

Indexed at **Manupatra**
A Critique on Radha Kanta Pal vs United Bank of India Ltd.
[AIR 1955 Cal 217]

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Introduction

This is a case of fidelity bond which means guarantying the performance of the debtor. This is related to Section 129 of the Indian Contract Act of 1872. This is a case of continuing guarantee where the performance of the employee who is employed is guaranteed. We could find a semblance in the fact scenario of this case with section 129 Illustration (a). In this case, we saw Rajani Kanta Pal now represented by Radha Janta Pal had guaranteed the performance of Nishi Kanta Pal and thus he had executed a bond as a surety. The matter of debate was *whether United bank is entitled to the sum of Rs. 8,800 from the proceeds of the securities deposited with Comilla Banking Corporation Ltd. as well as from the outstanding balance from the provident fund of the second defendant Nishi Kanta Pal?* And thus, this suit was filed before this hon'ble court.

Brief Facts

Rajani Kanta Pal, deceased now represented by Radha Kanta Pal, signed a bond with the Comilla Banking Corporation Limited now amalgamated with and represented by the United Bank of India Ltd. By this bond dated 8-8-1944 Rajani, in consideration of the appointment of his relation, the second defendant Nishikanta Pal, to the post of a cashier and in consideration of the security for the due discharge of Nishikanta's duties, executed as guarantor the security bond for Rs. 10,000/- for himself, his heirs, executors and assigns. The services of Nishikanta Pal were terminated on 4-12-1946, but the deposit money in the shape of the Government Promissory Notes has not been returned to the plaintiff.

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Issues Raised

- I. *Was the defendant Nishi Kanta Pal responsible for the shortage of the sum of Rs. 8,800/- belonging to the Comilla Banking Corporation Ltd. while working as its cashier as alleged in paragraph 6 of the Bank's written statement.*
- II. *Is the defendant's bank entitled to claim the sum of Rs. 8,800/- from the second defendant Nishi Kanta Pal? If so, is it entitled to adjust the same from the proceeds of the securities deposited with Comilla Banking Corporation Ltd. as well as from the outstanding balance from the provident fund of the second defendant Nishi Kanta Pal?*
- III. *Did the plaintiff have any knowledge in July 1947 of the aforesaid shortage?*
- IV. *Did the second defendant Nishi Kanta Pal fail to pay the said sum of Rs. 8,800/- or any portion thereof to the Comilla Banking Corporation?*
- V. *To what reliefs, if any, is the plaintiff entitled?*

Judgment

Issue 1

The defendant Nishi Kanta Pal was responsible for the shortage of the sum of Rs. 8,800/- belonging to the Comilla Banking Corporation while working as its cashier. This was held because of the evidence produced by the defendant i.e., the bank's witnesses Saroj Behari Nandy, Birendra Mohan Mitra, and Manindra Bhusan Dutt.

Issue 2

Part 1: As he has already found and held that the bank has proved its case in the written statement by the evidence of its three witnesses, which has not been contradicted by the defendant Nishi Kanta Pal, this part of the issue must, therefore, be answered in the affirmative. Nothing appears from the cross-examination of the bank's witnesses by the plaintiff's counsel to controvert that finding. Therefore, he held that the defendant's bank is entitled to claim the sum of Rs. 8,800/- from defendant Nishi Kanta Pal and answer this part of issue No. 2 in the affirmative.

Part 2: The ground of discharge was that Nishi Kanta failed to make good the shortage of the two sums of Rs. 8,200/- and Rs. 600/- amounting altogether to Rs. 8,800/-. It is necessary to mention here that Nishi Kanta made good the second shortage of Rs. 400/- of 25-11-1946 either on the same day or the day after.

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It was pointed out by the plaintiff's counsel that the continued employment of a dishonest servant without notice to the guarantor is inconsistent with the rights of the surety because the surety is thereby required to take a hazard which it may not have been his intention to take under the original guarantee had he known or if it was brought to his notice that the man whose faithful service he was guaranteeing has since been proved to be dishonest.

The court countered this argument by pointing out that the surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used, all the powers of superintending the performance of the debtor's duty which he could have exercised. After all, the employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work. [*Mayor of - Kingston-Upon-Hull Corporation v. Harding*] and as well points out that the Bank was very diligent and quick indeed to check Nishi Kanta's negligence of duties.

The guarantor in this case guarantees the fidelity and not the infidelity of the servant. He guarantees fidelity and ensures the loss against the risk of infidelity and not the fact of infidelity. To begin with, the guarantee for fidelity means that the guarantor says in fact that he knows the fidelity of this man and he will ensure the risk of any loss if such a servant commits an act of infidelity. If the employer wants to continue a dishonest servant after his dishonesty has been proved then he must give the guarantor notice of the act of infidelity so that the guarantor may get an opportunity to say whether he would continue his guarantee or not for a man whose infidelity has been proved. If he does then the employer can certainly hold the guarantor liable for the subsequent act of infidelity. But in this case, we could find that the employee had paid off the 2nd debt thus it cannot be pointed out by the bank that the employee had committed complete infidelity thus there cannot be any discharge as the mere presumption is not enough to dispose of the employee of his post², Nishi Kanta by making good this shortage by paying the sum of Rs. 400/- at least goes to indicate that his dishonesty in respect of this sum is not proved.

