380

HEN
v.
BANK
ENGAL.

and was obtaining discount to very nearly the full value of the goods. What profit, proportionate to the risk, the Bank was to make, if it was merely acting as agent for the defendant, in the manner suggested by him, it is not very easy to see. Nor is it at all comprehensible, why Cohen Brothers and Co. were to go through the form of accepting a bill, if the goods in respect of which their acceptance was to be given were only to come into their hands upon payment of cash. The whole case set up by the defendant appears to be untenable and impossible, and I am of opinion that each and all of his pleas fail. Although I differ with Mr. Justice Spankie, as to the admissibilty of the defence set up to this claim in point of law, this will in no way interfere with or prevent our decision of this case. The lower Courts have effectually and fully disposed of the questions of fact raised in issue upon all the pleas put forward, and with their findings we cannot interfere, though I may say I entirely agree with them. The appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH.

88
ry 3.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

BANS BAHADUR SINGH AND OTHERS (OBJECTORS) *v.* MUGHLA BEGAM AND OTHERS (DECREE-HOLDERS).*

CHUNNI BAI (OBJECTOR) *v.* NAROTAM DAS (DECREE-HOLDER) †

Appeal to Her Majesty in Council—Security for the costs of the respondent—Execution of decree against surety—Act X of 1877 (Civil Procedure Code), ss 253, 610.

An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and *B* and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against *B* and the other persons as sureties. *Held* by STUART, C. J., PEARSON, J., and OLDFIELD, J., that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties.

Per SPANKIE, J., and STRAIGHT, J.—*Contra.*

* First Appeal, No. 38 of 1879, from an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 14th January, 1879.

† First Appeal, No. 65 of 1879, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 29th March, 1879.

1880

BANS BAHADUR SINGH v. MUGHLA BEGAM.

Nur-ul-lah Khan obtained a decree for money against Mughla Begam and certain other persons on the 9th April, 1872, which was reversed by the High Court on the 17th March, 1873. Nur-ul-lah Khan desiring to appeal from the decree of the High Court to the Privy Council, the High Court called upon him to furnish security for the costs of the respondent. Accordingly he filed a security-bond, dated the 8th July, 1873, in which Bans Bahadur Singh and certain other persons jointly hypothecated certain immoveable property as security for such costs. On the 22nd February, 1878, the Privy Council dismissed Nur-ul-lah Khan's appeal, directing him to pay the costs of the respondent. On the 18th July, 1878, the decree-holder applied for execution of this order against the judgment-debtor and the sureties, seeking to recover the costs incurred by him in the Privy Council by the attachment and sale of the property hypothecated by the sureties as security for such costs. The sureties objected, contending that the order of the Privy Council could not be executed against them. This objection was disallowed by the Court of first instance. The objectors appealed to the High Court.

The Court (OLDFIELD, J. and STRAIGHT, J.) referred to the Full Bench the following question:—"Whether the decree-holders can recover the costs of the appeal to the Privy Council, which have been decreed to them, by executing their decree against the sureties, who, before the passing of the decree of the Privy Council, have become liable as sureties for the payment of such costs". A similar question was raised in another case which subsequently came before Spankie, J. and Straight, J. who ordered that it should also be laid before the Full Bench, and the two cases were heard and disposed of together by the Full Bench.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Lala *Lalta Prasad* and Munshi *Mehdi Hasan*, for the respondents, in No. 38.

Mr. *Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for appellant.

1880

BANS BAHADUR SINGH v. MUGHLA BEGAM.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondent, in No. 65.

The following judgments were delivered by the Full Bench:

STUART, C. J.—In my opinion our answers to these two references ought to be in the affirmative. I have looked into the records for the terms of the surety-bonds in both cases, and I find that in one the bond absolutely secures the costs of the Privy Council to the extent of Rs. 4,000, and in the other case the surety bond is not limited to the costs of the Privy Council appeal, but covers the whole decree appealed against, including the decretal amount of Rs. 11,853-7-10 and the costs. The legal question, however, is the same in both references, and must be answered in the same way.

