*Present :* Jayewardene A.J.

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VAIRAVAN CHETTY *v.* UKKU BANDA.

*167—C. R. Kurunegala, 20,524.*

*Surety—Security by judgment-debtor for satisfaction of a debt on arrest—Forfeiture of bond—Notice—Final judgment—Civil Procedure Code, s. 305.*

Where a person binds himself as surety for the satisfaction of a decree by a judgment-debtor, who has been arrested on a civil warrant, and the judgment-debtor is in default.

*Held*, that it is open to the judgment-creditor to proceed in the same action against the surety for the forfeiture of the bond, provided that due notice is given to the surety to show cause why the bond should not be forfeited and the amount recovered from him.

*Suppramanium Chetty v. Gabriel Fernando* [1] followed.

The question whether a judgment in appeal from the Court of Requests is a final one depends on the circumstances of each case. It is not possible to give a comprehensive definition of the term " final judgment."

A judgment or order which can be considered on appeal at a later stage of the proceeding, that is, when the case is finally decided does not fall within the term " final judgment," but an order which can never be so brought up in appeal is a " final judgment."

APPEAL from an order of the Commissioner of Requests, Kegalla.

In execution of a decree the plaintiff obtained a warrant of arrest, and had the first defendant arrested and produced in Court on March 19, 1923. On the following day the judgment-debtor gave security in Rs. 370, with the present appellant as surety, to pay the amount in two months' time. The plaintiff accepted the security, and the debtor was discharged. The debtor having failed to pay the amount as stipulated in the bond, the plaintiff's proctor, without any notice to the surety, moved for and obtained a writ of execution against the surety. On May 14, 1924, the surety filed affidavit and petition, and moved that the writ be recalled, and that the plaintiff be ordered to take proper steps against the surety by instituting an action on the security bond. The learned Commissioner of Requests held that no separate decree against the surety was necessary.

The surety appealed.

*Croos Da Brera*, for appellant.

*H. V. Perera*, for respondent.

[1] *(1904) 8 N. L. R. 42.*

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The point for decision in appeal arises in this way :—The plaintiff sued two defendants on a mortgage bond and obtained a mortgage decree. In execution of the decree, after the debtor's property had been sold, the plaintiff obtained a warrant of arrest. On this warrant the first defendant was arrested and produced in Court on March 19, 1923. The execution-debtor moved for and obtained a day's time to give security. On the following day the debtor gave security in Rs. 370, with a surety—the present appellant—to pay the amount in two months' time. The plaintiff accepted the security, and the debtor was discharged.

The security bond was entered into with the Chief Clerk of the Court, and purported to hypothecate and mortgage certain immovable property in a schedule annexed to the security bond. There is, so far as I can see, no schedule annexed to this bond. The debtor failed to pay the amount due within two months as stipulated in his bond, and the surety also did not pay the amount.

On May 28 the plaintiff's proctor without any notice to the surety moved for and obtained a writ of execution against the surety. A sum of Rs. 230 appears to have been paid to the judgment-creditor.

On February 7, 1924, the plaintiff moved to issue writ against the surety to recover the balance still due.

This was allowed. On May 14, 1924, the surety filed affidavit and petition, and moved that the order to issue writ be recalled and that a sale fixed for a certain date be stayed. He also moved that the plaintiff be ordered to take proper steps against the surety, that is, I suppose, to institute an action on the security bond. This application was discussed on June 16 and refused, the Court holding that no separate decree was necessary against the surety. From this order the surety appeals. A preliminary objection is taken to the hearing of this appeal, on the ground that the order appealed from is not a final judgment or an order having the effect of a final judgment, from which alone appeals are permitted in cases before Courts of Requests under sections 39 and 80 of the Courts Ordinance. The contention raised for the surety which was overruled by the learned Commissioner was that there should be a judgment and decree against him before writ of execution could be issued for the seizure of his property.

