1878.

In re MUSE ALI ADAM.

it must be based on the application alone of the Court or authority sanctioning the proceedings.

The Court annuls the order of the Subordinate Magistrate, permitting the withdrawal of the charge in this case, and directs the Magistrate to proceed with the trial, and dispose of the case according to law.

Order accordingly.

Note.—See Criminal Review No. 7 of 1876. *In re* Keshav Lakshman, I. L.R. 1 Bom. 175.

[APPELLATE CIVIL.]

Before Mr. Justice Kemball and Mr. Justice Pinhey.

July 11.

SHIVLA'L KHUBCHAND, APPLICANT, *v.* APA'JI BHIVRA'V AND OTHERS, OPPONENTS.*

Code of Civil Procedure (Act VIII. of 1859), Section 338—Sureties—Extent and duration of their liabilities.

The present applicant having taken out execution of a decree held by him, and the judgment-debtor having appealed to the District Court, the two opponents became sureties under section 338 of Act VIII. of 1859 that the judgment-debtor would "obey and fulfil all such orders and decrees as should be given against him in appeal;" and, in default of his so doing, they bound themselves "to pay jointly and severally, at the order of the Court, all such sums as the Court should, to the extent of Rs. 812-8, adjudge."

Held (Pinhey, J., *dissentiente*) that the obligation of the sureties to fulfil the decree of the Appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.

THIS was an application to set aside the order of W. H. Newnham, Judge of Puna.

Ganesh Rámchandra Kirloskar for the applicant.

Shámráv Vithal for the opponents.

The facts and arguments fully appear from the following judgments:—

KEMBALL, J.:—The dispute in this case arises out of the following facts:—

*Application (Extraordinary Jurisdiction) No. 25 of 1878 under Reg. II. of 1827, sec. 5, cl. 2.

One Shivlál Khubchand obtained a decree for Rs. 650 and proportionate costs, against one Balvantráv Venáik, in the Court of the Subordinate Judge of Puna. Balvantráv appealed to the District Court, and, pending the disposal of such appeal, Shivlál applied for execution. Balvantráv thereupon prayed for its stay, and his prayer was granted, upon two persons Apáji and Venáik becoming sureties "for the due performance of the decree or order of the Appellate Court." In the said appeal the decree of the Subordinate Judge was reversed; but in the special appeal, which Shivlál took up to the High Court, the decree of the lower Appellate Court was reversed, and the cause remanded for further trial, which resulted in the District Court confirming the original decree of the Court of first instance.

Upon this, Shivlál (apparently under section 204 of Act VIII. of 1859) sought execution of his decree against the sureties Apáji and Venáik. Apáji and Venáik opposed this application, and both the Subordinate and (in appeal) the District Judge rejected it, on the ground that the liability of the sureties lasted only until the District Court decided the cause the first time, the District Judge observing that "the consideration for the security bond was the staying of execution of the decree, and when the Appellate Court decided the other way, there was no more possible execution to be stayed."

Shivlál then applied to this Court for redress in the exercise of its extraordinary jurisdiction, and on the 21st February last a rule was granted against the said sureties to show cause why execution should not issue against them as prayed in the petition. The matter was argued before us on the 4th instant, both sides being represented by pleaders. And the question is,—whether the view taken by the District Judge of Puna, as to the extent and duration of the liability of the sureties, is correct?

The security bond entered into by the opponents Apáji and Venáik is, in substance and almost entirely in words, the same as the form given at page 246 of the High Court Circular Order Book. And in that they bound themselves, their heirs, and executors, to the Court of the First Class Subordinate Judge, that the defendant Balvantráv, his heirs, and executors should "obey

1878.

SHIVI A'L KHUBCHAND v. APA'JI BHIVRA'V AND OTHERS.

and fulfil all such orders and decrees as may be given against the said defendant Balvantráv in such appeal;" and, in default of Balvantráv so doing, they bound themselves, their heirs, and executors, "to pay jointly and severally, at the order of the said Court, all such sums as the said Court shall, to the extent of Rs. 812-8, adjudge" against them. On the face of this bond I can see no reason for holding that the obligation of the sureties ceased immediately upon the decree of the Court of first instance being set aside, or, as the District Judge puts it, "when there was no more possible execution to be stayed." They bound themselves to carry out any decree or order the Appellate Court might give in that appeal; and the obligation of the primary debtor, which it is now sought to enforce, appears to me to be precisely that to which they, as judiciary sureties, became accessory. It is, no doubt, a correct principle that, as a surety's engagement is accessory to a principal obligation, so the extinction of the principal obligation necessarily involves that of the surety, and, therefore, wherever the principal is discharged, the surety is discharged also. But the mistake in this case seems to me to be in regarding the reversal of the first Court's decree as involving the extinction of the obligations. Having regard to section 335 of the old Procedure Code, it seems clear that the principal obligation was for the due performance of the Appellate Court's decree, and the sureties bound themselves, on behalf of the principal debtor, for the payment of the sum so ordered to be paid to the extent of a particular amount. What was the nature of the first, and as it proved, erroneous order, it is immaterial to consider. It might have rendered unnecessary the performance of the obligation, but could not, in my opinion, operate to discharge the liabilities thus undertaken. The consideration for the sureties' promise to carry out whatever decree the Appellate Court might subsequently make, was the forbearance of the said Court to presently execute the decree already obtained; and all that we have now to consider is, whether the decree, which it is sought to execute, was passed by the same Appellate Court in the same appeal. To this question I apprehend there can be but one answer.

