State Bank of India Vs Mrs. T.R. Seethavarma and Others

A.S. No. 273 of 1986

Court: High Court Of Kerala

Date of Decision: June 3, 1994

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 7 Rule 7#Contract Act, 1872 â€" Section 62

Citation: AIR 1995 Ker 31

Hon'ble Judges: K.P. Balanarayana Marar, J; K.K. Usha, J

Bench: Division Bench

Advocate: P.C. Type, Joseph Thomas and V.O. John, for the Appellant; M.P. Kurup and T.M. Chandran, for the Respondent

Final Decision: Allowed

Judgement

Balanarayana Marar, J.
The appeal arises from a suit for money. Plaintiff is the appellant.

2. A partnership firm by name Reshmy"s of which defendants 1 and 2 are the partners availed of loan facilities from plaintiff bank. An overdraft

agreement for Rs. 3 lakhs was executed on behalf of the firm on 24-12-1979.

A promissory note for the same amount was also executed and handed over as collateral security with a letter of continuity on the same date. As

per the agreement it was agreed that the accommodation will be on account of current in the name of Reshmy"s at the Kaloor Branch of the

plaintiff bank with liberty to overdraw up to a limit of Rs. 3 lakhs. The third defendant had agreed to guarantee the same. The amount borrowed

was agreed to be repaid with interest at 18% per annum with quarterly rests. Advances were made to the firm by the Bank. Defendants 1 and 2

failed to operate account properly. On 24-1-1989 third defendant drew a cheque on Vijaya Bank for Rs. 6,60/- in favour of Reshmy"s and the

same was purchased by plaintiff bank. On presentation the cheque was dishonoured. The amount was not repaid in spite of demands. A cheque

was drawn by 4th defendant for Rs. 7,500/- in favour of Reshmy''s which also was dishonoured on presentation by the bank. The amount covered

by that cheque was also not paid. Another cheque drawn by Reshmy''s in favour of 4th defendant on 5-2-1980 for Rs. 19,380/- was also

discounted by Reshmy''s with the plaintiff bank. That cheque was also dishonoured on presentation. Another cheque drawn by the third defendant

for Rs. 4,500/- on 28-5-1980 was discounted with the plaintiff bank. That cheque also was dishonoured on presentation. The amount covered by

the four cheques comes to Rs. 37,950/- together with interest at the contract rate. Those amounts are also liable to be paid by defendants 1 and 2

as partners of Reshmy''s. A total amount of Rs. 3,91,540/- was claimed in the plaint of which Rs. 3,28,638/- represents the amount due as per

accounts as on 26-11-1982 and interest thereon and the balance amount represents the amount covered by the cheques together with interest.

3. Defendants 1 and 2 had executed a dissolution of partnership in which the 5th defendant company also joined as a party. By that deed of

dissolution the partnership was dissolved and the assets and liabilities of the partnership were taken over by the 5th defendant. When the bank

threatened to institute a suit defendants approached them and the 5th defendant agreed to pay the amount and the stock in trade, stores, laboratory

equipments, air conditioners, stock on hand and finished goods situated in and around the premises were hypothecated to the bank. On the basis

of that hypothecation a charge is claimed by the plaintiff over those goods. A decree was claimed against defendants 1 and 2 personally and the

5th defendant from out of the assets in their hands. A decree was also claimed against defendants 3, 4 and 6 personally for the amount shown in

valuation 1 to 5, the amount covered by the cheques. The third defendant died pending suit and defendants 7 to 9 were impleaded as legal

representatives.

3A. A joint written statement was filed by defendants 1 and 7 to 9 disclaiming liability to pay any amount contending that the assets and liabilities of

the partnership were taken over by the 5th defendant who had agreed to pay all the liabilities due to the bank. In pursuance to that agreement 5th

defendant had also remitted some amounts. The bank has therefore treated the 5th defendant as the debtor. The liability can therefore be fastened

only on the 5th defendant. These defendants further contended that they are not personally liable for the plaint claim.

4. In the written statement filed by the 5th defendant they admitted taking over the assets and liabilities of the firm, but contended that they are not

retaining any of the assets of Reshmy''s whereas they are only liabilities. They disclaimed liability to pay any amount and also disputed the

correctness of the amount claimed in the plaint. Defendants 2, 4 and 6 remained ex parte.

5. Documents were produced on the side of the plaintiff and a witness was also examined on their side. No documents were produced by

defendants nor was any witness examined on their side. The Court below on an appreciation of the evidence held that the 5th defendant has taken

upon itself the assets and liabilities of the firm and defendant alone is liable for the plaint claim. A decree for an amount of Rs. 3,28,638/- was

granted in favour of the plaintiff against the 5th defendant along with interest and costs. The other defendants were found not liable. Aggrieved by

that decision the bank has come up in appeal.

6. Heard counsel on both sides.

7. Three points arise for consideration.

i. Whether the contract between plaintiff and defendants 1 and 2 is subsisting?

ii. Whether there is a novation of the contract, the 5th defendant having taken over the assets and liabilities of the firm?

iii. Whether defendants 4 and 6 to 9 are liable for the plaint claim or any part of it?

