1930.

BACHA SHAM SUNDER KUER v. BALGOBIND SINGH.

COURTNEY TERRELL, C.J.

Mahton v. *Musammat Bibi Bersatan*(1) and in *Nilambar Jha* v. *Chandradhari Singh*(2). Those cases arose out of exactly similar facts and, as in the cases before us, it was contended that the rent suit was a fraudulent one to obtain a fraudulent ex parte decree. Whether this allegation be true or not the issues of fact as to the transfer of the holding and the consent of the landlord should be properly tried after admission as a defendant of the intervening party and there is no need to defer the trial of these issues for separate and later proceedings. I would, therefore, in cases nos. 590 and 591 reject the applications with costs and in no. 618 I would allow the application with costs and direct that the intervening party be admitted as a co-defendant. In cases nos. 590 and 591 the Munsif has in the presence of the plaintiff investigated and come to a finding on the evidence and that finding need not be disturbed. In case no. 618 the issue of fact as to the alleged transfer and recognition of the intervening party must be tried at the hearing of the rent suit.

JAMES, J.—I agree.

Rule discharged in nos. 590 *and* 591.

Rule made absolute in no. 618.

APPELLATE CIVIL.

1930.

April, 24.

Before Fazl Ali and James, JJ.

CHOUDHURI GOVINDA CHANDRA DAS

v.

HAYAGRIBA UPADHAYA.*

Hindu law—father executing security bond for the honesty of another—son or grandson, whether liable—plea, whether can be successfully taken after joint family property sold in execution of decree against father.

* Circuit Court, Cuttack. Appeal from Original Decree no. 6 of 1928, from a decision of M. E. A. Khan, Subordinate Judge of Cuttack, dated the 23rd April, 1928.

(1) (1925) 8 Pat. L. T. 305. (2) (1924)-10 Pat. L. T. 442.

1930.

CHOUDHURI GOVINDA CHANDRA DAS v. HAYAGRIBA UPADHAYA.

Although a Hindu son may be liable to pay debts contracted by the father on account of his standing surety for payment of money lent or for delivery of goods, he is not bound to pay debts incurred by the father by being surety for the honesty or good behaviour of another.

Tukarambhat v. *Gangaram Mulchand Gujar*(1), *Maharaja of Benares* v. *Ram Kumar Missir*(2), *Satya Charan Chandra* v. *Satpir Mahanty*(3), followed.

Where, therefore, the father with others executed a security bond for a certain sum, by which he hypothecated the joint family property and stood surety for the appointment of one *M* as guardian to her minor brother, and the bond recited, inter alia, as follows :—

"Further as stated above we Ganesh Upadhaya, Purosotum Upadhaya and Narain Upadhaya, the sureties for the appointment of Malati Debya as guardian, do hypothecate our properties noted below as security on this condition that if the said Malati Debya, or any person acting on her behalf, commits waste or damage or misappropriates, steals, squanders away, loses, improperly uses or destroys, injures or transfers on account of fraud or (illegible) or carelessness or insolvency, the property of the said minor or any portion or portions thereof during the period of her guardianship, the loss that may be caused to the said property or any portion or portions thereof can be remedied and compensation can be recovered from our aforesaid properties."

Held, that the security bond was for the honesty of the guardian, and not for the payment of a debt, and that, therefore, the liability of the surety could not, under the Hindu Law, be enforced against the ancestral property in the hands of the son or the grandson.

Held, further, that such a plea can be successfully taken by the son even after the property has been sold in execution of a decree against the father.

Satya Charan Chandra v. *Satpir Mahanty*(3), followed.

Brijnath Prasad v. *Bindeshwari Prasad Singh*(4) and *Chhakauri Mahton* v. *Ganga Prasad*(5), distinguished.

---

(1) (1898) I. L. R. 23 Bom. 454.
(2) (1904) I. L. R. 26 All. 611.
(3) (1918) 4 Pat. L. J. 309.
(4) (1925) 86 Ind. Cas. 791.
(5) (1911) I. L. R. 39 Cal. 862.

1930.

