RATNAMASARI v. AKILAND-AMMAL.

BENSON, J.—If the question were *res integra* I should attach great weight to the arguments put forward by my learned brother, whose judgment has just been delivered, to show that article 119 is applicable only to a suit where a declaration without further relief is sought; but I do not consider myself free to disregard what appears to be the necessary consequence of the judgment of the Privy Council in the case of *Jagadamba Chaodhrani* v. *Dakhini Mohun*(1) and of the reasoning by which that judgment is supported.

I therefore concur in the conclusion of my learned brother Moore, J., and dismiss the appeal with costs. It is much to be desired that where, as in this case, there is a direct conflict between the rulings of the several High Courts on matters of great and general importance, the Legislature should take an early opportunity of so amending the law as to remove doubts as to its true meaning.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 18, 29.

PUTTI NARAYANAMURTHI AYYAR (DEFENDANT), APPELLANT,

v.

MARIMUTHU PILLAI (PLAINTIFF), RESPONDENT.*

Contract Act—IX of 1872, s. 145—Implied promise by principal debtor to indemnify surety—Joint decree against two judgment-debtors—Satisfaction by one of them by execution of promissory note—Suit by him for contribution Maintainability—"Sum paid under the guarantee."

Two persons jointly executed a negotiable promissory note payable to S for Rs. 1,000, each receiving Rs. 500 out of the consideration. S subsequently sued them on the note and obtained a decree against them jointly for Rs. 1,480, being the amount due under the note, costs, etc. That decree was executed

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

* Second Appeal No. 1253 of 1900, presented against the decree of W. Gopalachariar, Subordinate Judge of Coimbatore, in Appeal Suit No. 185 of 1899, presented against the decree of C. Sriranga Chariar, District Munsif of Karur, in Original Suit No. 470 of 1898.

as against one of them, namely, the present plaintiff, who gave S another promissory note (in which a third party joined), for the whole amount due under the decree, namely, Rs. 1,480, and obtained a receipt which showed that the last-mentioned promissory note was accepted by S as payment of the amount due under the decree. This note had not, at the date of the suit, been paid. Plaintiff now sued the other joint maker of the original promissory note for contribution:

Held, that he had no cause of action at the date of suit.

SUIT for money. The facts, as found, were that plaintiff and defendant were joint makers of a negotiable promissory note, dated 5th July 1893, for Rs. 1,000, payable to Subba Chari, who sued both plaintiff and defendant on the note, in Original Suit No. 282 of 1895, and obtained a decree against them jointly for the amount of the note and costs, amounting in all to Rs. 1,480. Subba Chari executed that decree against plaintiff alone, by issuing a warrant for his arrest, whereupon plaintiff, in conjunction with one Muthurra Pillai gave a promissory note for the amount payable under the decree, namely, Rs. 1,480, to Subba Chari, who accepted it in satisfaction of the decree and gave plaintiff a receipt, which was filed as exhibit B, bearing date 25th September 1896. The finding of the High Court was that the promissory note for which this receipt was given was accepted as payment of the amount decreed. Further facts and findings are contained in the judgment of the High Court. Plaintiff contended that defendant had received the whole of the consideration for the original promissory note of 5th July 1893, and he now sued to recover the whole amount of the note given by him in satisfaction of Subba Chari's decree. The lower Courts, however, agreed in the finding that plaintiff and defendant must be taken, on the evidence, to have divided the Rs. 1,000 equally between them. The District Munsif accordingly passed a decree in plaintiff's favour for one-half of the Rs. 1,480 claimed, together with interest and proportionate costs. Both parties appealed to the Subordinate Judge who, after discussing the facts, said: "The suit brought by plaintiff is virtually one for contribution. The fact that plaintiff claimed a larger amount does not debar his recovering the amount which he is found entitled to. The vakil for the defendant contends that, as plaintiff had not actually paid the decree amount in Original Suit No. 282 of 1895 he cannot maintain the suit. The decree-holder does not deny that the decree was satisfied, and the promissory note given by plaintiff having been accepted as complete satisfaction, there is no doubt that the defendant's liability under the decree in Original Suit

