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Where an application is dismissed under any of the three clauses, then the bar under section 44 operates only in respect of a future application under the same clause and not for others. If an application is dismissed under section 5, it will not prevent another petition being brought under sub-section (2) of section 11 as in the instant case. The petition under sub-section (2) of section 11 is by way of defence and is specially provided for.

It was the second bar with which Chief Justice Bhandari was dealing in *Wadhawa Ram's* case. (1) Indeed, it would be going against the provision of the statute if it were to be held that the displaced debtor is debarred from pursuing his remedy under sub-section (2) of section 11 after his original application under section 5 has been dismissed on the ground of limitation. I must, therefore, hold that, so far as Gopal Dass is concerned, his application cannot be rejected under the provisions of section 44 of the Act.

No other point arises in this appeal which must accordingly be allowed. As the point involved is one with regard to construction of a statute, I would leave the parties to bear their own costs.

B.R.T.

APPELLATE CIVIL.

Before Inder Dev Dua, J.

MOHAMMAD ISHAQ,—*Appellant.*

versus

MOHAMMAD BASHIR AHMAD KHAN AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 129-D of 1957.

1960

August, 16th

Code of Civil Procedure (V of 1908)—Section 145—Suit for the enforcement of the liability of surety—Whether barred—Precedents—Value of.

(1) 1956 P.L.R. 252.

Held, that section 9 of the Code of Civil Procedure lays down in clear and unambiguous language that Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which the cognizance is either expressly or impliedly barred. A suit for the purpose of enforcing the liability of the surety is not barred by section 145 of the Code of Civil Procedure. The procedure laid down in this section is clearly intended to be procedure without in any manner taking away or curtailing a right which a citizen possesses under ordinary law of the land of having civil disputes adjudicated upon by a suit under section 9 of the Code of Civil Procedure.

Held, that precedent is an authority on its own facts and the jurisprudence which believes in law being made by precedent does not accept logical extension of the particular decision; more so when the consequences following such extension are not only inconvenient but deprive a citizen of a valuable right.

Case law discussed.

Regular Second Appeal from the decree of the Court of Shri P. D. Sharma, Additional District Judge, Delhi, dated the 20th day of August, 1957, reversing that of Shri O. P. Garg, Sub-Judge, 1st Class, Delhi, dated the 17th April, 1956, and dismissing the plaintiff's suit but leaving the parties to bear their own costs throughout.

BISHAMBAR DAYAL AND KASHIV DAYAL, ADVOCATES, for the Appellant.

DARYA DATTA CHAWLA AND MAHARAJ KRISHAN CHAWLA, ADVOCATES, for the Respondent.

JUDGMENT

DUA, J.—This second appeal raises a question as to the scope and interpretation of Section 145 of the Code of Civil Procedure. Dua, J.

2. Mohd. Ishaq, plaintiff-appellant before me, purchased four shops and a *balakhana* on 2nd June, 1946, which were in occupation of Mirza

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Ayub Beg, defendant No. 2, and others, who apparently refused to accept him as their landlord. As a result he was compelled to institute a suit for possession of the property in question against Mirza Ayub Beg and the occupants of the shops. This suit was decreed. Mirza Ayub Beg and the other occupants of the shop appealed against the decree in the High Court as a result of which the execution proceedings were got stayed on the condition that Mirza Ayub Beg, the then appellant, furnished security for due payment of costs of the trial Court and of the appellate Court and for damages and mesne profits accruing from the property from the date of the decree, i.e., 22nd January, 1948, to the date of delivery of possession of the property to the vendee. Mohd. Bashir Ahmed Khan, defendant No. 1 in the present proceedings, stood surety for the implementation of the orders passed by the High Court and duly executed a surety bond charging his property including House No. 1458 situate in Haveli Asam Khan. This he did on 1st May, 1948. The appeal was dismissed by the High Court on 29th July, 1953. Mohd. Ishaq obtained possession of the *balakhana* on 2nd September, 1953, and of the three shops on 2nd December, 1955, through the executing Court. Mirza Ayub Beg occupied the *balakhana* till the 2nd of September, 1953, and also continued to realise the profits from the occupants of all the shops.

