APPELLATE CIVIL.

Before Mr. Justice Mya Bu.

1936

Jan. 17.

C. SOON THIN
v.
K.S.A.V. CHETTYAR FIRM.*

Surety's bond—Attachment before judgment of defendant's property—Removal of attachment on surety's undertaking—Decree in favour of plaintiff—Surety's liability—Appeal against decree, effect of—Reversal of decree on appeal—Restoration of original decree on further appeal—Surety's liability not destroyed—Civil Procedure Code (Act V of 1908), O. 38, r. 5.

Where a surety has executed a bond under Order 38 of the Civil Procedure Code, and the property of the defendant is released from attachment on the undertaking of the surety that he will either produce the property before the Court whenever required or be liable for the amount that may eventually be decreed by the Court against the defendant, the liability of the surety is fully incurred as soon as the decree is passed against the defendant. This liability is not extinguished by an appeal being preferred against the decree. The decree of the appellate Court may reduce the *quantum* of the surety's liability which in a given case may be nothing. But if the Court of first instance passes a decree in favour of the plaintiff, though it may be set aside on appeal but is restored on further appeal, the surety's liability is not destroyed, and his bond becomes enforceable against him. Different considerations arise when the suit is dismissed in the first instance.

Shek Suleman v. *Shivram*, I.L.R. 12 Bom. 71—*referred to.*

Abdul Rahman v. *Amin Sheriff*, I.L.R. 45 Cal. 780; *D. Manackjee* v. *R.M.N. Firm*, I.L.R. 5 Ran. 492; *Pindi* v. *U Thaw Ma*, I.L.R. 9 Ran. 472—*distinguished.*

K. C. Sanyal for the appellant. The appellant executed a security bond under Order 38 of the Civil Procedure Code, and had the attachment before judgment passed against his property removed. The suit against the defendant was decreed in the trial Court, but was dismissed on appeal. A second appeal to this Court was also unsuccessful. Therefore the surety's liability ceased with the dismissal of the suit by the first appellate Court, and the fact that the respondent ultimately succeeded in a Letters

* Civil Second Appeal No. 272 of 1935 from the order of the District Court of Mandalay in Civil Appeal No. 26 of 1935.

1936

C. SOON THIN v. K.S.A.V. CHETTYAR FIRM.

Patent appeal in having the decree of the first Court restored does not affect the surety's liability. There is direct authority in support of the appellant. *D. Manackjee* v. *R.M.N. Chettyar Firm* (1) ; *Pindi* v. *U Thaw Ma* (2). The surety's liability ceases with the dismissal of a suit whether on the merits or on default, and does not revive because the suit is decreed by an appellate Court.

See also *Abdul Rahman* v. *Amin Sheriff* (3) ; *Shek Suleman* v. *Shivram Bhikaji* (4).

Chari for the respondent. The decision in *Shek Suleman* was not approved of in a later Bombay case, *Iranguada* v. *Irbasappa* (5), where it was held that the surety's liability continues during the appeal. In any case the present appeal is distinguishable from the cases cited because those were cases where the suit was dismissed in the trial Court. Here the trial Court decreed the suit, and the surety's liability commenced on that date. Order 38, r. 11 says that a fresh attachment is not needed to execute the decree indicating that this case stands on a different footing from cases where the trial Court dismisses a suit.

MYA BU, J.—This is an appeal against an order directing the enforcement of a surety bond executed by the appellant in a proceeding for attachment before judgment pending a suit instituted by the respondent firm against one Mahmoo *alias* Mohammed Ebrahim and another for recovery of a certain sum of money. After the filing of the suit the respondent made an application for attachment before judgment of a racing pony belonging to Mahmoo.

(1) I.L.R. 5 Ran. 492.
(2) I.L.R. 9 Ran. 472.
(3) I.L.R. 45 Cal. 780.
(4) I.L.R. 12 Bom. 71.
(5) I.L.R. 51 Bom. 31.

