
(1925) 04 MAD CK 0076
In the Madras High Court

K. V. Perlyamanna Marakkayar and Sons

APPELLANT

Vs

Banians and Co.

RESPONDENT

Date of Decision : 21-04-1925

Acts Referred:

Contract Act, 1872 — Section 69, 70

Citation : 95 Ind. Cas. 154

Hon'ble Judges : Kumaraswami Sastri, J;Krishnan, J

Bench : Division Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the respondents who were the Dubashes of the 1st defendant company for the recovery of Rs. 73,117 5-7 from the 1st defendant or in the alternative to direct the 2nd defendant -to pay either the plaintiffs or the 1st defendant the amount due by them.

2. The case for the plaintiffs is that by a Dubash agreement dated the 21st of November 1912 entered into between them and the 1st defendant, they Were appointed Banians or Dubashes of the 1st defendant to push certain, branches of the business of the 1st defendant, that the said agreement inter alia provided that the. plaintiffs were to guarantee the due completion of all contracts entered into by merchants with the is defendant and covered by the agreement in consideration of the plaintiffs receiving certain rates of commission, that the plaintiffs deposited a sum of Rs. 3,00,000 for the due performance by them of. the terms of their agreement with the 1st defendant, that a sum of Rs. 1,25,000 is now in the hands of the 1st defendant, that during the substance of the said agreement the 2nd defendant entered into a contract in writing with the 1st defendant on the 13th of February 1920 by which the 2nd defendant agreed to purchase from the 1st defendant 25 tons of yellow metal sheets at the rate mentioned in the contract, that the plaintiffs as the Dubashes of the 1st defendant guaranteed the due performance of the said contract by the 2nd defendant according to its terms, that under the contract between the 1st and

2nd defendants it was provided that cash must be paid against documents within 60 days of the arrival of the steamer and the 2nd defendant was to be entitled to a rebate of interest at 6 per cent for moneys paid before maturity, that the rate of exchange for payment at Madras was to be fixed on the 2nd defendant's account on or before the date when payment by the 1st defendant company to the shippers fell due subject to the banks in Madras operating for the period, that on the 14th of February, 1920, the 2nd defendant asked the 1st defendant in writing to fix the exchange at once and the 1st defendant agreed to do so, that the 1st defendant failed to fix the exchange and the 2nd defendant again asked the 1st defendant on the 3rd of May, 1920, to fix the exchange immediately without any reference to him which also the 1st defendant agreed to do, that the 1st defendant company, however, failed to fix the exchange, that the 2nd defendant by letter on the 20th of October, 1920, cancelled the contract owing to the 1st defendant's breach, but agreed to accept the goods by paying at the rate of exchange current during the first week of May, 1920, if delivery was offered on those terms, and that on the 29th of March 1921, the 1st defendant told the 2nd defendant that they had fixed the exchange at 1 Section 3d. which was alleged to be the current rate on that date and required the 2nd defendant to pay a sum of Rs. 73,117-5 7. The plaintiffs state that, under the circumstances mentioned above, the 1st defendant was bound to fix the rate of exchange at least in May, 1920, as required by the 2nd defendant and that the 1st defendant not having done so, the 2nd defendant was not bound to pay at a higher rate of exchange than what was current on the 4th of May, 1920, or accept the goods. They state that the 1st defendant was under an obligation to communicate to them the 2nd defendant's application and fix the rate of exchange and that if the 1st defendant had done so and told the plaintiffs of their inability, the plaintiffs would have taken steps to settle the exchange and that the 1st defendant wrongly debited to the deposit account of the plaintiffs, with the 1st defendants and deducted therefrom a sum of Rs. 73,117-5 7 alleged to be due by the 2nd defendant to the 1st defendants in respect of the contract made by the 2nd defendant and that the 1st defendant is bound to pay the plaintiffs that sum with interest at 12 per cent till the date of payment. The alternative case of the plaintiffs is that, if for any reason the Court should hold that there was no breach or default on the part of the 1st defendant and that they were entitled to debit the said sum, the 2nd defendant should be directed to pay the plaintiff or the 1st defendant a sum of Rs. 73,117-5 7 which was the amount which according to the 1st defendant, the 2nd defendant was liable to pay in respect of the contract for the purchase of yellow metal sheets.

3. The 1st defendant admitted the Dubash agreement and its terms and also the contract by the 2nd defendant with them for the purchase of yellow metal sheets, but they stated that they were under no absolute obligation to fix the rate of exchange in advance as it involved a contract with the banks, that between the date of the contract and the 20th of October 1920 the banks were not willing to enter into forward contracts fixing the rate of exchange for

remittances to London, that the failure to fix the rate of exchange would not entitle the 2nd defendant to cancel the contract, but that he can only claim damages and that, in any event, such failure would not relieve the plaintiffs from their obligations as surety under the Dubash agreement. They admit that they called upon the 2nd defendant to pay Rs.73,117-57 according to the rate of exchange on the 29th of March, 1921, and that they were within their rights in doing so. They also admit having debited the plaintiffs' deposit account with the sum of Rs. 73,117-5-7 and deny their liability to pay to the plaintiffs (he said sum or to restore the item to the plaintiffs' account. So far as the 2nd defendant is concerned, the 1st defendant firm state that they have no objection to any decree being passed against him.

4. The 2nd defendant filed a written statement admitting the contract, but denying that the plaintiffs guaranteed the due performance of the contract by him. He states that the plaintiffs did not undertake any liability at his instance or for his benefit, that he is not concerned with any agreement between the plaintiffs and the 1st defendant firm, that then was no privity of contract between himself and the plaintiffs and that any transaction between the plaintiffs and the 1st defendant firm would not affect him. As regards the fixing of the rate of exchange, he says that the 1st defendant firm wrongfully failed to fix the rate of exchange, that by reason thereof he was relieved from liability under the contract, that in any event the 1st defendant's remedy against him is not to claim the price of the goods, but the difference between the market rate and the contract rate and that, if the Court should be of opinion that the failure to fix the rate of exchange does not relieve him of his obligation under the contract and that his only right is to claim damages from the 1st defendant firm for breach of covenant, he claims, Rs. 30,500 as damages being the difference in the rate of exchange between May 1920, and the 29th of March, 1921. He states that if the plaintiffs have acquired the rights of the 1st defendant firm under the contract, he is entitled to act off the above sum of Rs. 30,500 against the plaintiffs' demand, that the 1st defendant firm refused to accept payment for the price of the goods at the rate of exchange prevailing in May, 1920, and thereby committed a breach of a contract and that the plaintiffs have no cause of action against him.

