

HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

R. F. A. No. 676 of 2021

Muhammad Altaf
versus
Rana Shakeel Ahmad

JUDGMENT

Dates of hearing	14-05-2024 & 24-06-2024
Appellant by:	Malik Shahid Iqbal Babbar and Malik Ali Muhammad, learned Advocates.
Respondent by:	Mr. Haroon Mehboob Butt, Barrister Muhammad Azaz and Mr. Tahir Habib, learned Advocates.

Sultan Tanvir Ahmad, J:—Through this single judgment, I intend to decide the titled appeal as well as regular first appeal No. 63163 of 2020, being outcome of same judgment and decree dated 22.09.2020 passed by the learned Additional District Judge, Lahore. Hereinafter, Muhammad Altaf shall be called as the ‘**Appellant**’ and Rana Muhammad Shakeel shall be called as the ‘**Respondent**’.

2. Brief facts of the case are that on 24.05.2016

the Respondent instituted suit for recovery of Rs.15,00,000/- (the '*suit*'), under Order XXXVII of the Civil Procedure Code, 1908 (the '*Code*'), with the averments that the Appellant and his partner namely Ali Adnan (the '*principal-debtor*') being importer of Japanese cars offered the Respondent to purchase a Honda Vezel 1500-CC, model 2010 (the '*vehicle*') for which initially an agreement dated 11.10.2014 (the '*first agreement*') was executed and the Appellant stood surety to the extent of Rs. 15,00,000/-; that the Appellant also placed his thumb impressions and signed the *first agreement* with a note that he stood guarantor on behalf of *principal-debtor* and issued a cheque No. 131052122 dated 11.10.2014, the Bank of Punjab, for an amount of Rs.15,00,000/- (the '*cheque*'); that Rs.22,50,000/- were paid as consideration of the *vehicle*. It is further pleaded in the *suit* that the *principal-debtor* failed to fulfill the terms of the *first agreement* or deliver the *vehicle* within the stipulated time period, upon which another agreement dated 16.12.2014 (the '*second agreement*') was executed, which was again signed by the Appellant and as per the terms of the said agreement another amount of Rs.7,50,000/- was received by the Respondent; that despite receiving the entire amount the *vehicle* could not be delivered. The Respondent filed the *suit* upon dishonouring of the *cheque* on its presentation before relevant branch of the bank. The learned trial Court allowed the Respondent to defend the case and accordingly he filed his written statement. Out of divergent pleadings, the following issues were framed:-

1. *Whether plaintiff is entitled for the decree and recovery of Rs.15,00,000/- on the basis of*

dishonour cheque No. 131052122 or not? OPP

2. *Whether the agreement No.740 dated 11.10.2014 and agreement No.1120 dated 16.12.2014 were executed in favour of plaintiff on behalf of Ali Adnan with regard to the give and take of sale amount of vehicle in presence of witnesses or not? OPP*
3. *Whether plaintiff has come to the court with unclean hands and suit is barred by law not maintainable after obtaining decree against Ali Adnan for same amount in dispute from competent court of law? OPD*
4. *Whether the suit is liable to be dismissed due to mis-joinder and non- joinder of parties and based on mala fide intention to blackmail and harass the defendant? OPD*
5. *Relief.*

3. After framing of issues, the parties produced their respective evidence. The learned trial Court gave issue-wise findings and granted the following relief to the Respondent, vide judgment and decree dated 22.09.2020: -

“..In view of my findings on issue No.1, the suit of the plaintiff is decreed with costs. The plaintiff is held entitled to recover principal amount of Rs.15,00,000/- from the defendant. Decree sheet be drawn accordingly...”

Being aggrieved from the above both sides have filed their appeals.

4. Malik Shahid Iqbal Babbar, learned counsel for the Appellant, has submitted that the Appellant has issued the *cheque* merely as a surety and the valid legal course for the Respondent was to get the liability of the *principal-debtor* to be first adjudged and only then the *suit* against the Appellant could have been filed. He has further submitted that the *principal-debtor* even

otherwise, was a necessary party and in his absence no relief could be granted to the Respondent, which is ignored by the learned trial Court.

5. Conversely, Mr. Haroon Mehboob Butt, learned counsel for the Respondent has opposed the above argument and he has stated that the Appellant has clearly undertaken the liability as well as issued an independent instrument i.e. the *cheque*, requiring no liability to be adjudged against any other person; that the *cheque* being negotiable instrument carries presumption as to its correctness and valid consideration under section 118 of the Negotiable Instruments Act, 1881 ('*N.I.A., 1881*'). He has added that the Respondent is entitled to interest in view of sections 79 and 80 of *N.I.A., 1881*.

