

## APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1931

May 11.

SIBA SINGH

v.

C.V.R.M. CHETTYAR FIRM.\*

*Civil Procedure Code (Act V of 1908), ss. 47, 145—Surety under s. 145 not a party within s. 47 for all purposes—Surety a party only for purpose of appeal against execution orders—Application by surety falling within s. 47.*

If an order for or in the course of execution is made against a surety who is within the ambit of section 145 of the Civil Procedure Code, he is at liberty to appeal against that order as though he were a party to the suit within the meaning of section 47, but in other respects he is not deemed to be a party within section 47, and is not entitled to file any application which falls within section 47, unless such application is permitted under some express provision in the Code.

A surety, whose property has been sold in execution of a decree for the liquidation of which he was liable under section 145 of the Code, cannot, by an application purporting to be filed under section 47, claim to set aside the sale on the ground that it was void as it took place after a stay order had been passed in respect thereof by the Appellate Court.

*Raj Raghubar v. Jai Indra Bahadur Singh*, I.L.R. 42 All. 158; *Ram Kishun v. Latta Singh*, I.L.R. 51 All. 346; *Ramanathan v. Doraiswami*, I.L.R. 43 Mad. 325; *Srinibash v. Kesho Prasad*, I.L.R. 38 Cal. 754—referred to.

The facts of the case and the preliminary objection to the appeal are set out in the judgment reported below.

*N. Jeejeebhoy* for the respondent. There is a preliminary objection that this appeal is not maintainable. The original application out of which this appeal arises could be only either under Order 21, rule 92, or under section 47 of the Civil Procedure Code. If it is under Order 21, rule 92, no second appeal lay and the proceedings before Carr, J., would be under the revisionary jurisdiction. Clause 13, Letters Patent, of this Court does not give a right of

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\* Letters Patent Appeal No. 4 of 1931 arising out of Civil Second Appeal No. 136 of 1930 of this Court.

appeal from the exercise of revisionary jurisdiction. If the original application purports to be under section 47, Civil Procedure Code, the application was not maintainable in its inception. The Privy Council has held in *Raj Raghobar Singh v. Bahadur Singh* (1) that a surety is neither a party nor a representative of a party within the meaning of section 47. The surety's remedy is by way of a suit.

*P. B. Sen* for the appellant. *Raghobar Singh's* case is distinguishable. Their Lordships were there dealing with an application for restitution under Section 144, Civil Procedure Code. Under section 145, with which we are concerned, the surety is to be deemed a party for the purposes of appeal. Read together, section 47 and section 145 give to the surety for the judgment-debtor the same remedies as the judgment-debtor. There is no doubt that an application like the present one would be maintainable at the instance of the judgment-debtor and the intention of the legislature in enacting section 145 was to give the surety the same facilities. Otherwise, an anomaly would exist.

*N. Jeejeebhoy* in reply. The Madras High Court in *Ramanathan Pillai v. Doraiswami Aiyangar* (2) makes it clear that a surety is to be deemed a party only for the purposes of an appeal. He is not competent to initiate an original application. There is no anomaly. The surety is not barred from filing a suit, whereas the judgment-debtor is bound to proceed under section 47, Civil Procedure Code.

PAGE, C.J.—This case disclosed an anomalous situation with regard to execution proceedings. For

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(1) (1919) 46 I.A. 228 at p. 236 ; 42 All. 158 at p. 166.

(2) (1920) I.L.R. 43 Mad. 325 at p. 328.

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the purpose of disposing of this appeal the material facts lie within a narrow compass.

