

(1931) 02 BOM CK 0020

In the Bombay High Court

Case No : O.C.J. Appeal No. 31 of 1930 and Suit No. 2412 of 1928

Jagjivandas Jethalal

APPELLANT

Vs

King, Hamilton and Co.

RESPONDENT

Date of Decision : 27-02-1931

Acts Referred:

Registration Act, 1908 — Section 17(1)(b)

Citation : (1931) 33 BOMLR 709 : (1931) ILR (Bom) 677

Hon'ble Judges : Mirza, J; John Beaumont, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Beaumont, Kt., C.J.—In this case the plaintiffs are suing to enforce an equitable mortgage of Immovable property situated at Dadar. It is, I think, quite clear from the plaint that the plaintiffs' case is that the defendants as owners of the Immovable property in question created an equitable mortgage upon it as sureties for the firm of Sarda & Sons who were carrying on business in Calcutta and who owed money to the plaintiffs who were carrying on the business of banking in Calcutta. The defendants' case, according to their written statement, was that in April 1922 the defendants applied to Sarda & Sons for a loan whereupon V.V. Sarda, a member of the firm, stated that he would negotiate with the plaintiffs for an overdraft to Sarda & Sons secured by a mortgage of the defendants' Dadar property and they say that those negotiations broke down and that no loan resulted. It appears from the evidence of Krishnalal Gokuldas, who is a brother of defendant No. 2 and attends to his business, that in May 1922, an interview took place in Calcutta between the witness, defendant No. 1, Sarda and the plaintiffs, at which interview there was a discussion, putting it no higher, as to whether the plaintiffs would advance money to Sarda on the security of the defendants' Immovable property. Having regard to the evidence of Krishnalal Qokuldas and to the subsequent correspondence I think that the defendants' case that negotiations broke down and that no business resulted is a

false one. I think it quite clear that the plaintiffs did, as a result of negotiations, of which this interview formed part, advance moneys to Sarda, and I think that they did so on the security of the defendants' property. It may well be that the defendants themselves got part of the advance, but whether that is so or not, it is, I think, perfectly plain that the advance was made to Sarda & Sons as the principal debtors and that the defendants have never been treated as being personally liable for the debt. They are not so treated in the plaint and they are referred to as sureties in letters written by the plaintiffs' solicitors. It appears that at the date of that interview in May 1922, Sarda & Sons were indebted to the plaintiffs. That appears from the account which is Ex. E. In May 1922 there was an indebtedness of rather over Rs. 20,000, and on May 25, 1922,--a material date as I will show presently--a further sum of Rs. 10,000 was advanced by the plaintiffs to Sarda & Sons. Subsequently, as the account shows, substantial further sums were advanced, but the advances stopped on November 1, 1922, at which date there was a debt from Sarda & Sons to the plaintiffs of over Rs. 90,000. It further appears that at the date of this interview in May 1922 the position of the defendants with regard to the Immovable property at Dadar was this: The defendants are contractors and they had built some buildings on this property for a client named Vardhman Jetsey. The client had not paid the amount due to the contractors and the defendants accordingly had arranged to take over the client's interest in the property in payment of the debt. The client, however, had only a building agreement under which when the building was erected he would become entitled to a lease of the property from the Bombay Improvement Trust, and the only interest which the defendants had in the property in May 1922 was a right through their client Vardhman Jetsey to this building agreement and to get the lease when it was ultimately granted. The lease was in fact granted on February 27, 1923. On May 26, 1922, i.e., just after the interview at Calcutta, and I think undoubtedly as a result of that interview, defendant No. 1 wrote a letter to the plaintiffs in these terms:--

We have instructed our solicitors Messrs. Pandia & Co. of Bombay to make over the title-deeds of our property at Badar-Matunga Estate, Bombay, Plot No. 21, value Rs. 1,00,000, monthly rent Rs. 730, to Messrs. King, King & Co., Bombay, to be held by you as a security against advances you may make to Messrs. Sarda & Sons, Calcutta.

King, King & Co. of Bombay were the plaintiffs' Bombay house. Further correspondence took place between the parties and on November 16, 1922, the defendants wrote a letter to the Estate Agent of the Bombay Improvement Trust in which they say:

With reference to your letter No. E 21353 of 1922 dated September 6, 1922, addressed to Messrs. King, King & Co., Bombay, regarding Dadar-Matunga Estate, Plot No. 21, we hereby authorise you to forward the lease when completed to Messrs. King, King & Co., Bombay. We shall also be obliged if you will have the lease prepared as quickly as possible as it is urgently required.

