
(1985) 09 GUJ CK 0026
In the Gujarat High Court

Patel Vimlaben Bhailalbhai

APPELLANT

Vs

Motavar Chhotabhai Ishwarbhai and Others

RESPONDENT

Date of Decision : 25-09-1985

Acts Referred:

Contract Act, 1872 — Section 128, 145, 145

Citation : (1986) 1 GLR 270

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Judgement

R.A. Mehta, J.—This Revision by the judgment creditor arises from execution of a money decree. The suit was decreed in 1974 by compromise. On August 3, 1975 in the course of the execution of the decree, three persons stood as sureties for the satisfaction of the decretal amount and bound themselves to pay the amount in case the principal debtor failed to pay the same. This bond was written and executed below the aforesaid warrant itself. By an order dt. 11.2.80 passed by the Debt Settlement Officer ex. 53. under the Rural Debtors Act the principal debtor was discharged from this debt.

2. The sureties contended before the Executing Court that in view of the judgment debt of the principal debtor having been wiped off, the sureties cannot be proceeded against in execution for recovery of the debt which has been wiped, off according to law because their liability is only for the payment of the debt and in co-extensive with that of the debtor.

3. The executing court upheld the contention of the sureties following the Full Bench judgment in the case of Aypunni Mani Vs. Devassy Kochouseph and Others, where the Full Bench had dissented from the judgment of the Nagpur High Court in the case of AIR 1944 277 (Nagpur) of the Contract Act enacts that the liability of the surety is co-extensive with that of the principal debtor. Section 145 of the Contract Act provides that as soon as the surety pays the debt to the creditor he subrogates in place of the creditor and becomes entitled to recover the said amount from the principal debtor and the surety is entitled to be

reimbursed by the principal debtor. In the present case the principal debtor has been discharged from his liability in accordance with law under the provisions of the Rural Debtors Relief Act and his debt is wiped off. Therefore the principal debtor is neither liable to the creditor nor the surety. Therefore it stands, to reason that the surety is not under liability for the debt which is not existing. The executing court therefore dismissed the execution application against the sureties.

4. The judgment creditor preferred an appeal to the District Court. That appeal was dismissed on the ground of non-maintainability of the appeal. Hence this Revision Application by the judgment creditor.

5. It is not necessary to decide whether the appeal before the District Court was maintainable or not. The order of dismissal of the appeal can be confirmed on merits also. The learned Judge of the executing court has rightly held that the sureties are not able to satisfy the judgment debt which has been extinguished in accordance with law and the judgment debtor has been discharged from the liability to judgment creditor (as also to sureties) since the judgment debt itself has been Wiped off and the execution application cannot survive.

6. Mr. Patel submitted that u/s 11(2) proviso the execution application against other persons would not abate. Section 11(2) proviso reads as follows:

11. (2) Any suit, appeal, application for revision against a decree for application to execute a decree pending before any such court on the appointed day shall abate;

provided that if any such suit, appeal, or application is pending jointly against such debtor and other person, who is not a debtor, nothing in Sub-section (2) shall affect the continuance of such suit or appeal or application for revision in so far as it relates to such other person.

Under Section 11(2) the suit for execution application against debtor would abate. However, under the proviso it would not abate in so far as it relates to other person or persons who are not debtors. The learned Counsel for the judgment creditor has submitted that the sureties are "other persons" and not debtors and therefore this execution application against them would not abate. Actually speaking this is not a question of abatement of execution application. Here the judgment debt itself is extinguished in accordance with law and it stands on the same footing as if the decree is satisfied so far as that debt is concerned and, therefore, all persons liable for such debt cannot be proceeded against. The proviso contemplates a case where there are several persons who are principally liable to pay the debt, out of such joint debtors if one of the debtor is relieved from his liability the other persons would not stand relieved by virtue of this proviso. But where the liability is not joint liability in that sense here the liability of the judgment debtor is of the principal debtor and the liability of the other persons is only as sureties and such liability is only co-extensive to the liability of the principal debtor. Therefore, it is not a case of abatement of

execution application against the sureties but of extinguishment of the judgment debt itself.

7. The learned Counsel for the petitioner-judgment creditor has submitted that the order of the Debt Settlement Officer is illegal because the application was made beyond time. This question was neither raised before the Debt Settlement Officer nor before the appellate authority. Who dismissed the appeal of the judgment creditor, nor was that question raised before the executing court and, therefore, such question cannot be raised at this stage. Moreover the orders of the competent officers and the appellate authority cannot be gone into by the executing court and, therefore, this contention also deserves to be rejected.

In the result, the Revision Application fails and rule is discharged with costs.