

MANU/WB/0075/1927

Equivalent Citation: AIR1928Cal204, (1928)ILR 55Cal154, 109Ind. Cas.752

IN THE HIGH COURT OF CALCUTTA

Decided On: 24.03.1927

Appellants: **Durga Priya Chowdhury**
Vs.
Respondent: **Durga Pada Roy and Ors.**

Hon'ble Judges/Coram:

B.B. Ghose and Mallick, JJ.

JUDGMENT

B.B. Ghose, J.

1. This is an appeal by the plaintiff. The suit was for accounts against the principal defendant 1 for the period of his service under the plaintiff as gomasta. The other defendants were made parties as they are the representatives of one Mahendra Nath Eoy who was the surety for defendant 1. A preliminary decree was made on 11th March 1922. The final decree was made by the Subordinate Judge on 25th April 1923. In making the final decree the Subordinate Judge found that the plaintiff was entitled to get from defendant 1, Rs. 2,000 odd for not accounting for moneys received on behalf of the plaintiff. The final decree was made by him against defendants 1 to 8. It was directed that if the money was not paid by defendant 1 within a month of the date of the decree the plaintiff would be entitled to realize the money by the sale of the property hypothecated by the surety bond and if the entire sum was not realized by that, the balance was to be recovered from any property left by Mahendra Nath Roy in the hands of defendants 2 to 8. Defendants 2 to 8 appealed against that decree. The District Judge on appeal reversed the decision of the Subordinate Judge holding that under the provisions of Section 131, Contract Act, the death of the surety operated as a revocation of the contract of guarantee so far as regards all future transactions. I ought here to state that the surety bond entered into by defendant 1 and Mahendra Nath Roy was dated 27th March 1914. Mahendra Nath Roy died on 10th August 1914. The learned Judge found that defendant 1 had not committed any act of default during the lifetime of Mahendra Nath Roy. He held that, if there had been any default by defendant 1 during the life time of Mahendra Nath Roy, the other defendants would be liable for the amount; but, inasmuch as it had been found that defendant 1 was not guilty of any default during the life time of the surety, defendants 2 to 8 were not at all liable. Against that decree the plaintiff appeals, to this Court.

2. The contention on behalf of the plaintiff-appellant is, first, that the contract of guarantee in this case is a continuing, guarantee. Reliance has been placed in support of this contention on the case of Sen v. Bank of Bengal A.I.R. 1920 P.C. 35. In that case their Lordships doubted whether there was any contract of guarantee at all. They, however, expressed the opinion that in that case there was only one transaction, that is, the appointment of the principal to a place of trust and the pledging of the security deposited with the bank. That seems to take the present case out of the ruling in that case as there was no continuing; guarantee. The present case, however, comes within the purview of Section 129, Contract Act. Ill. (a) to that section is exactly like the transaction in the present case. Here defendant 1 was appointed for the purpose of

collecting rents of the plaintiff's zamindari and Mahendra Nath Roy held himself responsible for the due collection and payment by defendant 1 of those rents to the extent of Rs. 600 by a security, bond executed by him.

3. This illustration I may refer to for the purpose of construing the section. It was held by their Lordships in the case of Mahomed Syedol Ariffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242 that it is the duty of the Court to accept, if that can be done, illustrations given under the section as being of value in the construction of the text; it would require a special case to warrant their rejection on the ground of repugnancy with the section. In my opinion, therefore, the present contract of the surety is a continuing guarantee. That being so, the relationship between the parties after the death of the surety must be governed by the provisions of Section 131, Contract Act. The learned vakil for the appellant has relied upon two-English cases in support of his contention' that the death of the surety did not amount to a revocation of the contract of surety. The cases referred to were Lloyds v. Harper [1880] 16 Ch. D. 290 and In re Silvester [1895] 1 Ch. 573. The rule in England, however, is quite different from the provisions of the Indian Contract Act. The law in England has been thus summarized in De Colyar on Guarantees, 3rd edn., p. 392:

With respect to subsequent transactions and liabilities, whether a guarantee is revoked by the death of the surety depends, it would seem, upon the nature of the guarantee given. If it be a guarantee which the surety could himself have determined by notice, then it appears that the notice of his death will operate as a re-evocation. But if, on the other hand, the surety could not himself have put an end to the guarantee by notice, then his death does not revoke the instrument, nor does it extinguish his liability thereunder.

4. It has also been similarly summarized in Rowlatt on Principal and Surety, 2nd edn., at p. 87. It is stated thus:

Revocation by notice of death of the guarantor, however, can only take place when the guarantee is such as, apart from special stipulation, might have been revoked by the guarantor himself at any moment.

