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SooperKanoon Citation : sooperkanoon.com/882613

Court : Kolkata

Decided On : Apr-15-1937

Reported in : 173Ind.Cas.183

Judge : Nasim Ali and ;R.C. Mitter, JJ.

Appellant : Harendra Kumar Ghosh and anr.

Respondent : Gurupada Bhowmick

Judgement :

1. Gurupada Bhowmick, respondent No. 1 in this appeal, instituted a suit in the second Court of the Subordinate Judge at Dacca for recovery of Rs. 7,351 from respondents Nos. 2 and 3 on the basis of two hand-notes on April 25, 1931. On April 27, 1931, he applied for attachment before judgment of some immovable properties belonging to respondent No 3. The learned Subordinate Judge thereupon passed the following order;

The defendants do show cause within a week from the service of notice upon them as to why they should not furnish security to the extent of Rs. 8,000. In the meantime let the properties said to belong to defendant No. 2 (respondent No. 2 in the appeal) be attached conditionally and provisionally and let the attachment continue till vacated.

2. On the next day the issue of the writ of attachment was stayed on defendant No. 2 giving undertaking that he would not transfer his properties. On May 5, 1931,

a security bond for Rs. 8,000 executed by defendant No. 2 and the appellants before us was filed before the learned Subordinate Judge. The Court asked the Nazir to test the sufficiency of the security. On May 12, 1931, the Court found the security to be sufficient and the order directing attachment before judgment of the properties of defendant No. 2 was revoked. On November 20, 1931, the suit was decreed on compromise, the terms of which are as follows:

(1) The plaintiff will get a decree against the defendants for the entire amount under claim with costs, but the decree will be made final by treating it as fully, satisfied on payment by the defendants of an amount of Rs. 5,000 within February 15, 1932, and a further sum of Rs. 2,000 within September, 1932. In default of payment, the entire balance of the decretal dues will be realizable and interest will run on the said amount at the rate of Rs. 1-8-0 per cent, per month till the date of realization, which we will pay;

(2) the surety bond executed by defendant No. 2 will remain in force so long as the money is not paid off.

3. Defendants Nos. 1 and 2, however, did not pay the instalments as directed in the decree. Thereupon several execution cases were started against defendants Nos. 1 and 2, the last of which was disposed of on May 25, 1935. By this execution proceeding the sum of Rs. 2,000 was realized. On September 26, 1935, the decree-holder filed an application in the Court of the Subordinate Judge against defendants Nos. 1 and 2 as well as the appellants who stood sureties for realization of the balance of the decretal amount. The prayer in this petition is as follows:

Notices may be issued upon the sureties and the judgment-debtors Nos 1 and 2. Then the immovable properties mentioned in the schedule annexed to the petition in the ownership and possession of defendants Nos. 1 and 2 and the sureties may be attached and then the attached properties of defendants Nos. 1 and 2 may be sold, first for satisfaction of the decretal dues, and in case the entire amount was not satisfied, then simultaneously the attached properties of the sureties may be sold in auction and the entire decretal amount may be realized.

4. On January 18, 1936, the sureties filed an objection to this execution under Section 47, Civil Procedure Code. Their objections in substance are; (1) That the application for execution against them was barred by limitation; (2) That the application for execution was not maintainable against them as they have been discharged from their liability under the surety bond by the compromise decree. The learned Subordinate Judge, by his order dated March 17, 1936, overruled these objections and ordered execution to proceed against them also. On March 28, 1936, the learned Judge ordered that the properties of the sureties should not be attached until and unless the decree-holder had exhausted his remedies against... defendants Nos. 1. and 2. The sureties;; appeal against the order of the learned Subordinate Judge, dated March 17, 1936. The first point urged by Mr. Gupta on behalf of the appellants is that the decree-holder is not entitled to execute the decree against the appellants inasmuch as they were discharged from their liability under the surety bond by the compromise decree. The material portion of the surety bond is as follows:

If any decree is passed against executant No. 1 (defendant No. 2 in the suit), I, executant No. 1, shall deliver to Court my properties or their value or such portion of them as would be sufficient for the satisfaction of the decree and if I, executant No. 1, fail to do this, we all the executants (defendant No. 2 and the sureties) will be jointly and severally liable for Rs. 8,000 mentioned in this surety bond and the amount of Rs. 8,000 which is the subject-matter of this surety bond will be realized from the movable and immovable properties and the executants of the bond and we and our heirs and legal representatives would be bound by the terms of this document.

