate the circumstances under which a surety is discharged, while Sections 136 and 137 of the Act state the circumstances under which a surety is not discharged. In the instant case, the sections referred to and relied upon by the learned counsel for the appellant are sections 139 and 141, whereas the learned counsel for the respondent relies upon Section 137.

28. Section 139 of the Indian Contract Act, reads as follows:

139. If the creditor does any act which is inconsistent with the rights of the surety or omits to do any Act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

29. Section 141 of the Act reads as follows:

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the Security.

30. u/s 139 of the Act, the surety will stand discharged if the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety against the principal debtor is impaired.

31. u/s 141, the creditor loses or parts with the security without the consent of the surety, the surety stands discharged to the extent of the value of the security.

32. The question for consideration is whether the conduct of the plaintiff in not seizing and selling the vehicle covered by the hire purchase agreement on default committed by the principal debtor the 1st defendant in payment of the instalments, can be said to be inconsistent with the rights of the surety or that the plaintiff omitted to do any act which his duty to the surety required him to do and whether the plaintiff had lost or parted with the surety without the consent of the surety.

33. In this context it is necessary to notice the relevant facts, The lorry was involved in an accident in November, 1966. By 7-9-1966, nine instalments were paid and there was default in payment of the subsequent instalments i.e. the default commenced from 7-10-1966. A notice (Ex. A-5) was given by the plaintiff to both the defendants on 4-11-1967 informing them that a sum of Rs. 29132-64 Ps. had fallen due, and that if they failed to pay the entire amount within a week i.e., on or before 11-11-1967 they would be constrained to seize the vehicle APV 5313 and sell it in a public auction and proceed against them in a court of law for realising the balance. But no. reply was given to the said notice. The plaintiff gave another notice (Ex. A-8) through their lawyer on 7-3-1968 setting out the instalments due and calling upon the defendants to pay the amount of Rs. 29,132-64 ps. with interest thereon and further stating that on payment of the said sum, the defendants could keep the vehicle. Thereafter the present suit was filed on 10-9-1969. The 2nd defendant signed the written statement on 1-4-1969 and filed it into court on 3-4-1969.

34. Sri T. Anantha Babu, submits that immediately after occurring of the default in October, 1966, the plaintiff did not take steps to seize the vehicle but gave notice only in November 1967, and filed the suit in September 1968. Thus the plaintiff allowed the lorry to remain in the custody of control of the 1st defendant and also allowed it to depreciate in value and thereby lost or parted with the security without the consent of the 2nd defendant.

35. We do not think we can accept this submission. Sec. 137 of the Act states, that "mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety."

36. The mere fact that the plaintiff did not file the suit immediately or seize the vehicle, does not absolve the 2nd defendant from his liability as a surety.

37. Clause VI of the Agreement (Ex. A-2) reads as follows:

The guarantor, in consideration of the owner agreeing to let the vehicles to the hirer hereby guarantees the due performance and observance by the hirer of the clauses and conditions of the agreement and agree to pay on demand any moneys due or which may become payable under this agreement (and not paid by the hirer) either by way of debt or damages costs or expenses; he further agrees that any time granted to the hirer or any indulgence in respect of the terms and conditions herein shall not prejudice the owner''s rights or relieve the guarantor from this his guarantee and that it shall not be necessary upon the hirer being granted any such concession or indulgence as aforesaid the owner to give any notice to the guarantor thereof, he further agrees that the owner''s right of lien on the vehicles or right to repossess the same shall not be destroyed by reason of any judgment he may obtain against the hirer or himself or both.

38. It is clause VI that casts the liability on the 2nd defendant as surety. Condition No. 5 of the conditions attached to the agreement, provides as follows:

The owner may terminate with or without notice the contract of hiring and forthwith retake and recover possession of the vehicle:-

(a) If any monthly hire or part thereof is in arrear and left unpaid for a period of seven days after the date fixed for its payment for any reason whatsoever and particularly "notwithstanding any claim which the Hirer may have in respect of policy of Insurance hereinafter mentioned xx xx

(Other portions omitted as unnecessary.)

39. Under condition No. 5 (a) no doubt the owner i.e. the plaintiff has the option to terminate the contract of hiring and forthwith recover possession of the vehicle if any default committed by the hirer in payment of any monthly instalment. In the instant case, the evidence shows that the vehicle was in the possession of a third party viz. M/s. Prakash Automobiles at Visakhapatnam for repairs and that they retained the vehicle with them claiming a lien over the same for repair charges. The vehicle was therefore not in the custody or possession of the plaintiff or the principal debtor the 1st defendant to enable the plaintiff to exercise the right to take possession and sell the vehicle.