The sections of the Code of Procedure to be considered are ss. 610 and 253. S. 610 provides that:—"Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." It will be observed that the words here employed are large and general, ordering execution of decrees of the Privy Council according to the rules, that is, *all* the rules, applicable to the execution of original decrees, and there is no exception from them of sureties or of s. 253, or of any other sections or provisions in the entire chapter. Now these rules for the execution of original decrees are comprised in Chapter XIX of Act X of 1877, and they begin with s. 223 and end with s. 343. By s. 253, which thus forms part of the rules applicable to the execution of original decrees, it is provided that: "Whenever a

1880

BANS BAHADUR SINGH v. MUGHLA BEGAM.

person has, before the passing of a decree in any original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant." To my mind the plain effect of this provision, which is thus made part of the law provided by s. 610, is that sureties for the execution of decrees of the Privy Council are placed in precisely the same position, and have precisely the same liability, as sureties for the performance of decrees in original suits, and may be proceeded against in the same summary manner, for under s. 253 sureties have no litigious and contentious rights, but simply become liable for whatever may be decreed against their principals. There appears to me to be no difficulty whatever in applying this section to the execution of Privy Council decrees, and the effect of it when read with s. 610 is that the words in s. 253, "before the passing of a decree in an original suit," mean, under s. 610, "before the passing of a decree in an appeal to the Privy Council."

It appears to me not unimportant to observe that s. 610 is immediately preceded by provisions dealing with the subject of security for the costs of the respondent, and for the security to be taken for the due performance of Privy Council decrees and of orders made by that supreme tribunal. Thus by s. 602 it is provided that, if the certificate for an appeal to the Privy Council be granted, the appellant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, "give security for the costs of the respondent," and by s. 603 it is provided that, when such security has been completed, the Court may, among other things, declare the appeal admitted. S. 604 provides that, at any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon. Then s. 605 provides for other and further security being taken for the expense of translating, transcribing, printing, &c., certain portions of the record; and by s. 606, if the appellant fails to comply with the order of the Court directing such security to be found, it is provided that "the proceeding shall be stayed, and the appeal shall not proceed without an order on this behalf of Her Majesty in

1880

RANS BAHADUR SINGH v. MUGHLA BEGAM.

Council, and in the meantime execution of the decree appealed against shall not be stayed." This section is, as I view it, very relevant to the question before us, showing, as it evidently does, the great importance attached in the mind of the Legislature to compliance with the pecuniary and necessary conditions attached to the privilege of appeal to Her Majesty in Council, the object plainly being to prevent the time of the Privy Council being taken up with idle and frivolous appeals. S. 603 again provides for security being taken, under other and further circumstances, from the respondent or the appellant in the Privy Council; and s. 609 is so important and germane in my view to the question involved in these references that I give it at length: "If at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security. In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, *issue execution of the decree appealed against as if the appellant had furnished no such security.* And if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit."

It is thus abundantly evident that the subject of security for costs in the Privy Council was very much and very anxiously in the mind of the Legislature when it enacted s. 610, and the conclusion appears to me irresistible that, by the use of the words "in the manner and according to the rules applicable to the execution of original decrees," the intention beyond all doubt was to import into the procedure for the execution of Privy Council decrees the provisions of s. 253; although irrespective of these sections immediately preceding s. 610 I should have held that by force of its direction the liability of sureties under s. 253 was distinctly applicable to sureties under s. 610. And indeed without such a reading s. 610 would appear to be of little use, even if the term "original suit" was meant solely to apply to the proceedings in the first Court.

1880

BANS BAHADUR SINGH v. MOGHL BEGAM

But I agree with my colleagues Mr. Justice Pearson and Mr. Justice Oldfield that the term "original suit" includes the proceedings in the Appellate Court, the suit being the same throughout, and I also agree with them that the expression "decree in the original suit" is not necessarily the same thing as a decree of the Court of first instance. Indeed, having regard to the course litigation generally takes in this country, the words "before the passing of a decree in an original suit" apply not merely to the first decree in a suit, but to a final decree in an original suit after the whole course of procedure by appeal has been exhausted, including even the decree by the Privy Council. And when to this is added the express provision of s. 610, there seems to be an end to all doubt, that the true intent and meaning of the law is to place parties who have undertaken the more limited liability of being sureties before the passing of a decree by the Privy Council, in the same position as sureties who have become liable before the passing of a decree in an original suit. To say the least the law in question is capable of such a reading, and there seems to be no intelligible reason in justice or in legal policy against its practical application.

