APPELLATE CIVIL.

1877
April 10.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

NANAK RAM (PLAINTIFF) *v.* MEHIN LAL (DEFENDANT).*

Act IX of 1872 *(Indian Contract Act), s.* 127, *illustration (c)—Surety-Bond—Void Contract—Want of consideration.*

Where *N* advanced money to *K* on a bond hypothecating *K's* property, and mentioning *M* as surety for any balance that might remain due after realization of *K's* property, *M* being no party to *K's* bond but having signed a separate surety bond two days subsequent to the advance of the money, *held* that the subsequent surety-bond was void for want of consideration under s. 127 of the Indian Contract Act (IX of 1872).

Per STUART, C.J.—The legal position of the surety considered and determined.

Per STUART, C.J.—Remarks on the legal character of the "illustrations" attached to Acts of the Indian Legislature, and opinion expressed that they form no part of these Acts.

THE plaintiff in the above case, Nanak Ram, advanced to one Kalka Prasad a sum of money upon a bond dated 14th November, 1872, which hypothecated certain property of Kalka Prasad as security for the repayment of the amount, and recited that the defendant in the present suit was surety for any balance of the debt which might remain unsatisfied after realization of the said property. The bond of 14th November, 1872, although reciting therein that the defendant Mehin Lal was surety for the advance and repayment of the money, did not bear the said surety's signature, but two days later, *viz.*, on the 16th November, 1872, Mehin Lal executed a separate surety-bond reciting the provisions of the bond of 14th November, 1872, and undertaking the liability mentioned therein.

Nanak Ram filed a suit against Kalka Prasad and Mehin Lal in the year 1875 to recover the amount advanced on the bond dated 14th November, 1872. Mehin Lal pleaded in answer to this suit that he was no party to the bond of 14th November, 1872, and that having executed a separate surety-bond on the 16th November, 1872, which was not referred to in the plaint, he could not be made liable on

* Special Appeal, No. 1337 of 1876, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 23rd August, 1876, affirming a decree of Munshi Lalta Prasad, Munsif of Chibramau, dated the 20th May, 1876.

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the previous bond which was the basis of the existing suit. The Munsif of Chibramau on the 2nd December, 1875, accordingly decreed the suit against the principal debtor, Kalka Prasad, and his property, but dismissed it as against Mehin Lal, the surety. This decision of the Munsif was, on appeal, upheld by the District Judge on the 15th March, 1876, and became final. Thereafter Nanak Ram the above plaintiff filed a second suit (out of which the present special appeal arises) against Mehin Lal, the surety, on the bond dated 16th November, 1872. The defendant, amongst other pleas in answer to the second suit, pleaded want of consideration for the subsequent surety-bond. The Munsif of Chibramau held that, under s. 127 of the Indian Contract Act (IX of 1872), the contract of guarantee dated 16th November, 1872, was void for want of consideration and dismissed the suit. The Subordinate Judge of the district, to whom the appeal from the Munsif's judgment was transferred by the District Judge, confirmed the Munsif's decree.

The plaintiff Nanak Ram filed a special appeal in the High Court impugning the decisions of the lower Courts, on the ground that the lower Courts had misconstrued the deed of the 16th November, 1872, and that it was a valid instrument under the Indian Contract Act, having been executed on account of the bond-debt, which was good consideration for the guarantee.

Munshi *Sukh Ram* and Shah *Asad Ali*, for appellant.

Lala *Lalta Prasad*, for respondent.

The following judgments were delivered by the Court :

STUART, C.J.—This is a special appeal from Farukhabad in a suit against a surety in a bond transaction which was dismissed by the Munsif of Chibramau in that district, his judgment having in regular appeal been confirmed by the Subordinate Judge. There had been a previous suit by the same plaintiff against his principal debtor and the same surety, in which a decrée was made against the principal debtor alone, but which decree was not brought by appeal to this Court. The present suit, on the other hand, claims to enforce the surety's liability without showing that the previous decree against the principal debtor had been executed and was unpro-

ductive of recovery to any extent and quite unavailing, and it is not easy to understand what could have been the real motives of the parties and their own true belief as to their relative position in the transaction, in all respects.