1936

C. SOON THIN v. K.S.A.V. CHETTYAR FIRM.

MYA BU, J.

On that application the Court ordered the conditional attachment of the pony under Order XXXVIII, rule 5 (*3*) of the Code of Civil Procedure, and served an order upon Mahmoo pursuant to sub-rule (1) of the rule. Thereupon Mahmoo applied to the Court that the pony might be released from attachment on his furnishing security. This application was disposed of by an order in the following terms :

"The attachment may be released on furnishing security to the extent of Rs. 5,000 or more, whichever amount this Court might eventually decree in favour of the plaintiff, or to produce the animals attached in lieu thereof, whenever required by the Court."

Consequently, the appellant executed a surety bond which recited :

"Whereas in the above mentioned case Mahmoo (*a*) Mohamed Ebrahim respondent therein was called upon under Rule 5 of Order 38 of the Code of Civil Procedure to produce the race pony now under attachment called 'Nanda Hlaing' whenever required by this Court or its value which may be fixed as the amount that may eventually be decreed in the connected Civil Regular Suit being No. 44 of 1933 of this Court, and sufficient to answer the claim against him. And whereas I have consented to be the surety for the production as aforesaid :

Now the condition of the above obligation is such that if the said Mahmoo (*a*) Mohamed Ebrahim shall produce the race pony called 'Nanda Hlaing' before the Court whenever required or its value which may be fixed as the amount that may eventually be decreed against him, then this obligation shall be void and of no effect, otherwise the same shall remain in full force and effect, and while the same remains in force I shall upon default by the abovesaid respondent Mahmoo (*a*) Mohamed Ebrahim in producing the said race pony called 'Nanda Hlaing,' or pay the decretal amount as aforesaid, pay into the said Court such sum of money as the said Mahmoo (*a*) Mohamed Ebrahim may be ordered to pay in the said suit."

Upon the appellant's execution of this bond the pony was released from attachment and some time

1936

C. SOON THIN v. K.S.A.V. CHETTYAR FIRM.

MYA BU, J.

thereafter the suit was decreed against both the defendants by the Subdivisional Court of Mandalay. Mahmoo, however, appealed against the decree successfully in the District Court of Mandalay which directed that the judgment and decree of the trial Court be set aside, and that the plaintiff's suit be dismissed with costs against both the defendants. The respondent appealed against the judgment and decree of the District Court in a Special Civil Second Appeal lodged in this Court, but the appeal was dismissed with costs. Undaunted the respondent obtained a certificate under clause 13 of the Letters Patent and filed a Letters Patent Appeal, the result of which was that the decrees of the District Court on First Appeal and of this Court on Second Appeal were set aside and the decree passed in favour of the respondent by the Subdivisional Court was restored. After his success in the Letters Patent Appeal the respondent sought to have the decree executed by issue of notices

> "both to the judgment-debtor Mahmoo (*alias*) Mohamed Ebrahim and the surety C. Soon Thin, to produce the pony called 'Nanda Hlaing' as bound under the security bond executed in Civil Miscellaneous No. 12 of 1933 or to deposit the decretal debt, failing which attachment may be issued in respect of property or properties of which the decree-holder will furnish particulars."

The pony did not come forth, and with reference to the prayer for the depositing of the decretal amount the appellant objected, *inter alia*, on the ground that the security bond ceased to have any force when the original decree was set aside by the District Court on First Appeal and by the High Court on Second Appeal. The other grounds upon which objection was taken by the appellant to the execution against him need not be set out, as they

1936

C. SOON THIN v. K.S.A.V. CHETTYAR FIRM.

MYA BU, J.

