Dwarka Das Vs. Kishan Das

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Court : Allahabad

Decided On : Apr-12-1933

Reported in : AIR1933All587; 147Ind.Cas.1048

Appellant : Dwarka Das

Respondent : Kishan Das

Judgement :

Sulaiman, C.J.

1. This is a defendant's appeal arising out of a suit for recovery of about Rs. 12,000 with interest on the basis of a security bond dated 24th June 1922 executed by the deceased father of the minor defendant. The plaintiff's case is that on the death of the grandfather, Ganesh Das, during whose lifetime his son Gokul Das (the father of the defendant) had already separated, there was a dispute between the other two sons, Kishun Das and Ram Das, relating to the partition of the family property. A will was being set up, alleged to have been executed by Ganesh Das in favour of his widowed daughter and an idol. This suit ultimately resulted in a written compromise which was dated 24th June 1922, and was filed in Court on 26th June. Under this compromise, Kishun Das got the Moradabad Estate together with a sum of money of Rs. 13,500 which was payable by Ram Das. The last portion of this compromise, the interpretation of which is in dispute, referred to a security-bond to be executed by Gokul Das. Gokul Das executed the sceurity-bond sued upon on 26th June 1922, and admittedly handed it over to the

plaintiff Kishan Das. The Court passed a decree in terms of the compromise on 4th July 1922 at which date Gokul Das paid Rs. 4,000 in cash to Ram Das which he had agreed to pay under a mortgage-deed taken from Ram Das in his favour. An attempt was made to get the security-bond executed by Gukal Das registered, but on objection being raised by Gokul Das the registration was refused. On the death of Gokul Das, the present suit was instituted for the enforcement of his liability under the security-bond against his minor son.

2. The claim was resisted by the defendant on various grounds, the principal ones of which were: (1) The defendant was not bound to discharge the debt at all under the Hindu law. (2) The security bond had been obtained by fraudulent misrepresentation and was voidable and therefore not binding on the minor defendant. (3) The original contract was varied subsequently by the plaintiff with the result that the surety has been discharged. The Court below has decided all these points against the defendant and has decreed the claim. In appeal these points are again pressed before us, and in addition it is also pleaded, that it was a part of the terms of the contract that there should be a separate security-bond executed by Ram Das himself and inasmuch as this condition was never fulfilled the liability of the surety did not come into existence. To take up the last point first, the contention is based on the last portion of the compromise which, translated literally, is as follows:

Let it be known that as regards the balance of Rs. 9,500 B. Gokul Das, brother of the plaintiff and defendant 1, shall execute one separate bond and get the same registered up to 26th June 1922.

3. The learned advocate for the appellant contends that the intention was that there should be a separate security-bond executed by Ram Das, defendant 1, in addition to his signing the compromise in question. On the-other hand, the learned advocate for the respondent contends that the intention was that Gokul Das, who was the brother of the plaintiff and was. brother of defendant 1, should execute a separate security-bond. We think that an the language of the compromise and the circumstances of this case the interpretation put upon it on behalf of the respondent is correct. Gokul Das,, who was to sign one separate security-bond,

was described as the brother of the plaintiff and of defendant 1. The intention was not, that Gokul Das, the brother of plaintiff, and also defendant. 1, should execute two separate security-bonds. It may also be noted that there was no necessity for Ram Das to execute a separate security-bond. He was a party to the suit and his having; signed the compromise, which was going to be incorporated in the decree, was quite sufficient for the purpose of binding him. A separate security-bond was necessary for Gokul Das because he was not a party to that suit.

4. It may further be noted that this plea was not taken in express terms in the written statement and there was no clear issue about it. The evidence as to whether Gokul Das executed any separate bond or not is almost nil and it is a mere matter of inference that he had not executed any such bond. Furthermore, if it had been intended that there should be a separate security-bond executed by Ram Das one would have expected such a condition to be entered in the security-bond which was signed by Gokul Das. There is no mention of it in that bond. The security-bond refers to the compromise, but does not contain any condition that there would be another security-bond executed by Ram Das. No doubt the terms of the decree which incorporated the compromise did. not make it possible for the plaintiff to realise the amount of execution but that did not deprive him of his remedy to recover the amount against the principal debtor and his surety by a separate suit. We do not think that the mere fact that the decree was incapable of execution, being a declaratory decree, necessarily discharged the surety of all his liability. There is accordingly no force in this contention.

