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Court : Allahabad

Decided On : Nov-27-1972

Reported in : 1973CriLJ1208

Judge : Yashoda Nandan and ;S. Malik, JJ.

Appellant : The State

Respondent : Jati Ram and ors.

Judgement :

Yashoda Nandan, J.

1. These are five connected revisions in which a common question of law has been raised. C. D. Parekh, J. before whom they came up for hearing was of the opinion that the question of law arising for consideration in these revisions merited consideration by a larger Bench and as a result of the reference made by him. these cases are before us. We are disposing them of by a common judgment.

2. The relevant facts giving rise to these revisions are that one M. A. Qidwai was being prosecuted in five different cases before the learned Additional District Magistrate (Judicial) Dehradun, for an offence punishable under Section 420/468, IPC On the 3rd September, 1968. the Public Prosecutor made an application before the learned Magistrate praying that enquiry proceedings for commitment of the accused be conducted ,in all the five cases. The learned Magistrate rejected

the application and embarked on the trial of the accused. On the 14th September. 1968. charges were framed against M. A. Qidwai in all the five cases. On the subsequent dates a number of prosecution witnesses were examined in the five trials. On the 15th May. 1969. the learned Sessions Judge, Dehradun. released M. A. Qidwai on bail in all the five cases. The respondents before us stood sureties for the accused. They executed surety bonds on printed forms identical with Form No. XLII of Schedule V of the Code of Criminal Procedure. The learned trial Magistrate fixed 14th and 15th October. 1969. for recording the evidence of the Investigating Officer as also for the statement, of the accused and the depositions of the defence witnesses. On the 14th and 15th October. 1969. the accused did not appear before the trial Court. When the accused failed to appear before the learned Magistrate on the 15th October, 1969. he passed orders forfeiting the surety bonds executed by the respondents and issued non-bailable warrants for the arrest of the accused. On the same date the learned Magistrate passed orders directing issuance of notices to the .respondents to show cause by the 4th November. 1969 as to why they should not be required to pay the amounts for which they had stood sureties. On the 4th November. 1969. the sureties filed applications before the learned Magistrate praying for one month's time to enable them to produce the accused before the Court. The learned Magistrate passed an order fixing 1st December. 1969 for the production of the accused by the sureties in his Court. On that date the accused did not appear and on applications made by the respondents on a number of occasions extension of time was granted by the trial Court for the production of the accused. On the 5th February 1970 the learned Magistrate ultimately passed an order for realisation of the .amounts covered by the surety bonds as penalty. Against the order dated 5th February. 1970 the ' sureties filed appeals before the learned Sessions Judge, Dehradun. The five appeals were allowed by the learned Sessions Judge. Dehradun. by a common judgment dated 31st July. 1971. The learned Sessions Judge took the view that by the bonds executed by them the sureties had merely undertaken to produce the accused during preliminary enquiry proceedings before the Magistrate and in the event of his being committed for trial to the Court of Session, before that Court. There however, had taken-no commitment proceedings or committal to the Court of Session. Since the only proceedings against the accused had been his trials

before the learned Magistrate in accordance with the procedure prescribed for trial of warrant' cases, the bonds executed by the sureties could not be enforced if the accused failed to appear, since the contingencies contemplated by the bonds had not occurred. Aggrieved by the appellate orders of the learned Sessions Judge, the State has filed these five revisions before this Court.

3. learned Counsel for the State.' appearing in support of the revisions has contended that the surety bonds of the nature with which we are concerned-should be construed in the light of the-purpose and the object for which they¹ had been executed and evidence of thea surrounding circumstances in which they' had come into existence could legitimately be taken into consideration for discovering the true intention of the parties concerned. It was urged that by the time the surety bonds in question-came into existence, the learned trial' Magistrate had already rejected an application made on behalf of the State for the conduct of enquiry proceedings; in the cases pending against the accused and had embarked on his trial. Consequently neither the sureties nor the State nor the Magistrate who accepted the surety bonds could have been under any misapprehension regarding the nature of proceedings pending against the accused. The respondents must consequently have known that they were required to enter into an agreement for the purpose of ensuring the attendance of the accused at the trials. The bonds consequently though executed in Form No. XLII must be construed as contracts expressing an undertaking-on the part of the executants to produce the accused on various dates fixed at the trials before the learned Magistrate. learned Counsel for the State placed reliance on the following observations in-the Supreme Court decision in State of Maharashtra v. Dadamiy.a Babumiya Sheikh : 1971 CriLJ1274 .

