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which has become merged in the decree. Nor do I think, for the reasons already stated, that there is any conflict between the aforesaid rule and the view that, acting under section 74 of the Indian Contract Act, a court executing a decree can relieve against the penal provision contained in the compromise.

Niamat-ullah, J.

For these reasons I agree with the Hon'ble ACTING CHIEF JUSTICE in answering the first question referred to this Bench in the affirmative. I also agree that the second question does not arise.

*Before Sir Lal Gopal Mukerji, Acting Chief Justice,
Mr. Justice King and Mr. Justice Niamat-ullah*

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January, 12.

KHAIR-UN-NISSA BIBI (JUDGMENT-DEBTOR) v. OUDH COMMERCIAL BANK (DECREE-HOLDER)*

Civil Procedure Code, order XXXIX, rule 1—Temporary injunction—Stay of execution of a decree by temporary injunction granted in another suit—Injunction granted on furnishing security hypothecating immovable property—Mode of enforcing security—Separate suit or execution—Civil Procedure Code, section 47.

A final decree for sale on a mortgage was put in execution, and one K was impleaded as an heir to one of the judgment-debtors deceased. K, however, had a claim to certain items of the mortgaged property in her own right and she instituted a suit, against the decree-holder and others, for a declaration that the decree was not binding on her or on the items of property belonging to her. The suit was dismissed and K filed an appeal in the High Court. She applied in the High Court for an injunction, pending disposal of the appeal, restraining the decree-holder from executing his decree against her. The decree-holder objected that as part of the decretal amount did not carry any interest, he would suffer loss of interest if the sale were to be stayed. It was estimated that probably Rs.6,000 would be the amount of such interest up to the time when the appeal would come to be decided, and it was ordered that if K executed a security bond for Rs.6,000 to cover the loss of interest her application would be granted. K accordingly furnished the security bond, hypothecating im-

* First Appeal No. 431 of 1931, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 20th of June, 1931.

movable property, and execution of the decree was stayed by temporary injunction. *K's* appeal was eventually dismissed and the decree-holder then sought, in execution of the decree in *K's* suit, to realise the Rs.6,000 by sale of the property hypothecated in the security bond. The question arose whether the property could be brought to sale in this way or only upon a suit for sale thereof.

Held, that the remedy of the decree-holder was by a suit on the security bond and not by execution of a decree or order.

There was no decree or order which directed *K* to pay Rs.6,000 or any sum of money to him. The only decree in *K's* suit was one dismissing her suit and awarding costs to the opposite party. The order regarding the furnishing of security was not an executable order, but was of the nature of a declaratory order. As there was no decree or order capable of execution regarding the Rs.6,000, section 47 of the Civil Procedure Code had no application, and the remedy was by the institution of a suit for sale of the property hypothecated in the security bond.

The Bench which first heard this appeal referred it to a Full Bench with the following referring order:—

NIAMAT-ULLAH and BENNET, JJ. :—This is an execution first appeal in which the following point of law has arisen : “Is it necessary that a regular suit should be brought for the enforcement of a hypothecation lien on immovable property mortgaged as security in a suit or is it open to the court to which the security has been furnished to order sale of the property in execution proceedings without a separate suit being brought to enforce the hypothecation lien?”

It appears to us that there is a conflict of authority on this point between certain rulings of this Court. In *Amir v. Mahadeo Prasad* (1) it was laid down that a regular suit is necessary. It is true that in that case the equity of redemption had passed from the surety to a third person, but the ruling did not limit the principle to that particular case. On the other hand it was laid down in *Beti Mahalakshmi Bai v. Badan Singh* (2) that there was no need to file a separate suit and that the enforcement of a hypothecation lien could be made by the court to which the surety had been furnished. The correctness of the latter ruling has been doubted in *Sukumari Debi v. Mugneeram Bhangar & Co.* (3), in which it was said that this ruling was inconsistent with a

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(1) (1916) I.L.R., 39 All., 225.

(2) (1923) I.L.R., 45 All., 649.

(3) (1926) I.L.R., 54 Cal., 1.

