

Before Rajendra Nath Mittal, J.

AMIN LAL—*Petitioner.*

versus

M/S FARIDABAD AUTO INDUSTRIES PRIVATE LTD.

—*Respondent.*

Civil Revision No. 532 of 1978.

October 5, 1978.

Code of Civil Procedure (V of 1908)—Order 38, Rule 5—Indian Contract Act (IX of 1872)—Section 135—Equitable principles contained in section 135—Whether applicable to surety bonds executed under Order 38, Rule 5—Compromise in the judicial proceeding in which the surety bond is executed—Liability of the surety—Whether discharged.

Held, that the equitable principles contained in section 135 of the Indian Contract Act, 1872 are applicable to surety bonds executed in favour of the Court under Order 38, Rule 5 of the Code of Civil Procedure, 1908. (Para 3)

Held, that according to section 135 of the Act 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. If the terms of the surety bonds show that the compromise between the parties was within their contemplation and the surety executed the bond knowing this fact, his liability would accrue under the compromise decree. But if the terms of the bond show that there was no such contemplation between the parties, the compromise between them will effect the discharge of the surety. In case some extraneous matters to the judicial proceeding are introduced in the compromise, the surety would also stand discharged. (Para 3).

Application under section 115 C.P.C. for the revision of the order of Shri J. D. Chandna, Sub-Judge, 1st Class, Ballabgarh dated 7th March, 1978 rejecting the objection petition of the objector.

Faridabad Auto Industries versus Paras Mechanical.

Claim in Appeal: For the reversal of the order of the Lower Court.

Gopi Chand, Advocate, for the Petitioner.

G. C. Mittal, Advocate, for the Respondent.

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JUDGMENT

R. N. Mittal, J.

(1) Briefly the facts are that Messrs Spensor Lock Company, through Mr. Ajit Kumar Mittal, filed a suit for the recovery of Rs. 50,327.50, due as arrears of licence fee against Paras Mechanical Industries and Bhima Products, through its partner Mr. Surinder Mela Ram Bhimra. The plaintiff also moved an application under Order 38, rule 5 of the Code of Civil Procedure, for the attachment of the property of the defendant. The Court, on the basis of that application, asked the defendant to furnish security for certain amount or to appear and show cause as to why it should not furnish security. In the meantime, it also ordered conditional attachment of some of its property. The defendant filed a bond, dated July 23, 1975 of one Devi Dayal Bhatia, whereby he agreed to pay to the Court at its order a sum of Rs. 60,000 if the defendant failed to produce and place the attached property at its disposal. This bond had to expire on August 11, 1975. On July 26, 1975 Amin Lal petitioner furnished another bond for the production of the attached goods at the disposal of the Court when required by it, or the value of the same or such portion thereof as may be sufficient to satisfy the decree if any, and in default of so doing, he bound himself to pay to the Court a sum of Rs. 60,000. On August 1, 1975, the plaintiff entered into a compromise with the defendant on the basis of which the plaintiff was given a decree of Rs. 60,000 payable in instalments of Rs. 5,000 per mensem on the same day. The decree further provided that in case of default in payment of any one instalment, the entire decretal amount would be recoverable in lump sum either from the defendant or from its surety Amin Lal.

(2) The judgment-debtor did not pay the decretal amount. The decree-holder, therefore filed execution application and prayed that the decretal amount be realised from Amin Lal surety. He filed an objection petition, dated March 3, 1976, *inter alia*, pleading that the decree was not binding upon him as the plaintiff had entered into a compromise with the defendant, in terms of which it agreed to pay the amount in instalments. The objection petition was contested by the decree-holder. The executing Court framed the following issues:—

1. Whether the decree in question cannot be executed against Amin Lal, objector on the grounds contained in the objection petition, dated March 3, 1976 ?
2. Relief.

It came to the conclusion that the liability of Amin Lal surety did not cease with the passing of a compromise decree. Consequently it dismissed the petition. Amin Lal surety has come up in revision against the order of the executing Court to this Court.

(3) It is argued by the learned counsel for the petitioner that the principle contained in section 135 of the Contract Act is applicable in the case of sureties, who furnish surety. According to him, in the present case, the terms of the surety bond go to show that the petitioner did not agree that the respondent could enter into a compromise with the judgment-debtor. He also argues that by the terms of the compromise, certain other disputes were also settled between the respondent and the judgment-debtor which complicated the matters further. In the circumstances he submits that the petitioner stood discharged and is not liable to pay the decretal amount.

