

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30-06-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE R. SUDHAKAR

O.S.A.NO.112 OF 1999
and
C.M.P.NO.20119 OF 2001

State Bank of Mysore,
Branch Office,
9A, Dr.C.P. Ramaswamy Iyer Road,
Chennai 600 018.
Rep.by its Chief Manager

... Appellant/Ist Defendant

Vs.

1. Pukhrajmal Sugarmal Lunkad,
Proprietor, Lunkad Finance,
99, Old Prabhadevi Road,
Mumbai 400 025.
Rep. herein by Power Agent
B. Uttamchand Galada

2. Giridarilal,
Prop: M/s. Surya Movie Unit,
139-A, Kodambakkam High Road,
Chennai 600 034.

... Respondents/Plaintiff and
IInd Defendant

Appeal filed under Clause 15 of the Letters Patent read with
Order XXXVI Rule 1 of O.S. Rules against the judgment and decree
dated 5.5.1999 in C.S.No.260 of 1988.

For Appellant : Mr.J.Radhakrishnan

For Respondent-1 : Mr.J.R.K.Bhavanantham for
Mr.P.B.Ramanujam

Respondent-2 : Mr.T.V.Krishnamachari

J U D G M E N T

P.K. MISRA, J

The present appeal is filed by the first defendant against the judgment and decree of the learned single Judge in C.S.No.260 of 1988 dated 5.5.1999 decreeing the suit for a sum of Rs.10,27,500/- jointly and severally against the two defendants.

2. The plaintiff (Respondent No.1 in the present appeal) is a financier. Defendant No.2 (Respondent No.2 in the present appeal) is the Proprietor of Suriya Movie Unit and Appellant/Defendant No.1 is a Nationalised Bank. The suit has been filed through the power agent. According to the averments in the plaint, the plaintiff was carrying business under the name and style of "Lunkad Finance". First defendant, which is one of the subsidiary branches of State Bank of Mysore, had one Branch Office in Madras. Defendant No.2 approached the plaintiff to advance a sum of Rs.10 lakhs for the business of Defendant No.2 as a film producer. "The plaintiff agreed to provide finance subject to the first defendant furnishing a bank guarantee guaranteeing repayment of the amount of Rs.10 lakhs with interest". Accordingly the bank guarantee dated 4.4.1986 was executed by Defendant No.1 agreeing to pay Rs.10 lakhs with 16½ % interest by invocation of bank guarantee to the plaintiff in the event the Defendant No.2 failed and neglected to pay the amount. The bank guarantee dated 4.4.1986 was to remain in force for one year with effect from the date of the plaintiff extending the loan to Defendant No.2. On the basis of such bank guarantee, the plaintiff advanced a sum of Rs.10 lakhs to Defendant No.2 by cheque dated 4.4.1986. Such cheque was realised through Defendant No.1 bank and credited to the account of Defendant No.2 in the same bank. The plaintiff intimated to Defendant No.1 by letter dated 4.4.1986 that cheque for Rs.10 lakhs had been issued in favour of Defendant No.2 and the Defendant No.1 by letter dated 11.4.1986 specifically confirmed the guarantee. "Since the defendant failed to pay the amount, the plaintiff by letter dated 17.6.1986 called upon the first defendant to pay the amount due under the Bank guarantee" and reminded Defendant No.1 by letter dated 21.6.1986. However, on 26.6.2006, the plaintiff received letter dated 16.6.1986 written by the Advocate of Defendant No.1 intimating that the Manager of the Bank M.Sundaraganapathy had issued bank guarantee dated 4.4.1986, which was not evidenced in any of the bank books of accounts maintained at Abrihamapuram Branch, and such Branch Manager had no power or controlling authority and therefore the bank was not liable to pay any amount and the bank guarantee had been brought about fraudulently and in gross violation of the norms and procedure. Thereafter, the plaintiff issued notice dated 17.7.1986 indicating that bank guarantee had been confirmed by letter dated 11.4.1986, issued by Defendant No.1, and the bank was

not justified in refusing to honour the said bank guarantee. Thereafter, there was further correspondence between the plaintiff and Defendant No.1 Bank and ultimately the suit was filed directing the defendants jointly and severally to pay Rs.10,27,500/- and further directing the defendants to pay interest at the rate of 16½ % on the sum of Rs.10 lakhs and for other ancillary reliefs.

