
(1932) 03 MAD CK 0017
In the Madras High Court

R.M.M.S.T. Vyravan Chettiar

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 08-03-1932

Acts Referred:

Contract Act, 1872 — Section 141

Citation : AIR 1933 Mad 39 : (1932) ILR (Mad) 949 : (1932) 36 LW 490 :
(1932) 63 MLJ 615

Hon'ble Judges : Ramesam, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Ramesam, J.—The facts out of which this appeal arises may be stated as follows.
Two Chetties, R.M.M.S.T. Vyravan Chettiar who is the

appellant before us and M.A.R.N. Ramanadhan Chettiar carrying on business
under the vilasam of M.A.R.N., were in the habit of borrowing from

the banks in Madras on joint promissory notes and utilising the amounts in equal
shares. There were two such promissory notes with which we are

concerned. On each occasion the amount borrowed was Rs. 50,000. The total
amount borrowed being one lakh, each debtor took Rs. 50,000

for his own purpose. The dates of the two notes are 8th July, 1924 and 22nd
April, 1925. On the 3rd August, 1925, M.A.R.N. was declared

insolvent. It is admitted that the insolvent paid interest on his share of the debt
on the 8th July, 1924, 8th October, 1924 and 8th January, 1925.

He had certain shares in the Indian Bank from whom those debts were borrowed,
and under Article 19 of the Articles of Association of the Indian

Bank, the bank had a lien on the shares. After the insolvency of Ramanadhan
Chetty, the bank demanded the appellant for payment and he paid

the whole debt. In respect of the moiety of the insolvent's debt he now claims to

be subrogated to the benefit of the lien which the Indian Bank had over the shares, and this is claimed u/s 141 of the Contract Act. The Official Assignee representing the insolvent claims that the shares had vested in him free of any such lien. The matter came on before our brother Waller, J., and he found that no specific agreement as was alleged by the appellant to the effect that each debtor was to be surety for the other," in respect of his moiety of the debt was made out. He therefore dismissed the application. This appeal is filed against his order.

2. We entirely agree with the learned Judge that the evidence does not make out any specific agreement between the parties to the effect that, though as between the Indian Bank and the debtors they were jointly and severally liable, as between themselves each should be regarded as a surety for the other in respect of his moiety of the debt. Under the Indian Contract Act, the contract of guarantee is confined to cases where the guarantor agrees with the creditor to discharge the liability of a third person in case of his default. Cases where on the face of the contract two persons are both jointly and severally liable do not fall within the definition. In other words, the contract of guarantee as defined in Section 126 of the Indian Contract Act is confined to cases of suretyship strictly so called. In *Duncan, Fox & Co. v. North and South Wales Bank* (1880) 6 A.C.

1. Lord Selborne, L.C, distinguishes between three kinds of cases at page 11. The first case there mentioned is the only case covered by the Indian Contract Act. The second and third cases there enumerated are cases of suretyship loosely described as such. The second case is a case where there was an agreement between the principal and the surety only, the creditor being a stranger to it. The third case is a case where, without any contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt as between the two being of one of those persons only, and not equally of both. After eliminating the cases of suretyship strictly so called, the Noble Lord discusses at page 12 how far the person secondarily liable as surety is entitled to be subrogated to the rights of the creditor in the second and third cases. He refers to Lord Eldon's dictum in *Yonge v. Reynell* (1852) 9 Hare 809 : 68 E.R. 744 : 89 R.R. 689 and finally winds up by saying that even in the second and third cases the surety has some right to be placed in the shoes of the

creditor where he paid the amount. The learned advocate for the appellant strongly relied upon this dictum and also the case in *William Rouse v. Bradford Banking Co., Ltd.* (1894) A.C. 586 But in this case there is an express agreement between the parties. He also referred to *Rowlatt on Principal and Surety*, page 7. But the passage at page 7 relies on the case in *Duncan, Fox & Co. v. North and South Wales Bank* (1880) 6 A.C. 1 and does not carry the statement of the law beyond it. To make this passage applicable, the case must be one where the debt must be wholly of one and not equally of both. The whole foundation for the equitable doctrine of the English Courts of Equity is the argument of Sir Samuel Romilly in *Craythorne v. Swinburne* (1807) 14 Ves. 160 : 33 E.R. 482 : 9 R.R. 264. That was a case of contract of guarantee in the strictest sense of the term. So also the cases reported in *Yonge v. Reynell* (1852) 9 Hare. 809 : 68 E.R. 744 : 89 R.R. 689 and *Wythes v. Labouchere* (1859) 3 De G. & J. 593 : 44 E.R. 1397 : 121 R.R. 238. Mr. Krishnaswami Aiyangar relied on *Sheldon on Subrogation*, Section 169. But that section does not very much help the appellant. The opening sentence shows that even in some States in America (Georgia, Albana and Vermont.) right of subrogation among the parties jointly bound as principals is denied, though in other States such right of subrogation seems to have been recognised. There is no case in England where the Courts have gone to this length. On the other hand, the statement of the law in *Duncan, Fox & Co. v. North and South Wales Bank* (1880) 6 A.C. 1 makes it subject to the limitation that the debt should not be equally of both. The case *Goverdhandas Goculdas Tejpal v. The Bank of Bengal* ILR (1890) 15 Bom. 48 is also a case of contract of suretyship strictly so called. The only point held there was that unless the surety pays down the whole money he is not entitled to the transfer of the security. We are not prepared to extend the legal position as laid down in English cases on the mere authority of the cases cited in *Sheldon*. The appeal fails and is therefore dismissed with costs.