5. The question whether there had been any fraudulent misrepresentation which vitiated the security-bond is one of fact. The learned Subordinate Judge has not believed the defendant's allegation on this point. The case for the defendant is that Gokul Das was assured that some ornaments would be pledged to him and it was on that assurance that he was made to execute the security-bond and that inasmuch as no ornaments were actually pledged the security-bond is not binding on Gokul Das and his heirs. As such a case, if established, would destroy the validity of the security-bond altogether, we cannot say that such evidence is inadmissible, but we agree with the Court below that the evidence is not satisfactory. (After discussing evidence his Lordship proceeded).

6. The last point urged by Sir Tej Bahadur Sapru on behalf of the defendant is that there can be no liability of the son for the payment of a debt incurred by reason of suretyship when it is not shown that consideration had been received by the father. It is conceded that in a large number of cases the liability of the Hindu son for the debt due by the father as surety has been accepted. We may mention the case of The Maharaja of Benares v. Ram Kumar Mi-sir (1904) 26 All 611, following the cases of Tukaram Bhat v. Ganga Ram. (1899) 23 Bom 454 and Sitaramayya v. Venkatramanna (1885) 11 Mad 373. There are other cases as well. We may mention the latest cases of this Court, namely, Salig Ram v. Lachhman Das : AIR1928 All46 and Krishna Singh v. Dist. Judge of Agra : AIR1928 All582 .It is not necessary to consider in this case whether such a liability justifies an alienation by a Hindu father straight off, and the less so if he has grandsons. On this point there is some difference of opinion in the two cases of this Court quoted just above. The Calcutta High Court in Hira Lal Marwari v. Chandrabali Haldarin (1909) 1 IC 153. seems to have adopted the view expressed in the first-mentioned case.

7. But the learned advocate has argued that there is no exception to this general rule which was not pressed in these cases. He relies strongly on the case of Narayan v. Venkatacharya (1904) 28 Bom 408, and particularly on the observations of Chandavarkar, J., at. p. 411 that:

the law as laid down in the Mitcakshara, by which the parties are governed, is that a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it.

8. It is urged that the same principle applies to the case of a son. In the first place, the observations of the learned Judge were confined to the liability of a grandson and as undoubtedly there is some distinction between the liability of a grandson and that of a son under the Hindu law so far as the debt of the father as a surety is concerned, this case cannot be accepted as any authority for the liability of the son. In the next place, with great respect to the learned Judge, there seems to have been some mistake in assuming that the law is laid down in those terms in the Mitakshara. As a matter of fact, we can find no passage therein where the

liability of the grandson to pay the debt of a grandfather, contracted as a surety, is subject to the receipt of consideration. The subject is dealt with at length in Ch. 6, Section 4 of the Mitakshara which deals with sureties and their liability. Placita 53 says:

Suretyship is enjoined for appearance, for confidence and for payment. On failure of either of the first two, the surety (himself) in each case shall pay; on that of the third, his sons also must pay.

9. Again PL 54 says:

If a surety for appearance or for confidence die, the sons have not to pay; in the case of a surety for payment the sons have to pay.

10. These texts are very clear and they lay down that the sons are liable to pay the debt of their father incurred as a surety for payment. In the note No. 12 there is a reference to a pledge. It is in these terms:

If the surety for appearance or for confidence binds himself after taking sufficient pledge, then his sons also must pay the debt incurred by becoming surety for the property taken in pledge.

11. This note applies to the case of the surety for appearance or for confidence and does not on the face of it apply to a surety for payment of a debt. That this is so is further Supported by the passage quoted from Katyayana as an authority for this statement of the law:

Let a man become a surety for the appearance of a debtor from whom he had received a pledge (as his own security); his son, on the demise of his father, may be compelled to pay the debt from the pledged property.

12. The comment goes on to add: 'Here security for appearance includes a security for confidence.'

13. There is no reference to security for payment. It follows that it is not correct to say that in the Mitakshara it is laid down that the liability of the son for payment of his father's debt as surety is confined to the case where sufficient pledge has been

taken. As regards the grandsons there seems to be no liability at all.

