IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31-07-2008

CORAM

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

A.S.No.940 of 1993

G.S.Loganathan ... Appellant/5th defendant

vs.

1. Central Bank of India,
Kasthurba Nagar,
Adyar, Madras-20
rep. by its Branch & Principal Officer.

2. M/s.Alcops (P) Ltd.,
Regd. Office at No.10 South Boag Rd.,
T.Nagar, Madras - 17.

3. P.Jayakumar

4. N.Kalyanaraman

5. K.Swaminathan ... Respondents/Plaintiff and Defendants 1 to 4

Appeal filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 08.05.1991 made in O.S.No.7830 of 1984 on the file of the VI Assistant City Civil Court, Madras.

For Appellant : Mr.Janarthanan for M/s.S.Parthasarathy

For Respondent 1 : Ms.Rajeni Ramadoss for M/s.K.Rajasekaran

J U D G M E N T

Challenging the judgment and decree dated 08.05.1991 made in O.S.No.7830 of 1984 on the file of the VI Assistant City Civil Court, Madras, the fifth defendant in the suit has filed this appeal.

2. Status of the parties in this appeal is referred to as per the Original Suit.

3. The facts are as under:

(i) The plaintiff, Central Bank of India is a Nationalised Bank having its branch office among other places at Kasthurba Nagar, Adyar, Madras 600 020. The first defendant firm is a Private Limited Company incorporated under the Companies Act, 1956 as per the Certificate of Incorporation No.8757 of 1981 dated 11.05.1981 of the Registrar of Companies, Tamil Nadu, having their factory at No.148, Old Mahabalipuram Road, Oggiam-Thoraipakkam, Madras 600 096, carrying on business as Manufacturers, Exporters and Dealers in all types of Pilfer proof caps and containers and they propose to manufacture, produce, repair, export, import, purchase and sell the same.

(ii) According to the plaintiff, the second defendant is the Managing Director and defendants 3 to 5 are the Directors of the Company M/s.Alkapse Private Limited. The fifth defendant, after retirement, ceased to be a Director with effect from 31.10.1982 as per the his letter to the plaintiff dated 22.11.1982 and as per the first defendant's letter dated 30.10.1982. The plaintiff further states that the first defendant Company was having a Current Account with the T.Nagar Branch of their Bank and was enjoying various financial facilities and aid. As per Clauses 13 to 20 of the Memorandum of Association of the Company read with Clause 9 of the Articles of Association of the Company, the Company has borrowing powers and to mortgage, pledge or charge the whole or any part of the property, assets or revenue of the Company and the Directors are empowered to exercise the said power. Further, as per Clause 24 of the Memorandum of Association of the Company, in the light of the Memorandum of Association and Articles of Association of the first defendant, the defendants on 27.10.1981 approached the plaintiff Bank for the grant of a loan of Rs.75,000/- to the first defendant as a Term Loan. The Company acting through its Directors, executed a Loan cum Hypothecation Agreement for the said loan of Rs.75,000/- in favour of the plaintiff. The plaintiff states that as per the said agreement, the first defendant had agreed to repay the said loan amount within five years in equal half-yearly instalments of Rs.7,500/- each, commencing from 27.04.1982 together with interest at 13.5% per annum or at such other rate or rates of interest as may, at any time, and from

time to time, be notified by the Bank to the borrowers with half-yearly rests as on 30th June, 31st December or with such other rests as the Bank may at any time, and from time to time notify to the borrowers. As per the said agreement, the first defendant had hypothecated its Plant and Machinery in favour of the plaintiff as Security for the due repayment of the said loan, together with interests.

