

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911.

July 31.

MOTILAL VIRCHAND (ORIGINAL DEFENDANT 1), APPELLANT, *v.* THAKORE CHANDRASANGJI HIMATSANGJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Decree—Execution—Appeal—Surety-bond for restitution—Suit.

Where a bond is passed as security for restitution in the event of the decree being reversed in appeal, a suit based upon such bond can be maintained.

FIRST appeal against the decision of Chunilal Lallubhai, First Class Subordinate Judge of Ahmedabad, in Suit No. 465 of 1907.

The facts were as follows :—

Thakore Mohansangji Hamirsangji brought a suit, No. 18 of 1894, in the Court of the Assistant Judge, F. P., at Broach against Thakrani Bai Jilba *alias* Sahebrani, widow of Thakore Himatsangji Prathisangji, deceased Thakore of Matar, and four others, (1) for a declaration that defendant 2, Chandrasangji, was not the son and heir of the late Thakore of Matar and that he, the plaintiff, was entitled to the property of the deceased Thakore and (2) for recovery of possession with mesne profits from date of suit till delivery of possession of all the moveable and immoveable property attached to the Matar estate. The claim was valued at Rs. 2,33,053-5-4. The Assistant Judge dismissed the suit with costs.

The plaintiff preferred appeal, No. 20 of 1898, to the High Court at Bombay, which, on the 7th March 1899, reversed the decree and awarded the claim for possession of the estate including all property moveable and immoveable.

Respondent-defendant 2, Thakore Chandrasangji, appealed to Her Majesty in Council and applied to the High Court for stay of execution of its appellate decree. The application was refused, but it was ordered that Mohansangji Hamirsangji, the successful appellant-plaintiff, should, before he was allowed to execute the decree, give security to the extent of the moveable

* First Appeal No. 86 of 1909.

property and mesne profits of the immoveable property for three years. In consequence of the said order Hemchand Mulchand and Motilal Virchand executed a bond to the Assistant Judge on the 26th August 1899 as follows:—

In case the order passed by the Honourable High Court in Appeal No. 20 of 1898 be set aside in the appeal preferred by the said defendants to the Privy Council, and the possession of the moveable property is ordered to be restored, then the plaintiff Thakore Mohansangji Hamirsangji shall give back to the defendants the whole of the moveable property of which the plaintiff Thakore Mohansangji Hamirsangji may have come in possession.

On the 30th August 1899 the High Court ordered on the application of Mohansangji that the sum of Rs. 10,000, which had been paid in by the Collector as Manager of the property in suit, should be paid to Mohansangji on the Registrar being satisfied that the security had been furnished.

The appeal to the Privy Council was decided on the 22nd June 1906. The decree of the High Court was reversed and the suit was dismissed with costs: *Chandrasangji Himatsangji v. Mohansangji Hamirsangji*⁽¹⁾.

Owing to the successful result of the appeal to the Privy Council, Thakor Chandrasangji Himatsangji brought a suit, on the 5th October 1907, in the Court of the First Class Subordinate Judge of Ahmedabad against the said two sureties Motilal Virchand and Hemchand Mulchand, deceased represented by his legal representatives, for the recovery of the amount of the surety bond, namely, Rs. 10,000 and interest Rs. 5,875, in all Rs. 15,875 with running interest and costs.

The defendants answered *inter alia* that the suit could not be maintained on the security bond.

The Subordinate Judge found that the suit was maintainable and passed the following decree:—

I direct that the plaintiff do recover Rs. 15,875 and costs with running interest at the rate of 6 per cent. per annum from the date of judgment to the date of recovery not exceeding the period of three years from defendant 1 and from the estate of the deceased Hemchand Mulchand. The defendants to bear their own costs.

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Defendant 1, Motilal Virchand, preferred an appeal.

, *G. S. Rao* (Government Pleader) for the appellant (defendant 1).

G. K. Parekh for the respondent (plaintiff).

SCOTT, C. J.:—On the 21st of June 1899 an application was made to the High Court praying that execution of the decree of the High Court in Appeal No. 20 of 1898 from an original decree of the Assistant Judge of Broach might be stayed pending disposal of the appeal preferred by the petitioner to Her Majesty in Council.

The application for stay was refused, but it was ordered that Mohansangji Hamirsangji, the successful appellant to the High Court, should, before he was allowed to execute the decree, give security to the extent of the moveable property and mesne profits of the immovable property for three years.

In consequence of this order Hemchand Mulchand and Motilal Virchand executed a bond to the Assistant Judge of Broach on the 26th of August 1899 agreeing with the Court as follows:—

“In case the order passed by the Honourable High Court in Appeal No. 20 of 1898 be set aside in the appeal preferred by the said defendants to the Privy Council, and the possession of the moveable property is ordered to be restored, then the plaintiff Thakor Mohansangji Hamirsangji shall give back to the defendants the whole of the moveable property of which the plaintiff Thakor Mohansangji Hamirsangji may have come in possession.”

