THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.884 OF 2014

ORDER:

Aggrieved by the order in E.P.No.73 of 2013 in O.S.No.46 of 2012 dated 20.01.2014 passed by the Additional Senior Civil Judge, Tirupati, the petitioner/D.Hr preferred this revision under Section 115 of the Civil Procedure Code (for short 'C.P.C'), whereby, the Court below partly allowed the execution petition for attachment of E.P. schedule property of the 5th respondent/5th J.Dr to realize her share of amount by proceeding against the E.P. schedule property.

The parties to the revision will be hereinafter referred as petitioner and respondents for the sake of convenience.

The petitioner filed E.P.No.73 of 2013 under Order XXI Rules 54, 64 and 66 C.P.C for attachment of the E.P. schedule property of 5th respondent and for sale of the same for realization of the decree amount. The petitioner is a company, filed O.S.no.46 of 2012 for recovery of amount, obtained decree on 28.12.2012 for recovery of a sum of Rs.2,41,195/-. As the respondents/J.Drs failed to discharge the debt due under the decree, the petitioner filed E.P.No.73 of 2013 for realization of the debt due by attaching the immovable property of 5th respondent by sale of the same under Order XXI Rules 54, 64 and 66 C.P.C.

The 5th respondent/5th J.Dr filed counter denying material allegations, *inter alia*, contending that though respondents 1 to 4 & 6 are having sufficient means or income to discharge the debt due under the decree, the petitioner and respondents 1 to 4 & 6 colluded together and got filed E.P.No.73 of 2013 against the 5th respondent. The petitioner company filed the original suit for recovery of amount in connection with chit transaction on the file of Senior Civil Judge, Kadapa and the said suit was decreed on 28.12.2012. The said decree was transferred to Additional Senior Civil Judge, Tirupati and the petitioner company intends to realize the total amount by proceeding against the 5th respondent. The 5th respondent in her counter stated that she is not getting any monthly income, as had no source of income. Further, the 5th respondent is only having property described in the schedule and she is totally depending on it. Further, number of execution petitions are pending against the 5th respondent in different courts and they are proceeding against 5th respondent for realization of the debt due under the decree. The 5th respondent further stated in the counter that her family members, including her school going children are dependent on her. Further, the market value of the schedule property is more than Rs.40 lakhs, but the petitioner by attachment and sale of the property intend to deprive the 5th respondent to eke out her livelihood. In such case, the petitioner cannot proceed against the property of the 5th respondent. The petitioner never demanded for payment of decreetal amount and the 5th respondent neglected to pay the amount due under the decree.

During enquiry, no oral or documentary evidence is adduced or produced.

Upon hearing argument of both the counsel, the Additional Senior Civil Judge, Tirupati passed the impugned order limiting liability of 5th respondent to her share. Aggrieved by the said order, the present revision is filed under Section 115 C.P.C challenging the exercise of jurisdiction which is not vested on the Trial Court to pass such an order and that the jurisdiction was exercised irregularly and illegally.

It is also contended that, if the order passed by the Trial Court is allowed to sustain, it would lead to miscarriage of justice and eventually result in irreparable loss to the petitioner. Joint and several liability was attached to the respondents/J.Drs and in the absence of any contract to the contrary, the petitioner is entitled to proceed against anyone of the J.Dr for realization of the debt due to it.

During hearing, learned counsel for the petitioner reiterated the contentions raised before the Trial Court raised in the grounds of appeal, placed reliance on the judgment of Apex Court in **Central Bank of India v. C.L. Vimla and others**[1], to contend that the liability of the J.Drs is joint and several and the D.Hr can proceed against anyone of the J.Dr. Further, learned counsel for the petitioner contends that according to Section 128 of Indian Contract Act, the liability of the surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract. In

[1] (2015) 7 Supreme Court Cases 337

such case, the petitioner is entitled to proceed against anyone of the J.Drs to realize the debt due to it, whose liability is joint and several and prayed to set-aside the order passed by the Trial Court and allow the petitioner to proceed against the 5th respondent to realize the debt due to it by attachment by sale of property under Order XXI Rules 54, 64 and 66 of C.P.C.

