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be made absolute, and we accordingly make it absolute and set aside the conviction and sentences.

CRIMINAL  
REVISION.

28 C. 594.

We are informed that the Magistrate, who tried this case, will not be in the district. The case must, therefore, go back to the District Magistrate, either to try it himself or to refer it for trial to any other Magistrate competent to try the same. The provisions of s. 350 of the Code of Criminal Procedure debar us from directing that the case should be proceeded with from the stage at which it was left on the 20th December. The trying Magistrate must proceed in accordance with that section.

*Rule made absolute.*

28 C. 597.

ORIGINAL CIVIL.

*Before Mr. Justice Harington.*

NEEL COMUL MOOKERJEE AND OTHERS *v.* BIPRO DASS  
MOOKERJEE AND ANOTHER.\* [31st May and 3rd June, 1901.]

*Contract Act (IX of 1872), s. 260—Guarantee, revocation of—Surety—Liability of surety to a firm which has undergone change in its constitution—Cause of action—Surety bond.*

The defendants *B* and *R* on December 6, 1895, executed a security bond, the condition of which was that *B* should duly and faithfully discharge his duties, while employed as cash-keeper to the firm of "N. C. Mookerjee," *R* standing as *B*'s surety to the firm. In July 1896 there being a change in the constitution of the firm, it came to be styled and designated as "N. Mookerjee and Son." Defalcations on the part of *B* were discovered between January 1897 and May 1900; *i.e.*, while *B* was in the service of "N. Mookerjee and Son," a firm, which came into existence in the year following that in which the bond was executed. The members of the present firm of "N. Mookerjee and Son" sued the defendants on the bond. An objection by way of demurrer to the plaintiffs' claim—that no cause of action was shown to exist against the defendants—having been taken.

[598] *Held*, that there being a change in the constitution of the firm before the alleged defalcations took place, the guarantee given by *R* would be taken as revoked by virtue of s. 250 of the Contract Act; and the alleged embezzlements having been committed by *B* while in the service of the new firm of "N. Mookerjee and Son," and not that of N. C. Mookerjee, there was no breach of the conditions of the bond; the objection taken by the defendants must, therefore, prevail, and the suit be dismissed.

THIS was an action brought by Neel Comul Mookerjee, Naro Nath Mookerjee, and Golab Roy Poddar, carrying on business in co-partnership as merchants and banians in the Town of Calcutta under the name, style, and firm of "N. Mookerjee and Son," for recovery of Rs. 5,000, on a bond executed by the defendants, Bipro Dass Mookerjee and Rakhal Dass Mookerjee (son and father, respectively) on December 6, 1895.

It appears from the plaint that previous to July 1895, the defendant Bipro Dass was employed by the plaintiff Neel Comul in his then firm of "Neel Comul Mookerjee," as a *sircar*; and that, in July 1895, Bipro Dass was appointed as its cash-keeper by the said firm of "Neel Comul Mookerjee;" and that some time after that Neel Comul called upon the defendant Bipro Dass to furnish security for the due and faithful discharge of his duties as cash-keeper, and to make good any loss which the said Neel Comul Mookerjee might sustain by or through the said Bipro Dass. Thereupon Bipro Dass proposed that his father Rakhal Dass Mookerjee,

\* Original Civil Suit No. 683 of 1900.

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the defendant No. 2, would be willing to stand as his surety: and Neel Comul having agreed thereto, both the present defendants, on December 6, 1895, executed a security bond for Rs. 5,000 in the following terms:—

“ Know all men by these presents that we, Bipro Dass Mookerjee, son of Rakhal Dass Mookerjee, of No. 8, Burtolla Street, in the Town of Calcutta, and Rakhal Dass Mookerjee, son of Ram Sarun Mookerjee, deceased, of the same place are held and firmly bound unto Neel Comul Mookerjee, son of Neel Madhub Mookerjee, deceased of ‘Holy House,’ being premises No. 29, Baniapukur Road in Calcutta aforesaid Banian in the sum of rupees five thousand of lawful money of British India to be paid at Calcutta to the said Neel Comul Mookerjee or to his executors, representatives, administrators or assigns, for which payment to be faithfully and truly made at Calcutta, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, representatives, executors and administrators firmly, by these presents, sealed with our respective seals at Calcutta this sixth day of December in the year of Christ one thousand eight hundred and ninety-five.

