
(1929) 08 BOM CK 0005

In the Bombay High Court

Case No : Letters Patent Appeal No. 34 of 1927

Mahomedalli Ibrahimji

APPELLANT

Vs

Lakshmibai Anant Palande

RESPONDENT

Date of Decision : 14-08-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : AIR 1930 Bom 122 : (1929) 31 BOMLR 1442 : (1930) ILR (Bom) 118

Hon'ble Judges : Norman Kemp, J;Bkackwell, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Kemp, Kt., A.C.J.

1. This is a Letters Patent Appeal against the summary dismissal of the appeal from the decision of the District Judge of Poona who reversed the decision of the Extra-Joint Subordinate Judge, Poona, in Darkhast No. 211 of 1925. Shortly put, the facts of the case are as follows:—In Suit 192 of 1924 the plaintiff applied for an order for attachment before judgment. The deceased, one Anant Wasudeo Palande, stood surety for the defendant under Civil Procedure Code, Order XXX.VIII, Rule 5. He executed a bond in Form 6 to Appendix F to the Code. On April 12, 1924, the plaintiff and the defendant arrived at a compromise which was subsequently recorded as an adjustment of the suit and a decree passed in terms thereof by the Extra-Joint Subordinate Judge. The compromise allowed the judgment-debtor to pay the amount by instalments of Rs. 200 per month. The first instalment was payable on May 12, 1924, the second on June 12, 1924, and the decree further provided that in default of payment of two instalments the plaintiff might recover the whole amount due. The question before us is whether by this compromise the surety has been discharged.

2. Mr. Thakor for the appellant contends that it is immaterial whether the decree was passed on a compromise or whether it was arrived at after adjudication by

the Court. He maintains that the surety is not discharged under the compromise decree. Turning to Form 6 in Appendix F, it is not absolutely clear whether the words "may adjudge" mentioned in the concluding part of the form refer to the adjudication of the Court on the claim or the adjudication of the Court on the value of the property which the opponent has failed to produce when required. I doubt, however, whether the words were intended to permit an inquiry into the value of the property so as to reduce the security for its production in case of its non-production. Presumably any question of the value of the property would have been considered when the amount of the security was fixed. Nor is part performance by the defendant by producing only part of the property ordered to be produced a performance pro tanto by the surety of his guarantee. If the words refer to the adjudication of the claim by the Court then, with great respect to the decisions to the contrary, I would be inclined to say that a decree passed on a compromise is not usually an adjudication contemplated by the surety. It is not an ordinary incident of the suit like an arbitration through the Court where (see 2nd Schedule, Clause 16, of the Code of Civil Procedure) the Court pronounce a judgment. Section 2, Clause (9), of the Civil Procedure Code, shows that a "judgment" implies a controversy. Section 2, Clause (2), of the Civil Procedure Code, no doubt says that a decree is the formal expression of an adjudication but the words "Court may adjudge" in Form 6, Appendix F, mean, I think, that the Court is to be the arbitrator not that it is merely to decree what the parties consent to. The adjudication required in a decree by Section 2(2) may be taken as inferring that a consent decree means that the order on the compromise is an adjudication but it does not necessarily define the meaning of the word "adjudge" in Form 6. The Court cannot refuse to record a compromise of the suit (Order XXIII, Rule 8) and it seems to me stretching the meaning of the word "adjudge" to say that where this power is taken away from the Court it has adjudged the dispute.

3. However, the appeal may, we think, be decided on another ground. Now, whether Section 135 of the Indian Contract Act applies to the case of a bond passed to the Court or not? and it must be noted that the relation of debtor and creditor did not exist between the plaintiff and the defendant when the bond was executed? I see no reason why the equitable principles underlying Section 1133 should not be applied in this case.

4. The correct test, I think, to apply to this case is, whether the compromise which was subsequently embodied in the decree was in the contemplation of the plaintiff and the surety when the latter became a surety. It may be that, if a decree on a compromise comes within Form 6, there may be a compromise which is consistent with the obligations which the surety had undertaken to discharge. But in the present case we have the fact that the compromise allowed the payment of the decretal amount, which amounted to Rs. 1,800, by instalments of Rs. 200 per mensem commencing from May 12, 1924. In other words, it would be nine months before the surety's liability, if it held good, was extinguished. During those nine months the position of the judgment-debtor

might have altered very much for the worse. It is true that mere forbearance to recover the debt might not release the surety but giving the debtor the right to refuse to pay except parts of the debt at stated intervals alters the position of the surety as regards the debtor. His rights against the debtor are prejudiced by this compromise, and, I think, it can fairly be said that such a compromise was not one which was contemplated by him when he entered into the suretyship.

5. In this connection I would refer to the case of *Tatwm v. Evans* (1886) 54 L. T. 338, and the following words of Mr. Justice Denman, as he then was, in his judgment (p. 337) :?

As "ragards Simson, I am of opinion that he is not liable. There can be no doubt that he entered upon the suretyship on the understanding that there was to be a defence of the fiction, and not a complicated compromise such as took place...; but I am of opinion that the compromise in this case is a thing so very different from a judgment in invitum pronounced by the court after some inquiry into the facts, as to release a surety who was not consulted about is. I do not think that in what took place, looking at the substance of the thing, there was, within the meaning of the bond, an "awarding of such sum so the court should think fit", but a complicated arrangement about which the surety had a right to be consulted.

6. That is the test which, I think, applies here. In my opinion the compromise in order to be binding on the surety in this case should have received his consent. I, therefore, think that the appeal should be dismissed with costs.

Blackwell, J.

7. I agree with my learned brother that this appeal should be dismissed for the reasons given by him in the latter part of his judgment.

8. I desire, however, to say a word as to the correct interpretation to be placed upon Form No. 6 in Appendix F to the Civil Procedure Code. In my opinion the words at the end of that Form "as the said Court may adjudge" apply only to a question which might arise in execution in proceedings against the surety, he the surety being called upon in default of the judgment-debtor placing at the disposal of the Court the property specified or the value of it or such portion as may be sufficient to satisfy the decree. I do not think that those words "may adjudge" have any application to the decree which the Court must pass before requiring the defendant to produce and place at the disposal of the Court the property specified, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree. Even, however, if the word "adjudge," does refer to the word "decree", I am still not satisfied that the surety would not be bound by a consent decree, provided that the consent decree did not alter the obligations of the surety. u/s 2, Sub-section (2), of the Code "decree" is defined to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or

final. Under Order XXIII, Rule 3, the Court is bound to record a compromise and shall pass a decree in accordance therewith. Having regard to the definition of the word "decree" in Section 2, Sub-section (2), the recording of a compromise and the passing of a decree in accordance therewith would, in my opinion, be an adjudication by the Court in the suit in question. However, in my opinion, a decision upon this point is really unnecessary for the determination of the matter before us, and I agree that this appeal must be dismissed for the reasons given by my learned brother in the latter part of his judgment.