

(1975) 02 GUJ CK 0003
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Indravadan Harilal Mody and Others

RESPONDENT

Date of Decision : 26-02-1975

Acts Referred:

Revenue Recovery Act, 1890 — Section 4

Citation : (1976) 17 GLR 240

Hon'ble Judges : M.P. Thakkar, J

Bench : Single Bench

Judgement

M.P. Thakkar, J.—The question which has cropped up in the present appeal is as regards the forfeiture of a bond executed by two sureties in form 4 of Appendix F of Civil Manual Vol. II. The bond was executed by them as sureties for a nazir in a district court. The nazir is alleged to have misappropriated golden ornaments worth about Rs. 16,803-27 p. Which were lying in the district and sessions court as muddamal articles in connection with some criminal cases. Shri I.P. Dave, then District & Sessions Judge of Ahmedabad passed an order on August 21/22, 1957 in the following terms calling upon the sureties to tender the amount of Rs. 5000/- mentioned in the surety bond without affording them any hearing to show cause against the proposed order:

Whereas you have jointly and severally stood as a surety to the tune of Rs. 5000/-for shri R.M. Shukla, ex-nazir, district court, Ahmedabad by executing a bond on 21-1-53.

And the said Shri R.M. Shukla, having been suspended from Government service by the district court office order No. C/91 of 1957, dated the 14th August 1957 and the said surety bond having been forfeited, the amount of surety bond has been ordered to be recovered and confiscated to Government.

You are, therefore, hereby called upon to tender jointly or severally the said amount of Rs. 5000/- within 48 hours from the hour of the service of this notice to you failing which immediate steps will be taken for the recovery of that

amount from you as arrears of land revenue.

It appears that the nazir who is said to have misappropriated the ornaments was prosecuted in connection with the offence alleged to have been committed by him. He was found guilty and was convicted by the criminal court. The appellate court set aside the order of conviction and sentence and remanded the matter for a fresh trial. Before the trial could be completed, the nazir (Shri R.M. Shukla) died. Thereafter proceedings were initiated against the sureties. Meanwhile one of the sureties Harilal Ambaram Modi, died. The proceedings were pending before Shri D.P. Desai, the then District Judge at Narol. He did not issue a notice to the heirs of deceased Harilal Modi. He passed an order on August 1, 1962 to the effect that a sum of Rs. 5000/- was recoverable from the sureties as arrears of land revenue and directed that a copy of the said order be forwarded to the collector for effecting the recovery. It appears that proceedings under the revenue recovery Act were initiated and some notices were issued (they are not brought on record). The heirs of deceased harilal thereupon instituted the suit giving rise to the present appeal inter alia claiming a declaration that the order passed by Shri Dave forfeiting the surety bonds and directing the recovery was illegal and without authority. They also claimed a consequential injunction. The learned trial judge came to the conclusion that there was no substance in the various contentions raised by the plaintiffs except and save with regard to the contention that the order for forfeiture was beyond the competence of the district judge. The view taken by the learned judge was that forfeiture I could be made only by the governor. Says the learned judge:

This contract clearly stipulates that the surety bond can be forfeited only by the governor and if that is so, I find, that the district judge, who is neither the governor nor the Government, would not be entitled to forfeit the surety bonds so as to compel the sureties to pay up the amount in question.

The state has preferred the present appeal and has questioned the legality I and validity of the decree passed by the trial court.