3. A written statement was filed on behalf of Defendant No.1. While denying generally the various allegations made, Defendant No.1 specifically pleaded that the records at Abhiramapuram Branch did not disclose issuance of bank guarantee dated 4.4.1986 and ordinarily the bank does not issue financial guarantee in respect of loan transactions between two individuals. There was no application from Defendant No.2 for furnishing bank guarantee on his behalf. The Manager of the Abhiramapuram Branch had no power or authority to enter into a transaction of bank guarantee for a sum of Rs.10 lakhs without submitting such proposal and without obtaining sanction of the Board of Directors. It was further indicated :-

"5.If the then Manager of the first defendant's Abhiramapuram Branch had issued as alleged, any such guarantee, it is wholly void and inoperative. The first defendant has reasons to believe that the alleged guarantee was the result of fraud practised by the then Manager of the first defendant's Abhiramapuram Branch, the plaintiff and the second defendant are acting in concert and collusion with one another."

It was further pleaded :-

"6. There is no truth in the allegation that the plaintiff advised the first defendant by a letter dated 4-4-1986 of the issue of a cheque in favour of the second defendant. No such letter was received by the first defendant's Abhiramapuram Branch. The first defendant's Abhiramapuram Branch was not at any time asked to confirm the issuance of a Bank guarantee for Rs.10,00,000/- nor did the first defendant send any letter dated 11-4-1986 confirming the issue of the alleged guarantee. All these and other allegations clearly indicate that the plaintiff, the second defendant and Shri Sundara Ganapathy the then Manager of the first defendant's Abhiramapuram Branch were acting collusively and fraudulently and obtained a guarantee document and also letters signed by the said Sundaraganapathy in an attempt to create evidence that a guarantee was issued on behalf of the Bank."

It was further pleaded that in course of inspection in June, 1986, the inspection officials learnt that M.Sundaraganapathy had

issued bank guarantee dated 4.4.1986 without obtaining any approval and without any authority. Accordingly, the bank through its Advocate, by letter dated 16.6.1986 informed the plaintiff that the bank cannot be held liable under any such guarantee and subsequently further letters were sent by the bank denying its liability.

4. Defendant No.2 filed a written statement categorically admitting the case of the plaintiff. It was stated that Defendant No.1 bank had given the bank guarantee on behalf of Defendant No.2 and the contentions raised by Defendant No.1 are not tenable and the Defendant No.1 is bound to honour the bank guarantee. It was further pleaded that Defendant No.1 had forced Defendant No.2 to furnish immovable property as security for the said bank guarantee and the bank has taken agreements in December, 1990 from Defendant No.2 pertaining to Flat No.45/15, Taylors Road, Chennai 10. However, Defendant No.2 has not contested the suit thereafter and has remained ex parte.

5. On the aforesaid pleadings, the learned single Judge framed the following issues :-

"1. Whether the 2nd defendant has borrowed a sum of Rs.10 lakhs from the plaintiff on 4-4-1986?

2. Whether the 1st defendant has given bank guarantee for the amount borrowed by the 2nd defendant ?

3. Whether the 1st defendant is liable to pay the amount claimed in the suit ?

4. Whether the Manager of the 1st defendant-Bank acted without authority and whether the Bank is not liable for the acts of the Manager ?

5. Whether there was any act of fraud and collusion between the plaintiff, the 2nd defendant and the Manager of the 1st defendant-Bank ?

