

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 17TH FEBRUARY 2006 / 28TH MAGHA, 1927

CRP.No. 1613 of 1995(G)

AGAINST THE ORDER DATED 16/08/1994 IN EP.21/90 IN
OS.168/1990 of MUSNIFF'S COURT,ADOOR

REVN. PETITIONER: DECREE HOLDER:

K.VARGHESE, MANAGING PARTNER,
VIKING TYRES, ADOOR VILLAGE,
ADOOR CENTRAL.

BY ADV. SRI.S.CHANDRASENAN

RESPONDENTS: JUDGMENT DEBTOR:

BHANUVIKRAMAN UNNITHAN, MANAGING DIRECTOR,
VIMUKTHA BHADA MOTOR SERVICE SOCIETY,NO.4106,
ERATHU HOUSE, VADAKKEDATHUKAVE P.O.

BY ADV. SRI.M.NARENDRA KUMAR

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 17/02/2006, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

K.T. SANKARAN, J.

C.R.P. NO. 1613 OF 1995

Dated this the 17th day of February, 2006

ORDER

The decree holder is the revision petitioner. He challenges the order passed by the executing court dated 16.8.1994, by which the executing court directed the decree holder to proceed against the Vimuktha Bhada Motor Service Society No.4106, and not against its erstwhile Managing Director, namely, Bhanuvikraman Unnithan.

2. The Vimuktha Bhada Motor Service Society No.4106 (hereinafter referred to as 'the Society') is a society registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 (Act XII of 1955). The suit was filed by the revision petitioner against the Society for realisation of money. Pending the suit, a bus bearing Registration No.KLB 4125, belonging to the Society, was attached before judgment on 22.9.1990. Later, the suit was compromised between the parties and a compromise petition dated 1.10.1990, was filed. On the same date on which the compromise was

signed by the parties, namely on 1.10.1990, a surety bond was executed and presented before the Court which was signed by P.Kuttappan - the Managing Director of the Society, Bhanuvikraman Unnithan- Secretary of the Society and one B.Narayana Pillai, describing himself as surety. The surety bond states that the bus was attached and produced before the Court and was in the custody of the Court. The executants of the surety bond agreed and undertook to produce the bus before Court in case it was released to them. It is also stated in the bond that if the executants of the bond failed to produce the bus, they would be liable not only for the plaint claim but also for all other consequences personally as well as out of their properties. On accepting the surety bond dated 1.10.1990, the bus was released on 3.10.1990. The compromise petition dated 1.10.1990 was accepted by the Court on 5.10.1990 and a decree in terms of the compromise was passed. As per the terms of the compromise, the defendants agreed to pay the plaint amount in monthly instalments at the rate of Rs.750/- per month. If default was committed, the decree holder would be entitled to realise the whole amount out of the properties of the judgment debtor as well as out of the bus, KLB 4125. It is provided in the compromise petition that the plaintiff agreed to release the bus to the

defendant on “ moonnamsthanam”.

3. Default was committed in payment of the amount as per the terms of the compromise. Execution was levied by the decree holder. It would appear that Bhanuvikraman Unnithan was arrested and produced before Court on 3.7.1992. Later on 3.7.1992 itself, Bhanuvikraman Unnithan filed E.A.No.53 of 1992 stating that he signed the compromise in his capacity as the Managing Director of the Society and that the present Managing Director is one Kuttappan Nair. It is also stated therein that Bhanuvikraman Unnithan has no personal liability and, therefore, he may be exonerated. As per order dated 3.8.1992, the executing court held that as per the terms of the decree, on the failure of the judgment debtor to pay the decree debt, the decree holder is at liberty to realise the amount by proceeding against the assets of the judgment debtor which includes the vehicle in question. It is also held that Bhanuvikraman Unnithan, being no longer the Managing Director of the Society, is not personally liable for the decree amount. Therefore, E.A.No.53 of 1992 was allowed and the decree holder was directed to proceed against the assets of the Society.