Each bond has to be construed on' its own terms. In some cases the bonds-require a strict construction. But in-construing a surety bond the purpose-and object of it must be kept in view.

On the other hand, learned Counsel appearing for the respondents contended that since the surety bonds were in effect contracts contemplating penal liabilities they should be construed strictly and literally and since the respondents bad merely

undertaken to produce the accused before the learned Additional District Magistrate (Judicial) during committal proceedings and in the event of his being committed for trial, before the learned Sessions Judge, the amount of the surety bonds could not be forfeited on the failure of the accused to -appear before the learned Magistrate at the trials. The facts of the Supreme Court decision in : 1971 CriLJ1274 were entirely different from those of the cases before us. The decision cannot be relied upon as an authority for the proposition that even in cases where the terms of the surety bonds are without any ambiguity, extraneous evidence regarding the intention of the .parties thereto could be taken into account for construing it. 'In fact such a view could not possibly have been taken in view of the express language of Section 92 of the Indian Evidence Act hereinafter referred to as the Act, It cannot be seriously disputed that the terms of surety bonds being Denal if their provisions are clear they must be strictly construed and unless the contingencies contemplated by them had occurred they cannot be enforced. Such a view was taken by the Supreme Court in State of Bihar v. M Homi : 1955 CriLJ1017 .

4. Though the argument broadly advanced that even if the terms of a surety bond are clear and unambiguous, evidence of surrounding circumstances may be taken into account for finding out the intention of the executant is unacceptable to us. on the facts of the cases before us. in our judgment evidence is admissible for that purpose. Sections 93 to 98 of the Act provide statutory rules for admission or otherwise of extrinsic evidence in construing documents. Section 93 of the Act prohibits admission of extrinsic evidence in cases where the language of a document is patently defective and ambiguous while Section 94 bars admission of such -evidence where there is neither an ambiguity in the language of a document on its face or in its relation to existing facts. Sections 95 to 97 of the Act deal with cases where the language used in documents suffers from what text book writers describe as 'latent ambiguity'. Section 95 of the Act is as follows :

When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

The only illustration in the section is of a case where 'A' had no house in Calcutta but had one at Howrah, of which 'B' had been in possession since the execution of the deed by which 'A' had sold his house 'in Calcutta' to him. The illustration states that in such a case evidence is admissible to show that the deed related to house of 'A' at Howrah.

5. In the cases before us through the surety bonds executed by the sureties, they undertook to produce the accused before the learned Magistrate during the committal proceedings and in the event of his committal- for trial before the Court of Session. The contingencies contemplated by the security bonds did not in fact exist at all. As already stated, the application made by the State before the learned Magistrate, that the proceedings before him be conducted as an enquiry and the accused be committed for trial had been rejected. Charges had been framed against the accused and practically the entire prosecution evidence had been recorded long before the execution of the surety bonds by the respondents and the release of the accused on bail. The undertaking by the sureties in the security bonds to produce the accused at the committal proceedings before the learned Additional District Magistrate (J) and in the event of his committal for trial before the Court of Session was clearly meaningless with reference to the existing facts. Extraneous evidence, in our opinion, consequently is admissible to show that the executants of the security bonds while stating that they undertook to produce the accused before the learned Magistrate during the committal proceedings in Court, meant that they undertook to produce him before the learned Additional District Magistrate during the trials going on before him.; Since the accused was undergoing trials the Court which granted him bail must have necessarily ordered his release on bail during the impendency of the trials There are on record affidavits filed by the respondents before the learned Additional District Magistrate (J.). Dehradun. Para. 3 of each one of the affidavits is to the effect that the deponent stands surety for the accused 'dauran moqadma' and undertakes to produce him before the Court on each day fixed. The only 'moqadma' .pending before the learned Additional District Magistrate (J.) was the trials. The circumstances in which the surety bonds were executed and the conduct of the respondents' who again and again applied for and obtained time from the learned Magistrate to .produce the accused at the trials pending also provide valuable

evidence indicating what they intended to under-1 take.