6. Whether the 1st defendant-Bank is not liable for the suit claim ?

7. To what relief is the plaintiff entitled?"

6. On behalf of the plaintiff, the power agent, through whom suit was filed, was examined as sole witness, whereas on behalf of the defendant Bank, its Manager who functioned subsequently at Abhiramapuram Branch was examined and several documents were produced on either side.

7. The trial court arrived at the following findings on different issues. Under issue Nos.1 and 2, it was held that the plaintiff had advanced a loan of Rs.10 lakhs with interest at 16½ % to Defendant No.2 on the basis of the bank guarantee furnished by Defendant No.1 on behalf of Defendant No.2. Under issue Nos.3 to 7, it was held that the bank had failed to establish that there was any fraud or collusion on the part of the plaintiff and the bank was obliged to honour the bank guarantee. Accordingly, the suit was decreed.

8. Learned counsel appearing for the appellant bank has submitted that the bank guarantee was given by the then Branch Manager without any authority and on the basis of fraud and collusion between Defendant No.2, the plaintiff as well as Branch Manager and the bank cannot be made liable.

9. Learned counsel appearing for the plaintiff / Respondent No.1 has submitted that since the bank guarantee had been furnished by the Branch Manager on behalf of the bank and since on the basis of such bank guarantee money has been advanced by the plaintiff, both the defendants are jointly and severally liable to pay the money and the bank cannot escape from its liability on the basis of certain technical pleas.

10. Keeping in view the submissions made by the learned counsels at the time of hearing, the following questions arise for consideration in this appeal :-

(1) Whether the Branch Manager was competent to furnish the bank guarantee without obtaining the sanction and approval of any proposal regarding furnishing of bank guarantee ?

(2) Even assuming that the Branch Manager had exceeded his jurisdiction in furnishing the bank guarantee, whether the bank is liable to honour the bank guarantee ?

(3) Whether the bank guarantee was obtained fraudulently ?

(4) Whether the plaintiff had colluded with Defendant No.2 in obtaining the bank guarantee ?

11. From the materials on record, certain basic facts are apparent.

On 27.3.1986, as per Ex.A-8 letter, there was request from Defendant No.2 to the plaintiff for a loan of Rs.10 lakhs. In such letter addressed to the plaintiff in its Bombay address, it was indicated :-

"... We will execute the On Demand Promissory Note and consideration receipt at the time of receiving the amounts from you through Cheque/Pay Order/Demand draft and all our repayments will be made by Demand Drafts payable in Madras City.

Further we are prepared to furnish a Financial Bank Guarantee from State Bank of Mysore, Abhiramapuram Branch, Madras 600018, stating that they would guarantee the repayment of the above said sum of Rs.10,00,000/- together with interest due thereon provided we do not discharge the amounts due by us within one year from this date, or whenever you demand the repayment thereof. You will only pay the loan amount to us as and we furnish the Financial Bank Guarantee to you."

12. On 28.3.1996, as per Ex.A-9, the plaintiff gave a reply to Defendant No.2 willing to extend loan of Rs.10 lakhs carrying interest at 16½%. In such letter it was indicated:-

"... The amount shall be repayable by you at Madras City as and when we demand the repayment thereof or within one year from the date of our payment, for which you will also execute an on Demand Pronote and Consideration Receipt at the time of your receiving the cheque. This loan will be extended to you only on your furnishing us the Financial Bank Guarantee of M/s. State Bank of Mysore, Abhiramapuram Branch, Madras-600 018, stating that they would stand guarantee for the repayment of the said sum of Rs.10,00,000/- (Rupees Ten lakhs only) for carrying interest thereon at 16½ percent per annum as per the specimen copy herewith annexed. We shall be advancing the amount to you only after we receive the Financial Bank Guarantee."

