Shyamlal Vs Takhatmal

Court: Madhya Pradesh High Court

Date of Decision: March 12, 1957

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 143
Displaced Persons (Debts Adjustment) Act, 1951 â€" Section 5

Citation: (1957) JLJ 473

Hon'ble Judges: Sen, J; Chaturvedi, J

Bench: Division Bench

Advocate: R.S. Dabir, for the Appellant; M.R. Bobde and N.P. Dvivedi, for the Respondent

Final Decision: Dismissed

Judgement

1. This is a Letters Patent Appeal against a decision of Kotval, J. in Miscellaneous (First) Appeal No. 44 of 1952, decided on 1st October, 1956.

2. This decision will also govern the disposal of Letters Patent Appeals Nos. 192, 196, 197, 199, 204, 212, 213 and 214 of 1956, filed by the

sureties.

3. Letters Patent Appeals Nos. 192 212 and 214 are filed by surety Shrimati Kamla Devi, Nos. 196 and 19 7 are filed by surety Lochan Singh,

Nos. 198 and 199 are filed by sureties Shyamlal and Shrimati Sushila Devi and Nos. 204 and 213 by surety Babulal. Shri R.S. Dabir argued for

sureties (1) Shrimati Kamla Devi, (2) Shyamlal an (3) Shrimati Sushila Devi. Sri V.K. Saturn argued for sureties Lochan Singh and Babulal. The

main arguments are common.

4. These appeals arise from a suit (No. 9-A of 1947, filed on 26th August 1947 by (sic) decree-holder, in the Court of the 1st Additional District

Judge. Jabalpur, against Mulkraj Malhotra (respondent No. 2) for dissolution of partnership and rendition of accounts. Two days after the

institution of this suit, a conditional order for attachment before judgment of the property of Mulkraj was passed. The property attached was stated

to be the Bills payable by the military authorities to M.R. Malhotra and Company. On 9th September 1947 Mulkraj applied to vacate the order of

attachment before judgment. This application was not decided, In the meanwhile, the defendant Mulkraj offered to furnish: security sufficient to

cover the claim in suit. This offer was accepted by the Court, and five persons mentioned below executed surety bonds on behalf of the said

Mulkraj Malhotra for the amounts respectively mentioned against their names:-

Takhatmal Plaintiff

Mulkraj Defendant

(Paramlal, the fifth surety, is dead. We are not concerned with his case). These bonds were executed on 16th and 17th October, 1947. On 18th

October 1947 an indemnity bond was executed by Mulkraj Malhotra in favour of sureties Shyamlal and his wife Shrimati Sushila Devi, offering to

indemnify the sureties in the event of the recovery of any amount from the sureties.

5. After the execution of the surety bonds the Court passed an order releasing the attached property from attachment preliminary decree was

passed in the suit on 20th November 1948. Sometimes after the passing of the preliminary decree, the Judgment-debtor Mulkraj Malhotra filed an

insolvency petition at Calcutta and was adjudged insolvent. It appears from the order-sheet of 3rd September 1951 that the judgment-debtor

(respondent No. 2) was adjudged insolvent somewhere in 1951. From the application dated 25th January 1952, Page 242 of the paper-book in

Misc. (First) Appeal No. 44 of 1952, it appears that the exact date is 1st August 1951, Thereafter, the judgment-debtor did not attend the Court

and proceedings in the suit against him were ex-parte from 13th September 1951. An ex-parte final decree was ordered to be drawn up on 20th

September 1951, and was actually signed on 15th October 1951, in favour of Takhatmal decree-holder, and against Mulkraj (respondent No. 2)

for a sum of Rs. 1,74,90 ft 4-0 plus costs Rs. 7,868-10-0. It may be mentioned here that on 9th July 1952 the Calcutta High Court annulled the

order of adjudication made on 1st August 1911.