5. The case was tried before Courts Trotter J., who held that the plaintiff had a cause of action against the 2nd defendant on the ground that they affixed their signature to the offer made by the 2nd defendant on the 13th of February 1920, and that, therefore, they must be taken to have guaranteed the contract which was subsequently made. As regards the fixing of the rate of exchange the learned Judge was of opinion, that, though it was possible to fix the exchange between February and May and difficult thereafter, the 1st defendant having employed a competent agent they were absolved from liability as the agent failed to get exchange fixed between February and May, After the Trial Judge gave these findings, the parties said that if the 5th of March was to be taken as the date when the exchange was to be fixed, Rs. 30 000 would be the sum payable

after giving credit for the price realised by the goods on re-sale under order of Court and he passed a decree for that amount in favour of the plaintiffs.

6. The 2nd defendant appeals, and the main grounds taken by Mr. Grant are that there was no privity of contract between the plaintiffs and the 2nd defendant entitling the plaintiffs to sue the 2nd defendant on the contract, that the evidence shows that there was no agreement Between the plaintiffs, the 1st defendant firm and the 2nd defendant whereby the plaintiffs entered into a contract of guarantee so as to give them any right of action under the provisions of the Contract Act, that at best the transaction was merely a transaction of indemnity between the plaintiffs and the 1st defendant firm without any consultation with the 2nd defendant, that the frame of the suit which is primarily against the 1st defendant firm shows that the suit was not instituted by the plaintiffs as the agents of the 1st defendant firm, nor was there any assignment of any cause of action by the 1st defendant firm even if such an assignment were permitted in law, that the 1st defendant firm was bound to fix the rate of exchange at the request of the 2nd defendant, that the onus is on them to show that they could not fix the rate of exchange and that they have not proved it. An objection is taken by the Advocate-General for respondent that the appeal is bad for non joinder of Messrs. Shaw Wallace & Co. No application was made either by the respondent or Shaw Wallace & Co. to be added as parties to the appeal. The appellant who was directed to pay the plaintiffs the amount claimed is not concerned with the 1st defendant company as he has to pay 1st defendant nothing. As Mr. Menzies says that there has been an, agreement between plaintiffs and 1st defendant firm that the plaintiffs, if unsuccessful against the 2nd defendant, the 1st defendant would pay plaintiffs Rs. 6,000, there is no necessity to join the 1st defendant firm without any application made by the 1st defendant. I am of opinion that on the evidence and the documents filed there was no privity of contract between the plaintiffs and the 2nd defendant and that the plaintiffs were not guarantors within the meaning of the Contract Act.

7. The D abash agreement between the plaintiffs and the 1st defendant has been filed as Ex. A in the case. It is dated the 21st November 1912. Paragraph 3 of the agreement states the nature of the business which is covered by it and it refers to three kinds of business (a) business undertaken by the firm either on their own account or as agents for any constituent on guarantee of the Banians; (b) business undertaken by the firm on joint account of themselves and the Banians, and (c) business undertaken by the firm on their own account. Clause(e)of para. 5 which refers to the duties of the Banians states that their duty shall be to guarantee due completion by contracting parties of all the terms of their contracts. (Clause (g) states that in the event of the failure of any contracting party or parties to pay for or take delivery of his or their goods at the date stipulated it shall be the duty of the Banians to pay the firm in cash all sums so payable in the manner provided in the agreement. Clause (h) runs as follows:

Generally in respect of any business covered by this agreement to guarantee the

due fulfilment by all dealers and traders of their several contracts, liabilities and obligations and to indemnify the firm against any loss in respect thereof and the liability of the Banians shall in no way be affected by the firm giving time or otherwise affording facilities to any dealer or constituent.

8. Paragraph G of the agreement runs as follows:

The liability of the Banians shall commence (1) in the case of transactions coming under Clause (a) and (b) of para. 2 hereof:

As soon as the business is entertained (1834) 3 M. & K, 183 : 3 L.J. Ch. 190. In all other cases as soon as contracts are made between the firm and any dealer and shall continue until the contracts all have been duly completed or all claims, losses, cost and damages in respect thereof shall have been fully discharged.

9. Paragraph 11 refers to the right of the company to deduct out of the security deposited by the Banians" any amounts that may be due by the Banians. Paragraph 13 refers to the duty of the firm to institute suits at the cost of the Banians for the realisation of any monies due in respect of contracts on the firm being sufficiently indemnified. Paragraph 14 refers to the commission payable. It states that as remuneration for their services under the agreement the Banians should be entitled to a commission of half a per cent in respect of yarns, metals, other than iron, paint, cement, sugar, timber and produce imported from other Indian ports.

10. The agreement gives the plaintiffs the option of refusing to be liable for any particular contract.

11. The contract between the 1st and" 2nd defendants for the purchase of yellow metal sheets has been filed as Ex. B and it is dated the 13th of February, 1920. It is for 25 tons of yellow metal sheets, English quality, to be shipped in November 1920, at ₹182-10 0 per ton C.I.F. and C.I. Madras. The clause relating to exchange runs as follows:

Exchange to be fixed on dealers" account on or before the date when payment by the merchants to shippers falls due subject to the Banks in Madras operating for this period.

Should no instructions in writing be received from dealers prior to the above mentioned date the merchants have the option of their fixing exchange at rates then current.

12. At the foot of the contract is a note signed by the Banians which runs as follows:

Responsibility acknowledged by Banians &Co.

13. The offer for these goods made by the 2nd defendant is Ex. 1 dated the 9th of January 1920 and at the foot of it the Banians & Co. have signed. There is nothing more than " For Banians & Co (Signet) Manager."

