
(1990) 10 KL CK 0066

In the High Court Of Kerala

Case No : C. R. P No"s. 166 and 1378 of 1989 and 815 of 1990

Francis and Others

APPELLANT

Vs

Central Bank and Others

RESPONDENT

Date of Decision : 26-10-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, Order 21 Rule 40, 145, 51, 55
Contract Act, 1872 — Section 126, 128, 133, 134, 140
Trusts Act, 1882 — Section 3, 30, 88

Citation : (1990) 2 KLJ 645

Hon'ble Judges : U.L. Bhat, J;T.V. Ramakrishnan, J

Bench : Division Bench

Advocate : Pius Kuriakose, R. Bhaskaran and T.R. Ramachandran Nair, for the Appellant; M.P.R. Nair, T. Karunakaran Nambiar and T.N. Surendran and S. Venkitasubramania Iyer and P.K. Balasubramanian, As Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—Central Bank of India is the respondent in C.R.P. No. 166 of 1989. Syndicate Bank is the respondent in C.R.P. No 815 of 1990. Corporation Bank is the first respondent in C.R.P. No. 1378 of 1989. The Banks filed suits for recovery of amounts advanced to certain debtors as well as against sureties for the loans and obtained decrees. Revision petitioners are such sureties. Executions were levied in enforcement of the decrees by arrest and detention in civil prison of sureties. Sureties raised plea of no means under clause (b) of the proviso to Section 51 C.P.C. The executing courts passed orders holding that sureties cannot raise the plea since the decrees are for sums of money for which the judgment-debtors were bound in fiduciary capacity to account as contemplated in clause (c) of the proviso to Section 51 C.P.C. and ordered arrest by separate orders. This view is supported by the decision of a learned single judge of this court in Velayudhan v. State Bank of India (1988 (1) KLT 491). The revision petitioners challenge these orders. Kalliath, J. who heard C.R.P. No. 166/89

doubted the correctness of the decision in Velayudhan s case (1988 (1) KLT 491) and adjourned the matter to be heard by a Division Bench. This revision petition has thus come up before us along with C.R.P. Nos. 1378 of 1989 and 815 of 1990.

2. Section 51 of the CPC deals with powers of court to enforce execution. Civil court is empowered to order execution of decree by delivery of the property specifically decreed, by attachment and sale or by sale without attachment of any property, by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section, by appointing a receiver or in such other manner as the nature of the relief granted may require. The proviso to Section 51 deals exclusively with decrees for payment of money. The proviso states that in the case of a decree for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment- debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons recorded in writing, is satisfied regarding the existence of conditions specified in clause (a), or clause (b) or clause (c). The condition stipulated in clause (a) is that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree is likely to abscond or leave the local limits of the jurisdiction of the court, or has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any Other act of bad faith in relation to his property. The condition stipulated in clause (b) is that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. The condition stipulated in clause (c) is that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account. Rules regarding arrest and detention are further elaborated in Sections 55 to 59 and Rules 37 to 40 of Order XXI. Clause (3) of Rule 40 makes the order to be passed by the executing court subject to the provisions of Section 51 and other provisions of the Code

3. The executing court has taken the view that the decrees are for sums for which the judgment-debtors were bound in a fiduciary capacity to account within the meaning of clause (c) of the proviso to Section 51 and therefore the bar against detention in prison contemplated in the proviso will not apply. At the outset Sri R. Bhaskaran, learned counsel for the revision petitioner in C.R.P. 1378/89 stated that even if clause (c) of the proviso is attracted, unless the conditions stipulated in clause (b) of the proviso are satisfied, arrest and detention cannot be ordered. Clause (c) of Section 51 "empowers the court to order execution of decree by arrest and detention in prison of the judgment-debtor. The proviso is really a proviso to clause (c) of Section 51. The proviso lays down that in case of a decree for payment of money, execution by detention in prison shall not be ordered unless the court is satisfied by the conditions stipulated in clause (a) or clause (b) or clause (c). The three clauses contemplate

three different sets of conditions. It cannot be said that the conditions contemplated in the three clauses are cumulative; on the other hand they are alternative in nature. The court can order detention in prison if either clause (a) or clause (b) clause (c) is satisfied. If any of the clauses is satisfied the executing court can pass order of detention. According to learned counsel it would be an act of punishment to detain in prison judgment-debtor who has no means to pay and that would go against Article 11 of the International Covenants on Civil and Political Rights, which reads:

