

(1940) 09 BOM CK 0002
In the Bombay High Court
Case No : O.C.J. Appeal No. 8 of 1940

Shree Meenakshi Mills Ltd.

APPELLANT

Vs

Ratilal Tribhovandas Thakar

RESPONDENT

Date of Decision : 24-09-1940

Acts Referred:

Contract Act, 1872 — Section 133

Citation : AIR 1941 Bom 108 : (1941) 43 BOMLR 53

Hon'ble Judges : Kania, J; John Beaumont, J

Bench : Division Bench

Judgement

John Beaumont, Kt., C.J.—This is an appeal from a decision of Mr. Justice B.J. Wadia. The plaintiff, who is a broker in Bombay, sued the three defendants for the amount of losses incurred in dealings in cotton on the New York Exchange during the year 1935. He sued defendant No. 1 as the principal debtor, defendant No. 2 as a surety, and defendant No. 3 apparently as having entered into the contract of suretyship on behalf of defendant No. 2. Defendant No. 2 is a company, which has existed for some time, and defendant No. 3 is the sole proprietor of the firm of the managing agents of defendant No. 2. Defendant No. 1 is a company, which had been formed shortly before the date of the present transactions, and defendant No. 3 was one of its directors. In 1935 the plaintiff, who had previously known defendant No. 3 and had done business for defendant No. 2, was asked to transfer defendant No. 2's account to defendant No. 1, and that he declined to do. He was distrustful of a new company of which he knew nothing. However, the evidence is that in February, 1935, defendant No. 3 came down to Bombay and persuaded the plaintiff to do business for defendant No. 1, and it was at that interview that defendant No. 3 is said to have given a guarantee on behalf of defendant No. 2 of the liabilities incurred by defendant No. 1 to the plaintiff. Pursuant to the arrangements then made, the plaintiff, through his ordinary brokers in New York, put through transactions for the purchase of 600 bales of cotton for the October settlement at specified prices. Subsequently the market went down, and as the plaintiff had not sufficient

margin, he closed the transactions by instructing his New York brokers to sell 600 bales for October. Evidence as to these transactions was given by the plaintiff. He stated in the witness-box that he had employed Messrs. Harriss & Vose, his usual agents in New York, to carry out these transactions. He produced copies of the telegrams he had sent and the telegrams and letters which he had received in reply, purporting to show that these transactions of purchase and sale had been carried out. The signature on the telegrams is naturally not proved. Harriss & Vose eventually sent a statement of account, which is exhibit A-6. There is a printed signature on it of Harriss & Vose, and it is initialled "Per J.D.F.," the initials being typewritten. That statement was sent on to defendant No. 1, who never disputed it. Defendant No. 2 must have known about the account, because defendant No. 3 is a director of defendant No. 1 and also the managing agent of defendant No. 2. It is, however, clear that there is no legal evidence of the transactions having taken place on the New York Exchange. The actual contracts entered into on the New York Exchange are not produced, and there is no evidence of the signature of Harriss & Vose. The 2nd defendant company, which is the principal appellant, contends that it was not bound by the evidence adduced by the plaintiff. Defendant No. 1 has gone into liquidation and has not challenged the amount claimed by the plaintiff. But defendant No. 2, in the first instance, disputes the fact of the guarantee having been given, and, in the second place, contends that if it did guarantee the debt, it is entitled to have the debt strictly proved as against it, and that it is not bound by any admission made by defendant No. 1.

2. With regard to the factum of the guarantee, we have the evidence of the plaintiff and of his clerk that defendant No. 3 in February, 1935, did guarantee on behalf of defendant No. 2 the liability of defendant No. 1 to the plaintiff. There is nothing in writing, and the plaintiff himself, who is a layman, frankly admitted that he did not really know the difference between obtaining a guarantee and a transaction being entered into by an agent. He was very anxious that the transactions, which he was to enter into on behalf of defendant No. 1, should be regarded in substance as transactions of defendant No. 2, and he did not mind whether that result was brought about by defendant No. 2 being regarded as a principal or a guarantor. His evidence as to the terms of the alleged guarantee cannot be regarded as very accurate. But: his clerk Chhaganlal was called, and he is an LL.B., and, therefore, may be taken to know something about general principles of law. He says that he was present at the interview, and that defendant No. 3 said that it was the 2nd defendant company's business and the moneys were of the 2nd defendant company, but still if the plaintiff wanted a guarantee, he would stand guarantee on behalf of the 2nd defendant company, and if any moneys remained unpaid, the 2nd defendant company would pay. That is clear evidence of a guarantee having been given. Defendant No. 3 did not go into the witness-box and did not, therefore, deny the account of this interview given by the plaintiff and his clerk, and the learned Judge accepted the plaintiff's evidence. No doubt one would have expected a guarantee of this sort to be put

into writing, and it is true that no reference was made to the guarantee until the plaintiff's letter of December 12, 1936; but still the learned Judge having accepted the evidence of these two witnesses, relying naturally on the fact that defendant No. 3 did not choose to go into the witness-box to deny the account of the interview, there is no reason, in my opinion, why we should differ from the learned Judge on that question. I, therefore, accept the finding that defendant No. 2 did guarantee payment of any moneys remaining unpaid by defendant No. 1 to the plaintiff.

