1962

Sham Kartik Singh
v.
Mathura

Raghubar Dayal J.

We accordingly allow the appeals, set aside the order of the Board of Revenue and remand the cases to it for decision in accordance with law. We further direct it to decide itself the contention raised by the respondents about their having acquired adivasi rights under the U.P. Zamindari Abolition and Reforms Act. In case the Board takes the view that for deciding the said issue any finding of fact is necessary, it may call for the said finding from the Trial Court and, on receiving it, proceed to deal with the appeals on the merits.

In the circumstances of these cases, we direct that the parties on either side bear their own costs.

Appeals allowed.

1962

September 4.

RAJA BAHADUR DHANRAJ GIRJI

v.

RAJA P. PARTHASARATHY RAYANIMVARU AND OTHERS.

(P. B. GAJENDRAGADKAR and K. C. DAS GUPTA, JJ.)

Surety Bond—Executed in favour of Court—Compromise decree in the proceeding, if effects a discharge—Equitable rule—Indian Contract Act, 1872 (9 of 1872), ss. 135, 126.

Although s. 135 of the Indian Contract Act does not in terms apply to a surety bond executed in favour of the court, there can be no doubt that the equitable rule underlying that section must apply to it. The reason for the said rule which entitles the surety to a discharge is that he must be able at any time either to require the creditor to call upon the principal debtor to pay off his debt, or himself to pay the debt and seek his remedy against the principal debtor.

The question as to whether the liability of the surety is discharged by a compromise in the judicial proceeding in which the surety bond is executed must depend on the terms of the bond itself. If the terms indicate that the surety undertook the liability on the basis that the dispute should be

1962

Raja Bahadur Dhanraj Girji v. Raja P. Parthasarathy Rayanimvaru

decided on the merits by the court and not amicably settled, the compromise will effect a discharge of the surety.

The Official Liquidators, The Travancore National & Quilon Bank Ltd. v. *The Official Assignee of Madras* I. L. R. 1944 Mad. 708, *Parvatibai* v. *Vinayak Balvant*, I. L. R. 1938 Bom. 794. *Mahomedalli Ibrahimji* v. *Laxmibai*, (1929) I. L. R. LIV Bom. 118, *Narsingh Mahton* v. *Nirpat Singh*, (1932) I. L. R. XI Patna 590 and *Muhammad Yusaf* v. *Ram Gobinda Ojha*, (1927) I. L. R. LV Cal. 91, referred to.

But if the terms show that the parties and the surety contemplated that there might be an amicable settlement as well, and the surety executed the bond knowing that he might be liable under the compromise decree, there can be no discharge and the surety will be liable under the compromise decree.

Haji Ahmed v. *Maruti Ramji*, (1930) I. L. R. LV Bom. 97, *Appunni Nair* v. *Isack Mackadan*, (1919) I. L. R. 43 Mad. 272 and *Kanailal Mookerjee* v. *Kali Mohan Chatterjee*; A. I. R. 1957 Cal. 645, referred to.

Consequently, in the present case where the surety bond was executed in favour of court and by it the sureties undertook to pay certain amount of money on behalf of the respondent if decreed by the court and the compromise decree between the parties introduced complicated provisions enabling the appellant to take possession of the properties in adjustment of rival claims, granted time, albeit to both the parties, to discharge their obligations thereunder and included matters extraneous to the judicial proceedings in which the surety bond was executed.

Held, that the sureties stood discharged by the compromise decree.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 343, 344 and 345 of 59.

Appeals from the judgment and order dated January 12, 1950 of the Madras High Court in A. A. O. Nos. 288 to 290 of 1946.

Alladi Kuppuswamy, S. B. Jathar and *K. R. Choudhuri*, for the appellants.

A. V. Viswanatha Sastri, V. Vedantachari and *T. Satyanarayana*, for respondent No. 2 (in C. A. No. 345 of 59.)

1962

Raja Bahadur Lhanraj Girji
v.
Raja P. Parthasarathy Rayanimvaru

T. V. R. Tatachari, for respondents Nos. 3 to 6 (in C. A. Nos. 343 and 344 of 59) and respondents Nos. 5 to 8 (in C. A. No. 345 of 1959.)

1962. September 4. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR, J.—[After disposing of Civil Appeals Nos. 343 and 344 of 1959, his Lordship proceeded as follows.]

That takes us to Civil Appeal No. 345 of 1959 in which the appellent wants liberty to proceed againat the surety, respondents Nos. 2 and 3. This claim has been rejected by both the High Court. But the decision of the High Court proceeds on the basis that the appellant was himself a defaulter and so, he could not be permitted to enforce his remedy against tho sureties. Since on the question of default, we have come to a contrary conclusion, it becomes necessary to examine whether the appellant is entitled to seek his remedy against the surety.

