(2013) 10 AP CK 0113

Andhra Pradesh High Court

Case No: C.C.C.A. No. 24 of 1992

The State Bank of Hyderabad, I.D.P.L. Colony Branch		APPELLANT
	Vs	
M/s. Star Electrical Industries and Others		RESPONDENT

Date of Decision: Oct. 28, 2013

Citation: (2014) 1 ALD 529

Hon'ble Judges: M.S. Ramachandra Rao, J

Bench: Single Bench

Advocate: Siva Reddy, for the Appellant; Subrahmanyam Korella for the Respondents 5 to 7, for the Respondent

Final Decision: Dismissed

Judgement

M.S. Ramachandra Rao, J.
This appeal is filed challenging the judgment and decree dt. 09-10-1991 in O.S. No. 103 of 1980 of the V Additional Judge, City Civil Court, Hyderabad. The appellant Bank is the plaintiff in the suit. It filed the suit against the respondents/defendants for recovery of a sum of Rs. 1,65,255-86 ps with interest @ 14.5% per annum from the date of the suit i.e. 24-12-1979 till the date of realization and for costs.

2. The 1st respondent/1st defendant is a partnership firm with respondents 2 to 6 as its partners. It was engaged in the business of manufacturing of LTGI pins and electrical goods etc. in Jeedimetla, Hyderabad. The plaintiff Bank''s branch at Kukatpally, Hyderabad granted credit facility to the defendants by way of a cash-credit facility on the basis of a personal guarantee of Defendant Nos. 7 and 8 and also against the security of stocks of Defendant No. 1 by way of pledge. The defendants requested the plaintiff to give further facility by way of cash credit limit of Rs. 1.00 lakh to be availed by them from the plaintiff Bank''s branch at Brabourne Road, Calcutta to enable them to avail the said facility at Calcutta for manufacturing purposes, as by that time their unit at Jeedimetla had

not started its production. The Bank sanctioned the said facility also on the security of hypothecation of movable assets of 1st defendant such as raw materials, finished products and machinery of 1st defendant firm. In respect of the said facility, defendants 2 to 8 executed Exs. A-3 to A-6 documents.

3. The plaintiff subsequently discovered that there was a deflation of stocks from the business premises of defendants 1 to 6 and in order to safeguard the interest of plaintiff-Bank, the stocks pledged to the Bank existing in the business premises of defendants 1 to 6 at Jeedimetla unit of 1st defendant were taken possession of by the plaintiff Bank with the consent of the Managing Partner of the 1st defendant firm (i.e. 2nd defendant) under a consent letter Ex. A-6 dt. 01-09-1978. However on inspection, on 03-11-1978, the officials of the plaintiff found that the lock put by the plaintiff to the godown of defendants 1 to 6 at Jeedimetla was broken and the stocks pledged to the Bank stolen. D-2 to D-4 and D-8 addressed a letter Ex. A-7 dt. 03-11-1978 informing the plaintiff that D-7 had broken the lock of the premises and had taken away the materials pledged to the Bank.

4. Plaintiff contended that the plaintiff filed a complaint with the police and the matter is under investigation; thereafter, the stocks of 1st defendant at Calcutta were also verified and it was discovered that articles there also were removed; another complaint was lodged with the police at Calcutta by the Brabourne Road Branch of the plaintiff and the matter is investigation; therefore the loans sanctioned to defendants 1 to 6 was recalled and a demand was made by the plaintiff to the defendants to repay the loan amount together with interest. It alleged that in respect of cash credit (Mundy type Account), defendants 2 to 6 have to pay Rs. 61,391-04 p.s. inclusive of interest from 01-10-1979 together with subsequent interest on a sum of Rs. 63,473-04 p.s. as on 24-12-1979; and in respect of cash credit facility availed by the defendants 2 to 6 at Brabourne Road Branch at Calcutta, a sum of Rs. 69,560-60 ps inclusive of interest from 01-10-1979 is due and payable by defendants together with subsequent interest which amounts to Rs. 99,782-82 ps. as on 24-12-1979. Plaintiff contended that it had issued legal notice dt. 02-03-1979 and 26-04-1979 to the defendants but the said amounts were not paid and therefore it was constrained to file the above suit.

