

and that consequently statements made by a witness to a litigant or his solicitor in preparing proof are absolutely privileged. I am therefore of opinion that apart from section 202 of the Criminal Procedure Code, it was competent to the Deputy Magistrate, Adōni, to have referred the matter to the police for investigation, and that the Sub-Inspector of Police, Aspari, was entitled to hold the investigation and having presented the petition, it was the duty of the defendant to assist in the investigation. It was said that such wide privileges would have disastrous consequences on innocent citizens, who would be left without redress. But it will always be open to such persons to put sections 182 and 211, Indian Penal Code, in motion by an application under section 195, Criminal Procedure Code.

SANJIVI
REDDY
v.
KONERI
REDDY.

VISWANATHA
SASTRI, J.

I would therefore dismiss the appeal with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

TAMBI REDDY VIRAREDDY (SECOND COUNTER-PETITIONER,
SURETY), APPELLANT,

1925,
November 24

v.

DEVI REDDY PATTABHIRAMI REDDY & Co.
AND OTHERS (PETITIONERS AND FIRST COUNTER-PETITIONER),
RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), sec. 145 and O. XXI,
r. II, cl. 3—Surety for a judgment-debtor—Application*

TAMBI REDDY
v.
DEVI REDDY.

by the decree-holder for execution of the decree against the surety—Plea by the surety of payment and discharge of decree—Satisfaction of decree, not certified to Court—Plea of discharge, whether open to surety, when it is not open to judgment-debtor.

Where a judgment-debtor, arrested and brought before a Court, was released on a person standing surety undertaking to produce him in Court whenever ordered by the Court and, in default of doing so, to pay the decree amount himself personally, and, on an application by the decree-holder against the surety to produce the judgment-debtor or in default to execute the decree personally against the surety, the latter pleaded that the decree could not be executed as it was wholly satisfied by payment, though satisfaction was not certified to the Court.

Held, that a surety could not plead adjustment or discharge of a decree, when the judgment-debtor himself could not successfully put forward that plea under Order XXI, rule 2 (3) of the Civil Procedure Code, even though the surety was not a party to the decree.

Onkarmal Agarwala v. Nritya Gopal Chaki, (1922) 67 I.C., 885, followed.

No second decree is passed against the surety under section 145 of the Code, but the decree that is executed against him is the decree passed in the suit.

APPEAL against the order of A. S. BALASUBRAHMANYA AYYAR, District Judge of Nellore, in E.P. No. 44 of 1924 in O.S. No. 2 of 1923.

The material facts appear from the judgment.

B. Somayya for appellant.

T. V. Venkatarama Ayyar for respondents 1 and 2.

JUDGMENT.

The plaintiffs who are respondents 1 and 2 herein arrested the second defendant, the third respondent herein, in execution of a money-decree. The appellant executed a security-bond on 11th December 1923 undertaking to produce and hand over the second defendant whenever the Court passed an order to produce him. The bond also provided that in default of the surety

producing the second defendant and handing him over to the Court, the amount of decree, interest, and costs shall be recovered by the plaintiffs from the surety personally. On the execution of the bond, the second defendant was released from arrest. The plaintiffs applied to the lower Court for an order that the surety be directed to produce the second defendant and in default of producing him, the decree-amount be realized from him. The appellant contended that the decree of the plaintiffs against the second defendant had been satisfied and that no execution could issue against him in execution of a decree already satisfied. The District Judge overruled the objection of the appellant and directed him to produce the second defendant on or before a certain date and on his failure to do so that execution should issue against him. The appellant has preferred this Civil Miscellaneous Appeal.

TAMBI REDDY
v.
DEVI REDDY.

Two points arise for consideration in this case, one of fact and the other of law.

