

## CIVIL REVISION.

Before D. N. Mitter and R. C. Mitter J.J.

AKSHAY ZEMINDARI LIMITED

1936  
June 24.

v.

RAMA NATH BARMAN.\*

*Stamp—Security bond for due performance of an order of the Court—Form of bond—Indian Stamp Act (II of 1899), Sch. I, Arts. 40, 57—Code of Civil Procedure (Act V of 1908), O. XLI, rr. 5(3) (c), 6(1).*

A security bond executed for the due performance of an order of the Court, e.g., under O. XLI, r. 5(3)(c) of the Code of Civil Procedure, by which the surety hypothecates any property, is really a mortgage-deed within the definition in s. 2, cl. (17) of the Indian Stamp Act, and is chargeable with stamp duty under Art. 40 and not under Art. 57 of Sch. I of the Act.

*Lal Harihar Pratap Bakhsh Singh v. Bisheshar Bakhsh Singh (1) and Jr. Secretary of the Board of Revenue v. Lalta Bakhsh Singh (2) dissented from.*

*Stamp Reference by the Board of Revenue (3) followed.*

In Art. 57 of the Indian Stamp Act, the words "Security bond or mortgage-deed" are both qualified by the subsequent words commencing with "executed by way of security" and ending with the words "the due performance of a contract".

The Court cannot be regarded as a juridical person and the forms prescribed in the Code of Civil Procedure, Sch. I, App. G, Nos. 2 and 3 show that the bond under O. XLI, rr. 5 and 6 is intended to be given to some one and not to be a mere undertaking to the Court. The security bond should, therefore, be addressed to some officer of the Court such as the *sherishtādar* or some other responsible officer.

*Raj Baghubar Singh v. Jai Indra Bahadur Singh (4) referred to.*

CIVIL RULE obtained by the decree-holder.

The facts of the case and the arguments at the hearing of the Rule are sufficiently stated in the judgment.

\*Civil Revision, No. 255 of 1936, against the order of Jamini Kishore Ray, Subordinate Judge of Khulna, dated Jan. 15, 1936.

(1) (1927) I. L. R. 3 Luck. 298.

(3) (1929) I. L. R. 52 All. 844.

(2) [1931] A. I. R. (Oudh) 99.

(4) (1919) I. L. R. 42 All. 153;

L. R. 46 I.A. 228.

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*Gopal Chandra Das, Surendra Nath Basu and Satyendra Nath Ghosh* for the petitioners.

*Gunada Charan Sen, Hemendra Chandra Sen and Hari Das Gupta* for the opposite party.

*The Officiating Senior Government Pleader, Bijan Kumar Mukherjea*, for the Secretary of State.

The judgment of the Court was as follows :—

The question raised by this Rule is as to the sufficiency of the stamp which has been affixed on a security bond executed under the circumstances to be referred to in detail hereafter, and also as to the form of the said security bond.

It appears that, during the pendency of an appeal to this Court, an application was made by the petitioners for stay of execution of decree in a rent suit. A Rule was issued on March 26, 1935, and the following order was made by this Court :—

After hearing Mr. Gunada Charan Sen for the petitioner and Dr. Mukherjea for the opposite party, we are of opinion that this Rule should be made absolute on these terms, namely, that the petitioner is to deposit in the Court of the Subordinate Judge of Khulna a sum of Rs. 6,000 on or before March 28, 1935, and is to furnish security for the balance of Rs. 9,000 and odd within three weeks from this date to the satisfaction of the Court below. The amount of costs Rs. 1,788-4-0 must also be deposited in Court within four weeks from this date. Unless these conditions are fulfilled the Rule will stand discharged with costs.

The opposite party in the present Rule, on April 12, 1935, put in an unregistered personal security bond for Rs. 9,000 on a stamp paper of Rs. 7-8 jointly executed by sixteen tenants of the opposite party hypothecating certain properties in the schedule thereto, which consisted of holdings under the opposite party in the lands in suit. Then there were intermediate proceedings to which it is not necessary to refer. It is sufficient for the purpose of the present Rule to state that the Subordinate Judge has considered that the stamp of Rs. 7-8 which was

affixed on the security bond, was quite sufficient, as according to him the bond was a security bond within the meaning of Art. 57 of the Indian Stamp Act.

On behalf of the petitioners it was contended that the bond should be stamped under Art. 40 of the Stamp Act. The contention of the petitioner was that the security bond was really a mortgage deed as contemplated by Art. 40 and did not come within the purview of Art. 57. This contention was negatived by the Subordinate Judge by his order dated January 15, 1936, and the Subordinate Judge came to the conclusion that the bond had been properly stamped, as it was a security bond within the meaning of Art. 57. The present Rule was obtained by the petitioner for the revision of that order.

We have heard Dr. Mukherjea, the Senior Government pleader, on behalf of the Crown, as this is a matter which concerns the revenue of the Crown, and we have also heard the petitioners and the opposite party. Having regard to the language of Art. 57, it appears to us clear that the present security bond is not covered by that Article. Article 57 is in the following terms:—

Security bond or mortgage-deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract, (a) when the amount secured does not exceed Rs. 1,000 (the same duty for a bond for the amount secured); (b) in any other case—Ten rupees.

