(1963) 07 RAJ CK 0001

Rajasthan High Court

Case No: Civil Ref. No. 61 of 1961 in Second Appeal No. 9 of 1956

Ranamal		APPELLANT
	Vs	
Firm Bachraj Chuni Ram and Others		RESPONDENT

Date of Decision: July 15, 1963

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 145, 47

Citation: AIR 1964 Raj 1 : (1963) RLW 473

Hon'ble Judges: P.N. Shinghal, J; I.N. Modi, J

Bench: Division Bench

Advocate: Hastimal, for the Appellant; Kishore Singh, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Modi, J.
This second appeal by the plaintiff in a suit for declaration which has been dismissed by both Courts below has been placed before this Bench on a reference by one of us sitting singly.

2. The facts out of which this reference arises may shortly be stated as follows. The firm Bachraj Chuniram defendant respondent No. 1 filed a suit for money against defendants respondents Bhera and Devichand. The former obtained on attachment before judgment with respect to the property of the defendants Bhera and Devichand ana the present plaintiff Ranamal is alleged to have stood surety tor them. Eventually respondent No. 1 obtained a decree against respondents Nos. 2 and 3 and took out execution of that decree against them as well as the surety who is the present plaintiff. The latter filed an objection saying that he never stood surety for the judgment-debtors and that no surety bond had ewer been executed by him. By an order dated the 26th August, 1952, the executing Court dismissed this

objection summarily. The plaintiff came in revision to this Court which was dismissed on the ground that it was incompetent. Thereafter the plaintiff filed the present suit on the 2nd June, 1954, in the Court of Munsiff Banner for a declaration that the surety bond in question had never been executed by him, and, therefore, he was not bound by it and further that the decree obtained by respondent No. 1 against respondents Nos. 2 and 3 was not executable against him.

3. The judgment-debtors allowed the suit to proceed ex parte against themselves. It was only the respondent No. 1 decree-holder who contested it. Some seven issues were framed by the trial Court. One of these was with respect to the alleged execution of the surety bond by the plaintiff. The other important issue, and with that alone we are concerned in the present reference, was whether the present suit was barred by the provisions of Section 47 of the Code of Civil Procedure. The trial Court took up the last-mentioned issue as a preliminary issue in the case, and having come to the conclusion that the plaintiff''s suit was barred by the provisions of Section 47 C.P.C. dismissed it. The plaintiff went up in appeal to the District Judge, Balotra, who by his judgment and decree dated the 8th November, 1955, upheld the decision of the trial Court. Thereafter the plaintiff filed a second appeal to this Court which was placed before a learned single Judge. As the question of law involved in the case was of considerable importance and was not governed by any decision of this Court, that learned Judge thought tit to make a reference to a larger bench. This is how this case has come up before us for decision.

4. The precise question which thus emerges for determination in this case is whether a surety whose objection to the levy of execution against him has been dismissed by the executing Court in a summary fashion can maintain a separate suit for obtaining the relief which was claimed by him in his objection.

5. The decision of this question is governed mainly by the provisions of Sections 47 and 145 C.P.C. Section 47 in so far as it is material for our present purposes reads as follows:

"Questions to be determined by the Court executing decree

(1) All questions arising between the Parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) .....

(3) .....

Explanation: For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit."

It will be noticed at once that a surety does not fall within the ambit of ''parties'' metioned in Sub-section (1) of Section 47, nor can he be deemed to be a party within the meaning of this sub-section by anything mentioned in the explanation to the section.

6. Then we come to Section 145 C.P.C., which deals with the enforcement of liability of a surety. Omitting the portion of the section which is not material for our purposes it reads like this:

"Where any person has become liable as surety--

(a) for the performance of any decree or any part thereof, or

(b) .....

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon the decree or order may be executed against him, to the'' extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47."

The meaning of this section, on its language, is perfectly plain, and it is that where the case of a surety fulfils the requirements mentioned in the first part thereof and where he has rendered himself personally liable to satisfy a decree which has been passed against a judgment-debtor, then to that extent the decree will be capable of being executed against him and such a person shall be deemed to be a party within the meaning of Section 41 not for all purposes thereof but only for the purposes of appeal.