3. Mohd. Ishaq instituted the present suit for recovery of Rs. 3,445-12-0 against Mohd. Bashir Ahmed Khan and Mirza Ayub Beg on account of damages and mesne profits for use and accupation of the *balakhana* and four shops for the period between 22nd January, 1948, and 2nd September, 1953. He claimed Rs. 30 per mensem by way of rent for the *balakhana* and Rs. 5-5-0 per mensem as rent of each of the four shops.

4. The defendants resisted the suit on various grounds including estoppel by his conduct on the part of the plaintiff, Order II, rule 2 of the Code of Civil Procedure, and that Mohd. Bashir Ahmed Khan could not be proceeded against until the plaintiff exhausted all his remedies against Mirza Ayub Beg. The plaintiff's *locus standi* to sue Mirza Ayub Beg was also questioned and finally the suit was alleged to be incompetent since the plaintiff had already recovered possession of the properties in question.

5. The following issues were framed on the basis of the pleadings of the parties :—

(1) Whether the plaintiff is entitled to recover the mesne profits and damages from defendant No. 2 for use and occupation of the premises in dispute ? If so, how much and at what rate ?

(2) Whether the suit is not maintainable against defendant No. 1 and as such he is not liable to pay the amount in dispute to the plaintiff ?

(3) Whether the plaintiff has got no *locus standi*,—*vide* objection No. 2 of the written statement ?

(4) Whether the suit is not maintainable on account of provisions of Order II rule 2 of the Code of Civil Procedure ?

(5) Whether the plaintiff is estopped by his conduct from bringing this suit ?

(6) Relief.

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(7) Whether the suit is not maintainable in view of the plaintiff's already having recovered possession and the suit costs ?

6. The trial Court decided issues Nos. (2), (4), (5) and (7) against the defendants and issue No. (3) which was held not to arise was left undecided. Under issue No. (1), the plaintiff was held entitled to recover Rs. 1,347-5-0 by way of rent of his shops and Rs. 673-10-6 by way of rent for the *balakhana* from the defendants ; a decree for Rs. 2,026-15-6 was consequently granted with proportionate costs. Future interest was also allowed at the rate of 6 per cent per annum from the date of the suit till realisation.

7. Mohd Bashir Ahmed Khan and Mirza Ayub Beg feeling aggrieved took an appeal to the Court of the learned District Judge and Mr. P. D. Sharma, Additional District Judge, held that the only course left open to the plaintiff-respondent, to enforce his claim on the basis of the surety bond, was by way of an application to the Court which accepted the surety bond and not by a regular suit. On this ground alone he allowed the appeal and reversing the judgment and decree of the Court of first instance dismissed the plaintiff's suit.

8. Feeling aggrieved by the Judgment and decree of reversal of the learned Additional District Judge, Mohd. Ishaq has filed this second appeal and I have heard the learned counsel for the parties at great length.

9. I may at the very outset state that the learned counsel for the respondents very fairly conceded that Section 144 of the Code of Civil Procedure was not applicable to the present case and that he did not rely on this section in support of the bar to the suit. He contended that it was

Section 145 of the Code of Civil Procedure alone which bars the suit and that it was only this provision of law on which he placed his exclusive reliance. The principal contention of the learned counsel is really based on a decision of the Privy Council in *Kanwar Rohni Ramandhwaj Prasad Singh* v. *Thakur Har Prasad Singh and others* (1), Head note (2) of this judgment, on which the counsel places reliance, in so far as is relevant for his contention, is as follows :—

> "P's suit against A, a minor, for possession of A's estate which was under Court of Wards was decreed. Pending the appeal by A the High Court ordered that P should be put in possession of the suit property in execution of the trial Court's decree on his depositing in the trial Court security in the sum of Rs. 42,000. Thereupon S executed a security bond for P in the sum of Rs. 42,000 charging the same on certain properties and rendering himself personally liable in the event of the charge failing to yield the sum of Rs. 42,000 and in respect of any such deficiency. This bond was not expressed to be in favour of any specified individual nor was any person other than S mentioned as a party thereto. On the execution of the bond, P was put in possession of A's estate in execution of the trial Court's decree. Subsequently, the High Court reversed the trial Court's decree and dismissed P's suit. The Court of Wards was then put in possession of the estate for A and a settlement was arrived at with P's aunt as his guardian under which the amount

(1) A.I.R. 1954 P.C. 189.

