

## APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894.  
August 28.

MINGALE ANTONE KANE (ORIGINAL PLAINTIFF), APPLICANT, v. RA'M-  
CHANDRA BA'JE (ORIGINAL SURETY), OPPONENT.\*

*Civil Procedure Code (Act XIV of 1882), Sec. 349—Surety—Insolvency of a  
defendant—Surety under Section 349—Default of principal—Liability of surety—  
Mode of enforcing liability of surety—Practice—Procedure.*

The Civil Procedure Code (Act XIV of 1882) provides no means for enforcing in execution a surety bond passed under section 349. The proper course of the plaintiff is to obtain an assignment of the bond with a view to suing on it.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order passed by Ráo Sáheb G. V. Saraiya, Subordinate Judge of Bassein, in an execution proceeding.

The plaintiff obtained a decree against one Bába Trimbak Náik, and in execution applied for his committal to jail. On the 5th June, 1893, Bába Trimbak applied to be declared an insolvent. He was thereupon released on his furnishing security to appear when called upon, and the opponent Rámchandra became his surety (Civil Procedure Code (Act XIV of 1882), sec. 349).

Bába failed to appear on the appointed day, namely, the 16th September, 1893, and on the 18th September the plaintiff applied for a warrant for his re-arrest. The warrant was returned unserved, as the bailiff was unable to find him. On the 14th October, 1893, the plaintiff's execution darkhást (application) was dismissed owing to the plaintiff's absence.

On the 28th November, 1893, the plaintiff applied for an order to recover the amount due from the surety Rámchandra (the opponent). The Subordinate Judge rejected the application, holding that he had no power to grant it.

The plaintiff applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling upon Rámchandra to show cause why the order of the Subordinate Judge should not be set aside on the ground that in rejecting the application he committed an error in law and failed to exercise a jurisdiction vested in him.

\* Application No. 41 of 1894 under the extraordinary jurisdiction.

*Gajardhanram M. Tripáthi* appeared for the plaintiff in support of the rule :—The Civil Procedure Code does not provide for proceeding against a surety appointed under section 349. We, therefore, required authority from the Court to recover the amount of the surety bond from the surety—*Poynor Bibee v. Nujjoo Khán*<sup>(1)</sup>; *Moidin v. Chandu*<sup>(2)</sup>. The Court should have assigned the surety bond to us; so that we might institute a suit on it.

*Mahádeo C. Apte* appeared for the opponent (surety) to show cause :—The applicant must show, if he wishes to have the bond given to him; that the execution proceedings are still pending. But the execution proceedings terminated with the dismissal of the darkhást owing to the applicant's default on the 14th October, 1893. The execution proceedings having terminated, the surety is absolved from liability—*Lálji Sahoy v. Odogya Sunderi*<sup>(3)</sup>.

FULTON, J. :—The facts of this case are explained in the plaintiff's application of the 28th November, 1893, to the Subordinate Judge as follows :—“The plaintiff presented darkhást No. 657 praying that his judgment-debtor the defendant might be committed to jail. The defendant on 5th June, 1893, applied to be declared an insolvent, and was released on his furnishing security on the same day to appear when called upon. He did not, however, subsequently appear in the course of the execution proceedings, and is said to have absconded. On the 14th October the darkhást was dismissed owing to the plaintiff's absence, and on the 28th November the plaintiff prayed the Court to give him such authority as would enable him to recover the amount due from the surety.” The Subordinate Judge thereupon made the following order : “I think that I have no power to grant this application. The applicant's remedy against Rámchandra Báje, if any, will be to proceed in the manner prescribed by the Civil Procedure Code. I refuse the application.”

Apparently the Subordinate Judge thought that a plaintiff might apply for execution against a surety under section 349 of the Code as against one under section 336. But in this view we

(1) I. L. R., 5 Cal., 437.

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

(3) I. L. R., 14 Cal., 757.

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are unable to concur. The Civil Procedure Code provides no means for enforcing in execution a surety bond passed under section 349, and the decisions in *Poynor Bibee v. Nujjoo Khan*<sup>(1)</sup> and *Moidin v. Chandu*<sup>(2)</sup> show that the proper course is for the plaintiff to obtain an assignment of it with a view to suing on it.

Mr. Apte for the opponent contended that with the dismissal of the plaintiff's darkhást the surety's liability terminated, and drew our attention to the decision in *Lálji Sahoy v. Odoya Sunderi*<sup>(3)</sup>. But that decision referred to the enforcement of a surety bond under section 336 and not to one given under section 349 in insolvency-proceedings which might be continued by the petitioner himself, and would not terminate owing to the absence of the judgment-creditor at whose instance the petitioner was originally arrested, and might also affect other creditors equally with such judgment-creditor.

In the present case the defendant failed to appear on the 16th September, and the plaintiff on the 18th applied for a warrant for his re-arrest. The warrant was returned unserved owing to the bailiff's being unable to find the defendant, and on the 14th October the darkhást was dismissed owing to the absence of the plaintiff, who may not unreasonably have thought it useless to prosecute it further against the judgment-debtor. The question whether the liability which the surety incurred on the 16th September, when the defendant first failed to appear, was discharged by the subsequent dismissal of the darkhást is one that must be decided between the parties concerned in any suit which may hereafter be instituted on the bond. *Primá facie*, however, there appears to be sufficient ground for the assignment to the applicant of the bond in question.

We must, therefore, make the rule absolute and direct the Subordinate Judge to assign it to the applicant. If the applicant file a suit on the bond within six months from this date, he may recover from the opponent his costs of this application in both Courts; otherwise he must pay the opponent's costs.

*Rule made absolute.*

(1) I. L. R., 5 Cal., 437.

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

(3) I. L. R., 14 Cal., 757.