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IN *RE* JAIKISSONDÁS PURSHOTAMDÁS.

justify us in exercising the discretion given to us by that section in favour of the applicant. I think the application must be rejected.

SCOTT, J. :—I concur. I am also of opinion that if section 5 of the Limitation Act applies, there are no circumstances here which should induce us to extend the time prescribed by section 38 for making such an application as the present.

I think, also, that it should be clearly understood that, although this application was nominally made on the 16th December, it was only provisionally received; and that every objection to its reception which could have been taken on that day can be taken now. The subsequent compliance by the petitioner with the requirements of the Act cannot place him in a better position than he occupied when the application was made. There is no doubt that if these objections had been then taken, the application must have been rejected, and, consequently, I think we must reject the application now.

Application rejected.

Attorneys for the petitioner:—Messrs. *Payne, Gilbert, and Sayáni.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

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VENKÁPÁ NA'IK, (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* BASLINGA'PA' BIN KOTRABASAPA, (ORIGINAL SURETY), RESPONDENT.*

Surety—Stay of execution of decree appealed against on giving security—Sureity for fulfilment of appellate decree—His liability—Mode of enforcing it—Civil Procedure Code (Act XIV of 1882), *Secs.* 253 *and* 583*—Execution proceedings—Separate suit—Words "in an original suit" in Section* 253 *of Act XIV of* 1882 *superfluous.*

Under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject.

* Appeal No. 87 of 1886.

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Reading section 253 with section 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under section 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under section 253 to satisfy a decree of a Court of first instance.

The words "in an original suit" in section 253 may be treated as a superfluous expression.

APPEAL from the decision of Ráv Bahádur G. V. Bhánap, First Class Subordinate Judge of Dhárwár, in *darkhást* No. 188 of 1886.

The appellant Vankápá Náik obtained a decree against Shankarbhárathi Swámi in Original Suit No. 326 of 1881 in the Court of the First Class Subordinate Judge of Dhárwár. Against this decree an appeal was preferred to the High Court. Pending the appeal the execution of the decree was stayed on the judgment-debtor's furnishing security for the satisfaction of the decree of the Appellate Court. One Baslingápá became his surety. The High Court confirmed the decree of the Court of first instance. Thereupon the decree-holder sought, in execution, to enforce the decree both against the judgment-debtor and the surety.

The surety objected to the execution of the decree against him, on the ground that he, having become a surety after, and not before, the passing of the decree in the original suit, the decree could not be enforced against him, in the same manner as against the judgment-debtor, under section 253 of the Code of Civil Procedure (Act XIV of 1882)[1].

The Subordinate Judge was of opinion that the provisions of section 253 of the Code of Civil Procedure could not be extended in their operation to the case of a person who became a surety for the fulfilment of the decree in appeal. He held that the proper mode of proceeding against the surety was by a regular suit, and not by a summary process in execution. He, therefore, refused to issue execution against the surety.

[1] Section 253 of Act XIV of 1882 provides as follows :—"Whenever a person has, *before the passing of a decree in an original suit*, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant: Provided a sufficient notice in writing has been given to the surety."

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Against this order the decree-holder appealed to the High Court.

Ganesh Rámchandra Kirloskar for the appellant:—Section 253 should be read with section 583 of the Civil Procedure Code. Section 583 distinctly provides that decrees in appeal should be executed in the same manner as decrees in original suits. Under Act VIII of 1859, sec. 204, a surety could be proceeded against in execution, whether he became a surety before or after the passing of the decree in the original suit—*Náráyan Dev* v. *Gajánan Dikshit*(1); *Shivlál Khubchand* v. *A'páji Bhivráv*(2); *Apáji Bhivráv* v. *Shivlál Khubchand*(3); *Sheo Gholám Sahoo* v. *Rahut Hossein*(4). Under the present Code of Civil Procedure it has also been held that the decree-holder can proceed in execution against the surety who has bound himself to fulfil the decree in appeal—*Bans Bahádur Sing* v. *Mughla Begam* (5).

