

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

1921.

September
24.

ABDUL HUSSEIN ESSUFALLI (PLAINTIFF) v. D. J. MISTRI & Co.
(DEFENDANTS)^o.

Civil Procedure Code (Act V of 1908), sections 55 (4) and 145—Security for appearance of judgment-debtor—Default—Application by judgment-creditor to execute decree against surety—Discretion of Court to refuse execution—Practice.

The security to be furnished by the judgment-debtor under section 55 (4) of the Civil Procedure Code, should continue until a final order is made upon the petition. Where a person has become liable as surety under this section and the judgment-creditor applies to the Court to execute the decree against him under section 145, the Court may in exercise of its discretion refuse to make an order in favour of the judgment-creditor.

CHAMBER summons in execution proceedings.

One Abdulla Hussein Essufalli, the plaintiff, sued the defendants, D. J. Mistri & Co., in the sum of Rs. 13,054 in respect of transactions entered into by the plaintiff with the defendants. The defendants in their written statement denied the plaintiff's claim and counter-claimed against the plaintiff for a sum of Rs. 12,120-8-0.

On 8th August 1919, the suit came on for hearing when the plaintiff did not appear whereupon the suit was dismissed and a decree was passed in favour of the defendants in respect of their counter-claim for Rs. 12,679-14-11, interest and costs of the suit. As the plaintiff did not pay the decretal amount, an execution was issued against him and he was arrested on the 15th March 1921 and brought before Pratt J., the Chamber Judge on the same day when the plaintiff expressed his intention to apply to be declared an insolvent and asked for time to file his petition in insolvency. His Lordship made an order that the plaintiff should deposit Rs. 2,000 in Court and furnish

security that he would so apply and appear in Court on 31st March 1921. One Husseinbhai Abdulla therefore deposited Rs. 2,000 in Court as security and the plaintiff was thereafter released. On the same day, the plaintiff filed his petition in insolvency, and a day after (i.e., on 16th March 1921) the plaintiff was adjudicated an insolvent.

~1921.

ABDUL
HUSSEIN

v.

D. J. MISTRY
& Co.

As the plaintiff did not appear and the surety failed to produce him in Court on 31st March 1921, Pratt J. made an order that the plaintiff be re-arrested on the same warrant and committed to jail.

On 19th April 1921, the plaintiff obtained an order for *interim* protection from the Insolvency Court. On 8th September 1921, the defendants took out a chamber summons for an order that the surety bond given by Husseinbhai Heptulla for the appearance of the plaintiff on 31st March 1921 should be estreated and that the sum of Rs. 2,000 deposited in Court should be realized by the Prothonotary and paid to the defendants, the said Husseinbhai Heptulla having failed to produce the plaintiff in Court on the appointed day.

The surety in showing cause denied that the plaintiff failed to attend Court on 31st March 1921 and submitted that as no order for realizing the security had been made by the Chamber Judge on 31st March 1921 and the defendants had failed to make an application in that behalf, the defendants were not, at a later stage, entitled to apply for an order to realize the security, the plaintiff having in the meanwhile duly filed his petition in insolvency and obtained a protection order from Court.

The material portion of the plaintiff's affidavit was as follows :—

3. On the same day, i.e., on 15th March 1921 I filed my petition. On 16th March 1921 I was adjudicated insolvent. On 31st March 1921 I attended

1921.

ABDUL
HUSSEIN
v.
D. J. MISTRI
& Co.

the Honourable Court. I am old, aged 60 years. I did not know the Court in which His Lordship the Chamber Judge was sitting. I moved from Court to Court and when I entered the Court, His Lordship the Chamber Judge was presiding. I found that he was sitting in Court. I made enquiries of the officer who was sitting in Court. He asked me to go as the Chamber work was over. I deny that I evaded arrest or kept in hiding as alleged by D. J. Mistri.

4. On 5th April 1921 I applied to the Insolvency Court for *interim* protection and the provisional protection was given to me for fifteen days. I sent usual notices to my creditors and sent one to the defendants on or about the 15th April 1921. On 19th April, His Lordship the Commissioner in Insolvency gave me a protection order from all process and ordered the protection to continue in force and all process stayed until 3rd Tuesday in July 1921. On 19th July 1921, His Lordship the Commissioner in Insolvency extended the said protection order until the 3rd Tuesday in October 1921.

6. I deny that I failed to appear in Court on 31st March 1921. As his Lordship the Chamber Judge was sitting in Court when I went in his Court I am not aware of the nature of the order His Lordship made against me.

Jinnah, for the defendants in support of the summons.

Taraporevala, for the surety to show cause.

