
(1871) 01 CAL CK 0003

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 271 of 1870

Abdul Karim and
Others

APPELLANT

Vs

Abdul Huque Kazi

RESPONDENT

Date of Decision: Jan. 10, 1871

Judgement

Norman, Officiating C.J.

1. The Judge, as we think, rightly holds that the bond as a security taken by the Court under the 8th section of Act XXIII of 1861 could be enforced under the 204th section of Act VIII of 1859, which enacts that "whenever a person has become liable as security, for the performance of a decree, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant." The cases referred to by the Moonsiff--Gajendra Narayan Roy v. Hemangini Dasi 4 B.L.R., App., 27 and Baboo Ramkisen Doss v. Hurkhoo Sing 7 W.R., 329 are distinguishable from the present. There the liability of the sureties did not arise in the course of, or out of, proceedings in the suit, but upon distinct and independent contracts made between the sureties and the creditor, in the one case to pay the debt if certain attached property was released, in the other to pay if the debtors could not pay. Here the engagement arises in the regular course of a proceeding in the cause. The sureties do not contract with the execution-creditor, but enter into an engagement with the Court, that the debtor shall appear when called upon, or in default of such appearance that they will pay the amount mentioned in the warrant. If the debtor failed to appear when called on within the time limited in a bond given u/s 8, the sureties as such would become liable to pay; and we think the case would fall within the terms of section 204. The Judge says the sureties have had an opportunity of producing the debtor and have not taken advantage of it. He does not say when the default of the sureties took place.

2. For ourselves, we have great doubts whether the default in producing the defendant in the present case was such as to render the sureties liable under the bond.

3. By section 8, the security is for the appearance of the party "at any time when called on while such enquiry is being made." We do not think that by the bond, though its language is not very clear, the sureties engaged, or can be taken to have intended to engage, for more than that. This engagement would not bind the sureties to produce the debtor at the end of an indefinite time during which, not the enquiry contemplated by section 8 but negotiations for a settlement were going on. We do not understand how it was that the Moonsiff did not complete the enquiry within a week or fortnight at latest from the 28th December 1868. It is possible that the enquiry may have been postponed from time to time at the request, or by consent of the sureties, and may not really have been concluded until the time when the sureties are supposed to have committed the default. No enquiry seems to have taken place as to the cause of the delay. We cannot therefore say whether there may not be circumstances which have not been made to appear before us to justify the Court in holding the sureties liable. If there was unreasonable delay it must be considered whether the plaintiff is in any way responsible for, or consented to, the delay, and whether the sureties, or either of them, consented to the delay. The Judge will enquire and come to a finding upon the questions--when the defendant was called upon to appear and made default, what was the cause of the delay, and whether the enquiry u/s 8 of Act XXIII of 1861, was still proceeding at time when the defendant was called upon to appear. The Judge will return his finding with the evidence to the Court.