1887
APRIL 21.

APPEL-
LATE
CIVIL.

12 B. 71.

12 B. 71.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

SHEK SULEMAN AND ANOTHER (*Original Sureties*), *Appellants v* SHIVRAM BHIKAJI AND ANOTHER.* [21st April, 1887.]

Sureties—Right of surety to appeal—Extent of sureties' liability—Attachment before judgment—Security under s. 484 of Civil Procedure Code (XIV of 1882)—Decree—Stay of execution by appellate Court—Fresh security under s. 545 of Civil Procedure Code (XIV of 1882)—Liability of original sureties.

A surety against whom a decree is sought to be enforced under s. 253 of the Code of Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution proceedings.

[72] A. and B. became sureties, under s. 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of property attached before judgment by the Court of first instance. Under their surety-bonds they were bound, in default, "to pay to the said Court such sum as the said Court may adjudge against the said defendant." The Court of first instance passed a decree in the plaintiff's favour for Rs. 229-14. Against this decree both parties appealed to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security, under s. 545, "for the due performance of such decree or order as may *ultimately* be binding on him." He accordingly gave fresh security. The appellate Court passed a decree in plaintiff's favour for Rs. 800 and costs.

Thereupon the decree-holder sought to enforce the appellate decree against the sureties A. and B. under s. 253 of the Civil Procedure Code. The sureties contended, first, that the original decree having merged in the appellate decree, they were not liable at all under their bond, which related only to the decree of the Court of first instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant: and, thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the appellate Court on defendant's furnishing a fresh security.

Held, that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. That and no other sum was such "as the said Court may adjudge against the said defendant." The security given to the Court of first instance was for the satisfaction of its decree—not the possible decree of a higher Court. If an appeal was made, it was left to the appellate Court to regulate the terms on which it would take security for the execution of its own decree.

Held, also, that as soon as the decree of the Court of first instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced inappeal, their liability would be diminished to a like extent; or, if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease, because the decree of the first Court merged in that of the appellate Court.

[F., 5 Ind. Cas. 985=5 L.B.R. 156; R., 28 M. 117=14 M.L.J. 430; (1914) M.W.N. 714; D., 23 M. 73 (80)=9 M.L.J. 265 (268).]

THIS was a second appeal from the order of H. Batty, Acting District Judge of Ratnagiri, in miscellaneous appeal No. 15 of 1885.

The plaintiff, Shek Ahmed, filed a suit in the Court of the Second Class Subordinate Judge at Vengurla, and obtained an order for attachment, before judgment, of certain property belonging to the defendant.

* Second Appeal No. 496 of 1886.

1887
APRIL 21.
APPEL-
LATE
CIVIL.
12 B. 71.

Thereupon Shek Suleman and Rama [73] Bhikaji together with a third person became sureties, under s. 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of the property which had been attached. They executed a surety-bond in the form prescribed by the High Court (1).

The Subordinate Judge passed a decree in the plaintiff's favour for Rs. 229-14, with costs. Both parties appealed against this decree to the District Court. In that Court the defendant applied for and obtained an order for stay of execution of the original decree on his furnishing security, under s. 545 of the Code of Civil Procedure, "for the due performance of such decree or order as may ultimately be binding on him." His surety was the third of the three persons who had become sureties in the Court of first instance. The District Court passed a decree, in the plaintiff's favour, of Rs. 800 and costs.

Thereupon the decree-holder applied for execution of the appellate decree, both against the judgment-debtor and against the two sureties, Shek Suleman and Rama Bhikaji. The sureties resisted this application, on the ground that the security bond continued in force only until the original Court passed a decree, but that the decree-holder having taken a fresh security for the due performance of the appellate decree, the original liability had become cancelled.

[74] This contention was disallowed by both the lower Courts. They held that the sureties were liable, under their bond, to satisfy the decree of the Court of appeal.

Against this decision the sureties, Shek Suleman and Rama Bhikaji, appealed to the High Court.

Manekshah Jehangirshah, for the appellants.

Ghanasham Nilkant, for the respondent.

At the hearing of the appeal, a preliminary objection was taken by the respondent's pleader, that the sureties had no right of appeal under the Code of Civil Procedure. He cited *Appaji Bhivrav* v. *Shivlal Khubchand* (2).

Manekshah Jehangirshah, for the appellant, relied on *Ex parte Bhikaji Vithal Ambekar* (3).

JUDGMENT.

PER CURIAM.—As the Legislature, in view of the rulings in *Ex parte Bhikaji Vithal Ambekar* (3), *Ghoree Lal Jha* v. *Sheo Narain Singh* (4) and *Akhoot Rumanah* v. *Ahmed Eusoofjee* (5); retained in Act XIV of 1882,

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(1) *Vide* Circular Orders Book, p. 226. The material part of the security bond was as follows :—

"Whereas in the suit above specified the plaintiff.....aforesaid has applied to the said Court that the said defendant.....may be called upon to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do certain property of the said defendant.....may be attached.

