

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

C.C.C.A. No.87 OF 2008

JUDGMENT:

The present appeal is preferred under Section 96 of the Code of Civil Procedure, 1908, by defendant Nos.3 and 5, who, of course, did not participate in the suit proceedings having remained *ex parte*, as only defendant No.2, who is respondent No.3 herein, contested the suit claim filed by respondent No.1, aggrieved over the judgment and decree, dated 07.02.1996, passed in O.S. No.1339 of 1989, by the learned II Additional Judge, City Civil Court, Hyderabad.

2. When the matter called, there was no representation for the appellants in the fore-noon sessions, and it was again called in the after-noon sessions, still, there is no representation. Sri A.K. Narasimha Rao, learned counsel for respondent No.1 is present and heard his arguments.

3. Respondent Nos.2, 3, appellant Nos.1 and 2 and respondent No.4 are defendant Nos.1 to 5 respectively, in the aforesaid suit, while respondent No.1 is the plaintiff.

4. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the aforesaid suit.

5. The plaintiff filed the suit for recovery of Rs.61,943/-. Defendant No.1 was a subscriber of chit in the plaintiff's company of

the value of Rs.1,00,000/- payable in 40 monthly installments of Rs.2,500/- each, and he executed an agreement of chit on 08.09.1987, while other defendants executed agreement of guarantee on 18.12.1987, besides executing promissory note marked as Ex.A-3 and cash voucher issued by defendant No.1 marked as Ex.A-4. The defendant No.1 became successful bidder in the auction held on 25.10.1987 and agreed to forego an amount of Rs.45,000/-. Other defendants Nos.2 to 5 are guarantors. The amount remained unpaid and, hence, the suit.

6. Defendant Nos.1 and 3 to 5 were set *ex parte*, as it appears they have not turned up despite service of summons on them respectively. Only the defendant No.2 contested the suit by filing written statement. He would state in his written statement that he signed the guarantee bond (Ex.A-2) on the request made by the defendant No.1, as defendant No.1 assured him that he would clear the loan amount borrowed by him, thinking that it was only a formality. Therefore, his defence was that the plaintiff ought to proceed against defendant No.1 alone as he is sufficiently well-off possessing lands at Nizamabad District, and thereby sought to dismiss the suit against him.

7. The Court below framed the following three issues for trial:

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1. Whether D2 is entitled for seek for the direction that the plaintiff shall recover the amounts due from D1 only at first?
2. Whether D2 is entitled for the payment to pay the suit amount in instalments?
3. To what relief?”

8. During trial, the plaintiff got examined PW.1 and exhibited Exs.A-1 to A-10, whereas no evidence, both, oral and documentary, was let in by the defendants.

9. On issue No.1, the Court below did not agree with the contention of defendant No.2 that the plaintiff can only proceed against defendant No.1 and after exhausting the relief, then only can proceed against other defendants including defendant No.2 and observing that defendant No.2 did not step into the box and did not depose anything besides not giving particulars of whereabouts of defendant and holding that once execution of documents is admitted by defendant No.2, as a guarantor, he cannot evade his liability as the liability of a surety is coextensive with that of the principal debtor and liability is joint and several and, accordingly, held issue No.1 in favour of the plaintiff and against defendant No.2.

10. On issue No.2, the finding that there was no evidence let in by defendant No.2 and his plea that he is entitled to pay the due amount in installments was negatived. Based on the said findings, the Court below decreed the suit with interest at the rate of 12% per

annum from the date of suit till the date of decree and, thereafter, at the rate of 6% per annum till the date of realization on Rs.55,000/-.

11. Defendant Nos.3 and 5, who suffered the decree without participating in the trial, preferred the present appeal contending that defendant No.1 died during the pendency of the suit and even defendant No.4 died before passing the decree and the legal representatives of the deceased defendants were not brought on record and, therefore, the decree under challenge is a nullity and cannot be executed. It is also contended that the Court below should not have declared them as *ex parte* and ought not to have proceeded with the consideration of the case on merits. Further contention is that the court below ought to have seen that the suit stands abated on account of death of principal debtor i.e., defendant No.1, and as such, the entire suit ought to have held abated as against other defendants, as sureties' liability is coextensive with that of principal debtor by following the provisions of Sections 127 to 145 of the Indian Contract Act, 1872, and, thus, sought to allow the appeal by setting aside the decree passed by the Court below.

12. While discussing on issue No.1, the Court below made a clear observation that defendant No.2 has not stepped into box to substantiate his stand and to give whereabouts of deceased defendant No.1. Had defendant No.2 mentioned in his written statement that defendant Nos.1 and 4 were no more, certainly, the Court below

would not have proceeded with passing of the decree without legal representatives being added. Even leaving apart, the appellants herein though, having come forward stating that defendant No.1 died during pendency of the suit and defendant No.4 died before the decree was passed, did not mention the dates of their deaths and, in fact, a duty is cast on defendant Nos.3 and 5 to file death certificates as Annexures to the present Memorandum of Grounds of Appeal giving their death particulars to arrive at whether deaths of defendant Nos.1 and 4 took place prior to commencement of trial or prior to hearing the arguments in the suit. When no details at all are furnished, averring only in the grounds of appeal that the deaths of defendant Nos.1 and 4 occurred during pendency of the suit and before passing the decree, would not satisfy the requirements of relevant Rules of Order XXII of CPC. Therefore, it has to be held that there is no merit in the present appeal.

13. Accordingly, the present appeal is dismissed. But, however, there shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in the appeal suit, stand closed.

A. SHANKAR NARAYANA, J

January 31, 2018.

Mgr