5. Defendants 1 and 2 filed a written statement admitting that defendants 1 to 6 are partners of 1st defendant firm.

(a) They contended that D-7 was in need of money for the purpose of business and he approached D-2 through D-8 for a loan; that D-7 requested D-2 to D-6 to lend money assuring that he would return the same within a couple of months; that D-7 wanted D-8 to assure the same and recommend to the plaintiff for the amounts to be given by D-2 and D-5 to D-7.

(b) It is further contended that on the recommendation and assurance of D-8, D-2 paid a total sum of Rs. 33,678-10 ps to D-7 from time to time and those payments were entered

and recorded by D-7 in an account book in his own handwriting; that D-7 did not pay the amount to D-2 as promised and thereafter D-2 along with D-6 demanded D-7 to return the same; D-7 expressed his inability to return the amount and suggested that D-2 to D-6 join in D-1 firm as partners and the amounts lent by D-2 would be treated as capital in the D-1 firm; that to repose confidence on D-2 and also guarantee the payment of the amounts lent by D-2, D-7 suggested that D-2 be styled as a Managing Partner; that D-7 was acting as a Manager and conducting the business of D-1 firm, maintaining the accounts and acting for the benefit of a firm and all the partners; and that D-7 also assured that D-5 and D-6 are partners in D-1 firm and he would act diligently for the uplift of the D-1 firm. As D-2 and husbands of D-3 and D-4 agreed for the said course and also reposed full confidence in D-7, D-1 firm was constituted and a partnership deed Ex. B-3 dt. 01-01-1978 was executed by D-2 to D-6.

(c) They contended that the business of the firm commenced from 09-02-1978 by opening an account in the plaintiff-Bank by depositing sum of Rs. 33,678-10 ps.; as per clause-3 of the Partnership Deed, the partnership shall be at will or till the execution of the then AP State Electricity Board Order No. 9-4083 dt. 28-10-1977 for supply of certain material worth Rs. 18,51,210/-, or whichever is earlier; that although the object of the firm was to carry on business as manufacturers and suppliers of electrical goods, it did not take up any such business; that D-7 opened an account with the plaintiff Bank at Calcutta, obtained signatures of D-2 to D-6 on blank papers and blank cheques and ran the D-1 firm.

(d) They also contended that D-7 alone transacted with the plaintiff Bank at Hyderabad and Calcutta and to the best of their knowledge, the plaintiff Bank had taken over possession of the Jeedimetla premises and Calcutta premises; that the manager of the plaintiff Bank verified the stocks of LTGI Pins kept in the business premises of D-1 firm in the presence of D-2 to D-8 and after satisfying himself certified that a value of stock kept in the premises is worth of Rs. 83,531-25 ps and put a lock to the shed in the presence of D-2 to D-8 and took away the key. Therefore the stocks were in the exclusive custody of the plaintiff. Similarly the Branch Manager of the plaintiff Bank at Calcutta verified the stocks and raw materials kept in the business premises of D-1 firm in Calcutta in the presence of D-7 and after verification, it was certified that the value of the stocks is worth of Rs. 1,28,000/-.

(e) They alleged that the plaintiff is solely responsible for the said stocks and in the event D-1 to D-8 are found liable, the plaintiff can sell the said stock and adjust the sale proceeds towards the outstanding dues and remit the balance to the D-1 firm. D-1 and D-2 also denied the correctness of statement of account filed by the plaintiff Bank and contended that they are not liable to pay the suit amount. They also contended that D-1 is entitled for reimbursement of Rs. 83,531-25 ps + Rs. 1,28,000/- i.e. Rs. 2,11,531-25 ps. and contended that if the suit amount is found to be correct, the plaintiff is bound to adjust the same against the above amount and refund Rs. 48,275-39 ps. to D-1.

