(1998) 01 KL CK 0032

High Court Of Kerala

Case No: A.S. No. 178 of 1989

State Bank of India		APPELLANT
	Vs	
G.J. Herman and Others		RESPONDENT

Date of Decision: Jan. 27, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 11
- Contract Act, 1872 - Section 128

Citation: AIR 1998 Ker 161 : (1998) 2 CivCC 457 : (1998) 2 ILR (Ker) 374 : (1998) 2 RCR(Civil) 558

Hon'ble Judges: K.S. Radhakrishnan, J; K.K. Usha, J

Bench: Division Bench

Advocate: S.K. Brahmanandan and G.S. Prabhu, for the Appellant; Chacko George, Baby N.P. and K.M. Joseph Kuttiyil, P. Sukumaran Nair (Sr.), Thottathil B. Radhakrishnan and G. Unnikrishnan for Addl., for the Respondent

Final Decision: Allowed

Judgement

Radhakrishnan, J.
The question that has come up for consideration in this case is as to whether the court has got jurisdiction to direct the creditor to postpone the execution of a decree as against some of the sgreties, till the creditor exhausts his remedies against another surety.

2. Plaintiff is the appellant. Suit was for realisation of money. Plaintiff bank had advanced a loan of Rs. 6,40,000/- to one Sasihithlu Fisheries on the guarantee of fifth respondent, a society set up for the welfare of the fishermen, for the purchase of a mechanised fishing boat. Fifth respondent stood as guarantor by pledging fixed deposit receipts for Rs. 9.87 lakhs Sasihithlu Fisheries failed to repay the loan amount. Consequently, fifth respondent offered to find out a person, for purchase of the fishing boat, provided the credit facilities given to Sasihithlu Fisheries are

transferred to the said purchaser by the bank. Plaintiff-bank accepted the offer and agreed to transfer the loan account in the name of the intending purchaser, as suggested by the fifth respondent.

3. Accordingly fifth respondent proposed the first respondent to purchase the fishing boats and requested the bank to transfer the loan account in the name of the first respondent. Consequently, on 10-2-1981 first respondent approached the plaintiff bank for a loan of Rs. 6,91,000/- for purchase of fishing boats and accessories. Bank had on 10-2-1981 granted the loan of Rs.6,91,000/ - on the guarantee of respondents 2 and 3. All the three respondents executed necessary documents before availing of the loan. Respondents 2 and 3 have deposited their title deeds which are, described in the plaint as A, B and C schedules with intention to create an equitable mortgage in respect of those properties. Respondents 1 to 3 agreed to repay the loan amount in monthly instalments with minimum interest at 11.35% per annum. Fifth respondent also offered fixed Deposits as security for the loan amount advanced to the first respondent. They agreed that the entire loan amount would he paid within a period of seven years from the date of avail.

4. First respondent committed default in repaying the instalments. Consequently, bank called upon respondents 1 to 3 to regularise the account. They offered to furnish additional security. Consequently, respondents 4 and 5 stood as additional guarantors for the first respondent. Fourth respondent also deposited title deeds of his property to create an equitable mortgage as security for the loan amount. The fixed deposits pledged by the fifth respondent as security for the loan amount are described as D schedule to the plaint. All the respondents agreed that they would be jointly and severally liable for the default of the first respondent. Respondents had also executed revival letters on 26-8-1982, 30-7-1983, and on 26-9-1985 acknowledging their liability under the original loan arrangement dated 10-2-1981. The first respondent committed default in repaying the loan amount and the bank then instituted the suit for an amount of Rs.13,15,816.96. Suit was instituted for realisation of the loan amount charged on A, B and C immovable properties as well as D schedule fixed deposits.

5. Respondents 1 and 3 alone contested the suit. According to the first respondent he had paid several amounts to the fifth respondent through the plaintiff-bank. Plaintiff-bank ought to have adjusted the loan amount from the fixed deposit amount as and when the same was matured. It is his case that fixed deposits amount was not adjusted with the intention of getting undue advantage. It is his further case that plaintiff''s claim is inflated and the clam itself is barred by limitation. Third respondent in his written statement denied the execution of the documents. Even though it was admitted that first respondent had sent the documents of title to the plaintiff-bank, according to him, he did not execute the memorandum of agreement dated 24-6-1981 agreeing to create an equitable mortgage.