(iii) Further, the defendants 2 to 5 executed a Deed of Guarantee on 27.10.1981 in favour of the plaintiff and that as per the terms of the Deed of Guarantee, the defendants 2 to 5 have jointly and severally guaranteed the repayment of the said loan with interest. Thereafter, the accounts of the first defendant Company were transferred to the Adyar Branch of the plaintiff on 07.09.1982 as per the request of the first defendant Company. The fifth defendant retired and ceased to be a Director with effect from 31.10.1982, and as per his letter dated 22.11.1982, the fifth defendant confirmed and acknowledged his liability as the Guarantor for the repayment of the Outstanding Debit Balance of Rs.59,314.82 as on 22.11.1982. Therefore, it is the case of the plaintiff that the fifth defendant is liable to pay a sum of Rs.59,314.82, as acknowledged by him on 22.11.1982 and he cannot repudiate the same on any ground known to law. It is the plaintiff's further case that the charge of the Plant and Machinery had been duly registered with the Registrar of Companies, Tamil Nadu as shown by the Certificate of Registration of Mortgage Deed dated 30.01.1982. The first defendant paid the instalments due on 27.04.1982 and 27.10.1982, and that the instalment due on 27.04.1983 was paid belatedly on 08.07.1983, and subsequently, the defendants have failed and neglected to pay the amount or honour the agreement. Besides the above said facilities, the defendants are enjoying other facilities like Open Loan, Key Loan and Overdrafts against Bills sent for collections, with the plaintiff Bank. The plaintiff is also taking recourse to legal action for recovery of the amounts due under the abovesaid heads.

(iv) It is the further case of the plaintiff that the operation of the accounts by the defendants has become unsatisfactory and that from a survey of the affairs of the company, the plaintiff has found that the first defendant company has tendered to develop signs of sickness adversely affecting its financial stability and that the plaintiff understands that the first defendant Company is also having other accounting facilities with various Banks and is having financial commitments. Hence,

the plaintiff sent repeated reminders to the defendants, as the defendants were very irregular in the operation of the account. However, the defendants continued to commit default and failed to pay the instalments as agreed to; they have also failed to comply with the terms and conditions of the Term Loan; therefore, the plaintiff is entitled to recover the arrears due to them by enforcing the hypothecation agreement.

(v) The plaintiff further states that on verification, it was found that the first defendant was not carrying on business and the Firm has developed a sign of sickness. Hence, the plaintiff was forced to issue a Notice to the defendants through their counsel on 09.11.1983. The said Notice was duly acknowledged by the defendants and the first defendant by his letters dated 18.11.1983, 19.12.1983 and 26.04.1984 acknowledged his liability and agreed to regularize the account, at an early date. Despite acknowledging their liability, the defendants have failed to repay the amount. The fifth defendant by his reply dated 25.11.1983 through his counsel repudiated his liability on untenable grounds. It is also the plaintiff's case that the defendants were given the Term Loan for the purpose of purchasing machineries to improve their pilfer proof caps and containers business, and the defendants are jointly and severally liable for the amount borrowed from them under the Term Loan together with interest.

(vi) In spite of repeated reminders, the defendants have failed and neglected to pay the amount and regularise the account. Having no other option, the plaintiff has filed the suit in O.S.No.7830 of 1984 praying for a direction to the defendants to pay them a sum of Rs.69,618.62 together with interest at the rate of 15.5% per annum from the date of Plaint till the date of realisation and also the costs of the suit. According to the plaintiff, they being a Nationalised Bank wholly owned by the Government of India, the provisions of the Debt Relief Enactments enacted in the State of Tamil Nadu shall not apply to the suit claim and the suit as filed, is maintainable in law and is not barred by limitation.

4. The second defendant filed a written statement denying all the allegations contained in the plaint and his contentions, as expressed therein are, as under:

(a) The first defendant obtained a term loan of Rs.75,000/- from the plaintiff under an agreement dated 27.10.1981 repayable within five years in equal half yearly instalments of Rs.7,500/-

commencing from 27.04.1982 on terms and conditions set out in the said agreement. As per the agreement, the first defendant had hypothecated its plant and machinery with the plaintiff as security for the said loan and availed the said loan on 27.10.1981 pursuant to the said agreement.

