



A.S.No.23

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.08.2023

CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

A.S.No.237 of 2011

Bank of Baroda

...Appellant

vs.

1.C.S.Venkatachalam

2.E.A.Kanakasabapathy

3.Subbas D.Sathe

...Respondents

Prayer: Appeal Suit filed under Order 41, Rule 1 and Section 96 of C.P.C., against the decree and judgment dated 14.02.1992 in O.S.No.193 of 1989 by the learned Principal Subordinate Judge, Coimbatore.

For Appellant : Mr.Ravishankar Rao
for Mr.C.Hamumantha Rao

For Respondents : No appearance for R1 to R3

J U D G M E N T

This Appeal Suit had been filed against the judgment and decree dated 14.02.1992 made in O.S.No.193 of 1989, on the file of the Principal Sub-Judge Coimbatore.



A.S.No.23

2. For the sake of convenience, the parties are referred to herein, as per their rank before the Trial Court.

WEB COPY

3. Brief facts, leading to the filing of this Appeal Suit, are as follows:

The first defendant has availed a sum of Rs.1,50,000/- from the plaintiff bank, for the said amount the first defendant had executed promissory notes. The second and third defendants stood as guarantors and have pledged their National Savings Certificates with the plaintiff bank. Thereafter, the first defendant had defaulted in repayment and committed irregularities in operating the accounts. The plaintiff bank has sent repeated notices but the first defendant did not take any steps to repay the same. Later on, the plaintiff bank has called upon the second and third defendants to repay the same as they stood as guarantors but they did not turn around to repay the amount. Hence, the plaintiff bank has filed a suit for realisation of the money lent and the suit was partly decreed as the trial court had directed the first and second defendant to repay a sum of Rs.2,02,408.91 and further the first defendant was directed to pay a sum of Rs.19,333.50 as the cost of the suit and as against the third defendant, the suit was dismissed. Challenging the same, the plaintiff bank has filed the present appeal.



A.S.No.23

WEB COPY

4.The third defendant had entered appearance and filed his written statement in the Trial Court, the contention of the third defendant before the Trial Court is that, the third defendant knew the first defendant only two years prior to the contractual transactions between the plaintiff bank. The third defendant was one of the guarantors for the loan availed by the first defendant, for which he had pledged his National Savings Certificates as a security for the loan availed by the first defendant. The first defendant had assured that the securities would be returned on or before 31.07.1988 and would relieve the third defendant from the liability, as the business stock of the first defendant was valued at about Rs.3,00,000/- and more, that itself would be the main security for the loan amount availed and in case of default such business stock will be proceeded against and that the security offered by the third defendant would only be an additional one to that.

5.It was the further case of the third defendant on 15.06.1988, the first defendant wrote a letter to the third defendant stating that he had disposed of his stock in trade at Cross-cut Road and in Periaswamy road and another shop was set up in M.R.Complex, R.S.Puram, Coimbatore for which the first defendant has stated that he has obtained the consent of the plaintiff bank for sale of the properties mentioned in 'C' Schedule of the suit. The third defendant had written a letter dated 10.08.1988 to the plaintiff bank enquiring the alleged sale of 'C'



A.S.No.23

WEB COPY

schedule property by the first defendant, for which the plaintiff bank had replied stating that the first defendant has sold the hypothecated property and has denied the personal knowledge of the bank on such sale done by the first defendant.

6.It is further stated that the third defendant had also issued a legal notice dated 13.08.1988 to the first defendant as well as to the plaintiff bank complaining about the irregular and illegal acts done by the first defendant, for which the first defendant had not chosen to reply and the plaintiff bank has sent a belated reply and has filed a suit against the third defendant. It is the further grievance of the third defendant that the plaintiff bank has allowed the first defendant to dispose of the primary security, without the consent of the third defendant who is one of the guarantor for the credit facilities availed by the first defendant, and it was proceeded against the third defendant to repay the amount due to the plaintiff bank and the third defendant is no more liable and the plaintiff bank cannot proceed against his securities pledged with the bank as he is not aware of the alleged sale done by the first defendant.

7.Based on the oral and documentary evidence, the Trial Court had framed the following issues:

(i).Whether the plaintiff is entitled for the amount as prayed for?



WEB COPY

A.S.No.23



(ii).What are the other reliefs?

