**Sodha v Vora and others**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 2003

**Case Number:** 1191/02

**Before:** Ringera J

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Bank – Guarantee – Variation of contract with principal debtor – Whether effect is to discharge*

*guarantee.*

*[2] Civil procedure – Injunction – Interlocutory injunction – Principles for grant of interlocutory*

*injunction.*

*[3] Contract – Variation – Whether variation of principal debtor’s obligations discharges the guarantor.*

**RULING**

**Ringera J:** This is an application by Chimanlal V Sodha, the Plaintiff herein, who is also the Chargor, to restrain Delphis Bank Limited, the Chargee from exercising its statutory power of sale to sell the charged property known as LR number 207/3451. The application which is expressed to be made under Order XXXIX, rules 1 and 3 of the Civil Procedure Rules is on the face of it based on the grounds that the Chargor’s claim discloses a *prima facie* case with a probability of success against the Chargee, that damages will not be an adequate remedy in the event the said property is sold and the Chargor’s claim in the suit succeeds, and that the balance of convenience favours the grant of the reliefs sought above. The application is supported by the Applicant’s own affidavit sworn on 30 November 2002. In opposition to the application is a replying affidavit sworn by YM Shukla, the Managing Director of the bank and an affidavit by the Second Defendant. The application was argued before me on 14 February 2003. From the material on record, the following is discernible. A company called Kendist Limited (hereinafter called “the Principal Debtor”) in which the Plaintiff, the First, Second and Third Defendants were all directors and shareholders with the Plaintiff as the Managing Director – requested the bank and the bank agreed to grant to the company credit facilities and other banking accommodation to a maximum of KShs 9 500 000 exclusive of interest upon the company providing satisfactory security. The Plaintiff agreed to guarantee the payment of the advance and to execute a mortgage over his property known as LR number 209/3451 by way of further security. The charge was given on 7 February 2000. So was the guarantee. Subsequently, the bank sought and obtained further guarantees which were given by one Dipak Chandulal Keshavji Vora (a brother of the First and Second Defendants) and by the Second and Third Defendants on 9 January 2001 and 15 January 2001. The Plaintiff complains that the addition of these three guarantees was without his knowledge or agreement and it amounted to a variation of the terms of the guarantee and charge given by him and the loan agreement. He contends that the charge could be discharged on the basis of the aforesaid variation. In support of that contention, reliance was placed on *Halsbury’s Laws of England* (4 ed) Volume 20 paragraph 328 where the learned editors posit the law as follows: “Where a guarantor pledges his personal credit by bond or covenant, and by the same contract also pledges his goods, or mortgages or charges his land, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the guarantor’s back, ... will discharge the guarantor from all personal liability and also release the property which he has included in the contract”. The Plaintiff also contends that by accepting those other three securities, the bank changed the course of dealing between it and the Plaintiff thereby substantially prejudicing the Plaintiff’s position. Reliance was placed on *dicta* in *Reid v National Bank of Commerce* [1971] EA 538 that the general words a guarantee cannot empower a creditor to change the nature of the relationship between himself and he debtor to the prejudice of the guarantor. It was also submitted on behalf of the Plaintiff that if the injunction was not granted and the property sold the prayers in the plaint would be rendered nugatory as the subject matter thereof would have ceased to exist. The opposition to the application was this. The application had been brought after undue delay and the Applicant should for that reason be denied equitable relief. In that connection, it was pointed out that the statutory notice was served as early as 5 June 2002 and the auctioneers’ redemption notice and notification of sale were also served on 27 September 2002. Yet the Plaintiff did not lodge an application for injunction until on the eve of the auction on 7 December 2002. It was pointed out that no reason for the delay had been given. As regards the variation of the security arrangements, it was contended there was no such variation and if there was, the Plaintiff was a party to those negotiations. In that regard it was pointed out that the Plaintiff was the Managing Director of the principal debtor and nothing could be done behind his back. It was also contended that the charge is an independent security which binds the Chargor irrespective of the existence of or variation of other securities which have no reference to it. In that connection, attention was drawn to clauses 4 and 10(c) of the charge which provides: “4. Without prejudice to the rights of the Chargee against the Borrower, the Chargor shall as between the Chargee and Chargor be deemed principal debtor in subject of the amount secured and accordingly the Chargor shall not be discharged nor shall liability of the Chargor be affected by any acts, thing omission or means whatsoever whereby such liability would not have been discharged if the Chargor had been principal debtor. 10 (c) The security hereby given shall be without prejudice and in addition to any other security whether by way of pledge, legal or equitable mortgage or charge or otherwise howsoever which the Chargee may now or at any time hereafter hold on any other property for or in respect of all or any part of the indebtedness of the borrower to the Chargee hereunder and he Chargee shall be at liberty to grant or refuse time, credit or any other indulgence to or to compound with the borrower or any other party now or hereafter liable to the Chargee and to take, retain, give up, release, modify, vary, exchange or abstain from perfecting, taking advantage or enforcing any securities negotiable or other instruments or contracts which the Chargee may now or at any time hereafter hold and to discharge any party thereto in any such manner as the Chargee may think fit and this security shall not thereby be affected, prejudiced or diminished”. Counsel for the bank also submitted that it had not been shown in what way the taking of additional guarantees have prejudiced the Plaintiff’s position. The bank was entitled to take them and far from prejudicing the Plaintiff’s position, that action was advantageous to him in that he could claim contribution from the other guarantors. It was also submitted that any variation relied on must be in writing and must make reference to the contract which it seeks to vary. Reference was made to *Chitty on Contracts* (27 ed) Volume I paragraphs 272–273 which on perusal were found to be completely irrelevant to variation of contracts. Last, but not least, counsel for the Defendant contended that in this case, the charge was properly executed, its terms were clear, the debt was admitted, and the Fourth Defendant was entitled to exercise its statutory power of sale. The additional guarantees