Mughla Begam and Others Vs Bans Bahadur Singh and Others
Narotam Das Vs Chunni Bai

Court: Allahabad High Court

Date of Decision: Jan. 3, 1880

Citation: (1880) ILR (All) 604

Hon'ble Judges: Robert Stuart, C.J; Straight, J; Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Robert Stuart, C.J.
In my opinion our answers to these two references ought to be in the affirmative. I have looked into the records for the

terms of the surety-bonds in both cases, and I find that in one the bond absolutely secures the costs of the Privy Council to the extent of Rs. 4,000,

and in the other case the surety-bond is not limited to the costs of the Privy Council appeal, but covers the whole decree appealed against,

including the decretal amount of Rs. 11,853-7-10 and the costs. The legal question, however, is the same in both references, and must be

answered in the same way.

2. The sections of the Code of Procedure to be considered areSections 610 and 253. Section 610 provides that:--
""Whoever desires to enforce

or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order

made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall

transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Courts as Her Majesty by her said

order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the

same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly in the manner and according to the rules

applicable to the execution of its original decrees. It will be observed that the words here employed are large and general, ordering execution of

decrees of the Privy Council according to the rules, that is, all the rules, applicable to the execution of original decrees, and there is no exception

from them of sureties or of Section 253, or of any other sections or provisions in the entire chapter. Now these rules for the execution of original

decrees are comprised in Chapter XIX of Act X of 1877, and they begin with Section 223 and end with Section 343. By Section 253, which thus

forms part of the rules applicable to the execution of original decrees, it is provided that: ""Whenever a person has, before the passing of a decree in

any original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the

extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant."" To my mind the plain effect

of this provision, which is thus made part of the law provided by Section 610, is that sureties for the execution of decrees of the Privy Council are

placed in precisely the same position, and have precisely the same liability as sureties for the performance of decrees in original suits, and may be

proceeded against in the same summary manner, for u/s 253 sureties have no litigious and contentious rights, but simply become liable for whatever

may be decreed against their principals. There appears to me to be no difficulty whatever in applying this section to the execution of Privy Council

decrees, and the effect of it when read with Section 610 is that the words in Section 253, ""before the passing of a decree in an original suit,"" mean,

u/s 610, ""before the passing of a decree in an appeal to the Privy Council.

3. It appears to me not unimportant to observe that Section 610 is immediately preceded by provisions dealing with the subject of security for the

costs of the respondent, and for the security to be taken for the due performance of Privy Council decrees and of orders made by that supreme

tribunal. Thus by Section 602 it is provided that, if the certificate for an appeal to the Privy Council be granted, the appellant shall, within six

months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, ""give security

for the costs of the respondent,"" and by Section 603 it is provided that, when such security has been completed, the Court may, among other

things, declare the appeal admitted. Section 604 provides that, at any time before the admission of the appeal, the Court may, upon cause shown,

revoke the acceptance of any such security, and make further directions thereon. Then s. 605 provides for other and further security being taken

for the expense of translating, transcribing, printing, &c, certain portions of the record; and by Section 606, if the appellant fails to comply with the

order of the Court directing such security to be found, it is provided that "" the proceeding shall be stayed, and the appeal shall not proceed without

an order on this behalf of Her Majesty in Council, and in the meantime execution of the decree appealed against shall not be stayed."" This section

is, as I view it, very relevant to the question before us, showing, as it evidently does, the great importance attached in the mind of the Legislature to

compliance with the pecuniary and necessary conditions attached to the privilege of appeal to Her Majesty in Council, the object plainly being to

prevent the time of the Privy Council being taken up with idle and frivolous appeals. Section 608 * again provides for security being taken, under

other and further circumstances, from the respondent or the appellant in the Privy Council; and Section 609 is so important and germane in my

view to the question involved in these references that I give it at length: ""If at any time during the pendency of the appeal, the security so furnished

by either party appears inadequate, the Court may, on the application of the other party, require further security. In default of such further security

being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the

respondent, issue execution of the decree appealed against as if the appellant had furnished no such security. And if the original security was

furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the

position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-

matter of the appeal as it thinks fit.

