

APPELLATE CIVIL.*Before Page and Graham JJ.*

MUHAMMAD YUSAF

v.

RAM GOBINDA OJHA.*

1927

June 1.

Surety—Surety executing bond to pay decretal amount if decree passed in the suit by Court, whether liable if decree passed by Court upon arbitration—Judgment-debtor must pay before surety held liable.

Where a surety undertook that he would be liable to pay the decretal amount in the event of a decree being passed in the suit, the parties agreed to a reference to arbitration, and upon an award the Court decreed the suit and the decree-holder seeking execution against the surety to realise the decretal amount :—

Held (i) that as there was no decree on contest by the Court, the surety was discharged ;

(ii) that it was incumbent upon the decree-holder to proceed against the judgment-debtor first and if nothing was recoverable from him, he could proceed against the surety.

MISCELLANEOUS APPEAL by Muhammad Yusuf and another as the representatives of the surety who is dead.

This miscellaneous appeal arose out of certain execution proceedings. The plaintiff respondent brought a suit to recover a sum of money against the judgment-debtor and in the cause of the suit an application for attachment before judgment was made and granted and some cattle belonging to the judgment-debtor were attached. The judgment-debtor appeared and prayed for release of the cattle. The Court asked him to furnish security as a condition precedent to the withdrawal of the attachment. One

* Appeal from Appellate Order No. 437 of 1926, against the order of G. N. Roy, District Judge of 24 Parganas, dated May 5, 1926.

1927
 MUHAMMAD
 YUSAF
 v.
 RAM
 GOBINDA
 OJHA.

Ilahi Bux stood surety for any amount for which a decree might be passed against the judgment-debtor. After this the respondent and the judgment-debtor without consulting the surety agreed to a reference to arbitration with the sanction of the Court, the arbitrator found in favour of the respondent and an award was made. The award was filed in Court and a decree was passed on it. The respondent thereafter proceeded to execute the decree against the surety. The Munsif held that the execution could not proceed, but the lower Appellate Court reversed the judgment.

Babu Rupendra Kumar Mitter (with him *Babu Paramananda Lahiri*), for the appellants, contended that the surety had entered into the contract on the footing that the decision should be by the Court. The reference to arbitration being made without the consent of the surety, he was discharged. The same principles which regulated the position of the surety where a defendant confessed judgment should have been applied here. There was also a misconstruction of the surety bond.

Mr. Harendra Kumar Sarbadhicary (with him *Babu Subodh Chandra Dutt*), for the respondent, contended that the case of a consent decree stood on a different footing from an award of an arbitrator. Here when the award was filed objections were raised by the judgment-debtor and only after those objections were overruled, a decree was passed by the Court.

GRAHAM J. This is an appeal against an order of the Second Additional District Judge of 24-Parganas reversing an order of the Munsif, First Court, Sealdah, and it arises out of certain execution proceedings. The facts shortly are as follows: The plaintiff respondent brought a suit claiming a sum of Rs. 775 and attached certain cattle and movables belonging to the

defendants before judgment. One Ilahi Bux, who has since died and is represented by the appellant in this appeal, stood surety for any moneys which might be decreed in the suit, and thereupon the cattle and moveables, which had been brought to the Court, were released from attachment. Thereafter the suit was taken up and partly heard. The parties then agreed upon a reference to arbitration and the Chairman of the Tollygunge Municipality was appointed arbitrator. The result of that arbitration was that the arbitrator awarded a sum of Rs. 400. The defendant filed an objection which was heard but the Court ultimately accepted the award and decreed the suit accordingly. The decree-holder then applied for execution of the decree and asked for a certificate of non-satisfaction with the intention of proceeding against the surety who had properties within the jurisdiction of the Munsif of Sealdah. The judgment-debtor filed an objection that the debtor filed a petition in insolvency, and that the decree-holder did not proceed against him. The learned Munsif overruled the objection on the ground that what the decree-holder wanted was to proceed against the surety and not against the judgment-debtor. The application for execution at Sealdah, however, was dismissed by the Munsif on the ground that it was premature and that the decree-holder must proceed against the judgment-debtor in the first instance. There was then an appeal against that decision to the District Judge at Alipore and the learned Second Additional District Judge reversed the decision of the Munsif holding that the decree-holder was entitled to proceed against the surety or against the properties of the surety in the hands of his heirs.

The present appeal is directed against this decision of the learned Additional District Judge and two

1927

MUHAMMAD
YUSAF
v.
RAM
GURINDA
OJHA.

GRAHAM J.

1927
 ———
 MUHAMMAD
 YUSAF
 v.
 RAM
 GOBINDA
 OJHA.
 ———
 GRAHAM J.

main points have been urged on his behalf. Firstly, it has been contended that the Court below should have held that the surety was in law discharged from the bond by reason of the judgment-debtor and decree-holder consenting to the case being determined not by the ordinary tribunal, that is to say, by the Court, but by a special tribunal, namely, by an arbitrator; and, secondly, it has been urged that having regard to the terms of the surety bond the Court below ought to have held that the decree-holder not having taken any steps to realize the decretal amount from the judgment-debtor could not execute the decree against the surety.

With regard to the first contention the material portion of the security bond has been placed before us and it appears that what the surety undertook therein was that in the event of a decree being passed in the suit, if the money could not be realized from the judgment-debtor, then he, the surety, would be liable for the amount. Now the question is what exactly was the liability which the surety undertook. It is arguable no doubt that when he speaks of a decree he means a decree arrived at by any of the various means by which a decree may be arrived at, and that it would cover the case of a decree arrived at after compromise. The terms of such surety bonds should, however, as is well-recognized, be interpreted in a manner favourable to the surety or guarantor as the case may be, and looking to the terms of this particular security bond, in my judgment, what the surety agreed was that in the event of there being a decree in the suit, that is to say, after contest between the parties before the Court, he would be liable for the decretal amount. I do not think however that it was in contemplation that the surety would hold himself liable for the decretal money in

any other circumstances. In my opinion, therefore, the first contention of the appellant is well-founded and must prevail.

With regard to the second point I think on a consideration of the terms of the security bond that it was incumbent upon the decree-holder to proceed in the first instance against the judgment-debtor, and it was only if it was established that the decretal amount could not be realized from the judgment-debtor that it was open to him to proceed against the surety. It appears, however, that there was nothing before the Munsif to show that any proper attempt had been made to realize the decretal amount from the judgment-debtor. I think, therefore, that the Munsif was right in the view he took of the application.

For these reasons I am of opinion that the appeal succeeds and must be allowed with costs.

PAGE J. To my mind this is a very plain case. Having regard to the terms of the bond the surety agreed, if the creditor was unable to obtain payment of the decretal amount from the debtor, to liquidate any sum which the Court after contest should hold was payable by the debtor to the creditor. Some tribunal had to decide the issue as to the liability of the debtor. "The parties chose to have this done by some one in "the confidence of both parties." But to such an arrangement the surety was no party, and he never undertook that the liability of the debtor should be determined by anybody whom the debtor and creditor might choose to agree upon as the tribunal; and unless he assented to it such an arrangement as was made operated as a discharge of the surety. I agree that the appeal should be allowed.

Appeal allowed.

B. M. S.

1927

MUHAMMAD
YUSAF

v.

RAM
GOBINDA
OJHA.

GRAHAM J.