APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Whitworth.

JAMSEDJI AND ANOTHER (ORIGINAL OPPONENTS 2 AND 3), APPELLANTS, *v.* BAWABHAI AND ANOTHER (ORIGINAL DEFENDANT AND OPPONENT 1 AND PLAINTIFF-APPLICANT), RESPONDENTS.*

1900. *December* 3.

Surety—Liability, mode of enforcing—Civil Procedure Code (XIV of 1882), sections 545-546.

The mode of enforcing payment by a surety who has rendered himself liable under section 545 (*c*) or section 546 of the Civil Procedure Code (Act XIV of 1882) is by a summary process in execution and not by means of a separate suit.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat, confirming the decision of Ráo Sáheb M. B. Hora, Second Class Subordinate Judge at Surat.

One Makan Purshotam obtained a money decree against Bawabhai Dullabhbhai.

When Makan applied for execution of the decree, Bawabhai paid the money into Court, but applied that Makan should not be allowed to take the money out, without first giving security under section 546 of the Civil Procedure Code (Act XIV of 1882) as he (Bawabhai) intended to file an appeal against the decree. The application was granted and Nowroji Sorabji became surety for Makan, agreeing to abide by such order as the Appellate Court might ultimately pass. Nowroji, the surety, died in 1893. Jamsedji and Dinbai, the appellants, were his heirs and legal representatives.

The decree was reversed in appeal in 1894, and on 26th November, 1897, Bawabhai filed the present *darkhást* both against Makan and against Jamsedji and Dinbai, the heirs and legal representatives of Nowroji, the deceased surety, for a refund of the money which had been taken out of Court by Makan on furnishing security as above stated.

Jamsedji and Dinbai contended, *inter alia*, that Bawabhai

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could not proceed in execution against the heirs and legal representatives of the deceased surety, but that his proper remedy was a regular suit.

The Subordinate Judge overruled this contention and ordered the execution to proceed.

This decision was upheld in appeal by the District Judge.

Thereupon Jamsedji and Dinbai preferred a second appeal to the High Court.

H. C. Coyaji for appellants:—The surety bond does not fall under section 546 of the Civil Procedure Code (Act XIV of 1882), for when it was executed no appeal was in existence. The section contemplates a case where an appeal is actually pending. The mode of enforcing a decree against a surety is not by a summary process in execution, but by a regular suit. In cases falling under sections 549 and 610 as amended by Act VII of 1888, the Legislature expressly provides that a surety shall be proceeded against in execution proceedings. The inference is that in other cases where no such provision is made the remedy is by a regular suit and not by a summary proceeding. The ruling in *Venkapa* v. *Baslingapa*[1] is in conflict with *Surjoo Das* v. *Balmakund*[2] and *Arunachellam* v. *Arunachellam*.[3] Having regard to these recent rulings, *Venkapa's* case ought to be reconsidered.

Manubhai Nanabhai for respondents:—The surety bond falls under section 546 of the Code of Civil Procedure (Act XIV of 1882), for at the date of its execution the appeal had actually been filed. Moreover, the bond has been all along treated as falling under section 546, and it is not now open to the appellants in second appeal to make a new case. Under section 253 of the Code, a surety for a defendant can be proceeded against in execution; and this section is *mutatis mutandis* applicable to a surety for a respondent under sections 582 and 583 of the Code. Sections 549 and 602 relate to security for costs provided by an appellant. It follows therefore that section 253 would not be applicable in such a case, and so sections 549 and 610 were

(1) (1887) 12 Bom. 411. (2) (1895) 3 Cal. 212.
(3) 891) 15 Mad. 203.

amended. But it does not follow from this that when security is given under section 546, the remedy against a surety must be by a suit and not by execution proceedings. The decision in *Venkapa's*[1] case is conclusive on this point.

CANDY, J.:—The facts of this case may be thus briefly stated. In 1884 Bawabhai obtained a money decree against Parshotam. In execution of that decree certain jewels and cash were attached. Parshotam's son Makan intervened and succeeded in raising the attachment of the jewels but not of the cash.

Makan then sued Bawabhai to have the cash declared to belong to him (Makan). He obtained a declaratory decree, but when, on Bawabhai having taken the money out of Court, Makan made an application to the Court, he was referred to a regular suit. So Makan sued Bawabhai for recovery of the money. He obtained a decree (6th October, 1891,) and on his applying for execution Bawabhai paid the money into Court, but made an application to the Court that Makan should not be allowed to take the money out without first giving security, as he (Bawabhai) was about to file an appeal against the decree awarding the money to Makan. This application was granted, and Nowroji executed a surety bond (23rd October, 1891) agreeing for himself, his heirs, and executors, with the Court to abide by the order of the appellate Court.

The Appellate Court reversed the decree which had been passed in favour of Makan, and the decree of the Appellate Court was confirmed by the High Court on 27th November, 1894.