Madhavan Nair, J.

3. The facts of this appeal are very simple. The appellant Vyravan Chetty, and another, who became an insolvent on the 3rd August, 1925,

borrowed from the Indian Bank on two occasions, 8th February, 1924 and 22nd August, 1925, a sum of Rs. 1,00,000, the loan on each occasion

being Rs. 50,000. The amount was borrowed under two promissory notes signed by both of them. On the face of the notes the liability of the

executants is joint and several. It is admitted that each of the promissors took for himself on each occasion half of the amount borrowed, so that

each owed the Bank Rs. 50,000. The insolvent owned 153 shares of the Indian Bank. Under Article 19 of the Articles of Association, the Bank

had a lien over these shares for the amounts due to it from the insolvent. The Indian Bank realised from the appellant the entire amount due to it

from both the promissors. The entire money due to the Bank from himself and the insolvent having been paid off by him, the appellant contends

that he is a surety for the insolvent for the amount due from him and that he is entitled u/s 141 of the Indian Contract Act to the benefit of the

security held by the Bank against the principal debtor, the insolvent, i.e., in other words, he is entitled to have charge on the insolvent's shares in

the Bank and the dividends accruing therefrom. The claim was opposed by the Official Assignee.

4. In the application in support of his claim, the appellant relied on two specific agreements of suretyship - one agreement each time the money was

borrowed - alleged to have been entered into between himself and the insolvent. In his evidence he set up a general ""custom"" amongst the

Nattukottai Chetties that in such borrowing transactions each borrower becomes surety for the amount taken by the other. The learned Judge held

neither the ""agreements"" set up nor the ""custom"" was proved and so dismissed the petition.

5. On the evidence it is not seriously contended that the learned Judge's conclusions are incorrect. The evidence does not establish the agreements

of guarantee set up nor does it support the alleged custom. Sections 140 and 141 of the Indian Contract Act regulates as against the principal

debtor the rights of a surety who performs or otherwise discharges the liabilities of the principal debtor. These sections are as follows:

Section 140. - Where a guaranteed 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. - 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.

6. Section 140 lays down a general principle of which the most important practical application is to be found in Section 141 (see Pollock and

Mulla, page 479). u/s 141 a surety is entitled to the benefit of every security which the creditor has against the principal debtor. This was the

section relied on by the appellant before Waller, J. If this section applies there can be no doubt that the appellant is entitled to claim a charge on the

shares of the Bank held by it (the creditor) as a security against the insolvent. Having regard to the finding of the learned Judge and our opinion that

the agreements set up by the appellant have not been proved, what is now urged is not that Section 141 of the Contract Act is directly applicable,

but that the general principle of equity underlying that section would apply to the appellant who, though he is not a surety strictly speaking, occupies

a position analogous to that of a surety; and since he has admittedly discharged the liability of the insolvent by paying the creditor his portion of the

debt, viz., Rs. 50,000, he is in equity entitled to the benefit of the security held by the Bank, (the creditor), against the insolvent. This argument is

sought to be supported by the decision in the well-known case of Duncan, Fox & Co. v. North and South Wales Bank (1880) 6 A.C. 1. It is

doubtful if this argument was put before the learned Judge but it is stated that the case was quoted before him. The question is purely one of law. It

was held in that case that

The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who

may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover

it deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of

those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the

suretyship.

