

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.03.2018
PRONOUNCED ON : 28.03.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.2262 of 2003

The Branch Manager,
United Bank of India,
171, Rangapillai Street,
Pondicherry - 605 001.

... Appellant/Respondent-1/
Defendant

Vs.

1. M.Govindaraj
2. T.N.Parthiban

...1st Respondent/Appellant/Plaintiff
... 2nd Respondent/2nd Respondent/2nd
Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 24.02.2003 made in A.S.No.36 of 2002 on the file of the Principal District Judge at Pondicherry, reversing the judgment and decree dated 08.02.2002 made in O.S. No.140 of 2001, on the file of the Second Additional District Munsif, Pondicherry.

For Appellant : Mr.S.R.Sundaram

For R1 : Mrs.V.Srimathi

For R2 : No appearance
Set exparte vide order
dated 13.03.2018

JUDGMENT

This second appeal is directed against the judgment and decree dated 24.02.2003 passed in A.S.No.36 of 2002, on the file of the Principal District Judge, Pondicherry, reversing the judgment and decree dated 08.02.2002 passed in O.S. No.140 of 2001, on the file of the Second Additional District Munsif Court, Pondicherry.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for mandatory injunction.

4. The case of the plaintiff, in brief, is that he stood as the guarantor to the second defendant in C.C. A/c.No.34 for availing overdraft facility in the first defendant's bank. At the time of executing the guarantee deed, he had deposited original title sale deed dated 15.03.1991 and since the plaintiff is in urgent need of huge amount for his family expenses and intended to sell his house property's holding rights through the deposit of title deeds, hence, the plaintiff approached the first defendant bank along with the second defendant, for which, the first defendant advised to provide another surety to substitute the plaintiff's surety and thereby, the second defendant offered another property as surety for the substitution of the surety given by the plaintiff and the said offer of the second defendant has been accepted by the first defendant and the second defendant had also signed the necessary papers in favour of the first defendant for the substitution of the surety and the first defendant had assured that the original title deeds would be returned after due intimation to the regional office. Despite the same, the first defendant had not returned the title deeds and hence, the plaintiff approached the first defendant for the return of the same and the first defendant informed the plaintiff that the regional office had instructed vide letter dated 24.08.1998 that the documents are to be returned after two months from the date of intimation. But, as on date, as the first defendant had not come forward to return the title deeds, despite repeated demands and also issuance of the lawyers notice, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the first defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is only M/s. Thirubuvanam silk house, represented by its proprietor, the second defendant, which had availed the loan from the first defendant and the correspondence between the first defendant bank and its regional office would not give any cause of action to the plaintiff for instituting the suit and the second defendant's firm above stated, availed cash credit loan to the tune of Rs.17,00,000/- and the firm also availed a sum of Rs.5,50,000/- as cash credit limit and the plaintiff stood as a guarantor for the firm by executing equitable mortgage for the property at Pondicherry valued at 7,00,000/- and the plaintiff and the second defendant approached the first defendant for the re-placement of the security, for which, the first defendant agreed for considering the request, subject to the fulfilment of certain terms and conditions and inasmuch as the terms and conditions set out by the first defendant had not been complied with by the second defendant, the first defendant did not consider the demand of the plaintiff and the second defendant for the discharge of liability of the surety offered by the plaintiff and the second defendant has failed to maintain the account properly after availing the sanctioned amount and as on date, a sum of Rs.27,00,000/- is due to be discharged to the bank and hence, the first defendant has taken steps to approach

the debt recovery tribunal for the recovery of the loan amount and hence, the suit laid by the plaintiff is liable to be dismissed.

6. The case of the second defendant, in brief, is that the suit laid by the plaintiff as against him is not maintainable and after admitting that the plaintiff stood as a guarantor for the loan availed by him from the first defendant, according to the second defendant, thereafter, requests were made by the plaintiff and the second defendant to substitute the surety offered by the plaintiff and the first defendant agreed to release the same after the same is exchanged by some other properties and as per the demand made by the first defendant, the second defendant offered his property at Cuddalore worth about more than Rs.25,00,000/- as guarantee and the second defendant has also executed necessary documents and deposited original title deed with the first defendant bank and after accepting the same, the first defendant assured that they would release the documents immediately. Hence, thereafter, there is no role on the part of the second defendant as regards the reliefs sought for by the plaintiff and hence, the suit, as against the second defendant, is liable to be dismissed.

7. In support of the plaintiff's case PW1 was examined, Exs.A1 and A2 were marked. On the side of the defendants DWs 1 and 2 were examined, Exs.B1 to B5 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit. On appeal, the first appellate Court on an appreciation of the materials placed, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Aggrieved over the same, the present second appeal has been laid.

9. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration:

"Whether the judgments and decrees of the lower Appellate Court are sustainable in law, as the entire evidence which is relevant to decide the issue and the relevant question of fact applicable to the facts of the case were not taken into consideration?"

10. It is not in dispute that M/s. Thirubuvanam silk house, represented by its proprietor, the second defendant, availed loan from the first defendant Bank. It is also not in dispute that the plaintiff stood as a guarantor for the said loan transaction by executing a mortgage deed of his property and depositing the sale deed relating to his property. Now, it is the case of the plaintiff that, inasmuch as he requires amount for settling his family expenses and needs the sale deed

pertaining to his property offered as security for arranging the sale of the same, it is his case that he along with the second defendant approached the first defendant bank and requested for release of the security and the same had been accepted by the first defendant bank provided sufficient security is offered in the place of the security already furnished by the plaintiff and it is the further case of the plaintiff that the second defendant had offered his property as security in substitution of the same and the same has been accepted by the first defendant bank and despite the same, the first defendant bank did not come forward to release the sale deed of the plaintiff's property as promised and hence according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

11. The first defendant has admitted that the plaintiff and the second defendant had approached them for the release of the security offered by the plaintiff and according to first defendant bank, the first defendant bank agreed to consider the request, provided, they fulfil certain special terms and conditions and according to the first defendant, inasmuch as the second defendant failed to fulfil the above said terms and conditions, it is stated that the request of the plaintiff and the second defendant to substitute the surety offered by the plaintiff was turned down and hence, according to the first defendant, the plaintiff's suit is liable to be dismissed as devoid of cause of action.

12. The second defendant has sailed with the plaintiff's case and according to him, he had offered additional security in substitution of the security furnished by the plaintiff and the same has been accepted by the first defendant bank and promised to hand over the title deed of the plaintiff property and therefore, according to the second defendant, he is not a necessary party to the suit proceedings and the suit is liable to be dismissed.

13. From the pleas set out in the pleadings and the evidence offered in the matter, it is evident that the plaintiff and the second defendant had approached the first defendant bank for releasing the security offered by the plaintiff towards the loan in question. As above seen, admittedly, the plaintiff stood as a guarantor for the loan availed by the second defendant's firm and thereby, furnished the title deed of his property as security to the Bank for the discharge of the said loan amount. Now, according to the first defendant, the request of the plaintiff and the first defendant was agreed to be considered provided, they fulfil certain terms and conditions and further, according to the first defendant, as the second defendant failed to comply with the same, the request to release the security offered by the plaintiff was turned down.

14. On the lines of the defence set out in the written statement, DW1 examined on behalf of the first defendant has

tendered evidence. Though, it is claimed by the plaintiff and the second defendant their request for the substitution for the plaintiff's security was accepted by the first defendant bank, on the second defendant furnishing the adequate security with reference to the same, to evidence the said facts, there is no material placed by either of them worth acceptance. As above seen, as per the case of the first defendant bank, the request to release the security offered by the plaintiff was accepted, provided the terms and conditions set out by them are complied with by the second defendant. It is the specific case of the second defendant that the terms and conditions set out by the bank had not been complied with by the second defendant.

15. That apart, when there is no material placed on record to hold that the offer made by the plaintiff and the second defendant to release the security furnished by the plaintiff had been validly accepted by the first defendant bank and the same had been communicated to the plaintiff or the second defendant as the case may be, it is found that the plaintiff cannot lay any claim of return of the title deed furnished by him for the security of the loan in question. When it is admitted by the plaintiff that he has stood as guarantor for the loan availed by the second defendant firm, as rightly contended by the bank, the liability of the surety/guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This position can be seen from section 128 of the Indian Contract Act, 1872. It is thus found that the liability of the surety/guarantor runs till the discharge of the loan by the principal debtor and accordingly, unless the security offered by the surety/guarantor is duly discharged by the creditor, the surety/guarantor cannot escape his liability from the legal action that may be initiated by the creditor with reference to the loan transaction in question.

16. The documents placed in the matter do not lend support to the case of the plaintiff that his request to release the surety offered by him had been accepted by the first defendant's bank. To the legal notice issued by the plaintiff marked as Ex.A1 dated 22.01.2001, it is found that the first defendant bank has issued a reply, marked as Ex.A2, wherein, the first defendant had only stated that with reference to the same they had written the letter to the higher authorities and will intimate the decision taken by their higher authorities in that regard as soon as they get information in that regard. It is thus found that, by way of the above reply, the first defendant bank has made it clear that only after getting necessary sanction from the higher authorities they would be in a position to discharge or release the security offered by the plaintiff and thus, it is found that no concluded contract had been arrived at between the parties concerned as far as the subject matter of the suit is concerned. In other words, the request of the plaintiff and the second defendant for the substitution of the plaintiff's security has not been accepted by the first

defendant bank and this could be seen from the communication sent by the first defendant bank marked as Ex.A2.