CHOUDHURI GOVINDA CHANDRA DAS v. HAYAGRIBA UPADHAYA.

Appeal by defendants nos. 1, 3 and 4.

This was an appeal by defendants nos. 1, 3 and 4 in a suit which was instituted by the plaintiffs-respondents under the following circumstances.

On 22nd October, 1914, one Malati Debya applied to the District Judge of Cuttack for being appointed guardian of one Lingaraj Das, her minor brother. On the 23rd January, 1915, the application of Malati Debya was granted and she was directed to furnish security for a sum of Rs. 10,000. Such security was ultimately furnished by defendant no. 10, who was the father of plaintiffs nos. 1 and 2 and grandfather of plaintiff no. 3, and two other persons Narain and Purusottam on the 13th September, 1918. On that date these three persons along with Malati Debya herself executed a security bond for a sum of Rs. 10,000 and by means of the bond defendant no. 10 as well as the other sureties hypothecated some of their properties. On the 2nd December, 1918, the minor Lingaraj Das died and the defendants 1 to 4 and the father of defendants nos. 5 to 9 succeeded to his estate as reversioners. On the 31st May, 1921, the District Judge assigned the security bond to the defendants who sometime later brought two account suits against Malati Debya and the three sureties including defendant no. 10 and ultimately a final decree was passed fixing the amount payable by Malati Debya at Rs. 19,116 and odd and directing that the amount for which the bond had been executed be realised by the sale of the properties hypothecated under the security bond if the amount was not paid within a certain time. When the defendants proceeded to sell the properties, the plaintiffs brought the suit out of which the present appeal arose and prayed for a perpetual injunction restraining the defendants from selling the properties mentioned in the Schedules *Ka* and *Kha* attached to the plaint. The properties in Schedule *Ka* were said to be the

ancestral properties of the plaintiffs, and those mentioned in Schedule *Kha* were said to be the properties purchased out of the joint funds of the family and from the income of the ancestral properties. The main ground upon which the plaintiffs sought to avoid the sale of the properties was that the surety debt contracted by defendant no. 10 was not binding upon them. As, however, the prayer of the plaintiffs to stay the sale was not granted and the properties were sold during the pendency of the suit, the plaintiffs amended their plaint and added a further prayer for recovery of possession.

The suit was resisted by the defendants 1 to 9 on a number of grounds. The main pleas of the defendants, however, were these:—

"(*1*) that the properties mentioned in both the Schedules attached to the plaint were the self-acquired properties of defendant no. 10; (*2*) that the plaintiffs were under a pious obligation to discharge the liability of defendant no. 10; (*3*) that the security bond was for the benefit of the family and the plaintiffs were bound by it and (*4*) that the disputed properties having already been sold in execution of the decree passed on the basis of the security bond, the plaintiffs could not impeach the sale except on proof that the debt by defendant no. 10 was illegal or immoral."

The Subordinate Judge held (*1*) that the properties in Schedule *Ka* were the ancestral properties of the plaintiffs as alleged by them and those mentioned in Schedule *Kha* had been acquired from the joint family funds and (*2*) that the plaintiffs were not bound to pay the surety debt as defendant no. 10 had stood surety for the honesty of the guardian and the bond, dated the 13th September, 1918, was tainted with illegality. On these findings he decreed the suit and held that the plaintiffs were entitled to recover possession of their share of the properties.

B. K. Ray, for the appellants.

D. Kar, for the respondents.

FAZL ALI, J. (after stating the facts set out above proceeded as follows:)

Now, the plea that the properties mentioned in the plaint were the self-acquired properties of defendant

1930.

CHOUDHURI GOVINDA CHANDRA DAS v. HAYAGRIBA UPADHAYA.

FAZL ALI, J.

no. 10 has not been pressed before us and the finding of the learned Subordinate Judge which is adverse to the defendants on this point has not been questioned. The learned Advocate for the appellants, however, has attempted to argue among other things that the security bond executed by defendant no. 10 was for the benefit of the entire family and was as such binding upon the plaintiffs. He has laid some stress in this connection upon the fact that the defendant no. 10 was admittedly an old servant of Lingaraj's family and it is pointed out by him that this defendant has admitted in his evidence that he would not have continued to be in service if Malati Debya had not been appointed guardian. These facts, however, standing by themselves are not sufficient, in my opinion, to justify a finding that the security bond was necessarily for the benefit of the family and I agree with the learned Advocate for the respondents that it has not been conclusively established in this case that the bond was either for legal necessity or for the benefit of the family.