In my opinion the order of the Judge holding that no separate judgment or decree is required by law against a surety in the position of the petitioner—and that, therefore, writ was rightly issued against him—is an order having the effect of a final judgment. It is impossible to give a comprehensive definition of the term "final judgment." Attempts to do so have not been successful. The question whether a judgment is a "final judgment" or not must depend on the circumstances of the case. But this

much may be stated, that a judgment or order which can be considered by a Court of Appeal at a later stage of the proceedings—that is, when the case is finally decided—does not fall within the term "final judgment." But it is not possible to say that any order which can never be so brought up in appeal is not a final judgement.

In this case the order under appeal is one made between the plaintiff and a surety who is not a party to the action in the strict sense of the term. The question has been finally decided between the parties to it, and the order is made in execution proceedings. If an appeal is not taken now, will the surety get any other opportunity of challenging the correctness of the order? I think not. If so, the order has the effect of a "final judgment," and is appealable under sections 39 and 80. The object of this section is to prevent interlocutory appeals in Court of Requests cases which are to be speedily disposed of, but it was, in my opinion, never intended to prevent appeals against orders of this kind. For the decision of this question previous decisions holding that certain other orders are not final within the meaning of sections 39 and 80 are not of much assistance. I accordingly overrule the preliminary objection.

To come to the objections raised in the lower Court. When a judgment-debtor is arrested and produced before the Court, the Court can release him from arrest under section 305 of the Civil Procedure Code "if he gives security for the payment of the same (that is, the amount of the decree and the costs of the arrest) to the satisfaction of the judgment-creditor." In this case the judgment-creditor was satisfied with the security given by the applicant as surety for the payment of the debt within two months, and the Court released the debtor. The applicant contends that the security bond cannot be enforced in the same action, but that it should be sued on in a separate action, and he also contends that if it is enforced in the same action, it should be after notice to him. In support of his contention Counsel for the appellant relies on *Arumogam Chetty v. Banda*,[1] in which it was held that when a surety had bound himself for the appearance of a judgment-debtor, who had been arrested on a particular date, and on every subsequent date to which the inquiry regarding the committal of the debtor might be postponed, and had failed to secure the attendance of the debtor on one of the dates, he was not liable to have his bond forfeited in the action in which it was given, but that it should be enforced by means of a separate action. This is a single Judge judgment, and is in direct conflict with another judgment of this Court (*Suppramaniam Chetty v. Gabriel Fernando*[2]), which is a judgment of two Judges. In this case the judgment-debtor appealed against the order committing him to jail. Pending

[1] *(1912) 6 L. L. R. 97.*

[2] *(1904) 8 N. L. R. 42.*

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appeal he was allowed out on bail, on the appellant in the case becoming his surety. In appeal the order was affirmed, and the debtor failed to appear on notice. The bail bond was forfeited in the action in which it was given without any notice to the surety to show cause against the forfeiture. The Supreme Court held that when a person has bound himself as a surety for the performance by a party to a legal proceeding of a judgment or order in such proceeding, he may be proceeded against in the same proceeding for the forfeiture of his bond and the recovery of the amount thereof, but he must, in the first instance, be noticed to show cause why the bond should not be forfeited and the amount should not be recovered from him.

The Court followed a decision of Cayley C.J. (then Cayley J.) reported in *Grenier's Reports, D. C. 1873, p. 79*, and said :— " *Voet (2, 7, 17)* seems to sanction the practice, which was said by Sir Richard Cayley when a Puisne Justice of this Court, to prevail in the District Court of Colombo (*Grenier's Reports, D. C. 1873, p. 79*) that when security has been given for the performance of a judgment to allow the liabilities of the sureties to be determined in the same case in which the judgment has been entered against the principal, without requiring the plaintiff to commence a fresh action, unless it is shown in any particular case that such a course would be manifestly inconvenient or prejudicial to the interest of the sureties." Sir Richard Cayley further says : " This practice should be followed in the other Courts in the Island, as it tends to prevent unnecessary delay and expense," but he is careful to enunciate for the protection of sureties that the proper course is to give full notice to the sureties, and that a rule should issue against them to show cause why their bond should not be forfeited.

