

* THE HONOURABLE SRI JUSTICE D.V.S.S.SOMAYAJULU

+ APPEAL SUIT No. 1776 of 1998

%09-11-2018

t.Pullaiah and others

...Appellants

Vs.

\$ G.Muthaiah and others

... Respondents

!Counsel for the Appellants: Sri Meherchand Nori

Counsel for the Respondents:

< Gist :

> Head Note:

? Cases referred:

1. AIR 1983 Karnataka 73
2. AIR 1955 Calcutta 217
3. the All England Law Reports 1947(2) 734



HON' BLE SRI JUSTICE D. V. S. S. SOMAYAJULU

APPEAL SUIT No. 1776 of 1998

JUDGMENT:

The brief facts are as follows- Plaintiff No.1, during his life time, filed the suit in OS No.108 of 1985 on the file of the Court of Senior Civil Judge, Khammam, for recovery of certain amounts. Plaintiff Nos.2 and 3 are the wife and son of plaintiff No.1 respectively. Plaintiff No.1 and defendant No.3 were partners of the firm under the name and style "M/s.Ekkala Hanumantharao and Company Kirana and Commission business", Gandhi Chowk, Khammam, which deals with purchase and sale of chillies, bran, horse gram, ground nut oil cake etc., Similarly, plaintiff No.1 (deceased) and the 4th defendant who was the son of 3rd defendant were also partners of another firm under the name and style of M/s.Ekkala Hanumantharao and company", Gandhi Chowk, Khammam, which deals with sale of agriculture produce in grain market, Khammam. Differences arose between above partners with regard to settlement of accounts of the above firms with effect from 03.11.1983. When plaintiff No.1 was planning for dissolution of the above firm and rendition of accounts, defendant Nos. 1 and 2, on behalf of 3rd and 4th defendants volunteered to settle the dispute and accordingly, the terms of reference Ex-A1 was reduced into writing and scribed by 1st defendant. As per Clause-16 of Ex.A1, 1st and 2nd defendants are guarantors for a sum of Rs.33,000/- realized by sale of mirchi obtaining with 3rd defendant. Further, none of the defendants paid that amount in spite of repeated demands and a notice dated 27.09.1995 -Ex.A2 was addressed to 1st and 3rd defendants, which

was received by them, but replied only by 1st and 2nd defendants, with incorrect statements, and therefore, the suit.

1st and 2nd defendants filed a common written statement, while 3rd and 4th defendants filed a common written statement. The substance of their plea is that 1st and 2nd defendants acted as elders to settle the dispute between the parties at the request of 1st plaintiff, 3rd and the 4th defendants alone; that Ex.A1 was scribed by 1st defendant to the dictation of 3rd defendant (son of 1st plaintiff), who is an advocate and that 1st and 2nd defendants never agreed to be guarantors for payment of Rs.33,000/- .

With regard to the specific claim of the plaintiff based on Clause-16 of Ex.A1, 1st and 2nd defendants submit that the said claim arises out of the accounts of the firm "M/s.Ekkala Hanumantharao and company, Kirana and Commission Business" and that there were imbalances in the credit accounts of both parties and they balanced it; after settlement of accounts, by directing 3rd and 4th defendants to pay Rs.20,000/- to 1st plaintiff which was accordingly paid. It is not a separate claim unconnected with accounting. This item is shown in the accounts books of the said firm which they have balanced and settled to the satisfaction of the parties. 3rd and 4th defendants explained that it was agreed upon that the elders (1st and 2nd defendants) had assured to pay in cash whatever amounts 3rd and 4th defendants had withdrawn in excess of their claims in both the firms, after looking into the accounts and at the time of Ex.A1 such withdrawals by 3rd and 4th defendants was estimated at Rs.33,000/- and after settlement of accounts the credits to the accounts of the plaintiff and persons on his behalf were found to be imbalanced with similar credits in respect of 3rd

and 4th defendants and the persons on their behalf at Rs.20,502.57/- and therefore, as per the advise of 1st and 2nd defendants, 3rd defendant paid a sum of Rs.20,000/- to 1st plaintiff and balanced the credits of both parties with a marginal difference of Rs.502.57. Thus, clause-16 of Ex.A1 pertained to a dispute arising out of the accounts of the firms and not a separate claim and therefore, 3rd and 4th defendants are not liable to pay any amount, much less the suit amount to the plaintiff.