14. The Mitakshara is a book of the highest authority in the Benares School, and even if there were more ancient texts capable of being interpreted in a different way, we would be bound to accept the interpretation put up-upon these texts in the Mitakshara. Similarly even if the law were differently interpreted in the Bombay School (Mayyukh) or the Bengal School (under the Daya Bhaga) we would be bound to give preference to the view expressed in the Mitakshara. But as a matter of fact, we do not find that! the law has been differently laid down either in the more ancient texts or in the Bombay School.

15. Admittedly the chapter on debts in the Daya Bhaga is not extant, and there is accordingly no discussion of this question in that treatise. In the Laws of Manu (Colebrook's Hindu Law, Vol. 1, p. 173, Edn. 3) after reciting that the son of the surety shall not in general be obliged to pay money due by a surety it. is stated:

Such is the rule in case of a surety for appearance or good behaviour; but if a surety for payment should die the. Judge may compel even the heirs to discharge the debt.

16. There is no exception laid down as regards the receipt of consideration. It is not necessary to refer to the opinion of Gautam who was apparently inclined to the view that there is no liability in any case. In the Institutes of Vishnu (Max Muller's Sacred Books of the East, Vol. 7, p. 46, Ch. 6, verse 41), it is stated:

Suretyship is ordained for appearance, for honesty, and for payment; the first two (sureties and not their sons), must pay the debt on failure of their engagements, but even the sons of the last (may be compelled to pay it).

17. There is no exception laid down as regards the receipt of consideration. The contention that there is such an exception is mainly based on the statement of the law as laid down in the Mayyukh, (Stoke's Hindu Law Books) Ch. 5, Section 3, para. 1. It lays down that sureties are of three kinds according to Yajnavalkya. It then proceeds to illustrate the three kinds of sureties. Para. 2 deals with the liability of the sureties themselves and then of their sons. Quoting Katyayana it is

stated:

Money due by a surety need not, on any account, be paid by his grandsons but in every instance such a debt incurred by his father, must be made good by a son without interest.

18. Then the text of Vyasa is, quoted under which a grandson is not liable. We then come to para. 3 which is in these terms:

Exception

This however, supposing the security to have been undertaken by him without receipt of property (or consideration) in return, for if he received (any) property as an inducement to become surety, in that case, the sum for which he was bound shall be paid with interest, by his sons or grandsons. And accordingly Katyayana declares: 'should a man become surety for the appearance of a debtor, from whom he had received a pledge (as his own surety), the creditor (if that surety die) may compel his son to pay the debt, even without assets left by his father.

19. In our opinion, this exception does not mean that even the liability of the son does not arise unless, there has been a receipt of property or consideration by the father. It merely states:

that the law laid down in the previous paragraphs was as regards the liability of the father, his sons and grandsons on the assumption that there had been no such consideration. When there is no such consideration, the father is liable and so are the sons for the principal but not the grandsons. The exception however is, if he received any property as an inducement to become surety in that case, the sum for which he was bound shall be paid with interest by his sons or grandsons.

20. That is to say, in case there has been a receipt of consideration, the sons and grandsons, both are liable to pay the principal with interest. Thus the exception imposes a further liability on the grandsons in the event of there having been consideration and does not in any way diminish the liability of the sons if there had been no consideration. It is thus obvious that the text of the Mayyukh cannot be cited in support of the contention urged on behalf of the appellant. As a matter of

fact, the law as laid down in the Mayyukh appears to be somewhat different from that laid down in the Mitakshara and accordingly we are bound to accept the interpretation of the law as laid down in the latter book. Under the Mitakshara the liability of the surety himself exists for the payment of the debt, where the surety is for appearance for confidence or for paymerit, the liability of the son exists in the case of surety fox payment, but the liability of the grandsons for the payment of the debt incurred as surety does not exist. But if the surety for appearance or for confidence had bound himself after taking pledge, then his sons also must pay the debt incurred by becoming surety from the property taken in pledge.

21. The case before us is that of the liability of the son of the surety and not of his grandson. We have accordingly no hesitation in holding that the liability can be enforced against the defentant-appellant. In our opinion, therefore the decree of the Court below was correct. The appeal fails and is dismissed with costs.