

section 22, clause (4), of the Act to require the petitioner to produce such accounts or documents as the Income-tax Officer thought necessary, and section 23, clause(4), provides that if the requisition under section 22, clause (4), is not complied with the Income-tax Officer shall make the assessment to the best of his judgment. There was the requisition under section 22(4) which was not complied with, and therefore, the assessment made by the Income-tax Officer under section 23(4) appears to be legal.

1929.

DAMODAR
PRASAD
2.
COMMISSIONER OF
INCOME-
TAX.

Application rejected.

APPELLATE CIVIL.

Before Das and Wort, JJ.

TATA IRON AND STEEL Co. LTD.,

v.

CHARLES JOSEPH SMITH.*

1929.

February, 21
22.

Security bond, executed by judgment-debtor for due performance of decree—whether can be enforced in execution—Transfer of Property Act, 1882 (Act IV of 1882), section 67—attachment, whether necessary condition—application to enforce security, where should be made.

Where an appellant judgment-debtor executes a mortgage bond as security for the due performance of the decree that may ultimately be passed by the appellate court, the bond is enforceable in execution proceedings, and the decree-holder may realize the properties given in security without attaching them or instituting a suit under section 67 of the Transfer of Property Act, 1882.

Held, further, that an application to enforce the security must be made to the court which passed the decree appealed from.

*Appeal from Original Order no. 9 of 1928, from an order of Babu Shivanandan Prasad, Subordinate Judge of Purnea, dated the 17th December, 1927.

1929.

TATA IRON
AND STEEL
CO., LTD.
r.CHARLES
JOSEPH
SMITH.

Shyam Sundar Lal v. Bajpai Jamarain(1), *Raj Raghbir Singh v. Jai Indra Bahadur Singh*(2) and *Subramanian Chettiar v. Raja of Ramnad*(3), referred to.

Appeal by the decree-holders.

The only question in this appeal was: When immovable property has been given by the judgment-debtor as security for the due performance of a decree, whether that property can be realised by the decree-holder in execution or can only be realised in a separate suit. Certain other questions which were also argued are referred to in the judgment.

Shortly stated the facts were these: The present appellant obtained a decree against the respondent for Rs. 1,62,817-7-10 in the Original Side of the Calcutta High Court. The decree was transferred for execution to Ranchi and certain immovable properties belonging to the judgment-debtor were attached in due course of law. The judgment-debtor had appealed from the decree passed in Calcutta and he applied for stay of execution pending the disposal of the appeal. He was directed to furnish security and on the 4th March, 1927, he executed a security bond by which he mortgaged his property called Kholassay Estate in the district of Purnea and covenanted that

"If the decree of the first court be confirmed or varied by the appellate court, I" that is to say, the judgment-debtor, "will duly act in accordance with the decree of the appellate Court and will pay whatever may be payable by me thereunder".

He then proceeded to say as follows in the security bond:

"and if I fail therein, then, any amount so payable shall be realised from the property hereby mortgaged and if the proceeds of the sale of the said property are insufficient to pay the amount due, I and my legal representative will be personally liable to pay the balance."

The appeal failed and the decree-holder made an application in the Court which passed the decree, for execution. The Calcutta High Court transferred the

(1) (1903) I. L. R. 30 Cal. 1060. (2) (1920) I. L. R. 42 All. 158, P. C.

(3) (1918) I. L. R. 41 Mad. 327.

decree for execution to the Court of the District Judge of Purnea. Meanwhile the security bond which was addressed to the Special Subordinate Judge of Ranchi was assigned by that Judge to the decree-holder. The decree-holder proceeded to execute the decree by the sale of the properties mortgaged and was met with the objection that the only remedy available to the decree-holder was to enforce the security bond by a separate suit. The argument found favour with the learned Subordinate Judge who dismissed the execution case; and the decree-holder appealed to the High Court.

1929.

TATA IRON
AND STEEL
CO., LTD.

v.
CHARLES
JOSEPH
SMITH.

Sir Sultan Ahmad (with him *A. D. Patel, Syed Ali Khan* and *H. R. Kazimi*), for the appellant: A security bond executed by the judgment-debtor for the due performance of the decree that may ultimately be passed on appeal, is enforceable in execution without attachment. The bond being addressed to the Court, which is not a juridical person, there is no mortgagee in the eye of law. Hence section 67, Transfer of Property Act, is inapplicable and a suit for the enforcement of the security is not necessary. The question of enforcement of the security given by the judgment-debtor is one arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. Therefore, the only mode of proceeding against the property is by selling it through the agency of the execution court. The point is concluded by authorities: *Shyam Sunder Lal v. Bajpai Jainarayan*⁽¹⁾; *Jyoti Prakash Nandi v. Mukti Prakash Nandi*⁽²⁾; *Raja Raghubar Singh v. Jai Indra Bahadur Singh*⁽³⁾; *M. R. M. A. Subramanian Chettiar v. Hon. P. Rajarajeswara Sethupathi*⁽⁴⁾; I also rely on *Mukta Prasad v. Mahadeo Prasad*⁽⁵⁾ and *Beti Mahalakshmi v. Badan Singh*⁽⁶⁾. The cases of

(1) (1903) I. L. R. 30 Cal. 1060.

