1931

RAMJI LAL LALA v. KING-EMPEROR.

Srivastava, J.

section 476 of the Code. It is therefore quite distinguishable from the present case. In *Tarakeswar Mukhopadhya* v. *Emperor* (1) a Bench of the Calcutta High Court held that the proper authority to make a complaint under section 476 of the Code of Criminal Procedure is not the court which tried and disposed of the original case. It is obvious that the court of the Bench Magistrates never tried or disposed of the complaint of Ramji Lal against Muhammad Ali.

In view of the opinion formed by me on the question of jurisdiction, it is not necessary for me to enter into a discussion of the other points raised in the order of reference. I accordingly allow the reference and set aside the order of the Bench Magistrates, dated the 7th of April, 1931, and the order of the Magistrate, first class, dated the 22nd of May, 1931, directing the prosecution of Ramji Lal.

Reference allowed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice H. G. Smith.

1931
August 31.

PRAG DAS, LALA AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* RAI SAHIB B. DHANI RAM (PLAINTIFF-RESPONDENT).*

Contract Act (IX of 1872), section 133—Discharge of surety for variance in contract—Guiding principle—A executing surety bond in favour of C for making good any loss caused by B, a tahvildar, while in service—Bond containing wide terms covering any office B may hold in future—Government Notification abolishing post of tahvildarship—B continuing C's service without any break or alteration—Liability of surety, if determined—Government Notification, if sufficient variation within section 133 of the Contract Act.

In order to determine the liability of a surety, it is necessary to examine the nature and import of the recitals contained in the security bond. The terms of the bond must

*Second Civil Appeal No. 363 of 1930, against the decree of Sheikh Ali Hammad, Additional Subordinate Judge of Fyzabad, dated the 17th of September, 1930, modifying the decree of Babu Pratab Shankar, Munsif of Fyzabad, dated the 27th of March, 1930.

(1) (1925) I.L.R., 53 Calc., 488.

1931

PRAG DAS, LALA v. RAI SAHIB E. DHANI RAM.

in every case be carefully studied and if there is any change in the position of the principal debtor as regards his creditor, it must materially affect the position of the surety before the latter can be absolved from liability.

Where *A* executes a surety bond for *B* who is appointed a tahvildar or *gomashta* in a treasury and agrees to make good to *C*, the treasurer, any loss occasioned to him by any negligence or misconduct on the part of *B* or any substitute from time to time appointed by him during *B's* absence on leave and the bond is to enure for the benefit of *C* during the period of *B's* "service" (*zamana-i-mulazmat*), and in the event of his resigning or being "dismissed", whether by *C* or by the Government, *A* is to remain responsible to *C* for any defalcations that might come to light during a period of one year following the occurrence of either of the above events—viz., the resignation or the "dismissal" of *B*, the terms of the bond are very wide one and apply not only to the office held at the time by *B*, but to any office to which he might be appointed in future. A subsequent Government Notification abolishing the post of tahvildar as Government appointment, but retaining *B* in it, without any breach of continuity or alteration of duties, as the servant of the treasurer, does not discharge *A* of his liability under the bond to make good for any defalcations committed by *B*. There is no material variance with the meaning of section 133 of the Contract Act of any implied contract that may be assumed to have existed between *B* and *C*, and there was no material change in the position either of *B* himself or of *A* as his surety. *Mathura Das and others* v. *The Secretary of State for India in Council* (1), *Polak and another* v. *Everett* (2), *Holme* v. *Brunskill* (3), *Guardians of the Malling Union* v. *Graham* (4), *Pybus* v. *Gibb and others* (5), *Freeman* v. *Evans* (6), *Crush and another* v. *Turner* (7), *Raj Kristo Mukerjee* v. *Issur Chandar Mukerjee* (8), *K. R., Chitguppi and Co.* v. *Vinayak Kashinath Khadilkar* (9), *Oswald* v. *The Mayor and others of Berwick-upon-Tweed* (10), *Anderson and others* v. *Richard Thornton* (11), *Worth and others* v. *Newton* (12), and *Mathra Das* v. *Shamboo Nath* (13), referred to and discussed.

