S. CHATTANATHA KARAYALAR

v.

THE CENTRAL BANK OF INDIA AND OTHERS

March 9, 1965

[P. B. GAJENDRAGADKAR, C. J., RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.]

Promissory Note, Letter of continuity and Hypothecation Agreement—Interpretation of—Liability if as surety of co-obligant.

On the basis of a promissory note and a letter of continuity executed by the appellant and respondent Nos. 2 and 3 and a hypothecation agreement executed by the respondent No. 2, the respondent No. 1—bank opened on overdraft account in the name of respondent 2. In the promissory note, the appellant and respondent Nos. 2 and 3 had "jointly and severally promised to pay" the bank or order; in the letter of continuity sent along with promissory note to the bank, the appellant, respondent Nos. 2 and 3 stated that "the said promissory note is to be a surety to you for the repayment of the ultimate balance or sum remaining unpaid on the overdraft"; and in the hypothecation agreement the bank had agreed to open a cash credit account at the request of respondent No. 2. The bank filed a suit against the appellant and respondent Nos. 2 and 3 for recovery of the amount due on the overdraft. The appellant and respondent No. 3 pleaded, *inter alia*, that they had executed the promissory note as a surety for respondent No. 2 and that they are not co-obligants. The Trial Court held the appellant and respondent No. 3, were not merely sureties but were co-obligants and decreed the suit, which was affirmed by the High Court. In appeal by certificate;

HELD: The finding of the High Court was not correct. [324 C-D].

Interpreting the language of the promissory note in the context of the letter and the hypothecation agreement, the status of the appellant with regard to the overdraft account was that of a surety and not of co-obligant. [324 A].

If the transaction is contained in more than one document between the same parties, they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. [323 C].

Manks v. *Whiteley*, (1912) 1 Ch. 735, applied;

The provisions of Section 92 of the Evidence Act did not apply in the present case, because the appellant was not attempting to furnish evidence of any oral agreement in derogation of the promissory note but relied on the existence of a collateral agreement in writing the letter and the hypothecation agreement, which formed parts of the same transaction as the promissory note. [325 H].

Case law referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 405 of 1964.

Appeal from the judgment and decree dated July 18, 1962 of the Kerala High Court in A. S. No. 561 of 1961.

S. T. Desai, M. S. K. Sastri and *M. S. Narasimhan* for the appellant.

G. S. Pathak, B. Dutta, C. Chopra, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain* for Respondent No. 1.

A The Judgment of the Court was delivered by

Ramaswami, J. This appeal by certificate is brought on behalf of the 3rd defendant against the judgment and decree of the High Court of Kerala dated July 18, 1962 in A.S. No. 561 of 1961 which affirmed the judgment and decree of the Court of the Subordinate Judge of Alleppey in O.S. No. 114 of 1957.

B By a resolution Ex. BD dated November 25, 1946 the Board of Directors of the 1st defendant Company authorised the 2nd defendant to obtain financial accommodation from the plaintiff-bank to the extent of Rs. 15 lakhs under different kinds of loans. Pursuant to this resolution the Company by its letter Ex. DE dated November 26, 1946 asked for accommodation for Rs. 1 lakh under C clean overdraft, for Rs. 4 lakhs under open loan and for Rs. 10 lakhs under out agency and key loans. On November 26, 1946 all the three defendants executed a promissory note Ex. B in favour of the plaintiff-bank for a sum of Rs. 4 lakhs. The promissory note was sent to the plaintiff-bank along with a letter—Ex. A styled letter D of continuity dated November 26, 1946. Ex. A reads as follows:

" Alleppey, 26th November, 1946.

The Agent,
The Central Bank of India Limited,
Alleppey.

