

THE
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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

THIRUMALAI (PETITIONER), APPELLANT,

v.

1889.
April 15, 16,
25.

RAMAYYAR AND ANOTHER (COUNTER-PETITIONERS, DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code, ss. 253, 546, 583—Surety for the due performance of appellate decrees—Mode of enforcing liability of such surety—Execution proceedings.

When security had been given on behalf of the respondent to an appeal under s. 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful :

Held, that under the provisions of ss. 253, 583, the decree of the Appellate Court could be enforced against the sureties in execution proceedings. *Venkaya Naik v. Basalingapa* (I.L.R., 12 Bom., 411), approved.

APPEAL against the order of S. Subbayyar, Subordinate Judge of Tinnevely, made on an application for the execution of the decree of the High Court in appeal No. 21 of 1886.

Defendant No. 2 in original suit No. 4 of 1884, on the file of the Subordinate Court, preferred the above appeal and obtained a decree reversing the decree of the Subordinate Court; he now sought to execute the decree of the High Court to the amount of Rs. 3,000 against two sureties who had furnished security on behalf of the plaintiff under section 546 of the Code of Civil Procedure for the fulfilment of the appellate decree.

* Appeal against Order No. 159 of 1888.

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The Subordinate Judge dismissed the application and the petitioner preferred this appeal.

Bhashyam Ayyangar for appellant.

Rama Rau for respondents.

The further facts of this case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of Muttusami Ayyar, J.

MUTTUSAMI AYYAR, J.—This was an application for the execution of a decree, passed by the High Court in appeal, against two sureties who engaged under section 546, Code of Civil Procedure, to become liable for the performance of that decree before it had been passed. The Subordinate Judge dismissed the application on the ground that the decree could not be enforced against a surety. He observed that section 253 was applicable to decrees of the Court of first instance only, and that section 583 was not intended to extend its operation to decrees passed in appeal. It is contended before us that the construction suggested by the Subordinate Judge is not the true construction, and our attention is drawn to the decisions in *Bans Bahadur Singh v. Mughla Begam*(1), *Rashbehary Mookhopadhyaya v. Maharani Surnomoyee*(2), and *Venkapa Naik v. Baslingappa*(3). From the course of decisions on section 204 of Act VIII of 1859* it is clear that that section was considered to include decrees passed in appeal. This is conceded for the respondents in this case, but it is argued for them that the wording of section 204 has since been changed, that the change of expression has been intended to limit the special rule embodied in that section to decrees of the Court of first instance, and that the extension contemplated by section 583 does not include the provisions of section 253. The only case decided in this Court that has some bearing on the question is that of *Balaji v. Ramasami*(4). In that case, however, the surety contracted the obligation after the Appellate Court had passed its decree pending the disposal of

(1) I.L.R., 2 All., 604.

(2) I.L.R., 7 Cal., 403.

(3) I.L.R., 12 Bom., 411.

(4) I.L.R., 7 Mad., 284.

Act VIII of 1859, section 204: Whenever a person has become liable as security for the performance of a decree or of any part thereof, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant.

section 369: Application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court, in the manner and according to the rules hereinbefore contained for the execution of original decrees.

an application for review. The Court, while declining to enforce the appeal decree against the surety, observed that "assuming that section 253 can be extended to appeals, it applied only to cases in which the security had been given before the passing of the decree in appeal." The point now raised for decision is whether section 253 can be extended to appeals. In the other High Courts there has been a difference of opinion. The High Court at Bombay and the majority of the Judges at Allahabad considered that the present Code did not alter the rule embodied in section 204, whilst the High Court at Calcutta, and some of the Judges at Allahabad considered that decrees of the Court of first instance alone could be enforced against sureties under the existing law. Comparing section 253 of the present Code of Civil Procedure with section 204 of Act VIII of 1859, it cannot be denied that there has been a change of expression in a material point. The words in the one were "whenever a person has become liable for the performance of a decree, &c.," whilst the words substituted for them in the other are "whenever a person has, before the passing of a decree in an original suit, become liable, &c." The case presupposed by the one set of words is the obligation of a surety contracted for the fulfilment of a decree whether in an original suit or in an appeal, whilst the case suggested by the other set of words is that of a surety who contracted the obligation before the passing of the decree in an original suit. I do not think that the words "the decree in an original suit" can be taken to mean the final decree in that suit, whether it is passed by the Court of first instance or by the Court of Appeal. The word "final" which is not found in section 253 will then have to be introduced into it, and we are not at liberty to alter the words. Again, section 583 shows that the Legislature first premised a distinction between decrees in suits and decrees in appeals, and then extended the operation of the rules applicable to the execution of decrees of Courts of first instance to the execution of decrees of the Appellate Courts.

