Before Mr. Justice Brett and Mr. Justice Mitra.

1903
Aug. 5.

JAGADINDRA NATH ROY

v.

CHANDRA NATH PODDAR.*

Principal and surety—Contract of guarantee—Surety bond—Consideration—Forbearance of claim—Continuing guarantee—Contract Act (IX of 1872) s. 129.

The forbearance of a claim against a third person is a sufficient consideration for a surety bond, although there may be no express contract by the obligee to forbear.

Callisher v. *Bischoffsheim* (1) and *Crears* v. *Hunter* (2) followed.

Lloyd's v. *Harper* (3), *Balfour* v. *Crace*(4), *Burgess* v. *Eve*(5), and *Raj Narain Mookerjee* v. *Ful Kumari Debi*(6) referred to.

APPEAL by the plaintiff, Maharaja Jagadindra Nath Roy.

One Shasti Charan Chakravarti, the defendant No. 1, obtained from the plaintiff an ijara lease of some forest lands for four years, from 1301 to 1304 B. S. One Madan Mohan Poddar stood surety for the defendant No. 1, and executed a surety bond dated the 20th Bhadra 1301 B.S., corresponding to the 4th September 1894. On the death of Madan Mohan, the defendant No. 2, Chandra Nath Poddar, executed a surety bond in favour of the plaintiff on the 17th Kartic 1303 B.S., corresponding to the 1st November 1896, standing surety for the defendant No. 1 to the extent of Rs. 5,000. The bond recited: "One Madan Mohan Poddar, of Madhupur, now dead, had stood surety for him (Shasti Charan Chakravarti) for payment of the said amount of money. The said Poddar having died, and the said Shasti Charan Chakravarti having been called upon to furnish fresh security to

* Appeal from Original Decree, No. 108 of 1902, against the decree of Har Prosad Das, Subordinate Judge of Mymensingh, dated Jan. 2, 1902.

(1) (1870) L. R. 5 Q. B. 449.
(2) (1887) L. R. 19 Q. B. 341.
(3) (1880) L. R. 16 Ch. D. 290.
(4) [1902] 1 Ch. 733.
(5) (1872) L. R. 13 Eq. 450.
(6) (1901) I. L. R. 29 Calc. 68.

your estate on account of the said ijara settlement, I have at his request come forward to become his surety for payment of the said ijara money, and do, of my own will and accord, execute this security bond and accept all the terms contained in the registered kabulyat executed by the said ijardar, Shasti Charan Chakravarti, and declare as follows: that is to say that if the said Shasti Charan Chakravarti goes away and absconds without furnishing the papers and paying the rents according to the instalments during the continuance of the term, or if he fails, for any other reason, to furnish the paper or pay the money, I shall stand responsible and be bound to indemnify you for any loss up to the sum of Rs. 5,000 as mentioned in this security bond."

The present suit was instituted for the recovery of Rs. 10,000, being arrears of rent with interest due in respect of the ijara lease. The defendant No. 1 did not contest the suit. The defendant No. 2 pleaded that the heirs of Madan Mohan Poddar were necessary parties to the suit, and that the surety bond executed by him was inoperative for want of consideration, &c.

The Subordinate Judge held that the death of Madan Mohan could not operate as a revocation of his guarantee, which was not a continuing one, specially as there was a stipulation in Madan Mohan's bond that his heirs and representatives, as well as the property hypothecated and his other assets would be liable to the plaintiff for the breach of any covenant of the lease. He further held that there was no consideration for the fresh guarantee given by the defendant No. 2, and accordingly dismissed the suit against that defendant and decreed it *ex-parte* against the defendant No. 1.

Dr. Rash Behary Ghose, *Babu Dwarka Nath Chakravarti* and *Babu Rama Kanta Bhuttacharjee* for the appellant.

Dr. Ashutosh Mookerjee and *Babu Gobinda Chandra Dey Roy* for the respondent.

BRETT AND MITRA JJ. The suit, out of which this appeal arises, was brought to recover the sum of Rs. 10,000 with costs and interest from Shasti Charan Chakravarti (defendant No. 1) as

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ijaradar, and from Chandra Nath Tai Poddar (defendant No. 2), as his surety, on account of arrears of rent due on a temporary ijara settlement of the *sankar* and *bankar* (grass and forest produce), &c., of certain ghats included in Gar Jayenshahy, &c., perganah Jayenshahy, and perganah Pukharia, in the district of Mymensingh. The ijara lease bears date the 16th Bhadra 1301, and is for a term of four years, 1301 to 1304 B.S., at a yearly rental of Rs. 14,597. The suit was brought for the balance of rents outstanding after termination of the lease with interest. On the 20th Bhadra 1301, Madan Mohan Tai Poddar executed a bond in the sum of Rs. 5,000 as surety on behalf of the ijaradar for the due fulfilment of the covenants in the lease. Madan Mohan died in 1303, leaving as heirs his daughters. After his death the husband of one of the daughters went to the plaintiff and asked to be discharged from the surety bond, and that the plaintiff would take some other surety. Thereupon, the plaintiff called on the defendant No. 1, the ijaradar, to furnish a fresh surety, and at the request of defendant No. 1 the defendant No. 2, Chandra Nath Tai Poddar, executed in favour of the plaintiff on the 17th Kartic 1303 a surety bond in the sum of Rs. 5,000 for the due fulfilment by defendant No. 1 of the covenants in the lease.

