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are liable to pay rent to the mokurraridar and not to the zemindar is made out.

Under these circumstances, the suit of the plaintiff was rightly dismissed by the lower Courts, and we affirm those decisions by dismissing this appeal with costs.

Appeal dismissed.

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.

ABDUL KARIM AND OTHERS (SURETIES) *v.* ABDUL HUQUE KAZI (DECREE-HOLDER.)*

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Jany 10.

Surety Bond—Execution—Civil Procedure—Act VIII of 1859, *s.* 204—*Act XXIII of* 1861, *s.* 8.

A surety bond taken by the Court under section 8 of Act XXIII of 1861, after judgment has been pronounced, can be enforced under section 204 of Act VIII of 1859.

SHAHZADEH MAHOMED SHUMSUDDIN having been arrested under a warrant in execution of a decree for Rs. 822-8, applied for his discharge under section 273 of Act VIII of 1859, on the ground that he had no means of paying the debt.

Pending the enquiry which the Moonsiff considered necessary, he released the judgment-debtor on the security of Syud Abdul Karim and Huro Prasad Bose, who, by an obligation or bond, addressed to the Moonsiff, bound themselves thus; "We do "hereby stand security for the said debtor and covenant that "should his application for the benefit of insolvency be refused "and he be called upon to pay, we shall immediately produce "him, and should we fail to produce him, we shall pay without "objection the above amount together with costs and future "interest due to the decree-holder, &c." This bond was dated the 22nd of December 1868.

On the 20th of December 1869, the decree-holder prayed that the sureties might be ordered to produce the judgment-debtor, and in default, that the decree be executed against them.

* Miscellaneous Special Appeal, No. 271 of 1870, from an order of the Judge of 24-Pergunnas, dated the 4th July 1870, modifying an order of the Sudder Moonsiff of that district dated the 18th April 1870

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The Moonsiff though that as the security bond had been entered into subsequent to the judgment, it was not one which could be enforced under section 204 of Act VIII of 1859, and refused the application for execution.

From that decision there was an appeal to the Judge, who held that the surety bond could be enforced under section 204 of the Code.

Baboo *Mahendra Lal Mitter* for the appellant.—The Moonsiff's decision was correct. It was beyond the power of the Court to execute a surety bond taken after judgment. There is no provision in the Code for such a proceeding. Section 204 of Act VIII of 1859 is confined to surety bonds taken in the suit before judgment. He referred to *Gajendra Narayan Roy* v. *Hemangini Dasi* (1) and *Baboo Ramkishen Doss* v. *Hurkhoo Sing* (2) in support of his contention.

Baboo *Bamacharn Banerjee* for the respondent.—It makes no difference that the bond was taken in this case after judgment. The cases cited, have no application to the case now before the Court.

NORMAN, J. (after stating the facts, continued.)—The Judge, as we think, rightly holds that the bond as a security taken by the Court under the 8th section of of Act XXIII of 1861 could be enforeced under the 204th section of Act VIII of 1859, which enacts that "whenever a person has become liable as security "for the performance of a decree, the decree may be exe- "cuted against such person to the extent to which he has ren- "dered himself liable, in the same manner as a decree may be "enforced against a defendant."

The cases referred to by the Moonsiff—*Gajendra Narayan Roy* v. *Hemangini Dasi* (1) and *Baboo Ramkishen Doss* v. *Hurkhoo Sing* (2) are distinguishable from the present. There the liability of the sureties did not arise in the course of, or out of, proceedings in the suit, but upon distinct and independent contracts made between the sureties and the creditor, in the one case to pay the debt if certain attached property was released, in the

(1) 4 B. L. R., App 27. (2) 7 W. R., 329.

other to pay if the debtors could not pay. Here the engagement arises in the regular course of a proceeding in the cause. The sureties do not contract with the execution-creditor, but enter into an engagement with the Court, that the debtor shall appear when called upon, or in default of such appearance that they will pay the amount mentioned in the warrant. If the debtor failed to appear when called on within the time limited in a bond given under section 8, the sureties as such would become liable to pay; and we think the case would fall within the terms of section 204. The Judge says the sureties have had an opportunity of producing the debtor and have not taken advantage of it. He does not say when the default of the sureties took place.

For ourselves, we have great doubts whether the default in producing the defendant in the present case was such as to render the sureties liable under the bond.

By section 8, the security is for the appearance of the party "at any time when called on while such enquiry is being made." We do not think that by the bond, though its language is not very clear, the sureties engaged, or can be taken to have intended to engage, for more than that. This engagement would not bind the sureties to produce the debtor at the end of an indefinite time during which, not the enquiry contemplated by section 8 but negotiations for a settlement were going on. We do not understand how it was that the Moonsiff did not complete the enquiry within a week or fortnight at latest from the 28th December 1868. It is possible that the enquiry may have been postponed from time to time at the request, or by consent of the sureties, and may not really have been concluded until the time when the sureties are supposed to have committed the default. No enquiry seems to have taken place as to the cause of the delay. We cannot therefore say whether there may not be circumstances which have not been made to appear before us to justify the Court in holding the sureties liable. If there was unreasonable delay it must be considered whether the plaintiff is in any way responsible for, or consented to, the delay, and whether the sureties, or either of them, consented to the delay.

The Judge will enquire and come to a finding upon the

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questions—when the defendent was called upon to appear and made default, what was the cause of the delay, and whether the enquiry under section 8 of Act XXIII of 1861, was still proceeding at time when the defendant was called upon to appear. The Judge will return his finding with the evidence to the Court.

Case remanded.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

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BRAJANATH DEY SIRKAR *v.* S. M. ANANDAMAYI DASI AND OTHERS.

Hindu Will, Construction of—Bequest void for Remoteness—Indian Succession Act (X of 1865), ss. 101, 103, 179, 180, 187, 242—Hindu Wills Act (XXI of 1870)—Executor under Hindu Will—Probate—Evidence.

A Hindu testator died possessed of considerable property and leaving a will dated 12th September 1870, by which he appointed his wife executrix in the following words:—"I appoint my wife, A. D., executrix on my behalf, and vest her with entire authority and responsibility. After my decease my said wife shall perform all duties according to my instructions embodied in the following paragraphs"; After reciting that his wife was a purda woman, and that his three sons were disobedient and extravagant, he appointed certain persons managers to perform certain duties under the will which could not be performed by a purda woman; and after various minor bequests and directions, he directed that if it should appear to the executrix or executors for the time being that they would not be able to protect the property, then they should form a family fund in the Government trust fund of all the property, and that the interest thereof should be employed in the performance of certain religious ceremonies and the family expenses, and then bequeathed as follows: "whatever Company's paper moveable and immoveable property, &c., shall be formed into a family fund in the Government trust fund, my great grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law. God forbid it, but should I have no great grandsons in the male line then my daughter's sons, when they are of age, shall take the said property from the trust fund and divide it according to the Hindu Shastras in vogue." The testator left living, at the time of his death, one son's son, three sons, and a daughter and her son, but no great grandson. *Held*,