were taken in abundant caution and have no bearing on the charge. The case appeared to be one of internal wrangles between the shareholders and the directors of the principal debtor and such wrangles should not prejudice the rights of the lender. In reply, counsel for the Plaintiff submitted that the charge was part of the loan arrangement. It could not be separated from the loan agreement or from the guarantee signed on the same date or from the resolution of the company to borrow. It was also argued that the principal debtor was party to the creation of the charge and the Plaintiff’s guarantee but it was not party to the subsequent guarantees given obtained from First, Second and Third Defendants. It was further argued that the clauses in the charge set out hereinabove could only refer to variations which are made with knowledge and participation of the principal debtor. It was conceded that the bank could take additional securities but it was submitted that that should only be done with the knowledge and the consent of the Plaintiff and the principal debtor. As regards delay in bringing the application, it was submitted that the same is an irregularity which does not take away the Plaintiff’s right to obtain the reliefs sought in the plaint. I have weighed the rival submissions. Needless to say the application must be considered on the usual criteria. That criteria is that the Applicant is required to show a *prima facie* case with a probability of success at the trial; second, it is to be borne in mind that an injunction would not ordinarily be issued unless the Applicant was exposed to an injury which could not adequately be compensated in damages if he were to prevail at the trial; third, if the court is in doubt about the existence of a *prima facie* case, it should decide the application on a balance of convenience; and fourth, injunction is a discretionary equitable remedy and it may be denied if the Applicant is shown to be undeserving of equitable relief. Looking at this matter that way, the first question is whether the Plaintiff/Chargor has shown a *prima facie* case with a probability of success at the trial that the charge on which the statutory power of sale is sought to be exercised by the bank may be discharged on the ground that by taking additional securities in the form of personal guarantees by the Second and Third Defendants and Dipak Vora without the knowledge or consent of the Plaintiff, there was an alteration of the contract between the guarantor and the creditor bank. In that regard, I think the submissions of counsel for the Defendant were misconceived. As I understood him, he was of the opinion that the contract which could not be altered or varied without the consent of the guarantor was the borrowing contract between the principal debtor and the creditor. In that regard he maintained that the act of the creditor taking additional securities was tantamount to a variation of the borrowing contract in this matter whereby the debt was to be secured by the Plaintiff’s personal guarantee and charge over his property. In my opinion, what is forbidden is any act or agreement between the principal debtor and the creditor without the consent or consultation with the guarantor which has the effect of varying or altering the contract of guarantee itself. That is evident from the passage from *Halsbury’s Laws of England* cited hereinabove and also from paragraph 326 of the same work which reads: “The basis of the principle that a guarantor is discharged *by an agreement between the creditor and the principal debtor which has the effect of varying the guarantee*, is that it is the clearest and most evident equity not to carry on any transaction without the privity of the guarantor, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as guarantor be made liable for default in the performance of a contract which is not the one the fulfillment of which he has guaranteed” (emphasis mine). Now that being the case, I don’t see that the taking of additional securities of the bank had the effect of altering the contract of guarantees at all or to the prejudice of the guarantor. Secondly, if due consideration is paid to clauses (4) and 10(c) of the charge, it also becomes evident that the action by the bank of taking additional guarantees would not affect the rights of the bank under the charge. In that regard clause (4) begs an answer to the question of whether, if the Chargor had been the principal debtor and the creditor had taken additional securities, the debtor would be discharged. The answer is an obvious no. And clause 10(c) makes it clear that the charge is an independent security without prejudice or in addition to any other security including any subsequently taken by the Chargee. The three additional guarantees subsequently taken by the bank must be seen as such additional securities which do not prejudice the Chargee’s rights under the charge. As regards alleged alteration of the course of conduct between the creditor and the principal debtor to the prejudice of the Plaintiff as a result of the alleged alteration or variation of the contract, I agree with the submissions by counsel for the Defendant, that even if there was the alleged alteration, and I have found there was none, there is no prejudice shown. I say so because the liability of the Plaintiff to the bank has not been increased to any extent. In so far as the Plaintiff is concerned, the taking by the bank of additional securities does not affect his position. It is only a matter that affects the bank’s position in that it could follow more than one person for recovery of its lending. In those premises, the Plaintiff cannot be said to have shown a *prima facie* case with a probability of success. As regards whether the injury the Plaintiff is exposed to unless the injunction is given is compensable adequately in damages, I have no doubt that it is and that the bank is capable of compensating him should he prevail at the trial. I have often said in these sort of cases that once a property is charged to a borrower to secure a lending, the same is converted to a commodity for sale on the basis of the inexorable logic that the Chargor knows very well that on default of payment of the debt by himself (or by the principal debtor if he is a guarantor) the security would be realised. And there is no commodity for sale whose loss cannot be adequately compensated in damages. Last, but not least, I also agree with the submissions of counsel for the Defendant that the application was presented after inordinate delay which has not been explained. Such delay was also an adverse factor to the Plaintiff’s case. All in all, this is not an appropriate case for the exercise of the equitable discretion of the court in favour of the Plaintiff. It is, as Defendant’s counsel contended, a case of internal wrangling between the directors of the principal debtor who must have been friends once but who cannot now see eye to eye. The differences should not be allowed to stand in the way of a lender who is owed money, whose charge is not impugned, and where there is default and all the pertinent statutory and legal notices and notifications have been given. The application for injunction is dismissed with costs to the Fourth Defendant/bank. For the Plaintiff:

*Information not available*

For the Defendants:

*Information not available*