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already indicated the nature of the dispute. As the award declared the legal ownership of Ishwari Prasad's heirs in the Raitar property and declared that they were entitled to retain their ownership until the specified sums of money had been paid to them, we think that under section 16(*d*) the suit could only be instituted in a court within the local limits of whose jurisdiction the Raitar property is situated.

It has been contended that the proviso to section 16 is applicable, but in our opinion, when the relief granted by the award is a declaration of proprietary title to certain immovable property the proviso is not applicable. The arbitrators in effect gave Ishwari Prasad's heirs a charge over the immovable property until the specified sums were paid to them, and the terms of the award were similar in many respects to a decree for redemption.

In our opinion, therefore, the court below had no jurisdiction over the subject-matter of the suit within the meaning of schedule II, paragraph 20 and the appeal must be allowed. We allow the appeal with costs here and in the court below. The application filed in the lower court will be returned to the plaintiff respondent.

Before Mr. Justice Thom and Mr. Justice Rachhpal Singh

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March, 2

NAGESHAR PRASAD (SURETY) *v.* GUDRIMAL NARAIN DAS (DECREE-HOLDER)*

Civil Procedure Code, section 55(4)—*Release from arrest of judgment-debtor intending to apply for insolvency—Surety—Terms of security bond not in accordance with section—Discharge of surety according to actual terms of bond—Whether a nullity—Jurisdiction—Civil Procedure Code, section* 151.

A judgment-debtor was arrested in execution of a decree, but was released under section 55(4) of the Civil Procedure Code on his expressing an intention to apply for insolvency

*Second Appeal No. 106 of 1932, from a decree of Sheo Harakh Lal, Additional Subordinate Judge of Ballia, dated the 7th of November, 1931, reversing a decree of Syed Ali Razi, Munsif of Rasra, dated the 1st of August, 1930.

and on his furnishing a surety who filed a security bond undertaking that the petition in insolvency would be duly filed and that he would produce the judgment-debtor in court on the date to be fixed by the court. The petition in insolvency was filed within one month, and the judgment-debtor was produced in court on the date fixed; and the court passed an order staying execution proceedings pending the determination of the insolvency proceedings. Two days later, the surety applied for discharge on the ground that he had performed his obligations under the security bond; and after hearing both parties the court passed an order discharging the surety. The insolvency petition was eventually rejected, and thereupon the decree-holder applied that the surety be ordered to produce the judgment-debtor. As, however, the surety bond had been cancelled, the decree-holder applied that the order of cancellation be set aside under section 151 of the Civil Procedure Code by the exercise of the inherent jurisdiction of the court. This application was refused by the court, but was allowed by the lower appellate court.

Held that although the terms of the security bond might not have been in accordance with the provisions of section 55(4), yet the bond having been accepted as executed, the surety was entitled to stand upon its terms; and those terms having been carried out, the bond was rightly cancelled, though the insolvency proceedings had not terminated and further proceedings in execution might yet be taken. The order of cancellation was passed with jurisdiction and was not a nullity.

The order of cancellation could not be set aside under section 151 of the Civil Procedure Code. Though it was not appealable, the decree-holder had a remedy by way of revision, of which he did not avail himself. It is well established that where a party considers a decree or order of the court unjust and has neglected to avail himself of the remedy provided by the Civil Procedure Code, e.g. his right of appeal or of application in revision, it is not open to him subsequently to invite the court by virtue of its inherent jurisdiction reserved by section 151 to disturb that decree or order which he has failed to challenge in the statutory manner and within the statutory period.

Mr. *Krishna Murari Lal*, for the appellant.

Dr. *N. P. Asthana*, Messrs. *Gopalji Mehrotra* and *J. P. Bhargava*, for the respondents.

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NAGESHAR PRASAD v. GUDRIMAL NARAIN DAS

THOM and RACHHPAL SINGH, JJ. :—The respondents, the firm Gudrimal Narain Das, obtained a simple money decree against one Raghunath Prasad on the 26th of April, 1926. In execution thereof Raghunath Prasad was arrested on the 20th of April, 1929. On this date Raghunath Prasad filed an application in the court of the Munsif of Rasra, in which he stated that it was his intention to apply to be adjudged an insolvent and in respect whereof he craved his release. The court ordered his release and stayed execution proceedings on condition that he furnished security under section 55(4) of the Code of Civil Procedure. The judgment-debtor furnished the appellant Nageshar Prasad as surety. The latter executed a surety bond under which he undertook (1) that the judgment-debtor would file an insolvency application in the court of the District Judge, and (2) that he, as surety, would produce the judgment-debtor in court on the date to be fixed by the court. The date fixed was 21st of May, 1929. On the 7th of May the application to be declared an insolvent was filed by the judgment-debtor. On the 21st of May the judgment-debtor was produced in court. On the 23rd of May the appellant applied to have his surety bond cancelled in respect that he had discharged the obligations undertaken by him thereunder. Parties were heard upon this application and on the same day, namely the 23rd of May, the court passed an order discharging the appellant.