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

This covenant came to be considered by Krishna Iyer, J. (as he then was) in *Xavier v. Canara Bank Ltd.* (1969 KLT 927). That was a case where only clause (b) of the proviso to Section 51 was invoked by the decree holder and the learned judge had to consider the significance and amplitude of the expressions "means" and "neglect". Dealing with Article 11 of the International Covenants on Civil and Political Rights the learned judge observed:

.....this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment u/s 51 of the Code, but this does not violate the mandate of Article 11. However, if he once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine Kim in jail so as to coerce him into payment.....I agree that the Declaration of Human Rights merely sets a common standard of achievement for all peoples and all nations but cannot create a binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated; but individual citizens cannot complain about their breach in the municipal courts even if the country concerned has adopted covenants and ratified the Optional Protocol. The individual cannot come to court but may complain to the Human Rights Committee, which, in turn, will set in motion other procedures. In short, the basic human rights, enshrined in the International Covenants above referred to, may at best inform judicial institutions and inspire legislative action within member-States; but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority. Indeed the construction I have adopted of Sec. 51 CPC has the flavour of Article 11 of the Human Rights Covenants.

4. Article 11 states that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. The three clauses of the proviso to Sec. 51 contemplate situations which either go far beyond or are different from mere inability to fulfil a contractual obligation. Clause (a) deals with case where judgment-debtor is guilty of contumacious conduct. Equally so is the case of

clause (b). Clause (c) deals not with the conduct of judgment-debtor after decree but the special position he occupied viz-a-viz the decree-holder with reference to the subject matter of the dispute. The three situations contemplated under the proviso are not so much defences for the judgment-debtors as they are restrictions on the power of the court to order detention. The court can exercise the power to order detention in a situation contemplated by any one of the three clauses. If the decree is for a sum for which judgment-debtor is bound in a fiduciary capacity to account, the court can order detention of the judgment-debtor in prison even if he has or had no means to-pay and this has nothing to do with mere inability to fulfil a contractual obligation. There is no violation of Article 11 of the Covenants. There is no jurisdiction to hold that even if the decree is of a nature contemplated in clause (c) of the proviso, the condition in clause (b) must also be satisfied.

5. We are fortified in the above conclusion by the decision of a Division Bench of the Calcutta High Court in *Tulsidas Mundhra v. The Official Liquidator* (A.I.R. 1983 Calcutta 403) speaking through by Sabyasachi Mukharji (as he then was). It was held that the case of a Director of a company occupying a fiduciary position in relation to the members of a company falls within clause (c) of the proviso to Section 51 and he could be arrested and detained. It was observed:

Unlike clauses (a) and (b), clause (c) is without any condition or any requirement that the delinquent judgment-debtor had refused or neglected to pay or had transferred or concealed any property. This in our opinion was so designedly used by the Legislature.....The intention, it appears to us, must have been to provide deterrent punishment. It was submitted before us on behalf of the appellant that such kind of deterrent punishment would serve no purpose if a man who had no means to pay at the time of execution of the decree though he might have been guilty of breach of any act in fiduciary capacity and decree might have been passed in this respect, no purpose would be served by passing an order against such a person, trying to penalise him or coerce him to pay the account. But in our opinion, however, the intention of the Legislature is clear; on the language used that intention becomes manifest if we compare and contract the requirements of clauses (a) and (b) with clause (c) of the proviso to Section 51 of the Civil P.C..... The fact that may not serve as a purpose of realising money would in our opinion be not sufficient when the legislative intent was clear, The purpose was to act as deterrent to all others to provide an absolute liability for those who were found guilty and a decree was passed in respect of the money in fiduciary capacity. If that is the position, in our opinion this case comes clearly within the mischief of clause (c) of the proviso to Section 51 of the Civil P.C. It is true that where civil liberty of a citizen is concerned, the court should be reluctant to roadd such power of restraint unless compelled by the circumstances. We find that this is manifestly clear in contradistinction to clauses (a) " and (b) of the same proviso and it was the intention of the Legislature to treat the men who are in fiduciary capacity separately and strictly for a public purpose.

