

Neel Comul Mookerjee and ors. Vs. Bipro Dass Mookerjee and anr.

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Court : Kolkata

Decided On : Jun-03-1901

Reported in : (1901)ILR28Cal597

Judge : Harington, J.

Appellant : Neel Comul Mookerjee and ors.

Respondent : Bipro Dass Mookerjee and anr.

Judgement :

Harington, J.

1. This is a suit in which Neel Comul Mookerjee, Naro Nath Mukerjee and Golab Roy Poddar who carry on business in co-partnership as merchants under the style and firm of N. Mookerjee and Son, sue one Bipro Dass Mookerjee and Rakhal Dass Mookerjee on a bond executed by these two defendants, the condition of which was that Bipro Dass Mookerjee should faithfully discharge the duties of his employment.

2. The defendants take an objection by way of demurrer to the plaintiffs' claim and say that, admitting all the allegations in the plaint to be true, no cause of action is shewn to exist against these two defendants in favour of the plaintiffs.

3. The plaint alleges that, previous to July 1895, Bipro Dass Mookerjee was employed by the plaintiff Neel Comul Mookerjee in his then firm of Neel Comul Mookerjee as a Sircar and Mohurir, and that in July 1895 Bipro Dass Mookerjee was appointed by the said firm as its cash-keeper.

4. And that the plaintiff Neel Comul Mookerjee called upon the defendant Bipro Dass Mookerjee to give security for the faithful discharge of his duties, and that a bond was executed by Bipro Dass Mookerjee and his father Rakhal Dass Mookerjee, with the intention of securing the plaintiffs against loss. The bond is attached to the plaint, and it alleges that Bipro Dass Mookerjee is employed by Neel Comul Mookerjee as a cash-keeper, and that Neel Comul Mookerjee has called upon Bipro Dass Mookerjee to furnish security for the due and faithful performance of his duties as cash-keeper, and to make good any loss which the said Neel Comul Mookerjee shall or may sustain by or through the means of the said Bipro Dass Mookerjee. Having recited these matters it goes on to set forth the condition, which is that the bond shall be void 'if the said Bipro Dass Mookerjee shall and will at all times hereafter so long as he the said Bipro Dass Mookerjee shall continue to be employed as such cash-keeper as aforesaid' faithfully perform his duties, etc., and the condition also contains the proviso that 'the said Bipro Dass Mookerjee at all times shall and will duly and regularly account for and pay or make over to the said Neel Comul Mookerjee or such person or persons as he may in that behalf appoint all monies or other property, which shall come to his hands, either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee' and that it goes on with a similar proviso that Rakhal Dass Mookerjee should keep 'harmless and indemnified the said Neel Comul Mookerjee, his heirs, executors, representatives and administrators of, from and against all claims, demands, actions, suits, troubles, costs, charges, damages and expenses, which shall or may at any time hereafter happen, or he may sustain, incur or be put to, for, or by reason or in consequence of any negligence, refusal of duty or of any act, permission, wilful or otherwise, or omission, or commission mismanagement, or otherwise, howsoever, of the said Bipro Dass Mookerjee in the discharge of his duties as such cash-keeper as aforesaid.'

5. The plaint then goes on to allege that the plaintiff Naro Nath Mookerjee became a partner in the said firm in July 1896, and that thereupon the firm came to be called and designated N. Mookerjee and Son, and that the plaintiff Golab Roy Proddar joined the firm as member previous to the year 1897, and ceased to be a member on the 9th of November 1899.

6. It then alleges that defalcations on the part of Bipro Dass Mookerjee were discovered, and it states that there were between the 11th January 1897 and 7th May 1900, defalcations to the amount of Rs. 19,100, which are attributed to embezzlements committed by Bipro Dass Mookerjee. The plaint then sets forth what happened on demand being made on Rakhal Dass Mookerjee on the bond, but these matters are not material for the determination of the principal points raised by the defendants. The defendants' objection to the plaint is two-fold: one is that the bond on the face of it is given to Neel Comul Mookerjee, and no facts are alleged which would give any right of action on that bond to the two co-plaintiffs, who are alleged to have joined this firm as partners. The other objection is that the plaint discloses no breach of condition of the bond, the bond being for the faithful discharge of Bipro Dass Mookerjee's duties, while cash-keeper to the firm of Neel Comul Mookerjee, and that the embezzlements, which are alleged, are embezzlements, while in service of the firm of Neel Comul Mookerjee and Son, a firm which came into existence in the year following that, in which the bond was executed.

