APPELLATE CIVIL.

1879
March 3 & 31.

FULL BENCH.

(48)

Before Sir. M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, and Mr. Justice West.

APPAJI BHIVRAV AND ANOTHER, APPELLANTS, *v.* SHIVLAL KHUBCHAND, RESPONDENT.*

Letters Patent of 1865, *Sec.* 36—*Act X of* 1877, *Secs.* 575, 647—*Act VIII of* 1859, *Sec.* 338—*Sureties—Extent and duration of their liabilities.*

The provision of the Letters Patent of 1865, section 36, that when the Judges of a Division Bench are equally divided in opinion, the opinion of the senior Judge shall prevail, has been superseded by section 575 of the Civil Procedure Code (Act X) of 1877 (which is entitled to miscellaneous proceedings of the nature of appeals by section 647 of that Code,) so far as regards cases to which section 575 is applicable.

The appellants became sureties, under section 338 of the Civil Procedure Code (Act VIII) of 1859, that the judgment-creditor 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, adjude.

Held by a Full Bench that the obligation of the sureties was not confined to the first decree of the Appellate Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.

THE facts of the case are fully stated in the judgments of the Division Bench (Kemball and Pinhey, JJ.) already reported.(1)

The order of the High Court in this case having been made in accordance with the opinion of the senior Judge, the opponents, Appaji and Vinayak, appealed under clause 15 of the Letters Patent of 1865. The appeal came before a Full Bench (Westropp, C.J., Melvill and West, JJ.) on the 3rd March 1879.

March 3.—*Shamrav Vithal*, for the appellants, took a preliminary objection to the order of the Appellate Court. The application before the Division Bench was made after the new Civil Procedure Code (Act X of 1877), came into force; section 575 of that Act, therefore ought to govern the proceedings of the appellate Court. At the Judges of the Division Bench differed in opinion, there was

* Appeal No. 1 of 1878 under the Letters Patent of 1865.

(1) See I. L. R. 2 Bom, 654.

no majority in favour of a judgment reversing the order of the District Court. That order, therefore, ought to have been affirmed under section 575, even though the senior Judge was of opinion that it should be reversed.

Ganesh Ramchandra Kirloskar for the respondent.—This case came before the Appellate Court as an application under the extraordinary jurisdiction of the High Court. That jurisdiction is derived from Regulation of II 1872, sec. 5, cl. 2. This power was transferred to the High Court by sec. 9 of 24 and 25 Vic. cap. 104. The procedure prescribed by the Letters Patent, therefore, and not that provided by Act X of 1877, ought to be followed by the High Court in the exercise of its extraordinary jurisdiction. Clause 36 of the Letters Patent provides that if the Judges should be equally divided, the opinion of the senior Judge should prevail. Mr. Justice Kemball's order, therefore, must be upheld.

WESTROPP, C.J.—This Court is of opinion that the learned Judges in the Court below were under a misapprehension in supposing that, when they differed in opinion, the opinion of the senior Judge should prevail. We consider that the provisions of the Letters Patent in this respect have been superseded by section 575 of Act X of 1877, (which is extended to miscellaneous proceedings of the nature of appeals by section 647,) so far as regards cases to which section 575 is applicable. We must, accordingly, reverse the order of the lower Court making the rule *nisi* absolute, and remand the case in order that the learned Judge may proceed in accordance with section 575 of Act X of 1877, and, if they think fit, may refer the application, in regard to which they differ to one or more of the other Judges of this Court.

The Division Bench (Kemball and Pinhey JJ.) on the case being remanded referred it to the same Full Bench

March, 31.—*Shamrav Vithal* for the appellants (the sureties) cited *Moonshee Ameer Ali Khan Bahadoor and Kassim Ali Khan* (1) *Ranee Birjobatee* v. *Pertaub Sing* (2) in addition to the case cited by Pinhey, J., in his judgment in the Court below.

(1) 13 Calc. W. Rep. Civ. Rul. 403. (2) 8 Moo. Ind. App. 169.

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AAPAJI BHIVRAV v. SHIVLAL KHUBCHAND.

G. R. Kirloskar for the respondent (the judgment-creditor).

WESTROPP, C.J.—This case clearly turns upon the words of the surety bond. The operative part of it runs thus: "Therefore we have voluntarily become sureties, and do hereby bind ourselves our heirs and executors to the said Court that the said defendant, his heirs and executors shall obey and fulfil all such orders and decrees as may be given against the said defendant in appeal; and, in default of his so doing, we bind ourselves, our 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 us." The sureties thus guaranteed the performance, by the defendant, of "all decrees" in appeal. We think that this expression cannot be cut down to the first decree of the District Court, and must apply also to the decree made by that Court on remand. Mr. Justice Pinhey does not explain how the word "decrees," standing as it does in the plural in the surety bond, would be consistent with the view he takes. In the case referred to by him as decided by Warden and Gibbs JJ., the surety bond seems to have the word "decree" in the singular as referred to by the Mr. Bosanquet. We, therefore, agree with Mr. Justice Kemball, and order that the rule *nisi* granted in this case should be made absolute, and execution of the decree be had against the sureties up to the amount specified in the surety bond, with all costs on the sureties.

Rule absolute, with costs.