On the above pleadings, the following issues were settled for trial on 22.12.1988.

- 1) Whether the plaintiff is entitled to a decree against the defendant for recovery of Rs.48,000/- together with future interest at 24% p.a. from the date of suit till realization ?
- 2) Whether the plaintiff and his son G.Madhavarao and defendant Nos.3 and 4 agreed to resolve their disputes and elected defendant Nos.1 & 2 as arbitrators to resolve their disputes by means of document dated 09.11.1983 and that disputes were resolved by 12.03.1984 as stated in the written statement ?
- 3) Whether the defendant Nos.3 and 4 along with defendant Nos.1 and 2 are not jointly and severally liable to pay the suit amount as contended in the written statement.

During the trial, 3rd plaintiff examined himself as PW-1 and Exs.A1 to A7 were marked. Defendant Nos.1 to 4 examined themselves as DWs-1 to 4 and Exs.B1 to B18 were marked.

After hearing both the sides, the court below decreed the suit with costs for Rs.40,575/- with interest 11% per annum on the principal amount of Rs.33,000/-, against the defendants 1 to 3. The suit against Defendant No.4 was dismissed with costs. Questioning the same, the present appeal is filed by defendant Nos. 1 to 3.

During pendency of the above appeal, Appellant No.3/Defendant No.3 died. The case against him has abated.

This Court has heard Sri Meher Chand Nori, learned counsel for appellants. There is no representation on behalf of respondent Nos. 1 and 2.

The essential ground that is urged by learned counsel for appellants is that Exs.A1-Agreement is not a deed of guarantee at all and that consequently, appellants/defendants are not liable to pay any amounts whatsoever to respondents in the appeal.

This Court is of the opinion that the first and foremost issue/question to be decided is about Ex.A1-Agreement and the clauses mentioned therein and consequently, if defendant Nos.1 and 2 have agreed to stand as guarantors. The meaning and effect of Clause-16 is the crux of this matter.

An examination of the impugned Judgment, shows that Issue Nos.1 to 3 decided by the court below would fit within this question. The impugned Judgment shows that the issue No. 1 that was decided by the court below was about the effect of Clause-16 of Ex.A1-Agreement. This court will also have to decide whether Ex.A1 amounts to deed of guarantee or a deed of reference of dispute of settlement.

Para-6 of the plaint clearly spelt out that on 09.11.1983, Defendant Nos.1 and 2 in the presence of parties wrote Ex.A1-Agreement, in which they set out "the matters to be settled". However, in para-7 of the plaint, it is stated that it amounts to a deed of guarantee. In the written statement filed by defendant Nos.1 and 2 to this plaint, it is clearly mentioned that on 09.11.1983 the document that has been prepared and signed only by plaintiff and defendant No.3 (not signed by defendants 1 and 2) and that it was decided that the accounts will be looked into and finalized on 12.11.1983 and on 13.11.1983 (i.e., after execution of Ex.A1). Later in the written statement, various dates on which the matters were resolved on a step by step basis going upto 1984 were spelt out in the written statement. It is also pleaded very clearly that mirchi sale amount of Rs.33,000/- pertains to the shops /firms and that the plaintiffs do not have an exclusive claim over the same. The written statement filed by defendant Nos.3 and 4 is to the same effect. A reading of the plaint itself makes it clear that the disputes are not fully resolved. Nevertheless, as the argument was advanced in the court below, and the lower court held that Ex.A1 constitutes a deed of guarantee, this Court is also examining the same at the very outset.

Before going into the same, this court notices the decision in ***H.Mohamed Khan & others V.Andhra Bank Ltd., and others***¹ wherein it was held by His Lordship Justice K.Jagannatha Shetty:

"15. A contract of guarantee is defined in Section 126 of the Contract Act in these terms:

"A 'Contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of default. The

¹ AIR 1983 Karnataka 73

person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the "creditor."

It is clear from the above definition that contract of guarantee involves three parties, the creditor the surety and the principal debtor. A contract of guarantee must therefore involve a contract to which all those three parties are privy. Their express participation or implied assent to have such a contract must be proved by the person who wants to rely upon it.

In Ramachandra v.Shapuri (AIR 1940 Bom 315) Beaumont, C.J., speaking for the Bench of the Bombay High Court observed at pages 316 and 317:

"there must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my opinion the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible in my view to work out the rights and liabilities of the surety under the Contract Act. Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. It is impossible to imply a promise by the principal debtor to indemnify the surety unless the principal debtor is privy to the contract of suretyship."