5. Under Section 130, Contract Act a continuing guarantee may be revoked as to future transactions by the surety by notice at any moment. The provisions of Section 131, Contract Act, run thus:

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

6. As I read the section the provision is, that unless there is any contract to the contrary the death of the surety operates as a revocation of a continuing guarantee. So in each case the contract between the parties must be looked into in order to determine whether the contract of the surety has been revoked by the death of the surety or not. If from the contract it can be gathered either from the express provisions contained in it or by necessary implication, that there was a contract that the death of the surety would not operate as a revocation, then the contract of guarantee must be held to continue even after the death of the surety. It would be otherwise if no such agreement can be discovered in the contract of the surety. In the present case the security bond was executed by Nagendra Nath Mukerji, defendant 1, and Mahendra Nath Boy, the surety. The important portion of the security bond with regard to this point runs thus:

I (Mahendrar Nath Boy) shall continue to stand surety to him (Nagendra Nath

Mukerji) and shall be bound by all the debts incurred by him. If the said Nagendra Nath Mukerji does not voluntarily pay up his debts and render account of the works done by him during his incumbency and make over the papers, or if he fails to do the same then I shall pay the same out of my own pocket, and if I do not pay it voluntarily you shall be at liberty to bring a suit against us and realize the amount by causing the mortgaged properties mentioned in the schedule below to be attached and sold at auction. To that the heirs and legal representatives of none of us both parties shall be entitled to raise any objection or plea.

7. Towards the end of the bond, it is further stated:

Our heirs and legal representatives shall be bound by the terms of this security bond in the same way in which we are bound by them.

8. From these terms it seems to be clear to me that the surety bound himself as well as his heirs and legal representatives by the terms of the contract entered into between him and the plaintiff for standing as surety for defendant 1. There is in this contract, as contemplated under Section 131, Contract Act, the stipulation that the representatives of Mahendra Nath Roy would be bound for any act done by defendant 1 during the continuance of his service even after the death of Mahendra Nath Roy. The learned Judge below in his judgment overlooked the last provision of the bond, which I have already cited. Probably, on account of that omission his judgment has been in favour of the defendants. The next point that has been urged on behalf of the appellant is that the question of the liability of the defendants for the period of defendant 1's service, after the death of the surety, Mahendra Nath Roy, could not have been raised by them before the District Judge on appeal from the final decree. The argument on his behalf is that the defendants raised in their written statement the question of their non liability for the period after the death of Mahendra Nath Roy. Upon that an issue was raised which runs thus:

Are properties of the late Mahendra Nath Roy liable for the debt of defendant 1? If so, for what amount are the properties liable? What other relief, if any, is the plaintiff entitled to?

9. This issue was decided against the defendants. It does not, however, appear that the question of the liability of these defendants after the death of Mahendra, was specifically brought to the notice of the Subordinate Judge. The ordering portion of the judgment was that a preliminary decree for rendition of accounts be passed in this case ex parte against defendant 1 and on contest against defendants 2 to 8. Then there was a certain direction as to costs. The plaintiff's contention is that these defendants might and ought to have appealed against this preliminary decree. Not having done so, they are precluded from disputing the correctness of the preliminary decree in an appeal preferred from the final decree under Section 97, Civil P.C. The learned vakil for the respondents, however, argued that there was no decree from which those defendants could appeal, because on the facts found accounts had to be taken in the presence of these defendants in order to find whether they were liable for any amount for which defendant 1 had not accounted during the lifetime of their father Mahendra Nath Roy. The question seems to me to have been left in obscurity on account of the perfunctory manner in which the judgment of the former Subordinate Judge was written and the decree drawn up. It appears, however, that this question as to the liability of defendants 2 to 8, after the death of their father, was fully argued before the second Subordinate Judge when he was hearing the case with regard to the final decree, and no objection

was taken to that. He decided the point against the defendant's contention.

10. On appeal the very same point was allowed to be raised without objection before the District Judge who decided in favour of those defendants. Having regard to this circumstance I do not think it is open to us to say that this question ought not to have been allowed to be raised by these defendants after the preliminary decree had been passed. However, upon the finding that there was a contract to the contrary, as referred to in Section 131, Contract Act, that these defendants would be bound by the contract of suretyship entered into by their father Mahendra Nath Roy, for the period even after his death, this question becomes of no importance.

11. It is now necessary to find what the extent of liability of those defendants is. It has been contended on their behalf that they cannot under any circumstance, be made liable for anything in excess of Rs. 600, which can only be recovered by the sale of the property mortgaged in the surety bond by their father Mahendra Nath Roy. The learned vakil for the appellant rightly concedes that he cannot claim anything more.

12. The result, therefore, is that the judgment and decree of the District Judge, so far as defendants 2 to 8 are concerned must be set aside, and in lieu thereof a decree should be made modifying the decree of the Subordinate Judge to this effect : that if the plaintiff is unable to realize the amount decreed from defendant 1 he will be entitled to realize from the property mortgaged in the security bond dated the 27th March 1924, the amount due to the plaintiff not exceeding Rs. 600 by sale of the property. The costs of this appeal and those of the lower appellate Court will be in proportion to the success of each of the parties.

Mallick, J.

13. I agree.

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