In other words, it seems to us to be perfectly clear that in the case of a surety tike this particularly as he cannot be held to be a party to the suit within the meaning of Section 47 C.P.C., it is absolutely open to the decree-holder to proceed against him in execution for the performance of such obligation as has been undertaken by him as a surety for the judgment-debtor or to proceed against him by a separate suit. And further, where the decree-holder chooses to proceed against him in execution, then he as a surety is by a sort of a legal fiction placed in the position of a party for the purposes of appeal with respect to any order that may have been passed for or against him, and, therefore, in such a case it would be open to the decree-holder to file an appeal against him or for the surety to do likewise if and as it becomes necessary to do so.

7. The point to be noted in this connection, however, is that Section 47 does not make the surety a party to the suit itself, and, therefore, the inhibition of that section that all disputes between a decree-holder and a judgment-debtor or their legal representatives relating to the execution, satisfaction or discharge of the decree shall be determined by the Court executing the decree, does not fall on him

in the sense that a separate suit is barred in the matter, and that ail such questions arising between the parties concerned must be decided by a proceeding in the execution Court itself. Reading these two sections together, therefore, it clearly seems to us that neither Section 47 nor Section 145 by itself bars a suit by the judgment-debtor (sic. Surety?) to negative his liability just as the sections do not prevent the decree-holder from seeking his relief against the surety by a separate suit if he chooses so io do.

8. It was strenuously urged before us that it could have hardly been the intention of the Legislature in enacting Section 145, as it has been worded, to allow the surety an opportunity of first seeking his relief in the execution Courts and if he fails in the various Courts on that side, than to seek the same relief by a separate suit, and that consequently we should hold that where a decree-holder levies execution against the surety and makes him a party thereto and he fails in his objection on the execution side, he cannot seek the relief to the same effect by a separate suit.

9. We have given this submission our most careful consideration and are unable to accept it in the sweeping form in which it has been made to us. The principal reason which has prevailed with us in negativing this contention is that if the intention of the Legislature was what learned counsel fcr the respondents contends it to be, then there was nothing to prevent it from enacting in Section 47 itself that a surety would be deemed to be a party within the meaning of that section when certain-other persons such as the auction-purchaser among others have been specially mentioned as being so in the Explanation thereto and further there would be no point in enacting in Section 145 that the surety would be deemed to be a party within the meaning of Section 47 for the purposes of appeal, that is, not for all the purposes of that section.

As we look at Section 145, the words "for the purposes of appeal" are its very key words and are absolutely plain. Any other construction of Section 145 would render ill-words "for the purposes of appeal" occurring therein absolutely nugatory and it is a well-settled principle of interpretation of statutes that Courts should not interpret a provision of law in a manner which would mean that the Legislature has been guilty of wasting any words. And that being so, we are altogether unable to accept that by virtue of anything contained in Section 47 or Section 145, a surety should or can be debarred from filing a suit to negative the liability which is sought to be fastened on him by the decree-holder.

10. From the discussion which we have made above, based as it is, on the clear and unmistakable language of Sections 47 and 145 C.P.C. the conclusion to which we come is that there is nothing contained in these sections which may bar a surety from filing a suit to negative a liability which is sought to be fastened on him by a decree-holder under a surety bond even if he may have been made a party to the execution proceedings. It must follow from this, therefore, that where a surety is so sought to be proceeded against he may straightway go and file a suit in a

competent Court without taking part in the execution proceedings. He may, however, choose to contest his liability on the execution side and if he does so and where an order has been passed contrary to his interest, he can seek his remedy by way of appeal because of the deeming provision contained in Section 145. But that provision as we have already pointed out goes no further and does not make him a party within the meaning of Section 47 for the entire purposes of that section.

11. The view that we have propounded above is supported by a number of decisions to which we may now generally refer as we do not consider it necessary to deal with each of these cases separately. These are Dewan Chand v. Pindi Das, AIR 1937 Lah 658, Bhagat Ram v. Mohammad Bakhsh, AIR 1939 Lah 175 , Thakur Bhawani Singh Vs. Baldeo and Another, O.A. Narayanaswami Ayyar Vs. S.A. Narayana Iyengar and Others, , Pukhraj Jeshraj Marwadi Vs. Jamsetji Rustum Irani, Siba Singh v. C.V.R.M. Chettyar Firm, AIR 1931 Rang 206, District Board, Malda v. Chandra Ketu, AIR 1937 Gal 625, Pandurang Gadiba v. Abdul Hussain, AIR 1938 Nag 148 and B. Nagappa v. Manianath Das, AIR 1959 Mys 165.

