

# CASES

DECIDED IN THE

## HIGH COURT OF BOMBAY.

[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Special Appeal No. 28 of 1871.*

NA'RA'YAN DEV ..... *Appellant.*

GAJA'NAN DIKSHIT and ANANDRA'V JOSHI. *Respondents.*

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January 14.

*Security bond for restitution of property taken under decree—Decree reversed on special appeal—Surety's liability—Act XXIII. of 1861, Sec. 36.*

A surety, who executes a security bond (in Form No. 82 of the High Court Circulars\*) under Sec. 36 of Act XXIII. of 1861, is liable for the fulfilment of the decree, not only of the Court of Regular, but also of that of the Court of Special, Appeal.

THIS was a miscellaneous special appeal from the decision of R. H. Pinhey, Judge of the District of Puna, reversing the order of the First Class Subordinate Judge at that city.

The facts of the case were briefly these :—

Bh'girthibái obtained a decree against Náráyan Dev. The latter preferred an appeal, but before its disposal Bh'girthibái executed the decree,—Gaj'nan Dikshit and Anandráv Joshi becoming sureties for the restitution of the property, the subject matter of the decree, in case of its being reversed in appeal, and passing a bond under Section 36 of Act XXIII. of 1861 (substituted for Section 339 of Act

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VIII. of 1859) in the form prescribed by the High Court at page 247 of the "Book of Circulars." In the Court of regular appeal, the decree in favor of Bhágirthibái was upheld, but that decree was set aside in the Court of special appeal.

Thereupon Náráyan Dev, the present appellant, applied to the Subordinate Judge at Puna for an order directing the present respondents, Gájánan Dikshít and Anandráv Joshi, to restore the property taken from him under the decree. The respondents, under the circumstances, objected that they were not liable to do so. Their objection being overruled, an appeal was made to the District Judge, who allowed the objection on the ground that the liability of the sureties had ceased upon the decision of the court of regular appeal in Bhágirthibái's favor.

The special appeal was heard by LLOYD and KEMBALL, JJ.

*Rársáheb V. N. Mandlik* and *Ganpatráv Bháskar* for the special appellant:—The security bond is applicable to the ultimate decision which may be passed in the suit. The juxtaposition of Sections 338 and 339 of the Code of Civil Procedure affords no assistance to the right interpretation of the security bond. The fact of the regular appellate court confirming the decree of the court of first instance, does not determine the liability of the sureties, because that decision is not final. As long as there is a possibility of that decision being reversed, so long their liability continues.

*Shántárám Náráyan* for the special respondents:—Looking to the unambiguous wording of the form of the security bond in question, it is perfectly clear that the sureties bound themselves only to carry out the decree of the court of regular appeal, and not that of any other superior court. The appeal pending at the date of the bond, was the only appeal contemplated by the parties. They did not contemplate a special appeal or an appeal to the Privy Council. The words "by the said court" and the word "and" in Sec. 362 of the Civil Procedure Code show that the things secured are to be done at one and the same time. In Miscellaneous Special

Appeal No. 2 of 1869 (*Ratan<sup>s</sup> /frimbak Patel v. Nasarvánjí Hormasjí and another*), WARDEN and GIBBS JJ. decided, on the 22nd December 1869, that the security bond ceased to have effect immediately after the District Judge gave his decree. This bond was under Sec. 338 of the Civil Procedure Code, but there is no substantial difference between it and a bond under Sec. 36 of Act XXIII. of 1861, which is the one in dispute in this case.

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PER CURIAM:—The Subordinate Judge's order in this case should, we think, not have been interfered with.

Bhágirthibái was allowed to take the amount awarded to her on her furnishing security under Section 36 of Act XXIII. of 1861, "for the restitution of any property which might be taken in execution of the decree," and the respondents, Gajánanráv and Anandráv, became the required securities and entered into a bond in the Form No. 82 prescribed by the High Court, whereby they bound themselves, "if required by the said court," to restore all such property, viz., that which had been taken in the execution of the decree; and as, under Section 362 of the Civil Procedure Code, the Court of the Subordinate Judge was the court to which only application could be made for executing the decree of either of the appellate courts, whether "the said court," *i.e.*, the Court of the Subordinate Judge, demanded such restitution in conformity with the decree of the District Judge or of the High Court, does not seem to affect the matter.

The case to which we have been referred is not on all fours with the present case. Security was therein taken under Section 338 of the Civil Procedure Code, and there is a marked distinction between the form of the security bond applicable to that section and the form of the bond now in question. We reverse the order of the District Judge, dated the 29th July 1871, and restore that of the Subordinate Judge, dated the 11th November 1870.

*Order of District Judge reversed and decree of Subordinate Judge restored.*