

(1937) 10 MAD CK 0001
In the Madras High Court

Gundla Venkamma

APPELLANT

Vs

Rao Sahib Kotla Sanyasayya

RESPONDENT

Date of Decision : 22-10-1937

Acts Referred:

Contract Act, 1872 — Section 139

Citation : AIR 1938 Mad 422 : (1938) 47 LW 84

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is an appeal from the decree of the Agency Subordinate Judge of Vizagapatam dismissing the suit of the

plaintiff for recovery of a Burn of money on the basis of a security bond dated 18th January 1909 in favour of the husband of the plaintiff in O.S.

No. 1 of 1907 on the file of the Court of the Government Agent, Godavari, Coconada. The said bond was executed under the following circumstances.

2. One Joga Venkataswami had dealings with the plaintiff's husband and he died in 1905 without having the account in respect of the said dealings

settled. On the date of his death two persons claimed his property; one is his adopted son Joga Ramulu and the other Joga Sitaramulu, who is

alleged to be his natural son. But the matters in dispute between these parties appear to have been settled by an arrangement in and by which each

took half the property left by Joga Venkataswami. The plaintiff's husband filed a suit (O.S. No. 1 of 1907) against both Joga Ramulu and Joga

Sitaramulu and one Joga Achamma, the widow of Joga Venkataswami, for an account in respect of the dealings had with the said Joga

Venkataswami and for recovery of a sum of Rs. 11,000 odd which according to the plaintiff would be found due on a taking of the said account.

By an order dated 13th July 1907, Joga Achamma was exonerated from the suit as not being a necessary party. Immediately after the institution of

the suit, Joga Ramulu died and his widow Joga Kondamma was brought on record as his legal representative. After Kondamma was brought on

record, the plaintiff's husband filed an application for an injunction restraining the defendants on record from alienating certain property and the

Court passed an order that if the defendants were to give proper security, injunction would not be granted and that the temporary injunction which

was granted on the said application would be dissolved. The present defendant offered himself as security for the claim in O.S. No. 1 of 1907 and

the Court on the strength of the security bond executed by him seemed to have discharged the injunction. The security bond was executed on 18th

January 1909 and the material terms of the bond run thus:

The plaintiff having accepted my personal security, I hereby agree and bind myself to pay to the plaintiff or his legal representatives and assignees

any amount that may be decreed in his favour in the said suit against the defendants in case the same is not recovered from the defendants.

3. It will be noticed that the defendants referred to therein are Joga Kondamma and Joga Sitaramulu. Sometime after the said order, the plaintiff in

the said suit, that is the plaintiff's husband, entered into a compromise with only Joga Sitaramulu as a result of which Joga Sitaramulu suffered a

decree to be passed against him for the amount claimed in the plaint, without reference to Joga Kondamma who was contesting the claim. A

preliminary decree was passed in that suit directing an account to be taken so far as defendants other than Joga Sitaramulu were concerned, i.e.

defendant 4, Joga Kondamma. The Commissioner, who was appointed in that suit, submitted his report showing that instead of the defendants

owing anything to the plaintiff, the plaintiff would be indebted to the defendants in the sum of over Rs. 3000. Objections were filed to the

Commissioner's report and before the final decree was passed, the plaintiff's husband died. Nothing seems to have been done for three years after

his death and on objection being taken by Kondamma, the suit was dismissed as against her so that no decree was passed against Kondamma in

respect of the suit claim. This plaintiff however brought herself on record and executed the compromise decree against Joga Sitaramulu and his property.

4. The suit has been instituted on 5th December 1927, alleging that all the property which Joga Sitaramulu died possessed of, had been sold, that

there was no other property wherefrom the amount could be recovered and therefore she was entitled to realize the balance still due on the

strength of the security bond executed by the defendant. Various defences were raised, one of which was limitation and the other was that he was

discharged from the liability under the said bond by reason of the dismissal of the suit against Kondamma. The learned Subordinate Judge

accepted the pleas raised by the defendant and dismissed the suit. It is against this decree that this appeal has been preferred by the plaintiff.

5. Several questions of fact and law were raised in this appeal but we do not think it necessary to go into all of them, as we think the appeal can be

disposed of on the ground that the defendant was discharged from his obligation on the bond by reason of the dismissal of the suit against

Kondamma. In construing a guarantee, the principle to be remembered is that a guarantee will only extend to a liability precisely answering the

description contained in the guarantee. Therefore, before a creditor can enforce the liability given by a guarantor, he must satisfy that the conditions

of the bond executed by him are fulfilled and that he is seeking the very liability which has been undertaken by the guarantor under the bond. On a

construction of the bond in the light of the surrounding circumstances, it is fairly clear that the obligation was Undertaken by the defendant on behalf

of both the defendants in the said suit, namely Joga Kondamma and Joga Sitaramulu and two conditions have to be fulfilled by the creditor

(plaintiff) before She can enforce the liability Under the bond, namely (1) there must be a decree against both the defendants in the said suit and (2)

there must be a failure to recover the money from both the said defendants or their property. Where therefore as a result of an act or omission of

the creditor, there is a variation of the liability Undertaken or a departure in the terms of the bond, the surety will be discharged from his obligation

there under, and it is immaterial whether the variation is substantial or material, because the contract ceases to be one which he has undertaken to

fulfill. A compromise decree against one of the defendants cannot be held to be a decree against the defendants" within the meaning of the surety

bond and the plaintiff cannot be heard to say that she has failed to recover the amount from the defendants.

6. The matter might be looked at in another way so far as this case is concerned. As aforesaid, the undertaking was on the joint behalf of both the

defendants and the dismissal of the suit against Kondamma prevented the accrual of any obligation against Kondamma. Therefore it operated as a

complete release of the said Kondamma. A release of one of the persons who is jointly bound as principals will discharge the surety. u/s 139,

Contract Act if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety

requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

7. In this case before the obligation can accrue in favour of the creditor, there must be a decree debt against both the defendants. By reason of the

dismissal of the suit, the eventual remedy of the surety to proceed against one of the principal debtors has been impaired. There can be no doubt

that the intention of the parties was that all the defendants should be held bound by the decree because under the arrangement entered into

between Joga Ramulu and Joga Sitaramulu each became entitled to a half of the property left by Joga Venkataswami and if a decree is obtained

against one of them, it would be impossible for the creditor to proceed against the property of the other or for the surety to enforce the implied

promise against that other in case the surety was compelled to make the payment which the defendants were liable to pay under the decree. Mr.

Govindarajachari relied on Subramania Iyer v. Gopala Iyer (1910) 83 Mad 308 wherein it was held that the omission to sue the principal debtor

would not discharge the surety. The ground of that discharge was that though the remedy was barred, the debt was not discharged; but in this case

there is an extinction of debt by reason of the dismissal of the suit. He also relied on a case, Nur Din v. Allah Ditta (1932) 19 AIR Lah 419 which

was also decided on the same principle. In that case it was held that the abatement of a suit as against the principal debtor does not discharge the

sureties from their liability; the reason given by Sir Shadi Lai at p. 819 is that ""the remedy of the creditor against the principal debtor is gone, but

the debt due to him is not extinguished"". But in the present case there is no debt at all as the suit was dismissed against Kondamma.

8. We are therefore of the opinion that the dismissal of the suit against Kondamma operated as a release of the surety under the bond executed by

him. We think that the view taken by the learned Subordinate Judge is therefore correct. In this view we think it unnecessary to go into the other

questions raised in this appeal. In the result, the appeal fails and is dismissed with costs.