

connection we might refer to the observations of Sir Barnes Peacock in the case of *Surwan Hossain Khan v. Golam Mahomed* (1), decided by a Full Bench of this Court, where that eminent Judge (see p. 173 of the Report) in referring to a similar argument that was put forward in respect of a suit to enforce a lien upon immovable property disapproved of that view, and he observed as follows : " If land is mortgaged as security for a loan, in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to us that the charge upon the land created an equitable interest upon the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest."

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In the view which we have just expressed the other questions that have been discussed before us do not arise.

The result is that this appeal will be allowed so far as the plaintiff seeks to enforce his charge against the articles pledged. Each party will bear his own costs.

J. v. w.

Appeal allowed in part.

Before Mr. Justice Ghose and Mr. Justice Gordon.

TOKHAN SINGH *alias* ROOP NARAIN SINGH AND OTHERS (DECREE-HOLDERS) v. UDWANT SINGH (JUDGMENT-DEBTOR.)^{*}

1894
August 16.

Surety—Enforcement of Security—Surety for amount of decree pending appeal—Execution of Decree—Separate suit—Civil Procedure Code, sections 244, 253.

Where a surety has become security for the appellant in an Appellate Court, under section 545 of the Code of Civil Procedure, the security bond cannot be enforced in execution of the decree under section 253, but a separate suit must be brought against the surety. *Kali Charan Singh v. Balgobind Singh* (2) referred to.

* Appeal from Appellate Order No. 287 of 1893, against the order of H. Holmwood, Esq., Officiating Judge of Bhagalpore, dated the 1st of July 1893, reversing the order of Babu Parbutty Kumar Mitter, Subordinate Judge of Monghyr, dated the 20th of May 1893.

(1) 9 W. R., 171 ; B. L. R., Sup. Vol. 879. (2) I. L. R., 15 Calc., 497.

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IN this case execution of a decree was applied for against the surety who had become security for the appellant under section 545 of the Code in an appeal which was pending against the decree. The surety took the objection that he should be proceeded against by suit and not summarily in execution of the decree.

In overruling this objection, the Subordinate Judge said :—

“The properties of the surety may be sold in execution of the decree under section 253 of the Civil Procedure Code without a fresh suit being brought against the surety. In this case the surety undertakes to pay the amount of the decree, while an appeal was pending, and his position is the same as that of a person becoming surety before the making of a decree in an original suit. The objections of the surety are overruled.”

On appeal the Judge reversed this decision in the following judgment :—

“In this case a surety has been made responsible for the decretal money in a suit in which an appeal is pending. The security was taken after the decree, and he appeals. On reading section 253 of the Civil Procedure Code, I could have no doubt, on the plain meaning of words, that the surety cannot be rendered liable in execution. It is, however, argued that the rulings in *Balaji v. Ramasami* (1), and also in *Radha Persad Singh v. Phuljuri Koer* (2), apply to proceedings after the appellate decree, and that this case, which has not advanced to an appellate decree, is governed by the judgment in *Bans Bahadur Singh v. Chuwari Bai* (3). I would observe that this was also a case which had reached its final stage in the Privy Council, and the principle to be decided is the same in all the cases, *viz.*, do the words in section 253 bear their plain meaning—‘before the passing of a decree in an original suit,’ *i.e.*, before the passing of any decree, thus excluding all but the decree of the Court of first instance; or must we, in the words of Straight, J., ‘wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence introduced intentionally,’ &c. In face of the dissentient judgments of Straight and Spankie, JJ., I do not think I should follow the Allahabad ruling, when the Calcutta ruling in *Radha Persad Singh v. Phuljuri Koer* (2) lays down the law on the subject as unquestioned and incontrovertible; for Field, J., says: ‘Now it is clear that the person against whom execution is sought did not become surety before the passing of the decree in the original suit, and therefore the express language of section 253 is not applicable.’ He then goes on to consider if any other section is applicable, and finds there is none. The Munsif’s order is in this case under

(1) I. L. R., 7 Mad., 284.

(2) I. L. R., 12 Cal., 402.

