

(1948) 04 MAD CK 0019
In the Madras High Court

Kunda Chinna Dasappa and Another	APPELLANT
Vs	
Gopalakrishna Co., by Managing Partner, Venkadari Gattu Venkatasubbiah	RESPONDENT

Date of Decision : 22-04-1948

Acts Referred:

Citation : (1948) 61 LW 599 : (1948) 2 MLJ 312

Hon'ble Judges : Panchapagesa Sastry, J;Panchapagesa Sastri, J

Bench : Division Bench

Judgement

Panchapagesa Sastry, J.—This is an appeal against the order of the District Judge of Cuddappah in I.A. No. 71 of 1944 in I.P. No. 28 of

1939. The respondent herein filed O.S. No. 75 of 1935 in the Court of the District Munsiff of Prodattur and obtained a decree against the

defendants therein for payment of certain sums. There was an attachment before judgment during the pendency of the suit, and in connection with

those proceedings one Seshagiri Rao stood surety

for the payment of any amount for which a decree might be passed either ex parte or upon contest in the suit or in the appeal or in revision against

all the defendants or any of them.

That document is E.P. No. 1 dated 15th April, 1935. In due course the suit ended in a decree on 12th July, 1937. It appears that the judgment-

debtors filed a petition for stay of execution, and they were allowed to do so on their furnishing security of immovable properties which they did

under the document Ex. P-2 dated 7th August, 1937. Meanwhile an application had been taken out by the decree-holder against the surety, but it

was not pressed and was dismissed on 31st July, 1937. On 4th September, 1939,

I.P. No. 28 of 1939 was filed for adjudication of Seshagiri Rao

as an insolvent and there was an order of adjudication on the 27th September, 1940. During the pendency of the adjudication petition E.P. No.

534 of 1939 would appear to have been filed against the surety. Some of his properties were attached and sold on 21st June, 1940, and part

satisfaction of the decree was entered up. Later E.P. No. 672 of 1940 was filed on 9th October, 1940, for execution of the decree against the

judgment-debtors, and the prayer was for directing the sale of the properties which they had furnished as security under Ex. P-2. During the course

of these proceedings, for some reason or other, the decree-holder released the security and allowed the petition to be dismissed. It appears also

that one item of the properties furnished as security was purchased by the decree-holder by private sale from the judgment-debtors, and to the

extent of the consideration part satisfaction of the decree was entered up.

2. The application before the District Judge out of which this appeal arises, was filed by the 21st creditor in the insolvency to have the proof of the

respondent, who was creditor, No. 22, expunged on the ground that the insolvent owed no debt to him in the circumstances set out earlier. The

contention was that the 22nd creditor, who was the decree-holder in O.S. No. 75 of 1935 must be deemed to have released the obligation of the

surety as he consented to take the security of Immovable property given by the judgment-debtors under Ex. P-2, and that this transaction

amounted to a novation of liability and operated to release the surety from his obligations. The second contention was that in any case, the giving

up of the said security by the decree-holder was an act which u/s 139 of the Contract Act put an end to the obligation of the surety. The District

Judge rejected both the contentions and dismissed the application.

3. The appeal was originally filed by the petitioner in the lower Court, namely) creditor No. 21, but it appears that his own debt was later on

expunged as nonexistent, and he ceased to be a creditor of the insolvent; but another creditor who has now been impleaded as the second

appellant is proceeding with the present appeal. It is stated on behalf of the respondent that this second appellant is no other than the son-in-law of

the insolvent and has really no locus standi to continue this appeal. It is unnecessary to deal with this question, because, firstly, the facts have not

been investigated, and secondly, in view of my decision on the other points, this point becomes unnecessary.

4. Mr. V. Ramaswami Aiyar for the appellant contends that the taking of the security by the decree-holder when the judgment-debtors furnished

the same in obedience to the order of Court making it a condition for their obtaining the stay of execution which they prayed for, amounts to the

giving of time without the consent of the surety which would therefore operate to release the surety from his obligation. There is nothing on record

to support the contention that the decree-holder voluntarily accepted this security or agreed to give time to the judgment-debtors. The order was

passed by the Court as a condition precedent to the granting of the stay which the judgment-debtors prayed for. This might well have been despite

the opposition of the decree-holder. Moreover, there is no time given by the decree-holder within the meaning of Section 135 of the Contract Act;

nor is there anything in the terms of the security bond, Ex. P-2, which operates to release the surety from his obligation or which amounts to a

novation of liability or an extinction of the surety's liability. The first contention therefore was rightly repelled by the District Judge.

5. The second point taken by Mr. V. Ramaswami Aiyar was that by reason of the conduct of the decree-holder in giving up the security in the

course of his execution proceedings in E.P. No. 672 of 1940, he had done something which was inconsistent with the rights of the surety, and the

eventual remedy of the surety himself was thereby impaired, and in consequence that attracted the provisions of Section 139 of the Contract Act

and the surety was discharged. In this particular case the security that was taken and released was not in existence at the time when the suretyship

obligation was created, and therefore Section 141 of the Contract Act does not apply. Illustration (c) specially shows that the giving up of such

security taken at a time later than the creation of the surety's obligation does not operate to release the surety, in this respect the Indian law being

different from the English law. Section 139 must be read along with Section 141 and not in such a way as to abrogate Section 141 when it applies.

As, in the present case, the security which was given up came into existence later it could not be postulated that the decree-holder did anything

which was inconsistent with his duties to the surety within the meaning of Section 139. There are therefore no merits in the second contention

either.

6. It is unnecessary to deal with the question whether the earlier order allowing attachment and sale of the surety's property operates as res

judicata or not; nor with the other contentions which the respondent wants to urge.

7. The appeal is therefore dismissed with costs.