6. On the question whether decree against surety would fall within the mischief of clause (c) of the proviso to Section 51, we have been referred to the decisions in *K.P. Ambady v. K.M. Balan* (1958 KLT 801). *D. Viswanathan v. Karnataka Bank Ltd.* (AIR 1988 Ker 274) and *Velayudhan v. State Bank of India* (1988(1) KLT 491). *K.P. Ambady's* case (1958 KLT 801) did not relate to case of a decree against debtor and surety. In that case, pending suit for recovery of money, moveables belonging to judgment debtor were attached before judgment and moveables were handed over to the defendant for safe custody under a security bond executed by him and two sureties. The suit ended in a decree. On notice being issued to produce moveables for the purpose of sale in execution, defendant defaulted. Plaintiff moved for enforcement of the security bond as against the two sureties by issue of warrant. Sureties pleaded non-liability on various grounds. But the plea was rejected. It was argued, *inter alia*, that surety is a person bound in a fiduciary capacity to account within the meaning of clause (c) of the proviso to Section 51 and hence he could be arrested and detained without anything more. It was argued that the security bond created a bailor-bailee relationship. *Iyengar, J.* without deciding but assuming that such was the relationship, examined the position and indicated that bailment involved quasi-trust or fiduciary position involving liability to account for another on the ground that confidence was reposed in the defendant when the goods were handed over to him for safe custody that he will produce them into court when called upon. *Iyengar, J.* held that the defendant as well as the sureties fell within the mischief of clause (c) of the proviso to Section 51 and are liable to be arrested.

7. We are not called upon in this case to decide whether the view that bailment involves fiduciary relationship with liability to account is correct. Assuming it to be so, there can be no doubt that clause (c) of the proviso to Section 51 is attracted. The point decided is that judgment-debtor is a person in a fiduciary capacity with liability to account and decree against such a person along with sureties falls within the mischief of clause (c). The transaction in *K.P. Ambady's* case (1958 KLT 801) was security bond in favour of a court in regard to attached moveables and the transaction involved handing over dominion over property with liability to account. The transaction is undoubtedly one involving fiduciary liability to account. This is so in principle as well as on the basis of public policy since the security bond was executed in favour of the court. Such a person, *i.e.*, a person who has furnished security or given a guarantee to court is governed by the provisions of Section 145 C.P.C. and not by the provisions of Contract Act. See *Parvatibai Harivallabhdas Vani v. Vinayak Balvant Jangam & others* (A.I.R. 1939 Bombay 23) and *Pirithi Singh v. Ram Charan Aggarwal* (AIR 1944 Lahore 428). At pages 135 and 136 of *Bonds and Guarantees* by S.N. Gupta, 1981 Edition, it is stated :

.....it has been held that when a bond is executed for the benefit of creditor the court cannot be brought within the definition of a creditor within the meaning of Section 126 (Contract Act). Thus the provisions of the Contract Act relating to contracts of guarantee do not in terms apply to a transaction where

surety bond is given to the court, as one under XXXVIII, Rule 5 C.P.C.....The obligation which a surety incurs under the bond which he gives to the court under the CPC is excluded from definition of contract of guarantee contained in Section 126.

Thus the decision in K.P. Ambady's case (1958 KLT 801) is not of much relevance for our purpose.

8. In D. Viswanathan and Another Vs. The Karnataka Bank Ltd., there was a decree for payment of money against the principal debtor and the surety both of whom were liable jointly and severally under the transaction. In execution both pleaded exemption from personal execution because of absence of means. The executing court ordered arrest without calling upon the decree-holder to adduce evidence on the ground that plea of no means is not available to surety. Padmanabhan, J. indicated that since the liability under the transaction was joint and several and there was no question of one being principal debtor and the other surety and both are equally liable for the entire amount. Even if the judgment-debtors are principal debtor and surety their liability is co-extensive. Clause (c) of proviso to Section 51 was not specifically invoked before the learned judge. Therefore this decision also is not helpful to us.

