Chowdhrain v. *Radha Soonduree Dossee*,[1] *Bhurut Pandey* v. *Mussamut Munthora Kooer*,[2] and *Matungini Debi* v. *Brojeswar Banerjee*.[3]

It would, therefore, follow that the view taken by the learned District Judge is erroneous. He ought not to have dismissed the suit but ought to have passed a decree apportioning the liability of the several defendants.

It is urged on behalf of respondent No. 6 that the decree is not produced in the case and it is not shown that he is liable to contribute in respect of the payment made by the present plaintiff. Respondent No. 6 did not appear in both the Courts and this contention was not raised by him in any of the two Courts. It is too late to raise that contention as a respondent in second appeal. The case of defendant No. 6 cannot be distinguished on the judgment produced in the case from the cases of the other defendants.

I would, therefore, reverse the decree and remand the case to the lower appellate Court for passing a decree apportioning the liability of the several defendants as contributories. Costs of this appeal will be costs in the lower appellate Court.

Decree reversed and case remanded.

B. G. R.

[1] (1875) 23 W. R. 283. [2] (1875) 23 W. R. 421.
[3] (1914) 20 Cal. L. J. 205.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar and Mr. Justice Barlee.

HAJI AHMED KARIM (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* MARUTI RAMJI BHONGLE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No 1), RESPONDENTS.*

1930 *June* 27.

Civil Procedure Code (Act V of 1908), section 145—Indian Contract Act (IX of 1872), section 135—Surety for fulfilment of decree passed in suit or in appeal—Compromise of suit—Liability of surety.

Defendant No. 2 as surety for defendant No. 1 agreed to "fulfil the terms of the decree or order that may be passed in the suit by the (trial) Court or by

*Second Appeal No. 715 of 1928.

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the Appellate Court or by the High Court and binding against the said defendant." The plaintiff and defendant No. 1 compromised the suit without consulting defendant No. 2 and a decree was passed by the Court in terms of the compromise. When the plaintiff sought to recover the amount of the decree from defendant No. 2 he resisted it on the ground that as the suit was compromised without consulting him and without it being litigated to a decree he was absolved from liability under his surety-bond.

Held, (1) that whether a compromise as such was or was not excluded under the terms of the surety-bond is a question of fact in each case;

(2) that on a true construction of the terms of the surety-bond in question a compromise of the suit was not explicitly or impliedly outside the terms of the surety-bond and defendant No. 2 was liable to pay the amount claimed.

Shivapa bin Gurlingapa v. *Nagapa bin Shivapa Kudrimoti*[1] and *Appanni Nair* v. *Isack Mackadan*,[2] followed.

National Coal Co. v. *Kshitish Bose & Co.*,[3] and *Muhammad Yusaf* v. *Ram Gobinda Ojha*,[4] distinguished.

SECOND Appeal No. 715 of 1928 against the decision of Dadiba C. Mehta, District Judge of Ahmednagar, in Appeal No. 289 of 1926.

Proceedings in execution.

One Maruti Ramji filed a suit in the Court of the Second Class Subordinate Judge at Kopargaon against one Mohan Krishnaji to recover Rs. 2,644 on the strength of a simple mortgage of the defendant's sugarcane crop. Along with the plaint the plaintiff filed an application for an interim injunction which was accordingly granted. After the notice of injunction was served upon him, the defendant made an application to the Court that the injunction should be forthwith dissolved as it involved him in serious loss. The Court granted the application on the defendant furnishing security to the extent of Rs. 3,000. One Haji Ahmed Curim of Poona stood surety for the defendant and passed the surety bond to the Court under section 145 of the Code of Civil Procedure which ran as follows :—

"I, surety Ahmed Haji Curim Memon, of Poona, by his Mukhtyar, Sadashiv Malhar Tamhane of Kopargaon, District Nagar, hereby stand surety and undertake that the defendant, Mohan Krishnaji Dhole, will fulfil the terms of the

(1) (1894) P. J. 25.
(2) (1919) 43 Mad. 272.
(3) (1926) 30 C. W. N. 540.
(4) (1927) 55 Cal. 91.

decree or order that may be passed in the said suit by the Kopargaon Court or by the Appellate Court or by the High Court and binding against the said defendant. In case the defendant fails to do so, I bind myself, my heirs and the administrators under my will to pay any sum up to Rs. 3,000 according to the orders of this Court. This surety bond is given in writing on November 26, 1924."

Eventually the suit ended in a compromise decree under which the defendant was to pay Rs. 2,580 to the plaintiff by annual instalments: the decree also provided that in case the defendant failed to pay any one of the instalments the plaintiff should recover from the defendant the whole of the amount which may then be due or from the surety given by the defendant. The defendant having failed to pay the first instalment the plaintiff served the surety with a notice calling upon him to pay the decretal amount. The surety then applied to the Court for discharge of his liability under his bond on the ground that the plaintiff and the defendant had colluded and had compromised the suit in order to put him to loss. Thereupon the plaintiff filed the present Darkhast to compel the surety to pay the decretal amount. The trial Court rejected the darkhast holding that the compromise of the suit was beyond the surety's terms of agreement and the compromise was effected without the knowledge or consent of the surety. On appeal the District Judge of Ahmednagar held that the darkhast was competent against the surety as the terms of the surety bond did not exclude the compromise of the suit. It was further held that there was no evidence to support the allegation of the surety that the compromise was the result of any collusion between the debtor (defendant No. 1) and the creditor (plaintiff) having for its object the ruin of the surety.

