
(1933) 11 MAD CK 0041
In the Madras High Court

Pl. Rm. Kr. Karuppan Chettiar

APPELLANT

Vs

A. Ct. N. Nagappa Chettiar and Another

RESPONDENT

Date of Decision : 01-11-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145
Contract Act, 1872 — Section 126

Citation : AIR 1934 Mad 186 : (1934) ILR (Mad) 688 : (1934) 39 LW 239 :
(1934) 66 MLJ 248

Hon'ble Judges : Pakenham Walsh, J

Bench : Division Bench

Judgement

Pakenham Walsh, J.—The plaintiff in this case applied for execution of his decree against the judgment-debtor as well as against the latter's surety. Execution was granted against the surety and against this order the surety appeals.

2. In the Lower Court there was a ground taken that the decree had been satisfied. This was found against and though it has been raised in the memorandum of appeal, it was given up in argument before us.

3. The circumstances in which the security bond came to be taken are as follows. The decree-holder put in E. P. No. 252 of 1931, dated the 4th December, 1931, to arrest the judgment-debtor. Notice was sent and finally the judgment-debtor was arrested on the 18th January, 1932. He prayed for one week's time for the purpose of settling the decree with the plaintiff and for making arrangements for paying the amount. The order of the Court on this, dated the 25th January, 1932, was " 3 days time more allowed; to be produced on the 28th January ". On that date the judgment-debtor put in a petition, E. A. No. 86 of 1932, to release him from arrest on the strength of the surety. This was accompanied by an affidavit. The surety-appellant executed on the same date in favour of the Court a security bond the material part of which is as follows:

The defendant in the above suit, vis., Pm. Rm. Perianan Chettiar was arrested, and he was produced before this Court. He agreed with the plaintiff to discharge

the decree debt within a month and he requested time for a month. The said Perianan Chettiar requested me to stand surety therefor, and I agreed to it and executed this bond. If the above Perianan Chettiar does not discharge the said decree to the plaintiff within one month, I hereby agree that myself, my heirs and the successors to my title are bound to pay the amount in full due upon the said decree, and I have executed this surety bond.

4. On this the Court passed the following order on 29th January, 1932:

Debtor arrested but released on security. Petition is dismissed.

5. The decree amount not having been paid within a month, the plaintiff sought to recover it from the surety.

6. The argument raised in appeal is that this bond must be held to have been given under Order 21, Rule 40, Clause (5) proviso. This proviso runs as follows:

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

7. This proviso and the new Rule 40 were substituted by the Madras High Court for Rule 40 in the Code. Now there is no doubt that if the Court had meant merely to release the judgment-debtor from arrest on security that if he did not satisfy the debt before the expiration of the specified period he should appear in Court, this proviso was the proper proviso to apply. But in point of fact the Court was neither asked to do this nor did it do it; nor did the surety bind himself at all that the judgment-debtor should appear before the Court on any date. In this connection it is useful to note not only what has been stated in the bond quoted above but in the affidavit of the judgment-debtor to the Court. The material portion thereof runs as follows:

2. I have been arrested in respect of the decree in the above suit and I have arranged with the plaintiff to discharge the decree. Plaintiff too has consented to have it settled and has asked me to have time for one month on producing a surety. To that effect, I have obtained a letter from the plaintiff and given it to the plaintiff's vakil.

3. I have got a house at Puduvayal. I have no other properties. I owe also certain other debts. In this circumstance, I have to arrange with the plaintiff, get a loan on the mortgage of the said house, and I have to pay the amount to him. I am unable to pay off the decree in any other manner.

The plaintiff knows all the above matters and he has agreed that I may take time for a month and that the decree may be satisfied within that time. If the decree amount is not paid to the plaintiff within the period of a month, the surety has

consented to pay the decree amount.

4. Pl. Rm. Kr. Karuppan Chettiar Avergal of Pallathur has consented to stand as surety and I have submitted herewith his surety bond. The plaintiff has accepted his suretyship by the plaintiff's letter.

It is therefore just and necessary that the Court may be pleased to release me from the arrest on the strength of the surety of the above person.

8. It is perfectly clear from this that after the arrest of the judgment-debtor he made a private arrangement between himself and his judgment-creditor by which the latter agreed that he should have a month to pay the decree amount on condition of furnishing a surety who would pay the decree amount if the payment was not made within that period. There was no condition that the judgment-debtor should appear before the Court, and it was natural that as the judgment-creditor was foregoing this hold upon the judgment-debtor, he required full security for the decree amount being paid. So we find that on this the Court passed the appropriate order of unconditional release and dismissal of the petition.