[569] “ Whereas the said Bipro Dass Mookerjee is employed by the said Neel Comul Mookerjee as a cash-keeper. And whereas the said Neel Comul Mookerjee having called upon the said Bipro Dass Mookerjee to furnish security for the due and faithful performance of his duties as such cash-keeper and to make good any loss which the said Neel Comul Mookerjee shall or may sustain by or through the means of the said Bipro Dass Mookerjee, he, the said Bipro Dass Mookerjee, has proposed the above bond on Rakhal Dass Mookerjee as his surety and he, the said Rakhal Dass Mookerjee, has agreed to enter into the above written obligation with such condition to make void the same, as is hereunder written. Now the condition of the above written bond or obligation is such that, if the said Bipro Dass Mookerjee shall and will at all times hereafter so long as he, the said Bipro Dass Mookerjee, shall continue to be employed as such cash-keeper as aforesaid by the said Neel Comul Mookerjee, well and truly and faithfully, discharge his duties of such office, and shall and will, truly and faithfully, perform all other business that he may, from time to time, be directed, enjoined or requested by the said Neel Comul Mookerjee to do and perform without refusing or neglecting to do the same and without consuming, wasting, embezzling, mispending or unlawfully making away with any of the property, monies or effects whatsoever of the said Neel Comul Mookerjee or of any person or persons whomsoever for which he the said Neel Comul Mookerjee, his heirs, executors, representatives or administrators shall or may, by law, be in anywise answerable or responsible, or which shall or may come into the hands of the said Bipro Dass Mookerjee as such cash-keeper as aforesaid, and if the said Bipro Dass Mookerjee at all times shall and will duly and regularly account for and pay, or make over to the said Neel Comul Mookerjee or such person or persons as he may in that behalf appoint all monies or other property which shall come to his hands either in the capacity of such cash-keeper as aforesaid, or by any other means on account of the said Neel Comul Mookerjee, and if the said Rakhal Dass Mookerjee shall and will, from time to time and at all times hereafter, save, defend, keep harmless and indemnified the said Neel Comul Mookerjee, his heirs, executors, representatives and administrators of from, and against all claims, demands, actions, suits, troubles, costs, charges, damages and expenses which shall or may at any time hereafter happen or he may sustain incur or be put to, for, or by reason or in consequence of any negligence, refusal of duty or of any act, permission, wilful or otherwise or omission or commission, mismanagement or otherwise howsoever of the said Bipro Dass Mookerjee in the discharge of his duties as such cash-keeper as aforesaid or if the said Bipro Dass Mookerjee and Rakhal Dass Mookerjee or either of them, their or his heirs, executors, administrators and representatives shall and will on demand pay to the said Neel Comul Mookerjee, his heirs, executors, administrators, representatives or assigns all such sum or sums of money as he or they shall or may have to pay to any person or persons by reason of such negligence, omission, default or misconduct [600] the said Bipro Dass Mookerjee as aforesaid, then the above written bond or obligation shall be void and of no effect, but otherwise the same shall be and remain in full force and virtue.”

(Sd.) BIPRO DASS MOOKERJEE (Seal)

(Sd.) ঐরাখাল দাস মথোপাধ্যায় (Seal)

THE facts alleged in the plaint were: That, in July 1896, the plaintiff Naro Nath Mookerjee became a partner in the said firm of Neel Comul Mookerjee, whereupon the said firm came to be called and designated “N. Mookerjee and Son.”

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That, previous to 1897, the plaintiff Golab Roy Poddar joined the said firm as a member, and finally ceased to be such member on November 9, 1899, but the said partnership account was not yet settled and closed.

That on or about the month of July 1900, large defalcations of the plaintiffs' money by the said Bipro Dass Mookerjee came to light, and that, on or about the 9th of July 1900 the said Bipro Dass absconded from Calcutta, and, as far as the plaintiffs could ascertain, the said defalcations, which took place between January 11, 1897 and May 7, 1900, amounted to no less than Rs. 19,000. The plaintiffs thereupon, charged the defendant Bipro Dass in the Court of the Presidency Magistrate under s. 408 of the Penal Code and a warrant was issued for the apprehension of Bipro Dass, who was still absconding.

That, upon the said defalcations being partially discovered the plaintiffs called upon the defendant Rakhhal Dass Mookerjee to make good the same and thereupon the said Rakhhal Dass, on July 14, 1900, made over to the plaintiff's former attorney, Babu Bipendro Nath Chatterjee of the firm of Messrs. Wilson, Chatterjee and Mitter, certain articles of jewellery and money as partial security for the payment and satisfaction of the monies payable by him under the terms of the aforesaid bond.

That the plaintiffs since called upon the defendant Rakhhal Dass to pay them the amount of the said bond, but he failed to do so, and alleged that the said articles of jewellery and money were made over to Babu Bipendro Nath Chatterjee aforesaid for safe custody; and that the said Rakhhal Dass since instituted a suit against the said Bipendro Nath Chatterjee for recovery of the same.

