Privy Council Appeal No. 30 *of* 1933.

Seth Pratapsing Moholalbhai and another - - - - - *Appellants*

v.

Keshavlal Harilal Setalwad and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER 1934.

Present at the Hearing:
LORD ALNESS.
LORD ATKIN.
SIR SHADI LAL.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the High Court at Bombay reversing the judgment of the Subordinate Judge at Ahmedabad who had given judgment for the plaintiffs. The suit was brought on a surety bond given by the defendants guaranteeing a loan on mortgage, which the plaintiffs had lent to one Desai Krishnalal Narsinhlal whose wife was a sister of the respondents. The defence was that the sureties had been released by the subsequent dealings between the creditors and the principal debtor. It appears that before the mortgage in question was executed the principal debtor, a pleader in Ahmedabad, had given mortages over four different parts of his immovable property to various creditors to secure loans which were then outstanding. The transaction with the creditors, who appear to be administrators of a charitable fund, was in the nature of a consolidation mortgage whereby Krishnalal was to borrow Rs. 1,25,000, which was to be applied in redeeming the four properties, the lenders to have a mortgage over the four properties. The mortgage deed, which is in Gujrati, is dated the 17th October, 1921. It is headed "Deed of mortgage with possession for Rs. 1,25,000 in respect of the property situate in North Dascroi.

After stating the parties it proceeds: I (the mortgagor) give this in writing as follows :—

> " To wit :—I have taken (borrowed) Rs. 1,25,000 in words one lac and twenty-five thousand in full, in cash, of the Bombay currency, on personal security. Interest on the same is to accrue due at the rate of nine per cent. per annum—in all Rs. 11,250 in words eleven thousand two hundred and fifty rupees are to accrue due (thereon) for interest every year. I am to pay every year the said interest including (interest for) an intercalary month. In security for the moneys of this deed and the interest thereon (I mortgage the following property :—) Houses and Bungalow and land belonging to me by right of exclusive ownership and being in my possession, which are situate within the sim (limits) of the City of Ahmedabad and Madalpar or Chhadavad and Vadaj in Taluka and Sub-district North Dascroi, District Ahmedabad. The particulars thereof are as under."

The document then proceeds to set out four properties :—

No. 1. Mortgaged to Jayantilal Motilal Co. for Rs. 30,000.
No. 2. Mortgaged to Jayantilal Motilal Co. for Rs. 25,000.
No. 3. Mortgaged to B. Maganbhai for Rs. 30,000.
No. 4. Mortgaged to Sheth Jiwanlal Chunilal for Rs. 16,500.

It then continues : " As to the property thus described . . . I have by this writing given the same to you in mortgage with possession for the moneys of this deed and the interest thereon and have made over that same into your possession." After providing that the income after meeting expenses for repairs, etc., is to be applied to keeping down the interest and as to any balance to be credited to principal it sets out terms as to insurance and repairs : " You have advanced the moneys of this deed to me for the period of a year. I am to pay the said moneys and the interest immediately after the expiry of the said period whenever you make a demand for the same." Then, after again setting out the particulars of the existing mortgages over the four properties the deed concludes :—

> " On the security of the aforesaid property Rs. 1,01,500 and the interest thereon are payable by me to the above mentioned persons. Therefore in order to enable you to pay off the said debt the amount of this deed (namely) Rs. 1,25,000 has been kept by me as Anamt (in deposit) with you. Therefore I am to get the said debt paid to them by you, to get the full satisfaction entered on the mortgage bonds relating to the said property and to obtain releases (reconveyances) according to law in respect of the said mortgage bonds and to hand over the same to you. Likewise I am to deliver to you the documents delivered by me to them as well as the documents that may be with me. And as to the surplus amount that may remain over, you are to hand over the same in cash to me. In this way Rs. 1,25,000 are to be made up and taken in full. And as regards the mortgage encumbrances that there are at present on the said property ; on the same being discharged with the moneys taken from you, the whole of the property mentioned in this deed will be deemed to be as in first mortgage for your amount. I have not in any manner given this property to any other person except as stated above, by a writing, nor is the same subject to any claim or share on the part of any one nor is the same subject to a charge for moneys due."

