IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 16.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.68 of 2017
and C.M.P.No.1128 of 2015

Tushar Thakkar ...Appellant/Defendant

Vs.

K.Ramdev ...Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 02.07.2016 made in A.S.No.73 of 2014 on the file of the III Additional District and Sessions Court, Coimbatore confirming the judgment and decree dated 02.12.2013 made in O.S.No.570 of 2011 on the file of the II Additional Subordinate Court, Coimbatore.

For Appellant : Mr.A.Thiyagarajan
For Respondent : Mr.A.Kumar,
Addl. Advocate General
for M/s.G.Mutharasu

J U D G M E N T

This Second Appeal is filed against judgment and decree dated 02.07.2016 made in A.S.No.73 of 2014 on the file of the III Additional District and Sessions Court, Coimbatore confirming the judgment and decree dated 02.12.2013 made in O.S.No.570 of 2011 on the file of the II Additional Sub Court, Coimbatore.

2. The defendant who is unsuccessful in both the courts below has come out with the present Second Appeal. The respondent/plaintiff filed O.S.No.570 of 2011 against the appellant for recovery of money. According to the respondent, the appellant borrowed money from Nedunkaadi Bank which was subsequently merged with Punjab National Bank. The respondent stood as guarantor for the amounts borrowed by the appellant. The appellant and respondent created equitable mortgage over their property as collateral security. They did not pay the amounts due to the Bank. The Bank initiated proceedings for recovery of money. The respondent, in order to save his reputation and property, negotiated with Bank and paid a sum of Rs.7,27,024/- as full and final settlement. As per Section 145 of Indian Contract Act, the respondent is entitled to recover money from the appellant and hence filed the suit.

3. The appellant filed written statement denying all the averments made in the plaint and contended that the appellant availed cheque discount facility from the Bank and the Bank failed to present two cheques of the appellant's supplier in time and could not recover the amounts. The Bank committed an error in not presenting the cheques of appellant's supplier. The Bank debited the said amount from the appellant's account. Due to the error committed by the Bank, the appellant sustained loss and could not continue his business. The respondent, without the knowledge and consent of the appellant, in collusion with the Bank, settled the amount. The respondent did not issue any notice to the appellant prior to the settlement to the Bank. The immovable property given as collateral security to the Bank was purchased in the name of the respondent and appellant. The entire consideration for purchase of the property was made by the appellant. Only to take away the said property for his enjoyment and detrimental to the interest of appellant, the respondent has hurriedly settled the dues to the Bank. The respondent has no right to settle the full claim of the Bank and prayed for dismissal of the suit.

4. Based on the above pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the respondent examined himself as P.W.1 and marked twenty four (24) documents as Exs.A1 to A24. The appellant examined himself as D.W.1, but no document was marked on his side.

5. The learned Trial Judge considering the pleadings, oral and documentary evidence, decreed the suit. Against the said judgment and decree dated 02.12.2013 made in O.S.No.570 of 2011, the appellant filed A.S.No.73 of 2014 on the file of the II Additional District and Sessions Court, Coimbatore. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge, considering the materials available on record, judgment of the Trial Court and arguments of the learned counsel for the parties, dismissed the appeal confirming the judgment and decree of the Trial Court.

6.Against the said concurrent findings of the courts below, the appellant has come out with the present Second Appeal.

7. At the time of admission, this court framed the following substantial question of law -

> (i) whether the provisions of Section 145 of the Indian Contract Act can be made applicable to the present case, considering that the respondent was under no compulsion to pay any amount to the creditor, in order to claim contribution from the appellant ?

8. The learned counsel appearing for the appellant

submitted that Section 145 of the Indian Contract Act [hereinafter referred to as "Act"] is not applicable to the facts of the present case. Only under compelling circumstances, the guarantor can pay the amount and claim the same from the principal borrower. In the present case, the respondent ought to have waited till the result of DRT proceedings. The respondent was contesting the proceedings as well as was negotiating for settlement. The respondent, without the knowledge of the appellant, paid and settled the amount with the Bank and in the said circumstances, the appellant is not liable to pay any amount to the respondent. The property mortgaged is joint property of the appellant and respondent and respondent has only ½ share in the said property. The respondent has safeguarded his ½ share of the property. In any event, the respondent is not entitled for any interest as per Section 145 of the Act.