4. It would appear from the records that the proceedings were not closed against Bhanuvikraman Unnithan and the other executants of the surety bond on the passing of the order in E.A.No.53 of 1992. Notice was issued to all the three executants of the surety bond on 18.11.1992, directing them to produce the vehicle before Court on 9.12.1992. On receipt of that notice on 25.11.1992, Bhanuvikraman Unnithan moved E.A.No.9 of 1993, stating that the vehicle was in the possession of Kuttappan Nair, the then Managing Director of the Society. Kuttappan Nair is the custodian of the vehicle and no notice was issued by the Court to him. Bhanuvikraman Unnithan prayed, in case Kuttappan Nair failed to produce the vehicle, the former may be granted time to produce the vehicle. It would appear that the Court ordered to issue notice to the then Managing Director as per order dated 11.6.1993, but later, it was reviewed on the application of the decree holder and notice was not sent. The decree holder stated that the Society became extinct and that Kuttappan Nair was no longer the Managing Director. The decree holder stated that as surety, Bhanuvikraman Unnithan is personally liable to produce the vehicle.

5. After hearing the parties, the executing court passed the impugned

order dated 16.8.1994, holding that the bond was executed by Bhanuvikraman Unnithan in his capacity as the Managing Director of the Society. (This is a mistake. Bhanuvikraman Unnithan was the Secretary of the Society.) The executing court directed the decree holder to proceed “against the Society on its other assets”. It was held that as per the compromise decree, the custody of the vehicle was to vest with the Society. It is noted in the order that the vehicle in question was sold to a third party as per the order of the High Court in O.P.No.9726 of 1990.

6. Copy of the judgment in O.P.No.9726 of 1990 was produced by the revision petitioner. The records in respect of O.P.No.9726 of 1990 were called from the office. On verification, it is seen that the Original Petition was filed by the Society, represented by its Managing Director. The affidavit accompanying the Original Petition disclosed that Kuttappan Nair was the Managing Director at that time. The original petition was filed against the Kerala Financial Corporation and its District Manager. When attempt was made to seize the vehicle in question in realisation of the dues to the Kerala Financial Corporation, the Society offered to sell the vehicle, KLB 4125, and pay the entire amount due to the Kerala Financial

Corporation. That suggestion was accepted by the Corporation and the Original Petition was disposed of accordingly. It is to be noted that O.P.No.9726 of 1990 was filed on 25.10.1990, within a period of one month from the date of release of the vehicle in terms of the surety bond executed by Bhanuvikraman Unnithan and two others.

7. The question that arises in this revision is whether Bhanuvikraman Unnithan has any personal liability on his failure to produce the vehicle before Court. Learned counsel for the respondent submitted that the contention of the decree holder is barred by res judicata in view of the order dated 3.8.1992 in E.A.No.53 of 1992. It is also submitted by him that the vehicle was released to the Society itself and not to the executants of the bond. He also raised a contention that the bond was executed on 1.10.1990 while the compromise petition was accepted and a compromise decree was passed only on 5.10.1990. As per the terms of the compromise, custody of the vehicle should vest in the Society. Therefore, the counsel contends that the liability, if any, as per the surety bond stand extinguished in terms of the compromise decree. He relied on the decision in **Amar Chand** v. **Bhano and another** (AIR 1995 SC 871) in this regard. Counsel for the

respondent also raised a contention that under Section 11 of the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 the decree shall not be executed against the property, movable or immovable, or against the body of the officer of the Society.

8. Section 145 of the Code of Civil Procedure provides for enforcement of liability of surety. It reads thus:

“145. Where any person has furnished security or given a guarantee----

(a) for the performance of any decree of any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed in the manner herein provided for the execution of decrees, namely:

(i) if he has rendered himself personally liable, against him to that extent;

(ii) if he has furnished any property as security, by sale of

such property to the extent of the security;

(iii) if the case falls both under clauses (i) and (ii), then to the extent specified in those clauses,

and such person shall be deemed to be a party within the meaning of section 47.

Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

The opening wordings of Section 145 states that ``where any person has furnished security or given a guarantee". Section 145 was amended by the Code of Civil Procedure Amendment Act, 1976 and before the amendment the wording was thus: `` where any person has become liable as surety". The words ``has furnished security or given a guarantee" were inserted by the Amendment Act of 1976 instead of the words ``become liable as surety". Clause © of Section 145 takes in any order by which a condition is imposed on any person and a person has furnished security or given a guarantee for the fulfilment of such condition. If Section 145 is attracted, such person shall be deemed to be a party within the meaning of Section 47 and the decree or order, as the case may be, may be executed against him. The corresponding provision under the 1882 Code was Section 283 which