Per contra, learned counsel for the 5th respondent supported the order passed by the Trial Court basing on the principle laid down by the Apex Court in **Ram Kishun and others v. State of U.P. and others**[2] and judgment of this Court in **M. Venkataramanaiah v. Margadarsi Chit Fund Limited, Kadapa**[3] to contend that the liability of J.Drs/guarantors is limited to their share, in view of Section 146 of Indian Contract Act and the co-sureties are liabile to contribute equally. But, in case there are more than one surety/guarantor they have to share the liability equally, unless the agreement of contract provides otherwise. On the strength of these principles laid down by the Supreme Court and this Court in the above two judgments, the learned counsel for the 5th respondent requested this Court to dismiss the revision, since there is no irregularity or illegality in exercise of jurisdiction while passing the order impugned in this revision.

Considering rival contentions and perusing the material available on record, the only point that arose for consideration is

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[2] 2012 (5) ALT 39 (SC)
[3] 2009 (4) ALD 300

"***Whether the liability of the 5th respondent/5th J.Dr is limited to her share, in view of Section 146 of the Indian Contract Act. If so, whether the petitioner is entitled to proceed against the property of the 5th respondent for realization of the entire decreetal debt due to it by attachment and sale of property described in the E.P. schedule?".***

P O I N T:

Admittedly, the petitioner obtained decree against the respondents, making them liable for payment of the debt due, jointly and severally. At this juncture, it is relevant to extract the operative portion of decree the in O.S.No.46 of 2012 dated 28.12.2012 for better appreciation of the case.

1. ***That the defendants do pay to the plaintiff a sum of Rs.2,41,195/- with subsequent interest at the rate of 12% from the date of filing of the suit till the date of passing of the decree and thereafter at 6% per annum from the date of passing of the decree till the date of realization.***

2. ***That the defendant no.1 is permitted to pay the decretal amount in 4 equal monthly instalments.***

3. ***If the 1st defendant fails to pay any instalment, the plaintiff's company is at liberty to recover the entire suit amount in lumpsum.***

4. ***That the defendants do also pay to the plaintiff a sum of Rs.14,500/- being the costs of the suit and do bear their own costs.***

The contents of the operative portion of the decree and judgment made it clear that the respondents are liable to pay the debt and there is liability is joint and several, it appears from the record that the first defendant is principal debtor and the other respondents are the guarantors or sureties for payment of the debt due to the petitioner company. The operative portion also specifically permitted first defendant to pay the decretal amount in 4 equal monthly instalments. Taking advantage of the decree, the petitioner filed E.P.No.73 of 2013 for attachment of immovable property described in the schedule and for sale of the same, under Order XXI Rules 54, 64 and 66 of C.P.C, as the 1st respondent failed to discharge the debut due as directed by the Trial Court and the other respondents failed to discharge the decree debt, despite issuing reminders. It is contended that the fifth respondent filed counter without raising any specific contention to attract Section 146 of Indian Contract Act, while contending that the other respondents having means to pay the decree debt and that the petitioner cannot proceed against the 5th respondent alone, who is totally dependent upon the property sought to be attached. But the Court below, based on the principle laid down by the Apex Court in **Ram Kishun and others**[2], limited the liability to the extent of share of 5th respondent and directed her to pay the debt due. No doubt, it is purely a legal question and such question can be raise at any time and there need not be any pleadings to that effect. Accepting the contention of the 5th respondent, the Trial Court, passed the order under challenge.

The basis for passing such an order under challenge is Section 146 of Indian Contract Act and it is apposite to extract Section 146 for better appreciation of facts.

> ***"146. Co-sureties liable to contribute equally:_*** *Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor"*

Chapter VIII of Indian Contract Act deals with Contract of Indemnity and Guarantee, rights and liabilities of the guarantors and co-sureties against one another. It is clear from Section 146 of Indian Contract Act that the co-sureties are liable to contribute equally and it is a right of one surety against co-sureties. The language employed in Section 146 of the Indian Contract Act clearly indicates that in the absence of any contract to the contrary, each surety, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor. The word '***as between themselves***' used in Section 146 indicates that it is right of a surety against the co-sureties to claim contribution of equal share of the debt. In view of the finding recorded by the Court below, it is relevant to advert to Section 43 of the Indian Contract Act, which deals with right of promisee to compel anyone of the joint promisors to perform and Section 43 reads as follows:

> *"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise."*

A co-joint reading of Sections 146 and 43 of Indian Contract Act, the surety is entitled to claim contribution against the co-surety, in the absence of any contract to the contrary, the co-surety is liable to contribute equally for the whole debt. Similarly, Section 43 permits the promisee to compel anyone or more of the joint promisors to perform the whole of the promise in the absence of express agreement to the contrary, when two or more persons make a joint promise. Therefore, it is the right provided under Section 146 of Indian Contract Act is against to 2nd part of Section 32 of the Contract Act. If, these two provisions are read together, the right of the surety against the other co-surety is only to claim contribution or discharge of debt to the decree holder. Therefore, the petitioner cannot be restrained from proceeding against anyone of the respondents when the decree is clear that the respondents are liable to pay the debt due under the decree jointly and severally. If, such interpretation is given, it amounts to reviewing the judgment and modifying the decree, limiting the liability of the sureties to the extent of their share of liability i.e. equal liability in the absence of any contract to the contrary.