3. The question, then, arises" whether on the evidence adduced defendant No. 2 is liable on the guarantee. It is well established that a guarantor is *prima facie* entitled to have the debt proved as against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the proceedings in which the judgment or the award was given, or was party to the admission of the principal debtor (see *Ex parte Young: In re Kitchin* (1881) 17 Ch. D. 668 But the way the learned Judge puts the case against defendant No. 2 is this. He says, first, that it was an implied term of the dealings between defendant No. 1 and the plaintiff that defendant No. 1 should accept the accounts submitted in the ordinary course of business by the New York brokers; and, secondly, that the debt which defendant No. 2 guaranteed was the debt as proved in accordance with this implied agreement.

4. With regard to the first proposition of the learned Judge, namely, that defendant No. 1 must be taken to have agreed to accept as evidence of the transactions on the New York Exchange the accounts sent by the brokers, the learned Judge relied on cases, which are generally referred to as the account-sale cases. The learned Judge set out a passage from the judgment of Couch C.J. in *Hodgson et. al. v. Rupchand Hazarimal* (1869) 6 B.H.C.R. 39. which is in these terms (p. 41):--

The law as to account-sales is, that where an account between merchants in different countries has been transmitted from one to the other, and no objection is made after several opportunities of writing have occurred, the account is deemed, in a Court of Equity a stated account, only to be opened when some cause is shown for the interposition of the Court; and when the goods are consigned to be disposed of in a foreign market, I think it must be considered that the consignor impliedly agrees that the account-sales furnished by the correspondents abroad shall be taken as *prima facie* evidence of what the goods realized. It would cause great expense and inconvenience if the debtor, by merely objecting to the account, could compel the procuring of evidence from abroad; and, seeing that in practice merchants are satisfied with the truth of the account-sales, and ask for no further evidence, I think there is a good ground for considering that there is such an implied agreement.

5. I certainly do not desire to challenge the principle there laid down, which was founded on a dictum in *Smith v. Blakey* (1867) L.R. 2 Q.B. 326. and has been

followed in *Mayen v. Alston* ILR (1893) Mad. 238. and in *Barlow v. Chuni Lall Neoghi* ILR (1901) Cal. 209. But so far as I know, the principle of those cases has never been extended to the case of forward contracts. In all the cases referred to actual goods had been consigned, and the actual sale of the goods in a foreign country was not disputed, and the Court held that the account sent in by the foreign agent must be treated as prima facie evidence, subject to the right of the client to surcharge and falsify. Mr. Coltman relied on an unreported decision of this Court in *Shree Meenakshi Mills, Ltd. v. Maurice Stern* (1935) O.C.J. Appeal No. 50 of 1934, decided by Beaumont C.J. and Blackwell J., on September 5, 1935, (Unrep.) in which the question which arose was to some extent the same as the question in this case. There were in that case other points which had to be determined, but the question as to the proof of contracts entered into on the Liverpool Market came up for decision, and it appears to have been admitted in that case that the evidence, which was similar to that tendered in this case, was not sufficient. However, these account-sale cases were not cited, and, therefore, I do not regard the decision in *Shred Meenakshi Mills, Ltd. v. Maurice Stern* as being an authority on the question whether the principle of those cases should be applied to contracts of the character with which we have to deal.

6. I am very doubtful myself whether we should be justified in extending the principle of those cases to forward contracts. It is much easier to check the sale of actual goods consigned, and to verify details of such a sale, than to check the mere making of contracts upon a foreign exchange. However, assuming that it can be said as against defendant No. 1 that there was an implied agreement to accept the accounts submitted by the New York brokers as accurate, although such an agreement is not pleaded, I cannot accept the second proposition of the learned Judge, and I am of opinion that it is impossible to hold defendant No. 2 liable as a surety. The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law, that is in this case under the Indian Evidence Act. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then I apprehend that there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself.

