REVISIONAL CRIMINAL.

Before Bucknill and Ross, J.J.

ALAUDDIN

v.

KING-EMPEROR.*

1924.

Dec., 1.

Bail Bond—Surety, liability of—accused arrested on some other charge—failure to appear—Bond, whether liable to be forfeited.

The applicant executed a bail bond in the usual form undertaking that the accused, who was on trial before a Magistrate, should appear before him on the date fixed and should continue to appear until further orders. On the date fixed for judgment the accused did not present himself before the Magistrate. The reason for this was that he had been arrested on a charge of dacoity in another province. The applicant and his fellow surety were called upon to show cause why their bail security should not be forfeited. The applicant stated the reason why he was in fact unable to produce the accused; but notwithstanding this the Magistrate ordered that the full amount of the bond should be forfeited and that distress warrants should issue against the sureties. The applicant then applied by way of appeal to the District Magistrate who, however, upheld the dcision of the Magistrate. The applicant having moved the High Court in revision,

Held, that the bail bond should not have been forfeited, the failure to produce the person being due to an act of law.

Where a surety is unable to produce the person for whom he has given bail owing to some circumstance which was not really under the surety's control, he should not, in ordinary circumstances, be compelled to forfeit his bail.

Robertson v. *Patterson*(1), *Merrick* v. *Vaucher*(2), *Sharp* v. *Sheriff*(3), *Hunt's Case*(4), applied.

* Criminal Revision no. 547 of 1924, from a decision of E. Horsfield, Esq., District Magistrate of Bhagalpur, dated the 6th September, 1924, affirming a decision of C. N. Alam, Esq., Subdivisional Officer of Bhagalpur, dated the 18th August, 1924.

(1) (1806) 103 E. R. 157.
(2) (1794) 101 E. R. 429.
(3) (1797) 101 E. R. 945.
(4) (1696) 90 E. R. 544.

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S. Vijiaraghavalu Naidu In re (1), followed.

Nrisingha Deb Chatterjee v. *King-Emperor*(2), *Rama Babu Pujari*, In re(3), and *People* v. *Bartlet*(4), referred to.

The facts of the case material to this report are stated in the judgment of Bucknill, J.

W. Akbari (with him *K. Hussain*), for the petitioner.

Sultan Ahmed (Government Advocate), for the Crown.

BUCKNILL, J.—This was an application in criminal revisional jurisdiction. The matter relates to an order under which the applicant was directed to forfeit the amount of security which he had undertaken to pay on behalf of a person who was under trial in the event of that person not appearing from time to time during the continuance of the trial. The applicant and another man, who does not appear before us, executed a bail bond in the usual form; undertaking that one Anandi Singh, who was on trial before the Sub-divisional Officer of Bhagalpur under the provisions of section 110 of the Criminal Procedure Code, should appear before the Subdivisional Officer on the 8th February, 1924, and should continue to appear until further orders. The case apparently continued for some months and the accused regularly appeared. On the 30th May last the case was put down for judgment and, so far as I understand, on that day the accused appeared in Court; but on that day judgment was not delivered and an order was passed as follows:

"Orders not ready. Put up on 2nd June, 1924. The accused as before."

Now, on the 2nd June the accused was not present. The reason for this was found to be that on the 31st May or 1st June he had been arrested on a charge of dacoity at a place called Maldah which is not very

(1) (1914) I. L. R. 37 Mad. 156.
(2) (1911-12) 16 Cal. W. N. 550
(3) (1916) 18 Bom. L. R. 688.
(4) 3 Hill. 570.

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far from Bhagalpur but which is said to be in the province of Bengal. The applicant and his fellow surety were called upon to show cause why their bail security should not be forfeited. The applicant did show the reason why he was in fact unable to produce the accused; but notwithstanding this, the Magistrate, on the 18th August, ordered that the full amount of the bond should be forfeited and distress warrants issued against the sureties. The applicant then applied by way of appeal to the District Magistrate who, however, upheld the decision of the Subdivisional Officer. It is on this point that the applicant has now applied to the Court in revision.

No direct authority in this country upon this question has been quoted; but there are numerous cases which have been decided both in England and in India (and it would appear there is also authority in the United States of America) which seem to throw considerable light upon the proper elucidation of this question. The case which is nearest to the point in English decisions is the case of *Roberts* v. *Patterson* (1). This is a very old decision; reported in 1806. In that case a seaman who was out on bail on process for a debt under £20 was seized by the press gang and impressed into the service of the King. The person who had gone bail for him applied to a Judge in Court for a *habeas corpus* to be directed to the captain of the ship on which the sailor was serving for the purpose of bringing the seaman up before the Court so that the surety might be discharged from his bail. The Court refused this application but granted a rule *nisi* for entering an *exoneretur* on the bail-piece on the ground that by act of law the surety was rendered incapable of taking the defendant's body for the purpose of rendering him before the Court; and that, therefore, the surety should not be prejudiced. The rule was made absolute and an *exoneretur* was granted. It seems to have been thought clearly by the Court

(1) (1806) 103 E. R. 157.

