
(1937) 11 MAD CK 0044
In the Madras High Court

Nuserwanji Cursedji Bhesania and Co.

APPELLANT

Vs

Mahamayi Ammal and Others

RESPONDENT

Date of Decision : 18-11-1937

Acts Referred:

Contract Act, 1872 — Section 134

Citation : AIR 1938 Mad 585

Hon'ble Judges : Leach, C.J

Bench : Division Bench

Judgement

Leach, C.J.—The appeal arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Dindigul to recover a sum of Rs. 77,770 with interest from K.S.N. Periathambi Nadar, who was sued as the principal debtor, and from U.P.A. Pachayappa Nadar, who was sued as his surety. They were defendants 1 and 6 respectively, and as it will be necessary in the course of this judgment to mention them frequently, it will be convenient to refer to them here as defendants 1 and 6. Defendant 6 died during the pendency of the suit and the respondents are his legal representatives. The appellants are a firm of produce merchants with their head office at Bombay. In 1915, they opened a branch at Bodinaickanoor in the Madura District, where they carried on business in coffee and cardamoms under the style of M.N. Bodiwala and Company. In the course of their business at Bodinaickanoor, they became associated with defendant 1, who, they say, pressed them to open a branch at Pattiveeranpatti and to allow him to become a working partner so far as the business at Pattiveeranpatti was concerned. Whether the suggestion came from defendant 1 matters not, but the suggestion was made and carried into effect on 15th July 1926. The arrangement was that the appellants were to provide the capital and were to share the profits or losses with defendant 1 in the proportion of ten annas and six annas respectively. It is the appellants' case that defendant 6 undertook to guarantee the payment of defendant 1's share of any loss that might result from the business and that the partnership was formed on this basis. They say that on 15th July 1926, three documents were executed, namely a vartamanam letter by

defendant 1, embodying the terms of the partnership (Ex. A); a counterpart vartamanam letter executed by Manchand Hathi Chand, the appellant's agent in Bodinaickanoor (Ex. A-1); and a vartamanam-letter by defendant 6 in which he undertook to make good to the appellants "the loss pertaining to defendant 1's share" and also any amount which might be found to have been misused by him out of the moneys provided by the appellants. This last letter is Ex. Rule Defendant 1 by his written statement admitted the appellants' case so far as the formation of the partnership was concerned and also admitted the genuineness of the three documents to which I have just referred, but defendant 6 denied that he had ever Undertaken to guarantee defendant 1 and averred that Ex. B was a forgery.

2. It is an undisputed fact that defendant 1 carried on business in partnership with the appellants at Pattiveeranpatti on the basis of the vartamanam letters, Exs. A and A-1, and that the appellants advanced consider, able sums of money for the purpose. The business was conducted on behalf of the appellants by Manchand. The market, however, proved to be a falling one and by the end of August 1927 heavy losses had been sustained. The appellants allege that on 2nd September 1927 it was agreed between them and defendant 1 that the latter should take over all the assets and liabilities of the Pattiveeranpatti business and pay to them a sum of Rs. 70,000. They further allege that defendant 6 agreed to guarantee the payment of this sum and that the arrangement was embodied in three other documents, Exs. D, E and XXVI, all dated 2nd September 1927. Ex. D is a promissory note payable on demand for Rs. 70,000, bearing interest at is $\frac{3}{4}$ per cent, per mensem executed by defendant 1 in favour of the appellants. According to its terms Ex. B is a vartamanam letter addressed by defendant 6 to the appellants in which he undertook to pay the amount due on the promissory note within one year in the event of defendant 1 failing to do so. Ex. XXVI is a vartamanam letter executed by Manchand on behalf of the appellants and addressed to defendant 1. It reads as follows:

Today I checked all the accounts relating to the coffee and cardamom business which you in partnership with our Company were carrying on under the name and style of Moolji Bhai Nuserwanji Bodiwala and Company, at Pattiveeranpatti from 15th July 1926 to 2nd September 1927; the out-standings and the profit and loss in the business pertaining to the aforesaid vilasam have been given up to you and I have obtained from you a promissory note for Rs. 70,000 (Rupees seventy thousand) in favour of Messrs. Nuserwanji Karpudji Basania and Co. at Bombay and as security for the amount of that note I have also obtained a security varthamanam from M.R. Ey. U.P.A. Pachayappa Nadar Avergal. The ledger, day book, etc., and the promissory notes of the parsons from whom amounts are due are also received. Yourself and myself shall within four days from this date start and go to Bombay, inform the principals of the N.C. Basania and Company, of these matters and I shall obtain from them a power of attorney In your favour enabling you to collect the out standings and pay the amount to us.

3. It will be observed that this document states that the out-standings and the profit and loss of the business had been given up to defendant 1, who had signed a promissory note for the agreed amount, but that who books and the promissory notes given by debtors of the partnership had been handed over to Manchand and that he and defendant 1 were to proceed to Bombay to interview the principals, who were to furnish a power of attorney in favour of defendant 1 in order that he might realize the assets of the business. It is however untrue that the assets had been handed over to defendant 1. Defendant 1 admitted the genuineness of these documents, but defendant 6 denied that he had undertaken to act as the surety of defendant 1 and alleged that Ex. B was also a forgery. Exs. D and XXVI are undoubtedly genuine and it is true that after these documents had been executed Manchand and defendant 1 left Pattiveeranpatti for Bombay where they interviewed the appellants. The evidence also discloses that the appellants were reluctant to carry out the arrangement entered into by Manchand, and defendant 1 left Bombay without the power of attorney. When defendant 1 returned to Pattiveeranpatti he wrote several letters to the appellants pressing them to hand over to him (a) the promissory notes and other securities which the debtors of the partnership had executed or provided and (b) the power of attorney, but the appellants did not comply with his demands. They had not been complied with by 29th June 1928, when Jagan Mohandas (P.W. 9), a partner in the appellants' firm, arrived at Pattiveeranpatti. Discussions then took place between him and defendant 1 which resulted in two further vartamanam letters, being executed (Exs. FFF and GGG). The first of these letters was executed on 16th July 1928 by defendant 1 and is in the following terms:

Whereas I made an agreement on 2nd September 1927 after looking into the accounts, to the effect that I would undertake all the responsibilities of the business of coffee seeds and cardamoms carried on under the name and style of Moolji Bhai Nuzervanji Bodivala and Company, in this place started on 26th July 1926 under the agency of Manchand Hatichand Sait, the agent of your firm at Bodinaickanoor, and pay you Rs. 70,000, whereas I accordingly undertook the same and executed a promissory note in your favour and whereas there is still time up to 2nd September 1928 for the vartamanam letter (letter of agreement) executed by M.R. Ry. U.P.A. Pachaiappa Nadar Avergal, in your favour as security, for the said sum, I declare that I or my surety shall pay the (said) money within the said due date, that in default you may make arrangements for the recovery of the said sum and that I will not alienate my moveable and immovable properties of nanja and punja lands, hills, gardens, houses, etc. all properties belonging to me by way of hypothecation, otti (mortgage with possession) etc. I declare that I have not prior to this encumbered any of the said properties to any one by way of mortgage, otti etc. You have this day agreed to prepare a general power of attorney similar to the copy of the power of attorney sent by me by registered post on 16th October 1927 and send the same as soon as possible, after reaching Bombay for the purpose of recovering the out-standings due under

promissory notes, accounts, usufructuary mortgage, hypothecation, lease, etc, all the documents and true accounts relating to the said firm of M.N. Bodivala and Company, and you have executed a vartamanam letter also to that effect. I shall from time to time pay the money collected by me out of the out-standings of the aforesaid M.N. Bodivala and Company, into your firm at Bodinaickanoor and obtain receipt.

