

Parvataneni Venkata Brahmarao vs The Andhra Bank Ltd., Gudivada And Anr. on 8 November, 1963

Equivalent citations: AIR1964AP555, AIR 1964 ANDHRA PRADESH 555

JUDGMENT

1. This appeal arises out of a suit brought by the 1st respondent, Andhra Bank Ltd., to recover from the 2nd respondent Adusumilli Kutumbarao and the appellant, Parvataneni Venkata Brahmarao, a sum of Rs. 7,966-72 nP. due on the overdraft account of the and respondent with the 1st respondent. The claim against the appellant was based on the fact that in consideration of the 1st respondent agreeing to give overdraft facility of Rs. 7,500/- to the and respondent, the appellant jointly with the 2nd respondent executed a promissory note for the said Rs. 7,500/. Exhibit A. 2 dated 5-5-1958, and gave Exhibit A.2 by their letter, Exhibit A.1 dated 5-5-1958, as continuing security for the repayment of any balance due on the overdraft. The appellant's material defence was that he was only a surety for the 2nd respondent that on 20-8-1958, without his knowledge and consent, the 1st respondent took an equitable mortgage of all the properties of the 2nd respondent for another debt and that as his eventual remedy against the 2nd respondent was thereby impaired, he stood discharged under Section 139 of the Indian Contract Act.

The learned Subordinate Judge upon a construction of Exhibits A.1 and A.2, rejected the 1st respondent's contention that both the 2nd respondent and the appellant were co-obligants or principal debtors. He agreed with the appellant's contention that the appellant was only a surety for the and respondent. But on the ground that the facts were on all fours with the decision in Mahalinga Aiyar v. Union Bank, Kumbakonam, AIR 1943 Mad 216, he held that the appellant's liability was not wiped out by the equitable mortgage. He passed a decree against both the appellant and the 2nd respondent for the amount of the debt as scaled down under the Madras Agriculturists Relief Act (Act IV of 1938). Against this decree, the appellant, who was the 2nd defendant in the lower Court has preferred the appeal.

2. The only questions that arise for determination in this appeal are:

(1) Whether both the appellant and the and respondent were principal debtors or whether the appellant was only a surety within the meaning of Section 126 of the Indian Contract Act; and (2) Whether the equitable mortgage executed by the 2nd respondent in favour of the 1st respondent discharged the appellant under Section 139 of the Indian Contract Act?

3. On the first question, it is true that in the promissory note. Exhibit A.2 dated 5-5-1958 executed by the appellant and the 2nd respondent, there was an unconditional undertaking given by them to pay to the 1st respondent a sum of Rs. 7,500/- with interest at 9 per cent per annum. But they jointly executed at the same time a letter (Exhibit A-1) addressed to the 1st respondent in the following terms :

"We beg to enclose an On-Demand Promissory Note for Rs. 7,500 /- (Rupees Seven thousand five hundred only) signed by us which is given, to you as security for the re-payment of any overdraft which is at present outstanding in the name of Adusumilli Kutumba Rao and also for the repayment of any overdraft to the extent of Rs. 7,500/- (Rupees seven thousand five hundred), which he may avail of hereafter and the said pronote is to be a security to you for the repayment of the ultimate balance or sum remaining unpaid on the overdraft....."

The word re-payment" obviously means payment check by or on behalf of the person, who had received the original payment. Admittedly the overdraft account was only in the name of the and respondent. The appellant's name was not joined in it and therefore the 2nd respondent alone was the debtor there under liable for its repayment. The expressions "is given to you as security" and "is to be a security" were obviously used in Exhibit A.1 to mean that the obligation under Exhibit A.2 was to arise only in the case of default by the and respondent, Thus the obligation of unconditional payment undertaken the Exhibit A. 2, was reduced by the terms of Exhibit A.1 to an obligation to pay only by way of guaranteeing the stipulation in Exhibit A.1 that both the executants remained jointly and severally liable to pay the amount that might, be due on the overdraft account. On a construction of Exhibit A.1 it appears to me that in spite of the unconditional undertaking to pay in Exhibit A.2, the effect of Exhibit A.1 was to make the appellant only a surety for the 2nd respondent, who alone was the principal debtor.

4. Sri C. V. Narasimha Rao, the learned counsel for the 1st respondent strongly relies on the case of Venkata Krishtayya v. Karnedan, AIR 1935 Mud 643 for his contention that, as the maker of a promissory note gives, under Section 4 of the Negotiable Instruments Act, an unconditional undertaking to pay, he cannot become a surety within the meaning of Section 126 of the Indian Contract Act, whose liability is conditional on the default of the principal debtor. There the suit was brought to recover the money due on a promissory note against its executants. One of the two executants pleaded that he was only a surety for the other executant. Madhavan Nair, J., rejected the plea as Section 92 of the Evidence Act forbids oral evidence to vary the terms of a written contract and relied upon Balakishen Das v. Legge, "ILR 22 All 149 (PC). But here the contract was comprised not only in Exhibit A.2 but also in Exhibit A.1 and both these documents are admissible under Section 91 of the Evidence Act to ascertain the terms of the contract.