provided that whenever a person has, before passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. Section 283 of the 1882 Code applied only to surety bonds for the performance of the decree and it did not extend to surety bonds for payment of money or fulfillment of any condition imposed as per an order of the court. The object of Section 145 is to enable the party for whose benefit the security has been given to enforce such security by executing the decree or order against the surety to the extent to which he has rendered himself personally liable in the same manner as if the surety was a party to the decree or order. Where a person has rendered himself liable or in other words, undertaken liability by giving a guarantee for the performance of a decree or for fulfillment of any condition on the basis of the bond executed by him and approved by the Court, it is not necessary to institute a suit for enforcing the surety bond. The object of the Section is to provide a summary remedy and to avoid further litigation to enforce the surety bond. Where a third party has executed the surety bond, he shall be deemed to be a party within the meaning of Section 47 which indicates that

a separate suit is not necessary for enforcing that bond. A tripartite agreement involving the decree holder, the judgment debtor and the surety is not necessary in view of the express wordings ``given a guarantee" in Section 145. If there are more sureties than one who executed the surety bond, their liability would be joint and several.

9. The question whether a security bond which does not satisfy the requirements of Section 145 could be enforced by exercising the inherent powers of the Court was considered in **Krishnan v. Dorarajan Chettiar** (1980 KLT 831). The decision of the Travancore-Cochin High Court in **Ouseph Korath v. Gopalan Nair and another** (AIR 1952 TC 237= 1951 KLT 627) was relied on in 1980 KLT 831 and held that the bond was enforceable under the inherent powers of the Court. That there was no order of the Court specifically entrusting the property to the surety is clear from the following narration of facts in paragraph 5 of the judgment therein:

``.. It is true that the bond in the present case was not executed for the performance of any decree; neither was it for the restitution of any property. It contains an undertaking to look after the crops and produce the same at the place and time as ordered by the Court and in default to deposit Rs.3,450/- or such amount as would be ordered by the Court.

At the same time the bond does not show that the entrustment of the crops and the execution of the bond were as per specific orders of the Court, which is one of the conditions required for the bond to fall under clause © of S.145 of the Code of Civil Procedure."

A Full Bench of this Court in Meenachil Panchayat v. Sivasankara Marar (2003(2) KLT 914 (F.B.)), held that the order of the Court creates the liability under the security bond and not by mere execution of the bond. It was held thus:

``According to us, it is the order of the Court which creates liability. The terms of bond are incorporated in the order and hence liability is created not by mere execution of the bond."

In the case on hand, the vehicle was released on the acceptance of the bond by the Court, on 3.10.1990. It is true that the compromise decree was accepted on 5.10.1990, in which there is a clause that the vehicle was released to the Society on ``moonnamsthanam". The contention of the respondent as noted earlier is that the liability under the bond stood extinguished by the acceptance of the compromise petition. I do not agree. The bond as well as the compromise petition were executed on

the same date, namely, 1.10.1990. The compromise as well as the release of the vehicle is part of the same package. The decree holder could realise the decree amount by proceeding against the vehicle on a decree being passed in his favour subsequently as the vehicle was under attachment before judgment. But for the compromise and the execution of the surety bond, the vehicle would not have been released by the Court. Had the attachment continued any private alienation could be avoided. That situation was obviated by the execution of the surety bond by which the executants therein unconditionally undertook to produce the vehicle as and when directed by the Court. The Court accepted it and relying on their undertaking released the vehicle. Thereafter, the executants of the surety bond cannot be heard to say that they are not liable under the bond and the liability is only on the Society. Even if Banuvikraman Unnithan ceased to be the Secretary, his liability under the bond would not cease since that liability has a separate existence unconnected with his position in the Society. Had he wished to exonerate himself from the liability under the security bond, necessarily he should have applied to the Court and got favourable orders. Having not done so, he cannot be heard to contend that he has no liability under the bond

and that he has no liability to produce the vehicle. If such contentions are accepted, there would be no sanctity for security or guarantee and any party to the proceeding or any other person bound by such security or guarantee could easily defeat any decree or order that would be passed by the court. The order of the court based on a solemn undertaking by a party or any person for the benefit of the party, should not become inexecutable, due to any subsequent change in the constitution of the party (Society in this case) for whose benefit the order was passed. The Court has a duty to execute and implement its orders and it cannot plead helplessness in the matter of execution of its decrees and orders. A party or a person on his behalf cannot be allowed to circumvent the orders of the Court on the basis of subsequent events to which the opposite party is not a party. The plaintiff/decreed holder is not bound by any reconstitution or change in the administration of the Society. The order is liable to be implemented in favour of the decreed holder. The executing court was not justified in telling the decreed holder that he cannot take advantage of the undertaking made by the surety while getting an order for release of the bus.

