

**(1957) 09 KL CK 0044**  
**In the High Court Of Kerala**  
**Case No : A. S. No. 19 of 1957 (T)**

Thomcos Bank Ltd.

APPELLANT

Vs

Anirudhan

RESPONDENT

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**Date of Decision :** 30-09-1957

**Acts Referred:**

Negotiable Instruments Act, 1881 (NI) — Section 87

**Citation :** (1957) KLJ 1211

**Hon'ble Judges :** T. K. Joseph, J;G. Kumara Pillai, J

**Bench :** Division Bench

**Advocate :** T. R. Subramania Iyer, for the Appellant; T. K. Narayana Pillai (P), for the Respondent

**Final Decision :** Allowed

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## Judgement

Kumara Pillai, J.—This appeal arise out of a suit for money due under an overdraft account. The appellant is the plaintiff, the Thomcos Bank Ltd., Trivandrum, which has its registered office at Alleppey. Defendant 1 is a merchant and contractor belonging to Vallakadavu in Trivandrum, who was dealing in tapioca starch. In 1945 the plaintiff-bank gave an overdraft accommodation to defendant 1 for Rs. 5000/-, and for this accommodation defendants 1 and 2 gave the bank a letter of guarantee Ext. A on 25-9-1945, signed by both of them. According to P. W. 2 who was in charge of the Trivandrum branch of the plaintiff bank, in 1947, defendant 1 wanted to raise the overdraft accommodation to Rs. 20,000/- and the bank accordingly allowed him an overdraft account for Rs. 20,000/-. Ext. B dated 24-2-1947 is a promissory-note executed by defendant 1 in favor of the plaintiff bank for Rs. 20,000/-and the plaintiff's case is that defendant 1 had executed Ext. B as security for the said overdraft account and that over and above Ext. B executed by defendant 1, defendants 1 and 2 had also given to the bank a letter of guarantee Ext. C dated 24-5-1947 signed by both of them, undertaking to repay to the plaintiff whatever amount might be found due to the bank under defendant 1's overdraft account

up to a maximum of Rs. 20,000/- and interest thereon at 9% per annum. Alleging that a sum of Rs. 26377, as. 11, pies 2 was due to the plaintiff bank on 31-3-1950 under the overdraft account, plaintiff brought the suit which has given rise to this appeal for recovery of the said amount and interest thereon from defendants 1 and 2. Defendants 1 and 2 contested the suit. Defendant 1 contended that Ext. B was not supported by consideration, that under the records of the account only a sum of Rs. 14,000/- was due from him, that he was for some time dealing in tapioca starch and had agreed at the plaintiff's request to open a key-loan account in the plaintiff bank in his name for some tapioca starch standing in the name of Messrs. Fazil and Lean D'Cruz, that the plaintiff bank subsequently transferred to the plaintiff overdraft account an amount of Rs. 12,000/- under the aforesaid key-loan account, that this transfer was made improperly and without authority and defendant was not responsible for the amount transferred and that he was not therefore liable for the whole plaintiff amount.

2. Defendant 2 contended that the letter of guarantee executed by him was only for Rs. 5000/-, that, without his consent and knowledge the figure 5000 in the letter of guarantee was altered to Rs. 20,000/-, that on account of this material alteration in Ext. C, he could not be made liable for the plaintiff claim and that the suit was also barred by limitation. According to the averments in the written statement, defendant 2 had agreed to stand surety for defendant 1 to the extent of Rs. 5000/- and when he signed Ext. C the amount entered therein was only Rs. 5000/-, the figure 5000/- was subsequently corrected to Rs. 20,000/- and on account of this material alteration the suit is not maintainable. It was further contended by defendant 2 that even on the allegations in the plaintiff the plaintiff is seen to have advanced to defendant 1 more amounts than that covered by the letter of guarantee and so the obligation of defendant 2 as surety must be deemed to have been discharged in law. Lastly, there was a prayer in the written statement that, if defendant 2 was found liable for any amount, his liability for the same might be made secondary to that of defendant 1.

3. The lower court repelled the contentions of defendant 1 and decreed the suit as against him in terms of the plaintiff, but it dismissed the suit as against defendant 2 on the finding that Ext. C, the letter of guarantee, contained a material alteration which was made after he signed it and without his consent. The material alteration which defendant 2 had alleged in his written statement was that the letter of guarantee was originally executed only for Rs. 5000/- and that the figure 5000 was subsequently corrected into 20,000, but the material alteration which the lower court found to have been made in the letter of guarantee" was that it was originally executed for Rs. 25,000/- and was then corrected without defendant 2's consent to Rs. 20,000/-. Although this material alteration found by the lower court was one reducing the liability which defendant 2 had undertaken when he signed the letter of guarantee, the court held that no claim could be enforced against defendant 2 on the letter of guarantee as it was materially altered. Plaintiff has brought the present appeal against the dismissal

of the suit so far as defendant 2 is concerned.

