

**(1916) 12 AHC CK 0022****Allahabad High Court****Case No:** None

Amir and Another

APPELLANT

Vs

Mahadeo Prasad

RESPONDENT

**Date of Decision:** Dec. 5, 1916**Citation:** AIR 1917 All 104 : (1917) ILR (All) 225 : 38 Ind. Cas. 33**Hon'ble Judges:** Henry Richards, C.J; Pramada Charan Banerji, J**Bench:** Division Bench**Final Decision:** Allowed

### **Judgement**

Henry Richards, C.J.

The facts connected with the suit out of which this appeal arises are as follows : A decree was obtained against one Suraj Din for some money due by him. Before decree Jagannath, his father, went security for the due payment of any amount that might be decreed against Suraj Din. In the bond he agreed that he would as surety be responsible for the amount of the decree, and by way of further security he hypothecated certain property. The decree-holder, after he had obtained his decree, sought to execute the same against Jagannath by selling one of the properties which Jagannath had mortgaged by way of security. In the meanwhile, however, Jagannath had sold his equity of redemption to Amir and Ramzan, the plaintiffs in the present suit. They objected to the sale of the property on the ground that they were the purchasers of all the interest of Jagannath. Notwithstanding their objection, the property was sold and was purchased by Mahadeo Prasad, the defendant. The present suit) has been instituted by Amir and Ramzan claiming a declaration that Mahadeo Prasad had acquired no title by the sale.

2. The court of first instance found that the sale by Jagannath to the plaintiffs was a valid sale for good consideration, and gave the plaintiffs a decree. Mahadeo Prasad appealed but he did not in his grounds of appeal challenge the finding of the court that the sale was a bona fide one. It was, however, strongly contended that u/s 145 of the Code of Civil Procedure, the court was at liberty to sell the property,

notwithstanding the sale to the plaintiffs, because Jagannath had gone surety for the due discharge of the decree against his son. Ordinarily speaking, where property is hypothecated, it can only be brought to sale by a regular mortgage suit in which all persons interested in the property are made parties. The law provides for the form of decree which is given in such cases and it allows the persons interested in the mortgaged property a period within which they can redeem the property if disposed. It is admitted that if Jagannath had given the bond to the decree-holder instead of to the court, the decree-holder's only remedy so far as the property is concerned would be to bring a regular mortgage suit. Unless therefore the Code provides to the contrary, the present bond could only be enforced by a regular suit brought by the court itself, or (as is usually done) by some person to whom the court would transfer the mortgage for the purpose of instituting the suit. It is not contended that any provision in the Code other than Section 145 permits of the bond being enforced in any other way than that we have mentioned. Section 145 is as follows: "Where any person has become liable as surety for the performance of any decree, or any part thereof, or for the restitution of any property taken in execution of a decree, or 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." It is contended that this provision enables the court summarily to sell any property which may have been mortgaged by the surety by way of security. I think that the words of the section do not warrant any such conclusion. All that the section says is that the decree or order may be executed against the surety to the extent to which he has rendered himself personally liable. The "decree" mentioned here is clearly the same decree against the judgement-debtor for the due performance of which the surety has rendered himself liable. In other words (applying the section to the facts of this particular case) the simple money decree which had been obtained against Suraj Din could be executed against Jagannath just as it could be executed against Suraj Din himself, neither more nor less. It is to be remarked here that the section does not refer to property mortgaged by the surety and it would appear to be more or less an accident that the surety not only became surety but went a step further and gave further security. He might have given a simple bond undertaking that he would be responsible for the due performance of the decree without mortgaging any property at all. I may point out the great inconvenience of holding that the section allowed a summary sale of hypothecated property. The persons interested in the property, (who might be numerous) would be no parties to the proceeding, nor would any period of redemption be allowed. In fact, the sale of the property in this way would be inconsistent with many of the provisions of the Transfer of Property Act and of the Code itself relating to the enforcement of mortgages. It was, no doubt, held in the case of *Janki Kuar v. Sirup Rani I.L.R (1895)*

All. 99 that the property might be sold having regard to the provisions of Section 253 of the CPC of 1882. In the new Code the word "personally" has been introduced. The introduction of this word, I think, got rid of any possible ambiguity there might have been under -the old section, and I, therefore, think that we are not required to follow a decision which was given under the old section. The case of Mukta Prasad v. Mahadeo Prasad I.L.R (1916) All. 337 has also been referred to. In that case, just as in the present, a party had gone security for the due performance of a decree and had mortgaged certain property by way of security. The decree-holder in execution of the decree against the surety sought to sell the hypothecated property. The learned Judges who heard the case in the High Court held that the application could be treated as an application to enforce the personal liability incurred by the surety u/s 145. The facts of the case differ substantially from the fact of the present case. There the surety was still possessed of the equity of redemption which the court considered could be attached and sold in execution of the simple money decree which was being executed under the provisions of Section 145 against the surety. In the present case the surety, prior to execution and sale, had parted with his equity of redemption in favour of the present plaintiff. It may seem hard on the defendant that he has paid money to the court without acquiring title. If he has really completed the sale and paid his purchase-money, the Judge in the court below may feel himself at liberty even now to assign the mortgage bond to the defendant, Mahadeo Prasad. I am not, of course, giving any direction to this effect. I only throw it out by way of a suggestion. I would allow the appeal.

Banerji, J.

3. I am of the same opinion, but I desire to make a few observations. u/s 253 of Act XIV of 1882, there was a conflict of opinion in the different High Courts as to whether a mortgage made by a surety could be enforced under that section. It seems to me that in order to reconcile the divergency of opinion which arose under the old Code and to remove any ambiguity that might exist on the subject the Legislature in enacting Section 145 of the present CPC added the word "personally" to the provisions of that section, thus clearly enacting that in execution of the decree it is the personal liability of the surety which could be enforced and not the liability of the property hypothecated by him, As pointed out by the, learned Chief Justice the enforcement of the mortgage created by the surety would require the provisions of the Transfer of Property Act as regards the array of parties and the form of the decree and other matters to be complied with. In the present case all that the defendant could acquire under his auction-purchase was such rights as existed in Jagannath Prasad at the time of the sale. Those rights had already been sold by him to the present plaintiffs and therefore the defendant acquired nothing under his purchase and is not in a position to resist the claim of the plaintiff.

4. The order of the Court is that we allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs

in all courts.