4. It is thus abundantly evident that the subject of security for costs in the Privy Council was very much and very anxiously in the mind of the

Legislature when it enacted Section 610, and the conclusion appears to me irresistible that, by the use of the words "" in the manner and according

to the rules applicable to the execution of original decrees,"" the intention beyond all doubt was to import into the procedure for the execution of

Privy Council decrees the provisions of Section 253; although irrespective of these sections immediately preceding Section 610 I should have held

that by force of its direction the liability of sureties u/s 253 was distinctly applicable to sureties u/s 610. And indeed without such a reading Section

610 would appear to be of little use, even if the term ""original suit"" was meant solely to apply to the proceedings in the first Court. But I agree with

my colleagues Mr. Justice Pearson and Mr. Justice Oldfield that the term ""original suit"" includes the proceedings in the Appellate Court, the suit

being the same throughout, and I also agree with them that the expression ""decree in the original suit"" is not necessarily the same thing as a decree,

of the Court of First Instance. Indeed, having regard to the course litigation generally takes in this country, the words "" before the passing of a

decree in an original suit"" apply not merely to the first decree in a suit, but to a final decree in an original suit after the whole course of procedure by

appeal has been exhausted, including even the decree by the Privy Council. And when to this is added the express provision of Section 610, there

seems to be an end to all doubt, that the true intent and meaning of the law is to place parties who have undertaken the more limited liability of

being sureties before the passing of a decree by the Privy Council, in the same position as sureties who have become liable before the passing of a

decree in an original suit. To say the least the law in question is capable of such a reading, and there seems to be no intelligible reason in justice or

in legal policy against its practical application.

5. My colleagues Mr. Justice Spankie and Mr. Justice Straight, who dissent from the majority of the Court, after noticing the course of decision u/s

204, Act VIII of 1859 (which undoubtedly supports the opinions I am now expressing), wind up their views on this part of the case with the

observation that it is plain that the whole current of opinion went to regard a surety as a party to the suit, but that under existing legislation execution

is limited to surety ship undertaken before the passing of a decree in an original suit. My answer to these suggestions, however, is that, so far as the

execution of a decree is concerned, a surety is as much now as he was under the former law of procedure a party to the suit, although that may be

in a very limited sense, for, as I have already remarked, sureties have no litigious or contentious rights of their own, but simply offer their direct

liability for whatever is decreed against their principals. My honourable colleagues further, with reference to the argument as to the expediency of

sureties being in every stage liable, and the anomaly of refusing to extend the operation of Section 253, suggest that these are matters of which

upon a simple question of construction no notice can be taken. But with the greatest deference to them the argument ab inconvenienti is of the

greatest importance and ought not to be disregarded, and its force, added to the other considerations I and my colleagues who agree with me have

urged, reasonably if not irresistibly, lead to the conclusion at which we have arrived.

6. Concurring therefore with Mr. Justice PEARSON and Mr. Justice OLDFIELD my answer to these references is in the affirmative in both cases.

Oldfield, J.

7. It appears that in these cases, appeals having been preferred to Her Majesty in Council from decrees of this Court, the appellants before us

became sureties for the costs of the respondents, and the appeals having been dismissed with costs, the question arises whether the respondents

can recover their costs by proceeding to execute their decrees against the sureties or should proceed against them by regular suits. Section 610,

Act X of 1877, provides the procedure for enforcing orders of Her Majesty in Council; it runs as follows: ""Whoever desires to enforce or to

obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in

appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the

order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may

direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and

the Court to which the said order is transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the

execution of its original decrees."" We have therefore to ascertain the manner and rules applicable for the execution of original decrees, and we find

these in Chapter XIX, treating ""of the execution of decrees,"" under the heading E, Of the mode of executing decrees,"" and among them in Section

253 is the following rule, ""Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of

the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a

decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the

surety.

8. We have here clearly a rule and manner laid down for enforcing a decree of an original Court against a person who has, before passing of the

decree in the original suit, become liable for the performance of the same or any part thereof, and we must apply the above rule and manner to the

enforcement of the order or decree of Her Majesty in Council in the case of a person who has, before the passing of the decree of Her Majesty in

Council, become surety for its performance. By the terms of Section 610 the rules applicable to the enforcement of orginal decrees are made

applicable to the enforcement of the orders and decrees of Her Majesty in Council, and amongst them clearly those which apply to sureties for

costs of a decree. This was undoubtedly the course laid dawn in Section 204, Act VIII of 1859, and has been followed by this and other Courts.

The only material difference between the terms of Section 204, Act VIII of 1859, and Section 253, Act X of 1877, is that the terms of the former

section are, ""whenever a person has become liable as security for the performance of a decree,"" whereas in the latter they are, ""whenever a person

has, before the passing of a decree in an original suit, become liable as surety for the performance of the same,"" the material addition being the

words ""in an original suit,"" and these words were probably added to show (possibly with reference to certain decisions under Act VIII of 1859,

Section 204,--Ram Kishen Doss v. Hurkhoo Singh 7 W.E. 329, Gujendro Narain Roy v. Hemanginee Dossee 13 W.R. 35, Chutterdharee Lal v.

