

(1895) 08 CAL CK 0001

Calcutta High Court

Case No: None

Surjoo Das

APPELLANT

Vs

Balmakund Das

RESPONDENT

Date of Decision: Aug. 2, 1895

Citation: (1896) ILR (Cal) 212

Hon'ble Judges: Prinsep, J; Ghose, J

Bench: Division Bench

Judgement

Prinsep, J.

The appellant gave security within the terms of Section 546 of the CPC for the due performance of the decree of the Appellate Court in regard to such restitution as might become necessary if the order under appeal were reversed by the High Court. The judgment of the Appellate Court was set aside, and so the appellant before us has become liable under the terms of his bond, and it is sought to realise the amount due by means of execution of the decree in the suit. Objection has been raised that the appellant before us cannot be held liable except through a decree in a suit properly brought against him, and that no proceeding as against him can be taken in execution of decree. The Subordinate Judge has overruled that objection, relying on the cases of Venkapa Naik v. Baslingapa ILR 12 Bom. 411 and Thirumalai v. Ramayyar ILR Mad. 1. Of these two cases, the one in the Bombay Court is alone expressly in point, and we may observe with reference to the case in the Madras Court that a somewhat different opinion was expressed by the same Court in the case of Arunaehellam v. Arunachellam ILR Mad. 203. The judgments of the Courts of Bombay and Madras have not been in accordance with the judgments of this Court in respect of the procedure to be taken for the enforcement of a security bond with respect to the liabilities of a judgment-debtor. In consequence of this difference of opinion the Legislature by Act VII of 1888 made express provision with regard to matters coming under Sections 549 and 610 of the CPC by declaring that the liabilities of a surety for costs may be enforced in execution of a decree of the particular Court in the same manner as if he were a party to the appeal. We may

observe that in this respect the Legislature has followed the terms of Section 253, which relates to security given for the performance of a decree or any part thereof in an original suit before the passing of the decree, and it is declared that proceedings may be taken against the surety as if he were a defendant; and no express provision has been made in respect of security given under Sections 545 and 546 of the Code of Civil Procedure, the one being security given by an appellant, the other by a respondent. No doubt if the security be security personal to these parties there would be no difficulty in proceeding to realize any amount that may be due in execution of the decree to which they were parties. The difficulty arises where the security is given by a third party for either the appellant or respondent.

2. There has been no case of this Court u/s 546, and the only case that we know of which has been reported is the case that has been already cited, the case of Venkapa Naik v. Baslingapa ILR 12 Bom. 411, Quite recently, however, there has been reported a case of this Court-Tokhan Singh v. Udwant Singh ILR Cal. 25. This case related to a security given u/s 545, and the learned Judges followed the rule laid down in previous cases decided before the Act of 1888 relating to Sections 549 and 610, which declared that proceedings to enforce a surety bond given by a third party should be by separate suit and not by means of execution of the decree to which it related. The law no doubt by making express provision in the Act of 1888 in regard to Sections 549 and 610 has made those decisions obsolete. But still the principle on which this Court proceeded remains, and it was applied in the case of Tokhan Singh to a security given u/s 545. I take it that the same principle should be applied to security given by a third party u/s 546.

3. I confess for my own part that I should have had some difficulty in arriving at this conclusion if the matter had been *res integra*. I am not inclined to adopt the reasons of the learned Judges of the Bombay High Court in Venkapa Naik v. Baslingapa ILR 12 Bom. 411, because I am not prepared to hold that the words "in an original suit" contained in Section 253 should be regarded as superfluous. It seems to me that those words were expressly used so as to harmonize with the further expression that the surety should be regarded as defendant for the purposes of all liability. In the same way we find, in the amendments made to Sections 549 and 610 that the Legislature thought proper to declare that such person shall be regarded as appellant in the cause. I have, however, some difficulty in holding that a different course should be taken where security u/s 546 is security either personal, or the property of the respondent, or security obtained through a third person. Section 583 declares that the party entitled to any benefit (by way of restitution or otherwise) may obtain it by execution of the decree passed in appeal, and therefore if this matter had not been decided on a different principle in other analogous matters, I should have felt inclined to hold that the party entitled to this benefit should have recourse to the same procedure, whether the security was that of the party to the cause or a third party who had made himself liable. I think it unnecessary after the course of decisions in this Court to express any dissent, more especially as the CPC

is now under amendment, and this matter will probably attract the attention of those responsible for our legislation. The order of the Lower Appellate Court will therefore be set aside with costs.

Ghose, J.

4. I concur in holding that this appeal should be allowed. My learned colleague has gone so fully into the question raised in this appeal that it is unnecessary for me to discuss the points over again. All that I need say is that I adhere to what was laid down by Gordon, J., and myself in the case of Tokhan Singh v. Udwant Singh ILR Cal. 25, and I think that the reasons of that decision, as also of the decisions in Kali Charan Singh v. Balgohind Singh ILR Cal. 497 and Radha Pershad Singh v. Phuljuri Koer ILR Cal. 402 equally apply to a case falling u/s 546.