

section 4, there is no possible interpretation of section 9 which can in any wise explain why section 10 should free the landlord from liability to a fine and the express proviso to section 9 should leave him under it.

For these reasons I am not prepared to give the plaintiffs a decree on the basis of an implication as their civil rights, derived from section 19, when I can find no other basis in the Act, and when I do find in the Act provisions which seem to me to be contrary to any such intention.

*Appeal dismissed.*

Attorney for the appellants : *P. C. Ghose.*

Attorneys for the respondents : *K. K. Dutt & Co.*

N. G.

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## APPELLATE CIVIL.

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*Before Cuming and Page JJ.*

JOYMA BEWA AND OTHERS

*v.*

EASIN SARKAR AND OTHERS.\*

*Surety—Execution proceedings—What constitutes surety—Insufficiency of stamp does not invalidate document—Admissibility of document insufficiently stamped—Stamp Act (II of 1899), ss. 35, 36—Code of Civil Procedure (Act V of 1908), s. 145—Contract Act (IX of 1872), s. 126.*

In a proceeding in execution of a decree the decree-holder, the judgment-debtor and the surety agreed that the decretal amount should be paid within a certain time by the judgment-debtor, failing which the decree-holder should be entitled to proceed against the surety to realize the decretal amount in execution of the decree. These terms were embodied in a petition signed by the parties and filed before the Court with a stamp appropriate

\*Appeal from Appellate Order, No. 419 of 1924, against the order of Mahendra Nath Das, Subordinate Judge of Mymensingh, dated Aug. 25, 1924.

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to a petition, but insufficiently stamped either as a contract of suretyship or as a security bond :—

*Held*, that the contract contained in the petition signed by the three parties concerned amounted to a contract of guarantee within section 125 of the Contract Act.

Failure duly to stamp a document which must be stamped by reason of the provisions of the Stamp Act does not affect the validity of any contract therein contained, but renders the document inadmissible evidence.

Section 35 of the Stamp Act provides that an instrument which is not sufficiently stamped should not be received in evidence or acted upon unless it is duly stamped, but where a document has been received in evidence its admissibility cannot subsequently be challenged under section 36 of the Stamp Act.

*Rung Lal Kalooram v. Kedar Nath Kesriwal* (1), *The Bombay Company, Limited v. The National Jute Mills Company, Limited* (2) referred to.

Under section 145 of the Code of Civil Procedure in order that execution may be levied against a surety it is incumbent upon the applicant to prove that the surety had rendered himself personally liable for the performance of some obligation as provided in the section.

It is not necessary that a contract of suretyship should be in the form of a security bond, or in writing, or that the contract of suretyship should be in favour of the Court for the purpose of execution as against a surety under section 145 of the Code of Civil Procedure.

APPEAL by Joyma Bewa and others, the decree-holders.

This appeal arose out of an order refusing execution against a person who stood surety for the judgment-debtor in a previous execution proceeding which was allowed to be struck off in consideration of his undertaking to satisfy the decree in the event of the judgment-debtor failing to pay off the amount due under the decree. The lower Courts found that this undertaking was embodied in a *solenama* signed by the decree-holder the judgment-debtor and the surety, and was filed in the Court, but being insufficiently stamped was not valid in law as a security

(1) (1921) 27 C. W. N. 513, 520. (2) (1912) I. L. R. 39 Calc. 669, 678.

bond. This document was, however, admitted in evidence by both the Courts below.

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*Babu Urukram Das Chakravarti*, for the appellants, contended, that the document in question was admitted in evidence by the Courts below, and, therefore, it could not be rejected now for lack of a proper stamp. Duty could be levied now to make the document admissible. The Courts below were wrong in deciding that the document could not be enforced as a contract.

*Babu Bimal Chandra Das Gupta* (with him *Babu Prasanta Bhusan Das Gupta*), for the respondents, contended, that the contract of suretyship was not in the form of a security bond in favour of the Court, but was a mere private arrangement between the three parties; therefore, execution could not be levied as against the surety under the provisions of section 145 of the Code of Civil Procedure.

PAGE J. This is an appeal from an order refusing to permit execution to be levied against a person who is alleged to have stood surety for the judgment-debtor in execution proceedings.

