CIVIL REVISION.

Before Mr. Justice Dunkley.

MUTUSWAMY *v.* KONAR.*

1936

Feb. 20.

Surety's cause of action against debtor—No payment by surety to creditor—Execution of bond for payment at future date by surety—Right of action by surety against debtor—Contract Act (IX of 1872), s. 145—Averment of payment by surety in plaint—Evidence of payment to be made in future on a bond—Illegal exercise of jurisdiction—Revision.

A person stood surety to the landlord for the payment of rent by the tenant of a piece of paddy land. The landlord demanded payment of the balance rent due by the tenant from the surety who thereupon executed a bond in favour of the landlord for payment at a future date. Without any payment to the creditor the surety sued the tenant for the sum due under the bond.

Held, that the suit was premature and the surety had no right of action against the tenant unless he had actually made payment of money or money's worth to the landlord.

Maxwell v. *Jameson*, 2 B. & Ald. 51 ; *P. N. Ayyar* v. *M. Pillai*, I.L.R. 26 Mad. 322 ; *Taylor* v. *Higgins*, 3 East 169—*referred to.*

Sripatrao v. *Shankarrao*, 32 Bom. L.R. 207—*dissented from.*

In accepting a case by a surety against the debtor on an allegation made in evidence that payment was to be made under a bond at some future time but had not yet been made, when the plaint averred that payment had already been made by the surety to the creditor, and in thus decreeing the suit on a case not to be found in the pleadings, a Court acts illegally in the exercise of its jurisdiction and revision under such circumstances lies to the High Court.

P. K. Basu for the applicant.

K. C. Sanyal for the respondent.

DUNKLEY, J.—The defendant-applicant was the tenant of one Ma Than Yin of an area of paddy land for a rental of 1,150 baskets of paddy. The plaintiff-respondent was his surety for the due payment of this rent. As the applicant failed to pay the whole of the rent, the landlord demanded the balance from the plaintiff-respondent and also certain expenses due

* Civil Revision No. 439 of 1935 from the judgment of the Assistant District Court of Hanthwaddy in Civil Appeal No. 35 of 1935.

1936

MUTUSWAMY v. KONAR.

DUNKLEY, J.

under the lease in connection with the delivery of the rental paddy. In satisfaction of this demand, the respondent paid a sum of Rs. 22 in cash to the landlord and also executed in her favour a bond for payment at some future time of 125 baskets of paddy. Thereupon the respondent brought a suit against the principal debtor (the applicant) for the recovery of a sum of Rs. 147, being the value of the 125 baskets of paddy *plus* the cash payment of Rs. 22. The respondent obtained a decree in the Township Court and this decree has been confirmed on appeal to the Assistant District Court of Hanthawaddy.

It has been urged as a preliminary objection to this application in revision that the application does not lie, the argument being that the learned Assistant District Judge has at most committed an error of law, and that he has applied his mind to the law applicable to the case and, consequently, it cannot be said that he has acted either in the exercise of a jurisdiction not vested in him or illegally or with material irregularity in the exercise of his jurisdiction. But it appears that the case which was set up by the plaintiff-respondent in his plaint was to the effect that he had actually paid 125 baskets of paddy and Rs. 22 in cash. The third paragraph of his plaint is as follows :

> "That as the landlord's agent Ma Sein Kyaw told the plaintiff that if the remaining 150 baskets of paddy and the sampan hire were not given a suit would be filed, the plaintiff had to give 125 baskets of paddy as 25 baskets of paddy were waived and also pay Rs. 22 being the sampan hire * * *."

This is a definite allegation that the amount of paddy and cash had actually been paid to the landlord, but in his evidence it transpired that the cash payment had been made, but that no paddy had

been delivered and only a bond for its future payment had been executed.

