

Proceedings of the Legislative Council), which points to the conclusion that the words "*bona fide*" were advisedly omitted from the article, to exclude the possible inference that absence of such notice was necessary to enable the purchaser to avail himself of the article.

Upon the whole we must confirm the decree with costs.

Decree confirmed.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

BALKRISHNA V. N. KIRTIKAR AND OTHERS (*Original Defendants 2 to 7*), *Appellants v. THE BANK OF BENGAL (Original Plaintiffs)*, Respondents.* [30th January and 6th and 13th February, 1891.]

Surety—Principal and surety—Guarantee—Discharge of surety—Concealment of material fact from surety—Contract Act (IX of 1872), s. 143—Further duties imposed on person for whom defendants were sureties.

In August, 1881, the defendants became sureties to the Bank of Bengal for the due discharge by one Bhau Krishnarav of the duties and liabilities of the office of *khajanchi* of the Bank in Bombay. Bhau Krishnarav was the second clerk in the Bank, and it was arranged between him and the Agent that he should [586] still continue to fill that office. He did so after his appointment as *khajanchi*, and he received the same salary as before in respect of it. In 1889 defalcations, for which as *khajanchi* he was responsible, were discovered to the extent of Rs. 1,42,142. The Bank obtained a decree against him for the total amount, and they sued the defendants as sureties. The defendants pleaded that they were not liable, inasmuch as the Bank had appointed Bhau Krishnarav to perform the duties of second clerk, in addition to those of *khajanchi*, without their knowledge and consent, and they contended that such appointment amounted to a subsequent variation of the contract which discharged them, under s. 143 of the Contract Act (IX of 1872), as to transactions subsequent to the variance.

The Court was of opinion that inasmuch as the evidence showed that Bhau Krishnarav was second clerk at the time of his appointment as *khajanchi* and continued afterwards to fill that office by arrangement between him and the Agent of the Bank, the question was not whether there had been a subsequent variation of the contract, but whether, as the surety-bond was silent as to this part of the arrangement between the Bank and Bhau Krishnarav and it was made (as the defendants alleged) without their knowledge and consent, they were discharged from liability on the ground that a material circumstance had been concealed from them.

Held, that the defendants were not discharged from liability. The expression "keeping silence" in s. 143 of the Contract Act clearly implies intentional concealment as distinguished from mere non-disclosure. The withholding must be fraudulent, as necessarily is the case when the material circumstance is intentionally concealed. In this case there was not the slightest reason to suppose that there had been any intentional concealment by the Bank of the fact that Bhau Krishnarav was to continue to fill the office of second clerk, or that, if the defendants had been informed of it, it would have in the least degree affected their readiness to make themselves liable for his faithful discharge of the duties of *khajanchi*. The evidence showed that the duties of the two offices were perfectly distinct, and, therefore, even if Bhau Krishnarav had been re-appointed to the office of second clerk after his appointment to the office of *khajanchi* (as it was contended for the defendants was the proper way of regarding what occurred), there would have been no material alteration in the

* Suit No. 700 of 1889 : Appeal No. 692.

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duties of *khajanchi* which would have relieved the defendants from their obligation as sureties, but merely the addition of a new office which would not affect the sureties' liability, unless indeed the surety-bond contained an agreement that the principal should not undertake any other business.

It was also contended for the defendants that they were discharged from liability, inasmuch as in the year 1883, the names on certain bills discounted with the Bank were found to be forged. The Bank then made a claim upon Krishnarav in respect thereof, and he repudiated his liability. The defendants contended on the authority of *Phillips v. Foxall* (1), that it was the duty of the Bank to have informed them of this occurrence at that time.

Held (distinguishing *Phillips v. Foxall*) that it could not have been assumed that Krishnarav was infallible in detecting forgeries, and the guarantee given by the [587] defendants was not, therefore, founded on that assumption, and, therefore, fair dealing could not require that the Bank should at once have informed the sureties as soon as Krishnarav had proved to be fallible.

THIS suit was brought by the Bank of Bengal against the appellants and against one Bhau Krishnarav. (defendant No. 1), on a bond dated 15th August, 1881, executed by the appellants (defendants 2 to 7) to the Bank as sureties for the said Bhau Krishnarav, who was in the employment of the Bank.