My colleagues Mr. Justice Spankie and Mr. Justice Straight, who dissent from the majority of the Court, after noticing the course of decision under s. 204, Act VIII of 1859 (which undoubtedly supports the opinions I am now expressing), wind up their views on this part of the case with the observation that it is plain that the whole current of opinion went to regard a surety as a party to the suit, but that under existing legislation execution is limited to suretyship undertaken before the passing of a decree in an original suit. My answer to these suggestions, however, is that, so far as the execution of a decree is concerned, a surety is as much now as he was under the former law of procedure a party to the suit, although that may be in a very limited sense, for, as I have already remarked, sureties have no litigious or contentious rights of their own, but simply offer their direct liability for whatever is decreed against their principals. My honorable colleagues further, with reference to the argument as to the expediency of sureties being in every stage liable, and the anomaly of refusing to extend the operation of s. 253, suggest that these are matters of which upon a simple question of construction

1880

RANS BAHADUR SINGH v. MUGHLA BEGAM.

no notice can be taken. But with the greatest deference to them the argument *ab inconvenienti* is of the greatest importance and ought not to be disregarded, and its force, added to the other considerations I and my colleagues who agree with me have urged, reasonably if not irresistibly, lead to the conclusion at which we have arrived.

Concurring therefore with Mr. Justice Pearson and Mr. Justice Oldfield my answer to these references is in the affirmative in both cases.

OLDFIELD, J.—It appears that in these cases, appeals having been preferred to Her Majesty in Council from decrees of this Court, the appellants before us became sureties for the costs of the respondents, and the appeals having been dismissed with costs, the question arises whether the respondents can recover their costs by proceeding to execute their decrees against the sureties or should proceed against them by regular suits. S. 610, Act X of 1877, provides the procedure for enforcing orders of Her Majesty in Council; it runs as follows: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." We have therefore to ascertain the manner and rules applicable for the execution of original decrees, and we find these in Chapter XIX, treating "of the execution of decrees," under the heading *E*, "Of the mode of executing decrees," and among them in s. 253 is the following rule, "Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner

as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

We have here clearly a rule and manner laid down for enforcing a decree of an original Court against a person who has, before passing of the decree in the original suit, become liable for the performance of the same or any part thereof, and we must apply the above rule and manner to the enforcement of the order or decree of Her Majesty in Council in the case of a person who has, before the passing of the decree of Her Majesty in Council, become surety for its performance. By the terms of s. 610 the rules applicable to the enforcement of original decrees are made applicable to the enforcement of the orders and decrees of Her Majesty in Council, and amongst them clearly those which apply to sureties for costs of a decree. This was undoubtedly the course laid down in s. 204, Act VIII of 1859, and has been followed by this and other Courts. The only material difference between the terms of s. 204, Act VIII of 1859, and s. 253, Act X of 1877, is that the terms of the former section are, "whenever a person has become liable as security for the performance of a decree," whereas in the latter they are, "whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same," the material addition being the words "in an original suit," and these words were probably added to show (possibly with reference to certain decisions under Act VIII of 1859, s. 204,—*Ram Kishen Doss* v. *Hurkhoo Singh* (1), *Gujendro Narain Roy* v. *Hemanginee Dossee* (2), *Chutterdharee Lall* v. *Rambelashee Koer* (3)) that the provision applies only to persons who have become sureties for the performance of a decree in the course of the suit and prior to the decree, and not afterwards, and was not intended to draw any distinction between persons becoming sureties before passing of decrees of a Court of first instance, and those becoming sureties after passing of the decree of the Court of first instance and before that of the Appellate Court. The term "original suit" includes the proceedings in the Appellate Court, the suit being the same throughout, and the

(1) 7 W. R., 329. (2) 13 W. R., 35.
(3) I. L. R., 3 Calc. 318.

