

1938

*Present : Hearne J. and Wijeyewardene A.J.*CHARLES *v.* JAYASEKERE.

32—D. C. (Inty) Colombo, 1,274.

Surety—Application for execution against surety—Default by defendant—Liability of surety—Civil Procedure Code, s. 348.

An action for the recovery of money due upon a promissory note was settled by a joint-motion agreeing to the decree being entered upon stated terms. The motion contained an endorsement to the following effect:—

“We, the undersigned . . . , jointly and severally promise to pay the plaintiff the amount of the decree or any sum that is due to the plaintiff if the defendant fails to satisfy the decree, as stipulated in the decree.”

The decree did not incorporate the undertaking contained in the endorsement. On default made by the defendant, the plaintiff applied for writ of execution against the sureties.

Held, that he was entitled to do so under section 348 of the Civil Procedure Code and that he was not bound to proceed by way of regular action.

Held, further, that it was not necessary that there should be a bond in favour of the Court before the section could be applied.

A PPEAL from an order of the District Judge of Colombo.

L. A. Rajapakse (with him A. C. Z. Wijeratne and O. L. de Kretser, *Jnr.*), for petitioner, appellant.

N. E. Weerasooria, K.C. (with him H. A. Wijemanne), for plaintiff, respondent.

Cur. adv. vult.

September 30, 1938. WIJEYEWARDENE A.J.—

The plaintiff instituted this action against the defendant for the recovery of a sum due on a promissory note. When the defendant was served with summons the Proctors for the plaintiff prepared the following consent motion to be filed in Court:—

“We move that judgment be entered for plaintiff as prayed for with costs payable as follows: a sum of Rs. 100 (one hundred) to be paid this day and the balance to be paid by monthly instalments of Rs. 30 commencing from November 10, 1936.

“If the defendant make default in any payment of instalments or if writ issues in any case against the defendant—writ to issue in this case without any notice to the defendant for the balance then due”.

This motion bore the following endorsement:—

“We, the undersigned K. D. Kamalawathie, K. Piyadasa, and D. C. E. Jayasekera of Second Division, Maradana, Colombo, jointly and severally promise to pay the plaintiff the amount of the decree or any sum that is due to plaintiff, if the defendant fails to satisfy the decree as stipulated in the decree.”

D. C. E. Jayasekera mentioned in the endorsement is the present appellant.

The motion was filed in Court and decree was entered in terms of the motion. The decree however did not incorporate the undertaking contained in the endorsement.

The defendant made some payments as set out in the decree and thereafter made default.

The plaintiff thereupon applied for writ against the defendant and on February 17, 1937, the Court ordered writ to issue returnable on February 17, 1938.

On November 4, 1937, the plaintiff applied under section 348 of the Civil Procedure Code, 1889, for execution against K. D. Kamalawathie, K. A. Piyadasa and the appellant, who he alleged were "sureties as aforesaid for the recovery of the balance claim and costs". The appellant filed an affidavit opposing this application. He pleaded that execution should not issue against him "as the decree entered in the case did not bind him" and he stated further that the plaintiff induced him to make the endorsement on the motion as a "guarantor" and gave him an assurance that the "signatures were obtained merely to ensure the defendant paying the instalments regularly".

The learned District Judge made an order allowing plaintiff's application and the present appeal is against that order. The order of the District Judge shows that the position taken by the appellant before him was that there was no decree entered against him and that his promise was merely a guarantee on which the plaintiff should bring a separate action.

The Counsel for the appellant has argued that section 348 did not permit the plaintiff to proceed in this action against the appellant and that the plaintiff should seek relief by way of a regular action. I am unable to uphold this contention. The provisions of the section indicate clearly that a judgment-creditor could proceed in the same action against a surety. The section states that the decree may be executed against the surety "after application made by the judgment-creditor to the Court for that purpose by a petition to which the person sought to be made liable as surety shall be named respondent". This section corresponds to section 253 of the Indian Code of 1889 and to section 145 of the Indian Code of 1908. Section 253 of the old Indian Code did not contain the provisions which I have cited from our section and even then there was a diversity of judicial opinion in India on the question whether a surety could not be proceeded against summarily under that section. The question was however set at rest when the Indian Code of 1908 was passed containing section 145 which like section 348 of our Code expressly provides for the adoption of summary procedure against a surety (*vide Sarkar's Civil Procedure Code (7th ed.), vol. I. p. 197.*)

The appellant's Counsel urged for the first time at the hearing of this appeal the following further arguments against the order of the District Court:—

- (i) that the provisions of section 348 do not apply where the surety has not entered into a bond,
- (ii) that in the absence of a bond in favour of the Court no proceedings could be taken under this section,
- (iii) that the appellant was not a surety.

In my opinion the first two propositions cannot be sustained without reading into section 348 certain words of limitation which are not there. Moreover, under our law, all that is required for a contract of suretyship in a writing signed by the party making the same (*vide* section 21 of Ordinance No. 7 of 1840). The decision of the Calcutta High Court in *Joyman Bewa v. Easin Surkar*¹ is a direct authority against the contention of the appellant's Counsel. It was held in that case that there was no warrant for the proposition that only a security bond in favour of the Court could be executed under section 145 of the Indian Code, 1908, and that there was no need for any bond provided there was an express contract guaranteeing the performance of any of the obligations set out in the section.

With regard to the objection that the appellant is not a surety I need only state that this objection appears to ignore the plain meaning of the endorsement on the motion and is directly in conflict with the position taken by the appellant in the District Court.

I dismiss the appeal with costs.

HEARNE J.—I agree.

Appeal dismissed.