2. It appears that an argument was advanced before the learned trial judge on the basis of the language employed in order ex. 25 passed by Shri L.P. Dave, the then district judge, whilst calling upon the sureties to tender the amount mentioned in the surety bond. In paragraph 2 it was stated that the surety bond had been forfeited and the amount had been ordered to be recovered and confiscated to Government. This was construed as an order of forfeiture. Reliance was placed on the stipulation contained in the surety bond which in so far as material is in the following terms:

We (1) Modi Harilal Ambaram and (2) Modi Manilal Dalsukhram both residing at Astodia Chakla, Ahmedabad, hereby declare ourselves sureties for the above-said Ramchandra Maganlal Shukla that he shall do and perform all that he has above-undertaken to do and perform and in case of his making default therein, we hereby bind ourselves jointly and severally to forfeit to the governor the sum

of five thousand (Rs. 5,000/-) in which the above-said Ramchandra Maganlal Shukla has bound himself or such other lesser sum as shall be deemed to be sufficient by the District Judge Ahmedabad to cover any loss or damage which the governor may sustain by reason of such default.

And we agree that the governor may, without prejudice to any other rights or remedies of the governor, recover the said sum as an arrcar of land revenue.

Now, it is provided in the surety second that in case of his making default therein, we hereby bind ourselves jointly and severally to forfeit to the governor the sum of five thousand (Rs. 5000/-)...in view of the aforesaid provision contained in the surety bond it was argued before the learned trial judge that the order for forfeiture could have been passed only by the governor and not by the District Judge. If the aforesaid provision is carefully examined and analysed in the light of the meaning of the expression forfeit it will appear that all that is provided is that in case of default on the part of Shri Shukla, the surety will be liable to pay, or to render himself liable to be deprived of, the amount of Rs. 5000/- in connection with the default. The expression forfeit inter alia means to render oneself liable to be deprived of or to have to pay in consequence of a crime, offence, breach of duty, or engagement it is, therefore, clear that all that is provided is that the surety will have to pay a sum of Rs. 5000/- in case of default on the part of Mr. Shukla the surety bond is an agreement between the State Government on one hand and the sureties on the other. There is no warrant for taking the view that any formal order of forfeiture is required to be passed by the governor in this connection. All that the bond provides is that the sureties will be liable to pay to the governor the sum of Rs. 5000/- in case of default on the part of the nazir for whom the persons concerned were standing as sureties. There was, therefore, no question of the authority to pass such a formal order for forfeiture. An illustration will make the point clear. Supposing such a provision was contained in the contract entered into between two citizens. Surely one would not have expected one of the contracting parties to pass an order of forfeiture in the present case also it is a contract between the State Government on one hand and the sureties on the other. Nothing in the bond or in the law requires the governor representing the Government to pass any order for the forfeiture himself. In fact the aforesaid provision does not contemplate any order of the forfeiture at all. All that it means is that the sureties will be liable to pay to the State Government a sum of Rs. 5000/- in case of default. The order, ex. 25, passed by Shri Dave cannot under the circumstances be voided on the ground that he had no competence to pass the order. Now, the order in question came to be made by the learned district judge by reason of the fact that the bond executed by the sureties in terms contemplated the determination of the amount of liability by the district judge. Attention must be focussed in this connection on the expression we hereby bind ourselves...to forfeit governor the sum of five thousand (Rs. 5000/-) in which the above-said Ramchandra Maganlal Shukla has bound himself or such other lesser sum as shall be deemed to be sufficient by the district judge Ahmedabad to cover any loss or damage which the governor may