Dear Sir,

E We beg to enclose an on demand pro-note p. Rs. 4,00,000 (Rupees Four lacs only) signed by us which is given to you as security for the repayment of any overdraft which is at present outstanding in our name and also for the repayment of any overdraft to the extent of Rs. 4,00,000 (Rupees four lacs only) which we may avail F of hereafter and the said Pro-Note is to be a security to you for the repayment of the ultimate balance of sum remaining unpaid on the overdraft and we are to remain liable to the Pro-Note notwithstanding the fact that by payments made into the account of the overdraft from time to time the overdraft may from time to time be re-G duced or extinguished or even that the balance of the said accounts may be at credit.

Yours faithfully,
for CASHEW Products Corporation Ltd.
For General Agencies Ltd. (Respondent 2)

H Sd/- P. S. George
(Respondent 3)

Sd/- P. S. George
Managing Director,
Managing Agents.

Sd/- S. Chattanatha Karayalar
(Appellant).

"

Exhibit B states:

"Br. Rs. 4,00,000

Alleppy, 26th November 1946.

On Demand we, the Cashew Products Corporation Ltd., S. Chattanatha Karayalar and P. S. George jointly and severally promise to pay The Central Bank of India Limited or order the sum of British Rs. Four Lacs only together with interest on such sum from this date at the rate of Two per cent over the Reserve Bank of India rate with a minimum of Five per cent per annum with quarterly rests for value received.

For Cashew Products Corporation Ltd.
For General Agencies Ltd.
Sd/- P. S. George (Respondent 2)
Managing Director,
.... Managing Agents.

Sd/-P. S. George (Respondent No. 3).

Sd/- S. Chattanatha Karayalar "
(Appellant).

On the same day, defendant No. 1 as "Borrower" executed in favour of the plaintiff-bank Ex. G, a deed of hypothecation of its stocks of goods for securing the Demand Cash credit. Ex. G is to the following effect:

"Hypothecation of goods to secure a Demand cash Credit.

No.

Amount No. 4,00,000.

Name. The Cashew Products Corporation, Limited, Quilon.

The Central Bank of India, Limited (hereinafter called 'the Bank') having at the request of the Cashew Products Corporation Ltd., Quilon, (hereinafter called 'the Borrowers' opened or agreed to open in the Books of the Bank at Alleppey a Cash Credit account to the extent of Rs. Four lacs only with the Borrowers to remain in force until closed by the Bank and to be secured by goods to be hypothecated with the Bank it is hereby agreed between the Bank and the Borrowers (the Borrowers agreeing jointly and severally) as follows:—

* * * * *

14. The Borrowers agree to accept as conclusive proof of the correctness of any sum claimed to be due from them to the Bank under this agreement a statement of account made out from the books of the Banks of the Bank and signed by the Accountant or other duly authorised officer of the Bank without the production of any other voucher, document or paper.

A 15. That this Agreement is to operate as a security for the balance from time to time due to the Bank and also for the ultimate balance to become due to on the said Cash Credit Account and the said account is not to be considered to be closed for the purpose of this security and the security of hypothecated goods is not to be con-
B sidered exhausted by reason of the said Cash Credit Account being brought to credit at any time or from time to time or of its being drawn upon to the full extent of said sum of Rs. 4,00,000 if afterwards reopened by a payment to credit.

* * * * *

C

In witness whereof the Borrowers have hereto set, their hands this Twenty sixth day of November the Christian Year one thousand nine hundred and fortysix.

For Cashew Products Corporation Ltd.,
D For General Agencies Ltd;

Sd/-

Managing Director,
Managing Agents

E Sd/-

Schedule of goods referred to in the foregoing instrument, Stocks of cashewnuts, cashew kernels, tin plates, Hoop Iron and other packing materials stored and or to be stored in the factories at Kochuplamood, Chathanoor,
F Ithikara, Kythakuzhi, Paripalli, Palayamkunnu and anyother factories in which we may be storing from time to time and at Cochin awaiting shipment.

For Cashew Products Corporation Ltd;
For General Agencies Ltd;

G Sd/-

Managing Director,
Managing Agents."

