
(1957) 03 MP CK 0034

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No's. 192, 196, 197, 198, 199, 204, 212, 213 and 214 of 1956

Shyamlal Ramkrishna Agarwal and Another

APPELLANT

Vs

Takhatmal Bodhraj and Another

RESPONDENT

Date of Decision : 12-03-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, 145, 9, 96

Contract Act, 1872 — Section 126

Displaced Persons (Debts Adjustment) Act, 1951 — Section 15, 40, 5, 9

Citation : AIR 1957 MP 98

Hon'ble Judges : Sen, J;Chaturvedi, J

Bench : Division Bench

Advocate : R.S. Dabir, for the Appellant; M.R. Bobde and N.P. Dwividi, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a Letters Patent Appeal against a decision of Kotval J. in Miscellaneous (First) Appeal No. 44 of 1952, decided on 1st October, 1956.

2. This decision will also govern the disposal of Letters Patent Appeals Nos. 192, 198, 197, 199, 204, 212, 213 and 214 of 1956, filed by the sureties.

3. Letters Patent Appeals Nos. 192, 212 and 214 are filed by surety Shrimati Kamla Devi, Nos. 196 and 197 are filed by surety Lochan Singh, Nos. 198 and 109 are filed by sureties Shyamlal and Shrimati Sushila Devi and Nos. 204 and 213 by surety Babulal. Shri R. S. Dabir argued for sureties (1) Shrimati Kamla Devi, (2) Shyamlal and (3) Shrimati Sushila Devi. Shri V. K. Sanglu argued for sureties Lochan Singh and Babulal, The main arguments are common.

4. These appeals arise from a suit (No. 9-A of 1947) filed on 26th August 1947 by Takhatmal, decree-holder, in the Court of the 1st Additional District Judge, Jabalpur, against Mulkraj Malhotra (respondent No. 2) for dissolution of

partnership and rendition of accounts. Two days after the institution of this suit, a conditional order for attachment before judgment of the property of Mulkraj was passed. The property attached was stated to be the Bills payable by the military authorities to M. R. Malhotra and Company. On 9th September, 1947 Mulkraj applied to vacate the order of attachment before judgment. This application was not decided.

In the meanwhile, the defendant Mulkraj offered to furnish security sufficient to cover the claim in suit. This offer was accepted by the Court, and five persons mentioned below executed surety bonds on behalf of the said Mulkraj Malhotra for the amounts respectively mentioned against their names:

(1)

Shyamlal Agarwal and his wife

Shrimati Sushila Devi

..

Rs. 60,000/-

(2)

Babulal

..

..

Rs. 15,000/-

(3)

Smt. Kamla Devi

...

...

Rs. 12,000/-

(4)

Lochan Singh

...

...

Rs. 11,000/-

(5)

Paramlal

...

...

Rs. 5,000/-

(Paramlal, the fifth surety, is dead. We are not concerned with his case.) These bonds were executed on 16th and 17th October, 1947. On 18th October, 1947 an indemnity bond was executed by Mulkraj Malhotra in favour of sureties Shyamlal and his wife Smt. Sushila" Devi, offering to indemnify the sureties in the event of the recovery of any amount from the sureties,

5. After the execution of the surety bonds the Court passed an order releasing the attached property from attachment. A preliminary decree was passed in the suit on 20th November, 1948. Sometime after the passing of the preliminary decree, the judgment-debtor Mulkraj Malhotra filed an insolvency petition at Calcutta and was adjudged insolvent. It appears from the order-sheet of 3rd September, 1951 that the judgment-debtor (respondent No. 2) was adjudged insolvent somewhere in 1951. From the application, dated 25th January, 1952, (page 242 of the paper-book in Misc. (First) Appeal No. 44 of 1952) it appears that the exact date is 1st August, 1951.

Thereafter, the judgment-debtor did not attend the Court, and proceedings in the suit against him were ex parte from 13th September, 1951. An ex parte final decree was ordered to be drawn up on 20th September, 1951, and was actually signed on 15th October, 1951 in favour of Takhatmal, decree-holder, and against Mulkraj (respondent No. 2) for a sum of Rs. 1,74,906/4/- plus costs Rs. 7,868-10-0. It may be mentioned here that on 9th July, 1952 the Calcutta High Court annulled the order of adjudication made on 1st August 1951.

