him in a better position than he occupied when the application was made. There is no doubt that if these objections had been then taken, the application must have been rejected, and, consequently, I think we must reject the application now.

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Application rejected.

Attorneys for the petitioner :—Messrs. *Payne, Gilbert, and Sayani.*

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12 B. 411.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

VENKAPA NAIK (*Original Decree-holder*), *Appellant v.* BASLINGAPA BIN KOTRABASAPA (*Original Surety*), *Respondent.** [18th July, 1887.]

Surety—Stay of execution of decree appealed against on giving security—Surety for fulfilment of appellate decree—His liability—Mode of enforcing it—Civil Procedure Code (Act XIV of 1882), ss. 253 and 583—Execution proceedings—Separate suit—Words "in an original suit" in s. 253 of Act XIV of 1882 superfluous.

Under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so, equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject.

[412] Reading s. 253 with s. 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under s. 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of first instance.

The words "in an original suit" in s. 253 may be treated as a superfluous expression.

[**Diss.**, 23 C. 212 (216) ; **F.**, 23 B. 473 (483) ; 25 B. 409 (411) ; 4 L.B.R. 197 (198) = 14 Bur. L. R. 170 ; 103 P.R. 1906 = 1 P.L.R. 1907 ; **Appr.**, 17 A. 99 (102) ; 13 M. 1 (5) ; **R.**, 19 B. 578 (580) ; 22 B. 42 (45) ; 31 B. 128 (135) = 8 Bom. L.R. 932 ; 36 B. 42 = 13 Bom. L.R. 909 = 12 Ind. Cas. 549 ; 2 Bom. L.R. 203 (205) ; 13 C.P.L R. 104 (106) ; 7 O.C. 210 (211) ; **Expl.**, 30 B. 506 (507) = 8 Bom. L.R. 367.]

APPEAL from the decision of Rav Bahadur G. V. Bhanap, First Class Subordinate Judge of Dharwar, in *darkhast* No. 188 of 1886.

The appellant Vankapa Naik obtained a decree against Shankarbharathi Swami in original suit No. 326 of 1881 in the Court of the First Class Subordinate Judge of Dharwar. Against this decree an appeal was preferred to the High Court. Pending the appeal the execution of the decree was stayed on the judgment-debtor's furnishing security for the satisfaction of the decree of the appellate Court. One Baslingapa became his surety. The High Court confirmed the decree of the Court of first instance. Thereupon the decree-holder sought, in execution, to enforce the decree both against the judgment-debtor and the surety.

The surety objected to the execution of the decree against him, on the ground that he, having become a surety after, and not before, the passing

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* Appeal, No. 87 of 1886.

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of the decree in the original suit, the decree could not be enforced against him, in the same manner as against the judgment-debtor, under s. 253 of the Code of Civil Procedure (Act XIV of 1882) (1).

The Subordinate Judge was of opinion that the provisions of s. 253 of the Code of Civil Procedure could not be extended in their operation to the case of a person who became a surety for the fulfilment of the decree in appeal. He held that the proper mode of proceeding against the surety was by a regular suit, and not by a summary process in execution. He, therefore, refused to issue execution against the surety.

[413] Against this order the decree-holder appealed to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant.—Section 253 should be read with s. 583 of the Civil Procedure Code. Section 583 distinctly provides that decrees in appeal should be executed in the same manner as decrees in original suits. Under Act VIII of 1859, s. 204, a surety could be proceeded against in execution, whether he became a surety before or after the passing of the decree in the original suit—*Narayan Dev* v. *Gajanan Dikshit* (2); *Shivlal Khubchand* v. *Apaji Bhivrav* (3); *Apaji Bhivrav* v. *Shivlal Khubchand* (4); *Sheo Gholam Sahoo* v. *Rahut Hossein* (5). Under the present Code of Civil Procedure it has also been held that the decree-holder can proceed in execution against the surety who has bound himself to fulfil the decree in appeal—*Bans Bahadur Sing* v. *Mughla Begam* (6).

Manekshah Jehangirshah, for the respondent.—The rule in s. 253 is a special rule of procedure applicable to a special case. It is not to be extended by analogy to other cases of a like nature. It provides that a person who becomes a surety before the passing of the original decree is to be treated as though he were a party to the suit. The same cannot be said of a person who becomes a surety after the decree. He is not a party to the suit, nor a party to the appeal. The ruling in *Baboo Ram Kishen Doss* v. *Hurkhoo Sing* (7) shows the distinction between the two classes of sureties. This ruling is followed in *Gajindra Narayan Roy* v. *Hemangini Dassi* (8). These cases must have been before the Legislature when it framed s. 253 of the present Code. If we compare it with the corresponding section of the old Code—s. 204, we at once perceive the change of expression. In s. 253 of the present Code there are the words "in an original suit" which are not to be found in s. 204 of the old Code (VIII of 1859). These words are advisedly put in to remove all possibility of doubt on the **[414]** subject. Those words prevent the application of the section to the case of a person becoming a surety *after* the decree.