The plaint stated that the said Bhau Krishnarav filled the office of *khajanchi* of the Bombay Agency of the Bank of Bengal; that on the 15th August, 1881, the appellants, (defendants 2 to 7), had, as sureties, joined with the said Bhau Krishnarav in executing a bond in favour of the Bank as security for the fulfilment of the duties of his said office by the said Bhau Krishnarav and of those employed under him, in addition to the security given by way of deposit by the said Bhau Krishnarav. The said bond was in the sum of Rs. 30,000, but it was recited therein that the said appellants (defendants 2 to 7) had agreed to become such sureties, upon the understanding that each of them should be liable only to the extent of Rs. 5,000 by reason or means thereof.

The plaint further set forth that the said Bhau Krishnarav had been recently dismissed from his said post in consequence of irregularities; that some securities upon which the Bank had advanced money were lost; others were found to be forged; and the Bank alleged that their claim against Bhau Krishnarav, in respect of matters for which he was liable, amounted to Rs. 1,42,286, and they prayed judgment against him for that sum. They also contended that the defendants were liable, under the bond, to the extent of Rs. 5,000 each, and prayed for judgment accordingly against them.

The condition of the bond was expressed as follows:—

“That if the said Bhau Krishnarav has hitherto faithfully discharged and still henceforth faithfully discharges the duties, liabilities and responsibilities which from time to time devolve on him as such *khajanchi* as aforesaid, or if the said sureties as far as the limits of their respective obligations permit or either of them, or either of their heirs, executors, administrators or representatives shall at all times save harmless and keep indemnified the said Bank, their successors and assigns against all damages, losses, costs, charges and expenses which the said Bank, their successors or assigns may incur, pay, sustain or be or become [588] liable for by reason of their having taken the said Bhau Krishnarav into their service, or by reason of any act, mismanagement, mistake in calculation, misrepresentation, dishonesty, embezzlement, fraud and neglect, or default of or by the said Bhau Krishnarav whilst in the service of the

(1) L.R. 7 Q.B. 666.

said Bank, or of or by his substitute, agent or representative for the time being, or of or by any of the native establishment for the time being or of the said Bank or of the native subordinates thereof the said *khajanchi*, the foregoing bond shall be void, but otherwise still remain in full force."

By the said bond it was further agreed and declared that the duties, liabilities and responsibilities devolving on the said Bhau Krishnarav were—

"Such as either by custom or contract usually devolve upon a *khajanchi* in the employ of the Bank of Bengal, including the duty of appointing a sufficient native staff for carrying on the business of the cash department of the Bombay Agency of the said Bank, and of dismissing any person or persons so appointed whom the said Bhau Krishnarav shall be directed by the Bombay Agent of the said Bank to dismiss, and of appointing another or others in the stead of the person or persons so dismissed, and also including responsibility for the intermissions of any person so appointed as aforesaid and for the correctness and genuineness of all *hundis*, securities, vouchers, deeds, documents, writing and signatures written in any native language or character and liability to make good to the said Bank any loss or damage that may be sustained from any forged instrument or signature, and also including the duty of enquiring into and as far as possible ascertaining and if required so to do of truly and faithfully reporting in writing upon the identity, credit, solvency and circumstances of all persons being natives of India, having dealings of any kind with the said Bank, and the sufficiency of all securities and indemnities offered to the said Bank and also including the liability of making good to the said Bank all losses and expenses by reason of any wilful carelessness or default or misrepresentation in any such enquiry or report as aforesaid and also including responsibility for the safe custody of all bullion, cash, securities and other property belonging to or deposited with the Bombay Agency of the said Bank, and liability for any loss occasioned by reason of the receipt of bad or base coin and also including, in the event of absence through illness or otherwise, the duty of appointing with the approval of the Agent of the said Bank a fit person to act for him as *khajanchi*."

The defendants (appellants) other than Bhau Krishnarav (defendant No. 1) filed a written statement in which they admitted the execution of the bond, but contended that they were not liable to the Bank, inasmuch as at or prior to the execution of the bond they had not been informed by the Bank that the said Bhau Krishnarav was to act as second clerk of the Bank in addition to his duties as *khajanchi*; that he had since been acting in the two-fold capacity, and that his duties and responsibilities [589] had thereby been greatly multiplied and their risks as guarantors had been greatly increased.

The defendants also alleged as a defence that in 1883 the names on certain bills discounted with the Bank were discovered to be forged; that the Bank made a claim upon Bhau Krishnarav in respect thereof, and he repudiated his liability. The defendants submitted that the Bank ought to have informed them at the time of the occurrence, and that by the Bank's omission to do so they were discharged from all liability on the bond.

Previously to and at the time of his appointment to the office of *khajanchi* Bhau Krishnarav had been second clerk to the Bank, and it was

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arranged between the Agent and him that he should still continue to fill that office. He accordingly did so, and received the same salary as before in respect of it.