7. The two cases cited by Mr. Coltman illustrate the distinction. In *Ex parte Young: In re Kitchen* (supra) an agreement had been entered into between a creditor and a principal debtor for the sale of certain wines, and the surety had guaranteed payment for the wines and had also guaranteed that all the terms of the agreement would be duly carried out. One of the terms of the agreement was that there should be an arbitration in respect of any dispute arising between the parties, and upon an arbitration, damages had been awarded as against the

principal debtor, and the question which the Court had to determine was whether the surety was bound to pay the amount of those damages, or whether he could claim that the amount of damage suffered by the creditor must be proved strictly as against him. The Court there held that the real question was what was the true intent and meaning of the guarantee? James L.J. says (p. 671):--

There are a great number of things which by the agreement they [principal debtors] are bound to do; he [the surety] guarantees that they will do these things, and if they fail to do them, then he is liable in an action against him by Messrs. Cantor [the creditors] for any damages which can be shewn by legal evidence to have been caused to them by default. That is what he has agreed.

8. So that on the construction of the agreement in that case the Court held that the surety had merely agreed to discharge the debts and liabilities of the principal debtor, and that there was no agreement by him to accept anything, less than legal proof.

9. In the other case referred to, which is an Irish case, *Guardians, Abbeylax Union v. Sutcliffe* (1890) L.R.I. 26 Q.B. 332, a bond had been given to secure the due performance of the duties of a rent-collector, and the conditions of the bond executed by the rent-collector and the surety were inter alia that the collector should collect the whole of the rates lawfully recoverable and pay the amount of the rates so collected to the treasurer whenever the sum exceeded ?50, and also that he should deliver to the person or persons authorized to require the same true and perfect accounts in writing under his hand of all moneys received by him as collector, and when required to do so should deliver up his books, and so forth. The rent-collector collected money and made default, and the question was whether his books, in which he had recorded the amount of his collections, could be used in evidence against the surety. The Court differed, the learned Chief Justice thinking that the entries in the books were inadmissible as evidence against the surety. Mr. Justice Gibson and Mr. Justice Holmes took the opposite view, and, as I understand it, the view they took was that in substance the surety had guaranteed the debt of the rent-collector to be proved by means of these books. Mr. Justice Gibson says (p. 336):--

Dealing with the matter as depending on principle only, the reception of the evidence must be rested on one of three grounds:--"1. that the bond is joint bond;" (that does not apply here;) "2. that the books are part of the *res gestae*, 3, that the contract, from its nature and effect, makes the books evidence.

10. He decided it primarily on the third ground, that is to say, that the actual debt guaranteed was the debt shown in the books.

11. Now, here, what the learned Judge has really held is that what defendant No. 2 guaranteed is the debt of defendant No. 1 to the plaintiff to be proved under the implied agreement arising from the account-sale cases. Even if one accepts the implied agreement, it seems to me quite impossible to hold that the guarantor agreed, to guarantee the debt to be proved by this special method. No

such guarantee is pleaded; there is no evidence whatever that such a guarantee was given. To stretch a verbal guarantee so as to cover methods of proof of debt which there is no reason for supposing were in the consideration of the parties when the guarantee was given, would not, I think, be right or fair. The plaintiff was very unwise in not having the guarantee put into writing, and it would be unfair to let him take advantage of his omission, and to hold that, having no very definite evidence as to the terms of the guarantee, it should be treated as extending to the method of proof of the debt guaranteed. I find it impossible on the evidence before the Court to say that the plaintiff agreed that he would guarantee a debt to be proved by something less than ordinary legal evidence, and on that ground I think the appeal of defendant No. 2 must succeed.

12. Defendant No. 3 has appealed against the only part of the judgment against him, namely that he was given no costs. The learned Judge thought that he was principally responsible for the litigation, and I do not think there is any ground on which we should differ from the discretion which the learned Judge exercised as to the costs of defendant No. 3. So his appeal fails.

Kania, J.

13. The relevant facts and documents have been referred to in the judgment delivered by the learned Chief Justice.

14. The plaintiff filed this suit claiming to act as a commission agent in respect of the transactions he was instructed to put through for the 1st defendant company. In paragraph 4 of the plaint he alleged that in or about February, 1935, defendant No. 3 as the managing director of the 1st defendant company employed the plaintiff as a commission agent for and on behalf of the 1st defendant company to effect forward transactions in American Cotton for October, 1935 delivery, on the terms and conditions mentioned in the contract form, copy whereof is annexed and marked "A", and in the correspondence. The last sentence in that paragraph deals with the guarantee and runs as follows:--

Defendant No. 3 as the Managing Agent of the 2nd defendant company for and on behalf of the 2nd defendant company guaranteed payment of the amount due by the 1st defendant company to the plaintiff in respect of the transactions of the 1st defendant company effected through the plaintiff as aforesaid.

15. The plaint then goes on to recite that the plaintiff effected purchases of 300, 200 and 100 bales on receipt of instructions from the 1st defendant company, and as margin was not paid, those outstanding purchases were closed by a sale. In paragraph 12 he states:--

The plaintiff became personally liable in respect of the said transactions in the market and paid the amount due in respect thereof. The plaintiff submits that he is entitled to be indemnified in respect of the liability incurred and the payments made by the plaintiff on behalf of and on account of the 1st defendant company in respect of the said transactions.

