

G. Krishnappa and ors. Vs. Sangli Bank Ltd. and ors.

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Court : DRAT Madras

Decided On : Jul-29-2005

Reported in : IV(2005)BC136

Judge : K Gnanaprakasam

Appellant : G. Krishnappa and ors.

Respondent : Sangli Bank Ltd. and ors.

Judgement :

1. Appellants are the defendants 4, 5 and 7 in the OA. Aggrieved by the Order dated 18.9.2003 in OA-364/1996 passed by the DRT, Bangalore, these defendants have preferred the appeal.

The 1st respondent, which is the plaintiff filed the Suit before the City Civil Judge, Bangalore, in OS No. 3330/1989, for a decree against the defendants 1 to 7 for a sum of Rs. 15,27,605.58p. together with future and current interest @ 19.5% per annum towards Cash Credit Hypothecation loan and @ 15.5% p.a. towards the Term Loan from the date of the Suit till realisation and for costs.

The case of the plaintiff is that defendants 2 and 3 are the partners of the 1st defendant Company. Defendants 2 and 3 had availed Cash Credit Hypothecation loan for the 1st defendant, to the extent of Rs. 3 lakhs on 25.2.1983 and executed Demand Promissory Note dated 25.2.1983 and also executed letter of lien, set off and also continuing security letter. They have also executed a letter of partnership

dated 25.2.1983, in favour of the plaintiff Bank agreeing that they are authorised to borrow money from the plaintiff's Bank from time to time and also to hypothecated movable and immovable properties of the 1st defendant and they have also executed Hypothecation Agreement dated 25.2.1983. The defendants 2 to 6 have also executed letters of acknowledgements dated 1.1.1986, 14.11.1987 and 4.8.1988, confirming the amount due. As the defendants 1 to 6 were not able to clear the dues, at the insistence of the plaintiff for additional security, the 7th defendant which is a partnership firm consisting of the defendants 2, 4 and 5 as partners stood as guarantors and executed letter of guarantee dated 4.8.1988 and, therefore, the defendants 1 to 7 are jointly and severally liable to repay the loan amount. Defendant No. 6 also created mortgage by deposit of title deeds in respect of the immovable property at Bangalore. Defendants 2 and 5 have also pledged their Life Insurance Policies, whose paid up value at that time was Rs. 1,43,000/- and assigned the same to the plaintiff Bank. At the request of defendants 2 and 3 on behalf of defendant No. 1, the plaintiff Bank also sanctioned Term Loan to the extent of Rs. 3 lakhs for purchase of machineries for which they have executed Loan Agreement, Demand Promissory Note, Secured Term Loan Agreement on 11.4.1983, in favour of the plaintiff Bank agreeing to repay together with interest @ 13.5% p.a. with quarterly rests and also penal interest at 2% p.a. Defendants 2 and 3 have also hypothecated the machineries to the Bank and executed continuing security letter as well as letter of lien and set off on the same date. Defendants 2 and 3 executed a letter of partnership dated 11.4.1983 in favour of the plaintiff Bank agreeing that they are the partners of the 1st defendant. Defendants 4 to 6 stood as guarantors and also executed a letter of guarantee on the same date defendants 2 to 6 have acknowledged the debt on 1.1.1986, 14.11.1987 and on 4.8.1988. As the defendants 1 to 6 were unable to clear the dues, the plaintiff Bank insisted for additional security and the 7th defendant, which is the partnership concern consisting defendants 2, 4 and 5 as partners stood as guarantors and executed letter of guarantee dated 4.8.1988, and, therefore, the defendants 1 to 7 are jointly and severally liable to pay the amount due on term loan. That on 28.10.1985, the 3rd defendant informed the plaintiff Bank that he was no longer a partner of the 1st defendant as the partnership was dissolved on 26.8.1983 and no document was produced to that

effect. As the defendants have failed to pay the amount due to the Bank, the Bank filed the suit before the City Civil Court and that thereafter, it was transferred to DRT, Bangalore, and taken on file as OA-364/1996.