We have been told that it would be exceedingly hard to keep the liability of the sureties hanging over their heads for an in-

definite time; but I fail to see the hardship of compelling the sureties to do that which they contracted to do. The judgment-creditor asks for nothing more than is due to him, and which he would have received long before but for the intervention of the engagement which the sureties undertook. It was not the fault of such creditor that the order for the payment of his debt was not made by the Appellate Court until after the remand by the High Court. I would reverse the orders of the Courts below, and direct that execution be had against the sureties within the limit fixed in the security bond.

PINHEY, J.:—I am unable to concur in the judgment just delivered by Kemball, J., and am of opinion that the order passed by the District Court of Puna (Newnham, J.) is right, and that, therefore, the rule *nisi*, issued by the Court on the 21st February last, should be discharged.

I need not repeat the facts of this case, as they are sufficiently set forth in my brother Kemball's judgment.

I am of opinion that the first decree of the Appellate Court having reversed the decree obtained by the plaintiff in the Court of first instance, the liability of the securities was thereby determined, and could not be revived without their consent.

As soon as the Appellate Court reversed the decree of the Subordinate Court there was no decree in existence which plaintiff could execute, and, therefore, the liability of the securities terminated. It is true that by special appeal to the High Court, or by application to the Appellate Court for review of judgment, the decree of the Subordinate Court might be restored; but that would be done by proceedings, of which the defendant would have notice, but the securities would have none. Therefore, I hold that the liability of the securities cannot be revived by such proceedings.

The only case in all fours with this one to which we have been referred, supports the view which I take in this case.

The case of *Náráyan Dev* v. *Gajánand Dikshit and another*(1) was cited, but it cannot be considered to govern the present case;

(1) 10 Bom. H. C. Rep. 1.

1878.

SHIVLA'L KHUBCHAND v. APA'JI BHIVRA'V AND OTHERS.

for in *Náráyan Dev* v. *Gajánand Dikshit* the security bond had been executed under section 36 of Act XXIII. of 1861, and in giving judgment in that case the Court pointed out that there was "a marked distinction between" a security bond executed under section 36 of Act XXIII. of 1861 and a security bond executed under section 338 of Act VIII. of 1859. The security bond in the present case was executed under section 338 of Act VIII. of 1859.

But there is a case in all four with the present one in which a Division Bench of this Court passed a decision which fully supports the view which I take of this case. I refer to *Ratan Trimbak Pátil* v. *Nasarvánji Hormasji*, cited in *Náráyan Dev* v. *Gajánand Dikshit*, but not reported.

I have sent for the record of the case between *Ratan Trimbak Pátil* v. *Nasarvánji Hormasji*. In that case the judgment of the District Court of Thána (A. Bosanquet, J.) was as follows:—

"The issue for decision is,—whether Ratan Trimbak was liable on his security bond for the amount of those mesne profits? I find that he was so liable. He became surety for the due performance of the decree or order of the Appellate Court,—that is, of this Court. Execution of the decree should not have been stayed if he had not given this security; but the bonds would have been made over to the plaintiff, who would forthwith have taken all further mesne profits derivable from them. The security had regard to the ultimate decree or order passed by the Appellate Court. The intermediate decree or order which was passed, was reversed by the High Court, and must be treated as if it had never been passed.

"The security given was for the performance of the Appellate Court's decree or order, and not for the amount of damage that might be sustained by the plaintiff in consequence of the execution of the first decree obtained by heirs being stayed.

"I, therefore, hold that the surety Ratan Trimbak has been rightly held liable for the amount of the mesne profits that he has paid. I confirm the Principal Sadar Amin's order with costs."

The case came before a Division Bench of this Court (Warden and Gibbs, JJ.) as miscellaneous special appeal No. 2 of 1869. No written judgment was recorded; but the order of the High Court states also the *ratio decidendi*. It is as follows:—

"The Court reverse the order of the Acting District Judge and of the Principal Sadar Amin of Thána, dated, respectively, the 16th June 1869 and 12th December 1868, directing execution of a decree against the said Ratan as surety, and direct that the security bond be cancelled, as it ceased to have effect immediately after the District Judge gave his decree reversing the decree of the Principal Sadar Amin, and throwing out the claim. Costs on the opponents."

If *Ratan Trimbak Pátil* v. *Nasarvánji Hormasji* was rightly decided by this Court, as I think it was, then it cannot be distinguished in principle from the case before us, and the rule which we have heard argued, should be discharged.

As, however, my brother Kemball is the senior Judge of this Division Bench, and thinks otherwise, the order of the Court will be in accordance with his opinion, and the rule will be made absolute with costs.

Rule absolute with costs.

Note.—Section 545 of the new Code of Civil Procedure (Act X. of 1877) provides that the Court may order execution to be stayed, "provided that security has been given by the applicant for the due performance of such decree or order as may *ultimately* be binding upon him."