6. On 15th October 1951, the decree-holder Takhatmal applied for execution of this decree, on 19th October 1951, he made an application to execute the decree against the sureties u/s 145 of the Code of Civil procedure. The judgment-debtor Mulkraj Malhotra (respondent No. 2) filed an application on 28th May 1952 before the Tribunal at Dehradun u/s 5 of the Displaced Persons (Debts Adjustment) Act, 1951 (No. LXX of 1951) (hereinafter referred to as "D. P. Act") claiming that he was a displaced person and that his debts were liable to be adjudicated upon and adjusted. The execution Court received its first intimation on 16th August 1952 through the official assignee, Calcutta, who transmitted to the 1st Additional District Judge a copy of the order dated 26th July, 1952, passed by the Debt Adjustment Tribunal at Dehradun (hereinafter referred to as "the Tribunal") in Case No. 19 of 1952.

That Tribunal, meanwhile, had informed the Civil Court of the making of the application by the judgment-debtor Mulkraj (respondent No. 2) and asked the said Court to stay execution before it and transmit all the papers to the Tribunal at Dehradun, The 1st Additional District Judge was asked by the judgment-debtor's counsel and by the sureties to stay the execution proceedings before

him. The sureties also raised other objections. They stated that the decree in the suit was obtained by the plaintiff fraudulently and in collusion with the defendant, and consequently the sureties were discharged. They also pleaded that the surety bonds were illegal, void and infructuous and had become impossible of performance.

The surety Shrimati Kamla Devi specifically raised the question that upon the intimation to the civil Court that the judgment-debtor had filed his application for adjustment of his debts under the D. P. Act, all proceedings in the Civil Court became automatically stayed and that it was incumbent upon the Additional District Judge, Jabalpur, to transmit the records of all the proceedings to the Tribunal at Dehradun. The learned Additional District Judge overruled all these objections and ordered execution to proceed against the sureties. The application of the judgment-debtor for setting aside the ex parte final decree was also rejected on 6th September, 1952, Against these orders, the judgment-debtor and the sureties filed miscellaneous appeals before the learned Single Judge, who dismissed all those appeals. Against the order of dismissal, the sureties have come in Letters Patent Appeals before us.

7. The first question raised by Shri R. S. Dabir learned counsel for appellants Shrimati Kamla Devi, Shyamlal and Shrimati Sushila Devi, is that the proceedings pending in the executing Court against the judgment-debtor and the sureties ought to have been stayed till there was a decision on the application of the judgment-debtor made to the Tribunal at Dehradun u/s 5 of the D. P. Act. It was also contended that at that time when that application had been made to the Dehradun Tribunal the judgment-debtor's application to set aside the ex parte decree in Miscellaneous Judicial Case No. 26 of 1951 was also pending.

The civil Court took the view that the Dehradun Tribunal had no jurisdiction, because the applicant was not a "displaced person" u/s 2(10) of the Act and that his debts did not fall within the definition of "debt" in Section 2(6) of the Act, and there-tore the Tribunal could not entertain the proceedings. Shri Dabir urged that the civil Court had no jurisdiction to determine whether the Tribunal was acting within or without jurisdiction because of the provisions of Section 9 read with Section 15 of the D. P. Act.

8. Sections 9 and 15 of the said Act are reproduced below:

"9. Proceeding after service of notice on respondents:

(1) If there is a dispute as to whether the applicant is a displaced person or not or as to the existence or the amount of the debt due to any creditor or the assets of any displaced debtor, the Tribunal shall decide the matter after taking such evidence as may be adduced by all the parties concerned and shall pass such decree in relation thereto as it thinks fit.

(2) If there is no such dispute or if the respondents do not appear or have objection to the application being granted, the Tribunal may, after considering

the evidence placed before it, pass such de-wee in relation thereto as it thinks fit."