7. The facts of the case were these : R. & Sons offered a bill of exchange for a

portion of the price due from them for a cargo of corn purchased from D. & Co. D. & Co. declined to take the bill of exchange. They were customers to N.S.W. Bank. One of the partners of R. & Sons had deposited with this Bank the title deeds of two of its own freehold properties and these were held by the Bank as securities for what the Bank might advance in the way of discounts. R. & Sons told D. & Co. that if they would inquire of the bankers they would find it would be alright with their bill. The Bank manager refused to discount the bill without the indorsement of D. & Co. but said that he believed D. & Co. would incur no more than a nominal liability by making the endorsement, placing the amount to the credit of D. & Co. R. & Sons later on stopped payment of the bill when it became due and the bill was dishonoured. D. & Co. then became acquainted with the fact that securities had been deposited with the bankers by R. & Sons to cover advances on their bills and brought an action against the bank to have the benefit, so far as they would go, of the securities deposited with them, claiming to be sureties to the bankers for what was due upon the bill. It was held that D. & Co. were sureties on their bill and that as such they were entitled to the benefit of these securities. (See the headnote.) In examining the principles and authorities applicable to the question to be decided the Lord Chancellor distinguished between three kinds of cases: (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two that of one of those persons only, and not equally of both, (the italics are mine) so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. In all these three kinds of cases it was pointed out by their Lordships that the person who discharges the liabilities due to the creditor would be entitled to the benefit of the security held by the creditor, though a case of suretyship strictly speaking would fall only under class I, as a contract of guarantee is confined to agreements

where the "surety" agrees with the creditor that he would discharge the liability of the "principal debtor" in case of his default (see Section 126 of the Indian Contract Act). Obviously classes II and III are not cases of suretyship strictly so called. Their Lordships observed that the case before them did not fall within the first or the second class as admittedly there was no agreement either between R. & Sons and D. & Co. constituting the relation of principal and surety to which the Bank was a party, or a similar agreement between the two, to which the Bank was a stranger; and that the case fell within the third class in which though there is, strictly speaking, no contract of suretyship "there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other". It was for this reason that D. and Co. were held to have the rights of sureties though they were, strictly speaking, not sureties on the bill. In the case before us no contract between the appellant and the insolvent constituting the former a surety for the latter to which the Bank was a party, has been pleaded and the specific contracts of suretyship pleaded have not been substantiated. The appellant therefore argues that though he is not strictly speaking a surety, he falls within the third class enumerated above and that he occupies in equity a position analogous to that of a surety as mentioned therein as he has discharged the liability of the insolvent to the Bank. The question is whether he occupies this position. If he does, then he is, by extension of the principle applicable to the case of sureties strictly so called, entitled to the benefit of the security held by the Indian Bank. To fall within class III mentioned above and to assimilate his position with that of a surety strictly so called, a person who discharges the liability to the creditor should be only secondarily but not primarily liable to the creditor. This was the position of D. & Co. in *Duncan, Fox & Co. v. North and South Wales Bank* (1880) 6 A.C. 1. Having regard to the facts of the present case, it cannot be said that this is the position of the appellant with respect to his liability on the promissory notes. As already pointed out, the liability on the promissory notes of the appellant and the insolvent is joint and several. There is only one debt in the present case, a debt which is equally a debt of both the parties. The Indian Bank can recover the entire amount either from the appellant or from the insolvent. Thus there is no question of one person being

primarily liable for the debt and the other only secondarily liable. In these circumstances the principle of the decision in *Duncan, Fox & Co. v.*

North and South Wales Bank (1880) 6 A.C. 1 has no application to the present case and on the strength of that decision the appellant cannot

claim that his position is analogous to that of a surety and that therefore he is entitled to the benefit of the security held by the creditor.

8. Various other cases were cited by the appellant's learned counsel, but all of them are distinguishable. In the case in *William Rouse v. The*

Bradford Banking Co., Limited (1894) A.C. 586 there was an express agreement between the parties. The case in *Craythorne v. Swinburne*

(1807) 14 Ves. 160 : 33 E.R. 482 : 9 R.R. 264 is one of co-sureties and the cases in *Yonge v. Reynell* (1852) 9 Hare. 809 : 68 E.R. 744 : 89

R.R. 689 and *Wythes v. Labouchere* (1859) 3 De G. & J. 593 : 44 E.R. 1397 : 121 R.R. 238 are all cases of strict suretyship. The case in

Goverdhandas Goculdas Tejpal v. The Bank of Bengal ILR (1890) 15 Bom. 48 is also a case of a contract of suretyship. Reference was made to

a passage in *Sheldon on Subrogation*, page 256, Chapter IV, Section 169, which shows that the right of subrogation between joint debtors exists

in some States in America, but the existence of such rights is denied in some other States. However, no English decision has been cited in support

of the contention that such right exists in England. In my opinion persons who are jointly and severally liable on promissory notes are not sureties

u/s 126 of the Indian Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so called to attract the provisions

of Section 141 of the Contract Act.

9. For the above reasons, I must hold that the appellant is not entitled to the benefit of the security held by the Indian Bank against the insolvent. I

would therefore dismiss this appeal with costs.