

Tulsi Misir Vs. Bindeshri Misir

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Court : Allahabad

Decided On : May-07-1936

Reported in : AIR1936All593

Appellant : Tulsi Misir

Respondent : Bindeshri Misir

Judgement :

Sulaiman, C.J.

1. This is an appeal preferred by a surety in an execution proceeding. The decree-holder had obtained an ex parte decree against the judgment-debtor, Ram Prasad, who applied for getting the decree set aside under Section 17(1), Provincial Small Cause Courts Act. The value of the subject matter in dispute was more than Rs. 500. It was necessary for the applicant to give security to the satisfaction of the Court. The present appellant, Tulsi Misir stood surety for the judgment-debtor and executed a security bond undertaking to pay the amount of the decree, if not otherwise realised. The ex parte decree was actually set aside and the suit was restored to its original number. Thereafter it was heard on the merits and resulted in a decree in favour of the respondent and against the judgment-debtor. Of course there was no decree passed against the surety. The decree-holder has not sought to execute the decree against the surety for the amount due from the judgment-debtor. The learned Munsif came to the conclusion that the ex parte decree for which the appellant had stood surety having been set aside, the

decree-holder could not proceed against the surety. The learned District Judge has taken a contrary view. The learned Counsel for the parties have not been able to cite before me any single case which is directly in point. The case therefore is one of first impression. Section 17(1) contains a proviso that

an applicant for an order to set aside a decree passed ex parte...shall at the time of pressing his application...give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct.

2. At the time when the application is made there is only the ex parte decree in existence, and it is to set aside that decree that the application is made. The proviso lays down that at the time of pressing his application, he must give security for the performance of 'the decree.' Prima facie the words 'the decree' must refer to the decree previously mentioned in the proviso, namely the ex parte decree. These words cannot mean any other decree which may eventually be passed in that suit. It also seems reasonable to hold that the security is offered for the performance of the ex parte decree in case the application ultimately fails. If the application succeeds, then the judgment-debtor for the time being is discharged from the liability under the decree which has been set aside and it will follow that the surety also is automatically discharged. The mere fact that at a subsequent stage another decree is passed on the merits seems to be no ground for making the surety liable to pay the amount due under this second decree. He never stood surety for the performance of the second decree. The security offered by him was only for the performance of the decree which was then in existence and which was sought to be set aside. I have also examined the security bond in this case and it does not contain any express undertaking for liability under any decree that may eventually come to be passed. In my opinion the view taken by the learned Munsif was correct and the opinion of the learned Judge is erroneous. I accordingly allow the appeal and setting aside the decree of the lower appellate Court restore that of the Court of first instance and dismiss the decree-holder's application as against the surety with costs in all Courts.