

Before Mr. Justice Spankie and Mr. Justice Tyrrell.

1881
May 17.

CHANDAN KUAR (SURETY) v. TIRKHA RAM (DECREE-HOLDER).*

Execution of decree against surety—Payment of decree by instalments—Act X of 1877 (Civil Procedure Code), ss. 210, 253.

A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale and applied for its postponement, producing a surety and a bond in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instalments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year. The judgment-debtor did not pay the amount of the decree within the time fixed, and the decree-holder therefore applied for execution of the decree against such surety.

Held that, inasmuch as the decree-holder had not been a party to the proceedings of the sale-officer or of the District Judge, and as the parties had not appeared before the Munsif, and as such surety had not agreed to pay the amount of the decree by instalments, the provisions of s. 210 of Act X of 1877 were not applicable and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year; and that therefore his liability was not one which could be enforced in execution of the decree under s. 253 of Act X of 1877.

THE Munsif of Kasganj, by whom a decree for money held by the respondent against one Behari Lal had been made, ordered that certain land paying revenue to Government belonging to the judgment-debtor should be sold in execution of the decree. On the 16th January, 1878, a few days before the day fixed for the sale, the judgment-debtor applied to the revenue officer appointed to conduct the sale to obtain its postponement, producing a surety, Chandan Kuar, who had executed a bond in which she promised to pay the amount of the decree, Rs. 400, within one year, if the judgment-debtor did not pay it within that period. The decree-holder was not privy to this arrangement. The revenue officer appointed to conduct the sale forwarded a proceeding to the District Judge, dated the 18th January, together with a copy of the bond, in

* Second Appeal, No. 75 of 1880, from an order of G. L. Lang, Esq., Judge of Ailgarh, dated the 3rd September, 1880, reversing a decree of Maulvi Ruh-ul-la, Munsif of Kasganj, dated the 20th May, 1880.

1881
 BHANDAN
 KUAR
 v.
 FIRKHA
 RAM.

which he stated that the sale of the property in question was objectionable, as it was ancestral, and that the judgment-debtor's surety had promised to pay the amount of the decree by instalments in one year, and requested the District Judge to sanction the arrangement and order the postponement of the sale. On the following day, the 19th January, the District Judge ordered the sale to be postponed, and forwarded the papers to the Munsif for the issue of orders regarding the arrangement. On the 5th February, 1878, the Munsif ordered that the amount of the decree should be paid by instalments within one year. The judgment-debtor failed to pay the amount of the decree within the time fixed, whereupon the decree-holder applied for execution of the decree against certain property belonging to the surety. The surety objected to the execution of the decree against her. The Court of first instance allowed the objection on the ground that the judgment-debtor possessed immoveable property of his own, and that, so long as this was the case, the decree ought not to be executed against the property of the surety. On appeal by the decree-holder, when the surety contended that the decree could not lawfully be executed against her, the lower appellate Court held that the decree might be executed against her under s. 253 of Act X of 1877. It so held on the ground that the order made by the Munsif for payment of the decree by instalments amounted to an alteration of the decree, and that the surety had rendered herself liable before the making of such alteration. The surety appealed to the High Court, contending that the provisions of s. 253 of Act X of 1877 were not applicable under the circumstances of the case.

Pandit *Nand Lal*, for the appellant.

The respondent did not appear.

The judgment of the Court (SPANKIE, J., and TYRRELL, J.) was delivered by

SPANKIE, J.—The pleas must be admitted. We have examined the decision of this Court referred to by the Judge,—Misc. S. A. No. 74 of 1877, decided 17th January, 1878 (1). But it states none of the facts, and we cannot therefore say on what it proceeds. It is no guide to us in this matter. On the facts which appear in

(1) Unreported.