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No. 282 of 1895 ceased. The omission to report the adjustments to Court may prohibit the Court when executing the decree from recognizing it if the decree-holder denied, but he does not deny it now. The English cases referred to by the vakil relate to actions brought for recovering money said to have been paid solely for defendant's benefit. I agree with the Munsif that plaintiff is entitled to recover a moiety of the amount from defendant for his share of the debt."

He confirmed the decree of the lower Court and dismissed both appeals.

Defendant preferred this second appeal.

K. Narayana Rau for appellant.

P. R. Sundara Ayyar for respondent.

BHASHYAM AYYANGAR, J.—The appellant and respondent were joint makers of a negotiable promissory note (dated 5th July 1893) for Rs. 1,000 payable to one Subba Chari, who obtained a decree thereon in Original Suit No. 282 of 1895 against the appellant and respondent jointly. The decree was executed against the respondent alone by the issue of a warrant for his arrest. The respondent thereupon, in conjunction with one Muthurra Pillai, gave a promissory note for the amount payable under the decree, viz., Rs. 1,480, to Subba Chari, who accepted the same in satisfaction of the decree and gave respondent a receipt (exhibit B), dated 25th September 1896. It is clear from the terms of the receipt that this promissory note—which is not filed as an exhibit in the case—was accepted as payment of the amount decreed and the decree was thus satisfied under section 257 (*b*), Civil Procedure Code. Under section 258, Civil Procedure Code, the decree-holder, Subba Chari, ought to have certified such payment to the Court but he did not do so, nor did the respondent take any steps under the latter part of section 258 and apply to the Court to record satisfaction of the decree. But Subba Chari in his deposition as a witness in this suit, which was instituted and tried in the same Court, admitted satisfaction of the decree and even if that were not technically sufficient for the purposes of section 258, the respondent undertakes, that, if necessary, Subba Chari shall certify the payment to the Court before the disposal of this appeal, so as to remove any doubt as to the possibility of the decree-holder taking any steps to execute the decree against the appellant. The circumstance that such preappointed evidence

as to the payment of the decree amount was not procured prior to the date of the suit is immaterial, for the payment which, prior to this suit, had been made out of Court to the decree-holder was valid under section 257 (*b*), and section 258 simply prescribes the procedure for recording the fact of such payment in the Court which has to execute the decree.

Each party asserted that the other alone was the principal debtor in respect of the amount borrowed under the original promissory note and that he himself was only a surety. Both the Courts below have come to the conclusion—and, as I think, rightly in the absence of any evidence to the contrary—that each borrowed a moiety, *i.e.*, Rs. 500, out of the Rs. 1,000, for which the promissory note was, by them, jointly given and this finding has not been seriously questioned in the arguments before us.

The original promissory note having merged in the judgment in Original Suit No. 282 of 1895, the legal relation between the appellant and respondent is that of joint judgment-debtors each of whom, *inter se*, was liable to bear the burden of a moiety of the judgment-debt, but one of whom alone discharged the whole debt, not however by payment in cash or by transferring to the decree-holder any property, real or personal, of value equivalent to the decree-amount, but by giving a promissory note jointly with a third party, apparently as his surety for the note. There is nothing on the record to show whether this promissory note was negotiable or not, but I do not think it necessary to call for a finding on this point, for even assuming that it was payable "to order," it will not, in the view which I take, affect the result of the case.