13. A copy of such reply of the plaintiff was apparently marked through State Bank of Mysore, Abhiramapuram Branch. On 4.4.1986, the bank guarantee undertaking to pay the amount to the plaintiff "not exceeding a sum of Rs.10,00,000/- together with interest due thereon in pursuance of the letter dated 27.3.86 written by the said M/s. Surya Movie Unit to you and duly confirmed by your letter dated 28.3.86 the copies of which are herewith annexed and for due performance the contract of M/s. Surya Movie Unit to you" was executed by the then Manager of the State Bank of Mysore, Abhiramapuram Branch.

14. On 4.4.1986, the plaintiff along with covering letter enclosed a cheque dated 4.4.1986 for Rs.10 lakhs drawn at Indian Overseas Bank, T.Nagar, in favour of Defendant No.2. A copy of such

letter dated 4.4.1986 was marked as Ex.A-6 through state Bank of Mysore, Abhiramapuram Branch. Ex.A-2 letter dated 11.4.1986 is to the following effect :-

"We acknowledge receipt of your letter dated 4.4.1986, note contents and confirm the same."

15. It is also not in dispute that the cheque in the name of Defendant No.2 was credited to the account of Defendant No.2 through and in Defendant No.1's bank. As per the case of the plaintiff, on 10.6.1986, as per Ex.A-10, Defendant No.2 was informed in the following manner :-

"... We have reminded you over the phone several times to return the amount of Rs.10 lakhs which we have advanced you against the bank guarantee of the State Bank of Mysore. You have failed to return the amount. We are therefore invoking the bank guarantee which you have given for the loan."

A similar letter was purported to be written on 14.6.1986. These two letters had been signed by B.L. Galada, the power agent on behalf of the plaintiff. (Defendant No.1 is challenging the genuineness/validity of these two letters).

16. On 16.6.1986, Ex.A-7 letter was written by the Advocate on behalf of Defendant No.1 to the plaintiff. Such letter was posted on 18.6.1986 and was served on the plaintiff on 26.6.1986, as apparent from the oral evidence. In such letter, it was indicated that :

"... Issuance of the said guarantee is not evidenced in any of the Bank's Books of accounts maintained at the Branch."

It was further indicated :

"2. On a careful scrutiny of all relative records of the Branch, it is noticed that the Branch Manager did not have any approval of his controlling authorities for issue of any such guarantee. The matter of issue of the guarantee as aforesaid has not at any time been informed either to the Bank's Regional Office, the Zonal Office or the Head Office. Under the Bank's extent guidelines specifying the discretionary powers of the Branch Manager, the Branch Manager does not have powers to issue on his own, the above said Bank guarantee without prior approval.

3. When and under what circumstances the Branch Manager is purported to have issued such a guarantee is a

matter for investigation. In the meanwhile, since the matter has come to the Bank's notice, the Bank feels it is its duty to inform you that the Abhiramapuram Branch of the State Bank of Mysore or any other office of the State Bank of Mysore cannot be held legally liable for payment of the amount covered by the guarantee. Prima facie, it appears to the Bank that the Bank guarantee has been brought about fraudulently and in gross violation of established norms and procedure including non-obtaining of prior approval from the controlling authorities, possibly in collusion with others."

17. P.W.1., the power agent of the plaintiff, in his oral evidence claims that on 17.6.1986 the plaintiff intimated the bank about the invocation of the bank guarantee by a notice said to be served personally in the Branch Office of Defendant No.1. However, no copy of such letter / notice has been produced in court. On the other hand, the plaintiff has produced Ex.A-13, which is a letter dated 17.6.1986 from Defendant No.2 to the Manager of Defendant No.1. In such letter, it is indicated as follows:-

"... Based on your Bank Guarantee, we have raised a loan of Rs.10 lakhs from M/s. Lunkad Finance, Bombay and we have deposited a cheque for Rs.10 lakhs with your Bank. We have also given you a counter guarantee.

