
(2002) 04 AP CK 0094
In the Andhra Pradesh High Court
Case No : LPA No. 120 of 1994

Y. Venkatachalapathi Reddy	Vs	APPELLANT
Bank of India and Another		RESPONDENT

Date of Decision : 02-04-2002

Acts Referred:

Contract Act, 1872 — Section 126, 127

Citation : (2002) 4 ALD 173 : (2002) 6 ALT 412 : (2003) 113 CompCas 368

Hon'ble Judges : D.S.R. Varma, J; B.S.A. Swamy, J

Bench : Division Bench

Advocate : P.V. Sanjay Kumar, for the Appellant; Surya Prakash Rao, for the Respondent

Final Decision : Dismissed

Judgement

B.S.A. Swamy, J.—In this LPA we are called upon to decide a ticklish issue i.e., whether the respondent-plaintiff (bank) can be unsuited by relying upon illustration (c) to Section 127 of the Indian Contract Act (for short "the Act"). In other words, whether the surety (guarantee) bond executed by the appellant-second defendant also applies to past consideration or whether the Court has to hold that as the consideration did not pass contemporaneously the surety bond executed by the appellant-second defendant at a later point of time is to be declared as void.

2. The facts of the case are as follows.

3. The first defendant who was not party in this appeal, approached the respondent-plaintiff (bank) and made application, dated 2-9-1976, for sanction of term loan for the purchase of a diesel metador (mini-bus) to eak out his livelihood by giving the mini-bus on hire. He agreed to discharge the loan amount with interest within three years as per Clause 17 of that application, and as per Clause 19 of that application the appellant-second defendant would stand as surety for repayment of the loan amount in regular monthly instalments. The

respondent-plaintiff (bank) having processed the application agreed to advance to the first defendant the money required for the purchase of mini-van. Accordingly the respondent-plaintiff (bank) sanctioned a sum of Rs. 43,000/- to the first defendant for the purchase of mini-bus. Unfortunately the letter of sanction did not see the light in this suit though other documents were filed.

4. Be that as it may, after the first defendant completed all the formalities, the respondent-plaintiff (bank) disbursed of the amount to the first defendant on 28-10-1976. The appellant-second defendant executed the surety bond on the next day i.e., 29-10-1976. From the pleadings it is seen that the first defendant was paying the monthly instalments intermittently, that both himself and the appellant-second defendant acknowledged the debt on 27-7-1978 and that an amount of Rs. 45,054-39 ps. was due to the respondent-plaintiff (bank) as on 26-7-1978. Since the first defendant failed to repay the loan amount, the respondent-plaintiff (bank) issued legal notice, the copy of which is Ex. A11, to the appellant-second defendant. The appellant-second defendant acknowledged that legal notice under Ex. A14 and did not choose to give any reply to the respondent-plaintiff (bank). As far as the first defendant is concerned he remained ex prate throughout the proceedings. The plea of the appellant-second defendant in the written statement is that of a total denial except to the extent of execution of Ex.A7 surety bond. On the basis of the pleadings of the respective parties, the Additional Subordinate Judge, Tirupathi (trial Court) framed the following issues for trial:

1. Whether the agreement of guarantee dated 29-10-1976 is true, valid and binding on the second defendant?

2. Whether the acknowledgment of debt dated 27-7-1978 is true, valid and binding on the second defendant?

3. Whether the suit is barred by limitations?

4. To what relief.

5. The respondent-plaintiff (bank), in order to prove its case, examined, PWs.1 and 2 marked Exs.A1 to A14. The appellant- second defendant, on his behalf, examined himself as DW1 but marked no document. By judgment, dated 24-6-1983, the trial Court, after considering the oral and documentary evidence, decreed the suit as against the first defendant but dismissed it (suit) as against the appellant-second defendant.

6. From the judgment it is seen that during the course of hearing the arguments, the appellant-second defendant raised alternative contention relying upon illustration (c) of Section 127 of the Act. As per illustration (c) to Section 127 of the Act if the consideration has not passed to the first defendant, the principal debtor contemporaneously the surety bond has no legal force. In other words, if the surety bond is executed after passing of consideration, such an agreement is void. The trial Court, while decreeing the suit against the first defendant, the

plea of the appellant-second defendant was found favour with the trial Court though it (trial Court) held against him on merits on the ground that the surety bond relates to past consideration to the first defendant, the principal debtor, the surety bond (guarantee agreement) was not valid one. Aggrieved by the judgment and decree the respondent-plaintiff (bank) preferred AS No. 2146 of 1983 before this Court. A learned single Judge of this Court, by judgment dated 2-3-1994, reversed the judgment of the trial Court and decreed the suit against the appellant-second defendant also. Hence this LPA.