""15. Consequences of application by displaced debtor:

Where a displaced debtor has made an application to the Tribunal u/s 5 or under Sub-section (2) of Section 11, the following consequences shall ensue, namely:

(a) all proceedings pending at the date of the said application in any civil Court in respect of any debt to which the displaced debtor is subject (except proceedings by way of appeal or review or revision against decrees or orders passed against the displaced debtor) shall be stayed, and the records of all such proceedings other than those relating to the appeals, reviews or revisions as aforesaid shall be transferred to the Tribunal and consolidated;

(b) all attachments, injunctions, orders appointing receivers or other processes issued by any such Court and in force at the date of the said application in respect of any such debt shall cease to have effect and no fresh process shall, except as hereinafter expressly provided, be issued:

Provided that where an order appointing a receiver ceases to have effect under this section, the receiver shall, within, fourteen days from the date on which his appointment ceases to have effect or within such further time as the Tribunal may in any case allow, submit to the Tribunal instead of to the Court which appointed him his outstanding accounts, and the Tribunal shall, in relation to such accounts, have the same powers with respect to the receiver as the Court which appointed him had or could have had;

(c) no fresh suit or other proceeding (other than any such appeal, review or revision as is referred to in Clause (a)) shall be instituted against a displaced debtor in respect of any debt mentioned by him in the relevant schedule to his application;

(d) any immovable property belonging to the displaced debtor and liable to attachment shall not be transferred except under the authority of the Tribunal and on such terms as it thinks fit, until the application of the displaced debtor has been finally disposed of or any decree passed against him is satisfied in accordance with the provisions of this Act.""

9. The view taken by the Bombay High Court in Baburao K. Pai Vs. Dalsukh M. Pancholi, is that the Displaced Persons (Debts Adjustment) Act is a self-contained Code with regard to adjustment of debts by displaced persons u/s 9. Where an application u/s 5 has been made to the Tribunal, it is the Tribunal that has to decide the question of the debt and the status of the debtor. As soon as the application has been made the matter is taken out of the hands of the civil Court because, the provision for stay u/s 15 comes into operation.

Therefore, if a suit is pending at the time of the application u/s 5, there is an

ouster of jurisdiction of the civil Court. A similar view has been held by the majority in *Parkash Textile Mills Ltd. Vs. Mani Lal and Others*, Both these decisions fortify us in the view that where there is an application by a person claiming to be a displaced debtor u/s 5 pending before a Tribunal constituted under the Act, the status of the said person can only be determined by the Tribunal, and the question whether the applicant before the Tribunal is or is not a debtor within the meaning of the D. P. Act cannot be decided by an ordinary civil Court in which proceedings are pending relating to his debts, whether decretal or not.

10. The D. P. Act gives a definition of the expression "debt" and also of "displaced person", and Section 5 provides for an application by a displaced debtor for the adjustment of his debts. Sub-section (1) of Section 5 provides that a displaced debtor may make an application for the adjustment of his debts to the Tribunal within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business or personally works for gain.

It is common ground that it was under this section that the judgment-debtor *Mulkraj Malhotra* made an application to the Dehradun Tribunal alleging that he was a displaced person and that the debts which were due by him should be adjusted. What has been laid down in Section 15(a) is that all proceedings pending at the date of the said application in any civil Court in respect of any debt to which the displaced, debtor is subject shall be stayed. The words "'all proceedings" in our opinion, are significant, and mean "each and every" proceeding in respect of the debt of the said displaced debtor,

A Division Bench of this Court (to which one of us was a party--Chaturvedi J.) in *Balwantrao v. Shamrao*, L. P. A. No. 5 of 1953, D/- 30-11-1956 (C) has taken a similar view in interpreting the words "all proceedings" in Section 4 of the Central Provinces and Berar Relief of Indebtedness Act. In our opinion, the executing Court was not justified in refusing to stay the execution proceedings against the judgment-debtor after an application u/s 5 of the D. P. Act had been made before the Dehradun Tribunal.

11. In *Prakash Textiles Mills Ltd. v. Mani Lal (FB) (B) (cit. sup.)* the dissenting view of Kapur, J., was to the effect that Clause (a) of Section 15 deals with original proceedings by way of suit, arbitration proceedings or proceedings in insolvency which can come within proceedings in respect of a debt and only proceedings of an original nature in respect of a debt can be stayed. There is no provision made for the stay of execution proceedings which are dealt with in Clause (b). Section 15, therefore, in his Lordship's opinion, does not cover proceedings in execution for the enforcement of a mortgage decree which is a decree for sale and is not for the recovery of a debt, although ultimately the effect may be that the debt is recovered.

