

(1934) 11 CAL CK 0019
In the Calcutta High Court

Sudhendu Mohan Bagchi

APPELLANT

Vs

Khitish Chunder Dass Gupta

RESPONDENT

Date of Decision : 28-11-1934

Acts Referred:

Citation : 163 Ind. Cas. 858

Hon'ble Judges : Cunliffe, J

Bench : Single Bench

Judgement

Cunliffe, J.—This is an unfortunate type of action from the point of view of the pleadings. It is brought before the Court as if it were a suit upon two bare promissory notes, claiming principal and interest for money lent. In point of fact there are a number of very material circumstances between the parties which have never been pleaded at all. I find the facts as follows:

The plaintiff and the defendant were old friends. The plaintiff was a man in better financial circumstances than the defendant. From time to time out of friendship he appears to have assisted him in his monetary difficulties. For example, on some date before the year 1927, he lent him three sums of money amounting to Rs. 1,800. For that loan the defendant signed a promissory note. In addition, the defendant was apparently in trouble with the Bengal National Bank who were pressing him for a debt. The Bank consented to take a certain form of security from him. That was a hundi drawn by the defendant upon the plaintiff and handed to the Bank. I may say here by way of parenthesis that it was not until the end of the" hearing that this description of the security reached me. I missed it in the cross-examination of the plaintiff, and I was unaware that the form of security given by the plaintiff to the Bank was not in the form with which we are all so familiar, namely an indemnity bond, and it was rather on the lines that it was indemnity bond (and in an indemnity bond there are certain legal vrights accruing both to the principal creditor and the guarantor), that most of the arguments on this particular phase of the case was addressed to me. Well, after the hundi was handed to the Bank, apparently the defendant took no steps to

liquidate or diminish his indebtedness, and an action was brought by the Bank against both the plaintiff and the defendant on the hundi. The defendant being a man of straw, the Bank made the plaintiff liable and the plaintiff undertook to make his payments to the Bank under the hundi by a series of instalment payments which even now have not yet been completed. Shortly after this action taken by the Bank, the defendant took the benefit of the Act. He became insolvent in 1927 and was discharged from insolvency in 1930.

2. After his discharge he again went to his old friend the plaintiff and according to the evidence he received various help from him. The plaintiff, for example, gave him meals in his house. He also took him round to various business firms, and endeavoured to get him some position of employment, and the plaintiff says that in addition to rendering him this assistance, he made him again 3 small cash loans. I may say at once that I do not accept this story of three small cash loans, although I accept the account of the other assistance. After that the defendant signed two new promissory notes, one dated August 5, 1930, for Rs. 2,800 and the other which is dated August 20, for another Rs. 2,800 in the year 1930; and it is said that the first promissory note for Rs. 2,800 was a fresh contract between the plaintiff and the defendant for Rs. 1,800. On the original handnote together with the new cash loans of Rs. 500, balance being made up of a calculated sum as to interest. The other promissory note for Rs. 1,800, it was agreed was the equivalent of a fresh contract for the indebtedness over the hundi which was handed to the Bank.

3. It is contended on behalf of the plaintiff that these two promissory notes amounts to two fresh promises and two fresh considerations which make the defendant liable, having regard to his earlier indebtedness before the bankruptcy took place. There is no doubt that authority can be found for this type of transaction. The leading decision which has been cited and approved of on several occasions is the case of *Bateman v. Crook* (1849) 4 Ex. D. 26. That was a case where an insolvent in England made a fresh agreement with his butcher who had proved for a small sum in bankruptcy to discharge this unenforceable debt for the consideration that he and his family should be supplied with meat and provisions during some months ahead. It was held there that it was quite open to the debtor once he obtained his discharge, to enter into this type of fresh agreement, and Baron Kelly in the course of his judgment said:

The debtor says that he went to his creditor and said, if you supply me with, food on credit, I will pay you the old debt. Is not that a good consideration? I think, it is. The contract is one of great benefit, not only to the creditor but to the debtor, and there is nothing in Section 49 of the Bankruptcy Act which is the discharging section, to prevent such an action being enforced.

4. There are other decisions of like effect, but as I understand the facts of the case which have been proved before me here, it is very difficult for me to hold that anything so explicit as the facts in the case I have just cited, ever took place at all. I think my sympathies are a great deal with the plaintiff, that the

assistance given to the defendant by the plaintiff (I have already said that I disbelieve the story of the fresh cash loans amounting to Rs. 500), did not amount to a real consideration to be attached to the terms contained in the note. The help given was never a fresh consideration on the basis of *Bateman v. Crook* (1849) 4 Ex. D. 26. What I think really happened was this that without thinking very much of any consideration at all, the plaintiff, as much in his family interests as in his own, induced the defendant to sign two notes as new acknowledgment of his indebtedness. The signing of the first note was accompanied, it may be noted, by a letter, which was directed to the defendant, in which the plaintiff assures him that neither he nor his sons will press for payment, and it expresses a hope that the defendant will pay off gradually what money was still owing. The terms of the promissory note are of course exceedingly misleading, as they would lead an ordinary person, unacquainted with the true facts, to suppose that the note was signed, for value received to the amount of its endorsement.

5. Then I am invited to hold that as the plaintiff did not meet his full payments to the Bank under the hundi, handed as security to the Bengal National Bank, therefore, the liability of the defendant to the plaintiff is still existing in spite of the bankruptcy. It is pointed out, however, by Counsel for the defendant, that such a contention is contrary to the whole scheme of the Insolvency Act, as it was open to the plaintiff to appear in the bankruptcy proceedings and prove the whole of the liability from the defendant to him, even if it was a liability in futurity or even a contingent liability. If any authority is wanted for the effect of not doing this, there is the case of *Gangadhar Vs. Kanhai*. The facts of that case are extremely analogous to the facts before me here. Its headnote reads as follows:

K was surety for payment of a debt due by G to D. G applied to be declared an insolvent and in due course G was discharged. D then sued K and obtained a decree against him. After wards K sued G for the recovery of the amount which he was compelled to pay, but it was held that the order for discharge was a bar to the suit.

6. The learned Judge in giving his judgment relied on the English decision *In re Blackpool Motor Car Co. Ltd.* (1901) 1 Ch. 77 : 70 L.J. Ch. 61 : 49 W.R. 124 : 8 Man 193, and said:

There is a very wide scope, because the debts and liabilities provable under the Act in Clause 2 of Section 34. They include debts and liabilities, present or future, certain or contingent.

7. With that judgment I am in complete agreement and, therefore, think that the plaintiff's claim under the second promissory note based on a revival of the old guarantee, is also unenforceable.

8. For these reasons, while I repeat that I have very considerable sympathy with the plaintiff, and I think he has been treated extremely badly by his friend, I must dismiss this case with costs.

9. I may add that if the parties wish to go further, that on the jurisdiction point, which was merely a question of fact, I am in favour of the plaintiff's version that the documents sued upon were executed within the jurisdiction of this Court.