6. On 15th October 1951, the decree-holder Takhatmal applied for execution of this decree. On 19th October 1951, he made an application to

execute the decree against the sureties u/s 143 of the Code of Civil Procedure. The judgment-debtor Mulkraj Malhotra (respondent No. 2) filed

an application on 28th May 1952 before the Tribunal at Dehradun u/s 5 of the Displaced Persons (Debts Adjustment) Act, 195l (No. LXX of

1951) (hereinafter referred to as "D.P. Act") claiming that he was a displaced person and that his debts were liable to be adjudicated upon and

adjusted. The execution Court received its first intimation on 16th August 1952 through -the official assignee, Calcutta, who transmitted to the 1st

Additional District Judge a copy of the order dated 26th July 1952, passed by the Debt Adjustment Tribunal at Dehradun (hereinafter referred to

as ""the Tribunal"") in Case No. 19 of 1952. That Tribunal, meanwhile, had informed the Civil Court of the making of the application by the

judgment debtor Mulkraj (respondent No. 2) and asked the said Court to stay execution before it and transmit all the papers to the Tribunal at

Dehradun. The 1st Additional District Judge was asked by the judgment-debtor"s counsel and by the sureties to stay the execution proceedings

before him. The sureties also raised other objections. They stated that the decree in the suit was obtained by the plaintiff fraudulently and in

collusion with the defendant, and consequently the sureties were discharged. They also pleaded that the surety bonds were illegal, void and

infructuous and had become impossible of performance. The surety Shrimati Kamla Devi specially raised the question that upon the intimation to

the Civil Court that the judgment-debtor bad filed his application for adjustment of his debts under the D.P. Act, all proceedings in the Civil Court

became automatically stayed and that it was incumbent upon the Additional District Judge, Jabalpur, to transmit the records of all the proceedings

to the Tribunal at Dehradun, The learned Additional District Judge overruled all these objections and ordered execution to proceed against the

sureties. The application of the judgment-debtor for setting aside the ex-parte final decree was also rejected on 6th September 1952. Against

these orders, the judgment-debtor and the sureties filed miscellaneous appeals before the learned Single Judge, who dismissed all those appeals.

Against the order of dismissal, the sureties have come in Letters Patent Appeals before us.

7. The first question raised by Shri R.S. Dabir learned counsel for appellant. Shrimati Kamla Devi, Shyamlal and Shrimati Sushila Devi, is that the

proceedings pending in the executing Court against the judgment-debtor and the sureties ought to have been stayed till there was a decision on the

application of the judgment-debtor made to the Tribunal at Dehradun u/s 5 of the D.P. Act. It was also contended that at that time when that

application had been made to the Dehradun Tribunal the judgment-debtor"s application to set aside the ex-parte decree in Miscellaneous Judicial

Case No. 26 of 1951 was also pending. The Civil Court took the view that the Dehradun Tribunal had no jurisdiction, because the applicant was

not a ""displaced person"" u/s 2 (10) of the Act and that his debts did not fall within the definition of ""debt"" in Section 2 (6) of the Act, and therefore

the Tribunal could not entertain the proceedings. Shri Dabir urged that the civil Court had no jurisdiction to determine whether the Tribunal was

acting within or without jurisdiction because of the provisions of Section 9 read with Section 15 of the D.P. Act.

8. Sections 9 and 15 of the said Act are re-produced below:Ã¯Â¿Â½

9. Proceeding after service of notice on respondents:Ã¯Â¿Â½

(1) If there is a dispute as to whether the applicant is a displaced person or not or as to the existence or the amount : of the debt due to any

creditor or the assets of any displaced debtor, the Tribunal shall decide the matter after taking such evidence as may be adduced by all the parties

concerned and shall pass such decree in relation thereto as it thinks fit.

(2) If there is no such dispute or if the respondents do not appear or have objection to the application being granted, the Tribunal may after

considering the evidence placed before it, pass such decree in relation thereto as it thinks fit.

15. Consequences of application by displaced debtor:Ã¯Â¿Â½

Where a displaced debtor has made an application to the Tribunal u/s 5 or under sub-section (2) of Section 11, the following consequences shall

ensue, namely:Ã¯Â¿Â½

(a) all proceedings pending at the date of the said application in any civil Court in respect of any debt to which the displaced debtor is subject

(except proceedings by way of appeal or review or revision against decrees or orders passed against the displace debtor) shall be stayed, and the

records of all such proceedings other than those relating to the a appeals, reviews or revisions as aforsaid shall be transferred to the Tribunal and

consolidated;

(b) all attachments, injunctions, orders appointing receivers or other processes issued by any such Court and in force at the date of the said

application in respect of any such debt shall cease to have effect and no fresh process shall, except as hereinafter expressly provided, be issued;

Provided that where an order appointing a receiver ceases to have effect under this section, the receiver shall, within fourteen days from the date

on which his appointment ceases to have effect or within such further time as the Tribunal may in any case allow, submit to the Tribunal instead of

to the Court which appointed him his outstanding accounts, and the Tribunal shall, in relation to such accounts, have the same powers with respect

to the receiver as the Court which appointed him had or could have had;

(c) no fresh suit or other proceeding [other than any such appeal, review or revision, as is referred to in clause (a)] shall be instituted against a

displaced debtor in respect of any debt mentioned by him in the relevant Schedule to his application;

(d) any immovable property belonging to the displaced debtor and liable to attachment shall not be transferred except under the authority of the

Tribunal and on such terms as it thinks fit, until the application of the displaced debtor has been finally disposed of or any decree passed against

him is satisfied in accordance with the provisions of this Act.

