

APPELLATE CIVIL.

Before Jack and Bartley JJ.

1934

April 11, 12, 17.

MAHENDRANATH BANERJI

v.

SATEESHCHANDRA CHAUDHURI.*

Security bond—Construction, Mode of—Realisation—Execution proceedings—Code of Civil Procedure (Act V of 1908), ss. 47, 145—Indian Evidence Act (I of 1872), s. 95.

A security bond must be strictly construed according to its own terms.

Manindra Chandra Nandy v. Durga Prashad Singh (1) and *Bomanji Ardeshir Wadia v. Secretary of State for India in Council* (2) referred to.

This is certainly true, where there is no ambiguity in the terms, but where there is a contradiction in terms, the law allows a reference to antecedent circumstances, under section 95 of the Evidence Act.

Where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing the security to be given.

Raghunandan Prasad Singh v. Kirtyanand Singh (3) followed.

Under the provisions of section 145 of the Code of Civil Procedure the amount of such a security bond can be realised in the execution proceedings.

APPEAL FROM ORIGINAL ORDER by the judgment-debtor.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Kalikinkar Chakrabarti for the appellant.

Seetaram Banerji, Anilchandra Datta and Indrachandra Ghosh for the respondent.

Cur. adv. vult.

*Appeal from Original Order, No. 529 of 1933, against the order of K. Banerji, Second Additional Subordinate Judge of 24-Parganas, dated Sep. 16, 1933.

(1) (1917) 21 C. W. N. 707.

(2) (1928) I. L. R. 53 Bom. 230 ;
L. R. 56 I. A. 51.

(3) (1932) 36 C. W. N. 701.

JACK J. This appeal has arisen out of an application under section 47, Civil Procedure Code in an execution case, in which it is sought to realize from the petitioner, Mahendranath Banerji, Rs. 6,106, due under a mortgage decree, by enforcing a security bond executed by him.

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Mahendra was a *puisne* mortgagee. The decree-holders, in March, 1929, obtained a mortgage decree for sale of the property mortgaged for the realization of Rs. 59,984 with interest up to the date of payment. Mahendra appealed against the decree and obtained a stay of execution on condition of executing a security bond for Rs. 5,000 as security for the increase of interest, which would be due owing to the stay of execution pending the appeal. The appeal was dismissed and the property was sold in March, 1932 for Rs. 65,000, the decretal amount having in the meantime amounted up to Rs. 70,446 with further interest.

The order of the court dated the 20th December, 1929 shows that the appellant was ordered to execute a security bond making himself liable to the extent of Rs. 5,000 for interest accumulating during the stay of execution, but the bond he actually executed only makes him liable for what should be payable by him under the appellate decree. Now, as the appellate decree merely dismissed the appeal and as the appellant, as *puisne* mortgagee was not liable at all under the original decree, the appellant maintains that he is not liable for any payment under the security bond. The terms of the security bond are as follows :—

I, of my own free will, will stand security to the extent of Rs. 5,000, mortgaging the properties specified in the schedule hereto annexed and covenant that, if the decree of the first court be *confirmed* or varied by the appellate court, then I shall duly act in accordance with the decree of the appellate court and shall pay whatever may be payable *by me* thereunder and, if I should fail therein, then any amount so payable shall be realized from the properties hereby mortgaged and, if the proceeds of the sale are insufficient to pay the amount due, I will be personally liable to pay the balance.

Two points are noteworthy in these terms :

(1) The surety contemplates a payment to be made by him in the case in which the decree of the first court is merely confirmed;

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(2) He only makes himself liable for whatever the appellate decree orders him to pay.

Thus the statement that he will pay whatever may be payable by him if the decree is confirmed is unmeaning with reference to the existing facts, since, if the decree is confirmed, no amount could be payable by him, since he only binds himself to pay whatever he is ordered to pay by the appellate court decree. This appears to be, therefore, a case coming under section 95 of the Evidence Act, which states that when the language used in a document is unmeaning with reference to existing facts, evidence may be given to show that it was used in a peculiar sense. We are entitled, therefore, to look into the record of the circumstances in which the bond was executed. Now the order of the appellate court dated the 12th December, 1929 makes it clear that the security bond was executed to indemnify the decree-holders for the interest accumulating on account of the postponement of the sale by making the surety personally liable up to Rs. 5,000; and it is, therefore, clear that this is what is meant by the statement in the security bond that the surety will duly act in accordance with the appellate decree and that, though he is not directed to make any payment by the decree, he is rendered liable for interest to the extent of 5,000 by the confirmation of the first court's decree by the appellate court.

None of the rulings, which have been cited to us for the appellant, are directly in point. The cases of *Manindra Chandra Nandy v. Durga Prashad Singh* (1) and *Bomanji Ardeshir Wadia v. Secretary of State for India in Council* (2) merely lay stress on the fact that a security bond must be strictly construed according to its own terms. This is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, as in the present case, the law allows a reference to antecedent circumstances. As pointed out for the respondents

(1) (1917) 21 C. W. N. 707.

(2) (1928) I. L. R. 53 Bom. 230;
L. R. 56 I. A. 51.

their Lordships of the Privy Council have even held in the case of *Raghunandan Prasad Singh v. Kirtyanand Singh* (1) that, where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing the security to be given. This is the course we have had to adopt in the present case and the order directing security to be given makes it clear that the appellant is liable to the extent of Rs. 5,000, since the amount of interest, which accumulated during the stay of sale between 1929 and 1932, much exceeded this amount. Under the provisions of section 145 of the Code of Civil Procedure the amount can be realized in the execution proceedings. The decree-holder is, however, not entitled to realize Rs. 6,106-13-9 the difference between the proceeds of the sale and the amount of the decree and the order of the lower court will be modified accordingly. In default of payment of Rs. 5,000 within one month the property mortgaged by the security bond will be sold and, if the sale proceeds are less than Rs. 5,000, the decree-holders will be entitled to recover the balance as a personal decree. They will also be entitled to costs of this appeal,—hearing-fee two gold *mohurs*.

BARTLEY J. I agree.

Appeal dismissed.

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(1) (1932) 36 C. W. N. 701.

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