14. None of the members connected with the firms of Banians and Co. have given evidence. Mr. Browning an assistant in 1st defendant firm was called as the plaintiffs' first witness. When asked about the contract, Ex. B, which I have already referred to, he states, that, in the course of business, documents are signed by the dealers, that those documents are sent down to Banians & Co. for counter signature and that so far as the 2nd defendant was concerned, he had no other "document given to him evidencing the contract but that he could always have access to the contract in the firm's office. This is all the evidence as regards what took place when the contract was entered into and there is no evidence that the plaintiffs introduced the 2nd defendant to the 1st defendant's firm or that there was any agreement between the plaintiffs, the 1st and 2nd defendants, that the Banians should guarantee the performance of this particular contract. All that appears from the evidence is that after the contract was signed, it was sent down to the Banians and they accepted liability under the terms of the Dabash agreement between the plaintiffs and 1st defendant and without any request by or reference to the 2nd defendant. There is nothing to show when the Banians affixed their signature to the proposal, Ex. B, nor is there any evidence to show that the Banians introduced the 2nd defendant to the 1st defendant and that the contract was brought about on their intervention and guarantee. On the contrary the evidence of Mr. Menzies, one of the principals of the 1st defendant firm shows that the 2nd defendant was doing business with Gibson & Co. the 1st defendants' agents at Tuticorin and that Mr. Menzies asked the 2nd defendant to do business with his firm. He states that he could not say whether the Banians were present when the contract was fixed up nor could he say when the Banians put their signature to the contract. He says it was customary in their firm after the contract was entered into to send that particular form of contract and get the Banians' signature. This was, I think, to show that the Banians did not exclude this contract from the scope of the Dabash agreement, Ex. A. I think that on the evidence on record there is no privity shown between the plaintiffs and the 2nd defendant. So far as the plaintiffs and the 1st defendant are concerned, the Dabash agreement creates an obligation on the part of the plaintiffs to indemnify the 1st defendant against any loss they may sustain by the non-performance and the question is whether such an indemnity would give a right of action against the 2nd defendant on the contract between the 1st and 2nd defendants.

15. Chapter VIII of the Contract Act deals both with contracts of indemnity and guarantee. A contract of indemnity is defined by Section 124 as a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. A contract of guarantee is defined by Section 128 as a contract to perform the promise, or discharge the liability, of a third person in " case of his default. The person who gives the guarantee is called the surety; the person in respect of whose default, the guarantee is given is called the principal-debtor, and person to whom the guarantee is given is called the Creditor. Section 140 states that where

a guarantee's debt has become due or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. Section 141 states that a surety is entitled to the benefit of every security which the creditor has against the principal-debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such surety or not; and if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. Section 145 states that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

16. I think that the Contract Act draws a distinction between contracts of indemnity and contracts of suretyship and that contracts of suretyship, unlike contracts of indemnity, require the concurrence of three persons, namely, the principal debtor, the creditor, and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor. Heading Sections 126 and 145 together, it seems to me that there can- be no contract of guarantee as distinguished from a contract of indemnity unless there is" privity between the principal debtor and the surety as it is difficult to speak of an implied promise between persons between persons whom there is on privity of contract. Section 126 refers to a contract of guarantee and speaks of three persons with reference to that contract, namely, the person who gives the guarantee, the person in respect of whose default the guarantee is given and the person to whom the guarantee is given. Section 127 refers to consideration for the guarantee which is sufficient to support the guarantee. *Nanak Ram v. Mehin Lal* 1 A. 487; 1 Ind. Dec. 335. is authority for the view that privity is necessary in all cases of suretyship between the three parties. Sections 140 and 141 only prescribe the methods by which the rights of the surety can be worked out and I find it difficult to see how a person who agrees to perform the obligation of another without reference to him can clothe himself with the right of action against him on the contract or how a person can become a surety without the knowledge and consent of the principal debtor and clothe himself with the right of action against him on the contract or how a person can become a surety without the knowledge and consent of the principal debtor and clothe himself with the rights mentioned in Sections 140 and 141 or Section 145.

17. The English law is clear that no person who is not a party or privy to a contract can sue upon it and it has been laid down as early as *Hodgson v. Shaw* (1834) 3 Myl. & K, 183 . that a person cannot make himself the creditor of another by volunteering to discharge the obligations of the other and that the rights of the surety against the principal debtor can only arise where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor. The law is thus stated in *Halsbury's Laws of England*, Vol. XV, at

p. 517:

The implied rights possessed by the surety against the principal debtor are not identical with those which the creditor has against the latter, but, are somewhat similar to those possessed by one surety against another. They are available where-ever the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise. Since no man can make himself the creditor of another by volunteering to discharge the latter's obligations, once however, such request has been obtained, an equity of indemnification becomes attendant upon the suretyship^ and the principal debtor will be liable without the necessity of any further request for all, sums subsequently paid by the surety under the guarantee as money paid to the use of the principal debtor.

18. I do not think that any difference was intended to be made in the Contract Act between the Indian and English Law on the subject, and I see no reason to depart from the English Law as to the necessity of a request, actual or constructive, of the principal debtor to the surety in order that there may be an effective contract of suretyship.

19. So far as the contract of indemnity is concerned by which a person agrees to indemnify another against loss caused by the conduct of a third person and which does not require the consent of or the privity with the third person, the person who indemnifies can, on payment or discharge of the obligation, sue but the suit in the absence of any assignment can only be in the name of the promisee. There is no subrogation in law as in the case of a surety who undertakes the obligation at the request of the promisor. I have not been referred to any English case where in a case of a mere indemnity as distinguished from a contract of guarantee a direct right of action on the original contract is given to the person who indemnifies against the person whose conduct has caused loss. In *Simpson v. Thompson* (1878) 3 A.C. 279 . which was a case of certain underwriters against the owner of a ship it was held that there was no independent right in the underwriters to maintain in their own name, and without reference to the person insured, an action for damages to the thing insured. Lord Cairns, after referring to the foundation for the right of underwriters, namely, the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed on all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss, observes:

But this right of action for damages they must assert, not in their own name but in the name of the person insured.

