

Case No. 100

1997 (II) CTC 523

IN THE HIGH COURT OF MADRAS

Shivaraj Patil, J.

C.R.P. No. 1641 of 1997

25.9.1997

Balakrishnan

Petitioner

Vs

H. Chunnilal Bagmar

Respondent

Section 128 of the Indian Contract Act - Liability of surety and principal debtor -separate though co-extensive - surety can be separately sued without suing the principal debtor - such decree is enforceable.

CASES REFERRED

AIR 1992 SC 1740 (6,9)

AIR 1977 Kar. 204 (9)

Mr G. Karthirvelu, Advocate for Petitioner.

Mr. P. Venkatachalapathy, Advocate for Respondent.

C.R.P DISMISSED

ORDER

1. The judgment -debtor in E.P.No.59 of 1992 has filed this revision petition challenging the order dated 18.11.1996 made in E.A.No.511 of 1993.

2. The respondent herein filed the suit O.S.No.6228 of 1981 for recovery of Rs 37,100 being the principal and interest due on hire purchase agreement entered into between himself and the first defendant for which the second defendant stood as guarantor for Rs .27,000 on 14.4.1978 in respect of vehicle No. TMX 5889, 1972 model Hindustan Bedford. The second defendant is the petitioner judgment - debtor in this civil revision petition.

3. During the pendency of the suit, the first defendant died, and the second defendant and third defendant were brought on record as Legal Representatives of the first defendant in I.A.No.12547 of 1983. First defendant was the father and the third defendant was the mother of the second defendant. Defendant No. 3 also died during the pendency of the suit. The second defendant - petitioner herein was set ex parte, and ultimately the suit was decreed directing the second defendant to pay to the plaintiff the amounts as mentioned in the decree.

4. Pursuant to the decree, E.P.No.59 of 1992 in O.S.No.6228 of 1981 was filed by the respondent. The petitioner filed E.A.No.511 of 1993, contending that the Court could not have passed the decree against him in the absence of any decree passed against defendants 1 and 3, stating that the petitioner was only a surety and his liability was co-extensive with the liability of the principal debtor viz., defendant No. 1; since there was no decree against defendant No. 1, the petitioner as the second defendant could not have been fisted with any liability as his liability was only co- extensive.

5. The Court below did not agree with the contentions raised by the petitioner, and in that view, passed the impugned order rejecting E.A.No.511 of 1993 by the order under revision. It is thus, the petitioner is before this court in this revision petition.

6. The learned counsel for the petitioner drew my attention to Section 128 of the Indian Contract Act and urged that in the absence of any decree passed against defendant No. 1, no decree could have been passed against the petitioner who was defendant No. 2 in the suit in the capacity as a surety. This submission he made on the basis that the liability of the petitioner was co- extensive with that of the principal debtor i.e., defendant No. 1 in the suit, particularly in the absence of the contract otherwise providing for. He fairly submitted that the decision of the Supreme Court in the case of State Bank of India v. Messrs. Indexport Registered and others, A.I.R. 1992 S.C 1740 is against the petitioner. But the learned counsel submitted that on the first principle, having regard to the plain reading of Section 128 of the Indian Contract Act, decree could not have been passed against the second defendant who was only a surety.

7. Per contra, the learned counsel for the respondent submitted that the decree passed in the suit was not against the defendant No.2 only in the capacity as a surety,

but it is also in the capacity as a legal representative of defendant No.1; in view of the fact that the petitioner herein, besides being a surety, is also the son of the first defendant, and after the death of the first defendant he was brought on record as his legal representative; hence it could not be said that the decree passed against the second defendant was not in order, or that it was a nullity as sought to be made out by the other side. He also pointed out to the written statement filed by the defendants 1 and 2 jointly; reading of the written statement gives an impression that both the defendants borrowed the amount jointly and they were liable to repay the sum together; further in the light of the decision of the Supreme Court aforementioned, the argument of the learned counsel for the petitioner cannot be accepted; and at any rate, the petitioner herein, having not challenged the decree passed against him, cannot go against that decree as is sought to be done by filing E.A. No. 511 of 1993 in the execution proceedings.

8. I have considered the submissions made by the learned counsel for the parties.

9. In the case of the State Bank of India v. Messrs. Indexport Registered and others, A.I.R.1992 S.C. 1740, the Apex Court, referring to very Section 128 of the Indian Contract Act, has taken the view that if on principle guarantor could be sued without even suing the principal debtor, there is no reason even if the decretal amount is covered by the mortgage decree to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. Further, when such a decree had become final, all the pleas as to the rights which the guarantor had, had to be taken during the trial and not after the decree while execution is being levied. In paragraph 17 of the said judgment, it is stated thus:-

“In Hukumchand Insurance Co. Ltd v. Bank of Baroda, Air 1977 Kar. 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety Vis-à-vis the principal debtor. Venkatachaliah, J (As His Lordship then was) observed (Para 12):-

“The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.”

10. From the paragraph extracted above, it is clear that the liability of the principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities although arising out of the same transaction. In the aforesaid judgment, rejecting a similar contention the decree holder was allowed to proceed against the guarantor for execution of the decree. Since the Judgment of the Apex Court is directly on the point, it is not for me to take a different view interpreting section 128 of the Indian contract Act, as is sought to be done by learned counsel for the petitioner. On this ground alone, this Civil Revision Petition is liable to be dismissed.

11. I may add that even on facts, it is clear that the defendants 1 and 2 filed a joint written statement in the suit; no plea was taken in the suit by defendant No. 2 separately that he was not liable to pay the amount in the absence of liability being fixed on defendant No.1., the decree passed against the petitioner has become final as the petitioner did not challenge the said decree. Plain reading of the decree passed against the defendant No. 2 does not show that the decree was passed against him only as a surety. The fact remains that the defendant No.2 was also the legal representative of defendant No. 1. Further the second defendant is none other than the son of the first defendant. Under the circumstances the court below was right in rejecting E.A. No.511of 1993.

12. In the result, for the reasons stated, the civil revision petition is dismissed, but with no order as to costs.