
(1872) 08 CAL CK 0013

Calcutta High Court

Case No: None

Ambica Charan Bose

APPELLANT

Vs

Kali Prasanna Roy

RESPONDENT

Date of Decision: Aug. 31, 1872

Judgement

Sir Richard Couch, Kt., C.J.

This suit was brought on a promissory note of the defendants for Rs. 2,500, dated the 19th of October 1870, and payable three months after date, with interest at 24 per cent per annum, and the plaintiff stated that the plaintiff on the 29th of January 1871 received from the defendants Rs. 250 on account of interest. The defence was that the note was made by the appellant as surety for the other defendant, with the knowledge of the plaintiff, and that the Rs. 250 which the plaintiff alleged that he received as interest was in excess of the interest then due, and was given to and taken by the plaintiff without the knowledge or consent of the appellant, and thereby the appellant became discharged. The plaintiff in his evidence said that he went to the first defendant, the principal, on the 19th of January, and was told by him he would pay interest a week or ten days afterwards, and on the 29th of January, the first defendant paid him Rs. 250 for interest; that he made no application for payment to the appellant; that the Rs. 250 was more than what was due for interest then,--it represented the interest which would be due up to the 19th of March; that he first applied to the appellant for payment in September 1871. He also said that on the day he was paid the Rs. 250, or two or three days before, the first defendant told him that the appellant joined in the note for his accommodation: and Macpherson, J., has found that he was aware from the first that the appellant was merely a surety. In reply to questions by the Court, he said, "I received the Rs. 250 on account of interest. I simply asked him to pay on account of interest, and he gave me that amount, and I gave him credit for it."

2. The rule that, if a creditor enters into any binding-contract the effect of which will be to give further time to the debtor without consulting, the surety, the surety will be thereupon discharged, and that it is immaterial that the further time was given in consequence of the

inability of the debtor to pay, or that no injury could thereby accrue to the surety, was laid down by Lord Loughborough in *Bees v. Barrington* 2 Tu. L. Ca., 887 : S.C., 2 Ves Jan., 540, and Lord Eldon in *Samwell v. Howarth* 3 Mer., 372. It has been followed in the Courts both of Equity and; Common Law in many cases which are mentioned in the note to *Rees v. Barrington* 2 Tu. L. Ca., 887 : S.C., 2 Ves Jan., 540, and must be followed by this Court.

It was argued by Mr. Branson for the plaintiff that there was no binding contract to give time; as if this meant an express contract. But a contract need not be expressed in writing, or by words, to be binding; a tacit or implied contract inferred from the acts of the parties is equally binding as an express one. The facts of the case of *Blake v. White* 1Y. & C., 420 are no doubt different from the facts of the present case; but the law laid down by Lord Lyndhurst, then Lord Chief Baron, is clearly applicable, He says, p. 426;--"But the question is, whether time was not given to the first of January 1819 upon a valuable consideration. The fact is admitted that the obligee received interest up to that time in the month of October preceding. Could he then in the interim have been allowed by a Court of Equity to bring his action on the bond? I think not. It is admitted that, in the case of a principal only, without a surety, if the debtor had given six months' interest in advance, a Court of Equity would interfere to stop the action. If, in such a case, the time for payment of the interest could be explained consistently with the action, that would alter the state of the case; but, if it appear simply that the six months' interest had been given, what could the imagination suggest but a contract *ipsissimis verbis*, that the creditor should not sue for that time? Besides, the interest being paid, would a Court of Equity endure that the creditor should put that interest into his pocket, and next day sue for the principal? If that be so, as between the principal debtor and the obligee, the same principles will apply to the surety. The question here is whether the party did not preclude himself from suing on the bond, by receiving by anticipation the interest due between October and January. The shortness of that period cannot affect the question. Taking even an hour's interest in the same manner, if it were the habit to reckon interest by hours, would be attended with the same consequences. Under the present circumstances I must grant this injunction." The Judgment was not founded upon the memorandum in writing to which Macpherson, J., alludes as distinguishing this from *Blake v. White* 1Y. & C., 420, for Lord Lyndhurst in the previous page speaks of it as a mere agreement to give time without any consideration, which would not prevent the creditor from successfully prosecuting his action at law. ""But the question is" he continues as above quoted.

3. Putting the most favorable construction upon the plaintiff's evidence, and allowing that the Rs. 250 were not paid on any calculation that it was interest which was due for two months in advance, or for any other time, it is a fact that interest was received by anticipation, and the time for which it was received was a matter of simple calculation. I think it is clear that, under those circumstances, a Court of Equity would have interfered to stop the plaintiff from suing the first defendant until the time which was covered by the payment in advance had expired. The plaintiff bound himself to give further time, and the

appellant was thereupon discharged from his liability on the note.

4. The decree, so far as it applies to the appellant, should be reversed, and the suit be dismissed as against him with costs, and the costs of the appeal should be paid by the respondent.