17. Exs.B1 to B3 also would not in any manner support the plaintiff's case for establishing that there had been an offer and acceptance between the parties concerned giving rise to a concluded the contract as regards the subject matter of the suit. The first letter dated 24.08.1998, marked as Ex.B1, would go to show that the bank had received the said communication from the Chief Regional Manager, wherein, interalia as regards the subject matter, it has been mentioned that the release/exchange of the additional security i.e.Sri M.Govindaraj's property at Pondicherry to be exchanged with Sri.T.N.Parthiban's property at Cuddalore may be done after two months, before which summary review of the account (Group accounts to be reviewed before that date) to be put up to this office. On a reading of the above said communication from the Chief Regional Manager, what could be gathered is that, the release of the plaintiff's security in exchange of the second defendant's property at Cuddalore can be examined and done after two months and prior to the same, the direction has been issued to the first defendant's bank to review the accounts summarily and put up the note to the Chief Regional Manager for his consideration. Thus, it is found that by way of Ex.B1, the bank has not agreed to release the security offered by the plaintiff straightaway and on the other hand, what had been determined by the bank is that after reviewing the accounts of the subject mater, they had decided to go ahead with the release the security offered by the plaintiff and in such view of the matter, by way of Ex.B1, it cannot be concluded that bank had agreed to release the security offered by the plaintiff in the place of the property security furnished by the second defendant.

18. The next letter dated 15.10.98 marked as Ex.B3, also a communication issued to the first defendant bank from Chief Regional Manager would only go to show that by way of the same the first defendant bank had been advised to take prior permission from the regional office before the release of the documents to the plaintiff Mr.M.Govindaraj. It is thus found that no final decision has been taken by the bank to release the documents to the plaintiff and on the other hand, the first defendant bank had been put on advice to seek the permission from the regional office before releasing the documents to the plaintiff. It is thus found that Ex.B3, as such, would not be helpful to the plaintiff's case in coming to the conclusion that the first defendant bank had accepted the offer of the plaintiff to release the security in the place of the security by the second defendant. No doubt, the office note is found to be appended to Ex.B3 and in the said office note, the same being only a xerox copy, there is a reference about the recommendation for the exchange of the plaintiff's property at Pondicherry with the second defendant's property and by way of the same, it cannot be concluded straightaway that the said recommendation

had been officially accepted and communicated to the first defendant bank to proceed further in the release of the security offered by the plaintiff. From Ex.B3 and the office note appended to the same what can be gathered is that the request of the plaintiff and the second defendant to release the security of the plaintiff with that of the security offered by the second defendant is in the active consideration of the bank and accordingly, it is found that they had taken some steps as regards the said subject matter. However, by way of the above said document, we cannot straight away hold that the first defendant bank had officially accepted to release the security offered by the plaintiff without any reservations.

19. The letter dated 17.10.98 marked as Ex.B2, which had emanated two days after Ex.B3, would go to show that within two days from the issuance of Ex.B3, a decision has been taken by the higher authorities of the bank, not to release the property of the plaintiff which has been given as equitable mortgage for the facilities sanctioned to the second defendant's firm in lieu of the second defendant's property and accordingly, it is found that the bank's higher authorities has turned down the request of the plaintiff as well as the second defendant to release the security offered by the plaintiff in lieu of the second defendant's property for the loan in question.

20. In the light of the above position, it is clearly seen that as putforth by the first defendant, though the request of the plaintiff and the second defendant was agreed to be considered by the first defendant bank, provided, the special terms and conditions set forth as regards the same are complied with and accordingly, when it is further seen that the first defendant bank had communicated with the higher authorities in connection with the above said proposal offered by the plaintiff and the second defendant, however, later, it is seen that as the terms and conditions set out by the first defendant bank had been failed to be complied with, particularly, by the second defendant, it is found that the higher authorities of the first defendant bank had directed the first defendant bank not to release the security offered by the plaintiff in respect of the subject loan in lieu of the second defendant's property. In such view of the matter, on the basis of the above said materials, it is found that inasmuch as there had been no concluded contract or agreement between the parties concerned, particularly, when the request of the plaintiff and the second defendant to release the security offered by the plaintiff had not been accepted by the first defendant bank and duly communicated to the plaintiff or the second defendant, as the case may be and further, when there is no material to hold that the bank had accepted the proposal of the plaintiff and the second defendant to release the security offered by the plaintiff till date, merely from Exs.B1 to B3, we cannot come to the conclusion that the bank had assured to return the security offered by the plaintiff without demur and on the other hand,

when it is found that as per the case of the first defendant bank, the said offer of the plaintiff and the second defendant was agreed to be taken into consideration, provided, they abide by certain terms and conditions and when it is the specific case of the first defendant bank that the terms and conditions set out by the bank had not been fulfilled, accordingly, the bank had not come forward to release the security offered by the plaintiff. Such being the position, the plaintiff, being also aware of the same, is found unable to place any valid material to hold that the bank had really accepted their proposal to release the security in lieu of the security offered by the second defendant and in such view of the matter, the case of the plaintiff, as if, there had been a concluded contract between the parties concerned for the release of the security offered by the plaintiff, as such, cannot be countenanced in any manner. Exs.B1to B3 do not in any manner advance the case of the plaintiff that the bank had assured to return the security offered by the plaintiff.