(2) (1924) I. L. R. 51 Cal. 150.

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

(4) (1918) I. L. R. 41 Mad. 327.

(5) (1916) I. L. R. 38 All. 327.

(6) (1928) I. L. R. 45 All. 649.

1929.

TATA IRON
AND STEEL
CO., LTD.
v.
CHARLES
JOSEPH
SMITH.

Tokhan Singh v. Girwar Singh⁽¹⁾ and *Amir v. Mahadeo Prasad*⁽²⁾ are distinguishable.

Pugh (with him *N. C. Sinha* and *N. N. Roy*), for the respondent: The security is in the form of a hypothecation bond, which can only be enforced by means of a suit under section 67, Transfer of Property Act.

[DAS, J.—Who is the mortgagee?]

It is addressed to the Judge. Furthermore, the bond has been assigned to the decree-holder.

[DAS, J.—How could he assign it? The court is not a juridical person.]

But that has been done. Section 145, Code of Civil Procedure, is the only section under which the execution can be directed. This section is inapplicable, first, because it relates to a surety and, secondly, because it contemplates personal liability. At any rate, the application to enforce the security should have been made to the court which took it. In all the recorded decisions such applications were made to that court. Furthermore, the decree-holder cannot sell the property without levying attachment, as the proceeding is one in execution: *Baijnath Goenka v. Mohanth Sia Ram Das*⁽³⁾.

[DAS, J.—By attachment the decree-holder only notifies that he is realizing his decree out of the property attached. In the present case the property having been already secured, there was no necessity for effecting attachment.]

N. C. Sinha, followed: If the decree-holder elects to proceed against the property in an ordinary way on the basis of a money claim, attachment becomes necessary: *Ganga Deo Narain Singh v. Joti Lal Sahu*⁽⁴⁾.

[DAS, J.—What is the reason?]

(1) (1905) I. L. R. 32 Cal. 494.

(3) (1913) 17 Cal. L. J. 267.

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

(4) (1917) 2 P. L. J. 197.

The reason is that the judgment-debtor may be prevented from alienating the property so as to make the fund available to the decree-holder.

[DAS, J.—But the fund has already been secured. The case of *M. R. M. A. Subramanian Chettiar v. Hon. Raja Rajeswara Sethupathi*(1) concludes the point.]

1929.

TATA IRON
AND STEEL
CO., LTD.
"."
CHARLES
JOSEPH
SMITH.

S. A. K.

DAS, J. (after stating the facts set out above, *Feb. 22.* proceeded as follows:) I have no doubt whatever that the decision of the learned Subordinate Judge is erroneous. It is conceded that section 145 of the Civil Procedure Code has no application to the case. The decision of the learned Subordinate Judge appears to be based on certain cases which were cited to him which according to him support the view that

"while a security bond given to a court under section 145 of the Civil Procedure Code can be enforced so far as personal liability of the surety is concerned by means of executing a decree against him, but if the surety takes upon himself more than personal liability and hypothecates immovable property, such hypothecation can only be enforced against the property by means of a regular suit."

But the case before us is not one between a decree-holder and a surety of the judgment-debtor; the case is one between the decree-holder and the judgment-debtor and I can see no answer to the argument that in such a case section 47 must apply. It is impossible to say that the question which has been raised between the parties is not a question arising between the parties to the suit in which the decree was passed; nor can it be said that it does not relate to the execution, discharge or satisfaction of the decree. Now if this be so, section 47 provides that such a question shall be determined by the court executing the decree and not by a separate suit. It was faintly contended before us that as properties have been mortgaged, the only method known to law is to enforce the mortgage by suit; but as has been pointed out in many cases and particularly by their Lordships of the Judicial

(1) (1918) I. L. R. 41 Mad. 327.

1929.

TATA IRON
AND STEEL
CO., LTD.
v.
CHARLES
JOSEPH
SMITH.
DAS, J.