(b) The second defendant denied that defendants 2 to 5 have executed any guarantee in favour of the plaintiff on 27.10.1981 as alleged in paragraph 6 of the plaint. It is his case that even from the cause of action pleaded by the plaintiff in paragraph 12 of the plaint, no deed of guarantee was executed on 27.10.1981 by him along with defendants 3 to 5; while agreeing to grant the term loan to the first defendant on 27.10.1981, the plaintiff never required any personal guarantee from the Directors of the first defendant company and there was no agreement to give any such guarantee. The plaintiff was satisfied with the security of the hypothecation of the plant and machinery of the first defendant and granted the loan under the said agreement of loan cum hypothecation. In fact, the first defendant approached the plaintiff for the said term loan on the hypothecation of its plant and machinery because the plaintiff agreed to make the advance without the personal guarantees of the defendants 2 to 4 as Directors of the first defendant as compared to the National Small Scale Industries Corporation, New Delhi, who were advancing against machinery at a lower rate of interest of 9% per annum instead of the plaintiff's rate of 13.5% per annum. The first defendant did not seek the loan from the said Corporation as it required the personal guarantee of the directors.

(c) The second defendant further denied the execution of a deed of guarantee with defendants 3 to 5 on 27.10.1981 in favour of the plaintiff and that by virtue of the same, he jointly and severally guaranteed the repayment of the said term loan with interest. According to the second defendant, several months after the said loan was granted to the first defendant under the said agreement dated 27.10.1981 by the plaintiff as agreed on the hypothecation of its plant and machinery, the said term loan was availed by the first defendant; the plaintiff got signatures of the second defendant and defendants 3 to 5 on the guarantee form on 08.05.1982, purporting to guarantee the payment of

the said term loan granted to the first defendant and the second defendant in the situation in which he was then placed had to sign the said form, though he never intended to give such guarantee. The said guarantee form signed by the second defendant on 08.05.1982 is not supported by any proper and valid consideration and therefore it is not valid and binding on him. The plaintiff had not done anything in consideration of the said guarantee form signed by the second defendant and defendants 3 to 5 on 08.05.1982. Therefore, according to the second defendant he is not liable to the plaintiff for the suit claim or any portion thereof under the alleged guarantee dated 27.10.1981, which he did not execute and the said guarantee form signed by him on 08.05.1982 is not valid and enforceable against him for lack of valid consideration.

(d) According to the second defendant, the plant and machinery hypothecated to the plaintiff Bank was worth more than one lakh of rupees on the date when the plaintiff caused a legal notice dated 09.11.1983 recalling the advance made by the plaintiff. The plaintiff has been grossly negligent and he did not take any steps to bring the said plant and machinery which was hypothecated to their Bank to sale and the plaintiff bank deliberately recalled the advance and prevented the defendants from running the factory thus the plaintiff Bank brought the entire business to a grinding halt.

(e) In this connection, it is pertinent to note that the plaintiff was not even asked for any charge decree. The plaintiff has not so far not taken any steps to bring the hypothecated plant and machinery for sale. If the plaintiff has been diligent in bringing the plant and machinery to sale, the plaintiff would have recovered the said sum of Rs.75,000/- long ago and there would not have been any necessity for the plaintiff to file the above suit. The second defendant reserves his right to proceed against the plaintiff for the loss caused by the plaintiff by reason of their gross negligence in alleging the hypothecated machinery to lie idle. Though the charge in favour of the plaintiff was registered, the plaintiff did not take any steps to enforce the security and thus the plaintiff is liable to compensate the second defendant for the loss suffered by the second defendant by reason of their negligence. The second defendant states that

the plaintiff without any just or reasonable cause deliberately recalled the loan, thus putting the defendant to great and irreparable loss. Only after the plaintiff recalled the amount and refused to nurse the factory, the factory came to a stand-still. The second defendant sent a reply to the legal notice and the second defendant craves leave of this Court to refer to the said reply notice sent by the second defendant as part and parcel of this Written Statement. It is also denied that the allegation that second defendant failed and neglected to regularise the account. The claim made by the plaintiff is highly excessive and the second defendant is not liable to pay a sum of Rs.69,618.20 and that the plaintiff is not entitled to reserve his right to proceed against the hypothecation execution. The plaintiff has deliberately refrained themselves from enforcing the security only with a view to cause loss to the defendants. Therefore, the second defendant prays that the suit is false, vexatious, unsustainable and completely devoid of merits and it may be dismissed with costs.

