PRIVY COUNCIL.

* J.C. 1939

Mar. 3.

MAHANTH SINGH *v.* U BA YI.

[On Appeal from the High Court at Rangoon.]

Contract—Guarantee—Suit against principal debtor and guarantor—Suit against principal debtor withdrawn—Liability of guarantor—Code of Civil Procedure, O. XXIII r. 1—Contract Act, ss. 2 (g) *and* (j) *and 134 and 139.*

Where, in a suit against a principal debtor and his surety, the plaintiff withdraws his suit against the principal debtor under Order XXIII rule 1 of the Code of Civil Procedure without obtaining leave to institute a fresh suit in respect of the same cause of action against the principal debtor, the plaintiff is precluded from bringing a fresh suit on the debt against the principal debtor, but the principal debt is not released or discharged. The remedy of the surety against the principal debtor is not impaired and his liability is, therefore, not discharged.

By s. 2 (*j*) of the Contract Act not every unenforceable contract is declared void, but only those unenforceable *by law*, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void.

Ss. 134 and 139 of the Contract Act are merely declaratory, of what the law of England was and is. S. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired. Under s. 134 of the Contract Act the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor.

Webb v. *Hewitt* (1857) 3 K. & J. 438 ; *Commercial Bank of Tasmania* v. *Jones* (1893) A.C. 313 ; *Bateson* v. *Gosling* (1871) L.R. 7 C.P. 9 ; *Oriental Financial Corp.* v. *Overend Guerney* (1871) L.R. 7 Ch. 142, 153 ; *Carter* v. *White* (1881) 25 Ch.D. 666 ; *Sankana Kalana* v. *Virupakshapa Ganeshapa* (1883) I.L.R. 7 Bom. 146 ; *Krishto Kishori Chowdrain* v. *Radha Romun Munshi* (1885) I.L.R. 12 Cal. 330 ; *Subramania Aiyar* v. *Gopala Aiyer* (1910) I.L.R. 33 Mad. 308 ; *Dal Muhammad* v. *Sain Das*, A.I.R. (1927) Lah. 396 ; *Murugappa* v. *Munusami* (1920) 38 M.L.J. 131 ; *Nur Din* v. *Allah Ditta* (1932) I.L.R. 13 Lah. 817 ; *Hajarimal* v. *Krishnarav* (1881) I.L.R. 5 Bom. 647, referred to.

Ranjit Singh v. *Nanbat* (1902) I.L.R. 24 All. 504, disapproved.

Decree of the High Court reversed.

Appeal (No. 30 of 1938) from a judgment of the High Court in its Appellate Jurisdiction (January 27,

* *Present :* LORD ROMER, LORD PORTER and SIR GEORGE RANKIN.

1937) which reversed a decree of the same Court in its Original Jurisdiction (April 9, 1936).

The suit was instituted in the High Court by the appellant, Mahanth Singh, against the four trustees of a Pagoda and the respondent, U Ba Yi, for moneys due for work done in connection with the Pagoda. The works were executed under a contract in writing entered into between Mahanth Singh and the four trustees. The four trustees signed the contract and U Ba Yi orally guaranteed the performance of it by them.

In the plaint each of the trustees was named as a defendant and after their names were added the words "All the above four are trustees of the Kyaikasan Pagoda, Thingangyun, and are sued in that capacity." By his prayer the plaintiff asked for relief against each of the defendants individually.

After the institution of the suit and before it was heard, the four trustees were removed from office and eight new trustees were appointed in their place.

Mahanth Singh then applied for and obtained leave to amend his plaint by substituting the eight new trustees for the original four trustees.

At the hearing, before the merits of the case were entered upon, the trial Judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees.

Mahanth Singh thereupon applied for the replacement of three of the original trustees (the fourth having died). This application was refused and the trial proceeded.

The trial Judge (Braund J.) held that, if a man contracted with a trustee, he contracted with him as an individual and that the case against the new trustees was misconceived as they were not parties to the contract and dismissed the suit as against them, but granted a decree against U Ba Yi for the sum claimed less a small

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amount not covered by his guarantee [Reported at (1936) I.L.R. 14 Ran. 336].

U Ba Yi appealed and Mahanth Singh filed cross-objections.

The Appellate Bench agreed with the trial Judge in dismissing the suit as against the new trustees, but held that, in withdrawing the suit against the original trustees, Mahanth Singh had discharged the principal debtor in such a way as to render the contract unenforceable and void and that the liability of the surety was in consequence discharged and dismissed the suit as against U Ba Yi also.