(1) (1930) 28 A.L.J.R., 1217.
(2) (1876) 1 Q.B.D., 669.
(3) (1877) 3 Q.B.D., 495.
(4) (1870) 5 Common Pleas, 201.
(5) (1856) 119 E.R., K.B., 1100.
(6) 1 Ch. D., 36.
(7) 3 Ex. Div., 303.
(8) (1874) 23 W.R., 90.
(9) (1920) I.L.R., 45 Bom., 157.
(10) (1856) 10 E.R., H. of L. 1139: 5 H.L.C., 856.
(11) (1842) 114 E.R., K.B., 510.
(12) (1854) 156 E.R., Ex. 435.
(13) (1928) 112 I.C., 843. A.I.R., 1929 Lah., 203.

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

Messrs. *Radha Krishna* and *B. K. Dhaon*, for the appellants.

Mr. *Hyder Husain* and Dr. *Qulubuddin Ahmad*, for the respondent.

RAZA and SMITH, JJ. :—These second appeals arise out of a decision by the Additional Subordinate Judge of Fyzabad, in appeal from a decision by the Munsif of that place. They can be disposed of conveniently by one judgment.

The suit was by Rai Sahib Dhani Ram, the Government Treasurer at Fyzabad, against two defendants, Lala Prag Dass and Pandit Mangali Prasad, who had executed a bond as sureties for one Banarsi Ram, who was tahvildar at the Tanda sub-treasury. He was appointed to that office on the 1st of February, 1925, on a pay of Rs. 35 a month, and the bond concerned in the suit was executed on the 29th of May, 1925. Banarsi Ram, it is alleged, committed embezzlements in respect of the following sums :—

(1) Rs. 495.
(2) Rs. 808-10-0.
(3) Rs. 374-13-0.

The dates when these amounts are supposed to have been embezzled are not stated in the plaint, but from a statement made by the pleader for the plaintiff it appears that the first sum was said to have been embezzled between the 1st of March, 1924, and the 1st of September, 1928; the second sum on or about the 22nd of August, 1928, and the third sum on or about the 1st of September, 1928. The first sum, that is to say, may according to that statement have been embezzled before the appointment of Banarsi Ram. The Treasurer had, according to the plaint, to make good the amounts in question on the following dates :—

(1) Rs. 495 on the 5th of September, 1928;
(2) Rs. 808-10-0 on the 30th of October, 1928;
(3) Rs. 374-13-0 on the 16th of January, 1929.

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

He accordingly sued Banarsi Ram's sureties for those sums, adding to them interest from the dates on which he made them good to the date of the suit, and a small sum of 12 annas as the cost of a registered notice sent by him to the defendants. Banarsi Ram is said to have absconded on the 1st of September, 1928, he was, it appears, afterwards arrested and convicted. The present suit was instituted on the 31st of August, 1929.

Raza and Smith, JJ.

The trial court decreed the total sum sued for, with costs, but did not allow any future interest, which also was claimed in the plaint. The defendants appealed, and the plaintiff made cross-objections on the point of future interest. The lower appellate court allowed the appeal as regards the item of Rs. 495, and dismissed the cross-objections. From that decision both sides have come in second appeal, the defendants being the appellants in No. 363 of 1930, and the plaintiff being the appellant in No. 1 of 1931. The defendants maintain that they were liable to pay nothing to the plaintiff. The plaintiff maintains that they were liable to him for the sum of Rs. 495 disallowed by the lower appellate court, as well as for the other amounts.

The surety-bond, of course, is a very important document for the decision of the questions before us. It begins by reciting that Banarsi Ram had been appointed to the office of *gomashta* (*ba ohda gomashtagiri mulazim hua hai*) and had been called on for security to the extent of Rs. 2,000 by "Babu Dhani Ram". It goes on to recite the conditions of the bond by which the defendants made themselves sureties for Banarsi Ram. Stripped of all needless details, the bond may be said to bind the sureties to make good to the treasury any loss occasioned to him by any negligence or misconduct on the part of Banarsi Ram or of any substitute from time to time appointed by him during

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

Raza and Smith, JJ.

his own absence on leave. The bond was to enure for the benefit of the treasurer during the period of Banarsi Ram's "service" (*"zamana-i-mulazimat"*), and in the event of his resigning or being "dismissed", whether by the Treasurer or by the Government, the sureties were to remain responsible to the treasurer for any defalcations that might come to light during a period of one year following the occurrence of either of the above events, viz., the resignation or the "dismissal" of Banarsi Ram.