"And whereas a warrant has been issued by the said Court to the Nazir of the said Court, commanding him to call upon the said defendant to furnish security in the sum of Rs.....

"Therefore, I.....have voluntarily become security, and do hereby bind myself, my heirs, and executors, to the said Court that the said defendantt.....shall produce and place at the disposal of the said Court, when required, the property herein below specified, or the value of the same, or such portion thereof as may be sufficient to fulfil such decree; and, *in default of his so doing, I bind myself, my heirs, and executors, to pay to the said Court at its order such sum.....as the said Court may adjudge against the said defendant.*"

(2) 3 B. 204.
(3) 4 B.H.C.R. A.C J. 119.
(4) 8 W.R. C.R. 24.
(5) 15 W. R, C. R. 538.

1887
APRIL 21.
APPELLATE CIVIL.
12 B. 71.

s. 253, the same language substantially as it had used in s. 204 of Act VIII of 1859, we must suppose that it approved of the interpretation put on that language by the High Court; otherwise we should have felt a difficulty with advertence to *Hermitage* v. *Kilpin* (1), *Rushforth* v. *Beatson* (2), and the language of Lord Selbourne in *Bradlaugh* v. *Clarke* (3).

The previous decisions have given to the surety a right of appeal as if he were a party, and we must allow it. See *Fraser* v. *Ehrensperger* (4).

Manekshah Jehangirshah, for the appellants.—Under the surety-bond the appellants are liable only to fulfil the decree passed by the Court of first instance, and not in appeal. Section 253 of Act XIV of 1882 shows that only the decree in the original Court is to be enforced against the sureties. The rulings in *Narayan Dev* v. *Gajan Dikshit* (5) and *Shivlal Khubchand* v. *Apaji Bhivrav* (6) do not apply. They were made under Act VIII of 1859. The [75] original decree is now superseded by the appellate decree, and the fresh security taken by the appellate Court extinguishes my client's liability under their bond. Again, the order for stay of execution was made without our knowledge and consent. The extension of time thereby allowed to the judgment-debtor discharges the sureties. He referred to *Nilvaru* v. *Nilvaru* (7), and *Bishenmun Singh* v. *The Land Mortgage Bank of India* (8),

Ghanasham Nilkant, for the decree-holder.—The new security bond did not extinguish the former one. The decree-holder did not give time, nor accept new terms, so as to affect the liability of the sureties. Section 484 of the Code of Civil Procedure regulates their liability. The security bond does not confine their liability to the amount of the original decree. The Code gives a litigant the right of appeal, and expressly provides for a stay of execution. The sureties must be taken to have known that there was a possibility of an appeal and a stay of execution. Their liability is, therefore, not affected by an appeal being made, or a postponement of execution.

A suit includes an execution proceeding: see *Mungul Pershad's Case* (9).

JUDGMENT.

WEST, J.—In this case the appellants became sureties along with a third person, under ss. 483, 484 of the Code of Civil Procedure, for the production of property attached in the course of a civil suit by the Court of first instance. The decree was in favour of the plaintiff as to part of his claim. Both parties appealed to the District Court, and in that Court the defendant, in order to get execution stayed, gave security for the fulfilment of that Court's decree. His surety was the third one of those who had bound themselves in the Court of first instance, and he does not now dispute his liability.

The decree in appeal awarded a greatly increased sum to the plaintiff. The two sureties now before the Court, on their failing to cause the property of the defendant to be placed at the disposal of the Court of first instance for execution of the decree in appeal, have been held liable for the amount of that decree. [76] They now contend (1) that the decree of the Court of first instance having merged in that of the District Court, they are not liable at all under a security for execution of the decree only of the former Court;

(1) L. R. 9 Ex. 205. (2) 1 Price 343. (3) L. R. 8 App. Cas. 357.
(4) L.R. 12 Q.B. Div. 310. (5) 10 B.H.C.R. 1.
(6) 2 B. 654. (7) 6 B. 110. (8) 11 C. 244. (9) 8 I.A. 123

1887
APRIL 21.

APPELLATE CIVIL.

12 B. 71.

(2), that, at any rate, they are responsible only for so much as was there adjudged against the defendant; and (3) that this original liability has been extinguished by the total change of circumstances created when the District Court without their assent postponed execution of the first decree at the request of the defendant, and thus allowed him a delay which affected, or, at any rate, might materially affect his solvency as it existed when the first decree was passed against him.