The suit was brought by the plaintiff against defendants Nos. 1 and 2 on the ijara lease of the 16th Bhadra 1301, and on the surety bond of the 17th Kartic 1303. Both of these are registered documents.

The suit was not contested by defendant No. 1. Defendant No. 2, however, disputed his liability and pleaded that the surety bond executed by him was inoperative for want of consideration; and apparently that if any one was liable as surety on behalf of defendant No. 1, it was the heirs of Madan Mohan Tai Poddar under the surety bond first executed on the 20th Bhadra 1301.

The Subordinate Judge decreed the suit against defendant No. 1, but accepted the plea of defendant No. 2 and dismissed the claim against him. He held that the guarantee under the surety bond executed by Madan Mohan Tai Poddar was not a continuing guarantee, and following the authority of the case of *Lloyd's* v. *Harper*(1), decided by the Court of Chancery in England, he held

(1) (1880) L. R. 16 Ch. D. 290.

that the guarantee could not be put an end to by his death. He further held that the death of Madan Mohan did not operate as a revocation of the guarantee, because in the bond there was an express stipulation that the heirs and representatives of Madan Mohan, the property hypothecated, and his other assets would be liable to the plaintiff for the breach of any covenant in the lease. Then having decided this point in favour of defendant No. 2, he further held that the guarantee given by defendant No. 2 was a fresh guarantee, that defendant No. 1 did not in any way benefit thereby, and that the guarantee was void as being given without consideration. He therefore held that defendant No. 2 was not liable to the plaintiff under the bond of the 17th Kartick 1303. The plaintiff has appealed against the judgment and decree of the Subordinate Judge so far as it dismissed his claim against defendant No. 2.

The appeal has been valued at Rs. 10,000, but it has been pointed out on behalf of defendant No. 2 that, as the bond of the 17th Kartic 1303 was for Rs. 5,000 only, the plaintiff (appellant) cannot succeed in his claim against defendant No. 2 beyond that amount. This is admitted on behalf of the appellant, and so far as Rs. 5,000 is concerned, the appeal must fail.

As regards the remaining Rs. 5,000, it is argued on behalf of the appellant that the appeal should succeed. It is contended that the finding of the Subordinate Judge, that the guarantee of Madan Mohan was not a continuing guarantee, cannot be supported under the law in force in India, and that his finding that there was no consideration for the bond executed by defendant No. 2 on the 17th Kartic 1303 is wrong, and contrary to the evidence and circumstances of the case.

On the first point the following argument has been pressed. In determining whether the guarantee given by Madan Mohan Tai Poddar was a continuing guarantee or not, the Subordinate Judge has relied on the law in England and not on the law as laid down in section 129 of the Contract Act and its illustrations. The law as laid down by Lush, L. J., in the case of *Lloyd's* v. *Harper* (1), which the Subordinate Judge has quoted in his judgment, was followed in 1902 in the case of *Balfour* v.

(1) (1880) L. R. 16 Ch. D. 290.

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Crace(1). The latter was the case of a surety who had given a bond for the integrity of a person in consideration of that person being appointed to an office by the obligee of the bond, and it was held that the liability of the surety will not, unless expressly so stipulated in the bond, be determined by his death. In fact under the English law such a guarantee was held not to be a continuing guarantee. Illustration (*a*) of section 129 gives the following as an example of a continuing guarantee:—"A, in consideration that B will employ C in collecting the rent of B's zemindari, promises to B to be responsible, to the amount of Rs. 5,000, for the due collection and payment by C of those rents." This, it is contended, is directly contrary to the rule of English law in the two cases quoted above, and indicates that in this country the Legislature intended to lay down the law differently from the law in England on the subject.

It is further suggested that in this case the guarantee was not for the payment of the full rental due on the lease, but for the regular payment of the instalments; that the lease provided that on default of payment by the lessee of any of the kists or instalments, the lessor might take the mahals into his khas collection and settle them with other parties; and that therefore the guarantee extended to a series of transactions, and so fell within the definition of a continuing guarantee given in section 129 of the Contract Act.

In opposition it is urged that as in illustration (*a*) to section 129 of the Contract Act no period for C's employment is specified, it is distinguishable from the cases in the Chancery Courts in England to which we have referred. In the case of *Balfour* v. *Crace* (1), however, no period is stated, and on that ground it does not seem possible to distinguish the case in the illustration. It has further been contended that under the terms of the bond of the 20th Bhadra 1301, it is clear that the surety intended to bind his heirs and representatives as well as himself, and that it was acknowledged that his liability under the guarantee was to extend for the full period of the lease, viz., four years. As he could not determine his guarantee by notice, it could not be revoked by his death. Moreover, it is suggested that his heirs

(1) [1902] 1 Ch. 733.

did not deny liability, but only asked to be allowed to withdraw, and the case of *Raj Narain Mookerjee* v. *Ful Kumari Debi*(1) is relied on to show that some sound reason and not caprice only would be necessary to enable them to obtain a discharge. That case followed the principle laid down in *Burgess* v. *Eve* (2). As in this instance there was no sound reason for the heirs of Madan Mohan to withdraw from their liability, under the first bond, the second bond was for the benefit of the lessor, and not for the advantage of the lessee under the ijara lease.

