

(2003) 06 KL CK 0069

High Court Of Kerala

Case No: A.S. No. 328 of 1995

C.S. Company

APPELLANT

Vs

Punjab and Sind Bank

RESPONDENT

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**Date of Decision:** June 4, 2003**Citation:** (2005) 126 CompCas 32 : (2003) 3 KLT 808**Hon'ble Judges:** K.S. Radhakrishnan, J; K. Padmanabhan Nair, J**Bench:** Division Bench**Advocate:** Bechu Kurian Thomas, for the Appellant; Markose Vallapally, S. Siri Jagan, K.S. Ambili and P. Santhalingam, for the Respondent**Final Decision:** Allowed

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### Judgement

K.S. Radhakrishnan, J.

Defendants 1, 2, 4, 7 and 8 are the appellants. Suit was instituted by the first respondent Bank for realisation of money on the strength of two bank guarantees alleged to have been executed on 11.5.1983 and 24.6.1983 in favour of Kerala State Electricity Board. Suit was decreed. It was also ordered that if the Bank could not realise full amount due to it by sale of hypothecated properties, Bank could proceed against defendants 2 to 4 personally against the assets of defendants 1 to 4 to realise the balance amount due to it.

2. First defendant is a partnership firm engaged in the business of engineering and other defendants are its partners. They undertook execution of certain civil engineering works awarded by the Kerala State Electricity Board. Defendants had approached the plaintiff Bank to furnish bank guarantee for Rs. 20 lakhs in favour of the Electricity Board. Bank had agreed to offer the bank guarantee subject to certain terms and conditions. Defendants executed necessary documents and furnished security by making immovable properties by deposit of title deeds. Plaintiff Bank on 11.5.1983 offered bank guarantee to the Kerala State Electricity Board for Rs. 1 lakh. Another bank guarantee for Rs. 19 lakhs was offered on 24.6.1983. Second defendant deposited the title deeds of his property in Kottayam Village with intent

to create a security in favour of the plaintiff. Fifth defendant deposited the title deeds of his property scheduled in the plaint with intent to create security by way of mortgage. Fifth defendant also confirmed the deposit of title deeds of his property by memorandum executed on 11.5.1983. Sixth defendant acting through his power of attorney holder deposited the title deeds of his property with the Bank by way of mortgage. Defendants 7 and 8 deposited their title deeds in respect of their property with intent to create security. Fourth defendant furnished security of fixed deposit receipt for a sum of Rs 25,000/-. By letter dated 19.6.1984 Electricity Board demanded and called upon the plaintiff to pay the sum of Rs. 19 lakhs. Plaintiff informed this fact to the first defendant. First defendant was called upon to pay the amount to the plaintiff. Plaintiff did not pay the amount. Hence plaintiff appropriated Rs. 4,56,962.80 for fixed deposit amount. After adjusting the said amount, amount of Rs. 14,43,037.92 is due. Defendants are liable for 20% interest. First defendant requested the plaintiff to extend the bank guarantee for one lakh for a period of one year. Plaintiff extended the period of Bank guarantee upto 11.5.1985. Kerala State Electricity Board terminated the contract and has proceeded to take further action against the defendants. Defendants did not pay the amount. Suit was instituted to realise the said amount.

3. Joint written statement was filed by defendants 1, 2 and 4. They stated that the plaintiff be put to strict proof regarding the dates of the guarantee. The deed of indemnity and guarantee were not admitted. Further it was also stated that even if bank had honoured guarantees they were not validly or legally invoked. Defendants 6 to 8 had stated that they had never gone to the plaintiff's Bank on 11.5.1983 or on any other date or deposited the title deeds of the properties to the plaintiff Bank for security. No mortgage was created in favour of the Bank in respect of the schedule property. Fourth defendant by letter dated 4.4.1983 forwarded the title deeds described in the plaint for the purpose of scrutiny. Further it was also stated that even though mobilisation advance was given to the first defendant, it was not on the condition that the first defendant firm would give a bank guarantee in favour of the Kerala State Electricity Board. Defendants 6 to 8 in their joint written statement had stated that they had not created any equitable mortgage in respect of their properties in favour of the plaintiff and also denied the execution of the deed of indemnity and guarantee dated 11.5.1983. In the written statements filed by defendants 6 to 8 it is stated that the plaintiff had taken blank signed papers from them on 11.5.1983 when the first bank guarantee for Rs. 1 lakh was issued in favour of the K.S.E. Board and those signed papers were utilised for the purpose of creating equitable mortgage, indemnity and guarantee and other documents.