6. In order to establish its case, bank produced Exts. A1 to A 30 documents; The manager of the bank was examined as PW1. First respondent got himself examined as DW1 and the third respondent as DW2.

7. After considering the oral and documentary evidence, the court below came to the conclusion that all the respondents are jointly and severally liable for the plaint claim. The court below therefore decreed the suit holding that the bank is entitled to realise the plaint claim from the respondents with interest at 11.35% per annum on the principal amount of Rs. 6,91,000/- from the date of the suit till realisation of the whole amount with costs. It was ordered that the plaintiff-bank would be entitled to realise the debt charged on the properties scheduled to the plaint. After entering such a finding, court below, however, directed the bank to recover the plaint amount at the first instance only from the fixed deposit receipts described as D schedule to the plaint, and only on failure to recover the amount, to proceed against the other sureties and the properties described in plaint A, B and C schedules. Bank is aggrieved by the said direction and hence filed this appeal.

8. The principal contention raised by counsel for the bank is that court below committed a grave error in directing the bank to realise the plaint claim from plaint A, B and C schedule properties, only after proceedings against the fixed deposits described as D schedule to the plaint towards the decree amount. Counsel contended that the court below ought not to have given such a direction, after having found that first respondent as well as all the sureties are jointly and severally liable for the plaint claim. Counsel further contended that there cannot be any distinction as among sureties. All the sureties are equally and severally liable. Counsel also contended that the liabilities of all the sureties are, to the extent of the securities offered by them, co-extensive with that of the principal debtor. Counsel relied on the decision of the Supreme Court in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, . Reliance was also place on the decision of the Supreme Court in State Bank of India Vs. Messrs. Indexport Registered and others, , and it was contended that since it is a composite decree, creditor is entitled to proceed against sureties personally as well as against their assets.

9. While the matter was pending before this Court, third respondent died, and additional sixth respondent was impleaded as legal representative. Counsel for the additional sixth respondent tried to justify the direction given by the court below under Order XX, Rule 11 CPC. According to counsel, Order XX, Rule 11 lables the court to postpone the realisation of t.he decree amount from other sureties, till the creditor exhausts his remedy as against one of the sureties. It is his case that reading the plaint as a whole, as well as oral evidence, would show dial it was the fifth respondent who was primarily responsible for the suit claim. It was extended that the decree was passed by the court below only in terms of the relief sought for in the plaint, and consequently, court below has not committed any illegality indirecting realisation of the amount at the first instance from the fixed deposits

offered by the fifth respondent.

10. We heard counsel for the appellant as well as counsel for the additional sixth respondent. Court below after considering the oral and documentary ev idence has come to the conclusion that respondents 2 to 5 are jointly and severally liable for the plaint claim. It is also found that third respondent had executed Exts. A1, A3 and A7 documents guaranteeing repayment of the loan amount advanced. This finding of the court below has become final, since neither the third respondent, nor other respondents have challenged those findings. In the instant case, we are concerned only with legality of the direction given by the court below as stated hereinbefore.

11. A contract of suretyship is in essence a contract by which one person agrees to answer for some liability of another to a third person. The contract may be constituted by a personal engagement on the part of the surety, or by a charge on property without any personal liability, or by both. Prima facie a surety does not merely undertake to perform if the principal debtor fails to do so; he undertakes to see that the principal debtor will perform. There can be no contract of guarantee, if liability does not exist. The liability of the guarantor pre-supposes the existence of a separate liability of the principal debtor and his liability is thus secondary, which comes into existence only on the failure by the principal debtor. A contract of guarantee as defined in Section 126 of the Contract Act is to discharge the liability of a third person, in the case of his failure. It is essentially a contract whereby guarantor/surety agreed to be answerable for some liability of the principal debtor to the creditor. The assumption of personal liability to answer is an clement in a contract of guarantee.

