

December, 1886, when that memorandum was filed in this Court, no explanation is offered on behalf of the appellant. I say most emphatically that when the memorandum of appeal was returned, on the 6th December, 1886, to the appellant, it was his bounden duty to hasten with all alacrity to this Court for the purpose of presenting his appeal, and that not having done so, we have no right to exercise in his favour the discretion conferred upon us. I agree with my brother Mahmood that Mr. Conlan's objection must prevail, and this appeal must be and it is dismissed with costs.

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*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell.*

GOPAL SINGH (DEFENDANT) v. BHAWANI PRASAD (PLAINTIFF)\*

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May 8.

*Lease—Guarantee for rent—Indemnity—Continuing guarantee—Death of surety—Act IX of 1872 (Contract Act), ss. 124, 125, clause (2), 126, 129, 131.*

One *B* proposed to take a lease of zamindári property from *M* for the period of eight years at a rental of Rs. 3,900 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: "And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May, 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed in appeal by the District Judge.

On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim.

*Held*, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and

\* Second Appeal No. 2282 of 1886, from the decree of T. R. Wyer, Esq., Officiating District Judge of Meerut, dated 21st September, 1886, confirming the decree of Babu Brij Pal Das, Officiating Subordinate Judge of Meerut, dated the 9th September, 1886.

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consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death.

*Held* further, that neither *G*, if he were alive, nor on his death the defendant, as his representative, can be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit.

*Lloyds v. Harper* (1) was referred to.

The facts of this case are stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaukhri*, for the appellaut.

The Hon. *T. Conlan* and Pandit *Moti Lal*, for the respondent.

EDGE, C. J.—One Bahal Singh proposed to take a lease of zamindári property from the proprietor Rao Maháráj Singh, from the year 1877 to 1884, at a rental of Rs. 3,900 per annum. Rao Maháráj Singh declined to grant the lease until the payment of rent during the time was guaranteed by one Shibán Lal, who was the father of the plaintiff. Shibán Lal on his part required a guarantee or indemnity against any rent which might not be paid by Bahal Singh and which he might under his proposed guarantee become liable to pay. The defendant's father, Ganga Bakhsh, gave a guarantee to Shibán Lal, which, so far as is material, is as translated as follows: "And for your satisfaction, I write that if any money remains due from Lala Balak Rai on account of the lease, for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." Lala Balak Rai was Bahal Singh, the proposed tenant. On his part Shibán Lal then gave his guarantee to Maháráj Singh. Rao Maháráj Singh granted the lease to Bahal Singh. Ganga Bakhsh died on the 22nd May, 1880. Bahal Singh failed to pay the rent which became due for 1883. The representatives of Rao Maháráj Singh, he having died, brought an action on the guarantee given by Shibán Lal to Rao Maháráj Singh, against Shibán Lal, and recovered the amount of the rent due and certain costs and expenses. Shibán Lal paid the amount of the decree. Shibán Lal died before this action was commenced. The plaintiff, who is the legal representative of Shibán

Lal, brought this action to recover the amount of the previous decree and costs which Shibani Lal had incurred in defending the previous action. This action was brought against the defendant who was the legal representative of Ganga Bakhsh. The Subordinate Judge of Meerut decreed the whole claim with costs to be recovered from the property of Ganga Bakhsh. The then District Judge dismissed with costs the appeal which was brought against the decree of the Subordinate Judge.

The question which we have got to determine is whether s. 131 of the Indian Contract Act applies to the case so as to make the death of Ganga Bakhsh an answer to the claim. That section says:—“The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.” A continuing guarantee is defined in s. 129 as follows:—“A guarantee which extends to a series of transactions is called a continuing guarantee.” Assuming without deciding that this was a continuing guarantee within the meaning of s. 131, I am of opinion, having regard to the transaction which was being guaranteed, and to the fact that it must have been the intention of the parties in the one case that the guarantee given by Shibani Lal should continue during the whole currency of the lease which was granted on the faith of that guarantee, and that the guarantee given by Ganga Bakhsh should continue also during the currency of the lease; in other words, having regard to the object for which those two guarantees were given, that we must conclude that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that Shibani Lal should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay. It is obvious that the lessor would not have granted his lease on a guarantee which might have been determined the next day. It is equally obvious that Shibani Lal would not have executed his contract of guarantee without which the lease would not have been granted, if he were only to receive a guarantee in his turn which might have been determined the following day. Consequently I am of opinion, even if this was a continuing guarantee, that the liability continued notwithstanding the death of Ganga Bakhsh in 1880. The law in

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England in cases of this kind and the principles on which that law is based are fully expressed by the judgments in the case of *Lloyds v. Harper* (1). The reason why I do not think it necessary to decide whether this is a continuing guarantee or not within the meaning of ss. 129 and 131, is that I consider it evident that the respective parties clearly intended that the respective guarantees should continue and not be determinable during the currency of the lease, and that the payment of the whole of the rent which might become due under the lease should be guaranteed. Further, I much doubt whether the framers of the Code had before their minds a case like the present. Whether this contract of Ganga Bakhsh is to be called a contract of guarantee, or a contract of indemnity, appears to me, to be immaterial. Ganga Bakhsh in any event was a surety, if it was a contract of guarantee, and it is to be distinguished from a contract of indemnity. I fail to see how Ganga Bakhsh, if he were alive, could be, or how his representative can be, made liable for the costs of Shibani Lal incurred in defending the action brought against him, or for the costs or expenses which he was obliged to pay to the plaintiff in that action. There could have been no defence to that action. The payment of the rent was the only thing guaranteed. If it was a contract of indemnity as distinguished from a contract of guarantee, the plaintiff could not be entitled to the cost or expenses of the previous action unless he brought the case within clause (2) of s. 125 of the Indian Contract Act. In this case there is no evidence to show that Shibani Lal acted as a prudent man would have done in defending the action against him, nor did the defendant authorize Shibani Lal to defend that suit. I am consequently of opinion that the plaintiff was entitled to a decree only for the actual rent which Shibani Lal had to pay, and not for any interest, cost or expenses incurred by the lessor or Shibani Lal prior to the previous suit. The result will be that the decree below will be varied by a decree in favour of the plaintiff for Rs. 3,417 with costs of this litigation proportionate to that sum and with interest at 6 per cent. on that sum from the commencement of the suit to the date of the payment. Costs of this appeal according to the success of the parties.

TYRRELL, J.—I concur.

*Decree modified.*