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The case was heard by Parsons, J., on the 9th June, 1890. Bhau Krishnarav, (defendant No. 1), did not appear, and judgment was passed against him for Rs. 1,42,142. The other defendants appeared by counsel and defended the suit. Judgment was passed against them for Rs.5,000 each, as prayed.

They appealed.

Lang and *Scott*, for appellants.

Latham (Advocate General), *Starling* and *Inverarity*, for respondents.

The following authorities were cited :—*Bonar v. Macdonald* (1); *Holme v. Brunskill* (2); *Railton v. Mathews* (3); *Hamilton v. Watson* (4); *North British Insurance Company v. Lloyd* (5); *Pybus v. Gibb* (6); *Skillett v. Fletcher* (7); *Skillett v. Fletcher* (8); *Phillips v. Foxall* (9); *Sanderson v. Aston* (10); *Mayor, &c., of Durham v. Fowler* (11); *Lloyds v. Harper* (12); *Burgess v. Eve* (13); *Anderson v. [590] Thornton* (14); *Wythes v. Labouchere* (15); *Davies v. London and Provincial Marine Insurance Company* (16); *Sanderson v. Aston* (10); *Smith v. Chadwick* (17).

JUDGMENT.

SARGENT, C.J.—This appeal arises out of a suit brought by the Bank of Bengal on a surety bond dated 15th August 1881, by which the defendants made themselves liable for the faithful discharge by Bhau Krishnarav of the duties, liabilities and responsibilities which from time to time might devolve on him as *khajanchi* for the Bombay Agency of the Bank. Two objections have been taken by the defendants to their liability on the bond (1) that the Bank appointed Bhau Krishnarav to perform the duties of second clerk, in addition to those of *khajanchi*, without their knowledge and consent; (2) that in or about the year 1883 the names on certain bills discounted with the plaintiffs were discovered to be forged, and the plaintiffs claimed upon Krishnarav in respect thereof, and the said Bhau Krishnarav repudiated his liability; and that it was the duty of the plaintiffs to have informed the defendants at the time of such occurrence.

It was contended, in support of the first objection, that what had happened amounted to a subsequent variance, without the surety's consent, in the terms of the contract between the principal and the creditor which by s. 133 of the Contract Act IX of 1872 discharged the surety as to transactions subsequent to the variance: and *Holme v. Brunskill* (2) was relied on as showing that the Court would not enquire whether such variance would materially increase the surety's risk. The evidence of Mr. Slater, the Agent of the Bank, as to this shows that it had been arranged between the Agent of the Bank and Bhau Krishnarav at the time of his

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| (1) 3 H. L. C. 226. | (2) L. R. 3 Q. B. D. 495. |
| (3) 10 Cl. & Fin. 934. | (4) 12 Cl. & Fin. 109. |
| (5) 10 Ex. 523 (675). | (6) 6 Ell. & Bl. 902. |
| (7) L. R. 2 C. P. 469 (473). | (8) L. R. 1 C. P. 217. |
| (9) L. R. 7 Q. B. 666. | (10) L. R. 8 Ex. 73. |
| (11) L. R. 22 Q. B. D. 394. | (12) L. R. 16 Ch. D. 290. |
| (13) L. R. 13 Eq. 450. | (14) 3 Q. B. 271. |
| (15) 3 De. G. & J. 593. | (16) L. R. 8 Ch. D. 469. |
| | (17) L. R. 9 App. Cas. 196. |

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consenting to Bhau Krishnarav's assuming the office of *khajanchi* that he should continue to fill the office of second clerk as he had hitherto done; and it is admitted by the Bank that he did so and received the same salary as before in respect of it. The question, therefore, for consideration is not whether there was a subsequent variation in the contract, the faithful discharge of which would discharge the surety, as was the case [591] in *Holme v. Brunskill* (1), but whether, as the bond was silent as to this part of the arrangement between the Bank and Bhau Krishnarav, and it was entered into, (as the defendants allege), without their knowledge and consent, they are discharged from their liability under the said bond.

They rely on s. 143 of the Contract Act, which provides that "any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid." The expression "keeping silence" clearly implies intentional concealment as distinguished from mere non-disclosure, which no doubt is of itself a fatal objection in insurance policies, and virtually, we think, expresses what is laid down in *North British Insurance Company v. Lloyd* (2) that the withholding must be fraudulent, which necessarily must be the case when a material circumstance is intentionally concealed. It is not necessary, therefore, to consider the decision of the House of Lords in *Railton v. Mathews* (3) which, it was argued, did not require the concealment to be fraudulent. We may remark, however, that in the *North Insurance Company v. Lloyd* (2) the case of *Railton v. Mathews* (3) was explained as turning upon a question of pleading, and it was pointed out that the House of Lords itself in *Hamilton v. Watson* (4) had ruled otherwise.

