

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

1929

Mar. 11.

DAW OHN BWIN

v.

U BAH AND ANOTHER.*

Surety's liability—Civil Procedure Code (Act V of 1908), s. 145—Surety's registered bond offering immoveable property as security to Court—Suit on bond, not necessary—Enforcement of bond by sale of property.

Where a surety has given a registered bond to a Court, offering his immoveable properties as security for his obligations under the bond, it can be enforced under s. 145 of the Civil Procedure Code against the properties without bringing a regular suit.

Beti v. Badan Singh, 45 All. 649; *Subramanian v. Raja of Ramnad*, 41 Mad. 327—referred to.

Tha Kin for the appellant.

E Maung for the respondents.

HEALD and MYA BU, JJ.—In Suit No. 9 of 1926 of the District Court of Pyapôn the present respondents sued Ma Seik Kaung for possession of certain properties, including a mill, on the strength of a registered conveyance of the properties given to them by Ma Seik Kaung.

In connection with that suit they applied for the appointment of a Receiver of the properties, and it was ordered that Ma Seik Kaung should be allowed to remain in possession of the mill on payment of a rent of Rs. 1,000 a month and on giving security for Rs. 7,000. The present appellant accordingly executed a security bond for Rs. 7,000. Subsequently further security for Rs. 3,000 was demanded by the Court and appellant executed a registered bond for Rs. 10,000 in favour of the Judge of the Court giving certain immoveable properties belonging to her as security for Ma Seik Kaung's duly performing and satisfying any order which might be made against her.

* Civil First Appeal No. 146 of 1928 from the order of the District Court of Pyapôn in Civil Execution No. 45 of 1927.

Ma Seik Kaung failed to pay the rent which she had undertaken to pay and for the payment of which appellant had stood surety, and after respondents had obtained a decree in the suit they applied to the Court for the recovery of the arrears of rent from appellant as surety under the provisions of section 145 (c) of the Code of Civil Procedure.

The Court found that appellant was liable on the bond to the extent of Rs. 10,000 in respect of the arrears of rent payable by Ma Seik Kaung and held that respondents were entitled to bring the properties, which she had given as security, to sale without filing a suit on the bond.

Appellant contends in appeal that the lower Court was wrong in holding that the properties could be sold without a suit on the bond and she says that there was no personal liability under the bond.

A reference to the terms of the bond shows that there is no basis for the latter of these grounds, and the only question which arises in the appeal is whether in a case where a surety has offered certain specified properties as security for her obligations under the bond, and where because those properties were immoveable properties it has been necessary to have the bond registered in order to make the security effective, the bond can be enforced against the properties without bringing a regular suit.

In form the bond in this case did not effect a mortgage of the properties although it was admittedly intended to do so. It was to the following effect: "I, Ma On Bwin am hereby bound to the Judge of the District Court in the sum of Rs. 10,000 in the following circumstances. It has been ordered by the Court that Ma Seik Kaung shall be allowed to continue to work the rice-mill in suit on giving security and I have consented to be surety for Ma

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Seik Kaung for the due performance and satisfaction of any order which may be made against her. Now the condition of the obligation of this bond is that if Ma Seik Kaung shall duly perform and satisfy any order which may be made against her then there shall be no obligation under this bond, but in case of any default by Ma Seik Kaung I shall pay to the Judge of the District Court Rs. 10,000 or such sum as the said Judge shall order in or towards satisfaction of such order." To that document ~~is annexed~~ a list of the properties which Ma On Bwin had in fact agreed to offer as security for her obligations under the bond, but there is no statement in the bond itself that those properties were offered as security or that they were mortgaged by Ma On Bwin.

It is not however the case of either side that the document did not in fact effect a mortgage of the properties mentioned therein and we shall therefore deal with the matter on the assumption that there was such a mortgage.

The question whether the remedy against immovable property given as security under a registered bond can be enforced without recourse to a suit was considered in the case of *Subramanian Chelliar v. Raja of Ramnad* (1), where it was decided that such property can be sold by order of the Court without recourse to a suit. There is a similar decision in the case of *Belj Mahalakshmi v. Badan Singh* (2), and we see no reason to doubt that those decisions are in accordance with intention of the legislature embodied in section 145 of the Code.

No question of the amount of the arrears of rent has been raised in the appeal and therefore we assume that the arrears amount to at least Rs. 10,000.

(1) (1917) 41 Mad. 327.

(2) (1923) 45 All. 649.

We are of opinion that the lower Court's finding that the property could be brought to sale without a suit on the mortgage bond was correct and we dismiss the appeal with costs, advocate's fee in this Court to be five gold mohurs.

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APPELLATE CRIMINAL.

Before Mr. Justice Carr.

NGA PO NGWE

v.

KING-EMPEROR.*

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 Mar. 12.

Penal Code (Act XLV of 1860), s. 227—Burma Criminal Law Amendment (Conditionally Released Prisoners) Act (Burma Act III of 1928), s. 2—Facts to be proved for conviction under s. 227 of the Penal Code—Mode of proof—Retrospective effect of Burma Act III of 1928.

Where a person is to be convicted under s. 227 of the Indian Penal Code for violation of the conditions of remission of punishment, it is necessary to prove (a) that the accused person has been convicted and sentenced and (b) has been granted a remission of punishment, (c) the conditions on which the remission was granted, (d) the identity of the accused (e) the fact that the accused has committed a breach of a condition of the remission.

The first three facts must be proved by documentary evidence, *viz.*, a certified copy of the judgment as regards conviction and sentence, a certified copy of the order of remission, and of the bond executed by the accused. Oral evidence is inadmissible on these points. The identity of the accused and the breach of conditions may be established by oral evidence.

Quære: Whether s. 2 of Burma Act III of 1928 has retrospective effect.

CARR, J.—The respondent, Nga Po Ngwe, has been convicted under section 227 of the Penal Code of a breach of a condition of remission of punishment, and has been sentenced under that section and section 2 of Burma Act III of 1928 to nine months' rigorous imprisonment. The unexpired portion of his

* Criminal Revision No. 876 of 1929 being a review of the order of the third Additional Magistrate of Taungdwingyi in Criminal Regular No. 164 of 1928.