As between the appellant and respondent, each party was, under the original promissory note, a principal debtor in respect of a moiety of the debt and a surety for the other, in respect of the other moiety and the same will be their relative position in respect of the judgment-debt. The appellant's pleader urges that the giving of a promissory note by the respondent is not such a payment of the decree-debt as would entitle him to sue the appellant for contribution; and in support of this argument, he principally relies upon the cases of *Tailor* v. *Higgins*(1) and *Maxwell* v. *Jameson*(2). Upon the finding already referred to, the plaintiff's cause of action, if any, is only in respect of a moiety of the debt, which was

(1) 3 East, 169. (2) 2 Barn and Ald., 51.

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primarily payable by the appellant and in respect of which respondent is only a surety. The principle of law applicable to the case is laid down in section 145 of the Indian Contract Act, which runs as follows:—"In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor, whatever sum he has rightfully paid under the guarantee; but no sum which he has paid wrongfully." It will be noted that the surety's right is to recover from the principal debtor whatever sum the former paid to the creditor, which sum ought to have been paid by the principal debtor. The principal debtor being bound to indemnify the surety, it is obvious that the cause of action cannot be merely the procuring, by the surety, of the principal debtor's exoneration from liability to the creditor, but also the surety being himself damnified.

In the two cases above referred to, the creditor accepted the surety's bond, in discharge of the principal debtor's obligation and also of that of the surety as such, in other words, after the coming into existence of the surety's obligation on default of payment by the principal debtor, the creditor accepted a bond from the surety in discharge of the obligation, both of the principal debtor and of the surety as such. Nevertheless it was held in both the cases that the surety was not entitled to maintain a suit against the principal debtor for contribution and that though the bond was accepted as equivalent to payment, in the sense that the original obligation was thereby discharged, yet it was not a payment which would entitle the surety to maintain such suit. In my opinion, the giving, by the surety, of a promissory note even if it was payable to "order or bearer" and accepted by the creditor as payment of the debt and not as a mere collateral security therefor, cannot be treated as payment as between the surety and the principal debtor.

In support of the contrary position, the respondent's pleader relies upon the case of *Barclay* v. *Gooch*(1). In that case, no doubt, Lord Kenyon held, at *nisi prius*, that "if a party gives a promissory note for the debt of another, which the creditor accepts in payment, it is as a payment of money to the party's use and can be recovered as such." A motion subsequently appears to have

(1) 2 Esp., 571.

been made for a new trial, but the Court agreed with his Lordship and refused a rule. It does not appear, however, clearly upon what ground the new trial was applied for and refused. This latter view seems also to prevail generally in America and a surety who gives his own note for the debt of the principal which is accepted as full payment by the creditor and the principal discharged, may treat the note as money paid and maintain an action of assumpsit thereon (Sedgwick on 'Damages,' 8th edition, section 797), though in one case in New York (*Van Ostrand* v. *Reed*(1)) the doctrine that negotiable notes are to be considered as money has been restricted to cases where the notes have been parted with to *bonâ fide* holders for value (Sedgwick, section 798). The authority of the *nisi prius* case is very much shaken by the two later cases already referred to—though these two cases related to the giving of a bond and not a note of hand, by the surety—and by the doubt thrown by Lord Ellenborough in *Tailor* v. *Higgins*(2) as to the correctness of that decision as well as by the dissent of Bayley, J., therefrom in *Maxwell* v. *Jameson*(3).

In the last-mentioned case Bayley, J., considered that *Barclay* v. *Gooch*(4) was in conflict with *Tailor* v. *Higgins*(2) and in following the latter observed as follows:—"Then, as the authorities differ it becomes necessary to look to the reason of the thing. No money has yet come out of the plaintiff's pocket and *non constat* that any ever will; for if he recovers from the defendant in the present action, it is still possible that he may never pay it over to Batson and Co. Then, the period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for his contribution." Abbot and Holroyd, JJ., also concurred in the decision of Bayley, J.