9. Per contra, the learned Additional Advocate General appearing for the respondent contended that the Bank filed O.S.No.720 of 2000 against the appellant and respondent. The said suit was decreed exparte on 23.01.2003. Both the appellant as well as respondent did not file any application to set aside the exparte decree or file appeal against the said judgment and decree. The Bank filed O.A.No.40 of 2006 before DRT, Coimbatore to execute the decree obtained by the Bank, marked as Ex.A5. In such circumstances, the respondent, to save his reputation and his property had negotiated with the Bank and settled the amount. The appellant is aware of the payment made by the respondent. As a guarantor, the respondent paid the amount and is entitled to receive the same as per Section 145 of the Act from the principal borrower and prayed for dismissal of the appeal.

10. Heard the learned counsel for the appellant as well as learned Additional Advocate General for the respondent and perused the materials available on record.

11. It is admitted by both the appellant as well as respondent that appellant borrowed money from the Bank and the respondent stood as a guarantor for the same. It is also admitted fact that the suit filed by the Bank was decreed in O.S.No.720 of 2000 and decree has become final. The Bank filed O.A.No.40 of 2006 before DRT, Coimbatore to execute the said decree. In such circumstances, the respondent, as a guarantor and one of the judgment debtors, paid the amount to save his property.

12.The contention of learned counsel for appellant that only under compelling circumstances, the respondent as guarantor can pay the amount to the creditor and recover the same from appellant is without merit. Section 145 of Contract Act reads as follows:

Section-145

145.Implied promise to indemnify surety -

> In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully. ”

As per Section 145 of the Act, there is implied promise by the principal debtor to indemnify the surety. The surety can recover all the amounts rightly fully paid by him to the creditor. Only when the surety wrongly pays the amount, the principal debtor is not liable to pay the said amount to the surety. It is not the case of appellant that respondent wrongly paid the amount to the Bank or respondent has not paid any amount or amount in excess than what is due to the Bank.

13. In addition to the above, from the materials on record, it is seen that the respondent has produced documents to show that Bank obtained decree against the appellant and respondent and also filed O.A.No.40 of 2006 to execute the decree. The respondent has proved that under compelling circumstances only, he settled the amount with the Bank. The appellant, in his cross examination has admitted that he knew that the respondent paid approximately a sum of Rs.8,00,000/- and settled the amount with the Bank. The appellant disputed the claim of the Bank on the ground that Bank committed an error in not presenting the two discounted cheques in time and therefore could not recover the said amount. This contention of the appellant relates only to cheque discount facility. The Bank has filed the suit for recovery of the amount availed by the appellant with various facilities and obtained decree against the appellant and respondent. The appellant did not file any appeal challenging the decree obtained by the Bank. The courts below have considered all the above materials on record, especially Section 145 of the Act, accepting the contention of the respondent and decreed the suit and dismissed the First Appeal filed by the appellant. The respondent is entitled to recover the amount paid by him as guarantor as per Section 145 of the Act as well as Judgment Debtor and recover the same from appellant. There is no error of law in the said finding.

For the above reasons, the substantial question of law is answered against the appellant.

13. In the result, Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

// True Copy//

Sub Assistant Registrar

To

1.The III Additional District and Sessions Judge, Coimbatore
2.The II Additional Subordinate Judge, Coimbatore.

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The Section Officer,
VR Section, High Court,
Madras-104.

+1cc to Mr.G.Mutharasu, Advocate SR.No.46481
+1cc to Mr.A.Thiyagarajan, Advocate SR.No.46493

S.A.No.68 of 2017
and C.M.P.No.1128 of 2015

SV(CO)
SMI/28.08.2018