[601] That the plaintiffs' cause of action arose on July 9, 1900, the day the defendant Bipro Dass absconded from Calcutta.

And the plaintiffs prayed for, amongst other reliefs, a decree for Rs. 5,000, the amount secured by the bond, with liberty to sue the defendant Bipro Dass for balance of the sum embezzled by him; and for an injunction to restrain the defendant Rakhhal Dass from further proceeding with his suit against the said Bipendro Nath Chatterjee, and from realizing the said monies and jewellery from him, until the determination of this suit.

An injunction was thereupon issued on December 17, 1900, against the defendant Rakhhal Dass restraining him, until further orders, from further proceeding with the suit instituted by him against Bipendro Nath Chatterjee, and from taking any steps to realize the said jewellery and monies from the said Bipendro Nath Chatterjee.

The defendant Bipro Dass alleged *inter alia* that, although the name of his appointment was changed into that of a cash-keeper, he was never, in fact, in an independent charge of the cash of the firm; that the charge of defalcation against him was only a pretence set up by the plaintiffs, Neel Comul and Naro Nath, with a view to defraud the plaintiff, Golab Roy Poddar, in the partnership account, which was yet to be settled.

And the defendant Rakhhal Dass pleaded that there was no defalcation at all. He admitted the execution of the bond, but denied his liability to the present plaintiffs or to any of them.

MAY 31, JUNE 3. Mr. Mehta and Mr. Roy Chowdhury for the defendants. Our preliminary objection is that the plaint discloses no cause of action against the defendants. The plaintiffs are suing on the bond, which was given to Neel Comul Mookerjee alone, and not to the firm as formed subsequently to the execution of the bond. There is

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nothing in the bond which makes the defendants liable to the present plaintiffs. It cannot be argued that Neel Comul's partners are his representatives or assigns. The surety is not liable to the firm, the constitution of which has undergone a change after the execution of the surety-bond in favour of only one of its members. The provisions of s. 260 [602] of the Contract Act are clearly to this effect. See De Colyar's Law of Guarantees, 3rd Edition, pp. 287, 288; *Barker v. Parker* (1), *Bellairs v. Ebsworth* (2), *Montefiore v. Llyod* (3), *Weston v. Barton* (4), *Chapman v. Beckinton* (5), *University of Cambridge v. Baldwin* (6).

Mr. Sinha, Mr. Zorab and Mr. A. C. Banerjee, for the plaintiffs.—It is not open to the defendants to take that objection now; if other persons have been joined as plaintiffs, it is only a misjoinder of parties. Taking Mr. Mehta's argument at its most, it affects only the surety and cannot take away the son's liability, as the surety-bond makes the son as well as the father liable; and the son cannot take advantage of his own fraud. It has been argued on the other side that, inasmuch as we have stated in our plaint that Naro Nath Mookerjee became a partner in July 1896 and Golab Roy ceased to be a partner in 1899, the defendants' obligation came to an end: that does not get rid of the suit, which is good against the son; see Contract Act, ss. 44 and 138.

Neel Comul could alone sue. The bond is given to Neel Comul in his own personal and individual capacity and not to a firm; and Neel Comul is entitled to maintain the suit on the bond (apart from the cause of action on the embezzlement) whether there was a change in the constitution of the firm or not. S. 260 of the Contract Act relates to a guarantee given to a firm and not to an individual, and therefore its provisions do not apply to this case, where the guarantee is given to Neel Comul Mookerjee by the defendants. Supposing monies came into Bipro Dass's hands otherwise than as cash-keeper, still he would be liable, as the bond provides for both classes of monies. I rely on that provision of the bond for the purpose of saying that it is not a guarantee to the firm, because the bond contemplates monies, in which the firm may be interested. It cannot be a contract [603] with Neel Comul individually as well as with the firm; it is only with Neel Comul; and, if necessary, the other two plaintiffs may be removed. Even assuming that it is to be taken as a guarantee to the firm, is not there sufficient provision in the bond itself to shew that the obligation was to continue, notwithstanding a change in the constitution of the firm? The words "any person or persons" in the bond include partners. See Bullen and Leake's Precedents, 5th Edition, p. 718.

JUNE, 3. HARRINGTON, J.—This is a suit in which Neel Comul Mookerjee, Naro Nath Mukerjee and Golab Roy Poddar who carry on business in co-partnership as merchants under the style and firm of N. Mookerjee and Son, sue one Bipro Dass Mookerjee and Rakhal Dass Mookerjee on a bond executed by these two defendants, the condition of which was that Bipro Dass Mookerjee should faithfully discharge the duties of his employment.