2. The 4th defendant filed the written statement before the City Civil Court at Bangalore, which was adopted by defendants 5 and 7 as stated in the Appeal Memorandum, which runs as follows: The 4th defendant denied his liability and also stated that there is no privity of contract between him and defendants 1 to 3. He further stated the signatures were taken on many blank printed forms and other related papers including stamp papers, well before (sic) are subsequently filled up without his knowledge and the Bank had created the documents. There is no inter-link to the various accounts referred to in the plaint nor there is any connection between the accounts and the letters of guarantee executed by him including the acknowledgement of debts. The Suit is not maintainable as the two suit accounts are independent and they are not inter-linked and the Suit is bad for multifariousness, mis-joinder of the parties and causes of action. As the 1st defendant firm was dissolved on 26.3.1983 itself, the 1st defendant firm was not in existence at the time of granting the Term Loan, and, therefore, the Suit filed against the 1st defendant describing it as a partnership firm is not maintainable. There is no contract between the 4th defendant and the plaintiff on the one hand and between the 4th defendant and the defendants 1 to 3 on the other, and hence the suit is not maintainable. The Suit is also barred by time. The Bank had already realised the suit amount from the defendants 1 to 3 from the Deposit Insurance and Credit Guarantee Corporation and, therefore, the suit against these defendants is not maintainable. The Bank also released more amount beyond the limit and thereby created an unauthorised liability and the defendant cannot be called upon to answer such unauthorised liability. Unless the Bank realises the amount due from the securities, it cannot proceed against the defendants, much less, against the guarantors. But, however, he admits that his liability is confined only to the amount for which he has given guarantee. According to him, a partnership firm cannot offer guarantee unless its ordinary business itself was to give guarantee and as such, any guarantee executed by the 7th defendant is not valid. The guarantee letters were not registered and hence it is unforceable. The plaintiff is not entitled to claim penal interest. The amount shown as due on both

the accounts are not true and correct.

3. As the other defendants have not preferred the Appeal, it has become unnecessary for this Tribunal to extract the written statement of the other defendants.

4. With the above said pleadings, the Civil Court framed seven issues.

It appears that during the trial of the OA, the Advocates appearing for defendants 1 and 2 on one hand and defendants 4 to 7 on the other, have urged that inasmuch as the OA against D3 was recorded as abated as D3 died during the pendency of the suit itself and, legal representatives were not brought on record, therefore, the entire suit is liable to be dismissed as not maintainable. It is also seen that during the pendency of the OA, defendant No. 6 also died and her LRs were brought on record as defendants 6(a) and 6(b). In view of the said submissions, the DRT framed as many as 19 additional issues. Defendant No. 2 was examined himself as DW1, who gave evidence on his behalf and on behalf of 1st defendant. The son of defendant No. 3 was examined as DW2. 4th defendant was examined as DW3 for himself and on behalf of defendants 5 to 7.

Defendant No. 6 was examined himself as DW4 through the Affidavits which are marked as Exhs. D1 to D4.

5. The DRT after having taken into consideration all the materials placed before it and also the evidence, both oral and documentary, and came to the conclusion that the defendants 1, 2, 4, 5 and 7 are liable to pay the debt to the plaintiff's Bank, jointly and severally and also held that the plaintiff Bank is entitled to bring the 'C' Schedule property for sale, which was mortgaged by the 6th defendant lying in the hands of LRs of the 6th defendant and also Schedules A and B properties, which are hypothecated to the Bank and further held that the liability of defendant Nos. 6(a) and 6(b), who are the LRs of defendant No. 6, is restricted to the extent of the assets of defendant No. 6 lying, if any, in the hands of defendants 6(a) and 6(b). Claim against defendant No. 3 was held as abated. As against the same, this Appeal has been filed.

