
(1926) 03 MAD CK 0037
In the Madras High Court

S.K. Mohideen Batcha Sahib

APPELLANT

Vs

K.A. Sheik Dawood Sahib and Others

RESPONDENT

Date of Decision : 05-03-1926

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 37

Citation : AIR 1926 Mad 1035 : (1926) 51 MLJ 203

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—It will be convenient to set forth the facts of this appeal by the plaintiff as it arises out of a suit ""of an unusual character."" The

1st defendant (Sheik Dawood) and his brother the late Kadir Mohideen carried on business under the name and style of K. Allauddin Sahib and

Sons.The plaintiff is a father-in-law of the 1st defendant, but the 1st defendant has since discarded the plaintiff's daughter and married another

wife, the daughter of the 4th defendant. In 1919 when the transactions commenced,no such misunderstandings existed between the plaintiff and 1st

defendant. The brothers executed Ex. D in March, 1919 in favour of the Agent to the Bank of Madras at Erode in which they stated that all

transactions entered into by one of the brothers or both, whether under the firm name or not, may be regarded as entered on behalf of the firm. On

30th July, 1919 the plaintiff who is also a merchant of Erode executed Ex.F, a promissory note for Rs. 30,000 in favour of the firm. This was

delivered to the Bank by the firm as an enclosure with Ex. C (in O.S. No. 9 of 1923 on the file of the Court of the Additional Subordinate Judge of

Coimbatore) of the same date as collateral security for the firm's drawings from the Bank on Current Account. It is admitted by both sides that the

firm did not pay to plaintiff Rs. 30,000 at the time of execution of Ex. F. The firm began to draw various amounts from the Bank and the Current

Account of the Bank showing the drawings of the firm and payments by it in reduction of its indebtedness to the Bank is Ex. G. It shows that on

the 30th July the firm drew Rs. 11,500 from the Bank by issuing a cheque in favour of plaintiff. Ex. I is the Ledger of the firm showing the account

between the firm and the present plaintiff. It shows that Rs. 11,500 was lent by the firm to the plaintiff. Thus the amount drawn by the firm from the

Bank on that date was shown in the documents as a debt of the firm to the Bank and secondly as a debt of the plaintiff to the firm and thus

ultimately reached the plaintiff's hands. Other amounts were drawn by the firm from the Bank. Some portions of the amounts reached the plaintiff

and appears in Ex. I as lent to the plaintiff. Other portions were utilised by the firm for their own purposes or for being lent to other customers of

theirs. By 31st August, 1921, the total amount drawn by the firm from the Bank amounted to Rs. 30,000 and odd and the account closed. On the

same date, the Bank en-dorsed the note to the 4th defendant who filed on 21st September, 1921 a suit to recover the amount. (O.S. No. 172 of

1921 of the Principal Sub-Court afterwards renumbered as O.S. No. 9 of 1923 of the Additional Sub-Court). By that time the 1st defendant's

brother died and his widow and daughter were sued in his stead. The present plaintiff was 1st defendant and the present 1st defendant was 2nd

defendant and the present 2nd and 3rd defendants were 3rd and 4th defendants in that suit. It may be added that the deceased Kadir Mohideen

and the present plaintiff married sisters and the plaintiff's brother married the daughter of Kadir Mohideen (now 3rd defendant). The suit was

decreed, the amount to be recovered in the first instance from the assets of the firm and after exhausting the assets from the present plaintiff. On

appeal the decree was modified by the High Court into an unconditional decree against all the defendants in that suit, but the execution against the

present plaintiff was postponed to 16th March, 1925 to enable him to file the present suit which was accordingly filed on 10th January, 1925.

2. The plaintiff's contention briefly is that so far as the Current Account between the firm and the Bank is concerned, the firm was the principal

debtor and he himself was only a surety by the execution of the promissory note Ex.F which was endorsed to the Bank as collateral security, and

that, though the Bank or its endorsee may obtain a joint and several decree against himself and the partners of the firm, he is entitled to equitable

relief from being ruined by the execution of the decree-holder solely against himself acting in collusion with the principal debtor. The vakil for the

4th defendant frankly stated before us that his motive for executing the decree against the plaintiff solely is that the 1st defendant discarded

plaintiff's daughter and that he (4th defendant) is anxious that his (laughter should not be similarly discarded and that he runs such risk if he

executes the decree against 1st defendant and that he is not colluding with the 1st defendant. This may not be actual collusion but is very nearly

akin to it. It may be also stated here that so far as the account between the firm and the plaintiff (Ex. 1) is concerned, another suit has been filed by

the 1st defendant against the plaintiff (O.S. No. 124 of 1923). Ex. C is the plaint and Ex. V is the written statement in that suit. The defence of the

plaintiff is that he discharged all the dues to 1st defendant. Thus, even if some of the amounts drawn from the Bank by the firm ultimately reached

plaintiff's hands and it is admitted some amounts did so reach them, they were the subject of independent loan transactions between the firm and

the plaintiff and the subject of a separate account account a separate suit. The plaintiff therefore contends that if it is found that he is owing any

amount to the 1st defendant, it can be lawfully decreed in that suit and there is no justification for the 1st defendant's attempt to throw the whole

burden of the firm's debt to the Bank on him.