Pointed out by the plaintiff that section-139 cannot be maintained. This section points out the impairment of the surety's eventual remedy against³ the principal debtor⁴ and thus points out that the plaintiff, in this very action, sues and issues the defendant Nishi Kanta Pal. Therefore, the plaintiff's act of using the principal debtor in this suit itself goes against the plaintiff's contention

² *Phillips v. Foxall.*

³ *Mahant Singh v. U Ba Yi.*

⁴ *M. Pogose v. Bank of Bengal.*

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that his eventual remedy against the principal debtor is impaired. When the surety himself sues the principal debtor thereby proving that his eventual remedy against him is not impaired, he cannot be heard to say that he has been discharged on the ground that his eventual remedy against the principal debtor is impaired.

Thus, hold that the defendant Bank is entitled to adjust the sum of Rs. 8,800/- from the proceeds of the securities deposited with the Comilla Banking Corporation Ltd. as well as from the outstanding balance of the Provident Fund of the second defendant Nishi Kanta Pal.

Issue 3

On the plaintiff's evidence and having regard to the admissions of fact already recorded It was held and found that the plaintiff did have knowledge of the aforesaid shortage in July 1947 and therefore answer issue No. 3 in the affirmative.

Issue 4

Therefore, defendant Nishi Kanta Pal did not himself pay any part of the shortage of Rs. 8,800/- to the Comilla Banking Corporation, credit on his account must be given for the sum of Rs. 600-14-3, being the total of the two sums of Rs. 306/- and Rs. 294-14-3 and the Bank is entitled to appropriate the same.

Issue 5

The plaintiff must have judgment for the sum of Rs. 8,199-1-9 with interest and costs. The plaintiff is entitled to both interim interest and interest on judgment on this sum as against the defendant Nishi Kama Pal which is allowed at six percent per annum. The Bank is entitled to hold the same to ultimately realize the balance of its dues from the proceeds thereof.

If the sale proceeds of the second Government Promissory Note yield more than Rs. 3,151-13-9 and the costs awarded hereby to the defendant Bank, then the Bank will hand over such surplus to the plaintiff.

Analysis

The matter, in this case, revolves around issue no 2. This issue answers all the other issues regarding this case. If we see that the main contention is whether the bank is entitled to get back the sum of money due from the promissory note given as surety. It was pointed out by the plaintiff's counsel

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that the continued employment of a dishonest servant without notice to the guarantor is inconsistent with the rights of the surety because the surety is thereby required to take a hazard which it may not have been his intention to take under the original guarantee had he known or if it was brought to his notice that the man whose faithful service he was guaranteeing has since been proved to be dishonest. The court countered this argument by pointing out that the surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised. After all, the employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's⁵ work and as well points out that the Bank was very diligent and quick indeed to check Nishi Kanta's negligence of duties. The guarantor in this case guarantees the fidelity and not the infidelity of the servant. He guarantees fidelity and ensures the loss against the risk of infidelity and not the fact of infidelity. To begin with, the guarantee for fidelity means that the guarantor says in fact that he knows the fidelity of this man and he will ensure the risk of any loss if such a servant commits an act of infidelity. If the employer wants to continue a dishonest servant after his dishonesty has been proved then he must give the guarantor notice of the act of infidelity so that the guarantor may get an opportunity to say whether he would continue his guarantee or not for a man whose infidelity has been proved. If he does then the employer can certainly hold the guarantor liable for the subsequent act of infidelity. But in this case, we could find that the employee had paid off the 2nd debt thus it cannot be pointed out by the bank that the employee had committed complete infidelity thus there cannot be any discharge as the mere presumption is not enough to dispose of the employee of his post. Nishi Kanta by making good this shortage by paying the sum of Rs. 400/- at least goes to indicate that his dishonesty in respect of this sum is not proved. Thus, there is no discharge of the surety. Hence the bank can recover the amount from the promissory notes.

⁵ Mayor of ~ 'Kingston-Upon-Hull Corporation v. Harding.

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Conclusion

Thus, they hold that the defendant Bank is entitled to adjust the sum of Rs. 8,800/- from the proceeds of the securities deposited with the Comilla Banking Corporation Ltd. as well as from the outstanding balance of the Provident Fund of the second defendant Nishi Kanta Pal. If the sale proceeds of the second Government Promissory Note yield more than Rs. 3,151-13-9 and the costs awarded hereby to the defendant Bank, then the Bank was asked to hand over such surplus to the plaintiff.

So, in this case of a continuing guarantee, we could see that consideration of guarantee was the honesty of the employment, which was noted by the bank, and hence they were entitled to get back their money from the promissory note.