The suit out of which the controversy arose resulted in a consent decree under which the judgment-debtor was ordered to pay Rs. 330 and the costs of the suit. An execution case followed. In the course of that case an agreement was arrived at between the surety, who is the present contending respondent, the decree-holder and the judgment-debtor. The decretal amount was not paid by the judgment-debtor, but after an application had been made to execute the decree against the surety a petition was filed on behalf of all the parties concerned stating the terms of the tripartite agreement which

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had been arrived at, and praying that the execution case might be withdrawn. That petition bears a Court stamp appropriate to a petition, but is not stamped either as a contract of suretyship or as a security bond. The Court, having regard to the petition, permitted the execution case to be withdrawn. Subsequently the judgment creditor applied for execution of the decree against the surety to the extent to which he had made himself personally liable for the decretal amount. This application was made under section 145 of the Civil Procedure Code, which provides that :—

“ Where any person has become liable as surety—(a) for the performance of any decree or 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 against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.”

The objection of the surety to an order being made under section 145 of the Civil Procedure Code was that he had never become a surety as provided in section 145 or otherwise for the fulfilment of any obligation of the judgment-debtor under the decree. Now, the contract of suretyship upon which it was sought to make the respondent liable in execution of the decree obtained against the judgment-debtor was contained in the petition of compromise which was in the following form :—

“ Both sides hereby state—It being inconvenient to pay money at present and the judgment-debtor petitioner having approached the decree-holder and Easin Sarkar of Mahajanpur having stood surety for the said money it is arranged that the judgment-debtor will pay the entire amount due after deducting the amount paid and the costs of this execution case to the decree-holder by the month of *Kartik* 1328 B.S. otherwise I Easin Sarkar stand surety for the entire amount aforesaid.”

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"If Sakir Sarkar does not pay the money to you the decree-holder then you the decree-holder will be able to realise the money from me Easin Sarkar by executing this decree. Let it be known that the entire cattle attached are released from attachment. Let it be known that we the decree-holders have got Rs. 100 which was in deposit with Kutub Mandal which will be credited in the decree. The judgment-debtor and the surety remain liable for Rs. 253-1-3 and costs of this execution case after deducting the aforesaid Rs. 100."

The contest of fact at the hearing of this application was whether the respondent had become liable as surety for the performance of the decree or for the payment of any money within the meaning of section 145 of the Civil Procedure Code. The respondent asserted that he had not signed, and was neither a party, nor privy, to the contract set out in the petition. The finding of fact by the trial Court was adverse to this contention. It was held by the learned Munsif that the respondent had signed this petition, and that the petition embodied the terms of the agreement which had been arrived at between the parties. This finding was not animadverted upon by the lower Appellate Court, and must stand.

In both the lower Courts this document was admitted in evidence, and was marked as an exhibit. The lower Appellate Court, however, dismissed the application upon the ground that inasmuch as the contract of suretyship was not duly stamped it was not valid as a contract, and further held that, whether that was so or not, the only mode by which a person could become liable as a surety under section 145 of the Code of Civil Procedure was by executing a security bond in favour of the Court which the Court accepted.

On a further appeal to this Court the contention that the contract contained in the petition was rendered void because it was not duly stamped was not persisted in. In my opinion, there is no substance in that contention. Failure duly to stamp a document

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which must needs be stamped by reason of the provisions of the Stamp Act does not affect the validity of any contract therein contained, but renders the document inadmissible in evidence. In my opinion, the contract contained in the petition signed by the three parties concerned amounted to a contract of guarantee within section 126 of the Contract Act. Under section 126 such a contract "may be either oral or written". I am of opinion, however, that the contract must be stamped not only as a petition, but also with a further stamp appropriate to a contract of guarantee as provided by the Stamp Act. Under section 35 of the Stamp Act the instrument in suit ought not to have been received in evidence or acted upon unless it was duly stamped. It was conceded, however, that this instrument was admitted in evidence in the Courts below. It falls, therefore, within the ambit of section 36 of the Stamp Act which provides that:—

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

The admissibility of the document, therefore, cannot be challenged in this appeal, or in any proceeding subsequent to the trial and incidental to the suit. Now, the meaning and effect of section 36 of the Stamp Act was considered in the case of *Rung Lal Kalooram v. Kedar Nath Kesriwal*(1). In that case Richardson J. observed with reference to section 36:

"Under that provision if any penalty is to be exacted, it can only be exacted under section 61. The revenue is then protected, so far as it is protected, by that section. In my opinion, once an instrument is admitted in evidence in any proceeding, either under section 35 or under section 36, it is available in that proceeding for all purposes as if it had been properly stamped from the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of

“jurisdiction merely by reason of non-compliance with the Stamp Act. Section 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted or acted upon an unstamped or insufficiently stamped instrument.”

see also *per Chitty J.* in *The Bombay Company v. The National Jute Mills Company Limited* (1).

The learned pleader for the respondent, however, contended that such a contract of suretyship not being a security bond in favour of the Court, but merely a private arrangement between the decree-holder the judgment-debtor and the surety, did not render the surety amenable to the provisions of section 145 of the Code of Civil Procedure. In my opinion, for such a contention there is no warrant either in the Code of Civil Procedure or in the Contract Act. Under section 145 of the Code of Civil Procedure, in order that execution may be levied against a surety, it is incumbent upon the applicant to prove that the surety had rendered himself personally liable for the performance of some obligation as provided in the section. Having regard to the terms of the contract of suretyship in this case it is apparent that the respondent expressly contracted that he should be liable personally to perform the decree as provided in the compromise, and that if he failed to fulfil his obligation as a guarantor of the judgment-debtor “the decree-holder will be able to realise the money from me ‘Easin Sarkar by executing this decree’”. It is clear, therefore, that if the instrument in question is within section 145 of the Code of Civil Procedure, the contract is one under which the respondent rendered himself liable to have the decree executed against him personally to the extent to which he had guaranteed the

(1) (1912) I. L. R. 39 Calc. 669, 678.

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performance by the judgment-debtor of his obligations under the decree. It is urged, however, that a contract of suretyship under section 145 of the Code of Civil Procedure must be in the form of a security bond. No authority for such a contention has been cited before us, although we have been referred numerous cases upon the subject, and the terms of section contain no reference to the form which a contract of suretyship within the meaning of the section must take. The words are "where any person has become liable as surety", and under section 126 of the Contract Act a contract of suretyship "may be either oral or written". In my opinion, the instrument in suit conforms to the requirements of section 145 of the Code of Civil Procedure.

Lastly, it is urged that it is only where the contract of suretyship is in favour of the Court that execution can be levied against the surety under section 145 of the Code of Civil Procedure. No doubt in many cases the security for the performance of the obligations referred to in section 145 will be given to the Court, and in such a case it is usual to require that a security bond should be entered into. But I see no warrant in any of the cases to which we have been referred for the proposition that it is only a security bond in favour of the Court which can be executed against the surety under section 145. No such limitation is contained in the section, and, in my opinion, it follows from the *ratio decidendi* of the judgments delivered in *Mukta Prasad v. Mahadeo Prasad*(1) and *Brajendra Lal Das v. Lakhmi Narain Khanna*(2) that no such limitation as is suggested ought to be placed upon the language used in section 145 of the Code of Civil Procedure. In my opinion, in a case where a person has contracted that he will personally guarantee the

(1) (1916) I. L. R. 38 All. 327,

(2) (1915) 19 C. W. N. 961.

performance of any of the obligations set out in section 145, whether such a contract be oral or in writing, he has rendered himself liable to be proceeded against in execution of the decree as provided in section 145 of the Code of Civil Procedure.

For these reasons, in my opinion, the order against which this appeal is brought should be set aside, and *Li* the decree-holder should be permitted to proceed with the application under section 145 of the Code of Civil Procedure for execution against the surety.

In my opinion, this instrument ought not to have been admitted in evidence without having been stamped with an additional 8 annas stamp, and we determine that the amount of duty with which the instrument is now chargeable is 8 annas exclusive of any penalty which may be levied, and that the duty is payable by the decree-holders. The document will be impounded, and a copy of the declaration of the Court as to the duty payable will be sent to the Collector.

The appellants are entitled to their costs in all the Courts. The hearing-fee on this appeal is assessed at three gold mohurs.

CUMING J. I agree

B. M. S.

*Appeal allowed.*

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