

Before Jitendra Chauhan, J.

JAGDISH SINGH GARCHA—Petitioner

versus

STATE OF HARYANA—Respondents

RSA No.3742 of 2013

November 02, 2018

Indian Contract Act, 1872— S.128— Liability of surety— Public auction— Petition surety for payment— Failed to pay— Surety liable— State has been given powers to impose penalty and terminate contract in case of default in due observance of terms and conditions of contract or in payment of contract money on due dates as provided in contract— Delay in action by Government cannot result in discharge of surety.

Held, that the State has been given powers to impose penalty and terminate the contract in case of default in the due observance of the terms and conditions of the contract or in payment of the contract money on the due dates as provided in Clause 16 of the contract, however, at the same time, it is provided in the contract that if the Contractor fails to pay any instalment of contract money or any part thereof, the amount can be paid with interest at the rate of 15% p.a. till the amount is paid.

(Para 12)

Sumit Mahajan, Sr. Advocate with Amit Kohar, Advocate, for the appellant.(In both the appeals)

Saurabh Girdhar, AAG, Haryana.

B.S. Sewak, Advocate, for respondent Nos.4 to 7 (In RSA No.3742 of 2013)for respondent Nos.4 to 6 (In RSA No.3752 of 2013)

ANIL KSHETARPAL, J.

(1) Arguments were heard on 31.10.2018 and the judgment was reserved. The judgment is being released.

(2) By this judgment, these two appeals bearing RSA Nos.3742 and 3752 of 2013 shall stand disposed of.

(3) Although, both the appeals are arising from the separate

suits, however, learned counsel for the appellant has submitted that the issues which need determination are common. In fact, the arguments were also addressed in RSA No.3742 of 2013. Hence, the facts are being taken from RSA No.3742 of 2013.

(4) The substantial question of law which needs determination is as under:-

1. Whether a surety can be absolved of the liability only on the ground that the Government did not take action against the principal debtor swiftly?

(5) Undisputed facts are that in a public auction, contract of quarries for extracting the minor minerals was granted in favour of defendant No.1. The plaintiff-appellant stood surety and made himself liable for defaulted amount, if any. The plaintiff signed the indenture/contract entered into between the Government, defendant No.4-The Metal Corporation of India, the Contractor. The Contractor was required to deposit the security and pay the contracted amount in the installments. Clause 2 of the agreement provided that if the Contractor fails to pay any installment of contract money or any part thereof, the amount shall be payable with 15% interest thereon. The relevant Clauses of the agreement are extracted as under:-

“16. PENALTY FOR DEFAULT

In case of default in the due observances of the terms and conditions of the contract or in payment of the contract money on the due dates, the contract may be terminated by the Government or any other office authorized by it in this behalf by giving one month's notice, with forfeiture of security deposit and also the installment paid in advance if any. The contractors shall deliver the possession of the quarry/mine to the Mining Officer/General Manager, District Industries Centre concerned within seven days of the receipt of order of termination of contract.

18. RECOVERY OF CONTRACT MONEY AS ARREARS OF LAND REVENUE

Any sum due from the contractors on account of contract money in respect of the contract shall be recovered from him as arrears of land revenue.

28. RECOVERY OF MONEY DUE TO GOVERNMENT

This indenture further witnessed that in further pursuance of the agreement and covenant referred to above the contractor and the surety do further covenant that if the contractor shall make default in the payment of the contract money under these presents including any interest thereon, on the dates on which the same shall or become payable, then the whole of the outstanding contract money and interest shall be payable by the contractor and the surety jointly and severally. The government shall be at liberty to recover the same from the Contractor or the surety irrespective of the fact whether government shall have *pursued all or any of its remedies against the contractor.*”

(6) It is not in dispute that the Contractor committed default in payment of monthly installment. Various notices were issued to the Contractor but since the payment was not made, ultimately the Contracts were terminated after giving sufficient opportunity to the Contractor vide order dated 30.10.1989 and the possession of the mine was taken over. Certain amount was deposited by defendant No.4, the Contractor. Thereafter, the balance amount was sought to be recovered from the Contractor as well as the plaintiff, the surety, when the plaintiff filed this suit for decree of mandatory injunction directing the Government to stop selling his property by way of a public auction for recovery of the contracted amount.