10. In Amar Chand v. Bhano and another (AIR 1995 SC 871), the surety had undertaken on behalf of the defendant for the due performance of the decree. Subsequently, the decree holder compromised with the principal debtor and a compromise was recorded in that behalf without reference to the surety. It is in that context, the Supreme Court held that the full satisfaction of the decree relieves the guarantor or surety from the obligation under the decree. It was held by the Supreme Court thus:

``A conjoint reading of these clauses do clearly indicate that when a person has undertaken as a guarantor or a surety for the due performance of a decree or any part thereof, to the extent of the undertaking or guarantee, the guarantor or the surety is personally liable for due performance of the liability of the judgment-debtor to the decree-holder and the later is entitled to proceed against him in the manner laid down in S.145. But When the decree-holder himself had compromised with the principal debtor and had discharged himself from the liability to the performance of the decree, in law it must be a full satisfaction of the decree under S.47 and the relevant rule in O.21, C.P.C. Full satisfaction recorded in that behalf relieves the guarantor or surety from the obligation with the decree-holder and the decree-holder cannot seek any further remedy against the surety."

In Amar Chand's case, the Supreme Court has further held thus:

``In case the compromise was with the consent of the guarantor or surety compromise with the principal judgment-debtor is for other liability other than the extent of the liability undertaken by the guarantor or surety, in that event the guarantor or surety is not relieved from his liability for due performance of the decree..."

In the present case, the liability of the surety as disclosed in the surety bond is distinct and different from the liability created on the Society as per the terms of compromise. The terms of the surety bond are not contrary to the terms of the compromise decree. The terms under the compromise decree could be reconciled with the terms under the surety bond and they did not run contra to each other. By a conjoint reading of the surety bond as well as the compromise decree, it is clear that the liability of the sureties is not for the decree amount but their liability is to produce the vehicle as and when directed by the Court. To that extent alone, the order dated 3.8.1992 in E.A.No.53 of 1992 has become final. I hold that that order has binding effect only to that extent and not to the extent of barring further proceedings, as contended by the learned counsel for the respondent.

11. The learned counsel for the respondent relied on Section 11 of the

Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act. Section 11 reads as follows:

“11. Enforcement of decree against society:- If a decree is against the person or officer named on behalf of the society, such decree shall not be executed against the property, movable or immovable, or against the body of such person or officer, but against the property of the society.”

Learned counsel also relied on the decision in **Velayudha Kurup v. Deputy Tahsildar** (1994 (2) KLT 219). In Velayudha Kurup's case, the seven appellants therein signed a bond in favour of the Khadi Board agreeing to repay the amount borrowed from the Khadi Board for the purpose of a charitable society of which the appellants were members. It was contended in that case that the appellants therein would be liable even if they ceased to be Directors of the Society. That question was not considered since it was found that the appellants were Directors not only at the time of execution of the bond, but they continued to be Directors at the time of disposal of the case and they never ceased to be Directors of the Society. However, it was held that Section 11 has no application when the office bearers entered into separate bond with the Khadi Board on their own volition.

12. Section 11 of Act XII of 1955 only bars execution of a decree against the Society by proceeding against the property or person of the officers of the Society. The reason is that the decree is against the Society and the officers represented the Society in the litigation. In such a case, the liability under the decree is that of the Society and not of its officers. A surety bond executed by an officer of the Society making himself liable personally, though executed for securing a benefit for the Society, would not come within the ambit of Section 11. A person who executed such a bond cannot take shelter under Section 11 and say that his liability ceased on his ceasing to be an officer of the Society. The liability under the bond is personal though it is for the benefit of the institution in which the executant works. If such officer wants to exonerate himself from the liability under the bond, he has to approach the Court and get orders in his favour. He cannot take shelter under Section 11 and disclaim the liability under the bond.

13For the foregoing reasons, I am of the view that the order passed by the court below is illegal and unsustainable. It is accordingly, set aside. I

hold that Bhanuvikraman Unnithan has personal liability as per the terms of the surety bond executed by him. This order will not preclude the Court from issuing notice to the other two executants of the surety bond nor does it preclude the decree holder from moving the court to proceed against the assets of the Society for realisation of the decree amount.

The Civil Revision Petition is allowed as indicated above. No order as to costs.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

C.R.P.NO. 1613 OF 1995

ORDER

17th February, 2006