4. Ext. C is a typed instrument purporting to be a letter of guarantee signed by defendants 1 and 2 and addressed to the Agent, Thomcos Bank Ltd., Trivandrum. The first five lines of the first paragraph in Ext. C reads:

Provided nevertheless that...liability on this guarantee shall not exceed the whole sum of Rupees 20,000/-..... (Rupees twenty thousand only) and interest thereon at the rate of nine per cent per annum from the date on which demand for payment shall have been made by you upon us".

This is the provision prescribing the maximum limit for the overdraft account. In the fourth line from the bottom of paragraph 1 of Ext. C the words "shall not exceed the whole sum of Rs. 20,000/-" occur. The typed portion of that passage in the said line ends with the word "rupees". After that word there are some dots providing a blank space for writing in ink the figure for the maximum limit for the overdraft account. After the dots, in the same line i.e., fourth line from the bottom of that paragraph, there is the beginning of a bracket followed by the typed word "Rupees". A few dots providing a blank space for writing the maximum limit of the account in letters then occur in the same line. The subsequent line i.e., the third line from the bottom of the first paragraph, begins with more dots and end with a bracket providing further blank space for continuing the entry in ink of the maximum limit for the overdraft in words. After the bracket closes, the third line runs on, reading "and interest thereon at the rate of nine per cent". In the first blank space in the fourth line (from the bottom) following the words "the whole sum of rupees", there is now a figure written in ink which reads "20,000". It is clear that the fourth digit from the end of this figure was originally written as "5" and was then corrected to "O". According to P. W. 2 and the finding of the lower court, the figure originally written after the words "the whole sum of rupees" was 25000/-, and the fourth digit was subsequently altered from "5" to "O" making the figure read 20000. According to defendant who has been examined as D. W. 1, the figure originally written was only a figure of four digits reading "5000", but that figure was subsequently corrected without his consent and knowledge to a figure of five digits reading "20000" by adding a "2" in the space between the figure "5000" and the word "rupees" and altering the fourth digit from "5" to "O" Likewise, according to P. W. 2 and the finding of the lower court, the figure written in ink in lines 4 and 3 (from the bottom) within the bracket and after the word "rupees" in the bracket was "twenty five thousand only" and that figure was subsequently altered to "twenty thousand" by scoring out the word "five". The word "twenty" in the amount stated in words occurs in the short space in the fourth line (from the bottom) after the word "rupees" in the bracket and the next line i.e., the third line (from the bottom) begins with the words "five thousand only" in the blank space within the bracket. According to defendant 2 when he signed Ext. C the shortspace within the bracket in the fourth line (from the bottom) was blank and the word "twenty" now found there was not then there. He says he had filled

up only the blank space inside the bracket in the third line (from the bottom) writing only the words "five thousand only". According to him, after he signed Ext C, someone without his consent and knowledge scored out the word "five" inside the bracket at the beginning of the third line (from the bottom) and wrote the word "twenty" in the short space inside the bracket in the fourth line (from the bottom), making the whole entry inside the brackets in lines 3 and 4 read "twenty thousand only". That the entries in Ext. C in figures and words relating to the maximum limit of the overdraft accommodation have been altered after those entries were made admits of no doubt. The alterations can be dearly seen by a mere look at the document. Therefore the burden was upon the plaintiff to prove how the alterations were made. Plaintiff has examined P. W. 2, and defendant 2 has examined himself to prove their respective cases regarding the alteration. In paragraph 9 of his judgment, the learned Judge below has said clearly that as to the actual alterations made he believes the evidence of P. W. 2 and does not believe defendant 2, and he has found that what was originally written in Ext. C in figures was 25000 and what was written in letters was "twenty five thousand only" and that the laterations effected were the alteration of the fourth digit in the figure 25000 changing "5" to "0" and the scoring out of the word "five" occurring at the beginning of the blank space inside the bracket in the third line (from the bottom).