(7) Both the Courts after appreciating the evidence, have dismissed the suit filed by the plaintiff. However, learned trial Court has directed that at first instance, the amount be recovered from the principal debtor. In case, it is not recoverable from him, the Government will be at liberty to recover the amount from the surety, the plaintiff.

(8) Learned Senior Counsel appearing on behalf of the appellant has submitted that as per Clause 18 of the Contract, the recovery of arrears of contract money could be recovered as arrears of land revenue only from the Contractor. He drew attention of the Court to Clause 18 of the Contract. Hence, he submitted that the proceedings initiated are without sanctity of law. He further submitted while referring to Sections 128, 133, 135, 139, 141 and 145 of The Indian Contract Act, 1872, that since the terms of the contract have been changed/ altered, therefore, the plaintiff-appellant stands discharged. He further submitted that had the Government immediately cancelled

the contract, once it was found that the installment on 01.12.1988 has not been paid, the defaulted amount could be recovered from the amount of security furnished by the Contractor. Hence, he submitted that the delay on the part of the Government to take action in accordance with the contract amounts to changing the terms of the agreement and hence, the security stands discharged. He further submitted that no information is proved to have been given to the surety. He further submitted that now the surety's right to recover the amount has been lost and, therefore, the appeal be accepted.

(9) For convenience, Sections 128, 133, 135, 139, 141 and 145 of the Contract Act, 1872 are extracted as under:-

“128. Surety’s liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

133. 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.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor.— 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.

139. Discharge of surety by creditor’s act or omission impairing surety’s eventual remedy.— If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

141. Surety’s right to benefit of creditor’s securities.— A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety,

parts with such security, the surety is discharged to the extent of the value of the security.

145. Implied promise to indemnify surety.— In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but, no sums which he has paid wrongfully.”

(10) As regards the first argument of the learned counsel, it is apparent that the right of the Government to recover the amount is co-extensive with the Contractor and as per Clause 28 of the Contract. The Government is entitled to recover the amount from the Contractor and the surety jointly and severally. Hence, there is no substance in the argument of the learned counsel that the amount as arrears of land revenue can only be recovered from the Contractor. It may be noted here that learned Senior Counsel appearing for the appellant could not draw attention of the Court to any such submission made before the Courts below on this aspect. However, in any case, this Court has permitted the learned counsel to raise the argument but finds no substance therein.

(11) As per the provisions of Section 128 of the Contract Act, liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided in the contract. In the present case, learned counsel could not draw attention of the Court to any Clause which does not make the liability of the surety co-extensive with that of the principal debtor. It is not in dispute that the contract itself has been signed by the surety-appellant herein.

(12) Next argument of the learned counsel is also to be noticed and rejected. The contract has to be read in entirety. No doubt, the State has been given powers to impose penalty and terminate the contract in case of default in the due observance of the terms and conditions of the contract or in payment of the contract money on the due dates as provided in Clause 16 of the contract, however, at the same time, it is provided in the contract that if the Contractor fails to pay any installment of contract money or any part thereof, the amount can be paid with interest at the rate of 15% p.a. till the amount is paid. Clause 2 of the agreement, provides as under:-

“2. INTEREST FOR DELAYED PAYMENT

If the contractor fails to pay any installment of contract

money or any part thereof due to the Government; under the terms and conditions of the contract on the due date without written permission of the Director of Industries in that behalf, they will be liable to pay interest therein at the rate of fifteen percent per annum till such amount is paid. Provided that no interest shall be payable, if the amount is paid within seven days.”

