**(1923) 05 AHC CK 0017**

**In the Allahabad High Court**

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| Beti Mahalakshmi Bai and Another | | APPELLANT |
| | Vs | |
| Badan Singh and Another | | RESPONDENT |

**Date of Decision :** 23-05-1923

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, 145

**Citation :** AIR 1924 All 105 : (1923) ILR (All) 649

**Hon'ble Judges :** Walsh, J;Kanhaiya Lal, J

**Bench :** Division Bench

## Judgement

Walsh and Kanhaiya Lal, JJ.—This is an appeal from an order refusing to enforce a security bond, filed under Order XLI, Rule 5 of the Code of Civil Procedure, by an execution proceeding. In the course of an appeal pending in this Court, an order for the stay of execution of a decree for costs was obtained by the judgment-debtor pending the decision of that appeal, and a security bond, executed by him and his surety Chaudhri Badan Singh, was filed, whereby the latter agreed to stand security for Rs. 15,000 and hypothecated certain property for the payment of the same in case the money which, might be found due under the decree was not realized from the judgment-debtor. The security bond stated: "We the executants willingly give security for Rs. 15,000 and after hypothecating the property specified below agree that if the appellate court affirms the decree of the court of first instance, then I, Rao Narsing Rao, will duly carry out the decree of the appellate court, and whatever costs may be allowed under the said decree on account of the costs of the trial court and of the appellate court shall be paid by me (Rao Narsingh Rao) with interest, irrespective of the above-mentioned security for Rs. 15,000. If Rao Narsingh Rao does not do so, then the sum which may be due under the decree may be realized from the hypothecated property of the executants."

2. The court below has found that no personal liability was undertaken by the surety under the above deed and that the only remedy of the decree-holder was to enforce the mortgage security by a separate suit for sale. Section 145 of the

CPC provides that where any person has become liable as a surety for the performance of any decree or any part there of, or for the restitution of any property taken in execution of a decree, or for the payment of any money, or for the fulfilment of any condition imposed in any suit or proceeding, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner 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. The object of this section is to provide that where a person has become liable as a surety for the performance of a decree or for any of the purposes above specified, the party for whose benefit the security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. Section 253 of the old CPC was limited to cases where a security bond was filed for the performance of a decree, and authorized the enforcement thereof against the surety to the extent to which he had rendered himself liable, in the same manner as a decree could be executed against the defendant. In the clause, "to the extent to which he has rendered himself liable," the word "personally" was added by the present Code of Civil Procedure, but by the addition of that word it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2, 3 and 4 of appendix G, appended to the Code of Civil Procedure, provide for the hypothecation of property to secure the performance of the obligation undertaken by the surety. The personal or individual liability of the surety under the security bond may not, always, be as extensive as that of the judgment-debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond. Beyond a statement that the surety willingly gave security for Rs. 15,000 there was nothing in the terms of the present bond to indicate that he undertook a personal liability. On the other hand, there was a clear indication that the money which may be found due on the decree passed in appeal would be realizable in the first instance from the judgment-debtor, and that if the judgment-debtor did not pay the same, it would be recoverable from the property hypothecated by the surety. There was no personal covenant by the surety to pay the same in case the hypothecated property was found to be insufficient. The only question for consideration in these circumstances is whether Section 145 of the CPC is applicable and whether the security bond can be enforced by an application for the execution of the decree. The security bond does not purport to have been executed in favour of the decree-holder. It contains an undertaking given to an appellate court which granted the stay of execution subject to the production of such security, and as held in the case of Janki Kuar v. Sarup Rani ILR (1895) All. 99 such a bond can be enforced by the court below in the same way as a decree. In the case of Mukta Prasad v. Mahadeo Prasad ILR (1916) All. 327 a similar view was taken. In the case of Raj Raghubar Singh v. Jai Indra Bahadur Singh ILR (1919) All. 158 their Lordships of the Privy Council allowed the security bond to be enforced in somewhat similar circumstances against the hypothecated property without a separate suit for sale.

3. The court below refers to the decision in the case of Amir v. Mahadeo Prasad ILR (1916) All. 225 but in that case the equity pf redemption in the hypothecated property had passed from the surety to a third person who could not be treated for the purposes of Section 145 of the CPC as a party to the decree and against whom the security could not have been enforced except by a separate suit for sale. In the case of Shyam Sundar Lal v. Bajpai Jainaraydn ILR (1903) Cal. 1060 and in the case of Subramanian Chettiar v. Raja of Ramnad ILR (1917) Mad. 327 security bonds hypothecating immovable property as security for the due performance of a decree have been allowed to be enforced by execution without a separate suit being considered necessary. Where the equity of redemption is still held by the surety, the surety is the primary person from whom the amount of security can be recovered, and Section 145 of the CPC is intended to enable the enforcement of such security. The appeal is, therefore, allowed with costs and the order of the court below set aside and the case is remanded to that court with a direction to re-instate it under its original number and to proceed with the disposal of the matter in accordance with law.

 