On the basis of those documents the plaintiff-bank opened an
H overdraft account in the name of defendant No. 1. On December 21, 1949, the three documents—Ex. A, B and G were renewed in identical terms by Exs. C, D and F. On January 1, 1950 a sum of Rs. 3,24,645/12/2 became due to the plaintiff-bank and on that date a demand notice—Ex. 'O' was sent by the plaintiff-bank for repayment of the amount. A second notice—Ex. L was sent by the plaintiff-bank on April 26, 1950. On September 8, 1950 the plaintiff-bank brought a suit for the recovery of Rs. 2,86,292/11/11 from

all the three defendants. The suit was contested by all the defendants. The case of defendant No. 1 was that it had sustained loss on account of sudden termination of credit facilities by the plaintiff-bank and the amount of loss sustained should be set off against the claim of the plaintiff-bank. Defendants Nos. 2 and 3 pleaded that they had executed the promissory notes only as a surety for the 1st defendant and that they are not co-obligants. It was further alleged that the plaintiff-bank had granted loan to the 1st defendant in other forms such as Out Agency loans against goods which were security for the open loan. It was said that the plaintiff-bank had made adjustments in the open loan account and in the clean over-draft account by debiting and correspondingly crediting in other accounts without the consent of defendants 2 and 3. The plaintiff-bank had also allowed defendant No. 1 to over-draw freely in the clean overdraft and open loan accounts far beyond the limits agreed upon. It was alleged that the plaintiff-bank had converted secured loans into simple loans by releasing goods covered by Bills of Lading against trust receipts and had thereby deliberately frittered away such securities. They contended that they were discharged from obligation as sureties to the contract for these reasons. Upon these rival contentions the learned Subordinate Judge of Alleppey took the view that defendants 2 and 3 were not merely sureties but they were co-obligants, because they had executed the promissory notes—Exs. B & D. In view of this finding the learned Subordinate Judge considered it unnecessary to go into the question whether defendant No. 3 was absolved from his liability "for all or any reasons set forth in para 5 of the Consolidated Written Statement filed by him". Against the judgment and decree of learned Subordinate Judge, Alleppey defendant No. 3 presented an appeal in the High Court of Kerala under A. S. 561 of 1961. Defendants 1 and 2 did not appeal. The appeal was dismissed by the High Court of Kerala on July 12, 1962. It was held by the High Court that defendant No. 3 was a co-obligant and not a surety. On July 16, 1962 defendant No. 3 filed C.M.P. No. 5032 of 1962 praying that the argument of the appellant with regard to his liability as co-obligant may be expressly dealt with in the judgment of the High Court and complaining that the appellant would be seriously prejudiced if the omission was allowed to remain. Thereupon the learned Judges of the High Court wrote a supplementary judgment on July 18, 1962 rejecting the further arguments addressed on behalf of the appellant.

A B C D E F G H

The first question presented for determination in this case is whether the status of the 3rd defendant in regard to the transaction of overdraft account is that of a surety or of a co-obligant. It was argued by Mr. Desai on hehalf of the appellant that the High Court has misconstrued the contents of Exs. A and B in holding that the 3rd defendant has undertaken the liability as a co-obligant. It was submitted that there was an integrated transaction constituted by the various documents—Exs. A, B and G executed between the parties on the same day and the legal effect of the documents was to confer on the 3rd defendant the status of a surety and not of a

A co-obligant. In our opinion, the argument put forward on behalf of the appellant is well-founded and must be accepted as correct. It is true that in the promissory note—Ex. B all the three defendants have "jointly and severally promised to pay the Central Bank of India Ltd. or order a sum of Rs. 4 lakhs only together with interest on such sum from this date", but the transaction between the B parties is contained not merely in the promissory note—Ex. B—but also in the letter of continuity dated November 26, 1946—Ex. A which was sent by the defendants to the plaintiff-bank along with promissory note—Ex. B on the same date. There is another document executed by defendant No. 1 on November 26, 1946—Ex. G—Hypothecation agreement. The principle is well-established that if C the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In *Manks* v. *Whiteley*,(1) Moulton, L. J. stated:

> "Where several deeds form part of one transaction and D are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising E out of the transaction as a whole."

