

Union of India Vs. Bank of India and ors.

Union of India Vs. Bank of India and ors.

SooperKanoon Citation : sooperkanoon.com/774133

Court : Chennai

Decided On : Feb-08-1980

Reported in : [1981]130ITR486(Mad)

Judge : G. Ramanujam and ;Venugopal, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 230A and 281

Appeal No. : Appeal Nos. 885 of 1975 and 206 of 1976

Appellant : Union of India;bank of India

Respondent : Bank of India and ors.;h.J. Matha Gowder

Advocate for Def. : N. Varadarajan, Adv.

Advocate for Pet/Ap. : M.R. Narayanaswami, Adv.;N.V. Balasubramaniam, Adv.

Judgement :

Ramanujam, J.

1. These two appeals arise out of a common judgment dated September 13, 1974, rendered but he Sub-Court, Nilgiris, at Ootacamund in O.S. No. 53 of 1971 on its file. A.S. No. 206 of 1976 has been filed by the plaintiff in the suit and A.S. No. 885 of 1975 has been filed by the 7th defendant therein.

2. Bank of India as the plaintiff filed the said Suit O.S. No. 53 of 1971 for the recovery of a sum of Rs. 1,98,746.70 with interest thereon at 10 1/4% per annum from defendants Nos. 1 to 3 and, 5 a sum of Rs. 1,71,399.67, out of the said sum 1,98,746.70 with interest at 10 1/4% per annum from the 4th defendant, a sum of Rs. 1,32,395.52 with interest thereon at 10% per annum from the 6th defendant and in default of payment by the 6th defendant direct the sale of the mortgaged properties, more fully set out in the second schedule to the plaint and for the a decree for specific performance directing the 5th defendant to execute and register a mortgage deed in favour of the plaintiff in respect of his properties described in the first schedule to the plaint as per the agreement date December, 16, 1967, or, in the alternatives for a decree for recovery of the said sum of Rs. 1,98,746.70 as damages for breach of the said agreement.

3. The case of the plaintiff, hereinafter referred to as the bank, as set out in the plaint was as follows : The bank is carrying on banking business among other places at Coonoor. The 1st defendant, a partnership firm, is doing business as tea blenders and merchants at Coonoor and the 2nd and 3rd defendants are its partners of which the former is the managing partner. The 1st defendant firm had been maintaining a current account with the bank since 1962, and it has also been granted facilities at the Coonoor branch of the bank of the bank in connection with the sale of their tea. At its request, the 1st defendant was granted by the bank on 27th July, 1966, advances by way of cash credit facility in two accounts, (i) cash credit (hypothecation) account up to limit of Rs. 75,000, and (ii) a cash credit (pledge) account up to a limit of Rs. 75,000, each repayable on demand at the rate of 4% over bank rate. In respect of the said advances, defendants Nos. 1 to 3 executed two joint and several demand promissory notes date 27th July 1966, for Rs. 75,000 each in favour of the bank and on the same date they also executed a letter of continuing security letter of lien and set off, an agreement of hypothecation of all manufactured tea belonging to the 1st defendant, a declaration that the goods hypothecate were free from all encumbrances and a memorandum of agreement of pledge of stocks of tea. In consideration of the said facilities granted to the 1st defendant, the 4th defendant also executed a letter of guarantee dated 27th July, 1966, in favour of the bank guaranteeing due payment by the 1st defendant of the monies due under both the accounts together with

interest and all cost and expense as mentioned in the said guarantee. At its request, the 1st defendant was also granted by the bank an advance facility under bills purchase account up to a limit of Rs. 1 lakhs and the 1st defendant promised to pay 4% over the bank rate towards the advance made on that account. With reference to this account also the defendants Nos. 1 to 3 have executed two letters of pledge dated September 4, 1965, and December 28, 1967, granting the plaintiff general authority to collect the bills and to appropriate the proceed toward its dues.

4. During the year 1967, the business of the 1st defendant in the bank decreased and the turnover, in the various accounts registered a steep decline. Taking note of this, the bank pressed the first defendant for immediate payment of all amounts due under all their accounts, and that in default legal proceedings will be initiate against them for recovery of the same. Thereupon, the 4th defendant as managing directors of the 6th diffident-company whose major portion of tea were being sold by 1st defendant came forward and undertook that the 6th defendent-company would give the plaintiff a second mortgage of the company's fixed assets. In pursuance of the said agreement, the 6th defendant in consideration of the bank granting further time to the 1st defendant and forbearing to sue, executed in favour of the bank a second mortgage dated February 9, 1968, in respect of its tea factory as security for the payment of the amount due to by the 1st defendant in their various accounts to the extent of one lakh of rupees together with interest on the said sum of 10 per cent, per annum. Under the said mortgage deed the time for payment of the principle was 9th February 1970, and the interest was payable regularly in quarterly intervals commencing from 1st April, 1968, and in case of default in payment of the said interest regularly, the entire principle and interest would become payable forthwith. The amount due under the said mortgage on the date of suit is a sum of Rs. 1,32,397.52. In consideration of the bank agreeing to give further time and for forbearing to sue defendants Nos. 1 to 3 for recovery of the amounts due from them on all these accounts, at the instance of the 1st defendant, the 5th defendant executed a letter of guarantee dated December 16, 1967, guaranteeing the due payment by the 1st defendant of all monies due and payable to the bank on all their account to the extent of two lakhs of rupees and all costs and charges and expenses mentioned in the guarantee. The 5th defendant