(1) Whether the dismissal of the Suit against the 3rd defendant on the question of abatement would disable the plaintiff from proceeding against the other defendants?

(2) Whether the liability arising from the Term Loan can be enforced against the sureties?

(4) Whether the letters of guarantee require registration under the Registration Act?

7. Point No. 1: The first and foremost submission made on behalf of the appellants is, that during the pendency of the Suit before the City Civil Court, Bangalore, the 3rd defendant, one of the partners of the 1st defendant Company, died on 21.12.1991 and his LRs were not brought on record and the City Civil Court by its Order dated 2.7.1993, dismissed the suit as against the 3rd defendant as abated. The DRT discussed about this proposition at length and it was of the view that the 3rd defendant was only a proper party and not a necessary party and the non-bringing of the LRs of the 3rd defendant would not militate the case against other defendants and that is being questioned by the appellant. It is submitted that the 3rd defendant was not a proper party as observed by the DRT, but on the other hand, he is necessary party to the Suit as he happened to be one of the partners of the 1st defendant. As the respondent Bank has not impleaded the LRs of the 3rd defendant, which resulted in inviting an Order of dismissal against the 3rd defendant and the Suit was dismissed as abated against the 3rd defendant, would hold good for other defendants also. When the Bank had chosen to file the Suit on the joint and several liability, Bank should proceed severally against all the persons joined as parties to the Suit or proceed against all of them together on the joint liability. This right flows from the combined reading of Order 1 Rule 6, C.P.C. and Section 25 of the Indian Partnership Act, 1932, read with Section 42 of the Indian Contract Act, 1872. Order 1 Rule 6, C.P.C. states that, "The plaintiff may at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on anyone contract, including the parties to bills of exchange, hundis and promissory notes". Section 25 of the Indian Partnership Act, 1932, states that, "Every partner is liable, jointly with all the other partners and also

severally, for all acts of the firm done while he is a partner", Section 42 of the Indian Contract Act states, "When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor the representatives of all jointly, must fulfil the promise."

8. The filing of Suit by or against firms and persons carrying on business in names of other than their own is regulated by Order 30, C.P.C. Order 30 Rule 1 states:

(1) Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued with the name of the firm (if any) of which such persons were partners at the time of accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued were partners in the name of their firm under Sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

9. It is well settled law that the firm can sue or be sued in the name of the firm and the documents required for taking such action to be signed, could be signed by any one of such person thereby, meaning any one of the partners. Therefore, all the partners need not necessarily sign the pleadings, either it is a plaint or written statement. On the other hand, if all the partners are made as parties, even then, it would be construed that the persons who were made as parties, as partners representing the firm and not in their individual capacity. As such, either the credit or liability is for and on behalf of the firm and not against in their individual capacity. On the death of a partner, if partners are more than two, the partnership business will not come to an end. Partner may die, but not the partnership business.

10. On the death of any one of the partners, who is a party to the suit, there is no necessity to bring the legal representative of the deceased as a party to the Suit and that is what Rule 4 (1) of Order 30, C.P.C. states, "Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872) where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any one of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the Suit".

11. In our case, also, the 3rd defendant died during the pendency of the Suit and his Legal Representatives were not brought on record and, therefore, the Civil Court dismissed the Suit against the 3rd defendant as it was abated. The Order of dismissal made only against the 3rd defendant in his individual capacity and not against the firm. Partner may die, but not the firm, unless if it is provided in the partnership deed. The liability of the firm shall continue. As such, the argument advanced on behalf of the appellants that when the Civil Court passed order of dismissal of the Suit against the 3rd defendant, that too as abated, the entire Suit stands dismissed, is not correct and the answer is available under Order 30 Rule 4(1), C.P.C. In fact, this is the principle laid down and accepted by the Supreme Court in the case of the Upper India Cable Co. and Ors. v. Sri Krishna, AIR 1984 SC 1986 wherein Their Lordships have held, "Now the question is where the suit is instituted against the firm and partners are impleaded as proper parties, in the event of death of a partner so sued, would the suit or appeal, as the case may be, abate if heirs and legal representatives of the deceased partner are not substituted within the prescribed period of limitation. There is a twofold answer to this question. Order 30 Rule 4 provides that notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872, where two or more persons are sued in the name of the firm under the enabling provisions of Order 30, and any such person dies whether before the institution of the suit or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. Secondly death of a proper party would have no impact on the suit more so where on death of a partner the partnership may stand dissolved or heirs do not desire to join the firm. Both these aspects were overlooked by the High Court". It was further held that, "On the death of two of the proper or formal