The crucial question in the case appears to me to be whether having regard to the terms of the bond it can be said that the debt contracted under it was of such a character that the plaintiffs could be made liable for it under the bond. This raises the general question as to how far ancestral or joint family properties in the hands of sons or grandsons are liable for a debt contracted by their father or grandfather as a surety. It appears that at one time the law on the point was not very clearly understood and there was some doubt as to whether sons were compellable to pay the debts incurred by their father as a surety. The question, however, was discussed somewhat elaborately by Ranade, J., with reference to the original texts, in *Tukaram Bhat* v. *Gangaram Mulchand Gugar*(1) and has also been dealt with in several subsequent decisions. It appears now to be

(1) (1898) I. L. R. 23 Bom. 454.

settled law that of the four classes of surety-debts referred to by Vrihaspati, while a son is liable to pay debts contracted by a father on account of his standing *surety for payment of money lent or for delivery of goods*, he is not bound to pay debts incurred by the father by being *surety for the appearance or for the honesty of another*. [*See Tukaram Bhat* v. *Gangaram Mulchand Gugar*(1); *Maharaja of Benares* v. *Ram Kumar Missir*(2); *Satya Charan Chandra* v. *Satpir Mahanty*(3) and *Brijnath Prashad* v. *Bindeshwari Prasad Singh*.(4)]

The main question which is thus to be decided in this appeal is whether the security bond with which we are concerned in this case was a bond for the payment of a debt or for the honesty of the guardian Malati Debya. It might be noted here that a confusion may sometimes arise if instead of looking to the essence of the transaction or the principal terms of the bond one goes on to attach undue importance to small details or bare subtleties. For example, if a debtor does not deliberately re-pay the loan he has contracted, he may be said to be acting dishonestly and one who stands a surety for the repayment of the loan may be said to be, in a sense, surety for the honesty of the borrower. Similarly, if a person receives money as a trustee and commits breach of trust by refusing to pay it to the persons entitled to receive it, that amount may well be said to be due from the trustee and he who guarantees against the dishonesty of such a trustee may also be said in a sense to guarantee that the amount found due from him would be repaid by him. The fact, however, remains that there is a broad and substantial distinction between the two classes of sureties and in order to find out whether a particular transaction belongs to the one class or the other, one will in each case

(1) (1898) I. L. R. 23 Bom. 454.
(2) (1904) I. L. R. 26 All. 611.
(3) (1918) 4 Pat. L. J. 309.
(4) (1925) 86 Ind. Cas. 791.

1930.

CHOUDHURI GOVINDA CHANDRA DAS v. HAYAGRIBA UPADHAYA.

FAZL ALI, J.

have to refer to the terms of the bond itself and the circumstances of the case. The bond Exhibit 1, with which we are concerned in this appeal, is not very artistically drafted and there was considerable discussion at the bar as to whether it is to be regarded as a bond for honesty or for payment of such amount as might be found due from the guardian. On a careful reading of the document I find that it consists of two important clauses. By one of these clauses the three sureties as well as Malati Debya undertook to be personally liable for a sum of Rs. 10,000 and also made all their properties including those hypothecated by the three sureties liable for that sum. This clause, it may be stated, also governs two other minor clauses wherein the conditions under which the bond was not to be in force are set out. The second important clause concerned the three sureties only and stated the conditions under which the properties hypothecated by them were to be held liable for the loss, if any, sustained by the estate. It runs as follows:—

"Further, as stated above we Ganesh Upadhaya, Purusottam Upadhaya and Narain Upadhaya, the sureties for the appointment of Malati Debya as guardian, do hypothecate our properties noted below as security on this condition that if the said Malati Debya, or any person acting on her behalf, commits waste or damage or misappropriates, steals, squanders away, loses, improperly uses or destroys, injures, or transfers on account of fraud or (illegible) or carelessness or insolvency, the property of the said minor or any portion or portions thereof during the period of her guardianship, the loss that may be caused to the said property or any portion or portions thereof can be remedied and compensation can be recovered from our aforesaid properties."