The present appeal is a disagreeable illustration of the crude, meagre, and unsatisfactory manner in which special appeals are, I regret to say, usually brought before us. The paper-books supplied to us, the Judges, in the present case contain nothing but the very loose although not erroneous judgments of the two lower Courts, the record itself is scanty of facts and of law, and at the hearing I failed to get any sufficient information from the pleaders on either side on the one question on which the whole case depends, *viz.*, the real position of the surety. For although this is a special appeal raising only, according to the theory of the procedure, a question of law, my difficulty was not a legal one, but simply a doubt as to a plain and simple matter of fact, *viz.*, whether Mehin Lal the surety in point of fact interposed in the transaction between Nanak Ram and Kalka Prasad the debtor for the benefit of the latter or otherwise. Under these circumstances, before disposing of the case, I thought it necessary to send for the record in the first suit between Nanak Ram and Kalka Prasad, and thus obtained some additional information. The case was also again put on the cause-list that the pleaders for the parties might have an opportunity, with this additional record before us, of throwing further light on the still somewhat obscure position of the surety, but with little success, the pleaders for the defendant, respondent, verbally and simply contending that Mehin Lal was the surety for the benefit of the plaintiff, and that, therefore, his surety-bond had been without consideration, while the pleader for the appellant unintelligibly suggested that he was really the surety for both parties, and that as the friend of both he had come forward to remove any dissatisfaction on the part of the lender, who had in the meantime parted with his money, and that that was a state of things which could not but be agreeable to the borrower. The case was thus left for our judgment in a condition far from satisfactory, and I am not sure that I yet quite understand the real truth of the matter, but it would I am convinced be idle to attempt any further investigation of the facts by a remand or otherwise.

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From all the materials now before us the facts would appear to be these. One Kalka Prasad borrowed and received the sum of Rs. 95 from the plaintiff Nanak Ram, and gave a bond for the same, the material parts of which are as follows:

"I, Kalka Prasad, son of &c., do hereby declare that I have borrowed Rs. 95 of the Queen's coin, half of which is Rs. 47-8-0, from Nanak Ram, son of &c., Mehin Lal, son of &c., being my surety, that I hereby promise that the said money together with interest at two per cent. per mensem shall be paid up in the course of three years without any objection whatever; that until the money is paid one kachha house and a field, No. 489, called Barnawala, measuring 20 bighas kham, and situated in Harballahpur, also called Uddhanpur, in pargana Chibramau, the boundaries of which are noted at foot, and also four bullocks, one of which is dark blue and the other three white coloured, and two she buffaloes of black colour, all of which belong to me, shall remain hypothecated in this bond, and that I shall not be competent to sell or mortgage or give them in gift to any one."

As to the surety, although he did not sign this bond, it purported to determine his liability as follows:

"I, Mehin Lal, surety, do hereby declare that if the money due to the creditor should not be recovered from the property of Kalka Prasad the principal party who borrowed the money, I, the surety, shall pay the money out of my pocket to the creditor."

This bond was duly executed by Kalka Prasad the borrower and is dated the 14th November, 1872, and duly registered, it having been presented for registration by him alone, but as I have stated it was not signed by the surety. But Nanak Ram the lender, or according to the theory of the plaintiff's pleader, both parties, the lender as well as the borrower, being content to leave things in the position just described, Mehin Lal the surety again came forward with a new guarantee or surety-bond in his own name alone, and that document is in the following terms:

"I, Mehin Lal, surety, son of &c., do hereby declare that whereas a bond for Rs. 95 has been executed on the 14th November, 1872, by Kalka Prasad, son of &c., agreeing to repay within three years with interest at two per cent. per mensem in favour of Nanak Ram, son of &c., but that the said Nanak Ram notwithstanding the hypothecation of the property of Kalka Prasad in the said bond is not fully satisfied, I, the surety for Kalka Prasad, therefore, agree and give it in writing that if Nanak Ram fails to recover the amount of the bond with interest from the property of Kalka Prasad, the principal debtor, I, the surety, shall pay from my own pocket the amount of the bond executed by Kalka Prasad with interest entered therein to Nanak Ram. I have therefore executed these few presents by way of a security-bond to be a document."

