
(1915) 03 MAD CK 0038
In the Madras High Court

Mool Chand and Another

APPELLANT

Vs

P. Alwar Chetty

RESPONDENT

Date of Decision : 23-03-1915

Acts Referred:

Contract Act, 1872 — Section 44

Citation : AIR 1915 Mad 934 : (1916) ILR (Mad) 548

Hon'ble Judges : Sadasiva Ayyar, J; Napier, J

Bench : Division Bench

Judgement

Napier, J.—This appeal is from an order passed in execution by Mr. Justice Kumaraswami Sastkiyar. It was on the application by the

plaintiff in execution of the decree in Original Suit No. 176 of 1909. The decree is as follows : ""That Kasturchand, Nattoji Mulchand and Amed

Mull, the defendants herein, do pay to the plaintiff the said sum of rupees twenty-three thousand,"" etc.; subsequently to the decree a petition was

put in under Order XXI, Rule 2 of the Civil Procedure Code, by the first and second defendants and not opposed by the decree-holder for a

certificate by the Court of the adjustment of the decree as against them, and an order was passed ""that the plaintiff herein do enter up satisfaction of

the decree herein in full as against the first and second defendants herein as agreed to by him by the said agreement."" Later when the execution

application above referred to as against the other defendants was put in, objection was taken that the decree had been fully satisfied by the

adjustment referred to on the ground that the discharge of one of several joint promisors discharges the others as well. Mr. Justice Kumaraswami

Sastriyar overruled the objection and ordered execution to issue.

2. It is contended before us that the learned Judge was wrong on two grounds, (1) that satisfaction having been entered up nothing remains and (2)

that the release of one judgment-debtor operates in favour of all.

3. On the first point it is only necessary to observe that the term "satisfaction" although used in the order is not one contemplated by the Civil

Procedure Code. The words of Order XXI, Rule 2, are "The decree-holder shall certify such payment or adjustment to the Court whose duty it is

to execute the decree and the Court shall record the same accordingly." Admittedly the decree has been adjusted by payment so far as the first

and second defendants are concerned, but there has been no satisfaction, although that word appears in the order.

4. The second point is one of more substance. It is argued that although Section 44 of the Indian Contract Act provides that a release of one or

more joint promisors does not discharge the other joint promisor or joint promisors, that has reference only to obligations arising out of contract

and does not apply to judgment debts; that under the English law a release of one promisor of a contractual joint debt, or of one judgment-debtor

in respect of a judgment joint debt does discharge the co-obligor, that in the original civil jurisdiction of the High Court the law as administered in

England prevails and that therefore there being no statutory provision as to a judgment-debt the English law of discharge still obtains. In my opinion

this argument is fallacious. Admitting that according to the English law, the fact that a debt is a judgment-debt makes no difference and that a

release in favour of one joint judgment-debtor operates in favour of the others it is only necessary to see the basis on which this doctrine is founded

to establish the fallacy in the argument. In *In re E.W. A; A debtor* (1901) 2 K.B. 642 (in the Court of Appeal) it was contended that where the

foundation of the obligation was a judgment the doctrine of release did not apply. Lord Justice Collins overrules this contention in the following

words: "I cannot see any foundation in principle for the distinction; for under any judgment-or other obligation creating a joint liability, there is only

one-debt, and that being so, the rule that the release of one of the joint debtors gets rid of the debt applies equally whether the obligation arises on

a judgment or on any other security. It is too late now to question the law that where the obligation is joint and several the release of one of two

joint debtors has the-effect of releasing the others."" The view of the Court is clear, namely, that where a right to a release arises on the original

contractual liability, the fact that a liability under a judgment has been substituted for that original liability cannot increase the burden or deprive the

debtor of the right given to him by the substantive law. It necessarily follows that where the substantive law has been altered, as has been done by

the Indian Contract Act, and the benefit of the doctrine of release has been, taken away from a joint debtor, the basis of the rule disappears. I do

not think it necessary to discuss the soundness of the decision of this Court in *Gurusami v. Chinna Mannar* and *Gurusami v. Sadasiva* ILR (1882)

Mad. 37 that in an appeal from the original side the English law has to be administered but I must not be taken to accept the correctness of that

conclusion. On principle I am clear that just as the debtor cannot in England be deprived of this right which attaches to his contract by reason of

the fact that the contract debt, has merged in a judgment-debt, so in India the creditor cannot be deprived of his statutory right to proceed against

a joint debtor in spite of a release by reason of the fact that the contractual debt has merged in a judgment debt. It is noticeable that the English law

was not accepted by the Courts in India in dealing with cases from the mufassal even prior to the Contract Act. For in two cases *Sheo Churn Lall*

v. Ram Surun Sahoo (1871) 16 W.R. 49 and *Nunkoo Lall v. Musst Dhunesh Kooer* (1872) 17 W.R. 496, respectively, it was held that a

judgment-creditor is entitled to realize his debt from any one of the debtors and that by proceeding against one he does not relieve the other

debtors from their joint liability to him. In *Ramratan Kapali v. Aurni Kumar Dutt* (1910) 37 Calc. 559 and *Bhavani Kooer v. Darsan Singh*

