

to contracts for the sale of movable property was re-enacted in section 5 of the Ordinance as numbered in the 1938 edition of the Legislative Enactments. When the English Statute made special reference in section 4 to agreements in consideration of marriage it thereby required a writing for all such agreements whether they referred to immovable property or movable property. Our Ordinance classified various transactions under three heads—(a) those requiring a notarial document, (b) those requiring a non-notarial writing and (c) those which require no writing at all. Our Legislature drew a distinction between agreements in respect of immovable property and agreements in respect of movable property. The position under the Prevention of Frauds Ordinance is that agreements in consideration of marriage fall under section 2 if they relate to immovable property and agreements in consideration of marriage relating to movable property fall outside the Ordinance.

I am unable to follow the decisions in *Thamby Lebbe et al. v. Jamaldeen (supra)* and *Lila Umma v. Majeed (supra)*. The view I have taken is supported by two earlier decisions of this Court—*Perera v. Abedeera*¹ and *Levvai v. Pakeer Tamby*².

I allow the appeal and direct decree to be entered dismissing the plaintiffs' action with costs in both the Courts.

JAYETILEKE S.P.J.—I agree.

NAGALINGAM J.—I agree.

GRATIAEN J.—I agree.

PULLE J.—I agree.

Appeal allowed.

1949

Present : Jayetileke S.P.J. and Canekeratne J.

WANIGASURIYA, Appellant, and HINIDUMA
CO-OPERATIVE SOCIETY *et al.*, Respondents

S. C. 4—D. C. Galle X 412

Civil Procedure Code—Execution of mortgage bond by surety as security for manager of Co-operative store.—Dispute—Arbitration—Award—Seizure of property hypothecated—Section 348—Not applicable.

The appellant executed a mortgage bond as security for the due performance by the 2nd respondent of his duties as manager of a Co-operative store. A dispute between the 1st and 2nd respondents was referred to arbitration under the Co-operative Societies Ordinance and an award was made against the 2nd respondent. Writ issued but was returned to Court. Thereafter the 1st respondent moved for a notice on the 2nd respondent in terms of section 348 of the Civil Procedure Code to show cause why the property hypothecated should not be sold.

Held, that section 348 of the Civil Procedure Code did not apply. That section applied only where a liability was incurred as surety for the performance of the decree after the institution of the action and before the entering of the decree.

¹ (1910) 2 *Matara Cases* 113.

² (1915) 6 *Balasingham's Notes of Cases* 46.

APPPEAL from a judgment of the District Judge, Galle.

H. W. Jayewardene, for the appellant.

Cyril E. S. Perera, with *E. A. G. de Silva*, for the respondents.

Cur. adv. vult.

June 3, 1949. JAYETILEKE S.P.J.—

The 1st respondent engaged the 2nd respondent to manage its business and the appellant executed a mortgage bond in favour of the 1st respondent for Rs. 1,000 by which he made himself liable as surety for the due performance by the 2nd respondent of his duties as manager. A dispute arose between the 1st respondent and the 2nd respondent in regard to a sum of Rs. 764.49 and the said dispute was referred to arbitration under rule 29 of the rules framed under the Co-operative Societies Ordinance, No. 34 of 1921. On January 23, 1945, the arbitrator made his award by which he awarded to the 1st respondent the amount claimed, to wit Rs. 764.49. The 2nd respondent failed to pay the said sum to the 1st respondent whereupon the latter filed the award in the District Court of Colombo on January 4, 1946, and applied for a writ against the 1st respondent in this action. The application was allowed and the Fiscal seized certain property belonging to the 1st respondent. On August 24, 1946, the Fiscal returned the writ to Court on the ground that the 1st respondent failed to pay the charges necessary for advertising the sale in the *Gazette*. On May 19, 1947, the 1st respondent moved for a notice on the appellant to show cause why the property hypothecated by him should not be sold. The appellant opposed the application on the ground that section 348 of the Civil Procedure Code on which the 1st respondent relied did not apply to a case like the present. That section reads—

“Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant :

Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety”.

The language of the section is very clear. It refers to a liability incurred by a person as surety for the performance of the decree after the institution of the action and before the entering of the decree. In the old Code of Civil Procedure of India¹ there is a section which corresponds with section 348 of our Code. It reads—

“Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant :

¹ *Code of Civil Procedure of India. Act XIV of 1882 s. 253.*

Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety".

In *Ram Coomar Coondoo v. Chunder Canto Mookerjee*¹ it was held that this section applies to arrest and attachment before judgment and to cases where a plaintiff may be called upon to give security for costs. In the present case no action was pending between the 1st and 2nd respondents at the time the bond was executed by the appellant and section 348 is therefore clearly inapplicable.

I would accordingly allow the appeal. The appellant will be entitled to the costs of appeal and of the inquiry in the Court below.

CANEKERATNE J.—I agree.

Appeal allowed.

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[COURT OF CRIMINAL APPEAL]

1949 *Present*: **Wijewardene C.J. (President), Nagalingam J. and Gratiaen J.**

THE KING *v.* MARSHALL APPUHAMY

APPEAL No. 61 WITH APPLICATION No. 165

S. C. 28—M. C. Negombo, 58,963

Court of Criminal Appeal—Charge of murder—Provocation—Intoxication—Can affect susceptibility to provocation—Misdirection—Penal Code, section 78.

Where the accused, who was indicted for murder, pleaded that his offence should be reduced from murder to culpable homicide not amounting to murder for the reasons that he acted on grave and sudden provocation and that he was so drunk that he was unable to form a murderous intention—

Held, that intoxication which fell short of the degree of intoxication contemplated by section 78 of the Penal Code could be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication.

APPPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

T. B. Dissanayake, for accused appellant.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *A. C. M. Ameer, Crown Counsel*, for the Crown.

Cur. adv. vult.

¹ 4 *Ind. App.* at 23.