Rambela-shee Koer ILR 3 Cal. 318, that the provision applies only to persons who have become sureties for the performance of a decree in the

course of the suit and prior to the decree, and not afterwards, and was not intended to draw any distinction between persons becoming sureties

before passing of decrees of a Court of First Instance, and those becoming sureties after passing of the decree of the Court of Erst Instance and

before that of the Appellate Court. The term ""original suit includes the proceedings in the Appellate Court, the suit being the same throughout, and

the term ""decree in the original suit"" is not the same thing as ""decree of the Court of First Instance."" Could the term, however, be so interpreted, I

should still be disposed to hold that the operation of Section 610 will be to make the provisions of Section 253, ""mutatis mutandis"" applicable to

execution of decrees of Her Majesty in Council in cases of persons becoming before the decree surety for its performance. I may add that no

reason has been shown why the Legislature should intend to make a difference in the manner of execution between the case of persons becoming

sureties for the performance of the decree of a Court of First Instance, and those becoming Sureties for the performance of the decree of the

Appellate Court or that of Her Majesty in Council, I would answer the question referred in the affirmative.

Pearson, J.

9. For the reasons stated by my honourable colleague Mr. Justice Oldfield, I concur with him in answering in the affirmative the question referred

to the Full Bench.

Straight, J., (Spankie, J., concurring).

10. The question submitted to the Full Bench in this, as well as the kindred reference in First Appeal from Order, No. 38 of 1879, is substantially

identical and may, for the purposes of brevity and convenience, be discussed and disposed of in a single judgment. The main point for our

consideration is, can sureties for an appellant in an appeal to the Privy Council, which is dismissed, be directly proceeded against in the execution

department in the same manner as the judgment-debtor? In order to reply to this inquiry it is necessary very closely to examine the provisions of

Sections 253 and 610 of Act X of 1877. Applying the attention first of all to Section 610, that will be found to regulate the procedure to enforce

orders of the Queen in Council, and the following directions are given as to the procedure to be followed by a person who wishes to carry into

execution any such order. He must apply to the Court from which the appeal to the Privy Council was immediately preferred, by petition, to which

should be attached a certified copy of the decree and order sought to be enforced. Then the Court is to send the order to the lower Court which

passed the first decree in the suit, and this latter Court is specifically directed to ""enforce or execute it accordingly, in the manner and according to

the rules applicable to the execution of its original decrees."" It is next necessary to see what these rules are to which reference is here made. They

may be found in Chapter XIX of Act X of 1877, which is intelligibly headed ""Of the execution of decrees"" and under several heads treats of the

following incidental matters:

1.--The Court by which decrees may be executed.

2.--Application for execution.

3.--Staying execution.

4.--Questions for Court executing decree.

5.--Mode of executing decrees.

6.--Attachment of property.

7.--Sale and delivery of property.

8.--Resistance to execution.

9.--Arrest and imprisonment.

11. Now it is argued by those, who contend for a reply in the affirmative to the question under consideration, that Section 253 of this chapter,

providing as it does for the execution of a decree against a surety, supplies one of the rules ""in the manner and according to which"" the enforcement

of orders of the Queen in Council u/s 610 is to be carried out. In other words, that the effect of the two sections, when read together, is to put

surety and judgment-debtor on precisely the same footing in execution. Upon a careful examination we find it quite impossible to adopt any such

view. We must take the words as they are and not wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence,

introduced, as we will show, intentionally into a clause, for the purpose of securing uniformity. What are the terms of Section 253? ""Whenever a

person has, before the passing of a decree in an original suit, become liable as a surety for the performance of the same or of any part thereof, the

decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against

a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

12. The corresponding provision of the former Civil Procedure Code, VIII of 1859, contained no such words as ""before the passing of a decree in

an original suit;"" on the contrary the language of Section 204 was of the most general kind and fixed no point of time at or before which a person

becoming a surety fixed his liability and rendered himself liable to all the consequences to which his principal was subject. The decisions that were

quoted in the course of the argument were upon cases, that had arisen under this earlier Act and to us appear clearly distinguishable from the

present. Though u/s 204, Act VIII of 1859, the Courts held, that it did not apply to parties who became sureties after a decree, they nevertheless

were unanimous or nearly so in declaring, that the word decree was not confined to that made in the original suit, but that the security given might

be enforced against a surety in execution of an appellate decree. In fact it is plain, that the whole current of opinion went to regard a surety as a

party to the suit, u/s 11 of Act XXIII of 1861, the corresponding section to which of Act X of 1877 is 244.

