

BANK OF BIHAR LTD.

v.

DAMODAR PRASAD & ANR.

August 8, 1968

[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Code of Civil Procedure, (5 of 1908) O. XX r. 11(1)—Direction to creditor to enforce decree against surety after exhausting remedies against principal—If justified.

The appellant-creditor lent moneys to the first respondent on the guarantee of the second respondent. The appellant filed a suit against the respondents for recovery of the amount due, and the suit was decreed. While passing the decree, the Trial Court directed that the appellant would not be at liberty to enforce the decree against the second respondent until he had exhausted his remedies against the first respondent. The appellant challenged this direction. The High Court dismissed the appeal. In appeal on certificate, this Court :—

HELD :—The direction must be set aside.

In the absence of some special equity the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. For making an order under O.XX r. 11(1) of C.P.C. the court must give specific reasons. The direction postponing payment of the amount decreed must be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal was of the vaguest character. It was not stated how and when the creditor would exhaust his remedies against the principal. [622 A, F-G]

It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under s. 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. The impugned direction cannot be justified under O.XX r. 11(1). Assuming that apart from O.XX r. 11(1) the Court had the inherent power under s. 151 to direct postponement of the execution of the decree, the ends of justice did not require such postponement. [623 A-C]

Lachhman Joharimal v. Babu Khandu and Surety Tukaram Khandoji. (1869) 4 Bom High Court Reports, 241.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1109 of 1965.

Appeal from the judgment and decree dated December 3, 1962 of the Patna High Court in Appeal from Original Decree No. 300 of 1959.

S. Mitra and R. C. Prasad, for the appellant.

A *K. K. Sinha*, for respondent No. 2.

The Judgment of the Court was delivered by

Bachawat, J. The plaintiff Bank lent moneys to defendant No. 1 Damodar Prasad on the guarantee of defendant No. 2 Paras Nath Sinha. On the date of the suit Damodar Prasad was indebted to the plaintiff for Rs. 11,723.56 nP on account of principal and Rs. 2,769.37 nP on account of interest. In spite of demands neither he nor the guarantor paid the dues. The plaintiff filed a suit against them in the Court of the Subordinate Judge, Ist Court, Patna, claiming a decree for the amount due. The Trial Court decreed the suit against both the defendants. While passing the decree, the Trial Court directed that the "plaintiff bank shall be at liberty to enforce its dues in question against defendant No. 2 only after having exhausted its remedies against defendant No. 1". The plaintiff filed an appeal challenging the legality and propriety of this direction. The High Court dismissed the appeal. The plaintiff has filed the present appeal after obtaining a certificate.

D The guarantee bond in favour of the plaintiff bank is dated June 15, 1951. The surety agreed to pay and satisfy the liabilities of the principal debtor upo Rs. 12,000/- and interest thereon two days after demand. The bond provided that the plaintiff would be at liberty to enforce and to recover upon the guarantee notwithstanding any other guarantee security or remedy which the Bank might hold or be entitled to in respect of the amount secured.

F The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under sec. 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor.

G Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in *Wright v. Simpson*⁽¹⁾. "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor." In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.

(1) 6 Ves. Jun. 714, 734 : 31 E.R. 1272, 1282.

Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In *Lachman Joharimal v. Babu Khandu and Surety Tukaram Khandoji*⁽¹⁾ the judge of the Court of Small Causes, Ahmedabad, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties presented applications for the imprisonment of the sureties before levying execution against the principals. The judge stated that the practice of his court had been to restrain a judgment creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C.J. and Melvell, J. agreed with this opinion and observed :—

“The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.”

It is now suggested that under Order XX r. 11(1) and sec. 151 of the Code of Civil Procedure the Court passing the decree had the power to impose the condition that the judgment-creditor would not be at liberty to enforce the decree against the surety until the creditor has exhausted his remedies against the principal. Order XX r. 11(1) provides that “where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.” For making an order under O. XX r. 11(1) the Court must give sufficient reasons. The direction postponing payment of the amount decreed must be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal is of the vaguest character. It is not stated how and when the creditor would exhaust his remedies against the principal. Is the creditor to ask for imprisonment of the principal? Is he bound to discover at his peril all the properties of the principal and sell them; and if he cannot, does he lose his remedy against the surety? Has he to file an insolvency petition against the principal? The Trial Court gave no reasons for this extraordinary direction. The Court rejected the prayer of the principal debtor for payment of the decretal amount in instalments as there was no evidence to show

(1) (1869) 4 Bom. High Court Reports, 241.

- A that he could not pay the decretal amount in one lump sum. It is therefore said that the principal was solvent. But the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under sec. 140 of the Indian Contract Act, and he may then recover the amount from the principal.
- B The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. The impugned direction cannot be justified under O. XX r. 11(1).
- C Assuming that apart from O. XX r. 11(1) the Court had the inherent power under s. 151 to direct postponement of execution of the decree, the ends of justice did not require such postponement.

- D In the result, the appeal is allowed, the direction of the court below that the "plaintiff-bank shall be at liberty to enforce its dues in question against defendant No. 2 only after having exhausted its remedies against defendant No. 1" is set aside. The respondent Dr. Paras Nath Sinha shall pay to the appellant costs in this Court and in the High Court.

Y.P.

Appeal allowed.