In determining this question, it is necessary first to enquire into the nature and extent of the liability undertaken by respondents Nos. 2 and 3 in executing the surety bond. The surety bond was executed on the 29th Sept. 1935. Clause 5 of the surety bond which is relevant provides that the sureties covenant that if the order of the High Court in C. M. A. No. 362/1929 be reversed or varied by the Privy Council and as a result of the said variation or reversal respondent No. 1 becomes liable to pay by way of restitution any amount to the said appellant in the Privy Council, the sureties would pay whatever sum may become payable by the said respondent and that if they failed therein, then any sum payable shall be realised in the manner specified in the said clause. This bond was executed in the favour of the court.

1962

Raja Bahadur Dhanraj Girji
v.
Raja P. Parthasarathy Rayanimvaru

Gajendragadkar J.

The appellant contends that as a result of the decision of the Privy Council, the matter was remitted to the trial Court for ascertaining the amount due to the appellant and it was during the pendency of the appeals which were pending in the Madras High Court against the decision of the trial Court on the applications made by the respective parties in the remanded proceedings that the compromise decree was passed between the appellant and respondent No. 1 and so whatever is claimable by the appellant by virtue of the said compromise decree must attract the operative portion of clause 5 of the surety bond. On the other hand, Mr. Sastri for the surety agrees that the surety bond must be strictly construed and it is only if the amount claimed by appellant from respondent No. 1 can be said to be the result of the reversal or variation by the Privy Council of the orders under appeal before it that the surety bond can be proceeded against. Mr. Sastri urges that when disputes were pending between the appellant and respondent No. 1 before the Madras High Court, the parties compromised the disputes and the compromise decree which followed acts as a discharge of the liability of the sureties. In support of this argument, reliance is placed on the equitable principles underlying section 135 of the Indian Contract Act. Mr. Kuppuswamy contests this position and urges that s. 135 is inapplicable to a surety bond executed in favour of a court and he argues that appellant's remedy against the surety is not affected by the fact that the dispute between the appellant and respondent No. 1 was amicably settled and terminated in a compromise decree.

This controversy raises the question as to whether s. 135 of the Indian Contract Act or principles underlying it apply to surety bonds executed in favour of the court. Section 135 provides that a contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract. There can thus be no doubt that a contract of suretyship to which s. 135 applies would be unenforceable if the debt in question is compromised between the debtor and the creditor without the assent of the surety. But this provision in terms cannot apply to a surety who has executed a bond in favour of the court, because such a contract of guarantee of suretyship does not fall within the scope of s. 126 of the Contract Act. A ontract of guarantee under the said section postulcates the existence of the surety, the principal debtor and the creditor, and this requirement is not satisfied n the case of a bond executed in favour of the couirt. Such a bond is given to the court and not to the creditor and it is in the discretion of the court to enforc the bond or not. Therefore, there cannot be any doubt that in terms, the provisions of s. 135 cannot apply to a court bond.

It is also clear that the equitable principles underlying the provisions of s. 135 apply to such a bond. If, for instance, the decree-holder gives time to the judgment-debtor and promises not to seek his remedy against him during that period, there is no reason why the extension of time granted by the creditor to the debtor should not discharge the surety even where the surety bond is executed in favour of the court. The reason for the equitable rule which entitles the surety to a discharge in such circumstances is that the surety should be able at any time to require the creditor to call upon the principal debtor to pay off his debt or himself pay off the debt and seek his remedy against the principal debtor. If the creditor has bound himself not to claim the debt from his principal debtor, that materially affects the right

1962

Raja Bahadur Dhanraj Girji v. Raja P. Parthasarathy Rayanimvaru

Gajendragadkar J.

of the surety and so, whenever time is granted to the debtor by the creditor without the consent of the surety, the surety can claim discharge. This equitable principle would apply as much to a surety bond to which s. 126 of the Contract Act applies as to a surety bond executed in favour of the court. Therefore, we see no justification for the argument that even the equitable principles underlying the provisions of s. 135 of the contract Act should not apply to surety bonds executed in favour of the court.

