

## APPELLATE CIVIL.

Before Mr. Justice Carr, Mr. Justice Cunliffe, and Mr. Justice Das.

KO MAUNG GYI AND OTHERS

v.

DAW TOK.\*

1928

Feb. 6.  
April 4.

*Surety's liability under administration bond, how enforceable—Proceedings under s. 292 of Succession Act (XXXIX of 1925) whether only remedy—Civil Procedure Code (Act V of 1908), s. 145 (c)—Whether decree against administrator can be executed against surety to administration bond.*

*Held*, (by CARR and DAS, JJ.) that a surety who is liable under the terms of his administration bond can be proceeded against only by obtaining an assignment of the bond as provided in s. 292 of the Succession Act. A personal decree against an administrator cannot be executed against his surety under an administration bond, by applying the summary remedy provided by s. 145, Civil Procedure Code. A proceeding for the grant of Letters of Administration may take the form of a suit, but is not a suit nor is it a proceeding consequent on a suit. The word 'decree' in s. 145 refers only to clause (a) and (b) of that section and not to clause (c), to which the word 'order' only applies.

*Kyaw Din* for the appellants.

*Anklesaria* for the respondent.

CARR, J.—Maung Ba Han obtained Letters of Administration to the estate of one Ma Myin and the present appellants were his sureties, on a bond executed under section 78 of the Probate and Administration Act, now superseded by section 291 of the Indian Succession Act, 1925.

The respondent, Daw Tok, obtained a mortgage decree against Ba Han as administrator, and subsequently a money decree for the balance due after realisation of the security. She took out execution of the money decree but Ba Han replied that he had rendered final accounts of his administration and had no assets of the estate left in his hands. Daw Tok

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\* Civil first Appeal No. 192 of 1927 against the order of the District Court of Pyawon in Civil Execution No. 51 of 1924.

desired to put him to proof of his accounts but was referred to a regular suit. That order was set aside by a Bench of this Court in Civil Miscellaneous Appeal No. 89 of 1926 and the proceedings were remanded. This Court held that the accounts filed did not show that administration of the estate had been completed.

Ba Han was then given an opportunity of substantiating his accounts, but did not do so. His conduct was evidently obstructive. Daw Tok then applied for execution of the decree against the sureties to the administration bond. Attachment of their properties was effected without service on them of the notice required by the proviso to section 145 of the Civil Procedure Code. They then appeared and objected to the attachment on the ground of the absence of notice and on the further ground that section 145 is not applicable to the bond executed by them. They now appeal against the dismissal of their objection.

The substantial question for decision is whether under section 145 the decree can be executed against the sureties or whether the procedure to be adopted is that laid down in section 292 of the Succession Act.

We have been referred to section 52 (2) of the Code of Civil Procedure. That sub-section makes it clear that the decree in question could be executed against Ba Han himself, but does not seem to assist to a decision whether his sureties are equally liable.

Turning to section 145 itself, clause (c) is the only one which might possibly apply. The appellants have undoubtedly become liable for "the fulfilment of a condition" imposed upon Ba Han "under an order of the Court". But I do not think that the further requirements of the clause, *viz.* "in any suit or in any proceeding consequent thereon" are fulfilled. Though

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a proceeding for the grant of Letters of Administration may take the form of a suit it is not in fact a suit, nor is it a proceeding consequent on a suit.

Moreover when we come to the operative words, "the decree or order may be executed against him", we have to ask "what decree or order?" In my view the word "decree" refers only to clauses (a) and (b) and not to clause (c), to which the word "order" only applies. There is in the present case no "order" which can be executed and the decree which it is sought to execute against the sureties does not, in my opinion, come within the terms of the section.

On the other hand section 292 of the Succession Act provides expressly for the procedure to be adopted in enforcing an administration bond and, until it can be shown that a more summary form of procedure is allowable, that is the procedure which should be adopted.

I have not been able to find any published decision on this question. In the case of *Maung Po Thein v. Ma Waing* (1), the bond was clearly one given in a suit or a proceeding consequent on a suit, and section 145 was undoubtedly applicable. The same can be said of *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (2) and consequently these decisions are of no assistance in the present case.

I do not regard this question as by any means a merely technical one. When a person has become a surety for the performance of a decree or the fulfilment of a condition imposed by the Court in a suit or in a proceeding arising out of a suit it is as a rule easy to say whether the obligation has been fulfilled or not and there is good reason for allowing the Court

(1) (1919) 10 L.B.R. 236.

(2) (1920) 42 All. 158.

to enforce the bond summarily in execution proceedings. But in a case such as the present it may not be easy to decide whether the principal has fulfilled his obligations and it is not unreasonable to require that the question shall be determined in a suit. In my view that is the consideration which underlies the provisions of section 292 of the Succession Act.

And where there are two provisions, one general and one dealing expressly with a particular case, the special provision should be followed, even if in its absence the general provision might be applicable.

In my opinion, therefore, this appeal should be allowed.

CUNLIFFE, J.—The respondent, Daw Tok, in this appeal held a money decree passed in a mortgage suit after the mortgaged property had been sold against one Maung Ba Han as Administrator of the estate of a woman called Ma Myint.