On the 26th November, 1897, Bawabhai filed the present darkhást against Makan and against Jamshedji and Dinbai and others, the heirs of Nowroji (who had died in January, 1893), for restitution of the money which had, as shown above, been taken out of Court by Makan on furnishing security.

On 6th July, 1898, letters of administration were granted to Jamshedji and Dinbai as executor and executrix of the will of the said Nowroji. The darkhást was accordingly amended on 14th July, 1898.

(1) (1887) 12 Bom. 411.

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Jamshedji and Dinbai raised various pleas. The Subordinate Judge framed the following issues :—

1. Is the darkhást barred by limitation ?

2. Is the applicant Bawabhai entitled to claim a refund of the moneys in dispute ?

3. Is he entitled to claim interest ?

The Subordinate Judge found on issues 1 and 3 in the negative and on 2 in the affirmative. The point of limitation has been abandoned in this Court, and though Bawabhai filed a cross appeal in the District Court and cross objections in the High Court on the third point, it was not mentioned by the learned pleader in this Court.

On the second point the Subordinate Judge relied on the authority of the decision in *Venkapa* v. *Baslingapa*[1] and *Thirumalai* v. *Ramayyar*.[2]

On appeal made by Jamshedji and Dinbai the District Judge confirmed the order of the Subordinate Judge.

Jamshedji and Dinbai have now made a second appeal to this Court; and the first point taken by Mr. Coyaji on their behalf is that when Nowroji passed the bond (Exhibit 14) there was no appeal pending, and that thus there was no surety bond under section 546, Civil Procedure Code, and therefore in any case Bawabhai's sole remedy is by suit on the bond. This point had never before been taken in the lower Courts. It is possible that though the appeal had not been filed when Bawabhai applied that security should be furnished before Makan was allowed to take the money out of Court, yet when Nowroji executed the security bond, the appeal had as a fact been filed. The case has all along been treated as falling under section 546. A similar case is to be found in *Kusaji* v. *Vinayak*.[3] This report (taken with the reports of the case at prior stages at Printed Judgments for 1893 page 491 and Printed Judgments for 1895 page 227) shows that the surety bond in question was taken before the appeal had been actually filed, but there never was any question as to its falling within the provisions of section 546.

This brings us to Mr. Coyaji's second point. In *Kusaji* v. *Vinayak* just quoted (*supra*) the District Judge, following the

(1) (1887) 12 Bom. 411. (2) (1889) 13 Mad. 1.
(3) (1898) 23 Bom. 479.

Calcutta ruling in *Surjoo Das* v. *Balmakund Das*,[1] held that the liabilities of the surety could not be enforced in execution, but by separate suit. In appeal to the High Court, Parsons, Acting C.J., and Ranade, J., differed from that view. Parsons, Acting C.J., said :—"This High Court, however, has decided that the mode of enforcing payment by a surety is by summary process in execution, and not by means of a separate suit—*Venkapa Naik* v. *Baslingapa*".[2]

Mr. Coyaji asks us to reconsider that ruling, and to say that in the light of later decisions in other High Courts this Court has no alternative but to reject the darkhást and refer Bawabhai to a regular suit against the representatives of Nowroji (the surety).

No doubt it is the fact that Mr. Justice Muttasami Ayyar, who in April, 1889, held (*Thirumalai* v. *Ramayyar*[3]) that in the case of security given under section 546 the decree of the Appellate Court could be enforced in execution proceedings against the sureties under the provisions of sections 253, 583, yet in the later case (September, 1891) of *Arunachellam* v. *Arunachellam*[4] held in the case of a respondent in an appeal to the Privy Council giving security under section 646 (*b*) (analogous to a respondent in an ordinary appeal giving security under section 546) that section 253 could not be treated as incorporated in section 610, as shown by the addition to section 610 made by Act VII of 1888, and therefore the decree-holder's only remedy against the sureties was by regular suit. This is practically the view taken by a Calcutta Division Court in the case already noted (*Surjoo Das* v. *Balmakund*[5]) in the case of security given under section 546. Mr. Justice Prinsep, however, confessed that he would have had some difficulty in arriving at this conclusion if the matter had been *res integra*, but he thought it unnecessary, after the course of decisions in the Calcutta High Court, to express any dissent, more especially as the Code of Civil Procedure was then (August, 1895) under amendment, and the matter would probably attract the attention of those responsible for our legislation. Mr. Justice

(1) (1895) 23 Cal. 212.
(2) (1887) 12 Bom. 411.
(3) (1889) 13 Mad. 1.
(4) (1891) 15 Mad. 203.
(5) (1895) 23 Cal. 212.

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Ghose contented himself with adhering to prior decisions of the Calcutta High Court, namely (*a*) *Tokhan Singh* v. *Udwant Singh*,[1] a case of security given under section 545, and their Lordships relied simply on the authority of (*b*) *Kali Charun Singh* v. *Balgobind Singh*,[2] a case of security *for costs* given under section 549, and the High Court held (February, 1888, before the amending Act VII of 1888 came into force) that it was perfectly plain that, wherever the Legislature intended that a security bond might be enforced summarily without the intervention of a regular suit (as in the case provided for by section 336,) it has distinctly provided for it; but in the case of a surety who becomes a surety in an appellate Court no such provision is made; (*c*) *Radha Pershad Singh* v. *Phuljuri Koer*,[3] in which it was decided (in July, 1885) in the case of security *for costs* in an appeal to the Privy Council given under section 602, that section 253 was not incorporated in section 610, and the only remedy was by regular suit against the surety.

