

limits the discretion of the Judge trying the suit. Section 35 of the Civil Procedure Code is clear that the Court has discretion in the matter of costs. There is no principle of law with which we are acquainted which makes it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute. In this case the real contesting defendants have been made liable for costs together with the other defendants and there is nothing improper in law in such an order. In fact, in our opinion, on the facts of this case the learned Judge would have been failing in his duty if he had not saddled the present appellants with costs.

For these reasons we dismiss the appeal with costs.

P. S.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Young C. J. and Monroe J.

SARDAR KHAN—Petitioner

versus

THE CROWN—Respondent.

Criminal Revision No. 800 of 1935.

Criminal Procedure Code, Act V of 1898, section 106 : Security bond to keep the peace — Forfeiture of — Liability of surety for amount of bond — in addition to any amount recovered from the principal.

On a Security bond for Rs.500 under section 106 of the Code of Criminal Procedure, the petitioner S. K. stood surety and himself expressly agreed that he would forfeit Rs.500 if the principal broke the peace. The principal having defaulted the Magistrate ordered the forfeiture of the amount of the bond against the principal as well as the surety.

Held, that the surety was liable to pay the amount specified in the bond in addition to any amount that might be recovered from the principal.

1935

SITAL DAS
v.
PUNJAB ANI
SIND BANK
LTD.
LYALLPUR.

1935

Dec. 4.

1935

SARDAR KHAN
v.
THE CROWN.

Salig Ram Singh v. Emperor (1), relied upon.

Jawaya v. Empress (2), *Kaku v. Queen-Empress* (3),
Ali Mahomed v. Emperor (4), *Crown v. Abdul Aziz* (5), and
Harnam v. The Crown (6), disapproved.

Queen-Empress v. Rahim Bakhsh (7), referred to.

Petition for revision of the order of Mr. A. C. Macnabb, District Magistrate, Attock at Campbellpur, dated 24th April, 1935, affirming that of Mr. N. M. Buch, Sub-Divisional Magistrate, Pindigheb, dated 25th March, 1935, forfeiting both the personal bond executed by Fateh Khan, and the surety bond executed by Sardar Khan.

MOHSIN SHAH, for Petitioner.

NAZIR HUSSAIN, Assistant Legal Remembrancer,
for Respondent.

The order, dated 9th October, 1935, referring the case to a Division Bench was passed by—

COLDSTREAM J.—On 21st December, 1932, the Sub-Divisional Magistrate, Pindigheb, passed an order under section 106 of the Code of Criminal Procedure directing Fateh Khan to execute a bond for Rs.500 with one surety for keeping the peace for a period of one year. The present petitioner, Sardar Khan, stood surety and himself executed a bond to the effect that he would forfeit Rs.500 if Fateh Khan broke the peace. Less than four months later Fateh Khan committed an offence under section 306, Indian Penal Code, and was convicted and sentenced to transportation for life. His appeal was dismissed by the High Court on the 27th of April, 1934. On the 11th of April, 1933, the Police had reported to the Court that Fateh Khan had been bound over to keep the peace and suggested that action should be taken to forfeit his bond. No action was, however, taken until

(1) (1909) I. L. R. 36 Cal. 562. (4) 226 P. L. R. 1211.

(2) 30 P. R. (Cr.) 1890. (5) (1923) I. L. R. 4 Lah. 462.

(3) 26 P. R. (Cr.) 1894. (6) (1924) I. L. R. 5 Lah. 448.

(7) (1893) I. L. R. 20 All. 206.

the 4th August, 1934, after the High Court had rejected the appeal. The Sub-Divisional Magistrate issued notice to Sardar Khan and after hearing him passed an order forfeiting both the personal bond executed by Fateh Khan and the surety bond executed by Sardar Khan, the petitioner. Against this order Fateh Khan did not appeal. Sardar Khan, however, appealed to the District Magistrate, who upheld the order of the Sub-Divisional Magistrate. Against the District Magistrate's judgment Sardar Khan has come to this Court on revision.