The appellants are the sureties to the administration bond entered into by Maung Ba Han. In Civil Miscellaneous Appeal No. 89 of 1926, the respondent came before this Court to appeal against the refusal of the District Court to investigate the accounts of the administrator under the provisions of section 52 of the Code of Civil Procedure.

This Court allowed her appeal and directed the Court below to dispose of the matter by means of an enquiry.

The District Court accordingly ordered a Commission to examine the accounts, but the administrator failed to appear. The present respondent, Daw Tok, then applied that the sureties should be ordered to pay the decretal amount. On the 7th of June of this year, the District Judge consented to the respondent

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Daw Tok's application and ordered the appellants to pay the decretal amount.

This is an appeal from that order. The first ground put forward against the order of the learned Judge is that section 145 of the Civil Procedure Code does not apply to sureties of an administration bond. The learned Judge thought it did and I agree with him. Section 145, which is drawn in the widest terms, clearly contemplates under sub-section (c) the liability of a surety to any undertaking by the Court. The exact wording of section 145 of the Civil Procedure Code, which is material to this point, is: "Where any person has become liable as a surety for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees." It appears to me that the appellants have become liable for the fulfilment of a condition imposed upon Ba Han, who entered into the administration bond. Ba Han entered into this bond under an order of the Court. It was argued that this was a proceeding arising out of a grant of Letters of Administration, but it was not a suit nor a proceeding consequent upon the grant of the Letters. It was further suggested that the appropriate remedy arose under section 292 of the Succession Act. I do not agree with this contention. It appears to me that the trouble here arose not specifically because of the grant of the Letters of Administration, but owing to the decree obtained in the mortgage suit by the respondent, Daw Tok. The procedure under section 145 is very convenient and I should say inexpensive.

The procedure provided under section 292 of the Succession Act is in my view both costly and cumbersome. I do not think it is stretching the limits of section 145 to allow process to be taken under that section. I think that the arguments against bringing this proceeding under section 145 are technical to a degree. I have no doubt that the section does not bar a regular suit against a surety. It is not an exclusive remedy, but an additional and direct means of enforcing the surety's liability.

A point was further taken before the learned Judge and before this Court that the execution of the decree against the appellants is barred by limitation. There is not much merit in this contention and I also agree with the manner in which this argument is dealt with in the judgment of the Court below.

One substantial error, however, in my opinion vitiates the whole order appealed from. It is imperative in any action taken by a Court under section 145 that notice should be given to the surety before attachment of his property. No notice whatever was given here and although it is true that after attachment the sureties did appear by their advocate and were heard, in my view an essential provision of the section has been disregarded.

For this reason alone the appeal will be allowed and the District Court is directed to give notice to each of the sureties and after hearing them, if they wish to be heard, to deal with the matter afresh. The present appellants will be allowed their costs of the hearing before us and of the former hearing in the Court below.

[Their Lordships having differed on the question of law as to whether in such a case section 145 of the Civil Procedure Code applies so that the decree against the administrator may be executed against the sureties to the administration bond, or whether the

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Court can proceed only by ordering assignment of the bond as provided in section 292 of the Succession Act, it was referred for decision by a third Judge.]

DAS, J.—My brothers Carr and Cunliffe having differed on a point of law, the matter has been referred to me under section 98 (2), of the Civil Procedure Code.

The facts of the case are as follows:—

One Ba Han obtained Letters of Administration to the estate of a deceased person. The appellants executed an administration bond as the sureties of Ba Han. The respondent, Daw Tok, obtained a decree against Ba Han in his capacity as administrator. She seeks to execute that decree against the appellants as sureties under the bond. The question is whether the respondent can proceed against the appellants under section 145 of the Civil Procedure Code or whether, before she can proceed against the appellants, she must obtain an assignment of the bond under section 292 of the Succession Act.

In my opinion section 145 of the Civil Procedure Code does not apply in this case. Section 145 (c) is as follows:—

“Where any person has become liable as surety for the payment of any money or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.

There can be no doubt that the word “decree” refers to clauses (a) and (b) of the section.

It is argued on behalf of the respondent that clause (c) applies. There is no suit in which the appellants render themselves liable as sureties. The proceeding for the grant of Letters of Administration is not a suit though it may take the form of a suit. The appellants only render themselves liable under the terms of the administration bond and the only way to proceed against them would be to obtain an assignment of the administration bond as provided by section 292 of the Succession Act.

I agree with my brother Carr in holding that section 145 of the Civil Procedure Code does not apply to a surety under an administration bond.

The appeal is therefore allowed with costs.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Cunliffe.*

KING-EMPEROR

v.

NGA HLAING.\*

1928  
 April 20.

*Corroborative evidence, admissibility and value of—Evidence Act (I of 1872), section 157—Substantive evidence, necessity of—First information reports and other reports.*

*Held*, that unless there is substantive evidence before the Court, first information reports and other reports by a witness cannot be used in corroboration.

*Held*, accordingly, that where the prosecution witness gives a different account in evidence before the Court, his previous reports cannot be admissible as corroborative evidence against the accused.

*Kyaw Zan Hla v. King-Emperor*, Criminal Appeal No. 452 of 1927—*distinguished.*

In this case there was a single eye-witness to the crime alleged to have been committed by the accused. The eye-witness in his evidence before the

\* Criminal Revision No. 141B of 1928.