

(1920) 03 BOM CK 0013
In the Bombay High Court
Case No : O.C.J. Suit No. 481 of 1919

Uderam Premasukh

APPELLANT

Vs

Shivbhajan Rampratab

RESPONDENT

Date of Decision : 29-03-1920

Acts Referred:

Contract Act, 1872 — Section 133, 62

Citation : (1920) 22 BOMLR 711 : 58 Ind. Cas. 272

Hon'ble Judges : Crump, J

Bench : Single Bench

Judgement

Crump, J.—This is a suit to recover from defendant as surety on a guarantee. The facts are simple and are not in dispute save in one minor particular that is as to the service of notice of demand which point was ultimately abandoned as being immaterial to the result. Those facts are shortly as follows. On May 30th 1917 plaintiffs agreed to buy 100 bales of cotton, April 1918 delivery, at Rs. 406-12-0 from the firm of Balmukund Premasukh Defendant as surety guaranteed the performance of the contract. On February 3rd, 1918, plaintiffs being uneasy as to the financial soundness of Balmukund Premasukh agreed to sell to them 100 bales of the same goods for the same delivery at Rs. 617-8-0. On February 4th Balmukund Premasukh became insolvent. Plaintiffs' claim against them has been paid in part by the Official Assignee. In the present suit they seek to recover the balance from defendant. It is admitted that the market rate on the Vaida day was Rs. 712. Plaintiffs put their case alternatively. They say, "Either we are entitled to recover the difference between the rates of the two contracts, or the difference between the rate of the first contract and the rate on the Vaida day."

2. A number of defences were suggested in the written statement but these were dropped at the hearing. The defence taken is that defendant is discharged from his suretyship by reason of the second contract between the plaintiffs and the principal debtor.

3. The following issues were raised:

- (1) Whether plaintiffs are entitled to recover Rs. 10507-8-0 from the defendant 1
- (2) Whether the. first contract remained outstanding until the due date as alleged in para 7 of the plaint 1
- (3) Whether plaintiffs in the alternative are entitled to claim Rs. 1526"2-8-0 or any other sum from the defendants ?
- (4) Whether defendant is not discharged from his suretyship as set out in para 4 of the written statement ?

4. The result of elaborate arguments in this case has been to confirm the conviction with which I set out that the only question to be decided is whether both the contracts remained alive and capable of performance until the due date. The matter may readily be put from either point of view. On the one hand it may be said that there are two separate and independent contracts, one of sale, and one of purchase, each legally subsisting until the due date, and legally capable of being enforced. On the other hand it may be argued that taking the two contracts together the intention of the parties was to enter into a new agreement to pay the difference at the due date. From the first point of view the surety is not discharged: from the second point of view the surety is discharged.

5. So far as I am aware there is no authority upon this point. As between the parties themselves it could not in practice arise, for whatever their exact legal rights may be, it is plain that they do not intend that there shall be any delivery, but that the sum settled by what may for convenience be termed the "cross contracts" shall be paid by one to the other. That is no doubt the point of view of the business man, and it is ordinarily permissible to speak of such contracts as "cancelling each other." An instance of the use of this phrase will be found in *J. 11, Tod v. Lakhmidas Purshotamdas I. L. R. (1892) Bom. 441*. Farran J. speaking of such contracts says:

This mode of dealing, when the sale and purchase were to and from the same person, of course had the effect of cancelling the contracts, leaving only differences to be paid.

6. The learned Judge was in that case, dealing with a defence of wager, and the question of the intention to deliver was therefore all-important. The point here is different, viz., whether the contracts mutually extinguish one another. The case of *Sassoon v. Tokersey I. L. R (1904). 28 Bom. 661* has also been cited, but there is little in that case which assists the decision here. The most relevant part of the judgment is that which points out the possible difference between the legal point of view and the "business" point of view (see p. 624). That difference must be remembered, and it is for this reason that in the present case the subsequent conduct of the parties is of little importance, All that they had to consider was the practical result which undoubtedly was that differences only would be paid. The extracts from the accounts which have been put in shew no more than that as business men they regarded the transactions as settled, and

that all that remained to be done was to pay or receive the difference on the due date. This however is not conclusive. There is a distinction between the legal "rights created by the contracts and the mode in which those rights may subsequently have been dealt with" (See the case last cited at p. 625).

7. We have here two contracts. On the face of them they are wholly independent. Each continues in full force and effect until it is discharged. Can it be said that the second contract extinguished the first and in so doing was itself extinguished? It seems to me that the true view is rather that each was capable of performance on the due date. Each party had a right to demand delivery from the other, but as the quantities are equal the practical result must have been that there would be no delivery. This was a necessary consequence of the two contracts. It was their combined effect, but there was no novation in the sense in which the term is used in Section 62 of the Indian Contract Act.

8. Ordinarily no doubt the best guide to the meaning of a contract is the common intention of the contracting parties: but that intention can be gathered only from that which is expressed. Here there are two distinct contracts of different dates. Each is complete in itself and free from ambiguity or obscurity. It is not even suggested that the parties by any outward expression agreed to treat them as forming by their combined effect a third contract superseding both. Therefore in law no evidence can be admitted varying the terms of either of these contracts. There is "no distinct subsequent oral agreement" rescinding the first contract (of s 92 of the Indian Evidence Act, Prov. (4)). No one even alleges that there are any materials but the contracts themselves, and the subsequent conduct of the parties from which the legal position can be gathered. The subsequent conduct does no more than recognise the practical result. But *prima facie* persons who enter into contracts must be supposed to contemplate performance. The payment of differences is no more than the necessary result, of any attempt to insist on the performance of both contracts. If the procedure of tendering the price against the goods and the goods against the price were solemnly enacted the result clearly would be that the advantage of the one party over the other would be measured precisely by the difference between the contract rates. It is therefore in my opinion unsound to argue that because the parties had in mind the payment of differences only, the two contracts were extinguished. The truth is that the practical mind immediately perceives the practical result of the operation of the two contracts, and confines its attention to that.

9. Unless it can be held that there was a rescission by a new agreement how were these contracts discharged? It is a case of a new agreement or nothing. The contracts are in precisely the same form : each is complete in itself: and each is on the face of it capable of being enforced on the due date. It has been questioned whether a suit would lie on the earlier contract. This is merely putting the question in another form. To a suit on either of these contracts two answers could be made: first, that the contract was extinguished. Secondly, that the claim due under the other contract should be set off. The latter represents in my

opinion the true position. The practical result would of course be that differences only could be awarded.

10. I have already indicated that upon the view which I have taken the surety is not discharged. The relevant sections of the Indian Contract Act are Sections 133 and 134t. The former does not operate here, the reason being that there is no variance in the terms of the first contract. As to Section 134 the principal debtor is not released, nor is the legal consequence of the act of the creditor that the principal debtor is discharged. The decisions cited do not carry the matter beyond the words of the Statute which require no comment.

11. The result therefore at which I have arrived-not, I admit, without considerable doubt-is that defendant remains liable on his guarantee. The logical consequence would be that he is liable to pay the plaintiff damages calculated on the difference between the rate of the contract and the rate on the due date. But as the plaintiff asks for a decree for the lesser sum only, viz., the difference between the rates of the two contracts, there will be a decree for that sum only.

12. I record the following findings.

13. 1. In the affirmative. 2. In the affirmative. 3. In the negative. 4. In the negative.

14. Decree for plaintiff for Rs. 8078, costs and interest on judgment at 6 per cent.