40. P.W. 1 the Accountant of the plaintiff-firm stated as follows:-

We could not seize the said lorry while it was in Prakash Automobiles Vizag. We do not know when it was taken after it was repaired. We could not locate the lorry till now.

Again he stated:-

The Prakash Automobiles (Motor Repair Shop) Vizag asked us to pay the repair charges and then take the lorry. When we went to Vizag the lorry was not in that garage. We were told that D. 1''s people removed the lorry.

In cross-examination, he stated as follows:

The Prakash Automobiles claimed Rs. 10,000/- in addition to Rs. 5,000/- paid for repairs xx xx"

"There is nothing in writing to show our demand for return of the lorry from Prakash Automobiles and that they refused. We did not send notice to him. We did not take steps to recover possession of the lorry.

41. The 2nd defendant as D.W. 1 admitted that the lorry was kept with Prakash

Automobiles, Visakapatnam for repairs but stated that he requested the plaintiff through phone to seize the vehicle from Prakash Automobiles. He further stated that the plaintiff, the 1st defendant and Prakash Automobiles had disposed of the vehicle. This evidence shows that the vehicle was with Prakash Automobiles for repairs, who were claiming a lien over the same for repair charges. It is highly doubtful whether the plaintiff could have lawfully seized the lorry when it was in the possession of a third party. This is not a case where the lorry was in the possession of the 1st defendant and the plaintiff did not take steps to seize and sell the vehicle nor is it a case where the plaintiff was in possession of the lorry, and parted with the vehicle. In the circumstances it cannot be said that the plaintiff did any act which was inconsistent with the rights of the surety the 2nd defendant or that he omitted to do any act which his duty to the surety required him to do and thereby the eventual remedy of the 2nd defendant against the principal debtor was impaired, nor could (sic) be said that the plaintiff had control or possession of the security and they lost it or parted with it without the consent of the 2nd defendant Thus the provisions of the Sections 139 and 141 of the Act, are not applicable to the facts of the present case.

42. Sri T. Ananta Babu, relies upon the ruling of the Supreme Court in State of Madhya Pradesh Vs. Kaluram, . In that case, at an auction held for sale of ''felled trees'' one Jagatram was declared as the highest bidder and the amount of the bid was payable in four instalments, Jagatram executed a contract in favour of the State of Madhya Pradesh and two persons Nathuram and Kaluram stood as sureties for Jagatram. Jagatram removed almost the entire quantity of trees but did not pay the three instalments of the price. The State of Madhya Pradesh then took proceedings to recover the amount from the surety Kaluram. Kaluram then filed a suit against the State of Madhya Pradesh for a declaration that he was not liable to pay the arrears of forest dues recoverable from Jagatram on two grounds, that the forest authorities gave time to Jagatram and omitted to take steps which their duty to the surety required them to take i.e. prompt seizure-and sale of the trees after the second instalment had fallen due, and on that account his eventual remedy against Jagatram was impaired.

43. The trial court upheld the claim of Kaluram, and the High Court confirmed the same. On further appeal to the Supreme Court, their Lordships held that under the provisions of the relevant Forests Contract Rules and Sections 82 and 83 of the Indian Forest Act No. 16 of 1927, the State Government had a first charge over the goods and was also entitled to prevent the goods from being removed without payment of the instalments due and that when the goods were removed by Jagatram, that security was lost and to the extent of the value of the security lost, the surety stood discharged.

44. In that context, the learned Judges observed as follows:-

The expression ''security'' in Sec. 141 is not used in any technical sense; it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefits of the rights of the creditors against the principal debtor which arise out of the transaction which gives rise to the right or liability, he is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or has parted with the security without the consent of the surety, the latter is by the express provision contained in Section 141, discharged to the extent of the value of the security lost or parted with.

The learned Judges further observed as follows:-

The Forest Officers of the State of Madhya Pradesh parted with the goods before receiving payment of the amount due by the contractor Jagatram. Thereby the charge in favour of the State was seriously impaired and the statutory power to sell the goods for non-payment of the amount remaining due became, for all practical purposes ineffective. Again under the terms of the contract the Forest Authorities had the right to prevent removal of goods sold until the price was paid that right was also lost The right conferred by Section 83 of the Forest Act and under the terms of the contract to prevent removal and right to sell goods for non-payment of the price, coupled with the charge on the goods constituted the security of the State, and that security was lost because the Forest Officers permitted removal of the goods by the contractor.

