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In the Bombay High Court

Case No : First Appeal No. 141 of 1926

Jayappa Lokappa Narsinganawar — APPELLANT

Vs

Shivangouda Dyamangouda Patil — RESPONDENT

Date of Decision : 25-08-1927

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, 145
Registration Act, 1908 — Section 17(1)
Transfer of Property Act, 1882 — Section 59

Citation : AIR 1928 Bom 42 : (1928) 30 BOMLR 19 : (1928) ILR (Bom) 72

Hon'ble Judges : Crump, J;Amberson Marten, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Crump, J.—The plaintiff instituted Suit No. 229 of 1917 in the Court of the Additional First Class Subordinate Judge at Dharwar to recover possession of a share of one-third of certain lands. Defendant No. 5 was the brother of plaintiff'' and supported plaintiff''s claim. The other defendants were members of the same family and it was alleged that defendant No. 6 had been adopted by defendant No 4, the widow of a deceased member named Basvantgouda. The properties in suit were watan properties, and plaintiff and defendant No. 5 claimed to be the nearest heirs under the law applicable to such property. The Court found that plaintiff and defendant No. 5 were the nearest heirs, and that the ''adoption of defendant No. G was not proved, Consequent upon these findings a decree was made giving plaintiff and defendant No. 5 certain shares in the suit properties. A partition was directed, and an order was made directing an inquiry as to the mesne profits due.

2. Against this decree defendants Nos. 2, 4 and 6 appealed to the High Court making plaintiff and defendants Nos. 1 and 5 respondents. An application was made to stay execution of the decree under Order XLI, Rule 5. On this the Court, on December 14, 1920, passed an order in the ordinary form, "Rule and ad

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interim stay". This implied that security was required from the applicants "for the due performance of such decree or order as may be ultimately binding upon them". Order XLI, Rule 5(3)(c). This order was communicated to the District Judge of Dharwar by this Court''s writ, dated December 14, 1920, and in reply the District Judge certified that security had been furnished. The writ refers to the petition of "Basangouda bin Mallangouda in Appeal No. 335 of 1920" and directs that execution be stayed of due security being furnished to the First Class Subordinate Judge. Basangouda bin Mallangouda is defendant No. 6, The return is endorsed on the writ under date January 25, 1921, and certifies that "the appellant petitioner having furnished the requisite security the further proceedings have been stayed". The surety was one Jayappa, now the appellant before us, and the bond executed by him was in the form laid down in Appendix G, No. 2, of the Code of Civil Procedure. Under it he makes himself liable to the extent of Rs. 4,000. On March 10, 1921, the Court made the following order, "Rule absolute, costs costs in the appeal".

3. The bond is in the following terms:

In the Court of the First Class Subordinate Judge at Dharwar.

Suit No. 229 of 1917.

Shivangouda bin Dyamangouda Patil.... Plaintiff.

versus.

1, Marewa wife of Mahalinga Gaudas; 2, Somawa wife of Vibhadra Gauda Patil; 3, Basangouda Mallangouda Patil; [-Defendants. 4, Basawa Gaodfci wife of Mallangouda and others.... J

To

The First Class Subordinate Judge''s Court at Dharwar.

In this Jayappa Lokappa Narasingnavar residing at Lokur Taluka Dhavwar states, by this security bond passed for staying the exeoution of the decree, as follows :?

In suit No. 229 of 1917 plaintiff Shivangouda Dyamangouda Patil residing at Lokur has filed a suit in this Court, against Marewa, Somawa, Basangouda and Basawa and others. The suit was decided in plaintiff''s favour on March 27, 1920, and a decree was passed therein. And defendants No. 2 Somawa and No. 6 Basangouda and Basawa Gadti filed an appeal in the High Court against the said decree.

The plaintiff who has got the decree in his favour filed an application for executing the said decree. Defendant has applied for getting the execution stayed and he (awanige) has been ordered to furnish security. I, therefore, voluntarily become a surety to the extent of Rs. 4,000, by mortgaging the property mentioned in the schedule annexed herewith. I hereby agree that in case the decree of the original Court is confirmed in appeal or reversed the said

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defendant (prativadeyu) will abide by the order and decree of the appellate Court properly. And if he will have to pay anything in accordance with that be will pay the same and in case he fails to do so the amount that will have to be paid accordingly should be recovered from the estate mortgaged by this writing. And if the said property does not cover the amount that will have to be paid I and my legal representatives will be personally liable. For this I have passed this security bond.