parties impleaded in their capacity as partners by the plaintiff along with the firm, in the absence of substitution of heirs and legal representatives the appeal abates"? I may even go a step further in stating that even on the death of two necessary parties who are partners of a firm and the Suit was filed against the firm, the impleading of legal representatives of the deceased as a party to the Suit shall not be necessary as it is stated in Rule 4 of Order 30, C.P.C. The language in Rule 4 is unambiguous which states, "Whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit." As such, the non-impleading of the LRs of the deceased 3rd defendant in this case, though the Civil Court has stated that Suit has been abated, it is not detrimental to the interest of the plaintiff to any extent and, therefore, it could not be contended that the Suit is abated. But on the other hand, the learned Advocate for the appellants relied upon the following judgments to contradict this view: and Ors., on a careful reading of this ruling, it could be seen that the Suit was instituted against the partners in their individual names as partners and not in the name of the firm, as stated in Rule 1 of Order 30, CPC and only in the said context, it was held that if one person dies, in the absence of the LR of the deceased the Appellate Court cannot determine the issues involved in this case.

13. In AIR 1981 Cal. 1999, Krishna Chandra Agarwalla and Ors. Shanti Prasad Jain and Ors., also the Suit was filed against three individual persons and not by the partnership firm and only in the said context it was held that the Suit was not filed as per provisions of Rule 1 of Order 30, CPC and, therefore, on the death of one of the persons, without impleading the LRs of that person, the Suit cannot be proceeded with.

where the decree was obtained not against the partnership firm but it was passed against the partners in their individual capacity and, therefore, it was held that in the absence of impleading the LRs of the deceased person, is not maintainable.

that case also, the Suit was filed against the partners in their own name and not against the firm. But no doubt, Rule 4 of Order 30, CPC was brought to the notice of that Court and the Court was of the view that Order 30 Rule 4 only deals with

the form of suits and does not affect the question as to whether the representative of the deceased party was or was not a necessary party to the Suit, and held the LR's of the deceased appellant (partner) were necessary parties to the appeal.

Where the legal representatives of the deceased are not brought on record in his place, the abatement of the appeal as a whole cannot be saved on the basis of Order 41 Rule 4 or Rule 33 of the C.P.C.¹⁶. The ruling of the Supreme Court in the case of *The Upper India Cables Co. and Ors.*, AIR 1984 SC 1381, is long after the pronouncement of the judgment of the High Court of Madhya Pradesh and that apart, the law declared by the Supreme Court shall be binding on all Courts within the territory of India under Article 141 of the Constitution of India and that, therefore, the view taken by the Madhya Pradesh High Court with all respect cannot be followed and by following the decision rendered by the Supreme Court in AIR 1984 SC 1381, I am of the view that the non-bringing of the LR's of the 3rd defendant, who is a partner of the firm when the Suit has been laid against the firm showing the persons as its partners, irrespective of the fact whether they are proper parties or necessary parties, does not suffer from any infirmity in spite of the fact that the Civil Court passed Order that the Suit against the 3rd defendant abated, it cannot be contended that the entire Suit stands abated, as argued by the learned Advocate for the appellant. This point is held against the appellants.