An identical question came up for consideration in **Ram Kishun and others**[2], wherein, the Supreme Court held that the liability of a surety is co-extensive with that of principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Thus, each respondent/J.Dr has to contribute equally for discharge of the debt remained unpaid in view of Section 146 of Indian Contract Act. There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the 'Contract Act'), the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide: **The Bank of Bihar Ltd. v. Dr. Damodar Prasad and Anr**[4]; **Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam and Anr.**[5] **Union Bank of India v. Manku Narayana**[6]; and **State Bank of India v. Messrs. Indexport Registered and Ors.**[7]).

In **State Bank of India v. Saksaria Sugar Mills Ltd. and Ors**[8]**,** the Apex Court while considering Section 128 of the Contract Act held that liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (See also: **Industrial Investment Bank of India Ltd. v. Biswasnath Jhunjhunwala**[9]**;** and **United Bank of India v. Satyawati Tondon and Ors.**[10]).

As per the discussion and observations made in paragraphs 5 & 6 of the judgment referred supra, it is for the petitioner/D.Hr

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[4] AIR 1969 SC 297
[5] AIR 1982 SC 1497
[6] AIR 1987 SC 1078
[7] AIR 1992 SC 1740
[8] AIR 1986 SC 868
[9] (2009) 9 SCC 478
[10] AIR 2010 SC 3413

to proceed against anyone of the respondents/ J.Drs and that the liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. So, the law declared by the Apex Court is abundantly clear that it is the choice of the D.Hr to proceed against anyone of the respondents/J.Drs for realization of dthe decree debt. But, incidentally, came to conclusion that each J.Dr is liable to contribute equally to the debt remained unpaid, in the absence of any contract to the contrary.

In the similar lines, this Court in **M. Venkataramanaiah**[3] case, held as follows:

> *"20. Another facet is that even if the execution proceedings were otherwise tenable and legal, the obligation on the part of the petitioner, as a co-surety, was guided by Sections 146 and 147 of the Act, which have already been extracted in the preceding paragraphs. Admittedly, there is no contract to the contrary and at the most, the petitioner was liable to share the whole debt equally along with other five sureties. There was absolutely no basis for the 1st respondent to proceed only against the petitioner, for the entire amount."*

Learned counsel for the petitioner/D.Hr placed reliance on the judgment in **Industrial Finance Corporation of India Ltd. v. The Cannanore Spinning & Weaving Mills Ltd. and ors**[11], wherein, the Division Bench of Supreme Court reiterated the principle to the extent of joint and several liability of debtor and surety/guarantor laid down in **Ram Kishun and others**[2], but in a different context and held that a guarantor cannot be escaped form the liability for payment of the debt due to the principal debtor. But, the judgments of the Apex Court, at best would show that the liability of the surety is co-extensive with that of the principal

[11] AIR 2002 SC 1841

debtor and thereby, the 5th respondent is liable for payment of entire decretal amount, as the respondents have to contribute their share of decree debt equally, in the absence of any contract to the contrary.

In all the judgments referred supra, the Courts did not decide the right available to surety against the co-surety and whether such right can be exercised when execution petition is filed by decree holder against anyone of the J.Dr even before payment by one surety in excess of his share and whether any such right is accrued to the surety to proceed against the co-surety.

At this stage, it is relevant to advert to Section 140 of Indian Contract Act which deals with rights of surety on payment of performance and it reads as follows:

> ***140. Rights of surety on payment or performance.*** *- Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.'*

Section 140 of Indian Contract Act visualise that when one co-surety discharged the debt due to the principal debtor, he will step into the shoes of the creditor to proceed against the other sureties for realization of the amount he invested or deposited in discharging the debt, in the absence of any contract to the contrary.

