

Chakkunny, (Surety) Vs. Viswanatha Iyer, (Decree-holder)

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Court : Kerala

Decided On : Mar-16-1960

Reported in : AIR1961Ker312

Judge : T.K. Joseph and; S. Velu Pillai, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 145; Contract Act - Sections 135

Appeal No. : A.S. No. 1078 of 1959

Appellant : Chakkunny, (Surety)

Respondent : Viswanatha Iyer, (Decree-holder)

Advocate for Def. : N. Sundara Iyer and; V.R. Venkatakrisnan, Adv.

Advocate for Pet/Ap. : D. Narayanan Potti, Adv.

Disposition : Appeal dismissed

Judgement :

Joseph, J.

1. This appeal arises from an order dismissing objections raised by a surety to enforcement of the bond given by him when certain moveables belonging to the first defendant were attached before judgment. During the pendency of the suit the

first defendant was adjudicated insolvent and the Official Receiver was impleaded as additional defendant. Thereafter the plaintiff and the defendants entered into a compromise and a decree was passed in terms of the compromise. When the decree-holder sought to enforce the bond, the surety objected contending that the bond should be deemed discharged as the suit was decreed on compromise and not on contest and as the first defendant has been adjudicated an insolvent. These objections were overruled and execution was ordered against the surety; he has therefore preferred this appeal.

2. As regards the first point, whether the appellant has become discharged on account of the compromise decree, it was contended that the parties contemplated a decree on contest and that a compromise entered into behind the back of the surety would discharge him of liability. The appellant relies on certain decisions of the Calcutta, Lahore, Patna and Allahabad Courts in support of this argument.

3. In *National Coal Co. Ltd. v. Kshitish Bose & Co.*, AIR 1926 Cal 818, Buckland, J., held that the surety was discharged as the decree in the suit was passed on a compromise allowing payment in instalments. This decision which is based on *Tatum v. Evans*, (1885) 54 LT 336, was dissented from, in *Jia Bai v. Joharmull*, ILR 59 Cal 1450: (AIR 1932 Cal 858), a decision of a Bench of the same Court to which reference will be made later.

4. There is yet another decision of the Calcutta High Court, *Md, Yusuf v. Ram Gobinda*, AIR 1928 Cal 177 (2), relied on by the appellant. That was a case in which a surety gave a bond in connection with attachment before judgment of moveables belonging to the defendant. The parties later referred the matters in dispute to arbitration and a decree was passed on the basis of the award given by the arbitrators.

It was held that the surety was discharged. On the facts the decision, if we may say so with respect, is correct because it was held that what the surety agreed was that in the event of there being a decree in the suit after contest between the parties before the Court, he would be liable for the decree amount. The decree passed on the award was not one in the contemplation of the parties. Page, J., has made this clear in his concurring judgment:

'To my mind this is a very plain case. Having regard to the terms of the bond the surety agreed, if the creditor was unable to obtain payment of the decretal amount from the debtor, to liquidate any sum which the Court after contest should hold was payable by the debtor to the creditor. Some tribunal had to decide the issue as to the liability of the debtor.

The parties chose to have this done by some one in the confidence of both parties. But to such an arrangement the surety was no party and he never undertook that the liability of the debtor should be determined by anybody whom the debtor and creditor might choose to agree upon as the tribunal; and unless 'he assented to it such an arrangement as was made operated as a discharge of the surety.'

This decision cannot therefore be treated as authority for the proposition contended for by the appellant.

5. The latest decision of the Calcutta High Court is ILR 59 Cal 1450: (AIR 1932 Cal 858) to which reference has been made earlier. Rankin, C. J., pointed out that the decision in (1885) 54 LT 336 did not justify the broad proposition that a surety was discharged if a decree was passed in the suit on compromise. The following observations of Denman, J., who decided (1885) 54 LT 336 were extracted:

'I do not say that in no case where a person gives security as surety under O. XIV, he is liable where a judgment is submitted to by consent. But I am of opinion that the compromise in this case is a thing so very different from a judgment in invitum pronounced by the court after some enquiry into the facts as to release a surety, who was not consulted about it.'

After referring to the fact that Buckland, J.'s decision was based on (1885) 54 LT 336, Rankin, C. J., observed:

'I would say upon this case that if it is to be contended that the surety is discharged from his bond in any case where there is a consent decree providing for postponed payment or payment by instalment, then that is a proposition to which as at present advised I am not prepared to assent.'

In Dalip Singh v. Kishan Chand, AIR 1937 Lah 34 it was held:

'...It is well established that the question, whether a compromise was or was not excluded cinder the terms of a surety bond is a question of fact in each case.'

On the facts it was held that a compromise decree was excluded and that the surety was discharged.

6. In Narsingh Mahton v. Nirpal Singh, AIR 1932 Pat 313 also it was held that the words of the bond excluded a compromise decree. It was further held that Section 135 of the Indian Contract Act was an effective answer to the decree-holder's contention. A single Judge of the Allahabad High Court held in Kunj Lal v. Batuk Prasad, 120 Ind Cas 552 (1) (All), that the surety was discharged from his liability under the provisions of Section 135 of the Contract Act. Apart from the reference to Section 135 of the Contract Act in the judgment there is no discussion of the principle involved.