17. Point No. 2: The learned Advocate for the appellant has strenuously argued that term loan was granted on 11.4.1983, by that time, the partnership was dissolved on 26.3.1983 itself and the Bank had knowledge of such dissolution and, therefore, it would not bind the sureties. It is further submitted that even otherwise, the material date worked out for the liability of the sureties is the date of actual dissolution of the partnership firm and any date contradicted thereafter would not bind the partners. It is also submitted that the defendants 4 to 7, who are the guarantors were not aware of the dissolution of the firm and the firm and principal debtor colluded together and managed to obtain letters of guarantee under Exhs. A21 to A23 and A28 and A14, and they are not valid and bind the defendants 4 to 7. It is further argued that they were all obtained by the respondent Bank by misrepresentation and by concealment of material facts and the same is supported by evidence of DW3, who in his evidence has stated that the guarantors were kept

in dark about many developments and happenings with regard to the transactions and the debt in question and they were not informed about the dissolution of the partnership. He also further deposed that the respondent Bank and the principal debtors have colluded together with a view to put the entire liability on the guarantors. It is, therefore, submitted that letters of guarantee in Exhs. A21, A23 and A28 are not legal and valid as Section 142 of the Contract Act states, "Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and consent, concerning a material part of the transaction is invalid" and Section 143 states, "Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances, is invalid".

18. It is pointed out by the respondent Bank that there is nothing on record to show that the firm had informed about its dissolution on 26.3.1983 itself as contended by the appellants. In fact in Para 14 of the plaint, where the respondent Bank made it very clear that, "Though the defendant No. 3 by letter dated 28.10.1985 informed the plaintiff that he was no longer a partner of defendant No. 1 by virtue of the Dissolution Deed said to have been executed on 26.3.1983, he failed to establish that fact by producing the relevant documents in spite of several requests made by the plaintiff Bank". This is more clinching on the issue that the respondent Bank had no knowledge about the dissolution of the partnership dated 11.4.1983, on which date the term loan was granted to the 1st defendant firm. The appellants were also not able to bring home the fact that the respondent Bank had knowledge about the dissolution of partnership on 11.4.1983 itself. That in the absence of the same, it Cannot be presumed that the respondent Bank had knowledge about the dissolution of the partnership on 11.4.1983 itself.

That only in the said circumstances, the DRT also held that the applicant Bank was not intimated of the so called dissolution dated 11.4.1983 till 28.10.1985 and on the other hand, the defendants 2 and 3 also signed the loan documents for the term loan sanctioned on 11.4.1983, thereby giving no clue to the applicant Bank that the partnership was being dissolved. DRT has also pointed out that the son of the 3rd defendant was examined as DW2, who has produced the original Deed of Dissolution and marked it as Exh. D2 and who in his cross-examination has also asserted, it is not correct to say that D2 signed the original Deed of Resolution

(Sick Resolution). It is also to be noted that, the defendants have not stated anywhere in the written statement when they actually intimated the respondent Bank about the so called dissolution and in the absence of the same as it has been observed by the DRT, it can be safely inferred that on the date of second transaction of the term loan i.e. on 11.4.1983, the respondent Bank was kept totally in dark about the so called dissolution of the 1st defendant firm. It is also pointed out that the 3rd defendant himself has played a pro-active role in coming forward to sign Ex. A15 DPN dated 11.4.1983 and also signed several other documents styling himself as one of the partners. The appellants are, therefore, estopped from contending that on the date of the 2nd loan, the partnership firm stood dissolved as the dissolution was only a hidden affair and stealthily brought about behind the back of the respondent Bank.

19. Section 45 of the Indian Partnership Act, 1932, states that, "Notwithstanding the dissolution of the firm, the partners continue to be liable as such to third parties for any act done by any of them, which would have been an Act of the firm, if done before the dissolution, until public notice given of the dissolution". In the instant case, there is no proof that the appellants have given public notice about the dissolution as required under Section 45 and, therefore, they continue to be liable to third parties for any act done by any of them, which would have been an act of the firm before dissolution and on that score also, the appellants cannot (sic) themselves from their liability. As such, the contentions of the appellants that the Suit against the sureties/guarantors is not maintainable on the ground that the second loan was given after the dissolution of the firm, has to fall to the ground. This point is also answered against the appellants.

