

1881

JULY 27.

APPEL-

LATE

CIVIL.

5 B. 643.

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Pinhey.

LOTLIKAR (*Applicant*) v. LOTLIKAR (*Respondent*).*
 [24th and 27th July, 1881.]

The Code of Civil Procedure, Act X of 1877, s. 484—Attachment—Security.

The defendants were, on the 10th of March 1881, called upon, under s. 484 of the Civil Procedure Code (Act X of 1877) to furnish security for the satisfaction of a decree that the plaintiff might obtain against them, or to show cause on the 28th March 1881 why security should not be furnished. To this direction the order was appended, which is provided by the form at the end of the Code of Civil Procedure for a provisional attachment under s. 484. The defendants, to avoid the attachment, gave security on the 12th March 1881 for satisfaction of the decrees, and the attachment was not carried out. On the 28th March 1881, they showed cause why security should not be furnished; but the Subordinate Judge, as security had been furnished, thought the matter was at an end, and that he could not cancel the security bond.

Held—that the Subordinate Judge was wrong; the security so given was really not the security expressly provided under s. 484, and did not preclude the defendants from showing cause why no security should be furnished.

THIS was an application for the exercise of the Court's extraordinary jurisdiction against the decision of Rao Bahadur K. S. Joglekar, Subordinate Judge (First Class) at Ratnagiri.

The facts appear in the following judgments.

The Hon. Rao Saheb V. N. *Mandlik*, for the applicant, moved for a rule, which was granted.

Shamrao Vitthal, for the respondent, showed cause.

JUDGMENTS.

WEST, J.—The defendants were, on the 10th March 1881, called on to furnish security for the fulfilment of a decree that the plaintiff might obtain against them, or to show cause on the 28th March 1881 why security should not be furnished. To [644] this direction the order was appended, which is provided by the form at the end of the Code for a provisional attachment.

The defendants, to avoid that attachment, gave security on the 12th March, 1881, for satisfaction of the decree, and the attachment was not carried out. On the 28th March, 1881, they showed cause why security should not be furnished; but the Subordinate Judge, as security had been furnished, thought the matter was at an end, and that he could not cancel the security bond.

Section 484, under which he issued his order, speaks of a "conditional attachment" as within the competence of the Court. This might mean an attachment to be made conditionally on the security not being furnished or cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished, or cause shown according to the terms of the order. The form shows that the latter was the intention of the Legislature. Had the attachment, therefore, in the present case, been actually made, it would, in the first instance, have been only a temporary one: the defendants showing cause on the 28th March, 1881, would have

* Extraordinary Civil Application, No. 67 of 1881.

had it set aside. The question is, whether, by taking the only step open to them in order to prevent the discredit and inconvenience that would arise from the attachment, they have excluded themselves from the further remedy which would otherwise have been open to them. The order for attachment was supplementary to that for furnishing security, and the order for furnishing security was itself, if the defendants chose, dependent on their failing to show cause on the 28th March, 1881. Primarily, therefore, they had till that date to prepare their reasons, and the additional order for intermediate attachment could not deprive them of that right. Neither, therefore, should the giving of security to avoid the pressure of that order. As the continuance of the order beyond the 28th March, 1881, was subject to the revision of the Subordinate Judge on that day, so, too, should the continuance of the security given in substitution for the attachment. The security furnished is not really the security expressly provided for by s. 484. It was given under pressure, and follows the nature of the process in lieu of which it was given and accepted.

[645] The Subordinate Judge, therefore, had authority to set aside the security on cause shown on the 28th March, 1881, why it should not be furnished for the ulterior purposes of the suit, and he should now proceed to consider the reasons assigned for his taking that course. His order is set aside. Costs to follow the event of the suit.

PINHEY, J.—On the 10th March, 1881, the plaintiff filed a plaint in the First Class Subordinate Court at Ratnagiri against the present applicant and his father for partition of the family property of the parties. Along with the plaint the plaintiff put in an application, accompanied by an affidavit, praying that the defendants might be required to give security for the satisfaction of any decree that might be passed in the suit, or that, in default of their doing so, certain moveable property, valued at Rs. 17,622-15-8, might be attached pending the further order of the Court.