The majority did not express any opinion on this point. But in another case *Bal Kishan Das Vs. Jhanumal and Others*, *Bishan Narain, J.*, who was a party to the

Full Bench case *Prakash Textile Mills v. Mani Lal (B.)* (cit. sup.) clearly has come to the conclusion that execution proceedings come within the purview of "all proceedings" in Section 15 of the D. P. Act and that it is the duty of the executing Court to stay the execution proceedings and send the records to the Tribunal as soon as it comes to know that the displaced debtor has made an application u/s 5 of the Act.

We respectfully concur with this opinion. The learned single judge also came to the same conclusion so far as the proceedings against the judgment-debtor were concerned, and he expressed the opinion that the 1st Additional District Judge ought to have stayed the proceedings in Miscellaneous Judicial Case No. 2G of 1951 (the ease of setting aside ex parte decree) as also the proceedings in Execution Case No. 9-A of 1947 in so far as the execution application asked for any relief against the judgment-debtor.

12. It appears that the petition made on 25th May 1952 u/s 5 of the D. P. Act by the judgment-debtor was on 20th August 1956 rejected and returned to the petitioner for presentation to the proper Court. The Dehradun Tribunal held that the petitioner (that is, the judgment-debtor in the present case) was residing at Jabalpur at the time of making the petition and that he continued to reside there. The Tribunal observed that the petitioner's version about his residence at Dehradun was concocted and his evidence was unreliable. It, therefore, passed the following order:

"The petition is rejected. Let the petition be returned to the petitioner for presentation to the proper Court....."

The learned single Judge stressed the importance of this order and held that there was no proceeding pending before the Tribunal and that any steps purporting to have been taken under the D. P. Act were a nullity and could not be looked at for the purpose of the application of Section 15 of the Act. It was argued before him that on 29th August 1956 an appeal had been filed against the order of the Dehradun Tribunal, and a certified copy of the memorandum of appeal, dated 29th August 1956, filed before the High Court of Judicature at Allahabad was produced. The appeal had been admitted there on 10th September 1956.

It was urged before the learned single Judge and the same argument was addressed before us that the appeal should be deemed to be a continuation of the application and Section 15 would thus continue to have effect. This argument was repelled by the learned single Judge on the ground that Section 15 makes serious inroads upon the rights of persons to approach the ordinary civil Courts and as such it could be strictly construed. The learned single Judge, therefore, held that the terms of Section 15 could not be extended to cover the case of an appeal after the application u/s 5 had ceased to be pending before the Tribunal.

He also expressed doubts whether the appeal could at all be admitted by the Allahabad High Court. It was also observed that the sureties were not parties

before the Tribunal, though they could have been made parties u/s 5, Sub-section (3); and as they were not made parties in an application u/s 5, the mere filing of an application before the Dehradun Tribunal could not effect any proceedings before the civil Court in which the sureties were being proceeded against in respect of their own bonds in favour of the Court.

13. Section 40 of the D. P. Act provides for an appeal in the following words:

"40. General provisions relating to appeals--Save as otherwise provided in Section 41, an appeal shall lie from--

(a) any final decree or order of the Tribunal, or

(b) any order made in the course of execution of any decree or order of the Tribunal, which if passed in the course of execution of a decree or order of a civil Court would be appealable under the Code of Civil Procedure, 1908 (Act V of 1908), to the High Court within the limits of whose jurisdiction the Tribunal is situate."

Section 41 may also be reproduced here:

"41. Restrictions on right of appeal in certain cases:

Notwithstanding anything contained in Section 40, where the subject-matter of the appeal relates to the amount of a debt and such amount on appeal is less than rupees five thousand, no appeal shall lie."

It is not disputed that -the appeal of the judgment-debtor has been admitted by the Allahabad High Court and is pending there. We have to see what effect it had upon the execution proceedings pending in the Jabalpur Court. It was contended that the appeal is a re-hearing and a continuation of the suit, and, therefore, the proceedings in execution be stayed.

14. In England the rule laid down is that appeals are by way of re-hearing (Order LVIII, Rule 2) and it was held in *Quilter v. Mapleson* 1882 9 QBD 672 (E) by Jessel, M. R. that on appeal such a judgment can be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. It was pointed out that this point often arose in the Court of Chancery where there was no strict appeal, but only a re-hearing before a superior Court. It was added that the 5th rule of Order LVIII gave the Court of Appeal power to admit further evidence, and stated that

"The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.""