Now we are shocked and surprised to hear that some one from your Bank has informed the Financiers as if you are going to revoke the Bank guarantee. This is neither legal nor proper.

If because of any hasty arbitrary and unilateral decisions on your part we are demnified we will hold the Bank responsible ."

18. On 21.6.1986, as per Ex.A-12, plaintiff wrote a letter to Defendant No.1 stating about the bank guarantee furnished by Defendant No.1 and the fact that loan had been advanced. In such letter it has been indicated that the plaintiff had demanded repayment of loan of Rs.10 lakhs from Defendant No.2 on 10.6.1986 and again on 14.6.1986. It was further indicated :

"... M/s. Suriya Movie Unit have not replied to our letters, telephone reminders and have failed and neglected to pay the loan amount which is payable on demand. We wish to confirm that a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) is outstanding from M/s. Suriya Movie Unit, and M/s. Suriya Movie Unit have failed and neglected to pay the loan amount of Rs.10,00,000/- (Rupees Ten Lakhs only) as

demanded by us. We have therefore called upon you by invoking the Bank Guarantee to honour the Bank Guarantee issued by you and make immediate payment of Rs.10,00,000/- (Rupees Ten Lakhs only) vide our letter dated 17th June '86. We approached your Branch Manager at Abhiramapuram on 17th June '86 for honouring your commitment as per the terms of the Bank Guarantee issued by you. You have not honoured your commitment by paying the amount due to us as committed by you in the Bank Guarantee."

From the endorsement on such document it is apparent that such letter was received at Abhiramapuram Branch of the State Bank of Mysore on 24.6.1986. It may be noted that even though there is a reference to invocation of bank guarantee by letter of the plaintiff dated 17.6.1986, no such letter is forthcoming.

19. On 30.7.1986, Ex.A-5 letter was issued by the Advocate of Defendant No.1. On 17.7.1986, Ex.A-4 notice was issued by the Advocate of the plaintiff to Defendant No.1. In such notice it was indicated that the plaintiff had invoked the bank guarantee by issuing letter on 17.6.1986 which was given by hand delivery and acknowledged by the Branch on 17.6.1986. It was further indicated :-

"... Another letter was sent by Regd. Post which was received by them very next day."

It was alleged in such notice that the so called letter purported to be signed by the Bank or Defendant No.1 on 16.6.1986 was actually written on 18.6.1986 and had been ante-dated. It was further indicated that since the bank guarantee had been furnished, on the basis of which loan was advanced to Defendant No.2, Defendant No.1 bank had no justification in not honouring the bank guarantee.

20. A reply was sent by the Advocate of Defendant No.1 as per Ex.A-5 letter dated 30.7.1986 refuting the allegations made in the notice of the Advocate of the plaintiff. It was reiterated therein that the Branch Manager had no authority to issue a bank guarantee for Rs.10 lakhs without getting any sanction or approval from the proper authorities. After exchange of such letters / notices the suit was filed. The plaint was signed by the power agent on behalf of the plaintiff and such power agent was examined as P.W.1.

21. On behalf of Defendant No.1, Circular dated 6.9.1983, issued by the Head Office of the State Bank of Mysore regarding various aspects, had been produced. The said circular clearly indicates the scheme of delegation of financial power. Entry No.18 indicates that guarantees (other than Deferred Payment Guarantee) with a margin of 25% and above should be given by Branch Manager-I upto Rs.10,000/-, Branch Manager-II upto Rs.25,000/-, Branch Manager-III upto Rs.1 lakh

and Regional Manager and Branch Manager-IV upto Rs.10 lakhs. Similarly guarantees other than Deferred Payment guarantee with a margin of below 25% or without margin should be given by a Branch Manager-II upto Rs.10,000/- and Branch Manager-III upto Rs.25,000/-. Coupled with unchallenged oral evidence of D.W.1, it is evident that the Branch Manager did not have authority to issue any bank guarantee in excess of Rs.25,000/-.

