
(1940) 09 MAD CK 0045
In the Madras High Court

The Nedungadi Bank, Limited

APPELLANT

Vs

Doraikannu Ammal

RESPONDENT

Date of Decision : 02-09-1940

Acts Referred:

Citation : AIR 1941 Mad 282 : (1941) ILR (Mad) 313 : (1940) 52 LW 951 : (1941) 1 MLJ 281

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—Admittedly the only question which arises in this appeal is whether the respondent gave a continuing

guarantee to the appellant bank. The respondent is the wife of one A. Murugesu Mudaliar, an army contractor and merchant carrying on business

in Madras. On the 5th May, 1926, for the purpose of this business, Murugesu Mudaliar opened a current account with the appellant and it was

arranged that he should be allowed to overdraw it at any one time to the extent of Rs. 18,000 provided that the respondent deposited with the

appellant the title deeds of a house belonging to her in Varadamuthiappan Street, Madras, as security for the overdraft. The respondent was to be

surety for her husband for this amount and to furnish security. The respondent admittedly deposited the title deeds with the bank on this footing.

Her husband paid in and withdrew considerable sums of money, but he did not exceed the limit of Rs. 18,000. On the 17th February, 1927, the

overdraft stood at Rs. 17,693-14-10, or allowing for further interest which had accrued due a little less than Rs. 18,000. At this stage Murugesu

Mudaliar wanted further finance : and the appellant agreed to allow him to overdraw to the extent of Rs. 25,000, provided that his wife executed a

legal mortgage in respect of the house. In other words, instead of an equitable mortgage for Rs. 18,000 there was to be a legal mortgage for Rs.

25,000. The respondent was agreeable to this course and on the 17th February, 1927, she executed a legal mortgage in favour of the appellant for

Rs. 25,000. In the deed it was recited that the respondent had already created an equitable mortgage over the property in favour of the appellant,

that the appellant had already advanced the sum of Rs. 18,000 on the security of the equitable mortgage for the purpose of Murugesu Mudaliar's

trade, that Rs. 7,000 more was required by him for this purpose and that the respondent had agreed to execute a mortgage deed for the

consolidated sum of Rs. 25,000 carrying interest at $9\frac{3}{4}$ per cent. per annum. The mortgage deed then proceeded:

This Indenture witnesseth that in consideration of the consolidated sum of Rs. 25,000 (Rupees Twenty-five thousand) which the mortgagor doth

hereby acknowledge her liability to pay to the mortgagee, the mortgagor doth hereby covenant with the mortgagee to pay back to the mortgagee

on demand being made the whole of the said sum of Rs. 25,000 with interest at $9\frac{3}{4}$ per cent. per annum, or any amount for the time being owing

and due to the mortgagee from the mortgagor on the footing of these presents with interest thereon at $9\frac{3}{4}$ per cent. per annum without claiming

any deduction or abatement whatsoever for any reason as aforesaid.

2. Between 18th February, 1927 and 24th February, 1927, Murugesu Mudaliar paid into his account various sums which had the effect of

reducing his overdraft to Rs. 14,220-8-2. After that there were drawings and payments in. The state of the account fluctuated, but it was always at

debit and on the 27th December, 1931, the account was overdrawn by, Rs. 19,482-8-9. The suit out of which this appeal arises was filed on the

26th February, 1936, to recover from the husband and the wife the sum of Rs. 15,259-6-11, the debit balance of that date. The suit was defended

and the pleas raised were that the defendants had not been given credit for certain sums of money to which they were entitled, that the suit was bad

for misjoinder of parties and causes of action and that it was barred by the law of limitation. The respondent did not plead that her guarantee was

not a continuing one and that the rule in Clayton's case (1816) 1 Mer. 572 : 35 E.R. 781 applied. This contention was, however, raised during the

hearing of the case and was accepted by the learned Judge (Venkataramana Rao, J.) as freeing the respondent from all liability. Consequently he passed a decree against her husband for Rs. 17,350-6-11 with costs, but dismissed the suit with costs as against her. In holding that the respondent was not liable the learned Judge had regard merely to the wording of the deed of mortgage of the 17th February, 1927. He considered that there was no evidence of any intention that the respondent's guarantee should be, a continuing one and that in these circumstances he was bound to give effect to the rule in Clayton's case (1816) 1 Mer. 572 : 35 E.R. 781. It is common ground that if the rule in Clayton's case (1816) 1 Mer. 572 : 35 E.R. 781, does apply, the mortgage debt was discharged by the 31st March, 1927.