9. The cases quoted for the appellant do not, we consider, establish the legal case put forward for him. In *Raja Raghunandan Prasad Singh v. Raja Kirtyanand Singh Bahadur* (1932) 63 M.L.J. 85 the Privy Council held that where a bond was executed by a surety in pursuance of an order of Court, the bond should be considered in the light of the order directing the security to be given, and that the circumstances in which it was executed may be looked at. In the present case the circumstances are perfectly clear. The prayer of the judgment-debtor in his affidavit, the bond executed by the appellant, and the order of the Court are all in entire conformity with one another. In *Chandi Charan Sen v. Ram Coomar Chakravarti* (1912) 23 I.C. 349 there was an order of the Court for appearance, which quite differentiates it from the present case. It may also be noted that it was found in that case that the bail bond was in Burmese which was not the language of the surety and it was held that he did not understand its terms. *Janki Das v. Ram Partab* ILR (1893) All. 37, the decision of a single Judge, was u/s 336 of the old Code corresponding to Section 55 of the present Code. There again there was an order for appearance made by the Court. And it has also to be noticed that under the old Code and even under the new Code until Act III of 1921 the Court was bound to release the judgment-debtor on his expressing his intention to apply for being declared an insolvent, and on his furnishing security to the satisfaction of the Court. Hence it is clear that any bond which went beyond this might be attacked as void for want of consideration. *D. Manackjee v. R.M.N. Chettyar Firm* ILR (1926) Rang. 492 is not relevant. In that case the liability under the surety bond was held to have come to an end when the attachment, in connection with which it was given, ceased on the dismissal of the suit. The Lower Court has held that the bond in question comes under Order 21, Rule 40(1). It certainly does not come under Order 21, Rule 40, Clause (5) proviso. We do not think it necessary to discuss whether the release of the

judgment-debtor in this case can or cannot be brought under the words "unable from poverty or other sufficient cause to pay the amount of the decree," because, assuming that it is within the power of the Court to take a bond like the present, though it is not specially provided for by any order or rule in the Code then there is ample authority for holding that it can be enforced. The case in *Joyma Bewa v. Easin Sarkar* ILR (1926) Cal. 515 is exactly in point. There, in execution of a decree, the decree-holder, the judgment-debtor and the surety agreed that the decretal amount should be paid within a certain time by the judgment-debtor, failing which the decree-holder should be entitled to proceed against the surety to realise the decretal amount in execution of the decree. These terms were embodied in a petition signed by the parties and filed before the Court with a stamp appropriate to a petition, but insufficiently stamped either as a contract of suretyship or as a security bond. It was held that the contract contained in the petition signed by the three parties concerned amounted to a contract of guarantee within Section 126 of the Contract Act, and that the failure duly to stamp a document which must be stamped by reason of the provisions of the Stamp Act does not affect the validity of any contract therein contained, but renders the document inadmissible in evidence; and with regard to Section 145, Civil Procedure Code, it was held that it is not necessary that a contract of suretyship should be in the form of a security bond, or in writing, or that the contract of suretyship should be in favour of the Court for the purpose of execution as against a surety u/s 145 of the Code of Civil Procedure. Execution against the surety was allowed. The present case is a very much stronger case than that, for here the bond is to the Court and all that can be said about it is that such a bond does not fall within the express terms of any order or rule in the Code, with regard to the power of the Court to take it. As regards the applicability of Section 145 it was not denied before us that the bond in its terms directly falls u/s 145(a)--" for the performance of any decree or any part thereof". Even had the bond not fallen exactly under any of the terms of Section 145, the Privy Council decision in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1919) L.R. 46 IndAp 228 : ILR 42 All 158 : (1919) 38 M.L.J. 302 (P.C), which has been followed in *Sankunni Variar and Another Vs. Vasudevan Nambudripad and Others*, shows that such a bond can be enforced by order of the Court. It has not been argued seriously that the present bond is not intra vires of the Court and it is clear enough that if the liability undertaken in the bond cannot be enforced when the condition as stated in the bond under which it is to be enforced has arisen, the bond cannot be enforced in default of appearance because (1) there is no order for appearance, and (2) there is no undertaking in the bond making the surety responsible for appearance. The bond therefore, as stated above, is not one given under Order 21, Rule 40, Clause (5) proviso. If it can be held to come under Order 21, Rule 40(1), as to which it is not necessary to express any decided opinion, then it would be enforceable. But if it comes under neither of these, it is enforceable under the Contract Act in view of the decision in *Joyma Bewa v. Easin Sarkar* ILR (1926) Cal. 515 quoted above and its terms directly bring it within Section 145(a), Civil Procedure Code.

10. We consider therefore that the order of the Lower Court was correct. The appeal fails and is dismissed with costs.