Dated this day January 8, 1921.

4. The High Court in appeal confirmed the decree of the lower Court with a variation which is immaterial for the purposes of the appeal now before us. An inquiry was then held as to the amount of mesne profits and these were assessed at Rs. 9,250, and were held to be recoverable from defendant No. 2. Defendant No. 2 failed to pay the amount and the learned Judge directed that execution for Rs. 4,000 should proceed against the surety Jayappa. Jayappa appeals against this order.

5. The appeal raises the following questions.

(1) Is the surety bond invalid for want of registration ?.

(2) Is the appellant liable for the decree except in so far as it is against defendant No. 6 ?

(3) How and to what extent can it be enforced in these proceedings ?

6. It is urged that the document requires registration and that therefore it cannot affect the property or even be looked at as evidence of transaction. This point therefore stands in limine.

7. Reliance is placed on Nagaruru Sambayya v. Tangatur Sub-bayya ILR (1908) 31 Mad. 330, A number of other authorities have been cited bearing more or less upon the point, but the first question is whether certain decisions of their Lordships of the Privy Council, to which I drew attention in the course of the argument, are not decisive upon the matter, I shall, therefore, proceed to discuss these first. I may, however, say here that there is no decision of this Court upon the point and that according to the prevailing practice, so far as I am aware of it, such bonds are not registered. This document "purports or operates to create or declare in the future a contingent right of the value of more than Rs. 100 in Immovable property". It is, therefore, within the scope of Section 17, Sub-section (1), of the Indian Registration Act, 1908. It may be noted that for the present purpose there is no difference between the terms of this Act and those of the previous Act of 187 7. Therefore ordinarily the document under either Act is compulsorily registrable In both Acts there is a special exemption in favour of "any 1927 decree or order of. a Court or any award". The result of holding that such a document executed as between a surety and the Court is not exempted from registration either on general principles or as falling within the special words cited would be some- what embarrassing. What the precise result might

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be in view of Section 49 is a question difficult to resolve, but the words of Section 17 are very wide and if they apply to proceedings in Courts would cover a variety of documents and necessity might arise for recourse to the registration office at several stages of a prolonged litigation. It is difficult to believe that the Legislature intended any such result. It seems reasonable to suppose that judicial proceedings in general are not within the scope of the Act, Order XXI, Rule 34, of the Code of Civil Procedure, provides for the registration of documents executed by the Court, but no direction is to be found as to the registration of documents in the form prescribed by Appendix G, No. 2, as appropriate for the purpose of Order XLI, Rule 5, or indeed in any other case. The argument ab inconvenienti is certainly very strong here. It would be moat inconvenient in practice if the Judge were bound to register a variety of documents such as this. Some of the difficulties will be gathered from the decision in Ma Shwe Mya v. Maung Ho Hnawng (1921) L.R. 49 I. A 395 24 Bom. L.R. 682 a decision to which I shall refer later.

8. Nor is this view without support in the decisions of their Lordships of the Privy Council. Bindesri Naih v. Gangasaran Sahu (1897) L.R. 525 IndAp 9. is a case decided with reference to the provisions of the Indian Registration Act of 1877 which, as has been said, differ in no way for the present purpose from those of the Act of 1908. The question there was whether compound interest should be allowed on certain mortgages and reliance was placed on a number of petitions for time made by the mortgagors which contained admissions that compound interest was due. It was argued for the appellants (the mortgagors) that u/s 17 of the Act of 1877 no effect could be given to those petitions as they were not registered. The matter was fully argued and, though the decision was based on other grounds, Lord Watson in delivering the judgment of the Board remarked as follows (p. 15) :?

Although, in the view which their Lovdships take, the question whether those proceedings can be founded on, without their having been registered in bonus of the Act of: 1877, does not necessarily arise in this appeal, they think it right to add that, having heard counsel fully upon the point, they are satisfied that the provisions of Section 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court.

