1929

PARSU
v.
TRUSTEES
OF THE
PORT OF
BOMBAY

Kemp Ag. C. J.

in their place. But it seems to me that such a meaning cannot be read into them and that the expression "for the purpose of" used in this connection means the same thing as "in" and that other words would have been used had it been intended to include a man, injured while engaged in preparations for the purpose of, ultimately, loading bales on to a ship. In fact the same argument might be used to apply to the case of every person engaged in working on such bales at any one of the many steps which intervene from where the bales are pressed in the mill to where they are stacked ready for loading into a ship, and it is clear that a line must be drawn somewhere. I think that the meaning of the term used is clear, and that protection under the Act is meant for the workmen who are actually engaged in the process of handling the bales, so as to transfer them from the wharf to the hold of a ship which is actually being loaded. But the workman in question was only stacking the bales in a shed and it does not appear that the ship which was to carry them was then being loaded. I agree with the answer proposed by the learned Chief Justice to the question in the reference and think that the claimant cannot be awarded compensation in this case.

Order accordingly.

J. G. R.

APPELLATE CIVIL.

1929
August 14.

Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Blackwell.

MAHOMEDALLI IBRAHIMJI (ORIGINAL DECREE-HOLDER), APPELLANT *v.* LAXMIBAI HUSBAND'S NAME ANANT VASUDEV PALANDE (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXXVIII, rule 5, Appendix F, Form 6—Surety—Security bond—Compromise decree—Instalments—Surety's consent not obtained—Discharge of surety's obligation.

When on an application for attachment before judgment, a surety executes bond in form 6 in Appendix F to the Civil Procedure Code, 1908, he is

*Appeal No. 34 of 1927 under the Letters Patent.

discharged from his obligations if a compromise decree is passed between the plaintiff and the defendant allowing the defendant to pay the decretal amount by instalments, unless it is proved that the compromise which was subsequently embodied in the decree was in the contemplation of the plaintiff and the surety when the latter executed the bond.

Tatum v. *Evans*,[1] relied on.

APPEAL under the Letters Patent against the order dismissing S. A. No. 926 of 1926 under Order XLI, rule 11, from the decision of J. T. Lawrence, District Judge at Poona, reversing the decree passed by A. I. Issak, Subordinate Judge at Poona.

Proceedings in execution.

The plaintiff Mahomedalli Ibrahimji applied for an order for attachment before judgment in Suit No. 192 of 1924. A notice was ordered to be issued on the defendant, who having expressed his willingness to furnish security it was ordered that security should be given for Rs. 2,200. One Anant Vasudeo Palande, the deceased husband of the respondent, executed a security bond in Form No. 6 in appendix F to the Civil Procedure Code.

On the suit coming for hearing the plaintiff and the defendant put up an application for recording a compromise and a decree in terms of the compromise was passed directing the defendant to pay the decretal amount by monthly instalments of Rs. 200 each, the first instalment to be paid on May 12, 1924, and the subsequent instalments on the 12th day of each succeeding month. It was further provided that in default of any two instalments not being paid in time, the plaintiff was to be at liberty to recover the whole balance then due.

The defendant having failed to pay the instalments the plaintiff sought to execute the decree against the estate of the surety.

[1] (1885) 54 L. T. 336.

1929

MAHOMEDALLI IBRAHIMJI v. LAXMIBAI

The Subordinate Judge allowed execution to proceed as in his opinion the compromise decree for instalments did not absolve the surety from his liability.

On appeal, the District Judge, Poona, set aside the decree as in his opinion the surety was discharged by operation of law as soon as the compromise between the plaintiff and defendant was passed.

The plaintiff appealed to the High Court. The appeal was dismissed summarily under Order XLI, rule 11, Civil Procedure Code.

The plaintiff preferred an appeal under the Letters Patent.

G. N. Thakor, with *M. L. Sheth*, for *M. H. Mehta*, for the appellant.

K. V. Joshi, for the respondent.

KEMP, AG. C. J. :—This is a Letters Patent Appeal against the summary dismissal of the appeal from the decision of the District Judge of Poona who reversed the decision of the Extra-Joint Subordinate Judge, Poona, in Darkhast No. 211 of 1925. Shortly put, the facts of the case are as follows:—In Suit No. 192 of 1924 the plaintiff applied for an order for attachment before judgment. The deceased, one Anant Vasudeo Palande, stood surety for the defendant under Civil Procedure Code, Order XXXVIII, rule 5. He executed a bond in Form 6 in Appendix F to the Code. On April 12, 1924, the plaintiff and the defendant arrived at a compromise which was subsequently recorded as an adjustment of the suit and a decree passed in terms thereof by the Extra-Joint Subordinate Judge. The compromise allowed the judgment-debtor to pay the amount by instalments of Rs. 200 per month. The first instalment was payable on May 12, 1924, the second on June 12, 1924, and the decree further provided that in default of payment of two instalments the plaintiff might

recover the whole amount due. The question before us is whether by this compromise the surety has been discharged.

