

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Appeal No.13 of 2013

Between: Kannukarathi Muhammed

Appellant

And: Life Insurance Corporation of India

Respondent

Appearances: Mr J. Savoia for the appellant

Ms Radhika Naidu for the respondent

Date of hearing: 24th September,2014

Judgment

1. This an appeal from a decision of the Magistrate .

The pleadings and hearing in the lower court

2. The respondent, in its amended statement of claim claimed that SANITRONICS & SYSTEMS(FIJI)LTD was indebted to the respondent in a sum of \$ 19,727.11. The defendant had guaranteed the payment of that sum by an “*Acknowledgement, Undertaking and Guarantee*”(Guarantee). The amended statement of claim claimed the sum of \$ 19,727.11 from the appellant .
3. The appellant, in its amended statement of defence admitted that he gave the Guarantee, but denied that the debtor had defaulted in its repayments and disputed the balance due and owing. The appellant further stated that the defendant is discharged from all liability under the Guarantee by a subsequent agreement entered into between the respondent and SANITRONICS & SYSTEMS(FIJI)LTD, in terms of which the respondent agreed to give that company additional time to pay its debt.

4. The appellant filed interrogatories and posed several questions to the respondent. The respondent in an affidavit in response filed on its behalf replied that:
- By letter of 3rd July, 2007, Messrs Diven Prasad Lawyers advised the respondent's solicitor that their client, the debtor had agreed to pay a sum of \$1,500.00 per month towards the principal debt and pay the whole debt within 6 months.
 - A sum of \$1,000.00 was paid to the respondent's solicitor on 23rd August, 2007.
 - The appellant is indebted to the respondent in a sum of \$19,727.11 and interest.
5. The parties agreed to take up as a preliminary issue the question whether the "Acknowledgement, Undertaking and Guarantee" executed on 3rd January 2007, has been varied or not.
6. The Learned Magistrate held that :

The Guarantor is not discharged by the mere voluntary forbearance of the Plaintiff to take steps to obtain timeous performance by the Debtor of the obligation which is the subject of the guarantee, for this does not affect the Guarantor's equitable right to compel the debtor to perform it'.

He concluded that he is satisfied that the appellant has not shown cause to be released from his obligations as Guarantor and entered judgment for the respondent in a sum of \$ 20,727.11 and \$ 500 costs.

7. *The grounds of appeal*

The grounds of appeal to this Court are as follows:

- 1) *The learned Magistrate erred as a matter of law in failing to consider and apply Section 13 of the Indemnity Guarantee and Bailment Act Cap 232 to the question of whether the Guarantee was discharged when the Principal Debtor and the Respondent agreed to variation of the Contract without the consent of the Appellant in his capacity as Guarantor.*
- 2) *The learned Magistrate erred as a matter of law in failing to consider that the variation of the Contract between the Respondent and the Principal Debtor was a composition and agreement to give time to the Principapl Debtor without the consent for the Appellant and therefore contrary to Section 13 of the indemnity Guarantee and Bailment Act Cap 232.*

3) *The learned Magistrate incorrectly awarded judgment in the sum of \$20,727.11 to the Respondent without reference to the Respondents Amended Statement of Claim of 12th June 2012 where the Respondent claimed \$19,727.11 and without reference to the Statement of Defence filed by the Defendant and without conducting a Trial.*

8. ***The determination***

a. The first and second grounds of appeal contend that the lower court failed to consider section 13 of the Indemnity Guarantee and Bailment Act,(cap 232) in terms of which the Guarantee was discharged when the debtor and the respondent agreed to a variation of the contract, without the consent of the appellant.

b. Section 13 provides:

*A contract between the creditor and the principal debtor by which the creditor makes a composition with or **promises to give time** to or not to sue the principal debtor discharges the surety unless the surety assents to such contract. (emphasis added)*

c. The section unequivocally provides that an arrangement between a creditor and debtor giving time to the debtor discharges the surety, if his consent has not been obtained.

d. This principle was succinctly stated by Lord Dunedin in ***Egbert v. National Crown Bank***, (1918) AC 903 at 908 as follows:

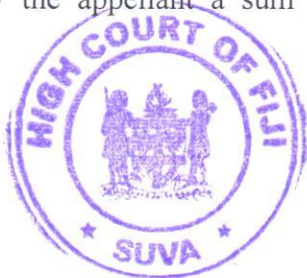
The judgment of Cotton L.J. in which Thesiger L.J. concurred, contains the following passages: "The cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor are only an exemplification of the rule stated by Lord Loughborough in Rees v. Berrington (3): 'It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (or they are as much his as your own) without consulting him.'(emphasis added, footnotes omitted)

- e. In *Carpenters Fiji Ltd v Singh* [2007] FJHC 30; HBC 41 of 2004. Singh J held that a guarantor was discharged from liability, if any variation to the underlying contract was done without the consent of the guarantor.
- f. Volume 20, *Halsbury's Laws of England*, (4th Edition) paragraph 253 provides:
Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed.
- g. In *Hole v Brunskill*, [1877] 3QBD 494 it was held that a surety should be asked whether he would assent to a variation in the terms, and not having been asked to assent he was discharged from liability.
- h. In my judgment, the first and second grounds of appeal succeed.
- i. Next, the Learned Magistrate having reached his finding on the preliminary issue made order "*Judgment in the sum of \$ 20,727.11*" without proceeding to trial, albeit there remained disputed issues to be determined, as recorded at the pretrial conference.
- j. Finally, the Learned Magistrate incorrectly awarded judgment in a sum of \$20,727.11, contrary to the claim in the amended statement of claim of \$19,727.11, as urged in the ultimate ground of appeal.
- k. Ms Naidu, counsel for the respondent conceded that the lower court had erred, as stated in the third ground of appeal.

9. **Orders**

- a. The appeal is allowed.
- b. I set aside the judgment of the Magistrates Court.
- c. The respondent shall pay the appellant a sum of \$ 1500 as cost summarily assessed.

20th November 2015



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
Judge