8. Points i & ii: That a liability was incurred by the firm Reshmy under Exts. A1 to A4 is not disputed. The four cheques Exts. A5 to A8 were also

discounted by the firm and the amount credited to the account of the firm. Those cheques having been dishonoured at the time of presentation the

firm has become liable to pay the amount covered by those cheques. The liability to pay the amount shown in valuations 1 to 5 of the plaint which

represent the amount due to the bank on the basis of the overdraft agreement and the four cheques cannot therefore be disputed. No dispute is

also seen raised regarding the correctness of the amount claimed in the plaint.

9. On behalf of the appellant bank it is contended that the contract between the bank and defendants 1 and 2 subsisted even after the transfer of

the assets and liabilities of the firm in favour of the 5th defendant. On the other hand, it is the contention of the learned counsel for defendants 1 and

7 to 9 that 5th defendant after taking over the assets and liabilities of the firm had paid a portion of the amount due to the bank and the bank had

treated the 5th defendant as the debtor. For that reason defendants 1 to 4 and 6 to 9 are absolved from any liability, according to the counsel.

Counsel has also relied on Exts. A9 and A10 in support of that contention. Ext. A9 is a copy of the deed of dissolution of the firm in which the 5th

defendant is also a party. Ext. A10 is a copy of the letter sent by the 5th defendant to the bank informing them about the taking over of the assets

and liabilities of the firm Reshmy and undertaking to discharge the liabilities of the firm detailed in that letter. There is an admission of the liability to

the extent of Rs. 3,66,950/-which comprises of the amount payable under the overdraft account, the amount payable towards the key loan and the

amount covered by the cheques discounted by the bank. One of the amounts, namely, the key loan debt amounting to Rs. 39,480.85 is stated to

have been discharged on the date of Ext. A10. Regarding the remaining liabilities 5th defendant had undertaken to repay the same in monthly

instalments of Rs. 10,000/-. The question to be considered is whether the liability of defendants 1 and 2 under the contract had come to an end

since the dissolution of the partnership by Ext. A9 and the undertaking of the liability by 5th defendant.

10. Learned counsel for the appellant drawing attention to Section 62 of the Indian Contract Act contends that there is no novation of the contract

and the liability of defendants 1 and 2 still subsists. Section 62 of the Indian Contract Act stipulates that if the parties to a contract agree to

substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. The marginal note to the section uses the word

novation which means discharge of one debt or debtor and the substitution of a new debt or debtor. The essential feature therefore is that when a

contract is substituted the rights under the original contract are relinquished or replaced by the new contract. Illustration (a) to Section 62 indicates

that one of the requisites of such novation is the agreement of all the parties to the new contract. The illustration reads :

A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt

of A to B is at an end and a new debt from C to B has been contracted :

Novation contemplated in Section 62 of the Act therefore involves an annulment of one debt and the creation of another. In every case of this

nature the court has to consider not only whether the new debtor has consented to assume liability but also whether the creditor has agreed to

accept the liability of the new debtor in substitution of the original debtor.

In other words, novation is not consistent with the original debtor remaining liable in any form, since the essential element of novation is that the

rights against the original contractor shall be relinquished and the liability of the new contracting party accepted in its place. Under law therefore

one of the requisites of novation is the agreement of the parties to the new contract.

11. Learned counsel for the contesting respondents draws attention to the decision in Balak Ram v. Telu AIR 1935 Lah 897 in support of his

contention that the creditor cannot fall back upon the original cause of action, the 5th defendant having admitted liability and a part of the claim

having been discharged by them. In the decision aforesaid it is observed that it is not always necessary to prove the substitution of a new contract.

It is enough if an alteration in the original contract is proved. The terms of the original contract are then varied and the variation is sufficient to

absolve the debtor from the performance of the original contract. It was held that the creditor cannot fall back on the original contract and cannot

sue thereon. This decision is of no assistance to the respondents since that was a case of variation of a contract and not a substitution or novation.

12. The Supreme Court in Khardah Co. Ltd, v. Raymon & Co. AIR 1962 SC 1810, observed that an assignment of a contract might result by

transfer either of the rights or of the obligations thereunder. There is a well recognised distinction between these two classes of assignments. The

Supreme Court held that obligations under a contract cannot be assigned except with the consent of the promisee and when such consent is given it

is really a novation resulting in substitution of liabilities. But rights under a contract are assignable unless the contract is personal in its nature or the

rights are incapable of assignment either under the law or under the agreement between the parties. The assets and liabilities of the firm were

transferred to the 5th defendant without the consent of the bank. The obligation of the firm under the contract cannot therefore be transferred

without the consent of the promisee, the plaintiff bank.

13. A Division Bench of this Court had occasion to consider the essential requisites for a valid novation in K. Appukuttan Panicker and Another

Vs. S.K.R.A.K.R. Athappa Chettiar and Others, . The Bench held that it is essential for the principle of novation to apply that there must be

mutual consent of all parties concerned.

14. The Calcutta High Court has also expressed the same view in Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd., Therein it

is observed that the liability can be transferred only by a tripartite agreement which will amount to novation.