6. I have heard the arguments of the learned counsel for the parties and perused the record with their able assistance.

7. The *first agreement* is on record as Ex.P-1. The second page (backside of the stamp paper) contains a note / Ex. P-2 (the '*Note*'), comprising of following term(s):-

”میں محمد الطاف ولد ربنواز شناختی کارڈ نمبر 5-36203-0836260-1500000 (پندرہ لاکھ) As a guarantee رانا شکیل
سکنہ چاہ انعوان ضلع خانپور تحصیل لودھراں پورے ہوش و حواس میں
صاحب کو دے رہا ہوں (علی عدنان کے behalf پر) اور ہر طرح سے
رانا شکیل صاحب کے پندرہ لاکھ کا ذمہ دار ہوں۔“

Beneath the *Note*, the signatures as well as thumb impressions of the Appellant are available. It is significant that the *first agreement* and execution of the

Note are not denied. The *principal-debtor* has also placed his thumb impressions and signatures on the *Note*.

8. From the reading of the *Note* it is evident that the Appellant has undertaken to pay Rs.15,00,000/- and he acknowledged issuance of the *cheque*. In his written statement (paragraphs No. 1 and 3, on merits) the Appellant has again admitted issuing of the *cheque* in favour of the Respondent, however, denied being partner of the *principal-debtor* and adopted the stance that he is just a surety. To wriggle out of the liability undertaken by the Appellant, it is much emphasized by the learned counsel for the Appellant that it is inevitable to first get the liability adjudged against the *principal-debtor* or have him in the array of parties as a defendant.

9. Section 128 of the Contract Act, 1872 (the '**Contract Act**') provides that *the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract*. The *Note* reflects that the Appellant undertook to pay Rs.15,00,000/-, apparently without requirement of any reference to the *principal-debtor*. There is nothing on record suggesting that anything contrary was settled between the parties. In case titled "Sukur Pradhan and others v. Orissa State Financial Corporation and others" (AIR 1992 ORISSA 281) the Court after referring the entire case law from 1917 to 1992, reached to the conclusion that surety can be held liable to creditor irrespective of remedy which the creditor may have against principal-debtor and the creditor can proceed against the surety without exhausting his

remedy against the principal-debtor. The general law as also stated in section 128 of the *Contract Act* is subject to the stipulations of the contract and if anything different is provided in the contract then the same is to be given effect. Same conclusion was drawn by the Supreme Court of India in case titled “The Bank of Bihar Ltd. v. Dr. Damodar Prasad and another” (AIR 1969 Supreme Court 297).

10. In cases titled “Pakistan Industrial Credit and Investment Corporation Ltd., Karachi versus Fazal Vanaspati Limited, Karachi” (PLD 1993 Karachi 90) and “National Bank of Pakistan versus F. S. Aitzazuddin and 2 others” (PLD 1982 Karachi 577), the Sindh High Court, facing the situation as in present case, made reference to section 137 of the *Contract Act*, which provides that *mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety*. It has been gathered by the learned Sindh High Court that a creditor cannot be compelled to first exhaust his remedy against a principal-debtor, when the contract does not provide anything contrary and mere forbearance to assert claim or pursue remedy against principal debtor, cannot discharge the surety. It will be beneficial to reproduce the following extract of National Bank of Pakistan case (*supra*): -

“...The liability of the surety arises immediately on the failure of the principal debtor and unless otherwise provided in the Contract a creditor cannot be compelled to first exhaust his remedy against the principal debtor before initiating any action against the

surety. The liabilities of the principal debtor and the surety are separate and distinct. Even in cases where the liabilities of both the parties arise from the same transaction of the same document, the liabilities are distinct. Reference can be made to the case PLD 1975 Kar. 504. The surety is liable under his contract which he executes in favour of the creditor. In terms of the letter of guarantee the defendants have agreed that their liability to the plaintiff shall be that of principal debtor and at plaintiff's option the defendants may be treated as primarily liable for the amount due from the borrower. There is nothing to suggest that the plaintiff should first exhaust its remedy against the borrower/principal debtor. This view finds support from the provision of section 137 of the Contract Act, which provides that a mere forbearance to sue the principal debtor or to enforce any other remedy against him does not in the absence of any provision to the contrary discharge the surety. In these circumstances the fact that the creditor has not sued or joined the principal debtor can hardly be a defence in a suit against the surety. This principal is so well settled that it is not necessary to discuss the authorities on the point. Suffice to mention, AIR 1927 Lah. 396 AIR 1932 Lah. 419 AIR 1935 Mad. 748 and AIR 1957 Pat 256. In Mahanth Singh v. U. Ba. YI. (1), it was held that failure to sue the principal debtor until recovery was barred by the Statute of Limitation did not operate as discharge of the surety.