The surety bond was dated on the 24th October, 1921, the parties being the mortgagees to the deed above described and the two sureties. The material part is as follows :—

> " Desai Krishnalal Narsinhlal residing near Sevka's Wadi in Khadia, Ahmedabad borrowed from you Rs. 1,25,000 in words Rupees one lakh twenty five thousand in full in cash of Bombay currency at interest at the rate of Rupees nine per cent. per annum. In security of the said amount he has passed a deed of mortgage with possession of his property. That being so, should the said Desai Krishnalal Narsilal fail to pay the whole of the amount mentioned in the said deed with interest or should the same be not recovered from his property, then as to whatever amount may be found claimable by you with interest under the said deed we, our guardians, heirs and assignees jointly and severally are to pay the whole of the same. Should we fail to do so, you may recover the same from the person and property of ourselves and our guardians heirs and assignees in such way as you like."

The deed of mortgage there mentioned had, in fact, been shown to the sureties before they executed the bond.

The exact legal effect of the document of the 17th October immediately after execution is perhaps not very clear. It purports to be a deed of mortgage with possession, but at the time some of the properties at any rate were in the possession of the then mortgagees. The new mortgagees are to open an account of Rs. 1,25,000 in favour of the debtor. Interest is to run on this amount from the date of the account being opened. The debtor undertakes to operate on the account to redeem the four properties by paying the mortgage moneys mentioned, with, of course, interest and expenses. As each property is redeemed the appellants become mortgagees with possession of it in respect of the whole advance of Rs. 1,25,000 and interest. Meantime the appellants have a mortgage over the whole properties (*i.e.*, until redemption of each, a second mortgage) for the whole sum and the interest. On the 29th November, 1921, the debtor redeemed properties No. 1 and No. 2 for Rs. 60,000, which were duly debited to his account. On the 7th March, 1922, he redeemed property No. 3 for Rs. 34,000, which was also debited to his account. As to the fourth property, it was never redeemed, and the agreement of the 17th October in respect of it was never carried out. The respondents sought to put in evidence a document dated the 14th May, 1922, which, as they alleged, varied the mortgage deed. It was objected to as a document requiring registration under section 17 (b) of the Registration Act, and therefore inadmissible under section 49 of the same Act. The Trial Judge rejected it on this ground. Mr. Justice Nanavati, however, admitted it on the ground that it was not within section 17 (b), and, secondly, that it was in any case being used for a collateral purpose. The document is in the following words :—

> " To Messrs. Harilal Jethabhai and Sha Chunilal Bhagubhai managing representatives of the firm of Sheth Anandji Kalyanji, both residing at Ahmedabad. Written by Desai Krishnalal Narsinhlal residing at Sevka's

