

(1934) 04 CAL CK 0010
In the Calcutta High Court

Mohendra Nath Banerjee

APPELLANT

Vs

Roy Satish Chandra Choudhury Bahadur and Another

RESPONDENT

Date of Decision : 17-04-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145, 47

Citation : AIR 1934 Cal 569 : 150 Ind. Cas. 985

Hon'ble Judges : Jack, J;Bartley, J

Bench : Full Bench

Judgement

Jack, J.—This appeal has arisen out of an application u/s 47 Civil P. C, in an execution case in which it is sought to realize from the petitioner Mohendra Nath Banerjee, Rs. 6,106 due under a mortgage decree by enforcing a security bond executed by him. Mohendra was a puisne mortgagee. The decree-holders in March 1929 obtained a mortgage decree for sale of the property mortgaged for the realization of Rs. 59,984 with interest up to the date of payment. Mohendra appealed against the decree and obtained a stay of execution on condition of executing a security bond for Rs. 5,000 as security for the increase of interest which would be due owing to the stay of execution pending the appeal. The appeal was dismissed and the property was sold in March 1932 for Rs. 65,000 the decretal amount having in the meantime mounted up to Rs. 70,446 with further interest.

2. The order of the Court dated 20th December 1929, shows that the petitioner was ordered to execute a security bond making himself liable to the extent of Rs. 5,000 for interest accumulating during the stay of execution but the bond he actually executed only makes him liable for what should be payable by him under the appellate decree. Now as the appellate decree merely dismisses the appeal and as the petitioner as puisne mortgagee was not liable at all under the original decree the petitioner maintains that he is not liable for any payment under the security bond. The terms of the security bond are as follows:

I of my own free will will stand security to the extent of Rs. 5,000 mortgaging

the properties specified in the schedule hereto annexed and covenant that if the decree of the First Court be confirmed or varied by the appellate Court then I shall duly act in accordance with the decree of the appellate Court and pay whatever may be payable by me thereunder and if I should fail therein then any amount so payable shall be realised from the properties hereby mortgaged and if the proceeds of the sale are insufficient to pay the amount due I will be personally liable to pay the balance.

3. Two points are noteworthy in these terms: (1) The surety contemplates a payment to be made by him in the case in which the decree of the first Court is merely confirmed. (2) He only makes himself liable for whatever the appellate decree orders him to pay. Thus the statement that he will pay whatever may be payable by him if the decree is confirmed is unmeaning with reference to the existing facts since, if the decree is confirmed, no amount could be payable by him since he only binds himself to pay whatever he is ordered to pay by the appellate Court decree. This appears to be therefore a case coming u/s 95, Evidence Act, which states that when the language used in a document is unmeaning with reference to the existing facts evidence may be given to show that it was used in a peculiar sense. We are entitled therefore to look into the record of the circumstances in which the bond was executed. Now the order of the Appellate Court dated 12th December 1929 makes it clear that the security bond was executed to indemnify the decree-holders for the interest accumulating on account of the postponement of the sale, by making the surety personally liable up to Rs. 5,000 and it is therefore clear that this is what is meant by the statement in the security bond that the surety will duly act in accordance with the appellate decree and that, though he is not directed to make any payment by the decree, he is rendered liable for interest to the extent of Rs. 5,000 by the confirmation of the First Court's decree by the appellate Court.

4. None of the rulings which have been cited, to us for the petitioner are directly in point. The cases of *Manindra Chandra Nandi v. Durga Prosad Singh* AIR 1917 PC 23 and *Bomanji Ardeshir Wadia v. Secy, of State* AIR 1929 PC 34 merely lay stress on the fact that a security bond must be strictly construed according to its own terms. This is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, as in the present case, the law allows a reference to antecedent circumstances. As pointed out for the respondents their Lordships of the Privy Council have even held in the case of AIR 1932 131 (Privy Council) that where there is any doubt about the true construction of the security bond the bond must be considered in the light of the order directing the security to be given. This is the course we have had to adopt in the present case and the order directing security to be given makes it dear that the appellant is liable to the extent of Rs. 5,000 since the amount of interest which accumulated during the stay of sale between 1929 and 1932 much exceeded this amount. Under the provisions of Section 145, Civil P. C., the amount can be realised in the execution proceedings. The decree-holder is however not entitled to realise Rs. 6,106-13-9 (the difference between the proceeds of the sale and the amount of the decree)

and the order of the lower Court will be modified accordingly. In default of payment of Rs. 5,000 within three months the property mortgaged by the security bond will be sold and if the sale proceeds are less than Rs. 5,000 the decree-holder will be entitled to recover the balance as a personal decree. They will also be entitled to costs of this appeal?hearing fee two gold mohurs.

Bartley, J.

5. I agree.