We are not prepared to say that the decision of the Subordinate Judge on this point is beyond question, but for the purposes of this case we think it unnecessary to determine whether the guarantee given by Madan Mohan Tai Poddar was a continuing guarantee or not, as in our opinion on other grounds the judgment of the Subordinate Judge cannot be supported.

It is perfectly clear on the facts of the case, as stated, that on the death of Madan Mohan his heirs entertained the belief that it was optional with them to continue or not the guarantee given by him. That view too seems to have been accepted by the lessor, the plaintiff. In the lease it is recited that the bid offered by the defendant No. 1 had been accepted, and the lease granted on the condition that security for the sum of Rs. 5,000 was given by Madan Mohan Tai Poddar for the due fulfilment by the lessee of its terms, and under that condition it was obligatory on the lessee to furnish a fresh security when that given by Madan Mohan was held by the parties to have determined. Failure on the part of the lessee to comply with that condition would seem to have been regarded as a ground for determining the lease. Whether or not the lessor and lessee were correct in the view which they seem to have taken of their legal rights and duties under the lease, the recitals in the bond given by defendant No. 2 leave no doubt that he executed the bond of the 17th Kartic 1303, in which he stood security in the sum of Rs. 5,000 for the lessee, at the solicitation of the lessee, who had been called on by the lessor to furnish fresh security after Madan Mohan's death. The object of the lessee in obtaining a fresh surety was clearly either to save his lease from

(1) (1901) 1 L. R. 29 Calc. 68. (2) (1872) L. R. 13 Eq. 456.

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being rescinded or induce the lessor to forbear from entering into litigation to compel him to furnish fresh security. In the case of *Callisher* v. *Bischoffsheim* (1), Cockburn C.J. remarked:—"The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference." In the judgment of Blackburn J. in the same case the following passage occurs:—"If we are to infer that the plaintiff believed that some money was due to him, his claim was honest and the compromise of that would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated." In *Crears* v. *Hunter*(2) Lord Esher, M.R., laid down the law as follows:—"I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear on the other hand that a binding promise to forbear would be a good consideration for a guarantee." It was held in that case that the plaintiff having forborne from suing defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing. It has been argued for the respondent that there is no proof in this case that any litigation was avoided, or that there was any compromise. The surety-deed, however, itself shows that the demand for fresh security was made by the lessor, and it is clear that defendant No. 2 was asked to become, and became, surety for defendant No. 1 in order to save him from the results of a failure to comply with the demand of the lessor, which would have been either forfeiture of his lease, or the institution of legal proceedings. This resulted in an advantage to the lessee, and we therefore hold, disagreeing with the Subordinate Judge, that there was sufficient consideration for the bond executed on the 17th Kartic 1303 by the defendant No. 2.

Further, it is clear that defendant No. 2 executed the bond in question with the intention of binding himself to pay Rs. 5,000 in the event of default on the part of the lessee to fulfil the terms

(1) (1870) L. R. 5 Q. B. 449. (2) (1887) L. R. 19 Q. B. 341.

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of the lease, and that he did so with full knowledge of all the circumstances. There is no suggestion of any pressure or deceit in the matter. Such being the case and the bond having been executed for consideration, we hold that defendant No. 2 is liable to the plaintiff to the extent of Rs. 5,000, the amount stated in the bond, and that the plaintiff is entitled to a decree against him for that amount. To this extent, therefore, we decree the appeal, and, in modification of the judgment and decree of the lower Court, direct that plaintiff's claim to the extent of Rs. 5,000 against respondent No. 2 be decreed.

Appellant will recover his costs in this appeal on the value only to which it has been decreed. Respondent will pay his own costs.

Appeal allowed.

M. N. R.

Before Mr. Justice Banerjee and Mr. Justice Pargiter.

BHAGWAN DAS
v.
CREET.*

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May 25.

Cheque—Bill of Exchange—Payment on a forged cheque—Principal and Agent Negligence—Banker, liability of.

When a banker makes a payment on a forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer.

Young v. *Grote* (1) distinguished.

Scholfield v. *Earl of Londesborough* (2) referred to.

SECOND APPEAL by the plaintiffs, Bhagwan Das Marwari and others.

The plaintiffs' father, Lopechand Marwari, instituted a suit in the Court of the Munsif of Ranigunge for the recovery of Rs. 522-4 due on a *hundi* or bill of exchange. It was alleged

* Appeal from Appellate Decree, No. 1631 of 1900, against the decree of B. C. Mitter, District Judge of Burdwan, dated May 29, 1900, reversing the decree of Shoshi Bhushan Chatterjee, Munsif of Ranigunge, dated April 27, 1899.

(1) (1827) 4 Bing. 253. (2) [1896] A. C. 514.