(13) Therefore, the delay in action by the Government cannot result in discharge of the surety. In fact, next argument of the learned counsel is also relying upon the aforesaid delay which in the considered opinion of this Court, does not result in discharge of surety as it does not amounts to change in terms of the contract as provided in Section 133 of the Contract Act. The variance/change in the terms of the contract as referred to in Section 133 of the Contract Act has to be in the context that some changes in the terms of the contract have been made without the consent of the surety. Merely because immediately on default, the contract has not been terminated does not amounts to change in the terms of the contract. Still further, no change in the terms of the contract has been brought to the notice of this Court. The Government gave opportunities to the Contractor to pay the amount while issuing the various notices. Such notices does not result in changing the terms of the original contract. Through these notices, opportunity was given to the Contractor to pay the amount.

(14) Next argument of the learned counsel for the appellant is based upon Section 135 of the Contract Act that whenever the Creditor makes a composition with, or promises to give time to, or not to sue the principal debtor, the surety stands discharged. In the present case, neither there is any composition between the Creditor and the principal debtor nor there is any promises to give time to or not to sue the principal debtor. Hence, the surety does not stand discharge.

(15) Next argument of the learned counsel is with reference to Section 139 of the Contract Act, which provides that if the Creditor taken any step which is inconsistent with the right of the surety, or omits to take any step which is obligated upon him to take and the surety requires him to do and as a result thereof remedy of the surety against the principal debtor is thereby stands impaired, the surety shall stand discharged. In the present case, the plaintiff-appellant has failed to prove any act of the Creditor which is inconsistent with the right of the surety. Before Section 139 of the Contract Act is made applicable, twin conditions are required to be fulfilled, one, Creditor must be

attributed an act which is inconsistent with the right of surety or omission to do any act which is his duty to the surety and second, the eventual remedy of the surety against the principal debtor is thereby impaired. In the present case, neither of the two parts of the aforesaid Section apply.

(16) Next argument of the learned counsel is that no prior information has been given to the surety.

(17) As per the official communications, which were sent to the Contractor, copy thereof were also sent to the surety, however, learned counsel while reading the statement of DW1-Deepak Kumar has stated that he has admitted that no notice was given to the surety. It may be noted that once the liability of the surety is co-extensive and there is no requirement as per the terms of the contract to serve the prior notice to the surety.

(18) Next argument of the learned counsel is with reference to Sections 141 and 145 of the Contract Act. Learned counsel submits that the right of surety to recover the amount has been lost and even the security amount which was available with the Government has been lost. While elaborating, learned counsel submitted that had the Government taken action promptly/swiftly, the amount of default could be recovered from the amount of security. He submitted that the failure to act at an appropriate moment has resulted in discharge of the surety.

(19) This Court has considered the submission.

(20) It is not the case of the plaintiff that the amount of security deposited by the Contractor has not been adjusted before issuing Recovery Certificate. Hence, security has not been lost. Still further, once it is specifically provided in the contract that the amount of installment can be recovered by the Government or paid by the Contractor with interest, Section 141 of the Contract Act would have no application.

(21) As regards the last argument of the learned counsel with reference to Section 145 of the Contract Act that right of surety to recover the amount from Principal is lost, is also without substance because the cause of action to recover the amount from the principal debtor/Contractor would arise in favour of the surety, only on deposits by the surety, the amount in place of Contractor/principal debtor, therefore, the right of surety is not lost.

(22) This Court is conscious of the fact that the learned trial Court has wrongly ordered that first effort be made to recover the amount from the Contractor and then only the steps be taken against the surety i.e. the plaintiff. In the considered opinion of this Court, such direction is against the spirit of the contract and the provision of Section 128 of the Contract Act. However, since State of Haryana did not either file first appeal or second appeal, hence, this Court opts not to modify the aforesaid directions of the trial Court.

(23) In view of the aforesaid discussions, the question of law framed earlier is answered against the appellant in the facts of the present case. Hence, both the appeals are dismissed with costs of Rs.1,00,000/- each.

(24) All the pending miscellaneous applications, if any, are disposed of, in view of the above said judgment.

Dr. Payel Mehta