
(1942) 07 MAD CK 0016
In the Madras High Court

Nallaiya Goundan

APPELLANT

Vs

Marappa Goundan

RESPONDENT

Date of Decision : 27-07-1942

Acts Referred:

Provincial Insolvency Act, 1920 — Section 44(2)

Citation : (1942) 55 LW 726 : (1942) 2 MLJ 626

Hon'ble Judges : Kuppuswami Ayyar, J;Kuppuswami Aiyar, J

Bench : Division Bench

Judgement

Kuppuswami Ayyar, J.—The only question for consideration in this appeal is whether the order of discharge obtained by the respondent in

the proceedings in insolvency in which he was adjudged an insolvent discharged him from the liability in respect of which he has been sued in the

suit from which this appeal arises.

2. The appellant and the respondent and another executed a promissory note for Rs. 600 to a bank. The bank obtained a decree and a portion of

the debt was recovered. The respondent was later adjudged an insolvent and he subsequently obtained an order of discharge. The bank assigned

the decree to a third person to whom the appellant had to pay money. This was after the order of discharge was passed. It is not disputed that so

far as the amount paid by the appellant is concerned it is an amount payable by the respondent and therefore recoverable by the appellant as

money paid by him as surety for the respondent.

3. The respondent's contention was that this liability which was incurred prior to the insolvency was extinguished by the order of discharge granted

in the insolvency proceedings. u/s 44 (2) of the Provincial Insolvency Act:

Save as otherwise provided by Sub-section (1) an order of discharge shall release the insolvent from all debts provable under this Act.

Debt provable under the Act is denned in Section 34 (2) which runs thus:

Save as provided by Sub-section (1) all debts and liabilities, present; or future, certain or contingent, to which the debtor is subject when he is

adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such

adjudication, shall be deemed to be debts proveable under this Act.

The question for consideration is whether this liability of the respondent to indemnify the plaintiff as his surety is a liability which was provable under

the Act or not. That a surety like the appellant is a creditor for the purpose of insolvency is pointed out in Roderigues v. Ramaswami Chettiar

(1916) 32 M.L.J. 253 : ILR 40. Mad. 783. But it is urged that that was a case of fraudulent preference and that he was considered to be a

creditor within the meaning of that expression in that particular section relating to fraudulent preference. It cannot be said that he is a person to

whom any provable debt was due in respect of which he could have obtained a dividend as no liability arose till he actually paid the amount to the

original creditor. In Gangadhar v. Kanhai ILR (1928) All. 606. their Lordships had to consider this very same question and it was held by that

Court on the interpretation of the language of Section 34 of the Provincial Insolvency Act that though this was a contingent liability it was a liability

which is denned as being provable under the Act and consequently u/s 44 (2) an order of discharge absolved him from this liability also. It is true

that under the English law such a surety had only a right to obtain a declaration that the insolvent was bound to discharge that debt. He could not

prove the debt in the sense that he could prove it and claim dividend out of the realisations of the estate of the insolvent. Even in India it is so. He

could not prove the claim and ask for a dividend being paid to him on the ground that he was a surety for the insolvent. But this is not what we are

concerned with. His inability to claim a dividend after proof cannot stand in the way of this liability being one which comes within the purview of

Section 34 (2). This is a case of contingent liability. The liability can be enforced only if the surety is made to pay the amount. But the fact that it is

contingent and the contingency had not occurred does not make it any the less a

liability provable under the Act. In these circumstances I do not see any reason to differ from the "finding of the Allahabad High Court in the ruling in Gangadhar v. Kanhai ILR (1928) All. 606. In the result, the second appeal fails and is dismissed with costs.

4. Leave to appeal is refused.