

1895.

CURSADA'S,
NA'THA
v.
JA'DKAVAHU.

deem the grounds put forward in the petition sufficient to warrant me under the peculiar circumstances of the case in holding that the applicant had sufficient cause for not making the application in time I must refuse it. I presume that the executors will not ask for costs.

Rule discharged.

Attorneys for the plaintiff:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendant:—Messrs. *Nanu and Hormasji.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894.

July 10.

GOPAL NA'NA' SHET (ORIGINAL JUDGMENT-DEBTOR AND DEFENDANT),
APPELLANT, v. JOHARMAL (DECREE-HOLDER, ASSIGNEE AND PLAINTIFF),
RESPONDENT.*

Decree—Execution—Stay of execution on giving security—Subsequent execution—Default of judgment-debtor—Surety—Liability of surety in execution.

The execution of a decree for partition was stayed pending appeal on the defendant giving security that he would satisfy such decree as might ultimately be passed against him by the Appellate Court. That Court confirmed the decree of the lower Court. In obedience of the decree the judgment-debtor deposited in Court certain property in his possession consisting of bonds, decrees and other articles. But as he did not produce the whole of the property as ordered by the decree, the Court directed execution to proceed against his surety. The surety paid into Court the full sum stipulated in the surety bond. Thereupon the judgment-debtor applied that the property deposited by him in Court should be valued and made over to the decree-holder in part satisfaction of the decree *pro tanto*, and that only the balance then remaining due should be paid out of the money paid in by the surety. The Court refused, holding that the decree-holder was entitled to be paid over the whole sum paid in by the surety. On appeal,

Held (reversing the order of the lower Court) that the property already produced in Court by the judgment-debtor should be first applied towards the satisfaction of the partition decree, and that if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available.

APPEAL from the decision of Ráo Bahádur G. V. Bhánap, First Class Subordinate Judge of Násik, in dharkást No. 166 of 1890.

*Appeal No. 43 of 1894.

In Suit No. 340 of 1880 a decree for the plaintiff was passed ordering partition of certain property belonging to a joint Hindu family. The defendant appealed and, pending the appeal, obtained a stay of execution upon giving security that he would satisfy such decree as might be passed against him by the Appellate Court. That Court confirmed the decree of the lower Court.

In execution of the decree the defendant deposited in Court certain bonds, decrees and other articles, which were in his possession. He did not, however, produce the whole of the property for which he was liable under the decree, and the Court, therefore, ordered execution to proceed against his surety. The surety paid into Court Rs. 4,030-11-9, being the total amount of the surety bond.

The defendant (the judgment-debtor) contended that the whole sum so paid in by the surety should not be applied in satisfaction of the decree, but only so much as was necessary to make up the balance due after giving credit for the total value of the property which he (the judgment-debtor) had himself produced in execution. The Subordinate Judge, however, decided that the whole sum should be applied in satisfaction of the decree. His judgment was as follows:—

“The surety Shankar Nani having paid the money into Court and not having raised any sort of objection to its payment by the Court to the opponent (who is the assignee of the decree-holder), nor having claimed a credit for the articles alleged to be in deposit with the Court, the opponent is entitled to receive the money in question..... The petitioner (Gopal) not having produced the property as required by the Court, the Court ordered execution against his surety, and the latter has paid the money into Court, and the petitioner has no right to produce any more property or to claim a deduction of the value of the property already produced by him against the amount produced and paid by his surety.”

Against this order the defendant Gopal appealed to the High Court.

Shivram V. Bhandarkar for appellant:—The defendant (judgment-debtor) has deposited property in Court in pursuance of the decree. That should be applied in satisfaction of the decree *pro tanto*, and the surety can only be required to pay any balance that may be left unsatisfied. The decree-holder has no right to

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take the money paid in by the surety until he has exhausted all his remedies against the principal debtor, especially when the principal debtor is ready and willing to satisfy the decree in full.

Dáji Abáji Khare for respondent (decree-holder):—The judgment-debtor has no right to interfere after the Court has ordered execution to proceed against the surety. So long as that order stands unreversed, the money paid in by the surety must be applied towards satisfaction of the decree.

JARDINE, J.:—Certain decrees, bonds and articles, which had been included in the partition decree, happened to be in the custody of the Court below during the litigation. Default being made by the defendant (now appellant) in satisfying the decree, the decree-holder took proceedings against the surety, who thereon, in satisfaction of the order made against him by the Court, paid the amount of cash stipulated in the surety-bond. After this payment into Court the defendant applied to have the property in Court valued and made over to the decree-holder to satisfy the decree so far as the property would go. The Court refused, holding that the decree-holder was entitled to be paid over the cash paid in by the surety without deduction of the value of the property.

It is argued for the defendant-appellant by Mr. Shivrám that so long as the money paid by the surety into Court had not been paid over, he was entitled to apply to get the property mentioned in the partition decree made available to the extent of its value. No authorities have been cited on either side. It is the rule of the English law embodied in section 137 of the Contract Act (IX of 1872) that, in the absence of express stipulation to that effect, a creditor who holds securities from the principal debtor for his debt need not first resort to them before suing the surety. But the bond under our civil procedure makes the surety directly liable to the Court and not merely to the judgment-creditor—*Venkápa v. Baslingápa*⁽¹⁾. Nor is the surety a party to the present appeal which is preferred by the defendant against the decree-holder. Treating the matter as one solely

(1) L. L. R., 12 Bom., 411.

arising between them, we are of opinion, in the absence of authorities, that the Court below ought to treat the amount paid in by the surety as an asset available in execution of the partition decree. But as the guiding principle of an executing Court's procedure is to see that the decree is executed according to its terms, we are of opinion that the decrees, bonds and other property now in the custody of the Court should be brought into partition and the respondent be satisfied out of them as far as can be according to the terms of the partition decree. If the respondent does not obtain complete satisfaction in this way, the money paid into Court by the surety can then be made available. This procedure is, in our opinion, the one most consistent with equity.

For these reasons we reverse the order of the Court below and direct it to pass a new order in accordance with this judgment; but as the point now decided is new, and not without difficulty, we direct each party to pay his own costs in both Courts.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

A'NANTA'CHA'RYA (ORIGINAL PLAINTIFF), APPELLANT, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1894.

July 12.

Watan—Bombay Act III of 1874, Sec. 17—Collector's power to determine the amount of payments of a fluctuating character—Act X of 1876, Sec. 4, Cl. (c)—Jurisdiction.

The payments referred to in section 17 of Bombay Act III of 1874 are those mentioned in section 4, namely, "customary fees orquisites in money or in kind whether at fixed times or otherwise." It is the commutation of these customary and fluctuating payments that is provided for by sections 17—21. But the Collector has no power under section 17 to impose new burdens on the landowner in cases where the payment being constant already there is nothing to determine.

Plaintiff was the inámdár of a certain village. Defendant No. 3 was the watandár kulkarni of the village. He enjoyed for the performance of his duties some inám lands and a cash allowance of Rs. 5 paid annually by the inámdár. In 1884 defend-

* Appeal No. 62 of 1893.