

(1961) 02 RAJ CK 0007

In the Rajasthan High Court

Case No : Civil Ex. First Appeal No. 11 of 1959

Firm Narsingh Das Ladu Mal

APPELLANT

Vs

Trilokchand Paddiwal and Another

RESPONDENT

Date of Decision : 10-02-1961

Acts Referred:

Contract Act, 1872 — Section 128

Citation : AIR 1961 Raj 247 : (1961) RLW 290

Hon'ble Judges : Jagat Narayan, J

Bench : Single Bench

Advocate : Kishore Singh, for the Appellant; S.L. Sogani, for the Respondent

Final Decision : Dismissed

Judgement

Jagat Narayan, J.—This is a decree-holder's appeal against an order of the Senior Civil Judge Ajmer passed in execution proceedings.

2. A decree for Rs. 10,600/- was passed in favour of the decree-holder against the Maharaja Kishangarh Mills Ltd. on 13-7-56 by the Senior Civil Judge Kishangarh. The decree-holder filed his first execution application on 10-8-56 in which the decretal amount was shown as Rs. 10,000/-. It was pointed out by the office that the amount was not correctly shown. He was directed to amend the application. He presented an amended application on 4-9-56 on which execution case No. 239/56 was registered. In column No. 10 of the application it was prayed that moveable and Immovable properties of the judgment-debtor may be proceeded against.

3. On 31-10-56 on the application of the judgment-debtor three months time was granted to it to bring a stay order from the Supreme Court on furnishing adequate security to the satisfaction of the executing court. Trilok Chand respondent No. 1 filed a surety bond on the same day, which runs as follows:

U;k;ky; flfoy tt egksn; fd"kux<

Jh ujflagnkl yknwyky enuxat ----- fMf?nkj

cuke

nh egkjktk fdlux<+ feYl enuxat ----- en;wu :- 10600? :- djhcu

tekur ukek

mijks? fo"k; esa en;wu egkjktk fd"kux<+ feYl fyfeVsM dh vkSj ls tekur ryc gS blds fy;s eSa fryksd pUn oYn ukuwyky lkfdU enuxat ;g tekur 10600 :- vad nl gtkj NS lks :i;s dh tekur is"k dj bdjkj djrk gwa fd ;fn en;wu egkjktk fd"kux<+ feYl fyfeVsM us 3 ekg esa mijks?s fM?h dh vihy lqizhe dksVZ esa ugha dh o bl U;k;ky; }kjk bl m? btjk; dh lohy vkjEHk gqbZ rks mDr en;wu egkjktk fd"kux<+ fyfeVsM dh tk;nkn ls fM?h dh jde olwy ugha gks ldsxh rks eSa tkehu frykspan oYn ukuqyky fuoklh enuxat mijks? btjk; dh jde Lo;a vius ?kjk?k: vnk d:axk o ;fn vnk ugha d:axk rks bl U;k;ky; dks vf/kdkj gksxk fd mijks? jde esjs eky eudwyk rFkk xSj eudwyk ls olwy dj ysosA ;g tekur ukek fy[k fn;k gS lks izekf.kr jgsA

fouhr

fryksdpan ikiMhoky-

4. This bond was accepted by the Court and execution proceedings were stayed on 5-1-57. Trilok Chand applied for further extension of time which was granted upto 16-2-57. No appeal was however filed in the Supreme Court even within this extended time. On 21-2-57 the court issued notice to the surety requiring him to deposit the decretal amount in court by 13-3-57. On 13-3-57 which was fixed as a date of hearing in the execution proceedings all the parties appeared in court. The surety filed an objection that under the terras of the bond he was only entitled to be proceeded against if the decree-holder was unable to recover the money from the properties of the judgment-debtor and that the money should first be recovered from the judgment-debtor.

On the same date an application was filed on behalf of the judgment-debtor offering to pay a sum of Rs. 1000/- forthwith and praying that the rest may be recovered from it in instalments payable during the next 12 months for which it was prepared to offer adequate security. This offer was not accepted by the decree-holder. The two-applications were posted for orders on 2-4-57. On that date the decree-holder filed a receipt showing that he had received a sum of Rs. 1000/- from the judgment-debtor and prayed that the execution proceedings be consigned to the record room. The court passed the following order:

D. H. present J. D."s pleader present, D. H. filed a receipt for Rs. 1000/- and did not wish to proceed further with the execution. It is ordered that the execution proceedings be consigned to the record room in part satisfaction of the decretal amount. J. D. shall pay costs. The amount remaining due is reduced by Rs. 1000/- and is now Rs. 9,620/1/-."

On 18-4-57 the decree-bolder filed a fresh execution application against the judgment-debtor and the surety. It was registered as Execution Case No.

139/57. (The proceedings were subsequently transferred to the court of Senior Civil Judge Aimer where it was registered as Execution Case No. 131/58.) Relief was only sought against the judgment-debtor in this application. On 16-5-57 an application was filed by the decree-holder praying that the property of the surety should be attached to realise the money.

