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and to grant the relief prayed for by him. By refusing to exercise this jurisdiction the court failed to exercise jurisdiction vested in it and therefore this Court can set aside the decision of the court of first instance and pass the same order that the learned District Judge has done. By dismissing the present appeal we shall be upholding the order of the District Judge which was the appropriate order in the case. We accordingly dismiss this appeal, but as the respondent is not represented we make no order as to costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

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LACHHMANDAS CHHIDDULAL (DECREE-HOLDER) v. BABU
LAL (SURETY)*

Civil Procedure Code, section 55(4)—Realisation of security from surety—Liability arises only when judgment-debtor neither applies for adjudication nor appears—Discretion of court.

Under section 55(4) of the Civil Procedure Code the decree-holder is not entitled to proceed against the surety unless there has been failure on the part of the judgment-debtor in both the respects, namely in applying for adjudication as an insolvent and in appearance. Where the judgment-debtor had complied with one of these conditions, by applying for adjudication as an insolvent, the decree-holder was not entitled to ask the court to realise the security.

The court has a discretion in making or refusing an order in favour of the decree-holder under section 55(4) of the Civil Procedure Code.

Mr. S. B. L. Gaur, for the appellant.

Mr. J. Swarup, for the respondent.

BENNET and VERMA, JJ.:—This is an appeal by the decree-holder and arises out of proceedings for the execution of a decree which is one for money. The judgment-debtor was arrested and was brought before the court on the 6th of February, 1933, when he made an application under section 55 of the Code of Civil

*Second Appeal No. 1947 of 1937, from a decree of V. Bhargava, Civil Judge of Agra, dated the 30th of August, 1937, confirming a decree of H. P. Asthana, Munsif of Fatehabad, dated the 21st of December, 1936.

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Procedure that he intended to file a petition for adjudication as an insolvent. He was directed to file a security bond in accordance with that section and the respondent, Babu Lal, executed a security bond which was filed, and the judgment-debtor was released. The judgment-debtor did apply to the insolvency court and an order for adjudication was actually passed in his favour. The present appellant appealed against that order and the district court allowed his appeal and dismissed the application for adjudication on 28th March, 1935. Thereafter the decree-holder on 25th July, 1935, filed the application which has given rise to this appeal. By this application the decree-holder prayed that the surety be required to produce the judgment-debtor and if he failed to do so the security be realised. It appears that the case was adjourned on several occasions and that on one of the dates fixed, namely the 9th of November, 1935, the judgment-debtor did appear, and as a matter of fact made an application to the court. The surety objected to the application of the decree-holder on the ground that the judgment-debtor having applied for adjudication as an insolvent the surety was discharged. Both the courts below have accepted this contention of the surety.

Having heard learned counsel for the appellant, we have come to the conclusion that the decision of the courts below is correct. Sub-section (4) of section 55 of the Code of Civil Procedure lays down: ". . . and, if he fails so to apply *and* to appear, the court may" It seems to us that unless there has been failure in both these respects, namely in applying for adjudication and in appearance, the decree-holder is not entitled to proceed against the surety. The judgment-debtor having complied with one of these conditions by applying for adjudication as an insolvent, it is clear, in our opinion, that the decree-holder is not entitled to ask the court to realise the security. Learned counsel for the appellant has cited the case of *Sundara Reddi v Varadharaja*

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Pillai (1). But the point that arises in the case before us was not argued there and no decision has been given on that point. Reference has also been made to the case of *Abdul Hussein v. D. J. Mistri & Co.* (2). In that case also the point which arises before us was not considered. Furthermore, it was pointed out by the learned CHIEF JUSTICE in that case that the court may in the exercise of its discretion refuse to make an order in favour of the judgment-creditor. The two courts below having concurrently exercised their discretion in favour of the respondent, we see no reason to overrule them and to hold that the appellant's application should have been granted.

For the reasons given above, we dismiss this appeal with costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

RAMESHWAR DAYAL AND OTHERS (DEFENDANTS) v.
HARI KISHEN (PLAINTIFF)*

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Transfer of Property Act (IV of 1882), section 55(4)—Vendor's lien—Sale of mortgaged property—Money left with vendee to pay off the mortgage—Mortgage satisfied by payment of less amount—Vendor's right to recover the balance from vendee—Equity.

Certain property, which was subject to a simple mortgage, was sold by the mortgagor for Rs.3,000, out of which Rs.928-8-0 was left with the vendee to pay off the mortgagee. Due to the passing of the U. P. Agriculturists' Relief Act, however, the vendee obtained the benefit of reduction of interest, so that the mortgage debt was discharged by the payment of Rs.732-13-0 only, and a balance of Rs.195-11-0 remained in the hands of the vendee: *Held*, that the vendor was entitled to recover this balance, which was part of the purchase money remaining unpaid, from the vendee, and there were no equities in favour of the vendee which could allow him to retain for himself the benefit of a smaller sum having to be paid to the mortgagee.

Where the money left by the vendor in the hands of the vendee for payment to a third person is a part of the specified

*Second Appeal No. 572 of 1937, from a decree of S. M. Munir, Civil Judge of Shahjahanpur, dated the 7th of January, 1937, reversing a decree of L. N. Misra, Munsif of Shahjahanpur, dated the 19th of October, 1936.

(1) (1916) 34 Indian Cases 407.

(2) (1921) I.L.R. 46 Bom. 702.