Committee in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1), for a proceeding to enforce a mortgage there must be a mortgagor and a mortgagee. It may be conceded that there is a mortgagor in this case; but one may ask the question, who is the mortgagee? It was suggested before us by Mr. Pugh that the special Subordinate Judge of Ranchi is the mortgagee. The special Subordinate Judge is not a juridical person, nor can he be sued. To adopt the words of their Lordships of the Judicial Committee, "It cannot take property, and as it cannot take property it cannot assign it". It is true that the special Subordinate Judge has purported to assign the security bond in favour of the decree-holder; but to my mind that circumstance ought not to be taken into consideration by us since it is well settled that such a Judge is in no sense a juridical person. As I have said, the question arises between the parties to the suit and relates to the execution, discharge or satisfaction of the decree. If there were no authorities on the subject, I would have no hesitation in holding on principle that the decision of the learned Subordinate Judge is wrong.

But the question is also concluded by authorities. It is not necessary for us to refer to all the decisions which have been cited before us. The identical question was raised in the Calcutta High Court in *Shyam Sundar Lal v. Bajpai Jainarain*(2). It was held in that case that the relationship between a decree-holder, and a judgment-debtor who has executed a security bond under section 545, clause (c), of the Civil Procedure Code, mortgaging certain properties, for the due performance of the decree or order that may ultimately be passed by the appellate court, is not that of mortgagee and mortgagor; and that in the event of the appeal being dismissed the decree-holder is entitled to realise his decretal money by sale of the properties given in security without instituting a suit under section 67 of the Transfer of Property

(1) (1920) I. L. R. 42 All. 158, P. C.

(2) (1908) I. L. R. 30 Cal. 1060.

Act. The same view was substantially taken by the Judicial Committee in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*⁽¹⁾. The material portion of the judgment of their Lordships is as follows :

“ It is suggested that they ”, namely, the judgment-debtors, “ are bound to the Court. But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money.” The procedure is in this passage stated with a clearness and precision which should not, in my judgment, mislead any person. In my opinion therefore it is open to the decree-holders to realise the properties in execution under section 47 of the Code.

Two other questions were raised by Mr. Pugh; first, that the application for execution should have been made before the special Subordinate Judge of Ranchi; and, secondly, that attachment was a necessary condition for execution. I will take the first point. Mr. Pugh's argument is founded upon the passage in the judgment of the Judicial Committee to which I have already referred; and he contends that if the decree-holder intended to enforce the security bond in execution proceedings the proper procedure was for the Company to make an application to the Court in which the security bond was executed. I am unable to see that the decision of the Judicial Committee gives the slightest encouragement for the argument. Their Lordships did not leave it in doubt that such an application should be made to the Court in the suit itself. Now it is obvious that if this be so, the proper court where the application could be made was the Calcutta High Court in its Original Side which heard the suit.

1929.

TATA IRON
AND STEEL
CO., LTD.

v.

CHARLES
JOSEPH
SMITH.

DAS, J.

1929.

TATA IRON
AND STEEL
CO., LTD.
v.
CHARLES
JOSEPH
SMITH.
DAS, J.

The second point is that attachment is a necessary preliminary to an execution proceeding. This is undoubtedly so; but we must find out a reason for the rule which requires a decree-holder to attach properties as a preliminary to taking execution proceedings. There is no doubt whatever that the whole object of attachment is to prevent an alienation and to make a particular fund available to the decree-holder; but this fund was available to the decree-holder as soon as the security bond was executed. It was impossible for the judgment-debtor after executing the security bond to alienate the property covered by the security bond to the embarrassment of the decree-holder. This has been dealt with by Wallis, C.J., in *Subramanian Chettiar v. Raja of Ramnad* (1) and I entirely agree with his conclusion on it.

In my opinion it is impossible to affirm the judgment of the learned Subordinate Judge. I would allow the appeal, set aside the order passed by the learned Subordinate Judge of Purnea and direct that he do proceed with the execution. The decree-holders are entitled to their costs both in this Court and in the Court below.

WORT, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Fazl Ali, JJ.

HARDAYAL RAM DASS RAY

v.

BENGAL AND NORTH-WESTERN RAILWAY.*

*Railways Act, 1890 (Act IX of 1890), sections 54 and 72—
delivery to railway company, what constitutes—giving and*

*Appeal from Appellate Decree no. 1448 of 1926, from a decision of J. A. Saunders, Esq., J.C.S., District Judge of Muzaffarpur, dated the 23rd July, 1926, confirming a decision of Babu Girindra Nath Ganguli, Munsif of Bettiah, dated the 23rd December, 1925.

(1) (1918) I. L. R. 41 Mad. 327.

1929.

Jan., 25, 29.
Feb., 25.