The terms of the bond are very wide, and apply not only to the office held at the time by Banarsi Ram, but to any office to which he might be appointed in future. The first of the paragraphs in which the terms of the bond are recited is worded thus:

> *Yih ki musamma Banarsi Ram apna kar i mansabi jis par ki woh ab muqarrar hai ya ainda ho nihayat dianatdari wa imandari wa mehnat—shiari wa zimmadari se anjam deta rahega.*

We have been referred on behalf of the defendants-appellants to a ruling, *Mathura Das and others* (*defendants*) v. *The Secretary of State for India in Council* (plaintiff) (1). That ruling does not seem to us to assist the defendants, inasmuch as the facts there were that a man officiated temporarily in a certain office, and gave security in that connection. Some eighteen months later he was again appointed to officiate in that same office, and during his second incumbency a large sum disappeared owing to his neglect. No fresh security had been taken from him, and the surety-bond furnished by him when he officiated on the former occasion was held not to apply to his second tenure of the post, and his sureties under that bond were absolved from liability. In the present case, however, as we shall show presently,

(1) (1930) 28 A.L.J.R., 1217.

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

there was no actual break in the continuity of the employment of Banarsi Ram, though certain proceedings took place on the part of Government which, according to the defendants, brought their liability to an end. What these proceedings were, will be explained presently. For the moment we need only say that in our opinion nothing contained in the ruling that has been referred to is of assistance to the defendants. We think, however, that it does, nevertheless, contain certain passages which may usefully be here cited, as regards the general principles applicable to the questions before us. The ruling (at page 1220) has this passage :—

Raza and Smith, JJ.

> "Lord WESTBURY has made the following pronouncement in *Blest* v. *Brown* (1) :— 'It must always be recollected in what manner a surety is bound.' You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into."

The learned Judge of the Allahabad High Court proceeded to add :—

> "In order to determine the liability of the defendants-appellants, it is necessary to examine the nature and import of the recitals contained in the security bond."

The principles above enunciated may be said to be axiomatic, and therefore not to need support by authority, but as they are succinctly stated in the very ruling put before us on behalf of the defendants we have thought it worth while quoting them.

(1) (1862) 4 D.G.F. & J. Report p. 376.

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

Raza and Smith, JJ.

There can be no question, in our opinion, that if the only thing to be considered in this case were the contents of the bond, the defendants could have no possible case for seeking to escape liability to the plaintiff for the defalcations of Banarsi Ram. There is a complication however, inasmuch as certain changes were introduced by Government in 1927 in the position of Tahvildars. The changes and the reasons for them are set forth in a letter, No. A-2820/X—252, from a Secretary to Government, United Provinces, to all Commissioners of Divisions. The date of the letter was the 25th of July, 1927.

It begins by setting forth that "tahvildars in sub-treasuries are appointed on the nomination of the treasurer of the district treasury, who is responsible for their work and honesty and who for that purpose is required to take suitable security from them". The taking of such security, we may mention, was introduced in 1925,—vide paragraph 1566 of the Manual of the Revenue Department, United Provinces, volume II. The letter of the 25th of July, 1927, goes on to say that "a tahvildar is, therefore, essentially a servant of the treasurer. The original intention of Government when declaring the posts of tahvildars to be non-pensionable, was that a treasurer might dispense with the services of a tahvildar as soon as he had lost confidence in him. It has, however, not been possible to put this intention into practice because tahvildars are paid from general revenues and therefore are whole-time Government servants, and as such, are entitled to the protection given to all Government servants by the classification rules framed by the Secretary of State in Council, namely, that no Government servant can be dismissed without a proper inquiry." It was accordingly decided to abolish the post of tahvildar, and to increase the remuneration of the treasurer by an amount equal

to the pay up to that time given to the tahvildars and to make the treasurer responsible for carrying on the work at sub-treasuries through his own servants. That decision was to have effect from the 1st of November, 1927, and all tahvildars were to be given notice that their services would not be required after the 31st of October, 1927. All treasurers were to be informed that thereafter they must employ their own tahvildars.