In the present case there are no circumstances affording the slightest reason for supposing that there was any intentional concealment by the Bank of the fact that Bhau Krishnarav was to continue to fill the office of second clerk, or that if the defendants had been informed of it, it would have in the least degree affected their readiness to make themselves liable for Krishnarav's faithful discharge of the duties and responsibilities of the office of *khajanchi*. The duty of the second clerk, as stated by Mr. Slater, the Manager of the Bank, is "to write up scroll cash book from the vouchers as they are passed by the Accountant." He adds: "He has no responsibility for those transactions; he only enters the vouchers as they are passed." [592] The second clerk "also keeps the register of shipping documents and writes up 'bills for collection' book, and sends a memo of the cash balance every evening to the head office." He also says that Krishnarav was by arrangement with the Bank to have the aid of an assistant to carry on those duties. On the other hand, the duties of *khajanchi*, as stated by Mr. Slater, "are to examine, verify and guarantee all native signatures or documents for money, and give the Agent information as to the bazar, and report as to the status of Bank's obligants. I rely on him a good deal in dealing with natives."

This evidence shows that the duties of the two officers were perfectly distinct, those of the former being little more than such as an ordinary clerk would perform; and, therefore, even if Krishnarav had been re-appointed to the office of second clerk after his appointment to the office of *khajanchi*, as it was contended for the defendants was the proper way

(1) L. R. 3 Q. B. D. 495.
(3) 10 Cl. & Fin. 984.

(2) 10 Ex. Ch. 523 (532).
(4) 12 Cl. & Fin. 109.

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of treating what occurred, there would have been no material alteration in the duties of *khajanchi* which would have relieved the defendants from their obligation as sureties, as was the case in *Pybus v. Gibb* (1), but merely the addition of a new office, which in *Skillett v. Fletcher* (2) was held would not affect the surety's liability, unless indeed, as in *Bonar v. Macdonald* (3), the surety bond contained an agreement that the principal should not undertake any other business.

It was said indeed that in this case the sureties did not merely guarantee the faithful and honest discharge by Krishnarav of *khajanchi's* duties, as in the above cases, but also of his responsibility for forged signatures on the bills, and that the additional duties imposed on him would make him less likely to detect such forgeries and, therefore, increase their risk. But we think it clear that, having regard to the duties of the second clerk, which are of such a nature as would not require Krishnarav's personal attention, this objection is quite unsubstantial.

It remains to consider the last objection, *viz.*, that the Bank ought to have informed the defendants of what occurred in 1883 [593] when the Indore bills with forged signatures of drawees were allowed to pass by Krishnarav. On that occasion there was no suspicion of Krishnarav's honesty, and under the circumstances the Bank did not enforce their claim against Krishnarav, as in strictness they might have done. In *Phillips v. Foxall* (4) the Court held that the surety was discharged in the case of a guarantee for the honesty of a servant where the master had discovered that he had been guilty of dishonesty and still continued him in his service without the knowledge or assent of the surety. The ground of the decision was that as the guarantee at its inception was founded on the trustworthiness of the servant, so far as that is known to both parties, "it never could have been in their contemplation that the guarantee should continue to apply to the servant's future conduct after his dishonesty had been discovered," and that equity required, as laid down by Malins, V. C., in *Burgess v. Eve* (5), that the guarantee should be regarded as no longer binding. Here, however, it could not have been assumed that Krishnarav was infallible in detecting forgeries, and the guarantee was not, therefore, founded on that assumption, and, therefore, equity and fair dealing cannot, we think, require that the Bank should at once have informed the sureties as soon as Krishnarav had proved to be fallible.

The defendants have, therefore, in our opinion, failed in both their grounds of defence to the action, and that the Bank is entitled to recover on the guarantee. The Bank to have the costs of this appeal.

Attorneys for the appellants (defendants):—Messrs. *Nanu and Hormasji*; and Messrs. *Roughton and Byrne*.

Attorneys for the respondents (plaintiffs):—Messrs. *Crawford, Burder, Buckland and Bayley*.

(1) 6 EIL. & BL. 902.

(2) L. R. 2 C. P. 469.

(3) 3 H. L. C. 226.

(4) L. R. 7 Q. B. 666.

(5) L. R. 13 Eq. 450.