22. There is no doubt that the then Branch Manager had issued a bank guarantee and Defendant No.2 had availed of the loan of Rs.10 lakhs from the plaintiff apparently on the basis of the said bank guarantee. However, it is apparent that such bank guarantee had been issued by the then Branch Manager without any authority. It is nobody's case that the then Branch Manager before issuing the bank guarantee had obtained any permission or sanction from the higher authorities. As a matter of fact, except the letters dated 27.3.1986 and 28.3.1986, there is no other correspondence before issuance of the bank guarantee dated 4.4.1986.

23. There is no dispute and cannot be any dispute that when the bank guarantee has been validly issued and such guarantee is invoked, payment is required to be made unless it is proved that there is any fraud or collusion. In the present case, there are certain tell-tale suspicious features which create sufficient doubt regarding the genuineness of the transaction. P.W.1 has admitted in his evidence that the transaction between the plaintiff and Defendant No.2 was first of its kind and there was no earlier transaction between the two. How P.W.1 is connected with the plaintiff is also shrouded in mystery. P.W.1 is of course the power agent, but he has admitted in his evidence that he has been given power of attorney by the plaintiff to conduct this case on behalf of him on 28.6.1986. The abovesaid power of attorney was given to him by the plaintiff to conduct this case for the first time. However, the evidence of P.W.1 indicates as if he is the person who was corresponding on behalf of the plaintiff even earlier and had received the bank guarantee from the Bank on 4.4.1986.

24. It is also interesting to note that such bank guarantee was addressed to the Bombay address of the plaintiff. In the plaint, there is no whisper that there was Branch Office of the plaintiff at Madras nor there is any whisper that in fact P.W.1 was looking after the business of the plaintiff at Madras in any capacity whether as a power of attorney holder or any other capacity. As per the evidence of P.W.1., Defendant No.2 had no previous transaction with the plaintiff. It is therefore surprising that Defendant No.2 suddenly thought of availing loan from the plaintiff. It is also not understandable as to how the bank instead of advancing the loan directly to Defendant No.2 by taking adequate security thought of executing bank guarantee on behalf of Defendant No.2 to enable

Defendant No.2 to obtain loan from a stranger. Of course it is claimed by Defendant No.2 in letter dated 17.6.1986, Ex.A-13, that a counter guarantee has been executed and in the written statement it has been indicated that some sort of property security has been given. However, no such evidence is forthcoming and Defendant No.2 had conveniently remained absent after filing a written statement practically admitting the case of the plaintiff.

25. Serious controversies have been raised regarding the letters dated 10.6.1986 and 14.6.1986, where under the plaintiff seems to have demanded repayment of loan. These two letters signed by P.W.1 purportedly on behalf of the plaintiff have been addressed to Defendant No.2. From Ex.A-1, the statement relating to interest received from Defendant No.2 by the plaintiff upto 6.4.1987, it is apparent that Defendant No.2 had paid substantial amount towards interest on the loan amount of Rs.10 lakhs. If Defendant No.2 was regularly paying interest, at least for first six months and even in advance, it is not understood as to why the plaintiff suddenly thought of asking Defendant No.1 for repayment of the loan on 10.6.1986, after giving the loan only two months before. There is no documentary evidence to prove that as a matter of fact Defendant No.2 had at any time declined to repay the amount and since one year time had been indicated, the so called sudden demand dated 10.6.1986 and 14.6.1986 appear to be mysterious. Moreover, it is noteworthy to indicate that in the plaint there is no whisper that on 10.6.1986 & 14.6.1986 the power agent of the plaintiff had called upon Defendant No.2 to repay the loan. It is also very significant to note that there is no reference to such letters dated 10.4.1986 and 14.6.1986 in the plaint and such documents were produced in court for the first time when P.W.1 was being examined in court. As a matter of fact, in the initial examination in chief dated 4.3.1999, such document had not been produced and only subsequently on 8.3.1999 such documents were produced as additional documents and marked as exhibits only on 15.4.1999, when P.W.1 was re-examined. From these documents certain discrepancies can be noted. It is not clear in what capacity P.W.1 had written these two letters dated 10.6.1986 and 14.6.1986, even though he was given the power of attorney only on 28.6.1986 to conduct the case. Moreover, in the absence of any pleading on this score, it is difficult to accept such documents, which were produced for the first time after recording of oral evidence had commenced and progressed. The authenticity of the documents are clearly in doubt.