Section 140 of the Act is limited to proceed against the principal debtor, but whereas, Section 146 of the Act deals with the right of co-surety to proceed against other co-sureties, if, one surety paid or discharged the debt due to the creditor in the event of principal debtors due to pay the debt, in excess of his share. Therefore, two provisions viz., Sections 140 conferred right on the surety to proceed against the principal debtor and it is an implied indemnity. Whereas, Section 146 of the Act conferred right of a surety to claim contribution against the co-sureties for the debt he paid to the creditor in excess of his share of liability. Such co-surety is entitled to claim right over the other co-sureties only on payment of whole or part of the debt in excess of his share. This right is known as contribution between co-sureties. The requisites for application of Section 146 of the Act are as follows:

(i) ***Two or more should be co-sureties,***
(ii) ***For the same debt or duty,***
(iii) ***They be so***
   a. Jointly or severally
   b. Whether under same or different contracts
   c. With or without the knowledge of each other
(iv) ***In such event as above postulated in the absence of contract to the contrary,***

The sureties are liable to pay each an equal share of the debt or of that part of it which yet remains unpaid by the principal debtor to the creditor.

The right to contribution as among co-sureties does not arise from contract but on principles of equity. In **S.A. Ramanathan v. M.P. Palaniappa**[12] The Madras High Court has expressed that it is wrong to regard a claim for contribution as arising out of a contract enforceable at law, such a claim is independent of contract and arises out of the necessity to do equity to a person

[12] AIR 1939 Mad 531, 539

who has been damnified by the default of the person liable in failing to fulfil an obligation which was essentially his own. The Doctrine of Right to Contribution applies only as between co-sureties. Consequently, a surety for a surety cannot claim this right of contribution. This right also depends upon the creditor's rights against the party from whom the relief of contribution is asked for. Therefore, this right of contribution contemplated under Section 146 of the Act purely depends upon a contract among co-sureties between or among co-sureties. When one surety paid the debt due to the creditor due by the principal debtor either whole or in part, he is entitled to claim the following rights.

Rights of co-surety

(i) *The rights of surety arise only on payment by him to the creditor. His right to contribution from a co-surety turns on the fact as to whether he had paid more than his proportionate share. The creditor has to be paid in full and so payment of part of the debt cannot lead to any claim for contribution. The exception is where the amount is payable in instalments in which event on payment of that instalment, a right to contribution arises. If he pays whole of the interest but not the whole of his share of the principal dues, he cannot base any claim for contribution to interest.*
Baron Parke formulated the issues thus:

"What then is the nature of the equity upon which the right of action depends? Is that, when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burden, or that, when he has paid more than his share he shall have a right to be reimbursed whatever he has paid beyond nit, or must the whole of the debt be paid by him or some one liable before he has a right to sure for contribution at all? We are not without authority on the subject and it is in favour of the second of these propositions.

(ii) *It may be noted that Section 146 has the words 'in the absence of a contract to the surety; so the rights of the contribution can be varied by the co-sureties on agreement.*

(iii) *Merely because the creditor has given time to the surety who seeks to enforce contribution, the right for contribution from the co-surety is not lost or affected.*

(iv) *A surety who seeks to enforce the right of contribution if he has been guilty of fraudulent concealment he cannot have such reimbursement.*

(v) *The right of contribution is individual to the co-surety. So also is his liability. So where one co-surety has not chosen to appeal and his right of appeal has abated, there is no bar to other co-surety from preferring an appeal.*

(vi) *As to claim of interest, on equitable principles the co-surety is entitled to it from the date on which his payment to the creditor becomes in excess of his share. It is not to be assessed from the date when both the liability and the amount are ascertained as well as adjudged.*

(vii) *The surety has also certain rights before payment. As pointed out in a chancery case, a creditor may compel one surety to pay the whole amount. In such an event the surety may protect his interest as against his co-surety by suing for a declaration of his right to contribution; or he can obtain an order for the co-surety to pay to the latter a proportion of the guaranteed debt; or even he can obtain a prospective order directing the co-surety; upon payment by the surety of his own share of the common liability, to indemnify him against further liability. This is so because, otherwise the surety may be ruined by the creditor's demands if he is not enabled as above to obtain judicial aid.*

(viii) *When one of the sureties becomes insolvent the entire liability to pay the creditor the full amount lies on the other co-sureties.*