The other contention of the appellants that the 1st defendant firm and Principal Debtor colluded together and managed to obtain letters of guarantee Exhs. A21 to A23 and A28 and A41, and they would not bind the defendants 4 to 7 cannot at all be countenanced for the reasons that the 2nd defendant, who is the partner in 1st defendant Company is none else than the son of the 4th defendant and he is also one of the partners in 7th defendant Company and as such, there cannot be any room for collusion of the 1st defendant Company and Principal Debtor with the Manager of the Bank. But on the other hand, the 1st defendant Company and 7th

defendant Company, both are family concerns, and they having borrowed the amount, now colluded with each other to defeat the amount due to the Bank. There is one more reason also there to support this contention. This Appeal has been originally filed by 4th defendant, 2nd defendant and 7th defendant. But subsequently, the Appeal Memo was amended by deleting the name of 2nd defendant, and 5th defendant was transposed as 2nd appellant. This would definitely prove and expose the collusion between the defendants among themselves and not with the Bank.

20. Point No. 3: The next attack of the appellant is heavily on the question of limitation. The Cash Credit loan was given on 25.2.1983 and Term loan was given on 11.4.1983. It is, therefore, submitted that the Suit had to be instituted on or before 24.2.1986 and 10.4.1986 respectively, treating both the loans as a money transaction, but whereas the Suit was filed on 26.6.1989 and the same is barred by time.

The learned Advocate for the appellant has vehemently argued that only to collect a higher rate of interest, the respondent Bank made these loans kept alive on the basis of letters of acknowledgement of debt under Exhs. A11 to A13 pertaining to Cash Credit Hypothecation loan and Exhs. A25 to A27 relating to term loan. The plaintiff has to prove that there was an extension of time of filing the Suit upto 26.6.1989. It is stated that on the date of filing of the Suit, the 1st defendant firm was not in existence as a partnership firm and defendants 2 and 3 were not its partners. The 4th defendant did not execute the letter of guarantee on 25.2.1983. The respondent Bank had obtained the signature on blank printed forms and other related papers, with which, the acknowledgement of liabilities were created and, therefore, the appellants were not at all liable to pay the amount. Further the 7th defendant, which is a partnership firm, cannot in law give guarantee unless its ordinary course of business itself is to give guarantee and, therefore, any manner of guarantee given by the 7th defendant is not valid under law. That in the absence of valid acknowledgement of liability, the entire Suit has to fail. The learned Advocate for the appellants has also quod up the requirements of valid acknowledgement, which according to him are:

- (1) The Statement on which the plea of acknowledgement was based must relate to a present subsisting liability;
- (2) The words used in the acknowledgement must, However, indicate the existence of jural relationship between the parties;
- (3) It must appear that the statement is made with an intention to such jural relationship;

21. For the abovesaid propositions, he relied upon the decision in AIR 1961 SC 1236 and AIR 1979 SC 1937. It is also the contention of the appellants that the essential requirements under Sections 18 and 20 of the Limitation Act are wanting in the acknowledgement of liabilities and hence they are not valid. Reliance cannot be made in respect of Exhs. A11, to A13 and A25 to A27, as they are invalid. Those acknowledgements of debt are also not signed for and on behalf of the principal debtor namely, the partnership firm or the person duly authorised in that behalf. The 3rd defendant has not signed them. The 2nd defendant who has signed them was not a competent person to sign them, as he was not an authorised agent to sign for and on behalf of the partnership firm, which already stood dissolved. As the acknowledgement of liabilities are after the dissolution of the partnership, which is known to the respondent Bank, these acknowledgement of debts are not valid.

