APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
July 12, 18.
October 21.

NARAYANAN CHETTI AND OTHERS (DEFENDANTS), APPELLANTS IN APPEAL No. 40 AND RESPONDENTS IN APPEAL No. 122,

v.

ARUNACHELLAM CHETTI (PLAINTIFF), RESPONDENT IN APPEAL No. 40 AND APPELLANT IN No. 122.*

Civil Procedure Code, s. 608—Order for security to be furnished by respondent in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security.

The present plaintiff purchased land brought to sale in execution of a decree and was put in possession. The sale was set aside by the High Court and the purchaser was ousted. He preferred an appeal to the Privy Council, and the High Court directed that security be given for the mesne profits and the due delivery of the property without waste in the event of the appeal being successful. The present defendants furnished security and executed a document under which the plaintiff who had succeeded in the Privy Council now sued to enforce his rights. It appeared that after the date of the instrument above mentioned a payment was made from the income of the property in satisfaction of a decree obtained by the Zamindar against the present plaintiff for arrears of poruppu previously accrued due:

Held, (1) that the order of the High Court requiring security to be furnished was not *ultra vires* and that the instrument above mentioned was enforceable;

(2) that the defendants who had given no personal guarantee were not competent to put an end to the security under the provisions of the Contract Act relating to revocation of a surety;

(3) that on the right construction of the instrument the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the decision of the Privy Council;

(4) that the defendants should be credited with the amount paid in satisfaction of the decree for poruppu.

CROSS APPEALS against the decree of Venkatarangayyar, Subordinate Judge of Madura East.

Plaintiff sued to enforce his rights under an instrument, dated 16th February 1886, and executed by the defendant under the circumstances which appear below. In execution of the decree in original suit No. 44 of 1879 on the file of the Subordinate Court of Madura East, certain villages were brought to sale and were

* Appeals Nos. 40 and 122 of 1893.

purchased by the present plaintiff, who was put in possession under the orders of the Court on the 15th October 1882. The High Court by an order, dated 16th October 1883, set aside the sale. The present plaintiff, having been dispossessed as the result of that order, preferred an appeal against it to the Privy Council. The appeal having been admitted, the High Court on 13th April 1885 made an order in the following terms:—"We direct that "the minors by their guardians (respondents) do furnish security "to the satisfaction of the Court of First Instance within three "months from this date for the mesne profits and the due delivery "of the property without waste if this Court's order is reversed."

The matter having accordingly come on before the Subordinate Judge, he made an order on the 9th May 1885 as follows:—

"This comes on to-day for orders as to the amount for which "the original judgment-debtors are to furnish security. Mr. Srini-"vasiengar, the purchaser's vakil, wants security for Rs. 12,000 "for mesne profits for two years at Rs. 6,000 per year, and "for Rs. 20,000 for due re-delivery of the property without waste. "Mr. Narasimachariar, the judgment-debtor's vakil, accepts the "valuation given by the other side for mesne profits and agrees to "give security for two years' profits, but, as regards the security for "the due re-delivery, he says it will be sufficient if his clients "undertake to place the purchaser back in possession if required. "I, therefore, consider that the judgment-debtors should lodge some "security to meet these contingencies. The question, then, is for "what amount. I consider that in the circumstances of the case, "security for Rs. 3,000 will be sufficient for this purpose.

"The judgment-debtors will, therefore, lodge security on or "before 13th July 1885 as already ordered for Rs. 15,000."

The instrument of the 16th February 1886 above referred to, which was executed by the present defendants who furnished the required security, recited the above proceedings and comprised a description of immovable property, which was therein stated to have been given as security in accordance with the above orders.

On the 29th June 1888 the Privy Council reversed the order of the High Court by which the sale had been set aside. The plaintiff now sued as above to enforce his rights against the defendants. It appeared that subsequent to 16th February 1886 a payment was made from the income of the property in question in satisfaction of a decree obtained by the Zamindar against the

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present plaintiff for arrears of poruppu previously accrued due. The Subordinate Judge passed a decree against the defendants personally and against the property comprised in the instrument for Rs. 9,543. Against this decree the plaintiff and defendants Nos. 3 and 4, respectively, preferred the present appeals.

The Advocate-General (Hon. Mr. *Spring Branson*) and *Krishnasami Ayyar* for appellants in No. 40.

Bhashyam Ayyangar and *Rangaramanuja Chariar* for respondent.

Bhashyam Ayyangar and *Jivaji* for appellant in No. 122.

Krishnasami Ayyar for respondents.

JUDGMENT.—It will be convenient to deal first with the contention on the part of the defendants (appellants in No. 40) that there was no consideration for the undertaking given by them, because the order of this Court, dated the 13th April 1885, was an order which the Court had no power to pass under Section 608 of the Code of Civil Procedure. It is said that such an order could not be made against a respondent in a Privy Council Appeal, who had already been put in possession in execution of the decree appealed against.

On the other hand we are referred to a decision of the Privy Council in *Mussumat Jariut-ool-Butool* v. *Mussumat Hoseinee Begum*(1), in which this point was considered with reference to the law as it stood under the Bengal Regulation of 1797. In that case it was held that it was competent to the Court to require security for protection of property during an appeal even after the execution of the decree. (See also *Sooruj Monee Dayee* v. *Sudanund Mohapattur*(2). In the face of these authorities we are unable to hold that the order was an illegal one; and even if it was, it is by no means clear that the undertaking given by the defendants at the request of the judgment-debtor or in consequence of the order was given without consideration.