Raza and Smith, JJ.

In pursuance of those instructions, the treasurer (plaintiff in this suit), appointed Banarsi Ram as tahvildar at Tanda, and the Deputy Commissioner approved that appointment.

In these circumstances, it is urged for the defendants-appellants, the provisions of section 133 of the Contract Act came into play in their favour, that is the point on which arguments have, in the main, been addressed to us, and it is clear that it is the only point on which the defendants had any chance of succeeding as regards the case as a whole.

The case-law bearing on the principles involved is mainly English, and we have been referred on behalf of the defendants-appellants to the following English rulings: *Polak and another* v. *Everett* (1), *Holme* v. *Burnskill* (2), *Guardians of the Malling Union* v. *Graham* (3) and *Pybus v. Gibb and others* (4). Other rulings referred to were *Freeman* v. *Evans* (5) and *Crush and another* v. *Turner* (6), but those rulings especially the second of them, seem to have no particular bearing on the question that is before us.

We are also referred to Indian rulings reported in *Rajkristho Mukerjee* v. *Issur Chand Mukerjee* (7). and *K. R. Chitguppi and Co.* v. *Vinayak Kashinath Khadilkar* (8).

(1) (1876) 1 Q.B.D., 669.
(2) (1877) 3 Q.B.D., 495.
(3) (1870) 5 Common Pleas, 201.
(4) (1856) 119 E.R., K.B., 1100.
(5) 1 Ch. D., 36.
(6) 3 Exchequer Dn., 303.
(7) 23 W.R., 90.
(8) (1920) I.L.R., 45 Bom., 157.

1931

PRAG DAS. LALA v. RAI SAHIB B. DHANI RAM.

On the other side we have been referred to the following English rulings: *Oswald* v. *The Mayor and others of Berwick—upon—Tweed* (1) *Anderson and others v. Richard Thorston* (2) and *Worth and others* v. *Newton* (3).

Raza and Smith, JJ.

Reference was also made to an Indian ruling reported in *Mathra Das* v. *Shambhoo Nath* (4)—(a decision of the Lahore High Court).

It is not necessary for us to go into an elaborate discussion of all the above rulings. They apply to their own facts, and do not necessarily assist in the decision of a case in which the facts are different. These two general principles, however, may be regarded as deducible from the English decisions:

(i) the terms of the bond must in every case be carefully studied;

(ii) if there is any change in the position of the principal debtor as regards his creditor, it must materially affect the position of the surety before the latter can be absolved from liability.

This latter principle, though without reference to any English or other authority, was laid down in the Lahore ruling that has been referred to *Mathra Das v. Shambhoo Nath* (4). It also finds recognition in illustration (*b*) itself of section 133 of the Contract Act, where the case of *Osswald* v. *Mayor of Berwick*, is referred to.

As regards the construction of the bond in the present case, we think, as we have indicated, that it was clearly wide enough to cover the circumstances that afterwards arose unless it must be held that as a result of the Government's instructions of 1927 there was a variance in the terms of the contract between

(1) (1856) 10 E.R., H. of L. 1139: 5 H.L.C., 856. (2) (1842) 114 E.R., K.B., 510.
(3) (1854) 156 E.R., (Excheq.) 435. (4) (1928) 112 I.C., 843.

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

Raza and Smith, JJ

Banarsi Ram and the treasurer sufficient to bring the sureties' liability to an end.

On that point, it may be argued, and was, in fact, argued on behalf of the plaintiff that there was, strictly speaking, no contract between him and Banarsi Ram when the latter was appointed. It is admitted that there was no express contract, and we think that the implied contract must be regarded as being merely that Banarsi Ram should act honestly and diligently as a tahvildar. There was no break in the continuity of his service or in the nature of his duties in consequence of the abolition of tahvildarships as Government posts in 1927, and we do not think that Banarsi Ram can properly be said to have been "dismissed" by the Government, or that the expressions *barkhast* and *barkhastgi* used in paragraph 6 of the bond were intended to apply to what actually happened . . . the abolition of Banarsi Ram's post as a Government appointment, but his retention in it, without any breach of continuity or alteration of duties, as the servant of the treasurer. As regards his pay, it is not shown to have been varied and we have no doubt that it was not varied, as the Government increased the remuneration of the treasurer to the extent of the tahvildars' pay.