Acting upon that authority from the defendants the Improvement Trust did, on July 26, 1923, forward to the plaintiffs the lease of the property which had been previously granted, and they wrote a letter to the defendants' solicitors pointing out that that had been done. The only other fact which, I think, it is material to mention is that in 1925 the plaintiffs sued Sarda & Sons in the High Court at Calcutta for the amount due, which was then Rs. 68,530-14, and a consent order was made in that action on June 12, 1925, decreeing payment of the amount due on the terms of an adjustment arrived at between the parties, that adjustment providing for payment of the amount due by instalments--Rs. 15,000 to be paid within two months from March 12, 1925, and the balance by instalments of Rs. 2,000 per month commencing from March 1925.

2. Now on these facts the appellants take two points. They say, first of all, that the only facts which the Court has before it from which an equitable charge can be inferred are, first, that the defendants' documents have been deposited with the plaintiffs and, secondly, that Sarda & Sons owed money to the plaintiffs, and they say that there is nothing to connect the deposit of the title-deeds of the defendants with the amount owing by Sarda except the letter of May 26, 1922; and that being so, they say that that letter creates or declares a title to Immovable property and therefore requires registration under the provisions of Section 17 of the Indian Registration Act, and as the document was not registered they say that it cannot be put in evidence and therefore there is nothing to connect the deposit of the defendants' title-deeds with the debt due from Sarda to the plaintiffs. I think there are two answers to that point. The first is that on the evidence it is proved, I think, apart altogether from the letter of May 26, that the advance to Sarda was made at the request of the defendants and that one can properly infer that the deposit which is subsequently proved was made in respect of that advance. Apart from that, however, I am myself disposed to hold that the letter of May 26, 1922, even if one has to look at it in order to connect the deposit of the defendants' title-deeds with the advance made to Sarda, is not a document which requires registration under the Act. In order to bring the document within the Act it must purport or operate to create or declare an interest in immovable property. The Immovable property in question is the lease of the Dadar property which at the date of that letter did not exist, and which did not come into existence for nearly a year afterwards, and I fail to see how that letter could possibly have created or declared any interest in property, viz., the lease which had no existence. The letter could only operate as a contract imposing upon the defendants an obligation to create a mortgage when they acquired the property to be mortgaged, and if that is so, the document does not fall within the operative words of Section 17 (1)(b), and on the other hand does, it seems to me, fall within the exception contained in Sub-section (2) of sub-paragraph (v). In my view, therefore, the appellants fail on their first point.

3. Their second point is this, that by reason of the consent decree of 1925 to which I have referred, time was given to the principal debtor and that the effect

of that under the ordinary law was to release the surety, there being no evidence that the surety was in any way consulted and there being nothing in the consent order to keep the rights of the surety alive. Mr. Desai's answer to that is that the defendants here "were not sureties. He relies on Section 126 of the Indian Contract Act which provides that a "contract of guarantee " is a contract to perform the promise or discharge the liability of a third person in case of his default, and the person who gives the guarantee is called the "surety". Mr. Desai says that here there was no personal obligation on the defendants to pay anything: they merely handed over their property as security, and that being so, there was no contract to perform the promise or discharge the liability of a third person. Then he says that in Section 135, which provides that a contract between the creditor and the principal debtor by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety unless the surety assents to such contract, the word "surety" must have the same meaning as in Section 126, and therefore a person who merely deposits the documents as security is not a surety within Section 135. There may possibly be something in that argument on the wording of the sections, but it has been held often that the Indian Contract Act is not exhaustive, and, therefore, one has to consider apart from the Act what the general law is.

4. Now it has been held in England in a recent case in the Court of Appeal, following a previous decision of Mr. Justice Chitty, that the general rule that a surety is discharged if any material alteration is made in the contract between the creditor and the principal debtor without reference to the surety applies to a surety who is under no personal liability but has merely deposited documents. The case to which I refer is *Smith v. Wood* [1929] 1 Ch. 14 It is a very strong case because all the learned Judges, Lord Hanworth, the present Lord Chancellor, and Lord Russell of Killowen (then Kussell L. J.) comment upon the very ungracious nature of the sureties' claim in that case and express their reluctance to hold in favour of the sureties, but their inability to avoid doing so. The facts in that case were that twelve persons had deposited certain title-deeds with the defendant to secure sums which he might be called upon to pay on a guarantee which he had given. That deposit was made in February 1924. In April 1924 one of the depositors prevailed on the defendant to hand her the title-deeds of some of her houses included in the deposit and she subsequently created a mortgage upon one of the houses. In October 1924 the defendant was called upon to pay under his guarantee, and three years later, in 1927, he proposed to realise the securities deposited with him. Certain of the depositors then commenced the action claiming that the securities deposited by them had been released from liability under the memorandum of charge by reason of the defendant having obliged one of the depositors by letting her have her deeds and create a mortgage upon them. The Court held that the sureties were discharged. The particular point as to whether the rule about discharging a surety applies to the case of a surety who is under no personal liability was discussed both by the