20. Lord Blackburn observes:

In England, the action must be in the name of the shipowner, not of the underwriters. I think this material, as showing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters.

21. In *King v. Victoria Insurance, Co.* (1896) A.C. 250 their Lordships of the Privy Council observe at page 256. Page of (1896) A.C.[Ed.]

It is true that subrogation by act of law would not give the insurer a right to sue in a Court of law in his own name. But that difficulty is got over by force of the express assignment of the Bank's claim.

22. So far as the Indian Law is concerned, there is nothing either in the Contract Act or the C. P. C. which can give any higher rights to a person under a contract of indemnity as distinguished from a contract of guarantee. In the present case as I am of opinion that the evidence only shows that there was a contract of indemnity evidenced by Ex. A, I find it difficult to see how it is open to the Banians to sue the 2nd defendant, between whom and the Banians there is not privity, for damages for breach of contract. It is clear in the present case, and it is not disputed before us, that no property in the goods passed to the 2nd defendant and that the claim so far as the 1st and 2nd defendants were concerned was a claim for damages for breach of contract.

23. It is contended by the Advocate-General that a contract of suretyship can be entered into without reference to the debtor and that even in such cases the person who indemnifies himself can avail of the provisions of Sections 140 and 141 though he cannot u/s 145 and reference has been made to *Muthu Raman Chetty v. Chinna Vellayan Chetty* 33 Ind. Cas. 508 : 30 M.L.J. 369 : 19 M.L.T. 278 : 3 L.W. 393 : (1916) 1 M.W.N. 290, where it was held by Oldfield and Napier, JJ., that a person who becomes a surety without the concurrence thereto of the principal debtor gets as against the latter only the rights given by Sections 140 and 141 and not those given by Section 145. The main question in that case was whether, a suit would lie on a hundi which is a negotiable instrument under the circumstances mentioned therein and both the learned Judges differed from, the lower Court and held that an action would lie if the hundi was presented for payment within a reasonable time and notice of dishonour was given and they sent the case back to the lower Court for findings on the above points. The case was also argued on the footing of guarantee and also of Sections 6;) and 70 of the Contract Act and it was held that Sections 69 and 70 would not apply. The learned Judges in dealing with the argument as to guarantee expressed the opinion above mentioned. With all respect it seems to me that there is nothing in the Contract Act which makes it necessary for us to depart from the well known rule of English Law that no action can be brought on a contract except by the parties or privies to it, and that in cases of a mere indemnity no action can be maintained except in the name of the party to the original contract or on an assignment from him. Oldfield, J., observes:

There is then in defendant's favour the English Law, stated in *Hodgson v. Shaw* (1834) 3 Myl. & K, 183 : 3 L.J. Ch. 190 already referred to and other cases, that the implied rights possessed by the surety" are available, when the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no one can make himself the creditor of another

by volunteering. to discharge his obligations. In these circumstances, the opposite view must be supported unambiguously by Section 145, if it is to be sustained.

24. I find it difficult to see what there is in Section 145 that departs from the well-known rule of English Law. Napier, J., while stating that the Indian Legislature has not used the clear and unambiguous language to be found in Mercantile Law Amendment Act (19 & 20 Vict. Ch. 97), Section 5 thinks that the Legislature intended to embody the law to be found in the Mercantile Law Amendment Act and to make no distinction between sureties in a bilateral contract and those in a trilateral contract. He, however, is not prepared to hold that Section 145 can be construed as giving effect to that intention. He thinks that the plaintiff must fall back on Section 140. I find it difficult to follow the view taken by the learned Judges. It seems to me that Sections 140, 141 and 145 refer not to contracts of indemnity but to contracts of suretyship which have been defined in Section 126.

25. Treating the position of the Banians as that of persons who under the contract of indemnity (Ex. A) have discharged the obligations, which the 2nd defendant was bound to perform, their right was either to get an assignment from the 1st defendant or to sue in the 1st defendant's name for their own benefit. In the present case it is difficult to see how on the plaint as framed the plaintiffs can say that they represent the interest of the 1st defendant. Almost the whole of the plaint is taken up with charging the 1st defendant with wrongfully debiting their deposit account with the loss claimed in respect of the 2nd defendant's contract. Paragraphs 14, 15, 16, 17 and 18 charge the 1st defendant with wrongful conduct so far as this contract is concerned and repudiate the plaintiffs' liability as guarantors. The subsequent paragraph refers to the other contracts and states that the plaintiffs have been discharged from all liability under the Dubash agreement. The only paragraph containing the alternative claim is para. 24 where they state:

Plaintiffs charge that if for any reason this Hon'ble Court should hold that there was no breach or default on the part of the 1st defendant then, and in such event, the 2nd defendant should be directed to pay to the plaintiffs or to the 1st defendant the said sum of Rs. 73,117-5-7 with further interest thereon at 12 per cent, per annum and all other charges incurred by the 1st defendant in storing and keeping the goods up to date of payment; and that, on default of payment by the 2nd defendant, the goods in question may be sold under the orders of the Hon'ble Court; that the sale-proceeds thereof be paid to the plaintiffs and that the 2nd defendant be directed to pay the plaintiffs the balance due by the 2nd defendant, in case there is deficiency in the amount due to them from the 2nd defendant.

26. It cannot be said that in a suit as framed like the present the plaintiffs are suing as persons who have indemnified the first defendant against losses which they may incur and it is difficult to see how in this suit they can in any sense be

taken to represent the 1st defendant" merely because they added an alternative claim against the 2nd defendant.

27. It was suggested in the course of the argument that the plaintiffs by virtue of the Dubash agreement can be treated as del credere agents but there is no evidence which would justify me in holding that any such agency exists. A del credere agent is defined as one, who, in consideration of extra remuneration, called a del credere commission undertakes that the persons with whom he enters into contracts on the principals' behalf will be in a position to perform their duties. It is necessary that before a person can claim to be a del credere agent he must have brought about the contract in question. Reference was made to the observations of Sir John Wallis, C. J., in the *South Indian Industries Ltd. v. Minda Ramajogi* 26 Ind. Cas. 822 : 27 M.L.J. 501:

The position of Dubashes in this part of India is much the same as that of Banians in Northern India which was considered in *Peacock v. Baijnath* 9 Ind. Dec. 383 (P.C). by Wilson and Cunningham, JJ., in a passage of their judgment at page 588 Page of 18 C.---[Ed.] which was subsequently approved by the Privy Council on appeal.