7. There seems to be divergence of opinion whether the surety bond under these circumstances applies to past consideration also or not? This Court referred the difference of opinion of various High Courts in *Mir Niyamath Ali Khan Vs. Commercial and Industrial Bank Ltd. and Others*, , and left the issue open as it is felt not necessary to decide the issue in the facts and circumstances of that case in the following words:

"In our view, it is not necessary for the purposes of this case to enter into that controversy. As we are of the opinion that both the collateral securities were executed for consideration, it was either simultaneous or was executory in its character, and secondly, since the bank was not willing to advance any more money by way of overdraft to the brother of the first defendant unless the collateral securities were given, the securities were supported by consideration."

8. We perused the decision of a Division Bench of the Travancore-Cochin Bench in *K. Unikali v. Krishna Vasantha*, AIR 1952 Travancore-Cochin 203, and also the decision of a learned single Judge of the Rajasthan High Court in *Ram Narain Vs. Lt. Col. Hari Singh and Another*, relied upon by the learned Counsel for the appellant-second defendant. Those decisions give us an impression that their Lordships picked up the illustration (c) to Section 127 of the Act in rendering the decisions without considering the purport of the Act and the provisions of Chapter VIII of the Act relating to indemnity and guarantee.

Section 2(d) of the Act defines "consideration" which reads:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

From the above it is seen that at the instance of the promisor if promisee has done something or abstained from doing something, such an act or abstinence or promise is called consideration for the promise. In this case, on the promise made by the appellant-second defendant, the respondent-plaintiff (bank) came forward to advance the loan to the first defendant, the principal debtor. But, Sri P.V. Sanjay Kumar, learned Counsel for the appellant-second defendant, strenuously contends that the appellant-second defendant is not a party to Ex.A8 application for loan and therefore on the basis thereof the liability cannot be fastened on him (appellant-second defendant). But the fact remains that as per

banking practice, as and when a person approaches the bank for loan, the information furnished by the loanee will be enquired into and after the bank is satisfied that the loanee furnished the information correctly and he is in a position to discharge the loan and in a position to furnish surety for the repayment of the loan, the bank generally proceeds further in granting the loan. That is the reason why we have already observed that had the sanction letter and the note prepared by the bank before acceding to the request of the loanee been marked as exhibits much more information would have been available to the Court. But unfortunately neither the note nor the sanction letter was marked as exhibit in this case. This reflects the pathetic situation prevailing in the public sector undertakings in protecting the public moneys.

9. Be that as it may, it is true that the loan was disbursed to the first defendant on 28-10-1976 and the appellant-second defendant executed the surety bond Ex.A7 on the very next day. Further he also acknowledged the debt along with the first defendant, the principal debtor on 27-7-1978 under Ex.A9. Initially the appellant-second defendant took the stand that he did not sign the surety bond and that he was not aware of the loan disbursed by the respondent (plaintiff) bank to the first defendant, the principal debtor. It is only at the stage of arguments the learned Counsel for the appellant-second defendant raised this contention. From the above it is seen that it cannot be said that the promisee bank had not acted on the basis of the promise given by the promisor that in the event the first defendant, the principal debtor does not fulfil the promise to pay monthly instalments to the respondent-plaintiff (bank) the appellant-second defendant will indemnify the respondent-plaintiff.

10. Now the question to be considered is whether Ex.A7 the surety bond is hit by illustration (c) to Section 127 of the Act. It is useful to extract Sections 126 and 127 of the Act and illustration (c) to Section 127 of the Act. Section 126 of the Act reads:

"126. "Contract of guarantee", "surety", "principal debtor" and "creditor" -- A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety", the person in respect of whose default the guarantee is given called the "principal debtor" and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."

Section 127 of the Act reads:

"127. Consideration for guarantee.--Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

Illustration (c) to Section 127 of the Act reads:

"(c) A sells and delivers goods to B. C afterwards, without consideration, agrees

to pay for them in default of B. The agreement is void."