(1911) 14 C.L.J. 354, the point was considered at great length by Mookerjee, J. He relies on the two Calcutta cases above referred to as

establishing the law outside the provisions of the Contract Act and bases the variance from the English Law on the obvious grounds of justice,

equity and good conscience; and he points out that in England there has been a tendency to restrict the operation of the Common Law by a refined

distinction between a release and a covenant not to sue. That this distinction exists is clear from the language of BOMBAY, L. J., in *In re E.W. A; A*

debtor (1901) 2 K.B. 642, the case above referred to. For in that case the learned Lord Justice expresses a doubt whether, ""having regard to the

form of the document and the surrounding circumstances there was not a discharge of the debt but only a discharge of the particular debtor from

the liability as against himself personally, in other words an agreement by the Bank not to sue him." It is clear, therefore, that even in England the

Courts will favour the construction of a document in a manner beneficial to the creditor, Sir Frederick Pollock in dealing with the result of Section

43 of the Indian Contract Act says: "We think it the better opinion that the enactment should be carried out to its natural consequences, and that

notwithstanding the English authorities founded on a different substantive rule a judgment against one of several joint promisors remaining

unsatisfied cannot in British India be held to be a bar to a subsequent action against the other promisor or promisors." This view was adopted by

this Court in Ramanjulu Naidu v. Aravamudu Aiyangar ILR (1910) Mad. 317, where it was argued that the omission in a previous suit against one

of several joint promisors of a part of the cause of action was a bar u/s 43 (of the Civil Procedure Code) to a subsequent suit against a joint

promisor for the balance so omitted. KKISHNASWAMI AYYAB, J., in an elaborate judgment after considering all the authorities declined to

limit the logical result of the operation of Section 43 of the Contract Act by the language of Section 43 of the Civil Procedure Code. I adopt the

reasoning of the very eminent jurist referred to and of the learned Judge in that case, which in my opinion applies with equal force to Section 44,

namely that you must look to the substantive law and must give full effect to it, and in that view it seems to me dear that a release of a judgment-

debtor can give his co-judgment-debtor no higher rights than he would have had prior to the judgment, and that full effect must be given to the

substantive law laid down in Section 44.

5. That being so there is no force in the last contention for the appellant, that the release enures for the proportionate amount of the debt. Reliance

is placed on the language to be found in the judgment of Mookerjee, J., in Bhavani Koer v. Darsan Singh (1911) 14 C.L.J. 354, and I agree that

where the consideration for the release is not the payment of a definite portion of the debt but an adjustment otherwise than by payment within the

meaning of Order XXI, Rule 2, difficulties may arise in ascertaining the amount of the balance remaining due, and that therefore it may be

necessary to hold that the adjustment operated to the extent of the proportionate liability of the released judgment-debtor as between him and his co-judgment-debtors. But whereas in this case the amount received by the judgment-creditor was a specific sum, I am clear that as the liability of the other judgment-debtors is for the whole amount of the debt, they can only claim the benefit of the amount actually paid by the judgment-debtor who has been released. In my view, therefore, this appeal fails and must be dismissed.

Sadasiva Ayyar, J.

6. I entirely agree. I only wish to add the following remarks:

If the passage (at page 46) in the judgment of Muthuswami Ayyar, J., in *Gurusami v. Chinna Mannar* and *Gurusami v. Sadasiva* ILR (1882) Mad.

37, was intended to lay down that the High Court on its original side is bound to decide questions like the one in controversy on the basis of

English precedents and English Common Law procedure even though the following of such precedents and procedure may be against the "justice

and right" or the "justice, equity and good conscience" which are the true guides to be followed according to the Charter Acts, I respectfully differ

from the observation in that passage. The doctrine that the release of one joint-debtor releases the others is an artificial doctrine not consonant with

justice and right.

7. It was decided in *Bhawani Koer v. Darsan Singh* (1911) 14 C.L.J. 354, that the decree-holder in that case ought to give credit to the

proportionate sum due by the released judgment-debtors on the basis that all the judgment-debtors were liable equally as among themselves to pay

the decree-amount. That decision is (if I may say so) no doubt justifiable on the facts of that case. But it could not, in my opinion, be extended as a

support to the very broad proposition that even if the creditor realized only a definite and lesser proportionate amount from the released joint-

debtor or debtors he has not got the right to go against the other debtors for the whole of the remaining balance, but only for what would be found

to be the latter's proportionate share if the decree-amount was equally divided between all the debtors including the released debtor or debtors.