7. It is conceded by Mr. Sinha that if the bond were given to Neel Comul Mookerjee in his personal capacity, it cannot be argued that the two co-plaintiffs have any right of action, and that it would be necessary, to enable the suit to proceed, to strike out their names from the Record, and it is argued that the bond was a personal bond given to Neel Comul Mookerjee and that a certain passage in the condition, namely, the passage that provides that 'Bipro Dass Mookerjee shall and will truly and faithfully perform all other business that he may from time to time be directed, enjoined or requested by the said Neel Comul Mookerjee to do and perform without refusing or neglecting to do the same, and without consuming, wasting, embezzling, losing, mispending or unlawfully making away with any of the property, monies or effects whatsoever of the said Neel Comul Mookerjee or of

any person or persons whomsoever for which he, the said Neel Comul Mookerjee, his heirs, executors, representatives or administrators, shall or may by law, be in anywise answerable or responsible' and also that the proviso in the condition that he 'shall and will duly and regularly account for and pay or make over to the said Neel Comul Mookerjee or such person or persons, as he may in that behalf appoint, all monies or other property, which shall come to his hands either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee' are wide enough to make these gentlemen responsible for the monies of the firm, which had come into Bipro Dass Mookerjee's hand during the period that these defalcations are said to have taken place.

8. In my opinion the objections taken by the defendants must prevail. If the bond is treated as having been given to the firm of Neel Comul Mookerjee, by whom in the plaint the first defendant is alleged to have been employed, then on the change of the firm by the introduction of the two partners and the changing of the firm of Neel Comul Mookerjee into Neel Comul Mookerjee and Son, the guarantee given by the defendant No. 2 would be revoked by virtue of Section 260 of the Indian Contract Act. If, on the other hand, the bond is treated as given to Neel Comul Mookerjee personally, then a difficulty lies in the plaintiffs' way in showing that there has been a breach of the conditions of the bond. The defendant No. 1 is alleged to have been employed as cash-keeper to the firm of Neel Comul Mookerjee. It is alleged that the firm became N. Mookerjee and Son, and changed, as regards its constitution, before the defalcations, which give rise to the present suit.

9. The condition of the bond is limited to the time during which Bipro Dass Mookerjee is employed as cash-keeper by Neel Comul Mookerjee and not by the firm of N. Mookerjee and Son, and the paragraph, on which reliance may be placed by the plaintiffs, viz., that the defendant 'shall and will duly and regularly account for and pay or make over to the said Neel Comul Mookerjee or such person or persons, as he may in that behalf appoint, all monies or other property, which shall come to his hands either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee' is, I think, not sufficient to carry the plaintiffs home, because the monies, which are

alleged to have come to the hands of the defendant No. 1, were not received on account of the individual Neel Comul Mookerjee, but of the firm of N. Mookerjee and Son. The result is that, as far as any cause of action is founded on this bond, the plaintiffs must fail on the facts that they have alleged in their plaint, and the objection of the defendants must be sustained.

10. It has been stated that criminal proceedings are pending against the first defendant in respect of these defalcations. That being so, and the questions on the merits not having been tried, no execution for costs must be issued as against the plaintiffs, until the determination of the proceedings which are pending, and then only on notice to the other side; subject to that order, the suit must be dismissed with costs.

11. Mr. Mehta.--I ask leave that the costs of the defendant No. 2, may be executed against the plaintiffs.

12. The Court.--It is inconvenient. He will have to wait, until the determination of those proceedings.

13. Mr. Sinha.--They appear not separately, but through the same Counsel and attorney, and so there cannot be any separate costs.

14. The Court.--He will have to postpone execution for a short period.

15. Mr. Mehta.--I would ask for an order of discharge of the injunction against him, and for reserved costs.

16. The Court.--That follows of course as to the injunction. You are entitled to the same order as to reserved costs. All costs will be dealt with together. That will include all reserved costs.

17. Mr. Sinha.--This decree will not affect my cause of action on the debt against the defendants.

18. The Court.--No, I have tried my best to guard against that.