5. In the Written Statement filed by the third defendant, it is stated as under:

(a) The suit itself is not maintainable either on law or on facts and is barred by limitation. The third defendant is not a necessary party to the suit and hence the suit is bad for misjoinder of parties and he has ceased to have any interest in the first defendant company and consequently he cannot be fastened with any liability.

(b) It is specifically denied that it is false to the knowledge of the plaintiff to state that the third defendant was the managing director of the company. According to the third defendant, he was the only director of the company and that too he ceased to have any interest as a Director consequent to his resignation from the Board of Directors of the first defendant with effect from 08.11.1983 onwards. The resolution and a copy of it has already been forwarded to the plaintiff which is well within their knowledge. The said copy of the resolution was also submitted to the Registrar of Companies and therefore the third defendant cannot be saddled with any consequence.

(c) According to the third defendant, as per clause 13 to 20 of the Memorandum of Association of the Company read with clause 9 of Articles of Association of the Company, the Company was empowered to borrow money by executing mortgage, pledge or charges either in whole or any part of the property or the assets of the company. It is true that the first defendant was paid a sum of Rs.75,000/- in pursuance of executing a loan-cum-hypothecation agreement in favour of the plaintiff. Under the terms of the agreement, the first defendant agreed to pay the said loan amount within 5 years in equal instalments of Rs.7,500/- computed half yearly commencing from 27.04.1982 together with interest at 13.5% per annum.

(d) He also stated that he is not aware of any letter written by the fifth defendant intimating the fact that he ceased to be a Director in the first defendant company with effect from 31.10.1982. He is also not aware of the acknowledgement of liability by the fifth defendant and about the instalment paid by the first defendant of the plaintiff which was due on 27.04.1982 and 27.10.1982 and he was not put on notice by the plaintiff the fact of admitted belated payment made by the first defendant to the plaintiff on 08.07.1983; the instalment was due on 27.04.1983 itself and the enlargement of time granted to 1st defendant by plaintiff was not within the knowledge of the third defendant; consequently, the liability of the third defendant stands discharged due to the enlargement of time granted to the first defendant by the plaintiff without the consent of the third defendant.

(e) It is false that repeated reminders were sent to the defendants by the plaintiff and that the defendants were highly irregular in the operation of the accounts. The plaintiff ought to have put the defendants on notice the moment the default occurred and the act of the plaintiff in enlarging the time to the first defendant for payment of dues substantially and materially varied the terms of agreement and as such the third defendant is discharged in the capacity of Guarantor.

(f) The third respondent also stated that the plaintiff never intimated him by several repeated reminders as alleged in the plaint about the non-payment of the instalment amount due to the

plaintiff by the first defendant. He further stated that the plaintiff ought to have intimated him the moment the first default occurred to enable him to pressurise the first defendant to properly pay the instalment due to the plaintiff; on the contrary, without the written consent of the third defendant and behind his back, the plaintiff has granted time to the first defendant by giving him concessions that are not open to him. By such variance in the contract subsequently entered into by the plaintiff with the first defendant, the third defendant was not made a party to such transactions and therefore, he is not liable to pay a sum of Rs.69,618.62 as alleged in the plaint.

6. The fifth defendant, who is the appellant herein, has filed an independent Written Statement before the Lower Court and his submissions are as under :