(4) I have given, due consideration to the argument of the learned counsel. Section 135 of the Contract Act says 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. It has been settled by the Supreme Court in *Raja Bahadur Dhanraj Girji v. Raja P. Parthasarthy Rayanimvaru and others* (1), equitable principles contained in section 135 of the Indian Contract Act are applicable to surety bonds executed in favour of the Court. The relevant observations of Gajendragadkar J., as he then was, are as follows:—

“Although section 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.”

It is now to be seen as to whether the surety in the present case stood discharged as the respondent entered into a compromise with

(1) (1963) 3 S.C.R. 921.

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the judgment-debtor according to which it (judgment-debtor) agreed to pay the decretal amount in instalments of Rs. 5,000 per mensem. It has also been settled by the Supreme Court in *Raja Bahadur Dhanraj Girji's* case that if the terms of the surety bond show that amicable settlement was within the contemplation of the parties to the suit and the surety executed the bond knowing this fact, his liability could accrue under the compromise decree. But if the terms of the bond show that there was no such contemplation between the parties, the compromise between the parties will effect the discharge of the surety. It is also observed therein that if some extraneous matters to the judicial proceedings are introduced, even then the surety stood discharged. It will be appropriate to reproduce the observations of his Lordship which are as follows:—

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

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.

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.”

In view of the above observations, it will be necessary to go into the terms of the compromise. It has already been mentioned above that

a decree was passed in favour of the decree-holder against the judgment-debtor for recovery of Rs. 60,000 and the decretal amount was to be paid in instalments of Rs. 5,000 per mensem. Thus time extending to one year was granted to the judgment-debtor to make payment of the decretal amount. In addition to granting of time, the decree-holder and judgment-debtor compromised some extraneous matters and in pursuance of the compromise, the decree-holder gave adjustment of some amount which was lying with it as security and took certain installations fitted in the leased premises. The relevant terms of the compromise are contained in clauses 5, 6 and 7, which are as follows:—

- “5. That the defendant has undertaken to remove the machinery, etc., installed in the premises in dispute within a week of the execution of this agreement, at its own costs and expenses.
6. That the arrears of dues for use and occupation of the said premises by the defendant after the institution of the said suit comes to Rs. 73,700 which amount includes a sum of Rs. 67,000 for a period of 20 months, i.e., commencing from 1st December, 1973 to 31st July, 1975 at the rate of Rs. 3,350 per month. The balance of Rs. 6,700 is towards the interest accrued thereon.
7. That the said amount of Rs. 73,700 has been agreed to be adjusted in the manner hereinafter described. The costs of the cables and electric fittings, etc. installed by the defendant in the suit premises at his cost have been assessed at Rs. 15,000. In addition to the above amount the defendant has already deposited a sum of Rs. 10,000 as an advance with the plaintiff at the time of the original agreement of licence. The defendant has further paid a sum of Rs. 15,000 in cash today to the plaintiff the receipt of which amount the plaintiff hereby acknowledges. Thus the total amount thus received by the plaintiff from the defendant comes to Rs. 40,000. The plaintiff has agreed to surrender the balance of Rs. 37,700 and discharges the defendant from the liability of the above amount.”

From the reading of the above-said compromise, it is evident that certain concessions were given by the decree-holder to the judgment-debtor and it was allowed to remove certain machinery, etc. from the

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premises in dispute. It agreed to give certain installations fitted in those premises to the decree-holder towards payment of subsequent rent/damages of the property. The value of these installations was assessed at Rs. 15,000. The judgment-debtor also paid Rs. 15,000 to the decree-holder. In case the decree-holder had not entered into the compromise with the judgment-debtor, the installations, etc. might have remained as security with the surety. He might have taken benefit of Rs. 10,000 also which was lying as advance with the decree-holder. From the terms it can be safely inferred that the compromise was prejudicial to the interests of the surety. The observations of the Supreme Court fully apply to the case. From the surety bond no inference can be drawn that the surety had agreed that the decree-holder could enter into a compromise with the judgment-debtor. In the aforesaid circumstances, in my view, the observations of the Supreme Court fully cover the present case, and the surety, in view of the compromise between the decree-holder and the judgment-debtor, stood discharged.

