

Ata Husaln Vs. Mustafa Husaln and ors.

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Court : Allahabad

Decided On : Nov-25-1925

Reported in : AIR1926All657

Appellant : Ata Husain

Respondent : Mustafa Husaln and ors.

Judgement :

Mukherji J.

1. Two points of law have been raised in this appeal and a third point, also of law, has been argued with the permission of the Court.

2. It appears that Mt. Amrit Bibi, the Respondent 2, brought a suit for recovery of her alleged dower-debt from the decree-holder, Respondent 1, Mustafa Husain, who was in possession of some of the property of the late husband of Mt. Amrit Bibi, as heir to his wife, the daughter of Mt. Amrit Bibi's husband. While the suit was pending, Mustafa Husain obtained an order from the Court to the effect that the plaintiff Mt. Amrit Bibi must furnish security for his costs. This security was furnished by the appellant Ata Husain. He gave a bond hypothecating a certain property on the 25th April 1922. The suit was decided against Mt. Amrit Bibi and Mustafa Husain has taken out execution for costs. He applied for the sale of the property hypothecated by Ata Husain and also he applied for the attachment and sale of certain other property said to belong to Mt. Amrit Bibi.

3. Ata Husain objected to the execution proceeding against him and his case is that he is liable only after Mt. Amrit Bibi has been compelled to pay and has failed to do so and that a failure on the part of the decree-holder to execute that decree against Mt. Amrit Bibi amounted to release of his liability. The point urged for the first time is that the appellant's liability can be enforced by suit and not in execution.

4. As regards the plea that execution should proceed at first against the lady we have to look to the language of the bond itself. The bond says that if the lady failed to obey the order of the Court, the property of the surety would be liable and also be himself in case the property proved insufficient. There is no provision for the principal debtor being proceeded against as a condition precedent to execution against the surety. This disposes of also the connected plea that by not proceedings against the principal debtor the surety has been discharged. Section 139 of the Contract Act does not apply to the facts of the case. It is true that the learned Judge of the Court below suspected that the judgment-debtor Mt. Amrit Bibi had been won over by the decree-holder Mustafa Husain who is her son-in-law. But that Court did not arrive at any definite finding. I agree with the Court below that the question of collusion is immaterial. Even if there be any collusion the decree-holder has done nothing, no overt act by which it can be said that the principal debtor has been released from liability to the decree-holder or that any remedy of the surety against the principal debtor has been impaired. It is clear, therefore, that the points taken in the grounds of appeal cannot succeed.

5. The third question is whether Section 145 of the Civil P.C. applies and there can be no execution of the decree by sale of the property charged, in the execution department. This question cannot be decided without having regard to the language of the bond executed by the appellant. It is to be noted that there is no mortgage in the legal sense of the term. The appellant said in the bond that the Court had called upon Amrit Bibi to furnish security for costs to the amount of Rs. 600 and that, therefore the appellant was offering himself as a surety agreeing that the amount of costs payable by the lady might be realised by sale of the property hypothecated and the balance from him personally. It is clear, therefore, that there is no mortgage in the proper sense of the term. There is no mortgagee and in the

language of their Lordships of the Privy Council the Court not; being a juridical person it cannot be sued, it cannot take property and it cannot assign the mortgage: vide *Raj Raghubar Singh v. Jai Indra Bahadur Singh* AIR 1919 PC 55. The bond before the Privy Council was in language very similar to the language of the bond now before me. The learned Counsel for the appellant has relied on the case of *Amir v. Mahadeo Prasad* AIR 1917 All 104 and it was urged that the Court might assign the mortgage to anybody in order that the mortgage might be enforced by a regular suit. As was pointed out in this course of the argument, the observations in the case of *Amir v. Mahadeo Prasad* AIR 1917 All 104 of Richards, C.J., at page 227, that the bond could only be enforced by a regular suit brought by the Court itself, or by some person to whom the Court could transfer the mortgage for the purpose of instituting the suit, go counter to the observations of their Lordships of the Privy Council already quoted. The position, therefore, is this that there is a liability undertaken by the appellant and there ought to be some method of enforcing the same. The method can be by way of execution alone as there is nobody to enforce the mortgage by means of a suit. This was the opinion of their Lordships of the Privy Council in the case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh* AIR 1919 PC 55 and a similar view was taken by a Bench of this Court in *Mahalakshmi Bai v. Badan Singh* AIR 1924 All 105. I hold that the surety bond given in the present case can be enforced by execution alone and therefore the order of the Court below was correct.

6. The appeal fails and is hereby dismissed with costs.