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that it was impossible for the surety practically to have prevented what had taken place and impossible for him to have in fact produced the seaman before the Court. There are several cases which are somewhat similar although the circumstances vary. In *Merrick* v. *Vaucher* (1) it was held that a surety should be exonerated from his security where the person for whom he had become surety had been sent out of the kingdom under the provisions of an Act relating to Aliens' Expulsion (33 Geo. 3, c. 4). In another case [*Sharp* v. *Sheriff* (2)], the facts seem to have been that the defendant had been arrested at the suit of the plaintiff and had been enlarged on bail. After his enlargement he was arrested on a charge of murder in Ireland and it would appear that application had been made by the authorities in Ireland to have him sent over for trial there. The person who had stood as surety for him applied to the Court that his bail bond should not be forfeited; and in the result, although this application was not granted in terms, the effect was similar because the man was brought up before the Court on a *habeas corpus*. He was thus surrendered to the Court and the bail in consequence was discharged. After that, he was committed to Newgate on the charge of felony. In what is known as *Hunt's* case (3), Hunt had been committed for trial on high treason. He was admitted on bail and his surety applied to the Court proving on an affidavit that he could not produce Hunt because Hunt had been violently removed from his house by a party of French who had forcibly taken him to France. The Attorney-General opposed the application stating that it would be made to appear that this abduction was of Hunt's own contrivance in order to avoid the risk of a trial. Holt, L.C.J., refused to make any order of the nature asked because he thought that it was premature. He pointed out that if it could be shown that Hunt had voluntarily or at his own contrivance been carried off

(1) (1794) 101 E. R. 429.
(2) (1797) 101 E. R. 945.
(3) (1696) 90 E. R. 544.

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by the French the bail would be forfeited. But if upon the matter being enquired into and it was subsequently found that this was not so, then the bail would not be forfeited. The matter was left with an order for an enquiry; it does not appear whether the merits of the matter were in fact enquired into nor as to what happened in this case finally does there appear any account. These cases I think sufficiently show that where a surety is unable to produce the person for whom he has given bail owing to some circumstance which was not really under the surety's control, such as for example, the impressment of a person into the King's service; his arrest on a charge of felony or the like, he will not be compelled to forfeit his bail in ordinary circumstances. In India there are two interesting cases where the suicide of the person for whom an applicant had become surety was held to discharge the surety from his bail obligation. One is the case of *Nrisingha Deb Chatterjee* (1) where the Court laid down that when a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him. Another case is that of *re. S. Vijiaraghavalu Naidu* (2). In this case the question of what might be held to constitute the discharge of a bail surety was dealt with at considerable length and the exceptions were divided into three classes (*1*) act of God, (*2*) act of law, and (*3*) act of parties. Suicide of course belongs to the last of these three classes and in that particular case it would seem that it was suggested that the sureties might and should have been able to prevent the individual from committing suicide. The act of God would of course include cases such as the death of the person. The act of law was regarded as including being sent abroad under an Aliens Deportation Act, becoming a peer; being sentenced to transportation or being impressed by the press gang [*see* also the case of *R. B. Pujari*(3)]. The case now under consideration

(1) (1911-12) 16 Cal. W. N. 550. (2) (1914) I. L. R. 37 Mad. 156.
(3) (1916) 18 Bom. L. R. 683.

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by us, falls, I think, under the second class, *i.e.*, an act of law. It is interesting to observe, although it is unfortunate that we have not got the Report, that Mr. Sohoni, in the 11th edition of his Criminal Procedure Code, at page 1076, when discussing section 514 of the Criminal Procedure Code, states that in the United States of America it has been definitely held that it is a good defence to an action on a recognizance for a person's appearance to answer a criminal charge that he had been arrested and committed to jail in another country [*People* v. *Barlet* (1)].

The learned Government Advocate does not think that in this case he can support the order which has been passed. I think there is no doubt that in this case the bail bond should not have been forfeited the failure to produce the person being due to an act of law. The order will be set aside and this application will be allowed. If the amount has been paid it will be refunded.

ROSS, J.—I agree.

Application allowed.

S. A. K.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J.J.

1924.

Nov., 18, 19. Dec., 2.

MUSSAMMAT ABBASI BEGUM

v.

MUSSAMMAT YAQUTI BEGUM.*

Guardian and Wards Act, 1890 (*Act VIII of* 1890), *sections* 34, 41 *and* 45—*Ex-guardian, failure of payment by—Duty of the Court to ascertain what sum was actually due—Order imposing fine, legality of.*

* Appeal from Original Order no. 6 of 1924, from an order of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 22nd December, 1923.

(1) 3 Hill, 670.