Master of the Rolls and the present Lord Chancellor. The Master of the Rolls says (p. 23):--

Let me refer also to *Bolton v. Salmon* [1891] 2 Ch. 48 where Chitty J. followed and applied the rule in *Holme v. Brunskill* [1891] 2 Ch. 48 which in itself followed the rule stated by Lord Loughborough in *Rees v. Berrington* (1795) 2 Ves. Jun. 540 The rule stated by Lord Loughborough was: " It is the clearest and most evident equity not to carry on any transaction without the privity of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." In *Bolton v. Salmon* Chitty J. applied the rule by holding not only that the surety was discharged from personal liability, but also that the security which had been put up by him was discharged. Shortly after quoting from Lord Loughborough's judgment, he says in his judgment: "This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him." If, therefore, a difference is sought to be drawn between the present case and the other cases to which I have referred, in the sense that what is contributed here are securities and not a personal liability, it appears upon the statement of Chitty J. that we ought to apply the same reasoning as in the case of a personal liability.

5. The present Lord Chancellor (then Lord Justice Sankey) deals with the point. He says (p. 27):--

Finally, it is only necessary in my view to look at *Bolton v. Salmon*, because if that case is carefully investigated it is seen to be on all fours with the present case, and, unfortunately for him, against the appellant. The argument for the appellant here being that the parties to the deed were not sureties, that there was no personal obligation, no joint liability, it is important to look at the argument advanced in the case of *Bolton v Salmon* for the unsuccessful claimant, which was exactly the argument put forward here on behalf of the appellant, Mr. Byrne, who appeared for the plaintiff, contended: "The fact that the defendant's personal liability on the covenant in the mortgage of the 4th of September 1857, has been released by giving time to the principal debtor, does not necessarily release the securities mortgaged by that deed, and which are now vested in the plaintiff." Mr. Jason Smith, for the defendants, contended: " On principle and on authority the surety is released by giving time to the principal debtor by transactions to which the surety is no party, and this release extends not only to the surety's personal liability on the covenant, but also to the property charged." Chitty J., in giving his judgment, calls attention to the fact that the plaintiff "a counsel contend that: " although Miss Buckenham's covenant is gone, by reason of time having been given to the principal debtor, the security which she gave remains." Then the learned Judge continues: "With all their learning and research, the plaintiff's counsel were not able to produce any authority for this proposition. The reason may be, that no one has ever previously thought of raising such a contention".

6. Then the Lord Chancellor goes on (p. 28):--

May I say this is the second time the contention has been raised, and raised in my view unsuccessfully. The learned Judge points out, as my lord has already pointed out: " This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him." Now although that was a surety case, it was on all fours with the present case, because the personal liability had gone and only the documents remained, as indeed in the present case, where there is no personal liability and only the deposit of the deeds. Therefore I have come to the conclusion, for the reasons that my Lord has given and for the reasons that I have endeavoured to give, that this appeal should be dismissed.

So that, the Court there based their decision on a general principle and I can see no reason why that principle should not apply as much in India as in England. The general principle is that the rights of a surety are not to be interfered with without his consent, and it has always been held that giving time to the principal, debtor does prejudice the rights of the surety by preventing him from paying off the creditor and then enforcing the creditor's original rights against the principal debtor. Mr. Justice Baker in the trial Court disposes of this point quite shortly by holding as a fact that the defendants were partners with Sardaj and therefore were principals and not sureties. But, I think, the learned Judge overlooked two facts. The first is that there is no suggestion that anyone except defendant No. 1 was a partner with Sarda and the property in question in the suit belonged to defendants Nos. 1 and 2 in respect of a business in which Sarda, so far as we know, had no interest at all. The other point which, I think, the learned Judge overlooked is this, that on the documents, the articles of partnership Ex. No. 3 and Exs. S and T, to which the learned Judge refers, it would appear that defendant No. 1 became a partner with Sarda as from November 1, 1922, and, as I have already pointed out, the advances by the plaintiffs to Sarda closed on that date. There is no evidence whatever that defendant No. 1 ever became liable for the debts of Sarda's firm incurred before November 1, 1922. The fact that the plaintiffs subsequently sued Sarda and did not sue the defendants shows that they appreciated that defendant No. 1 was not liable for the amounts advanced to Sarda. For these reasons, I think, with some regret, that the appeal must be allowed. I think the plaintiffs in giving time by their consent decree to Sarda discharged the property of the defendants from any liability for Sarda's debt. That being so, the appeal must be allowed, plaintiffs' action dismissed, and there must be an order on the counter-claim for delivery of the lease to the defendants.