15. Admittedly there is no tripartite agreement nor is there any consent by the promisee to accept the undertaking of the 5th defendant in

substitution of the contract entered into with the firm. True the bank had received Ext. A10 letter of the 5th defendant informing them of the taking

over of the assets and liabilities and undertaking to discharge the liability. A portion of the liability was also discharged by the 5th defendant. An

agreement is stated to have been executed by the 5th defendant hypothecating the goods in the promises to the bank. That the bank has received a

portion of the amount from the 5th defendant and the further fact that the bank had obtained a hypothecation of the goods from the 5th defendant

will not amount to a substitution of the new contract so long as a tripartite agreement has been entered into by the parties whereby the 5th

defendant has accepted as the debtor in which case alone the liability of the firm can be said to have been discharged. There is also no indication in

any of the documents produced in this case to suggest that the firm has been absolved from its liability and the bank has treated the 5th defendant

as the debtor liable to discharge the liability incurred by the firm.

16. Here is therefore a case where the firm of which defendants 1 and 2 are the partners owed money to the bank under a contract. At the

instance of the partners of the firm 5th defendant had agreed to discharge the debt and a portion of the debt was received by the bank from the 5th

defendant. This does not amount to a novation of the contract since there is no debt contracted by the 5th defendant in favour of the bank in

substitution of the debt due from the firm. The plea that there has been a novation of the contract is, therefore, unsustainable. The Court below was

wrong in absolving the partners from their liability and in finding that the 5th defendant alone is liable.

17. There is indication in the plaint itself to suggest that there is no substitution of the contract entered into by the bank with the firm. The bank was

aware of the transfer of the assets and liabilities in favour of the 5th defendant. It appears that the bank had taken steps to initiate legal proceedings

for realisation of the amount. Knowing about this defendants 1 to 4 are stated to have approached the bank and requested them to delay the action

in view of the undertaking of the 5th defendant to pay off the liabilities. The 5th defendant also had approached the bank and requested for

postponement of the threatened action and had undertaken to pay off the debt they having taken over the assets and liabilities. It was in pursuance

to these representations that 5th defendant hypothecated the stock in trade and other articles in favour of the bank. A charge was no doubt,

claimed by the bank over those goods on the strength of the hypothecation deed. The claim against the 5th defendant was sought to be sustained in

the plaint only for the reason that the 5th defendant having taken over the assets was liable to discharge the liabilities and the non-discharge of

liability will amount to unjust enrichment. Plaint therefore proceeds on the basis that the original contract is still subsisting and that 5th defendant had

only undertaken to discharge liability on behalf of defendants 1 and 2.

18. From the discussions in the foregoing paragraphs it is evident that there is no novation of the contract. The liability of defendants 1 and 2 on the

basis of the original contract has not come to an end. Fifth defendant who had undertaken to discharge liabilities of the firm had not entered into a

new contract with the plaintiff bank nor has the bank consented to treat the 5th defendant as the debtor. The finding of the Court below that 5th

defendant alone is liable for the plaint claim is therefore erroneous and is set aside.

19. The further question that arises for consideration is whether a joint liability can be fastened on defendants 1 and 2 and the 5th defendant.

Having found that there is no novation of the contract plaintiff can proceed only against defendants 1 and 2. A decree was granted by the Court

below against the 5th defendant who has not chosen to challenge the same in appeal. The finding of the Court below that 5th defendant alone is

liable having been set aside a decree has to be granted against defendants 1 and 2. If that be so, the relief against 5th defendant will not be

sustainable. But the 5th defendant had come into possession of the assets of the firm and had also executed a hypothecation of the goods in favour

of the bank. It is in that capacity that 5th defendant is seen impleaded in the suit and proceeded against. Though a decree against 5th defendant is

not sustainable, 5th defendant has not chosen to challenge the decree by filing an appeal or at least by filing cross objections in this appeal. That

part of the decree is therefore not liable to be varied in the present appeal. The result is that there will be a decree against defendants 1, 2 and 5.

20. Point No. iii : Defendants 7 to 9 are the legal representatives of deceased third defendant. Third defendant is a guarantor and a cheque drawn

by him in favour of Reshmy was also discounted by the bank, the firm having endorsed the cheque in favour of the bank, claim is therefore made

for that amount also against the third defendant. He died pending suit and additional defendants 7 to 9 were impleaded as his legal representatives.

The plaint was not amended in consequence of impleadment and no relief is seen claimed against defendants 7 to 9 either personally or as legal

representatives of the third defendant. In the absence of any relief against those defendants the claim against them is not sustainable. The liability

covered by the four cheques had been admitted by defendants 1 and 2. Those liabilities were also taken over by the 5th defendant. That being so,

defendants 4 and 6 cannot be held liable for any amount.

For the aforesaid reasons the appeal is allowed and in modification of the judgment and decree of the Court below the suit is decreed against

defendants 1, 2 and 5 for an amount of Rs. 3,93,540/- with interest at 18% per annum from date of plaint till date of realisation. Defendants 4 and

6 to 9 are found not liable. The costs incurred by the appellant here as well as in the Court below shall be paid by defendants 1, 2 and 5.