Feb. 3, 6. Pritt K.C. and *De Silva K.C.* for the appellant : The plaintiff did not release the principal debtor; if he did, he did it in such a way that he reserved his rights against the surety. The application to amend the plaint was not an application under O. XXIII r. 1 of the Code of Civil Procedure. There is nothing in that Order which deals with a case such as this. That shows the application to amend and the amendment were not made under that Order. The plaintiff did not abandon a part of his claim. It is difficult to say he withdrew the suit as against the four trustee-defendants. He had a claim against the trustees of the Pagoda. He was trying to get money out of the trust fund. If the trustees had to be changed, the names of the defendants had to be changed. Order VI r. 17 might also apply. [Section 12 of the Code was referred to.] So long as there is any life in a contract, it does not fall under s. 2 (*j*) of the Contract Act. The contract did not become void by reason of the amendment of the plaint. It was still enforceable. There is nothing in s. 134 of the Contract Act to say you cannot, when releasing the principal debtor, preserve your right against the surety.

Reference was made to ss. 56 and 65 of the Contract Act and to *Murugappa Mudaliar* v. *Minor Munusami Mudali* (1) and *Nur Din* v. *Allah Ditta* (2).

If the conclusion is arrived at that what the plaintiff did affected an alteration of his rights by procedural law, then the question would arise as to whether the plaintiff's error could be cured under s. 151 of the Code : *Sadashio Rao* v. *Umaji* (3). The case might be remitted with a direction that the original trustee defendants should be again brought on the record.

Dunne K.C. and *Leach* for the respondent : It is clear that what was asked for in the suit was a personal decree against the trustees. By the amendment of the plaint, the new trustees were substituted for the old and a decree was asked for against them. The plaintiff seems to have been in some confusion as to his rights, but he did not ask for a decree against the trust. Under O. II r. 2 he was bound to sue for all his remedies in one suit. The suit was withdrawn as against the original trustee defendants. O. XXIII provides for withdrawal or abandonment and reservation of rights and is applicable. The legal effect of the withdrawal of the suit as against the original trustees was to discharge them. In the absence of reservation of rights under O. XXIII r. 1 there is a complete discharge or release of the debtor.

The rights against the debtor are gone. The debt is released. When the debt is released, the surety is released.

O. I r. 10 and O. VI r. 17 are not applicable here. When there is a special rule dealing with withdrawal and abandonment, it ought to be applied.

It is said that the plaintiff by not proceeding against the original trustees was merely forbearing to sue and the case was within s. 137 of the Contract Act.

(1) (1920) 38 M.L.J. 131. (2) (1932) I.L.R. 13 Lah. 817.
(3) (1925) Nag. 79.

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The case here is different. Here, by the withdrawal, the contract became unenforceable and void. A contract originally good may become void, for example, a contract on which the right to sue becomes barred by limitation. Section 2 (*g*) of the Contract Act covers unlawful contracts and contracts originally void. It does not deal with contracts originally good. When a contract becomes unenforceable and void, the surety will be barred from enforcing his rights. *Murugappa Mudaliar* v. *Minor Munusami Mudali* (1) was referred to.

There can be no question of rights being preserved or reserved where a suit is withdrawn without leave to bring a fresh suit under O. XXIII. Sections 2 (*j*) and 65 of the Contract Act were referred to.

Pritt K.C. replied : As regards O. II the suit was for the whole claim. It cannot be disputed that there was a claim against the trustees. The plaintiff tried to group them. The real error in the Court below is that it has mixed up avoidance of an executory contract with a supervening bar. Section 2 (*j*) and (*g*) have no application to contracts in which the cause of action has been discharged by agreement or satisfaction in some other way.

The judgment of the Judicial Committee was delivered by

Mar. 3. LORD PORTER : The facts in this case can be shortly stated. The plaintiff who is a building contractor was employed by the four trustees of a pagoda known as the Kyaikasan Pagoda.

The terms of the employment are set out in a written agreement dated the 1st January, 1933, and expressed to be made between the Board of the

(1) (1920) 38 M.L.J. 131.

Kyaikasan Pagoda Trustees and the appellant. It is signed by the appellant and each of the trustees.

The respondent was trustee of the estate of a lady called Daw Dwe who had left certain property for charitable purposes. He was not a party to the contract but had orally guaranteed its due performance by the trustees, and in Burma such a guarantee is binding though it is not in writing.

The appellant fulfilled his contract and there was due to him a sum of Rs. 26,082-8-6, less, as the learned trial Judge found, a sum of Rs. 158, which had not been paid. The appellant thereupon instituted the present action on the 21st May, 1934, in the High Court in its original jurisdiction, claiming the former sum against the four trustees and the respondent.

In the plaint each of the trustees was named as a defendant and after their names were added the words "All the above four are trustees of the Kyaikasan Pagoda, Thingangyun and are sued in that capacity." By his prayer the plaintiff asked for relief against each of the defendants personally and against the respondent in particular as the trustee of Daw Dwe's trust.