9. An identical case came up for consideration before Thomas, J. in Velayudhan v. State Bank of India (1988 (1) KLT 491), where the learned judge held that the case of surety attracts the operation of clause (c) of the proviso to Section 51. Learned judge indicated that the expression "fiduciary capacity" is not restricted to technical or express trusts but includes also such offices or relations involving the imparting of a confidence on the strength of which one person has acted. When a guarantor gives an undertaking to another for advancing money to a third person, the guarantor knows that the other person would not advance money without such a guarantee. In other words, the money is advanced on the strength of the confidence reposed in the guarantor of the performance promised or undertaken. In that view, the position of a guarantor is very much near to that of a trustee. Learned judge relied on the observations of Iyengar, J. in K.P. Ambady's case (1958 KLT 801) to the effect that it is only a quasi-trust or fiduciary position involving liability to account in relation to another party. The learned judge noticed that in K.P. Ambady's case the principal debtor was also held to be under an obligation in a fiduciary capacity but took the view that the distinction is too tenuous to sideline the effect of the salutary observations made by Iyengar, J.

10. There can be no controversy that for the purpose of clause (c) of the proviso to Section 51, there need not be an express trust; it could as well be an implied trust or a quasi-trust. All that is necessary is that the decree must be for a sum of money for which judgment-debtor was bound in a fiduciary capacity to account. We are, however, unable to agree with the view taken by the learned judge that the distinction between the facts in K.P. Ambady's case (1958 KLT 801) and the facts in Velayudhan's case (1988 (1) KLT 491) is tenuous. The

liability of a surety is, generally speaking, co-extensive with that of principal debtor subject of course to any variation in the contract of guarantee or suretyship. " When the liability of the principal debtor himself is one in regard to which he is bound in a fiduciary capacity to account, the liability of the surety cannot take on a different colour. If the judgment-debtor is bound in a fiduciary capacity to account for the money involved in the decree, the liability of the surety takes the same colour so far as the creditor is concerned and the decree attracts clause (c) of the proviso to Section 51. We are here not concerned with a case where principal debtor is bound in a fiduciary capacity to account. We are concerned with a case where liability of the judgment-debtor is purely contractual not involving any fiduciary capacity with liability to account, and the liability of the surety is alleged to be one of the nature contemplated in clause (c).

1. What exactly is the meaning to be attributed the words "judgment debtor was bound under fiduciary capacity to account"? The expression "fiduciary capacity" and "account" are both expressions importing considerable significance. Judgment-debtor must be bound to account and the liability to account must arise by virtue of his fiduciary capacity vis-a-vis the decree-holder and not a co-judgment debtor.

12. In Black's Law Dictionary, Fifth Edition, at page 562 "fide-jus" is explained as an act by which any one binds himself as an additional security for another, "Fide-jussor" is explained as a guarantor, one who becomes responsible for the payment of another's debt by a stipulation which binds him to discharge it if the principal debtor fails to do so, The following explanation is offered regarding fiduciary".

The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect of the trust and confidence involved in it and the scrupulous good faith and candor which it requires.....As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.....

For example: executor of estate; receiver in bankruptcy; trustee. A trustee, for example, possesses a fiduciary responsibility to the beneficiaries of the trust to follow the terms of the trust and the requirements of applicable state" law.

Fiduciary bond", according to Black's Law Dictionary, is a type of surety bond required by court to be filed by trustees, administrators, executors, guardians, and conservators to insure proper performance of their duties. "Fiduciary capacity" is explained thus:

One is said to act in a "fiduciary capacity" or to receive money or contract a debt in a "fiduciary capacity", when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to when he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of

good faith on the other part. The term is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law a guardian, executor, or broker, a director of a corporation and a public officer.