4. Ex. GGG bears the same date and is the counterpart signed by Jagan Mohan Das on behalf of the appellants. In spite of this arrangement, the documents which the appellants were to hand over to defendant 1 were not then handed over to him, and they also withheld the power of attorney. After waiting till 3rd August 1928 and the appellants being still in default, defendant 1 wrote to Jagan Mohan Das, who was then at Bodinaickanoor, saying:

Mr. Mauchand Hathichand has not delivered the documents and the pro-notes to me as it was decided in our agreement. It is a pity that the agreement was not honored. If I do not get any reply for this within three days, please kindly take notice that my pro-note of 2nd September 1927 and the agreement of 16th August 1928 are null and void and will not bind me.

5. This is Ex. WWW. On 8th August 1928 Manchand wrote to defendant 1 a letter (Ex. 31) and with it enclosed a number of promissory notes and other documents, but he did not send the power of attorney which defendant I had throughout insisted on being supplied to him and which the appellants had agreed to furnish. On 18th August 1928, defendant 1 wrote to the appellants at Bombay a long letter (Ex. 34-A) setting out the arrangement entered into with them and concluding as follows:

On account of your many defaults, and your non-compliance with the agreement given by Mr. Jagan Mohan Das on 16th July 1928, I have hereby cancelled the pro-note for Rs. 70,000 (seventy thousand rupees only) executed by me on 2nd. September 1927. I am enclosing a typed translation of this notice.

6. This letter was written in Tamil. Defendant 1 having cancelled the agreement, as he had the right to do, as the appellants had for a year failed to carry out their part of the agreement the appellants wished to carry it through and sent him a power of attorney. This, however, did not arrive until 7th September 1928 and it was then too late. The appellants filed the suit on 27th November 1928. Written statements were in due course filed by defendants 1 and 6. The defendant 1 denied liability on the ground that there had been a total failure of consideration for the promissory note which he had signed. Defendant 6 denied that he had ever been consulted and described the claims as being false and fraudulent. Defendant 1 eventually withdrew his defence and allowed the case to proceed against him ex parte. By this time defendant 6 had died and his widow was made a party as defendant 7. She filed an additional written statement in which she adopted the defence of defendant 1 in addition to the defence set up by her husband. The trial was a lengthy one as it involved the question whether

Exs. B and E were forgeries. It was alleged that other documents on which the appellants relied had also been fabricated, but it is not necessary for the purpose of this appeal to refer to these other documents. The learned trial Judge held that Exs. B and E are forgeries and dismissed the suit so far as it concerned defendant 6. It is also not necessary for the purposes of deciding the appeal to enter upon a discussion of the finding of the learned trial Judge that Exs. B and E are forgeries, because the appeal fails on other grounds.

7. In answer to questions put by the Court, the learned Advocate-General very properly admitted that Manchand had full authority to bind the appellants and that the arrangement entered into by him with defendant 1 on 15th June 1926 was binding and needed no confirmation by the appellants. The same admission was also very properly made with regard to the further arrangement entered into by Manchand with defendant 1 on 2nd September 1927. The learned trial Judge held that the appellants and Manchand had the entire control of the business at Pattiveeranpatti until May 1928 in spite of the execution of the promissory note, Ex. D, the consideration for the transfer of the assets of the partnership to defendant 1. The mention of the month of May is a mistake for July, as it was on 16th July 1928 that Exs. FFF and GGG were executed. With this correction we concur without hesitation in the finding of the learned trial Judge in this respect. This means that in spite of the binding contract which defendant 1 entered into with the appellants in July 1927 the appellants failed to fulfill their part of the bargain, and after the ratification of July 1928 they still remained in default and were in default when defendant 1 gave notice of cancellation of the arrangement by reason of the default. The consideration for the promissory note therefore failed and defendant 1 was relieved of all liability under the promissory note. That he subsequently withdrew his defence and allowed judgment to be given against him cannot in our opinion affect the position of defendant 6. If defendant 1 was not liable on the promissory note, defendant 6 as surety was also discharged. This is specifically provided for in Section 134, Contract Act, which says that the surety is discharged by an act or omission of the creditor the legal consequences of which is the discharge of the principal debtor. The reason why defendant 1 gave up his defence and allowed judgment to go against him has not been disclosed and no purpose will be served by entering into speculation with regard to the motive.