Now after the execution of that bond an application for execution which had been filed by Mohansangji was dismissed by the District Judge on the ground that it was not in proper form, and on the next day, the 31st of August 1899, the High Court ordered on an independent application of Mohansangji that the sum of Rs. 10,000 which had been paid in by the Collector as Manager of the property in suit should be paid to Mohansangji on the Registrar being satisfied that the security had been furnished.

The appeal to the Privy Council was successful and the present suit was filed to recover the sum of Rs. 10,000 paid to Mohansangji as above stated.

The defendants are the executants of the surety bond.

Two points have been taken in objection to the suit. First, it is said that the obligee of the bond must proceed in execution against the obligor where the bond is passed as security for restitution in the event of a decree being reversed, and that no suit based upon such a bond can be maintained, and secondly, it is said that if the first objection is a good one the Court would be prevented by considerations of jurisdiction from converting this suit into a proceeding in execution to enforce the bond against the surety.

To deal with the last point first, the defendants live in Ahmedabad and in consequence of their residence in that district they have been sued in the Court of the First Class Subordinate Judge of Ahmedabad. The decree has to be executed in the first instance by the District Court of Broach, and has not been transmitted for execution to the Court of the First Class Subordinate Judge, Ahmedabad : therefore, it is said, there is an objection to converting the suit into a proceeding in execution.

In the view that we take of the case that objection cannot prevail, for, we think that assuming that the bond could be enforced by a proceeding in execution, it is not necessary for the obligee to resort to that procedure. He may file a suit upon the contract contained in the bond.

That was the view which was taken many years ago by the Allahabad High Court in *Abdul Kadir v. Baboo Hurree Mohun*⁽¹⁾, and it is a view which does not appear to have been controverted definitely in any of the many subsequent decisions to which reference has been made.

Reliance is placed upon the decisions of this High Court in *Venkapa Naik v. Baslingapa*⁽²⁾, *Kusaji v. Vinayak*⁽³⁾, and *Jamsedji v. Bawabhai*⁽⁴⁾, and we are asked to infer from them that this suit will not lie. We do not think that any such inference can be drawn. In *Venkapa Naik v. Baslingapa*⁽²⁾, the Subordinate Judge was of opinion that the provisions of

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(1) (1874) 6 N.-W. P. H. C. R. 261.

(3) (1898) 23 Bom. 478.

(2) (1887) 12 Bom. 411.

(4) (1900) 25 Bom. 409.

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section 253 of the Code of Civil Procedure of 1882 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, and he, therefore, refused to issue execution against the surety. On appeal it was contended on behalf of the appellant that there was nothing to be gained by driving the decree-holder to a regular suit against the surety, that it would be only prolonging litigation unnecessarily, and that the authorities showed that the liability could be enforced by proceeding in execution. Mr. Justice West in delivering the judgment of the Court said: "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," and he held that there was no objection to following the same procedure in cases under section 546 as under section 253.

In *Kusāji v. Vinayak*⁽¹⁾, there is a dictum of Mr. Justice Parsons that this Court had decided that the mode of enforcing payment by surety is by summary process in execution and not by means of a separate suit. That is an inaccurate statement of what was said by Mr. Justice West in *Venkapa Naik v. Baslingapa*⁽²⁾. It omits the word "ordinary" which in connection with the argument addressed to us is very material. There is nothing in the decision in *Venkapa Naik v. Baslingapa*⁽²⁾, which should induce us to hold that a suit will not lie to enforce the surety bond even in a case where the ordinary mode of proceeding would be in execution.

Under the present Code of Civil Procedure where any person has become liable as surety for the performance of any decree or for the restitution of any property taken in execution of a decree, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees, and

(1) (1898) 23 Bom. 478.

(2) (1887) 12 Bom. 411.

such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.

That, however, does not, we think, involve the conclusion that a suit cannot be filed upon the contract created by the surety bond.

We therefore agree with the learned Subordinate Judge in thinking that this suit will lie.

Then it is contended that the Rs. 10,000, the recovery of which is the object of the suit, is not money realized in execution and therefore the sureties are not liable to restore it.

It is to be observed, however, that the sureties do not confine their liability to money realized in execution, but they contract that the plaintiff Mohansangji shall give back to the defendants the whole of the moveable property of which the plaintiff may have come in possession. These words cover, in our opinion, the Rs. 10,000. We affirm the decree and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

CHUNILAL VIRCHAND (ORIGINAL PETITIONER), APPELLANT, v. THE AHMED-
ABAD MUNICIPALITY (ORIGINAL OPPONENT), RESPONDENT.*

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Bombay District Municipal Act (Bombay Act III of 1901), section 160†—Municipality—Compulsory acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—High Court—Construction of statutes.

No appeal lies from the decision of a District Court under clause (3) of section 160 of the Bombay District Municipal Act (Bombay Act III of 1901).

* First Appeal No. 200 of 1910.

† The section runs as follows :—

160. (1) If a dispute arises with respect to any compensation, damages, costs or expenses which are by this Act directed to be paid, the amount, and if necessary, the apportionment of the same, shall be ascertained and determined