

on the issue of "dishonesty". Nevertheless, it was necessary that the Jury should have received adequate directions so as to enable them to decide whether, in regard to each alleged offence of criminal breach of trust, all the ingredients of that offence were established to their satisfaction. We set aside the conviction of the first accused on the second count in the indictment, and order that he be re-tried on this count in fresh proceedings.

Conviction of 1st accused on count 1 set aside and re-trial ordered on count 2.

Appeal of 2nd accused allowed.

1950 *Present: Jayetileke C.J., Gunasekara J. and Swan J.*

JOHN *et al.*, Appellants, and CHARLES DE SILVA, Respondent

S. C. 22—D. C. Galle (Inty.), X 247

Civil Procedure Code—Execution of bond by surety—Circumstances in which section 348 is applicable.

Section 348 of the Civil Procedure Code applies only where a liability was incurred as surety for the performance of a decree after the institution of the action and before the entering of the decree. Its application is limited to security taken before the Court under the provisions of the Code.

APPPEAL from an order of the District Court, Galle. This case was referred by Dias and Pulle J.J. for consideration by a fuller Bench, under section 48A of the Courts Ordinance (as amended by the Courts (Amendment) Act, No. 52 of 1949).

D. S. Jayawickrama, with Rienzie Wijeratne, for the sureties appellants.

G. P. J. Kurukulasuriya, with D. W. F. Jayasekera and B. S. Dias, for plaintiff respondent.

Cur. adv. vult.

July 26, 1950. JAYETILEKE C.J.—

In action No. 40,699 of the Magistrate's Court of Galle the defendants charged the respondents and five others with theft of certain articles enumerated in a list marked A, criminal trespass and hurt.

On the date of trial it was agreed between the parties as follows:—

- (1) That the respondents should institute an action against the defendants for a declaration of title to the goods referred to in the list marked A.
- (2) That the 1st defendant should give security in a sum of Rs. 4,000, take charge of the said goods, and keep them in his custody till the said action was decided.

In pursuance of the said agreement the defendants executed two bonds bearing numbers 2203 and 2204 dated June 22, 1944, attested by A. M. Saeed, Notary Public, and took charge of the said goods, and the respondents instituted this action on August 25, 1944, against the defendant for a declaration of title to the said goods and for the recovery of damages. The appellants became parties to bond 2204 as sureties. The material portions of the bond are as follows:—

- (1) " We Don Simon Henry Senanayake, as principal, and H. Liyanage John, and H. Liyanage Sopi Nona as sureties are jointly and severally held and firmly bound unto A. Ganapathi Pillai, the Chief Clerk of the Magistrate's Court of Galle, or the Chief Clerk for the time being of the said Court in the sum of Rs. 3,000, for the payment of which we bind ourselves our heirs and we the said sureties for securing the payment of the said sum hereby mortgage and hypothecate"
- (2) " The condition of this obligation is such that if the above bounden principal will restore the articles referred to above or pay their value to the party entitled in accordance with the order of Court in the proposed civil action undertaken to be brought by the 1st and 7th accused or either of them as aforesaid then this obligation to be void and of no effect otherwise to remain in full force and virtue. "

After a lengthy trial judgment was entered in favour of the respondents declaring them entitled to the said goods and for Rs. 7,850 as damages up to January 23, 1947, and further damages at Rs. 215 a month till they are restored to possession of the said goods. The defendants failed to deliver the said goods to the respondents or to pay their value which was assessed at Rs. 2,500, and the respondents moved to execute the decree against the appellants, under section 348 of the Civil Procedure Code. The section is in these terms:—

" Whenever a person has before the passing of a decree in an original action become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against the judgment-debtor, upon 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 "

The appellants opposed the application on the ground that the section applied only to security furnished to the court which entered the decree. After hearing argument the learned District Judge allowed the application. The present appeal is against that order. The appeal came up for hearing before Dias and Palle JJ. who thought that the question was one which should be considered by a Bench of three Judges. At the argument before us Counsel for the appellants relied entirely on the judgment of this Court in *Wanigasooriya v. The Hiniduma Co-operative Society*¹.

In that case the appellant executed a mortgage bond as security for the due performance by the second respondent of his duties as manager

¹ (1949) 51 N. L. R. 138.

of a co-operative store. A dispute between the 1st and 2nd respondents was referred to arbitration under the Co-operative Societies Ordinance and an award was made against the 2nd respondent. Writ was issued but was returned to Court. Thereafter the 1st respondent moved for a notice on the 2nd respondent in terms of section 348 of the Civil Procedure Code to show cause why the property hypothecated should not be sold. It was held that section 348 applied only where a liability was incurred as surety for the performance of a decree after the institution of the action and before the entering of the decree. Counsel for the respondents differentiated that case on the ground that the security was not given for the performance of a decree, and he pointed out that it was not necessary for the purpose of that appeal to decide that section 348 applies only to security given after the institution of the action. He contended that the language of the section was wide enough to include a surety bond given before the institution of the action.