The creditor's right to proceed against the surety is not accessory to the right to proceed against the principal debtor personally. A surety in the absence of a contract to the contrary cannot compel the creditor to first exhaust his remedy against the principal debtor. In view of the above discussion as in the present case liability of the surety is based on a letter of guarantee, which is distinct from the liability of the principal debtor, the suit is maintainable."

(Underlining is added)

11. In case titled “Suresh Narain Sinha v. Akhauri Balbhadra Prasad and others” (AIR 1957 PATNA 256), the arguments of learned advocate for surety that the suit cannot succeed unless the plaintiff has exhausted his remedies against the principal debtor, were repelled while concluding that failure to sue the principal debtor, until recovery was barred by the statutes of limitation, did not operate as discharge of the surety. The following extract from the above judgment is relevant:-

“(4) It was then contended on behalf of the appellant that even if there was a contract of guarantee between the parties, the suit cannot succeed unless the plaintiff has exhausted his remedies against the principal debtor, namely, the Modern Bank of India, Ltd. defendant No. 5, with its registered Head Office at Dacca. We do not think there is any substance in this argument. It is provided by S. 128 of the Indian Contract Act that the liability of the surety is co extensive with that of the principal debtor, unless it is otherwise provided by the contract. There is high authority in support of this view in Mahanth Singh V. U. Ba YI, AIR 1939 PC 110 (G). It was held by the Privy Council in that case that failure to sue the principal debtor until recovery was barred by the statutes of limitation did not operate as discharge of the surety....”

12. In view of the above discussed provisions of the *Contract Act* and referred decisions, the argument of Malik Shahid Iqbal Babbar (learned ASC) that the *principal-debtor* was required to be proceeded against before institution of the *suit* against surety is found incorrect, therefore, the said argument stands rejected.

13. Now coming to the next contention regarding the *second agreement* and the stance that this agreement resulted into rescinding the *first agreement* or release the Appellant from his liability. This contention stand negated from the simple reading of the *second agreement* as a whole and in particular the following clause contained therein:-

"--مزید یہ کہ معاہدہ ہذا جو کہ سابقہ معاہدہ مورخہ 10-11-2014 کی توسیع اور تازہ تحریر ہونے کی بنیاد پر اصل اور سابقہ اشٹام کی پشت پر مذکورہ شرائط کنڈیشن گاڑی بدستور نافذ العمل ہو گئی۔۔۔"

The thumb print and signatures of the Appellant are again available on the *second agreement*. The above clause is essentially making reference to the *Note*, besides other clauses, contained in the *first agreement*. Though the thumb print and signatures of the Appellant on the *second agreement* are placed as identifier but it precludes possibility of keeping anything hidden from the Appellant as well as it reveals the clear intention of the parties to keep the surety intact and the fact that the Appellant was never relieved from his liability.

14. The Respondent entered in the witness box and stood by the averments in the *suit*. The *cheque* is also brought on the record as Ex. P-6. In support of his stance, Majid Rasheed appeared as PW-2 who deposed that the *principal-debtor* was approached by the Respondent, who refused to return the amount that he received. He verified the contents of the *first agreement* (Ex.P-1) and the *second agreement* (Ex.P-3). Almost same was deposed by Muhammad Suleman (PW-3).

The three witnesses were cross-examined in length but nothing adverse or sufficient to rebut the presumption arising under section 118 of the *N.I.A., 1881* is noticed. The Appellant appeared as DW-1 and in response to a question, he admitted signing the *second agreement* (Ex.P-3). He has not denied issuance, presentation and dishonor of the *cheque*. After hearing the arguments and reading the record, I am of the firm opinion that the learned trial Court has reached to the correct conclusion. The titled appeal being meritless is dismissed, with further cost of Rs. 2,50,000/-.

15. As far as the appeal No. 63163 of 2020 is concerned, the learned counsel for the Respondent though initially claimed interest in terms of the relevant provisions of *N.I.A., 1881*, however, he stated that he has instructions not to press the claim of interest if this Court is convinced to allow reasonable cost in favour of the Respondent and against the Appellant. In view of the same, appeal of the Respondent is dismissed being not pressed.

(Sultan Tanvir Ahmad)
Judge

Approved for reporting

Judge

Announced in open Court on _____.

Judge