Additional issue framed on 04.02.1992:

(i).Whether the second and third defendants were relieved from their liability?

8.Before the Trial Court on the side of the plaintiff, one Mr.Ramachandran was examined as P.W.1 and Exs.A1 to A20 were marked. On the side of the defendants, the third defendant Mr.Subhas D.Sathe was examined as D.W.1 and Exs.B1 to B7 were marked.

9.On the basis of the evidence and materials, the Trial Court had partly decreed the suit and held that the first and second defendants are jointly liable to pay a sum of Rs.2,02,408.91 together with an interest rate at 17.5% payable to the plaintiff bank, further the first defendant is directed to pay a sum of Rs.19,333.50 as cost of the suit and the Trial Court has dismissed the suit as against the third defendant.

10.Heard Mr.P.Ravi Shankar Rao, learned counsel appearing for Mr.C.Hanumantha Rao, learned counsel appearing for the appellant/plaintiff. The notices were not served to the respondents/defendants in the Appeal Suit and this Court by an order dated 17.02.2022 had directed the appellants to take



A.S.No.23

substituted service. Pursuant to the general publications made, none has entered appearance either through counsel or in person.

WEB COPY

11.The learned counsel for the plaintiff submitted that the plaintiff Bank, viz., Bank of Baroda, Coimbatore branch had granted cash credit to the first defendant upto a limit of Rs.1,00,000/- and a demand loan of Rs.50,000/- for running a video shop business. On 24.12.1986 and 30.12.1986, the first defendant had executed demand promissory notes and agreements of hypothecation for Rs.1,50,000/- in favour of the plaintiff bank. For which, the second and third defendants stood as guarantors and on 24.12.1986 & 29.12.1986, the second and third defendants executed two agreements in favour of the plaintiff guaranteeing the due repayment of the advance amount, the said documents were marked as Exs.A3 and A4. As further security, the second and third defendants had pledged their National Savings Certificates with the plaintiff bank on 29.12.1986 & 30.12.1986.

12.It is the further case of the plaintiff that the first defendant who availed credit facilities had committed irregularities in operating the accounts. He had also changed his business premises without notifying the same to the plaintiff bank. The bank has sent repeated letters to the first defendant to regularise his accounts, he did not do so and had not repaid the loan regularly. The third



A.S.No.23

WEB COPY

defendant had sent a notice to the plaintiff bank dated 13.08.1988 alleging that the first defendant had disposed of the hypothecated goods and also leased the shop and the same has been done with the knowledge and concurrence of the plaintiff and hence the third defendant was absolved of his liability. The plaintiff had sent a reply in which it is stated that the allegations are untrue and that the plaintiff was not aware of any transfer done by the borrower and the guarantee is a continuing one till the loan availed is fully repaid.

13.The learned counsel for the plaintiff submitted that the learned Trial Judge has erroneously decreed the suit as only against the first and second defendants as both the second and third defendants stood as guarantors for the loan availed by the first defendant. The learned Judge also erred that the second and third defendants had waived of their rights under Sections 134, 135, 139 and 141 of the Indian Contract Act and they cannot plead discharge under the ground that the plaintiff were negligent in securing the goods hypothecated by the first defendant. Therefore, he would pray that the third defendant is also equally liable to repay the amount due to the plaintiff bank as the first and second defendants.

14.I have considered the arguments and I have perused the materials available on record. From the same, the following point now arises for consideration in this appeal:



A.S.No.23

WEB COPY

(i) Whether the Court below was right in holding that the third defendant is discharged of his liability under the Guarantee Agreement?

15. From the facts of the case, it could be seen that the first defendant herein had availed certain financial assistance from the plaintiff. Pursuant to the financial assistance extended to him, he had executed a Hypothecation Agreement and other documents. The second and third defendants herein had also executed Guarantee Agreement guaranteeing the repayment of the financial assistance extended by the plaintiff. It is an admitted case that the first defendant/borrower had defaulted in repayment of the financial assistance received by him. When that being the position, the second and third defendants being the guarantors are liable to honour their guarantee.

