APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

S. AYYASWAMI AYYAR (PETITIONER), APPELLANT,

1932, October 18.

v.

SIVAKKIAMMAL (RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 145—Policy underlying—Sureties not personally liable—Applicability of section to such cases—Appealability of orders of Court against such sureties.

Section 145 of the Code of Civil Procedure, 1908, applies only to cases where sureties have made themselves personally liable. But even where sureties have not made themselves personally liable, the Courts possess a general power in regard to executing orders made against sureties, and in such cases, having regard to the decision of the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*, (1919) I.L.R. 42 All. 158 (P.C.), and the policy underlying section 145, the sureties' remedy by way of appeal subsists.

APPEAL against the order of the Court of the Subordinate Judge of Madura, dated the 1st March 1930, in Execution Application No. 747 of 1929 (Execution Petition No. 101 of 1928) in Original Suit No. 13 of 1919, Subordinate Judge's Court, Mayavaram.

K. V. Sesha Ayyangar for appellant.

C. A. Seshagiri Sastri for respondent.

The ORDER of the Court was delivered by

VENKATASUBBA RAO J.—Mr. Seshagiri Sastri for the respondent takes an objection *in limine* that the present appeal is incompetent. The point to be decided is, whether an appeal lies against the order in question. The facts may be briefly stated. VENKATASUBBA RAO J.

* Appeal against Order No. 481 of 1930.

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One Chellammal executed a deed of mortgage in favour of Sivakkiammal, the respondent. In a suit (Original Suit No. 13 of 1919 on the file of the Mayavaram Sub-Court), subsequently brought by Chellammal's husband, Ramachandra Ayyar, against Ayyaswami Ayyar the appellant, Ramachandra Ayyar was appointed receiver. He was directed to furnish security, and Chellammal executed on 24th July 1917 a security bond in favour of the Court creating a charge over the property already mortgaged to Sivakki. Sometime later, Chellammal executed another mortgage in favour of one Ramaswami Ayyangar. Sivakki then filed a suit on foot of her mortgage (Original Suit No. 239 of 1922 on the file of the Munsif's Court, Madura). At that time she alleges she was not aware of the security bond executed in favour of the Mayavaram Sub-Court. Naturally, while she impleaded Ramaswami Ayyangar as a party, she did not add as defendant any person claiming an interest under the security bond in question. Even if she was aware of the security bond, she would have had a difficulty in deciding as to whom she should add as a party, the charge having been created in favour of the Court. Sivakki in due course obtained a decree, brought the property to sale and on 1st February 1926 purchased it herself in Court-auction and, in October following, she was put in possession. Subsequently Ayyaswami Ayyar instituted proceedings in Original Suit No. 13 of 1919 against the surety, Chellammal, obtained an order against her and got it transferred to the Madura Munsif's Court for execution. To those proceedings Sivakki was not a party. The order was executed, the charged property was brought to sale and Ayyaswami Ayyar himself purchased it in Court-auction some time after 30th July 1928. Then, finding that the property was in the possession of Sivakki, he moved

the Court, complaining of her obstruction, to remove her from the property, and the lower Court has made an order rejecting the application. The present appeal is from that order.

Mr. Seshagiri Sastri for the respondent contends that the order against the surety cannot be deemed to be one under section 145 of the Code of Civil Procedure. The order was for the sale of Chellammal's immovable property, and the section applies only where a surety has made himself personally liable. If section 145 does not apply, the learned Counsel contends that Chellammal cannot be deemed to be a party to the suit (Original Suit No. 13 of 1919) within the meaning of section 47. It is true that to the proceeding in question section 145 does not apply, and we must regard that the order against the surety was made, not under the terms of that section, but under the general power which the Judicial Committee has held the Courts possess in regard to executing orders made against sureties ; *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*(1). But the very judgment of the Judicial Committee shows that what was contemplated was an order in the suit itself (see page 167), and the implication is that the surety was dealt with as if he was a party to the suit. Section 145, while it prescribes a remedy against the surety also provides for the surety's remedy by way of appeal. When their Lordships of the Judicial Committee held that there was power outside section 145 to proceed against the surety, they could not have intended to deprive him of the remedy which he would have had had the proceedings been taken under section 145. Their Lordships point out that the surety was not a party to the suit at the stage of the fixation

(1) (1919) I.L.R. 42 All. 158 (P.C.).

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of mesne profits, that is to say, before the execution commenced. But, having regard to their Lordships' decision and the policy underlying section 145, we must hold that it was not intended that the surety's rights should in this respect be abridged.

The only other point bearing on the preliminary objection is whether Sivakki is the representative in interest of Chellammal. Sivakki by reason of her purchase became the assignee of Chellammal's equity of redemption. This has not been seriously disputed.

In the result, we must disallow the preliminary objection.

The questions raised in the appeal itself are similar to those raised in Civil Miscellaneous Second Appeal No. 182 of 1931*, which a Bench has suggested may be heard by three Judges. Subject to the orders of the Chief Justice it appears to us convenient that this appeal should be heard by the same Bench of three Judges.

G.R.

* [The Opinion of the Full Bench in Civil Miscellaneous Second Appeal No. 182 of 1931 and in this Civil Miscellaneous Appeal appears at pages 846 to 878 herein.]