9. This dictum is general in its terms and not expressed to be based on any specific provision of the Act. It might indeed be difficult to bring such petitions within the words "decree or order of the Court or any award".

10. In (1899) L.R. 26 I.A. 101 (Privy Council) , there had been a previous suit between the parties in 1885. That suit was brought to an amicable conclusion, and on January 16, 1886, two documents were executed. One was termed a ''''razinatnah", the other "agreement of union". Neither was registered under the Act of 1877. The "razinamah" alone was produced in the suit. Both were relied upon in the second suit which came before the Privy Council in appeal. Lord

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Watson again delivered the judgment of the Board. As to the razinamah the following passage may be cited from pp. 103-1 of the report:?

The second document executed by the same parties, the razinamah, was not registered in terms of Act HI, of 1877; but it was produced in the suit of 1885; its terms were considered in a judgment delivered by the Subordinate Judge of Kumbakonum on March 31, 1888, and they were made the foundation of an order passed by the learned Judge, the parties to the document having concurred in moving '' that a decree may be passed in accordance with the razinamah which they have presented u/s 375 of the Civil Procedure Act, after settling''.

The razinamah had incorporate! with it four schedules of lands, marked respectively A, B, 0 and D; schedule D containing n, description of the lands which had been expressly excluded from the suit of 1880, and of no others In the body of the doamnent, the parties, first, set forth in detail the lands as to which they were in controversy in the suit of 1885, and concluded by stating that they had agreed each to take a contain share of these lands and their produce, ''in full satisfaction of all claims within the 15th of Panguni (27th March 1886) next; and that both the parties shall bear their respective costs of this suit''. In the second place, the document set forth as follows : '' Remarks : Not only have we, on this date, entered into a union agreement in regard to the land &c, referred to in the plaint is this suit, and described in schedule D hereof, and divided thereunder the said lands into two equal shares between us, but a deed of release has also been taken from the 7th defendant''s (present appellant''s) guardian in relinquiahment of the right possessed by the 7th defendant (present appellant) to the said half-share of lands''.

In the judgment delivered by him on March 31, 1886, the Subordinate Judge, having the razinamah before him, treated the first part of it as the only portion of the portion of the document with which he was desired by the parties to deal. In giving effect to its terms, the learned judge observed : ''The 7th defendant (present appellant) is her only daughter (i. e., of Ramaswami''s grand-daughter) and she and the plaintiff have put in a razinamah in respect to items 1, 3, 5, and 7, and a decree in its terms has been passed''. It is admitted, that items 1,3,5, and 7 specified by the learned judge, were the lands claimed from the present appellant in the suit of 1885. The learned judge plainly did not understand that he was asked by the parties either to consider or to give effect to the teems of the compromise which the parties narrated, by way of remark, that they had made with respect to the lands contained in schedule D of the rewinainah, which are the subject of this appeal. Accordingly, the order passed by him did not include and bad no reference to these lands.

11. The distinction between the two documents is brought out in the following passage (pp. 105-6):?

It is sufficiently obvious that, in maintaining that defence, the appellant can

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derive no aid from the terms of the agreement of union. The document has not been registered under the provisions of Act III of 1877; and, therefore, its stipnlations are ineffectual in law to create, in favour of the appellant, any right, title, or interest to or in the lands in dispute.

The razinamah was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not, in their Lord-ships'' opinion, apply to its stipulations and provisions, in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The razinamah, in so far as it was submitted to and was acted upon judicially by the learned judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted res judicata, binding upon both the parties to this appeal, who gave their consent to it.

If the parties, after agreeing to settle the suit of li-85 on the footing that they were each to take a half-share of the lands involved in that suit, and also a half-share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land, now in dispute. Bat their Lordships are unable to find that any such course was taken, either in the razinamah, or in the judicial order which gave effect to it. The razinamah merely referred, by tray of remark, to the lands now in dispute; and the judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in schedule D of the razinamah. So far as regarded these lands, the compromise was not submitted to the learned judge, but was deliberately left by the parties to stand upon their unregistered agreement of union.