1880

JANS BAHADUR SINGH v. MUGHLA BEGAM.

term "decree in the original suit" is not the same thing as "decree of the Court of first instance." Could the term, however, be so interpreted, I should still be disposed to hold that the operation of s. 610 will be to make the provisions of s. 253, "mutatis mutandis," applicable to execution of decrees of Her Majesty in Council in cases of persons becoming before the decree surety for its performance. I may add that no reason has been shown why the Legislature should intend to make a difference in the manner of execution between the case of persons becoming sureties for the performance of the decree of a Court of first instance, and those becoming sureties for the performance of the decree of the Appellate Court or that of Her Majesty in Council. I would answer the question referred in the affirmative.

PEARSON, J.—For the reasons stated by my honorable colleague Mr. Justice Oldfield, I concur with him in answering in the affirmative the question referred to the Full Bench.

STRAIGHT, J. (SPANKIE, J., concurring)—The question submitted to the Full Bench in this, as well as the kindred reference in First Appeal from Order, No. 38 of 1879, is substantially identical and may, for the purposes of brevity and convenience, be discussed and disposed of in a single judgment. The main point for our consideration is, Can sureties for an appellant in an appeal to the Privy Council, which is dismissed, be directly proceeded against in the execution department in the same manner as the judgment-debtor? In order to reply to this inquiry it is necessary very closely to examine the provisions of ss. 253 and 610 of Act X of 1877. Applying the attention first of all to s. 610, that will be found to regulate the procedure to enforce orders of the Queen in Council, and the following directions are given as to the procedure to be followed by a person who wishes to carry into execution any such order. He must apply to the Court from which the appeal to the Privy Council was immediately preferred, by petition, to which should be attached a certified copy of the decree and order sought to be enforced. Then the Court is to send the order to the lower Court which passed the *first decree* in the suit, and this latter Court is specifically directed to "enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of

1880

BANS BAHADUR SINGH v. MUGHLA BEGAM.

its original decrees." It is next necessary to see what these rules are to which reference is here made. They may be found in Chapter XIX of Act X of 1877, which is intelligibly headed "*Of the execution of decrees*" and under several heads treats of the following incidental matters :—

1.—The Court by which decrees may be executed.
2.—Application for execution.
3.—Staying execution.
4.—Questions for Court executing decree.
5.—Mode of executing decrees.
6.—Attachment of property.
7.—Sale and delivery of property.
8.—Resistance to execution.
9.—Arrest and imprisonment.

Now it is argued by those, who contend for a reply in the affirmative to the question under consideration, that s. 253 of this chapter, providing as it does for the execution of a decree against a surety, supplies one of the rules "in the manner and according to which" the enforcement of orders of the Queen in Council under s. 610 is to be carried out. In other words, that the effect of the two sections, when read together, is to put surety and judgment-debtor on precisely the same footing in execution. Upon a careful examination we find it quite impossible to adopt any such view. We must take the words as they are and not wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence, introduced, as we will show, intentionally into a clause, for the purpose of securing uniformity. What are the terms of s. 253? "Whenever a person has, before the passing of a decree in an original suit, become liable as a surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety".

The corresponding provision of the former Civil Procedure Code, VIII of 1859, contained no such words as "before the passing of a decree in an original suit;" on the contrary the language

880

1 BAHA-
SINGH
v.
GHLA
EGAM.

of s. 204 was of the most general kind and fixed no point of time at or before which a person becoming a surety fixed his liability and rendered himself liable to all the consequences to which his principal was subject. The decisions that were quoted in the course of the argument were upon cases, that had arisen under this earlier Act and to us appear clearly distinguishable from the present. Though under s. 204, Act VIII of 1859, the Courts held, that it did not apply to parties who became sureties after a decree, they nevertheless were unanimous or nearly so in declaring, that the word decree was not confined to that made in the original suit, but that the security given might be enforced against a surety in execution of an appellate decree. In fact it is plain, that the whole current of opinion went to regard a surety as *a party to the suit*, under s. 11 of Act XXIII of 1861, the corresponding section to which of Act X of 1877 is 244.