9. The view taken by the Bombay High Court in Baburao K. Pai Vs. Dalsukh M. Pancholi, is that the Displaced Persons (Debts Adjustment) Act

is a self-contained Code with regard to adjustment of debts by displaced persons under Sec. 9. Where an application under Sec. 5 has been made

to the Tribunal, it is the Tribunal that has to decide the question of the debt and the status of the debtor. As soon as the application has been made

matter is taken out of the bands of the Civil Court because the provision for stay under Sec. 15 comes to operation. Therefore, if a suit is pending

at the time of the application under Sec. 5, there is an ouster of jurisdiction of the Civil Court. A similar view has been held by the majority in

Parkash Textile Mills Ltd. Vs. Mani Lal and Others, Both these decisions (sic) us in the view that where there is an application by a person

claiming to be a displaced debtor under Sec. 5 pending before a Tribunal constituted under the Act, the status of the said person can only be

determined by the Tribunal, and the question whether the applicant before the Tribunal is or is not a debtor within the meaning of the U.P. Act

cannot be decided by an ordinary civil Court in which proceedings are pending relating to his debts, whether decretal or not.

10. The D.P. Act gives a definition of the expression ""debt"" and also of ""displaced person"", and Sec. 5 provides for an application by a displaced

debtor for the adjustment of his debts. Sub-sec. (1) of Sec. 5 provides that a displaced debtor may make an application for the adjustment of his

debts to the Tribunal within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business or personally works for

gain. It is common ground that it was under this section that the judgment-debtor Mulkraj Malhotra made an application to the Dehradun Tribunal

alleging that be was a displaced person and that the debts which were due by him should be adjusted. What has been laid down in Sec. 15 (a) is

that all proceedings pending at the date of the said application in any civil Court in respect of any debt to which the displaced debtor is subject shall

be stayed. The words ""all proceedings"", in our opinion, are significant, and mean ""each and every"" proceeding in respect of the debt of the said

displaced debtor. A Division Bench of this Court (to which one of us was a partyÃ¯Â¿Â½Chaturvedi, J.) in Balwantrao vs. Shamrao 1957 JLJ 167, has

taken a similar view in interpreting the words ""all proceedings"" in Sec. 4 of the Central Provinces and Berar Relief of Indebtedness Act. In our

opinion, the executing Court was not justified in refusing to stay the execution proceedings against the judgment-debtor after an application under

Sec. 5 of the D.P. Act had been made before the Dehradun Tribunal.

11. In Parkash Textile Mills Ltd. Vs. Mani Lal and Others, the dissenting view of Kapur, J. was to the effect that clause (a) of Sec. 15 deals with

original proceeding; by way of suit arbitration proceedings or proceedings in insolvency which can come within proceedings in respect of a debt

and only proceedings of an original nature in respect of a debt can be stayed. There is no provision made for the stay of execution proceedings

which are dealt with in clause (b). Sec, 15, therefore, in his Lordship''s opinion, does not cover proceedings in execution for the enforcement of a

mortgage decree which is a decree for sale and is not for the recovery of a debt, although ultimately the effect may be that the debt is recovered.

The majority did not express any opinion on this point. But in another caseÃ¯Â¿Â½ Bal Kishan Das Vs. Jhanumal and Others, Bishan Narain, J. who

was a party to the Full Bench case Parkash Textile Mills Ltd. Vs. Mani Lal and Others, (cit sup.) clearly has come to the conclusion that execution

proceedings come within the purview of ""all proceedings"" in Sec. 15 of the D. P. Act and that it is the duty of the executing Court to stay the

execution proceedings and send the records to the Tribunal as soon as it comes to know that the displaced debtor has made an application under

Sec. 5 of the Act. We respectfully concur with this opinion. The learned Single Judge also came to the same conclusion so far as the proceedings

against the judgment-debtor were concerned, and he expressed the opinion that the 1st Additional District Judge ought to have stayed the

proceeding in Miscellaneous Judicial Case No. 26 of 1951 (the case of setting aside ex-parte decree) as also the proceedings in Execution Case

No 9-A of 1947 in so far as the execution application asked for any relief against the judgment-debtor.