The insolvency application of the judgment-debtor was eventually rejected some time after the surety had been discharged. Thereupon the decree-holder applied on the 10th of July, 1930, for an order that the appellant be ordained to produce the judgment-debtor and in default thereof that execution should be enforceable against the appellant. As the surety bond had been cancelled by the order of the 23rd of May, 1929, the respondent filed a further application on the 28th of July, in which he prayed that this order be set aside by the court in the

exercise of its inherent jurisdiction reserved to it by section 151 of the Code of Civil Procedure. On the 28th of July, 1930, it was not open to the respondent to challenge the order of May, 1929, by way of appeal, the statutory period for appeal having expired.

The learned Munsif held that it was not open to the court to disturb the order of the 23rd of May, 1929, as the respondent had neglected to avail himself of his statutory remedy. Having failed to take advantage of his statutory remedy, it was not open to respondent to invoke the provisions of section 151. He accordingly dismissed the respondent's application against the appellant.

The learned Additional Subordinate Judge in the lower appellate court has held that the order of the 23rd of May, 1929, discharging the surety is null and void, and he has accordingly allowed the respondent's claim.

The argument that the respondent was entitled under section 151 to have the order of the 23rd of May, 1929, reviewed and set aside was not pressed before us in appeal. It was contended at some length that the order, inasmuch as it was not made in an application against the surety by the decree-holder, was not a decree within the meaning of the Code of Civil Procedure. It was not appealable and the remedy of appeal was, therefore, not available to the respondent. With this argument we are in agreement and in this connection we refer to two rulings, namely *Ram Kishun* v. *Lalta Singh* (1) and *Ramanathan Pillai* v. *Doraiswami Aiyangar* (2). These two rulings clearly support the respondent's contention in this connection. It was admitted, however, that the respondent had a remedy by way of revision. It is well established that where a party considers a decree or order of the court unjust and has neglected to avail himself of the remedy provided by the Code of Civil Procedure, e.g. his right of appeal or of application in revision, it is

(1) (1928) I. L. R., 51 All., 346. (2) (1919) I. L. R., 43 Mad., 325.

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not open to him subsequently to invite the court by virtue of its inherent jurisdiction reserved by section 151 to disturb that decree or order which he has failed to challenge in the statutory manner and within the statutory period. But as already remarked, this point was given up by the respondent in the course of the hearing.

In support of his appeal the appellant has argued that he is no longer a surety; by the order of the 23rd of May, 1929, his responsibility under his surety bond has been cancelled and that, therefore, the court cannot hold him liable under it. The respondent has argued in reply that the surety bond was executed under section 55(4) of the Code of Civil Procedure and could not be cancelled till the termination of the insolvency proceedings. We have considered the terms of the bond. Upon the face of it the bond does not appear to have been executed under any section of the Code of Civil Procedure. No reference is made to section 55(4). It may be that the court should not have accepted the bond as executed, but the fact is that it did accept the bond without any objection on the part of the respondent. In these circumstances we are of opinion that the appellant is entitled to stand upon the terms of the bond, and it is not open to the respondent to have imported into the bond provisions which are not there.

The appellant argued in the second place that assuming that the order of the 23rd of May, 1929, was a bad order, it cannot now be challenged since the respondent did not take steps to challenge it timeously. We have already dealt with this argument, with which we have declared our agreement. The respondent, however, has contended that the order of the 23rd of May, 1929, was *ab initio* null and void. The lower court had stayed execution proceedings pending the determination of the insolvency proceedings and the latter not having been terminated upon the 23rd of May, 1929, the court, he maintained, had no jurisdiction to pass the order cancelling the bond on that date. We are unable to

accept this contention. It was not disputed by the learned counsel for the respondent that the lower court had jurisdiction to entertain the application made upon the 23rd of May, 1929, by the appellant for his discharge as surety. Further, it is possible to envisage many circumstances in which the granting of such an order upon an application for discharge would not only be within the jurisdiction of the court but indeed just and equitable. We cannot therefore regard the order of discharge of the 23rd of May, 1929, as a fundamental nullity which the respondent was and is entitled to ignore. We are of opinion that the order was a just order in the circumstances, but, just or unjust, it certainly was not a nullity. Whether a decree or order of the court is a nullity or not may sometimes be a somewhat complicated problem. There may be border-line cases where the question is attended by a considerable difficulty. This matter was considered in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (1). In the course of their judgment their Lordships of the Privy Council stated that one well established test of whether an order or decree is a nullity or a mere irregularity is,—is it open to the parties against whom the decree or order is passed to waive objection to it? Applying that test in the present case it is clear that the order of the 23rd of May, 1929, was not a nullity. It was an order which the court had jurisdiction to pass upon consideration of the appellant's application for discharge.

We hold (1) that the order of the 23rd of May, 1929, is sound in law; (2) that in any event it cannot now be challenged by the respondent; and (3) that the appellant has been discharged as surety in connection with the proceedings against Raghunath Prasad. In the result the appeal is allowed, and the appellant will have his costs throughout.

(1) (1907) I. L. R., 35 Cal., 61(72).