
(1988) 02 KL CK 0007

In the High Court Of Kerala

Case No : C.R.P. No. 1881 of 1987

Chittur Service Co-operative Bank Ltd.

APPELLANT

Vs

R.C. Pankunny and Others

RESPONDENT

Date of Decision : 03-02-1988

Acts Referred:

Contract Act, 1872 — Section 134

Citation : (1988) 64 CompCas 78

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : V. Chitambaresh and A.M. Shaffique, for the Appellant; S. Venkitasubramania Ayyar, for the Respondent

Final Decision : Allowed

Judgement

K.T. Thomas, J.—A decree holder filed an application for attachment and sale of the properties of one of the judgment-debtors who is not the principal debtor. The application was dismissed solely on the ground that the decree holder has not shown any reason for eliminating the principal debtor. Hence this revision at the instance of the decreeholder.

2. A decree for money was obtained by the petitioner against three persons in an award passed as per the provisions of the Kerala Co-operative Societies Act, 1969. The decree made the three persons jointly and severally liable for the decree debt, the first among them being the principal debtor and the other two are sureties. The application is for attachment of the properties of the second judgment-debtor. There is no dispute that the person whose properties are sought to be attached was only a surety. There is also no dispute that no step, so far, has been taken against the other two judgment-debtors. The execution court dismissed the application saying that the petitioner has not given any reason for not proceeding against the principal debtor.

3. Learned counsel for the second respondent (whose properties are sought to be

attached) contended, in support of the impugned order, that principles of equity are not completely alien to execution proceedings and hence the dismissal of the application is only consistent with such principles of equity. Reference was made to a recent decision of the Supreme Court in *Union Bank of India v. Manku Narayana* [1987] 62 Comp Cas 1 (SC) to bolster up his contention. In that case, the plaintiff-bank obtained a mortgage decree against three persons one of whom was the principal debtor and other two were guarantors for repayment of the loan, and the decree holder took out execution proceedings against the principal debtor. The High Court in a revision filed against the order of the execution court, directed the decree-holder to proceed against the mortgaged property and also the principal debtor first. The Supreme Court did not interfere with the said direction and dismissed the appeal filed by the decree holder. The decision affords no assistance in this case because the decree in that case was basically a mortgage decree. The rules in Order 34 of the CPC provide that a decree-holder in such a decree shall be entitled to have the mortgaged properties sold in realisation of the mortgage debt. The Supreme Court declined to interfere with the said direction passed by the High Court on the principle contained in the provisions under Order 34 of the Code. The position is different here, since the decree is not passed on a mortgage. Learned counsel for the second respondent then brought my attention to a passage in Chapter 7 of the book "Rowlatt on the Law of Principal and Surety" (at page 132 in the fourth edition), in which the learned author has made a reference to some decisions in support of the proposition that a surety also has an equity against the creditor in order to prevent the latter from bringing down the whole weight of the debt upon the surety. The relevant portion of the said passage is extracted below :

"There is some authority for suggesting that a surety also has an equity against the creditor to prevent the creditor from bringing down the whole weight of the debt upon the surety. Wright, J., in *Wolmershausen v. Gullick* [1893] 2 Ch 522 considered by way of dictum that a surety could in equity "be controlled and prevented from enforcing its legal right inequitably against one alone of the sureties " ".

4. The further portion in the same passage deals with the preponderance of the principle that a surety has an equity on the basis of *Wolmershausen* to stay a creditor attempting unfairly to place the whole burden of the debt upon the surety or at least in special circumstances, where there is a solvent principal debtor or solvent co-sureties who could easily be joined in the action. "One situation in which the surety's equity has been held maintainable against the creditor is where the creditor has an opportunity to recover the debt from the principal debtor which will not be available to the surety ".

5. It is difficult to accede to the contention that the surety's right to equity as against the creditor must be imported in post-decretal areas when no such equity has been worked out in the decree. In our system of civil litigation which is bifurcated into two distinct stages, one before the decree and the other after the

decree, the parties have full opportunity to make a plea for application of equitable principles or for providing terms based on consideration of equity. Those are matters to be worked out during the pre-decretal stage. When a cause of action has transformed itself into a decree in which no such equity has been given a place, it is not within the province of the execution court to whittle down the mandates of a decree on principles of equity. Once a decree is passed in which the decree-holder is told by the trial court that he may proceed against any one of the judgment debtors or that judgment debtors are jointly or severally liable, there is neither fairness nor equity in telling him, during execution stage, that what is said in the decree is not meant for implementation. It is trite law that a decree-holder cannot be compelled to take out execution only as against a particular judgment debtor, when all the judgment debtors have equal liability under the decree. Nor can the decree holder's right of choice be scuttled by the dictates of the judgment-debtor.

6. Learned counsel next contended that on the principle adumbrated in Section 134 of the Indian Contract Act, the surety will stand discharged when the creditor omits to proceed against the principal debtor. Section 134 is based on the principle that when a principal debtor is discharged, the surety also stands discharged. There must be some act or omission on the part of the decree-holder to indicate that the principal debtor is discharged from liability. The mere fact that a decree-holder chooses to proceed against the properties of the surety, in realisation of the decree debt, does not mean that the decree-holder has discharged the principal debtor. If the decree-holder does not succeed in realising the debt from the surety, he has the freedom to turn against the principal debtor. Sometimes, the decree-holder may find that, realisation process is easier as against the surety than as against the principal debtor. If he adopts the former method, it is no indication of release of the principal debtor. Hence I am not impressed by the argument advanced on the basis of Section 134 of the Contract Act.

7. The court below was wrong in dismissing the execution application merely on the ground that the decree-holder has not shown any reason to eliminate the principal debtor. For the reasons stated above, the impugned order cannot be supported in law. Hence, I allow this Civil Revision Petition and set aside the order under attack. I direct the execution court to proceed with the application filed by the petitioner. No costs.

8. The civil revision petition is disposed of on the above terms.