

## CIVIL REVISION.

*Before Mr. Justice Dunkley.*

1936

KANAHAI MISSIR *v.* SUKANANAN.\*

Mar. 11.

*Surety and debtor—Suit by creditor—Debtor unserved with summons—Waiver of claim against debtor—Surety not discharged—Effect of waiver—Barring of remedy against debtor—Debt not destroyed—Remedy of surety against debtor unimpaired—Contract Act (IX of 1872), ss. 134, 145.*

Where the creditor sues the debtor and his surety for the debt due and being unable to serve the debtor with summons waives his claim against the debtor he does not thereby discharge the surety, and can proceed with the suit against the surety only. The effect of the creditor waiving his claim against the principal debtor is to bar the remedy by suit against the debtor, but it does not extinguish or destroy the debt, and the remedy of the surety against the debtor is not thereby impaired.

*Amadana v. Konammal*, I.L.R. 56 Mad. 625; *Close v. Close*, 43 E.R. 474; *Cragoe v. Jones*, 8 Ex. 31; *Murugappa v. Munniswami*, 38 M.L.J. 131; *Nathubhai v. Ranchhodlal*, I.L.R. 59 Bom. 52; *Shaik Ali v. Mahomed*, I.L.R. 14 Bom. 267; *Webb v. Hewitt*, 69 E.R. 1181—*referred to*.

*Maung Pyo Tha v. Ko Min Pyn*, 1 L.B.R. 150—*dissented from*.

*Sanyal* for the applicant.

*Kyaw Htoon* for the respondent.

DUNKLEY, J.—The plaintiff-applicant brought a suit against one Teradin Tewari and the defendant-respondent, Sukananan Pande, for the recovery of the balance of the purchase price of two cows. He alleged in his plaint that he had sold the cows to Teradin Tewari for a sum of Rs. 300, of which Rs. 100 was paid on the spot, and that the respondent Sukananan had become surety for the payment by Tewari of the balance of the price. He therefore sued them both for the recovery of the sum of Rs. 200. Several attempts were made to serve the defendant Tewari with summons, but as

\* Civil Revision No. 415 of 1935 from the judgment of the Assistant District Court of Hanthawaddy in Civil Appeal No. 27 of 1935.

he could not be served the applicant waived his claim against him and decided to proceed against the respondent only. Therefore the learned Township Judge, relying on the ruling of the Chief Court of Lower Burma in the case of *Maung Pyo Tha v. Ko Min Pyu and another* (1), held that the applicant had, by his act in waiving his claim in the suit against Tewari, discharged the principal debtor, and therefore the surety, *i.e.*, the respondent, was discharged by reason of the provisions of section 134 of the Indian Contract Act. This decision has been upheld on appeal to the Assistant District Court of Hanthawaddy.

With all due respect, the case of *Maung Pyo Tha v. Ko Min Pyu and another* (1) was, in my opinion, wrongly decided. The effect of the creditor waiving his claim against the principal debtor in a suit brought against the principal debtor and the surety is the barring of the remedy by suit against the debtor, and is not the extinction of the debt. The principal debtor is not thereby discharged. The remedy of the surety under section 145 of the Contract Act, to recover from the principal debtor any sum which he is compelled to pay, or which he rightfully pays, under his guarantee, remains open and unimpaired to the surety. Where, as in this case, there is an express intention of the creditor to reserve his rights against the surety, the surety is not discharged, because the principal debtor is not in actual fact released as he will be liable to indemnify the surety in respect of payments made by him to the creditor. [*Webb v. Hewitt* (2); *Close v. Close* (3).] The true rule was laid down by Kelly C.B. in the case of *Cragoe v. Jones* (4) that "if the

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(1) 1 L.B.R. 150.

(2) 69 E.R. 1181.

(3) 43 E.R. 474.

(4) (1872) L.R. 8 Ex. 81.

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creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers on the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged." Where the creditor merely waives his right of action against the principal debtor, the debt is not destroyed and the remedy of the surety against the principal debtor is not thereby impaired; therefore the surety is not discharged. [*Shaik Ali v. Mahomed and another* (1); *Nathabhai Tricumlal v. Ranchhodlal Ramji* (2); *Murugappa Mudaliar v. Munuswami Mudali* (3).] Even if by agreement there is an explicit release of the principal debtor by his creditor, when that is combined with a reservation of the creditor's right to proceed against the surety, the agreement does not discharge the surety. [*Annadana Jadaya Goundar v. Konammal and another* (4).]

Consequently I hold that the respondent, as surety, was not discharged by reason of the applicant, as creditor, waiving his claim in the suit against the principal debtor, Tewari, as the applicant expressly reserved his right to proceed against the respondent. The judgments and decrees of the Assistant District Court of Hanthawaddy and the Township Court of Syriam are therefore set aside, and the suit is reopened and remanded to the Township Court for decision on the merits. The costs of this application in revision and of the appeal to the Assistant District Court of Hanthawaddy shall be costs in the suit, advocate's fee in this Court two gold mohurs.

(1) (1889) I.L.R. 14 Bom. 267.

(3) 38 Mad. L.J. 131.

(2) (1914) I.L.R. 39 Bom. 52.

(4) (1932) I.L.R. 56 Mad. 625.