

4 B. 465.

APPELLATE CIVIL.

1880
MARCH 24.*Before Sir Michael Roberts Westropp, Kt., Chief Justice and
Mr. Justice M. Melvill.*APPEL-
LATE
CIVIL.NAGO MAHADEO APTE VAKIL (*Original Defendant*), Appellant
v. NARAYAN RAMCHANDRA PATWARDHAN (*Original
Plaintiff*), Respondent. [24th March, 1880.]

4 B. 466.

*Misrepresentation—Suit against an attesting witness to a security bond for appearance
of an insolvent judgment-debtor.*

The plaintiff held a money decree against M., who was arrested in execution of it. On being brought to the Court, however, M. applied for his discharge as an insolvent under s. 273 of the Civil Procedure Code (Act VIII of 1859). He was released on the security of G., who executed a bond for the appearance of M. at the enquiry into his insolvency. The defendant attested the bond, and wrote in the attestation that G. was a solvent person. In consequence of the non-appearance of M. the plaintiff sought to execute his decree against the surety G., who on his arrest also applied for his discharge on the ground of his insolvency, and was discharged after inquiry. The plaintiff thereupon sued the defendant for the amount of his decree and cost of execution, on the ground of his representation in the attestation that G. was solvent. The Subordinate Judge rejected, but the District Judge, in appeal, allowed, the plaintiff's claim.

Held, by the High Court, on second appeal, that the plaintiff had no cause of action against the defendant, whether the suit was considered as brought upon a covenant or misrepresentation, as the defendant was neither a [466] co-obligor in the security bond of G., nor did he make any promise in the attestation of it to compensate the plaintiff for the non-appearance of M., nor any representation to the plaintiff.

Quere—Whether the nazir was liable to the plaintiff for negligence in not taking a proper surety?

THIS was a second appeal from the decision of W. H. Newnham, Judge of the District Court of Poona, in appeal No. 114 of 1879, reversing the decree of G. A. Mankar, Subordinate Judge (Second Class) at Khed.

The plaintiff sued to recover Rs. 864-10-11 as damages from the defendant under the following circumstances:—The plaintiff held a money decree against one Mir Zulf Ali, and caused him to be arrested in execution of it. Mir Zulf Ali, on being brought to the Court, applied for his discharge, under s. 273 of the Civil Procedure Code (Act VIII of 1859) on the ground that he had no means of paying off the debt. He was released on the security of Gulam Mohidin, who executed to the nazir a security bond for the appearance of Mir Zulf Ali at the inquiry into his alleged insolvency. The defendant, who acted as pleader for Mir Zulf Ali in the insolvency proceedings, attested the security bond of Gulam Mohidin, and wrote in the attestation that he (Gulam Mohidin) was a solvent person. In consequence of the non-appearance of Mir Zulf Ali, the plaintiff sued out execution against Gulam Mohidin, who, on being brought to the Court, also applied for his discharge on the ground of his insolvency, and was discharged. The plaintiff thereupon sought to execute his decree against the defendant, on the ground that, on his assurance, Gulam Mohidin's security had been accepted. His application for execution was rejected, and he was referred to a regular suit to establish his right to recover the amount of his decree from the defendant. He,

* Second Appeal No. 405 of 1879.

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therefore, brought the present suit. The defendant denied his liability. The Subordinate Judge rejected the plaintiff's claim. The District Judge, in appeal, reversed the decree of the lower Court, and allowed the plaintiff's claim. The defendant appealed to the High Court.

Macpherson (with him *Shamrao Vitthal*), for the appellant.—The District Judge was wrong in holding that what the appellant wrote in his attestation, made him legally liable to the respondent [467] for the amount of his decree. It was a mere statement made in good faith before a public officer, and not a contract. The respondent has not shown that it was made in bad faith, and was, therefore, an actionable misrepresentation. The District Judge has held the appellant liable as if he himself was the surety. There is no evidence that the surety was not solvent at the date of the security bond.