We have already ruled that, on the decisions, an appeal lies in the present case; and proceeding now to consider the several points of objection to the judgments of the Courts below, we think (1) that the decree of the Court of first instance, immediately on its being made, satisfied the condition under which the sureties became severally bound to cause the defendant to place at the disposal of the said Court, when required, the property specified in their bond. In default they became bound "to pay to the said Court.....such sum as the said Court may adjudge against the said defendant." This liability having thus been fully incurred was not extinguished by appeal being made against the decree. If the amount recoverable by the plaintiff should be diminished in appeal, the amount of which payment could be enforced would be diminished to a like extent, and the sureties' engagement being one of indemnity would diminish in the same proportion. So, too, if the decree being reversed the sum recoverable became zero, the sureties' liability would be reduced to nothing. This was involved in the nature of their engagement, but it did not cease to be an engagement, because the decree of the first Court merged in that of the appellate Court. The liability had been fully incurred whatever afterwards happened, though in its nature variable as to amount.

But (2) we think that on the terms of the bond, as already quoted by us, and equally on the intention of the Legislature the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiffs by the [77] Court of first instance. This and no other sum would be such "as the said Court may adjudge against the said defendant." Under ss. 483, 484 of the Code of Civil Procedure, the security is to be for the defendant's placing at the disposal of the Court of first instance such property as shall satisfy its decree, not the possible decree of a higher Court. Section 488 says that an attachment shall be raised when the suit is dismissed, though an appeal may still be competent to the plaintiff. Under s. 479 a defendant may be called on to furnish security for his appearance. The surety has to bind himself on the defendant's default to pay the sum awarded against the defendant in the suit, but no one, we suppose, would extend this to the amount afterwards awarded in the first or the second appeal. What the Code contemplates in such case is apparently security to be given to the Court for the execution of its own decree which in the regular course should promptly follow judgment. If an appeal is made, it is left to the appellate Court to regulate the terms on which it will take security for the execution of its own decree. The security for its satisfaction may or may not be coincident in the liability it involves with one already incurred in the Court of first instance.

As to that liability (3), we think it is not affected by a postponement of the execution, which must have from the first been contemplated as possible and not improbable, because it is expressly provided for by the Code of Civil Procedure.

1887
APRIL 21.
APPELLATE CIVIL.
12 B 71.

For these reasons, we modify the decrees of the Courts below and pronounce the appellants liable to the decree-holders for the amount of the decree of the Court of first instance.

Costs of this appeal and of the Courts below to be in proportion to the amounts sought and now awarded.

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12 B. 78.

[78] APPELLATE CIVIL.

Before Mr. Justice West, and Mr. Justice Birdwood.

YASHVANT NARAYAN ADARKAR (*Original Opponent*), *Appellant v.* XAVIER J. J. V. DESOUZA (*Original Applicant*), *Respondent.**
[21st April, 1887.]

Civil Procedure Code (Act XIV of 1882), s. 617—Pleader—Professional conduct.

Section 617 of the Code of Civil Procedure (Act XIV of 1882) does not authorize a reference, except on a point arising in a litigation between parties in a suit, or appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties.

A pleader was fined Rs. 25 by a Second Class Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee. On appeal, the District Judge referred the matter to the High Court, under s 617 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the inquiry into the pleader's professional conduct was of a disciplinary, and not litigious, character. The fact that an appeal lay from the Subordinate Judge to the District Judge did not make it litigious. In such an inquiry no reference could properly be made, under s 617 of Act XIV of 1882.

THIS was a reference, under s. 617 of the Code of Civil Procedure, by H. Batty, Acting District Judge of Ratnagiri.

One Yashvant Narayan Adarkar, a pleader practising at Vengurla, in the Ratnagiri District, was fined Rs. 25 by the Second Class Subordinate Judge of Vengurla for refusing to act on behalf of his client, Xavier J. J.V. DeSouza, after receipt of retaining fee. Yashvant Narayan appealed to the District Court.

The District Judge referred the following questions to the High Court for decision:—

"1. Is a pleader justified in refusing to act for a client, on the ground that in a former case he had been engaged by the party to whom under his new engagement he would be opposed, unless his previous engagement has placed him in possession of facts, &c., that would give him an undue advantage?

"2. Is a pleader justified in receiving a retaining fee, with a conditional acceptance of his duties?

"3. Does a pleader by refusal to act after accepting the retaining fee commit an offence under s. 50 of Reg. II of [79] 1827? Or is it sufficient justification that he believes *bona fide* that his undertaking is inconsistent with a previous engagement, when that belief has been formed on facts which he might have ascertained before accepting the fee?

The District Judge's opinion on the first and second points was in the negative; on the third he held that the offence was complete, whenever a refusal to act was given after the acceptance of a

* Civil Reference, No. 8 of 1887.