The majority of a Full Bench at Allahabad (*Bans Bahadur Singh* v. *Mughla Begum*[4]) had held (January, 1880) the contrary view in the case of security for costs furnished by an appellant in the Privy Council.

Having regard to the above decisions and to the obvious fact that when Act VII of 1888 became law, the reported decisions showed a difference of opinion between the Calcutta and Allahabad High Courts as to the remedy to be sought by a decree-holder against a person who stood *security for costs*, it may fairly be concluded that the additions made by Act VII of 1888 to sections 549 and 610 of the Civil Procedure Code were simply intended to put an end to that difference, and to provide that when a surety renders himself liable on behalf of an appellant for the costs of a respondent in an appeal, then such costs may be recovered in execution against the surety. But it does not follow that the Legislature intended that where a surety has rendered himself liable on behalf of an appellant for the due performance of the decree or order of an Appellate Court (section 545 (*c*)), or on

(1) (1894) 22 Cal. 25.
(2) (1888) 15 Cal. 497.
(3) (1885) 12 Cal. 402.
(4) (1880) 2 All. 604.

behalf of the respondent for the restitution of property and the due performance of the decree or order of the Appellate Court (section 546), in those cases the recovery should not be by proceedings in execution, but by regular suit against the surety. We have for so many years in the Bombay Presidency followed the reasoning of Mr. Justice West in 1887 (1) in the case of *Venkapa Naik* v. *Baslingapa*, that we are not prepared now to assume that the reasoning has become valueless, because the Legislature in 1888, possibly for the sake of greater caution, made additions to sections 549 and 610, providing that a surety on behalf of the appellant for the respondent's costs may be proceeded against in execution just as if the surety was the appellant.

Mr. Manubhai, the pleader for Bawabhai before us, has called our attention to the words in section 253, "in the same manner as a decree may be executed *against a defendant*," showing that the apparent intention of the Legislature was to confine section 253 to the case in which *a defendant* has furnished security before the passing of a decree in an original suit, and (by the application of sections 582, 583), in appeals to the case in which *a respondent* has furnished security before the passing of the appellate decree. As under sections 549 and 602 the security for costs is furnished by the *appellant*, section 253 would be inapplicable, and therefore additions to sections 549 and 610 were necessary to specially provide that the costs may be recovered from the surety in the same manner as if he were the appellant. The argument is ingenious. Instances of defendants furnishing security before the passing of a decree in an original suit are to be found in the provisions of sections 477 to 480 (arrest before judgment) and of sections 483 to 489 (attachment before judgment). But then what are we to say of the case of a plaintiff in the course of a suit required to furnish security for costs under section 380 or 381? If the suit is dismissed with costs, was it expressly intended by the Legislature that in such a case the remedy against the surety could only be by separate suit? or is it a *casus omissus*? or does "a defendant" in section 253 simply mean the party against whom the decree has been passed? If Mr. Manubhai's argument is adopted, we shall have this anomaly: when a

(1) (1887) 12 Bom. at pp. 414, 415.

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respondent furnishes security under section 546, section 253 will be applicable: when an *appellant* furnishes security under section 545, section 253 will not be applicable. The subject is in some confusion. Thus, take the case of a Court to which a decree has been sent for execution requiring security from the judgment-debtor before staying execution, to enable the judgment-debtor to apply for stay under section 545 (sections 239, 240, and see Form XXI. Bombay High Court Circulars, p. 192); section 253 does not in terms apply, for the security is taken after decree; section 583 does not apply, because the security is taken under section 240 before application is made under section 545, and is quite distinct from the security furnished under section 545. Section 336 similarly applies to circumstances arising subsequent to the decree of the first Court and is not in the chapters relating to appeals: therefore there is a special provision in section 336 that in the case of a surety such security may be realised in manner provided by section 253. But there is no such provision in section 240. And yet there is no reason why a surety in the one case should not be subject to the same liabilities as in the other.

The view hitherto taken by the Bombay High Court with regard to sureties under sections 545, 546 is supported by the judgment of the Allahabad High Court in *Janki Kuar* v. *Sarup Rani*.[1] It is a violent assumption that the Legislature by the amendment in Act VII of 1888 of sections 549, 610, Civil Procedure Code, expressly intended that sureties might be proceeded against in execution *for costs*, but when the security is for due performance of the decree, the remedy against sureties must be by suit. There is no reason why there should be such a difference.

We therefore see no reason to depart from the practice of this Court; and we confirm the order and dismiss the appeal and the cross-objections with costs.

Appeal dismissed.

(1) (1895) 17 All. 99.