The first point is whether the decree has been satisfied. Mr. Somayya for the appellant relies very strongly upon Exhibit II which is the defendant's ledger in the account book of the plaintiffs. From the entries in the ledger it is found that a nil balance is struck. And Mr. Somayya's contention is that the decree-debt has been wiped off by payment. There are entries on both sides of the ledger and the balance is zero. In Exhibit III, the ledger of the third defendant, there is a debit entry of Rs. 5,000. It is argued for the appellant that the third defendant paid Rs. 5,000 in discharge of the decree-debt and thereby the decree-debt has been fully satisfied.

Exhibit I is the day-book and in it there is an entry that the decree in O.S. No. 2 of 1925 has been transferred to Adapala Varada Reddi for Rs. 5,000 and a promissory

TAMBI REDDY
v.
DEVI REDDY. note for the sum of Rs. 5,000 has been obtained this day from him.

Mr. T. V. Venkatarama Ayyar for the respondents 1 and 2 contends that there was no transfer of the decree in favour of Adapala Varada Reddi, the third defendant in the case, but there was only an agreement to transfer the decree to him. Exhibit A, pro-note executed by Varada Reddi in favour of the plaintiffs, on 10th January 1924, contains a recital that Varada Reddi had arranged to take a transfer of the decree-debt from the plaintiffs. The entry in the day-book is of the same date as that of the pro-note. The third defendant was only a surety for defendants 1 and 2, and in the razinama decree, he is made liable only for 2/5ths of the decree amount in case the plaintiffs were unable to realize the decree amount from defendants 1 and 2. It is unlikely that when he was made liable only for 2/5ths of the amount in case the plaintiffs were unable to obtain satisfaction from defendants 1 and 2 that he would discharge the whole of the decree amount by undertaking to pay Rs. 5,000. There is no evidence that the decree has been transferred to the third defendant. The appellant's contention is, that the entry that the decree has been transferred should be taken to mean that the decree was transferred on the 10th January 1924. Taking the entry alone, in Exhibit A, it cannot be said that the decree has been transferred to the third defendant. The onus is upon the appellant to show that the plaintiffs have transferred the decree and that they could not apply for execution. On a consideration of the evidence we have no hesitation in holding that the decree was not transferred to nor was any amount paid towards the decree by the third defendant. The appellant has not shown that the decree has been satisfied by any amount being paid by the third defendant Varada Reddi.

The next question is, granting for arguments sake, TAMBI REDDY
v.
DEVI REDDY. that the decree amount was paid by the third defendant, can the appellant take advantage of the payment, when the payment has not been certified by the Court as required by Order XXI, rule 2. The appellant's argument is that the surety is not a party to the decree and he could not apply to the Court to enter up satisfaction of a decree which has been satisfied by payment by the third defendant. The surety is not a party to the decree but becomes a party only for a limited purpose, that is, for the purpose of appeal when an order is made against him under section 145, Civil Procedure Code—vide *Ramanathan Pillai v. Doraiswami Aiyangar*(1). The fact that he is not a party to the decree is no ground for getting round a definite provision of law under Order XXI, rule 2, clause (3).

Mr. Somayya strongly urges that the said provision is contained in processual law and should not be held to override substantive law and under the Law of Contract a surety is not bound to pay, when the debt which he undertook to pay in case of default of the principal debtor has been paid off or adjusted.

Whatever may be the policy of the legislature in enacting clause (3), the Court is bound to give effect to it. Where the decree is adjusted wholly or in part the judgment-debtor should apply within three months to the Court and that such adjustment or payment should be recorded as certified and if he fails to do so, he cannot plead adjustment or payment in answer to the execution of the decree against him. Considerable reliance is placed by Mr. Somayya on the interpretation of Order XXI, rule 16, by the Madras High Court that the executing Court has a discretion to refuse execution at the instance of a transferee of a decree.

(1) (1920) I.L.R., 43 Mad., 325.

TAMBI REDDY
v.
DEVI REDDY.