The natural inference is that section 253, as suggested by its language, enacts a rule applicable to decrees of the Court of first instance. But section 583 appears to me to contain a statutory declaration that that rule shall also apply to decrees in appeal. The words "according to the rules hereinbefore prescribed for the execution of decrees in suits" must ordinarily include every

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rule relating to the mode of execution, and section 253 is inserted in the sub-division E of Chapter XIX which treats of the mode of executing decrees. It is then said that section 253 blends together the liability and the machinery, whilst the rules extended by section 583 are those which relate exclusively to the machinery; but I do not think there is sufficient foundation for this distinction. The sections which relate to the liability of the surety and which provide for its enforcement are not one and the same, whether in Act VIII of 1859 or in the present Code of Civil Procedure. In the former enactment sections 76 and 83 indicated how a surety became liable for the fulfilment of the original decree, and section 36 of Act XXIII of 1861 explained how his liability for the performance of the decree passed in appeal originated.* In the present Code, sections 479, 484 and 546 correspond to them. In the former it was section 204 that provided the machinery for its enforcement, whilst in the latter the machinery is contained in two sections, 253 and 583. The words in section 253 "whenever a person has, before the passing of a decree in an original suit, become liable for the performance of the same," only premise the case in reference to which the rule of procedure is prescribed; and they do not support the remark that the liability

* Act VIII of 1859, section 76: If the defendant fail to show such cause, the Court shall order him to give bail for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against the defendant in the suit, with costs. Any order made by the Court, under the provisions of this section, shall be open to appeal by the defendant.

section 83: If the Court, after examining the applicant and making such further investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of the decree, it shall be lawful for the Court to issue a warrant to the proper officer, commanding him to call upon the defendant, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the Court when required the said property or the value of the same or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. The Court may also in the warrant direct the attachment until further order of the whole or any portion of the property specified in the application.

Act XXIII of 1861, section 36: When an order is made for the execution of a decree against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require security to be given for the restitution of any property which may be taken in execution of the decree or of the value thereof, and for the due performance of the decree or order of the Appellate Court. The Appellate Court may in any such case direct the Court which pronounced the decree to take such security.

and the machinery for its enforcement are blended together. Such being the case there is nothing unreasonable in holding that section 583 includes the rule embodied in section 253 among the rules applicable to execution of decrees in suits, and extends them all to execution of decrees passed in appeal. As to the question of necessity for changing the language of section 204 of Act VIII of 1859 it seems to me that the change was designed to bring the language of section 253 into complete accordance with the general scheme of the Code. Between section 204 and section 362 of Act VIII of 1859 there was this incongruity or want of precision. The case presupposed by the former was one in which a surety was liable for the performance of a decree, and the words "a decree" included appeal decrees. Again, the rules applicable to the execution of original decrees were declared by section 362 to apply to the execution of decrees of an Appellate Court. In the present Code all the rules applicable to the execution of original decrees were kept distinct, collected together in Chapter XIX and classified under appropriate heads. In carrying out this scientific arrangement, it was probably considered desirable to make section 253 in express terms what its place in the Code implies, viz., strictly a provision on the mode of executing original decrees and to indicate its applicability to the decrees of Appellate Courts by the general direction in section 583 that all the rules that apply to one shall likewise apply to the other. Again, the obligation which the surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or appellant in the original suit or in appeal, and the obligation is contracted before the Court and is as much a matter of record as the decree undertaken to be fulfilled. There is no apparent reason for directing the successful party to obtain a fresh decree against the surety whilst the very obligation is to fulfil the decree against the defendant or the appellant. If this principle is to be recognized for the purpose of executing against the surety decrees of the Court of first instance, it is difficult to see why decrees of Appellate Courts should be excluded from its operation. I am therefore of opinion that the construction placed on sections 253 and 583 in *Venkapa Naik v. Basingapa*(1) is the true construction, and I would set aside the order of the Subordinate Judge and

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(1) I.L.R., 12 Bom., 411.

THIRUMALAI direct that the decree be executed against the sureties in accord-
 v. ance with law.
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The respondents will pay the appellant's costs throughout.

WILKINSON, J.—I also am of opinion that the decree can be executed against the surety, the provisions of section 253 being made applicable by section 583.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SIVASANKARA (DEFENDANT), APPELLANT,

v.

VADAGIRI (PLAINTIFF), RESPONDENT.*

Temple management—Dismissal of dharmakarta, grounds for—Dharmakarta guilty of misfeasance retained in office on terms.

A suit to remove a dharmakarta, though he is held to have been guilty of misconduct in the discharge of his duties as such may, in the absence of any proved and deliberate dishonesty on the defendant's part, be dismissed on conditions to be complied with by him.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 22 of 1885.

Mr. Gover, Rama Rau, and Mahadeva Ayyar for appellant.

Ramasami Mudaliar, Sadagopa Charyar and Ranga Charyar for respondent.

The facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.—The appellant and the respondent are the joint dharmakartas of Kandasami temple at Tiruporur, in the District of Chingleput. The respondent charged the appellant with various acts of misfeasance and sues for his dismissal from the office of dharmakarta. The District Judge has found against the appellant with regard to three of the charges made against him. He has found that the appellant has been guilty of malversation in respect of casuarina trees at Kalavakam and of improperly maintaining his mother and sister out of temple funds, and he has also found,

* Appeal No. 128 of 1887.