This instrument was duly executed by Mehin Lal and it is dated the 16th November, 1872, that is two days after the execution of the first bond by Kalka Prasad the borrower, and it is admitted to be a contract of guarantee within the meaning of s. 126 of the Contract Act. Such being the state of the transaction in November, 1872, the plaintiff appears to have waited till the three years had expired and then to have resolved on taking proceedings for the recovery of his money. It is, however, difficult to understand the course he adopted. He brought a suit, the first suit, against his debtor and the surety, but claiming therein solely on the basis of the first bond which had not been signed by the surety, and passing by the additional guarantee which had been given by the surety two days after the date of the first bond. Why this should have been appears to me to be inexplicable, for the plaint in the first suit was filed on the 23rd November, 1875, the plaintiff and his pleader therefore must have had full knowledge of all that the surety had done, and that in their view the two instruments formed but one security. But so it was. It is not therefore to be wondered at that this first suit was, in the Munsif's Court, dismissed as against the surety, the claim having been decreed against Kalka Prasad alone, and this decision was on appeal affirmed by the Subordinate Judge on the 15th March, 1876. The decree, however, so made against Kalka Prasad has not been executed, but on the 29th April following Nanak Ram instituted a second suit against Mehin Lal the surety alone, and now before us in special appeal, basing his claim on the separate guarantee or surety-bond executed by Mehin Lal, the surety, on the 16th November, 1872. No explanation appears to have been offered why the surety had not been made a defendant in the first suit on this liability, and at the hearing of this appeal no objection on that score was taken, and it is unnecessary to say more on the subject at present, confining our attention to, as matter of law, Mehin Lal's liability as surety under the document now sued on.

The Munsif in his judgment describes the surety-bond as "apparently without consideration" and he then proceeds as follows: "Consideration as defined in s. 127 of the Contract Act (IX of 1872) means 'anything done or any promise made for the benefit

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of the principal debtor.' In the present instance, the execution of the new contract or the promise made therein was not so made for the benefit of the principal debtor (Kalka Prasad), he having received the consideration money and thus satisfied his appetite for and the final cause of his loan, two days previously. The execution of this new contract and the promise made therein can rather be said to have been made for the benefit of the creditor than that of the principal debtor. This new contract of guarantee being thus proved to be without consideration, under the provisions of the aforesaid section of the Contract Act, is void and hence not enforceable." The lower appellate Court upheld this judgment in the following words: "I find that the Munsif's finding is correct; undoubtedly the bond sued on was a nullity under clause (*e*), s. 127 of Act IX of 1872; and previous to the institution of this suit the defendant does not appear to have denied the bond which forms the basis of the claim. The objections urged in appeal are not worthy of consideration."

In special appeal to this Court it is now in substance argued that the judgments of the lower Courts are wrong, that their reading of the Contract Act is erroneous, and that the consideration for the defendant's engagement as surety and his liability in that behalf to the plaintiff are clear. S. 127 of the Contract Act is expressed in these terms: "Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee." Now having regard to the wording of the two instruments under consideration, the first bond and the subsequent additional security by the surety, and to the circumstance that the position of a surety in such a pecuniary transaction is ordinarily that he interposes in behalf of and for the benefit of the debtor, such a contention in special appeal would appear to be not unreasonable. There are other circumstances, however, which weigh against it. In the first place it must not be forgotten that on the 16th November, 1872, when the surety executed and delivered his separate engagement, the money had already passed from the hands of the lender to Kalka Prasad his borrower, and on a contract which made the latter safe for at least three years, and he had therefore nothing to fear from any dissatisfaction or objection that might subsequently have occurred to