22. Per contra, the learned Advocate for the respondent Bank would submit that the letters of acknowledgement of debt dated 1.1.1986, by the defendants 2 to 5 and acknowledgement of debt dated 14.11.1987 signed by the defendants 2 and 4 to 6, and also acknowledgement of debt dated 4.8.1988, signed by the defendants 2 and 4 to 6, are all valid and the defendants have executed those ADs after fully understanding that they were acknowledging the debts due to the respondent Bank and if there is any infirmity in those letters, they would not, to any extent, discredit the validity of those ADs and the contentions of the appellants have got to be rejected.

23. The DRT dealt with these points in detail in Paragraphs 28 and 29 of the judgment. As far as Acknowledgement of debt dated 1.1.1986, the guarantors i.e.

defendants 4 to 6 along with defendant No. 1, categorically confirmed the outstanding debts due to the Bank. The other letter of Acknowledgement of debt dated 14.11.1987, which is Exh.

A12, was executed by defendant No. 2 with the name of the defendant No.1 styling himself as Proprietor, as also defendants 4 to 6. The comment of the appellant is that this letter of acknowledgement of debt has to be rejected as invalid on the ground that defendant No. 1 partnership firm did not sign it but the same was signed by defendant No. 1 styling himself as a Proprietor. It is held that the said contention of the appellants cannot be accepted for the reason that at the time when the loans were given, the 1st defendant was only a partnership firm and the person who has signed styling himself as a Proprietor K.Nara-simhamurthy, defendant No. 2, who has signed in original in Demand Promissory Note (DPN) along with defendant No. 3. Exh A12 dated 14.11.1987, came to be executed in connection with the original liability based upon the DPN dated 25.2.1983 and in the said circumstances, the said acknowledgement of liability cannot be rejected on the ground that it is invalid. It is further pointed out by the learned Advocate for the appellants that there was no date underneath the signature of the defendants 4 to 6. Pointing out these particular circumstances, the appellants are trying to make a capital out of it by contending that it's not a valid document. DRT had met this point and opined that it is only an omission and the appellants are also equally responsible for such omission and just because there is omission we cannot completely reject the document on that score. The respondent Bank by its evidence made clear that it was executed on 14.11.1987 and on the top of the letter also, addressed to the Manager of the respondent Bank, the date was given and as such, the contention of the appellants cannot be accepted. As far as Exh. A13 dated 4.8.1988 is concerned, which is related to the DPN dated 25.2.1983, here also the comment is that it was not dated. But the fact remains that it was executed by none else than defendants 2 and 3 on behalf of the 1st defendant. The letters of acknowledgement of debt in relation to that liability are marked as Exhs. A25, A26 and A27. Exh. A25 is signed by the 2nd defendant on behalf of the 1st defendant firm as the principal borrower and defendants 4 to 6 as its guarantors. The date put on the bottom of this document is shown as January 1, 1983. Pointing out the said date, the learned Advocate for the appellants is trying

to state that no credence could be given for these documents as it was dated January 1, 1983, on which date there was no loan transaction at all.

The mere fact that there was some error in putting the date, we cannot come to the conclusion that the entire document is false or fabricated.

As it has been rightly pointed out by the DRT, a person who signs a document should also take sufficient care to put the date under his signature if he so desires and if it is not done so, it is not open to him to question the date in the said document. There may be some omissions, which would take the appellants nowhere. Likewise, the signing by the 2nd defendant on behalf of the 1st defendant styling as a proprietor also would not to any extent militate the case of the respondent Bank. The appellants argued at length by pointing out certain infirmities and the DRT had observed that they are not sufficient grounds to hold that all these six letters of acknowledgement of Debts propounded by the respondent Bank are not valid and I am also in complete agreement of the said view and I do not find any ground to set aside the said finding of the DRT. This point is also answered against the appellants.