also undertook to execute and register a mortgage in respect of an extent of land measuring 1.52 acres out of 1.59 acres of his land in S. Nos. 408/B and 408/2 in Hubbathalai village including in tea factory, and in pursuance of the above undertaking he delivered the title deeds of the above property to the bank and undertook to execute and register a mortgage deed within one month from the date thereof in respect of the above properties as security for due payment of all the amount due by first defendant to the bank. The 5th defendant, however, failed to execute and register a mortgaged deed within one months as undertaken in the agreement dated December 16, 1967, and in spite of repeated demands, the 5th defendant had not executed the document and, therefore, the plaintiff is entitled to seek as specific performance of the said agreement as against the 5th defendant. Since defendants Nos. 1 to 6 have failed to perform their obligations as undertaken by them under the promissory notes and guarantee bond executed by them, the bank was constrained to file the suit for the reliefs set out above as against the various defendants.

5. All the defendants contested the suit. Defendants Nos. 1 to 3 though they admitted that the 1st defendant had three different accounts with the bank with a limit of Rs. 75,000 each, disputed their liability to pay sum of Rs. 1,246.43 under the hypothecation account and a sum of Rs. 72,938.05 under the pledge account and stated that the bank is bound to give credit in a sum of Rs. 80,000 being the sale price of the tea pledged with the bank between February 16, 1969, and February 20, 1970 and that the bank is liable to give credit to a sum of Rs. 2,720 being the godown rent for 17 months at the rate of Rs. 163 per months which the defendants had to incur as a direct consequence of the wrongful withholding of the goods by the plaintiff-bank between December 15, 1967, to May 15, 1969. They also pleaded that they are entitled to the relief by way of deduction of interest under the Usurious Loans Act and that, even otherwise, they being agriculturists are entitled to scale down the interest. Thus, defendant Nos. 1 to 3 denied their liability to pay only the amount due under the hypothecation account as also the bill purchase account after scaling down the interests.

6. Defendants Nos. 4 and 6 filed a written statement contending that though they had executed the letter of guarantee in favour of the bank, the bank having

contravened the terms of the letters of guarantee the guarantee letters cannot be enforced as against them, that the letters of guarantee executed by them were null and void as they were not supported by consideration, that the claim as against them was barred under O. 2, r. 2, CPC, as also by the principle of res judicata under s. 11 CPC, as the bank has filed a written statement in O.S. No. 181 of 1970 filed by one Noel Shreshta against the 6th defendant on a mortgage claiming a sum of Rs. 1,22,083 from defendants Nos. 1 to 4. They had also contended that the 4th defendant had now power to give the guarantee letter as per the memorandum and the articles of association of the 6th defendant-company and, therefore, the guarantee letter cannot bind the 6th defendant.

7. The 5th defendant in his written statement contended that as the guarantee letter was given by him to the bank to stifle a criminal prosecution which the bank intended to launch against defendants Nos. 1 to 4 who had clandestinely removed the tea stocks which had been pledged with the bank, the guarantee letter was void and unenforceable, that he never promised to give security of his properties to the bank, nor did he seek forbearance from the bank on behalf of defendants Nos. 1 to 4 that he induced to execute the guarantee letter without disclosing the contents therein, that he signed the guarantee letter which was in printed form, that he never agreed to execute a mortgage deed in respect of his properties, that he did not execute a guarantee letter for Rs. 2,00,000 but he merely signed a printed form without knowing the contents thereof, and that even otherwise the said guarantee letter was void and enforceable as being without any consideration. He also raised the plea that the claim was barred under O. 2, r. 2, CPC, as similar claim had been made against him by the bank as 2nd defendant in the said O.S. No. 181 of 1970.

8. With reference to the various pleas taken by all the defendants, the bank filed a reply statement stating that on the physical verification of the stocks for November and December, 1969, hypothecate with the bank defendants Nos. 1 to 3, the bank came to know that all hypothecate stocks had been removed, that there was deterioration in quality of the remaining tea stocks which could not possibly fetch more than Rs. 40,000 in all, defendants Nos. 1 to 3 were asked to give additional security for the amount due by them and that, therefore, there was no question of

the bank crediting the entire amount of Rs. 80,000 said to be the real value of the available stocks. It was also stated by the bank in the reply statement that the defendants were not entitled to the benefits of the Usurious Loans Act or the Agricultural Relief Act and that the Suit was not bad for multifariousness or under s. 11, or 2, r. 2, CPC. In this reply statement the bank had clearly averred that at no time it had threatened defendants Nos. 2 to 4 with criminal prosecution or with any dire consequence but was only insisting on the payment of the amount due and to give additional security for granting further time to them if they wanted time for payment. It was in view of the presume brought by the bank on defendants Nos. 2 to 4 for immediate payment or to give additional security if further time was needed, that the 5th defendant, at the instance of defendants Nos. 2 to 4 and after acquainting himself with all the facts and knowing fully the implications of the recitals in the documents, executed the guarantee letter.

