1938

Dec. 19.

Before Ameer Ali J.

In the goods of NANI LAL DAS, *deceased.*

Administration-bond—*Surety, Liability of—Discharge of surety—Maladministration—Completion of administration—Declaration of completion—Revocation of grant—Jurisdiction—Indian Succession Act (XXXIX of 1925), s. 263, Exp.* (d)*—Rules and Orders of High Court, Original Side, Ch. XXXVIII, r. 48.*

The position of surety to an administration-bond is not similar to that of a surety under the Contract Act and he cannot withdraw from his suretyship, at his will, without an order of Court.

Raj Narain Mookerjee v. *Ful Kumari Debi* (1) dissented from.

Mahomed Ali Mamooji v. *Howeson* (2) followed.

The liability of a surety under a bond continues until the fulfilment of the obligations by the administrator and the surety cannot be discharged on the ground of maladministration by the administrator.

Bâi Somi v. *Chokshi Ishvardâs Mangaldâs* (3) and *Radhika Nath Biswas* v. *Rati Kanta Bakshi* (4) relied on.

In the absence of any enquiry as to the administration-account, it is not competent for the Court to declare that the administration is complete.

Completion of administration does not entitle the Court to revoke the grant under s. 263, Exp. (*d*) of the Indian Succession Act and thereby release the surety.

In the matter of *Arthur Gerald Norton Knight* (5) and In the goods of *Kanai Lal Khan,* deceased (6) referred to.

APPLICATION by the administratrix for her own discharge and the discharge of her surety, the Alliance Assurance Company, from the bond given to the Court.

A. C. Mitra (requested by the Court to argue the matter). There is no statute law relating to the discharge of sureties to Court, but the Calcutta High

(1) (1901) I. L. R. 29 Cal. 68.
(2) (1925) 30 C. W. N. 266.
(3) (1894) I. L. R. 19 Bom. 245.
(4) [1925] A. I. R. (Cal.) 158.
(5) (1909) I. L. R. 33 Mad. 373.
(6) (1913) 18 C. W. N. 320.

1938

In the goods of *Nani Lal Das*, deceased.

Court has framed rules in regard to this. *Vide* Rules and Orders of the High Court, Original Side, Ch. XXXVIII, r. 48.

The rights and duties of sureties in respect of executors and administrators are governed by the Indian Succession Act. Discharge of sureties has to be considered under the following headings :—

(*i*) Discharge due to default of the administrator.

(*ii*) Discharge by reason of fulfilment of obligations of the administrator or of extinction of security.

We have further to consider the question of procedure.

The view held in *Raj Narain Mookerjee* v. *Ful Kumari Debi* (1) that the surety could discharge himself from liability by mere notice has been dissented from by the Privy Council in *Mahomed Ali Mamooji* v. *Howeson* (2) and it is now clear that there must be an application to Court for discharge of the surety. The question, however, remains whether the Court has jurisdiction to order a discharge and, if so, under what circumstances it can make the order.

Administration-bonds with sureties are given to the Court under s. 291 of the Indian Succession Act. Relevant forms of the bonds are Nos. 6 and 8 given in App. M to the Rules and Orders of the High Court, Original Side. The bond and the sureties are taken to ensure due administration of the estate. There is one indivisible order and a grant is never made until security is furnished.

The principle in s. 128 of the Indian Contract Act should apply and the liability of the surety ends with the discharge or removal of the administrator.

(1) (1901) I.L.R. 29 Cal. 68. (2) (1925) 30 C.W.N. 266.

1938

In the goods of *Nani Lal Das*, deceased.

Administrators and executors cease to function and thereby discharge the surety under two circumstances, *viz.*—

(*a*) When the grant is revoked under s. 263 of the Indian Succession Act; and

(*b*) When the administration is complete and the administrator or executor ceases to function.

Under s. 263 of the Indian Succession Act, maladministration, misappropriation, waste are not made grounds for revocation and the Court has no jurisdiction to discharge a surety on these grounds except under Exp. (*e*). *Subroya Chetty* v. *Ragammall* (1); *Bái Somi* v. *Chokshi Ishvardás Mangaldás* (2). If the security fails, the Court can call for fresh securities, otherwise it has power to revoke the grant. *Raj Narain Mookerjee* v. *Ful Kumari Debi* (3); *Surendra Nath Pramanik* v. *Amrita Lal Pal Chaudhuri* (4).