(a) The first defendant was given a term loan of Rs.75,000/- by the plaintiff under an agreement dated 27.10.1981 repayable within 5 years in equal half-yearly instalments of Rs.7,500/- commencing from 27.04.1982 on terms and conditions set out in the said agreement. He specifically denied that any guarantee was executed by the defendants 2 to 5 on 27.10.1981 in favour of the plaintiff as alleged in paragraph 6 of the plaint and even from the cause of action pleaded by the plaintiff in paragraph 12 of the plaint, it will be clear that no deed of guarantee was executed on 27.10.1981; in fact, no guarantee was given by him along with defendants 2 to 4 or otherwise to the plaintiff on 27.10.1981. While agreeing to grant the term loan to the first defendant on 27.10.1981, the plaintiff never required any personal guarantee from the Directors of the first defendant company and there was no agreement to give any such guarantee. The plaintiff was satisfied with the security of the hypothecation of the plant and machinery of the first defendant and granted the loan under the said agreement of loan cum hypothecation. In fact, the first defendant approached the plaintiff for the said term loan on the hypothecation of its plant and machinery because the plaintiff agreed to make the advance without the personal guarantees of the defendants 2 to 4 as Directors of the first defendant as compared to the National Small Scale Industries Corporation, New Delhi who were advancing against machinery at a lower rate of interest at 9% per annum instead of the plaintiff's rate of 13.5% per annum. The first defendant did not seek the loan from the said Corporation as it required the personal guarantee of the Directors. He also denied that he executed with defendants 2 to 4 a deed of guarantee on

27.10.1981 in favour of the plaintiff and that by virtue of the same, he jointly and severally guaranteed the repayment of the said term loan with interest.

(b) After several months, after the said loan was granted to the first defendant under the said agreement dated 27.10.1981 by the plaintiff as agreed on the hypothecation of its plant and machinery and the said term loan was availed by the first defendant, the plaintiff got the signatures of the fifth defendant and defendants 2 to 4 on the guarantee form on 08.05.1982 purporting to guarantee the payment of the said term loan granted to the first defendant and the fifth defendant in the situation in which he was then placed had to sign the said form though he never intended to give such guarantee. The said guarantee form signed by the fifth defendant on 08.05.1982 is not supported by any proper and valid consideration and therefore not valid and the plaintiff had not done anything in consideration of the said guarantee form signed by the fifth defendant and defendants 2 to 4 on 08.05.1982. Therefore, the defendant is not liable to the plaintiff for the suit claim or any portion thereof under the alleged guarantee dated 27.10.1981 which he did not execute nor under the said guarantee form signed by him on 08.05.1982, which is not valid and enforceable.

(c) On account of the plaintiff's negligence and failure to take diligent steps against the first defendant to realise the amount by the sale of the hypothecated plant and machinery which have been depreciating in value day by day, the security of the guarantors under the alleged guarantee has been considerably impaired and he is therefore discharged from the alleged guarantee. Knowing well that he had no say in the affairs of the first defendant company and that it had not been paying the instalments of the term loan due and that it had accounting relationship with other Banks contrary to the terms of the agreement with the plaintiff , the plaintiff ought to have diligently proceeded against the hypothecated plant and machinery without any delay. The plaintiff has failed to proceed against the said hypothecated plant and machinery even after they were called upon to do so by the reply dated 25.11.1983 sent by the fifth defendant through his counsel to the pre-suit notice dated 09.11.1983.

(d) The claim of the plaintiff on the footing of the alleged confirmation and acknowledgement of liability by the fifth defendant as guarantor for the outstanding debit balance of Rs.59,314.82 is untenable. The alleged

guarantee by the fifth defendant itself is not valid and enforceable; the alleged acknowledgement and confirmation of such an invalid guarantee is also not valid and the plaintiff cannot rely upon the same; the fifth defendant is not liable to pay the plaintiff a sum of Rs.59,314.82 or any portion thereof as claimed.

(e) The fifth defendant denied that he is jointly and severally liable with the other defendants for the amount borrowed under the said term loan. He also denied that the plaintiff is entitled to recover from him a sum of Rs.69,618.62 as the amount due under the said term loan as on the date of plaint. Moreover, the fifth defendant does not admit the correctness of the amounts claimed for principal and interest and that the rate of interest charged and claimed is not correct and tenable and that in any event the compound interest charged is usurious. According to the fifth defendant, the suit filed against him is not maintainable and the plaintiff ought to have enforced his claim on the hypothecated plant and machinery and it is not open to him to reserve his rights to proceed against such hypothecation in execution. Therefore, the suit against him is unsustainable in law and on facts and the same is to be dismissed.