12. It appears that the petition made on 25th May 1952 under Sec. 5 of the D.P. Act by the Judgment-debtor was on 20th August 1956 rejected

and returned to the petitioner for presentation to the proper Court. The Dehradun Tribunal held that the petitioner (that is, the judgment-debtor in

the present case) was residing at Jabalpur at the time of making the petition and that he continued to reside there. The Tribunal observed that the

petitioner''s version about his residence at Dehradun was concocted and his evidence was unreliable. It, therefore, passed the following order:Ã¯Â¿Â½

The petition is rejected. Let the petition be returned to the petitioner for presentation to the proper Court....

The learned Single Judge stressed the importance of this order and held that there was no proceeding pending before the Tribunal and that any

steps purporting to have been taken under the D.P. Act were a nullity and could not be looked at for the purposes of the application of Sec. 15 of

the Act. It was argued before him that on 29th August 1956 an appeal had been filed against the order of the Dehradun Tribunal, and a certified

copy of the memorandum of appeal, dated 29th August 1956, filed before the High Court of Judicature at Allahabad was produced. The appeal

had been admitted there on 10th September 1956. It was urged before the learned Single Judge and the same argument was addressed before us

that the appeal should be deemed to be a continuation of the application and Sec. 15 would thus continue to have effect. This argument was

repelled by the learned Single Judge on the ground that Sec. 15 makes serious inroads upon the rights of persons to approach the ordinary Civil

Courts and as such it could be strictly construed. The learned Single Judge, therefore, held that the terms of Section 15 could not be extended to

cover the case of an appeal after the application under Sec. 5 had ceased to be pending before the Tribunal. He also expressed doubts whether

the appeal could at all be admitted by the Allahabad High Court. It was also observed that the sureties were not parties before the Tribunal, though

they could have been made parties under Sec. 5, sub-section (3); and as they were not made parties in an application under Sec. 5, the mere filing

of an application before the Dehradun Tribunal could not effect any proceedings before the Civil Court in which the sureties were being proceeded

against in respect of their own bonds in favour of the Court.

13. Sec. 40 of the D.P. Act provides for an appeal in the following words:Ã¯Â¿Â½

40 General provisions relating to appeals.Ã¯Â¿Â½

Save as otherwise provided in section 41, an appeal shall lie fromÃ¯Â¿Â½

(a) any final decree or order of the Tribunal, or

(b) any order made in the course of execution of any decree or order of the Tribunal, which if passed in the course of execution of a decree or

order of a Civil Court would be appealable under the Code of Civil Procedure, 1908 (Act V of 1908), to the High Court within the limits of

whose jurisdiction the Tribunal is situate.

Sec. 41 may also be reproduced here:Ã¯Â¿Â½

41. Restrictions on right of appeal in certain cases,Ã¯Â¿Â½

Notwithstanding anything contained in Sec. 40, where the subject-matter of the appeal relates to the amount of a debt and such amount on appeal

is less than rupees five thousand, no appeal shall lie.

It is not disputed that the appeal of the judgment-debtor has been admitted by the Allahabad High Court and is pending there. We have to see

what effect it had upon the execution proceedings pending in the Jabalpur Court. It was contended that the appeal is a re-hearing and a

continuation of the suit, and, therefore, the proceedings in execution be stayed.

14. In England the rule laid down is that appeals are by way of rehearing (Order LVIII, rule 2) and it was held in Quilter vs. Mapleson 1882 9

Q.B.D. 672, by Jessel, M.R. that on an appeal such a judgment can be given as ought to have been given at the original hearing; but on a rehearing

such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. It was pointed out that this point

often arose in the Court of Chancery where there was no strict appeal, but only a re-hearing before a superior Court. It was added that the 5th

rule of Order LVIII gave the Court of Appeal power to admit further evidence, and stated that ""The Court of Appeal shall have power to give any

judgment and make any order which ought to have been made and to make such further or other order as the case may require."" The learned

Master of the Rolls, therefore, came to the conclusion that it was intended to give appeals the character of re-hearings, and to authorise the Court

of Appeal to make such order as ought to be made according to the state of things at the time. In Attorney-General vs. Birmingham, Tame, and

Rea District Dranage Board (1912) A.C. 788, the House of Lords took the view that as an appeal to the Court of Appeal was by way of re-

hearing, the Court could make such order as the judge of first instance could have made if the case had been heard by him at the date on which the

appeal was heard.