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dictum of their Lordships of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1), a ruling which *Beti Mahalakshmi Bai v. Badan Singh* purported to follow. In view of this conflict between two rulings of this Court we direct that this appeal should be laid before the Hon'ble the Chief Justice for orders for the formation of a larger Bench to decide this appeal. There is no other point raised in this appeal except this point of law.

The appeal was then laid before and heard by a Full Bench.

Messrs. *Mukhtar Ahmad* and *S. N. Gupta*, for the appellant.

Mr. *Shabd Saran*, for the respondent.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :—

This appeal has been referred to us by a Bench of two learned Judges of this Court because the point involved is of importance and it was thought necessary that the law on the point should be laid down by a Full Bench.

The facts of the case will have to be stated at some length in order to appreciate the point or points of law that arise. The Oudh Commercial Bank obtained a decree for sale in suit No. 50 of 1913 of the court of the Subordinate Judge of Fyzabad against Riasat Husain and Saleha Bibi. The suit was based on a mortgage bond. The final decree in the suit was passed on the 16th of December, 1915. Execution was taken out and Khair-un-nissa Bibi, who is the appellant before us, was impleaded as an heir to one of the deceased judgment-debtors. She, however, it appears, claimed some of the property mortgaged in her own right and therefore she instituted a suit, being suit No. 383 of 1923, in the court of the Subordinate Judge at Azamgarh to obtain a declaration that she was not bound by the decree No. 50 of 1913 obtained in the court of the Subordinate Judge of Fyzabad by the Oudh Commercial Bank. Her suit was dismissed on the 18th of April, 1925, and she filed a first appeal, being appeal No. 313 of 1925, in this Court. The Oudh Commercial

Bank having taken out execution of the decree No. 50 of 1913 obtained by it, Khair-un-nissa Bibi applied to this Court for an order of injunction restraining the Oudh Commercial Bank from executing its decree. In the course of the consideration of the application it transpired that a part of the decree obtained by the Oudh Commercial Bank did not carry any interest and it was pointed out to the Court, on behalf of the Bank, that if the execution of the decree was stayed the Bank would suffer loss of interest. The amount which did not carry interest was about Rs.27,000 and the learned Judges of this Court calculated that in the course of the average period of the pendency of a first appeal the Oudh Bank would lose a sum of Rs.6,000 in interest, the sum being calculated at 6 per cent. per annum. The plaintiff was told that her application for stay of execution would be granted if she executed a security bond in a sum not less than Rs.6,000 to secure the loss of interest. Such a security bond was furnished on the 14th of May, 1926, and the execution of the decree No. 50 of 1913 was stayed by issue of a temporary injunction.

Khair-un-nissa Bibi's appeal (383 of 1923) was eventually dismissed by this Court. The Bank brought the property, as to which it had obtained an order for sale, to sale and realized a large amount of money. Thereafter it proceeded to execute the decree of appeal No. 383 of 1923 with respect to Rs.6,000 by sale of the property which Khair-un-nissa Bibi had hypothecated under the security bond of the 14th of May, 1926. An objection was taken by Khair-un-nissa Bibi that it was not open to the Bank to bring the property to sale without a suit. The objection was dismissed and she has filed the appeal now before us.

The question to be determined is whether for the realization of the security given on the 14th of May, 1926, by Khair-un-nissa Bibi the Oudh Commercial Bank should have recourse to a suit or whether it can

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execute any decree or order, and if so, what decree or order.

Before the learned Judges hearing the appeal as a Division Bench several rulings were cited and we have to consider the bearing of those rulings on the question before us. The rulings that were cited before the learned Judges related mostly to securities furnished by third parties as sureties, under the Civil Procedure Code of 1908.

To start with, we have got the case of *Mukta Prasad v. Mahadeo Prasad* (1). In this case the person who offered security was one Mahadeo Prasad. He not only made himself personally liable but also hypothecated some property. The learned Judges of this Court (PIGGOTT and WALSH, JJ.) treated the case as if there was no hypothecation of property by way of security, but only a personal liability. Their Lordships held that, in the circumstances, there was no bar to the decree being executed personally against Mahadeo Prasad nor was there any bar to the property of Mahadeo Prasad (which had been mentioned in the bond) being attached and sold. This case therefore is no guide to us.

