

1908

JAGAN NATH

v.

DIBBO.

alienations by Musammat Shitabo, and that Musammat Shitabo was alive and was a party to the litigation. Both these grounds are fatal to the plaintiff's case. We accordingly dismiss the appeal with cost.

Appeal dismissed.

1908

December 1.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KANDHYA LAL (APPLICANT) v. MANKI (OPPOSITE PARTY)*

Act No. V of 1881 (*Probate and Administration Act*), section 78—Act No.

IX of 1872 (*Indian Contract Act*), section 129—Administration—Surety—Continuing guarantee.

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, this is not a continuing guarantee within the meaning of section 129 of the Indian Contract Act, 1872. Such a surety cannot of his own free will withdraw from his suretyship. *Subroya Chetty v. Ragammal* (1) followed. *Raj Narain Mookerjee v. Ful Kumari Debi* (2) dissented from.

IN this case letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Musammat Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate. One Kandhya Lal became surety. Less than six months afterwards Kandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Musammat Manki to provide a fresh surety. The District Judge rejected this application. The surety thereupon appealed to the High Court.

Babu Lalit Mohan Banerji, for the appellant.

Babu Sital Prasad Ghosh, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—The respondent Musammat Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Kandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammat Manki

* First Appeal No. 64 of 1908 from an order of G. A. Paterson, District Judge of Benares, dated the 30th of March 1908.

(1) (1905) I. L. R., 28 Mad., 161. (2) (1902) I. L. R., 29 Calc., 68.

to furnish a fresh surety. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a surety bond given under the circumstances stated can be cancelled—see *Raj Narain Mookerjee v. Ful Kumari Debi* (1) and *Subroya Chetty v. Ragammal* (2). The former Court held that a surety bond given under the circumstances stated is a continuing guarantee within the meaning of section 129 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administratrix had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says :— “ I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged.” If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammam Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court, to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

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Appeal dismissed.

(1) (1902) I. L. R., 29 Calc., 68. (2) (1905) I. L. R., 28 Mad., 161.