21. Inasmuch as the bank had not come forward to discharge the surety of the plaintiff for the subject loan, it is found that on noting that the second defendant had not operated his accounts properly and thereby, failed to honour his commitment in the discharge of the loan, accordingly, it is found that the bank had initiated legal proceedings against the second defendant's firm as well as the guarantor of the subject loan including the plaintiff and laid necessary civil action against them before the debt recovery tribunal, which could be evidenced from the document marked as Ex.B4. It is thus found that as the security offered had not been agreed to be discharged by the first defendant bank and also not duly discharged as per law, it is found that the first defendant bank had initiated recovery proceedings against one and all involved in the matter, including the plaintiff, as the guarantor, before the debt recovery tribunal and therefore, the plaintiff cannot lay any valid claim insisting the bank to return the security offered by him without the discharge of the subject loan.

22. The plaintiff having come forward with open eyes to be the surety for the loan availed by the second defendant's firm, it is found that his liability is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. When the liability of the principal debtor is still subsisting and not liquidated in any manner and when it is found that the recovery proceedings had been initiated by the bank for the same, the plaintiff as the surety/guarantor is also liable for the discharge of the loan and without discharging the same, the plaintiff cannot make a valid claim for the release of his surety. Particularly, when the materials placed on record do not point out that the bank had agreed to release the security offered by the plaintiff in lieu of the security furnished by the second defendant, sans material placed by the plaintiff to evidence that the security offered by him had been duly

discharged by the bank in accordance with law, it is found that his liability would continue to run till the debt is wiped off or liquidated and prior to the same, the plaintiff cannot seek any legal claim for the return of the security.

23. In the light of the above discussions, it is found that the first appellate Court, on an erroneous appreciation of the materials placed on record, both oral and documentary, committed a serious miscarriage of justice by holding that the first defendant bank had agreed to release the security offered by the plaintiff in lieu of the security furnished by the second defendant, when it is found that no such concurrence had been given by the bank in any manner either to the plaintiff or the second defendant as the case may be and in such view of the matter, when it is found that the plaintiff's liability as surety/guarantor is co-extensive with that of the principal debtor and when it is further seen that the subject loan had not been liquidated and recovery proceedings had been initiated by the bank against one and all concerned in connection with the same, the determination of the lis by the first appellate Court in support of the plaintiff is found to be vitiated and the reasonings and conclusions given by the first appellate Court for coming to the above said determination are found to be totally perverse and illogical. Therefore, the same cannot be allowed to sustain any further. The substantial question of law formulated in this second appeal is accordingly answered against the plaintiff and in favour of the first defendant bank.

24. In support of her contentions, the plaintiff's counsel placed reliance upon the decision reported in 2015 (2) MWN (Civil)424 (Sree Vadivambigai Ginning Industries Pvt Ltd and two others Vs. Tamil Nadu Mercantile Bank Limited in S.A. Nos.736 & 737 of 2009) (Tamil Nadu Mercantile Bank Limited Vs. Sree Vadivambigai Ginning Industries Pvt Ltd and two others in S.A.Nos. 355 & 356 of 2010). Section 171 of the Indian Contract Act, 1872 does not apply to the facts and circumstances of the case. Further, so far as this case is concerned, the subject loan had not been liquidated. It is still pending and for the recovery of the same, proceedings had been initiated by the bank against all parties concerned. Such being the position, till the discharge of the subject loan, neither the principal debtor nor the guarantor/surety make any valid claim for their release from the liability and particularly, the plaintiff having come forward to stand as surety for the subject loan, he remains liable as that of the principal debtor unless and until the subject loan is wiped out as per law. Such being the position, the abovesaid decision, is found to be inapplicable to the facts and circumstances of the case at hand.

25. In conclusion, the judgment and decree dated 24.02.2003 passed in A.S.No.36 of 2002, on the file of the Principal District Judge, Pondicherry, are set-aside and the judgment and decree dated 08.02.2002 passed in O.S. No.140 of 2001, on the

file of the Second Additional District Munsif Court, Pondicherry are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Puducherry.

2. The Second Additional District Munsif Court,
Puducherry.

Copy to: The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate Sr.No.23500

RSY(CO)
sm:18.4.2018

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