On 17-7-57 the surety appeared and filed an objection. He referred to his objection filed on 13-3-57 and further stated that he was discharged on 2-4-57 when the decree-holder accepted Rs. 1000/- from the judgment-debtor and did not wish to proceed further with the execution. The arguments of the parties were heard on the objections raised by the surety, but before a decision was given by the executing court the decree-holder made a statement on 27-7-57 that he did not want to proceed against the surety. He proceeded against the properties of the judgment-debtor some of which were attached on 30-7-57.

5. On 25-3-58 he filed an application in which he stated that it was not possible to recover the money from the judgment-debtor as it was indebted to the extent of rupees twenty-five lacs and all the old machinery and buildings belong to Maharaja Kishengarh Somyog Mills Ltd, and there was no property owned by the judgment-debtor from which the money remaining due could be recovered. He accordingly prayed that the money should be recovered from the surety. On this application notice was issued to the, surety to show cause why the money should not be recovered from him.

This notice does not appear to have been served on the surety. 26th April 1958 was fixed for hearing the surety if he had any objection to the decree being executed against him. As no objection was filed on his behalf an order of attachment of his property was passed in execution of which his property was attached on 29-5-58. The surety then appeared and filed an objection supported by an affidavit on 2-7-58- Thereafter the surety moved for a transfer of the execution proceedings to some other court.

The proceedings were then transferred to the court of the Senior Civil Judge Ajmer on 29-9-58. On 12-1-59 the decree-holder filed a reply to the objections. The objections were heard by the learned Senior Civil Judge who held that the liability of the surety came to an end on 2-4-57 when execution case No. 239/56 was consigned to the record room on part satisfaction of the decree. He also held that according to the terms of the surety bond the money could only be recovered from the surety after all attempts had been made to recover it from the properties of the judgment-debtor and it could not be so recovered.

6. The first question to be determined in the present appeal is as to whether the liability of the surety under the bond is not co-extensive with that of the judgment-debtor. Section 128 of the Contract Act runs as follows:

"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

7. u/s 126 a "contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The surety bond provides that if the decretal amount cannot be recovered from the properties of the Maharaja Kishangarh Mills Ltd. then the surety would be liable to pay it.

8. On behalf of the appellant it was contended that the learned Senior Civil Judge erred in holding that the bond contained a contract to the contrary within the meaning of Section 128. Reliance was placed on a Division Bench decision of the Lahore High. Court in Kuckreja Ltd. v. Said Alam, AIR 1941 Lah 16 which followed the decision of the Madras High Court in Swaminatha Pillai Vs. S.L. Lakshmana Ayyar and Another, The wordings of the surety bond in the Lahore case were as follows:

"Please note that if you supply any goods to the Civil and Military Sports Works, Sialkot, on credit or on hundi and are unable to realize the price thereof from the Civil and Military Sports Works I and my property will be responsible for that amount."

9. It was held that these words did not contain any express or implied provision to the effect that the liability of the surety would not be coextensive with that of the principal debtor. The terms of the surety bond in the Madras case which was relied upon were:

"If there be default in payment of the said amount and if money be due to you and in case you are not able to recover the amount so due from them, I agree to pay the same to you."

10. Madhavan Nair, J. held that the language of the bond did not imply a contract contrary to the general principle that a surety's liability was coextensive with that of the principal debtor.

11. The decision of the Calcutta High Court in John Carapiet Galstaun Vs. Diana Sarkies, which was relied upon by the learned Civil Judge was distinguished in the above case on the ground that the language used in the surety bond was not specified in the judgment.

12. I may mention here that the surety is regarded as a favoured debtor who is entitled to insist upon a rigid adherence to the terms of his obligation by the creditor and cannot be made liable for more than he has undertaken. His contract is one strictissimi juris. (See Halsbury's Laws of England, Volume 16, Hailsham Edition, Part V, Article 52 page 59) With all respect to the learned Judges who decided the above cases I do not see why words to the effect "if you are unable to realize the price thereof from the Civil and Military Sports Works I and my property will be responsible for that amount" as used in the bond in the Lahore case, AIR 1941 Lah 16 and the words "in case you are not able to recover the amount so due from them, I agree to pay the same to you" as used in the Swaminatha Pillai Vs. S.L. Lakshmana Ayyar and Another, should not be given their natural meaning.

They clearly imply that the surety would become liable only in case all remedies against the principal debtor failed. No doubt a contract of guarantee can only be enforced if there is a default on the part of the principal debtor. The words to the effect "if there be a default in the repayment of the loan you may look to me for repayment¹ as used in *Sreenath Roy v. Peary Mohan* AIR 1917 Cal 154 or to the effect "if he should fail to pay, any amount so payable shall be realised from me" as used in Form No. 2 of the Security bond given in Appendix G of the CPC Code no doubt do not indicate any contract to the contrary within the meaning of Section 128.

13. On behalf of the respondent my attention was drawn to *Dialoo Mal v. Firm Nandu Shah Jai Lal* AIR 1927 Lah 846 in which according to the terms of the decree the decretal amount was payable by the surety if it were not realised from the principal debtors it was held that before the surety becomes liable all remedies should be exhausted against the principal debtors,

14. I accordingly hold that in the present case the decretal amount can be recovered from the surety only when the decree-holder is unable to recover it from the property of the judgment-debtor. No evidence was produced on behalf of the decree-holder to show that he was unable to realise the money from the property of the judgment-debtor.

* * * * *