7. During the course of trial, on behalf of plaintiff, Branch Manager of the Bank was examined as P.W.1 and Exs.A-1 to A-18 were marked. On the side of defendants, two of the defendants were examined as D.Ws.1 and 2 and Ex.B-1 was marked.

8. The trial Court, considering the evidence both oral and documentary, decreed the suit as prayed for from the defendants 1 to 4 jointly and severally and also for a sum of Rs.59,314.82 from the fifth defendant, along with costs of the suit.

9. Learned counsel for the appellant/fifth defendant would contend that Ex.A-3, Deed of Guarantee, is not contemporaneous with Ex.A-2, which is the term loan agreement under which the second respondent had borrowed the suit amount from the plaintiff bank and, therefore, Ex.A-3 is not supported by any valid consideration and that Ex.A-3 having been executed long after Ex.A-2 in respect of the amount already advanced to the principal debtor under Ex.A-2 and the same could not be for a valid consideration, it cannot be acted upon for want of consideration. According to him, any contract, which is without consideration, is void and any acknowledgement thereof would not be of any avail to the plaintiff to recover any amount on the basis of the alleged contract of guarantee. It is also his contention that there was no stipulation for furnishing of personal guarantee for the loan by the directors of the second respondent; Ex.A-6 letter would not give rise to any cause of action for filing the suit as it

is in respect of a contract of guarantee, which is prima facie void and unenforceable; Ex.A-2 has been signed by the appellant only as a Director of the first defendant company and he is not personally liable to the amount due thereunder; there is only one borrower under Ex.A-2 i.e., the first defendant and, as such, clause 23 of Ex.A-2 is not applicable to the instant case; the plaintiff bank, by its total inaction to secure the machinery hypothecated, has failed in its duty to protect the hypotheca for the benefit of the surety and, therefore, no liability can be fastened on the appellant. It is also his further contention that on account of the plaintiff's negligence and failure to take diligent steps against the first defendant to realise the amount by the sale of the hypothecated plant and machinery which have been depreciating in value day by day, the security of the guarantors under the alleged guarantee has been considerably impaired and hence the appellant is discharged from the alleged guarantee. Accordingly, he prayed for allowing the appeal.

10. I have heard the learned counsel for the parties and also gone through the records.

11. The points which arise for consideration in this appeal are : (i) whether the plaintiff is entitled to the decree, as granted by the trial Court, and (ii) whether the fifth defendant/appellant can be fastened with liability as per the decree.

12. It is not in dispute that the first defendant company has borrowed a sum of Rs.75,000/- from the plaintiff and, for the said loan, the first defendant company mortgaged its plant and machinery. The Loan-cum-Hypothecation Agreement was executed by the defendants 2 to 5, as the Directors of the company. As per the said agreement, the first defendant agreed to repay the loan amount of Rs.75,000/- on the basis of one instalment for every six months within a period of five years and for each instalment, an amount of Rs.7,500/- was to be paid along with interest at 13.5% p.a. The defendants paid the first three instalments and, thereafter, they failed to pay the balance amount. Under the circumstances, the plaintiff sent a lawyer's notice to the defendants on 09.11.1983 prior to the filing of the suit and the same was acknowledged by the defendants under Exs.A-9 to A-13. Since the notice did not yield any result, the plaintiff was forced to file the suit for recovery of the balance amount against the defendants.

13. Ex.A-2 is the Loan-cum-Hypothecation Agreement executed on 27.10.1981 in favour of the plaintiff bank by the second defendant in the capacity as the Managing Director and the fifth defendant as a Director of the company for the term loan of Rs.75,000/-. All the defendants admitted the fact that they executed Exs.A-2 and A-3. Further, D.W.1, in his cross-examination, has admitted that the defendants are liable to pay the amount received from the plaintiff bank. It is also admitted therein that no notice is given to the bank

stating that the signature has been obtained in Ex.A-3 under coercion and, hence, that document is invalid. Under Ex.A-14 also, the defendant has stated that they would repay the amount.

