

(1940) 01 AHC CK 0005
In the Allahabad High Court

Firm Lachhman Das Chhiddu Lal

APPELLANT

Vs

L. Babu Lal Surety and Others

RESPONDENT

Date of Decision : 15-01-1940

Acts Referred:

Citation : AIR 1940 All 304 : (1940) 10 AWR 266

Hon'ble Judges : Verma, J

Bench : Division Bench

Judgement

Verma, J.—This is an appeal by the decree-holder and arises out of proceedings for the execution of a decree, which is one for money. The judgment-debtor was arrested and was brought before the Court on 6th February 1933 when he made an application u/s 55, Civil P.C., that he intended to file a petition for adjudication as an insolvent. He was directed to file a security bond in accordance with that Section and the respondent, Babu Lal, executed a security bond which was filed, and the judgment-debtor was released. The judgment-debtor did apply to the Insolvency Court and an order for adjudication was actually passed in his favour. The present appellant appealed against that order and the District Court allowed his appeal and dismissed the application for adjudication on 28th March 1935. Thereafter, the decree-holder on 25th July 1935 filed the application which has given rise to this appeal. By this application the decree-holder prayed that the surety be required to produce the judgment-debtor and if he failed to do so, the security be realized. It appears that the case was adjourned on several occasions and that on one of the dates fixed, namely 9th November 1935, the judgment-debtor did appear, and as a matter of fact made an application to the Court. The surety objected to the application of the decree-holder on the ground that the judgment-debtor having applied for adjudication as an insolvent, the surety was discharged. Both the Courts below have accepted this contention of the surety.

2. Having heard learned Counsel for the appellant, we have come to the conclusion that the decision of the Courts below is correct. Sub-section (4) of Section 55, Civil P.C., lays down: "...and, if he fails so to apply and to appear, the

Court may...." It seems to us that unless there has been failure in both these respects, namely in applying for adjudication and in appearance, the decree-holder is not entitled to proceed against the surety. The judgment-debtor having complied with one of these conditions by applying for adjudication as an insolvent, it is clear, in our opinion, that the decree-holder is not entitled to ask the Court to realize the security. Learned counsel for the appellant has cited the case in *Sundara Reddi v. Varadharaja Pillai* (1917) 4 AIR Mad 237. But the point that arises in the case before us was not argued there and no decision has been given on that point. Reference has also been made to the case in *Abdul Hussein Essufalli v. D.J. Mistri & Co.* (1922) AIR Bom 340. In that case also the point which arises before us was not considered. Furthermore, it was pointed out by the learned Chief Justice in that case that the Court may in exercise of its discretion refuse to make an order in favour of the judgment-creditor. The two Courts below having concurrently exercised their discretion in favour of the respondent, we see no reason to overrule them and to hold that the appellant's application should have been granted. For the reasons given above, we dismiss this appeal with costs.