It has been contended on behalf of the Crown, and also on behalf of the petitioner, that this is not a security bond which is executed by these several sureties to secure the due performance of a contract. Mr. Sen, who is appearing to show cause, has contended that Art. 57 must be so read as to read the words "security bond" by themselves, as not being affected by the qualifying clause which follow the words "mortgage deed." We are unable to accede to this contention. In our opinion, the words

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“security bond” or “mortgage deed” are both qualified by the subsequent words commencing with “executed by way of security” and ending with the words “the due performance of a contract.” We have been referred to the definition of mortgage-deed in s. 2, cl. (17) of the Stamp Act, according to which section a mortgage deed includes every instrument whereby for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt or the *performance of an engagement*, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property.

It is contended by Mr. Sen that the security bond was executed to secure the due performance of a contract, and his argument was that the contract was between this Court, and the judgment-debtor and to secure this contract this security bond was executed. We are unable to accede to this contention. The language of Art. 57 clearly shows that the security bond must be executed to secure the due performance of a contract. This Court merely passed an order that execution be stayed on security being furnished. The transaction purported to be an order and not an agreement or contract. Now what is the contract in the present case between the Court and a party to the suit? The true effect of the order of this Court is that, to secure the due performance of an order of the Court, the security bond has to be executed. The contract to pay rent has after the decree merged into the decree and the contractual debt has become a decretal debt. If the intention of the legislature was that the security bond was also to secure the due performance of an order or decree of Court one would have expected that those words would have been added after the words “to secure the due performance of a contract.” There was nothing to prevent the legislature from introducing those words if the object was to secure the performance of a decree or order of a Court. Suretyship is a collateral engagement to answer for the debt, default

or miscarriage of another. In the present case it is a collateral engagement to secure the due performance of the order of the Court. It is Mr. Sen's contention that the security bond is really an agreement between the Court and the sixteen tenants in the present case. The difficulty in accepting this contention is that a Court cannot possibly be regarded as a juridical person, and as we have to consider later with reference to the form of the bond, the bond is not at all in proper form, having regard to what has been observed by their Lordships of the Judicial Committee with reference to security bonds under O. XLI, rr. 5 and 6 of the Code of Civil Procedure. It is pointed out by the Judicial Committee in the case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1) that—

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The new Code of Civil Procedure, that of 1908, provided a special form of security bond to be given during the pendency of an appeal. The form shows that it is intended to be given to some one and not to be a mere undertaking to the Court. Whether that some one should be the other party or an officer of the Court is not made clear; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future.

In the same case their Lordships stated that—

The Court is not a juridical person. It cannot take property, and as it cannot take property it cannot assign it.

In this view, the form in which the security bond has been executed in the present case does not seem to be correct. The security bond should be addressed to some officer of the Court, such as the *sheristâdâr* or some other responsible officer.

With regard to the question about the sufficiency of the stamp, the view we take receives support from a decision of a Full Bench of the Allahabad High Court in the case of *Stamp Reference by the Board of Revenue* (2). We entirely agree with the observations of the learned Judges in that case that

(1) (1919) I. L. R. 42 All. 158 (167-8); (2) (1929) I. L. R. 52 All. 844. L. R. 46 I.A. 228(238).

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there was no such agreement in that case between the Subordinate Judge and the judgment-debtor which would amount to a contract within the meaning of Art. 57. Indeed no agreement was expressed there as here. This Court directed in the present case that execution was to be stayed upon security being furnished and it was in pursuance of an order of this Court that the security bond in the present case was furnished. The security bond is really a mortgage deed within the definition in cl. (17), s. 2, already referred to. It is true that there is a decision of the Lucknow Chief Court [*Lal Harihar Pratap Bakhsh Singh v. Bisheshar Bakhsh Singh* (1) followed in *Jr. Secretary of the Board of Revenue v. Lalta Bakhsh Singh* (2)], which is contrary to the view which has been taken by the learned Judges of the Allahabad High Court in this Full Bench decision, but we prefer to follow the Allahabad decision because we agree with the view that the word "contract" used in Art. 57 must be taken to mean a contract as defined in s. 2(h) of the Indian Contract Act of 1872.

We do not think that the alleged agreement, as in the present case, between the Subordinate Judge and the sureties, who are no parties to the suit, is such a contract as would be enforceable in law. We therefore, think that the security bond should be stamped as mortgage deed within the meaning of Art. 40.

With regard to the form of the security bond, as has already been pointed out in the passage, to which reference has already been made in the decision of the Judicial Committee in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (3), the form of the bond must be in favour of some person, and we think that the bond should be in favour of a named person, namely some officer.

(1) (1927) I. L. R. 3 Luck. 298.

(2) [1931] A. I. R. (Oudh) 99.

(3) (1919) I. L. R. 42 All. 158 ; L. R. 46 I.A. 228.

The result is that this Rule is made absolute and the opposite party is directed to put in within a month from this date the security bond addressed to some officer of the Court on which a stamp should be affixed according to Art. 40 of the Indian Stamp Act, treating the document to be a mortgage deed, and the opposite party will also get this document registered within the said time. If this order is not complied with, the Rule for stay will stand discharged.

Let this order be communicated to the lower Court and the execution records sent down as early as possible.

There will be no order as to costs.

*Rule absolute.*

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