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was suspended and if so for how long. That was a novel point and each party will bear his own costs of that issue.

Attorneys for plaintiff: Messrs. *Little & Co.*

Attorneys for defendants: Messrs. *Payne & Co.*

Decree accordingly.

G. G. N.

APPELLATE CIVIL.

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

1916. December 15.

CHANDULAL DALSUKHRAM (ORIGINAL PLAINTIFF), APPLICANT *v.* JESHANGBHAI CHHOTALAL (ORIGINAL APPLICANT-SURETY), OPPONENT.*

Civil Procedure Code (Act V of 1908), Order XXXVIII, Rule 5, sections 115 and 145—Attachment before judgment—Surety for defendant—Death of defendant before hearing—Legal representative brought on record—Application by surety for discharge, whether premature.

The petitioner plaintiff having obtained an attachment before judgment against the defendant, the opponent stood surety for the defendant whereupon the attachment was raised. The defendant died before the hearing of the suit and his widow was immediately brought on record as his legal representative. The surety afterwards applied to the Court for his discharge on the ground of the death of the defendant. The lower Court ordered that the surety should be discharged. The petitioner, therefore, having applied to the High Court in revision,

Held, that the order of the Court discharging the surety was premature and should be set aside under section 115 of the Civil Procedure Code, 1908, as the proceedings had not come to an end, because they had been revived by the substitution of the widow of the defendant and the stage had not been reached at which the liability of the surety could be decided.

APPLICATION under extra-ordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908)

* Application under Extra-ordinary Jurisdiction No. 99 of 1916.

against the order passed by M. I. Kadri, Extra Joint Subordinate Judge at Ahmedabad, in Suit No. 745 of 1915.

One Motiram Bechar (defendant) took on rent from the petitioner (plaintiff) his theatre for a period of 12 months agreeing to pay Rs. 977 as rent per month.

The rent having run into arrears the petitioner filed a suit against the defendant for the recovery of Rs. 2,167-6-0 and costs and at the same time applied for an attachment before judgment of all the moveable properties belonging to the defendant.

An order having been passed on the petitioner's application directing the defendant to furnish security, the opponent stood surety and signed a surety-bond whereby he guaranteed the payment by the defendant of Rs. 2,167-6-0 and costs or such other amount as the Court might order him to pay and agreed that on the defendant's failure to pay the said amount he would be bound to pay the same.

By reason of the surety-bond the attachment was raised and the defendant was allowed to deal with the property as his own. The defendant having died before the hearing of the suit, the petitioner at once substituted defendant's widow on the record as his representative. The opponent afterwards applied to the Court for cancellation of the surety-bond and for his discharge.

The Subordinate Judge ordered that the surety should be discharged. His reasons were as follows :—

"*Prima facie* on the defendant being dead it is beyond the power of the Court to order him to pay anything. When this cannot be done, no obligation would attach on the surety, for, his turn of payment would come only on the default of the original defendant in making payment.

The suretyship was only for the original defendant and it cannot extend to his heirs.

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The rulings (I. L. R. 24 Mad. 637 and 25 W. R. 250) support the view I have taken. Hence though the applicant has not been able to show any specific provision in the Code of Civil Procedure under which he could be discharged, I think it is but fair under the common law and in equity that the present application should be granted.

I discharge the applicant from any liability attaching to him under the surety-bond executed by him on the 9th October 1915."

The plaintiff preferred an application to the High Court under the extra-ordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908).

G. N. Thakor, for the petitioner :—The lower Court has no jurisdiction to entertain the application of the surety for his discharge. There is no provision in Order XXXVIII of the Civil Procedure Code, 1908, as to discharge of a surety where a person has become a surety in case of attachment before judgment. The obligation of the surety has nothing to do with the existence or death of the debtor. The consideration is single and indivisible and the surety cannot be discharged by the death of the debtor. As a result of the acceptance of the surety-bond the debtor succeeded in removing his property outside the jurisdiction of the Court and his death cannot affect the position of the creditor. Again as section 130 of the Contract Act, 1872, as to discharge of surety by death of the debtor, does not apply to administration bonds, the same principle should be applied here : see *Subroya Chetty* v. *Ragammall*[1]; *Bai Somi* v. *Chokshi Ishvardas Mangaldas*[2].

The cause of action has not abated in this case. We have brought the widow of the deceased debtor on the record as his legal representative. The order is, therefore, contrary to law on the merits : see *Lloyd's* v. *Harper*[3]; *Burgess* v. *Eve*[4].

(1) (1904) 28 Mad. 161.
(2) (1894) 19 Bom. 245.
(3) (1880) 16 Ch. D. 290.
(4) (1872) L. R. 13 Eq. 450.

As to interference in revision I submit this is an exercise of jurisdiction not provided for by the Code. At any rate it is a material irregularity that has led to failure of justice.