9. The 7th defendant, the Union of India represented by the Tax Recovery Officer, Coimbatore, which has been impleaded as a party on its own petition filed a written statement to the following effect : The 6th defendant in the suit owned a sum of Rs. 32,273 towards income-tax for the assessment years from 1961-62 to 1967-68 that certificates under s. 222 of the I.T. Act has been issued by the TRO on March 7, 1969, for Rs. 15,126, that further amounts of tax were due from the 6th defendant for subsequent years, that on the date of the alleged mortgage by the 6th defendant in favour of the bank there was an income-tax liability due by the 6th defendant to the extent of Rs. 25,625 that the said mortgage had been executed by the 6th defendant only to defraud and deprive the I.T. Dept. through its managing director, the 4th defendant, that at the time of the execution of the mortgage the bank was fully aware of the amount due to the I.T. Dept by the 6th defendant and that the bank, defendants Nos. 1 and 2 and 4 and 6 had colluded together to bring about the suit mortgage.

10. On these pleadings as many as 17 issues came to be framed by the trial court. After due consideration of the evidence adduced by the parties the court below decreed that the bank was entitled to recover from the defendants Nos. 1 to 3 sum of Rs. 1,98,930.70 together with interest, a sum of Rs. 1,71,399.67 out of the same from the fourth defendant, and a sum of Rs. 1,32,395.52 out of the amount

decreed against defendants Nos. 1 to 3 to be recovered from the properties mortgaged by the 6th defendants and dismissed the suit as against the 5th defendant. The court below also held that the 7th defendant is not entitled to any relief in the suit.

11. Defendants Nos. 1 to 3 and 4 and 6 have not challenged the decree of the court below as against them by filing any appeal. However, aggrieved against the dismissal of the suit as against the 5th defendant, the plaintiff has filed A.S. No. 206 of 1976, and the 7th defendant has filed an appeal, A.S. No. 885 of 1975, against the judgment of the court below in so far as it rejected its claim that the mortgage executed by the 6th defendant in favour of the bank was void and inoperative under s. 281 of the I.T. Act, 1961, as having been brought into existence collusively by the bank and the 6th defendant with a view to defeat the rights of the I.T. Dept. to recover the income-tax dues levied on the 6th defendant.

12. In A.S. No. 206 of 1976, the points that arise for consideration are : (1) Whether the guarantee letter dated December 16, 1967, given by the 5th defendant is unenforceable as has been held by the court below and (2) Whether the plaintiff is entitled to the specific performance by the 5th defendant of the agreement dated December 16, 1967, to execute and register a mortgage in favour of the bank in respect of the properties described in the plaint schedule

13. The court below has held that the guarantee letter given by the 5th defendant and the agreement signed by him to execute a mortgage deed are void and unenforceable as they are not supported by consideration and it is only on that basis the suit against the 5th defendant has been dismissed. The court below having held against the 5th defendant in respect of the other defence taken by him such as his signing the printed form without knowing the contents thereof, etc., it is not necessary to go into the said defence. Therefore, the only question to be considered now is as to whether the guarantee letter, ex A-26 and the agreement, ex. A-27 executed by the 5th defendant are void and unenforceable as contended by the 5th defendant for was of consideration. The court below is of the view the exs. A-26 and A-27 executed by the 5th defendant are not supported by consideration that the monies lent by the bank already to the 1st defendant cannot

from the consideration for exs. A-26 and A-27 which came into existence later, and that the plaintiff had not threatened the defendants Nos. 1 to 3 with any criminal or civil proceedings so as to bring in the theory of forbearance to sue which might form a proper consideration. We have to, therefore, see as to the circumstance under which exs. A-26 and A-27 came to be executed and whether those documents are devoid of consideration as has been held by the court below.