7. As regards costs, we think the appellants must get their costs of the appeal and the counter-claim and two-thirds costs of the action. We deprive them of part of the costs of the action because of the false case set up by them, the trial of which increased the costs.

8. Receiver discharged on parsing his accounts, and moneys in his hands to be

paid to defendants" attorneys, and he to hand over possession of the property to defendants.

Mirza, J.

9. The plaintiffs came in possession of the title-deed of the defendants" property on July 24, 1923. The title-deed consisted of a lease in defendants" favour from the Improvement Trust of the City of Bombay. It was executed on February 17, 1923. Previous to that/ on November 16, 1922, the defendants had given a letter of authority to the plaintiffs to obtain the title-deed from the Improvement Trust when completed. The plaintiffs" case is that an equitable mortgage by the deposit of this title-deed has been effected in their favour to secure a debt due to them by a firm called Sarda & Sons. By paragraph 5 of the plaint the plaintiffs state that the title-deed they were holding was in the nature of a collateral security for the repayment of the moneys advanced from time to time by the plaintiffs to Sarda & Sons in their account with the plaintiffs. The deposit of the title-deed, it appears, was not followed by any writing and no contemporaneous oral agreement has been proved in respect of the deposit. The plaintiffs rely upon certain previous negotiations between thorn on the one hand and the defendants and Sarda & Sons on the other to prove that the deposit was in pursuance of an agreement arrived at between the parties whereby the plaintiffs agreed to allow Sarda & Sons to draw moneys in their overdraft account and the defendants agreed that the property in suit should be security for such overdraft. The plaintiffs also rely upon the terms of a writing (part of Exhibit A2 in the case), which is a letter dated May 26, 1922, addressed by the defendants to the plaintiffs. The letter is in this form:--

We have instructed our solicitors Messrs. Pandia & Co. of Bombay to make over the title-deeds of our property at Dadar-Matunga Estate, Bombay, Plot No 21, value Rs. 100,000, monthly rent Rs 730, to Messrs. King, King & Co., Bombay, to be held by you as a security against advances you may make to Messrs. Sarda & Sons, Calcutta.

10. It appears that previous to the date of this letter the instructions mentioned in this letter had reached Messrs. Pandia & Co. in Bombay, and in pursuance of such instructions they had, on May 25, 1922, deposited with Messrs. King, King & Co., an unexecuted engrossment of a lease from the Trustees of the Improvement Trust of the City of Bombay to the defendants. The letter of May 26, 1922, is subsequent to the date of the deposit but it does not purport to record any terms that may have been agreed to in respect of the deposit. There is no evidence on the record of any letter having either accompanied or followed the engrossment. It is clear that this unexecuted engrossment could not be treated as a title-deed and was in fact subsequently withdrawn as appears from the letter of Messrs. Pandia & Co., dated July 27, 1922. The engrossment was returned to Messrs. Pandia & Co., on May 30, 1922, to enable Messrs. Pandia & Co. to get it executed. Messrs. Pandia & Co. then discovered that one of the parties mentioned in the agreement had been adjudicated insolvent and the

engrossment in consequence would have to be altered. They cancelled the engrossment and got a refund from the Superintendent of Stamps for the stamps which had been affixed. . For the purposes of the Indian Registration Act, in my opinion, it is immaterial whether the document was effective or not. The question whether the letter dated May 26, 1922, requires registration under the provisions of Section 17 of the Indian Registration Act must, in my opinion, be decided by the tenor of the document. The letter, in my opinion, purports to be a declaration that an equitable mortgage by the deposit of title-deeds has been effected on an Immovable property. It is evidence not merely of the deposit of the title-deed, but of the mortgage itself, and as such would be inadmissible in evidence if not registered.