In determining the question as to whether liability under such a surety bond is discharged by reason of the fact that a compromise decree had been passed in the judicial proceedings in which the surety bond came to be executed, it will always be necessary to examine the terms of the bond itself. Did the surety contemplate when he executed the bond that the dispute pending between the debtor and the creditor may be compromised, or did he contemplate that the dispute would, and must be settled by the court and not compromised by the parties? If the terms of the bond indicate that the surety undertook the liability on the basis that the dispute would be decided on the merits by the court in invitium and would not be amicably settled, then the compromise of the dispute would discharge the liability of the surety (vide *The Official Liquidators, The Travancore National & Quilon Bank Ltd.* v. *The Official Assignee of Madras*, (1) *Parvatibai* v. *Vinayak Balvant* (2); *Mahomedalli Ibrahimji* v. *Laxmibai*; (3); *Narsingh Mahton* v. *Nirpat Singh* (4) and *Muhammad Yusaf* v. *Ram Gobinda Ojha*. (5) If, on the other hand, from the terms of the bond it appears that it was within the contemplation of the parties including the surety

(1) I.L.R, 1944 Mad. 708.
(2) I.L.R. 1938 Bom. 794.
(3) (1929) I.L.R. LIV Bom. 118.
(4) (1932) I.L.R. XI Patna 590.
(5) (1927) I.L.R. LV Cal. 91.

1962

Raja Bahadur Dhanraj Girji
v.
Raja P. Parthasarathy Rayanimvaru

Gajendragadkar J.

that the dispute may be amicably settled and the surety executed the bond knowing that his liability may arise even under the compromise decree, then the passing of the compromise decree will not entitle him to claim discharge vide *Haji Ahmed* v. *Maruti Ramji*; [6] *Appunni Nair* v. *Isack Mackadan*, [7] and *Kanailal Mookerjee* v. *Kali Mohan Chatterjee* [8]. The question would thus always be one of construing the surety bond in order to decide whether a compromise decree discharges the surety or not.

Turning to the bond passed by respondents Nos. 2 and 3 in the present case, it is impossible to hold that it was within the contemplation of the sureties when they executed the bond that the parties would amicably settle their dispute in the manner they have done. At the time when the surety bond was executed, the dispute pending between the parties was the money dispute the decision of which would have ended in an order directing one party to pay another a certain specified amount. The compromise decree has introduced complicated provisions for the satisfaction of the appellant's claim against respondent No. 1. Under the compromise decree, the appellant would have been entitled to take possession of the properties in suit and in that process, rival claims of both the parties would have been adjusted. We are satisfied that the material terms in clause 5 of the surety bond could not be said to be attracted when the parties chose to settle their dispute in accordance with the terms of the compromise agreement. Besides, it is clear that the compromise agreement gave time to respondent No. 1 and the decree was, therefore, not executable immediately after it was passed. In substance, by the decree, time was granted though it is true that time was granted to both the parties to discharge their respective obligations under

(6) (1930) I.L.R. LV Bom 97. (7) (1919) I.L.R. 43 Mad. 272.
(8) A.I.R. 1957 Cal 645.

1962

Raja Bahadur Dhanraj Girji v. Raja P. Parthasarathy Rayaninvaru

Gajendragadkar J.

the compromise. That is another reason why we think the liability of respondents No. 2 and 3 under the surety bond is discharged as a result of the compromise decree.

There is yet another consideration which is relevant in dealing with this point. It is common ground that amongst the disputes which were settled between the parties was included the claim made by respondent No. 1 for damages on account of the fact that the appellant had created occupancy rights in favour of strangers in respect of the properties which were in his possession as a mortgagee. This claim is plainly outside the proceedings contemplated and permitted by the order passed by the Privy Council, and yet this dispute has been settled by the compromise decree which means that a matter which was strictly not germane to the judicial proceedings in which the surety bond was executed has been introduced by the parties in their final settlement. Therefore, we are satisfied that though the appellant succeeds in showing that he was not a defaulter, he cannot seek his remedy against the surety, respondents Nos. 2 and 3.

An attempt was made by Mr. Kuppuswamy to suggest that respondents Nos. 2 and 3 should not have been allowed to raise this point before the High Court, because no such point had been taken by them in the trial Court. We do not think there is any substance in this argument. It is true that respondents No. 2 and 3 did not take any such contention in the trial Court, but that may be because parties had then concentrated on the issue as to who was the defaulter. But when the appeals were argued before the High Court, this point was specifically urged by respondent No. 2 and it has been considered by the High Court. No doubt Mr. Ku puswamy ingeniously suggested that this was not a pure question of law and so, the High Court should not have allowed it to be raised for the first time in appeal. The argument is that if the point had been raised in the Court of first instance, the appellant would have shown that respondents Nos. 2 and 3 had consented to the compromise agreement between the appellant and respondent No. 1. This is clearly an afterthought. If the appellant's case was that respondents Nos. 2 and 3 were not discharged by the compromise decree because they were consenting parties to the compromise agreement, they should have stated so before the High Court and the High Court would then have either called for a finding on that issue or would have refused permission to respondents Nos. 2 and 3 to raise that point.

The result is, Civil Appeal No. 345 of 1959 fails and is dismissed with costs.

Appeal dismissed.