The Subordinate Court examined the plaintiff, and ordered the attachment of the property indicated in the plaintiff's application, and further ordered the defendants to show cause why they should not, on or before the 28th March 1881, be required to give security in the sum of Rs. 12,000 for the fulfilment of the decree in the suit. On the same day—the 10th March 1882—the nazir of the Court proceeded to attach the property in the possession of the defendants. The second defendant, the applicant here, at once went to the Subordinate Court, and begged that a security for Rs. 12,000, which he produced, should be at once taken and the nazir be directed to refrain from attaching the defendants' property. On receiving this application, the Subordinate Court ordered the nazir, on defendant giving security for Rs. 17,000, to stop from making the attachment.

On the 11th March, 1881, the applicant prayed that three sureties might be accepted instead of one surety, as the sum increased by the Subordinate Court to Rs. 17,000 was a very large one. This prayer was granted by the Subordinate Court. On the 12th May, the applicant gave one sufficient surety for the fulfilment, by the defendants, of any decree that might be passed in the suit.

On the 28th March, 1881 (the date on which the defendant had been originally required by the notice served on them to show [646] cause why they should not be required to give security for the fulfilment of the decree that might be passed in the suit), the applicant appeared before the Subordinate Court, and prayed that the surety given might be

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1881 discharged on the ground that, in the circumstances of the case, neither
 JULY 27. an attachment before judgment nor security were necessary.

On the 31st March, the Subordinate Judge refused this application
 APPEL- on the ground that as defendants had given security it was not now
 LATE competent to them to show cause against the conditional order made on
 CIVIL. the application of the plaintiff presented at the same time as the plaint.

But the Subordinate Court was wrong in so holding. The date fixed
 5 B. 643. by the Subordinate Court for the defendants to show cause against the
 conditional order of the 10th March, 1881, was the 28th March, 1881.
 Until that date it was not open to the defendants to show cause against
 the order: but it was clearly within the right of the defendants, and the
 Subordinate Court so ruled on the petition of the defendants, to prevent
 the interim attachment of their property by giving the security required
 by the Court. The fact of the defendant giving this security at once in no
 way took away their right to show cause on the 28th March, 1881, why
 it was not necessary, in the circumstances of the case, to order the attach-
 ment of their property before judgment, nor for the defendants to be
 required to give security for the fulfilment of the decree of the Court.

The order of the Subordinate Court, dated 31st March, 1881, must,
 therefore, be set aside, and the Subordinate Court directed to allow the
 defendants to show cause why the order of the Subordinate Court, dated
 10th March, 1881, requiring defendants to give security for the fulfilment
 of the decree of the Court, should not be discharged.

Costs of this application should be costs in the cause.

Order accordingly.

5 B. 647=6 Ind. Jur. 139.

[647] APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice,
 and Mr. Justice Birdwood.*

HAJARIMAL, (Plaintiff) v. KRISHNARAV AND ANOTHER
 (Defendants).* [29th March, 1881].

*The Dekkhan Agriculturists' Relief Act XVII of 1879, s. 72—Limitation Act XV of
 1877, sch. II, art. 59—Non-agriculturist principal—Agriculturist surety—Remedy
 against principal barred, but surety held liable—The Indian Contract Act IX of
 1872, ss. 126 to 147.*

On the 11th September, 1880, a suit was instituted against a non-agriculturist
 principal and agriculturist surety for Rs. 88-8-0, being principal and interest due
 on a bond dated the 5th August, 1877, and payable on demand. The action
 being barred against the principal debtor under the Limitation Act XV of 1877,
 sch. II, art. 59, the question was referred to the High Court, whether, under
 s. 72 of the Dekkhan Agriculturists' Relief Act XVII of 1879, the agriculturist
 surety was still liable for the amount sued for.

Held—that although the suit was barred as against the principal debtor under
 art. 59, sch. II of the Limitation Act, yet the surety, being an agriculturist,
 was still liable, inasmuch as s. 72 of the Dekkhan Agriculturists' Relief Act,
 which extends the period of limitation in the case of suits against agriculturists,
 applies to all agriculturists, whether principals or sureties, in the districts affect-
 ed by that Act.

Sections 126 to 147 of the Indian Contract Act IX of 1872, relating to con-
 tracts of guarantee, considered in connection with the effect of s. 72 of the
 Dekkhan Agriculturists' Relief Act XVII of 1879.

* Civil Reference, No. 34 of 1880.