APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

1906. *October* 1.

WAMAN HARI (ORIGINAL SURETY No. 1 AND OPPONENT No. 1), APPELLANT, *v.* HARI VITHAL (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 253—Decree—Execution—Stay of execution on furnishing security—Execution against surety—Surety's liability—Erroneous decision upon a point of law—Res Judicata.

The execution of a decree passed in plaintiff's favour was stayed pending appeal by the defendant on his furnishing security. Afterwards the plaintiff having proceeded in execution against the defendant and the surety, the Court allowed the plaintiff's claim against the surety. In a subsequent execution proceeding the plaintiff having presented a darkhast for further execution against the surety, the Court passed an order allowing the claim. The order was confirmed in appeal. On second appeal by the surety,

Held, dismissing the second appeal, that it was not open to the surety to re-open the question as to his liability, he having accepted the finding as to his liability in the prior execution proceeding and having abandoned the point in the lower appellate Court in the present proceeding.

Per BEAMAN, J.:—An erroneous decision upon a point of law may yet as between the parties to it, but no further, be a sufficient *res judicata* to preclude them from re-agitating it.

The conflict between *Lakshman* v. *Gopal* (1) and *Venkapa Naik* v. *Baslingapa*(2) indicated.

SECOND appeal from the decision of T. D. Fry, Joint Judge of Sátára, confirming the order of K. R. Natu, Subordinate Judge of Islámpur, in an execution proceeding.

One Suryaji had a son Balaji who predeceased his father, leaving his widow, Annapurnabai, him surviving. After Suryaji's death his widow, Yeshvadabai, adopted one Vithal and on his death his widow adopted Hari.

Hari brought a suit, No. 331 of 1890, to recover possession of the family property in the hands of Annapurnabai. In the said suit Hari, the plaintiff, on the 6th September 1892, obtained a decree awarding him possession of the property claimed. Annapurnabai preferred an appeal, No. 250 of 1892, against the decree

* Second appeal No. 124 of 1906.

(1) (1906) 30 Bom. 506 : 8 Bom. L. R. 367.

(2) (1887) 12 Bom. 411.

and in the appeal Yeshvadabai was added a party. On the 10th October 1895 the appellate Court confirmed the decree and further added that the plaintiff should pay Annapurnabai Rs. 87 every six months for her maintenance and that the maintenance should be a charge on the property in suit.

In the meanwhile, on the 26th October 1892, the plaintiff presented a darkhast, No. 517 of 1892, to execute his decree in suit No. 331 of 1890, and in the execution proceedings that followed some property was given in his possession, but further execution was stayed by the appellate Court pending the disposal of Annapurnabai's appeal No. 250 of 1892. The appellate Court granted the stay on Annapurnabai's giving security and one Wâman Hari stood surety for her up to Rs. 1,000. This darkhast was struck off after the decision in appeal.

The plaintiff then gave a second darkhast, No. 46 of 1896, against Annapurnabai and her surety Waman demanding possession from Annapurnabai and Rs. 1,000 for costs and mesne profits from Waman. The plaintiff was accordingly put in possession of some of the property, but his prayer against Waman was rejected on the 29th January 1896 on the ground that he was not a defendant but merely a surety. It was apparently held that the plaintiff could not enforce his decree against Waman in execution but must file a separate suit. This darkhast was finally disposed of on the 9th July 1897.

Afterwards the plaintiff gave a third darkhast, No. 140 of 1898, against Annapurnabai, Yeshvadabai and the surety Waman, demanding possession of the remaining property and costs and mesne profits for six years at the rate of Rs. 800 a year. Out of the sum of Rs. 4,800, the plaintiff demanded Rs. 1,000 from Waman and the Court allowed the plaintiff to recover that amount from him. The order was passed on the 20th August 1900. Waman appealed against the said order and during the pendency of the appeal he got the order provisionally stayed on giving security. One Balaji Purushottam stood surety for him on the 1st November 1900. This darkhast was dismissed on the 25th September 1901 owing to the failure of the plaintiff to appear and to show cause why the stay should not be continued.

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The appeal preferred by Waman against the order of the Court granting plaintiff Rs. 1,000 was, however, heard and the order was confirmed on the 10th December following.

Annapurnabai died in the year 1901 and Yeshvadabai in 1902.

On the 9th December 1902 the plaintiff filed the present darkhast, No. 457 of 1902, against the first surety Waman and his surety Balaji to recover Rs. 1,000 and Rs. 24-5-2 as costs and future costs.