These observations reflect the true legal position with regard to a contract of guarantee."

The next important decision that falls for consideration is ***Radha Kanta Pal V. United Bank of India Ltd.***,². At paragraph -28 of the Judgment, the learned Single Judge relied upon Halsburys, Hailsham Edition, page 59, Article 52. It reads as under:

"A contract of guarantee unlike a contract of insurance is not one of uberrimae fidei but a contract "strictissima juris." (16 Halsbury, Hailsham Edition, page 59, Article 52),

As per the Merriam Webster's "Dictionary of Law" the meaning of "strictissima juris" is according to the strictest interpretation of law. It is thus clear that a contract of guarantee has to be interpreted very strictly.

In addition to, this Court notices that the general principles of interpretation of contract state that the entire document should be read as a whole to understand its true import and effect. A word or a sentence cannot be read in isolation to understand the contract. The entire document must be read to understand its true meaning and import. In addition, the rule of contra proferentem applies if the terms of contract are ambiguous. In case of ambiguity, the terms should be construed against the maker and in favour of guarantor. The decision in ***Eastern Counties Building Society V. Russell***³ is apposite and it is cited hereunder:

LORD TUCKER, L.J.

"... However, it is not necessary to come to a final conclusion on that matter, because, if there is any reasonable ambiguity as between the two meanings, it is clear, as was stated very clearly by Hilbery, J., that the words must be construed most favourable to the surety. Therefore, assuming ambiguity, I think that the surety should be given the benefit of

² AIR 1955 CALCUTTA 217

³ The All England Law Reports 1947(2) 734

any doubt and the judge came to a right conclusion when he held that the moneys owing in respect of the bonus were not moneys owing in respect of the advance.

LORD COHEN, L.J.,

... Be that as it may, I think that, in the context of the deed as a whole, that prima facie meaning is rendered more probable by the other clauses, and I do not propose to go through them as they have been reviewed by my Brothers. I would also say that I agree with my Brothers that, if there is an ambiguity, on the principle of contra preferentum we are bound to resolve that ambiguity in favour of the surety."

Against this legal back drop, the facts of the present case are being examined. It is an admitted fact that defendants 1 and 2 did not sign on Ex.A1. Therefore, in view of the settled law on the subject, this court has to see whether by any overt action, they have consented to act as guarantor for any debt due. The document A1 and the conduct of the parties have to be examined.

The first witness examined on behalf of plaintiffs is P.W.1. He admitted in his chief-examination itself that Ex.A1 is signed by plaintiff No.1, defendant No.3 and his son-in-law -Dakshina Murthy. He admits that defendants 1 and 2 have not signed on Ex.A1. In the further cross-examination on 26.08.1997, he admits that mirchi of the value of Rs.33,000/- which is the subject matter of the suit claim was sold to the Commission agent, but he cannot give his name. He further admits that the said chilli concerns his father and defendant No.3. In his further cross-examination, he admits that Ex.A1 was executed before the dispute was resolved and that it was executed to resolve the dispute. Further, he agrees that except Ex.A1, there is no other document to show the guarantee. He agreed that the assets of the firm were partitioned and distributed in February, 1984. As per the

evidence of DW-1, plaintiff No.1 and defendant No.3 have executed the document as PW-1 could not scribe the document as he was an Advocate, the same was scribed by DW-1. In his chief-examination, he asserts that the actual physical division took place later and he did not assume any personal liability. He also agreed that the word "Havalthi" means standing as surety, but he denies that Ex.A1 shows that himself and defendant No.2 assumed personal liability. Defendant No.2, who was examined as DW-1, clearly stated that he has not signed on Ex.A1 and that he did not stand as surety. The next important witness is DW-3, who deposed that Ex.A1 is a document requesting the elders i.e., defendants 1 and 2 to resolve the dispute. He states that the actual resolution of the dispute took place later. He reiterates that defendants 1 and 2 never stood as guarantors. In his cross-examination he clearly admitted that Ex.A1 was written prior to the verification of the accounts. DW-4 is another witness, who reiterated the facts as stated above. Therefore, from the above oral evidence of the witnesses coupled with Ex.A1, it is clear that there was no actual physical verification of the accounts as on the date of Ex.A1. There was no resolution of the dispute by the date of execution of Ex.A1. Thus, the figures are not crystalized nor is the debt ascertained for it to be guaranteed, as per the learned counsel for appellants.