MACLEOD, C. J.:—The defendants in Suit No. 1312 of 1918 have taken out this summons as decree-holders on the counter-claim filed by them in the above suit, for an order that the surety bond given by one Husseinbhai Heptulla for the appearance of the plaintiff before the Chamber Judge on the 31st March 1921 should be estreated and that the sum of Rs. 2,000 should be realized by the Prothonotary and paid to the defendants, as the said Husseinbhai Heptulla had failed to produce the plaintiff in Court on such day. The plaintiff was arrested at the instance of the defendants and produced before the Judge in Chambers on the 15th March when he asked for time that he might file his petition under the Insolvency Act. Accordingly the order was made that he should appear before the learned Judge on the 31st March, and, as security for his

applying to be declared an insolvent and for such appearance, the aforementioned Husseinbhai Heptulla deposited with the Prothonotary Rs. 2,000, which was to remain with the Prothonotary as security. It may be noted that under section 55 (4) of the Civil Procedure Code the judgment-debtor should give security not only that he will apply to be declared insolvent but also that he will appear when called upon in any proceeding upon the application, so that the security should continue until a final order is made upon the petition. The plaintiff failed to appear on the 31st March before the Chamber Judge. When that happens, under section 55, sub-section (4), of the Civil procedure Code, the Court may either direct the security to be realized or commit the judgment-debtor to the civil prison in execution of the decree. A direction that the security should be realized seems unnecessary, as the judgment-creditor can proceed in execution against the surety under section 145 of the Civil Procedure Code, thus dispensing with the necessity of filing a separate suit. The actual order made by the Chamber Judge on the 31st March was to direct the plaintiff to be re-arrested and committed to jail. Section 145 of the Code directs that where any person has become liable as surety, *inter alia*, for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner therein provided for the execution of decrees. In *Basanti Lal v. Chhedo Singh*⁽¹⁾, one Chhedo Singh stood surety for the production of one Chhedi Halwai, who, on filing an application for insolvency, was ordered to be released from the civil jail. As the surety failed to produce Chhedi on the date on which he was

1921.

ABDUL
HUSSEINv.
D. J. MISTRY
& Co.⁽¹⁾ (1912) 39 Cal. 1048.

1921.

ABDUL
HUSSEINv.
D. J. MISTRY
& Co.

directed to produce him, the security was forfeited. The decree-holder prayed that the amount should be forfeited to him basing his claim on section 145 of the Civil Procedure Code. The District Judge refused that application and declared that the money should be forfeited to Government. On appeal it was held that there was no power in the Court to declare a forfeiture in favour of the Government. The surety contended that his suretyship did not extend beyond the pendency of the insolvency proceedings, but as he had not appealed from the order adjudicating upon this point adversely to him, the Court directed that the sum of Rs. 500 should be paid to the decree-holder, to this extent executing the decree against the surety. If the security has been realized under an order of the Court under section 55 (4) or in the first instance consists of a cash deposit, as in this case, the judgment-creditor may ask the Court to execute the decree under section 145 against the money lying in Court. But the Court may in exercise of its discretion refuse to make an order in favour of the judgment-creditor.

Now, the debtor has sworn that he came to the Court, but did not know where to find the Chamber Judge, and when after moving from Court to Court he found himself at last in the right place, he was told that the Chamber work was over and an order had been made for his arrest. Whether that story is true or not, there is no doubt that he had so far fulfilled the condition on which he was allowed to be released on the 15th March by filing his petition in the Insolvency Court, and if he had issued notices to the creditors he would be able to apply to the Insolvency Court for a protection order on the 5th April. And taking it at the most that the surety was guilty of great carelessness in not seeing that the plaintiff was guided to the proper place where he would find the Chamber Judge, I think he will be

sufficiently punished by having to pay his costs of this summons, which will otherwise be discharged. The moneys can be repaid by the Prothonotary.

I think the proper order is that each party do pay his own costs.

Solicitors for the surety : Messrs. *Little & Co.*

Solicitors for the defendant : Messrs. *Amin & Desai.*

Summons discharged.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

IN RE PANALAL GANESHIDAS, a Firm, AND IN RE INDIAN INCOME TAX ACT (VII of 1918)*.

Indian Income Tax Act (VII of 1918), section 51—Reference to High Court—Whether permissible after disposal of the case by the Chief Revenue-authority.

An application by the assessee to the Chief Revenue-authority to refer a question to the High Court under section 51 of the Indian Income Tax Act must be made in the course of assessment, before the case is disposed of.

MOTION on a petition under section 45 of the Specific Relief Act.

The petitioners who carried on business in Bombay as bankers, merchants and commission agents, were called upon by the Collector of Income Tax to make a return of income under the Excess Profits Duty Act of 1919. On the 24th June 1919, they submitted their return of income.

Thereupon, the Collector of Income Tax issued a notice of demand assessing the petitioners with Excess

* O. C. J. Petition under section 45 of the Specific Relief Act.

1921.

ABDUL
HUSSEIN

v.

D. J. MISTRY
& Co.

1921.

September
26.