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CHOUTHI PARSAD GUPTA

v.

UNION OF INDIA AND ORS.

August 31, 1966

B [K. N. WANCHOO, J. C. SHAH AND R. S. BACHAWAT, JJ.]

Code of Civil Procedure (Act V of 1908), s. 145 and O.XXI, r. 46(1) —Prohibitory order under the rule—If s. 145 is attracted.

The appellant, who was the decree-holder, applied for the execution of the decree. The Sub-Divisional Officer, Military Engineering Service,
C was in possession of some movable property of the judgment-debtor. The Court ordered attachment under O. XXI, r. 46(1), Civil Procedure Code by prohibiting the Sub-divisional Officer from handing over the property to the judgment-debtor. Thereafter, instead of following the proper procedure which was to sell the property under O.XXI, r. 64 and then pass an order for its delivery under O.XXI, r. 79(2), the Court ordered the Sub-divisional Officer to produce the property, and, when it was not produced, proceeded under s. 145 of the Code treating the Union of
D India as the principal judgment-debtor.

HELD: Section 145 of the Code was not applicable to the case. That section only applies when a person becomes liable as a surety and the execution Court was wrong in holding that the Sub-divisional Officer became a surety simply because attachment had been made by the prohibitory order under O.XXI, r. 46(1). [209-H, 210 B-C]

E CIVIL APPELLATE JURISDICTION: Civil Appeal No. 556 of 1964.

Appeal from the judgment and order dated March, 24, 1961 of the Assam and Nagaland High Court in M. A. (F) No. 29 of 1956.

F *B. Sen* and *D. N. Mukherjee* for the appellant.

S. G. Patwardhan and *R. N. Sachthey*, for the respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal on a certificate granted by the Assam High Court and arises in the following circumsG tances. The appellant had obtained a money decree against Thakur Prosad Joyaswal and others in 1947. As the decree remained unsatisfied it was transferred from Calcutta to Gauhati for execution. On May 2, 1953, an application was made for execution in the court at Gauhati by attachment under O.XXI, r. 46 of the Code of Civil Procedure of certain movable
H property of the judgment-debtors which was said to be in the possession of the Sub-Divisional Officer, Military Engineering Service, Pandu. Consequently an order was issued under O.XXI r. 46 (1)(c)(iii) prohibiting the Sub-Divisional Officer from parting with

the property of the judgment-debtors. It may be mentioned that the Sub-Divisional Officer is subordinate to the Garrison Engineer, Shillong. Though certain applications were put in on behalf of the Sub-Divisional Officer before the court, it was only on February 1, 1954 that the Acting Garrison Engineer, Shillong stated before the court that the movable property in question (*i.e.* 41 R.S. joists) had been sold and delivered as far back as November 22, 1951 to Messrs. Ghunilal-Kanhaiyalal of Palasbari. This objection was considered by the execution court and it held on September 25, 1964 that this belated statement that the property in question had been sold as far back as November 22, 1951 could not be believed. The execution court therefore dismissed the objection and ordered execution to proceed.

Thereafter orders were issued for the production of the joists but they were not produced. Thereupon the appellant applied that the Union of India should be considered to be the principal judgment-debtor and execution should be levied against the Union of India. The Union of India objected to this and on April 21, 1956 the objection of the Union of India was dismissed and the execution court held that the Union of India be treated as the principal judgment-debtor and be made liable to the extent of the proceeds of the attached joists. Later on the same day, a further legal argument was raised on behalf of the Union of India to the effect that as there was no surety bond the Union of India could not be treated as the principal judgment-debtor. This objection was heard and finally the court ordered on April 28, 1956 that even though there was no surety-bond executed on behalf of the Union of India it was liable as a surety. Thereupon the Union of India appealed to the High Court against the order of April 28, 1956.

The High Court allowed the appeal and set aside the order of the execution court holding that no action could be taken against the Union of India under s. 145 of the Code of Civil Procedure upon which the execution court had apparently relied. Thereupon the appellant asked for and obtained a certificate from the High Court, and that is how the matter has come before us.

We are of opinion that there is no force in this appeal. Order XXI r. 46(1) provides that in the case of other movable property not in the possession of the judgment-debtor, except property deposited in or in the custody of any court, the attachment shall be made by a written order prohibiting the person in possession of the same from giving it over to the judgment-debtor. The necessary prohibitory order had been issued by the execution court in this case with respect to 41 joists and had been received by the Sub-Divisional Officer. Such a prohibitory order is sufficient for the purpose of attachment, though the

A property mentioned therein is not actually taken in possession by the Court. After attachment has been made in the manner provided by r. 46 the next step that the court has to take is to order sale of the property attached. Then comes O.XXI r. 79 which provides that where the property sold is movable property of which actual seizure has been made, it shall be delivered to the pruchaser [see B r. 79(1)]. But where the property sold is movable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser [see r. 79 (2)]. In the present case there was no actual seizure of the property but attachment had been made under O.XXI r. 46 (1). C The proper procedure for the court to follow was to sell the property under O.XXI r. 64 and then pass an order under O.XXI r. 79 (2) for its delivery in the manner provided therein. The court however went on asking the Sub Divisional Officer to produce the property and when it was not produced it proceeded under s. 145 of the Code. We agree with the High Court that s. 145 D has no application in the present case.

Section 145 runs thus :

"Where any person has become liable as surety—

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

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(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 F 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 therein provided for the execution of the decrees and such person shall, for the purposes of appeal be deemed a party within the meaning of s. 47:

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

A bare perusal of s. 145 shows that it applies when a person has become liable as surety. Now the mere fact that an attachment was made of 41 joists said to be lying with the Sub-Divisional Officer H by the issue of the prohibitory order under O.XXI r. 46 does not make the Sub Divisional Officer or the Union of India a surety for the performance of the decree which was in execution. There was no surety bond taken from the Sub-Divisional Officer and the joists

were not actually seized by the court and handed over to the Sub Divisional Officer as *suparddar* on the basis of a surety bond. If that had been done some question may have arisen whether the Sub-Divisional Officer did become a surety for the performance of the decree or part thereof. But where merely a prohibitory order is issued under O. XXI r. 46(1) and attachment is made in that manner, there can be no question of the person to whom the prohibitory order is issued becoming a surety for the performance of the decree. We therefore agree with the High Court that s. 145 of the Code was not applicable to this case and the execution court was completely wrong in holding that the Sub-Divisional Officer became a surety simply because attachment had been made in the manner provided in O.XXI r. 46 (1). The appeal fails and is hereby dismissed with costs to the Union of India.

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V.P.S. *Appeal dismissed.*