5. Markby, J.--In this case I do not think it necessary to examine the facts at length. It is admitted that the principal debtor paid to the creditor at the creditor's request, on the 29th January, a sufficient sum to cover the interest upon the debt up to the 19th of March, and it seems to me, with the greatest deference for the opinion of the learned Judge who decided this case in the first instance, that it is impossible to avoid inferring from that an undertaking that the creditor will not sue the principal debtor during that period. I do not discuss this part of the case further, because it has been clearly shown by the Chief Justice that the case of *Blake v. White 1 v. &c.*, 420 distinctly lays down that we ought to infer this.

6. But then comes the question (and it is one which, from the way in which the case was then decided, was not considered in the first Court), what effect has this giving of time upon the engagement of the surety? Giving time to the principal debtor, though, as a general rule, it discharge the surety, does not always do so; see *Green v. Wynn L.R.*, 7 Eq., 28; *S.C on appeal, L.R.*, 4 Ch., 204 and the question we have to decide is whether we ought to infer in this case from the receipt of interest such a giving of time as would discharge the surety. There was no intention to discharge him, and we can only give the surety his discharge if it is necessary to do so, in order to do Justice between the parties. For these reasons it appears to me necessary to examine very carefully the grounds upon which the surety is discharged when he is discharged. Now, the most recent case on the subject to which we have been referred is that of *The Oriental Financial Corporation v. Overend, Gurney & Co. L.R.*, 7 Ch. 142, and as this case has been argued on both aides entirely upon the principles of English law, and as that case was decided by very high authority, our decision would ordinarily be governed by it, In that case it is laid down as the true explanation of law to be applied in such cases that, "if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety, you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal." And then it is added that it is plain that this is the right explanation of the law, because " it is competent to the creditors to reserve all their rights against the surety it which case the surety is not discharged; and for this reason that the contract made with, the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal; "and at the end of the judgment it is said the defendants would have freed themselves from all difficulty by reserving their rights against the plaintiffs.

7. Now, if this be true ratio legis, I should certainly feel difficulty in saying that the surety was wholly and absolutely discharged by the acceptance of interest in advance from the principal. An undertaking by the creditor not to sue the principal debtor during the period in respect of which interest has been paid is implied, because otherwise, as Lord Lyndhurst points out in *Blake v. White 1Y. & C.*, 420, the injustice would follow that the creditor might put the interest into his pocket, and next day sue the principal. But we are asked to infer from the acceptance of interest in advance, not only a suspension of the right to sue the principal, but an absolute discharge of the surety. Now, if (as it seems to be put in *The Oriental Financial Corporation v. Overend, Gurney & Co. L.R.*, 7 Ch., 142, the creditor was prevented from suing the surety, only because his so doing would be a breach of the contract with the principal, it seems to me that the only inference, which in reason or justice could be made, would be, not that the surety was discharged altogether, but that the right to sue him was suspended for the same period as the right to sue the principal was suspended; so that the surety might not, by being sued during that period, be turned upon the principal. But, on a reference to some of the earlier authorities, most of which are quoted and recognized in *The Oriental Financial Corporation v. Overend, Gurney & Co. L.R.*, 7 Ch., 142, I am satisfied that the rule of law by which the surety is discharged does not rest exclusively on a consideration of the rights of the principal debtor, but upon a consideration of the rights of the surety himself. It seems to me in the first place, (I say it with the greatest deference,) that the judgment in *Oriental Financial Corporations Overend, Gurney & Co. L.R.*, 7 Ch., 142 does not quite correctly state the opinion of Lord Cranworth in *v. Homan* 4 H.L. Ca., 997. What Lord Cranworth said was not simply that the rights against the surety could be reserved, but that he thought "it must be competent to a creditor to contract with his principal debtor to give him time so far as he can lawfully and effectually do so, without prejudicing his right against the surety." This was said by way of protest against an opinion, which appears to have been expressed by Lord Truro in the Court below that a creditor could not reserve his rights against the surety. But the observations and counter-observations of these learned Judges must be taken with reference to the sort of reservation which had been actually made in that case. The contract by which time was given in that case provided that nothing therein contained should discharge the sureties; but whilst providing that the creditor would not take any proceedings against the principal during the period specified these important words were added, "except at the instance or request of the sureties." It was therefore, not merely reservation of the creditor's right against the surety, but a reservation of their mutual right, the right of the creditor to compel the surety to pay the debt, and the right of the surety to compel the creditor at any time to sue the principal debtor."

