

*Before Sir Francis W. Maclean, K.C.L.E., Chief Justice,
and Mr. Justice Gaill.*

1903

Aug. 17.

GOPI NATH CHOWDHRY

v.

BENODE LAL ROY CHOWDHRY.*

Security Bond—Assignment of Security bond—Assignee of Security bond, rights of—Suit on Security bond—Civil Procedure Code (Act XIX of 1882) s. 349.

The assignee of a security bond, which was given to a District Judge under s. 349 of the Code of Civil Procedure for the production of a judgment-debtor when called upon to appear, is entitled to maintain an action upon that bond.

Mingale Antone Kame v. Ramchandra Baje(1) referred to.

SECOND APPEAL by the defendant, Gopi Nath Chowdhry.

This appeal arose out of an action brought by the plaintiffs to recover a certain sum of money upon the basis of a security bond. The allegation of the plaintiffs was that they, as decree-holders, in execution of their decree got one Dwarka Nath Roy arrested and put into jail; that while in jail Dwarka Nath applied for insolvency and moved the District Judge of Dacca to be set at liberty on bail; that the District Judge ordered that he could be released on furnishing a security bond for Rs. 3,500; that on the 25th February 1898, the defendant executed in favour of the District Judge a security bond for that amount, undertaking to produce Dwarka Nath Roy whenever called upon to do so by the District Judge, making himself liable to pay a fine of Rs. 3,500; that thereupon Dwarka Nath Roy was set at liberty; that subsequently his application for insolvency was rejected; that on the application of the plaintiffs the District Judge directed the second Subordinate Judge of Dacca to issue a notice on the defendant calling upon him to produce Dwarka Nath Roy; that

* Appeal from Appellate Decree No. 13 of 1901 against the decree of G. Gordon, District Judge of Dacca, dated Dec. 4, 1900, reversing the decree of Upendra Nath Bose, Officiating Subordinate Judge of that district, dated July 28, 1900.

the defendant failing to produce the said Dwarka Nath, the District Judge, by an order dated the 2nd May 1899, sanctioned the realization of Rs. 3,500 from the defendant, but that order was set aside by the High Court on the ground that the amount of the security bond could not be realized in summary proceedings in execution of a decree; and that on the 27th March 1900, the District Judge assigned the security bond to the plaintiffs; and hence was the suit.

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The defendant, *inter alia*, pleaded that the plaintiff had no cause of action; that as the District Judge himself did not call upon him for the production of the judgment-debtor there had been no violation of the terms of the bond, and therefore the suit was not maintainable; that inasmuch as the District Judge had no jurisdiction to take the security bond and to release the judgment-debtor on bail after he was imprisoned, he (the Judge) had no right to assign the bond; that upon the assignment, the plaintiffs acquired no right to enforce the security bond against the defendant, it being a personal contract.

The Court of first instance allowed the objections raised by the defendant, and dismissed the plaintiff's suit. On appeal, the District Judge of Dacca reversed the decision of the first Court.

Dr. Ashutosh Mookerjee (Babu Baikuntha Nath Das with him) for the appellant. The plaintiffs having obtained an assignment of the security bond from the District Judge, brought this suit, and I submit it is not maintainable inasmuch as there was no valid assignment, and besides, no condition of the said bond was broken. In the case of *Mingale Antone Kane v. Ramchandra Baje* (1) it was no doubt held that the security bond given under section 349 of the Civil Procedure Code could not be enforced summarily, but might be assigned with a view to sue on it, but the terms of the bond in that case were not known. Each case must be governed by the terms of the document. Upon the present security bond, I submit, no suit can be maintained.

Dr. Rash Behary Ghose (Babu Bidhu Bhushan Ganguli with him) for the respondent. The plaintiffs are entitled to sue upon the security bond, and the assignment was a valid one.

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The case of *Mingale Antone Kane v. Ramchandra Beje*,⁽¹⁾ supports the view I take. The security bond could not be enforced summarily: *Moidin v. Chaudu*⁽²⁾, *Poynor Bibee v. Nujjoo Khan*⁽³⁾. The proper course is to assign over the bond, and it can be so done if the terms of it have been complied with.

Dr. Ashutosh Mookerjee in reply.

MACLEAN C.J. This is a suit upon a bond dated the 25th of February 1898 given to the District Judge of Dacca. By that bond the defendant as surety undertook to produce a certain gentleman who had filed a petition for insolvency in that Court, and we find these words in the bond: "Accordingly I stand surety by executing this security bond do agree to produce the said judgment-debtor, Dwarka Nath Roy, when demanded by your Honour on the disposal of the said insolvency case, or before or after the same. If I fail to produce him upon demand by your Honour then I shall pay to the Empress of India a fine of Rs. 3,500." Then there is added: "Let it be stated that if upon demand by the Court I fail to produce the said Dwarka Nath Roy in Court, I shall pay the whole of the said amount of rupees three thousand and five hundred mentioned in this security bond. If I fail to pay the same, then the amount shall be realized from my moveable and immovable properties and from my person."

The District Judge directed the Subordinate Judge before whom the execution proceedings were pending to call upon the surety to produce the judgment-debtor. The surety took no objection to this action on the part of the Subordinate Judge but, before the Subordinate Judge, asked for time and he got it. Eventually the judgment-debtor was not produced, and on the 27th of March 1900 the District Judge assigned the bond to the present plaintiffs who are now suing upon it. The Court below has decreed the suit.

Two objections are taken by the appellant: *first*, he says that there was no breach of the condition of the bond inasmuch as there was no demand made by the District Judge of Dacca to

(1) (1894) I. L. R. 19 Bom. 694.

(2) (1883) I. L. R. 7 Mad. 273.

(3) (1879) I. L. R. 5 Calc. 437.

produce the judgment-debtor. There is no substance in this objection. Having regard to the nature of the bond and the circumstances under which the bond was given, the contention that the defendant is not liable to be sued because the District Judge himself did not personally demand the production of the insolvent cannot, I think, be sustained. He authorized the Subordinate Judge before whom the proceedings were pending to make the demand, and he made it, and no exception was ever taken by the defendant to this. The first point fails.

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Then it is said that the District Judge had no power to assign the bond to the plaintiffs. I can find no authority for such proposition: nor has any been cited. It was held in the case of *Mingale Antone Kane v. Ramchandra Baje* (1) that that was the proper course to adopt, and I think it was.

I think it would be a useful thing if there was a prescribed form of bond for these cases.

The appeal is dismissed with costs.

GEORGE J. I concur.

Appeal dismissed.

S. C. G.

(1) (1894) I. L. R. 19 Bom. 694.