13. Under existing legislation, however, execution is limited to a suretyship undertaken ""before the passing of a decree in an original suit."" Though

Section 583 provides for the execution of appellate decrees and Section 610 of orders passed by the Queen in Council according to the rules

prescribed in Chapter XIX, there is not to be found in the whole of its 120 clauses one word that authorises enforcement of execution against a

surety, except when he has taken upon himself that character ""before the passing of a decree in an original suit."" The argument, as to the

expediency of sureties being in every stage liable and the anomaly, the existence of which it is argued we are countenancing, by refusing to extend

the operation of Section 253, are matters of which upon a simple question of construction we can take no notice. Still as to this latter point we can

well understand why a difference may fairly be drawn between a surety who undertakes his liability before the passing of the decree in the original

suit, and so to speak identifies himself with and becomes a party to it, and another who comes upon the scene at a later stage, when litigation has

proceeded a considerable distance on the road either to the lower Appellate Court, the High Court, or the Privy Council.

14. The decree in the original suit practically passes against the surety, and so far as he is liable under it, it is that decree, which is enforced against

him, and not any security-bond he may have entered into subsequent to the passing of that decree. The Sections 583 and 610 do not confer any

greater power on the Court that made the decree appealed, than it already possesses under Chapter XIX of the Code. If that Court extends the

action of Section 253, and drags within its operation a surety who has not become liable before the passing of an original decree, it is acting ""ultra

vires "" and any order passed to that effect would in our judgment be illegal and void. For it would not only be enforcing a liability undertaken after

the passing of its own decree, but one created under a surety-bond, the responsibility upon which no Court had definitely determined in any decree

or order.

15. Now it should be observed, that Section 253 has a twofold character, First, it continues in mitigated shape a personal liability to execution

without process originally introduced in a novel and somewhat startling form in Section 204 of Act VIII of 1859, and next it details the machinery

by which such liability is to be enforced without the ordinary intervention of a suit, in summary fashion. The only reservation made in the surety''s

favour is that he is to have sufficient notice. The words of Section 610, however, seem simply to provide for the enforcement of decrees or orders

of the Queen in Council according to the same method as original decrees are exeouted by the Court passing them, but they create no liability, and

establish no specific responsibility in the surety. In the argument for the respondents upon Section 253 it is ingeniously sought to mix up liability and

machinery and to treat them as one and the same, but the decree is one thing, the mode of executing it another. At any rate having regard to the

fact that the phrase ""before the passing of the decree in the original suit"" is not to be found in Section 204 of Act VIII of 1859 but appears for the

first time in Section 253 of the Act now in force, we must assume that it was introduced for some good purpose, and that purpose, if words mean

anything, would seem to be to limit a new and somewhat arbitrary liability, existing outside the actual parties to the suit, to those persons who from

its institution had qua guarantors so to speak, vouched for its bona fides by becoming sureties before the passing of the first decree. It is the decree

of the original Court determining the liability of plaintiff or defendant, as the result may be, that by special provision carries also with it the liability of

the surety against whom it may be executed, but the decree of the Appellate Court or the order of the Queen in Council is not declared to have

attaching to it any such contingency, and while it is perfectly intelligible, that to put in force s. 610, the machinery of Section 253 may be used, it

seems equally clear to us, that the words "" before the passing of a decree in an original suit"" are prohibitory to an extended application of the

section for the further purpose of establishing an exceptional liability.

16. For the reasons and upon the grounds we have adverted to we are of opinion that the question raised in this reference must be answered in the

negative.

*Powers of Court pending appeal.

[Section 608:--Notwithstanding the admission of any appeal under this Chapter, the decree appealed against shall be unconditionally enforced,

unless the Court admitting the appeal otherwise directs.

But the Court may, if it thinks fit, on any special cause shown by any party interested in the suit, or otherwise appearing to the Court

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed against to be enforced, taking such security from the respondent as the Court thinks fit for the due performance of

any order which Her Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed against, taking such security from the appellant as the Court thinks fit for the due performance of the

decree appealed against, or of any order which Her Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions, or give such other direction respecting the subject-matter of the

appeal as it thinks fit.]