

APPELLATE CIVIL.

Before Skemp J.

SRI RAM—Appellant.

versus

THE CROWN THROUGH THE COLLECTOR OF
DELHI AND ANOTHER, Respondents.

First appeal from Order No. 177 of 1938.

*Indian Succession Act (XXXIX of 1925), SS. 291, 299 —
Probate of Will — Executor — Surety — mal-administration
by executor — Surety whether can be released from his
security — Order for fresh security — Whether appealable.*

This was a first appeal against an order of the Senior Subordinate Judge directing one S. who had obtained probate of a will, to lodge fresh security for the administration of the balance of the estate, the order being passed on the application of the surety who had given security for the administration of the estate in the first instance and had applied to be released from his security bond on the ground that S. had been adjudged insolvent and was not properly managing the estate. A preliminary objection was taken that no appeal was competent.

Held (over-ruling the objection), that the appeal was competent because an order by a Court, as the present, calling upon an executor to furnish fresh security is passed by the Court in the ordinary course of the case under the provisions of the Act and should be subject to appeal under S. 299 of the Act.

It was contended on behalf of the appellant that once a surety has given security that executor shall administer the estate, he cannot be permitted to withdraw.

Held (repelling the contention), that the surety is entitled to be discharged from his obligation as regards future transaction on a good cause being shown such as mal-administration of the estate by the executor.

1938

Dec. 9.

Raj Narain Mookerjee v. Ful Kumari Debi (1), *National Guarantee and Suretyship Association v. Prayag Deb Banerji* (2) and *Shahab-ul-Din v. Fazal Din* (3), relied upon.

Subroya Chetty v. Ragammall (4) and *Kandhya Lal v. Manki* (5), not followed.

First appeal from the order of Sayyad Shaukat Hussain, Senior Subordinate Judge, Delhi, dated 14th June, 1938, ordering the executor to file a detailed and complete account and to furnish a fresh security.

SHAMAIR CHAND, for Appellant.

M. SLEEM, Advocate-General, for Crown. VESHNU DATTA, for Bhola Nath. Respondents.

SKEMP J.—This is a first appeal against an order of the Senior Subordinate Judge, Delhi, directing one Sri Ram, who had obtained probate of a will, to lodge fresh security for the administration of the balance of the estate. This order was passed on an application by the surety Bhola Nath who had given security for the administration of the estate in the first instance. He sought to be released from his security bond on the grounds that Sri Ram had been adjudged insolvent and was not properly managing the estate. As a first step the Judge ordered Sri Ram to lodge fresh security.

A preliminary objection is taken that no appeal lies. This is based on section 299 of the Indian Succession Act which says “every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court.....”

Admittedly there is no specific provision in the Act enabling the Court to take fresh security or cancel a security bond, and Mr. Vishnu Datta for the respondent Bhola Nath argues that there can, therefore, be no appeal. On the other hand, Mr. Shamair Chand

1938

SRI RAM

v.

THE CROWN
THROUGH THE
COLLECTOR OF
DELHI.

SKEMP J.

(1) I. L. R. (1902) 29 Cal. 68. (3) 52 P. R. 1902.

(2) I. L. R. (1932) 54 All. 293. (4) I. L. R. (1905) 28 Mad. 161.

(5) I. L. R. (1909) 31 All. 56.

1938

SRI RAM
v.
THE CROWN
THROUGH THE
COLLECTOR OF
DELHI.

SKEMP J.

urges that the Senior Subordinate Judge was seized of the case by virtue of the Act, that the order was passed in the ordinary course of the case under the Act and, therefore, section 299 must be deemed to apply. I accept this argument. If a Court can pass an order calling upon an executor to furnish fresh security it is obviously right and proper that the order should be subject to appeal.

Mr. Shamair Chand for the appellant takes the point that once a surety has given security that an executor shall administer the estate, he cannot be permitted to withdraw. He relies for this proposition on *Subroya Chetty v. Ragammall* (1) which did so hold relying on *In Re Stark* (2). *Subroya Chetty v. Ragammall* (1) was followed in *Kandhya Lal v. Manki* (3).

On the other hand there are several cases in which a surety has been released from security. See *Raj Narain Mookerjee v. Ful Kumari Debi* (4) where the applicant had become surety for his sister for the due administration of the mother's estate but alleged that the administratrix was wasting the estate. It was held by a Division Bench of the Calcutta High Court that the Court had jurisdiction to take a second bond with fresh sureties and that the surety could be released from his obligation by giving notice.

In *Surendra Nath Pramanik v. Amrit Lal Pal Chaudhri* (5) another Bench of the Calcutta High Court held that where the surety had become worthless the Court could call on the executors for fresh security.

In *Shahab-ud-Din v. Fazal Din* (6) a Division Bench of the Chief Court held "that a surety of an

(1) I. L. R. (1905) 28 Mad. 161.

(4) I. L. R. (1902) 29 Cal. 68.

(2) (1866) L. R. 1 P. and D. 76.

(5) I. L. R. (1920) 47 Cal. 115.

(3) I. L. R. (1909) 31 All. 66.

(6) 52 P. R. 1902.

executor is entitled to be discharged from his liability as regards the future transactions of the latter when the executor for whom he is surety wastes the estate, and as the effect of his discharge would be to revoke the probate, if fresh security is not furnished, an appeal lies against an order refusing to such discharge." The learned Judges said "The surety isentitled to protection against the executor if it be shown that the latter is wasting the estate, and thereby rendering the former liable on his surety bond. In our view of the law the course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and, on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security the probate should be revoked and the surety discharged."

In a recent case, *National Guarantee and Suretyship Association v. Prayag Deb Banerji* (1), it was held that "Although a surety for the due administration by a grantee of letters of administration cannot claim as of right to be relieved of all future liability by merely expressing his intention to revoke, either by notice or by an application to the Court,..... yet the Court to which the guarantee is given has power, when good cause is shown, to grant a release from all liability for future transactions." In the course of their judgment the learned Judges said "It may well be that at the time when the surety furnished security, the administrator was honest and was believed to be capable of administering the estate in a proper way, but he might subsequently become dishonest or might mismanage the estate, and so it would be astonishing if there were no provision of law which

1938

SRI RAM
v.
THE CROWN
THROUGH THE
COLLECTOR OF
DELHI.

SKEMP J.

(1) I. L. R. (1932) 54 All. 293.

1938

SRI RAM
v.
THE CROWN
THROUGH THE
COLLECTOR OF
DELHI.

SHEPHERD J.

would give the surety remedy by way of objecting to the Court and asking to be relieved. He cannot merely sit idle and watch the administrator committing the waste and misappropriation, knowing fully well that the liability will be his own."

Mr. Shamair Chand suggested that as there is no authority of this High Court on the point it should be referred to a Division Bench, but I see no need for this course. There is a ruling of the Chief Court dealing with the point with which I am in respectful agreement. I also think the remarks in *National Guarantee and Suretyship Association v. Prayag Deb Banerji* (1) particularly apposite.

The executor by being adjudged insolvent has demonstrated that he is unable to manage his own affairs and it is reasonable for the surety to believe that he is not a fit person to manage an estate of somebody else.

I reject this appeal with costs to the respondents.
A. N. K.

(1) I. L. R. (1932) 54 All. 293.