12. The distinction drawn is that the "act of union" was not submitted to the Court and was not made the foundation of any order: the "razinamah'' was so submitted and an order was founded on it. Its was thus "in itself a step of judicial procedure not requiring registration''''.

13. In this ease too no reference is to be found to any special exemption created by the Act itself. As in Bindesri Naik''s case the judgment rests on a broad general principle that the proceedings of Courts do not require registration. It is permissible to doubt whether the head-note in Pranal Annee''s case is not too A, o. J. narrowly expressed.

14. It is surely no straining of language to hold that the security bond in the present case is "in itself a step in judicial procedure", Plainly the order making the rule absolute was founded upon it, and in my judgment it matters not that it

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was submitted to the Court of the First Class Subordinate Judge and not to the High Court. The Subordinate Judge certified that the required security had been furnished and the Judges of this Court were seized of that fact when they made their order.

15. But even if it be supposed that in the two cases cited their Lordships of the Privy Council based their judgment on the expressed exemption in the Act, though they do not allude to it, the result is the same. If those proceedings fall within the exemption why not the proceedings in the case before us? I am unable to see any real difference. All are steps in the procedure of the Court.

16. The question is further dealt with by their Lordships of the Privy Council in 24 CWN 177 (Privy Council) . In that case a petition of compromise had been made in a previous suit between the parties. The petition was not registered. The whole was embodied in a decree, but as to one clause of the petition the decree was not operative as that clause was outside the scope of the suit. The question raised was whether that clause could be put in evidence. It was held that the special exemption in Section 17, Sub-Section 2(vi), applied inasmuch as there was a decree or order of the Court embodying the disputed clause. Their Lordships refer to Pranal Annee v. Lakahmi Annee, and cite a passage from Lord Watson''s judgment which has been set out above. They then say (p. 248) :-?

Sect. 375 and its effect were clearly under the consideration of the Board, and the judgment thus expressed showed that, merely regarding the question as a question of evidence and not as to the effect of the decree on lands outside the subject of the suit, suck a document as that in the present case when incorporated in a decree was clearly admissible as judicial evidence. Though this judgment does not in terms refer to Section 17, Sub-section 2(vi) of the Registration Act, is gives full effect to the opinion that their Lordships have formed as to its interpretation. The decree in the present case is a decree which makes no difference whatever in its language between one part and another part of the compromise; it incorporates the whole; and it is, in other words, a decree which, though affecting the lands in the Suit as a decree incorporates the whole of the agreement which led to the suit being compromised. For this reason their Lordships think that the registration of the agreement was unnecessary and that the decree is sufficient evidence of its terms.

17. Now it is true that here the surety bond is not embodied in the Court''s order, but none the less the Court''s order is based on the surety bond, and were the order written out in extenso it would of necessity refer to the bond which had been made an exhibit (n the case. Thus in my judgment the matter is within the scope of the judgments of Lord Watson, if not directly covered by the case last cited.

18. Reliance was placed for the appellant on Ma Shwe Mya v. Maung Ho Hnaung (1921) L.R. 49 IndAp 395 24 Bom. I.R. 682, bat the point of registration was not decided there. The bond was registered. The question was whether it had been

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validly registered. It was assumed that registration was compulsory. The case was heard ex parte and the only point decided was as to the proper method of presentation. At p. 397 their Lordships say, "The respondent was not represented on the appeal and their Lordships have accordingly not heard an argument in support of the validity of the bond". It would be wrong to rely on this decision as being in any sense an authority on the point before us,

19. In my opinion it is a fair conclusion upon these authorities that on the facts of this case the surety bond executed by the appellant does not require registration. I am, therefore, unable to agree with the judgment of the Madras High Court in Nagaruru Sambayya v. Tamgatur Subbayya ILR (1908) 31 Mad, 330, It doss not appear that the decisions of the Privy Council set out above were cited or considered in that case.