The next case is that of *Amir v. Mahadeo Prasad* (2), decided by RICHARDS, C. J., and BANERJI, J. This was a case in which a third party stood surety and mortgaged his property. Their Lordships definitely held that the earlier case, *Mukta Prasad v. Mahadeo Prasad* (1), was decided according to its peculiar circumstances, and in the case before their Lordships Jagannath's property could be sold only by means of a suit and not in execution of the decree. *Raj Raghobar Singh v. Jai Indra Bahadur Singh* (3) is a decision of their Lordships of the Privy Council. In this case the surety agreed that the mesne profits to be decreed in favour of the

(1) (1916) I.L.R., 38 All., 327.

(2) (1916) I. L.R., 39 All., 225.

(3) (1919) I.L.R., 42 All., 158.

opposite party might be realized from his property. The security bond was given in favour of the court and not in favour of any individual. Their Lordships said that section 145 of the Civil Procedure Code did not apply. Their Lordships pointed out that there was no mortgage because there was no mortgagee. In the circumstances their Lordships held that the only way to enforce the security was by execution. Their Lordships pointed out that in the case of securities given in accordance with the forms to be found in Appendix G, Nos. 2 and 3 of the Civil Procedure Code, 1908, no difficulty like the one that arose in the case before their Lordships could arise, because in documents executed according to the forms some individual would be mentioned as the mortgagee.

The next case that we have been asked to consider is the case of *Beti Mahalakshmi Bai v. Badan Singh*, (1). Two learned Judges of this Court (WALSH and KANHAIYA LAL, JJ.) purported to follow the case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh*. The main reason that guided their Lordships was that the bond before them, like the bond in *Raj Raghubar Singh's* case, had no mortgagee mentioned therein. At page 652 there occur the following words: "The security bond does not purport to have been executed in favour of the decree-holder. It contains an undertaking given to an appellate court which granted the stay of execution subject to the production of such security . . ." There is no doubt a remark at page 651 of the report as follows: "In the clause, 'to the extent to which he has rendered himself liable,' the word 'personally' was added by the present Code of Civil Procedure, but by the addition of that word it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2, 3 and 4 of Appendix G appended to the Code of Civil Procedure provide for the hypothecation of property

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to secure the performance of the obligation undertaken by the surety." If by this remark their Lordships meant to say that where a surety gave a mortgage, section 145 of the Civil Procedure Code would be a sufficient warrant for selling the mortgaged property in execution, we would respectfully dissent from that view. We are fortified in our opinion by what fell from their Lordships of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1) and by the plain language of section 145 itself.

In *Ram Kishun v. Lalta Singh* (2) it was laid down that if the security furnished had to be realized from the property given as security, the realization must be by a suit and not in the execution department. The actual words used are: "It is also clear that if he executed a valid hypothecation bond as security, the charge could be enforced by a separate suit." To this decision one of us was a party.

In the case before us the security was furnished not by a third party but by a party to the litigation. The question is whether, in the circumstances stated, the remedy of the Bank is by a suit or by execution of a decree or order.

There is no decree or order which directs Khair-un-nissa Bibi to pay a sum of Rs.6,000 or any sum of money to the Oudh Commercial Bank, except such amount as was decreed against her for costs of the two courts. The order as to security need not be quoted at length, but the following quotations will show the nature of it: "The third objection is that a portion of the decree bears no interest and if the sale is stayed and the Bank prevented from realizing the decretal money, considerable loss will accrue to the Bank." The quotation shows the argument of the Bank against the passing of an order staying execution of the decree No. 50 of 1913. The following extract from the same

(1) (1919) I.L.R., 42 All., 158.

