Mahanth Singh Vs. U Ba Yi

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Court : Privy Council

Decided On : Mar-03-1939

Judge : Lord Romer, Lord Porter and Sir George Rankin

Appeal No. : Privy Council Appeal No. 30 of 1938 (From Rangoon)

Appellant : Mahanth Singh

Respondent : U Ba Yi

Advocate for Pet/Ap. : D.N. Pritt and L.M.D. de Silva, for Appellant ; A.M. Dunne, R.W. Leach and G. Harocks, for Respondent. Solicitors for Appellant, Hy S.L. Polak and Co. ; Solicitor for Respondent, Gard Lyell and Co.

Judgement :

Lord Porter:

The facts in this case can be shortly stated. The plaintiff who is a building contractor was employed by the four trustees of a pagoda known as the Kyaikasan Pagoda. The terms of the employment are set out in a written agreement dated 1st January 1933, and expressed to be made between the Board of the Kyaikasan Pagoda Trustees and the appellant. It is signed by the appellant and each of the trustees. The respondent was trustee of the estate of a lady called Daw Dwe who had left certain property for charitable purposes. He was not a party to the contract but had orally guaranteed its due performance by the trustees, and in Burma such a guarantee is binding though it is not in writing. The appellant fulfilled his contract

and there was due to him a sum of Rs. 26,082-8-6, less, as the learned trial Judge found, a sum of Rs. 158, which had not been paid. The appellant thereupon instituted the present action on 21st May 1934, in the High Court in its original jurisdiction, claiming the former sum against the four trustees and the respondent. In the plaint each of the trustees was named as a defendant and after their names were added the words "All the above four are trustees of the Kyaikasan Pagoda, Thingangyun, and are sued in that capacity."By his prayer the plaintiff asked for relief against each of the defendants personally and against the respondent in particular as the trustee of Daw Dwe's trust. The sum awarded by the learned trial Judge was obviously due from the respondent and from the trustees personally, but the appellant seems to have thought that his remedy was not against the named trustees but against any one who might from time to time be trustee of the pagoda.

Shortly after the suit had been begun, the four trustees were removed from their position as trustees of the pagoda, and eight others were appointed in their place. The appellant thereupon made an interlocutory application asking originally to add the eight new trustees as defendants and ultimately to substitute the new trustees in place of the old. The application was granted on 20th June 1935, and thereupon the names of the four original trustees were struck out and those of the new trustees inserted in their place. When however the case came on for trial and before the hearing on the merits, the learned trial Judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees. Thereupon the appellant on 24th March 1936 applied to replace the names of three out of the four original trustees (the other having died) as defendants. To this application the trial Judge refused to accede. He held that he had jurisdiction to grant it under O. 1, R. 10 and O. 6, R. 16 (R. 17 ?), Civil PC, but he did not think that the appellant should be allowed to change his mind again in the course of the proceedings. The eight trustee defendants were, he thought, entitled to have their case disposed of, more particularly as in his view the appellant would probably be able to pursue his remedies against the original trustees in another suit though to do so might expose him to a liability for some extra costs.

The suit then proceeded to trial, the claim against the new trustees was dismissed and the respondent found liable as guarantor. From this decision the respondent appealed to an Appellate Bench and in that appeal for the first time put forward the contention that the learned Judge erred in law in holding him liable. His liability, it was suggested, should have been held to be discharged by the act of the present appellant in forgoing his claim against the original trustees. The learned Judges of the Appellate Bench, whilst rejecting all the other grounds of appeal, held that this contention was well founded, allowed the appeal and condemned the appellant in costs. The question argued before their Lordships was whether they were right in so doing. The grounds upon which in circumstances material to the present case a guarantor may be discharged from his liabilities are well established and indeed were not in issue. A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it, to sue the principal in the name of the creditor is interfered with. To hold that in such cases the creditor still retained his right against the surety, and that the surety on his part could still sue the principal debtor, would mean that the release or grant of time was of no effect inasmuch as the debtor would still be liable at any moment to an action at the suit of the surety.

Where an absolute release is given, there is no room for any reservation of remedies against the surety : see (1857) 3 K and J 438 (1) and (1893) AC 313. (2) Where however

the debt has not been actually released the creditor may reserve his rights by notifying the debtor that he does so, and this reservation is effective not only where the time of payment is postponed but even where the creditor has entered into an agreement not to sue the debtor. In neither case is there any deception of the debtor since he knows that he is still exposed to a suit at the will of the surety. In England the striking out of the names of the four original trustees would not have affected the respondent's liability. A fresh action could have been brought against them at any time. But, it is said, that the law of Burma differs from the law of England in this respect and reliance is placed upon the terms of O. 23, R. 1, Civil PC, and upon Sec. 2 (g) and (j) and Secs. 134 and 139, Contract Act. O. 23,

R. 1 is as follows :

(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied :

(a) that a suit must fail by reason of some formal defect; or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit or abandons part of a claim without the permission referred to in sub-r. (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

The Sections of the Indian Contract Act are as follows :

2.- (g) An agreement not enforceable by law is said to be void.