20. I now turn to the second point. Did the appellant undertake to be bound by the decree which might be passed against the appellants other than defendant No. 6? First Appeal No. 335 of 1920 was filed by defendants Nos. 2, 4, and 6. The application for stay of execution describes the applicants as "Basangouda bin Mallangouda & others". Basangouda is defendant No. 6. It is carelessly drafted. In the preamble, in para. 1 and also in the concluding sentence the plural "petitioners" is used. In para. 3 the word "petitioner" appears in the singular. The affidavit in support is made by defendant No. 6 and it sets out that execution proceedings were being taken against defendant No. 2. The Court''s order "Rule and ad interim stay" clearly meant, having regard to Order XLI, Rule 5, that security must be given by the applicant, and the application must be read as being on behalf of all the appellants. But the Court''s writ speaks o? one petitioner only, viz., defendant No. 6. it was upon that writ that the surety bond came to be executed, The precise terms of the bond are set out above. A surety bond must be construed strictly and upon a strict construction it appears that the appellant before us agreed to become surety for one defendant only, The word used is masculine and singular, and as one only of the three appellants was a male, the description can apply to him alone. That one defendant is defendant No. 6. Thus there is a very real doubt as to whether the obligation of the surety extends beyond the decree as against defendant No. G. The result is unfortunate but in my opinion a surety cannot be held liable except to the extent to which he is clearly bound. It is impossible to say that the appellant knowingly undertook to be liable for the decree which might be passed against defendant No. 2. That being so the attempt to hold him so liable must fail.

Amberson Marten, Kt., C.J.

21. This first appeal raises numerous questions which are far easier to ask than to answer and which have not been adequately dealt with in the trial Court. The main questions are (1) whether the security bond, Exhibit 11, of January 5, 1921, which was expressed to be given by the appellant surety Jayappa to the First Class Subordinate Judge''s Court at Dharwar in suit No. 229 of 1917, requires registration under the Indian Registration Act, and (2) whether this

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security bond can be enforced in the present darkhast either against the property thereby expressed to be mortgaged, or against the obligor personally or otherwise, and (3) if so, in respect of whose default is the appellant surety liable.

22. The present darkhast is No. 39 of 1925 taken out in suit No. 229 of 1917. That was a suit filed by the plaintiff Shivangouda in the Court of the First Class Subordinate Judge at Dharwar against Mareva defendant No. 1, Soniava defendant No. 2, Basangouda defendant No. 6, and Basava defendant No. 4, and others. The suit was decided in the plaintiff''s favour on March 27, 1920, and a decree was passed therein. Somava, defendant No. 2, and Basangouda, defendant No. 6, and Basawa, defendant No. 4, filed an appeal in the High Court against the said decree. The plaintiff, who got the decree in his favour, filed an application for executing the said decree. Thereupon an application was made to the High Court in which the petitioners were described in the title as "Basangouda and others". A rule nisi was granted by the High Court for a stay of execution on terms. Subsequently on the security being furnished, that rule nisi was made absolute. The security in question is this bond, Exhibit 11, of January 5 1921. It is expressed to be given to the First Glass Subordinate 1927 Judge''s Court at Dharwar.

23. The first point for consideration is whether this bond required registration under the Indian Registration Act. I have had the advantage of reading the judgment of my brother Crump on this question, and I respectfully agree with his reasoning and con-elusion that the Act does not apply here by reason of the fact that the bond was part of the judicial proceedings and incorporated therewith. It follows, therefore, I think that Section 59 of the Transfer of Property Act does not necessitate registration; for "registered" is defined to mean "registered under the law for the time being in force regulating the registration of documents". Further, Sections 5, 58, and 100 contemplate a transaction between two persons, but here the bond was to "the Court" and, as stated in Raghubar Singh v. Jai Indra Bahadur Singh (1919) L.R. 46 IndAp 228. 22 Bom. L.R. 521, the Court is not a juridical person.

24. This brings me to the next point, viz., that the security was given to the Court and not to a named individual and is therefors void. Now the form is one taken from the First Schedule to the Civil Procedure Code, Appendix G, Form No. 2, but that form is headed "To (blank)" and is no doubt intended to be given to a named individual. In Raghubar Singh v. Jai Indra Bahadur Singh (1919) L.R. 46 IndAp 228 22 Bom. L.R. 521, their Lordships of the Privy Council had to consider a case where the old CPC was in force when the suit began, but the new Code of 1903 was in force when the application against the widow and sureties for the recovery of mesne profits was started. There also a security bond had been given to the Court, but no person was mentioned in the instrument. After stating at p. 236 that "there remains a matter which has given their Lordships considerable trouble" and after holding that Section 145 did not apply because the lower Court had construed the instrument as giving only a charge upon property, and after

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holding that Sections 47 and 144 did not apply, the judgment proceeded (p. 237):?