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of mesne profits while P had been in possession was fixed at Rupees 24,722 and paid. Subsequently, A filed an application under Sections 145 and 151 claiming mesne profits against P during his possession of the estate by enforcement of the security bond against S. P. was only formally made a party and the main relief was sought against S. The application was dismissed both by the trial Court and the High Court on the ground that the claim did not come within Section 145 and could be made only in a separate suit ;

"Held that (1) the case did not come within Section 145 as that section applied only to the personal liability of the surety ;

"(2) but the claim was nevertheless one which could not be made by a suit but could only be made by application to the trial Court under Section 144 and under its inherent powers to enforce the security ; .....

.....".

The counsel has tried to emphasise that the only remedy which the plaintiff had in the present case was to proceed under Section 145 of the Code of Civil Procedure and a separate suit was by necessary intendment barred by virtue of the language of Section 145 of the Code of Civil Procedure. The learned counsel for the appellant has tried to construe the Privy Council decision not to go against his contention whereas on behalf of the respondents it is claimed that this judgment completely supports their contention. Mr. Chawla has also referred me to an earlier decision of the

Privy Council in *Raj Raghubar Singh and another* v. *Jai Indra Bahadur Singh* (1), head note (b) of which is in the following terms :—

> "Where by the instrument of security, the surety charges his property by way of security for restitution and does not hold himself personally liable, he is not a party within Section 47. But the only mode of enforcing the security bond must be by the Court making an order in the suit upon an application to which the surety is a party so that the property charged be sold unless before a day named the surety finds the money."

The counsel has laid great stress on the observation that the only mode of enforcing the surety bond must be by the Court making an order in the suit. A Bench decision of this Court, *Babu Ram and others* v. *Dhan Singh and others* (2), has also been relied upon on behalf of the respondents. In this decision, Gurnam Singh, J., with whom Mehar Singh, J., agreed, held that it was well settled that ordinarily a stranger to a transaction cannot take advantage of a contract even though it may be for his benfit. This rule was considered to be subject to certain exceptions, one of them being that where a stranger holds the position of *cestui quo trust* in relation to the obligee, in such a case the stranger was held entitled to enforce the trust. In the reported case it was observed that where money is merely left with the mortgagee to pay off the mortgage debt of the previous mortgagee, this by itself would not create any trust in favour of the previous mortgagee and would not entitle him to sue the subsequent mortgagee for recovery of

(1) A.I.R. 1919 P.C. 55.
(2) 1957 P.L.R. 63.

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the mortgage debt. I have not been able to appreceiate how the ratio of this case can possibly advance the contention urged before me on behalf of the respondents. The reported case and the one in hand have hardly any common features.

10. Mr. Bishambar Dayal has, on the contrary, quoted some passages from the Civil Procedure Code by Chitaley, Volume 2, page 1762, note 11, where it is stated that a regular suit is not barred by the fact that a summary and concurrent remedy is also provided for and that a suit to enforce the security is not barred by Section 145. In *Bhagat Ram Khanna* v. *Mohammad Bakhsh* (1), Skemp, J., also took the view that a regular suit against the surety is not barred by reason of the remedy provided by Section 145 of the Code of Civil Procedure. The head note of this case reads thus :—

> "Section 145 simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the extent to which the surety has rendered himself personally liable, and no more. If an order for or in the course of execution is made against a surety who is within the ambit of Section 145 he is at liberty to appeal against that order as though he were a party to the suit within the meaning of Section 47 ; but in other respects he is not deemed to be a party within Section 47. Hence Section 145 does not bar a regular suit against surety."

11. After considering the arguments addressed at the Bar and after giving my most anxious

(1) A.I.R. 1939 Lahore 175.

thought to the respective contentions of the counsel, in my opinion, the appeal should prevail. Section 9 of the Code of Civil Procedure lays down in clear and unambiguous language that Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which the congnizance is either expressly or impliedly barred. It is not contended, and indeed it is conceded on behalf of the respondents, that Section 145 does not expressly bar the suit against the surety. It is, however, argued that the bar must necessarily be implied and that it is implicit in the language of Section 145. It would be helpful at this stage to reproduce Section 145 of the Code :—

"Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceedings consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47 ;