14. In the original plaint it has been averred by the bank that the 5th defendant, the proprietor of Hubbathalai Tea Factory was brought to the plaintiff by the 1st defendant, that in consideration of the plaintiff agreeing to give further time and forbearing to sue defendants Nos. 1 to 3 he executed a letter of guarantee dated December 16, 1967, guaranteeing the due repayment by the 1st defendant of all the monies due and payable to the plaintiff to the extent of the Rs. 2 lakhs together with interest thereon and all costs and charges, that he also undertook to execute a registered mortgage of his properties in R.S. Nos. 408-B and 408/2 situate at Hubbathalai village where in a tea factory has been located and in pursuance of that undertaking delivered the titled deeds of the above property and also a stamped agreement of the same date undertaking to execute a registered mortgage deed within the one month from the date thereof as security for payment of all the amounts due by the 1st defendant to the plaintiff. The 5th defendant in his written statement has, however, stated that he executed the guarantee letter, Ex. A-26, and the agreement, Ex. A-27, with a view to stifle the prosecution, which true bank intended to launch against defendants Nos. 2 to 4 for the clandestine removal and sale of the tea stocks which had been hypothecate with the plaintiff, that, therefore, the documents having been executed to stifle or avoid a criminal prosecution, they are unenforceable that in any even the not having sought the forbearance from the bank on behalf of the defendants Nos. 1 to 4 the documents and that the allegation of forbearance to sue made in the plaint is not true. In the reply statement, the plaintiff, however, has gone back on the averments made in the original plaints. In para 15 therein the plaintiff has stated that the bank has at no time threatened defendants Nos. 1 to 4 with criminal prosecution or with dire consequence but that the bank was insisting on the payment of the amount due and in the alternative on the production of the an additional security if defendants Nos. 1 to 3 wanted further time. This stand taken by the plaintiff in its reply

statement has been reiterated at the stage of the evidence. P.W. 1, the principal witness on behalf of the bank and who was the agent of the bank at the relevant time, has deposed in his chief examination as follows :

'Exhibit A-26 is the guarantee letter executed by D-5 on 16-12-1967. A few days earlier to 16-12-1967, when he inspected the stock with the books, the position was not satisfactory. So we took into possession the hypothecated goods and also asked defendants Nos. 1 to 3 for additional security. So 2nd defendant brought the 5th defendant and 5th defendant signed Ex. A-26 for an amount of Rs. 2 lakhs as that was the approximate aggregate liability of the borrower. D-5 also executed Ex. A-27 on the same date as EX. A-26. Only after the contents of Exs. A-26 and A-27 were written and completed and only after satisfying himself of all particulars, D-5 signed in them we also reminded D-5 of his undertaken got give a registered mortgage but eventually he did not do so. It is not rue to say that the bank refused to release the tea stock in he bank's possession. On the other hand we have been pressing D-1 to pay the amount the take the stocks.'

15. In cross-examination he again repeats :

'When the first defendant's tea stock got depleted we did not threaten D-2 with criminal or civil proceedings. We asked D-2 to pay off the money to put this account in order. AT that time D-2 brought D-5. I explained to D-5 this position. D-5 offered to give security. D-5 told that me that the property belonged to him. D-5 did not say that it was his joint family property At the time when Exs. A-26 and A-27 were drafted by D-5, I told him his liability to be fixed by them. I did not tell him that only if he execute a mortgage deed there will be the liability. The consideration for that must be between D-2 and D-5 and we had nothing to do with that.'

16. The 5th defendant as D.W. 3 had deposed that the 2nd defendant came and told him that as criminal proceedings are to be launched against him by the bank and as there will also be trouble to the bank agent, unless is gives a guarantee he signed in Ex. A-26 without filling up the blanks, that he similarly signed Ex. A-27 without reading the contents thereof, and that apart from signing the document, Ex. A-27 he never said that the will stand guarantee for the dues of the 1st

defendant. Exhibit A-26 the letter of guarantee, executed by the 5th defendant on 16-12-1967 in favour of the plaintiff, is in a printed form and the portion relating to the consideration for the execution of the said guarantee letter is as follows :

'In consideration of your from time to time making or continuing advances to, or coming under liabilities or discounting bill or otherwise giving credit or accommodation or granting time for as long as you think fit to M/s. Harimohan and Company (hereinafter called 'the principal') either alone or jointly with any other person or persons, I, the under signed, hereby guarantee the due payment, two days after demand in writing, incurred, or discounted before or after the date thereof, to or for the principal, either alone or jointly with any other person or persons, and also all bills promissory notes, or guarantees held by you bearing the principal's signature, together with interest, commission, and other banking charges, including all legal charges and expenses, provided always that the total amount which I shall be liable to pay under this guarantee shall not exceed Rs. 2,00,000 together with interest thereon'

17. Exhibit A-27, dated December 16, 1967, the agreement executed by the 5th defendant to the plaintiff undertaking to execute a registered mortgage deed in pursuance of the said guarantee letter, Ex. A-26 does not recite any specific consideration, apart from saying that as guarantor to the various advances granted by the bank to the first defendant he undertakes to create a registered mortgage in favour of the bank in relation to the properties set out thereunder. It is in the light of the above pleadings and the evidence that we have to consider the question whether Exs. A-26 and A-27 are supported by consideration. Exhibit A-27 merely proceeds on the basis of the 5th defendant's liability as a guarantor. Therefore, there need not be any separate consideration for the enforceability of Ex. A-27, if it is found that Ex. A-26 is supported by valid consideration. A-27 will also be void and unenforceable for want of consideration. Exhibit A-26, which is in a printed form, recites two items of consideration as will be seen from the extract set out above. (1) The plaintiff making or continuing to make advances to the 1st defendant from time to time or otherwise giving credit accommodation and (2) The plaintiff granting time to the 1st defendant as long as the bank thinks fit. The first item of consideration can come into operation only when there are future