This judgment is binding on me. The Civil Procedure Code makes no provision for a case of this kind. Section 348 expressly provides for the case of a person who *before the passing of a decree in an original action* becomes liable as surety for the performance of the same or of any part thereof, and in such a case the decree may be executed against the surety in the same manner as the decree may be executed against a judgment-debtor, upon application made by the judgment-creditor by a petition to which the person sought to be made liable as surety is named respondent. It may be argued that in the absence of a similar provision in the case of a person becoming surety after the passing of the decree, the proper procedure is to enforce the bond by a separate action. But the procedure approved in *Suppramaniam Chetty v. Gabriel Fernando* (*supra*) and by Cayley C.J. was a procedure which existed under the law which regulated the practice of our Courts before the Civil Procedure Code came into operation, and is conserved by section 4 of the Civil Procedure Code which directs

that "in every case in which no provision is made by this Ordinance, the procedure and practice hitherto in force shall be followed . . . ."

The adoption of this procedure since the Civil Procedure Code came into operation may, therefore, be justified under section 4. All judicial bonds are, so far as I am aware, enforced in this summary manner, and bonds given to secure the payment of costs of appeal have always been summarily enforced without the respondent being driven to the necessity of bringing an action on it. Our Courts have also approved the practice which prevailed before the Code came into operation of judicial bonds being signed before a Judge or a high officer of the Court, without requiring its execution before a notary and two witnesses or a District Judge or Commissioner of Requests and two witnesses as required by Ordinances No. 7 of 1840 and No. 17 of 1852, notwithstanding the fact that the bond hypothecated immovable property (*Mohammaddo Tamby v. Pathumma*,[1] *Menikhamy v. Pinhamy*,[2] and *Fernando v. Fernando* [3]).

In the present case, too, the security bond has been signed before the Judge. The procedure referred to in *Suppramaniam Chetty v. Gabriel Fernando* (*supra*) applies in my opinion to all judicial bonds which the Code authorizes the Courts to accept. This case is not referred to in the judgment of Lascelles C.J. in *Arumogam Chetty v. Banda* (*supra*), and I am sure the decision of the learned Chief Justice would have been otherwise, if his attention had been drawn to it. In this connection I would point out the necessity of counsel referring the Court to all the decisions relevent to a point under discussion. If counsel do so, many conflicting decisions which are to be found in our law reports and which prove so embarassing to those who have to administer justice in our Courts would largely disappear, and I desire to emphasize here what a learned English Judge said on the subject: "Half the bulk and much of the confusion of English case law springs from the fact that many decisions are given without adequate reference to the particular authorities which bear on the point at issue. If these authorities are before the Court, then a decision, be it right or wrong, is, at all events, given with a knowledge of the appropriate cases. If not before the Court, then obscurity and inconsistency take a new birth."

I may, however, point out that there is nothing to prevent any obligee from bringing a separate action on the bond if he chooses to do so (*Misso v. Kadappa Chetty* [4] and *Moldrich v. Cornelis* [5]).

I would follow *Suppramaniam Chetty v. Gabriel Fernando* (*supra*), and hold that the security bond can be enforced in the action in which it was entered into. But there has been a failure

[1] *I C. L. Rec. 26.*
[2] *(1921) 23 N. L. R. 189.*
[3] *(1921) 23 N. L. R. 453.*
[4] *(1899) 3 A. C. R. 48.*
[5] *(1910) 14 N. L. R. 97*

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to call upon the surety to show cause against the forfeiture of the bond. This is a necessary preliminary to the enforcement of the bond in the same action, as decided by this Court in that case.

I am therefore compelled to set aside the order under appeal. All the proceedings against the appellant subsequent to May 28, 1922, including the order made on that day, are quashed, and the case is remitted to the lower Court to enable the Commissioner to issue a notice on the appellant to show cause why the bond granted by him should not be declared forfeited.

The judgment-creditor might also consider whether it is not necessary to obtain an assignment of the bond in his favour (*Misso v. Kadappen Chetty* (*supra*) and *In the Matter of the Goods and Chattels of Hippola Dhamma Rakitta Shahithadana Mahanayaka Unnanse* [1]).

The appellant is entitled to the costs of this appeal and to any costs incurred by him in the lower Court.

*Set aside.*