7. The only other ease relied on by the appellant is Mahomedall Ibiabimji v. Lakshmibai Anant, 31 Bom LR 1442: (AIR 1930 Bom 122). The decree in that case was passed on a compromise allowing payment of the amount by instalments. Kemp, Ag. C. J., held that when the surety referred to a decree in the bond he meant a decree passed on contest. Blaekwell, J., who concurred in the decision did not accept this position but agreed that the case was governed by the decision in (1885) 54 LT 336 and that the correct test was whether the compromise which was subsequently embodied in the decree was in the contemplation of the plaintiff and the surety when the latter became as surety.

It was held that it was not. It may be pointed out that this view was not followed by the High Court of Bombay in Ahmed Karim v. Maroti Ravji, AIR 1931 Bom 55. It was pointed out that the bond in question did not provide that a compromise should not be entered without the surety's knowledge and consent. The earlier decisions of the Calcutta High Court reported in AIR 1926 Cal 818 and AIR 1928 Cal 177 (2) were distinguished.

8. The view taken in AIR 1932 Cal 858 to which reference has already been made is in consonance with the principles laid down by the Madras High Court in Appanni Nair v. Isaak Mackadam, AIR 1920 Mad 355, and AIR 1931 Bom 55 and

these decisions are relied on by Rankin C. J., in ILR 59 Cal 1450: (AIR 1932 Cal 858). In AIR 1920 Mad 355, the surety relied on Section 135 of the Contract Act. Dealing with this argument it was held:

'For the respondent the principle underlying Section 135 of the Contract Act has been referred to, and it has been contended that as the first defendant entered into a compromise with the plaintiff without the assent of the surety, the latter is discharged from his obligation under the security bond. This provision is not, in my opinion, applicable. The respondent had made himself liable for the amount that might be adjudged against the defendant. This adjudication might follow a compromise which the court considers lawful and liability of the surety is not limited to cases where there has been a contest to the finish. The liability of a surety is neither greater than nor different from that which he undertook.'

In a later decision *Annadana V. Konammal*, AIR 1933 Mad 309 the same view was adopted, namely, that so long as a compromise decree was not excluded, the fact that the suit was decreed on compromise did not absolve the surety. We have already referred to the decision of the Bombay High Court in AIR 1931 Bom 55. These decisions were followed in *Kabiruddin v. Debisingh*, AIR 1935 Nag 16. *Vivian Bose, A. J. C.* (as he then was), considered the earlier decisions of the Calcutta High Court as well as that of the Patna High Court and observed:

'The Bombay and Madras High Courts take the opposite view: AIR 1931 Bom 55 and AIR 1920 Mad 355 and the latest decision of the Calcutta High Court agrees with them: AIR 1932 Cal 858. I think they are right. A consent decree is not any the less a decree because it is agreed to by the parties to the suit, and though for certain limited purposes it is treated on the same footing as the agreement itself the rules of contract do not apply in their entirety nor do those of tort: *Ramkrishna v. Laxminarain*, AIR 1929 Nag 164 and *Gulabrao Ramchandra v. Deorao Krishnarao*, AIR 1934 Nag 119. Express provision is made for this type of decree in Order 23, Rule 3, Civil P. C., and the possibility of such a termination to the litigation must be within the contemplation of every party to a suit; at any rate no court will allow them to say it was not.

It follows a surety must be taken to have contemplated such a possibility as well. Therefore when he undertakes to be bound by such decree or order as may be passed by the court, he undertakes to be bound by a consent decree as well as by one after contest. The matter is within the terms of his bond. Of course, if there is fraud or collusion or any of the matters on which a contract can be set aside, he could claim exemption on those grounds, for consent decrees are treated on the same footing as agreements for those limited purposes, but not for any other. Also, if the decree comprises matters not arising out of the litigation, as they often do, he could fairly claim exemption on the ground that the matter was not within his contemplation at the time of the agreement but not otherwise. Therefore Section 135, Contract Act, cannot apply, for such an agreement must be deemed to have had the surety's assent.'

The above is a clear exposition of the law with which we respectfully agree; we therefore hold that on the terms of the bond the compromise decree is not excluded and that the surety bond stands undischarged.

9. The appellant had a contention that the compromise was entered into fraudulently and collusively but no evidence was adduced in support of the same. The fact that the compromise was entered into after the Official Receiver was brought on the party array shows that this contention has no force. Further, as observed by Rankin, C.J.,

'the fact that the defendants admit their liability is a better proof that they are liable than any proof that the plaintiff can give and any practice to the effect that by accepting any admission of liability made by the defendants before the learned Judge a plaintiff would deprive himself of the right to security which he has obtained would be a very bad and inconvenient practice leading to much injustice.'

10. The only point which remains for consideration is whether the adjudication of the judgment-debtor as insolvent operates as a bar to the enforcement of the surety bond. It has not been shown that the decree-holder has realised any sum in insolvency. If he has, it is open for the surety to prove the fact in execution. The pendency or insolvency proceedings against the judgment-debtor is no bar to the enforcement of the surety bond.

11. The appellant fails on both points. The decision of the court below is therefore confirmed and the appeal is dismissed with costs.

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