The learned Master of the Rolls, therefore, came to the conclusion that it was intended to give appeals the character of re-hearings, and to authorise the Court of Appeal to make such order as ought to be made according to the state of

things at the time. In *Attorney-General v. Birmingham, Tame, and Rea Drainage Board*, 1912 AC 788 (F) the House of Lords took the view that as an appeal to the Court of Appeal was by way of rehearing, the Court could make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard.

15. It was pointed out by a Division Bench of the Madras High Court (Sir Arnold White, C. J. and Abdur Rahim J.) in *Rajah of Venkatagiri v. Mukku Narsaya* 7 Ind Cas 202: (AIR 1914 Mad 564) (G) that there is not to be found in the sections of the CPC of India which relate to the powers of an appellate Court, or in the Rules, any provision which corresponds to Order LVIII, Rule 1 of the English rules of the Supreme Court that all appeals shall be by way of re-hearing.

The argument pressed before the Court in that case was that the appeal should be considered to be a re-hearing of the suit so as to have the effect of rendering a statute retrospective in its effect even though no such effect is to be gathered from the terms of the statute itself. The observations made by Jessel, M. R., in *Quilter v. Mapleson*, (E) (cit. sup.) were brought to the notice of the Court in the Madras case. It was pointed out by the learned Judges that those observations were made with reference to the English rule under the Judicature Act and should not be applied to appeals in India.

Then, an observation by Sir Bhashyam Aiyangar in *Krishnama Chariar v. Mangammal* ILR 26 Mad 91 (FB)(H) that when an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of appeal, and re-heard either in whole or in part, was also brought to their notice. The High Court pointed out that this observation was made with reference to the question of limitation then before that Court and that it could not be relied upon as supporting the proposition that under the Code and rules an appeal is a re-hearing of the suit so as to have the effect of rendering a statute retrospective in its effect.

16. In AIR 1941 5 (Federal Court) the English case law has been referred to by Varadachariar J., who observed that it is on the theory of an appeal being in the nature of a re-hearing that the Courts in India have in numerous cases recognised that in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. His Lordship further added that the hearing of an appeal is under the processual law of this country in the nature of a re-hearing, and it would make no difference if this provision is not explicitly stated in the Indian statutes that an appeal is by way of re-hearing. These observations should, in our opinion, be confined only to the question of moulding the relief to be granted by the appellate Court.

17. The main Question before us in this case is: Can the appeal of the judgment-debtor pending in the Allahabad High Court against the decision of the Tribunal at Dehradun be regarded as a continuation of the application u/s 5 of the D. P. Act

so as to bring out all the consequences that u/s 15 of the said Act should follow from that application? In other words, the question is: Can the proceedings in execution of the decree against the judgment-debtor be stayed simply because an appeal is pending in the Allahabad High Court?

18. It has been held by a Division Bench of the Punjab High Court (Monroe and Rahman JJ.) in *Mst. Rewati v. Chiranji Lal* ILR (1943) Lah 666: (AIR 1944 Lah 29) (J) that in India an appeal cannot be regarded as a re-hearing of the suit itself; and that there is no warrant for the proposition that an appeal from an order passed in execution proceedings could itself be regarded as a re-hearing of the application. In *Rangaswamy v. Alagayamma* AIR 1915 Mad 1133 (K) the view expressed was that an appeal is only a continuation of the original proceedings and the appellate judgment dates back to and stands in the place of the original judgment.

In that case, possession taken by a person pending an appeal was held to be subject to the result of the appeal and was deemed to have been without legal title when the original decree or order was reversed, and so the rents and profits were held to have been wrongfully received within the meaning of Article 109 of the Limitation Act. The general observations, rather broadly stated in that case, should, in our opinion, be confined to the facts of the case. It has been made quite clear by a Full Bench of the Lahore High Court in *Zahur Din v. Jaial Din* ILR (1944) Lah 443: (AIR 1944 Lah 319) (L) that though an appeal is a continuation of a suit, yet this is only in a limited sense. It does not mean that the rights, which could be pleaded and enforced before a suit was finally adjudicated by the first Court, could be pleaded as of right for the first time during the pendency of the appeal. The rule of law, in our opinion, laid down in this case is the correct one, and we respectfully concur with it.

