

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coze.

1909
April 2.

KANAI PROSAD BOSE

v.

JOTINDRA KUMAR ROY CHOWDHURY.*

*Principal and Surety—Breach of Contract—Variance in terms of Contract—
Surety, liability of—Contract Act (IX of 1872), s. 133.*

A entered into a surety bond on behalf of B for the due performance of the duties of B as a *tehsildar* under the terms of a contract, the security being limited to a fixed amount. One of the terms was that B should render account of his *tehsil* every year. B did not render account for the year 1308, and was allowed to realize rents for 1309 in breach of the terms of the contract. In a suit for account against B and his surety :—

Held, that there was no variation in the contract between the parties as contemplated by s. 133 of the Contract Act, and that the surety was liable.

SECOND APPEAL by Kanai Prosad Bose, the defendant No. 2.

The facts were briefly as follows :—The plaintiffs held certain lands standing in their names. The defendant No. 1 executed a *kabuliat* in favour of the plaintiff No. 1 and was appointed *tehsildar* in respect of these lands of the plaintiffs. In order to secure the due performance of the *tehsildar's* duties, one Kanai Prosad Bose, the second defendant in the original suit, stood surety for the defendant No. 1 and executed a surety bond in favour of the plaintiff No. 1, the liability being limited to Rs. 200 only. One of the terms of the contract was that unless the *tehsildar* rendered account of his *tehsil* of any year, he should not continue the work of collection next year. The defendant No. 1 did not duly render accounts for the whole year, 1308 B.S., and continued in office the whole of 1309 and up to the end of Sraban 1310. A suit was instituted in the Munsif's Court at Rungpur against both

* Appeal from Appellate Decree, No. 603 of 1907, against the decree of K. C. Mukerjee, Subordinate Judge of Rungpur, dated Nov. 26, 1906, affirming the decree of Kumud Bandhu Gupta, Munsif of Rungpur, dated July 20, 1906.

the defendants for account. The surety alone contested the suit which was decreed against both the defendants. On appeal preferred by the surety, the Subordinate Judge dismissed the appeal.

The surety, thereupon, appealed to the High Court.

Babu Baidyanath Dutt (Babu Hem Chandra Mitter with him), for the appellants. The question here is whether, looking at the terms of the deed and the decree, the terms of the contract were varied. There was substantial variation in the terms, the *tehsildar* having been allowed to continue in office from 1308 to Sraban 1310 without rendering accounts. This has gone to enhance the liability of the surety, which might have been increased to any amount. A man cannot be allowed to benefit by his own laches at the expense of a third party, *viz.*, the surety in this case, and the surety cannot be sued if there has been a substantial variation of the contract so as to increase his liability. I rely on section 133 of the Contract Act : see Pollock and Mulla's Contract Act, 1905, pp. 385, 388 ; *Damodar Das v. Muhammad Husain* (1).

Babu Brojendra Nath Chatterjee, for the respondents, was not called upon.

1909
KANAI
PROSAD
BOSE
v.
JOTINDRA
KUMAR
ROY
CHOWDHRY.

SHARFUDDIN AND COXE JJ. This was a suit for accounts by the zemindar against his *tehsildar* and one Kanai Prosad Bose, who stood surety for the due performance of the *tehsildars'* duties. The Courts below have decreed the suit and the surety appeals. The ground of the appeal is that, as the contract between the zemindars and the *tehsildar* was varied, the surety was discharged from liability by section 133 of the Contract Act. The terms of the contract to which reference has been made are as follows :—“ As long as I do not make over the *tehsil* in my *jimba* on clearing my *nikash* of any year to your satisfaction, I will not be able to take up the work of realizations and collections from the said mehals for the following year.” It is said that the *tehsildar* did not render accounts

1909
 KANAI
 PRASAD
 BOSE
 v.
 JOTINDRA
 KUMAR
 ROY
 CHOWDHRY.

for the year 1308, but notwithstanding that omission continued to realize rent for 1309. We do not think that this amounted to a variation of the contract. The breach of a contract is not a variation of it. Under the contract it was stipulated that if the accounts were not rendered the *tehsildar* should pay Rs. 50 a year as the cost of having them prepared. Doubtless also the zemindar had other remedies. He could probably dismiss the *tehsildar*, or take the work away from his hands. But the mere fact that he did not enforce any of these remedies immediately did not amount, in our opinion, to a variation of the original contract. The original contract remained the same. If the *tehsildar* committed a breach of the contract by realizing rent for 1309, the zemindar was able to enforce the original contract and the remedies which he had under it. It is not stated that the zemindar and the *tehsildar* ever met together and came to any agreement on the subject. All that happened was that the *tehsildar* to a certain extent broke his part of the contract and the zemindar did not immediately enforce his remedies under it.

It is argued that the surety might in this way become liable for the defalcations of several years, although it was originally intended that the accounts should be completed and rendered at the end of each year. But the security was limited to a fixed amount, and it could at any time have been revoked by the surety.

In our opinion, there was no variation in the contract between the parties, and we think, therefore, that the decisions of the Courts below were right, and that this appeal must be dismissed with costs.

Appeal dismissed.

C. M.