16. His case, therefore, on his plaint is that he was an agent employed for and on behalf of the 1st defendant company by defendant No. 3 and, therefore, entitled to the agent's indemnity. The terms of employment as between him and the 1st defendant company are, according to paragraph 4 of the plaint, stated in the contract note sent by him to the 1st defendant company and the correspondence which is annexed. In respect of the guarantee, his allegation is that defendant No. 2 stood guarantee for the amount due in respect of the transactions effected through the plaintiff as aforesaid. The fact of guarantee rests on oral evidence. The learned trial Judge on hearing evidence found it in favour of the plaintiff, and for the reasons given in the judgment of the learned Chief Justice, I see no reason to differ from that conclusion.

17. That raises the question of the extent of the liability of defendant. No. 2. The learned Judge in the trial Court has stated as follows:--

But I do not think that an agent owes the same duty to the guarantor which he owes to the principal in the matter of proving the transactions. I do not, therefore, think that the agent is bound to prove the transactions to the guarantors, but he has got to prove the amount of the liability for which the surety stood guarantee.

18. Stated as it is, I am afraid I cannot agree with the opinion of the learned trial Judge. The question in fact is whether, according to the terms of the guarantee, defendant No. 2 is liable. In the normal course, what has to be proved against the principal debtor has to be proved against the guarantor. He may ask for, if at all, a larger amount of proof. By the terms of his guarantee he may however give up his right. In the present case the question of proof of the transactions against defendant No. 1 has not become material, because no defence was put in on his behalf, and according to the rules of pleading the plaintiff's allegations contained in paragraphs 5, 6 and 7 of the plaint were deemed to be admitted by that company. Defendant No. 2 has filed a written statement, in which that company stated that it had no knowledge of the allegations contained in the aforesaid paras, and it did not admit its liability. The company further alleged that it was not given any intimation about the said transactions and the said demand of margin money. Reading paragraph 3 of defendant No. 2's written statement, I am unable to hold that there was any admission of the allegations found in paragraphs 5, 6 and 7, of the plaint.

No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay. (p. 671).

19. Those observations in the judgment of James L.J. in *Ex parte Young: In re Kitchin* (1881) 17 Ch. D. 668. are worthy to be borne in mind for deciding the liability of the 2nd defendant company. Those observations, read along with Section 133 of the Indian Contract Act, refute the contentions urged on behalf of the plaintiff, that if on receipt of intimation from New York and conveying the

same to the 1st defendant company, they did not challenge the transaction, it was not open to the surety thereafter to challenge the same. The question, therefore, resolves itself here into finding what guarantee was given by the 2nd defendant company. Nowhere in the pleading it was suggested that the statements or communications received from New York were to be considered as evidence, much less conclusive evidence; of the facts stated therein as against the 1st defendant company itself. As I have pointed out, the allegation in the plaint is that the terms of employment are contained in the contract note sent to the 1st defendant company and in the correspondence which is on record. Nowhere throughout those documents such a term is mentioned, nor suggested. The guarantee, according to paragraph 4 of the plaint, is for losses arising in respect of transactions effected through the plaintiff as aforesaid. I believe it means¹ in accordance with the terms mentioned before. If so, on the pleading itself the case now put forward is not suggested and, in my opinion, is not warranted by the evidence on record. An argument was based on what are compendiously described as account-sale cases, namely, *Hodgson et al. v. Rupchand Hazarimal* (1869) 6 B.H.C.R. 39. *Mayen v. Alston* (1893) ILR 16 Mad. 238. and *Barlow v. Chuni Lall Neoghi* ILR 1901 Cal. 209. Those were cases of actual sales of goods. The facts noticed in the reports do not show that the party disputed the sale itself. The disputes were in respect of what was realised, and whether the sale proceeds were properly accounted for. The wisdom of extending that principle to forward contracts may be disputed. The point is not here before us, in this appeal, and, therefore, I do not propose to discuss the question whether the principles underlying those cases should be extended and made applicable to forward contracts. But, as I have pointed out, the liability of the guarantor must be judged by his contract of guarantee and not by a contract between the principal debtor and the creditor. It would be importing a dangerous principle of law to widen the terms of the guarantee, when on the pleadings and on the evidence no justification can be found for including a term alleged in the course of argument. I, therefore, think that in the present case the terms of guarantee, as pleaded, and, as established, do not cover the stipulation that the 2nd defendant company as guarantor would be bound to accept even as prima facie evidence documents received from New York by the plaintiff. On that ground I think the appeal of defendant No. 2 should be allowed.