6. No case in which Section 95 of the Act was pressed in aid for the purpose of construing a security bond under the Code of Criminal Procedure has been brought to our notice by either party. We, however, find considerable support for the view taken by us from the decision of the Calcutta High Court in *Mohendra Nath Banerji v. Roy Satish Chandra Choudhury Bahadur* : AIR1934 Cal569 in which Section 95 of the Act was relied upon for purposes of construing a security bond executed in civil proceedings. In that case the decree-holders in March 1929 obtained a mortgage . decree for sale of the property mortgaged for the realisation of Rupees 59,984/- with interest upto the date of payment. Mahendra Nath Banerji. who was a puisne mortgagee, appealed against the decree and obtained a stay of execution on condition of executing a security bond for Rs. 5,000/- as security for the increase of interest which might result owing to the stay of execution proceedings pending the appeal. In March 1932 the appeal was dismissed and the property was sold for Rupees 65,000/-, the decretal amount having in the meantime mounted upto Rs. 70,446/-with further interest. The order of the Court by which conditional stay of execution had been allowed showed that the petitioner was to furnish a security bond making himself liable to the extent of Rs. 5,000/- for interest accumulating during the stay of execution. The bond actually executed by Mahendra Nath Banerji however, made him only liable for what would become payable by him under the appellate decree. Security bond which came up for consideration before the learned Judges of the Calcutta High Court was in the following terms:

I of my own free will will stand security to the extent of Rs. 5,000/-mortgaging the properties specified in the schedule hereto annexed and covenant that if the decree of the First Court be confirmed or varied by the appellate Court then I shall duly act in accordance with the decree of the appellate Court and pay whatever may be payable by me thereunder and if I should fail therein then any amount so payable shall be realised from the properties hereby mortgaged and if the proceeds of the sale are insufficient to pay the amount due I will be personally liable to pay the balance.

The learned Judges held that there were two noteworthy points in the terms of the security bond: (1) The surety contemplated a payment to be made by him in the case in which the decree of the first Court was merely confirmed.. (2) He only made himself liable for whatever the appellate decree ordered him to pay. The learned Judges held that the statement of the executant of the security bond that he would pay whatever might be payable by him if the decree was confirmed was unmeaning with reference to the existing facts since if the decree was confirmed no amount could be payable by him since he only bound himself to pay whatever he was ordered to pay by the appellate Court decree. The view was taken that on the facts of the case Section 95 of the Act was attracted. The learned Judges held that they were entitled to look into the record of the circumstances in which the bond was executed. Relying on 'the order of the appellate Court by which stay had been granted it was held that it was clear that the security bond was executed to indemnify the decree-holders for the interest 'accumulating on account of the postponement of the sale, by making the surety personally liable upto Rs. 5.000/-. It was held that in view of the stay order it was obvious that what the executants of the security bond meant was that he would duly act in accordance with the decree and that though he had not been directed to make any payment by the decree, he was rendered liable for interest to the extent of Rs. 5,000/- by confirmation of the trial Court's decree by the appellate Court. As in the case before the Calcutta High Court, the language used in the security, bonds executed by the applicants is unmeaning with reference to the existing facts, the existing facts being that there were no committal proceedings pending before the Additional District Magistrate (J) before whom the accused was actually being tried.

7. In the view taken by us, these revisions must be allowed and we order accordingly. The appellate orders of the learned Sessions Judge dated 31st July. 1971 are set aside and the order of the learned Additional District Magistrate (Judicial) dated 5th February. 1970. is restored. The record of the cases will be sent down to the Court concerned at an early date.