Under existing legislation, however, execution is limited to a suretyship undertaken "before the passing of a decree in an original suit." Though s. 583 provides for the execution of appellate decrees and s. 610 of orders passed by the Queen in Council according to the rules prescribed in Chapter XIX, there is not to be found in the whole of its 120 clauses one word that authorises enforcement of execution against a surety, except when he has taken upon himself that character "before the passing of a decree in an original suit." The argument, as to the expediency of sureties being in every stage liable and the anomaly, the existence of which it is argued we are countenancing, by refusing to extend the operation of s. 253, are matters of which upon a simple question of construction we can take no notice. Still as to this latter point we can well understand why a difference may fairly be drawn between a surety who undertakes his liability before the passing of the decree in the original suit, and so to speak identifies himself with and becomes a party to it, and another who comes upon the scene at a later stage, when litigation has proceeded a considerable distance on the road either to the lower appellate Court, the High Court, or the Privy Council.

The decree in the *original suit* practically passes against the surety, and so far as he is liable under it, it is that decree, which is

enforced against him, and not any security-bond he may have entered into subsequent to the passing of that decree. The ss. 583 and 610 do not confer any greater power on the Court that made the decree appealed, than it already possesses under Chapter XIX of the Code. If that Court extends the action of s. 253, and drags within its operation a surety who has not become liable before the passing of an original decree, it is acting "*ultra vires*" and any order passed to that effect would in our judgment be illegal and void. For it would not only be enforcing a liability undertaken after the passing of its own decree, but one created under a surety-bond, the responsibility upon which no Court had definitely determined in any decree or order.

Now it should be observed, that s. 253 has a twofold character. First, it continues in mitigated shape a personal liability to execution without process originally introduced in a novel and somewhat startling form in s 204 of Act VIII of 1859, and next it details the machinery by which such liability is to be enforced without the ordinary intervention of a suit, in summary fashion. The only reservation made in the surety's favour is that he is to have sufficient notice. The words of s. 610, however, seem simply to provide for the enforcement of decrees or orders of the Queen in Council according to the same method as original decrees are executed by the Court passing them, but they create no liability, and establish no specific responsibility in the surety. In the argument for the respondents upon s. 253 it is ingeniously sought to mix up liability and machinery and to treat them as one and the same, but the decree is one thing, the mode of executing it another. At any rate having regard to the fact that the phrase "before the passing of the decree in the original suit" is not to be found in s. 204 of Act VIII of 1859 but appears for the first time in s. 253 of the Act now in force, we must assume that it was introduced for some good purpose, and that purpose, if words mean anything, would seem to be to limit a new and somewhat arbitrary liability, existing outside the actual parties to the suit, to those persons who from its institution had *qua* guarantors so to speak, vouched for its *bona fides* by becoming sureties before the passing of the first decree. It is the decree of the original Court determining the liability of plaintiff or defendant, as the result may

1880

ANS BAHADUR SINGH v. MUGHLA BEGAM.

be, that by special provision carries also with it the liability of the surety against whom it may be executed, but the decree of the appellate Court or the order of the Queen in Council is not declared to have attaching to it any such contingency, and while it is perfectly intelligible, that to put in force s. 610 the machinery of s. 253 may be used, it seems equally clear to us, that the words "before the passing of a decree in an original suit" are prohibitory to an extended application of the section for the further purpose of establishing an exceptional liability.

For the reasons and upon the grounds we have adverted to we are of opinion that the question raised in this reference must be answered in the negative.

1880
January 7.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

NAND RAM AND OTHERS (DEFENDANTS) *v.* MUHAMMAD BAKHSH (PLAINTIFF).*

Dismissal of appeal for appellant's default—Appeal—Act X of 1877 (Civil Procedure Code), ss. 556, 558, 588—Act XII of 1879, s. 90 (27).

Where an appeal is dismissed, under s. 556 of Act X of 1877, for the appellant's default, the order dismissing it is not appealable.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The following judgments were delivered by the High Court:

STUART, C. J.—We cannot entertain this appeal. The Judge having proceeded under s. 556 of the Civil Procedure Code, the defendants ought to have applied to the Judge of the District for the re-admission of the appeal to him under s. 558, and the only further procedure open to the defendants was by an appeal to this Court from the Judge's order under s. 588 as amended by Act XII of

* Second Appeal, No. 511 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 18th February, 1879, affirming a decree of Rai Lachman Singh, Assistant Collector of Bulandshahr, dated the 23th August, 1878.