1904.
November 30.

SUPPRAMANIAM CHETTY v. GABRIEL FERNANDO.

D. C., Negombo, 2,805.

Surety in legal proceedings—Procedure for forfeiture of bond and recovery of the amount—Rule to show cause.

Where a person has bound himself as a surety for the performance by a party to a legal proceeding of a judgment or order in such proceeding, he may be proceeded against in the same proceeding for forfeiture of his bond and recovery of the amount thereof; but he must, in the first instance, be noticed to show cause why the bond should not be declared forfeited and the amount should not be recovered from him.

THE defendant in this case was arrested on a writ against his person on 19th April, 1903, and committed to jail on 6th May, 1903. He appealed, and was allowed to stand out on bail, having entered into a bond jointly with one Sebastian Fernando. The bond ran as follows: " Know all men by these presents that we .... Gabriel Fernando and .... Sebastian Fernando of Otarawadiya are jointly and severally held and firmly bound to the Secretary of the said (*i.e.*, District) Court in the sum of Rs. 1,000, for the payment of which we bind ourselves jointly and severally, our respective heirs, executors, and administrators firmly by these presents, I, the said Sebastian Fernando hereby renouncing the *beneficium ordinis, divisionis et excussionis*, and all benefits to which sureties are otherwise by law entitled. Now the condition of this obligation is such that, if the above-bounden Gabriel Fernando shall appear before the said Court when noticed, then this obligation shall be void—otherwise, to remain in full force and virtue. "

On the return of the record from the Supreme Court, the order of the Court below having been affirmed, the plaintiff's proctor issued a notice on the petitioner to appear before the Court with the defendant to hear the judgment of the Supreme Court.

The notice was issued and re-issued to different places, and the plaintiff on the 11th December, 1903, swore that "the said security and debtor are aware of the result of the judgment of the Supreme Court, and they are in concealment in order to evade the service of notice on them. " On this affidavit substituted service was ordered, and notice was reported to have been affixed on a house at Otarawadiya, a village in the Negombo District, and the last known residence of the said security, and on the returnable date of that notice, on the 28th January, 1904, his bond was declared forfeited.

On the 28th June, 1904, the said Sebastian Fernando filed an affidavit and petition, and moved that the order forfeiting the bond be vacated, and that he may be discharged. The District Judge, by his order of the 26th September, 1904, dismissed the petitioner's application with costs.

The petitioner appealed.

The matter came up for argument before Layard, C.J., and Moncreiff, J., on the 30th November, 1904.

Bawa, for appellant.—The bond could not have been forfeited without giving the appellant notice that the question of forfeiture of the bond was to be discussed. *2 Grenier, D. C., p. 79. Voet, 2, 7, 17.*

Soyza, for respondent, *contra*.

30th November, 1904. LAYARD, C.J.—

The defendant in this case was arrested on a writ against person on the 19th April, 1903, and was committed to jail on the 6th May, 1903. Pending appeal he was allowed out on bail. One Sebastian Fernando, the present appellant, became the defendant's surety. The condition of Sebastian Fernando's bond was as follows:—That if the defendant should appear before the District "Court when noticed, then the obligation" should "be void and of none effect—otherwise, to remain in full force and virtue."

In this Court the order of commitment was affirmed and notice was issued by the District Judge to the defendant and to the present appellant to appear on the 16th September and hear the judgment of the Supreme Court. That notice appears from the journal sheet in the record to have been served on the defendant, but not on the present appellant. The defendant did not appear, and warrant was ordered for his arrest. The notice on the present appellant appears to have been issued and re-issued from time to time, and eventually the District Judge directed that there should be substituted service on him.

Substituted service having been reported to the Court as made, on the returnable date of the notice, *i.e.*, on the 21st January last, the present appellant not having appeared, the District Judge straightaway ordered the bond to be forfeited. On the 28th June, 1904, the present appellant filed an affidavit and petition and moved that the order forfeiting the bond be vacated. This motion was disallowed by the District Judge on the 26th December, 1904, and from that order the present appeal has been brought.

The question simply is this, could the District Judge order the bond to be forfeited without giving the appellant notice that the question of forfeiture of the bond was to be discussed ?

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The notice issued to the appellant was, I understand, to appear before the District Court with the defendant to hear the judgment of the Supreme Court. I do not see that there was any necessity for the appellant-surety to attend the Court to hear the judgment of the Supreme Court; he certainly was not bound to do so; the obligation he had entered into was that the defendant should appear before the District Court when noticed, and not that he himself should.

I was surprised, when the case first came before us on the present appeal, to find that the order of forfeiture was made without any opportunity being given to appellant to show cause against such forfeiture.

I thought possibly, however, some such practice had arisen in our Courts, and so I directed the Registrar to write to the Secretary of the District Court of Colombo to inquire as to the practice; thereupon the Secretary replied that he was not aware of any case in which forfeiture of a bond under the circumstances mentioned had been ordered. The District Judge of Negombo was also applied to, and I am indebted to him for referring me to a passage in *Pereira's Laws of Ceylon*, which indicates that the forfeiture of a surety's bond given in the course of legal proceedings may take place in the same proceedings without recourse to a fresh action. The question, however, still remains as to whether such forfeiture can be ordered without full notice to the surety that the forfeiture of the bond will be discussed. Voet (*2, 7, 17*) seems to sanction the practice, which was said by Sir Richard Cayley, when a Puisne Justice of this Court, to prevail in the District Court of Colombo (*Grenier's Reports, D. C., 1873, page 79*), that "when security has been given for the performance of a judgment to allow the liabilities of the sureties to be determined in the same case in which the judgment has been entered against the principal, without requiring the plaintiff to commence a fresh action, unless it is shown in any particular case that such a course would be manifestly inconvenient or prejudicial to the interest of the sureties." Sir Richard Cayley further says: "This practice should be followed in the other Courts in the Island, as it tends to prevent unnecessary delay and expense," but he is careful to enunciate for the protection of sureties that the proper course is to give full notice to the sureties, and that a rule should issue against them to show cause why their bond should not be forfeited. In the present case, as pointed out above, the appellant was merely noticed to attend the Court to hear the judgment of the Supreme Court. He had not by his obligation ever bound himself to do so, and there was no necessity for him to attend. The notice served on

him did not call on him to show cause why his bond should not be forfeited. The safeguard directed by Sir Richard Cayley has not been adopted. The order of forfeiture of the bond was obtained behind the appellant's back, and he has never had an opportunity to show cause against such forfeiture.

The order of the 28th January, 1904, is set aside and the case remitted to the District Court with a direction that a notice do issue to appellant, which may be served on appellant's proctor, to appear on a convenient day to be fixed by the District Judge to show cause why the bond dated 6th May, 1903, should not be declared forfeited. If sufficient cause is not shown, the District Judge will be at liberty to declare the bond forfeited.

The cost of this appeal to abide the final result of the order made by the District Judge.

MONCREIFF, J.—I concur.