his creditor Nanak Ram, so far as he, the borrower, was concerned, therefore any additional engagement on his behalf by a surety was legally unnecessary. On the other hand, Nanak Ram, feeling dissatisfied with the security he had obtained from his debtor, and knowing that his hands were tied for three years, must naturally have desired some further security: and with this feeling he appears to have had some communication with Mehin Lal, the result being the document now under consideration. Again having, in the absence of any sufficient information from the pleaders in this appeal, looked into the evidence in the first suit (and I consider I am not only entitled but bound to do that for the sake of explanation and the possible clearing up of any doubts as to the true position of the surety), it appears to me to favour the suggestion I have just offered against the appellant's argument. The plaintiff himself was examined in that suit, and he stated on oath as follows: "I have got another document executed by Mehin Lal. I know this bond (the bond executed by Kalka Prasad and formerly sued upon) to be the principal and not that bond (the bond now sued upon), and therefore I did not sue on the basis of the latter. I had the other bond executed to secure my debt, the other bond has been executed with the consent of Mehin Lal and myself. After the execution of the said other bond I and the security were satisfied. It was recorded in the other bond that it has been executed as a security for Kalka Prasad for the sum of Rs. 95 borrowed by him." Two other witnesses were examined; one Nabi Baksh, the person employed to write both documents, states in regard to the first bond that "Mehin Lal stood as security of his own accord," and again this witness states that on the 16th November, 1872, both parties came to me, and that Mehin Lal "asked me to write another deed of security which I accordingly did, and Mehin Lal made it over to Nanak Ram," and he adds that Nanak Ram himself joined in the request to him to write the additional document as he did not look upon the first bond as sufficient. And this evidence is in substance corroborated by that of another witness, Ram Ghulam. Now although to my mind the real truth of the case is not without doubts and difficulties, I think the fair construction to be put on these disclosures, including as they do the plaintiff's own account of his and Mehin Lal's relative position in

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the transaction, and remembering also, I again say, that the original debt had been irrevocably paid over to Kalka Prasad on a bond for three years, I say the fair conclusion is that Mehin Lal acted as surety not on behalf of the principal debtor, who needed no assistance of the kind, but as surety for the benefit of Nanak Ram the lender alone, and, if so, there was undoubtedly no consideration within the meaning of s. 127 of the Contract Act. Against this conclusion, indeed, there appears to be nothing in the case excepting the language of the two documents themselves and any general inference to be deduced from the ordinary position of a surety in transactions of this kind. The original bond of the 14th November, 1872, was not signed by Mehin Lal, but I think its terms may fairly be referred to as *pro tanto* indicating the person on whose behalf he engaged as surety, and in that instrument Kalka Prasad describes, or is made to describe, Mehin Lal as "*my* surety." And again in the additional document deliberately executed by Mehin Lal himself, he on the recital of the first bond and of Nanak Ram's dissatisfaction, describes himself as "I, the surety *for Kalka Prasad*." All this it is perfectly fair to notice in the way of argument, although too much importance should not be attached to the terms of vernacular instruments of such a nature. Their language is very much under the control of the person who is employed to write them, and he no doubt chooses his words without particular regard to any peculiar or occult legal meaning of his own. In the present case we have seen that the writer of these instruments was examined as a witness, and the gloss suggested by his evidence is somewhat different from, if it does not go to contradict, the terms in which he wrote the bonds. He says that the money was paid into the hands of Mehin Lal and was by him delivered to Kalka Prasad, and that afterwards both parties came to him and asked him to write the second document, the meaning of which appears to me to be that notwithstanding the phraseology of the two deeds, Mehin Lal was not only the mere go-between, but the actual messenger and representative of Nanak Ram in the business. He, Mehin Lal, therefore, cannot be regarded as having been surety for the benefit of the principal debtor but really for the satisfaction and benefit of Nanak Ram the lender. His suretyship, therefore, was without consideration, and in fact a mere *nudum pactum*.

I must not conclude this judgment without offering a few remarks on a subject which has been much dwelt upon in this case, I allude to those "illustrations" which the Government of India in its Legislative capacity have thought fit of late years, and no doubt with the best and most considerate motives, to add to its Legislative enactments. These illustrations, although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct. In this country, where the administration of the law is for the most part conducted by persons who are not only not professional lawyers, but who have had no legal education or training in any proper or rational sense of the term, the Legislature acts with wisdom and salutary consideration for the interests of justice by putting into the hands of judicial officers appliances such as the illustrations in question for their guidance and direction in the performance of their duties. But, for myself, I can truly say I have never experienced their utility, and I fear they sometimes mislead, and I observe they are more regarded in the subordinate Courts in these Provinces, and even by the pleaders of this High Court, than is the paramount language of the Act itself, of which, however, as I have remarked, they, strictly speaking, form no part. With respect to the present case, plainer language than that used in s. 127 of the Contract Act it would be difficult to imagine, and why it should have been thought proper to illustrate it at all I do not very well comprehend. Appended, however, to s. 127, are three illustrations (*a*), (*b*), and (*c*), and illustration (*c*) is as follows: "A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void." This illustration appears to have received much more attention in the lower Courts than s. 127 itself. In fact the lower appellate Court goes entirely upon it, and at the hearing of this appeal it was almost entirely relied on notwithstanding repeated attempts on my part to point out that it was the meaning of s. 127 itself and not the illustration that was material. The illustrations (*a*) and (*b*) appear to be correct enough, although I do not think they were wanted for the elucidation of the section, but this illustration (*c*) is so vague and bald as to be open to

