Raja Bahadur Dhanraj Girji

Vs

Raja P. Parthasarathy Rayanimvaru and Others

Civil Appeals Nos. 343, 344 and 345 of 59

(P. B. Gajendragadkar, K. C. Das Gupta JJ)

04.09.1962

JUDGMENT

GAJENDRAGADKAR, J. -

[After disposing of Civil Appeals Nos. 343 and 344 of 1959, his Lordship proceeded as follows.]

That takes us to Civil Appeal No. 345 of 1959 in which the appellant wants liberty to proceed against the surety, respondents Nos. 2 and 3. This claim has been rejected by both the High Court. But the decision of the High Court proceeds on the basis that the appellant was himself a defaulter and so, he could not be permitted to enforce his remedy against the sureties. Since on the question of default, we have come to a contrary conclusion, it becomes necessary to examine whether the appellant is entitled to seek his remedy against the surety.

In determining this question, it is necessary first to enquire into the nature and extent of the liability undertaken by respondents Nos. 2 and 3 in executing the surety bond. The surety bond was executed on the 29th Sept. 1935. Clause 5 of the surety bond which is relevant provides that the sureties covenant that if the order of the High Court in C.M.A. No. 362/1929 be reversed or varied by the Privy Council and as a result of the said variation or reversal respondent No. 1 becomes liable to pay by way of restitution any amount to the said appellant in the Privy Council, the sureties would pay whatever sum may become payable by the said respondent and that if they failed therein, then any sum payable shall be realised in the manner specified in the said clause. This bond was executed in the favour of the court.

The appellant contends that as a result of the decision of the Privy Council, the matter was remitted to the trial Court for ascertaining the amount due to the appellant and it was during the pendency of the appeals which were pending in the Madras High Court against the decision of the trial Court on the applications made by the respective parties in the remanded proceedings that the compromise decree was passed between the appellant and respondent No. 1 and so whatever is claimable by the appellant by virtue of the said compromise decree must attract the operative portion of clause 5 of the surety bond. On the other hand, Mr. Sastri for the surety agrees that the surety bond must be strictly construed and it is only if the amount claimed by appellant from respondent No. 1 can be said to be the result of the reversal or variation by the Privy Council of the orders under appeal before it that the surety bond can be proceeded against. Mr. Sastri urges that when disputes were pending between the appellant and respondent No. 1 before the Madras High court, the parties compromised the disputes and the compromise decree which followed acts as a discharge of the

liability of the sureties. In support of this argument, reliance is placed on the equitable principles underlying section 135 of the Indian Contract Act. Mr. Kuppuswamy contests this position and urges that s. 135 is inapplicable to a surety bond executed in favour of a court and he argues that appellant's remedy against the surety is not affected by the fact that the dispute between the appellant and respondent No. 1 was amicably settled and terminated in a compromise decree.

This controversy raises the question as to whether s. 135 of the Indian Contract Act or principles underlying it apply to surety bonds executed in favour of the court. Section 135 provides that 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 discharges the surety, unless the surety assents to such contract. There can thus be no doubt that a contract of suretyship to which s. 135 applies would be unenforceable if the debt in question is compromised between the debtor and the creditor without the assent of the surety. But this provision in terms cannot apply to a surety who has executed a bond in favour of the court, because such a contract of guarantee of suretyship does not fall within the scope of s. 126 of the Contract Act. A contract of guarantee under the said section postulcates the existence of the surety, the principal debtor and the creditor, and this requirement is not satisfied in the case of a bond executed in favour of the court. Such a bond is given to the court and not to the creditor and it is in the discretion of the court to enforce the bond or not. Therefore, there cannot be any doubt that in terms, the provisions of s. 135 cannot apply to a court bond.

It is also clear that the equitable principles underlying the provisions of s. 135 apply to such a bond. If, for instance, the decree-holder gives time to the judgment-debtor and promises not to seek his remedy against him during that period, there is no reason why the extension of time granted by the creditor to the debtor should not discharge the surety even where the surety bond is executed in favour of the court. The reason for the equitable rule which entitles the surety to a discharge in such circumstances is that the surety should be able at any time to require the creditor to call upon the principal debtor to pay off his debt or himself pay off the debt and seek his remedy against the principal debtor. If the creditor has bound himself not to claim the debt from his principal debtor, that materially affects the right of the surety and so, whenever time is granted to the debtor by the creditor without the consent of the surety, the surety can claim discharge. This equitable principle would apply as much to a surety bond to which s. 126 of the Contract Act applies as to a surety bond executed in favour of the court. Therefore, we see no justification for the argument that even the equitable principles underlying the provisions of s. 135 of the contract Act should not apply to surety bonds executed in favour of the court.