Waman, the first surety, answered *inter alia* that as he was not a party to the original decree the plaintiff could not, in a darkhast proceeding, execute the decree against him as surety; that supposing his liability did arise, then the present darkhast was barred by section 13 of the Civil Procedure Code as the plaintiff did not claim mesne profits in his first darkhast, No. 517 of 1892, nor had he in that darkhast reserved his right to demand mesne profits; that the darkhast was time-barred owing to the former darkhasts being not presented in time; that in the second darkhast, No. 46 of 1896, it was held on the 29th January 1896 that no darkhast could lie against him, and as no appeal was preferred against that order, it became final and his liability was at an end; that during the proceedings of the third darkhast, No. 140 of 1898, the previous orders were not brought to the notice of the Court owing to the plaintiff's fraud, hence the order in that darkhast was not proper, and this being a point of law, there was no bar of *res judicata* and the point should be re-considered; that Annapurnabai being dead and the plaintiff being her heir, both the judgment-debtor and judgment-creditor had become identical; that even if it be held that the plaintiff was not Annapurnabai's heir, still his claim was entirely satisfied, and that the plaintiff being guilty of laches in executing his decree against the original judgment-debtor, and as that judgment-debtor was dead, the opponent's liability as surety had come to an end.

Balaji Purushottam, the second surety, added that as he was not a party to the original decree, he was not liable under the darkhast, and that the darkhast was barred under sections 13

and 43 of the Civil Procedure Code as the plaintiff did not demand mesne profits in his first darkhast, No. 517 of 1892, and as he had not reserved his right to claim mesne profits in that darkhast.

The Subordinate Judge framed in all seven issues and his findings on issues Nos. 3 and 6 were :—

(3) The darkhast was not time-barred.

(6) Waman's liability as surety had not come to an end as contended for by him and his surety Balaji.

The Subordinate Judge therefore directed that the darkhast should proceed against Waman and Balaji for the amounts claimed from them.

Waman having appealed, the Assistant Judge (Mr. French) reversed the said order, being of opinion that the decision in the second darkhast, No. 46 of 1896, operated as *res judicata*.

The plaintiff thereupon preferred a second appeal, No. 101 of 1905, and the High Court (Jenkins, C. J., and Batty, J.), on the 19th June 1905, reversed the decree and remanded the case, holding, "We do not think that the decree of the Assistant Judge can be supported having regard to the order passed on the later darkhast. The result is that we reverse the decree of the lower appellate Court and send back the case for disposal on the merits."

On the remand the arguments before the lower Court were confined to two issues, namely, whether the present darkhast was time-barred and whether Waman's liability having been based upon the fact that he was surety for Annapurnabai, the respondent (plaintiff) Hari, who was heir to Annapurnabai, could not recover. The Court found both the issues against Waman and confirmed the order of the first Court.

Waman preferred a second appeal.

S. R. Bakhle, for the appellant (first surety and opponent 1) :— We contend that the plaintiff should enforce liability against us by a separate suit. He cannot do so in execution. Section 253 of the Civil Procedure Code provides for cases where a person becomes liable as surety before the passing of a decree in an

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original suit. In the present case we became surety after the passing of the decree and while the appeal against the decree was pending. It was therefore wrong to allow execution against us. The latest ruling in support of our contention is in *Lakshman* v. *Gopal* (1).

N. A. Shiveshvarkar, for the respondent (plaintiff) :—It is not now open to Waman to contend that we should proceed against him by filing a regular suit. After the case was remanded by this Court in the second appeal for disposal on the merits, the only points urged in the lower Court were—(1) limitation and (2) we having alleged ourselves to be Annapurnabai's heir had no right to proceed against the surety as the right under the decree had merged, we being Annapurnabai's heir. He had abandoned his contention with respect to the point now raised.

Secondly, so far as the appellant's liability in execution proceeding is concerned he is concluded by the order in the third darkhast, No. 140 of 1898. In that darkhast we sought to execute the decree against Annapurnabai and Waman, the appellant. Therein he contended that we could not proceed against him in execution and that a regular suit was our remedy. An issue to that effect was raised and it was found against him. He appealed and the decision of the first Court was confirmed. He did not proceed further by way of second appeal.

[BEAMAN, J. :—Why should he take the matter higher, the darkhast being dismissed for your default ?]

The fact is, after he preferred the appeal against the order of the Subordinate Judge, he obtained stay of execution in November 1900. It was therefore impossible for us to proceed with the darkhast, and therefore we allowed it to be dismissed on the 25th September 1901. The appeal was decided in our favour on the 10th December following. It was perfectly immaterial whether the darkhast was dismissed or allowed to remain on file. The dismissal did not improve Waman's position in any way. The decision of the Court in his appeal was a decree within the meaning of section 2 of the Civil Procedure Code, and it has been held in numerous cases that such decrees operate as *res judicata*

(1) (1906) 30 Bom. 506 : 8 Bom. L. R. 367.

in subsequent proceedings : *Hari Ganesh* v. *Yamunabai*[1], *Qamar-ud-din Ahmad* v. *Jawahir Lal*[2].