2. - (j) a contract which ceases to be enforceable by law becomes void when it ceases to be unenforceable.

134.- The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor.

139.-If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

By reason of these provisions the debtor, as the respondent contended, was absolutely released. The appellant indeed contended that he had not proceeded under Order 23, R. 1, in applying to substitute the new trustees for the old, but that his application was made under O. 1, R. 10 alone. Their Lordships cannot accept this view. The last named Rule no doubt authorizes the Court to order the name of a party improperly joined to be struck out and that the names of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just. If no terms are inserted in the order, then in their Lordships' view the effect of withdrawing the suit against some of the defendants is to be ascertained from O.23, R. 1. That Order is not very happily worded, but its meaning is reasonably clear. Under its provisions, the Court may give liberty to the applicant to institute a fresh suit after a withdrawal, but if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter. The result however is not to release or discharge the debt, but merely to prevent the creditor from suing the principal debtor. In England an undertaking by the creditor not to sue the principal debtor or a binding agreement to give him time does not operate as a discharge of the surety, providing it is a condition of the undertaking or agreement that the rights of the creditor to sue or receive the money from the surety are reserved : see (1871) LR 7 CP 9 (3) and (1871) LR 7 Ch 142 (4) at page 153.

Similarly, a failure to sue the principal debtor until recovery is barred by the statutes of limitation does not operate as a discharge of the surety in England : see (1881) 25 Ch D 666. (5) The same view prevails in most of the High Courts in India : see 7 Bom 146,(6) 12 Cal 330,(7) 33 Mad 308 (8) and also AIR 1927 Lah 396.(9) It is true that the first two cases were decided in reliance upon the provisions of S. 137, Contract Act, which enacts that :

Here forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not in the absence of any provision in the guarantee to the contrary discharge the surety.

But the two later cases base their reasoning also on the broader ground adopted by English law, and hold S. 137 to be merely declaratory of the law and to be

enacted only to allay any doubts as to whether the same principles were applicable in India. With these decisions of the other High Courts in India may be contrasted the case in 24 All 504 (10) which decides that in spite of the provisions of S. 137, the creditor's right against the surety is not preserved unless he sues the principal debtor within the period of limitation. Such a decision is inconsistent with the views held by the Courts in England and the majority of the Courts in India. In this conflict, their Lordships prefer the reasoning of the majority. In any case those decisions deal rather with the question whether the debt was absolutely released, than with the question whether an agreement not to sue or to give time with a reservation of right against the surety, operated as a discharge to him. The present case is in their Lordship's opinion an example of the latter type, and they entertain no doubt that the creditor's rights against the surety were preserved. The appellant's act in continuing to sue the surety though he withdrew his action against the principal debtors was in their view a clear reservation of his rights. Indian authority illustrating this proposition is to be found in 38 Mad LJ 131 (11) and in 13 Lah 817.(12)

But the respondent argues that even if those cases are applicable in their own circumstances, or binding in England, they are not applicable in Burma to the present case, because, as he maintains, Sec. 2 (j), Contract Act, alters the position. In his contention that Section must be read in its widest sense with the result that in India and Burma any contract in respect of which an action cannot be brought is void, and therefore the plaintiff's right to recover the debt from the original trustees being unenforceable, is void. It follows, he argues, that the principal debtors having been absolutely released, the surety is discharged. If the premises were accurate the conclusion might follow, even though some of the results would be startling and unexpected. One such result would be that when the period of limitation had run out, not only would the remedy be barred, but the debt would be gone and with it all right to retain anything given as security for the debt, and all right to set off a counter liability against it. This possibility was indeed envisaged in 5 Bom 647, (13) but the point was left undecided. A still more startling result, however is brought about on this construction if S. 2 (j) is read with S. 65, Contract Act, since in such a case not only would every unenforceable contract become void but each party would be under the obligation of restoring or

making compensation for any benefit received, no matter how much had been done towards the performance by either party.

But it is not necessary to adopt a construction leading to such surprising results. The solution is, in their Lordship's view, to be found in the wording of S. 2 (j) itself. Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by Sec. 2 (g), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by Sec. 2 (j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void.

Finally, as their Lordships think, Ss. 134 and 139 are merely declaratory of what the law of England was and is. Sec. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired, and for the reasons they have given, their Lordships find nothing in the present case which impairs the respondent's remedy against the original trustees. Under S. 134 the surety is discharged, if and only if a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor, the legal consequence of which has been to discharge the principal debtor. If, as in the present case, the only result of striking out the original trustees from the action is to preclude the bringing by the appellant of a fresh suit in respect of the subject-matter against them, and is not to release or discharge the principal debt, then the debt remains a debt though the creditor by reason of a rule of procedure cannot himself bring an action upon it. In such circumstances there is nothing in the Section to discharge the liability of the surety. For these reasons their Lordships hold that the respondent has not been relieved of his liability under the guarantee and will humbly advise His Majesty that the appeal be allowed, the decree of the High Court on its Appellate side set aside and the decree of the trial Judge restored. The respondent must pay the appellant's costs of the appeal before the

Appellate Court and before their Lordships' Board.

Appeal allowed.