APPELLATE CIVIL.

Before Mr. Justice Maung Ba and Mr. Justice Brown.

1926

July 13.

D. MANACKJEE

v.

R.M.N. CHETTYAR FIRM. (I)*

Surety's liability under O. 38 of the Civil Procedure Code (Act V of 1908) when it ceases—O. 38, r. 9—"Suit" whether includes appellate proceedings.

Held, that when security is given to obtain removal of attachment before judgment under Order 38 of the Civil Procedure Code, the liability of the surety ceases as soon as the suit is dismissed in the first Court. The plaintiff succeeding on appeal in his suit cannot hold the surety liable.

In this case the word "suit" does not include appellate proceedings.

Ma Bi v. *S. Kalidas*, 5 L.B.R. 156—*followed*.

Mitter—for Appellant.

Sanyal—for Respondents.

MAUNG BA AND BROWN, JJ.—In this case the respondent Chettyar firm filed a suit against one Ma Ywet and, before the decision of that suit, applied, under the provisions of Order 38 of the Code of Civil Procedure, for attachment of certain property before judgment. The property was attached, and the appellant then offered himself as surety for removal of that attachment, and the attachment was removed on his executing a security bond. The trial proceeded and eventually the suit was dismissed in the trial Court. The plaintiff respondent appealed and his appeal was successful. He then sought to execute the decree he obtained in the Appellate Court against the surety, the present appellant. The trial Court held that he was entitled so to execute his decree, and it is against this finding that the present appeal has been filed.

* Civil Miscellaneous Appeal No. 13 of 1926 (Mandalay).

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It was held in almost precisely similar circumstances in the case of *Ma Bi* v. *S. Kalidas* (1), that the liability of the surety ceased as soon as the suit was dismissed in the first Court, and we find ourselves in entire agreement with the view taken in that case.

Under the provisions of Rule 9 of Order 38 of the Code of Civil Procedure, when property has been attached before judgment that attachment must be removed immediately the suit is dismissed. If, then, the Court had refused to accept the security of the appellant and the property had remained under attachment, the dismissal of the suit would have put an end to that attachment. The removal of the attachment on the furnishing of security by the appellant has, therefore, not affected the decree-holder adversely in any way whatsover. He is in exactly the same position as though the security had never been given.

In these circumstances it seems to us only reasonable to hold that the intention of the appellant in executing the bond was not to make himself liable after the dismissal of the original suit, which, by itself, would have put an end to the temporary attachment.

In the recitals of the bond reference is made to the defendant having to produce the property attached before judgment whenever called upon by the Court while the said suit is pending and until execution or satisfaction of any decree that may be passed against her, and similar words occur in the operative part of the bond.

It is argued that the appellate proceedings were merely a continuation of the original suit, and that, therefore, the said suit was included the appellate

(1) 5 L.B.R. 156.

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proceedings. It is true that for certain purposes appellate proceedings have been held to be a continuation of the the trial Court proceedings; but that is not a universal rule, the word "suit" not being defined anywhere in the Code of Civil Procedure.

Having regard to the circumstances under which the bond in this case was executed, we do not think that we can read the word "suit" in this sense. No authority has been shown to us which really suggests that the view taken in *Ma Bi's* case was wrong, and we accept that view as correct.

We accordingly set aside the orders passed by the District Court, and direct that execution in this case cannot be taken out against the appellant.

The respondent will pay the appellant his costs in this Court, advocate's fee two gold mohurs.

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A very similar case arose in **Maung Po Aung** *v.* **Ma Thet Pon*** when Brown, J., following the above case held that when security is given to obtain removal of attachment before judgment under Order 38 of the Civil Procedure Code the liability of the surety ceases as soon as the suit is dismissed in the first Court. The learned Judge then proceeded as follows :—

It has been urged on behalf of the appellant that the law on the question has been altered by the latest amendment to section 145 of the Code. It has been urged that the section, as now drafted, is very wide in its terms and is sufficient to cover a case of this kind. I am unable however to see how section 145 can affect the present question. Section 145 does not profess to define in any way the liability of a surety. It merely describes a procedure when the surety is liable, for enforcing his liability.

* Civil Second Appeal No. 442 of 1926.

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BROWN, J.

The question in the present case is not how the surety's liability is to be enforced but whether he is liable at all. It is urged that in the present case if the security bond had not been given, when the suit was dismissed in the trial Court, although the attachment must necessarily have been removed, the plaintiff might have taken early steps to have it renewed by the Appellate Court. This seems to me to be a very problematical eventuality. The view we took in *Manackjee's* case was that in any event the attachment must have ceased when the trial Court passed its decree, and that the plaintiff was therefore in no way in a worse position than he would have been if the attachment had not been removed. That view still seems to me to be correct. In the present case in the bond Ma Thet Pon says that at any time the Court may require she will deposit the value of the logs in Court. These terms are very general and might, if interpreted strictly, be held to impose a liability on her to deposit the money in Court in any case decided by that Court when required whether that case had anything to do with the present one or not. It is quite clear that that could not be the intention of Ma Thet Pon. In interpreting the terms of the bond the provisions of law, under which it was executed, must be considered. I do not think it can presumed that Ma Thet Pon intended to bind herself to do anything more than to secure the plaintiff from loss against the removal of attachment. As the attachment had to be removed in any case after the dismissal of the suit, I do not consider he has suffered any loss from the previous removal. I see no reason to differ from the opinion expressed by me in *Manackjee's* case.

I dismiss this appeal with costs.