1935
 SARDAR KHAN
 v.
 THE CROWN.

The only point which calls for consideration is whether there is force in the contention pressed before me by Mr. Mohsin Shah for the petitioner that the order making his client liable to pay Rs.500 in addition to any amount which may be recovered from Fateh Khan, his principal, is not in accordance with law. The learned counsel for the Crown has referred me to *Salig Ram Singh v. Emperor* (1) in support of the view taken by the learned District Magistrate (see pages 12 and 13 of the District Magistrate's judgment) to which view some support is given by a judgment of the Madras Court in *Kulur Annappa Nair v. Emperor* (2). On the other hand the Lahore Court has taken an opposite view on three occasions (see *Jawaya v. The Empress* (3), *The Crown v. Abdel Aziz* (4) and *Harnam v. The Crown* (5). None of the judgments to which I have referred deals with a bond executed in compliance with an order under section 106, Criminal Procedure Code, but I think that this fact does not render them inapplicable for the purposes of this case. The meaning of the words in section 106, Criminal Procedure Code, would, I think, naturally

(1) (1909) I. L. R. 36 Cal. 562. (3) 30 P. R. (Cr.) 1890.
 (2) (1909) 10 Cr. L. J. 294. (4) (1923) I. L. R. 4 Lah. 462.
 (5) (1924) I. L. R. 5 Lah. 448.

1935

SARDAR KHAN
v.
THE CROWN.

be taken to be that the surety will be bound to make good the amount stated in the bond executed by his principal in the event of the latter's failure to do so, but the form of the surety bond given in Schedule V to the Civil Procedure Code (see form 11) seems to show that in the case of surety bonds executed under the provisions of sections 108, 109 and 110 the intention is that the surety should be liable independently of his principal. No form of bond to be taken from a surety is appended to form No.10 (bond to keep the peace under section 107).

In view of the conflict of opinion in this matter I refer the petition for determination on this point to a Division Bench.

The order of the Division Bench was delivered by—

YOUNG C. J.—This petition was referred to this Court for determination of one question only, whether when a bond has been given under section 106 of the Criminal Procedure Code, with a surety and the person bound commits a breach of the peace, the amounts payable under the bond by the person bound and by the surety can be recovered or whether the surety only becomes liable in the event of default in payment by the person bound. Section 106 of the Criminal Procedure Code, provides that whenever any person, accused of any one of certain offences, is convicted of such offence and the Court is of opinion that it is necessary to require him to execute a bond for keeping the peace, the Court may, at the time of passing sentence, order him to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace during such period not exceeding three years as it thinks fit to fix. In the present case, an order was made under this section on

1935

SARDAR KHA
v.
THE CROWN

the 21st of December, 1932, by the Sub-Divisional Magistrate of Pindigheb, ordering Fateh Khan to execute a bond for Rs.500 with one surety for keeping the peace for a period of one year. Fateh Khan entered into a bond binding himself not to commit a breach of the peace during the term of one year and in case of his making default he bound himself to forfeit to His Majesty the King-Emperor the sum of Rs.500. On the same form underneath the bond of Fateh Khan the petitioner declared himself surety for Fateh Khan that he would be of good behaviour to His Majesty the King-Emperor and to all His subjects during the said term and in case of Fateh Khan's making default therein he Sardar Khan bound himself to pay to His Majesty the sum of Rs.500.

It will be observed in the first place that the bonds of both Fateh Khan and Sardar Khan have been made in accordance with the provisions of section 106 and in the second place that Sardar Khan's obligation is to pay in the event of a breach of the peace by Fateh Khan and not in default of payment by Fateh Khan after he has committed a breach of the peace.

