

MS ANIRUDHAN VS. THE THOMCO'S BANK LTD

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CITATION: 1963 AIR 746

BENCH: A.K. SARKAR, J.L. KAPUR AND M. HIDAYATULLAH, JJ.

FACTS : An appeal that has arisen out of a suit was filed by the Thomco's Bank Ltd., Trivandrum, (Bank) against V. Sankaran (the principal Debtor) and N. S. Anirudhan (the surety and appellant). The suit was based against V. Sankaran on a promissory note executed by him in favour of the Bank on February 24, 1947, and against the present appellant on a letter of guarantee dated May 24, 1947.

A blank form of guarantee was given by the Bank to Mr.Sankaran, who then had it filled up by the appellant stating the maximum amount which he guaranteed to for was Rs. 25,000/-. When Mr.Sankaran brought the letter of guarantee which was duly signed by the appellant and himself to the Bank the latter i.e the Bank refused to accept the guarantee up to that limit. The Bank was not prepared to give or were unwilling to give Mr.Sankaran accommodation for a Larger sum than Rs. 20,000/- and wanted it to be limited to the extent of Rs. 20,000/- only. Mr.Sankaran then made alterations in the letter with the amount of the maximum limit corrected it from Rs. 25,000/- to Rs. 20,000/- and gave it to the Bank. In a suit instituted by the Bank against the principal debtor, Mr.Sankaran, and the appellant on the basis of the contract of guarantee for Rs. 20,000/-, for recovering the dues, the said appellant pleaded that as the document was altered without his knowledge or consent, he was said to be discharged from his liability.

ISSUES : Whether document i.e. contract of guarantee is void due to alteration made and does it discharge the surety of his liability ?

LAW INVOLVED: The law involved in this case is of **Section.133** of Indian Contract Act,1872. The section states as follows:-

“Discharge of surety by variance in terms of contract.—Any variance, made without the surety’s consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. —Any variance, made without the surety’s consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.”

The High Court of Kerala relied on the principle contained in **Section.87** of the Negotiable Instruments Act, 1881 which states :

“Effect of material alteration.—Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties; Alteration by endorsee.—And any such alteration, if made by an endorsee, discharges his endorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of sections 20, 49, 86 and 125.”

This principle has also been formulated in *Halsbury's Laws of England*, 3rd Edn., Vol. II, p. 370, in the following words :

“An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed; It appears that an alteration is not material which carries out the intention of the parties already apparent on the face of the deed...”

The Apex Court i.e. Supreme Court of India also took into account the other principles of law of that of England.

They considered the *Halsbury's laws of England*, 3rd Edn., Vol. 8. para 301, p.176 which states that :

“An unauthorised material alteration avoids a contract so that if a promisee after a written contract has been executed materially alters it without the consent of the

promisor whether by adding anything to the contract or striking out any part of it or otherwise the contract is avoided as against the person who was otherwise liable upon it. It may also be taken to be the law that even if the alteration is made by a stranger without the knowledge of the promisee the other party is discharged if the contract is in possession of the promisee or his agent. But if the contract is altered by a stranger when the contract was not in the custody of the promisee the promisor is not discharged.”

ANALYSIS: It is a principle of common law that any variance made in the absence of the consent of the surety, in the contract of guarantee will result in discharge of the surety. The principle of law on the discharge of sureties is that the surety like any other contracting party cannot be held bound to something for which he has not contracted. The matter is on an appeal before the Supreme Court. The Initial findings by the trial court was that the amount guaranteed had originally been mentioned in the letter as Rs. 25,000/- and this had been altered without the consent of the appellant to Rs. 20,000/-. It observed that as it was not disputed that the alteration was material, the suit against the appellant had to be dismissed and passed a decree accordingly, obviously in the view that the alteration had avoided the instrument. The respondent Bank then appealed to the High Court of Kerala. The High Court agreed with the trial court that the letter of guarantee originally mentioned Rs. 25,000/- and this figure was later altered to Rs. 20,000/- without the consent of the appellant. It added the probably the alteration had been made by the principal debtor, Mr.Sankaran. It however held that the appellant had mentioned Rs. 25,000/- in the place of Rs. 20,000/- in the letter probably by a mistake and that the alteration had been made in order to carry out the common intention of Mr.Sankaran, the appellant and the Bank that for the overdraft accommodation of Rs. 20,000/- allowed to Mr.Sankaran the appellant would give a letter of guarantee to the Bank. The High Court, relied on the principle contained in S. 87 of the Negotiable Instruments Act, 1881 and passed a decree against the appellant.