12. On the other hand, learned counsel for the respondent has drawn our attention to the following cases namely Linga Reddy v. Hussain Reddy, ILR Mad 117 ; Mt. Purnama Devi Vs. Ram Prasad and Another, Mst. Bhaggo Bibi v. Sri Ishwar Radha Ramanji, AIR 1942 All 260, Bur Singh v. Labhu Ram AIR 1930 Lah 399 and AIR 1942 107 (Nagpur) In support of the contrary view, and we now propose to deal with these cases briefly.

13. The first two of these cases viz. ILR Mad 117 and Mt. Purnama Devi Vs. Ram Prasad and Another, seem to be based on the view that the surety was party to the suit, and, therefore, a separate suit was barred by Section 47 or its counter-part in the old Code, Section 244. With all respect we find ourselves entirely unable to accept this view as correct, because there is nothing in Section 47 to indicate that the surety is or can be deemed to be a party wilhin the meaning of that Section, and there was nothing to prevent the Legislature in saying so if it wanted to do that.

14. In the next case AIR 1930 Lah 399 the reason given by the learned Judge for holding that a separate suit was barred was that the surety had not objected to his liability under the security bond on the execution side and so it was not open to him to contest the same by means of a separate suit. We regret, we cannot accept this view as correct for the simple reason that a surety is not a party to the suit within the meaning of Section 47 C.P.C. Besides, it also seems to us that the reasoning of the learned Judge cannot be sustained on the principle that where a litigant has the benefit of two concurrent remedies he cannot necessarily be confined to any one of them and because he fails to choose the earlier one which was open to him, he cannot be deprived of the advantage of the other.

15. In the next case AIR 1942 107 (Nagpur) the facts are entirely distinguishable. There the surety having been made a party to the execution proceedings raised a

defence, and then the matter was heard and decided and thereafter he filed a suit which was dismissed as being barred by res judicata. That, in our opinion, is an entirely different matter; because it may well be that even if a separate suit by a surety or a decree-holder by virtue of anything contained in Section 47 or Section 145 C.P.C. may not be barred, the parties might join issue and fight out the matter on the execution side and it is heard and then decided and such an order has become final in which case the bar of res judicata may come in. So far as the case before us is concerned, the matter was never heard, and we are extremely doubtful whether a final decision was given, because all that the executing Court said was that from a certain application given by the surety, it prima facie appeared to it that he had undertaken to stand as a surety for the judgment-debtors, and, therefore, it concluded that it was entirely unnecessary to make any inquiry into the matter or decide it.

16. The only other case which now remains to deal with is AIR 1942 All 260 (supra), The facts of this case were very peculiar inasmuch as the security bond appears to have been given by Mst. Bhaggo who was the plaintiff herself. Moreover, she had raised an objection on the execution side and that objection appears to have been heard and finally decided against her, so that the bar of res judicata also came in her way in this case. As we have already indicated above, the present case is entirely distinguishable on facts.

17. The sum and substance of the cases to which our attention has been invited on the side of the respondent, in so far as they are acceptable is that where a surety having been made a party to the execution proceedings raises an objection against the enforcement of his liability and such objection is heard and finally decided against him on the execution side itself, then it would not be open to the surety to file any separate suit seeking to exonerate himself from such liability by virtue of the rule of res judicata or by any other rule which may bar the filing of a separate suit. This is, however, an aspect of the case on which we are not called upon to pronounce any firm opinion having regard to the facts and circumstances of the case which is before us.

As we have already indicated, the order that was passed by the executing Court in this case on the 26th August, 1952, was, in our opinion, neither an order which was final as that Court had formed only a prima facie opinion and was not prepared to go further nor that order had been passed after hearing the parties. That being so, there is no question of the rule or principle of res judicata operating in this case, and it squarely falls to be governed by the provisions of Section 47 and Section 145 C.P.C. which by themselves for the reasons we have already given do not bar the filing of a suit by either the surety or the decree-holder in a case falling u/s 145.

18. The result, therefore, is that this appeal must be allowed and the judgment and decree of the Courts below set aside. As the suit was thrown out by the Courts below on the preliminary issue of law, the case has got to go back for a retrial. We,

therefore, send it back to the trial Court with a direction that it will dispose of the remaining issues arising in the case and then decide the whole suit according to law. Certificate for refund of court-fee filed on the memoranda of appeal in this Court and the Court below is hereby granted. As the point in volved in this reference was not free from difficulty, we leave the parties to bear their own costs of this appeal and in the Court below but other costs will abide tne result.