19. There is no provision in the D. P. Act to indicate whether for the purposes of the Act an appeal should be taken to be a continuation of the original proceedings or not. The question has, therefore, to be decided on general principles. As the D. P. Act is a special statute, principles deduced from the decisions of the Courts in other countries may usefully be referred to. In the *Slaughter House Cases* (1870) 19 Law Ed 915 (M), it was stated by Justice Clifford, who delivered the opinion of the U. S. Supreme Court:

"Rules and regulations prescribed by law, of course, control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the Court, denying an application for an injunction does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity."

Many American decisions on the point have been referred to in the judgment. In India also the same view has prevailed. In a decision of the Madras High Court,

which has been reproduced at pages 179 to 186 of the official report of the Privy Council decision in *Sankaralinga Nadan v. Raja Rajeswara Dorai* 35 I A 176 (N) we find the following at page 181:

"The appeal, no doubt, opens up the whole question for the decision of the Appellate Court, but pending that decision the decree of the Subordinate Judge does not cease to be binding on the parties. Pending that decision they are just as much bound by the decree as if there was no appeal."

These observations appear to have been approved by the Privy Council. In a later case *Juscura Boid v. Pirthichand Lal Choudhury*, ILR 46 Cal 670: (AIR 1918 PC 151) (O), Sir Lawrence Jenkins, while delivering the judgment of the Board, observed at page 670 (of ILR Cal): (at p. 153 of AIR);

".....whatever may be the theory under other systems of law, under the Indian law and procedure in original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

These observations are important and weighty and must be made applicable, of course, by means of an analogy to the facts of the instant case. Till reversed by the High Court of Judicature at Allahabad, the order of the Tribunal at Dehradun rejecting the application of the judgment-debtor must remain binding on the parties. We, therefore, take the view that at present no application u/s 5 of the D. P. Act is pending before any Tribunal so as to bring out the effect of Section 15 of the said Act on the execution proceedings in the Jabalpur Court. In our opinion, therefore, the learned single Judge was correct in holding that the terms of Section 15 of the D. P. Act could not be extended to cover the case of an appeal after the application u/s 5 had been rejected by the Dehradun Tribunal and returned for presentation to the proper Court,

20. Shri Dabir also pointed out that the application of the judgment-debtor dated 11th October 1951 for setting aside the ex parte decree in Miscellaneous Judicial Case No. 26 of 1951 was also wrongly rejected by the learned civil Judge of Jabalpur. The decree-holder had opposed that application on 21st December 1951. The learned Judge then framed issues on that application on 29th January 1952. It was after five months that by an application dated 28th June 1952 the judgment-debtor informed the Court that he had applied to the Tribunal at Dehradun for adjustment of his debt u/s 5 of the D. P. Act and that a telegram to that effect had been received by this counsel from the applicant. He, therefore, requested that u/s 15 of the aforesaid Act the proceedings be stayed till the decision of the application.

Another application to a similar effect was made by the judgment-debtor on 5th September 1952. By his order dated 6th September 1952 the learned 1st Additional District Judge, Jabalpur, rejected the application for setting aside the ex parte decree and On the same day the said Judge also rejected the application of the judgment-debtor for staying the proceedings u/s 15(a) of the

D. P. Act. It is contended by Shri Dabir, learned counsel for the appellants-sureties, that the learned Judge was in error when he rejected the application for setting aside the ex parte decree. In our opinion, the contention is well-founded. We have already taken the view that once the Court was informed of an application having been made at the Dehradun Tribunal under the D. P. Act, further proceedings against the judgment-debtor Ought to have been stayed, but they were not stayed. In the meantime, the Tribunal at Dehradun rejected and returned the application for presentation to the proper Court on the basis of absence of jurisdiction.

21. In view of the said order of the Tribunal at Dehradun, the only view that can be taken now is that no application u/s 5 of the D. P. Act was pending before the Dehradun Tribunal, and so the dismissal of the judgment-debtor's application for setting aside the ex parte decree on merits cannot be questioned.

22. The next point which remains to be decided is about the proceedings by the execution Court against the sureties. During the arguments on this point many rulings have been cited by both the parties about the contractual liability of the sureties. On the one hand, it has been urged that the liability of the surety is co-extensive with that of the principal debtor u/s 128 of the Contract Act. On the other hand, it is contended that the "suretyship contract" is a collateral one and as an independent contract it can be enforced. In our opinion, in the view we take of the proceedings the ruling cited by both the sides do not help us.