advances or accommodation given by the bank to the 1st defendant and the earlier advances made to the 1st defendant cannot be brought within that recital as forming part of the consideration for the guarantee given by the 5th defendant. It is not even the case of the plaintiff that the 5th defendant gave guarantee for future advance to be made or accommodation to be given to the 1st defendant by the bank. The other item of consideration is granting time for the first defendant as long as the bank thinks fit. Since Ex. A-26 is in a printed form which sets out two items of consideration out of which one item of consideration is inapplicable, the plaintiff has necessarily to prove that the 5th defendant specifically sought for extension of time for payment by the defendant of the amount already advanced and the plaintiff agreed to give time in consideration of the 5th defendant giving a guarantee. The plaintiff has not adduced any such evidence. Though in the original plaint it has been alleged that the bank wanted to proceed against defendants Nos. 1 to 4, that at the instance of the 5th defendant there was a forbearance to sue on its [part and that it formed the consideration for the guarantee executed by the 5th defendant there was a forbearance to sue on its part and that it formed the consideration for the guarantee executed by the 5th defendant, in the reply statement this has been completely given up and a new stand has been taken that defendants Nos. 1 to 4 were not threatened with any proceedings, civil or criminal, that they were merely asked to pay back the amount or given additional guarantee if they wanted further time. This is the stand which has been affirmed also in the oral evidence of P.W. 1. It is, therefore, clear that the plaintiff bank came forward with a specific case that the consideration for Ex. A-26 was itself forbearance to sue and that the case had been given up at the stage of the trial. It came forward with a new case that the guarantee, Ex. A-26, was given by the 5th defendant in consideration of the bank giving further time to defendants Nos. 1 to 3 for payment of their dues. Even on this aspect of the case the evidence adduced on the part of the plaintiff is quite wanting. As already stated, Ex. A-26 which is in a printed form contains a recital for grant of time as long as the bank thinks fit. In the setting in which the recital occurs, it will mean that the time given is for payment of the amounts referred to in the earlier recital, i.e., future advances to be made by the bank, and it cannot refer to any advances already made. Even assuming that it referred to past advances, it does not specifically say as to what

was the time asked for by the 5th defendant and what was the time agreed to by the bank for repayment of the amounts by defendants Nos. 1 to 3. Neither in the pleadings nor in the avoidance is there any reference to any specific time having been asked for by the 5th defendant or defendants Nos. 1 to 3 and granted by the bank to defendants Nos. 1 to 3 for payment of their dues. Even assuming that extension of time for payment will form proper consideration for the guarantee given by the 5th defendant, the extension of time sought for by defendants Nos. 1 to 3 or the 5th defendant and given by the bank should be for a definite period and it cannot be indefinite. A promise or agreement to give time by the bank can form a valid consideration for the guarantee only when the promise is definite and specific and is capable of enforcement. We find that the printed form, Ex. A-26, is quite inappropriate to the situation and the said form is appropriate to the guarantee letter executed at the time of the original borrowing. Even P.W. 1 does not say that defendants Nos. 1 to 4 or the 5th defendant stipulated for any specific period of time for payment of the dues by defendants Nos. 1 to 4 and it is only in consideration of such grant of time by the bank that the 5th defendant executed the guarantee letter, Ex. A-26. P.W. 1 completely gives up the case of the bank and says that the guarantee was given only as an additional security as the bank was not satisfied with the security already given by defendant Nos. 1 to 4. His evidence appears to be consistent with the stand of the 5th defendant that as he was persuaded by defendants Nos. 2 to 4 to give additional security he gave security for the amounts already borrowed by defendants Nos. 1 to 3 from the bank.

18. It is true, the 5th defendant specifically came forward with a case that the guarantee bond was executed with the object of stifling the prosecution intended to be initiated by the bank against defendants Nos. 1 to 3 for the clandestine removal of the tea stocks which were hypothecated with the bank and that, therefore, the guarantee letter given is void as being opposed to public policy. But the plaintiff cannot succeed on the basis of the defence taken, and it must stand or fall on its own case. In the reply statement and in its evidence the plaintiff has completely gone back on its earlier case of forbearance to sue forming the consideration for the guarantee, Ex. A-26. If really there is evidence that the guarantee was given to forbear the plaintiff from initiating civil or criminal