4. In order to establish its case plaintiff Bank examined PWs. 1 to 4 and produced Exts. A1 to A83. On the side of the defendants DW-1 was examined and Exts. B1 to B5 were marked. The court below held that the defendants had deposited the title deeds of the properties shown in the plaint schedule with the plaintiff and had created valid equitable mortgage of the same in favour of the plaintiff. The court

below held it was not in dispute that two bank guarantees for a total sum of Rs. 20 lakhs were issued to the Kerala State Electricity Board on the request made by the first defendant and the two bank guarantees had been invoked by the Electricity Board. The court also found that the Bank had paid Rs. 1 lakh to Kerala State Electricity Board on 15.10.1984 and Rs. 19 lakhs on 23.6.1984. Further, the court also found that Exts. A39 to A43, A45 to A48, A53, A54 and A63, tax and revenue receipts relating to the properties Exts. A57 to A62 and the confirmation letters regarding deposit of title deeds would indicate that the defendants had deposited the title deeds with the Bank. Further it was also found that first defendant had executed guarantees, Exts. A16 and A73. The Court also found that the Bank had invoked guarantees. Placing reliance on Exts. A2 and A82 the court found that the guarantees were in force when they were invoked by the Electricity Board. Further it was held that Exts. B1 to B5 do not in any way vitiate against the said finding. The court found that the defendants are liable to make good the loss sustained by the Bank.

5. Counsel appearing for the first defendant submitted that the burden is on the plaintiff to prove all the terms and conditions of the said bank guarantees and the counter guarantees. Counsel submitted that if at all the Bank had invoked the guarantees, the same was not done validly or legally. Counsel submitted that the plaintiff should have produced the bank guarantees incorporating the terms and conditions. Counsel submitted that evidence adduced by the plaintiff would not establish the terms and conditions of the bank guarantees. No explanation is forthcoming with regard to the non production of bank guarantees. Counsel also submitted that bank guarantees were not properly invoked as per the terms and conditions. Burden is on the plaintiff to show that they were invoked as per the terms and conditions and the plaintiff had failed to discharge the said burden.

6. Counsel appearing for the respondent Bank submitted that Bank guarantees were rightly invoked by the Bank. There is sufficient evidence in this case to show that bank guarantees were valid when they were invoked by the Board. Counsel also referred to Exts. A16 and A73 bank guarantees executed by the defendants and the plaintiff. Placing reliance on Ext. A2 it is contended by the counsel that bank guarantees were rightly invoked by the Chief Engineer of the Electricity Board. Reference was also made to Ext. A3 communication by the Chief Engineer to the Bank. Counsel also made reference to Ext. A6 letter issued by the defendant in reply to Ext. A5 letter expressing the desire to pay the amount in instalments. Counsel also took us through the oral evidence adduced by the parties.

7. We may at the outset point out that the suit rested on two bank guarantees, one for Rs. 1 lakh dated 11.5.1983 and another for Rs. 19 lakhs executed on 24.6.1983. It is the specific case of the defendants that the Bank guarantees were not in force when they were invoked by the Board. When a specific contention was raised by the defendants that plaintiff or the Board had not complied with the terms of the bank

guarantees it was the bounden duty of the Bank and the Board to produce the bank guarantees before court and establish the same. The Apex Court in *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.* 2003 (1) SCC 547 held that though contract of guarantee is a primary transaction it is independent transaction containing independent obligations. Apex Court in [State of Maharashtra Vs. Dr. M.N. Kaul \(Deceased by his Legal Representatives\) and Another](#), held that whether a guarantee is enforceable or not depends upon the terms under which the guarantor bound himself. In [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), the Apex Court held that the terms of bank guarantee are extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The Court also held that the invocation will have to be in accordance with the terms of the bank guarantee or else the invocation itself would be bad.