28. But in *Peacock v. Baijnath* 18 I.A. 78 : 5 Sar. P.C.J. 651 : 9 Ind. Dec. 383 (P.C). all that was held was that the Banian in that by the course of dealing between him and his principals, became liable as a del credere agent and that he " could be called upon to pay, though he had been guilty of no fault or neglect. I can find no authority for holding that a Dubash who gets a commission thereby becomes a del credere agent in respect of contracts entered into without his intervention. Assuming that the plaintiffs are del credere agents, it is difficult to see how they can sue the 2nd defendant for breaches of contract. The position of del credere agents was considered by Pickford, J., in *Gabrial v. Churchill & Sim* (1914) 1 K.B. 449 : 83 L. J. K.B. 491: 110 L.T. 155. This was a case where a vendor sued the del credere agent to recover the amount claimed, by him under a contract as to which there were disputes between the vendor and the purchaser who refused payment on the ground that the seller did not duly perform his part on the contract. It was held by Pickford, J., after a review of the authorities that liability of del credere agents does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. The learned Judge after a review of the authorities observed:

I do not think that any of these cases affords any ground for the contention set up by the plaintiffs in this case, that where there is a contract effected through a del credere broker, if disputes arise between the seller and the buyer, the seller is entitled to call on the del credere broker to litigate those disputes, taking upon himself- all the obligations of the buyer and taking to himself all the defences of the buyer?

29. This decision was affirmed by the Court of Appeal and is reported in *Gabrial*

v. Churchill & Sim (1914) 3 K.B. 1272 : L.J.K.B. 233 Buckley, L. J., after approving of the observations of Pickford, J., as to the extent of the obligation observed:

The liability of the del credere agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the del credere agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.

30. If the 1st defendant could not under the law sue the plaintiffs as del credere agents to recover the sum claimed from the 2nd defendant under the contract as to which there was a bona fide dispute it seems to me difficult to see how, by the mere withholding of the deposit of the plaintiffs and debiting the amount claimed in the deposit account, the plaintiffs, assuming they are del credere agents, can litigate the disputes as between the 1st and 2nd defendants in respect of the contract.

31. The next question is whether the 1st defendant committed breach of contract in not fixing the rate of exchange. Under the contract, Ex. B, the 1st defendant was bound to fix the exchange on the dealer's account in advance subject to the Banks operating for the period. On the 14th of February 1920, i. e., the day after the contract, Ex. B, the 2nd defendant wrote the letter Ex. III, to the 1st defendant, and as regards the fixing of the rate of exchange he states:

Regarding fixing exchange for the above shipment we think it advisable to fix the exchange at the present rate. We have also spoken about this with Mr. Meczies and trust you will do the needful.

32. To this letter the 1st defendant sent the reply Ex. IV, on the 16th of February 1920. About exchange they state:

We regret we are unable to fix exchange for you as the Banks will not at present; book forward. We will advise you when we are able to fix.

33. On the 18th February 1920 the 2nd defendant wrote to the 1st defendant the letter Ex. VIII which states:

We hope that you will let us know about the assortment required on hearing from your suppliers and fixing of exchange at your earliest convenience as advised in your letter.

34. On the 9th of April, 1920, the second defendant again wrote the letter, Ex. IX, to the 1st defendant firm. About exchange he states:

We have to remind you again for the same at a favourable, rate at your earliest convenience.

35. On the 3rd of May 1920 the 2nd defendant again wrote to the 1st defendant" the letter, Ex, X, in which he states:

We beg to draw your attention still further regarding the fixing of exchange you have promised us for 25 tons of brass sheets which we have indented in your office.

36. On the 4th of May, the 1st defendant firm wrote to the 2nd ?defendant the letter, Ex XI." About exchange they state:

We regret we have so far not been able to fix exchange forward for your yellow metal sheets. We are keeping in touch with the Banks, however, and should we Be able to do so will at once advise you. We understand that you wish us to fix the exchange at the first opportunity without reference to you.

37. There is no correspondence between this date and October. On the 20th of October, 1920 the 2nd" defendant wrote Ex XII to the 1st defendant firm complaining that exchange had not been fixed till then although Mr. Menzies had promised to do so and stating that Mr. Mackintosh told them that he had no personal knowledge of it and had referred the matter to Mr. Menzies, that if Mr. Menzies had not fixed the exchange, the 1st defendant firm should cable to England to cancel the contract and that they could only accept the goods at the rate of exchange current on the 1st of May, and not otherwise. The 1st defendant firm thereupon sent the cable Ex. V (a) to England asking the English merchants whether they could cancel the contract. On the 22nd of October, 1920, the 1st defendant wrote the letter, Ex. XIII, to the 2nd defendant stating that they had cabled to England and were awaiting a reply which they would communicate. As regards exchange they state:

In reply to your remarks regarding exchange, we would refer you to the clause in your contract covering this matter.

38. The clause is the clause which I have referred to. On the 23rd of October, the 2nd defendant wrote the letter, Ex. XIV, to the 1st defendant firm complaining about exchange not having been fixed and stating that they were depending upon the 1st defendant firm to fix the exchange and that they would not accept the goods except at the rate of exchange which was current in the first week of May, 1920. To this letter the reply, Ex. XV, was sent on the 25th of October where the 1st defendant states:

Our letter of 4th May was written to inform you that we are not able to fix exchange forward against the contract. If you will refer to the original contract you will find that the exchange clause reads "exchange to be fixed on dealers," account on or before the date that payment by the merchants to the shippers falls due subject to the Bank in Madras operating for this period.