proceedings against defendants Nos. 1 to 4 for the clandestine removal of the tea stocks hypothecate with the bank, that will not amount to stifling the prosecution as contended by the 5th defendant and the documents, Ex. A-26 and A-27, cannot be taken to be void as being opposed to public policy. A contract entered into with a view to forbear a party from taking a criminal proceeding will not amount to stifling of prosecution as has been held in *Ouseph Poulo v. Catholic Union Bank. Ltd.*, : [1964]7SCR745 . Even the court below has not held that in this case the guarantee has been executed by the 5th defendant for stifling the prosecution. As a matter of fact it holds that there was no attempt on the part of the plaintiff to initiate criminal proceedings against defendants Nos. 1 to 4 for the clandestine removal of the tea stocks hypothecate with the bank. In those circumstances, the plaintiff-bank which has given up the plea of forbearance to sue must positively prove that Ex. A-26 was executed by the 5th defendant in consideration of the bank granting a specified time to defendants Nos. 1 to 3 either at their request or at the request of the 5th defendant for payment of their dues. But the plaintiff has not chosen to let in such evidence and the document executed Ex. A-26, monies puts that at the time when the 5th defendant executed Ex. A-26, monies had been advanced by the bank long ago and security for payment had also been given by defendants Nos. 1 to 4 and no money consideration passed between the bank on the one hand and defendants Nos. 1 to 3 and 5 on the other on the date of Ex. A-26. It is true, there need not be a separate money consideration, for, forbearance to sue for recovery of money for a specified time will form a proper consideration for a guarantee given by the 5th defendant. But in this case the plaintiff's own evidence is to the effect that there was no idea to sue for recovery of the money from or to prosecute the defendants Nos. 1 to 3 for clandestine removal of the tea stocks which were hypothecated with the bank and there was only a pressure on defendants Nos. 1 to 3 to bring in additional security and it is only at that stage the 5th defendant was brought for giving Ex. A-26 and Ex A-27. If no specified time was granted by the bank to defendants Nos. 1 to 3 for payment of their dues as to form a proper consideration for the guarantee executed by the 5th defendant, the guarantee cannot be taken to be supported by any consideration. The original consideration which proceeded from the bank to the 1st defendant cannot form the consideration for the guarantee. Therefore,

facts are to be established to show that there is a fresh consideration agreed upon between the parties for the execution of Ex. A-26. Since the printed form in Ex. A-26 talks of grant of time as long as the bank thinks fit, it is quite inappropriate and cannot form the consideration for a subsequent guarantee bond, though it may be relevant in connection with the original borrowing.

19. In *Nanak Ram v. Mehin Lal* 1875 ILR 1 All 487, the facts were more or less similar to the case on hand. In that case, one N advanced money to K on a bond hypothecating his property to N and mentioning M as a surety for any balance that might remain due after realisation from K's property. M though not a party to K's bond executed a separate surety bond two days subsequent to the advance of the money reciting the provisions of the bond executed by K and undertaking the liability mentioned therein. When N filed a suit against K and M for recovery of the amount advanced to K, M pleaded that the surety bond given by him two days later after K borrowed money from N on executing a bond of his own was without consideration and, therefore, it was unenforceable. A Division Bench of the Allahabad High Court held that as the money was not advanced to K on the basis of the bond executed by M, there was no consideration in respect of the guarantee bond executed by M, and as N did not promise to do or did not do anything or did not do anything for the benefit of the principal debtor, K, so as to constitute consideration for the surety's giving the guarantee, the guarantee bond executed by M fell for want of consideration. According to the learned judges, though the surety bond promised to make good any deficiency if the property hypothecated by the borrower did not satisfy the debt, the creditor had not agreed or promised to do anything in return and, therefore, the surety bond in that case could not be enforced. The principle laid down in that decision is that the creditor should have done or agreed to do something in consideration of the surety's giving the guarantee. If the execution of the surety bond is simultaneous with the original borrowing then the original lending by the creditor will itself form sufficient consideration for the surety bond. But, where the surety bond comes into existence after the original borrowing., the creditor must prove if he wants to proceed against the surety or guarantor, that in consideration of the contract of surety or guarantee he did something or refrained from doing something. Since the plaintiff has given up its case of forbearance to sue and has relied only on the plea

of additional security, the decision in that case will squarely govern this case as well. A similar question came up for consideration in *Muthukaruppa Mudali v. Kathappudayan* [1914] 27 MLJ 249 (Mad), wherein a Division Bench held that advances made on the recommendation of a person were not sufficient consideration in law for a subsequent promise by him guaranteeing their payment. In that case, on the recommendation of K certain amount was advanced by a creditor to a debtor. Subsequently, K guaranteed the payment of the sum borrowed by the debtor. When the question arose as to the enforceability of the subsequent guarantee given by K it was urged that a mere recommendation by one party to another to lend money to a third party did not render the first party to repay the loan, that at the time when the guarantee was given by him the amount had already been advanced by the guarantee was given by him the amount had already been advanced by the creditor to the debtor and that the creditor having done nothing in consideration of the subsequent guarantee, the same could not be enforced. This contention was accepted by the court as tenable. Halsbury's Laws of England, volume 20, 4th edition, para. 115 (at p. 58), deals with the topic 'requisites of consideration' for a surety bond. It is as follows :

'The consideration for the surety's promise does not move from the principle debtor, but from the creditor. It need not directly benefit the surety, although it may do so, and it may consist wholly of some advantage given to or conferred on the principal debtor by the creditor at the surety's request. Thus, the surety's promise often stipulates for a supply of goods or an advance of money to the principal debtor, or that the principal debtor should be taken into the creditor's service or employment.'