3. Mr. Varadachari who appeared for the 1st defendant contends that the real view to take of the transactions with the Bank is that the plaintiff and

the firm were both principal debtors and the plaintiff is not entitled to any relief as surety. He concedes that if this suit is dismissed and if his other

suit is decreed, it amounts to plaintiff being made to pay doubly for the same amount, that if this suit is dismissed, his other suit in so far as it covers

all amounts drawn from the Bank ought to be dismissed and consequently if the suit by the plaintiff is decreed, his own suit ought to be decreed

subject to any plea of discharge; but he contends that, of these two alternatives, the former is the more proper course to take, i. e., that this

plaintiff's suit ought to be dismissed and that his own suit in so far as it covers amounts drawn from the Bank and re-lent to the plaintiff ought to be

dismissed and as to other amounts not so re-lent, the plaintiff, after payment to the decree-holder (4th defendant), will be entitled to his remedy

against the 1st defendant as a joint debtor for contribution even if such a round about way may end in plaintiff's ruin. Thus it is clear from the

contentions of the respondent's vakil, the 1st defendant's description of the present suit in paragraph 4 of his written statement as a counter-blast

to the other suit is not accurate.

4. The main point to be determined resolves itself into the question what is the legal relation of the parties as between themselves in respect of the

drawings from the Bank? Were they joint debtors or was the plaintiff a surety for the firm? In one sense all sureties are only joint debtors so far as

the creditor is concerned. But in a special sense, a surety is only a surety and not a joint debtor though the creditor is entitled to a joint and several

decree or even can exclusively sue the surety. In either case, if the amount is exclusively recovered by the creditor from the surety or one of the

debtors who has not received its benefit at the time of the borrowing, it can be recovered from the principal debtor or the joint debtor respectively.

But the exact form of the transaction is important. If the plaintiff is a surety, he can be indemnified in an appropriate case, before actual payment,

by an anticipatory action of this kind [vide *In re Richardson: Ex parte The Governors of St. Thomas's Hospital* (1911) 2 K B 705 of.

Wolmerhausen v. Gullick (1893) 2 Ch 514 a case of suing a co-surety, and *Veerappa Cketty v. Arutta chalatn Chetty* (1924) 47 M.L.J 168 --a

case of partners].

5. When we examine Ex. G, we find that a considerable part of the amount drawn from the Bank reached the plaintiff's hands and, relying on this

fact, the Subordinate Judge held that the account was opened substantially for his benefit and dismissed the suit. It is true that considerable

amounts out of the drawings by the firm reached the plaintiff's hands. But it is necessary to remember two points (1) other portions were utilised

by the firm itself, (2) the drawings appeared first in the account of the firm with the Bank and such portions of them as were lent to the plaintiff

appeared in another account between the firm and the plaintiff. That the drawings were regarded in the first instance as the firm's drawings is clear

from several considerations. For example, the net value of the amounts drawn

from the Bank that reached the plaintiff after giving credit to payments never exceeded Rs. 18,000 and at the close of the account amounted only to Rs. 3,050. If, on the other hand, we look at the account between the firm and the plaintiff which covered not only sums re-lent to the plaintiff out of the drawings from the Bank but several other transactions, the indebtedness of the plaintiff was sometimes much less than Rs, 30,000, at other times it far exceeded it. It is clear that the sole object of Ex. F was to serve as collateral security for the Bank and did not represent a voucher for money borrowed. Ex. G and Ex. I must be regarded as the two separate and distinct accounts which they purport to be. It is true we have to look at the substance of a transaction and not the form. But where the form itself is part of the substance, we must attach weight to the form also. Mr. Varada-chari relied on Section 37 of the Negotiable Instruments Act. But on the facts relating to Ex. F the section has no application, it is conceded that the plaintiff is entitled to an equitable relief if the facts justify it (see Buckley, L.J.'s remarks in the case already cited). The only question is one of fact and we agree with the learned Advocate-General's contention for the plaintiff. The Subordinate Judge seems to have been led away by certain false statements which the plaintiff made in the pleadings and depositions in the other case on matters which have really no bearing on the material point before us in his anxiety to save himself from the joint pressure of the 1st defendant and 4th defendant. It is true the Subordinate Judge has observed the witnesses and we have not, as he seems to be anxious to point out. But the point before us is not one of choosing between the oral evidence but what is the real meaning of Exs. G, I, F with such light as is thrown on them by the oral evidence, if necessary. It is true, as Mr. Varadachari contends, that the real effect of the transactions of 1919 should be ascertained from the documents of the time and not from the later conduct of the parties, such as the filing of the connected suit O.S. No. 124 of 1923 by the 1st defendant. Our conclusion is based on the documents of 1919 only and the plaint in O.S. No. 124 of 1923 only corroborates and supports it.

6. There will be a decree declaring that the plaintiff is only a surety for the firm of Allauddin and Sons represented by defendants 1 to 3 and that defendants 1 to 3 are bound to indemnify the plaintiff in respect of the decree in

O.S. No. 9 of 1923 and defendants 1 to 3 are liable in the first instance to satisfy the 4th defendant's decree as per the terms of the Sub-Court's decree in O.S. No.9 of 1923.

7. In the event of non-satisfaction of 4th defendant's decree by defendants 1 to 3 to the extent of the amount as decreed by the Sub-Court in O.S.

No. 9 of 1923 within three weeks, plaintiff will have liberty to apply in execution to raise the amount due under the said decree by appointment of

a Receiver or otherwise from the assets of the firm and have the same paid to the 4th defendant in satisfaction of the said decree.

8. If the said decree is executed against the plaintiff in whole or in part the plaintiff shall have liberty to apply to the Court to have paid to him out of

the funds raised under the last paragraph the amounts realised by the decree-holder from the plaintiff by such execution.

9. Plaintiff's prayer (2) in paragraph 18 will be dismissed and the appeal is dismissed as against 4th defendant. Plaintiff will have proportionate

costs throughout on the footing that the relief in respect of which he succeeds is worth Rs, 35,000 and will pay proportionate costs in respect of

the first three amounts in Scheduel II (the costs will include the costs of private printing). Plaintiff will pay half the costs to 4th defendant and the 1st

defendant will pay the other half of the costs of 4th defendant throughout.