Fiduciary contract" is explained as--

An agreement by which a person delivers a thing to another on the condition that he will restore it to him.

Fiduciary debt" is explained as --

A debt founded on or arising from some confidence or trust as distinguished from a "debt" founded simply on contract.

13. We will now refer to Bouvier's Law Dictionary and Concise Encyclopedia - 3rd edition - Vol. I. At page 1216 "fides" is explained as faith, honesty or confidence.

Fiducia" is explained as --

A contract by which we sell a thing to some one - that is, transmit, to him the property of the thing, with the solemn forms of emancipation on condition that he will sell it back to us.

At page 1217 it is stated with reference to "fiduciary relation" as follows:

What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society..... Medical or religious adviser;..... husband and wife..... an agent who appropriates money put into his hands for a specific purpose of investment collector of city taxes who retains money officially collected;..... one who receives a note or other security for collection..... In the following cases debt has been held not a fiduciary one; a factor who retains the money of his principal..... an agent under an agreement to account and pay over monthly;..... one with whom a general deposit of money is made.

14. At page 970 of Vol. II of Stroud's Judicial Dictionary, illustrations of cases involving fiduciary capacity are given. The illustrations given are the traditional cares of trust such as administrator who has received money under letters of administration, debt due from an executor, broker on the stock exchange etc.

15. Section 3 of the Indian Trusts Act defines "trust" as "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner"..... The person who reposes or declares the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"..... Section 30 onwards in Chapter IX of the Act deal with obligations in the nature of trusts. Section 88 deals with advantage gained by fiduciary. The section refers to trustee, executor,

partner, agent, director of a company, legal adviser or other person bound in fiduciary character to protect the interest of another person. In certain circumstances such a person must hold pecuniary advantage derived by him for the benefit of another person.

16. Bearing in mind the above principles we will consider the position of a surety or guarantor. Section 126 of the Indian Contract Act states that 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 person who gives the guarantee is called the "surety", the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor" According to Section 128, liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. According to Section 133, any variance made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. Section 134 states that the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or, by any omission of the creditor, the legal consequence of which is the discharge of the principal debtor. According to Section 140 where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which creditor had against the principal debtor.

17. Suretyship is dealt with in Vol. 74 of Second Edition of American Jurisprudence at page 20. It is stated that -

The relation of suretyship arises only by express agreement of the parties, except where it exists by operation of law. The contract of suretyship must generally be in writing, since it is regarded as an undertaking to answer for the debt or default of another within the statute of frauds.

At page 90 it is stated -

The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction, although it has been said that the creditor does not stand as a fiduciary in his relation to the surety

In Rowlatt on the Law of Principal and Surety, Fourth Edition, it is stated at page 1 -

A surety may be defined as one who contracts with an actual or possible creditor of another to be responsible to him by way of security, additional to that other, for the whole or part of the debt. The obligation of a surety is thus necessarily a collateral obligation, postulating the principal liability of another, the principal debtor.

18. In 1986 edition of the Law of Guarantee by Kevin Patrick McGuinness it is stated at page 5 that-

a guarantee is a promise by one person to answer to a creditor for the due payment or due performance of the debtor obligation owed to the creditor by another person, known as the principal. As it is an undertaking to answer for another's default, a guarantee is a type of contract security.

At page 26 it is stated that-

guarantee is an accessory contract which relates to the performance of some primary obligation.....A guarantee is a contractual rather than a tort-based form of liability. In most cases, a guarantee will involve the assumption of a personal liability on the part of the guarantor; however, it is not necessary that the obligation assumed be of a personal nature. It is no less a guarantee for the surety to provide a pledge or security in support of the performance of an obligation by another person.

19. In *Reconley Ex-parte the Trustee v. Barclays Bank* (1938 (2) All E.R. 127), concept of suretyship or guarantee has been considered in detail. Sir Wilfrid Greane M.R. observed:

It is, I think, true to say that by a contract of suretyship or guarantee, which is one of the most familiar types of commercial contract, is generally meant a contract by which personal responsibility for the debt is assumed.