8. As far as this case is concerned, Bank had not produced the originals of both the bank guarantees. Bank had produced photo copy of the guarantee Ext. A19 dated 11.5.1983. Plaintiff had produced Ext. A16 counter guarantee in which a typed version of Bank guarantee for Rs. 19 lakhs was appended. A perusal of Ext. A16 and the typed version of the bank guarantee alleged to have been executed would show that even Ext. A16 is not a complete document. It does not bear the signature of the Branch Manager. We are of the view no suit can safely be decreed on the basis of a photostat copy of a bank guarantee and incomplete counter guarantee. We are not in a position to ascertain what are the terms and conditions of the bank guarantees and the rights and liabilities of the parties arising out of those guarantees. No explanation is forthcoming from the side of the Bank as to why originals were not produced before court. No attempts have been made by the Bank to adduce any secondary evidence after giving any explanation as to the non-production of the originals. The Apex Court in [The Roman Catholic Mission Vs. State of Madras and Another](#), held that if the originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence, no reliance could be placed on the secondary evidence.

9. Defendants have got a further contention that the alleged bank guarantees could not be properly invoked. The Apex Court in [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), held that invocation of bank guarantee would be in accordance with the terms thereof. Since originals of the bank guarantees were not produced, we are not in a position to ascertain what are the terms and conditions of the bank guarantees. Going by the photo copy of the bank guarantees produced, we find that the same could be invoked only by the Chief Engineer (Civil). In the instant case, plaintiff had produced Ext. A7 letter dated 15.10.1984 issued by the Secretary, Kerala State Electricity Board seeking to invoke the bank guarantee. If the Bank had paid any amount on the basis of Ext. A7 it is at the risk of the Bank since as per the terms and conditions of the bank guarantee he cannot invoke the bank guarantees. Further we notice Ext. A3 is a letter issued by the Chief Engineer seeking to invoke

the Bank guarantee for the period 11.5.1983 to 11.5.1984. If the plaintiff's case is accepted, and Ext. A19 is extended for one more year from 11.5.1984 to 11.5.1985 Ext. A3 could not have been a valid demand for invocation. It is the specific case of the plaintiff Bank that bank guarantee for Rs. 19 lakhs was invoked by the Kerala State Electricity Board as mentioned in Ext. A4. This statement would go against Ext. A16 which shows that bank guarantee could be invoked by the Chief Engineer (Civil) alone. Plaintiff had produced Ext. A82 which was opposed by the defendants. According to the defendants Ext. A82 was subsequently created. The above mentioned facts would create suspicion in the matter in which bank guarantees were executed. The entire case of the plaintiff rests on two bank guarantees. When the originals of the bank guarantees were not produced, plaintiff cannot successfully lay their claim on those two bank guarantees.

10. Counsel appearing for the Bank submitted even though bank guarantees were not produced reliance can be placed on the counter guarantee. We may point out, even counter guarantee produced is also incomplete. Terms of the conditions could be given effect to only when guarantees are produced. Counsel for the plaintiff submitted that even though those guarantees were not produced plaintiff could very well realise the money from the mortgage created in favour of the plaintiff. Specific case of defendants 2 to 8 was that they never went to Bank on 11.5.1983 for deposit of title deeds as alleged. Fourth defendant by letter dated 4.4.1983 forwarded the title deeds described in the plaint schedule for the purpose of scrutiny. Defendants 6 to 8 also stated that they have not deposited the title deeds of the properties. Defendants 1 to 3 have got a specific case that plaintiff had concocted the documents. We are of the view since plaintiff could not successfully lay their claim on the bank guarantees the alleged deposit of title deeds in lieu of the performance of the bank guarantees cannot be enforced.

11. In the above mentioned circumstances, we are inclined to allow this appeal, set aside the judgment of the trial court. Parties would bear their respective costs.