The sum awarded by the learned trial Judge was obviously due from the respondent and from the trustees personally, but the appellant seems to have thought that his remedy was not against the named trustees but against any one who might from time to time be trustee of the pagoda.

Shortly after the suit had been begun the four trustees were removed from their position as trustees of the pagoda, and eight others were appointed in their place. The appellant thereupon made an interlocutory application asking originally to add the eight new trustees as defendants and ultimately to substitute the new trustees in place of the old. The application was granted on the 20th June, 1935, and thereupon

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the names of the four original trustees were struck out and those of the new trustees inserted in their place.

When, however, the case came on for trial and before the hearing on the merits, the learned trial Judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees. Thereupon the appellant on the 24th March, 1936, applied to replace the names of three out of the four original trustees (the other having died) as defendants. To this application the trial Judge refused to accede. He held that he had jurisdiction to grant it under Order I, Rule 10, and Order VI, Rule 16 (? Rule 17) of the Code of Civil Procedure, but he did not think that the appellant should be allowed to change his mind again in the course of the proceedings. The eight trustee defendants were, he thought, entitled to have their case disposed of, more particularly as in his view the appellant would probably be able to pursue his remedies against the original trustees in another suit though to do so might expose him to a liability for some extra costs.

The suit then proceeded to trial, the claim against the new trustees was dismissed and the respondent found liable as guarantor.

From this decision the respondent appealed to an Appellate Bench and in that appeal for the first time put forward the contention that the learned Judge erred in law in holding him liable. His liability it was suggested, should have been held to be discharged by the act of the present appellant in foregoing his claim against the original trustees.

The learned Judges of the Appellate Bench whilst rejecting all the other grounds of appeal held that this contention was well founded, allowed the appeal and condemned the appellant in costs.

The question argued before their Lordships was whether they were right in so doing.

The grounds upon which in circumstances material to the present case a guarantor may be discharged from his liabilities are well established and indeed were not in issue. A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it, to sue the principal in the name of the creditor is interfered with.

To hold that in such cases the creditor still retained his right against the surety, and that the surety on his part could still sue the principal debtor, would mean that the release or grant of time was of no effect inasmuch as the debtor would still be liable at any moment to an action at the suit of the surety.

Where an absolute release is given there is no room for any reservation of remedies against the surety. See *Webb* v. *Hewitt* (1) and *Commercial Bank of Tasmania* v. *Jones* (2).

Where, however, the debt has not been actually released the creditor may reserve his rights by notifying the debtor that he does so, and this reservation is effective not only where the time of payment is postponed but even where the creditor has entered into an agreement not to sue the debtor. In neither case is there any deception of the debtor since he knows that he is still exposed to a suit at the will of the surety.

In England the striking out of the names of the four original trustees would not have affected the respondent's liability. A fresh action could have been brought against them at any time.

(1) (1857) 3 K. & J. 438. (2) [1893] A.C. 313.

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But it is said that the law of Burma differs from the law of England in this respect and reliance is placed upon the terms of Order 23, Rule 1, of the Code of Civil Procedure, and upon section 2 (*g*) and (*j*) and sections 134 and 139 of the Indian Contract Act. Order 23, Rule 1 is as follows :

"(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

(*a*) that a suit must fail by reason of some formal defect ; or

(*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit or abandons part of a claim without the permission referred to in sub-rule (2) he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

The sections of the Indian Contract Act are as follows :

"2.—(*g*) An agreement not enforceable by law is said to be void.

2.—(*j*) A contract which ceases to be enforceable by law becomes void when it ceases to be unenforceable.

134.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

139.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

By reason of these provisions the debtor, as the respondent contended, was absolutely released. The

appellant indeed contended that he had not proceeded under Order 23, Rule 1, in applying to substitute the new trustees for the old, but that his application was made under Order 1, Rule 10 alone. Their Lordships cannot accept this view. The last named rule no doubt authorizes the Court to order the name of a party improperly joined to be struck out and that the names of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just.

If no terms are inserted in the order then, in their Lordships' view, the effect of withdrawing the suit against some of the defendants is to be ascertained from Order 23, Rule 1. That order is not very happily worded, but its meaning is reasonably clear. Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal, but if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject matter.

The result, however, is not to release or discharge the debt, but merely to prevent the creditor from suing the principal debtor.

In England an undertaking by the creditor not to sue the principal debtor or a binding agreement to give him time does not operate as a discharge of the surety providing it is a condition of the undertaking or agreement that the rights of the creditor to sue or receive the money from the surety are reserved. See *Bateson* v. *Gosling* (1) and *Oriental Financial Corp.* v. *Overend Guerney* (2).

Similarly, a failure to sue the principal debtor until recovery is barred by the statutes of limitation does not operate as a discharge of the surety in England. See *Carter* v. *White* (3).

