

## CIVIL REVISION.

Before S. K. Ghose J.

MEHERULLA

v.

SARIATULLA.\*

1929

Nov. 20.

*Indemnity—Amount of bail forfeited, if can be recovered from the accused—  
Difference between express and implied contracts—Indian Contract  
Act (IX of 1872), s. 9.*

Any indemnity given to bail, whether by the person bailed or another, is illegal and cannot be enforced.

*Consolidated Exploration & Finance Company v. Musgrave (1), Prasanno Kumar Chuckerbutty v. Prokash Ch. Dutt (2) and Bhupati Ch. Nandy v. Golam Ehibar Chowdry (3) followed.*

In an ordinary surety bond, there is no implied contract that the accused should either appear on the date fixed or pay the amount which his surety had to pay.

Under section 9 of the Contract Act, the difference between the promises express and implied is that the former is made in words, while the latter is made otherwise than in words. But in the case of an agreement which is unenforceable by law, it makes no difference whether the contract is express or implied.

CIVIL RULE obtained by defendant No. 1.

The material facts appear from the judgment of the Court.

*Mr. Priyanath Datta*, for the petitioner.

*Mr. Birendrakumar De*, for the opposite party.

GHOSE J. The plaintiff opposite party brought a suit against the petitioner in the 3rd court of the Munsif at Habiganj, exercising Small Cause Court powers, for the recovery of the sum of Rs. 100 with damages. The plaintiff's case was that he had executed a bail bond for Rs. 100 for the release of the

\*Civil Revision, No. 803 of 1929, against the decree of D. Sen, Small Cause Court Judge of Habiganj, district Sylhet, dated March 18, 1929.

(1) [1900] 1 Ch. 37.

(2) (1914) 19 C. W. N. 329.

(3) (1919) 24 C. W. N. 368.

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petitioner from custody in a criminal case, in which the latter was an accused, and that the plaintiff had to pay the amount as the bail bond was forfeited on account of the laches of the petitioner. The defence *inter alia* was that the plaintiff was not legally entitled to recover the amount. The trial court decreed the suit. Against that order, the petitioner has obtained the present Rule.

The trial court has proceeded upon the view that there was an implied contract by the defendant to indemnify the plaintiff upon the bail bond. It is pointed out, on the other side, that the bail bond itself is not on the record. But I take it that it was properly proved, otherwise it takes away the very foundation of the case. It is admitted that there was no express contract and the point is whether the trial court is correct in its view that there was an implied contract to indemnify the plaintiff and that on such implied contract the plaintiff is entitled to succeed. It is contended in support of the Rule that there was no such implied contract and further that, even if there was an implied contract, it could not be legally enforced. Upon the terms of the surety bond, a copy of which has been produced, it may be said that there was an implied contract that the accused should duly appear on the date fixed for the hearing. But I do not think that the implication went any further and that there was an implied contract that the accused should either appear on the date fixed or pay the amount which his surety had to pay. It may be noticed here that the accused himself had also furnished a bail bond.

Upon the further question as to whether any such implied contract upon which the lower court has relied is enforceable in law, authorities seem to be against the view taken by that court. The law on the subject of contract is summarised as follows:—  
“Where the defendant in a criminal case has been ordered to find bail, a promise given either by him or by a third person to indemnify his surety against

“liability on his recognizances is illegal, because it deprives the public of the protection which the law affords for securing the appearance or good behaviour of the defendant” (Halsbury’s Law of England, Vol. VII, Article 826, at page 398). In the case of *Consolidated Exploration & Finance Company v. Musgrave* (1), it was held that any indemnity given to bail, whether by the person bailed or another, is illegal. It is essential that the person giving bail should be interested in looking after the accused and, if necessary, exercising the legal powers he has to prevent the accused from disappearing. The surety is bound to see that his principal obeys the order of the court. But if the money, for which the surety is bound, is deposited with him as an indemnity against any loss which he may sustain by reason of his principal’s conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore, it is held that a contract like this is tainted with illegality. Following this rule, it was held in *Prasanno Kumar Chuckerbutty v. Prokash Ch. Dutt* (2) and *Bhupati Ch. Nandy v. Golam Ehibar Chowdry* (3) that an agreement by a third party to indemnify a surety is illegal and cannot be enforced.

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It is contended on behalf of the opposite party that although there may not be an express contract, still there may be an implied contract. But under section 9 of the Contract Act, the difference between the promises express and implied is that the former is made in words, while the latter is made otherwise than in words. It makes no difference whether the contract is express or implied. But it must be an agreement which is enforceable by law, otherwise it is no contract at all.

It is contended lastly by the learned advocate for the opposite party that since interference under section 25 of the Provincial Small Cause Court Act

(1) [1900] 1 Ch. 37.

(2) (1914) 19 C. W. N. 329.

(3) (1919) 24 C. W. N. 368.

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is discretionary, it would not be proper to interfere with the decree in this case. But if the decree is opposed to public policy, it cannot be said that it would be improper to interfere with such decree. The equities of the case are also not entirely in favour of the opposite party. As mentioned already, the accused himself is liable for his own bail bond, and the plaintiff must be taken to have acted with full knowledge of his responsibilities.

Having regard to all these circumstances, it seems to me that the decree of the lower court is not in accordance with law and it should be reversed. The Rule is made absolute and the judgment and decree of the Small Cause Court Judge are set aside. The parties will bear their own costs.

*Rule absolute.*

A. C. R. C.