Now, I regard this latter clause as the most important clause because evidently the defendants sought to enforce that clause against the sureties by asking for a mortgage decree against them and the Court also granted them a mortgage decree apparently relying upon this clause. It also appears that in the course of the account suit Malati Debya set up several false pleas to avoid payment of the amounts which

were said to have come into her hands but those pleas were negatived by the Court. Keeping these facts as well as the general tenor of the document in view I have no doubt in my mind that defendant no. 10 had been made liable because he had stood surety for the honesty of Malati Debya who was found to have dishonestly retained certain sums of money which she should have reimbursed to the estate of the minor and, therefore, in my opinion the Court below was correct in holding that the plaintiffs' share in the property hypothecated was not liable for the surety debt incurred by defendant no. 10.

I have quoted the hypothecation clause in the bond in extenso because it at once distinguishes the present case from the case of *Brij Nath Prashad* v. *Bindeshwari Prasad Singh*(1) which was much relied upon by the learned Advocate for the appellants. It is true that the facts of that case appear at first sight to be very similar to the facts of the present case, because in that case also a guardian appointed under the Guardian and Wards Act being required to give security had found a surety and the question arose whether the liability of the surety could under the Hindu Law be enforced against the ancestral property in the hands of his heirs. It was decided in that case that the heirs were liable for the surety debt incurred by their grandfather, but Ross, J., who delivered the judgment in that case (in which Kulwant Sahay, J. concurred) clearly pointed out that there was " no basis for the finding of the Munsif that the security bond recited that the grandfather stood surety against embezzlement or misappropriation on the part of defendant no. 1 " and that " it was not suggested that there was any reference in the bond to embezzlement or misappropriation ". In this case, however, in the clause which I have reproduced from the bond reference has been made to more than one of the possible acts of dishonesty of which the

(1) (1925) 86 Ind. Cas. 791.

1930.

CHOUDHURI GOVINDA CHANDRA DAS v. HAYAGRIBA UPADHAYA.

FAZL ALI, J.

guardian might be guilty; and it was to insure against such acts of dishonesty that the properties had been hypothecated.

The learned Advocate for the appellants next relied on the case of *Chhakauri Mahton* v. *Ganga Prasad*(1), but in my opinion that decision also does not help him much. The question that arose in that case was whether a decree, obtained by a person against a Hindu father, for damages on account of injury done to his crops by the obstruction of a channel through which he was entitled to irrigate his lands, in such circumstances that it could not be said that the act of the judgment-debtor was one of wanton interference with the rights of the decree-holder, could be enforced against his son and the question was answered by Mookerjee and Carnduff, JJ. in the affirmative. Mookerjee, J., in the course of a very elaborate judgment, referred to two classes of cases relating to the liability of a Hindu son to discharge the debt of his father, when such debt consisted of money misappropriated by the latter. After referring to several apparently conflicting decisions on the subject the learned Judge proceeded to reconcile them as follows—

"These cases, however, may possibly be reconciled if we recognise the distinction between a criminal offence and a breach of civil duty. In the first three cases, the father was guilty of criminal misappropriation as regards sums of money for which he was accountable; while in the second set of three cases, the father merely failed to account for the money received by him, and his failure to do so constituted nothing more than a breach of civil duty. The distinction is real though refined, and was recognised in *Medai Tirumalayappa Moodeliar* v. *Veerabudra*(2).....The case last mentioned consequently supports the view that, where the taking

(1) (1911) I. L. R. 39 Cal. 862.
(2) (1909) 19 Mad. L. J. 759.

of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence."