This is equally so to all the sureties who stood guarantee. As per Section 128 of the Contract Act, the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The liability of the surety arises immediately on failure of the principal debtor to perform his obligations. Section 140 of the Contract Act safeguards the rights of a surety on payment of the guaranteed debt.

12. A surely who has actually met the liability which he has undertaken to discharge is entitled to be indemnified by the principal debtor. The intention of the Legislature is to keep alive the benefit of the surety and the rights of the creditor whether under a security or otherwise which he had against the principal debtor and which could have been extinguished by payment of the debt or performance of the duty and to subrogate the surety to those rights.

13. Supreme Court in its decision in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, has laid down that where a creditor has obtained a decree against a surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedy against the principal. It was held that before payment of the amount, surety has no right to ask the creditor to pursue his

remedies against the principal at the first instance. This dictum laid down by the Supreme Court was later followed with approval in State Bank of India Vs. Saksaria Sugar Mills Ltd. and Others, . Supreme Court held that u/s 128 of the Indian Contract Act, 1872, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The sureties thus became liable to pay the entire amount. Their liability was immediate and it was not deferred until the creditor exhausted his remedies against the principal debtor.

14. A larger Bench of the Supreme Court in State Bank of India v. Indexport Registered, AIR 1.992 SC 1740 upheld the dictum laid down in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, as well as in State Bank of India Vs. Saksaria Sugar Mills Ltd. and Others, .

15. Therefore the principle laid down by the Supreme Court is that the liability of the sureties is co-extensive with that of the principal debtor. Consequently creditor can proceed against the principal debtor or against the sureties, unless it is otherwise provided in the contract. The same should also be the principle with regard to the rights and liabilities between co-sureties as well. A co-surety cannot insist that the creditor should proceed either against the principal debtor or against other sureties before proceeding against him, since the liability of a surety is joint and several. To the extent to which they stood guarantee, they are liable to be proceeded against by the creditor. The option is entirely that of the creditor to decide against whom he could proceed with either against principal debtor, or against any of the sureties. Court for that matter, or a cosurety cannot insist that creditor should proceed against other sureties before proceeding against him. Such a direction is directly against the principle of co-extensiveness.

16. Counsel for the additional sixth respondent tried to justify the direction given by the court below under Order XX, Rule 11 read with Section 151 C.P.C. According to counsel, under the above mentioned provisions, court has power to postpone the execution of a decree as against one of the sureties. The decree sought to be enforced in this case is a composite decree, a decree passed personally against the respondents and also as against the mortgaged property. A composite decree is a decree which is both personal as well as a mortgage decree without any limitation of its execution. A Division Bench of this Court in Vysya Bank Ltd., Ernakulam Vs. Kalapurakal Industries and Others, took the view that the provisions of Order XX, Rule 11 enabling payment of amounts in instalments has application only 10 simply money decrees and not to deprees for sale of property for realisation of money due. Court further held that the provisions of Order XX. Rule 11 cannot enable the benefit of instalments by passing a decree, whereby postponing the realisation of the decree amount.

17. Supreme Court in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, , had occasion to consider the scope and ambit of Order XX, Rule 11 in the case of a composite decree. Supreme Court held that the very object of the guarantee would

be defeated if the creditor is asked to postpone his remedies against the sureties. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. While setting aside the direction for postponing the decree, the Supreme Court held that direction cannot be justified under Order XX, Rule 11 and that the ends of justice also would not justify such a direction even u/s 151, C.P.C. It is also pertinent to note that in cases where the Court resorts to Order XX, Rule 11, CPC, Court must give sufficient reasons and the direction postponing the execution of a decree would be clear and specific. Court should state cogent reasons for directing postponement of the decree. In any view, in this case, we have already found, since it is a composite decree, there is no question of postponement of the decree.

18. On the basis of the above mentioned settled legal position, we are of the view that the direction given by the Court below that the plaintiff should realise the decree amount at the first instance from the fifth respondent, and then only to proceed against other sureties and their properties cannot be sustained. We, therefore, delete that portion of the decree. It is declared that the decree holder is entitled to proceed against all the respondents jointly and severally and also against their assets. Appeal is accordingly allowed.