(2) (1928) I.L.R., 51 All., 346.

judgment will show the reason that led the Hon'ble Judges to make an order as to security: "As regards the interest which the Bank claims to be entitled to as compensation for the delay in executing the decree it seems desirable that the Bank should be allowed interest at 6 per cent. on the portion of the decretal money which bears no interest, as compensation for the delay which would accrue if the sale be stayed. The amount of such interest for a period of three years will approximately amount to Rs.6,000." This, then, was the reason why the appellant was called upon to furnish security in the amount of Rs.6,000. The following is the order that was made on the application: "The appellant will be required to file an additional security for Rs.6,000 for payment of interest as compensation on that portion of the decree which does not bear interest for the period for which the recovery of the decretal money *may be delayed* and the Bank will be entitled to enforce the security if the appeal is dismissed but not otherwise." We may take it that on the security being furnished on the 14th of May, 1926, the Division Bench passed an order staying the sale till the decision of the appeal No. 313 of 1925.

On the facts stated above, it seems to be clear to us that there is no order directing Khair-un-nissa Bibi to pay the amount of Rs.6,000 to the Oudh Commercial Bank that could be executed by the Bank against Khair-un-nissa Bibi. It was argued that the order quoted was itself executable as an order, but the order, in its nature, is *declaratory*. It declared that if the appellant Khair-un-nissa Bibi furnished the security the impending sale would be stayed and the Bank would be *entitled* to recover compensation, at the rate of 6 per cent. interest, on the amount of money which did not carry interest. The amount of money which the Bank could realize by way of compensation was not Rs.6,000 but depended on the period during which the execution of decree No. 50 of 1913 might be

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stayed. As a matter of fact, the appeal was decided in less than three years, that is to say, in January, 1929. It is only after the dismissal of the appeal that the liability of Khair-un-nissa Bibi could have been determined. Evidently there is no "order" which professed to determine that liability and to direct Khair-un-nissa Bibi to pay anything to the Oudh Commercial Bank by way of compensation. In the circumstances, it is difficult for us to say how the Bank could execute what it supposed to be a decree or order standing in its favour in the manner it is sought to execute it. The remedy declared by the order of the High Court, dated the 6th of April, 1926, lay, in our opinion, in the institution of a suit for sale of the property mortgaged by Khair-un-nissa Bibi.

The learned counsel for the respondent has laid great stress on the decision of their Lordships of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1). He has argued that in the case before us there is no mortgagee and therefore the security is to be realized by execution. To start with, the assumption is wrong that there is no mortgagee. The security bond distinctly states that the Oudh Commercial Bank would be entitled to realize the security. Secondly, as we have pointed out, there is no decree or order that is capable of execution. Both these facts distinguish the case before us from the case before their Lordships of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*.

The learned counsel for the respondents has addressed us on the applicability of section 47 of the Code of Civil Procedure. He has argued that as the controversy has arisen between the parties to the suit therefore the dispute that has arisen must be decided in execution and not by way of a separate suit. But to this contention the clear answer is that there is no order or decree which can be executed. We have

(1) (1919) I.L.R., 42 All., 158.

already pointed out that this Court never passed any order to the effect that the Oudh Commercial Bank was to realize the sum of Rs.6,000, or anything less than that, by way of compensation from Khair-un-nissa Bibi, *by virtue of that very order*. As there is no order or decree in execution of which the question has arisen, section 47 does not apply. Section 47 reads: "All questions arising between the parties to the suit in which the decree was passed . . . and relating to execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit." As there was no decree or order in existence, none could be executed. The decree which is sought to be executed, namely the decree No. 383 of 1923, is a wholly different decree. It was the decree passed in Khair-un-nissa Bibi's suit to obtain a declaration that the decree No. 50 of 1913 was not executable against her and the property belonging to her. The decree in the appeal ended by dismissing the appeal and maintaining the order of dismissal of the suit. The only decree that could be executed was a decree for costs and it is not that decree which is being executed at the instance of the Oudh Commercial Bank. The decree No. 50 of 1913 was a decree for realization of the mortgage amount and that is not the decree under execution and the present controversy has not arisen either in execution of decree No. 50 of 1913, or in execution of decree No. 383 of 1923. In this view there is no controversy which is to be settled by the application of section 47 of the Code of Civil Procedure.

For the reasons given above we are of opinion that the respondent has misconceived his remedy and his application to realize Rs.6,000 from Khair-un-nissa Bibi in execution was not maintainable.

We allow the appeal, set aside the order of the court below and dismiss the respondent's application for execution with costs throughout.

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