It is well-known that the obligation which a surety incurs under the bond, which he gives to the Court under the Code of Civil Procedure, is excluded from the definition of a "contract of guarantee" as contained in the Contract Act, which is a tripartite, agreement between the "surety", the "principal debtor" and the "creditor". No such tripartite contractual obligation is created between the parties to the; suit and the surety when the latter gives his surety bond to the Court under the Code of Civil Procedure. It was observed by Seshagiri Ayyar J. at p. 277 (of ILR Mad): (at p. 357 of AIR) in Appaani Nair v. Isak Mackadan ILR 43 Mad 272: (AIR 1920 Mad 355) (P) that

"under the CPC the bond is given to the Court and any infringement of the terms of the bond is a violation of the obligations to the Court, and therefore the agreement between the parties which resulted in a compromise decree has not the effect of discharging his liability to the Court."

In Mohammad Ehiya Saheb v. Valliappa Chettiar AIR 1936 Mad 576 (Q) , columns 1 and 2, it is observed:

"It is said that this is a contract of suretyship of a continuing nature which can be determined by notice at any moment by the surety and that the application is such a notice. We dispose of that point shortly, following the decision in In re, In Re: Dr. Abinash Chandra Banerji, on the ground that where a bond is given to the Court the liability continues until the surety is discharged by the Court and such liability cannot be determined at any moment by the surety giving notice."

In *Jang Bahadur v. Basdeo Singh* AIR 1936 All 540 (S), it was observed at p. 552:

""Section 134, Contract Act, presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor, are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. In the case before us, there was no contract between the sureties and the plaintiffs. The security bonds were executed by the sureties at the instance of the debtor and in pursuance of the orders of the Courts granting stay."

Then, it is further added:

"As already stated, the bonds are in favour respectively of the District Judge and the Registrar. The fact that the sureties empowered the plaintiffs to enforce the undertaking given by them (the sureties) to the Court does not imply that the plaintiffs became a party to the contract of guarantee embodied in the bonds. In this view, Section 134, Contract Act, does not apply to the facts of the present case."

In *Mahomed Ah Mamoojee v. Howeson Brothers* AIR 1926 PC 32 (T), a judgment of the Calcutta High Court (Asutosh Mookerjee and Ilnkin, JJ.) has been, in its entirety, reproduced. This was a decision on appeal from an order made by Mr. Justice Greaves against a surety u/s 145, Civil Procedure Code. A preliminary decree had been granted in a mortgage suit instituted against Harveys. One of the defendants was appointed Receiver. The appellant became surety for the Receiver. The surety, then, made an application to be released from his obligations and covenants as stated in the security bond. The question was whether the surety could tentatively discharge himself by giving a notice. Mr. Justice Greaves answered it in the negative and an order was made against the surety in terms of Section 145.

This order was confirmed by the Division Bench of the Calcutta High Court, which held the view that notwithstanding Section 130, which holds that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor, it is not competent to the surety for a Receiver, who has been appointed as officer of the Court, to discharge himself merely by notice to the decree-holder, or other person at whose instance or for whose benefit the Receiver was appointed. It was further stated that a person does not become a surety till he has been accepted as such by the Court and he cannot discharge himself without the consent of the Court. This judgment, as stated above, has been reproduced in AIR 1926 PC 32 (T), and underneath it is a short order by Viscount Finlay on behalf of the Board stating "In their Lordships" consideration of this case they see no reason for differing from the Courts below."

23. In *Madanlal Motilal v. Radhakishan Laxmi-narain* 31 Nag LR Sup 83: (AIR 1935 Nag 258) (U), at p. 95 (of. NLR Sup): (at p. 264 of AIR), a Division Bench (Grille, J. C. and Subhedar, A. J. C.), observed thus:

"By no stretch of imagination could the Court be called a "creditor" in whose favour the surety executes the bond incurring the obligation which the Court is empowered to enforce summarily by way of execution u/s 145, of the Code of Civil Procedure. It, therefore, follows that the provisions of Sections 133 to 139 of the Indian Contract Act cannot be made applicable to the bond given by a surety to the Court."

We respectfully concur with this opinion and hold that the liability of the surety in such bonds can be determined only by the Court itself u/s 145.

