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I will make the order on the same terms as the Vice-Chancellor in the case of *Robins* v. *Goldingham* (1).

I order the change of attorney. Babu Romesh Chunder Mitter is directed to make over the papers to Baboo Radhika Lall Mookerjee on the latter's undertaking to receive and hold them without any prejudice to any lien possessed by Babu Romesh Chunder Mitter, and to return them undefaced within a fortnight from the conclusion of the suit. If the attorney (Babu Romesh Chunder Mitter) seeks for inspection of those papers, I will allow the same.

Mr. Bell. I ask for an order for costs of this application as against Babu Romesh Chunder personally on the ground that he has been wrong throughout: *Robins* v. *Goldingham* (1).

The Court. In my opinion Babu Romesh Chunder Mitter has been clearly wrong and I will make the same order as in that case and make him pay the costs of this application. I certify for counsel.

B. D. B. *Application granted.*

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

RAJ NARAIN MOOKERJEE
v.
FUL KUMARI DEBI.

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Surety—Probate and Administration Act (V of 1881), ss. 51 and 78—Surety bond, power of a District Court to take a second—Administratrix, mal-administration of the estate by—Contract Act (IX of 1872), s. 130—Application by a surety, who is not a beneficiary, to be discharged from his suretyship.

Under the Probate and Administration Act (V of 1881) a District Court, after once having taken a bond with sureties, has jurisdiction to take a second bond with fresh sureties, if the necessity arises.

A surety (who is not a beneficiary) for the administratrix of an estate can, so far as relates to the future, by giving notice, be released from his obligation as surety on account of mal-administration of the estate by the administratrix.

S. 130 of the Contract Act (IX of 1872) applies to such a case.

The petitioner, Raj Narain Mookerjee, appealed to the High Court.

* Appeal from Order No. 181 of 1899 against the order of B. L. Gupta, Esq., District Judge of Hooghly, dated the 29th of March 1899.

(1) (1872) L. R. 13 Eq. 440.

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Ful Kumari Debi was appointed, under the Probate and Administration Act, administratrix of the estate of Nistarini Debi, deceased, and Raj Narain Mookerjee stood surety for the administratrix, who was his sister. On the 25th February 1899, Raj Narain Mookerjee applied to the District Judge of Hooghly, on the ground of mal-administration of the estate of the deceased, to call upon the administratrix to furnish a new surety and release him (the petitioner) from the liability under the security bond. On the 29th March 1899, the learned District Judge, without going into the question of mal-administration, rejected the application and refused to release the surety from liability as regards future transactions, holding that he had no jurisdiction to entertain the application. On appeal by the petitioner the case was remanded to the District Judge for a finding whether the administratrix was guilty of mal-administration of the estate or not. The finding of the learned District Judge was in the affirmative. The appeal then came on for hearing for a second time before the High Court.

Dr. Ashutosh Mookerjee, *Babu Jnanendra Nath Bose* and *Babu Biraj Mohun Mozumdar* for the appellant.

Babu Saroda Churn Mitter and *Babu Benode Behary Mookerjee* for the respondent.

MACLEAN C. J. This was an application to the District Judge of Hooghly by a gentleman who was a surety in an administration bond granted in connection with the estate of his mother, to whose estate his sister was appointed administratrix, and the application was that the Court should call upon the administratrix to furnish a new surety and to release him from the liability under the security bond.

The applicant's case is this. He admits that he became surety for his sister for the due administration of the mother's estate, to the extent of Rs. 22,000, but he says that the administratrix is wasting the estate, and that he is powerless to stop her by an administration suit or otherwise, as he has no interest in the estate, and he cannot prevail on any of the beneficiaries, who, he alleges, are colluding with his sister against him to take such administration proceedings, and, under such circumstances, he says it is

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only fair and reasonable that he be discharged. The matter came before the District Judge, who did not go into the matter very fully, but held that he had no jurisdiction to accede to the application, and accordingly refused it.

The case then came before this Court about a year ago, and, on consideration, we thought, before deciding the question of law, which was then based upon a hypothetical state of circumstances, that it would be better to ascertain whether in point of fact the administratrix had been guilty of mal-administration of the estate, so we remanded the case in order that the Lower Court should determine whether or not the alleged case of mal-administration could be substantiated, the case being retained upon the file of this Court. The record went back, and the District Judge has found that the case of mal-administration had been made out, and it now comes back to us.

In this state of circumstances, two questions arise : *first*, whether the District Judge has power to discharge the surety ; and, if so, *secondly*, whether he ought to have done so in this case.