Wadi in Khadia, Ahmedabad. To wit :—On 17-10-1921 I passed in your favour a deed of mortgage with possession for Rs. 1,25,000 in words one lac and twenty-five thousand and got it registered on the same day. In para. 4 of the aforesaid document there has been mentioned a piece of land admeasuring 1 acre and 3 Gunthas out of 4 acres and 22 Gunthas, bearing Old survey No. 578 and Revision Survey No. 562 in the outskirts of Mouze Vadaj, a village in Taluka North Daskroi ; and the said land was purchased in the name of Thakor Shambhuprasad Chimanlal on my behalf and with my moneys Having borrowed Rs. 16,500 in words sixteen thousand and five hundred, I have given the same to Sheth Jivanlal Chunilal in mortgage with possession. The said land is still in the possession of the said Sheth Jivanlal Chunilal ; and now it has been settled that I should sell the said land to the mortgagee Sheth Jivanlal Chunilal for the mortgage amount and the amount of interest thereon. That being so, I am not to take from you and you are not to pay me such amount as would be covered by the said land. That is to say, I have received under the said deed of mortgage with possession Rs. 94,125 in words ninety-four thousand one hundred and twenty-five which I got paid by you to different mortgagees and as to Rs. 5,875 in words Rupees five thousand eight hundred and seventy-five being the balance which I was to take under the deed of mortgage with posession of the said date, I have this day got the same paid by you in cash in Bombay currency to Mr. Kunjlal Tolaram. Thus I have received Rs. 1,00,000 in words Rupees one lakh under the deed of mortgage of the aforesaid date against the properties mentioned in paras. 1, 2 and 3 and excepting the land in the outskirts of Vadaj mentioned in para. 4 out of the properties mentioned in the whole document of the aforesaid date. And the deed of mortgage with possession of the aforesaid date is to be considered as the deed of mortgage with possession of properties mentioned in paras. 1, 2 and 3 for that much amount with interest accruing due thereon. Ahmedabad. The 14th May, 1922. My own handwriting.

It is signed by Krishnalal. The document was stamped as a receipt, but it is more than a receipt and appears in terms to be a written agreement to vary the terms of the mortgage of the 17th October, 1921. The last sentence of the document seems to make this evident. Mr. Justice Nanavati, considering that the document of the 17th October, 1921, was only an agreement to give a mortgage, and did not itself create any charge over land, saw no reason why such an agreement should not be varied by an unregistered agreement. In this view it would appear that the earlier document itself need not have been registered. But, in their Lordships' opinion the earlier document created a charge upon immoveables, while the later document released the charge upon the property No. 4. It came, therefore, directly within the terms of section 17 (b), required registration and was not admissible in evidence. If this be so, it would not be open to the respondents to give secondary evidence of the agreement contained in the document of the 14th May by producing the entry in the plaintiffs' journal, which was admitted by Mr. Justice Nanavati, or by tendering any other evidence. This would be in violation of section 91 of the Indian Evidence Act. Nor, in their Lordships' opinion, if the document be inadmissible as between the parties,

can it be said to be used in the present suit for a collateral purpose. It is sought to be used for the express and direct purpose of showing that property No. 4 was in fact released under the varied mortgage constituted by the document in question. The decisions as to collateral use of unregistered documents are, therefore, irrelevant, and are not under consideration in this judgment. It follows from what has been said that the Trial Judge was right in rejecting the evidence proffered by the defendants that the mortgage of the 17th October had been varied by the agreement of the 14th May.

But the defendants say that the matter does not rest there. Though they failed to prove the specific agreement to vary the original contract, they did succeed in showing, according to this contention, that the original contract was not in fact performed. As to this the facts are not really in dispute. What happened as to the property No. 4 was that Krishnalal sold it to the then mortgagee for a sum which is not stated. That this was done with the assent of the plaintiffs is clear. Krishnalal, of course, put it out of his power to redeem the mortgage No. 4 : no part of the advance of Rs. 1,25,000 could be used for the purpose of redemption : and the plaintiffs recognised the position and appreciated that they had no further claim on the property. As one of the plaintiffs said in evidence, " We had no right to the security of vaday land [No. 4] thereafter, as we were not to pay thereafter." To redeem the first three properties the plaintiffs had advanced Rs. 94,000.

To redeem the fourth property would have required Rs. 16,500 with such interest as might be due. Any balance from the Rs. 1,25,000 would have been paid to Krishnalal. In fact, the plaintiffs appear to have advanced no more than Rs. 1,00,000, paying to Krishnalal a sum of Rs. 5,875, which, with Rs. 125 costs and the Rs. 94,000, made up the round sum mentioned. And for this sum only with interest is his claim against the sureties based. It appears, therefore, that whereas the guaranteed transaction was an advance of Rs. 1,25,000 on security of four properties, the transaction carried out was an advance of Rs. 1,00,000 on security of three properties.