20. Paragraph 116 (at the same page) also appears to be relevant; it is as follows :

'The consideration may take the form of forbearance by the creditor, at the surety's request, to sue the principal debtor, or of the actual suspension of pending legal proceedings against him. The mere fact of forbearance is not, however, of itself a consideration for a person's becoming a surety for the payment of a debt. There must be either an undertaking to forbear, or an actual forbearance at the surety's express or implied request. An agreement to forbear for a reasonable time will

provide sufficient consideration to support a surety's promise. So will an agreement to forbear for an indefinite period, at least when a reasonable time can be inferred or where the surety has received the advantage contemplated. Whilst the fact of forbearance, as opposed to an express promise to do so, will not supply the necessary consideration, an act of forbearance following a request, at the time the guarantee was entered into, so to act will do so, even if the request was not expressly agreed. To be effectual the forbearance relied upon must be of a right capable of being enforced. Therefore, where there is no person who could be sued for the debt agreed to be forborne, the forbearance to sue cannot form any consideration.'

21. As per the legal position enunciated in the above paragraphs the mere fact of forbearance to sue is not sufficient to constitute consideration for a person becoming a surety for the debt but there must be a promise or undertaking to forbear or an actual forbearance at the surety's express or implied request and the promise by the creditor to forbear to form a consideration should be such as is capable of being enforced. In this case Ex. A-26 talks of the plaintiff granting time as long as it thinks fit. Such a vague provision without any specified time-limit is incapable of being enforced by the surety. Therefore, it cannot be taken to be a sufficient consideration to support the contract of guarantee. Further, any promise made by the bank either to extend time or to forbear to sue if it is to be treated as consideration for the guarantee bond given by the 5th defendant, that promise should be such as is enforceable against the bank. As already stated, the bank has given up its case of forbearance to sue as forming consideration for the guarantee bond but has restricted its case in the evidence only to the plea of extension of time. The extension of time sought for either by defendants Nos. 1 to 3 or by the 5th defendant is not specific and Ex. A-26 proceeds on the basis that the bank can give such time as it thinks fit. Such a vague term is not possible of enforcement by the 5th defendant who has executed the guarantee. Besides there is absolutely no evidence at all adduced by the bank to show that there was a promise to extend time by the bank at the instance of the 5th defendant. Unless the bank, its promise to extend the time for payment of the dues by defendants Nos. 1 to 3 was at the instance of the 5th defendant, it cannot be said that the guarantee bond given by him is supported by proper consideration.

22. A faint attempt was made by the learned counsel for the plaintiff bank that the release of the stocks from the hypothecation and the pledge by the bank may form consideration for the guarantee bond executed by the 5th defendant. It was said that it was only after the 5th defendant had given the guarantee bond that the bank agreed to release the tea stocks. This appears to be completely a new case which had not been set out either in the pleadings or at the stage of the evidence. The contract of guarantee contained in Ex. A-26 does not refer to the release of the stocks to defendants Nos. 1 to 3 as the consideration for the 5th defendant's guarantee. The evidence of P.W. 1, the agent of the bank also does not refer to the releasing of the stocks as forming consideration for the guarantee. In any view of the matter was have to agree with the view of the court below that the guarantee bond, Ex. A-26, is not support by consideration.

23. If Ex. A-26 is not support by consideration, then Ex. A-27, which proceeds on the basis that the 5th defendant is a guarantor, will also fail for want of consideration. The agreement, Ex. A-27, undertaking to execute a mortgage deed being unsupported by consideration cannot also be enforced. Therefore, the plaintiff is not entitled to any relief as against the 5th defendant. A.S. No. 206 of 1976 is, therefore, dismissed with costs.

24. In A.S. No. 885 of 1975, the Union of India, the 7th defendant in the suit, questions the finding of the court below holding that the TRO cannot question the validity of the mortgage executed by the 6th defendant in favour of the bank. The case of the appellant is that the mortgage, Ex. A-28, dated February 9, 1968, executed by the 6th defendant in favour of the bank was void in view of the order in Ex. B-11 dated August 28, 1973. The said order was passed by the ITO, Ootacamund, under s. 281 of the I.T. Act, 1961, hereinafter referred to as the Act. Section 281 of the Act provides that if any assessee creates a charge be on, or parts with possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever of any of his assets in favour of any other person such charge or transfer shall be void as against any claim in respect of the completion of any proceeding under the Act. The proviso to the said section, however, says that such charge or transfer shall not be void if it is made for adequate consideration and without notice of the pendency of the proceeding, or without