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misapprehension. Brevity and succinctness are no doubt very desirable qualities in the expression of a law, but they do not necessarily argue distinctness, and in my experience I know of nothing more dangerous than unnecessary brevity in the statement of a proposition in the law of contracts. Now this illustration (*c*), as it stands, may be either good or bad law, if it means that the party C without any privity, and in fact merely as a volunteer, agreed to pay for the goods in default of B, and no other act or fact in the way of consideration appearing, then no doubt the agreement would be void, and the illustration would be right. But it does not of itself show that. It assumes the absence of consideration, without any definition of the term other than that given in s. 127 itself, and so far it is calculated to mislead. To be of real service to those for whose assistance these illustrations are intended, they ought to be pellucidly clear in their phraseology, and, if possible, I had almost said infallibly sound in their law. But for the purposes of the High Courts of this country these illustrations are not only not required in any sense, but they are frequently the cause of embarrasment, and I would infinitely prefer to have the bare and simple language of the Act itself, without any appendages of the kind. I am afraid, too, that they are open to the objection of being opposed to the canons of construction which prevail in the English Courts for the interpretation of statutes. Thus it has been ruled in England that "the intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute"—*Fordyce* v. *Bridges* (1); and "the Court knows nothing of the intention of an Act, except from the words in which it is expressed applied to the facts existing at the time"—*Logan* v. *Courtown (Earl)* (2); "the language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments"—*Philpott* v. *St. George's Hospital* (3).

In the present case it is satisfactory to know that any ambiguity that this illustration (*c*) may fairly, or unfairly, be considered to be characterised by, has not prevented us from applying the

(1) 1 H. L. Cas. 1; S. C. 11 Jur. 157.
(2) 13 Beav, 22; S. C. 20 L. J. Chanc. 347.
(3) 6 H. L. Cas. 338; S. C. 3 Jur. N. S. 1269.

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plain language and the very clear meaning of s. 127 of the Contract Act, and we now do that by dismissing the present special appeal with costs.

SPANKIE, J.—Both parties admit that the instrument on which the suit is based is a contract of guarantee as defined in s. 126 of the Indian Contract Act of 1872 The first plea will not hold, as it has been found that the money was not advanced to the obligor of the bond executed two days before the guarantee on the strength of such contract of guarantee. Both instruments (and this circumstance disposes of the second plea) show that there was no consideration in respect of the contract of guarantee. The creditor did not promise to do anything, and did not do anything, for the benefit of the principal debtor, whereby there was a consideration for the surety's giving the guarantee. It is clear that two days after the bond had been executed, and the money advanced to the principal debtor, the creditor feeling anxious about the sufficiency of the security, took the contract of guarantee from the surety. In this deed the surety simply promises to make good any deficiency if the property hypothecated by the obligor of the bond does not satisfy the debt. But the creditor agreed to do nothing, and promised nothing, in return. I therefore think that the suit could not be maintained, and hold that the decision of the lower appellate Court should be affirmed.

Decree affirmed and suit dismissed.

CRIMINAL JURISDICTION.

1877 *November 9.*

Before Mr. Justice Turner and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* ABUL HASAN.

Act XLV of 1860 *(Penal Code)*, *s.* 211—*False Charge.*

To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made though no prosecution is instituted thereon. *The Queen* v. *Subbanna Gaundan* (1) followed. *The Queen* v. *Bishoo Barik* (2) distinguished.

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal passed by G. E. Watson, Esq., Ses-

(1) 1 Mad. H. C. R., 30. (2) 16 W. R. Cr., 77.