

(1869) 04 CAL CK 0014
In the Calcutta High Court
Case No : Special Appeal No. 2884 of 1868

Komal Lochan Roy and his adopted Son, Radha Gobind Roy	APPELLANT
Vs	
Ramtanu Acharji	RESPONDENT

Date of Decision : 30-04-1869

Acts Referred:

Citation : (1869) 04 CAL CK 0014

Judgement

Norman, J.—One Komal Lochan Roy gave an ijara to Balaram Biswas, and at the time of executing the lease the present defendant, Ramtanu Acharji, executed a bond as surety for the rent to Komal Lochan Roy. The rent not having been paid by Balaram, Komal Lochan now sues Ramtanu Acharji upon the bond, and has obtained a decree for the amount due, and a declaration that the property pledged by the bond is liable to be sold to realize the amount due. It is Quite clear that the decision is right in the main. It has been objected in special appeal that Komal Lochan Roy cannot maintain the present action, because in a former suit against Balaram Biswas for rent, Ramtanu Acharji was named in the Collector's Court as a second defendant, and it is contended that the decree in that suit being a decree for the amount of rent now sought to be recovered, was enforceable against Ramtanu Acharji; and consequently this second suit is upon the same cause of action within section 2, Act VIII of 1859. We need not go into the question as to whether or not a suit will lie in the Collector's Court against the surety, joining him with the principal, for arrears of rent. For myself, I cannot assent to the doctrine laid down in *Bhobun Mohun v. Bhobosundari Debia* 8 W.R. 452. It is unnecessary to consider the question here, because on examining the plaint, the decree, and the proceedings in the Collector's Court, it is clear that Ramtanu Acharji was treated, and I think he could only have been treated, as a mere nominal party. No issue was raised as to his liability, and no decree was pronounced against him. Komal Lochan's present suit is upon a bond, which has not been before any Court on any previous occasion.

2. Another objection has been taken by the appellant. It is that the lower appellate Court has given to the plaintiff the costs of the suit against Balaram

Biswas in the Collector's Court. This is clearly a mistake. The defendant by the bond makes himself liable for the due payment of several kists of rent on the days on which they were to become due. He does not in terms render himself liable for any costs the plaintiff incurred in endeavoring to recover that rent by suit against Balaram Biswas. It was his own act that he sued Balaram, and not the defendant, and if it was an unwise act to sue a person who could not pay instead of the surety, he must take the consequences. We cannot cast those consequences upon the surety. The decree will be modified by disallowing the costs of the Act X suit. The parties will get their costs in this Court and the lower Courts in proportion to the amount of the claim decreed or disallowed.