Pigot (with him *V. B. Patwardhan*), for the respondent.—The appellant's statement was an assurance to the respondent himself through the nazir, and created a privity between himself and the respondent. The assurance was acted upon, inasmuch as Gulam Mohidin was accepted as surety. The plaintiff is not to be supposed to be a perfect stranger in the matter of the security. The appellant is liable, as held in *Abdul Kureem v. Abdool Hug Kazeel*(1). Though the appellant was not a party to the security bond, he made a misrepresentation, and is liable for the consequences. Whether it was a misrepresentation or not, is a question of fact. The Judge held that it was so. The finding is conclusive. This Court cannot interfere.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C. J.—If this suit be looked upon as one upon a covenant or promise, it must fail, inasmuch as the defendant is neither a co-obligor in the bond given by the surety Kazi Sayad Gulam Mohidin, nor did the defendant, in writing what he has written in his attestation of that bond, make any promise to compensate the plaintiff if the judgment-debtor did not appear on the inquiry into his alleged insolvency. If this suit be looked upon as one founded on misrepresentation (if there were misrepresentation), the misrepresentation was made by the defendant to the nazir and not to the plaintiff, and there is neither allegation in the plaint or elsewhere by the plaintiff, nor proof that the plaintiff acted upon that misrepresentation. The plaintiff does, in his plaint, aver that he objected to the sufficiency of Kazi Sayad Gulam Mohidin as a surety for the appearance of the judgment-debtor Mir Zulf Ali, but he does not aver that, in consequence of the misrepresentation of the defendant that the said [468] Kazi was a fit person to be surety, he, the plaintiff, withdrew his objection. Hence it appears that the plaintiff had not any cause of action whatever against the defendant. It may, indeed, be that, if the nazir were (as to which we give no opinion) liable to the plaintiff for negligence in not taking a proper surety, the nazir might have an action over against the defendant for the misrepresentation, if it were volunteered by the defendant, and the latter might be compelled to recoup the nazir for any loss which he might incur in being compelled to pay damages to the plaintiff for having accepted the Kazi as a surety(2). But,

(1) 15 W. R. C. R. 21.

(2) See *Humphreys v. Pratt*, 5 Bligh N. S. 154 = 2 Dow and Clark, 288; and 2 Hudson and Brooke 522; and referred to in *Vana v. Hata* 11 B. H. C. R. 46, 53, and see *Bailey v. Morrell*, 3 Bulstrode 95; and *Collins v. Evans* 5 Q. B. 820.

in the present state of circumstances, it is unnecessary for us to decide, and we do not say, whether or not the nazir could maintain such an action.

We must reverse the decree of the District Judge, and restore the decree of the Subordinate Judge. The plaintiff must pay to the defendant the costs of both appeals.

Decree reversed.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Melvill, Mr. Justice Kembal, Mr. Justice Pinhey, Mr. Justice F.D. Melvill and Mr. Justice Marriott.

H. KASTOLINO, THROUGH HIS CONSTITUTED ATTORNEY J. CARDOZ,
(*Plaintiff*) v. RUSTOMJI DADABHAI (*Defendant*)*
[8th March, 1880.]

Plaint, signing and verification of—Civil Procedure Code (X of 1877 as amended by Act XII of 1879), ss. 51 and 52.

A plaint, signed by a person holding a general power of attorney to sue on behalf of the plaintiff, is properly signed within the meaning of the proviso in s. 51 of the amended Civil Procedure Code.

The Court must be satisfied, under s. 52, that a person, other than the plaintiff, verifying the plaint, is acquainted with the facts of the case; but in the case of a person holding a general power of attorney, or of any other recognized agent the Court will not insist on any extreme stringency of proof.

[469] Section 52 does not require the verification of a plaint to be made in the presence of an officer of the Court; but, having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint is acquainted with the facts of the case, it is desirable that a verification by such a person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance.

[R., 16 C.P.L.R. 103; 41 P.R. 1902=54 P.L.R. 1902; D., 2 L.B.R. 41 (49).]

THIS case was referred under s. 617 of Act X of 1877, for the opinion of the High Court by Madan Shrikrishna, Judge of the Small Cause Court at Poona, with the following remarks:—

"The plaintiff, who formerly resided at Poona, is at present a resident of Bombay. The plaint was, consequently, signed and verified by his constituted attorney.

"The defendant objects that the plaint is not signed and verified by the plaintiff personally; that the person, who has verified it, is not proved to the satisfaction of the Court to be acquainted with the facts of the case; that the plaint has not been sworn to before an officer of this Court; and that, therefore, it should be rejected under s. 53 of the new Civil Procedure Code (Act X of 1877).

"Under this contention the following issues arise for decision, *viz*:—

"1. Whether a plaint, signed by a person holding a general power of attorney, is properly signed as required by s. 51?

"2. Whether it should be proved to the satisfaction of the Court, before the plaint is admitted or at the time of the hearing of the suit, that the person verifying the plaint is acquainted with the facts of the case?

* Small Cause Court Reference, No. 1 of 1880.