45. In that case it was found that though title in the goods passed to Jagatram, the forest authorities had a charge over the felled trees and had a right under Sec. 83 of the forest Act and under the terms of the Contract Act to prevent removal and right to sell the goods for non-payment of the price, and that security was lost because the Forest Officers permitted removal of the goods by the Contractor.

46. In the instant case, the plaintiff had no control or possession over the vehicle in question as it was in the possession of the third parties M/s. Prakash Automobiles claiming a lien over the vehicle for repair charges and therefore the plaintiff could not have lawfully exercised his right of seizure of the vehicle which was in the possession of the third parties.

47. The next decision relied upon by the learned counsel for the appellant in Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others, In that case also it was found that the creditor Bank lost the goods pledged with it due to its negligence or for some other reason and therefore the surety stood discharged of the liability to the Bank to the extent of the value of the goods lost That is also a case where the possession of the goods was with the creditor which lost the goods due to its negligence. Therefore the said ruling has no application to the facts of the present case.

48. In P. Janakiram Chetty Vs. Punjab National Bank Ltd. and Another, it was found that the creditor Bank sold the security, the value of which was far in excess of the liability without the consent of the surety which caused prejudice to him since the sale resulted in considerable loss, and the conduct of the creditor-

bank in parting with the security without the consent of the surety discharged him from liability. In that case also it was the negligence of the creditor Bank that caused prejudice to the surety. Therefore, u/s 41 of the Act, the surety was held to be discharged. This case does not help the case of the appellant.

49. In the instant case, the failure of the plaintiff to exercise the right of the seizure and sale of the vehicle cannot be said to amount to such negligent act or omission which could be said to be an act inconsistent with the right of the surety or that it resulted in impairing the eventual remedy of the surety against the principal debtor. The evidence discloses that the lorry was with M/s. Prakash Automobiles, both on the date of filing of the suit and on 27-2-69 when the 2nd defendant put a call on to the plaintiff as evidenced by the entry in the Diary Ex. B. 37 and also at the time when the written statement was filed on 1-4-1969. There is no reason why the 2nd defendant could not have taken immediate steps to pay off the amount and exercise the right which the creditor had against the principal debtor which right is available to the surety u/s 140 of the Act. The surety the 2nd defendant did not move in the matter in spite of his knowledge of the default as early as on 4-11-1967 and also subsequently. He could have discharged the debt at any time and proceeded against the security, Having remained inactive, and there being no evidence of any positive act of negligence on the part of the plaintiff which resulted in the loss of the security, the 2nd defendant cannot claim to be discharged as a surety. For the foregoing reasons, we hold that the 2nd defendant did not stand discharged from liability as surety.

50. A contention was urged, though feebly, that the lower court had no territorial jurisdiction to entertain the suit. It is submitted that both the defendants were residents of Visakapatnam that the agreements were signed by the defendants 1 and 2 at Visakapatnam and therefore the cause of action arose in Visakapatnam and not at Kaki-nada.

51. But this contention is clearly untenable. Exs. A-1 and A-2 and all the forms show that they were signed at Kakinada in the plaintiffs Office. The chassis for the lorry was purchased from Sri. Ramadas Motor Transport (PVT) Limited, Kakinada. Condition No. 12 of the Hire Purchase Agreement (Ex. A-2) provides that the courts at Kakinada alone and no other courts whatsoever could have jurisdiction to try all suits in respect of any claim or disputes arising out of under the said agreement.

52. It was sought to be contended that the word ''kakinada'' was inserted later without the knowledge of the defendants and that their signatures were obtained on the blank forms.

53. We do not find that the evidence on record is sufficient to substantiate this plea. The parties are governed by the terms of the written contract which clearly provides for filing of suits in the courts at Kakinada. Therefore the contention that the lower court had no territorial jurisdiction to try the suit, is devoid of any merit.

54. We have held on Additional Issue No. (1), that the payment of Rs. 5,000/- by the plaintiff to the 1st defendant, was not true and not binding on the 2nd defendant. This amount has to be disallowed from the amount of Rs. 31,268-31 decreed by the lower court. Accordingly the appeal is partly allowed and the suit is decreed against both the defendants for a sum of Rs. 26,268-31 together with interest thereon at 6% per annum from the date of suit till the date of payment. The parties will pay and receive proportionate costs both here and in the courts below.

