1914.

TULSIDAS LALLUBHAI v. THE BHARAT KHAND COTTON MILL CO., LTD.

order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, and this, we are both very strongly of opinion, is one of the worst abuses to which the winding-up sections of our Statute law upon Companies could be perverted. We are clearly of opinion that the learned Judge below was right, and that his order ought to be confirmed and this appeal dismissed with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1914.
August 18.

NATHABHAI TRICAMLAL (ORIGINAL PLAINTIFF), APPLICANT, *v.* RANCHHODLAL RAMJI (ORIGINAL DEFENDANT No. 2), OPPONENT.*

Indian Contract Act (IX of 1872), sections 134, 137—Suit against principal and surety—Removal of principal's name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time—Civil Procedure Code (Act V of 1908), Order IX, Rule 5, Order XXIII, Rule 1.

A suit was brought in 1913 on a promissory note passed in 1912 by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1 : his name was therefore struck out and the suit proceeded against defendant No. 2 alone. The lower Court dismissed the suit on the ground that as the principal was discharged by an act of the creditor (plaintiff) in having his (defendant No. 1's) name struck out, the surety also was thereby discharged. On plaintiff's application under extraordinary jurisdiction :—

Held, reversing the decree and remanding the suit, that the mere omission of the plaintiff to pursue his suit against one of the defendants, with the result that that defendant's name was struck off and the suit dismissed against him under Order IX, Rule 5, of the Civil Procedure Code (Act V of 1908), did not discharge the surety, provided the suit was still in time against the principal.

* Civil Application No. 119 of 1914 under extraordinary jurisdiction.

1914.

NATHABHAI TRICAMLAL v. RANCHHODLAL RAMJI.

APPLICATION under civil extraordinary jurisdiction from the decision of G. V. Saraiya, Judge of the Court of Small Causes at Ahmedabad.

The plaintiff sued in 1913 on a promissory note for Rs. 250, dated the 23rd October 1912, which was signed by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1. His name was, therefore, struck out at plaintiff's instance.

The surety (defendant No. 2) thereupon applied that the suit against him be dismissed, for as the principal debtor was discharged by an act of the creditor, his (the surety's) liability had come to an end.

The learned Judge held that the surety was discharged from liability under section 134 of the Indian Contract Act owing to the act of the plaintiff which led to the discharge of the principal debtor from the suit. The suit was dismissed.

The plaintiff applied to the High Court under extraordinary jurisdiction.

T. R. Desai, for the applicant :—Summons could not be served on defendant No. 1. The plaintiff therefore took action under Order IX, Rule 5, of the Civil Procedure Code, elected to drop the name of the principal and to proceed against the surety alone. A dismissal of a suit under these circumstances does not bar a fresh suit. There is thus no discharge of the principal and section 134 of the Indian Contract Act has no application. Further section 134 should be read subject to section 137. See *Hajarimal* v. *Krishnarao*[1] and *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi*[2]. See also *Shaik Alli* v. *Mahomed*[3].

(1) (1881) 5 Bom. 647. (2) (1885) 12 Cal. 330.
(3) (1889) 14 Bom. 267.

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Ratanlal Ranchhoddas, for the opponent :—The act of the plaintiff in having the name of defendant No. 1 struck out fell under Order XXIII, Rule 1, of the Civil Procedure Code. If so, he cannot bring a fresh suit against the principal debtor. This discharge of the principal debtor involved also the discharge of the surety. Section 137 of the Indian Contract Act is an independent provision and is by no means a corrollary to section 134. We rely on *Hazari* v. *Chunni Lal*[1], *Radha* v. *Kinlock*[2] and *Ranjit Singh* v. *Naubat*[3].

BEAMAN, J. :—The plaintiff sued the two defendants on a promissory note. The second defendant pleaded that he was a surety. There was some difficulty in serving the first defendant, and we gather from the record that his name was struck out. As a year had not elapsed, presumably this was done, if not at the request, at least with the consent of the plaintiff. The defendant No. 2 then contended that as the act of the plaintiff in having the defendant No. 1's name thus struck off operated as a complete discharge of the principal debtor, he, the surety, was likewise discharged and the suit must be dismissed.

The learned Judge who tried this suit as a Small Cause Court suit was of opinion that this contention was sound and dismissed the plaintiff's suit.

We think that the striking off of the defendant No. 1's name was a procedure under Order IX, Rule 5, rather than Order XXIII, Rule 1. And all the authorities in all the Courts of India who have had this question under consideration, although they differed upon another point, are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name

(1) (1886) 8 All. 259. (2) (1889) 11 All. 310.
(3) (1902) 24 All. 504.

is struck off and the suit dismissed against him under Order IX, Rule 5, does not discharge the surety, provided the suit be still in time against the principal. That being so, and confining our decision to that ground alone, we think that the order of the learned Judge below dismissing the suit was wrong.

Even were that not so, it would still be a question whether, in view of the form of the suit, the Judge ought to have taken it for granted, as he appears to have done, that the plaintiff was suing the second defendant merely as a surety. If, in fact, he was suing him as a principal, none of these considerations upon which the dismissal of the suit has been based would apply at all.

We must, therefore, reverse the decree of the learned Judge below and remand the case to him for trial upon the merits.

Costs will be costs in the cause.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

VENKAJI NARAYAN KULKARNI AND OTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GOPAL RAMCHANDRA DESHPANDE (ORIGINAL PLAINTIFF), RESPONDENT.*

1914. *August* 19.

Mortgage—Equity of Redemption—Extinguishment—Mortgagor passing a rajinama *to mortgagee for the land—Mortgagee executing* kabulayat *to pay Government assessment.*

In 1876, the plaintiff mortgaged the land in dispute to the defendants; and in 1879 passed a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The latter at the same time gave a comple-

* Second Appeal No. 368 of 1913.