15. It was pointed out by a Division Bench of the Madras High Court (Sir Arnold White, C.J., and Abdur Rahim, J.) in Rajah of Venkatagiri vs.

Mukku Narsayya 7 I.C. 202, that there is not to be found in the sections of the CPC of India which relate to the powers of an appellate Court, or

in the Rules, any provision which corresponds to Order LVIII, Rule 1 of the English rules of the Supreme Court that all appeals shall be by way of

re-hearing. The argument pressed before the Court in that case was that the appeal should be considered to be a re-hearing of the suit so as to

have the effect of rendering a statute retrospective in its effect even though no such effect is to be gathered from the terms of the statute itself. The

observations made by Jessel, M.R. in Quilter vs. Mopleson 1882. 9 Q.B.D, 672 (cit. sup.) were brought to the notice of the Court in the Madras

case. It was pointed out by the learned Judges that those observations were made with reference to the English rule under the Judicature Act and

should not be applied to appeals in India. Then, an observation by Sir Bhashyam Aiyangar in Krishnama Chari vs. Mangammal 26 Madras 91 at

P. 95, that when an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of appeal, and re-heard either in

whole or in part, was also brought to their notice. The High Court pointed out that this observation was made with reference to the question of

limitation then before that court and that it could not be relied upon as supporting the proposition that under the Code and rules an appeal is a re-

hearing of the suit so as to have the effect of rendering a statute retrospective in its effect.

16. In Lachmeshwar Prasal Shukul vs. Keshwar Lal Choudhuri 1940 F.C.R. 84 at pp. 102-103, the English case law has been referred to by

Varadachariar, J., who observed that it is on the theory of an appeal being in the nature of a re-hearing that the Courts in India have in numerous

cases recognized that in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take into account even facts and

events which have come into existence after the decree appealed against. His lordship further added that the hearing of an appeal is under the

procedural law of this country in the nature of a re-hearing, and it would make no difference if this provision is not explicitly stated in the Indian

statutes that an appeal is by way of re-hearing. These observations should, in our opinion, be confined only to the question of moulding the relief to

be granted by the appellate Court.

17. The main question before us in this case is: Can the appeal of the judgment-debtor pending in the Allahabad High Court against the decision of

the Tribunal at Dehradun be regarded as a continuation of the application under Sec. 5 of the D.P. Act so as to bring out all the consequences that

under Sec. 15 of the said Act should follow from that application ? In other words, the question is: Can the proceedings in execution of the decree

against the judgment-debtor be stayed simply because an appeal is pending in the Allahabad High Court ?

18. It has been held by a Division Bench of the Punjab High Court (Monroe and Rahman, JJ.) in Mst Rewati Vs. Chiranji Lal ILR (1943) Lah 666

that in India an appeal cannot be regarded as a re-hearing of the suit itself; and that there is no warrant for the proposition that an appeal from an

order passed in execution proceeding could itself be regarded as a re-hearing of the application. In Rangaswamy vs. Alagayyamma AIR 1915

Mad 1133 the view expressed was that an appeal is only a continuation of the original proceedings and the appellate Judgment dates back to and

stands in the place of the original judgment. In that case, possession taken by a person pending an appeal was held to be subject to the result of the

appeal and was deemed to have been without legal title when the original decree or order was reversed, and so the rents and profits were held to

have been wrongfully received within the meaning of Art. 109 of the Limitation Act. The general observations, rather broadly stated in that case,

should, in our opinion, be confined to the facts of the case. It has been made quite clear by a Full Bench of the Lahore High Court in Zahur Din vs.

Jalal Din ILR (1944) Lahore 443 that though an appeal is a continuation of a suit, yet this is only in a limited sense. It does not mean that the rights,

which could be pleaded and enforced before a suit was finally adjudicated by the first Court, could be pleaded as of right for the first time daring

the pendency of the appeal. The rule of law, in our opinion, laid down in this case is the correct one, and we respectfully concur with it.