sustain by reason such default, (emphasis is added). The liability of the sureties did not extend to the entire amount of Rs. 5000/- merely because there was a default. The question as to the extent of the liability was required to be determined by the district Judge having regard to the facts and circumstances of the case upon examining the extent of the loss. And the responsibility in this behalf as per the stipulation in the agreement was that of the district judge. It is, therefore, clear that the district judge alone was competent to determine the question as regards the extent of the liability of the sureties. That is why order ex. 25 was passed by Shri I. P. Dave, the then district sessions judge at Ahmedabad. However, the learned district judge who passed the order was bound to afford a reasonable opportunity to the sureties to show cause as to why the entire amount of Rs. 5000/- or a lesser amount should not be recovered. The sureties could have shown that no loss was incurred or that on a true construction of the surety bond they were not responsible therefore or that having regard to the particular circumstances their liability stood discharged. Or they could have shown that their liability could not exceed a particular sum. The sureties could not have shown this unless an opportunity was afforded to them to show cause against the determination as regards the quantum of the liability in the context of the stipulation contained in the surety bond. The question which the District Judge was required to decide was one which affected the monetary liability of the sureties. It was a question which affected the rights and obligations of the parties. The district judge was, therefore, discharging a quasi-judicial function. He could not have decided the question as regards the extent of the liability, if any, of the sureties without complying with the principles of natural justice. The impugned order passed by the learned district judge (ex. 25) cannot be sustained in view of these circumstances. It may be mentioned that at that point of time Mr. Shukla had merely been suspended and there was no basis on which it could have been said that Mr. Shukla had in fact Misappropriated the amount. An argument was urged in this context before the learned trial judge but it was negatived on the ground that subsequently Shri D.P. Desai had considered the question at the time of passing order ex. 18 dated August 1, 1962. It, however, is an admitted position that before the said order was passed, Shri Harilal Ambaram Modi had died. Shri D.P. Desai was, therefore, determining the liability of the heirs of the deceased surety. Order, ex. 18, shows that no notice was issued to his heirs to show cause against the proposed Action. Now, this High Court has taken the view that in regard to the liability of the heirs of a deceased surety it will depend on whether the property which has come to the heirs is the separate property of the deceased surety or whether the property in question is joint family property in which the deceased surety has an interest as a co-parcener. see Babubhai Shankarlal Soni and Ors. v. State of Bombay (now Gujarat) 8 G.L.R. 45). The heirs could have shown that the property which had come to their hands was not the separate property of deceased Shri Harilal Modi and that it was not liable to be proceeded against in connection with the liability arising under the surety bond in question. If that contention was accepted, the state would have had to institute a suit as indicated in Babubhais case (supra). If

the contention was not accepted, the proceedings under the revenue recovery Act could have been initiated and it would have been open to the heirs to file a suit as contemplated by Section 4 of the revenue recovery-Act.

3. The result of the aforesaid discussion is that order ex. 25 passed by Shri L.P. Dave, the then district & sessions judge of Ahmedabad in 1957 cannot be enforced having regard to the fact that it was passed without affording any opportunity to the sureties to show cause against the proposed recovery and the recovery proceedings could not be initiated till there was a valid determination made by the district judge as regards the extent of the liability of the sureties. So far as order ex. 18 passed by Shri D. P. Desai, the then District Judge of Narol is concerned, it has been passed after the death of the surety and without affording any hearing to the heirs of the surety. The determination made by him under the circumstances cannot be said to be a valid determination as regards the extent of the liability, if any, of the heirs of the deceased surety. The result is that no recovery proceedings can be initiated against the heirs of the deceased surety till there is a valid order (determining the liability in the context of the surety bond) passed by the District Judge after affording a reasonable opportunity to the heirs to show cause against the proposed Action. Neither ex. 25 nor ex. 18 can be said to be an order recording a valid determination in regard to the liability of the heirs from the aforesaid point of view. The plaintiffs are, therefore, entitled to be protected. The decree passed by the trial court must be sustained though on different grounds. It must be made clear that the respondents-plaintiffs are not exonerated from their liability, if any, in regard to the bond executed by deceased Harilal Ambaram Modi. However, the said amount cannot be recovered from them till a valid determination is made by the learned district judge after affording a reasonable opportunity to them to show cause. It will be open to the learned district judge to initiate fresh proceedings and to pass an appropriate order in accordance with law after affording a reasonable opportunity to the respondents-plaintiffs. It will be open to the respondents-plaintiffs to raise all contentions excepting the one that there is no order of forfeiture passed by the governor or the State Government. So far as that question is concerned, it would be concluded by the present judgment. Apart from this, all possible contentions as may be open under the law may be taken by the respondents-plaintiffs. In the result, the appeal fails and is dismissed. There will be no order regarding costs.