have been fully dealt with by the Courts below which decided the case against the appellant and as the ground set out above is the only ground upon which this appeal is urged. At first sight this ground appears to receive some air of strength from the decisions of this Court in *D. Manackjee* v. *R.M.N. Chettyar Firm* (1), and *Pindi* v. *U Thaw Ma and another* (2). In the former it was held that when security is given to obtain removal of attachment before judgment under Order XXXVIII of the Civil Procedure Code, the liability of the surety ceases as soon as the suit is dismissed in the first Court, and that the plaintiff succeeding on appeal in his suit cannot hold the surety liable. In the latter it was held that when a suit is dismissed for default all interim and ancillary orders in the proceedings must fall with it, and that an attachment before judgment comes to an end when the suit abates and is dismissed, and the attachment does not revive if the suit is restored. It must be conceded that according to the judgment in *Pindi* v. *U Thaw Ma* (2), the same principles would apply where a suit has been dismissed upon the merits instead of for default, because this is the effect of the ruling in *Abdul Rahman* v. *Amin Sheriff* (3). The present case, however, is distinguishable from either of those cases. In the present case the Court of first instance decreed the suit and the immediate question before the Court is not what the fate of an attachment before judgment is but whether the order of the first appellate Court, confirmed by the second appellate Court, which orders, however, were set aside in the Letters Patent Appeal, directing the

(1) (1926) I.L.R. 5 Ran. 492. (2) (1931) 9 Ran. 472.
(3) (1918) I.L.R. 45 Cal. 780.

1936

C. SOON THIN v. K.S.A.V. CHETTYAR FIRM.

MYA BU, J.

dismissal of the plaintiff's suit, destroys the surety's liability upon the bond in spite of the fact that the Court of first instance decreed the suit. In *Shek Suleman and another* v. *Shivram Bhikaji and another* (1), which was relied on in *Ma Bi* v. *S. Kalidas* (2), which, again, was relied on in *D. Manackjee* v. *R.M.N. Chettyar Firm* (3), it was held that as soon as the decree of the Court of first instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. In the course of the judgment it was observed :

" *** ***, we think (1) that the decree of the Court of first instance, immediately on its being made, satisfied the condition under which the sureties became severally bound to cause the defendant to place at the disposal of the said Court, when required, the property specified in their bond. In default they became bound 'to pay to the said Court . . . . . such sum as the said Court may adjudge against the said defendant.' This liability having thus been fully incurred was not extinguished by appeal being made against the decree. If the amount recoverable by the plaintiff should be diminished in appeal, the amount of which payment could be enforced would be diminished to a like extent, and the sureties' engagement being one of indemnity would diminish in the same proportion. So, too, if the decree being reversed the sum recoverable became zero, the sureties' liability would be reduced to nothing. This was involved in the nature of their engagement, but it did not cease to be an engagement, because the decree of the first Court merged in that of the appellate Court. The liability had been fully incurred whatever afterwards happened, though in its nature variable as to amount."

(1) (1887) I.L.R. 12 Bom. 71. (2) (1910) 5 L.B.R. 156.
(3) (1926) I.L.R. 5 Ran. 492.

1936

C. SOON THIN v. K.S.A.V. CHETTYAR FIRM.

MYA BU, J.

In the light of these observations, in which I respectfully concur, upon the passing of the decree the surety's liability arose, the subsequent appeal or appeals from the decree could only have the effect of reducing the *quantum* of the liability which may even be found to be nothing, but it did not destroy the liability, and when the decree of the Court of the first instance was finally restored, there is no practical or legal ground for thinking that the liability incurred, when it was first passed, is not restored at all. Even if analogy be taken from the case of attachment before judgment, there will be no justification whatever for applying to the present case in which the suit was decreed by the Court of first instance the rules as to cessation or termination of the attachment before judgment upon the dismissal of the suit by the Court of first instance. The decreeing of the suit by the Court of first instance has a different effect upon the attachment before judgment from the dismissal of the suit by that Court. Under Order XXXVIII, rule 11, of the Civil Procedure Code, a fresh attachment even is unnecessary when execution is taken out upon the decree after it is passed.

For all the above reasons I see no substance in this appeal, which is dismissed with costs, advocate's fee five gold mohurs.