The liability of a surety under an administration-bond does not depend on the validity or otherwise of the grant. Without an express order of Court, neither the administrator nor the surety can be discharged and the liability of the surety ceases from the date of revocation. *Debendra Nath Dutt* v. *Advocate-General of Bengal* (5).

Under Exp. (*d*) of s. 263, the surety can apply for his discharge on the ground of fulfilment of obligation. The grant is given for a certain period and for a certain purpose. After that purpose has been fulfilled, the grant becomes useless. *Vide Blake* v. *Bayne* (6).

In In the matter of *Arthur Gerald Norton Knight* (7), where the Court held that the surety could not

(1) (1904) I. L. R. 28 Mad. 161.
(2) (1894) I. L. R. 19 Bom. 245.
(3) (1901) I. L. R. 29 Cal. 68.
(4) (1919) I. L. R. 47 Cal. 115.
(5) (1908) I. L. R. 35 Cal. 955; L. R. 35 I. A. 109.
(6) [1908] A. C. 371.
(7) (1909) I. L. R. 33 Mad. 373.

1938

In the goods of *Nani Lal Das*, deceased.

apply to be discharged from suretyship when the administration was complete, this section was not pointed out to the Court.

In the case of *Kanai Lal Khan*, deceased (1) the Court, after going through the facts and finding that administration was complete and the estate was made over, ordered discharge.

In view of the practical difficulty of the payment of premiums to the guarantee society, which has to be continued until some order from Court has been obtained, the Court may, in proper circumstances, upon notice to all persons liable to be affected thereby discharge the surety on the ground that the administration was complete. The circumstances are those contemplated in s. 263, Indian Succession Act.

There remains the question of procedure. Broadly speaking, s. 263 of the Indian Succession Act does not contemplate an application for revocation by a surety. But in *Bái Somi* v. *Chokshi Ishvardás Mangaldás* (*supra*), the Court, in holding that the surety was liable for the acts and defaults of the guardian, did not preclude that the surety might not apply to Court to take steps for his protection. The nature of the surety's obligation cloaks him with an interest to entertain an application for revocation on grounds of s. 263 and thereby put an end to his liability. Moreover, under s. 302 of the Act, a surety can bring to the notice of the Court, acts or defaults of the administrator to enable the Court to give directions in the matter and thereupon discharge the surety or revoke the grant. *Surendra Nath Pramanik* v. *Amrita Lal Pal Chaudhuri* (*supra*).

There is nothing inconsistent in the Rules of the High Court and Ch. XXXVIII, r. 48 provides for the discharge of sureties.

(1) (1913) 18 C. W. N. 320.

To sum up :—

(*a*) A surety cannot terminate his liability by mere notice. *Mahomed Ali Mamooji* v. *Howeson* (*supra*).

(*b*) A surety can apply for his discharge under certain circumstances.

Vide : (*i*) Ch. XXXVIII, r. 48 of the Rules of the High Court; (*ii*) *s.* 302 of the Indian Succession Act; (*iii*) *Surendra Nath Pramanik* v. *Amrita Lal Pal Chaudhuri* (*supra*).

(*c*) The circumstances under which sureties to administrators' or executors' bonds are discharged must be restricted to those set out in the Explanations of s. 263 of the Indian Succession Act, which are exhaustive and not illustrative. *Raj Narain Mookerjee* v. *Ful Kumari Debi* (*supra*); *Surendra Nath Pramanik* v. *Amrita Lal Pal Chaudhuri* (*supra*); In the goods of *Kanai Lal Khan* (deceased) (*supra*).

(*d*) The circumstances do not include maladministration because it is not a ground for revocation *Bái Somi* v. *Chokshi Ishvardás Mangaldás* (*supra*); *Subroya Chetty* v. *Ragammall* (*supra*); *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee* (1); *Gour Chandra Das* v. *Sarat Sundari Dassi* (2).

AMEER ALI J. In this matter I am much indebted to the assistance of Mr. Mitra whom I asked to argue the matter and I will consider the judgment now given after further perusal of the note which he has handed in.

(1) (1896) I. L. R. 24 Cal. 95. (2) (1912) I. L. R. 40 Cal. 50.