(ix) *The benefit of securities taken by any of the surety from the principal debtor is equally liable to all co-sureties. This is so even if the principal debtor and the contracting surety agree that security should not be available to the other co-sureties. In fact the security will ensure to the full extent of its value in favour of all the sureties until all of them recoup what is due to them. The co-surety's right is limited to a just claim that he should share proportionately in the proceeds of the security (mortgage) when it is released. He cannot plead that his liability be postponed until the realization of the security. If the principal debtor has offered the security for a different debt other than that for which the suretyship exists, the latter cannot base any claim on the security. This is so even if the security is distinctly for another part of the debt.*

(x) *Equality of burden and equal benefit is the basis of co-suretyship.* ***Steel v. Dixon***[13] *expounds this thus: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute and then the law superadds that they should all contribute equally if each is*

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[13] 17 Ch. D 825

a surety to an equal amount; and if not equally, then proportionately to the amount for which each is a surety.

(xi) *Story postulates the rule thus: "Sureties are not only entitled to contribution from each other for monies paid in discharge of their joint liabilities for the principal but they are also entitled to the benefit of all securities which have been taken by any of them to indemnify himself against such liabilities.*

(xii) *If the agreement with the creditor stipulates that a surety is liable only when the co-surety executes also, then the former is not liable in the event of the latter not executing at all the document.*

(xiii) *A creditor has no lien on the security taken by the surety from the debtor. The surety cannot be a trustee of the securities he obtained from the debtor to benefit the creditor.*

(xiv) *A surety's right for contribution from his co-surety can be enforced in a small cause court.*

(xv) *That the surety was ignorant of the existence of other sureties is no answer to a suit for contribution.*

(xvi) *Once a decree is passed again a surety, the latter gets a right to institute a suit for contribution against the co-surety. This appears to be an exception to rule of actual payment.*

(xvii) *The ordinary rule is that a co-surety is liable for an equal amount. But if the sureties are bound by separate deeds and unequal amounts the relevant surety is not liable to contribute beyond the sum mentioned in his own deed.*

(xviii) *A surety cannot claim as a rule costs in defending unless the co-sureties authorised him to do so. Or it must be that in so defending he acted as a prudent and reasonable man.*

On a close analysis of the law, the principal requisite to claim right against co-surety, such right would arise only when one surety paid a part or whole of the debt in excess of his liability to the creditor due by the principal debtor.

In **Pitt v. Purssord**[14] it was held that, where one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, <u>on the note becoming due, paid the amount, although no demand had been made or action brought against him by the holder, that such</u>

[14] 151 E.R 1152

payment could not be considered voluntary, and that he might use his co-surety for contribution.

In **Muthusami Naidu v. Rayalu Naidu**[15] the Madras High Court was of the view that the defendant having undertaken by the hypothecation bond B-I to discharge the promissory notes was bound to contribute the money to the plaintiff.

In **Hitchman v. Stewart**[16] the Court held that when one of several sureties has paid the principal debt, and some of the co-sureties are insolvent, he is entitled as against the solvent sureties to be repaid their numerical shares of what he has paid, with interest form the time of payment, although the instrument does not contain any express indemnity so as to carry interest as on a speciality. And the insolvent sureties must pay their own costs of being brought before the Court to the final hearing of the cause.

In **Davies v. Evan Humphreys**[17] the Court relying on **Ex parte Gifford**[18] observed that sureties stand with regard to each other in a relation which gives rise to this right amongst others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay, and that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other and if a surety pays a part of the debt only and less than his moiety, he cannot be entitled to call

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[15] AIR 1924 Mad 848
[16] 61 E.R. 907
[17] 151 E.R. 361
[18] 6 Ves. 805

on his co-surety who might himself subsequently pay an equal or greater portion of the debt, in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other, and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the surety within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share.

In **Re Snowdown**[19], the Court of Appeal held that a surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor.

In **Stirling v. Burdett**[20], the Chancery Division held that interest and premiums constituted one debt, that, until the plaintiffs had paid more than their due proportion of the entire

[19] (1881) 17 Ch.D. 44
[20] [1911] 2 Ch. 418

debt, they could not call on the defendants to contribute; and that it was immaterial that the plaintiffs had paid more than their share of the part which had become due.

In **Dering v. Earl of Winchelsea**[21], the Court of Chancery held that the Doctrine of Contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burthen and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute.

In **Wolmershausen v. Gullick**[22] the Chancery Division while deciding the rights of contribution of principal, surety and co-surety held that a surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability.

