

(1958) 04 KL CK 0009
High Court Of Kerala
Case No: S.A. No. 67 of 1958

Saithu Mohammad Ismail and
Another

APPELLANT

Vs

Abdur Rahiman

RESPONDENT

Date of Decision: April 12, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 145

Citation: (1958) KLJ 1087

Hon'ble Judges: N. Varadaraja Iyengar, J

Bench: Single Bench

Advocate: P. Karunakaran Nair, for the Appellant; K.N. Narayanan Nair, for the Respondent

Final Decision: Dismissed

Judgement

N.V. Iyengar, J.

This second appeal is by a surety in execution. The appellant was entrusted by the Court with a lorry, pending an enquiry into a claim petition regarding its possession. On the claim petition being rejected, the appellant failed to produce the lorry and so became liable to pay the decree amount in pursuance to his undertaking in the surety bond he had executed to the Court in the first instance. On the decree-holder seeking to execute the decree against the appellant, he applied to the Court for instalment concessions under Act III of 1956. The Courts below have rejected this application on the ground that the appellant's liability arose out of breach of trust within the meaning of section 2 (b) (iii) of the Act. Hence this appeal.

2. Learned Counsel for the appellant says that the appellant's liability was only in some way connected with and did not arise out of any trust obligation and the sub-section could not apply. And he relied on the decision reported in [Kakatur Linga Reddi Vs. Yerabolu Subbarami Reddi and Others](#), . But that case was concerned with

a surety for a trustee and the learned Judges said that the surety's obligation being only purely contractual, could not be said to have arisen out of the principal debtor's trust liability. Here surely the matter is different. The appellant has directly undertaken the liability to return the vehicle. So there was a fiduciary obligation so far as he himself was concerned and it is hardly possible to say, that his present liability did not arise out of that fiduciary obligation. And there is the direct authority of *Narayani Ammai Govinda Pillai v. Kalyani Amma Bai Amma* (1946 T.L.R. 592) to say that the word "trust" in the context, does not mean the strict liability of a trustee. The word, it is said, is used only in the popular sense. So whenever confidence is reposed in a person and that person betrays the same, the obligation which arises in consequence will be assimilated to that under the clause in question. In that case the liability was that of a bailee who had failed to fulfil his obligations to return the goods "bailed and the bailer was not allowed to escape the payment in full. This case is almost on a par with the case in *Narayani Amma Govinda Pillai v. Kalyani Amma Bai Amma* (1946 T.L.R. 592) just cited and it seems to me that the same principle as was applied there, must apply here also.

3. Learned Counsel for the appellant referred to *K.V. Dakshinamurthi Somayalu v. Krishnamurthi* (A.I.R. 1957 Andhra 337) for the proposition that a co-owner's liability, fixed under a decree, for failure to account to the rest of the co-owners did not fall within the corresponding provision 4 (e) of the Madras Agriculturists Relief Act and the learned Judges took occasion to consider trustees and their obligations in contrast. There is however the decision in [Mottai Meera alias Sheik Abdul Kadir Rowther Vs. Chinna Sheik Abdul Kadir Rowther and Others](#), which holds more or less to the contrary, in view of the provisions in Chapter IX of the Trusts Act dealing with obligations in the nature of a trust inclusive of that of co-owners in circumstances similar to those in the Andhra case. But it is unnecessary to pursue this discussion about co-owners. This case is, in my opinion, without complexity and clearly within the trust aspect. The decision of the Court below that the appellant surety is not entitled to have concessional payments is therefore right.

4. Learned Counsel for the appellant finally said that the court below has not passed orders u/s 145, C.P.C. yet and so the question of the appellant's liability vis-a-vis the decree-holder has not arisen so far. It is no doubt true that specific order determining the liability, after the notice to show cause was issued, has not been passed. But the court having rejected the motion for concessional payments made by the appellants and also passed an order for execution for the entire amount decreed in favour of the decree-holder may be deemed to have gone through the formality referred to by the appellants. In the result the second appeal has no merit and is therefore dismissed with costs.