APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

1932

Mar. 15, 16.

RAJANIKUMAR SEAL

v.

THE MAHALAKSHMI BANK, LTD.*

Execution of Decree—Surety for judgment-debtor—Plea of discharge, if open to surety, when it is not open to judgment-debtor— Indian Limitation Act (IX of 1908), Art. 174—Indian Contract Act (IX of 1872), s. 135— Code of Civil Procedure (Act V of 1908), s. 47; O. XXI, r. 2.

After the dismissal of a judgment-debtor's application under Order XXI, rule 2 of the Code of Civil Procedure asking that payments made by him in satisfaction of the decree be certified by the court because the application was made out of time, it is not open to the surety for the said judgment-debtor to raise the same question over again by an application under section 47 of the Code of Civil Procedure.

Tambi Reddy Virareddy v. *Devi Reddy Pattabhirami Reddy & Co.* (1) followed.

APPEAL FROM APPELLATE ORDER.

The material facts are set out in the judgment.

Nripendrachandra Das and *Rohinibinode Rakshit* for the appellant.

Chandrashekhar Sen for the respondent.

C. C. GHOSE J. In this case, what has happened, shortly stated, is as follows. It appears that the decree-holder obtained a decree against the judgment-debtor and applied for execution of the decree. The present appellant thereafter intervened and agreed to stand as surety for the amount of the decree passed against the judgment-debtor.

*Appeal from Appellate Order, No. 290 of 1931, against the order of J. Younie, District Judge of Chittagong, dated June 9, 1931, affirming the order of S. C. Chakrabarti, First Subordinate Judge of Chittagong, dated June 6, 1931.

(1) (1925) I. L. R. 49 Mad. 325.

Thereafter, several applications, as the record shows, were made by the decree-holder to obtain satisfaction of the decree by means of execution. The judgment-debtor and the surety raised various objections and it would appear that no less than fifteen Miscellaneous Cases were started at the instance of the judgment-debtor and the surety, objecting to the execution of the decree on various grounds. This took place from 1st November, 1924 to 24th December, 1929. The decree-holder, harassed and frustrated, made another application for execution on the 24th of March, 1930. The judgment-debtor and the surety, not content with raising objections in the fifteen Miscellaneous Cases referred to above, raised a fresh objection in the shape of an application under Order XXI, rule 2 of the Code, asking for the payments alleged to have been made in satisfaction of the decree being certified by the court and also under section 47 of the Code. This application was filed on the 14th of November, 1930. Neither the judgment-debtor nor the surety took any steps whatsoever to proceed with their objections to the execution or with their application under Order XXI, rule 2 and the result was that their application and their objections were dismissed on the 11th of April, 1931, for non-prosecution. The judgment-debtor applied for a re-hearing of the application, which was dismissed for default, and that was on the 16th of April, 1931. This application for re-hearing was, however, dismissed on the 9th of May, 1931. So far as the judgment-debtor is concerned, it does not appear that he took any further steps; but, so far as the surety is concerned, he made another application, out of which this appeal has arisen, and that was on the 25th of May, 1931.

The surety's present application was under section 47 of the Code, and also under section 135 of the Contract Act and his allegation was that the decree had been satisfied and that, in the events which had happened, whatever liability had been undertaken

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by him as surety had come to an end and he was entitled to be released. This application, when analysed, would appear to be one really to obtain the same order as the judgment-debtor had applied for under Order XXI, rule 2. It was no doubt a round-about application to obtain the precise relief, but, as I have stated just now, the practical relief wanted by the surety was an order of the court stating that it had been satisfied that the decretal amount had been paid by the surety and that no further liability attached to him. Having regard to the facts stated above, it would appear that the question is whether the surety could, by means of a fresh application, under section 47 of the Code, obtain the same relief as the judgment-debtor would have obtained if he had been in time within Article 174 of the Limitation Act in applying under Order XXI, rule 2; in other words, the question is, if the judgment-debtor is not able, by reason of the lapse of time or by some other reason, to obtain an order under Order XXI, rule 2, whether the surety in such circumstances is prevented from obtaining the same relief. This identical question has been the subject of debate and decision in the case of *Tambi Reddy Virareddy* v. *Devi Reddy Pattabhirami Reddy & Co.* (1). The facts are more or less analogous and it has been held in that case, following a decision of this Court in 1922, that the surety is bound so long as the judgment-debtor is bound and the judgment-debtor is bound so long as any payments which he might have made are not certified by the court; in other words, the position is that, if the judgment-debtor cannot get any relief at this distance of time, by applying to the court under Order XXI, rule 2, the surety must be in the same position as the judgment-debtor is now and it must, therefore, follow that it is not open to the surety to apply under section 47 and raise the same question over again. There is sense in what has been

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laid down and I am content to follow the case of *Tambi Reddy Virareddy* v. *Devi Reddy Pattabhirami Reddy & Co.* (1) as an authority for supporting the judgment of the court below, although on different reasons.

The result, therefore, is that, in my opinion, the surety is not now entitled to raise the same question over again, having regard to the fact that the judgment-debtor's application under Order XXI, rule 2 of the Code has been negatived; and, that being so, the appeal is without any substance and must be dismissed with costs. Hearing fee two gold mohurs.

RANKIN C. J. I agree.

Appeal dismissed.

A. K. D.

(1) (1925) I. L. R. 49 Mad. 325.