(4) In the above conclusion, I also get support from the observations of a Division Bench of the Lahore High Court in *Prithi Singh v. Ram Charan Aggarwal*, (2). In that case a surety bond was executed in favour of the Court under Order 38 rule 5 of the Code by the surety and arrangement was reached between the creditor and the principal debtor without the surety's knowledge on the basis of which a decree was passed in favour of the creditor and the principal debtor was allowed to pay the amount in instalments. It was observed by the learned Bench that a contract between the creditor and the debtor by which the former had promised to give time to the debtor and instalments were fixed without the surety's consent or even knowledge which prevented him to require the creditor from calling upon the principal debtor to pay off the entire debt or to pay the entire debt himself and then to recover it from the principal debtor comes within the terms of sections 135, 139 and 141 and the surety is discharged from his liability. In the present case, in addition to granting time to the judgment-debtor for payment of the decretal amount, certain other concessions were given to him on account of which the surety has been adversely affected. A similar view was taken by a Division Bench of the Kerala High

(2) A.I.R. 1944, Lahore 428.

Court in *Kurian v. The Alleppey C. C. M. S. Society*, (3). In that case a compromise was arrived at between the creditor and the principal debtor during the pendency of a suit in terms of which a decree was passed in favour of the creditor for a certain amount and the judgment-debtor was given nine months' time to make payment. Earlier a surety bond was furnished by the surety in favour of the Court. It was held that the agreement between the creditor and the principal debtor to give nine months' time to the latter for paying off the debt discharged the surety. With great respect I am in agreement with the observations of the learned Benches in the aforementioned cases.

(5) The learned counsel for the respondent has strenuously urged that granting time by the creditor to the principal debtor for making the payment of the decretal amount determined on the basis of the compromise or to allow the principal debtor to make payment of the decretal amount in instalments, does not discharge the surety. He referred to *Jatindra Narayan Deb v. Gauranga Chandra Dutta Banik and another*, (4), and *Mohan Lal v. Suraj Mani and another*, (5), in support of his contention. The Supreme Court has firmly laid down that the terms of the surety bond have to be taken into consideration to determine as to whether the surety had agreed that the judgment-debtor could suffer a decree on the basis of compromise and if the court comes to a conclusion that the surety knew that he might be liable under the compromise decree, then he would remain liable under such decree. *Jatindra Narayan Deb's* case was decided before the decision of *Raja Bahadur Dhanraj Girji's* case. In this situation, it will not be proper to place reliance on the said case. In *Mohan Lal's* case, the learned Full Bench came to the conclusion that at the time of execution of the surety bond, passing of the consent decree was within the contemplation of the parties. Thus the observations in that case are to be taken in the context of the facts therein. In my view, the counsel for the respondent cannot take any benefit from the said observations.

(6) After taking into consideration the facts and circumstances of the case I am of the opinion that in the present case, in view of

(3) A.I.R. 1975 Kerala 44.

(4) A.I.R. 1957, Assam 71.

(5) A.I.R. 1973 Jammu and Kashmir 92 (F.B.).

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the compromise between the decree-holder and the judgment-debtor, the surety stood discharged.

(7) Faced with this difficulty, the learned counsel for the respondent sought to argue that no revision petition was maintainable against the order of the executing Court. According to him, if two views can be taken of the same matter and the first Appellate Court on erroneous view of law decided the matter one way, that cannot be said to be an error of jurisdiction. I am not convinced with this contention of the learned counsel. In the present case, in my view, the Court has acted in exercise of its jurisdiction illegally and in such situation this Court can interfere with its order under section 115 of the Code. It provides that if a subordinate Court acted in the exercise of its jurisdiction illegally, the High Court may make such order as it thinks fit. In cases of this type this Court can always go into the matter and upset the judgment of the Courts below.

(8) For the reasons recorded above, I accept the revision petition, set aside the order of the Court below and discharge the surety. No order as to costs.

H. S. B.

Before B. S. Dhillon and S. S. Dewan, JJ.

COMMISSIONER OF INCOME TAX—Applicant.

versus

DILBAGH RAI—Respondent.

Income Tax Reference No. 54 and 55 of 1974.

October 5, 1978.

Income Tax Act (XLIII of 1961)—Section 147—Individual assessee becoming a partner in a firm without investing any capital—Such assessee by declaration throwing his share in the firm the common hoch porch of the Hindu Undivided Family—Hindu Undivided Family having no nucleus on the date of declaration—Share of a partner—Whether property—Share income from the firm—Whether to be assessed in the hands of the Hindu Undivided Family.