Mánekshán Jehángirshán for the respondent:—The rule in section 253 is a special rule of procedure applicable to a special case. It is not to be extended by analogy to other cases of a like nature. It provides that a person who becomes a surety before the passing of the original decree is to be treated as though he were a party to the suit. The same cannot be said of a person who becomes a surety after the decree. He is not a party to the suit, nor a party to the appeal. The ruling in *Báboo Rám Kishen Doss* v. *Hurkhoo Sing*(6) shows the distinction between the two classes of sureties. This ruling is followed in *Gajindra Náráyan Roy* v. *Hemangini Dossi*(7). These cases must have been before the Legislature when it framed section 253 of the present Code. If we compare it with the corresponding section of the old Code—section 204, we at once perceive the change of expression. In section 253 of the present Code there are the words "in an original suit" which are not to be found in section 204 of the old Code (VIII of 1859). These words are advisedly put in to remove all possibility of doubt on the

(1) 10 Bom. H. C. Rep., 1.
(2) I. L. R., 2 Bom., 654.
(3) I. L. R., 3 Bom., 204.
(4) I. L. R., 4 Calc., 6.
(5) I. L. R., 2 All., 604.
(6) 7 Calc. W. R. Civ. Rul., 329.
(7) 4 Beng. L. R., 27 Appx.

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subject. Those words prevent the application of the section to the case of a person becoming a surety *after* the decree.

Ganesh Rámchandra Kirloskar in reply:—The change in the wording of section 253 does not imply any change of intention or procedure. The ruling in *Gajendranáráyan Roy* v. *Hemangini Dasi*[1] is practically overruled by a subsequent case, *Akhut Ramana* v. *Ahmed Yousuffji*[2]. There is nothing to be gained by driving the decree-holder to a regular suit against the surety. It would be only prolonging litigation unnecessarily.

WEST, J.:—The cases cited in argument make it clear that under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. In the case of security taken after decree, and when no litigation between the parties was actually pending, a difference seems to have been recognized in some instances, but it is not necessary to discuss those cases at present. In the new law embodied in Act XIV of 1882, section 253 says that execution of a decree in an original suit may proceed against one who has become surety for its satisfaction pending the suit, in the same manner as against the defendant. Section 583 again says that the Court shall on due application execute a decree in appeal "according to the rules hereinbefore prescribed for the execution of decrees in suits." This should apparently empower the Court to proceed against a surety for the fulfilment of the decree in appeal who has accepted that obligation under section 546 in the same way as against a surety who has become liable under section 253 to satisfy a decree of a Court of first instance. No reason could be adduced by the respondent's pleader why a surety in the one case should not be subject to the same liabilities as in the other, and the necessity for a prompt execution is the greater in proportion as the previous contest has been prolonged.

But it is contended that the express insertion of the words "in an original suit" in section 253 implies that, should security be

(1) 4 Beng. L. R., 27 Appx. (2) 7 Beng. L. R., 81, A. C.

taken otherwise than in an original suit, the rule is not meant to be applied. There is undoubtedly some weight in this argument, and it seems to have been felt on some occasions as having great force; but we should have expected a very material change of the law to have been more clearly indicated than by this uncertain inference. It would be a change at variance with general harmony of principle in the Code, and on that account also should have been very plainly expressed. The argument that the mere adoption by section 583 of the rules of execution prescribed for decrees in original suits does not imply the adoption of a substantive rule as to the liability of a surety, does not seem to be of any weight. If the liability and the mode of enforcing it could properly be dealt with in one section of a Code of procedure, it could with equal propriety be adopted in another section of the same Code. The mere introduction of the words "in an original suit" will not, we think, bear the stress put upon them. The case of *Hough* v. *Windus*[1] shows that the use of a superfluous word or phrase is an insufficient ground for an inference of a special intention of the Legislature.

The forms framed by this Court under section 652 of the Code have the force of law, except where they are inconsistent with the Code. The form of surety bonds prescribed and followed in the present case was drawn up under this power. It makes a surety directly liable to the Court, not merely to the judgment-creditor. Such a rule is not inconsistent with the provisions of the Code, though it supplements them. It has been in operation for many years without question.

The surety, therefore, is, we think, directly liable, as is the judgment-debtor under the final decree, and we accordingly reverse the decree in execution of the Subordinate Judge, and direct that the application as against the respondent be dealt with in the execution proceedings. Costs of this appeal to be borne by the respondent.

Order reversed.

(1) L. R., 12 Q. B. Div., at p. 228.