It is then argued on the appellants' behalf that, although the undertaking given by them might in its inception be valid, it was competent to them to withdraw it at any time and release themselves and their property from all liability in the future. In the view we take of the document the provisions of the Contract Act relating to revocation of a surety are inapplicable, because no per-

(1) 10 M.I.A., 196. (2) 12 W.R., 296.

sonal guarantee was given by the appellants. At the request and for the benefit of defendants Nos. 8 and 9 the appellants pledged certain property to secure the claim which Arunachellam might eventually have in respect of the mesne profits of the land which was allowed to remain in the possession of the same defendants. We do not understand on what principle the appellants can claim to withdraw their property from pledge before the event has happened on which the accrual of the claim secured by it depends. No authority was cited for the position that a pledge or mortgage given under such circumstances could be cancelled at the will of the person who has given it. The evidence, moreover, does not go beyond showing that the appellants were desirous of being released from liability. This contention of the appellants must, we think, fail.

The questions which next arise relate to the construction of the bond. It is much to be regretted that a document of this importance should be drawn in such a slovenly way. The order of the Subordinate Judge directing that security be given is also open to the charge of ambiguity. The Judge who tried the case treated the document as one imposing a personal liability on the executants. We can find no words to justify that view and Mr. Bhashyam Ayyangar did not attempt to support it. To that extent, therefore, the appeal must be allowed.

Then it is contended that the intention was that the executants should be liable for the mesne profits of two years only, and reliance is placed on the reference to two years contained in the order of the 9th May 1885. The real order, as it appears to us, is contained in the last two lines of the document in which no limit of time is fixed. But, however that may be, we have to find the terms of the obligation in the document executed by the appellants, and, if they meant to limit their liability in point of time, they ought to have seen that words to that effect were introduced. There is no such limit, but on the contrary it is clear that the mesne profits for which security is given are the mesne profits accruing up to the date of the decision of the pending appeal. The other terminus, that is, the point of time from which the mesne profits are to be calculated is not stated in the document. The parties might have agreed to make the executants responsible for the profits accruing since the date when Arunachellam was dispossessed; and for the respondent it is argued that the document should be

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construed as if an agreement to that effect were expressed in it. In our opinion if it was intended to carry back the liability of the executants to an earlier date than the date of execution, the plaintiff, who was taking the document by way of security, ought to have taken care that express words to that effect were introduced. In the absence of such words we think it must be taken to have been intended that the appellants should be chargeable with the profits which might accrue between the date of the bond and that of the decision by the Privy Council. Subject to the limit of Rs. 15,000 expressed in the document and to certain questions about to be considered, the sum recoverable from the appellants is the amount of the mesne profits which accrued between the two dates above mentioned. The figures are given in our order of the 2nd November 1888, which figures were apparently adopted by both parties at the trial. The above-mentioned two dates cover a period beginning in Fasli 1295 and ending with Fasli 1297. As to the profits of Fasli 1295, it will have to be ascertained how much was received after the 16th February 1886, the date of the bond.

As to the profits of Fasli 1296, which are said to have been Rs. 6,924-6-4, the appellants claim a deduction in their favour on account of a payment made from the collections towards a sum due by Arunachellam under a decree obtained against him by the Sivaganga Zemindar. The payment was made by the receiver who was then in possession, and the decree obtained by the Zemindar related to arrears of 'poruppu' due to him by Arunachellam. It appears to us that, as Arunachellam has had the benefit of this payment, and as the amount was subtracted from the profits which the defendants might otherwise have had, the appellants, being in the position of sureties, are entitled to deduct that amount from the profits of Fasli 1296. In this view it is immaterial that the 'poruppu' on account of which the payment was made was not the 'poruppu' of the current fasli. The exact amount of the payment must be ascertained. Another question is raised with regard to a sum of Rs. 2,456-6-3, which has been allowed against the plaintiff-appellant in No. 122. No intelligible reason is given for the allowance and it is admitted that the amount did not arise from the profits of the land.

We must request the Subordinate Judge to have an account prepared on the lines above indicated, after holding such inquiry

and taking such evidence as may be necessary, and to submit the same within six weeks from the date of the receipt of this order.

In compliance with the above order, the Subordinate Judge submitted findings, and on receipt of which the High Court gave judgment as follows:—

JUDGMENT.—The result of the further finding is that Rs. 11,133-0-1 is due to the plaintiff. That sum will have to be substituted for Rs. 9,543-9-9. To the extent of the difference between these two sums the plaintiff's appeal is allowed, and he will have or pay proportionate costs of that appeal accordingly. In the other appeal No. 40, the defendants have failed, except as to the form of the decree, which must be amended by relieving them from personal liability. Substantially the defendants have failed in their appeal and must pay the cost of it.

There will be a decree for the plaintiff for the first-mentioned sum with interest at 6 per cent. from date of plaint till date of payment with a direction that, if the sum with interest thereon is not paid within six months from this date, the property will be sold.

The decree must also be amended by giving interest on costs allowed from date of decree.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SANKARAN (DEFENDANT No. 1), APPELLANT,

1885. October 15.

v.

PARVATHI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 6), RESPONDENTS.*

Civil Procedure Code, s. 13, Explanation 2, s. 43—Ground of defence not raised in previous suit—Relief not asked for in previous suit—Circumstances giving right to such relief not known at date of previous suit.

The plaintiffs, who were the junior members of a Malabar edom of which

* Second Appeal No. 39 of 1895.