In *Rama Ayyan v. Sreenivasa Pattar*(1), the judgment-debtor transferred some of his immovable properties to a person in consideration of his paying the judgment-debt to the original decree-holder. The vendee without paying the decree-holder the amount of the decree, got a transfer of the decree to himself and, as assignee, applied for execution. It was held that he was not entitled to execute the decree when he himself in spite of his undertaking to discharge the decree had fraudulently obtained a transfer of the decree from the decree-holder. Mr. Justice SUBRAHMANYA AYYAR observed at page 232, with regard to section 258 of the old Code corresponding to Order XXI, rule 2 of the present Code :

“The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly therefore the enquiry under the said second paragraph can take place only between a person standing in the relation of a judgment-debtor and a judgment-creditor.”

The surety not being a party to the decree could not apply under Order XXI, rule 2. I am unable to accept the argument that a surety though he is not a party to the decree could not ask the Court to hold an enquiry as to the decree being satisfied by payment or adjustment provided the application is made within the time allowed by the law.

Though he has no *locus standi* to insist upon an enquiry he could apply to the Court to hold an enquiry inasmuch as he has an interest in showing that the decree has been satisfied. In *Ponnuswami Nadar v. Letchmanan Chettiar*(2), there was a difference of opinion between Mr. Justice ABDUR RAHIM and Mr. Justice SUNDARA AYYAR, as regards the question

(1) (1896) I.L.R., 19 Mad., 230.

(2) (1912) I.L.R., 35 Mad., 659.

whether the prohibition regarding uncertified adjustment will or will not apply while the adjustment is made by a third party. TAMBI REDDY
v.
DEVI REDDY.

In *Ramayya v. Krishnamurti*(1), it was held that

“Order XXI, rule 2, did not disentitle a judgment-debtor from proving facts that a transferee of a decree applying for execution was merely a benamidar for another judgment-debtor.”

These cases have no application to the present question and they do not throw any light upon the points raised in this case. The real question is whether a surety can plead adjustment or the discharge of a decree when the judgment-debtor himself could not successfully put forward that plea. In this case the payment or adjustment was not certified by the Court as required by Order XXI, rule 2, and therefore execution could proceed against the second defendant.

When there is an executable decree against the second defendant, can it be reasonably contended that so far as the surety is concerned there is no executable decree? The Court cannot recognize any adjustment or payment out of Court unless certified as is required by law and in the absence of such certificate, a decree-holder, however fraudulent his conduct may be, is entitled in law to execute his decree against the judgment-debtor, and so long as he is entitled to execute the decree against the judgment-debtor, a surety, who undertakes to pay the decree-amount, cannot plead that there is no decree against the judgment-debtor and therefore he is released from liability under the bond. Section 145 says:—

“When any person has become liable as a surety, a decree or an order may be executed against him to the extent to which he has rendered himself personally liable.”

TAMBI REDDY
 v.
 DEVI REDDY.

On the failure of the surety to carry out the terms of the bond, he makes himself liable for the amount of the decree or such amount as he has undertaken to pay.

It is next suggested that the original decree is not executed against the surety but a second decree passed on his failure to carry out his undertaking and therefore that decree is different from the original decree. No second decree is passed against the surety. The order under section 145 is passed when he makes himself liable by failing to carry out the terms of the bond, to the extent to which he has rendered himself liable. The decree that is executed against him is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him.

The contention of Mr. Somayya for the appellant that uncertified adjustment or payment could be pleaded by the surety, was specifically negatived in a recent case decided by a Bench of the Calcutta High Court in *Onkarnal Agarwala v. Nritya Gopal Chaki*(1). The learned Judges observed at page 886 :

“The surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified by the Court.”

In the result we have no hesitation in holding that so long as there is an executable decree against the judgment-debtor the surety is not relieved from his liability to pay the decree amount under the terms of the security bond executed by him.

The appeal fails and is dismissed with costs.

K.R.

(1) (1922) 67 I.C., 885.