Mr. Thakor for the appellant contends that it is immaterial whether the decree was passed on a compromise or whether it was arrived at after adjudication by the Court. He maintains that the surety is not discharged under the compromise decree. Turning to Form 6 in Appendix F, it is not absolutely clear whether the words "may adjudge" mentioned in the concluding part of the Form refer to the adjudication of the Court on the claim or the adjudication of the Court on the value of the property which the opponent has failed to produce when required. I doubt, however, whether the words were intended to permit an inquiry into the value of the property so as to reduce the security for its production in case of its non-production. Presumably any question of the value of the property would have been considered when the amount of the security was fixed. Nor is part performance by the defendant by producing only part of the property ordered to be produced a performance "*pro tanto*" by the surety of his guarantee. If the words refer to the adjudication of the claim by the Court then, with great respect to the decisions to the contrary, I would be inclined to say that a decree passed on a compromise is not usually an adjudication contemplated by the surety. It is not an ordinary incident of the suit like an arbitration through the Court where (see 2nd Schedule, clause 16 of the Code of Civil Procedure) the Court pronounces judgment. Section 2, clause (9) of the Civil Procedure Code, shows that a "judgment" implies a controversy. Section 2, clause (2) of the Civil Procedure Code, no doubt says that a decree is the formal expression of an adjudication but the words "Court may adjudge" in Form 6, Appendix F, mean, I think,

1929

MAHOMEDALLI IBRAHIMJI v. LAXMIBAI

Kemp Ag. C. J.

that the Court is to be the arbitrator not that it is merely to decree what the parties consent to. The adjudication required in a decree by section 2 (2) may be taken as inferring that a consent decree means that the order on the compromise is an adjudication but it does not necessarily define the meaning of the word "adjudge" in Form 6. The Court cannot refuse to record a compromise of the suit (Order XXIII, rule 3) and it seems to me stretching the meaning of the word "adjudge" to say that where this power is taken away from the Court it has adjudged the dispute.

However, the appeal may, we think, be decided on another ground. Now, whether section 135 of the Indian Contract Act applies to the case of a bond passed to the Court or not—and it must be noted that the relation of debtor and creditor did not exist between the plaintiff and the defendant when the bond was executed—I see no reason why the equitable principles underlying section 133 should not be applied in this case.

The correct test, I think, to apply to this case is, whether the compromise which was subsequently embodied in the decree was in the contemplation of the plaintiff and the surety when the latter became a surety. It may be that, if a decree on a compromise comes within Form 6, there may be a compromise which is consistent with the obligations which the surety had undertaken to discharge. But in the present case we have the fact that the compromise allowed the payment of the decretal amount, which amounted to Rs. 1,800, by instalments of Rs. 200 per mensem commencing from May 12, 1924. In other words, it would be nine months before the surety's liability, if it held good, was extinguished. During those nine months the position of the judgment-debtor might have altered very much for the worse. It is true that mere forbearance to

recover the debt might not release the surety but giving the debtor the right to refuse to pay except parts of the debt at stated intervals alters the position of the surety as regards the debtor. His rights against the debtor are prejudiced by this compromise, and, I think, it can fairly be said that such a compromise was not one which was contemplated by him when he entered into the suretyship.

In this connection I would refer to the case of *Tatum* v. *Evans*[1] and the following words of Mr. Justice Denman, as he then was, in his judgment (p. 337):—

> "As regards Simson, [the surety], I am of opinion that he is not liable. There can be no doubt that he entered upon the suretyship on the understanding that there was to be a defence of the action, and not a complicated compromise such as took place . . . . ; but I am of opinion that the compromise in this case is a thing so very different from a judgment *in invitum* pronounced by the Court after some inquiry into the facts, as to release a surety who was not consulted about it. I do not think that in what took place, looking at the substance of the thing, there was, within the meaning of the bond, an 'awarding of such sum as the Court should think fit,' but a complicated arrangement about which the surety had a right to be consulted."

That is the test which, I think, applies here. In my opinion the compromise in order to be binding on the surety in this case should have received his consent. I, therefore, think that the appeal should be dismissed with costs.

BLACKWELL, J.:—I agree with my learned brother that this appeal should be dismissed for the reasons given by him in the latter part of his judgment.

I desire, however, to say a word as to the correct interpretation to be placed upon Form No. 6 in Appendix F to the Civil Procedure Code. In my opinion the words at the end of that Form "as the said Court may adjudge" apply only to a question which might arise in execution in proceedings against the surety, he the surety being called upon in default of the

(1) (1885) 54 L. T. 336.

1929

MAHOMEDALLI IBRAHIMJI v. LAXMIBAI

Blackwell J.

judgment-debtor placing at the disposal of the Court the property specified or the value of it or such portion as may be sufficient to satisfy the decree. I do not think that those words "may adjudge" have any application to the decree which the Court must pass before requiring the defendant to produce and place at the disposal of the Court the property specified, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree. Even, however, if the word "adjudge", does refer to the word "decree," I am still not satisfied that the surety would not be bound by a consent decree, provided that the consent decree did not alter the obligations of the surety. Under section 2, sub-section (2) of the Code "decree" is defined to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Under Order XXIII, rule 3, the Court is bound to record a compromise and shall pass a decree in accordance therewith. Having regard to the definition of the word "decree" in section 2, sub-section (2), the recording of a compromise and the passing of a decree in accordance therewith would, in my opinion, be an adjudication by the Court in the suit in question. However, in my opinion, a decision upon this point is really unnecessary for the determination of the matter before us, and I agree that this appeal must be dismissed for the reasons given by my learned brother in the latter part of his judgment.

Decree confirmed.

J. G. R.