In our opinion this section and the form of the bond supply the answer to the question before us. There can be no doubt that the obligation of Sardar Khan to pay Rs.500 became absolute when a breach of the peace was committed by Fateh Khan. The learned Judge's reason for referring the case was that there are conflicting decisions on the point, *Salig Ram Singh v. Emperor* (1) supporting the view that the surety's obligation to pay is independent of that of the person accused. But on the other hand there are five decisions of this Court to which the learned counsel for the petitioner has drawn our attention and which

1935
 ARDAR KHAN
 v.
 THE CROWN.

support the contrary view. In *Jowaya v. The Empress* (1) it was held that only one bond should be taken from the accused and his sureties for one determinate amount, the sureties engaging to be bound jointly and severally for the same amount as the accused, so that it may be realizable from any one of the obligors, and further there was no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the aggregate the amount for which the accused is liable. The judgment in this case is a very short one of a single Judge and he has not considered at all the wording of section 106 which makes the surety liable not for payment of money, but for the good conduct of the person bound.

The next is *Kaku v. Queen-Empress* (2). It is a judgment of the same Judge and the learned Judge relied on his own previous judgment.

The third case is *Ali Mahomed v. Emperor* (3), also the decision of a single Judge. There is no reference to section 106 or discussion of the law. Without giving any reason, the learned Judge said that only the amount for which the bond of the person bound was taken could be recovered and that amount might be recovered from him, or any one or both of the sureties. The fourth case is *The Crown v. Abdul Aziz* (4) which is also the judgment of a single Judge and which followed *Kaku v. Queen-Empress* (2).

The fifth case is *Harnam v. The Crown* (5) which also follows *Kaku v. Queen-Empress* (2) and *Ali Mahomed v. Emperor* (3). In this case, the learned Judge referred to the decision of the Division Bench

(1) 30 P. R. (Cr.) 1890.

(3) 226 P. L. R. 1911.

(2) 26 P. R. (Cr.) 1894.

(4) (1923) I. L. R. 4 Lah. 462.

(5) (1924) I. L. R. 5 Lah. 448.

of the Calcutta High Court, *Salig Ram Singh v. Emperor* (1) from the view of which he differed. In this case, *Salig Ram Singh v. Emperor* (1), it was held that upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal. The question there arose under section 107 of the Criminal Procedure Code, where the provision is that the Magistrate may "require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit to fix." It will be seen that the wording is substantially the same as in section 106. The learned Judges in their judgment seem to us to have discovered the fallacy which with respect we consider underlies the Punjab decisions when they said, "*Prima facie*, no doubt, a surety merely agrees to pay the creditor failing the debtor, and his liability is, as a rule, co-extensive with that of the principal. But this is not a case of ordinary suretyship for the payment of money. As pointed out by Edge, C. J. in *Queen-Empress v. Rahim Bakhsh* (2), the object of these provisions of the Code is to prevent crime, and not to obtain money for the Crown. It is not, as in the case of, for example, an administration bond with sureties, the object to secure the payment of money or the avoidance of pecuniary loss. Hence it is provided in section 118 of the Code that the amount of every bond demanded under these provisions shall be fixed with due regard to the circumstances of the case and shall not be excessive, while in section 106 it is expressly directed that the amount of the principal bond shall be proportionate

1935

SARDAR KH.
v.
THE CROWN

(1) (1909) I. L. R. 36 Cal. 562. (2) (1889) I. L. R. 20 All. 206.

1935
SARDAR KHAN
v.
THE CROWN.

to the means of the person bound down. That being so, it is obvious that the power to require sureties must have been given with some object other than that of ensuring the recovery of the amount of the bond; in other words, an additional security for the principal's keeping the peace, not a surety for his paying forfeit, is demandable."

The learned Judges also relied on the form of the bond used which was taken, as in the present case, from the 5th Schedule to the Code.

We have no doubt that the considered decision of the Calcutta High Court is to be preferred to the Lahore decisions, and we think that the view expressed in these decisions is, on first principles and also on a consideration of the words of the Statute, untenable. We answer the question referred by the learned Judge as follows :—

The order requiring Sardar Khan, petitioner, to pay Rs.500 in addition to any amount which may be recovered from Fateh Khan is in accordance with law.

F. S.

Reference answered in the affirmative.
