

right to object at the hearing of the appeal to that part of the decree without filing a separate appeal. The learned Judge seems to think that both these cases are of an analogous character. In the case of the decree of the first Court being partially adverse to the respondent, the section allows him the right to take objections to that part of the decree, and when he has done so and the appeal has proceeded to hearing, the Court, being seised of the objections, is bound to decide them, although the appellant may have withdrawn from the appeal; but where the respondent has preferred no objections under the second paragraph of the section, the Court cannot refuse to allow the appellant to withdraw the appeal because the result may be that the respondent will not be able to challenge the findings of the Court below which are adverse to him. As has been pointed out by the learned Chief Justice, the respondent does not suffer, and is not prejudiced in any way, by the withdrawal. He could have supported the decree upon grounds other than those on which the decree was passed. But when the appellant withdraws the appeal the decree remains as it is, that is, as a decree in favour of the respondent, and the respondent has no occasion to support it upon any grounds other than those on which the Court of first instance passed it. That being so, the learned Judge was wrong in proceeding to hear the appeal and in deciding it on the merits. I agree in the order proposed.

Appeal decreed.

Before Mr. Justice Aikman.

T. H. SMITH (JUDGMENT-DEBTOR) v. THE ALLAHABAD BANK, LD.

(DECREE-HOLDER).*

Civil Procedure Code, section 266—Execution of decree—Attachment of money payable to an auctioneer by purchasers of goods sold by him at auction.

Held that money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment-debtor had a disposing power over which he could exercise for his own benefit; and further, that if such money was attached the auctioneer was a proper person to raise the objection that it was not attachable under section 266 of the Code of Civil Procedure.

1901

KALYAN
SINGH
v.
RAHMU.

1901

January 11.

* First Appeal No. 218 of 1900 from an order of Syed Muhammad Sirajuddin, Judge of the Court of Small Causes, exercising powers of a Subordinate Judge, at Allahabad, dated the 2nd August 1900.

1901

T. H. SMITH
v.
THE
ALLAHABAD
BANK, LD.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. R. K. Sorabji, for the appellant.

Munshi Jang Bahadur Lal, for the respondent.

AIKMAN, J.—This appeal arises out of proceedings in execution of a decree obtained by the Allahabad Bank, Limited, against the appellant, T. H. Smith. From the facts stated in the judgment of the lower Court it appears that the judgment-debtor is an auctioneer, to whom the public send articles for sale by auction, and that the respondent, the Allahabad Bank, has attached in the hands of the purchasers of certain articles sold by Mr. Smith as auctioneer, the amounts these purchasers bid at auction, but which they had not on the date of attachment paid to the auctioneer. The judgment-debtor objected to the attachment on the ground that the money was the proceeds of the sale of articles which did not belong to him. The lower Court on the above facts expressed an opinion that the money belonged to Mr. Smith, and further that he had no right to object to its attachment. It consequently disallowed the objection which had been raised by the judgment-debtor. Against this order the judgment-debtor appeals. In my opinion the view taken by the lower Court is wrong. It is clear from the words of the first paragraph of section 266 of the Code of Civil Procedure, that it is money over which the judgment-debtor has a disposing power which he may exercise for his own benefit which is liable to attachment. Now in this case it appears to me that the money in question was not money over the whole of which the judgment-debtor had such a disposing power. An auctioneer is entitled to a certain commission on the price of articles sold by him, which belonged to the persons who sent the things to him for auction. It may also be that some of the articles sold may have been Mr. Smith's own property. Over the commission in one case and the price of the articles in the latter case Mr. Smith had a disposing power which he could exercise for his own benefit. With regard to the objection that Mr. Smith had no right to object to the attachment, I am of opinion that it is without force. I see nothing to prevent a judgment-debtor contending that he is the trustee or bailee of certain property, and that therefore it is not liable to attachment

under the provisions of section 266. Taking the above view of the case, I allow the appeal, and, setting aside the order of the lower Court, remand the case to that Court, in order that it may determine over what portion of the money attached the judgment-debtor had a disposing power which he could exercise for his own benefit. Costs here and in the lower Court will abide the result.

Appeal decreed and cause remanded.

PRIVY COUNCIL.

HODGES AND ANOTHER (DEFENDANTS) v. THE DELHI AND LONDON BANK, LIMITED (PLAINTIFF).

On appeal from the Court of the Judicial Commissioner of Oudh.

Principal and surety—Act No. IX of 1872 (Indian Contract Act), section 135—Stipulation against discharge of surety by time being given to the debtor—Parda-nashin women as a class protected.

The first of the two appellants represented the estate of a deceased surety for the repayment by the borrower of money lent on his bond by the respondent bank. The second was another surety. Both had agreed that, though in relation to the principal debtor they were to be regarded as sureties only, they were, upon default by him to be in the position of debtors to the bank for the amount secured, and thus not to be discharged from liability in consequence of any dealings between the bank and the principal debtor, whereby in the absence of this stipulation they would have been exonerated.

Default was made by the principal, and time was allowed to him, by arrangement between him and the bank.

Held, upon the construction of the contract, that the sureties were liable as principals upon the debtor's default, and that the giving time did not cause their release from liability for the debt to the bank.

The deceased surety, by birth a Kashmiri, had been, and was found by both Courts below to have been, intelligent and quite competent to manage business affairs, and to have executed of her own volition. Neither of the sureties could avoid liability in the absence of proof of misrepresentation, or undue influence, and no evidence was given of these.

A woman who is not a parda-nashin cannot be regarded as under the same protection of law that regulates the making of contracts by women of that class. Where it is alleged that a woman, not of that class, is wanting in sufficient capacity for business, that fact must be proved in order to show that those who have contracted with her, in good faith, as an ordinary person, were legally bound to take special precautions.

1901

T. H. SMITH
v.
THE
ALLAHABAD
BANK, LD.

P. C.
J. C.
1900
June 28, 29.
July 3, 21.

Present: Lords HOBHOUSE, MACNAGHTEN and LINDEY, SIR RICHARD COUCH and SIR HENRY DEVILLIERS.