The reasoning of Bayley, J., is, to my mind, convincing and it indicates the true principle, viz., that it is not merely the gain resulting to the principal debtor from the act of the surety, but the loss which the surety has sustained by the default of the principal debtor, which entitles the surety to sue the principal debtor for recovery of the amount by way of contribution; and I would certainly follow that in preference to the American decisions

(1) 1 Wend, 424 at p. 430.
(2) 3 East, 169.
(3) 2 Barn and Ald., 51.
(4) 2 Esp., 571.

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and the decision in *Barclay* v. *Gooch*(1), which seems also to have been followed in a case in Ireland (*M'Kenna* v. *Harnett*(2)). In the present case it is not certain that the plaintiff will pay the amount of the promissory note or that he will be solvent when demand may be made upon him for payment. The decision is *Barclay* v. *Gooch*(1) will in my opinion be sound if restricted to cases in which the surety himself was the holder in due course of the promissory note and circulated the same as currency by delivery or indorsement, to the creditor. In that case, he would have parted with a chattel being property in his hands and sustained a loss and not have simply incurred a liability to the creditor, as in the present case, by himself making and giving a promissory note—a liability which may or may not be enforced against him to his detriment.

The giving by delivery or assignment to the creditor, of any other property belonging to the surety, whether personal or real (Sedgwick on 'Damages,' section 800) in discharge of the debt, will also stand on the same footing and in the absence of any fraud or collusion, the value of such property will, as against the principal debtor, be taken to be the same as that agreed to between the surety and the creditor, in the transaction by which the debt was discharged, whether wholly or in part. In my opinion, the expression "whatever sum he has rightfully paid" occurring in section 145 of the Contract Act will include not only coin, but also property of whatever kind which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owing to him.

In my opinion the decision in *Rodgers* v. *Maw*(3) cannot be regarded as amounting to an approval of the *nisi prius* case of *Barclay* v. *Gooch*(1). In that case, the question was whether a certain amount paid by the Sheriff under an execution against the goods of a surety can be recovered from the principal debtor as money paid by the surety for his use. It was held that the Sheriff simply made money of the surety's goods and therewith had paid the claim in the action and that therefore it was money paid by the surety and Pollock, C.B., referred to the case of *Barclay* v. *Gooch*(1) only in this connection. In *Rodgers* v. *Maw*(3), the surety suffered actual loss in that his goods were

(1) 3 Esp., 571. (2) 13 Ir. L.R., 206.
(3) 15 Mand W., 449.

sold and converted into money for payment of the debt to the creditor.

The case of *Wolmershausen* v. *Gullick*(1) which was cited on behalf of the respondent, has no bearing whatever upon the question arising in this case. All that was held in that case was that a surety against whom a judgment was obtained by the creditor, might, in equity, take proceedings against his co-surety, making the creditor also defendant, and would be entitled to a declaration of his right to contribution and to an order upon the co-surety to pay his proportion to the principal creditor. But, as in that case the principal creditor had not been made a party to the action, the plaintiff's right was declared and a prospective order made under which, whenever he had paid any sum beyond his share, he was to get it back by way of contribution from the co-surety and there was a direction that upon the plaintiff paying his own share, the defendant—the co-surety—was to indemnify him against further payment or liability and was, by payment to him or to the principal creditor, or otherwise, to exonerate the plaintiff from liability beyond the extent of his own share, with liberty to the plaintiff to apply in chambers and generally to apply.

In *Ram Pershad Singh* v. *Neerbhoy Sing*(2) a somewhat similar relief was prayed for by a surety against whom judgment alone had been obtained but not executed. But such relief by way of mere prospective declaration was refused on the ground that it would amount merely to an interlocutory decree and could not be worked out under the Indian procedure, except in a new suit (per Phear, J., at p. 84).

On the ground, therefore, that the plaintiff had no cause of action at the date of the suit, I would reverse the decrees of both the lower Courts and dismiss the plaintiff's suit, but only on that ground. Under the circumstances of the case, each party will bear his own costs throughout.

BENSON, J.—I concur.

(1) L.R., [1893], 2 Ch., 514. (2) 11 B.L.R., 76.