1928.

Present : Bertram C.J. and Garvin J.

BABUNAPPUHAMY *v.* DON DAVITH.

4—D. C. Tangalla, 1,912.

Security for performance of a judgment or order—Forfeiture of bond in the same proceeding—Court cannot order surety to pay more than the amount of the bond.

Where security has been given for the performance by a party to a legal proceeding of a judgment or order in such proceeding, application may be made in the same proceeding for the forfeiture of the bond. Upon such an application what the Court should do is to order the forfeiture of the bond, and the forfeiture of the bond implies solely and simply, unless on equitable grounds some mitigation of the penalty is ordered—the payment of the penal sum and nothing else. The Court is not entitled to go beyond the penal sum and order the surety to pay the actual amount of the costs.

THE appellant stood surety for the plaintiff who lived outside the jurisdiction of the Court, and bound himself as surety for the payment by plaintiff of defendant's costs.

The plaintiff having lost, the appellant paid Rs. 100 as promised, but the defendant claimed that the appellant should pay the entire costs. The District Judge (R. B. Naish, Esq.) upheld this contention.

The surety appealed.

The bond was as follows:—

We, Ranaweera Kankananage Babun Appuhamy of Hakuruwela as principal, and Don Hendrick Seneviratna Gunawardana Bandara of Hakuruwela as surety, are jointly and severally held and firmly bound unto Mr. P. E. Kalupahana, Secretary of the District Court of Tangalla, in the penal sum of Rs. 100 to be paid to the said Mr. P. E. Kalupahana, or his successors of the said office of the Secretary, for which payment, to be well and faithfully made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators firmly by these presents, hereby renouncing the *beneficium ordinis, divisionis et excussionis*, and all benefits to which sureties are otherwise by law entitled.

Whereas by order dated April 26, 1921, made in the above-named action, wherein Ranaweera Kankanange Babun Appuhamy of Hakuruwela is plaintiff, and Jayasekara Patiranage Don Davith, Police Officer of Hakuruwela is defendant. It was on the application of defendant's proctor in the said action ordered to give security for the payment of defendant's costs in the said action already incurred, and are likely to be incurred, and whereas the above-bounden Ranaweera Kankananage Babun Appuhamy and Don Hendrick Seneviratna Gunawardana Bandara have agreed to enter into the above-written obligation subject to the condition hereinafter contained.

Now the condition of the above-written bond or obligation is such that if the above-bounden Ranaweera Kankananage Babun Appuhamy and Don Hendrick Seneviratna Gunawardana Bandara, or either of them, their or either of their heirs, executors, or administrators, do and shall well and truly pay or cause to be paid to the defendant or to his Proctor in the said action, all such costs as the said Court shall think fit to award to the said defendant in the said action, then the above-written obligation to be void, or else to remain in full force and virtue.

Tangalla, May 3, 1921.

(Signed in Sinhalese,)
Principal,
D. H. S. G. BANDARA, Surety.

M. W. H. de Silva, for the surety, appellant.

Soertsz, for the defendant, respondent.

February 19, 1923. BERTRAM C.J—.

In this case the learned Judge appears to have made an erroneous order. The appellant entered into a bond of security for the payment of costs. The costs were estimated by both parties as not likely to exceed Rs. 100, and the penal sum in the bond was accordingly fixed at that amount. I need not discuss minutely the circumstances under which the bond came to be given, but there seems to be no doubt that on the authority of the case of *Suppramaniam Chetty v. Gabriel Fernando*,[1] which proceeded on

[1] *(1904) 8 N. L. R. 42.*

1933.

BERTRAM C. J.

Babunappuhamy v. Don Davith

an earlier authority in (*Grenier's Reports D. C. 1,873, p. 79*) that, where security has been given for the performance by a party to a legal proceeding of a judgment or order in such proceeding, application may be made in the same proceeding for the forfeiture of the bond. No application in this case was made in those precise terms. But this is the only manner in which this application can be rightly made, and the application actually made must, for the purpose of this appeal, be treated as so made. Upon such an application what the Court should do is to order the forfeiture of the bond, and the forfeiture of the bond implies solely and simply, unless on equitable grounds some mitigation of the penalty is ordered, the payment of the penal sum and nothing else. It appears to me, therefore, that that was the only order which the District Judge could make in this case. He was not entitled to go beyond the penal sum and order the surety to pay the actual amount of the costs incurred. This is a well-settled principle, and will be found enunciated in the Article on Bonds in *Halsbury's Laws of England, Vol. III., p. 93, section 192.*

In my opinion, therefore, the appeal must be allowed with costs, here and below.

GARVIN J.—I agree.

Appeal allowed.