In determining the question as to whether liability under such a surety bond is discharged by reason of the fact that a compromise decree had been passed in the judicial proceedings in which the surety bond came to be executed, it will always be necessary to examine the terms of the bond itself. Did the surety contemplate when he executed the bond that the dispute pending between the debtor and the creditor may be compromised, or did he contemplate that the dispute would, and must be settled by the court and not compromised by the parties ? If the terms of the bond indicate that the surety undertook the liability on the basis that the dispute would be decided on the merits by the court in invitium and would not be amicably settled, then the compromise of the dispute would discharge the liability of the surety (vide The Official Liquidators, The Travancore National & Quilon Bank Ltd. v. The Official Assignee of Madras (I.L.R. 1944 Mad. 708.), Parvatibai v. Vinayak Balvant (I.L.R. 1988 Bom. 794.); Mahomedalli Ibrahimji v. Laxmibai ((1929) I.L.R. LIV Bom. 118.); Narsingh Muhton v. Nirpat Singh ((1932) I.L.R. XI Patna 590.) and Muhammad Yusaf v. Ram Gobinda Ojha ((1927) I.L.R. LV Cal. 91.). If, on the other hand, from the terms of the bond it appears that it was within the contemplation of the parties including the surety that the dispute may be amicably settled

and the surety executed the bond knowing that his liability may arise even under the compromise decree, then the passing of the compromise decree will not entitle him to claim discharge vide Haji Ahmed v. Maruti Ramji ((1930) I.L.R. LV Bom. 97.); Appunni Nair v. Isack Mackadan ((1919) I.L.R. 43 Mad. 272.), and Kanailal Mookerjee v. Kali Mohan Chatterjee (A.I.R. 1957 Cal. 645.). The question would thus always be one of construing the surety bond in order to decide whether a compromise decree discharges the surety or not.

Turning to the bond passed by respondents Nos. 2 and 3 in the present case, it is impossible to hold that it was within the contemplation of the sureties when they executed the bond that the parties would amicably settle their dispute in the manner they have done. At the time when the surety bond was executed, the dispute pending between the parties was the money dispute the decision of which would have ended in an order directing one party to pay another a certain specified amount. The compromise decree has introduced complicated provisions for the satisfaction of the appellant's claim against respondent No. 1. Under the compromise decree, the appellant would have been entitled to take possession of the properties in suit and in that process, rival claims of both the parties would have been adjusted. We are satisfied that the material terms in clause 5 of the surety bond could not be said to be attracted when the parties chose to settle their dispute in accordance with the terms of the compromise agreement. Besides, it is clear that the compromise agreement gave time to respondent No. 1 and the decree was, therefore, not executable immediately after it was passed. In substance, by the decree, time was granted though it is true that time was granted to both the parties to discharge their respective obligations under the compromise. That is another reason why we think the liability of respondents No. 2 and 3 under the surety bond is discharged as a result of the compromise decree.

There is yet another consideration which is relevant in dealing with this point. It is common ground that amongst the disputes which were settled between the parties was included the claim made by respondent No. 1 for damages on account of the fact that the appellant had created occupancy rights in favour of strangers in respect of the properties which were in his possession as a mortgagee. This claim is plainly outside the proceedings contemplated and permitted by the order passed by the Privy Council, and yet this dispute has been settled by the compromise decree which means that a matter which was strictly not germane to the judicial proceedings in which the surety bond was executed has been introduced by the parties in their final settlement. Therefore, we are satisfied that though the appellant succeeds in showing that he was not a defaulter, he cannot seek his remedy against the surety, respondents Nos. 2 and 3.

An attempt was made by Mr. Kuppuswamy to suggest that respondents Nos. 2 and 3 should not have been allowed to raise this point before the High Court, because no such point had been taken by them in the trial Court. We do not think there is any substance in this argument. It is true that respondents No. 2 and 3 did not take any such contention in the trial Court, but that may be because parties had then concentrated on the issue as to who was the defaulter. But when the appeals were argued before the High Court, this point was specifically urged by respondent No. 2 and it has been considered by the High Court. No doubt Mr. Kuppuswamy ingeniously suggested that this was not a pure question of law and so, the High Court should not have allowed it to be raised for the first time in appeal. The argument is that if the point had been raised in the Court of first instance, the appellant would have shown that respondent Nos. 2 and 3 had consented to the compromise agreement between the appellant and respondent No. 1. This is clearly an afterthought. If the appellant's case was that respondents Nos. 2 and 3 were not discharged by the compromise decree because they were consenting parties to the compromise agreement, they should have stated so before the High Court and the High Court would then have either called for a finding on that issue

or would have refused permission to respondents Nos. 2 and 3 to raise that point.

The result is, Civil Appeal No. 345 of 1959 fails and is dismissed with costs.

Appeal dismissed.

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