39. To this, the reply, Ex. XVI, was sent by the 2nd defendant on the 26th of October, stating that there was no necessity to refer to the original contract having regard to the letter of the 4th May and that Mr. Menzies had promised

that he would fix the exchange at a favourable opportunity. The English firm eventually declined to cancel the contract as appears from the cable, Ex VI (a), which was communicated to the 2nd defendant by the letter, Ex. VII, dated the 28th of October. On the 21st of January 1921 the 1st defendant gave the 2nd defendant notice of arrival of the goods and, on the 21th of January, "the 2nd defendant wrote the letter, Ex. XVIII referring to their letter of the 4th of January 1921, and stating that they would be able to pay only at the rate of exchange on the 4th of May, 1920, and take delivery if exchange were fixed at that rate. The 2nd defendant wrote another letter, Ex. XIX, on the 4th of February to the same effect. To this letter the 1st defendant sent the reply. Ex XX, on the 4th of February stating that they could allow the 2nd defendant no conclusion as regards the exchange, and that they wanted settlement without any delay

40. As regards the oral evidence about the fixing of the rate of exchange there is direct conflict of evidence between Mr. Todd of Messrs. Huson and Todd, a firm of brokers who were admittedly the only brokers employed by the 1st defendant firm in respect of this contract and Mr. Menzies the Managing Director and Mr. Browning an Assistant of Messrs. Shaw Wallace & Co. Mr. Todd is positive that there was no request made to him to fix the exchange till May while Mr. Browning states that he was having interviews as regards the fixing of exchange from February onwards. Mr. Mackintosh who is an Assistant in Messrs. Shaw Wallace & Co., states that between February and May he did nothing in the matter of fixing the exchange. Mr. Menzies states that in February he asked the brokers to quote for March and April, 1921 and that they said the Banks would not quote so far ahead. The learned Trial Judge in dealing with the evidence observes as follows:

What happened was that the dealers did in fact express a desire to have the exchange fixed as early as 14th February and at that time these matters were in the hands of Mr. Menzies. According to him, he did apply every morning to Mr. Todd of Huson and Todd to get the exchange fixed for purposes of this contract. Mr. Mackintosh wrote on 16th February and ha says that he wrote on the authority of Mr. Meuzis and Mr. Menzies confirms it. We regret we are unable to fix the exchange for you as the Banks will not at present book forwards. We will advise you when we are able to fix.

41. Mr. Todd says that this contract was very very long ahead and that the Banks would not fix rates so far ahead. Apparently the difficulty arose about the beginning of May when the exchange began to oscillate. His books show that he fixed the exchange for a considerable number of "forward contracts, at forward dates for very much larger sums of money in. the period before May. I cannot help thinking that, if there had not been a hitch or misunderstanding about-this, Mr. Todd would have been able to fix the rate of exchange for this contract. Having regard to what Mr. Todd says in the witness box---he says:

That he got instructions but that he did not note them at the time but carried them in his head---I am afraid that the truth, may be that the matter passed out of his mind between February and May. This is not the fault of Shaw Wallace"s)

they keep the matter in charge of the most competent persons to do it. That, to my mind, exhausts their obligations. Then in May came further instructions from the 2nd defendant firm, again pressing for the exchange to be fixed and I have no doubt whatever that, from that time onward, Mr. Todd tried and tried fruitlessly to get the exchange fixed for this very long time ahead because the evidence before me is, and it appears from Mr. Todd's books not to be challenged, that the longest future date he could fix between the months of May and November was one month, except in two cases where there were bill transactions on the other side which made it easier.

42. On this finding of the learned Judge it seems to me difficult to see how the 2nd defendant can be made liable for any default on the part either of Mr. Menzies or Mr. Todd. Either Mr. Menzies did not from February to May ask Mr. Todd to fix the exchange or Mr. Todd, though asked, forgot to do it. Mr. Todd was the agent employed by Messrs. Shaw Wallace & Co., and it seems to me that if Mr. Todd was guilty of any neglect of duty it would not exonerate Messrs. Shaw Wallace & Co., from liability to the 2nd defendant as they cannot take advantage of their agent's neglect. The finding of the learned Trial Judge with which I agree is that it was possible if attempts had been made between February and May to fix the change. The evidence of Mr. Todd is that the exchange which was 2s. 3 3/4d. (the figure 13 3/4 page 22 Part 1 in the printed book is admittedly a mistake) in February and March became unfavourable later on. Mr. Todd, says that it was easier to fix the rate in March than in May. Mr. Todd's cross examination by Mr. Grant shows that transactions were put through and that though it was easier to fix the rate in March 1920 than in May 1920 still transactions were put through later. So far as this contract is concerned the goods were expected to arrive in January and it was the option of the 2nd defendant to pay immediately the goods arrived and get a rebate as to interest or to pay at any time within two months after the arrival. Even assuming that it was not possible to ask in exchange ahead for March, it was clearly possible to fix the exchange in advance till January and if the 2nd defendant had been informed that it would be difficult to fix the exchange in March he might very well have exercised his option of paying for and taking delivery of the goods the moment they arrived " especially as the evidence is that after May there was a tendency in the exchange to become unfavourable to him. It was the duty of the 1st defendant to keep the 2nd defendant informed as to the steps taken to fix the exchange. But from March 1920 till October 1920 the 1st defendant did not write to the 2nd defendant about the difficulty in fixing the exchange and left the 2nd defendant to believe that the 1st defendant was doing his best in the matter. I am of opinion that the 1st defendant company failed in their duty to take adequate steps to fix the exchange it being immaterial, in my opinion, whether that failure was caused either by the 1st defendant not giving instructions to Mr. Todd between February and May or by Mr. Todd (1st defendant's agent) not fixing the exchange though asked to do so. If it is necessary to decide who is in default I think it is more probable that Mr. Todd who is speaking from his books

did not receive from February to May instructions to fix the exchange as deposed to by him. The 1st defendant does not produce the book which Mr. Browning says was kept as a record of the transactions in which the firm agreed to fix the rates of exchange for aid and no explanation as given for its nonproduction. It is clear that the term in the contract, Ex. B, relating to the fixing of exchange was a very material term intended to protect the 2nd defendant against fluctuations in exchange. The 1st defendant firm to "1 protect themselves against fluctuations in exchange quoted in sterling and the 2nd defendant in order to protect himself as -far as possible required exchange when favourable to be fixed in advance. When the contract was entered into there is little doubt that the exchange was very favourable, being 2s. 3 3/4d. and for some months the fluctuations were not material and were very favourable to the 2nd defendant. I am, therefore, of opinion that the 2nd defendant is entitled to claim that he would only pay according to the rates of exchange current between February and May when according to the finding of the learned Trial Judge with which I agree it was possible fix the exchange. If that is so, the amount which the 2nd defendant would be entitled to, owing to the difference in exchange would cover the sum decreed against him after the sale of the goods.