Now, the determination in a cause must be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. In a suit brought by a surety against the principal debtor there is an essential difference between a plea of payment of the debt by the surety and a plea that a bond has been executed by the surety in favour of the creditor for payment of the principal debtor's debt at some future time. Consequently, in accepting a case founded on an allegation made in evidence that payment was to be made under a bond at some future time but had not yet been made, when the plaint averred that payment had already been made, the learned Judges of the lower Courts decreed the suit on a case which was not to be found in the pleadings and was inconsistent therewith. It must, therefore, be held that in the exercise of their jurisdiction they acted illegally and with material irregularity, and, consequently, this application in revision lies.

The sole point which has been urged before me in support of this application is the same point as was urged before the learned Assistant District Judge on first appeal, namely, that as the plaintiff-respondent in his capacity of surety has not yet paid the amount due by the defendant-applicant as principal debtor, the respondent's suit for the recovery of the amount due by the principal debtor to his creditor is premature in view of the provisions of sections 140 and 145 of the Indian Contract Act. The learned Assistant District Judge held that a surety can bring a suit against his principal debtor before he has actually paid the amount due to the creditor and as authority for this proposition he cited three

1936

MUTUSWAMY v. KONAR.

DUNKLEY, J.

cases, namely, *Barclay and Proctor against Gooch* (1), *S. K. Mohideen Batcha Sahib* v. *K. A. Sheik Dawood Sahib and others* (2) and *Sripatrao Sadashiv Upre* v. *Shankarrao Sarnaik* (3).

The correctness of the decision in the first case has been doubted in subsequent decisions of the English Courts. I would refer to the cases of *Taylor against Higgins* (4) and *Maxwell against Jameson* (5). In these later cases it was held that the decision in *Barclay against Gooch* (1) must be restricted to cases where the surety gives to the creditor something which can be considered to be the equivalent of a cash payment, *e.g.* a negotiable instrument, and in no case could the execution of a bond by the surety be held to give the surety a right of action against the principal debtor. The case of *Sripatrao Sadashiv Upre* v. *Shankarrao Sarnaik* (3) purports to follow the case of *Chiranji Lal* v. *Naraini and others* (6), but, with all due respect to the learned Judge who decided the former case, it seems to me that the Allahabad decision was not properly understood as it proceeded upon the basis that a decree had already been obtained against the surety and that therefore the surety would be compelled to satisfy this decree by action of the Court. It is not an authority for the wider proposition laid down in the Bombay case that a surety is entitled to make a claim against the principal debtor in cases where he has not made the payment under the guarantee but has become liable only *in praesenti* to do so. With all due respect, in my opinion the proposition in the Bombay case is too broadly stated. The case of *Mohideen Batcha* v. *Sheik Dawood* (2) certainly does not support such a broad proposition.

(1) 2 Espin. 571.
(2) 51 Mad. L.J. 203.
(3) 32 Bom. L.R. 267.
(4) 3 East. 169.
(5) 2 B. & Ald. 51.
(6) (1919) I.L.R. 41 All. 395.

In the case of *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai* (1), where one of two joint debtors had actually given a promissory note to the creditor and then brought a suit against his joint debtor, it was held that as the promissory note had not been paid at the date of suit no cause of action had yet arisen and the suit was premature.

The plain terms of section 145 of the Contract Act show that the payment which gives the surety a right of action against the principal debtor must be a payment of money or money's worth. It follows, therefore, that the suit brought by the plaintiff-respondent against the defendant-applicant was premature in respect of the 125 baskets of paddy, and that he has no cause of action against the applicant on this account until he has paid to the landlord the amount of paddy which is due under the bond executed by him.

This application in revision is therefore allowed, the judgments and decrees of the Assistant District Court of Hanthawaddy and the Township Court of Thôngwa are set aside, and instead thereof the plaintiff-respondent will be granted a decree for the amount which he has paid in cash, namely Rs. 22. The defendant-applicant is entitled to his costs on the sum of Rs. 125 in all Courts, advocate's fee in this Court two gold mohurs.

(1) (1902) I.L.R. 26 Mad. 322.