8. This at once suggests a doubt whether the principle on which the surety is discharged is correctly, or, at any rate, fully stated in *The Oriental Financial Corporation v. Overend, Gurney & Co. L.R.*, 7 Ch., 142, and I think the very authorities referred to in that judgment do introduce another and a very important element. I find that in *Oakley v. Pasheller* 10 Bli., 548; at p. 590, Lord Lyndhurst says:--""The principle of law is this, that, where a creditor gives time to the principal, there being a surety, without any communication with

the surety, and without the consent of the surety, it discharges him from liability, because it places him (i.e., the surety) in a new situation, and exposes him to risk and contingencies which he would not otherwise be liable to:" and the Master of the Rolls had given a similar reason, namely, that the surety is thereby prejudiced. And so in another case to which the Lord Chancellor refers, *Samuell v. Howarth* 3 Mer, 273, Sir William Grant says:-- "The surety is held to be discharged for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract." The principle is explained in the same way by Williams, J., in *Strong v. Foster* 25 L.J., C.P., 106 : at p. 111: S.C., 17 C.B., 201 where he says:--"The surety has a right to say to the creditor, "I have reason to believe the debtor is in insolvent circumstances; you should sue him, or allow me to do so in your name." Then, if the creditor said, "I cannot sue him because I have bound myself to give time, that would discharge the surety:" and this explanation was adopted by the Court of Queen's Bench in *Pooley v. Harradine* 26 L.J., Q.B., 156 : at p. 160 : S.C., 7E. & B., 431. These cases put the principle upon a very clear and intelligent basis-- that the surety is discharged, not only because the principal debtor would be prejudiced by proceeding against the surety, but because the surety is prejudiced by the loss of the right to proceed against the principal debtor; and this fully accorded with the opinion intimated in *Owen v. Homan* 4 H.L. Cs., 997, namely, that, if with the assent of the principal debtor this right of the surety is reserved by the creditor, then the surety, not being prejudiced, is not discharged. I do not of course mean to say that the principle, exactly as stated in the case of *The Oriental Financial Corporation v. Overend, Gurney & Co.* I.R., 7 Ch., 149 has not been so stated by other authorities. It is so stated in a note to *Lewis v. Jones* 4 B. & C., 506, which is frequently quoted, and by Lord Eldon in *English v. 2 Bos & Pul.* 61, and it is to be found in various text books. Nor can there be any doubt whence this statement of the principle has been derived. It is almost a literal translation of a passage in the Digest of Justinian:-- "Quod cum sit, at non" Digest, Bk. II Tit 14 par 32. And as to this it is further said:-- "Debitoris coventio fidejussoribus proficet, nisi hoc non petatur, a petatur; tunc exceptions non " par, 22. But this is said of a contract wholly different from a contract of suretyship. The creditor here alluded to was under his obligation to preserve the remedies of the surety against the principal debtor, and was not, therefore, bound to pay any regard to the rights of the surety in his arrangement with the principal debtor. If therefore the creditor gave time to the principal debtor, the surety could originally take no advantage of it, but afterwards he was allowed to do so i.e., for the sake of the principal debtor, because otherwise the principal debtor would be prejudiced; for should the surety be sued by the creditor, he would then be able to sue the principal debtor at once, though the time given had not expired. But if the rights of the creditor to sue the surety had been preserved in the contract to give time, then, as the principal debtor could not complain, so neither could the surety, and the surety was liable first as before. This is no doubt exactly the principle laid down in *The Oriental Financial Corporation v. Overend, Gurney & Co.* L.R. 7 Ch., 142, but is applied to a transaction of an essentially different kind, and with a wholly

different result, namely, that the remedy against the surety is not extinguished, but suspended. Bearing in mind and applying the principle as it is explained in *Samuell v. Howarth* 3 Mer., 273 and *Strong v. Foster* 25 L.J., C.P., 106 : at p. 111 : S.C., 17 C.B., 201, and, I must say as it seems to me, though perhaps not quite so clearly, in *Oakley V. Pasheller* 10 Bli., 548; at p. 590 also, there is, I think, little difficulty in disposing of the present case. The creditor had accepted interest in advance from the principal debtor, and he had thereby not only put it out of his own power to sue the principal debtor for a certain period, but had also put the principal debtor in a position in which it would be a hardship that he should be used by any one at all during that period. But though all that the principal debtor could require us to say upon this would be that the rights of the surety against him should also be suspended, the surety could not be thus satisfied. The creditor has no right to put the surety without his consent in a position, in which he cannot exercise his rights against the principal debtor at any time be to do so. Nor can we say the rights of the creditor against the surety are reserved. A simple reservation of the rights of the creditor would not be sufficient; the surety's rights must also be reserved. But that is excluded by the acceptance of interest, for no one would pay interest in advance, unless he was secure against being sued either by the creditor or the surety. The surety, therefore, whose rights have been interfered with by the voluntary act of the creditor, without his consent, has a right to say that he is discharged, It may perhaps appear unnecessary for me to have discussed this case at so great a length, seeing that I arrive ultimately at the same conclusion as the Chief Justice. It must, however be acknowledged that the case before us is a striking example of the serious consequences of ignorance upon this subject; and as the law upon it is not very easy to discover, I have thought myself justified in making this endeavor to ascertain how it really stands.