5. The correctness of this finding is questioned by the respondent's learned counsel who contends that the evidence of defendant 2 should have been accepted by the lower court and that it should have found that the alteration was from "5000" to "25000" and not from "25000" to "20000". A scrutiny of Ext. C would show that the lower court's finding was more in conformity with the probabilities than the respondent's contention. The figure "2" in the fifth digit in the figure "20000" written after the typed words "the whole sum of rupees" in the fourth line (from the bottom) is not written in a cramped style and the spacing after the word "rupees" and the figure "2" and the spacing between the subsequent digits appear to be natural and almost even. If it was the figure "5000" which was written at first, it would have left a comparatively large blank space between the word "rupees" and the figure 5. It is highly improbable that the defendant 2 would have left such a large space between "rupees" and "5". Similarly, the space at the end of the fourth line (from the bottom), wherein the word "twenty" now appears and, according to defendant 2, was written there by someone after he signed Ext. C and without his consent and knowledge, would not have been left blank by him when he signed Ext. C. If he had not written anything in the space he would have at least drawn a line across it. Yet another circumstance appearing from Ext. C is that the word "five" with which the third line from the bottom begins, is written with a small "f" and not with a capital "F". If what was written originally was five thousand, the word "five" would have been written with a capital "F", for that is how it is written in Ext. A. These are circumstances which belie the defendant's contention and probabilities the plaintiff's case. During the course of his argument, the respondent's learned

counsel referred to the fact that in the copy of Ext. C which the plaintiff filed in the lower court, the corresponding entries are "25000" and "Twenty five thousand", and that in the replication also the letter of guarantee is referred to as one for Rs. 25000/-. The learned counsel contended that even the plaintiff and his counsel were not sure what was the real figure given in Ext. C. There is not much substance in this contention, for in the plaint it was clearly stated that the letter of guarantee was for rupees twenty thousand. The mistake in the copy and the replication was, according to the plaintiff, due to the fact that the copy filed in court and the replication were prepared with the help of a copy of Ext. C which defendant 1 had furnished to the bank. The evidence of P. W. 2 is that since defendant 2 was not in station at the time the second overdraft account was opened and Ext. B executed, Ext. C was typed out with certain blank spaces left for entries therein to be made by defendant 2 regarding the maximum limit of the account, and interest etc., and sent to him, that it was defendant 1 who brought Ext. C to the bank and at time he had brought it the blank spaces for the maximum limit were filled up showing the limit to be rupees twenty five thousand; that he (P. W. 2) therefore returned Ext. C to defendant 1 point out the discrepancy between the figure in Ext. C and the amount for which the overdraft accommodation had been allowed; that defendant 1 thereupon pressed him to accept Ext. C and raise the overdraft accommodation to rupees twenty five thousand, that he refused to do this also, and that defendant 2 then took away Ext. C and again brought it back with the amount of the maximum limit corrected to "twenty thousand". It is highly probable that when defendant 1 brought Ext. C first to the bank and took it away he gave a copy of it also to the bank. The lower court has believed the evidence of P. W. 2 and after having carefully gone through his deposition and that of defendant 2, we also consider that his evidence is reliable and that of defendant 2 is untrustworthy. It is admitted by both sides that in 1945 defendant 1 had opened an overdraft account with the plaintiff bank for Rs. 5000, and that defendants 1 and 2 had given the bank a letter of guarantee for that amount Ext. A dated 25-9-1945 is the letter of guarantee for that account. There was therefore no necessity or likelihood for a second letter of guarantee being asked from defendant 2 in 1947 for that identical account and amount. The very fact that the second letter of guarantee was demanded in 1947 and defendant 2 had agreed to give such a letter shows that the overdraft accommodation given to defendant 1 was raised in 1947 with defendant 2's consent and on his undertaking to give a guarantee for the increased accommodation. It is also significant that the reply which defendant 2 gave to the notice sent to him by the bank was one of utter denial of the letter of guarantee and that there was no suggestion in that reply that the bank was demanding a higher amount than that what he had really guaranteed. Having regard to all these facts and circumstances, we agree with the lower court in disbelieving the evidence of defendant 2 and accepting the evidence of P. W. 2, We therefore hold that Ext. C was first executed by defendant 2 for Rs. 25000 and that it was subsequently altered to Rs. 20000/-.

6. The next question for consideration is who made this alteration and whether it is such a material alteration as would disentitle the plaintiff from getting any relief against defendant 2 on the strength of Ext. C. On the evidence of P. W. 2 already referred to, it would appear that the alterations were made after he returned Ext. C to defendant 1 on account of the discrepancy in the amount and before the latter again took it back to him with the corrections. From his evidence it is clear that the alterations were made either by defendant 1 or by defendant 2. There is no positive evidence to prove that the correction was made by defendant 2. One circumstance which militates against the suggestion that the alteration must have been made actually by defendant 2 is that he has not initialed the alterations and that the bank also had not insisted upon having the alterations initialed by him before it accepted the instrument. The probabilities therefore are that defendant 1 made the alterations after P. W. 2 returned the instrument and he again took it to P. W. 2.