43. I am of opinion that the appeal should be allowed and the suit dismissed against the 2nd defendant with costs in this and the Court below.

Krishnan, J.

44. This is an appeal by the 2nd defendant company against a decree passed against them by Mr. Justice Coutts-Trotter now Chief Justice sitting on the Original Side, for a sum of Rs. 30,000 and interest and costs. The suit was brought by the plaintiffs the Banians & Co., (against Messrs. Shaw Wallace & Co.) as the 1st defendant and in the alternative against the 2nd defendant. Between the plaintiffs and the 1st defendant there was an arrangement evidenced by Ex. A, called the Dubash agreement by which the former undertook to guarantee the latter against all loss in certain specified branches of their business in consideration of the payment of a commission at one per cent on piecegoods and iron and at half per cent, on other goods, Among other things the Banians were "To guarantee due completion by contracting parties of all the terms of their contracts", See para. 5 Clause (e) of Ex A. They were, however, to have an option to accept or decline to accept responsibility as regards any particular contract. It was the usual practice of the Banians to counter-sign the contract if they had accepted responsibility with regard to it.

45. The 1st defendant entered into a contract with the 2nd defendant on 13th February 1920, for a sale of 25 tons of yellow metal sheets at 182-10-0 per ton C. I. F. shipment in November, 1920; cash against documents: delivery to be taken at once on arrival of the documents on or before the 60th day after such arrival that being the due date. The price was fixed in English currency as the exchange was then fluctuating very much. To minimise loss on exchange the parties entered into a covenant that the exchange was to be fixed (in advance)

on dealers account on or before the date when payment fell due subject to the Banks in Madras operating: but if no instructions were received from the dealers prior to that date the 1st defendant company was to have the option of fixing exchange at the current rate at the time of payment, These terms are embodied in Ex. B, Exs. I and II, evidencing the prior negotiations.

46. The contract fell within the class of contracts guaranteeable by the plaintiffs and they accepted liability for it and in token thereof they counter-signed the contract. When the goods arrived in January 1921, the 2nd defendant refused to pay the pries calculated at the then current exchange and to take delivery as they contended that the 1st defendant had wrongfully failed to fix the exchange when asked to do so in February, 1920, when the exchange was very much more favourable. In fact it was then about 2/3 or 2/4 a rupee, whereas in 1921 the exchange had fallen to about f or so. The contract being broken the 1st defendant company had the goods sold, in auction and that caused a 1/3 or Rs. 30,000. They deducted this amount under the Dubash agreement Ex. A from the security which the plaintiffs had given to them.

47. Plaintiffs thereupon brought this suit alleging in the first instance that the 1st defendant company had itself committed the breach by wrongfully failing to fix the exchange in time and that they were, therefore, not entitled to any damages or to deduct any money from plaintiffs' money in their hands and they claimed, therefore, that the 1st defendant company should refund to them the money so deducted. In the alternative they asked that if the Court found that the 2nd defendant had committed the breach and was liable in damages the amount payable by that company as damages should be decreed to be paid over to them. The Trial Judge had exonerated the 1st defendant company from all liability and holding that the 2nd defendant company committed the breach of contract has decreed damages to be paid to the plaintiffs. The 2nd defendant company has appealed to us making the plaintiff company the sole respondent to the appeal.

48. It was contended for the plaintiff company (respondents) that the first defendant; company was a necessary party to the appeal and that the appeal should be dismissed for their non-joinder. Plaintiffs urge that they are entitled to a decree against one or the other of the defendants and, therefore, both the defendants should be before us so that if the 2nd defendant is to be exonerated the 1st defendant may be made liable. That no doubt is the plaintiffs' point of view but so far as the 2nd defendant is concerned he only desires that the decree against him in favour of the plaintiffs should be set aside. His appeal against the plaintiffs alone is, therefore, properly constituted and it was for the plaintiffs to take the necessary steps to safeguard their interests. I should have been prepared to direct the 1st defendant" company to be added as a party to the appeal but it appears from the evidence of Mr. Monzies P. W. No. 3, that the matter of the suit has been compromised between that company and the plaintiff company. I am not prepared to hold that the 1st defendant company is a

necessary party to this appeal and the objection on that score must be overruled.

49. The next point we have to consider is the objection of the 2nd defendant company that the plaintiff company is not entitled to maintain any suit against them for damages for breach of the suit contract as that company was not a party to the contract at all. This objection is raised in Issues Nos. 7 and 8 in the case which runs thus:

7. Did the plaintiffs guarantee the due performance of the contract at the instance of the 2nd defendant and was there any privity of contract between the plaintiffs and the 2nd defendant.

8. If not, are the plaintiffs entitled to maintain the suit against the 2nd defendant.

50. The learned Trial Judge treated the question as if it was one of want of consideration for the contract of guarantee because the guarantor had not been proved to have affixed his signature until the contract between the principals had been concluded. He overruled the objection by saying that the plaintiffs had signed the letter of the 13th February, before the contract was concluded. With respect to the learned Judge I think the point was misappreciated by him. The plea was that the 2nd defendant had nothing whatever to do with the plaintiffs' guarantee to the 1st defendant and that was a matter of arrangement purely between the plaintiffs and the 1st defendant and the "fact that under such guarantee the plaintiffs had to pay the 1st defendant the damages claimed to be payable by the 2nd defendant on the contract gave them no cause of action for damages against them. The first question for decision in this connection is had the 2nd defendant company anything to do with the giving of the guarantee by the plaintiffs. There is no evidence to show that they had. The arrangement was made in the usual course of business between the 1st defendant company and their Dubashes, the plaintiffs under Ex. A. As I read Ex. A, the plaintiffs are in the position of insurers and they insure against any loss occurring to the 1st defendant company from their contracts, on the payment of premium or commission on each contract. They indemnify the 1st defendant company against loss but they do not do so at the instance of or at the request of the dealers with whom 1st defendant company " was entering into contracts. The finding on issue No. 7 must, therefore, be that the plaintiffs did not guarantee at the instance of the 2nd defendant company and there was no privity of contract between them.