6. D-3 and D-4 remained ex parte.

7. (i) D-5 filed a written statement contending that at the time when the partnership was formed, she was only a student and on the advice of D-7, she invested Rs. 25,000/- as her share capital in D-1 firm in the shape of LTGI pins to be supplied to the AP State Electricity Board with a view to earning profits. She contended that she has no personal knowledge of the affairs of the firm except signing and delivering several blank cheques to D-2 for easier and convenient operation of the accounts at Hyderabad and Calcutta. She denied that she approached the plaintiff for any credit facility and contended that she has no knowledge of the circumstances under which the plaintiff Bank granted credit facilities to D-1 firm overlooking the formalities and procedures. She alleged that the plaintiff acted in collusion with 2nd defendant and committed several irregularities breaching terms and conditions in respect of allocation of funds; that the plaintiff failed to insist upon D-2 to reach the transactions through it and erred in permitting withdrawal of the funds by D-2 without any pledge of goods under lock and key. She alleged that the operation of the account of the firm with the plaintiff Bank at Calcutta was kept as a secret and D-2 mismanaged and misappropriated the funds at Calcutta in connivance with Bank officials at Calcutta; that this suit is filed by the plaintiff as a counter blast to O.S. No. 186 of 1979 filed by D-5 to D-7 on the file of II Additional Judge, City Civil Court, Hyderabad against it; that at the instance of D-2 to D-4, D-6 and D-7 surrendered the limits of the plaintiff and D-7 and D-8 have also stood as personal guarantors to the various loans sanctioned by the Bank to 1st defendant; that D-2 diverted the funds of D-1 firm for his personal business and domestic luxuries; that D-2 in connivance with the plaintiff got issued Ex. B-11 letter to D-1 refusing to accept guarantee of D-7 stating that the plaintiff Bank at Hyderabad filed a suit against D-7 with regard to another industrial unit run by him by name M/s. Garimella Industries; that the plaintiff further insisted to provide an alternative guarantor in the place of D-7 for the purpose of continuing the limits already allowed to D-1 firm; that D-7 arranged three alternative guarantors who were not acceptable to the plaintiff; thereupon D-2 insisted D-7 not to act as a technical advisor to firm and insisted D-5 and D-6 to retire from the firm.

(ii) She contended that D-2 colluded with the plaintiff and got the plaintiff to file police complaint against D-7 alleging that D7 had taken articles kept in the godowns at Calcutta and Hyderabad. She further alleged that when the guarantorship of D-7 was refused by plaintiff, the matter was settled in the presence of V. Nageswara Rao, Syed Maheboob Basha, Salika Satya Murthy and Mohd. Muneer and the partners agreed to pay Rs. 87,642/- in full and final satisfaction of claims of the outgoing partners D-5 to D-7 including the share capital invested by them apart from remuneration of D-7 so as to avoid litigation; that the settlement took place on 23-10-1978 and the same was recorded on the reverse of Ex. B-3; that a cheque bearing No. 879222 dt. 23-10-1978 issued in favour of D-7 drawn on the State Bank of Hyderabad and Calcutta, when presented by D-7 on 26-10-1978 was dishonoured on 02-11-1978 with endorsement "refer to drawer"; therefore, D-7 filed O.S. No. 186 of 1979 against the plaintiff and defendants 1 to 4 for

recovery of Rs. 92,543-10 ps. before the II Additional Judge, City Civil Court, Hyderabad; that the theft of the stocks from the godowns of the plaintiff at Jeedimetla and Calcutta occurred when some people brought a lorry, broke open the locks and took away the goods on 03-11-1978. She contended that the plaintiff and D-2 in collusion with each other caused disappearance of the hypothecated goods for their wrongful gain and to cause loss defendants 5 to 7, and in fact there was no theft at all; that it is not known whether the plaintiff Bank had preferred any claim against the insurance company in respect of the missing stock. She contended that D-5 to D-7 are not liable to pay the suit amount. She also contended that D-1 to D-4 and D-8 are alone liable to pay the outstanding amount to the Calcutta and Hyderabad Branches of the plaintiff.

8. D-6 filed memo adopting the written statement of D-5.

9. D-7 filed a written statement admitting the partnership but denying the rest of the plaint averments. He contended that he never approached the plaintiff for any credit facility and he has no knowledge under which circumstances, the loan was granted to D-1 firm overlooking all formalities and procedures. He also denied that he offered his personal guarantee for the loans advanced by D-1 firm. He adopted the allegations made in the written statement of D-5.