26. The very fact that Defendant No.2 showed over anxiety in the matter of invocation of bank guarantee by the plaintiff is also a matter which cannot be ignored. It is seen from Ex.A-13 letter dated 17.6.1986, written by Defendant No.2 to Defendant No.1 Bank, wherein Defendant No.2 has raised protest against Defendant No.1 regarding possibility of the bank revoking the bank guarantee.

27. From the side of the plaintiff letters dated 27.3.1986 and 28.3.1986 had been produced. There is no other evidence to indicate that there was any application to the bank for furnishing bank guarantee on behalf of Defendant No.2. In such a background it is difficult to understand as to why the stamp paper on which the bank guarantee was executed by the Branch Manager had been purchased on 15.3.1986. It is not the case of the plaintiff that before 27.3.1986 the plaintiff had been approached by Defendant No.2 and the plaintiff had insisted upon furnishing of bank guarantee nor there is any evidence to indicate that before 27.3.1986 Defendant No.2 had approached the bank and requested for the bank guarantee. In the absence of any such evidence, it is more difficult to fathom as to why such stamp papers had been purchased in the name of the bank on 15.3.1986. The fact that such stamp papers were purchased from T. Nagar, where P.W.1 was residing, is an aspect which cannot be altogether ignored, more particularly when the bank is at Abhiramapuram, which is at a considerable distance from T. Nagar.

28. The other unusual feature in the transaction is the fact that before issuing the cheque for sum of Rs.10 lakhs in favour of Defendant No.2, no promissory note has been taken from Defendant No.2 and not even a receipt, even though in the correspondence dated 27.3.1986 and 28.3.1986 it has been categorically stipulated that promissory note would be required to be given by Defendant No.2,. In Ex.A-8, the letter written by Defendant No.2 seeking for loan, it has been categorically indicated "... we will execute the On Demand Promissory Note and consideration receipt at the time of receiving the amounts. ...". In the letter dated 28.3.1986 written by the plaintiff to Defendant No.2 agreeing to extent the loan of Rs.10 lakhs, the plaintiff had indicated :-

"... The amount shall be repayable by you ... when we demand the repayment thereof or within one year from the date of our payment for which you will also execute an on demand pro-note and consideration receipt at the time of your receiving the cheque."

The bank guarantee was apparently given on the basis of these two documents, which have been referred to in the bank guarantee itself. Therefore, the fact that the on-demand promissory note was not taken from Defendant No.2 can by itself be considered as breach of the condition and stipulation for issue of the bank guarantee.

29. Learned single Judge had discarded the contention of the bank that furnishing of bank guarantee had not been reflected in the Register maintained by the bank. The trial court has pointed out and with some justification that the Register produced did not indicate about various bank guarantees chronologically and, therefore, such a