In their Lordship's opinion the sureties cannot be held liable in respect of this performance, which was not what they contracted to guarantee.

It appears to their Lordships that the law on the discharge of sureties has been somewhat obscured by the emphasis laid in the cases on an agreement between the parties to vary the terms of the original agreement. The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there

is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. In the vast majority of cases a different performance of the original contract is due to an express variation of the terms between the parties; and it is natural that the reported cases should mainly deal with this situation. But it is important that the underlying principle should not be obscured. A good illustration of the essential rule is afforded by the case of *Blest* v. *Brown* (1862) 4 De G. F. & J. 367, at p. 376. In that case the surety had guaranteed the payments by a baker to the flour merchant for flour to be delivered to the baker for the purpose of baking bread that he supplied for army requirements. The flour was to be of specified quality. The merchant delivered flour which was not of the contract description. The surety commenced a suit in Chancery to have it declared that the surety bond was void in equity by reason of misrepresentations and "by reason of the conduct of the parties." After dealing with the case based upon misrepresentation, the Lord Chancellor, Lord Westbury, proceeded as follows:—

> "It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say 'The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.' Now, I construe this engagement to be an engagement to be answerable for flour supplied in conformity with the requisitions of this contract. Then I ask *de facto* was any flour supplied to Millar in conformity with the requisitions of the contract. The answer of the defendants themselves is an admission that none such was supplied. The conclusion is plain, therefore, that no legal obligation so far as the surety is concerned arises upon what has been done under this contract so construed, as I hold it ought to be construed, and as involving the representation that I have stated."

A similar application of the principle may be found in *Smith* v. *Wood* [1929] 1 Ch. 14. There a number of persons as co-sureties had deposited their title deeds with the creditor to secure a debt of the principal debtor. The creditor allowed one of them to create a prior charge in favour of a third person. It was held that though the creditor had not released his charge, yet he had permitted a prior charge to be created which interfered with the rights of the other co-sureties to have the securities marshalled: and that performance being altered in this way they were all discharged. It is unnecessary to consider whether the case might not have been treated as one where a security

was sacrificed, in which case the sureties might only have been discharged to the extent of the value of the security lost. Its value for the present purpose is that without any agreement between the creditor and the surety to vary the contract, the fact that the creditor stood by and permitted something to be done which made the original performance impossible discharged the other sureties whose consent had not been obtained. In their Lordships' opinion, therefore, the sureties are being sued in respect of an obligation which they did not contract to make good, and are entitled to succeed.

It is, perhaps, desirable to add that the application of this principle must always depend upon a correct analysis of the contract in fact made. Guarantees frequently relate to obligations without special reference to any specific contract between the creditor and the principal debtor. In such a case the doctrine referred to would have a very limited operation. In the present case, as in many others, the contract between the creditor and the principal debtor was the basis of the surety bond. It was shown to the sureties before the bond was executed and is referred to in the body of the document.

Having arrived at this conclusion, it becomes unnecessary to consider the effect of section 133 of the Indian Contract Act. Whether that much-discussed section relates only to continuing guarantees or is intended to affect a guarantee of one obligation, and if so what it means, it is unnecessary to determine. In any view of the section it cannot, in their Lordships' opinion, operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor to his promise. It could hardly be contended that in India, if a surety guaranteed repayment of an advance to be made to the principal debtor on a specific contract that the advance was to be applied towards the purchase of real estate, the creditor could, whether he and the debtor rescinded the specific contract or not, recover from the surety on the advance of a sum made to finance speculations in shares. And while by section 128 the liability of the surety is coextensive with that of the principal debtor, it only extends to this liability on the contract guaranteed and not on something different.

For the above reasons, which appear to be in substance the foundation of the judgment of Baker J. in the High Court, their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of this appeal.

In the Privy Council.

SETH PRATAPSING MOHOLALBHAI
AND ANOTHER

v.

KESHAVLAL HARILAL SETALWAD
AND ANOTHER.

DELIVERED BY LORD ATKIN.

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