the case before us the sale was improperly stopped at the request of the judgment-debtor, who produced a surety, who executed a security-bond promising to pay Rs. 400 within one year in the event of the judgment-debtor not paying the same. The decree-holder was no party to the arrangement. The Deputy Collector, staying the sale, asked the Judge to sanction the proposed arrangement. The Judge ordered postponement of the sale, sending in the security-bond and papers to the Munsif, who had passed the decree. That officer, however, neither accepted nor disallowed the surety bond, but fixed instalments to be paid under the decree. The surety-bond proposed no instalments, but simply stipulated that the judgment-debtor should pay Rs. 400, the amount of the decree, within a year, and in case of default the surety should pay it. The action of the Deputy Collector, of the Judge, and of the Munsif seems to have been irregular. With this, however, we are not now concerned. The decree-holder is now attempting to enforce the surety bond against the surety in execution of decree against the judgment-debtor under s. 253. We are of opinion that the decree-holder cannot succeed in this attempt. S. 210 of the Code does not apply to this case. The decree-holder and the judgment-debtor have not, on the face of these proceedings, appeared before the Court, and prayed the Munsif to fix instalments for the payment of the amount of the decree, on condition of security being given for this purpose. The decree-holder was no party to the arrangement which was made by the Deputy Collector, and forced upon the Munsif by the Judge, and, as already pointed out, the suretyship is not for the payment of the decree by instalments, but the bond covenants to satisfy the entire amount of the decree, if the judgment-debtor does not discharge it within one year. Again, we do not understand that the surety has made himself a party to the suit by engaging to pay the debt in one year, if the judgment-debtor does not. He has incurred a liability, but not one that can be enforced summarily in the execution proceedings against the judgment-debtor. He has certainly not become liable under the provisions of s. 253, which refers to suretyship before the passing of a decree. The Full Bench decision of this Court—*Bans Bahadur Singh v. Mughla Begam* (1)—in which the majority of the Court

1881

CHANDAN
KUAR
v.
TIKHA RAM

(1) I. L. R. 2 All. 604.

1881¹

CHANDAN
KUAR
v.
TIRKHA RAM.

extends the section to decrees of the Judicial Committee of the Privy Council, and apparently to all suretyships for the due performance of appellate decrees. does not go further but stops there. The section would be quite remodelled if we were to hold that under it a surety-bond, executed at the moment of sale, promising to satisfy the decree in one year, if the judgment-debtor did not do so, could be summarily enforced by the execution of the original decree against the surety, in the same manner as a decree may be executed against a defendant. We reverse the order of the Judge and decree the appeal with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KHUB CHAND (DEFENDANT) v. NARAIN SINGH (PLAINTIFF).*

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13—“Same parties.”

G sold an estate nominally to the minor son of *K*, but in reality to *K*. *K* brought a suit in his minor son's name against *N*, the mortgagee of such estate, to redeem the same. *N* set up as a defence to such suit that such sale was invalid under Hindu law, as such estate was a share of certain undivided property of which he was a co-sharer and had been made without his consent. It was finally decided in that suit that such estate was a share of such undivided property and not the separate property of *G*, and that such sale was invalid, having been made without the consent of *N* a co-sharer of such undivided property. *G* subsequently redeemed such estate, and having done so sold it a second time to *K*. *N* thereupon sued *K* to set aside such sale on the same ground as that on which he had defended the former suit. *Held* that the issue in such suit whether such estate was a share of undivided property or the separate property of *G* was *res judicata*, inasmuch as *K*, though not in name, yet in fact was a “party” to the former suit in which such issue was raised and finally decided.

THE plaintiff in this suit, Narain Singh, and one Ganesh Singh were the proprietors in equal shares of a two biswas share of a certain village. Ganesh Singh's one biswa share of the estate was mortgaged to Narain Singh. He sold such share, nominally to Gajadhar Singh, the minor son of the defendant in this suit, Khub Chand, but in reality to Khub Chand. Khub Chand brought a suit in his minor son's name against Narain Singh for the redemption of such share. Narain Singh defended that suit on the ground that such sale was

* Second Appeal, No. 992 of 1880, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 22nd June, 1880, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 25th August, 1879.