But the questions of their liability upon the instrument whether they were personally liable, and whether, in the events which happened, it had become applicable, were matters which they were entitled to have determined against them in a regular and authorized manner. The contention for the appellants is that for this purpose there should have been u separate suit to enforce the charge, and that this must have been one according to the procedure provided by Section 90 of the Transfer of Property Act.

In order to see whether this is so their Lordships turn to the instrument itself. For a proceeding under the Transfer of Property Act there must be a mort gagor and a mortgagee. Their Lordships have to examine whether in this case there is any mortgagee, any person to whom the security was given. Now, no person is mentioned in the instrument It recites the decree that the widow has been ordered to furnish security, and then the declarants furnish security by hypothecating their property. The form of an instrument such as this, in the absence of any special form being provided by the Code, and there is no suggestion that there was any such form provided under the Code then in force, must vary according to the practice of the Court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the Court, and that, if the instrument has to be put in suit, either the officer sues, or he, under order of the Court, assigns the security to the party who wishes to avail himself of it; but this instrument does not purport to bind the sureties to any individual officer or to anyone.

It is suggested that they are bound to the Court. But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that hero is an unquestioned liability, and there must be some mode of enforcing it, and that the only mode of enforcing it must be by the Const making an order in the suit upon an application to which the sureties are parties, that the property charged he sold unless before a day named the sureties find the money. This form of procedure is that to which the High Court; of Allahabad gave its sanction in the case of Janki Kuar v. Sarup Rani ILR (11895) 17 All, 99.

The new Code of Civil Procedure, that of 1908, provides a special form of se. curity bond to be given during the pendency of an appeal (Appendix G, No. 3). The form shows that it is intended to be given to someone and not to be a mere undertaking to the Court, Whether that someone should be the other party or an officer of the Court is not made clear; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future.

25. Stopping there for a moment, unfortunately that very difficulty has arisen in the present case because the bond was given to the Court, as I have already stated, and not to a named individual. Then their Lordships proceeded (p. 238) :?

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It appears to their Lordships that the proper way of dealing with the present case is to consider that there are throe steps: 1. The assessment of the mesne profits to which tho auroti.ua need to be parties. 2. The construetion of the instrument determining that the property charged is liable as security in the events which have happened 3. The order that the property be sold unless the sureties pay.

It might have been more regular lo take the first by itself... and to take the second with the third; but unless it be Unit there is possibly some increase of costs, no harm has been done. It is idle to talk of the proceedings as if they had been take before a Court which had no jurisdiction; and no serious objection was raised to the form of procedure; nor can the appellants point to anything which would show that justice has not been done to them.

In the result, therefore, their Lordships think that except as to the matter of the personal liability of the appellants, the decree appealed from is right.

26. They accordingly directed that the decree of the Subordinate Judge should be varied by substituting the words "the property hypothecated by the instrument of security of September 16, 1902, is liable" for the words "the two sureties are liable".

27. The effect of that decision was that the property hypothecated by the surety bond was held liable for the sums in question. The result therefore, was that in effect their Lordships enforced the security bond given to the Court, Accordingly, stoping there, it would seem on the authority of that case that the present security bond could be enforced by the Court against the property in appropriate proceedings,

28. An alternative view is that the words in the bond refer not to the Court but to the Judge for the time being occupying the position of the First Class Subordinate Judge at Dharwar. That view presents obvious difficulties particularly having regard to what their Lordships say at p. 238. Having regard to the numerous changes which take place unfortunately amongst the personnel of the Subordinate Judges, I can understand the practical convenience of a bond to the Court instead to an individual Judge by name. But an undertaking to the Court is one thing, and could, I take it, be enforced by any Judge of the Court to whom the action was assigned for the time being. A mortgage to the Court as pointed out by their Lordships is quite another.

