
(1871) 05 CAL CK 0013

Calcutta High Court

Case No: Miscellaneous Regular Appeal No. 11 of 1871

Ahmed Yousaffji

APPELLANT

Vs

Akhut Ramana and
Ramkarinji

RESPONDENT

Date of Decision: May 22, 1871

Final Decision: Allowed

Judgement

Norman, Officiating C.J.

1. The first question we have to consider is whether the decree of the Appellate Court can be executed against the surety. By the 363rd section of the CPC it is enacted that decrees of an Appellate Court shall be executed by the first Court in the manner and according to the rules hereinbefore contained for the execution of original decrees." By section 204 : Whenever a person has become liable as security for the performance of a decree, the decree may be executed against such person to the extent to which he has "rendered himself liable in the same manner as a decree may be enforced against a defendant." The cases of Baboo Bam Kishen Doss v. Hurkhoo Sing 7 W.R., 329 and Gajendranarayan Roy v. Hemangini Dasi 4 B.L.R., App., 27, cited by the respondent's counsel, are distinguishable from that before us. They are cases of engagements by sureties, subsequent to the final termination of the suit, wholly independent of and collateral to it. That which we have before us is a contract entered into in the course of proceedings in the appeal, and which is itself in the nature of a proceeding in the suit whereby the surety renders himself liable to an order to be thereafter made on the appeal.

2. We think that the view taken by the appellants is correct. The surety having rendered himself liable as security for the performance of the decree of the Appellate Court, there seems no reason to doubt that u/s 204 such decree may be enforced against him as if he had been a defendant or respondent in the suit.

3. The next point is whether an appeal lies from the order of Mr. Coryton dismissing the case against the surety. By section 27 of the Recorder's Act it is enacted that in suits determined by the Recorder in which the amount exceeds 3,000 rupees and is less than 10,000 an appeal shall lie to the High Court, subject to the rules contained in the said CPC (i.e., Act VIII of 1859 as amended by Act XXIII of 1861) regarding regular appeals."

4. Section 11 of Act XXIII of 1861 enacts that "all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of that suit and the execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any "other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by the order of the Court executing the decree and not by separate suit, and the order passed by "the Court shall be open to appeal."

5. The question is whether an order u/s 204 relating to the execution of a decree against the surety is open to appeal.

6. I think it is not an unnatural construction of the words of this section to hold that a surety who becomes liable as security for the performance of a decree against whom an order may be made under the 204th section that the decree may be executed against him as surety, is a party to the suit within the meaning of that term as there used. He is a person against whom an order may be made in the suit. He has a right to be heard in the suit to show cause against any order directly affecting him. He has surely a right to be treated as a party to the proceedings upon any execution issued against him. It seems impossible to suppose that a surety against whom an order for execution should be made u/s 204 would not have a right of appeal against orders made in the course of the execution of a decree against him. If so, it must be because he has become a party to the suit as surety. In the case of *Ex parte Bhikaji Vithal Ambekar* 4 Bom. H.C. Rep., A.C., 119, the Sudder Ameen, upon the application of one of two sureties against whom a decree was being executed u/s 204, ordered an attachment of the property of the sureties to be removed. The High Court of Bombay, on the appeal of the judgment-creditor, held that an appeal lay u/s 11 of Act XXIII of 1861, in a matter between the judgment-creditor and the surety of the judgment-debtor. This ruling, which is directly in point, is in accordance with the previous decision of a Division Bench of the High Court here--Mr. Justice L.S. Jackson and Mr. Justice Hobhouse in *Ghoree Lal Jha v. Sheonarain Sing* 8 W.R., 24--where the question arose upon an appeal by the surety against an order passed by the Court in executing a decree against him.

7. The next question is, what is the effect of the order of the Recorder on the petition of the 19th of January 1870, and the cancellation of the bond which then took place?