3. With great respect for the opinion of the learned Judge we are unable to agree that there is no evidence on the record from which it can be concluded that there was here a continuing guarantee. The authorities indicate that in deciding such a question the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is precluded from taking anything else into consideration. The account was opened and, Murugesu Mudaliar allowed to overdraw it on the condition that the respondent provided security for any sums which might be drawn from time to time by him not exceeding Rs. 18,000 and when he wanted further accommodation from the appellant, the appellant agreed to give it on the security of the respondent's house provided that a legal mortgage was substituted for the equitable mortgage. The banking account was placed on no different basis when the limit of the overdraft was increased to Rs. 25,000. The security provided was for the total sum of Rs. 25,000 with interest or any amount for the time being owing and due to the appellant from the respondent "on the footing of these presents", the deed referring specifically, to the husband's overdraft. On behalf of the respondent it is conceded that when the overdraft account was secured by the equitable mortgage the respondent's guarantee was a continuing one. The appellant would certainly not have agreed to free the respondent from her continuing guarantee. The very nature of the account would preclude this. Nor is it feasible to suppose that the respondent thought her position was in any way being altered, apart from the increase in the amount of her guarantee.

The respondent has not ventured in the witness-box to support the case advanced on her behalf and the fact that there is no averment in her written statement based on the rule in Clayton's case (1816) 1 Mer. 572 : 35 E.R. 781 is not without significance.

4. Now what do the authorities say? In *Heffield v. Meadows* (1869) L.R. 4 C.P. 595, the Court of Common Pleas had to consider whether there was a continuing guarantee where a document had been given in these terms:

I, John Meadows, of Barwick in the County of Northampton, will be answerable for 50/. sterling that William York, of Stamford, butcher, may

buy of Mr. John Heifield, of Donington.

5. It was held that the guarantee was a continuing one. Willes, J., said:

It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding

circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to

ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of

mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee.

6. After considering the facts Willes, J., observed:

For these reasons, I am of opinion that the guarantee in question is a continuing guarantee, as well upon the authorities as upon the common-sense

view of the matter.

7. Montague Smith, J., said:

The consideration is defectively stated in this guarantee. It does not show in what the supply is to consist. We may, therefore, look at the

surrounding circumstances, in order to see for what it was given and to what transactions or dealings it was intended to apply,--not to alter the

language, but to fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied.

8. In *Henniker v. Wigg* (1843) 4 Q.B. 792 : 114 E.R. 1095, Lord Denman, C.J., held that there was a continuing guarantee when the condition of

a bond was simply for the repayment of £1,000 with interest on or before the 6th April, 1837, the bond itself bearing the date 10th January,

1837. It was pointed out that the precise nature of the agreement at the time the bond was given did not appear distinctly, but taking into

consideration the conduct and language of the defendants or some of them, the Court came to the conclusion that there was no doubt that the bond

was intended to be a continuing guarantee for advances made by a bank.

9. A document in these words "the within warrant of attorney is given to secure the payment of the sum of ₹4,000 with lawful interest thereon

was held to be a continuing guarantee in *Woolley v. Jennings* (1826) 5 B. C. 165 : 108 E.R. 61, because there was nothing on the face of the

warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of

anything to show such an intention, it was held that it must be construed as a continuing security.

10. The judgment of Knight Bruce, Vice-Chancellor, in *Melland v. Gray* (1843) 2 Y. C.C.C. 199 : 63 E.R. 87 also contains some apposite

remarks so far as the present case is concerned. In that case a son executed a bond in favour of his father for 1845. In the following year he

executed another bond for ₹1,200 and on the same date he created a mortgage in favour of his father for the amount of the bond. The Vice-

Chancellor said:

Looking at the position in which the father stood towards his only son, a young man just entering the Army and requiring a provision--looking at

the character of the securities, and the many observations which occur with reference to the frame of the mortgage deed, perhaps answered in

some degree by Mr. Wigram, but still important when coupled with this, that the father lived more than 15 years after the latter security, and there is

no evidence of any demand made upon either security or of any interest having been paid or demanded, the son having been wholly during that

time maintained by the father--the probability, and I think I may say the fair inference, is that the bond for ₹1,200 was rather meant as a running

security, than as an absolute bond for that amount.

11. The wording of the mortgage deed executed by the respondent does not preclude the Court inquiring whether there is here a continuing

guarantee. When the facts are examined and the probabilities considered in our opinion the only conclusion consistent with common-sense is that

the respondent gave this mortgage as a continuing security for her husband's liability on his overdraft account, limiting of course her own liability to the amount stated in the mortgage deed.

12. Mr. C. Padmanabha Aiyangar has pressed upon us Kirby v. The Duke of Marlborough (1813) 105 E.R. 289 and Walker v. Hardman (1837)

7 E.R. 99, but when examined these cases differ greatly from the one now before us. In the first of these two cases the bond was obviously one

which was limited to a specific advance of ₹3,000 and was not a guarantee of any running account. In the second case the Court expressly

found that there was no evidence on which it could be held that the bond was given as security for floating balances. In the present case there is in

our opinion ample evidence to support such a conclusion.

13. For the reasons given the appeal will be allowed with costs to the appellant throughout. The interest allowed will not, however, be the interest

allowed against the respondent's husband. As far as the respondent is concerned the interest will be on the basis of the mortgage deed, namely, at

93/4 per cent. per annum up to the date fixed for redemption, that is, six months from to-day. As the appeal has been valued at only Rs. 13,039-

6-11 the decretal amount will not exceed this sum except for interest at the contract rate between the date of the filing of the plaint and the date

fixed for redemption.