Upon the first point the Probate and Administration Act is silent: there is no express provision enabling the Court to discharge the surety.

But s. 51 of the Act gives to the District Judge jurisdiction to grant and revoke Probates and Letters of Administration in all cases within his district, and the giving of an administration bond with sureties is part and parcel of the procedure connected with the granting of Letters of Administration. S. 78 specially empowers the Judge to call upon the administrator to give a bond with one or more surety or sureties. There is no provision in the Act as to what is to be done or what the Court can do in the event of the death of the surety, or in the event of the surety, under such circumstances as the present, desiring to be relieved of the burden which he has undertaken. In my opinion s. 78 ought not to be read as meaning that the District Judge can once and once only direct a bond with sureties to be given, and that after that has been done he becomes then and there *functus officio*, and that he has no power in the event of the surety dying, say the next day, to call upon the administrator to furnish another surety. That would be a narrow and not a common sense view to take of the section, and would lead to most in-

convenient results. Having regard to s. 51, I do not see why we should limit s. 78 to one application, and say that, when once the Court has taken a bond with sureties, it cannot take a second with fresh sureties, if the necessity arise. I, therefore, think that the Court had jurisdiction to entertain the present application. Then arises the question whether it ought to have been granted.

Speaking with every respect I think that there is a great deal of force and common sense in the observation of the late Vice-Chancellor Malins, in the case of *Burgess* v. *Eve* (1); observations which have a distinct bearing upon the point immediately under discussion, and apart from s. 130 of the Indian Contract Act, to which I will refer in a moment, I should have been disposed to hold, upon general equitable principles, that the surety, situated as is the present applicant, seeing the person, for whom he is the surety, wasting the estate, whilst he is powerless to interfere, should have the right of being discharged from his suretyship as regards future transactions. Had he been a beneficiary in the estate, and so could have invoked the aid of the Court in an administration suit to prevent the waste of the estate, different considerations might possibly have applied. But, apart from this view, I think the case falls within s. 130 of the Indian Contract Act, and I fail to see upon principle why we should hold that that section does not apply. That section is perfectly consistent with the equitable doctrine which has been laid down by Vice-Chancellor Malins in the case I have cited.

It is true that in the Bombay High Court in the case of *Bai Somi* v. *Chokshi Ishvardas Mangaldas* (2), it was held that a surety for the guardian of a minor's estate, appointed under the Minor's Act, should not be released from his obligation as surety on account of the guardian's mal-administration of the estate, and it was held that s. 130 does not apply to such a case. No doubt, in principle that is very like the present case. But one of the reasons for the decisions given in that case was this: "In holding this view of the sureties obligation, we do not say that the surety may not apply to the Court to take steps for his protection against the guardian." That probably means that he might have applied to the Court as the next friend of the minor for the

(1) (1872) L. R. 13 Eq. 450, 457. (2) (1894) I. L. R. 19 Bom. 215.

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discharge of the guardian. But such reasoning has no application to the present case, for the surety here, not being a legatee or a creditor of the estate, can take no steps to protect either the estate or himself by instituting administration proceedings.

Here the surety is absolutely without a remedy, and, if the view of the Court below is sound, he is compelled to look on and see the administratrix wasting the estate, which probably means, in the result, a serious pecuniary liability upon himself. That does not commend itself to my mind, and, for the reasons I have given, I think the applicant is entitled to be discharged, so far as relates to the future, from his suretyship. I am not dealing with the case of a person, who becomes surety, and then from mere caprice or for no sound reason desires to be discharged.

The appeal must, therefore, be allowed with costs.

BANERJEE J. I am of the same opinion. There is no reason why s. 130 of the Indian Contract Act should not apply to the case of the surety here. The learned vakil for the respondent very properly conceded that he was not able to contend that that section was not applicable to the present case. If that is so, the surety by giving a notice as contemplated by s. 130 could have the guarantee revoked. And, if the Judge is to be held to have no power to deal with the matter and to require the administrator to find fresh surety, it would lead to an anomalous result. There would be an administrator without any surety, the guarantee having been revoked by the operation of s. 130 upon notice having been given by the surety, and there would be no power in the Judge to require the administrator to furnish a fresh surety. That would be the result, if we were to give effect to the contention urged on behalf of the respondent that the District Judge, after having made his order for the execution of the surety bond, ceases to have any further power regarding the matter. I think the proper view to take of s. 78 of the Probate and Administration Act, under which the surety bond is taken, would be to hold that the Judge has power to deal with the matter of the surety bond, upon a contingency like the present arising, and that he does not become *functus officio* after the first surety bond is executed.

S. C. G. *Appeal allowed.*