
(1915) 03 MAD CK 0015
In the Madras High Court

Moolchand and Another

APPELLANT

Vs

P. Alwar Chetty

RESPONDENT

Date of Decision : 23-03-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2

Citation : 29 Ind. Cas. 303

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

Bench : Division Bench

Judgement

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

execution of the decree in Civil Suit No. 176 of 1909. The decree is as follows: That Kastoor Chand, Nattoji, Mulohand and Omed 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 CPC by the 1st and 2nd 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 1st and 2nd defendants herein as agreed to by him by the said agreement." Latter when the execution application above referred to as

against the other defendants was put in, objection was taken that the decfee 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 Sastri 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 1st and

2nd 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 14 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

release in favour of one 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 : 70 L.J.K.B. 810 : 85 L.T. 31 : 49 W.R. 642 : 8 Manson, 250

(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 other." The view of the Court is clear, namely,

that, where a right to 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 a

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*

Gotetti v. Samurti Ohinna Munnar and Gurusami Ohetti v. Sadasiva Chetti 5 M.P. 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 Mofussil even prior to the Contract Act. For in two cases *Sheo Churn Lall v. Bam Sarun Sahoo* 16 W.R. 49 and *Nunkoo Lall v.*

Musammat Dhunesh Kooer 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 *Ram Ratan Kapali v. Aswini*

Kumar Dutt 6 Ind. Cas. 69 : 37 C.P. 59 : 14 C.W.N. 849 : 11 C.L.J. 503 and *Jhawani Koer v. Darsan Singh* 11 Ind. Cas. 450 : 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 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 Bomer, L.J., in *In re E.A.W. a Debtor* (1901) 2 K.B. 642 : 70

L.J.K.B. 810 : 85 L.T. 31 : 49 W.R. 642 : 8 Manson, 250, 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 a 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.

5. This view was adopted by this Court in *Ramanjulu Naidu v. Aramudu Iyengar* 5 Ind. Cas. 135 : (1910) M.W.N. 35 : 7 M.L.T. 373 : 33 M.P

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 CPC to a subsequent suit against a joint promisor for the balance so omitted. Krishna-sami Iyer, 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 clear 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.

6. 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 language to be found in the judgment of Mookerjee, J., in *Bhawani Koer v. Darsan Singh* 11 Ind. Cas. 450 : 14 C.L.J. 354 and I

agree that where 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 30-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 Aiyar, J.

7. I entirely agree. I only wish to add the following remarks: (1) If the passage (at page 46) in the judgment of Muthusami Iyer, J., in *Gurusami*

Ghetti v. Samurti Ghinna Munnar and Gurusami Ghetti v. Sadasioa Ghetti 5 M.P. 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 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." (2). It was decided in *Bhawani Koer v. Darsan Singh*

11 Ind. Cas. 450 : 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-

debtor, on the basis that all the judgment-debtors were liable equally 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 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.