1938

In the goods of *Nani Lal Das*, deceased.

Ameer Ali J.

This is an application by the administratrix for her own discharge and the discharge of her surety, the Alliance Assurance Company, from the bonds given to the Court.

The administratrix filed her inventory and her account and the petition states that the estate has been duly administered.

The practical difficulty involved is that the Assurance Company, like other companies doing suretyship work, continues to charge an annual premium until some order of Court is obtained.

I have repeatedly expressed a doubt whether such orders should or can be made by this Court, and I asked the office in this case to report upon the practice. The office reported that orders of this kind have become the practice either in an unconditional form or without prejudice to anything done or undone by the administrator up to the date of the order. I have looked into the matter further and I am the more convinced, subject as I say to a further perusal of Mr. Mitra's note, that the practice is erroneous.

The bonds are given under section 256 of Act X of 1865, now section 291 (*1*) of the Succession Act (XXXIX of 1925) read with rr. 15 and 16 of Ch. XXXV. The forms of the bonds are given in App. M, forms 6 and 8.

I have a printed form of the bond before me supplied by the office and this contains the words "the "said administration account, the same being first "examined and allowed by the said High Court". The first thing to note is that these words are wholly inappropirate to our practice. We have no procedure for examining or checking these accounts and we have never done it. The words have remained in the bond. So far as I am aware they do not appear in the English bonds for administration.

Now, the questions dealt with by the Indian Courts relating to administration-bonds are of two categories, to which I have added a third :—

(*i*) Discharge from or vacating the bond at the instance and at the will of the surety.

(*ii*) Discharge from or vacating the bond by order of Court on the ground of default by the administrator.

(*iii*) Discharge from or vacating the bond by the Court because of the fulfilment of the obligations by some form of declaration or finding that the estate has been properly administered.

The last category is the one with which I have especially to deal.

Dealing with class (*i*), the view taken by this Court in *Raj Narain Mookerjee* v. *Ful Kumari Debi* (1) to the effect that the surety or giver of the second bond is to be regarded in the light of a surety under the Contract Act and that he may therefore discharge himself by notice (see s. 130 of the Contract Act) was differed from by the Madras High Court in *Subroya Chetty* v. *Ragammall* (2) and has been definitely disposed of by the Privy Council in *Mahomed Ali Mamooji* v. *Howeson* (3). It is now clear that the surety, using that word throughout this judgment in a neutral sense, cannot discharge himself without an order of Court.

That ruling, however, did not indicate the circumstances under which the Court would or could make an order for discharge.

Class (*ii*). The Court was applied to for such an order in the following cases: *Bái Somi* v. *Chokshi Ishvardás Mangaldás* (4) was the case of a surety for a guardian. The Court refused the order on the

(1) (1901) I. L. R. 29 Cal. 68.
(2) (1904) I. L. R. 28 Mad. 161.
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1938

In the goods of *Nani Lal Das*, deceased.

Ameer Ali J.

ground that default by the guardian was the very object of taking and retaining the security. In *Kandhya Lal* v. *Manki* (1) the surety for an administrator applied for cancellation of the bond without giving reasons. This was during the course of the administration. The Court held that it had no jurisdiction to make such an order. The matter was dealt with by this Court on the Appellate Side in *Radhika Nath Biswas* v. *Rati Kanta Bakshi* (2). The Court did not decide on the question of jurisdiction, but Sir Asutosh Mookerjee and Rankin J. held in that particular case that charges of improper administration were not sufficient ground for the Court's order.

Class (*iii*) dealing with the last category, discharge by reason of the fulfilment of the obligations. We have I think only two cases: In the matter of *Arthur Gerald Norton Knight* (3) where, notwithstanding evidence that the administration was complete, the Court refused to make an order on the ground of want of jurisdiction. The case of *Kanai Lal Khan*, deceased (4) is peculiar. Evidence was given of the satisfactory completion of the administration and of the acceptance of the accounts by the persons entitled to the estate. Nevertheless, after representations by the Registrar, the Court held that neither the administrator nor the sureties could be discharged. The order made was that the security given by the sureties could in the particular circumstances of the case be reduced.

The above cases lead me to the conclusion that the orders which have been very frequently made on these applications, so far as they are applications for discharge, should not be made.