11. In Section 126 of the Act "contract of guarantee", "surety", "principal debtor" and "creditor" were defined. To our mind, it seems that the language of Section 127 of the Indian Contract Act was not couched with the language, which gives an impression that it does not cover past consideration. Section 126 of the Act says that anything done or promise made for the benefit of the principal debtor either anterior or posterior to the surety bond is sufficient consideration to the surety for giving guarantee. The illustration (c) to Section 127 of the Act says that if the consideration has passed earlier and the surety agrees to pay the amount in default of the principal debtor without passing consideration contemporaneously the agreement is void.

12. Now the question to be considered is whether the illustration (c) to Section 127 of the Act can curtail or amplify the language used in the section and whether the illustration can be given effect in the absence of any such indication to that effect in the section.

13. The effect of the illustration was considered by a Division Bench of the Karnataka High Court in Jayakunvar Manilal Shah v. Syndicate Bank 1992 (1) Bank CLR 485. Having surveyed the case law on the issue including the two decisions cited by the learned Counsel for the appellant-second defendant, their Lordships of the Karnataka High Court, relying on a decision of the Privy Council in Kali Charan v. Abdul Rahman AIR 1918 PC 226, held that the execution of the surety bond subsequent to the principal agreement, if it is in compliance with the terms of the principal agreement, that itself is a sufficient consideration for the surety. In the facts and circumstances of the case their Lordships of the Karnataka High Court held:

"Thus, it is clear that the surety bonds were executed though on a date subsequent to the principal agreement was executed, but the surety bonds were executed in pursuance of one of the terms of the agreement. Thus itself was a sufficient consideration."

14. The facts of the case on hand is exactly similar in nature. Admittedly, while applying for loan, the first defendant, the principal debtor clearly indicated that the appellant-second defendant will furnish third party surety for proper discharge of the loan amount sanctioned. As pointed out earlier, the note put up by the office has not seen the light and we have no doubt that the officer who conducted the enquiry on the financial capacity of the loanee for the discharge of the loan might have definitely ascertained the willingness of the appellant-second defendant in giving surety. However, after the loan amount was disbursed the appellant-second defendant along with he loanee signed Ex.A9 acknowledging the liability to the respondent-plaintiff (bank) on behalf of the first defendant, the principal borrower.

In paragraph 35 of the judgment in the decision their Lordships categorically recorded a finding that the rules of English Common Law applicable to the

contracts can be applied by the Courts in India where no statutory provision to the contrary is found in the Act.

15. Admittedly there is no ambiguity in the language of Section 127 of the Act. The Supreme Court also held that the illustration (c) to Section 127 of the Act cannot either abridge or explain the language of Section 127 of the Act. Respectfully following that observation we are of the opinion that the illustration (c) to Section 127 of the Act tried to explain the language of that section (Section 127 of the Act) which is not permissible in law.

16. To the similar effect is the decision of a Division Bench of the Bombay High Court (Goa Bench) in *UBI v. Avinash P. Bhonsle* 1991 (2) Bank CLR 578, wherein their Lordships held that if the language of the text of Section 127 of the Act is clear and unambiguous, the sweep of the Act text cannot be curtailed by using illustration (c) to Section 127 of the Act to impose a limitation on the expression "anything done or any promise made for the benefit of the principal debtor" that it should be done at the time of giving the guarantee and that the language is wide enough to include anything that was done or a promise made before giving the guarantee and would not restrict the application of the section if the consideration to the principal borrower is not passed contemporaneously. Hence we prefer to follow the above two decisions in preference to the decisions relied upon by the learned Counsel for the appellant-second defendant for the reason that these decisions were rendered without reference to the language employed in Section 2(d), Section 126 and Section 127 of the Act. On the other hand, both the decisions of the Division Benches of Karnataka and Bombay (Goa) relied upon by us are exhaustive and thought-provoking decisions keeping the contemporaneous situation prevailing in the country.

17. If we give any other interpretation, the results will be disastrous and the public moneys will be going to drain. It is also well settled principle that the Courts while interpreting the provision of the Act or a rule the paramount consideration should be to see that the ends of justice are met and any judgment rendered by the Court should be in furtherance of cause of justice. Hence we do not find any merit in this LPA.

18. The LPA is accordingly dismissed. There shall be no order as to costs.