8. It appears that this order was made on the application of the respondent, and without notice to the appellants. Had such notice been given there can be no doubt but that the appellants would have pointed out that a petition had been presented for the re-admission of the appeal. The cancellation of the bond appears to have taken place in consequence of a mistake on the part of the Recorder in supposing that the appeal had been finally dismissed. The security which was given u/s 36 of Act XXIII of 1861 was for the restitution of the money, and for the due performance of the decree of the Appellate Court. We think this means the performance of such order or decree as the Appellate Court shall finally pass. The order discharging the surety, while proceedings in the Appellate Court were still pending, and before the final decree of the Appellate Court had been pronounced, was in our opinion erroneous and invalid.

9. The only remaining point is, to what extent the surety is liable under the obligation.

10. Mr. Lowe compared the case to that of a bond in the English form by which the obligor binds himself in a penal sum usually double the amount of the sum intended to be secured, and there is a condition that if the obligor duly pays the sum secured or performs the acts stipulated for, the bond is to be void; but that otherwise it shall remain in full force. Mr. Lowe contended that the sum of Rs. 4,825-3-0 must be treated as a penal sum beyond which the obligor could not be made liable. And if this obligation were simply a bond in the ordinary English form Mr. Lowe's argument would have been unanswerable. On the face of such a bond in the ordinary form, conditioned for the performance of particular acts, all that the obligor engages to do is to pay the penalty; and there is a proviso that, if the condition be performed, the bond or obligation shall be void. It is well settled that the liability of the obligor is limited to the amount of the penalty in such cases. See *Branscombe v. Scarbrough* 6 Q.B., 13.

11. The rule, however, is not inflexible. Where it appears that, upon the true construction of the agreement as contained in the bond, the obligor has really entered into an engagement binding him to an extent beyond the sum mentioned in the first part of the bond, that obligation may be enforced. Thus in *Francis v. Wilson 1 Ry. & Moo.*, 105 the bond was in the sum of Rs. 120 conditioned for the payment of ■ 120 and interest, and it was held by Littledale, J., that interest beyond the amount of the penal sum of ■ 120 might be recovered. The obligation before us is not in the form of an ordinary English bond. The 36th section of Act XXIII of 1861 empowers the Court allowing execution of a decree which has been appealed from to require security, first, for the restitution of property taken in execution; and, secondly, for the due performance of the decree of the Appellate Court. The obligation entered into by the surety by the instrument before us is substantially in the form contemplated by section 36. That part of the bond which comes as a condition purports to bind Hadji Abdul Ryman to the payment of all such sums of money as should be decreed against Ahmed Yousaffji by the Appellate Court.

12. Had the bond been given upon an application of the appellants that the respondent should give security u/s 36 before receiving the money out of Court, I should be disposed

to think that we ought to construe this particular bond as a covenant binding the surety to the extent contemplated by the 36th section,--i.e., not only to the restitution of the money, but to the performance of the decree. The appellants' petition of the 23rd of April 1869 simply prays the Court to detain the money in Court pending the decision of the appeal. The order on this application is let the money be held till the further order of the Court." There is not on the proceedings any application by the appellants that the respondent should furnish security u/s 36. The order upon which the money was paid out of Court and the bond taken is not amongst the proceedings. It was for the appellants to have brought this order before us. "We are therefore unable to say that there was any order u/s 36 which showed that Hadji Abdul Ryman as surety was to be bound to any greater extent than the sum which stands as the penalty of this bond. Upon the whole, we cannot say that we are satisfied either that the surety meant to bind himself beyond the extent of Rs. 4,825-3, or that upon the true construction of the bond he is bound to a greater extent.

13. We order that the amount of Rs. 4,825-3 be paid to the appellants by the said Hadji Abdul Ryman within seven days after the service of this decree upon him, and that, in default, execution do issue against him.

14. An order for such execution must be applied for by the appellants in the usual way. The surety Hadji Abdul Ryman must pay the costs of this appeal.