It should be noted in the present case that the promissory note—Ex. B—was enclosed by the defendants along with the letter of continuity—Ex. A before sending it to the plaintiff-bank. In the letter—Ex. A it is clearly stated that the promissory note Ex. B was F given to the plaintiff-bank "as security for the repayment of any overdraft to the extent of Rs. 4,00,000". It is further stated in Ex. A that "the said promissory note is to be a security to you for the repayment of the ultimate balance or sum remaining unpaid on the overdraft". In the hypothecation agreement—Ex. G it is stated that the plaintiff-bank has agreed to open a cash Credit account to the G extent of Rs. 4 lakhs at the request of the Cashew Products Corporation Ltd., Quilon. According to para 15 of the hypothecation agreement it operates as a security for the balance due to the plaintiff-bank on the Cash Credit account. Para 12 of the hypothecation agreement states that if the net sum realised be insufficient to cover the balance due to the plaintiff-bank, defendant No. 1 should pay H the balance of the account on production of a statement of account made out from the books of the bank as provided in the 14th Clause. Under this Clause defendant No. 1 agreed to accept as conclusive proof of the correctness of any sum claimed to be due from it to the bank a statement of account made out from the books of the Bank and signed by the Accountant or other duly authorised officer

(1) [1912] 1 Ch. 735.

of the Bank without the production of any other document. If the language of the promissory note—Ex. B is interpreted in the context of Exs. A & G it is manifest that the status of the 3rd defendant with regard to the transaction was that of a surety and not of a co-obligant. This conclusion is supported by letters—Exs. AF dated November 27, 1947, AM dated December 17, 1947 in which the Chief Agent of the plaintiff-bank has addressed defendant No. 3 as the "guarantor". There are similar letters of the plaintiff-bank, namely, Exs. CE dated December 28, 1947, CG dated January 13, 1948, AS dated February 23, 1949, V dated October 21, 1949, III dated December 16, 1949, IV dated January 12, 1950 and 'O' dated March 29, 1950 in which defendant No. 3 is referred to either as a "guarantor" or as having furnished a guarantee for the loan. Our concluded opinion, therefore, is that the status of the 3rd defendant with regard to the overdraft account was that of a surety and not of co-obligant and the finding of the High Court on this issue is not correct.

On behalf of respondent No. 1 Mr. Pathak stressed the argument that there is no contract of suretyship in the present case in terms of s. 126 of the Contract Act and the plaintiff-bank is not, legally bound to treat the 3rd defendant merely in the character of a surety. Mr. Pathak relied upon the decision of the Madras High Court in *Vyravan Chettiar* v. *Official Assignee of Madras*(1) in which it is pointed out that persons who are jointly and severally liable on promissory notes are not sureties under s. 126 of the Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so called to attract the provisions of s. 141 of the Contract Act. Reference was made, in this connection, to the decision of the House of Lords in *Duncan Fox & Co.* v. *North & South Wales Bank*(2) in which Lord Selbourne, L. C. distinguished between three kinds of cases; (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor, is a stranger, and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two that of one of those persons only, and not equally of both, so that the other if he should be compelled to pay it, would be entitled to reimbursement from the persons by whom (as between the two) it ought to have been paid. It is pointed out by the learned Lord Chancellor that in all these kinds of cases the person who discharged the liability due to the creditor, would be entitled to the benefit of the security held by the creditor though a case of suretyship strictly speaking would fall only under class 1, as a contract of guarantee is confined to agreements where the surety agrees with the creditor that he would discharge the liability of the principal

(1) A.I.R. 1933 Mad. 39.
(2) [1881] 6 A.C.I.