notice of such tax or other sum payable by assessee or with the previous permission of the ITO. Sub-clause (2) says that sub-s. (1) will apply only if the tax due exceeds Rs. 5,000 and the assets charged or transferred exceed Rs. 10,000 in value. That the property charged by the 6th defendant in favour of the plaintiff-bank was more than Rs. 10,000 in value is not in dispute. According to the appellant since the 6th defendant had to pay Rs. 33,273 as income-tax arrears for the assessment years 1961-62, and on the date of the mortgage, Ex. A-28, dated February 9, 1968, a sum of Rs. 25,626 was the tax liability, and as, by the 6th defendant, a mortgage has been created with a view to avoid and evade the said tax liability, the ITO, Ootacamund has passed an order under s. 281 of the Act holding that the mortgage deed entered into on February 9, 1968, between the company and the bank is void against the claim of the I.T. Dept. for appears amounting to Rs. 31,031. The 6th defendant has not disputed its liability to pay the income-tax arrears and on the date of the execution of the mortgage there were income-tax arrears aggregating to more than Rs. 5,000. But the 6th defendant has adduced evidence to prove that before the said mortgage, Ex. B-11 was executed in favour of the bank a tax clearance certificate was obtained from the concerned ITO under s. 230A and that would show that there was no intention to defraud the revenue. It is also pointed out by the learned counsel for the bank that s. 281 as it existed on the date of Ex. B-11 was different from s. 281 as it now exists as a result of the Amending Act of 1975, and that as per the old section it was only the transfers made with the intention to defraud the revenue which will be void and not genuine transfers enter into without any intention to defraud the revenue. Section 281 before its amendment in 1975, was as follows :

'281. Transfers to defraud revenue void. - Where, during the pendency of any proceeding under this Act, any assessee creates a charge on or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever, of any of his assets in favour of any other person with the intention to defraud the revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as against any claim in respect of any tax or any other sum payable by the assessee as a result of the competition of the said proceeding : Provided that such charge or transfer shall not be void if made for valuable consideration and without notice of the pendency of

the proceeding under the this Act.'

25. This section will stand attracted only if creation of a charge or transfer of a property has been made with intention to defraud the revenue. Exhibit B-11, the order passed under s. 281 of the Act on August 28, 1973, proceeds on the basis that the 6th defendant was fully aware of his tax liability and yet he wilfully and deliberately stood guarantee to the 1st defendant and that can be only with an intention to defraud the I.T. Dept. of its legitimate dues and that the said intention was obvious from the fact that the 6th defendant had no interest in the affairs of the 1st defendant for whose benefit the mortgage had been executed.

26. As already stated, even before the execution of the mortgage deed, the 6th defendant had applied for under Ex. B-10 and obtained a certificate under s. 230A of the Act wherein certain income-tax arrears have been referred to. The ITO while granting the said certificate has specifically stated that the 6th defendant had made satisfactory provision for payment of tax due under the I.T. Act, Excess Profits Tax Act, Business Profits Tax Act, Wealth-tax Act, Expenditure-tax Act and Gift-tax Act and that the registration of the document would not prejudicially affect the recovery of any of the taxes under those Acts. Thus, the certificate given by the ITO prior to the registration of the mortgage deed, Ex. B-11, clearly indicates that the 6th defendant did not intend to defraud the revenue by executing the mortgage deed, Ex. A-28. When the ITO himself says that the execution of the mortgage deed would not prejudicially affect the recovery of the taxes due from the 6th defendant to defraud the revenue. As per s. 281 unless there is an intention to defraud the revenue the transaction cannot be held to be void. Apart from this question the 6th defendant or the bank has not been given notice of the proceedings in Ex. B-11 holding the mortgage to be void. It cannot be disputed that before any order is passed under s. 281 declaring a transaction to be void on the ground that it was in fraud of the revenue, the parties to the document who were likely to be affected by the decision should have been given notice and their representations heard before a final order was passed. In this case it is conceded by the appellant's counsel that neither the 6th defendant nor the plaintiff-bank who are parties to the mortgage deed, Ex. A-28, had been given notice. The learned counsel for the appellant would, however, submit that even orders passed without

notice to the affected parties will have statutory force, and it cannot be said to be absolutely null and void. In support of this submission the learned counsel refers to certain decisions. But having regard to the fact that on merits it has already been held that there was no intention to defraud the revenue on the part of the 6th defendant when he executed the mortgage deed. Ex. A-28, and that as such the order passed under Ex. 28, and that as such the order passed under Ex. B-11 cannot be said to be valid and legal, it is not necessary to consideration the above decisions cited.

27. In this view of the matter the court below appears to be right in holding that the appellant was not entitled to claim the mortgage deed, Ex. A-28, to be void. This appeal also, therefore, fails and it is dismissed with costs.

28. The learned counsel for the appellants in both the appeals seek leave of this court for filing appeals before the Supreme Court. But having regard to the fact that our decision rests on the factual position, we do not think that these are fit cases for grant of leave to appeal to the Supreme Court. The request for leave is, therefore, rejected.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com