16. The first defendant even though represented by a counsel in the Trial Court seems to have not filed any written statement. But, however, the third defendant had filed a detailed written statement contending that the first defendant had sold away all the hypothecated stock in trade with the knowledge of the plaintiff bank, the guarantee document executed by the third defendant would automatically be extinguished and that the bank does not have any right to proceed against the third defendant. The said written statement was also adopted by the second defendant.



A.S.No.23

WEB COPY

17.The first defendant against whom a finding had been given as to his liability to repay the amount had not filed any appeal against the impugned Judgment & Decree. Even the second defendant who was a guarantor against whom, the Court below fastened the liability as joint & several for the repayment of amount due by the first defendant had also not preferred any appeal.

18.It is pertinent to note that even though the Court below had given a specific finding that the second and third defendants would not be called upon to honour their guarantee, the Court below had proceeded to fasten the liability on the second defendant.

19.Be that as it may, the Court below had relied upon certain judgments of this Court & had given a finding that when the property given as a security by the Principal Debtor gets destroyed or damaged, the guarantor cannot be held responsible for the repayment of money. An analysis of the aforesaid judgment, it could be seen that due to subsequent events, if there was a novation of contract between the Principal Debtor and the lender of which knowledge is not made known to the surety/guarantor, then, they would not be held responsible. Here is a case, that even though the third defendant had pleaded that the plaintiff bank had the knowledge of disposal of the secured assets by the Principal Debtor, the plaintiff bank had specifically denied any such knowledge.



WEB COPY

20.The third defendant had also not by way of evidence both oral & documentary had produced any substantial piece of evidence to suggest that the plaintiff bank had the knowledge of the disposal of the secured assets by the Principal Debtor viz., the first defendant. That is the reason why the Court below had not given any reasonings & findings which was within the knowledge of the plaintiff and with the consent of the plaintiff that the first defendant/borrower had disposed of the secured assets. But, however, the Court below had gone on the presumption that the plaintiff bank ought to have been more cautious and vigilant in seeing that the secured assets are not being disposed of. When the bank is negligent of protecting the secured assets, it would mean that the Guarantee Agreement could not be pressed into service.

21.The said reasonings & findings given by the learned Judge to discharge the third defendant from the Guarantee Agreement, in my considered view, is wholly erroneous. An agreement of contract for financial assistance is an Independent Agreement. Even though, a third party executes Guarantee Agreement in favour of the lender pursuant to the Loan Agreement that the lender had entered with the borrower is again an Independent and Separate Agreement. The Hon'ble Apex Court in various judgments have held that even in cases where there is novation of contract between the borrower and the lender, the guarantor who had executed a Guarantee Agreement for initial loan



transaction would be liable to guarantee repayment of the loan under the Original Agreement.

WEB COPY

22. In fine, the reasonings & findings given by the Court below is wholly erroneous & contrary to law and therefore is liable to be set aside. Accordingly, the Judgment & Decree of the Court below dismissing the suit as against the third defendant is set aside and the Appeal Suit is allowed. However, when this Court had put a query as to whether the plaintiff bank had initiated any execution proceedings as against the first and second defendants, it was informed that no execution proceedings had been initiated against them. As per the provisions of the Limitation Act, the said decree as against the first and second defendants cannot be now sought to be executed. The plaintiff bank had not acted prudently against the principal borrower and other guarantor. Even though, I have found that the Court below had wrongly discharged the third defendant from his liability, it would not entitle the plaintiff bank to seek execution of the decree even against the third defendant.

23. It is also pertinent to note that the Judgment & Decree by the Trial Court was made on 14.02.1992. The Appeal Suit had been numbered after nearly a period of 19 years within which period, the period of limitation against the first and second defendants had also expired. In such circumstances, I am of



A.S.No.23

WEB COPY

the considered view that the aforesaid reversal of judgment could only be on an academic interest, as the Judgment of the Court cannot be allowed to stand when made on a mistake & wrong understanding of law. The plaintiff bank would not be entitled to execute the decree pursuant to the Judgment & Decree made in this appeal. No costs. Consequently, the connected miscellaneous petition is closed, if any.

02.08.2023

Index: Yes/No
Speaking order: Yes/No
pam



WEB COPY

To

The Principal Subordinate Judge, Coimbatore.

A.S.No.23





WEB COPY



A.S.No.23

K.KUMARESH BABU, J.

pam

A.S.No.237 of 2011

02.08.2023