The defendants take an objection by way of demurrer to the plaintiffs' claim and say that, admitting all the allegations in the plaint to be

(1) (1786) 1 T. R. 287.  
(2) (1811) 3 Camp. 52.  
(3) (1868) 12 W. R. 83.

(4) (1812) 4 Taunt. 678.  
(5) (1842) 3 Q. B. 708.  
(6) (1889) 5 M. & W. 580.

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true, no cause of action is shewn to exist against these two defendants in favour of the plaintiffs.

The plaint alleges that, previous to July 1895, Bipro Dass Mookerjee was employed by the plaintiff Neel Comul Mookerjee in his then firm of Neel Comul Mookerjee as a Sircar and Mohurir, and that in July 1895 Bipro Dass Mookerjee was appointed by the said firm as its cash-keeper.

And that the plaintiff Neel Comul Mookerjee called upon the defendant Bipro Dass Mookerjee to give security for the faithful discharge of his duties, and that a bond was executed by Bipro Dass Mookerjee and his father Rakhal Dass Mookerjee, with the intention of securing the plaintiffs against loss. The bond is attached to the plaint, and it alleges that Bipro Dass Mookerjee is employed by Neel Comul Mookerjee as a cash-keeper, and that Neel Comul Mookerjee has called upon Bipro Dass Mookerjee to furnish security for the due and faithful performance of his duties as cash-keeper, and to make good any loss which the said Neel Comul Mookerjee shall or may sustain by or through the means of the said Bipro Dass Mookerjee. Having recited [604] these matters it goes on to set forth the condition, which is that the bond shall be void "if the said Bipro Dass Mookerjee shall and will at all times hereafter so long as he the said Bipro Dass Mookerjee shall continue to be employed as such cash-keeper as aforesaid" faithfully perform his duties, etc., and the condition also contains the proviso that "the said Bipro Dass Mookerjee at all times shall and will duly and regularly account for and pay or make over to the said Neel Comul Mookerjee or such person or persons as he may in that behalf appoint all monies or other property, which shall come to his hands, either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee" and that it goes on with a similar proviso that Rakhal Dass Mookerjee should keep "harmless and indemnified the said Neel Comul Mookerjee, his heirs, executors, representatives and administrators of, from and against all claims, demands, actions, suits, troubles, costs, charges, damages and expenses, which shall or may at any time hereafter happen, or he may sustain, incur or be put to, for, or by reason or in consequence of any negligence, refusal of duty or of any act, permission, wilful or otherwise, or omission, or commission mismanagement, or otherwise, howsoever, of the said Bipro Dass Mookerjee in the discharge of his duties as such cash-keeper as aforesaid."

The plaint then goes on to allege that the plaintiff Naro Nath Mookerjee became a partner in the said firm in July 1896, and that thereupon the firm came to be called and designated N. Mookerjee and Son, and that the plaintiff Golab Roy Proddar joined the firm as member previous to the year 1897, and ceased to be a member on the 9th of November 1899.

It then alleges that defalcations on the part of Bipro Dass Mookerjee were discovered, and it states that there were between the 11th January 1897 and 7th May 1900, defalcations to the amount of Rs. 19,100, which are attributed to embezzlements committed by Bipro Dass Mookerjee. The plaint then sets forth what happened on demand being made on Rakhal Dass Mookerjee on the bond, but these matters are not material for the determination of the principal points raised by the defendants. The defendants' objection to the plaint is two-fold: [605] one is that the bond on the face of it is given to Neel Comul

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Mookerjee, and no facts are alleged which would give any right of action on that bond to the two co-plaintiffs, who are alleged to have joined this firm as partners. The other objection is that the plaint discloses no breach of condition of the bond, the bond being for the faithful discharge of Bipro Dass Mookerjee's duties, while cash-keeper to the firm of Neel Comul Mookerjee, and that the embezzlements, which are alleged, are embezzlements, while in service of the firm of Neel Comul Mookerjee and Son, a firm which came into existence in the year following that, in which the bond was executed.