24. Shri Dabir, then contended that the passing of the D. P. Act was an event not within the contemplation of the sureties when they executed the bonds, and therefore it should be taken that the contracts were frustrated. We have already taken the view that the bonds in favour of the Court did not produce any contractual liability and therefore this contention of Shri Dabir will be rejected. Shri V. K. Sanghi also pointed out that the bonds were given under Order XXXVIII, Rule 5 of the Code of Civil Procedure. In our opinion, this should make no difference in so far as an order u/s 145, Civil Procedure Code, is concerned.

25. The bond being in favour of the Court the mode of enforcement should be by an order of the Court. In *Raj Raghubar Singh v. Jai Indra Bahadur Singh* ILR 42 All 158: (AIR 1919 PC 55) (V), at p. 167 (of ILR All): (at p. 59 of AIR), their Lordships of the Judicial Committee observed that in such cases "the only mode of enforcing the bond must be by the Court making an order in the suit and upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money", and this order has already been passed by the executing Court.

26. Shri Dabir, learned counsel for the appellant-sureties, then, contended that under the terms of the bonds of the sureties the bonds cannot be enforced. The several bonds executed by the sureties are almost identical, and it will be sufficient if one of them is reproduced below:--

"In the Court of Addl. District Judge, Jabulpore. C. S. No. 9-A of 1947. Takhatmal Plaintiff Mulkraj Defendant (Security under Order 38, Rule 5, C. P. Code)

Whereas at the instance of Takhatmal, the plaintiff in the above suit; Mr. Mulkraj, the defendant has been directed by the Court to furnish security in the-sum of Rs. 1,10,000 to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore, we Shyamlal Agarwal and Shreemati Sushiladevi Agarwala have voluntarily become surety and do hereby bind ourselves, our heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same or such portion thereof as may be sufficient to satisfy the said decree; and in default of his so doing, we bind ourselves, our

heirs and executors to pay to the said Court, at its order, the said sum of Rs. 60,000 or such sum not exceeding the said sum as the Court may adjudge.

Schedule.

- (1) Meat supply bills of J. B. P. for the month of July 1947 and onwards.
- (2) H. T. bills of J. B. P. for the month of July 1947 and onwards.
- (3) Coolie labour supply bill for July 1947 and onwards.
- (4) F. W. Quicklime and Charcoal supply bill of July 1947 and onwards.
- (5) H. T. Supply bill of Mhow for July and onwards.
- (6) Coolie labour supply bill for July 1947 and onwards for Mhow 1947.
- (7) Meat, Firewood and Lime and Charcoal supply at Katni for July and onwards.
- (8) Meat, Firewood and Lime and Charcoal supply at Pachmarhi for July 1947 and onwards.
- (9) Meat, Firewood, Charcoal and Q. Lime supply bill of Saugor.
- (10) Meat, Firewood, Charcoal and Q. Lime supply at Mhow. All above bills of Rs. 60,000.
- (11) Firewood bill of Katni and J. B. P. and Meh-gaon for 1945-46 amounting Rs. 50,000. Grand total Rs. 1,10,000.

Sd/- Shamlal."

Shri Dabir urges that under the terms, as aforesaid, the liability would arise only when the Court requires the property from the judgment-debtor and he does not produce it. He emphasises the words "in default of his so doing, we bind ourselves to pay to the said Court the said sum." In our opinion, this contention must fail. The bonds were executed by the sureties in order to enable the judgment-debtor to get money from the military authorities for payment to the decree-holder, and the judgment-debtor obtained money from the authorities. Considering that the securities were furnished by the judgment-debtor only to draw money of the Bills from the military authorities, they ought to have seen that the judgment-debtor deposited the money in the Court. It appears that after executing the bonds the sureties did not care to see what happened to the money received by the judgment-debtor. Under the circumstances of the case, any order by the executing Court to the judgment-debtor to produce the bills or the value of the same was not necessary. In fact, it would have been a mere formality to ask the judgment-debtor to produce the value of the property. Under these circumstances, we are of opinion that the bonds of the sureties are enforceable. The view taken by the learned Single Judge, under these circumstances, appears to be correct.

27. We, therefore, dismiss the appeals of the sureties with costs. There shall be

one set of counsel's fees. Counsel's fee Rs. 500.