
(1955) 12 BOM CK 0021
In the Bombay High Court
Case No : First Appeal No. 782 of 1954

Ganapati Nana Mokashi

APPELLANT

Vs

Anubai Abasaheb Mokashi

RESPONDENT

Date of Decision : 14-12-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145, 47
Transfer of Property Act, 1882 — Section 68

Citation : (1956) 58 BOMLR 622

Hon'ble Judges : Bavdekar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bavdekar, J.—[His Lordship, after dealing with points not material to this report, proceeded:] Then we come to the third point. Here the contention of the appellant was that inasmuch as he had given a charge on his Immovable property, unless the charged property was exhausted the decree-holder had no right to proceed against him personally by attachment and sale of his moveables. Now it is common ground that in this case there is not only a charge upon the property of the appellant; he is also personally liable under the bond. But there is no decree in favour of the respondent for bringing the charged property to sale. The respondent is really seeking to enforce the liability of the appellant under the bond which he has given by an application u/s 145 of the Code of Civil Procedure. It has application to cases in which the decree-holder is attempting to enforce the personal liability of the surety. The section provides how that liability is to be enforced. It says:-

...the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47:

When therefore the liability is being enforced under that section, it is to be

enforced in the manner laid down by that section, that is, that the decree or order is to be executed as against the surety as if he was himself a party to the decree. In the second instance in whichever way the decree-holder chooses to enforce the liability there is a limitation. The decree could be executed in any of the manners provided for the execution of the decrees but only to the extent of the personal liability of the surety. Now, the bond in this case is in favour of the Court. The result is that there is no mortgage. As their Lordships of the Privy Council pointed out in *Raghubar Singh v. Jai Indra Bahadur Singh* (1919) L.R. 46 IndAp 228 : 32 Bom. L.R. 521 in order that there should be a mortgage there must be a mortgagor and mortgagee, and consequently it must be found whether there is any person to whom the security is given. Where the bond is in favour of the Court inasmuch as the Court is not a juridical person, there is no mortgage. If the bond had been in favour of a named officer, of the Court in that case there would undoubtedly be a mortgage. The principle underlying Section 68 of the Transfer of Property Act might have application not because there is before the Court a suit but because that section shows that where there is a mortgage there is so to speak a restriction upon the liability of the surety. It is true that Section 68 gives a discretion to the Court, but even then ordinarily the Court will exercise the discretion in favour of the mortgagor. If a suit is filed by the mortgagee against the mortgagor in order to enforce his personal liability under the bond, the Court would require him either to give up the security or in the alternative say that it would stay the suit until in the first instance the mortgagee has enforced his security. It may be possible therefore to say that the personal liability of the person who has executed a mortgage is limited to this extent that he can say that the mortgagee can proceed against him personally only after he has first exhausted his remedy against the property mortgaged unless he is prepared to give up the security. But where there is no mortgage in law, it cannot be said that the liability of the person who has given the bond is so limited. It may be of course that when giving a bond the surety may limit his liability. The bond may expressly provide that the decree-holder would be entitled to proceed against the surety personally only after he has first exhausted his remedies against the charged properties, but the bond does not do that in the present case and Section 68 of the Transfer of Property Act or even the principle underlying it has no application because it cannot be said that the surety has in giving the bond effected a mortgage upon his properties.

2. It is said that even so the principle underlying Section 68 of the Transfer of Property Act should be applied on equitable grounds. Now, the difficulty in applying this principle is that when there is an application received by the Court u/s 145 the enforcement of the bond has to be effected in the manner laid down by the section itself. The manner in which the section says that the liability of the surety is to be enforced is by allowing the decree-holder to execute the decree as against the surety in any manner provided by the Code of Civil Procedure. In this case the application which has been made by the decree-holder is for attachment and sale of the moveable property belonging to the surety. That is undoubtedly a

manner for which provision is to be found in the Code, the only limitation upon this being that the decree can be executed against the surety only to the extent that he has rendered himself personally liable, It is impossible to apply the equitable principle when the liability of the surety, under the bond cannot be said to be limited in any manner. The question to be answered when the Court is asked to apply the equitable principle is whether there is any limitation upon the unequivocal personal liability taken by the surety by his bond. When the bond does not amount to a mortgage, it is not possible to say that the personal liability is limited. The full bench case of Gurappa Gurushiddappa v. Amarangji vanichand (1940) 43 Bom. L.R. 26. is against the existence of any such general principle which can be applied when the bond does not create a mortgage. Inasmuch as the only question which has to be determined is to what" extent the surety has made him self personally liable if it cannot be said that there is any limitation upon the liability undertaken by the surety, the decree-holder cannot be compelled either to proceed against the property which has been charged, or to give up the security.

[The rest of the judgment is not material to the report.]

The appeal will, therefore, be dismissed with costs.