It is conceded by Mr. Sinha that if the bond were given to Neel Comul Mookerjee in his personal capacity, it cannot be argued that the two co-plaintiffs have any right of action, and that it would be necessary, to enable the suit to proceed, to strike out their names from the Record, and it is argued that the bond was a personal bond given to Neel Comul Mookerjee and that a certain passage in the condition, namely, the passage that provides that "Bipro Dass Mookerjee shall and will truly and faithfully perform all other business that he may from time to time be directed, enjoined or requested by the said Neel Comul Mookerjee to do and perform without refusing or neglecting to do the same, and without consuming, wasting, embezzling, losing, mispending or unlawfully making away with any of the property, monies or effects whatsoever of the said Neel Comul Mookerjee or of any person or persons whomsoever for which he, the said Neel Comul Mookerjee, his heirs, executors, representatives or administrators, shall or may by law, be in anywise answerable or responsible" and also that the proviso in the condition that he "shall and will duly and regularly account for and pay or make over to the said Neel Comul Mookerjee or such person or persons, as he may in that behalf appoint, all monies or other property, which shall come to his hands either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee" are wide enough to make these gentlemen responsible for the monies of the firm, which had come into Bipro Dass Mookerjee's hand during the period that these defalcations are said to have taken place.

[606] In my opinion the objections taken by the defendants must prevail. If the bond is treated as having been given to the firm of Neel Comul Mookerjee, by whom in the plaint the first defendant is alleged to have been employed, then on the change of the firm by the introduction of the two partners and the changing of the firm of Neel Comul Mookerjee into Neel Comul Mookerjee and Son, the guarantee given by the defendant No. 2 would be revoked by virtue of s. 260 of the Indian Contract Act. If, on the other hand, the bond is treated as given to Neel Comul Mookerjee personally, then a difficulty lies in the plaintiffs' way in showing that there has been a breach of the conditions of the bond. The defendant No. 1 is alleged to have been employed as cash-keeper to the firm of Neel Comul Mookerjee. It is alleged that the firm became N. Mookerjee and Son, and changed, as regards its constitution, before the defalcations, which give rise to the present suit.

The condition of the bond is limited to the time during which Bipro Dass Mookerjee is employed as cash-keeper by Neel Comul Mookerjee and not by the firm of N. Mookerjee and Son, and the paragraph, on which reliance may be placed by the plaintiffs, viz., that the defendant "shall and will duly and regularly account for and pay or make over to the said Neel Comul Mookerjee or such person or persons, as he may in

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that behalf appoint, all monies or other property, which shall come to his hands either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee" is, I think, not sufficient to carry the plaintiffs home, because the monies, which are alleged to have come to the hands of the defendant No. 1, were not received on account of the individual Neel Comul Mookerjee, but of the firm of N. Mookerjee and Son. The result is that, as far as any cause of action is founded on this bond, the plaintiffs must fail on the facts that they have alleged in their plaint, and the objection of the defendants must be sustained.

It has been stated that criminal proceedings are pending against the first defendant in respect of these defalcations. That being so, and the questions on the merits not having been tried, no execution for costs must be issued as against the plaintiffs, [607] until the determination of the proceedings which are pending, and then only on notice to the other side; subject to that order, the suit must be dismissed with costs.

Mr. Mehta.—I ask leave that the costs of the defendant No. 2, may be executed against the plaintiffs.

The Court.—It is inconvenient. He will have to wait, until the determination of those proceedings.

Mr. Sinha.—They appear not separately, but through the same Counsel and attorney, and so there cannot be any separate costs.

The Court.—He will have to postpone execution for a short period.

Mr. Mehta.—I would ask for an order of discharge of the injunction against him, and for reserved costs.

The Court.—That follows of course as to the injunction. You are entitled to the same order as to reserved costs. All costs will be dealt with together. That will include all reserved costs.

Mr. Sinha.—This decree will not affect my cause of action on the debt against the defendants.

The Court.—No, I have tried my best to guard against that.

*Suit dismissed.*

Attorneys for the plaintiffs: Messrs. Kally Nath Mitter and Sarvadhikary.

Attorney for the defendants: Babu K. N. Gangooly.

28 C. 608.

[608] APPELLATE CIVIL.\*

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and  
Mr. Justice Banerjee.

THE COLLECTOR OF DACCA (*Defendant*) v. JAGAT CHUNDER  
GOSWAMI (*Plaintiff*). [3rd July, 1901].

*Ascetic—Letters of Administration—Application for, by preceptor's preceptor—Custom.*

On an application for Letters of Administration to the estate of a deceased *baïragee*, that is an ascetic, by his preceptor's preceptor, the Secretary of State resisted the application, alleging that the deceased died without leaving any heir, and that therefore his estate escheated to Government.

Held, that according to the custom prevalent amongst the sect, the preceptor's preceptor was entitled to the Letters of Administration.

\* Appeal from Original Decree No. 282 of 1899, against the decree of S. J. Douglas, Esq., District Judge of Dacca, dated the 15th May 1899.