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

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It is instructive to note that although in Section 144 there is an express provision creating a bar to the institution of the suits, in Section 145 the Legislature has, in its wisdom, chosen not to create any such bar. The bar under Section 144 has been created notwithstanding that an order under that Section has to be deemed to be included in the expression 'decree' as defined in Section 2(2) of the Code of Civil Procedure. Section 145 does, however, expressly lay down that a surety, in so far as the proceedings under this section are concerned, is to be deemed to be a party to a decree for the purposes of appeal and, therefore, all orders passed in those proceedings are appealable. It is significant that this fiction is only confined to the purposes of appeal; again, this deeming provision appears to me to become operative only if proceedings under this section are taken against the surety and not otherwise. The section is completely silent with respect to any bar to a suit to enforce the right created by the surety bond. It is a well recognized rule that in order to create a bar of a civil suit in the ordinary Courts, on grounds of necessary intendment, such a bar must be supportable either on general principles of law or on grounds of public policy. In the present case neither of these two grounds support the respondents' contention. In order to deprive a citizen of his right to claim adjudication of his dispute by the ordinary procedure of a suit, in the municipal Courts, generally speaking, there is almost invariably some other equally adequate and efficacious mode of adjudication provided by law. In so far as the enforcement of liability of surety in the case in hand is concerned, if the argument of the respondents is accepted then there would be no other mode of securing adjudication on the question except by means of the summary remedy provided by Section 145. Here also, but for the

deeming provision, whereby a surity has to be deemed to be party within the meaning of Section 47, even the right of appeal would not be available to the aggrieved party. It is not without significance that the Legislature has merely brought in Section 47 for the purposes of creating a fiction of the surety being a party; it has not made the other provisions of Section 47 applicable, e.g., the provisions of sub-section (2) of Section 47, which empowers the Court dealing with the objections under Section 47 to treat a proceeding as a suit, have not been made applicable to the proceedings under Section 145. Similarly, the Legislature, has, in its wisdom, also refrained from adding a provision like sub-section (2) of Section 144. These circumstances, in my opinion, clearly suggest that the Legislature did not intend to bar a suit for the purposes of enforcing the liability of the surety and the procedure laid down in Section 145 is, in my opinion clearly intended to be a summary procedure without in any manner taking away or curtailing a right which a citizen possesses under ordinary law of the land of having civil disputes adjudicated upon by a suit under Section 9 of the Code of Civil Procedure. No law, statutory or otherwise, has been brought to my notice laying down that a regular suit should be held barred by the mere fact of a summary and concurrent remedy having been provided for the redress of a grievance. The Privy Council decisions are authorities on their own facts and cannot by any permissive logical extension of the rule be held to apply to the present case. A precedent is an authority on its own facts and the jurisprudence which believes in law being made by precedent does not accept logical extension of the particular decision; more so when the consequences following such extension are not only inconvenient but deprive a citizen of a valuable right. Two proceedings or remedies

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being concurrently available does not *per se* and by itself, show that one of them operates, as a matter of abstract rule of law, in derogation of the other, and indeed this is not the respondents' contention.

12. In view of the above discussion, in my opinion, this appeal deserves to be allowed. I accordingly accept the appeal and, setting aside the order of the learned Additional District Judge, restore that of the Court of first instance. In the circumstances of the case, the parties are directed to bear their own costs in this Court. The cross objections with respect to costs in the courts below are hereby dismissed with no costs.

K.S.K.

CIVIL MISCELLANEOUS.

Before Shamsher Bahadur, J.

THE BIRLA COTTON SPINNING AND WEAVING MILLS,—*Appellant.*

versus

SUMER CHAND,—*Respondent.*

F. A. O. 38-D of 1954.

1960

August, 18th.

Employees' State Insurance Act (XXXIV of 1948)—Section 40(2)—Employee's contribution made by employer for the period of authorised leave without pay of the employee—Whether can be recovered by deduction from his wages—Period—Meaning of—Whether means a week or a month for which wages are paid. ...

Held, that there is an absolute bar under sub-section (3) of section 40 of the Employees State Insurance Act, 1948 to the employer deducting the employer's contribution from any wages payable to an employee or otherwise to recover it from him. It is only in case of the contribution made on behalf of the employee that sub-section (2) of