To-day I have had the benefit of Mr. Mitra's arguments and he has dealt mainly with the second category of cases, namely, where the Court is applied

(1) (1908) I. L. R. 31 All. 56.
(2) [1925] A. I. R. (Cal.) 158.
(3) (1909) I. L. R. 33 Mad. 373.
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1938

In the goods of *Nani Lal Das*, deceased.

Ameer Ali J.

to for discharge on the ground of maladministration or similar grounds. He suggests and it is a very ingenious suggestion, that the law and the Rules of this Court can be reconciled by using as a key to the whole matter s. 263 of the Succession Act.

Let me first quote Rule 18A of Ch. XXXV of our Rules, now merged in the general Rule 48 of Ch. XXXVIII.

> The surety shall be entitled to bring to the notice of the Court any act, omission or neglect of duty cast on the administrator by law or any other circumstances which would entitle the sutrety to be discharged from the obligation created by the bond, and the Court may then make such order as it thinks fit.

Mr. Mitra has suggested that this means nothing more than an application leading to the revocation of the letters of administration; that it does not imply that the surety can be discharged or released from the obligation, but that read with s. 263 it is intended merely to bring about a cessation of the administration, which would have the practical result of protecting the surety.

If that is the correct reading, I have nothing to say. But, in my opinion, the language of the rules cannot be so limited.

It is apparently assumed :—

(*i*) that there are a number of "circumstances "which entitle the surety to be discharged "from the obligation created by the bond";

(*ii*) among those circumstances is to be included "any omission or neglect of duty cast on "the administrator by law";

(*iii*) that the Court may make an order for the discharge of the surety.

It is quite true that the rule does not categorically state that the surety is entitled to be discharged by reason of the administrator's default, but this is clearly the implication. It is also true that it leaves the order at the discretion of the Court. But again it implies that an order of discharge can be made.

1938

In the goods of *Nani Lal Das*, deceased.

Ameer Ali J.

If this is the correct reading of the rules, it may be well argued that the rules of themselves place the surety in the position of a surety under the Contract Act, and of themselves give jurisdiction to the Court to discharge the surety.

In my opinion, the wording of those rules requires re-consideration. It seems to me that when drawn it was erroneously assumed that the giver of the second bond is a common law surety and nothing else. This in my opinion he is not.

In my opinion his liability is immediate and permanent and is only to disappear on the fulfilment of the obligations by the administrator. Default by the latter is no ground for discharging the bonds, it may be ground for revoking the grant or taking other steps to control the administration.

Mr. Mitra has also assisted me on the question of discharge when the administration is completed, and has suggested that the solution suggested by him can be applied to this case also by reason of cl. (*d*) of s. 263, *i.e.*, revocation of the grant on the ground that the grant has become useless and inoperative. Here we have no rule to help or to confuse us. In my opinion this does not apply to cases where the administration has been completed. I do not think that, in circumstances such as the present, applications for revocation can be made.

I am quite aware of the practical difficulty of the annual premium, and that it is felt that under the present system some limit should be put to the period during which the insurance company should continue to take an interest in the matter and continue to charge their premium.

But, as a matter of law, it seems to me that what is asked of the Court is not logically justified. The order asked for either amounts to a discharge or it amounts to a declaration by the Court that the estate has been properly administered. Either it has been

1938

In the goods of *Nani Lal Das*, deceased.

Ameer Ali J.

properly administered or it has not. If it has, the bond does not operate. If it has not, a default has taken place and is taking place, and that is one of the very things in respect of which the bond is given.

It is suggested that there can be no harm in making an order for discharge "without prejudice to "past acts or defaults".

In my view, there is harm in so doing, because in the case of administration it is meaningless and may give a false sense of security.

The Court is not able to declare the administration complete. If it is complete, it is only for past acts that the surety can be liable. If it is not complete, that either is or is not past default. In the former case the Court has no right to relieve the administrator or his surety from the consequences.

It seems to me that the logic of the law must be followed and that a practical remedy must be found for a practical difficulty.

I am aware that guardians and others under special provisions of law are able to get their accounts passed, and consequently obtain in some form or other orders for discharge. The above judgment is given on the basis that, notwithstanding the phrase as to passing accounts in the bonds, there is no provision or machinery in our Courts for discharging or vacating the bond after enquiry.

Application refused.

G. K. D.