

(1934) 10 AHC CK 0018
In the Allahabad High Court

Sukhdeo Behari Lal

APPELLANT

Vs

(Firm) Rama Nand Dwarka Das

RESPONDENT

Date of Decision : 25-10-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2

Citation : AIR 1935 All 268

Hon'ble Judges : Bennet, J

Bench : Division Bench

Judgement

Bennet, J.—This is an execution second appeal by a surety against whom the two lower Courts have given concurring decisions. The facts are that there was a decree obtained in suit No. 679 of 1928 by a certain firm against the Pioneer Mills, Bombay. There was an application for restoration and the Court required that sufficient security should be given by defendant for restoration of the suit. The appellant was counsel for the defendant and he gave a surety bond to the extent of Rs. 999-8-0. This bond very clearly states that he stood surety to the extent of Rs. 999-8-0. Learned Counsel for the respondent desires to interpret that bond to mean that although the sum is mentioned, the surety undertook liability to the whole extent of the decree. I do not consider that the bond can be interpreted in that sense and to interpret it in that sense would in my opinion make it contradictory in its terms. The matter proceeded further and on a certain date the surety applied to the Court for permission to deposit Rs. 1,000. The decree-holder objected that this amount was insufficient. The Munsif before whom these proceeding's took place held that the question of whether the surety was liable for a larger amount than Rs. 999-8-0 or not should be determined at a later stage. The surety took an appeal against this decision objecting to the decree being executed against him on the ground that the decree-holder has taken no steps to execute the decree against the original debtor. That was the only matter brought before the appellate Court by the grounds of appeal. The decree-holder did not file any cross-objection and there is nothing on the record to show that any person brought the matter of the extent

of the liability of the surety before the appellate Court. In my opinion the appellate Court had no jurisdiction to decide that issue unless the issue was raised before it. The issue might have been raised before it in the grounds of appeal, but it was not, or it might have been raised by an application in writing made to the Court by one of the parties, but it was not. Learned Counsel for the decree-holder argues that the issue could have been properly brought before the appellate Court by oral argument of counsel on behalf of the parties. I do not consider that that is a procedure contemplated by the Civil Procedure Code. In my opinion the Code requires that the pleadings of the parties either in an original or in an appellate Court must be in writing. It does not contemplate that there should be oral pleadings. Learned Counsel has referred to Order 41, Rule 2, which states that the appellant shall not except by leave of the Court urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, and he suggests that leave was given. If such leave was given then there should have been a record on the order sheet or otherwise by the appellate Court, but there is no such record. All that we have before us is the judgment of the appellate Court. This judgment sets out that:

the plaintiff sought to recover all the decree money from the surety appellant and the surety appellant opposes the plaintiff saying that he was liable to pay Rs. 999-8-0 and no more. The learned Munsif dismissed the objection. Hence this appeal.

2. The appellate Court failed to notice the grounds of appeal and was apparently under the impression that all the matters before the lower Court were again in issue in appeal. There lay the error of the appellate Court as this was not so. The appellate Court framed two issues, the first of which was, is the appellant liable to pay Rs. 999-8-0 only or all the decree money it is grown to by this time? That is an issue which did not arise before the appellate Court as there is no pleading of this nature in the grounds of appeal or otherwise before that Court. I consider therefore that the judgment of the appellate Court holding that the surety was liable to pay the whole of the decretal amount is a judgment which cannot; operate as res judicata because the issue was not before that Court. u/s 11 no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The matter was not in issue between the parties in that appeal and therefore in my opinion the decision of the appellate Court cannot operate as res judicata. This is the only ground on which the lower Court has proceeded. The lower appellate Court in fact remarks:

Having regard to the terms of the bond this decision appears to be incorrect.

3. I consider also that this decision is incorrect that the terms of the bond imposed a liability on the surety to pay Rs. 999-8-0 only and no more. Learned Counsel for the decree-holder argues that the Court would not have accepted a surety for a less than the total amount, which was Rs. 1,239. A Court is not bound to require security for the whole amount. For these reasons I allow this

appeal with costs throughout and I dismiss the present application for execution against the surety with costs. I do not think that any case has been made out for a Letters Patent appeal, so permission is refused.