Thirdly, we contend that the question of Waman's liability in execution proceeding was decided by this Court in this very darkhast when it remanded the case in second appeal No. 101 of 1905.

The facts show that the second darkhast, No. 46 of 1896, was dismissed against Waman on the 29th January 1896 on the ground that he was not a defendant in the decree but became surety after the decree. It was in consequence of this circumstance that the Assistant Judge (Mr. French), while deciding the present darkhast in appeal, reversed the order of the first Court, holding that the matter was *res judicata*. The High Court in reversing the decree of the Assistant Judge referred to the order of the Court in the third darkhast, No. 140 of 1898, granting us relief against Waman. We therefore submit that it is not now open to Waman to raise the same question over again.

Assuming that it is open to Waman to raise the question, the rulings of this Court are to the effect that the surety can be proceeded against in execution : *Venkapa Naik* v. *Baslingapa*[3] ; *Maharaval Mohansinghji Jeysinghji* v. *The Government of Bombay*[4] ; *Babaji Ramji* v. *Babaji Devji*[5]. The High Courts of Madras and Allahabad also adopt the same view : *Bans Bahadur Singh* v. *Mughla Begam*[6] ; *Janki Kuar* v. *Sarup Rani*[7] ; *Thirumalai* v. *Ramayyar*[8].

Bakhle, in reply :—The point which we have raised now is a point of law, and such point can never be *res judicata* : *Chamanlal* v. *Bapubhai*[9] ; *Parthasaradi* v. *Chinnakrishna*[10].

The final ruling on the point as to whether a surety can be proceeded against in execution is in *Lakshman* v. *Gopal*[11]. In that case the ruling in *Venkapa Naik* v. *Baslingapa*[3] was considered and distinguished. It is not now open to take

(1) (1897) 23 Bom. 35.
(2) (1905) 27 All. 334.
(3) (1887) 12 Bom. 411.
(4) (1881) 5 Bom. 408.
(5) (1897) 23 Bom. 47.
(6) (1880) 2 All. 604.
(7) (1895) 17 All. 99.
(8) (1889) 13 Mad. 1.
(9) (1897) 22 Bom. 669.
(10) (1882) 5 Mad. 304.
(11) (1906) 30 Bom. 506 : 8 Bom. L.R. 367.

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a different view, and if it be found necessary to do so, the point will have to be referred to a Full Bench. The point was not expressly abandoned in the lower Court, and even supposing that it was abandoned, the point being one of law, it can be considered even at this stage.

Shiveshvarkar referred to *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya*[1].

RUSSELL, Ag. C. J.:—The plaintiff herein (Hari Vithal) applied for execution of a decree against the surety (Waman Hari) of the judgment-debtor (Anpurnabai) and the surety of the surety (one Balaji).

The following is a concise statement of the proceedings herein.

6th September 1892. Decree for plaintiff in suit No. 331 of 1890 in Subordinate Court of Islampur against Anpurnabai, wife of Babaji Suryaji.

26th October 1892. Plaintiff applied for execution, Darkhast 517 of 1892 (Darkhast No. I), and got possession of some property.

On appeal against the decree (250 of 1892), further execution was stayed on Waman giving security. The appellate Court remanded the suit and Darkhast No. I was struck off the File of the lower Court.

10th October 1895. The appellate Court finally modified the decree.

Plaintiff then presented an application for execution, 46 of 1896 (D. II), against Anpurnabai and surety Waman. On 29th January 1896 the Court dismissed his claim against Waman for Rs. 1,000 on the ground that he was not a defendant in the original suit.

9th July 1897. The application was finally disposed of.

Then plaintiff applied for execution against Anpurnabai, also against another defendant who had been added on appeal and Waman, Darkhast 140 of 1898 (D. III).

20th August 1900. The Court *inter alia* allowed plaintiff's application against Waman.

(1) (1901) 28 Cal. 318

10th December 1901. Waman filed an appeal which was decided against him. It was on this occasion that Balaji stood surety for Waman.

25th September 1901. D. III, 140 of 1898 was disposed of on account of the plaintiff's default.

9th December 1902. Present Darkhast IV presented by plaintiff against the two sureties. The First Court granted the plaintiff's claim. Waman appealed to the lower appellate Court which reversed the decree, holding that the decision of the Court in No. 46 of 1896 (D. II) operated as *res judicata* against plaintiff in the present application.