The first contention of Mr. Gupta appearing, on behalf of the appellants in substance is this: The decree contemplated in the bond was a decree for money, payable at once on the passing of the decree and not an instalment decree by which the payment of the decretal amount would be deferred. The sureties guaranteed the promise of defendant No. 2 to deliver the properties to Court as soon as the decree would be passed and as by the compromise an instalment decree was passed, the plaintiff decree-holder by entering into this compromise has made it impossible for the guaranteed performance to take place. The

sureties, therefore, have been discharged from their liabilities under the surety bond. In support of his contention, Mr. Gupta relied on the recent decision of their Lordships of the Judicial Committee in *Pratap-singh Moholalbai v. Keshavalal Harilal* in which Lord Atkin made the following observation:

The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place.

5. At p. 35 Pages of 62 I.A.--[Ed.] of the report, however, we find the following observation:

It is perhaps, desirable to add that the application of this principle must always depend upon a correct analysis of the contract in fact made. Guarantees frequently relate to obligations without special reference to any specific contract between the creditor and the principal debtor. In such a case the doctrine referred to would have a very limited operation.

6. The words in the bond indicate that the sureties would be jointly and severally liable up to the extent of Rs. 8,000 if the suit be decreed and defendant No. 2 fails to produce the properties which the plaintiff wanted to attach before judgment. The properties of defendant No. 2 were going to be attached before judgment. In order to release these properties from attachment, he promised that on the suit being decreed he would produce the property which the plaintiff wanted to attach before judgment, and on his failure to do so, the sureties undertook to pay up to the amount of Rs. 8,000. We do not agree with the contention of Mr. Gupta that by the terms of this bond the sureties intended that the decree must not be an instalment decree and that the decretal amount must be payable as soon as the decree was passed. The contention of Mr. Gupta involves certain limitations in the

terms of this bond which we do not find in the bond. The words used in the bond are 'if any decree is passed'. The word 'any' is wide enough to include an instalment decree. By Section 133, Contract Act, any variance made without the surety's consent in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance. By Section 135,

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, discharge the surety unless the surety assents to such contract.

7. These provisions of law are of no assistance to the appellants as we are of opinion that the terms of compromise are not at variance with the terms of the bond. The surety bond contemplated an instalment decree also. The question of giving any time by the creditor to the principal debtor, therefore, does not arise in the present case. The next contention of Mr. Gupta is that the liability of the sureties under the decree came to an end by the concluding portion of the terms of compromise, namely, that 'the surety bond executed by defendant No. 2 will remain in force so long as the money is not paid off'. It is contended by him that the evident implication of this portion of the compromise is that the decree-holders gave up their rights under the surety bond against the appellants. We are unable to agree with him in this view of the matter. These words simply indicate that the surety bond will continue to be in force till the money is realized. The words 'executed by defendant No. 2' are merely descriptive and they were not intended to limit the liability under the surety bond only to defendant No. 2. We are therefore, unable to hold that the liability of the appellants under the surety bond has been discharged by the compromise between the plaintiff decree-holder and defendant No. 2. The last contention of Mr. Gupta is that the application for execution against the sureties is barred by limitation. His argument is that an application for execution against the surety comes under Article 181, Limitation Act, and not under Article 182 of the said Act. The decree holder wants to enforce the payment of the decretal amount against the sureties evidently under Section 145, Clause (a) and (c), Civil Procedure Code. By this section,

when any person has become, liable as surety for the performance of any decree or any part thereof or for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purpose of appeal, be deemed a party within the meaning of Section 47.

8. The appellants made themselves liable as sureties for the performance of any decree that would be passed in the suit ultimately. It is true that there is no specific order of the Court making the sureties liable for the decretal amount. But the order accepting the security bond necessarily incorporated within it the terms of the bond by which the sureties made themselves personally liable to the extent of Rs. 8,000 to the plaintiff. The application for execution against the sureties is, therefore, an application for execution of a decree as by operation of Section 145 of the Code, the sureties become judgment-debtors under the decree. Such an application for execution, therefore, comes under Article 182. It cannot come under Article 181, Limitation Act. The result, therefore, is that the order of the learned Subordinate Judge, dated March 17, 1936, rejecting the appellants' objections under Section 47, Civil Procedure Code and making the sureties liable for Rs. 6,000 is affirmed and this appeal is dismissed with costs; hearing-fee being assessed at one gold mohur.