24. Point No. 4: It is the contention of the learned Advocate for the appellants that the letters of guarantee require registration under the Registration Act, 1908, and they having been not registered, it would not have evidentiary value nor those documents can be looked into and relied upon. It is further argued that the letter of guarantee should be a Tripartite Agreement, which contemplates the principal debtor, the creditor and the surety. Pointing out the letters of guarantee obtained by the respondent Bank, it is submitted that the same is not in conformity with Section 126 of the Indian Contract Act, also.

Appellants also relied upon the case of H. Mohammed Khan (Deceased) by LRs and Ors. v. Andhra Bank, , wherein the Court after extracting the definition of Section 126 of the Contract Act, had observed that, "It is clear from the above definition that the contract of guarantee involves three parties, the creditor, the surety and the principal debtor. A contract of guarantee must, therefore, involve a contract to which all these parties are privy. Their express participation or implied assent to have such a contract must be proved by the person who wants to rely on

it." On the contrary, the learned Advocate for the respondent Bank would contend that the contract of guarantee does not require registration and it need not necessarily be signed by all the three persons namely, the creditor, the surety and the principal debtor. It is also not a sine qua non that the principal debtor must expressly be a party to the document of guarantee as it is adequate if the principal debtor is a party by implication. Merely because the third party namely, the principal debtor does not figure in by nomination, it cannot be said that it gives rise to the contract of indemnity as in fact, in substance and essence it is a contract of guarantee because primarily and essentially it is the substance that has got to be looked into and not the form in order to determine in such cases as to whether it is a contract of guarantee or indemnity.

Section 126 of the Contract Act deals with the contract of guarantee which states, "A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default.... A guarantee may be either oral or written" (Emphasis supplied). This section does not contemplate registration nor it would attract Section 17(1)(b) of the Registration Act, 1908, which deals with the documents of which registration is compulsory and those documents are, "Non-testamentary instruments which purport or operate to create, declare, assign limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upward, to or in immovable property". A perusal of the guarantee given by defendants 4 to 6, which are Exhs. A8, A9 and A10, would disclose that they are not in respect of any immovable property and as such, it would not fall under any of the category enumerated in Section 17(1)(b) of the Registration Act, 1908. As they are the Agreements and it is also stated so in the letter of guarantee itself that, "In consideration of your, at our request making and agreeing to make loans and advances....I, the undersigned...

guarantee the payment." would make it very clear that they are the Agreements in the required Stamp paper and they do not require registration as submitted by the appellants and hence the said argument of the appellants cannot be countenanced. The other contention of the appellants that the guarantee must be a Tripartite Agreement is not acceptable for the reason that the contract between

the surety and the creditor by which the surety guarantees the debt and no doubt, the consideration for the contract may move either from the creditor or from the principal debtor or both. Even Section 145 of the Contract Act provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The contract of guarantee may be either oral or written as set out in Section 126 of the Contract Act and as such, tripartite agreement between the surety, principal debtor and creditor is not contemplated, as in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety and, therefore, the Guarantee Agreement executed by the guarantor is valid. This point is also answered against the appellants.

25. Point No. 5: The learned Advocate for the appellants has contended that the respondent Bank has charged penal interest as against the principles laid down in the case of *Central Bank of India v. Ravindra and Ors.*, I (2002) BC 150 (SC) : IV (2001) CLT 127 (SC) : AIR 2001 SC 3095. It is true that the Hon'ble Supreme Court in the above cited judgment has held in Para 55 that: "(1) Though Interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest, (sic).

(2) Novation, that is, a debtor entering into a fresh agreement with creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any contract express or implied and an express acknowledgement of accounts are best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(3) The prevalence of banking practice legitimatises stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contract voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to

recovery and payment of interest.

The learned Advocate for the respondent Bank submitted that they have not capitalised the penal interest. The appellants also, have not let in any evidence that the respondent Bank has capitalised the penal interest. Hence, this point is also answered against the appellants.

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