19. There is no provision in the D.P. Act to indicate whether for the purposes of the Act an appeal should be taken to be a continuation of the

original proceedings or not. The question has, therefore, to be decided on general principles. As the D.P. Act is a special statute, principles

deduced from the decisions of the Courts in other countries may usefully be referred to. In the Slaughter House Case 19 Lah. 915 it was stated by

Justice Clifford, who delivered the opinion of the U.S. Supreme Court.

Rules and regulations prescribed by law, of course, control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in

equity, that an appeal from the decision of the Court, denying an application for an injunction does not, operate as an injunction or stay of the

proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle

the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity

Many American decisions on the point have been referred to in the judgment. In India also the same view has prevailed. In a decision of the

Madras High Court, which has been reproduced at pages 179 to 186 of the Official report of the Privy Council decision in Sankaralinga Madan

vs. Raj-Rajeswara Dorai 33 I.A. 176, we find the following at page 181:Ã¯Â¿Â½

The appeal no doubt, opens up the whole question for the decision of the Appellate Court, but pending that decision the decree of the Subordinate

Judge does not cease to be binding on the parties. Pending that decision they are just as much bound by the decree as if there was no appeal.

These observations appear to have been approved by the Privy Council. In a later case Juscurn Boid vs. Pirthichand Lal Choudhury 46 Cal 670

P.C. Sir Lawrence Jenkins, while delivering the judgment of the Board, observed at page 679:Ã¯Â¿Â½

Whatever may be the theory under other systems of law, under the Indian Law and Procedure an original decree is not suspended by presentation

of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

These observations are important and weighty and must be made applicable of course, by means of an analogy to the facts of the instant case. Till

reversed by the High Court of Judicature at Allahabad, the order of the Tribunal at Dehradun rejecting the application of the judgment-debtor must

remain binding on the parties. We therefore, take the view that at present no application under Sec. 5 of the D.P. Act is pending before any

Tribunal so as to bring out the effect of Section 15 of the said Act on the execution proceedings in the Jabalpur Court. In our opinion, therefore,

the learned Single Judge was correct in holding that the terms of Section 15 of the D.P. Act could not be extended to cover the case on an appeal

after the application u/s 5 had been rejected by the Dehradun Tribunal and returned for presentation to the proper Court.

20. Shri Dabir also pointed out that the application of the judgment-debtor dated 11th October 1951 for setting aside the ex parte decree in

Miscellaneous Judicial case No. 25 of 1951 was also wrongly rejected by the learned Civil Judge of Jabalpur. The decree-holder had opposed

that application on 21st December 1951. The learned Judge then framed issues on that application on 29th January 1952. It was after five months

that by an application dated 28th June 1952 the judgment-debtor informed the Court that he had applied to the Tribunal at Dehradun for

adjustment of his debt under Sec. 5 of the D, P. Act and that a telegram to that effect had been received by this counsel from the applicant. He,

therefore, requested that under Sec. 15 of the aforesaid Act the proceedings be stayed till the decision of the application. Another application to a

similar effect was made by the judgment-debtor on 5th September 1952. By his order dated 6th September 1952 the learned 1st Additional

District Judge, Jabalpur, rejected the application for setting aside the ex parte decree and on the same day the said judge also rejected the

application of the judgment-debtor for staying the proceedings under Sec. 15 (a) of the D.P. Act, It is contended by Shri Dabir, learned counsel

for the appellant''s sureties, that the learned Judge was in error when he rejected the application for setting aside the ex pate decree. In our opinion,

the contention is well founded. We have already taken the view that once the Court was informed of an application having been made at the

Dehradun Tribunal under the D.P. Act, further proceedings against the judgment-debtor ought to have been stayed, but they were not stayed. In

the meantime, the Tribunal at Dehradun rejected and returned the application for presentation to the proper Court on the basis of absence of

jurisdiction.

21. In view of the said order of the Tribunal at Dehradun, the only view that can be taken now is that no application under Sec. 5 of the D.P. Act

was pending before the Dehradun Tribunal, and so the dismissal of the judgment-debtor''s application for setting aside the ex parte decree on

merits cannot be questioned.