10. D-8 filed written statement reiterating the averments in the written statement of D-1 and D-2. He contended that since the plaintiff could not keep the pledged goods safe and had allowed them to be removed, it has to adjust the value of the pledged goods in respect of the outstanding dues from the defendants as per law. He stated that D-1 is entitled for reimbursement of Rs. 2,11,531-25 ps from the plaintiff and after adjusting the suit amount, the plaintiff has to refund Rs. 48,278-39 ps. to D-1. He further prayed that if the suit is decreed, the plaintiff Bank should be directed to first proceed against D-1 to D-7 and then to proceed against D-8 for the balance.

11. On the above pleadings, the Court below framed the following issues:

1. Are the defendants-2 to 6 partners of the 1st defendant?

2. Are defendants 7 and 8 guarantors for defendants 1 to 6?

3. Whether the defendants are liable to pay the suit claim?

4. Did the disputes inter se between the defendants exonerate all or any of them from the liability of the plaintiff?

5. To what relief?

12. The plaintiff got examined P.W. 1 and marked Exs. A-1 to A-11. The defendants got examined D.Ws. 1 and 2 and marked Exs. B-1 to B-35.

13. The Court below held that D-1 to D-6 are partners of D-1 firm and this fact is proved by the evidence of P.W. 1, D.Ws. 1 and 2 and by Ex. B-3; that D-7 and D-8 are guarantors for D-1 to D-6; that D-1 to D-6 executed Exs. A-1 promissory note for Rs. 2,25,000/- in favour of D-7 and D-8, who in turn endorsed the same in favour of plaintiff under Ex. A-2; that D-7 executed a guarantee agreement Ex. A-5 in favour of the plaintiff; as such all the defendants had jointly executed documents in favour of the plaintiff-Bank and the disputes inter se among the defendants have no relevancy to the suit and they would not exonerate the defendants from liability to pay the suit amount to the plaintiff. It also held that the plaintiff did not accept the guarantorship of D-6 and D-7 in view of Exs. B-5, 12, 15 and 25 and therefore D-7 was discharged from liability in his capacity as a guarantor for the loan sanctioned by the plaintiff-Bank; that in view of Ex. B-5, D-5 and D-6 retired from the partnership and D-7 was also relieved of the technical advisorship of D-1 firm; Ex. B-5 was sent to plaintiff with covering letter Ex. B-25 and the receipt of Ex. B-5 was admitted by P.W. 1 and also under Ex. B-12; so D-5 to D-7 are not liable to pay the suit amount; and D-2 to D-4 and D-8 alone are liable to pay the suit amount. It thus partly decreed the suit.

14. However it held that the plaintiff-Bank took into possession, goods of the D-1 firm at Hyderabad and Calcutta valued at Rs. 2,11,531-25 ps on 01-09-1978 and the said goods were stolen; that D-7 was acquitted by the Judicial First Class Magistrate''s Court, Medchal under Ex. B-33/judgment dt. 31-12-1988 in C.C. No. 121 of 1982; in view of the same, the plaintiff has to adjust the amount of Rs. 2,11,531-25 ps to the suit amount and even after such adjustment, there remains, the balance of Rs. 46,275-39 ps. It held that the defendants had not made any counter claim by paying any Court Fee on the said amount, and so no direction can be granted to refund the said amount.

15. Aggrieved thereby, the plaintiff Bank has filed this appeal.

16. The appeal has been dismissed for default as against respondents 1 to 4 and 8 on account of non-payment of process fee/batta as directed in the conditional order dt. 17-10-2011 passed by this Court.

17. Heard Sri Ch. Siva Reddy, learned counsel for the appellant and Sri Subrahmanyam Korella for the respondents 5 to 7/D-5 to D-7.

18. The endeavour of the appellant/plaintiff in the appeal is to also make respondents 5 to 7 herein i.e., D-5 to D-7 liable for the suit amount and also to get a decree for the suit amount against all defendants.