The respondent, who is a Chettyar, obtained a decree for Rs. 1,586 against a person to whom he had advanced money. The appellant became personally liable under a bond of suretyship to liquidate that decree by the payment of the money due. By the bond it was made a condition that "if the suit be decreed in favour of the plaintiff C.V.R.M. Firm the defendant Hta Wa shall pay up Rs. 1,500 or any sum up to Rs. 1,500 towards the satisfaction of the decree, and this obligation shall be void and of no effect; otherwise the same shall remain in full force and effect and I, surety Siba Singh, shall pay up Rs. 1,500 or such sum up to Rs. 1,500 towards the satisfaction of the decree." The judgment-debtor having absconded without paying the judgment-debt the decree-holder on the 8th February 1929 obtained leave to execute the decree against the appellant as a surety personally or by attachment and sale of his property. No appeal was filed against the order granting leave to execute the decree against the appellant, and on the 22nd June 1929, the sale of the appellant's property in execution of the decree took place. On the 26th June 1929, the appellant filed an application for an order setting aside the sale on the ground that it was invalid and void inasmuch as, prior to the sale taking place, an order had been passed by the District Court of Toungoo staying the proceedings in connection with the sale. On the 9th August the Subdivisional Judge dismissed the appellant's application to set aside the sale, and on the 17th December an appeal from the order of the Subdivisional Judge was dismissed by the District Judge of Toungoo. A second appeal was then preferred to the High Court, and on the 22nd December 1930, the

appeal was dismissed by my learned brother Carr. Leave to appeal having been granted by Carr, J., the present Letters Patent Appeal was filed. A preliminary objection has been taken on behalf of the respondent that no second appeal lay to the High Court, and *a fortiori* that no Letters Patent Appeal could lie from the order under appeal. In my opinion the preliminary objection must prevail.

On behalf of the appellant it was contended that the appeal to the High Court did not arise out of an application under Order 21, rule 90, of the Code of Civil Procedure, but under section 47 of the Code; and that under sections 47 and 145 a second appeal lay to the High Court. The issue of the appeal depends upon the true construction of section 145 which runs as follows:—

“Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or,
- (b) for the restitution of any property taken in execution of a decree, or,
- (c) 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, and such person shall *for the purposes of appeal* be deemed a party within the meaning of section 47.”

On behalf of the appellant it is contended that unless an appeal lies in the circumstances obtaining in the present case an anomalous situation is disclosed, because it is common ground that a second appeal would have lain in the present case if execution had been levied against the judgment-debtor, and if a second appeal does not lie when execution is taken out against the appellant as a surety under section 145

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the result is that the judgment-debtor is placed in a more favourable position than the person who has agreed to become a surety for him. The learned advocate for the appellant contends that if and so soon as execution is taken out against the surety under section 145 he is to be deemed *for all purposes* to be in the same position as a party within the meaning of section 47. If the construction of section 145 for which the appellant contends is correct the words "for the purposes of appeal" in the section would be superfluous, and the question to be determined is what is the meaning and effect of the words "for the purposes of appeal" as used in section 145.

Now, a surety is not a party or the representative of a party within the meaning of section 47; [*Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1)] and, therefore, would be at liberty to canvass any question that falls within the ambit of section 47 in a regular suit, whereas a judgment-debtor or any other party or the representative of such other party would be bound to agitate such questions in proceedings under section 47 before the executing Court.

It has been held by the High Courts at Calcutta, Madras and Allahabad [*Srinibash Prasad Singh v. Kesho Prasad Singh* (2), *Ramanathan Pillai v. Doraisawmi Aiyangar* (3), *Ram Kishun v. Lalta Singh* (4)] that the effect of the words in section 145 "such person shall for the purposes of appeal be deemed a party within the meaning of section 47" is that the surety is given the same right to appeal against an order made against him in the execution proceedings as a party to the suit possesses, but is not for any other purpose to be

(1) (1919) I.L.R. 42 All., 158.

(3) (1920) I.L.R. 43 Mad. 325.

(2) (1911) I.L.R. 38 Cal. 754 at p. 776.

(4) (1929) I.L.R. 51 All. 346.

regarded as a party to the suit, or the representative of such party within section 47. I am constrained to take the same view. If an order for or in the course of execution is made against a surety who is within the ambit of section 145 he is at liberty to appeal against that order as though he were a party to the suit within the meaning of section 47; but in other respects he is not deemed to be a party within section 47 and is not entitled to file any application which falls within section 47, unless such application is permitted under some express provision in the Code. It follows, therefore, that the present appeal, which arose out of proceedings purporting to be filed by the surety under section 47, does not lie. We express no opinion upon the questions raised and determined in the appeal before Carr, J. The appeal is dismissed with costs, three gold mohurs.

MYA BU, J.—I agree.

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