22. The next point which remains to be decided is about the proceedings by the execution Court against the sureties. During the arguments on this

point many rulings have been cited by both the parties about the contractual liability of the sureties. On the one hand, it has been urged that the

liability of the surety is co-extensive with that of the principle debtor u/s 128 of the Contract Act. On the other hand, it is contended that the

suretyship contract"" is a collateral one and as an independent contract it can be enforced. In our opinion, in the view we take of the proceedings,

the ruling cited by both the sides do not help us. It is well known that the obligation which a surety incurs under the bond, which he gives to the

Court under the Code of Civil Procedure, is excluded from the definition of a ""contract of guarantee"" as contained in the Contract Act, which is a

tripartite agreement between the ""surety"", the ""principal debtor"" and the ""creditor"". No such tripartite contractual obligation is created between the

parties to the suit and the surety when the latter gives his surety bond to the Court under the Code of Civil Procedure. It was observed by

Seshagiri Ayyar J., at page 277 in Appunni Nair Vs. Isack Mackadan 43 Madras 272 that ""under the CPC the bond is given to the Court and any

infringement of the terms of the bond is a violation of the obligations to the Court, and therefore the agreement between the parties which resulted

in a compromise decree has not the effect of discharging his liability to the Court"". In Ehiya vs. Villiappa Chettiar AIR 1936 Mad 576 at page 578,

columns 1 and 2, it is observed:Ã¯Â¿Â½

It is said that this is a contract of suretyship of a continuing nature which can be determined by notice at any moment by the surety and that the

application is such a notice. We dispose of that point shortly, following the decision in re Abinash Chandra Benerji 54 Allahabad 293 on the

ground that where a bond is given to the Court the liability by the Court and such liability cannot be determined at any moment by the surety giving

notice.

In B. Jang Bahadur Singh and Others Vs. Basdeo Singh and Others, it was observed at page 552:Ã¯Â¿Â½

Section 134, Contract Act, presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor, are

parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. In the

case before us, there was no contract between the sureties and the plaintiffs. The security bonds were executed by the sureties at the instance of

the debtor and in pursuance of the orders of the Courts granting stay.

Then, it is further added:

As already stated, the bonds are in favour respectively of the District Judge and the Registrar. The fact that the sureties empowered the plaintiffs to

enforce the undertaking given by them (the sureties) to the Court does not imply that the plaintiffs became a party to the contract of guarantee

embodied in the bonds. In this view, Section 134, Contract Act, does not apply to the facts of the present case.

In Mohomed Ali Mamooji Vs. Howeson Brothers AIR 1926 P.C. 32 a judgment of the Calcutta High Court (Asutosh Mookerjee and Rankin,

JJ.) has been, in its entirety, reproduced. This was a decision on appeal from an order made by Mr. Justice Greaves against a surety u/s 145 Civil

Procedure Code. A preliminary decree had been granted in a mortgage suit instituted against Harvoys. One of the defendents was appointed

Receiver. The appellant became surety for the Receiver. The surety then, made an application to be released from his obligations and covenants as

stated in the security bond. The question was whether the surety could tentatively discharge himself by giving a notice. Mr. Justice Greaves

answered it in the negative and an order was made against the surety in term of Section 145. This order was confirmed by the Division Bench of

the Calcutta High Court which held the view that notwithstanding Sec 130 which holds that a continuing guarantee may at any time be revoked by

the surety as to future transactions Dy notice to the creditor, it is not competent to the surety for a Receiver, who has been appointed an officer or

the Court to discharge himself merely by notice to the decree-holder, or other person at whose instance or for whose benefit the Receiver was

appointed. It was further stated that a person does not become a surety till he has been accepted as such by the Court and he cannot discharge

himself without the consent of the Court. This judgment, as stated above, has been reproduced in AIR 1926 P.C. 32, and underneath it is a short

order by Viscount Finlay on behalf of the Board stating ""in their Lordship"" consideration of this case they see no reason for differing from the

Courts below.

23. In Madanlal Motilal vs. Radhakishan Lakshminarayan 31 N.L.R. 83 at page 95, a Division Bench (Grille, J.C. and Subhedar, A.J.C.)

observed thus:Ã¯Â¿Â½

By no stretch of imagination could the Court be called a ""creditor"" in whose favour the surety executes the bond incurring the obligation which the

Court is empowered to enforce summarily by way of execution under Sec. 145 of the Code of Civil Procedure. It, therefore follows that the

provisions of Sec. 133 to 139 of the Indian Contract Act cannot be made applicable to the bond given by a surety to the Court.

We respectfully concur with this opinion and bold that the liability of the surety in such bonds can be determined only by the Court itself under Sec.

145.