On the 19th June 1905 the High Court held that "having regard to the order passed on the later Darkhast (D. III), the decree must be reversed and the case sent back for disposal on the merits."

The case was accordingly sent back and the only issues then argued were Nos. 3 and 6, *viz.*, limitation, and the issue as to whether the plaintiff being alleged to be Anpurnabai's heir had no right to proceed against the surety as the right under the decree was merged. Both these issues were found against the defendant and he has not attempted to impugn the findings on them before us.

But on the 3rd day of March 1906 a Bench of this Court in *Lakshman* v. *Gopal* (1) held that where a surety has become liable for the performance of a decree passed prior to his entering into the obligation he cannot under section 253 of the Civil Procedure Code be proceeded against in execution of the decree. And this is the sole point which has been argued before us.

The question which arises is—is it now open to Waman *in this proceeding* to re-open this question. If it is, the matter must be referred to a Full Bench looking at the case of *Venkapa Naik* v. *Baslingapa* (2).

But we do not think it is open to Waman in this proceeding to re-open the question. For by his accepting the finding on this

(1) (1906) 30 Bom. 506 : 8 Bom. L. R. 367. (2) (1887) 12 Bom. 411.

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point and deliberately abandoning it before the lower appellate Court we do not see how he can now seek to do re-open it in the way he seeks to do.

In our opinion his proper course after the decree of the High Court (8 Bom. L. R. 367) was to have applied for a review—see *Waghela* v. *Shaik Masludin* [1]—relying upon that judgment as being new and important matter within section 623. Whether it is open to him now to adopt this course is a point upon which we obviously give no opinion.

The result is that this appeal must be dismissed with all costs.

BEAMAN, J.:—The question is whether the plaintiff can proceed against the surety Waman in execution or must file a separate suit against him? That question was raised and determined in Waman's favour on the second darkhast. No appeal was preferred against that order. It is conceded that an order in execution is of the nature of a decree and if unappealed against or confirmed in appeal is a decree constituting a *res judicata*. On Darkhast No. 3, the same question was re-agitated but with a different result. This time the Courts held against Waman and in the plaintiff's favour. No further appeal was made. But as a matter of fact before the decree of the first appellate Court was pronounced, the darkhast had been struck off for the plaintiff's default. There was therefore no apparent reason why Waman should have taken the matter higher. Be that how it may, plaintiff put in darkhast No. 4. And the first Court held that the question between him and Waman was still open. The Court of first appeal on the contrary held that it was *res judicata* not by the abortive proceedings on the third, but by the effective and final proceedings on the second darkhast. Plaintiff appealed to the High Court, where it was held that the Judge of first appeal was in error, and that by reason of the third darkhast and what was done upon it, the plea of *res judicata* based on the result of the second darkhast, upon which Waman still relied, failed. Their Lordships accordingly reversed the decree of the Court below and remanded the case for disposal on the merits. From what followed it is clear beyond all reasonable doubt that

(1) (1888) 13 Bom. 330.

Waman understood this Court to have meant, not only that his own plea of *res judicata* had failed but that he was himself precluded by a like plea of the plaintiff's from re-agitating the question as to his liability to be pursued in execution. For when the remand came on, Waman did not again press his former contention, but limited himself to two points and two points only, one of limitation and one of a highly technical nature; both were decided against him, and in this appeal he has not disputed or attempted to dispute the correctness of those findings. But about the time that the lower appellate Court gave judgment, a Bench of this Court held that a surety after the decree of the first Court, although before the decree of the Court of final appeal could not be pursued in execution. That finding appears to be in direct conflict with a former decision of this Court in *Venkapa Naik* v. *Baslingapa* [1] which was in accordance with the views of the High Courts of Calcutta and Allahabad. Upon the strength of that Ruling the appellant presses us to hold that he is not liable in these execution proceedings. He further contends that upon a mere question of law there can be no *res judicata*. As to the first point were it necessary to deal with it we perceive no other course in the present state of the case than to refer it to a Full Bench. But we are of opinion that upon a true construction of this Court's remand order, it purported to and did in fact affirm that the particular question which is now sought to be re-opened was *res judicata* by the proceedings upon the third darkhast between these parties. And we have the best authority for holding that an erroneous decision upon a point of law may yet as between the parties to it, but of course no further, be a sufficient *res judicata* to preclude them from re-agitating it. We are not of course to be understood as suggesting that the decision of this Court was in any way erroneous: we merely say that even had it been, yet if it did bear the meaning and construction which we believe that it does, it would conclude the point which is now pressed upon us. For that reason we would dismiss this appeal with all costs.

Appeal dismissed.

G. B. R.

(1) (1887) 12 Bom. 411.