8. Section 133 of the Contract Act says that any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance. The contract which the appellants entered into with defendant 1 contemplated the immediate handing over of the assets of the business of Pattiveeranpatti to defendant 1, or at any rate within a reasonable time. It also contemplated the giving of the power of attorney by the appellants to defendant 1 to facilitate his enforcement of rights against the debtors of the partnership. No assets were handed over to defendant 1 until after twelve months from the date of the contract had elapsed and those which were sent to him were only sent after

defendant 1 had given notice that he would not be bound by the contract. The same remark applies to the delivery of the power of attorney. The arrangement embodied in Exs. FFF and GGG amounted to a variation of the terms of the contract, because it excused the immediate delivery of the assets to defendant 1 and allowed delivery to be made after more than a year had elapsed. The learned Advocate-General has suggested that inasmuch as Section 133, Contract Act contains the words "as to transactions subsequent to the variance" the case does not fall within the section. Assuming that it does not, it is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted. There are many authorities bearing on the point, but it will suffice if I quote in this connexion the remarks of their Lordships of the Privy Council in AIR 1935 21 (Privy Council) of the report appears the following passage:

It appears to their Lordships that the law on the discharge of sureties has been somewhat obscured by the emphasis laid in the cases on an agreement between the parties to vary the terms of the original agreement. The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed.

9. At page 348 their Lordships observe:

Having arrived at this conclusion, it becomes unnecessary to consider the effect of Section 133, Contract Act. Whether that much-discussed section relates only to continuing guarantees or is intended to affect a guarantee of one obligation, and if so what it means, it is unnecessary to determine. In any view of the section, it cannot, in their Lordships' opinion, operate to alter the primary law of the contract of guarantee that the promise must show performance before he can hold the promisor to his promise.

10. The passage just quoted shows that the provisions of the Contract Act cannot be deemed to be exhaustive. It is clear in this case that the appellants have not shown performance, and, therefore they cannot hold defendant 6 to his promise. A halfhearted attempt has been made to show that defendant 6 did agree to the arrangement entered into between Jagan Mohan Das and defendant 1 at Pattiveeranpatti in July 1928. The attempt was based on a statement in the evidence of Jagan Mohan Das to be found on p. 746 of the printed record where he says:

I saw defendant 1 and defendant 6. They said they could not make any collections as the season was dull and the crops were not good and wanted more time for payment of the pro-note debt. I said that if they paid Rs. 25,000 or Rs. 30,000, I would give them time. They said they would consult and let me know

the next day. Next day they said they would give an undertaking that they would not mortgage or sell defendant 1's property and that I need not file a suit or apply for an attachment before judgment. I agreed.

11. At a later stage in his evidence the witness stated that he met defendant 6 between 12th and 16th July 1928, but only once. His statement that he saw both defendants 1 and 6 the next day after they asked for time is therefore on his own showing untrue. The learned trial Judge has disbelieved the statement of Jagan Mohan Das that defendant 6 did agree to the arrangement embodied in Exs. FFF and GGG, and we consider that he was fully justified in so doing. If defendant 6 had agreed with Jagan Mohan Das to accept the variation in the contract we have no doubt that he would have induced him to sign Ex, FFF or execute a fresh vartamanam letter. The contention that defendant 6 fell in with the arrangement made by Jagan Mohan Das and defendant 1 at Pattiveeranpatti in July 1928 must therefore be rejected, and we hold that defendant 6 was not a consenting party to the variation of the contract. As the contract was varied without his consent he is discharged from liability, apart from any question of cancellation. Moreover defendant 6 was in fact greatly prejudiced by the fact that immediate delivery of the assets of the partnership to defendant 1 was dispensed with. The arrangement of July 1928 meant that the principal debtor had lost much valuable time and was not likely to be able to realize the assets before the expiration of the twelve months allowed to the surety for payment. For these reasons, we hold that the appeal fails and must be dismissed with costs in favour of respondent 2. We fix the advocate's costs at Rs. 1200. The memorandum of objections is dismissed. No order as to costs.