(3) I. L. R., 2 All., 604.

section 253, and even if I had to go beyond it, and see if there is any other way of rendering the surety liable in execution, the Calcutta ruling settles that point for me. As regards the other point, that the surety having deposited the decretal money, the decree is satisfied, and there is no appeal to me under section 244 of the Civil Procedure Code, I find that the Munsif made the deposit of the decretal money a condition of admitting the surety's objections. It was in deposit only when the objection was decided and the execution proceedings cannot have determined. The appeal is decreed."

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From this decision the decree-holders appealed to the High Court, the only ground material to this report being that the Judge was in error in holding that the decree-holder's remedy against the surety was by separate suit and not by execution of the decree.

Babu *Karuna Sindhu Mukerjee* for the appellants.

Babu *Jogesh Chunder Roy* for the respondent.

The following cases were cited: *Balaji v. Ramasami* (1); *Bans Bahadur Singh v. Churni Bai* (2); *Radha Persad Singh v. Phuljuri Koer* (3); *Kali Charan Singh v. Balgobind Singh* (4); *Venapa Naik v. Baslingapa* (5); and *Thirumalai v. Ramayyar* (6).

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

The question raised in this appeal is whether the provisions of section 253 of the Code of Civil Procedure are applicable to a surety who becomes security for an appellant in the Appellate Court under section 545 of the Code, or, in other words, whether the security bond can be enforced against the surety in execution of the decree of the Appellate Court, without a separate suit being brought against him.

The learned vakil for the appellants has referred us to several cases as bearing upon the question. It is sufficient for us to refer only to the case of *Kali Charan Singh v. Balgobind Singh* (4), decided by this Court, where a question very similar to that which is raised in this case was fully discussed and decided.

(1) I. L. R., 7 Mad., 284.

(2) I. L. R., 2 All., 604.

(3) I. L. R., 12 Calc., 492.

(4) I. L. R., 15 Calc., 497.

(5) I. L. R., 12 Bom., 411.

(6) I. L. R., 13 Mad., 1.

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We think that the Court below has come to a right conclusion in holding that the money covered by the decree cannot be realized from the surety in execution of the decree, and accordingly the appeal will be dismissed. We make no order as to costs in this appeal.

J. V. W.

Appeal dismissed.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894
July 24.

BAMA SUNDARI DASÍ (PLAINTIFF) v. ADILAR CHUNDER SARKAR
AND ANOTHER (DEFENDANTS).*

Voluntary Payment—Contract Act (IX of 1872), sections 69, 70—Money paid for benefit of another—Money paid to protect property from sale in execution of decree for arrears of rent.

Certain immoveable property was inherited by S., the mother of the plaintiff, from her husband, and during her tenure of it she alienated it by deed of sale to the defendants. S. died in April 1890, and the estate devolved upon the plaintiff, an only daughter (there being no male issue). In 1890 the property in possession of the defendants was, at the suit of a person who was the landlord, ordered to be sold together with other properties of the defendants for arrears of rent, due in the lifetime of S. and to prevent the sale the plaintiff paid the amount of the decree. In a suit for possession of the property and for a refund of the sum paid by the plaintiff to stop the sale, the defendants claimed an absolute interest in the property, but the Courts below found that the alienations by S. to the defendants were not made for legal necessity and were therefore invalid. *Held*, that the payment made by the plaintiff was not a voluntary payment, but was one which she was entitled to recover from the defendants. It being a question at the time whether the property belonged to the plaintiff or to the defendants, the payment to stop the sale was one in which the plaintiff was interested sufficiently to bring the case within section 69 of the Contract Act. Section 70 was also applicable as the payment relieved the defendants from liability to their landlord, and was made for the defendants, and not gratuitously, and the defendants enjoyed the benefit of such payment. The principles laid down in the cases of *Duli Chand v. Rankishen Singh* (1), *Smith v. Dinonath Mookerjee* (2) and *Jugdeo Narain Singh v. Raja Singh* (3) were held to govern this case.

*Appeal from Appellate Decree No. 1248 of 1893, against the decree of H. Peterson, Esq., District Judge of Burdwan, dated the 3rd of June 1893, affirming the decree of Babu Janoki Nath Dutta, Munsif of Burdwan, dated the 27th of June 1893.

(1) I. L. R., 7 Cal., 648; L. R., 8 I. A., 93. ● (2) I. L. R., 12 Cal., 213.

(3) I. L. R., 15 Cal., 656.