(1) (1871) L.R. 7 C.P. 9. (2) (1871) L.R. 7 Ch. 142, 153.
(3) (1881) 25 Ch.D. 666.

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The same view prevails in most of the High Courts in India. See *Sankana Kalana* v. *Virupakshapa Ganeshapa* (1); *Krishto Kishori Chowdrain* v. *Radha Romun Munshi* (2); *Subramania Aiyar* v. *Gopala Aiyer* (3); and also *Dal Muhammad* v. *Sain Das* (4).

It is true that the first two cases were decided in reliance upon the provisions of section 137 of the Indian Contract Act which enacts that:

"Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not in the absence of any provision in the guarantee to the contrary discharge the surety."

But the two later cases base their reasoning also on the broader ground adopted by English law, and hold section 137 to be merely declaratory of the law and to be enacted only to allay any doubts as to whether the same principles were applicable in India. With these decisions of the other High Courts in India may be contrasted the case of *Ranjit Singh* v. *Nanbat* (5); which decides that in spite of the provisions of section 137, the creditor's right against the surety is not preserved unless he sues the principal debtor within the period of limitation. Such a decision is inconsistent with the views held by the Courts in England and the majority of the Courts in India. In this conflict, their Lordships prefer the reasoning of the majority.

In any case those decisions deal rather with the question whether the debt was absolutely released, than with the question whether an agreement not to sue or to give time with a reservation of right against the surety, operated as a discharge to him.

The present case is in their Lordships' opinion an example of the latter type, and they entertain no

(1) (1883) I.L.R. 7 Bom. 146.
(2) (1885) I.L.R. 12 Cal. 330.
(3) (1910) I.L.R. 33 Mad. 308.
(4) A.I.R. (1927) Lah. 396.
(5) (1902) I.L.R. 24 All. 504.

doubt that the creditor's rights against the surety were preserved. The appellant's act in continuing to sue the surety though he withdrew his action against the principal debtors was in their view a clear reservation of his rights. Indian authority illustrating this proposition is to be found in *Murugappa* v. *Mumusami* (1) and in *Nur Din* v. *Allah Ditta* (2).

But the respondent argues that even if those cases are applicable in their own circumstances, or binding in England, they are not applicable in Burma to the present case, because, as he maintains, section 2 (*j*) of the Indian Contract Act alters the position. In his contention that section must be read in its widest sense with the result that in India and Burma any contract in respect of which an action cannot be brought is void, and therefore plaintiff's right to recover the debt from the original trustees being unenforceable, is void. It follows, he argues, that the principal debtors having been absolutely released the surety is discharged.

If the premises were accurate the conclusion might follow, even though some of the results would be startling and unexpected. One such result would be that when the period of limitation had run out, not only would the remedy be barred, but the debt would be gone and with it all right to retain anything given as security for the debt, and all right to set off a counter liability against it. This possibility was indeed envisaged in *Hajarimal* v. *Krishnarav* (3) but the point was left undecided. A still more startling result, however, is brought about on this construction if section 2 (*j*) is read with section 65 of the Indian Contract Act, since in such a case not only would every unenforceable contract become void but each party would be under the obligation of restoring or making

(1) (1920) 38 Mad. L.J. 131. (2) (1932) I.L.R. 13 Lah. 817.
(3) (1881) I.L.R. 5 Bom. 647.

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compensation for any benefit received, no matter how much had been done towards the performance by either party.

But it is not necessary to adopt a construction leading to such surprising results.

The solution is, in their Lordships' view, to be found in the wording of section 2 (*j*) itself. Not every unenforceable contract is declared void, but only those unenforceable *by law*, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by section 2 (*g*), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by section 2 (*j*). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void.

Finally, as their Lordships think, sections 134 and 139 are merely declaratory of what the law of England was and is.

Section 139 only applies where the eventual remedy of the surety against the principal debtor is impaired, and for the reasons they have given, their Lordships find nothing in the present case which impairs the respondent's remedy against the original trustees.

Under section 134 the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor.

If, as in the present case, the only result of striking out the original trustees from the action is to preclude

the bringing by the appellant of a fresh suit in respect of the subject matter against them, and is not to release or discharge the principal debt, then the debt remains a debt though the creditor by reason of a rule of procedure cannot himself bring an action upon it. In such circumstances there is nothing in the section to discharge the liability of the surety.

For these reasons their Lordships hold that the respondent has not been relieved of his liability under the guarantee and will humbly advise His Majesty that the appeal be allowed, the decree of the High Court on its Appellate Side set aside and the decree of the trial Judge restored.

The respondent must pay the appellant's costs of the appeal before the Appellate Court and before their Lordships' Board.

Solicitors for the appellant : *Hy. S. L. Polak & Co.*

Solicitors for the respondent : *Gard, Lyell & Co.*