Ganesh Ramchandra Kirloskar in reply.—The change in the wording of s. 253 does not imply any change of intention or procedure. The ruling in *Gajendranarayan Roy* v. *Hemhngini Dasi* (8) is practically overruled by a subsequent case, *Akhut Ramana* v. *Ahmed Yousuffji* (9). There is nothing to be gained by driving the decree-holder to a regular

(1) Section 253 of Act XIV of 1882 provides as follows:—"Whenever a person has, *before the passing of a decree in an original suit*, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant: Provided a sufficient notice in writing has been given to the surety."

(2) 10 B.H.C.R. 1. (3) 2 B. 654. (4) 3 B. 204.
(5) 4 C. 6. (6) 2 A. 604. (7) 7 W.R.C.R. 329.
(8) 4 B.L.R. Appx. 27. (9) 7 B.L.R. A. C. 81.

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suit against the surety. It would be only prolonging litigation unnecessarily.

JUDGMENT.

WEST, J.—The cases cited in argument make it clear that under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. In the case of security taken after decree, and when no litigation between the parties was actually pending, a difference seems to have been recognized in some instances, but it is not necessary to discuss those cases at present. In the new law embodied in Act XIV of 1882, s. 253 says that execution of a decree in an original suit may proceed against one who has become surety for its satisfaction pending the suit, in the same manner as against the defendant. Section 583 again says that the Court shall on due application execute a decree in appeal "according to the rules herein before prescribed for the execution of decrees in suits." This should apparently empower the Court to proceed against a surety for the fulfilment of the decree in appeal who has accepted that obligation under s. 546 in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of first instance. No reason could be adduced by the respondent's pleader why a surety in the one case should not be subject to the same liabilities as in the other, and the necessity for a prompt execution is the greater in proportion as the previous contest has been prolonged.

But it is contended that the express insertion of the words " in an original suit " in s. 253 implies that, should security be [415] taken otherwise than in an original suit, the rule is not meant to be applied. There is undoubtedly some weight in this argument, and it seems to have been felt on some occasions as having great force; but we should have expected a very material change of the law to have been more clearly indicated than by this uncertain inference. It would be a change at variance with general harmony of principle in the Code, and on that account also should have been very plainly expressed. The argument that the mere adoption by s. 583 of the rules of execution prescribed for decrees in original suits does not imply the adoption of a substantive rule as to the liability of a surety, does not seem to be of any weight. If the liability and the mode of enforcing it could properly be dealt with in one section of a Code of Procedure, it could with equal propriety be adopted in another section of the same Code. The mere introduction of the words " in an original suit " will not, we think, bear the stress put upon them. The case of *Hough* v. *Windus* (1) shows that the use of a superfluous word or phrase is an insufficient ground for an inference of a special intention of the Legislature.

The forms framed by this Court under s. 652 of the Code have the force of law, except where they are inconsistent with the Code. The form of surety bonds prescribed and followed in the present case was drawn up under this power. It makes a surety directly liable to the Court, not merely to the judgment-creditor. Such a rule is not inconsistent with the provisions of the Code, though it supplements them. It has been in operation for many years without question.

(1) L. R. 12 Q. B. Div. 228.

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The surety, therefore, is, we think, directly liable, as is the judgment-debtor under the final decree, and we accordingly reverse the decree in execution of the Subordinate Judge, and direct that the application as against the respondent be dealt with in the execution proceedings. Costs of this appeal to be borne by the respondent.

Order reversed.

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12 B. 416.

[416] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

VINAYAK AMRIT DESHPANDE (*Original Defendant*), *Appellant v.* ABAJI HAIBATRAV (*Original Plaintiff*), *Respondent.**
[19th July, 1887.]

Decree—Declaratory decree—Execution—Separate suit—Mesne profits, meaning of—Decree awarding mesne profits—Construction.

In 1878 the plaintiff obtained a decree declaring that he was entitled to receive, every year, from the defendant 12 *per cent.* of the rents and profits of a certain *inám* village. The decree also awarded mesne profits from the date of the institution of the suit.

In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84.

Held, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in aeternum*. The very word "mesne" implied a terminus *ad quem* as well as *a quo*, and in the absence of a special order the terminus was the date of the decree.

[Appr., 13 C.P.L.R. 156 (157).]

THIS was an appeal from the order of Rav Bahadur Ganpatrao A. Mankar, First Class Subordinate Judge of Satara in *darkhast* No. 1153 of 1884.

The plaintiff filed a suit in 1864 to recover his share of the income of certain *inam* villages according to the terms of an old partition deed of the year 1817, supplemented by a subsequent agreement made between the parties in 1833. He asked (*inter alia*) for a yearly payment of Rs. 1,237-12-0 in perpetuity out of the revenues collected by the defendant.

The Court of first instance passed a decree in plaintiff's favour, declaring him entitled to receive yearly from the defendant one-fourth of the income of the village of Bichukli, and that he was also entitled to a fourth share of the income of two other *inam* villages, *viz.*, Sonake and Arle.

On appeal, the High Court in 1878 amended this decree by declaring that the plaintiff was entitled to 12 *per cent.* of the revenues of Bichukli and 16 *per cent.* of the revenues of each [417] of the two villages Sonake and Arle, and that the plaintiff was entitled to recover mesne profits from date of the institution of the suit (1).

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* Appeal, No. 91 of 1886.

(1) See Printed Judgments for 1878, p. 293.