20. In 1985 edition of Vol. III of Sanjeeva Row's Contract Act, at page 2333 it is stated;

A surety thus pledges his credit or his trustworthiness while assuming the liability of the principal debtor.

At page 2339 it is stated:

The nature of the contract cannot be equated with that of an insurer or uberrima fides, it is one strictissimi juris.

At page 2355 it is stated:

The liability of a surety could not form the subject-matter of a trust.

The liability of the surety is explained by the Supreme Court in *Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, .

21. Suretyship is a contract to perform the promise or discharge the liability of a third person "in the case of default. Surety is one who promises to perform the promise or discharge the liability of a principal debtor. No doubt in general way it can be said that contract of suretyship involves good faith and confidence between the parties. It could well be said that but for the surety or guarantor creditor would not have advanced money to the principal debtor. It is one thing to say that the contract indicates good faith or confidence. It is quite a different thing to say that the relationship involves a trust or that it is a fiduciary relationship with liability to account. The scheme of the Indian Trusts Act does not take in suretyship or guarantee. Suretyship is not regarded either as trust or

as quasi-trust or as creating an obligation under the provisions of the Indian Trusts Act. Fiduciary relationship invariably involves dominion over property which is wholly lacking in the case of a contract of suretyship or guarantee. The liability to account which is invariably the hall mark of fiduciary relationship is wholly absent in the case of simple money transaction involving contract of guarantee. A surety might have inspired confidence in the mind of the creditor and as a result of the confidence creditor might have agreed to advance money to the principal debtor. But that is confidence in the general sense of the expression and not in the legal sense; the confidence which the surety generates does not create a liability in him to account for anything. His liability is only to perform the promise given by the principal debtor to the creditor or discharge his liability in the case of principal debtor's default. It is invariably a commercial transaction in which fiduciary element cannot be imported. His liability to discharge the principal liability undertaken by the principal debtor cannot be regarded as liability to account. Surety has not received anything nor has he been entrusted with money or property. He has not been given dominion over any asset. He has no liability to account. It cannot be said that any fiduciary liability is created. This is not a case where there is express trust involved. There is no quasi-trust or fiduciary capacity involving liability to account in relation to another. In these circumstances, with great respect; we are, unable to agree with the view taken in Velayudhan's case (1988 (1) K.L.T 491). We hold that a surety, who is a party to a tripartite agreement for advance of money by the creditor to the principal debtor, has no fiduciary capacity with liability to account. Therefore the decree does not fall within the mischief of clause (c) of the proviso to Section 51.

22. We are fortified in the above view by the observation of the Supreme Court in Prem Ballabh Khulbe v. Mathura Datt Bhatt (AIR 1967 SC 1342) The case related to partnership in regard to which final decree was passed for accounts of the dissolved partnership. At the stage of execution, Managing Partner pleaded for exemption from personal execution under clause (c) of the proviso to Section 51. The Supreme Court observed :

A partner must observe the utmost good faith in his dealings with the other partners. He is bound to render accounts of the partnership assets in his hands. But in the absence of special circumstances he cannot be regarded as a kind of trustee for the other partners or liable to render accounts to them in a fiduciary capacity.

Similarly suretyship involves an element of confidence but a surety cannot be regarded as a kind of trustee for the creditor or liable to account to him in a fiduciary capacity.

23. In view of our finding that decrees in these cases do not attract clause (c) of the proviso to Sec. 51, it must follow that unless the decree-holder seeks to invoke either clause (a) or clause (b) he cannot succeed. Decree holder has no contention based on clause (a). Decree-holder can only fall back on clause (b).

That being so sureties are entitled to raise the plea of no means. The executing court has to consider this aspect and pass orders in accordance with law.

24. The impugned orders are set aside and the Execution Petitions are remanded to executing court for fresh disposal in accordance with law and the observations contained in this order. The case will be called in the respective courts on 26-11-1990. Revision petitions are thus allowed, but in the circumstances without costs. We record our appreciation of the assistance rendered by learned counsel who appeared in the case and Sri S. Venkitasubramanya Iyer and Sri P.K. Balasubramonian who addressed arguments at our request.