It may be that, as against a bona fide holder in due course of Exhibit A.2, who was not a were of the existence and the terms of Exhibit A.1, the appellant's plea of being only a surety would be of no avail. But as against the 1st respondent to whom Exhibit A.1 was addressed and who admittedly accepted it as part of the agreement for granting the overdraft, it is impossible to come to any other conclusion than that the contract was to make the appellant only a surety for the repayment of the overdraft account of the 2nd respondent. AIR 1943 Mad 216 was also a case where the suit based entirely on a promissory note and there was no other document containing the terms of the contract similar to Exhibit A.1 here. Illustration (b) to Section 139 of the Indian Contract Act (IX of 1872) shows that there is nothing inconsistent between a person being in fact a surety and his executing promissory note in favour of the creditor. No doubt, the 1st respondent's accountant (P. W. 1) asserted that the appellant was a 'Co-obligant' along with the 2nd respondent. But I have no

hesitation in agreeing with the lower Court that the effect of Exhibit A.1 was to make the appellant only a surety for the suit debt.

5. The next question for consideration is whether the equitable mortgage executed by the and respondent in favour of the 1st respondent on 20-8-1958 avails the appellant for the purpose of Section 139 of the Indian Contract Act. The 2nd respondent was a partner of a firm, which was separately indebted to the 1st respondent at its Masulipatam office in a sum of over Rs. 70,000/-. As the firm was in financially embarrassed circumstances, the 1st respondent took an equitable mortgage of most of the and respondent's properties. The learned Subordinate Judge states, in paragraph 7 of his judgment, that the equitable mortgage was of all the properties of the and respondent. This does not appear to be correct because according to P. W. 1, the property statement shows that he has other properties also. The appellant, as D. W. 1, admitted in his cross-examination that he did not know what properties were mortgaged to the 1st respondent and whether he had other properties.

A comparison of the letter creating the equitable mortgage, Exhibit A.4 dated 20-8-1958, with the 2nd respondent's property statement Ex. A.5 dated 30-12.1957, reveals that a site measuring 800 sq. yards was not included in the equitable mortgage. Although nothing turns on the difference, it appears that the equitable mortgage comprised only most and not all of the 2nd respondent's properties.

6. The appellant's contention is that, by the equitable mortgage, his remedy against the 2nd respondent is impaired and that, therefore, he is discharged. Section 139 of the Indian Contract Act reads as follows:

"If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

Sections 733, 734 and 135 deal with some of the acts or omissions of the creditor with the principal creditor, which discharge the surety. Section 139 is a residuary provision. Adopting the language of Lord Langdale in *Calvert v. London Dock Co.* (1838) 2 Kern, 638, the object of Section 139 appears to be to ensure that no arrangement different from that contained in the surety's contract is forced upon him and that the surety, if he pays the debt, has the benefit of every remedy which the creditor has against the principal debtor.

7. It is not suggested here that the 1st respondent obtained the equitable mortgage or (sic) fraudulent motive against the appellant. There was nothing in the contract with the 2nd respondent or with the appellant restraining the 2nd respondent from alienating his properties as he pleased. If the appellant's contention is accepted, the 2nd respondent could mortgage or sell his properties to any person in the world except the 1st respondent. Such a restriction on the 1st respondent cannot be inferred in the absence of express words to that effect either in exhibits A.1 and A.2 or in a subsequent agreement between the parties.

No decision has been brought to my notice, where it has been held that a principal debtor cannot alienate his properties in favour of the creditor without discharging the surety, although there is no such restriction in the contract of suretyship. With regard to his eventual remedy, the right of the appellant was only to stand in the shoes of the 1st respondent as against the 2nd respondent. Therefore it cannot be said that by obtaining after the contract of suretyship an equitable mortgage in respect of another debt, the 1st respondent acted inconsistently with any of the rights of the appellant. The question arises under the latter part of Section 139 as to whether there was a breach of any duty owed by the 1st respondent to the appellant.

8. In *Sitaramaswamy v. Basavayya* AIR 1920 Mad 311, a person became surety for four defendants and agreed to be liable for any decree which might be passed against them. The plaintiff obtained a decree against the 1st defendant alone and exonerated the other three defendants. Ayling and Odgers, JJ. said:

"This materially alters the position of affairs from the surety's point of view. At the time he became surety there were four persons (equal coparceners in family property as we are told) against all of whom he would have his own remedy if he had to pay anything under the decree." They held that a surety must be held to be discharged on the principle of Section 139 of the Indian Contract Act. It may be observed that there was a variance in the terms of the contract between the principal debtors and the creditor which brings the case within Sections 133 or 135.

9. In *Darshan Ram Ganesh Das v. Khajr DinAllah Baksh*, AIR 1924 Lah 194, a compromise decree was passed against the debtors providing for the payment of the debt by installments. A person stood surety for the due payment of such installments. Subsequently permission was granted to the judgment-debtors to mortgage and sell the property that was attached before judgment. Abdul Raoof, J., said:

"When the surety undertook the liability to pay the entire property belonging to the judgment-debtors was under attachment and the surety must have felt secure when he undertook the liability. The moment permission was granted to the judgment-debtors to effect private mortgages or sales the whole position was changed, and in my opinion, the surety was justified in applying to the Court to be relieved of his undertaking." The surety was absolved from his liability, as there was obviously a variance of the implied terms of the contract and Section 133 of the Contract Act was applicable.

10. In *Ram Prasad v. Gordhan*, AIR 1934 All 616 the surety bond was executed when the property of the judgment-debtors was under attachment. The Court released the property, but the decree-holder subsequently attached it again and later withdrew the attachment in spite of the objections from the surety. It was held that the surety was discharged to the extent of the property released. This was based on the illustration (b) to Section 141 of the Indian Contract Act.

11. In my opinion, none of these decisions are relevant to a case of the creditor, subsequently obtaining a mortgage of the principal debtor's properties, not referred to in the contract of suretyship at all. There is no breach of duty owed by the creditor to the surety and Section 139 of the Indian Contract Act does not apply.

12. The appeal fails and is dismissed with costs.