19. The learned counsel for the appellant/plaintiff contended that the plaintiff-Bank had not accepted the retirement of D-5 and D-6 partners from the Bank even though the letter Ex. B-5 dt. 23-10-1978 was sent by 1st defendant to the plaintiff and that they continue to be liable for the suit debt. He also contended that the finding of the Court below that D-7 ceased to be a guarantor is not correct because D-7 had admittedly signed the

guarantorship agreement Ex. A-5 dt. 13-02-1978 of the cash credit loan of Rs. 2,25,000/- given to D-1. Even though the plaintiff Bank addressed a letter Ex. B-15 dt. 27-05-1978 asking for substitution of guarantorship of 7th defendant by other guarantors, and as no fresh guarantors acceptable to the Bank were furnished, D-7 continues to be liable as a guarantor for the debts due by D-1 firm and therefore, the finding of the Court below that D-7 ceased to be a guarantor is erroneous in law. He further contended that the liability of D-7 is coextensive with D-1 to D-6 in view of Section 128 of the Contract Act, 1872 and therefore, D-2 to D-6 being partners of the D-1 firm are jointly and severally liable u/s 25 of the Partnership Act, 1925 and D-7 is liable u/s 128 of the Contract Act, 1872. He also contended that even if the appeal is dismissed against D-1 to D-4 and D-8, there is no impediment for the appeal to be proceeded against D-5 to D-7. He relied upon Jatindra Kumar Dass Vs. Dhirajlal Vrajlal Kanakia, , and State Bank of India Vs. Messrs. Indexport Registered and others,

20. The learned counsel for the respondents 5 to 7/D-5 to D-7 however contended that the finding of the Court below that D-5 to D-7 are not liable is valid and proper and therefore the appeal be dismissed as against D-5 to D-7. He also contended that on the dismissal of the appeal on account of non-payment of process fee to D-1 to D-4 and D-8, it cannot be proceeded with even as against D-5 to D-7. Alternatively he also contended that even if D-5 to D-7 are liable for the suit debt, still on account of the fact that goods worth Rs. 2,11,531-25 ps (which had been taken custody by the plaintiff-Bank from D-1 firm) were lost and the Criminal Court had acquitted D-7 of the charge of theft of the said goods, the suit amount is to be adjusted against the value of the goods lost and in this view of the matter, the appeal be dismissed.

21. I have noted the submissions of both sides.

22. The following points arise for consideration in the appeal:

(i) Whether the dismissal of the appeal against some of respondents bars this court from considering the appeal?

(ii) Whether D5 and D-6 are liable for the suit amount?

(iii) Whether D-7 is liable for the suit amount?

(iv) Whether the judgment and decree of the trial court is liable to set aside?

Point (i):

23. u/s 25 of the Partnership Act, every partner is liable jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

24. In Sahu Rajeshwar Nath Vs. Income Tax Officer, C-Ward, Meerut and Another, the Supreme Court held that under the Partnership Act, 1925 the liability of the partners of a

firm is joint and several and it is open to a creditor of the firm to recover the debt of the firm from any one or more of the partners.

25. This principle has been reiterated in Ashutosh Vs. State of Rajasthan and Others, In the said case, it was held that a debt obtained against a partnership firm can be executed by attachment of the house property of it''s partner on the principle that a partner is always liable for a partnership debt.

26. In Jatindra Kumar Dass (supra), the Calcutta High Court has also held that it is open to a creditor to sue one of the partners alone for recovery of a debt of a firm and that it is not necessary to implead all the partners of a firm in the suit.

27. In view of the above legal position, I am of the opinion that the dismissal of the appeal against D-1 to D-4 does not in any way bar this Court from proceeding with the appeal as against D-5 and D-6. Therefore, the contention of the learned counsel for the respondents 5 and 6/D-5 and D-6 that the appeal having been dismissed against D-1 to D-4, it cannot be allowed to be proceeded with in regard to D-5 and D-6, is rejected.

Point (ii):

28. It is true that under Ex. B-5 dt. 23-10-1978, D-5 and D-6 retired from D-1 firm and Ex. B-5 was sent under Ex. B-25 dt. 26-10-1978 to the plaintiff Bank. It is also true that the receipt of Ex. B-5 was admitted by P.W. 1 in her evidence as well as Ex. B-12.

