APPELLATE CIVIL.

Before Mr. Justice Mosely.

AH YAN AND ANOTHER

v.

THE PRESIDENT, WAKEMA MUNICIPAL COMMITTEE. *

1937

Apl. 7.

Surety's liability—Tax-collector of municipality—Passive neglect of municipality to observe bye-laws and regulations—Neglect to supervise and check tax-collector—No provision in bond to supervise—Defalcations by tax-collector—Laches and passive acquiescence of obligee—No discharge of surety—Positive acts of obligee—Connivance and fraud—Contract Act, s. 139.

A passive neglect on the part of a municipality from observing the bye-laws made and resolutions passed for its own protection as regards the supervision and the checking of its tax-collector, and forming no part of the conditions of the bond entered into by the surety of the tax-collector, does not discharge the surety from his obligation to make good the defalcations of the tax-collector. Mere laches of the obligee, or mere passive acquiescence by the obligee in acts which are contrary to the conditions of the bond, is not sufficient of itself to relieve the surety. To have that effect, there must be some positive act done by the obligee to the prejudice of the surety, or such degree of negligence, as to imply connivance and amount to fraud.

The Mayor, Aldermen and Citizens of Durham v. *Fowler*, 22 Q.B.D. 394, followed.

Maclaggart v. *Watson*, 3 Cl. & Fin. 525; *Samuell* v. *Howarth*, 3 Mer. 272; *Trent Navigation Co.* v. *Harley*, 10 East 34, referred to.

Rauf for the appellants.

Wellington for the respondent.

MOSELY, J.—This second appeal is against a decree by which the appellants, who were sureties for one Maung Ba U, a Tax Collector for the Wakema Municipality, were ordered to pay Rs. 2,378-6-6,—the amount of the Tax Collector's defalcations,—to the said Municipality.

The only ground now argued is that the Municipality omitted to do certain acts which their duty to the

* Civil Second Appeal No. 327 of 1936 from the judgment of the District Court of Myaungmya in Civil Appeal No. 18 of 1936.

1937

AH YAN v. THE PRESIDENT, WAKEMA MUNICIPAL COMMITTEE.

MOSELY, J.

sureties required them to do, and thereby impaired the remedy of the sureties against the principal debtor, thereby discharging the sureties, (section 139 of the Contract Act).

It appears that the Municipal bye-laws require the Secretary to see that the Tax Collector did not keep more than Rs. 300 in his possession, (Rule 21). Some of the tax receipts in question had been entrusted to the Tax Collector on the 1st of April, 1933, others in July, and others in October. The defalcation was apparent on the 27th of November, 1933, when the Tax Collector made a false report of burglary. Some of the tax tickets were perhaps an unduly long time in his hands.

The Municipality had passed a resolution as long ago as November, 1923, deciding that all Tax Collectors should send in a return of the taxes collected once a week. This resolution appears to have been a dead letter until August, 1933, when efforts were made to enforce it, but the Tax Collector in question failed to send in any statements, and from then on, it would appear from the Auditor's report, which has been put in in evidence, (exhibit 1), that, after the last credit of taxes by the Collector on 20th of September, 1933, the Secretary failed to check the assessment rolls and verify the outstandings with the tax tickets, (*vide* rule 17, see page 4 of exhibit 1). It would appear, too, from the evidence of the then President, Maung Than Kywe, (page 34 of the record), that the Commissioner was warning the Municipality about the outstandings.

It is argued for the appellants that these failures on the part of the Municipality to check the tax collections and to see that the receipts were promptly credited were responsible for the defalcation.

There was nothing, of course, in the bond which bound the Municipality to supervise the work of the Tax Collector in this way or in any other way.

As was said in the leading case of *John Mactaggart* v. *William Watson* (1) by Lord Brougham :

" Now the main reliance of the respondent, and in which view the Court below fully shared, is upon the supposed fact of the commissioners having been careless in calling on Jeffrey to render accounts, and in other respects to perform his duty under the statute. They say that it was the office of the commissioners to see that he did properly discharge his duty ; that the cautioner relied on their performing that office, and that their non-performance creates a case which he never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe that the performance of the statutory duties by Jeffery was one of the very things for which the obligation bound his surety ? Assuredly it is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings. The statute and the bond have the very same object of giving the creditors a double security against malversation of the trustee,—the superintendence of the commissioners and the obligation of the surety. The argument of the respondent here, and by which he swayed the Court below, at once cuts off one of these securities, and leaves the creditors only protected by the other. The duty incumbent on the commissioners, as a pledge to them, continues ; but that security they had without the bond, and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails."

It is clear that mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. See on this : *The Mayor, Aldermen and Citizens of Durham* v. *Fowler and another* (2) ; *Mactaggart* v. *Watson* (1) cited above ; *Trent Navigation Co.* v. *Harley* (3) ; and *Samuell* v. *Howarth* (4).

(1) 3 Cl. & Fin. 525, 539, 540.
(2) (1889) 22 Q.B.D. 394, 417.
(3) 10 East 34.
(4) 3 Mer. 272.

1937

AH YAN v. THE PRESIDENT, WAKEMA MUNICIPAL COMMITTEE.

MOSELY, J.

It is necessary to show, as was said in *Mactaggart*'s case (1), that the Municipality so conducted themselves as

"either by their conduct they prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened."

Denman J. said in *The Mayor, Aldermen and Citizens of Durham* v. *Fowler and another* (2):

"Lord Kingsdown's judgment in *Black* v. *Ottoman Bank*, (6 L.T.—N.S.—763), puts the matter thus, after referring to several other cases: 'From these cases it is clear that upon the point now in dispute the rule at law and in equity is the same; that the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the security; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence, as, in the language of Wood, V.C., in *Dawson* v. *Lawes*—Kay, 280—to imply connivance and amount to fraud.' Here, again, the language must be understood to mean at least connivance in acts *contemplating* the probability of a defalcation, and so being guilty of a fraud upon the sureties, in the sense of assisting an act which *must* be detrimental to *them*."

I do not think it is necessary to go into the further point raised in *The Mayor, Aldermen and Citizens of Durham* v. *Fowler and another* (2), where it was said:

"Still we think that where the parties taking the bond are mere trustees for ratepayers, as the corporation here were, and the collector also a person who owed a duty to the ratepayers, the sureties who had guaranteed the proper discharge of his duties have no right to shelter themselves under the neglect of its duty by the corporation in not insisting on the fulfilment of the very

(1) 3 Cl. & Fin. 525, 539, 540. (2) 22 Q.B.D. 394, 424.

conditions of the bond to which they are parties. The corporation may themselves be looked upon 'as public officers' as much as was the treasurer in *Lawder* v. *Lawder and others*—Ir. R. 7 C.L. 57—."

It appears to me in the present case that it has not been shown that the Municipality were guilty of affirmative but merely of negative misconduct. The case is very similar to *The Mayor, Aldermen and Citizens of Durham* v. *Fowler and another* (1), where, as was remarked :

"If the corporation had insisted on the regular weekly payments, as stipulated for, the Tax Collector could never have kept in his hands the sums which were found to have been received and not paid over by him, and which were sought to be recovered by the plaintiffs against the sureties in this action."

It was held there that the plaintiffs could not be held to have connived at the departure from the conditions of the bond in a sense amounting to more than mere passive inactivity.

In the present case, as has been said, it was not part of the conditions of the bond that the Municipality should supervise the Tax Collector and, of course, it was only for its own protection that bye-laws were passed prescribing the methods of doing so.

This appeal accordingly fails and is dismissed with costs.

(1) 27 Q.B.D. 394, 418.