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[21] 29 E.R. 1184
[22] [1893] 2 Ch. 514

In **Robinson v. Harkin**[23] the Chancery Division held that the principle established in **Wolmershausen v. Gullick**[25] that the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred form loss occasioned to the trust estate by their joint default. In such case, therefore, time does not begin to run as between the co-trustees until the claim of the *cestui que* trust has been established against one of them.

In **Pendlebury v. Walker**[24] the Court considered the liability of co-sureties and held that where the default of the principal renders all the co-sureties responsible, all are to contribute and then the law superadds that they should all contribute equally if each is a surety to an equal amount; and if not equally, then proportionately to the amount for which each is a surety.

Thus, from the law declared by various Courts in England, Supreme Court of India and judgments of Madras High Court, it is abundantly clear that when one surety discharged the liability of the principal debtor to the creditor, the other sureties are liable to contribute equally based on the Principle of Equity, till the surety paid part or whole of the debt due to the creditor by the principal debtor, the question of claiming right of contribution against the co-surety does not arise. The judgments of England referred supra,

[23] [1896] 2 Ch. 415
[24] 160 E.R. 1072

though not binding precedent under Article 141 of Constitution of India, they are of greater persuasive value, since the principles of Indian Contract Act are borrowed from England.

The judgements of foreign Courts are having highest persuasive value though not binding precedent, as those judgments are not the law declared by the Apex Court under Article 141 of Constitution of India.

In "***Forasol v. ONGC***[25]" the Apex Court observed that the English decisions are of high persuasive value and our Courts should be cautious enough whether the rule laid down can be applied by them in the context of our laws and legal procedure and the practical realities of litigation in our country. Where law is laid down by Supreme Court and reiterated in numerous subsequent judgments, a wider proposition of law laid down in foreign judgment is not acceptable in view of the judgment rendered in "***BSES Ltd. v. Fenner India Ltd.***[26]"

Thus, the judgments of foreign courts though not fall within the ambit of Article 141 of Constitution of India, the Courts in India can draw the principle laid down in those judgments subject to similarity in the provisions of the Act i.e. if the provisions of a particular enactment in India and Foreign Countries are in Pari materia, however no precedent value can be attached to such judgments though they have higher persuasive value.

[25] 1984 (Supp.) SCC 263
[26] (2006) 2 SCC 728

Therefore, in view of the law declared by the Apex Court in the judgments referred supra, the judgments of Foreign Courts are having greater persuasive value and the Court may accept the principles laid down in those judgments when the principles are borrowed from those countries. Consequently, the principles laid down in the judgments referred supra are having greater persuasive value and this Court can follow those principles.

In any view of the matter, in the present facts of the case, an execution petition was filed by a decree holder for realization of the decree debt by attachment and sale of the property of fifth respondent. But, the Trial Court relying on the principle laid down in **Ram Kishun and others**[2] case, concluded that the fifth respondent is liable to his share of amount as surety, since the other co-sureties are liable to their moiety of the debt due to the decree holder. But, the Court did not distinguish the right of surety against the debtor and right of surety against co-sureties under Sections 140 & 146 of the Indian Contract Act and when it would arise more particularly when a decree making all respondents liable jointly and severally. Admittedly, in the present facts, there was no contract limiting the liability of any of the sureties and a decree was passed making all the sureties jointly and severally liable to the debt due. In such case, the direction issued by the executing court in the present facts making liable to pay only a share of 5th respondent appears to be contrary to the law declared by the Apex Court and when a decree was passed against the sureties, the decree holder is entitled to proceed against all or anyone of the judgment debtors to realize the decree debt. If such contention is accepted, the principle under Section 128 of the Act, regarding joint and several liability will be otiose. As such, the decree holder proceeded against the fifth respondent to realize the decree debt in terms of the decree alone. No contract limiting the liability of the petitioner is brought on record or to the notice of this Court. In the absence of any such contract limiting the liability of surety to his or her share, proceeding against the fifth respondent by the petitioner/decree holder for realization of decree debt cannot be faulted. Therefore, the finding recorded by the Executing Court is in consonance with the judgment of the Apex Court in **Ram Kishun[2],** since, the judgment in **Ram Kishun[2]** is directly on the issue and the facts are identical. Therefore, the judgment in **Ram Kishun[2]** is binding precedent both on the Trial Court and Executing Court, though the law referred above is otherwise to maintain judicial discipline this Court is bound to follow the law declared by the Apex Court in **Ram Kishun[2]** case. Consequently, the order passed by the Trial Court does not call for interference of this Court.

In the result, the civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Date:30.08.2017

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