The surety appealed to the High Court.

W. B. Pradhan, for the appellant.

G. N. Thakor, with *P. V. Kane*, for respondent No. 1.

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MADGAVKAR, J. :—The defendant No. 2 appellant became surety for defendant No. 1 judgment-debtor, to the plaintiff-respondent decree-holder. The plaintiff and defendant No. 1 compromised the suit, the decree-holder sought to enforce the decree against the surety, who resisted on the ground that the decree was not obtained after contest, and he was, therefore, released. The trial Court upheld the plea, the lower appellate Court rejected it, the surety appeals.

It is argued for the appellant that the terms of the surety-bond particularly the words that the surety " will fulfil the terms of the decree or order that may be passed in the said suit by the Kopargaon Court or by the appellate Court or by the High Court and binding against the said defendant," implicitly, if not explicitly, exclude a compromise and postulate a contest. Further, the judgment-debtor in his written statement had set up a payment of Rs. 1,400, which he did not seek to prove in the compromise. There is, therefore, a variation in the terms of the surety-bond, which, whether prejudicial or not, would entitle the surety to be discharged.

For the respondent decree-holder it is contended that the bond including these terms did not exclude a compromise. The appellant failed to go into the witness-box, or prove collusion, which he had set up, and on the contrary, according to the respondent, had taken away crops, which were the subject of an interim injunction, and the surety is not, therefore, discharged.

For the appellant reliance is placed on decisions such as *National Coal Co.* v. *Kshitish Bose & Co.*[1] and *Muhammad Yusaf* v. *Ram Gobinda Ojha.*[2] The respondents rely on decisions such as *Shivapa bin Gurlingapa* v. *Nagapa bin Shivapa Kudrimoti*[3] and *Appunni Nair* v. *Isack Mackadan.*[4]

[1] (1926) 30 C. W. N. 540.
[2] (1927) 55 Cal. 91.
[3] (1894) P. J. 25.
[4] (1919) 43 Mad. 272.

The first question in these cases, in our opinion, is whether a compromise as such is or is not excluded under the terms of the surety-bond. That must be a question of fact in each case. In the present case, we are unable to accept the argument for the appellant that the mention of the three Courts in the surety-bond necessarily implies a contest in the Courts and excludes a compromise. It would be impossible to argue, for instance, that the mention of these three Courts necessarily placed the judgment-debtor under an obligation to carry the matter right up to this Court, and to incur the costs that they involve merely by reason of such mention. The Courts are mentioned *pro majore cautela* instead of the simple phrase, "the ultimate decree of the Court." In terms, therefore, a compromise is not excluded. There is no reliable evidence on the record to show that it was implicitly excluded. There was, it is true, in the written statement the allegation of part satisfaction, but no receipt or documentary evidence was produced, accounts were gone into before the compromise and the appellant has never gone into the witness-box and stated that the judgment-debtor assured him that he would be able to substantiate such payments, or that it was in reliance upon such an assurance that he entered into such a bond.

It follows on this view that a compromise as such is not explicitly or implicitly outside the terms of the surety-bond in this case.

The collusion alleged is not supported by the evidence, the trial Court does not find it proved, the lower appellate Court found it not proved. For the purpose of this appeal, therefore, we must hold that no collusion is established.

On these facts the law is, in our opinion, clear that the surety cannot resist enforcement of the bond on

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a compromise on the face of it *bona fide*. The bond itself does not stipulate that even such a compromise should not be entered into without his knowledge and consent. We adopt the reasoning and almost the language of this Court in *Shivapa bin Gurlingapa* v. *Nagapa bin Shivapa Kudrimoti*[1] and hold that the surety is liable. The same view has been adopted by the Madras High Court in *Appunni Nair* v. *Isack Mackadan*.[2] The decision in *National Coal Co.* v. *Kshitish Bose & Co.*,[3] is the decision of a single Judge, based on the English case of *Tatum* v. *Evans*.[4] A reference to that case shows that the learned Judges expressly held that the surety had been induced to enter into the bond on an allegation that there was a very good defence to the suit and had expressly made himself liable, only for such an amount "as the Court might think fit to award." That case, therefore, is no authority for the proposition that a compromise without the knowledge and consent of the surety necessarily releases the surety of his liability. We may distinguish the case of *Muhammad Yusaf* v. *Ram Gobinda Ojha*[5] on the ground that the parties contemplated the Court as the forum to settle the amount of the liability to the defendant and the latter without the consent of the surety altered it by appealing to arbitration, thus varying the form of the bond and releasing the surety.

For these reasons we are of opinion that on the terms of the present bond and the facts of the present case the surety is liable.

The appeal fails and is dismissed with costs.

Decree confirmed.

B. G. R.

(1) (1894) P. J. 25.
(2) (1919) 43 Mad. 272 at p. 277.
(3) (1926) 30 C. W. N. 540.
(4) (1885) 54 L. T. 336.
(5) (1927) 55 Cal. 91.