24. Shri Dabir, then contended that the passing of the D.P. Act was an event not within the contemplation of the sureties when they executed the

bonds, and therefore it should be taken that the contracts were frustrated. We have already taken the view that the bonds in favour of the Court

did not produce any contractual liability and therefore this contention of Shri Dabir will be rejected. Shri V.K. Sanghi also pointed out that the

bonds were given under Order XXXIII, Rule 5 of the Code of Civil Procedure. In our opinion, this should make no difference in so far as an order

under See, 145. Civil Procedure Code, is concerned.

25. The bond being in favour of the Court the mode of enforcement should be by an order of the Court. In Raj Raghubar Singh vs. Jai Indra

Bahadur Singh- 42. All. 158 P.C. at page 167, their Lordships of the Judicial Committee observed that in such cases the only mode of enforcing

the bond must be by the Court making an order in the suit and upon an application to which the sureties are parties, that the property charged be

sold unless before a day named the sureties had the money, and this order has already been passed by the executing Court.

26. Shri Dabir, learned counsel for the appellant''s sureties, then, contended that under the terms of the bonds of the sureties the bonds cannot be

enforced. The several bonds executed by the sureties are almost identical, and it will be sufficient if one of them is reproduced below:Ã¯Â¿Â½

In the Court of Addl. District Judge, Jabalpur.

C.S. No. 9-A of 1947

Table missing in file No. MP570249

(Security under O. 38 R. 5 C. P. Code)

Whereas at the instance of Takhatmal the plaintiff in the above suit, Mr. Mulkraj the defendant has been directed by the Court to furnish security in

the sum of Rs. 1,10,000/- to produce and place at the disposal of the Court the property specified in the Schedule hereunto annexed.

Therefore, we Shyamlal Agarwal and Shreemati Sushiladevi Agarwala have voluntarily become surety and do hereby bind ourselves, our heirs and

executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in

the said Schedule, or the value of the same or such portion thereof as may be sufficient to satisfy the laid decree; and in default of his so doing, we

bind ourselves, our heirs and executors to pay to the said Court, at its order, the said sum of Rs. 60,000/- or such sum not exceeding the said sum

as the Court may adjudge.

SCHEDULE

(1) Meat supply bills of JBP for the month of July 1947 and onwards.

(2) H.T. bills of JBP for the month of July 1947 and onwards.

(3) Coolie labour supply bill for July 1947 and onwards.

(4) F.W. Quicklime and charcoal supply bill of July 1947 and on wards.

(5) H.T. Supply bill of Mhow for July and onwards.

(6) Coolie labour supply bill for July 1947 and onwards for Mhow 1947.

(7) Meat, Firewood and Lime and Charcoal supply at Katni for July and onwards.

(8) Meat, Firewood and Lime and Charcoal supply at Pachmarhi for July 1947 and onwards.

(9) Meat, Firewood, Charcoal and Q. Lime supply bill of Saugor.

(10) Meat, Firewood, Charcoal and Q. Lime supply at Mhow.

All above bills of Rs. 60,000/-.

(11) Firewood bill of Katni and JBP and Mehgaon for 1945-46 amounting Rs. 50,000/- Grand Total Rs, 1.10,000/-

Sd/- Shamlal

Sri Dabir urges under the terms, as aforsaid, the liability would arise only when the Court requires the property from the judgment-debtor and he

does not produce it. He emphasises the words ""in default of his so doing we bind over selves to pay to the said Court the said sum"". In our opinion

this contention must fail. The bonds were executed by the sureties in order to enable the judgment-debtor to get money from the military authorities

for payment to the decree-holder, and the judgment-debtor obtained money from the authorities. Considering that the securities were furnished by

the judgment-debtor only to draw money of the Bills from the military authorities they ought to have seen that the judgment-debtor deposited the

money in the Court. It appears that after executing the bonds the sureties did not care to see what happened to the money received by the

judgment-debtor. Under the circumstances of the case, any order by the executing court to the judgment-debtor to produce the bills or the value of

the same was not necessary. In fact, it would have been a mere formality to ask the judgment-debtor to produce the value of the property. Under

these circumstances we are of opinion that the bonds of the sureties are enforceable. The view taken by the learned Single Judge, under these

circumstances, appears to be correct.

27. We therefore dismiss the appeals of the sureties with costs. There shall be one set of Counsel''s fees. Counsel''s fee Rs. 500/-