A debtor in case of his default. It is manifest that classes 2 and 3 are not cases of suretyship strictly so called. Lord Selbourne observed that the case before him did not fall within the first or the second class but it fell within the 3rd class in which strictly speaking there was no contract of suretyship. But the Lord Chancellor held in that case that even in the second and third class of cases the surety B has some right to be placed in the shoes of the creditor where he paid the amount. The argument of Mr. Pathak was that the position in Indian Law is different and the principles relied upon by Lord Selbourne, L. C. in *Duncan Fox & Co.* v. *North & South Wales Bank*(1) did not apply to the present case. Mr. Pathak referred, in this connection, to the illustration to s. 132 of the Contract Act in C support of his argument. We consider that the legal proposition for which Mr. Pathak is contending is correct, but the argument has not much relevance in the present case. It is true that s. 126 of the Contract Act requires that the creditor must be a party to the contract of guarantee. It is also true that under s. 132 of the Contract Act the creditor is not bound by any contract between the co-D debtors that one of them shall be liable only on the default of the other even though the creditor may have been aware of the existence of the contract between the two co-debtors. In the present case, however, the legal position is different, because the plaintiff-bank was a party to the contract of guarantee—Ex. A which is contemporaneous with the promissory note—Ex. B. The plaintiff-bank E was also a party to the contract of hypothecation executed by defendant No. 1 in which it is stated that the plaintiff-bank had agreed to open a Cash Credit Account to the extent of Rs. 4 lakhs in favour of defendant No. 1. It is manifest, therefore, in the present case that the requirements of s. 126 of the Contract Act are satisfied and defendant No. 3 has the status of a surety and not of a co-F obligant in the transaction of overdraft account opened in the name of defendant No. 1 by the plaintiff-bank. On behalf of respondent No. 1 Mr. Pathak also referred to the decision in *Venkata Krishnayya* v. *Karnedan Kothari*(2) and submitted that defendant No. 3 cannot be permitted to give evidence in regard to a collateral transaction in view of the bar imposed by s. 92 of the Evidence Act and his G position is as a co-obligant and that the terms of the promissory note cannot be altered by any other transaction. We are unable to accept this argument as correct. The provisions of s. 92 of the Evidence Act do not apply in the present case, because defendant No. 3 is not attempting to furnish evidence of any oral agreement in derogation of the promissory note but relying on the existence of H a collateral agreement in writing—Exs. A & G which form parts of the same transaction as the promissory note—Ex. B. The decision of the Madras High Court in *Venkata Krishnayya* v. *Karnedan Kothari*(2) is, therefore, not applicable and Mr. Pathak is not able to make good his submission on this aspect of the case.

(1) [1881] 6 A.C.I.
(2) A.I.R. 1935 Mad. 643.

It was also contended by Mr. Pathak on behalf of respondent No. 1 that the suit is based on the promissory note—Ex. B against all the three defendants and not on the overdraft account. We do not think there is any substance in this argument. In this connection Mr. Pathak took us through the various clauses of the plaint but there is no mention about the promissory note dated December 21, 1949 except in para 6 of the plaint which recites that the defendant executed a promissory note "as security for the repayment of the balance outstanding under the overdraft". We are satisfied, on examination of the language of the plaint, that the suit is based not upon the promissory note but upon the balance of the overdraft account in the books of the plaintiff-bank. In para 11 of the plaint the plaintiff-bank asked for a decree against the defendants jointly and severally "for the recovery of Rs. 2,86,292/11/11 as per accounts annexed". In the plaint it is stated that the plaintiff had given two notices to the defendants—Ex. 'O' dated January 1, 1950 and Ex. L dated April 26, 1950 but in neither of these notices has the plaintiff referred to the promissory note executed by the defendants or that the suit was based upon the promissory note. On the contrary, the plaintiff-bank referred in Ex. 'O' to the open loan accounts and asked the defendants to pay the amounts due to the bank under these accounts. It is, therefore, not possible for us to accept the contention of Mr. Pathak that the suit is based upon the promissory note and not upon the amount due on the overdraft account. In this connection, we may incidentally refer to the fact that in its statement of the case before this Court, respondent No. 1 has clearly stated that the claim on the overdraft account against the appellant was valid "because the overdraft was treated as in favour of all the defendants (appellant and respondents 2 and 3 herein) and that respondent No. 2 was only authorised to operate independently on that account and that the limit under the overdraft was placed at the disposal of respondent No. 2 by an express authority given by all the defendants (the appellant and respondents 2 and 3)". This shows that respondent No. 1's case is that the suit is based on an overdraft, and since the overdraft was treated as in favour of all the defendants, the appellant is liable for the balance due on it.