29. The next difficulty is that the present application is said to be based on Section 145 of the Civil Procedure Code. That section provides that the decree or order may be executed against him (the surety) to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees. Now in the above case of Raghubar Singh v. Jai Indra Bahadur Singh their Lordships of the Privy Council, as I have already pointed out, took the view that Section 145 only applied if the sureties were personally liable, and as the instrument there only gave a charge on the property, the section had no application, nor was it in fact relied on. A similar decision has been arrived at

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by this Court in Gurushantappa v. Gurava (1925) 28 Bom. L.R. 603. That was a case where, pending insolvency proceedings, a composition deed was arrived at between the creditors and the insolvent. The appellant Gurushantappa became a surety for the insolvent, and hypothecated his property as surety, and ho also became personally liable. It was there held in effect that the personal liability of the surety could be enforced as if it was for a money decree, and that then the property in question could be sold in execution of that quasi money decree. But in doing ho the parties entitled to the benefit of the security bond, or the Court in their behalf, would only be in the position of unsecured creditors. Consequently, supposing the surety had assigned his equity of redemption to the third parties, then the mortgage security could only be enforced in a separate suit. Thus Sir Norman Macleod says (p. 606):?

If, therefore, the surety has not disposed of the equity of redemption, the position is this, that the decree-holder, if lie wishes to rely upon the mort contained in the surety bond, must gob a decree upon the mortgage before ho can realize his security. But he is not. obliged to rely upon the security given Marten 0. J. him by the hypothecation of the property under the bond. Ho can rely upon the personal liability of the surety and seek to attach the property on account of that personal liability. Thereby he only releases his own interest in the mortgage, and runs the risk of other claims being made against the property either by persons entitled to later uhargns on it, or by ether attaching creditors. However, that is a mutter which the present, respondent, must consider for himself. At present we say that the order made by the Judge for sale of the property in question was right, and the appeal must be dismissed....

30. In the present case it does not appear that the surety has mortgaged or assigned his equity of redemption. But the decree-holder, the plaintiff, does not. wish is be put to a separate suit to enforce the charge given by the security bond. His darkhast is framed in the alternative, and if necessary he contends that the security bond creates a personal liability on the part of the surety, and that consequently proceedings can be taken against him u/s 145 on that basis. The two eases above cited are in his favour on that point. If, however, contrary to our view, the Indian Registration Act had applied, then on the construction of this particular bond a difficult question might arise as to whether the personal covenant was severable. Alternatively it was argued for the surety that this was a contingent liability within the meaning of Section 2 of the Indian Contract Act, because it was dependent on the property charged proving insufficient, and so it could not be enforced until the contingency happened. But, in the view we take, I need not pursue this point.

31. I arrive then at the conclusion that the bond could be enforced in appropriate proceedings against the property itself. The next main question then arises whether the surety, the so-called defendant No. 8, was liable for the default of defendant No. 6 only as be contends, or for that also of defendants Nos. 2 and 4, as the plaintiff contends. I say "so-called defendant No. 8," because the surety

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was not an original party to the suit. He has only been a party to the present darkhast proceedings to enforce the bond he gave. Now the above question as to the liability of defendant No. 8 depends primarily on the construction of the bond itself taken in conjunction with the proceedings referred to in the body of the bond itself. My mind has fluctuated on the point, and the case appears to me to be on the Hue. But, undoubtedly, there was carelessness in the application to the Court for a stay, and in the subsequent orders that were made. I mean as to the person or persona for whom security "was to be given. Unfortunately for the plaintiff, this Court''s writ of December 14, 1920, mentioned only one petitioner, via, defendant No. 6 : and the return to the writ by the District Judge on January 25, 1921, is to the like effect. Further, the bond given is more consistent in its language with one petitioner and he of the male sex than with three petitioners of different sexes. In the result, I think the benefit of the doubt must be given to the surety. Accordingly I agree with my brother Cramp in holding that the surety is not liable for the default of the female defendant No. 2.

32. In the result, therefore, this appeal will be allowed, and the order of the trial Court set aside, and the darkhast dismissed with costs throughout including the costs of this appeal.

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