14. It is also noticed, that, in order to realise the amount, the bank also initiated proceedings by appointing a Commissioner to sell the hypothecated machinery in public auction and get the amount thereto, but, during the auction, no one asked for the said machinery and, therefore, the said effort of the bank became futile. Further, D.W.1 had deposed that the value of the machinery at the time of obtaining the loan from the plaintiff bank was not the same at that time and, on the basis of depreciation, the value had reduced to 50%. When the plaintiff failed to recover the amount through the sale of machinery in public auction, he invoked Clause 23 of Ex.A-2, which fastened the liability on the defendants to pay the suit loan jointly and severally. Clause 23 goes to the effect that when the borrower is more than one individual, each one of them shall be bound and liable jointly and severally with the other or others of them and all covenants, conditions, agreements herein contained shall be performed by them and each of them jointly and severally and any act or default by any of them shall be deemed to be an act or default by all of them. Further, in Ex.A-6, the fifth defendant has admitted that he signed the deed of guarantee, dated 08.05.1982, along with other three Directors for the loan amount of Rs.75,000/-. He has also stated therein that the amount of Rs.59,314.52 has to be repaid by the company in eight half yearly instalments of Rs.7,500/- each beginning from 27.04.1983 onwards with accrued interest. Therefore, the first defendant company having obtained the loan of Rs.75,000/- from the plaintiff bank and executed the agreement Ex.A-2 through its directors and, for the loan, the defendants 2 to 5 having executed the guarantee deed Ex,.A-3, the defendants cannot escape their liability. Though Ex.A-3 has been executed subsequent to Ex.A-2, the defendants are still liable, as they have admitted in their evidence that Ex.A-3 has been given for the loan amount of Rs.75,000/-, received under Ex.A-2, and also in Ex.A-6. In addition, the fifth defendant, as D.W.2, has admitted that as per Clause 23 of Ex.A-2, he, along with the other defendants, is personally liable for the loan. Moreover, no appeal is also filed by the defendants 1 to 4 against the decree of the trial Court. All the above factors would clinchingly establish that the defendants are liable to pay the suit claim jointly and severally.

15. As regards the liability of the fifth defendant, based on Ex.A-6, which is a letter sent by the fifth defendant to the plaintiff, stating that his liability is limited to the extent of Rs.59,314.52 along with the other defendants and not for the future advances as he retired from the company on 31.10.1982, the trial Court decreed the suit separately against the fifth defendant for the said sum of Rs.59,314.52, in addition to granting the suit claim as

against 1 to 4. This Court is at a loss to understand how such a liability could be fastened by the trial Court on the fifth defendant when there is no prayer at all to that effect and the suit claim is only to the amount of Rs.69,618.62 against all the defendants, that too when plaintiff has not exercised his option to file the suit against the fifth defendant alone. Such an attitude of the trial Court has to be highly deprecated.

16. Therefore, this appeal is allowed in part, modifying the judgment and decree of the trial Court to the suit claim alone against the defendants 1 to 5 instead of defendants 1 to 4, as ordered by the trial Court, and the finding with regard to the individual liability of the fifth defendant/appellant to a sum of Rs.59,314.52 is set aside. The order made by the trial Court as regards costs shall remain. There shall be no order as to costs in this appeal.

17. It is seen from the records, that, during the pendency of this appeal, interim stay was granted and the same made absolute on condition that the appellant should deposit 50% of his liability as per the decree of the trial Court together with costs and, thereafter, the first respondent/plaintiff was permitted to withdraw the said amount. If the said amount is deposited and the same is in excess of the liability of the appellant as per this judgment, the same shall be refunded to the appellant by the first respondent.

sd/-
Deputy Registrar

/true copy/

Sub Asst.Registrar

dixit

To
1.The Registrar,
City Civil Court,
Madras.

2.The Section Officer,
V.R.Section, High Court, Madras

+1 cc To Mr..Rajasekaran, Advocate, SR.41764

A.S.No.940 of 1993

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