Register had been maintained by extracting information from other registers which had not been produced. Even though the criticism levelled by the trial court is justified, the stand of the Bank that such guarantee had been executed by the Branch Manager without authority is not diluted. The bank guarantee had apparently been executed by the Branch Manager without obtaining any sanction from the higher authorities. The stamp paper had been purchased in the name of the bank even before there was any proposal regarding the transaction. If Defendant No.2 in private communication with the Branch Manager had obtained the stamp paper, such a step obviously adds to the suspicion surrounding the transaction. The very fact that a notice was drafted and signed by the Advocate of the Bank on 16.6.1986 objecting to the bank guarantee and on the very next day Defendant No.2 writes a letter threatening the bank only reflects the over anxiety of Defendant No.2 to enable the plaintiff to manage and obtain the amount from the bank. In a circumstance when occasion arises for invocation of bank guarantee the person for whose benefit such bank guarantee is furnished is always keen to see that the bank guarantee is not invoked and ordinarily such person approaches the court with a prayer for injunction. The present case is an instance where the person on whose behalf the bank guarantee is furnished is rather keen to see that the amount covered under the bank guarantee is paid to the other contracting party, namely, the person for whose benefit the bank guarantee is executed. Such unusual reversal of roles only indicates that Defendant No.2 was hand in glove with the plaintiff, obviously with a view to dupe the Bank collusively. The conduct of the plaintiff in not even bothering to take an on-demand promissory note or a receipt regarding the loan is also significant. As already indicated, the so called letters dated 10.6.1986 and 14.6.1986 regarding the alleged demand of the plaintiff to Defendant No.2 for refund had surfaced rather belatedly and in a suspicious manner. The Branch Manager was obviously a willing partner with Defendant No.2 in this collusive transaction.

30. Learned single Judge has drawn inference against the bank for non-examination of M. Sundaraganapathy, the then Branch Manager. The contention of the bank that such Branch Manager was not examined as he had been dismissed from service in the meantime has not been accepted by the trial court on the basis that no such plea had been taken in the written statement and no document had been produced. During pendency of the present appeal, an application has been numbered as C.M.P.NO.20119 of 2001 seeking permission to adduce additional evidence by including various orders relating to dismissal of the Branch Manager including the judgment in W.P.No.8835 of 1992 dated 17.4.2001, filed by the said M. Sundaraganapathy challenging the order of dismissal. Objection has been filed on behalf of the plaintiff / respondent to such additional evidence being admitted on the ground that such evidence was available at the time of trial and Defendant No.1 should not be permitted to fill up the lacuna in its

evidence. The fact that such Branch Manager was dismissed from service is also apparent from the oral evidence of D.W.1. The only cross-examination of D.W.1 on such aspect is that no document has been produced, but there is no suggestion that such Branch Manager had not been dismissed. It may be that the bank could have produced some documents relating to dismissal, but, oral evidence being available, the contention that the Branch Manager was not examined as he had been dismissed from service is acceptable. Therefore, it is not necessary to consider the application for adducing additional evidence as even without such evidence it can be safely concluded that the Branch Manager had been dismissed from service. Examination of the Branch Manager would not have been in any way relevant for the purpose of proving the case of the bank as here is a case of collusive transaction to defraud the bank. On the other hand, if the plaintiff wanted to disprove the case of the bank by proving that the Branch Manager had not exceeded his jurisdiction in executing the bank guarantee, the plaintiff could have taken steps to summon the Branch Manager.

31. For the aforesaid reasons, we are unable to sustain the decree passed by the trial court so far as it relates to the liability of the present appellant and the decree of the trial court is accordingly required to be modified.

32. In the result, the appeal is allowed and the decree of the trial court is set aside so far as it relates to the present appellant. The decree against Respondent No.2 is affirmed as such decree has not been challenged. There would be no order as to costs so far as this appeal is concerned and so far as the trial court is concerned, costs is to be paid only by Defendant No.2. Consequently, C.M.P.NO.20119 of 2001 is closed.

dpk

Sd/

Asst.Registrar

/true copy/

Sub Asst.Registrar

To:1.The Deputy Registrar, Original Side, High Court,Madras.
2.The Sub Asst. Registrar, Original Side, High Court,Madras.

+ one cc to Mr.P.B.Ramanujam, Advocate Sr.No.28040.
+ one cc to Mr.J.RadhaKrishnan, Sr.No.27999.

OSA.NO.112/1999

RSM/10.7.2006