7. Nevertheless, we do not consider that these alterations are so material as to disentitle the plaintiff from getting a decree against defendant 2 on the strength of Ext. C. From the evidence of P. W. 2 and from Ext. B, and D, it is clear that the bank had allowed an overdraft accommodation to defendant 1 for Rs. 20000 on 24-2-1947. The evidence of P. W. 2 is that this overdraft accommodation was given on the guarantee of defendant 2 and that as defendant was not in station, the letter of guarantee was typed out and sent to him for signature. Defendant 2 also admits that he had agreed to give a second letter of guarantee, but he would say that he had agreed to guarantee only rupees five thousand. This evidence of his must be false, for on the date of Ext. C there was no necessity for a second letter of guarantee from him for rupees five thousand. His explanation for the demand for a second letter of guarantee was that the first letter had become barred by limitation. But that letter written on 25-9-1945 could not have become barred by 24-2-1947 when Ext. B was executed or by 24-5-1947 when Ext. C was executed. In the circumstances it is clear that he must have agreed to give a letter of guarantee for the increased overdraft accommodation allowed on 24-2-1947. Defendants 1 and 2 were friends, the former being a dealer in tapioca starch and the other having been the Controller of Tapioca Starch in the former state of Travancore at the time of Ext. A. From the evidence of P. W. 2 it is further clear that it was not in the plaintiff bank that defendant 2 filled up and signed Ext. C, and that the discrepancy between the maximum limit given in Ext. C and the maximum limit allowed for the overdraft accommodation was discovered and became known even to defendant 1 only when he took Ext. C to the bank. Probably defendant made a mistake in Ext C because he had not the relevant papers with him when he signed it. When the discrepancy was pointed out to defendant 1, he made an attempt to reconcile it by making the bank agree to a further enhancement of the overdraft accommodation. When the bank refused to allow this enhancement and returned Ext. C to defendant 1, he took it away for a short time and brought it back with the alteration made in Ext. C, and it was then that the bank accepted Ext. C. Those alterations were to the effect of

furnishing a guarantee for Rs. 20000, which was the maximum limit of the enhanced overdraft accommodation which defendant 2 had agreed to guarantee. In the circumstances we hold that the alterations in Ext. C were made in order to carry out the common intention of defendants 1 and 2 and the plaintiff that for the overdraft accommodation for Rs. 20000 allowed to defendant 1, defendant 2 was to give a letter of guarantee to the bank. Section 87 of the Negotiable Instruments Act provides that any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties. The same principle must hold good in the case of letters of guarantee also. In *Lachmi Rai and Another Vs. Srideo Rai and Another*, it was held that

Where a sarkhat, as originally drawn up does not contain any reference as to the payment of interest through an accidental omission and the creditors subsequently made an alteration in the sarkhat, by incorporating in it a previous agreement between the parties - for payment of interest, the alteration although made without reference to the debtors does not make the sarkhat void as against the debtors, in as much as the alteration is made in order to carry out the common intention of the parties.

The Calcutta High Court also has held in *Ananda Mohan Sha v. Anandachandra Sha* (35 IC 182) that an alteration made in a mortgage bond by one of the parties in good faith without the knowledge of the other party in order to carry out their original intention, does not vitiate the instrument-Adopting the principle of section 87 of the Negotiable Instruments Act and the principle accepted in the above cases, we hold that the alterations in Ext. C do not render the instrument void as against defendant 2 in as much as the alterations were made in order to carry out the common intention of the plaintiff and defendants 1 and 2, that defendant 2 was to guarantee the overdraft accommodation for rupees twenty thousand allowed by the bank to defendant 1, and that the plaintiff is entitled to get a decree against defendant 2 on the strength of Ext. C in spite of the alteration made in it.

8. There is no substance in defendant 2's contention that the bank has advanced more than Rs. 20000 to defendant 1 under the overdraft account. Ext. D shows that the actual advance has not exceeded Rs. 20,000 and that the balance claimed is on account of interest. In Ext. C also interest is guaranteed over and above the advance of Rs. 20,000/-. In the result the appeal is allowed, the decree of the lower court in as much as it dismisses the suit as against defendant 2, is set aside and the plaintiff is given a decree to recover the plaint amount and interest claimed in the plaint from defendant 2 also. In view of the omission to get the alterations in Ext. C initialed by defendant 2, we allow to the plaintiff-appellant only one-half of the costs incurred in this court. Respondent (defendant 2) will suffer his costs. As the plaintiff has been allowed to recover costs incurred in the lower court from defendant 1, we do not make defendant 2 liable for the

plaintiff's costs in that court. In view of the letter of guarantee and the fact that the transaction sued upon was a business loan, we refuse the appellant's prayer to make his liability secondary to defendant 1's liability and leave the plaintiff free to execute the decree against defendant 1 and 2 in any manner the bank considers convenient and beneficial to it.