

(1920) 03 BOM CK 0012
In the Bombay High Court
Case No : Second Appeal No. 468 of 1919

K.R. Chitguppi and Co.

APPELLANT

Vs

Vinayak Kashinath Khadilkar

RESPONDENT

Date of Decision : 09-03-1920

Acts Referred:

Contract Act, 1872 — Section 133, 138

Citation : AIR 1921 Bom 164 : (1920) 22 BOMLR 659 : 58 Ind. Cas. 184

Hon'ble Judges : Shah, J;Hayward, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shah, J.—The plaintiffs in this case sued defendant No. 1, the principal debtor, on the contract of nub-agency, for the price of goods supplied to him and for accounts, and defendant No. 2 upon his contract of indemnity and guarantee.

2. The defence of defendant No. 2, with which we are concerned in this appeal, was that in consequence of a subsequent variation in the contract between the plaintiffs and defendant No. 1 he was absolved from all liability in respect of the contract subsequent to the variation.

3. The lower Courts have disallowed the plaintiff's claim as against defendant No. 2; and in the present appeal, which is against defendant No. 2, the question is whether the lower appellate Court is right in its conclusion as to the liability of defendant No. 2. The contract in question between the plaintiff's- and defendant No. 1 was entered into on the 1st of October 1909. Broadly speaking the contract was for the sale of certain goods by the sub-agent in the District of Poona on commission at the rate of 7 1/2 per cent, on the price of the goods sold, and in addition the sub-agent was to get all the office expenses. On the same day defendant No. 2 wrote a loiter to the plaintiffs in which the terras of the contract of indemnity and guarantee were set forth. " He undertook to indemnify the firm against all losses, damages and expenses whatsoever the plaintiffs might suffer

by reason or in consequence of any default on the part of the sub-agent. It was also agreed that the plaintiffs were at liberty at any time or times at their absolute discretion and without giving him any notice to refuse further credit or supply of goods to the sub-agent and to grant to the sub-agent any time or other indulgence and to compound with him or to show him any forbearance in respect of any failure or neglect on his part to perform his services and duties to their firm or to account for the moneys, goods and property of their firm, and to treat the defendant No. 2, in all respects as though he and the sub-agent were jointly liable with him as a debtor to the plaintiffs. It was further agreed that no change whatever in the constitution of the plaintiffs' firm or in the constitution of the firm of the sub-agent should affect, impair, curtail, diminish or discharge his liability. Defendant No. 2 "expressly waived all or any of the rights as surety (legal, equitable, statutory or otherwise) which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce". Lastly he agreed that "the guarantee shall not be revocable by him at any time, but shall continue during the employment of the sub-agent". Subsequently the terms of the sub-agency were varied in June 1910 without the knowledge or consent of the defendant No. 2. The variation was that the sub-agent was to receive commission at the rate of 22 per cent, inclusive of all office expenses.

4. The question is whether the variation has the effect of discharging the surety from all subsequent liability. It depends upon the construction of the letter. It seems to me that there is no express provision in the letter that the surety will not be entitled to claim the benefit of the legal consequences of any variation in the terms of the contract of sub-agency. It is argued that defendant No. 2 consented to the variation in anticipation without knowing the nature of the variation. It seems to me that it would not be such consent to the variation as is contemplated by Section 133, It has been urged on behalf of the plaintiffs that as Section 133 enables the surety to consent to the variation, there is nothing wrong or objectionable in the surety giving such consent in anticipation. In the present case it is an admitted fact that there was a variation of one of the principal terms in the contract on the 1st of June 1910. The variation was that instead of 71 per cent, commission on the price of the goods sold and the office expenses the sub-agent was to get a commission of 22 per cent, inclusive of all office expenses. It is urged that this really is not a variation. But I feel quite clear that it is a variation in the terms of the original contract and certainly not an insignificant variation by any means. As to whether this variation would be beneficial to the surety or not is a question with which we are not concerned. u/s 138 of the Indian Contract Act the variation involves the result that the surety is discharged as to transactions subsequent to the variation. I do not think that the general clause in the letter of indemnity under which he waived all rights under the statutes can be read as implying any consent to the variation within the meaning of Section 133 or as entitling the plaintiffs to enforce the liability against the surety even though, according to law, he is discharged from such liability. The discharge from liability is an incident of the variation, and I do not

see how any such general agreement could be interpreted as amounting to that specific consent to the variation contemplated by Section 133. Such a consent necessarily implies that the surety has knowledge of the nature of the variation. It is not suggested in the present case that the defendant 2 had any such knowledge or that he consented to the variation. I do not say that a surety can never anticipate the nature of a future variation and give his consent in anticipation of such variation. But it seems to me that in the present case there is neither a general nor a specific consent to the variation in the terms of the sub-agency. I am therefore of opinion that the lower appellate Court was right in holding that in virtue of the provisions of Section 133 the defendant No. 2 was absolved from liability.

5. It is urged, however, that the defendant No. 2 would still be liable in respect of the transaction prior to the date of the variation. No point as to the short period between the 1st October and the 1st of June, when the variation was effected, was made in the lower appellate Court. The substantial period with which we are concerned in this suit is the period subsequent to the variation; and in respect of the liability of ant 1 for the goods supplied in that period the defendant No, 2 is not responsible as a surety. It is not necessary to remand the case now for a finding as to whether there is any liability of defendant No. 2 in respect of the goods supplied from the 1st of October 1909 to the 1st of June 1910, having regard to the state of the accounts between the plaintiffs and the defendant No. 1. If there was any substance in this contention, I feel sure that it would have been raised in the lower appellate Court at the proper time. But the omission to raise that point indicates in my opinion that there is no substance in it; and no attempt IN made to show that any appreciable part of the liability of defendant No. 1 determined by the trial Court relates to transactions prior to the variation. It is not necessary now to prolong this litigation by remand on such a point, as was not made in the lower appellate Court, and as is not shown to be substantial.

6. I would, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs.

Hayward, J.

7. I concur. A contract of continuing guarantee was in my opinion clearly constituted by the letter between the parties. A commission of 7 1/2 per cent, and a payment of office expenses was one of the conditions of the contract with the principal and a commission of 22 per cent, without payment of office expenses was the condition subsequently introduced. The Courts do not consider how far modification is material, but leave it for the surety to judge the importance of any variation. If his consent is not obtained to such modification as this, which is obviously a variation, he is discharged from his suretyship by Section 133 of the Indian Contract Act. But it has been argued that there is a saving provision to the effect that "nothing herein contained shall affect...any incident of any contract not inconsistent with the provisions of this Act" in Section 1 of the Contract Act and that it has been provided in the letter that any

rights of a surety inconsistent therewith should be waived and that full liberty has been given by the letter to introduce variations notwithstanding Section 183 of the Indian Contract Act. It seems to me impossible to hold that these provisions of the letter were not in express terms inconsistent with the provisions of the Contract Act. Wherever it has been intended that independent provisions should be permitted, it has always been expressly provided for such provisions by the introduction of the phrase in the absence of any contract to the contrary" which occur in Section 146 and a number of other sections of the Contract Act.

8. I concur, therefore, that this appeal ought to be dismissed with costs.