The Civil Procedure Code is divided into ten parts under different headings and these parts are sub-divided into Chapters under different headings. Part I deals with actions in general. It is sub-divided into 25 Chapters and section 348 is in Chapter 22 in which all the sections relating to execution are grouped. An examination of the section shows that it provides a summary remedy for the enforcement of the liability of a surety who has given security for the performance of a decree or any part thereof. It does not create a liability but it provides the machinery for the enforcement of the liability of the surety. If there are provisions in the Code which give the Court the power to call upon a party to give security for the performance of the decree or any part of it, the operation of section 348 must, in my view, be limited to the enforcement of security taken in the exercise of such power. Section 348 does not indicate the classes of surety bonds to which it applies. The words "for the performance of the decree or any part thereof" can be referred to specific provisions of the Code, for instance, sections 650, 654, 706 and 763. When a surety makes himself liable under any one of these sections by giving security, section 348 enables the party for whose benefit the security was given to enforce the security by execution proceedings in the same manner as if the surety was a party to the decree or order in respect of which security was given. A Court has no power to order execution against a person who is not a party to the action unless he submits to its jurisdiction. A surety who is not a party to the action makes himself amenable to the jurisdiction of the court in execution proceedings not by virtue of the provisions of section 348 but by giving security in the face of the court. The application of section 348 should, therefore, be limited to security taken before the court under the provisions of the Code. This view has the support of two judgments of the High Court of Madras under the corresponding sections of The Indian Civil Procedure Codes of 1882 and 1908.

The language of section 348 is almost identical with that of section 253 of The Indian Civil Procedure Code Act 14 of 1882. It reads:—

"Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof the decree may be executed against him to the extent to

which he has rendered himself liable in the same manner as the decree may be executed against the defendant Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

In *Thirumalai v. Ramayyer*¹ the question arose whether section 253 could be availed of when security had been given on behalf of the respondent to an appeal under section 546 for the due performance of the decree. In the course of his judgment Muttuswamy Aiyer J. said :—

(1) "The sections which relate to the liability of the surety and which provide for its enforcement are not one and the same whether in Act 8 of 1859 or in the present Code of Civil Procedure. In the former enactment ss. 76 and 83 indicated how a surety became liable for the fulfilment of the original decree In the present Code sections 479, 484 and 546 correspond with them. In the former it was section 204 which provided the machinery for its enforcement whilst in the latter the machinery is contained in two sections 253 and 583. The words of section 253 'whenever a person has before the passing of a decree in an original suit become liable for the performance of the same' only premise the case in reference to which the rule of procedure is prescribed, and they do not support the remark that the liability and the machinery for its enforcement are blended together".

(2) "The obligation which a surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or the appellant in the original suit or in appeal and the obligation is contracted before the Court and is as much a matter of record as the decree undertaken to be fulfilled".

The sections in our Code which correspond with sections 479, 484 and 546 referred to in the passage quoted above are 650, 654 and 763 respectively.

This judgment was followed in *Subaraya Pillai v. Sathananda Pandara*², in which the question for consideration was whether a surety bond taken by the judgment creditor outside the court could be enforced under section 145 of Act 5 of 1908. Section 145 is in these terms :—

"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 proceeding 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."

¹ I. L. R. 13 Madras 1.

² A. I. R. (1919) Madras 813.

Napier J. said :—

“ As at present advised I think that considering that the language of the various sub-sections can be referred to specific provisions of the Code and considering that the object of the section is to allow execution against a person who is not a party to the suit or legal representative it is more proper to confine it to cases where the liability has been entered in the face of the Court, or has been recorded by the Court in accordance with the provisions of the Code. ”

Sadasiva Aiyar J. said :—

“ I do not think that the fact that the Court itself stayed the execution on the report made to it of security having been given outside the Court would enable the Court to allow the security to be realised in execution. The only security which could be so realised is one to be furnished to the Court, or at least filed in Court. ”

I would, accordingly, set aside the order appealed against and dismiss the respondent's application with costs here and in the Court below.

GUNASEKARA J.—I agree.

SWAN J.—I agree.

Order set aside.

1950

Present : Dias S.P.J.

COSTA, Appellant, and GORDEN (S. I. Police), Respondent

S. C. 292—M. C. Colombo, 8,474|B

Penal Code—Sections 341 and 345—Using criminal force—Defining section formulates two definitions—“ Without that person's consent ”—Burden of proof—“ Outraging the modesty of a woman ”—No such offence—Sexual offence—Corroboration of alleged victim's evidence necessary—Evidence Ordinance, s. 153.

Where the accused was charged and convicted, under section 345 of the Penal Code, of using criminal force on a girl “ with intent to outrage her modesty ”—

Held, that section 341 of the Penal Code formulated two definitions of the offence of using criminal force. Under the first definition the burden of proof was on the prosecution to establish that what was done was done “ without the consent ” of the woman. Under the second definition no such burden rested on the prosecution.

Held further, (i) that “ outraging the modesty of a woman ” was not an offence and the criminal force alleged to have been used in this case was therefore that contemplated in the second definition.

(ii) that in sexual offences the evidence of the alleged victim should be corroborated by independent evidence, either oral or circumstantial.

(iii) that where a witness has been asked a question solely relating to his credit and has denied it, he cannot thereafter be contradicted—s. 153 of the Evidence Ordinance.