

Before Mr. Justice Ryves and Mr. Justice Gobul Prasad.

RAMESHWAR DAS (SURETY) v. SRI LAL (DECREE-HOLDER).*

1921
November, 10.

Civil Procedure Code, section 145—Liability of surety for production of judgment-debtor—Failure to produce judgment-debtor due to his having been sentenced to imprisonment in a criminal case—Knowledge of surety that criminal case was pending.

In order to procure the release of L, who had been arrested in execution of a decree, one R gave a bond to the Court for the production of L when called upon, and in case of default, for payment of the amount of the decree under which L had been arrested. At the time when R executed the bond criminal proceedings were, to R's knowledge, pending against L, and by the time that R was called upon to produce L in Court, it was impossible to do so because L had been sent to jail. *Held* that in the circumstances the surety could not be excused for his inability to produce the judgment-debtor, inasmuch as the possibility or even the probability of his being sent to jail must have been within the surety's contemplation. *Krishnan Nayar v. Itinan Nayar* (1), *Ashiq Ali v. Moti Lal* (2) and *Nabin Chandra Hazari v. Mirbunjoy Barick* (3) distinguished.

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

Pandit Mohan Lal Sundal, for the appellant.

Munshi Narain Prasad Ashthana, for the respondent.

RYVES and GOKUL PRASAD, JJ. :—This appeal arises out of execution proceedings. One Sri Lal obtained a decree against Lakhpat Rai for some money and in execution of his decree had Lakhpat Rai arrested and brought to court. Thereupon Rameshwar Das, the appellant, got Lakhpat Rai released from custody on his undertaking to produce him whenever the court required, and gave a surety bond to the court in which he bound himself that on failure to carry out his promise to produce Lakhpat Rai whenever required by the court, he would himself pay the amount decreed against Lakhpat Rai. This bond was executed on the 8th day of January, 1920. It may be noted here that at that time criminal proceedings were pending against Lakhpat Rai on a charge of embezzlement on the complaint of Sri Lal and in those proceedings Rameshwar Das himself went bail for Lakhpat Rai. The court gave Rameshwar Das one month's time for the

* Second Appeal, No. 195 of 1921, from a decree of T. K. Johnston, District Judge of Agra, dated the 13th of January, 1921, reversing a decree of Banwari Lal, Munsif of Agra, dated the 7th of July, 1920.

(1) (1901) I. L. R., 24 Mad., 687. (2) (1907) 4 A. L. J., 497.

(3) (1913) I. L. R., 41 Calc., 50.

payment of the money and directed him to produce Lakhpat Rai on the expiry of the month. The month expired on Sunday the 8th day of February, 1920. On the 9th day of February Lakhpat Rai was convicted by the Criminal Court and sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs. 1,000 or, in default, to suffer six months' imprisonment. It was also ordered that if the fine or any portion of it were paid, that amount would be paid to Sri Lal as compensation. On the 9th day of February, 1920, Rameshwar Das put in an application to the court, stating that, inasmuch as Lakhpat Rai had been that morning sent to jail it was impossible for him to produce him in the Civil Court and prayed that he be discharged from his bond. No order appears to have been passed on that application, but subsequently when the decree-holder, Sri Lal, applied for process against the surety the same objection was raised by him and accepted by the executing court. On appeal, however, the learned District Judge has overruled the objection and directed execution to issue against the surety. Hence this appeal.

It is argued that the fact that Lakhpat Rai was in jail on the day on which the surety should have produced him was beyond the contemplation of anybody when the surety bond was executed, and that circumstances over which the parties had no control prevented the surety from producing Lakhpat Rai, and reliance was placed on the cases of *Krishnan Nayar v. Ittinan Nayar* (1), *Ashiq Ali v. Moti Lal* (2) and *Nabin Chandra Hazari v. Mirtunjoy Barick* (3). In all those cases the circumstance that prevented the surety from carrying out his promise was the death of the judgment-debtor. That was not so here. It can scarcely be said that Rameshwar Das could not have contemplated the possibility, or perhaps even the probability, of Lakhpat Rai being in jail within a month of his executing his surety bond when he knew that at that time criminal proceedings were going on against Lakhpat Rai. We, therefore, agree with the learned District Judge in holding that the rulings relied on do not cover this case.

(1) (1901) I. L. R., 24 Mad., 637. (2) (1907) 4 A. L. J., 437.

(3) (1913) I. L. R., 41 Cal., 50.

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We are informed that Lakhpat Rai has not paid up any portion of his fine and that there is no likelihood whatever of his ever doing so. Be that as it may, it seems to us that if the fine or any portion of it is realized and paid over to Sri Lal as compensation, then to that extent Rameshwar Das will have a right to get a refund from the decree-holder.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

GOKUL PRASAD HAR PRASAD (DEFENDANTS) v. RAM KUMAR
(PLAINTIFF)*

1921
November, 10.

Civil Procedure Code (1908), sections 107, 151; order XLI, rule 23—Remand—Inherent powers of court to order remand—Appeal from remand under inherent powers—Scope of order XLI, rule 23.

In a suit for rendition of accounts of certain partnership transactions, the court appointed a commissioner to examine the accounts and on the basis of his report passed a preliminary decree. The plaintiff appealed to the Court of the District Judge, who remanded the case to the first court for re-trial, but without definitely stating under what provision of the Code of Civil Procedure he did so. On appeal from this order it was contended that no appeal lay, the order of remand having been passed, not under order XLI, rule 23, but under the inherent powers of the court apart from order XLI.

Held that it was not necessary to decide whether such inherent powers of remand as may have been exercised by High Courts from time to time were or were not possessed by District Judges; but, inasmuch as the policy of the Court had always been to allow as wide a meaning as was reasonably possible to the provisions of order XLI, rule 23, the remand might be taken to have been made under that order.

Observations as to the inherent powers of remand possessed by High Courts. *Ghuznavi v. The Allahabad Bank, Ltd.*, (1) and *Habib Balchsh v. Baldeo Prasad* (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. B. E. O'Connor, Dr. S. M. Sulaiman, Mr. A. P. Dube and Dr. Kailas Nath Katju, for the appellants.

Mr. S. A. Haidar and Munshi Kumudu Prasad, for the respondent.

PIGGOTT, J. :—This is an appeal against an order of remand passed by the District Judge of Cawnpore under the following

* First Appeal No. 22 of 1921, from an order of E. H. Ashworth, District Judge of Cawnpore, dated the 16th of November, 1920.

(1) (1917) I. L. R., 44 Cal., 929. (2) (1901) I. R. L., 28 All., 167.