

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Sirdar
Sujan Singh v. Ganja Ram and another, from
the Chief Court of the Punjab; delivered
11th November, 1881.*

Present :

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE suit in this Appeal was brought by Hardyal Singh, who has since died and is now represented by the Respondents, against Makkun Singh and the Appellant, Sujan Singh, to recover a sum of money which the Plaintiff said he had paid as surety, and was entitled to recover from them.

Mukkun Singh is since dead, and his representative has not joined in the Appeal. Sujan Singh is the son and representative of Nand Singh, who died before the suit.

The circumstances under which the Plaintiff became surety are, that on the 12th of November 1869 Nand Singh and Makkun Singh, through their agent Gormukh Singh, entered into a contract with the political agent of the State of Bhawalpoor to supply timber, the contract being that the timber should be supplied clear and without knots; that on its arrival at Mooltan it was to be examined there by a mistree appointed by the political agent, and after inspection was to be forwarded to Bhawalpoor; that though the timber should be forwarded, yet, notwithstanding the approval of the mistree, the contractors

Q 8637. 125.—12/81. Wt. 5818. E. & S.

A

would take back any timber which was disapproved by the State at Bhawalpoor. Another clause, as to the place of depositing it, is not material; and the fifth was that the political agent would purchase the timber brought by the contractors to Bhawalpoor, and rates of payment for it were specified. Nothing was said as to the quantity of timber which was to be supplied, nor as to the time during which the contract was to remain in force. It was only a contract to supply timber, and allowed the political agent, who represented the State of Bhawalpoor, to take it or not according to his approval of it. It would appear that shortly after the making of the contract the contractors were desirous of obtaining an advance of money, and they applied to the political agent for it. The Plaintiff has given his account of the transaction; but as the political agent, Colonel Minchin, has also stated what took place, it will probably be better to refer to what he said. He was examined as a witness, and said, in answer to the question, "On whose security did Nand Singh and Makkan Singh obtain an advance of 10,000 rupees from the Bhawalpoor State?"—"On the security of the Plaintiff, who was at that time confidential agent attached to my Court; the Defendants were introduced to me by the Plaintiff, who stated that they were the agents for the sale of timber belonging to the Maharajah of Cashmere and Cashmere subjects;"—"I at once accepted him as security, on the understanding that if the Defendants failed to carry out their contract, the Plaintiff should make good the balance of advance." In answer to a question in cross-examination he said, "The Plaintiff was in no way responsible for the fulfilment of the contract, but only for the repayment of the advance in case the contract should fail." The Plaintiff's statement was

that he had a letter from the Defendants, asking him to obtain an advance on account of the contract; that the agent Gurmukh Singh asked for Rs. 25,000, and he suggested that Rs. 10,000 might be advanced; and that he went to Colonel Minchin on the day he received the letter. Colonel Minchin refused to advance the money unless on security, and the Plaintiff said he would be surety, and requested him to advance Rs. 10,000 for the present to enable the contractors to open their work. The money was advanced. The period for the supply of timber appears to have been during the cold season, when only it could be floated down the river, as it had to be for a considerable distance. The contractors supplied some timber. Part of it was received and part rejected; and complaints were made, no doubt, as to the quality of it. In September 1870 Colonel Minchin called upon the Plaintiff to pay the balance which then remained of the advance of Rs. 10,000, after giving credit for the timber which had been received by the State, and which balance amounted, as Colonel Minchin says, to Rs. 8,860 7 annas. He gave directions that this amount should be recovered from the Plaintiff; and it was recovered from him, in the first instance, by his giving up jewels and different securities, which were valued at the sum to be recovered, which was ultimately realised from them. The Plaintiff was, in fact, obliged to pay the amount, as being the balance remaining of the advance; and this is what he now seeks to recover from the Defendants. The question is whether he is entitled to do so. The Lower Courts have decided that he is entitled. When the case first came before the Chief Court, one of the learned Judges was of opinion that, applying, according to his view, the law of British India to the case, there had been a breach

of contract which justified the payment of the money by the Plaintiff; and therefore he, as surety, was entitled to recover it. The other learned Judge was of opinion that the act of Colonel Minchin as an act of State could not be inquired into; and that on this ground, the Plaintiff having been thus obliged to pay the money, he was so entitled. Consequently a decree was made in the Plaintiff's favour. There was then an application for a review, upon which the learned Judge who had in the first instance thought the contract had been broken, after a discussion of the evidence, came to the contrary conclusion, and thought that the contract had not been broken, and therefore that the Plaintiff was not entitled to recover. The other learned Judge adhered to his opinion that the act of Colonel Minchin could not be disputed, and on its being referred to a third Judge he took the same view. The application for a review was therefore dismissed, and the decree was confirmed.

Their Lordships have now to consider whether this decree in favour of the Plaintiff ought to stand.

The contract under which the Plaintiff became the surety, and which is the contract that must really be considered in this case, was made in Bhawalpoor, and the parties must be considered to have made it according to the liabilities that would be incurred there. Their Lordships do not concur in the view that, when the surety comes to enforce his rights against the principals, the law of British India is to be looked at. They must see what was in the contemplation of the parties when they entered into the contract at Bhawalpoor, and the evidence of Colonel Minchin puts it as high as it can be put in the Defendants' favour. He says that the Plaintiff was to be responsible for the repayment of the advance in case the contract

should fail. The question is, whether the contract to supply timber has not failed within the meaning of the contract of suretyship. It is clear that when Colonel Minchin, in September 1870, directed that the balance should be recovered from the Plaintiff, the contract had failed. It was put an end to by a power which neither the Defendants nor the Plaintiff, the surety, could dispute. Colonel Minchin had power to put an end to the contract; and if we look not merely to the power which he might have as political agent, but to the terms of the contract for the supply of timber, it would appear that he was entitled to do so. The contract was one which, being indefinite in point of time, it would seem might be put an end to by either party. It was really only a contract to pay for timber supplied and accepted according to certain rates. Therefore in this respect, if it were necessary to go into that question, he had power to put an end to the contract. Moreover, if their Lordships had thought it necessary to go into the question whether Colonel Minchin was justified in what he did, there is evidence that the contract had failed through the acts of the contractors; that they had, according to Colonel Minchin's evidence, after offering a quantity of timber which had been rejected, as there was power to do, abandoned the contract, and they do not seem to have taken any steps insisting on the timber being received or to have sent other timber in its place. The evidence is, and there is no reason to doubt that it is true, that they had in fact done in the way of abandoning the contract what would have justified the political agent in treating it as at an end, and saying that the balance ought to be repaid to the Government. The agent had, under those circumstances, declared the contract at an end. In any view of the case, therefore, the balance of the advances

ought to be repaid by the surety. And the surety, having been compelled to pay the money, is entitled to recover it from the Defendants.

Their Lordships think that the decree which was made in the first instance by the Chief Court, and confirmed upon the application for a review, was right; and they will humbly advise Her Majesty to dismiss the Appeal.