

(1925) 04 MAD CK 0055
In the Madras High Court

K.V. Periyamianna Marakkayar and Sons	APPELLANT
Vs	
Banians and Co.	RESPONDENT

Date of Decision : 21-04-1925

Acts Referred:

Contract Act, 1872 — Section 69, 70

Citation : AIR 1926 Mad 544 : (1926) ILR (Mad) 156 : (1926) 23 LW 432

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

Bench : Full 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 1st 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 subsistence 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 his letter of 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 1st 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 1s. 3-3/4d., 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 defendant 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. 73,117-5-7 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 the 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 there 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 set off the above sum of Rs. 30,500 against the plaintiff's 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 contract and that the plaintiffs "have no cause of action against him.

5. The case was tried before Coutts-Trotter, J., who held that the plaintiffs 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 to the price realized 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 an 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 nonjoinder 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 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 dubash 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 paragraph 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 or 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 6 of the agreement runs as-follows:

The liability of the Banians shall commence (1) in the case of transactions coming under Clauses (a) and (b) of paragraph 3 hereof:

As soon as the business is entertained. (2) In all other cases as soon as contracts are made between the firm and any dealer and shall continue until the contracts have all been duly completed or all claims, losses, costs 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 moneys 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 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 and Co.

13. The offer for these goods made by the 2nd defendant is Ex. I, dated the 9th of January 1920, and at the foot of it the Banians and Company have signed. There is nothing more than

For Banians and Co. (Signed) Manager,

14. None of the members connected with the firms of Banians and Company 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 and Company for countersignature 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 Dubash 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 Dubash 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 con-concerned, the Dubash agreement creates an obligation on the part of the plaintiffs to indemnify the 1st defendant against any loss they may sustain by the nonperformance, 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 126 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 the

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 security 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. Beading 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 whom there is no privity of contract. Section 126 refers to 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* [1875] 1 All. 487 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 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 My.& 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 page 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 whether 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. Thomson* [1877] 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 to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss, observes:

But this tight 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 the action of 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 P 256:

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 CPC 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 2 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 v. Chinna Vellayan [1916] 39 Mad. 965, 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 69 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 My.& K. 183 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 and 20 Vic. 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 Section 140, 141 and 145, refer not to contracts of indemnity but to contracts of suretyship which has 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 interests 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 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 paragraph 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, if in default of payment by the 2nd defendant, the goods in question may be sold under the orders of this Hon'ble Court; that the sale proceeds thereof be paid to the plaintiff and that the 2nd defendant be directed to pay .the plaintiffs the balance due by the 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 1st 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 persons with whom he enters into contracts on the principal's 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 *South Indian Industries Ltd. v. Mindi Ram Jogi* [1915] 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* [1891] 18 Cal. 573 by Wilson and Cunningham, JJ., in a passage of their judgment at P. 586 which was subsequently approved by the Privy Council on appeal.

28. But in *Peacock v. Baijnath* [1891] 18 Cal. 573 all that was held was that the Banian in that case, 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 breach of contract. The position of del credere agents was considered by Pickford, J., in *Thomas Gabriel and Son v. Churchill and Sim* [1914] 1 K.B. 449. 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 of 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 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 *Thomas Oabrial and Sons v. Churchill and Sim* [1914] 3 K.B. 1272 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 the event of 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 1st defendant committed breach of contract in not fixing the rate of exchange. (After discussing evidence his Lordship continued as follows) 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 that it is more probable that Mr. Todd who is speaking from his books did not receive from February to May instruction 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 transaction in which the firm agreed to fix the rates of exchange forward and no explanation is given for its non-production. 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 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 2sh. 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 rate of exchange current between February and May when, according to the finding of the learned trial Judge with which I agree, it was possible to 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 resale of the goods.

32. 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.

33. After stating facts and holding that 1st defendant Company was not

necessary party to the appeal his Lordship discussed evidence and held that the plaintiffs did not guarantee at the instance of the 2nd defendant Company and there was no privity of contract between them). We have then to decide whether the plaintiffs have any right to maintain this suit against the 2nd defendant Company. We have here thus a position like this: A enters into a contract with B; C without any connexion 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 third parties. See Smith Mercantile Law page 583 (Insurance against fire) and the cases cited ; but it is clear law that the insurer can only sue third parties in the name of the insured and not in his own name: *Simpson v. Thompson* [1877] 3 A.C. 279 and *King v. Victoria Insurance Co., Ltd.* [1896] A.C. 250 and Halsbury's Laws of England Vol. 17, P 519 para. 1024. My learned brother having 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 of indemnity falling u/s 124 and under such a contract no right is given to the promisor to sue third parties. Feeling 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 third parties who are liable, for the benefit of the plaintiffs. This method has not been adopted here.

34. 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 is 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 say expressly 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 debtor 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 *Muthu Raman v. Chinna Vellayan* [1916] 39 Mad. 965, where Section 140 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 Section 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 *Muthu Raman v. Chinna Vellayan* [1916] 39 Mad. 965 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 entirely distinguishable from the present lease. The observations on the meaning of Section 140 by the two learned Judges who took part in that decision do not seem to be quite concurrent 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.

35. 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. (After discussing evidence his Lordship proceeded.) Whether the fault be the 1st defendant Company's or Mr. Todd's in either case the 2nd defendant Company is entitled to be reimbursed for the loss caused by the failure to fix up the exchange in time. On this view neither the 1st defendant Company nor the plaintiffs will be entitled to any amount as damages from the 2nd defendant Company. On this ground also the suit would fail.

36. For the above reasons, I agree that the appeal should be allowed and the

decree of the trial Judge against the 2nd defendant Company should be set aside and the suit dismissed against them with costs in the trial Court and of the appeal.