51. We have then to decide whether the plaintiffs have any right to maintain this suit against the 2nd defendant's company. We have here thus a position like this; A enters into a contract with B; C without, any connection with B undertakes to indemnify A against any loss on that contract for a consideration moving from A. Loss occurs by B breaking the contract and C is obliged to make good that loss under his agreement with A. Can C sue B for such damages in his own name? It seems to me he cannot. The general principle is that a person who is not a party or privy to the contract cannot enforce it. An insurer who pays is no doubt

subrogated to the rights of the insured against 3rd parties. See Smith's Mercantile Law, page 583 (Insurance against fire) and the cases cited; but it is clear law that, the insurer can only sue 3rd parties in the name of the insured and not in his own name : *Simpson v. Thompson* (1878) 3 A.C. 279 : 38 L.T. 1 : 3 A. M.C. 567.; *King v. Victoria Insurance Co Ltd.*(i) and Halsbury's Laws of England, (Vol. XVII, page 519, para. (1024). My learned brother briefly referred to all the English authorities quoted. I have not thought it necessary to refer to them myself again. Under the Indian Contract Act the agreement between the plaintiffs and the 1st. defendant is, it seems to me, a contract or indemnity falling u/s 124, and under such a contract no right is given to the promisor to sue 3rd parties. Peeling this difficulty the parties have expressly stipulated in para 13 of Ex. A that the "defendant company should, after the plaintiff company had paid off their liability, sue in their own name on being properly indemnified, the 3rd parties who are liable, for the benefit of the plaintiffs. This method has not been adopted here.

52. It is clear that under the English Law such a suit as the present one will not lie against the 2nd defendant company. But it is argued that the Indian Law is different and that the Indian Contract Act does give a right of suit in such circumstances and reliance is placed on Section 140 of the Contract Act for this contention. It seems to me that the section does not apply to this case as it lays down the rights of a surety in a contract of guarantee as defined in the Act. Such a contract in a tripartite contract to which the surety, the principal debtor and the creditor are all parties. Such a contract results only when at the instance of the debtor the surety guarantees payment to the creditor. Section 126 of the Act which defines a contract of guarantee though it does not expressly state that the debtor should be a party to the contract clearly implies, in my opinion, that there should be three parties to it, namely, the surety, the principal debtor and the creditor; otherwise it will only be a contract of indemnity. Section 145 which enacts that in every contract of guarantee there is an implied promise by the principal debtors to indemnify the surety clearly shows that the debtor and the surety are both parties to such a contract, for it will be strange to imply in a contract a promise between persons who are not parties to it. As that section deals with every contract of guarantee it would seem to follow that in every such contract the debtor must be a party. I can see no reason to suppose that the Indian Legislature intended to lay down a law different from the English Law on this point. I would have had no doubt on the matter but for the ruling in *Mutturama v. Chinnavalayaa* 33 Ind. Cas. 508, where Section 140 is construed as applying to a case of a bilateral contract to which the debtor is not a party though it is held in it that Section 145 implies the existence of three parties. With all respect, I am unable to follow the reasoning of that ruling; I think: it is unsound. Section 140 refers to a tripartite contract of guarantee just as s 145 does, the former stating what rights pass to the surety from the creditor and the latter dealing with the rights of the surety against the principal debtor. Section 141, which immediately follows Section 140 throws light on how Section 140 is

to be construed, for Section 141 explains that the surety's right includes a right to the benefit of securities and provides that if the creditor loses the securities, as between him and the surety his claim is restricted to that extent. The case in *Mutturama v. Chinnavalayan* (1916) 1 M.W.N. 290, was a case of a negotiable instrument and the decision seems to have been based mainly on the sections of the Negotiable Instruments Act. It is thus easily distinguishable from the present case. The observations of the meaning of Section 140 by the two learned Judges who took part in that decision do not seem to be quite consistent and the decision finally, turned on the findings under the Negotiable Instruments Act. I do not, therefore, think it necessary to refer the question as to the correctness of its interpretation of Section 140 to a Full Bench. I would hold that plaintiffs are not entitled to maintain the suit as brought against the 2nd defendant company. As regards the argument based on the plaintiff company being *del credere* agents it is sufficient to say that such a point does not arise as plaintiffs had nothing to do with the making of the suit-contract; they did not arrange it as agents at all. This is sufficient to dispose of the appeal but I think it proper to express my opinion on the question raised on the merits as well.

53. It is 2nd defendant's case that 1st defendant company committed breach by wrongfully failing to fix the exchange in proper time and thus causing a loss of more than the Rs. 30,000 claimed in suit. It is true that the covenant to fix the exchange is not a part of the main contract, Ex. B; but is only a collateral covenant and the breach of it will not justify a breach of the main contract. But it was open to the 2nd defendant company, if the 1st defendant company committed breach of that covenant, to set off the damages resulting from it against the damages for the breach of the main contract and as the former, is admittedly larger than the latter it furnishes a full defence to the suit. The question then is whether the 1st defendant company wrongfully failed to fix the exchange.

54. The covenant was for the 1st. defendant company to get the exchange fixed on receiving written instructions to that effect from the 2nd defendant company subject to the Banks in Madras operating for the period. The 2nd defendant company wrote Sis early as 14th of February 1920, asking exchange to be fixed at the then prevalent rate see Ex. III. It is conceded that exchange was not fixed till the due date that is in March 1921. The 1st defendant company excuses itself by pleading that the Banks were not operating for the period; the burden is on them to prove this. The evidence in the case on the point leaves the matter in considerable doubt. Mr. Menzies who was in charge of the 1st defendant company says he applied at once to Mr. Todd, of Messrs. Huson Todd & Co., exchange brokers, to get the e