11. This point, however, is not very material in this case, as in the light of subsequent events it is open to us to look upon this document for a collateral purpose as forming part of the *res gestae*. It is admitted by the defendants that there were negotiations between the plaintiffs on the one hand and Sarda & Sons and the defendants on the other in April and May 1922 with a view to induce the plaintiffs to allow Sarda and Sons to draw on the plaintiffs in their over-draft account, the defendants agreeing to give security of their property in Bombay for such over-draft. At the date when these negotiations were started there already subsisted an over-draft account between the plaintiffs and Sarda & Sons. On April 6, 1922, the debit balance against Sarda & Sons in this account was Rs. 19,284 and on May 19 it was Rs. 27,100-9-9. There is no oral evidence to show that the negotiations between the parties matured into an agreement or that the further moneys advanced by the plaintiffs to Sarda & Sons were advanced on the faith of the representations made to them by the defendants. On May 26, 1922, which is the date of the letter to which I have alluded, a further sum of Rs. 10,000 was advanced by the plaintiffs to Sarda & Sons, but in the absence of oral evidence to that effect it would not, in my opinion, be proper to infer that this was done on the faith of representations made by the defendants in this letter. The over-draft account continued till November 1, 1922, after which date no further sums were advanced by the plaintiffs to Sarda & Sons. It is clear from the evidence that the defendants were anxious for the plaintiffs to advance moneys to Sarda & Sons and were willing to complete the security which they had offered to give to the plaintiffs. One of the partners in the defendant firm, named Nagindas Mohanlal, entered into a partnership agreement with Sarda & Sons. The indenture is undated but it says that it is to come into effect from November 1, 1922. Mr. Lucas, a partner in Messrs. Oraigie, Blunt & Caroe, had attested the agreement. Messrs. Oraigie, Blunt & Oaroe were appointed solicitors of the defendants on November 23, 1922, for the completion of the lease. Probably this agreement was executed after that date, although it provides that it is to come into operation from November 1, 1922. It looks probable that Mr. Sarda took additional partners in his original firm with a view to influencing the plaintiffs to allow the firm so reconstituted further credit in the over-draft account although the title-deed of the property which was to be deposited with

the plaintiffs as further security was not yet complete. But the plaintiffs, it appears, have given no further credit to Sarda & Sons in the over-draft account since November 2, 1922. There is no evidence that any intimation was given to the plaintiffs of the change in the partnership by the addition of new partners. No alteration as made by the plaintiffs in the heading of their account subsequent to November 1, 1922, and there is no evidence that the new firm took over the liability of the old firm in respect of its over-draft account. After the title-deed was completed and deposited with the plaintiffs, no further advances were made by the plaintiffs to Messrs. Sarda & Sons. It appears from the evidence that the defendants had at this time business relations with Sarda & Sons and were benefiting by the moneys Sarda & Sons were getting from the plaintiffs in their over-draft account. In my judgment, it must be held that the plaintiffs continued advancing moneys to Sarda & Sons on their own credit in the hope that Sarda & Sons would ultimately give them further security in a legal form.

12. The correspondence between the parties shows that the plaintiffs and their legal advisers were of opinion that no equitable mortgage by the deposit of the title-deed had been effected and that it would be necessary to have a regular mortgage deed executed by the defendants.

13. In my opinion, with great respect, it should be held that the respondents have failed to prove that the title-deed deposited with them by the appellants is by way of equitable mortgage of their immoveable property to secure the debt due to the respondents by Sarda & Sons.

14. With regard to the second point it is clear from the pleading, the correspondence and the issues, that the plaintiffs are suing the defendants not as debtors but as sureties. It is also clear that they arrived at an adjustment of their claim with Sarda & Sons in the suit they filed in Calcutta against Sarda & Sons to which the defendants were not parties. By the adjustment they agreed to give time to Sarda & Sons for payment of the debt. The terms of the adjustment were recorded and a consent decree was taken in terms of the adjustment. The defendants were not consulted nor were they consenting parties to the giving of time to Sarda & Sons, It is clear that a surety would be absolved from liability as surety if time is given to the principal debtor without the surety's consent or acquiescence. The appellants, in my opinion, have succeeded in showing that they never consented to or acquiesced in the giving of time by the respondents to Sarda & Sons for payment of the debt for which the defendants could be said to be sureties.

15. I agree that this appeal should be allowed and the decree of the lower Court reversed.

16. I agree with the order proposed by the learned Chief Justice as to costs and the return of the lease to the defendants.