We do not think the sureties intended to limit their liability to such time as Banarsi Ram remained a Government servant. The bond does, it is true, at one place, in paragraph 5, use the words *'ba waqt len den mutalliqa-i-khidmat-i-sarkari''*, but construed as a whole it was clearly intended to cover all forms of loss occasioned by the neglect or misconduct of Banarsi Ram. The very use of the non-technical terms *gomashtagiri* seems to us to indicate that the sureties had not in mind Government service as distinguished from the private service of the treasurer, and we have already pointed out that the bond covers

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

not only the post held by Banarsi Ram at the time the bond was executed, but any post to which he might be appointed in future.

Raza and Smith, JJ.

The result is that we hold the defendants-appellants liable under the terms of their bond to make good to the plaintiff any defalcations committed by Banarsi Ram during the currency of the bond, and we do not hold that the Government proceedings in 1927 brought their liability to an end. There was no material variance of any implied contract that may be assumed to have existed between Banarsi Ram and the treasurer, and there was no material change in the position either of Banarsi Ram himself or of the defendants' as his sureties.

We accordingly hold that the defendants appeal fails, and we dismiss it, except to this extent. The learned lower appellate court did not make it clear that the interest on the sum of Rs. 495 disallowed by it was also disallowed. If the principal amount is disallowed, it follows, of course, that the interest upon it must be disallowed also. That, needless to say, is not disputed by the plaintiff.

We are satisfied that the sum of Rs. 495 was rightly disallowed by the lower appellate court. It is not proved that that sum was embezzled during the currency of the bond, . . . it is not even proved that it was embezzled during the time that Banarsi Ram was acting as tahvildar. The defendants were clearly not liable to the plaintiff for that amount, and the plaintiff's appeal has not been seriously pressed before us.

The result is that the defendants appeal (No. 363 of 1930) is allowed to this extent only that it is clearly declared that neither the sum of Rs. 495 nor the interest claimed upon it is decreed to the plaintiff. In other respects the defendants' appeal is dismissed. The modification that we have made for the sake of clarity is rendered necessary merely by the fact that

1931

PRAG DAS, LALA v. RAI SAHIB B. DHANI RAM.

the lower appellate court's judgment was not explicit on the point, the plaintiff has not contested the appeal as far as that point is concerned, and there is no reason why he should not receive his full costs of the appeal No. 363 of 1930 in which he is the respondent. It is ordered accordingly.

The plaintiff's appeal (No. 1 of 1931) fails, and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice H. G. Smith.

RAM HET (DEFENDANT-APPELLANT) *v.* POHKAR, (PLAINTIFF-RESPONDENTS.)*

1931 *September, 7.*

Subrogation, principle of—Agreement between the borrower and the lender for substitution for the earlier creditor, if necessary—Oral agreement to execute mortgage, how far sufficient to create a mortgage or charge within the meaning of sections 58 and 100 of the Transfer of Property Act (IV of 1882)—Transfer of Property Act (IV of 1882), section 92—Mortgage,—Person advancing money for payment to prior mortgagee—Mortgagor never agreeing by registered instrument for subrogation of such person—Oral agreement, if sufficient.

The right to benefit under the principle of subrogation depends upon the existence of an agreement between the borrower and the lender by which it is provided that the subsequent lender must be substituted for the earlier creditor and the mere fact that money is borrowed and used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. Where an oral agreement provides that the mortgagor would execute a mortgage in favour of the person paying the money due on a prior mortgage the agreement creates merely a right to

*Second Civil Appeal No. 341 of 1930, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 19th of August, 1930, reversing the decree of Saiyed Akhtar Ahsan, Munsif of Sitapur, dated the 26th of October, 1929.