T. R. Desai, for the opponent :—It is true that there is no express provision in Civil Procedure Code, 1908, as to the discharge of a surety in case of attachment before judgment, but from the mere fact that there is no such express provision it cannot be inferred as a matter of law that a surety cannot get his discharge. The Order XXXVIII of Civil Procedure Code, 1908, is not exhaustive. It does not cover points of substantive law. By section 151 of the Code, Courts are invested with certain inherent powers in matters of procedure to give the necessary relief. A surety can go to Court and say that the debtor is dead and so it is not possible to compel him (the debtor) to produce an amount in Court to satisfy the decree that may be passed and that therefore it may be declared that he is discharged from the obligation. The obligation extends to the debtor personally and not to his legal representative after his death. The cases of *Krishnan Nayar* v. *Ittinan Nayar*[1]; *Mohip Narain* v. *F. A. Shaw*[2]; *Raj Narain Mookerjee* v. *Ful Kumari Debi*[3] support my contention. If the surety waits the plaintiff might without a regular suit enforce the bond under section 145 of the Civil Procedure Code, 1908, in execution and in the meantime the deceased debtor's representatives might do away with his estate and the surety would be left without any remedy or means to indemnify himself. The only remedy of the plaintiff is to proceed against the estate of the deceased in the hands of his legal representatives. No cause of action, therefore, survived

(1) (1901) 24 Mad. 637. (2) (1876) 25 W. R. 250.
(3) (1901) 29 Cal. 68.

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to the plaintiff against the surety after the death of the debtor.

Assuming the order is wrong, it is at the most an error of law. It cannot be said that the Subordinate Judge had no jurisdiction. The Courts have refused to interfere under section 115 of the Civil Procedure Code, 1908, on grounds like or similar to these: *Amir Hassan Khan* v. *Sheo Baksh Singh*[1]; *Muhammad Yusuf Khan* v. *Abdul Rahman Khan*

SCOTT, C. J.:—In this case there was an attachment before judgment and the opponent stood surety under a surety bond for the defendant agreeing with the Court that the defendant should, when the Court so directed him, produce in Court Rs. 2,167-6-0 and costs, or the amount which the Court might direct, and that if he failed so to produce it the surety bound himself to pay at the order of the Court such sum as might be ordered by the Court to be paid by the defendant. By reason of the surety bond the defendant was enabled to deal with this property freed from attachment. He died before the hearing of the suit was arrived at in January 1916. The plaintiff at once had his widow substituted as his representative, and she is now the defendant in the suit. The surety afterwards applied to the Court that he might be discharged, that his surety bond should be cancelled, and the Court ordered that the surety should be discharged, being of opinion that *prima facie* on the defendant being dead it is beyond the power of a Court to order him to pay anything, and when this cannot be done, no obligation would attach on the surety for his turn of payment would only come on the default of the original defendant in making the payment. That, however, is not correct, for the cause of action survives against the representative of the defendant,

(1) (1884) 11 Cal. 6. (2) (1889) 16 Cal. 749.

and the representative of the defendant has been brought on the record, and will, if the plaintiff's case is tried and succeeds, be liable to satisfy the plaintiff's claim out of the assets of the deceased. The rulings followed by the learned Judge, *Krishnan Nayar* v. *Ittinan Nayar*[1] which was a case of a guarantee for the production of the person of the defendant, and *Mohip Narain* v. *F. A. Shaw*[2] which was upon its true construction a guarantee for only a limited period, are not in point in connection with the facts of this case. The liability of the surety cannot be determined until the time for execution has arrived. Section 145 of the Civil Procedure Code provides that "where any person has become liable as surety...for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit...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 such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47."

It is in connection with this provision of the Civil Procedure Code that the question arises whether we ought not to interfere under section 115 of the Civil Procedure Code on tho ground that the Court has committed a material irregularity in the exercise of its jurisdiction. The manner in which the liability of the surety is to be enforced is specified in section 145, and it has to be enforced at a particular stage of the proceedings. The proceedings had not come to an end because they have been revived by the substitution of the widow of the defendant, and the stage has not been reached at which the liability of the surety can be decided. In my opinion, therefore, the order of the

(1) (1901) 24 Mad. 637. (2) (1876) 25 W. R. 250.

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Court discharging the surety is altogether premature and should be set aside. The surety must pay the costs of these proceedings.

HEATON, J. :—I agree with the order proposed. The result stated is necessarily arrived at whether we take the view that there has been want of jurisdiction or a serious irregularity in the exercise of jurisdiction. It seems to me that there are reasons of considerable cogency which point to a want of jurisdiction, but as the result remains unaffected, whether it is attributed to that ground or to a serious irregularity in the exercise of jurisdiction, it does not seem to me very profitable to discuss which of the views is the one which ought to prevail in this case.

Order set aside.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916.

December 22.

GURURAO SHRINIVAS HEBLIKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Saranjam—Grant of royal share of revenue—Resumption of Saranjam—Lands can be still held on payment of assessment—Suit to recover possession of land—Revenue Jurisdiction Act (X of 1876), section 4—Pensions Act (XXIII of 1871), section 4.

It is well established that in the case of Saranjam or Jaghir (the terms being convertible) the grant is ordinarily of the royal share of the revenue and not of the soil, and that the burden of proving that in any particular case it is a grant of the soil lies upon the party alleging it.

Krishnarav Ganesh v. *Rangrav*[1], *Ramchandra* v. *Venkatrao*[2] and *Ramkrishnarao* v. *Nanarao*[3], followed.

* First Appeal No. 169 of 1913.

(1) (1867) 4 Bom. H. C. R. (A. C. J.) 1. (2) (1882) 6 Bom. 598 at p. 606.

(3) (1903) 5 Bom. L. R. 983.