29. u/s 32 of the Partnership Act, 1925, the retirement of D-5 and D-6 as partners of D-1 firm would not exonerate them from liability to third parties in respect of debts of the firm incurred prior to their retirement. Therefore, even if notice has been given to the plaintiff Bank of their retirement, they continue to be liable for the debts of the firm prior to Ex. B-5 dt. 23-10-1978. Therefore, the finding of the Court below that D-5 and D-6 are not liable to pay the suit amount to the plaintiff Bank is not correct as the liability sought to be enforced by plaintiff is for the period prior to 23-10-1978. Point (ii) is answered accordingly.

Point (iii):

30. As regards D-7, under Ex. B-15 letter dt. 27-05-1978, the Bank wrote to D-1 that the suit had been filed by another branch of the Bank against D-7 and had called upon D-1 firm to arrange alternative guarantors in the place of D-7. Three other persons who were sought to be substituted as guarantors by D-1 firm in the place of D-7 were not acceptable to the Bank. Therefore, the liability of D-7 towards Bank under Ex. A-5 guarantee deed continues as D-7 was not released by the Bank from his obligation as guarantor. In this view of the matter I am of the opinion that D-7 is liable to discharge the dues, if any of D-1 firm, to the plaintiff. Therefore the finding of the trial Court to the contra is set aside. This point is answered accordingly.

Point(iv):

31. However the fact remains that on 01-09-1978, the custody of the stocks of the 1st defendant firms at Hyderabad and Calcutta valued at Rs. 83,531-25 ps and Rs. 2,28,000/- respectively totaling Rs. 2,11,531-25 ps were taken over by the plaintiff Bank. Admittedly while the said goods were in the custody of the plaintiff Bank, there was a theft and the plaintiff Bank lost the custody of the goods. Although the plaintiff Bank alleged that D-7 committed the said theft, the Judicial First Class Magistrate, Medchal in his judgment Ex. B-33 dt. 31-12-1998 in C.C. No. 121 of 1982 exonerated D-7 and acquitted him of the charge of theft of the pledged goods. No evidence is placed by the plaintiff-Bank in this suit to prove that it was D-7 who was responsible for the theft of the goods.

32. In Lallan Prasad Vs. Rahmat Ali and Another, the Supreme Court held that where a pawnee files a suit for recovery of a debt, though he is entitled to retain the goods, he is bound to return them on payment of the debt; that the right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and therefore if he has put himself in a position where he is not able to redeliver the goods, he cannot obtain a decree. It held that if it were otherwise, it would mean that he would not only recover the debt and also retain the goods pledged and the pawner in such a case would be placed in a position where he incurs a greater liability than he bargained for under the contract pledged. It also held that if the value of the pledged property is less than the debt, and in a suit for recovery of debt by the pledgee, the pledgee is not in a position to return the pledged goods, he has to give credit for the value of the goods and would be entitled then to recover only the balance.

33. In this view of the matter the Court below is right in observing that the value of the pledged property being more than the amount claimed in the suit by the plaintiff-Bank, if credit is given for the value of the goods lost, then the plaintiff cannot have a decree.

34. Even as against the guarantor, D-7, the plaintiff Bank would not be entitled to a decree. u/s 141 of the Contract Act, 1872 a guarantor is entitled to benefit of every security which the creditor had against the principle debtor at the time when the contract of guarantee was entered into and if the creditor loses the said security, the guarantor is discharged to the extent of the value of the security.

35. In State Bank of Saurashtra v. Chitranjan Rangnath Raja and Another AIR 1980 S.C. 1528, goods pledged to a Bank were lost on account of negligence of the Bank. The Supreme Court held that Section 141 of the Contract Act would be attracted and the surety would be discharged to the extent of the security lost.

36. In the present case also, there is no explanation forthcoming from the plaintiff-Bank as to how goods pledged to it and which were in its exclusive custody were lost. It has to be presumed that on account of the negligence of the plaintiff Bank they were lost.

Therefore, Section 141 of the Contract Act, 1872 would be attracted and the guarantor D-7 is also discharged to the extent of the value of the goods lost. As the value of the goods lost is admittedly more than the value of the goods claim, the plaintiff Bank would not be entitled to a decree. Therefore this point is answered against the appellant Bank. In this view of the matter, there are no merits in the appeal and therefore the appeal is dismissed. But in the circumstances, without costs.