Ex.A1, according to learned counsel for appellant and rightly so, in the opinion of the court is a document setting out the terms of settlement or the areas of dispute to be actually resolved and not a document settling the same. The actual verification of the accounts of the firms took place after execution of Ex.A1. This fact is clear from the cross-examination of P.W.1 itself on

26.08.1997, wherein he states that Ex.A1 was written prior to the verification of the accounts.

The sum of Rs.33,000/- mentioned in Clause-16 of Ex.A1 belongs to the firms and defendants 1 and 2 were appointed as mediators/elders to resolve the payment of this along with other issues . As correctly stated by defendants 1 and 2 in their written statement, the entire amount does not belong to the plaintiffs for him to claim it exclusively. It is an amount belonging to the firms. The plaintiff was not able to establish that this entire amount belongs to the plaintiff alone and that therefore the same was guaranteed by 1st and 2nd defendants.

In addition to, the learned counsel for appellants also argued that the clause on which the plaintiffs relied upon is not very happily worded. He points that even at para-18 of the impugned Judgment, the trial Judge observed the said fact. The learned counsel for appellant also points out that the court below also agreed that it is capable on different interpretations because of the style and language used. A reading of Clause-16 of Ex.A1 does not make it clear that the entire amount of Rs.33,000/- is of defendant No.3 or of the plaintiff. The plain language interpretation shows that Clause-16 of Ex.A1 that money represents the realization out of the sale of mirchi in Hyderabad and also the amount of D3. A further reading of clause shows that the accounts would be written on 12/13.11.1983. This court is of the opinion that Clause-16 reads that after taking into consideration the said amount, the accounts would be settled. The written statement of defendant No.3 shows that this amount of Rs.33,000/- was not a fixed sum and that the actual sums were realized later when the accounts were being settled. Defendants 1 to 3 gave figures as per which the

accounts were balanced and adjusted. The trial Judge while extracting Clause-18 of Ex.A1 has however, not correctly extracted the last para of clause-16, wherein it was mentioned that the amounts belongs to shops (kottu Taluku vi). It is admitted that this amount belongs to kottu/mirchi shop. It is also further written that accounts will be settled on 12/13.11.1983.

This court finds sufficient force in the contention of the learned counsel for appellants, who argued that the amounts do not exclusively belongs to plaintiff and it is an income derived from out of the business which has to be apportioned or divided. Therefore, it is his contention that the plaintiff does not have any exclusive right over the same. This court notices that in matters of this nature, when there is an ambiguity the rule of contra proferentem should be applied. Therefore, merely by use of word "havalthi" cannot be used to shift the entire burden of payment of this amount onto defendants 1 and 2. The rule of strictest interpretation also rules out the interpretation that defendants 1 and 2 agree to stand as guarantors. Even if there is no ambiguity and the rule of contra proferentem, does not apply, but still the fact remains that by their conduct, defendants 1 and 2 (who are not signatories to Ex.A1) did not show that they agreed to act as guarantors. The implied assent noticed in the cases cited supra, is not at all found in the instant case. Therefore, for all these reasons, it cannot be said that defendants 1 and 2 consented to be guarantors for this amount . The essentials of contract of guarantee mentioned supra are also not found in Ex.A1.

In view of the fact that as the legal issues involved are in this narrow compass namely, interpretation of one clause and the facts necessary to be

determined in the appeal are discussed in the judgment, the other facts and other issues are not being decided separately

This court holds that defendants 1 and 2 did not agree to act as guarantors. They merely agreed to act as elders to resolve the disputes. Therefore, the findings of the court below on issue Nos. 2 and 3 are set aside holding that defendants 1 and 2 did not agree to act as guarantors and they are not jointly and severally liable along with defendants 3 and 4 to pay the said amount. Issue Nos. 2 and 3 are therefore, decided in favor of appellants. As a consequence, the findings on Issue No.1 are reversed and the plaintiffs are not entitled to the decree as prayed for.

With the above observations, the appeal is allowed and the Judgment and decree passed in OS No.108 of 1985 on the file of Senior Civil Judge, Khammam, is set aside. No costs.

Dt. 09.11.2018

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B/o. Ml/ *

JUSTICE D. V. S. SOMAYAJULU