Majority bench was of the opinion that letter contained an enforceable contract as it was supported by consideration which had already moved from the Bank, namely, the advance to Mr.Sankaran before the date of the letter and the promise to make further advances. Then it is said that inadequacy of consideration does not avoid a contract as stated in Explanation 2 of S. 25 of the Indian Contract Act, 1872, and therefore the Bank's undertaking to advance upto Rs.

20,000/- could support the appellant's promise to guarantee up to Rs. 25,000/-. But it is not the Bank's case that there was such a contract of guarantee. Its case was that the contract of guarantee was for Rs. 20,000/-. Such an alteration was in no way detrimental to the surety as the reduced sum was already included in the amount of guarantee originally furnished i.e. if the amount stood at Rs. 25000/- the appellant would have had to anyways cover the amount of Rs. 20000/- while paying off the debt of Rs. 25000/-. Thus a reduction of an amount already consented to be paid would not require a distinct consent and such consent can be taken as implied. Thus the alteration made by Sankaran in the letter of guarantee cannot be considered as a material one.

Therefore it's contended that the alteration was immaterial and it did not affect the instrument so far as the appellant is concerned is to no purpose in the present case. The letter of Anirudhan to the Bank was based on a consideration which had already moved to Sankaran and which Anirudhan wished to guarantee. Even if treated as an offer by Anirudhan to the Bank, the Bank accepted the amended offer and Sankaran must be deemed to have had, the authority to reduce the amount, though not to increase it. The document was altered while in the possession of the very person who, as the agent of Anirudhan, brought it to the Bank on both the occasions. Anirudhan must be deemed to have held out Sankaran as his agent for this purpose and this creates an estoppel against Anirudhan, because the Bank believed that Sankaran had the authority. The offer thus remains in its amended form an offer of Anirudhan to the Bank and the Bank by accepting it turned it into a contract of guarantee which was backed by the past consideration on which the offer of Anirudhan was originally based.

In minority's opinion i.e. of J.L. Kapur, J the alteration to Rs. 20,000/- and any change of figure was considered to be a material alteration resulting in the avoidance of the contract, even though the alteration might have been advantageous to him, the obliger. Howsoever innocent the obligee might be or howsoever innocent the alteration might have been made so far as it is material the non-accepting obliger - the appellant in this case - cannot be held liable on the obligation in the altered form because he never made or consented to such an obligation and he cannot be held liable on the obligation in the original form because the obligation was never assented to by the creditor - the respondent Bank. Now an unauthorised material alteration avoids a contract so that if a promisee after a written contract has been executed materially alters it without the

consent of the promisor whether by adding anything to the contract or striking out any part of it or otherwise the contract is avoided as against the person who was otherwise liable upon it. Even if the alteration is made by a stranger without the knowledge of the promisee the other party is discharged if the contract is in possession of the promisee or his agent. But if the contract is altered by a stranger when the contract was not in the custody of the promisee the promisor is not discharged. If a guarantor entrusts a letter of guarantee to the principal borrower and the principal borrower makes an alteration without the assent of the appellant then the guarantor is liable because it is due to the act of the guarantor that the letter of guarantee remains with the principal debtor, in this case defendant No. 1, and what the principal debtor did will estop the guarantor from pleading want of authority.

The appellant agreed to stand surety for an overdraft allowed by the respondent Bank to the principal debtor, Shankaran. The Bank required a guarantee in the form which was handed over to the principal debtor, Shankaran. Shankaran got it filled by the appellant for a sum of Rs. 25,000/-. The Bank did not accept the guarantee up to that limit but wanted the figure to be corrected i.e., by insertion of Rs. 20,000/-. The document was thereupon handed back to the principal debtor who, it is stated, altered the document. At that stage the principal debtor was acting for and on behalf of the appellant because it was at his instance that the appellant was standing surety and the appellant handed over the deed of guarantee to the principal debtor for the purposes of being given to the bank, the respondent. In these circumstances the avoidance of contract by material alteration is inapplicable because the document was not altered while in possession of the promisee or its agent but was altered by the principal debtor who was at the time acting as the agent of the guarantor, the appellant.

CONCLUSION : In accordance with the opinion of the majority, the appeal is dismissed. It is necessary to note, as a concluding point, that this decision laid down the law for the interpretation of the principle of discharge of surety by variance in the terms of the contract of guarantee. In spite of the criticism, the interpretation of the rule of discharge of surety, as laid down in this judgment is still a good law. This decision is a precedent and thus unimpeachable. In fact, this judgment laid down an Indian authority on the fact that any alterations in the terms of guarantee which is not material or is

beneficial for the surety shall not be considered to discharge the surety from his obligations under the contract.