We shall then consider the question whether defendant No. 3 is discharged of his liability as a surety by reason of the alleged conduct of the plaintiff-bank in violating the terms of the agreement—Ex. G or by the alleged fraudulent or negligent conduct of the plaintiff-bank in other ways. It was submitted on behalf of the appellant that the plaintiff-bank had made adjustments in the open loan account and in the clean overdraft account with the 1st defendant by debiting and correspondingly crediting in other accounts without the consent of the appellant. It was further alleged that the plaintiff-bank had granted loans to the 1st defendant against goods covered by open loan agreement and that it had converted

A secured loans into simple loans by releasing goods covered by the Bills of Lading against trust receipts and had thereby deliberately frittered away such securities. The question at issue is a mixed question of law and fact and it is unfortunate that the High Court has not properly dealt with this question or given a finding whether the appellant would be discharged from the liability as a surety for B the overdraft account because of the alleged conduct of the plaintiff-bank. We consider it necessary that this case should go back on remand to the High Court of Kerala for deciding the issue and to give proper relief to the parties. In this connection, it is necessary to point out that after the High Court delivered its judgment on July 12, 1962, an application was made by the learned Advocate C appearing for the appellant that some grounds which had been urged by him before the High Court had not been considered by it The High Court, therefore, adopted the somewhat unusual course of delivering a supplemental judgment. Mr. Desai contends that even the supplemental judgment has failed to consider the appellant's contention that he had been discharged by reason of the D fact that adjustments were made by respondent No. 1 indiscriminately in respect of its dealings in three or four different accounts with respondent No. 2 to the prejudice of the appellant. We have broadly indicated the nature of the contention raised by Mr. Desai.

Ordinarily, we do not permit parties to urge that points raised E on their behalf in the High Court had not been considered, unless it is established to our satisfaction that the points in question had in fact been urged before the High Court and the High Court, through inadvertence, has failed to consider them. In the present case, we are not prepared to take the view that the grievance made by Mr. Desai is not well-founded. It does appear that after the first F judgment was delivered, an application was made by the learned Advocate who argued the appeal himself before the High Court in which he set out his complaint that some of the points which he had argued before the High Court had not been considered by it. That is why the High Court delivered a supplemental judgment. Aggrieved by the said judgment, the appellant filed an application G for certificate before the High Court, and in this application again he has taken specific grounds, e.g., under paragraph 6(k) and paragraph 8 that even the supplemental judgment has failed to consider some of the points urged by him. While granting the certificate, the High Court has made no comment on these grounds. It is to be regretted that when these grounds appear to have been urged before H the High Court, the High Court should have failed to deal with them even in its supplemental judgment. That is the reason why we think it is necessary that the matter must go back to the High Court for disposal of the appeal in the light of this judgment.

Mr. Pathak, no doubt, seriously contested the validity of Mr. Desai's argument. He urged that the adjustments on which Mr. Desai has founded his claim for discharge do not really support

his case. We proposed to express no opinion on this point. As we have just observed, the contention thus raised amounts to a mixed question of fact and law and we do not think it would be expedient for us to deal with it ourselves when the High Court has omitted to consider it. A

For these reasons we allow this appeal, set aside the judgment and decree of the High Court of Kerala dated July 18, 1962 in A.S. 561 of 1961 and order that the case should go back for being re-heard and redetermined by the High Court in accordance with the observations made in our judgment. The parties will bear their own costs upto this stage. B

Appeal Allowed.