The learned Advocate for the appellant laid great stress upon this passage; but it must be pointed out that what Mookerjee, J. was dealing with there was not a surety debt or a debt which was incurred by the father in the interest of a stranger: but he was dealing with a class of debts which accrued by reason of the father himself having misappropriated or failed to account for money belonging to others. A careful reading of the judgment in that case will show that Mookerjee, J. was careful enough to regard surety debts as a distinct class of debts altogether. At page 869 after referring to a number of original texts the learned Judge says as follows—

"If the provisions of all these texts are summarised, the result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows:—(*i*) debts due for spirituous liquor, (*ii*) debts due for lust, (*iii*) debts due for gambling, (*iv*) unpaid fines, (*v*) unpaid tolls, (*vi*) useless gifts or promises without consideration or made under the influence of lust or wrath, (*vii*) *suretyship-debts*, (*viii*) commercial debts, and (*ix*) debts that are not vyavaharika."

Again at page 875 he says as follows—

"Reference was made at the bar to decisions upon the question of the liability of a son to satisfy a suretyship-debt of his father, and mention was made particularly of the cases of.....It is not necessary, however, to discuss for our present purpose the question of the liability of a Mitakshara son for

1930.

CHOUDHURI GOVINDA CHANDRA DAS v. HAYAGRIBA UPADHAYA.

FAZL ALI, J.

the suretyship-debt of his father, because the determination of that question depends upon the interpretation of special texts, specially the text of Vishnu, which defines the different kinds of sureties, namely, for appearance, for honesty, for debt and for delivery of the debtor's effect."

It is sufficient to say that suretyship-debts must be regarded as a class by themselves, and are not necessarily to be governed by any principles that may have been laid down in connection with other classes of debts. In my opinion the learned Subordinate Judge was right in relying on the case of *Satya Charan Chandra* v. *Satpir Mahanty*(1) That decision is authority at least for two propositions (*1*) that a son will not be liable for a debt incurred by the father on account of his having stood a surety for the honesty or good behaviour of another person and (*2*) that such a plea can be successfully taken by the son even after the property has been sold in execution of a decree against the father.

I have dealt so far only with the legal aspect of the case which in fact is the only aspect with which we are concerned in this appeal, though I might mention that on facts also the decision of the learned Subordinate Judge does not appear to be either a hard or an inequitable one. As will appear from my statement of the facts of this case, Lingaraj Das, the minor, died less than three months after the execution of the surety bond and it appears that defendant no. 10 made an application to the Judge shortly after the death of the minor that he was no longer responsible for the acts of the guardian. I am also told that the defendants have successfully proceeded against the other two sureties and apparently most of the defendants or their guardians do not seem to be dissatisfied with the decision of the Subordinate Judge, considering that there is no appeal before us on behalf of the defendants 2 and 5 to 9.

(1) (1918) 4 Pat. L. J. 309.

In my opinion the suit has been rightly decided by the learned Subordinate Judge and the appeal must be dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before James and Chatterjee, JJ.

PARMESHAR MISSIR

v.

DHORI AHIR.*

1930.

May, 6.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 37—*enhancement of rent, suit for—application for withdrawal—plaintiff permitted to withdraw, subject to payment of costs with liberty to bring fresh suit—costs if not paid, suit to stand dismissed—costs not paid—second suit brought within* 15 *years—dismissal, whether on merits—section* 37, *whether a bar—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXIII, rule* 1, *whether applicable.*

D brought a suit for enhancement of rent which he wished to withdraw on the 16th of August, 1927. The order of the trial court was that the suit might be withdrawn with permission to bring a fresh suit, if the defendant's costs were paid within fourteen days, but that if the costs should not be paid within that time, the suit should stand dismissed. The costs were not paid with the result that the suit stood dismissed on the 30th of August, 1927. In the meantime the plaintiff instituted the present suit on the 25th of August, 1927. The defendant contended that the suit having been instituted within fifteen years was barred under section 37, Bengal Tenancy Act, 1885.

* Appeal from Appellate Decree no. 1582 of 1928, from a decision of A. C. Davies, Esq., I.C.S., District Judge of Shahabad, dated the 17th September, 1928, reversing a decision of Babu Uma Kanta Prashad Sinha, Munsif of Sasaram, dated the 23rd December, 1927.