Khumaji Gajaji and Co. Vs Damaji Korsey

Court: Bombay High Court

Date of Decision: July 27, 1933

Acts Referred: Evidence Act, 1872 â€" Section 92

Citation: AIR 1934 Bom 39 : (1933) 35 BOMLR 1197

Hon'ble Judges: Rangnekar, J

Bench: Single Bench

Judgement

Rangnekar, J.
The question in this suit is whether a person who has executed a promissory note personally can be permitted to show by

oral evidence that he signed it merely as a surety for another person. The suit is brought on three promissory notes executed by the two defendants

personally. Defendant No. 1 does not appear, but has put in a written statement admitting the notes but questioning the amount. Defendant No. 2

pleads that he executed the promissory notes merely as a surety for defendant No. 1, and that by reason of certain compromise arrived at between

the plaintiffs and defendant No. 1 he is discharged from his liability u/s 135 of the Contract Act.

2. When the issues were raised it struck me that it was not open to defendant No. 2 to lead oral evidence to prove that he was a surety when on

the face of the promissory notes he appeared to be a joint debtor. The learned counsel appearing in the case were not prepared to argue out the

point, Mr. M.S. Vakil for defendant No. 2 stating that he had been briefed in the suit just at the time the case was called on. I stood the case over

to enable counsel to refer to authorities, and this morning Mr. Vakil fairly admitted that the decisions of some of the High Courts in this country

were against him. The question thus raised has not come up specifically for decision in this Court though it has been decided in a number of

decisions of the other High Courts, to some of which I shall refer presently.

3. Apart from authority the position seems to me to be simple. Section 92 of the Indian Evidence Act prohibits oral evidence being given for the

purpose of contradicting, varying, adding to, or subtracting from, the terms of any contract in writing, unless the case comes in any of the

exceptions to the section. Whatever the current of decisions in this country has been before the decision in 4 CWN 153 (Privy Council) it is clear

that since that decision the Court in considering whether oral evidence can be given or not has to look to the Indian Evidence Act, and the

equitable considerations which have influenced the English Courts in cases like this have no application in this country. The view taken in Balkishen

Das v. Legge has since been confirmed in Maung Kyin v. Ma Shwe La (1918) L.R. 44 IndAp 236 s.c. 20 Bom. L.R. 278.

4. Section 126 of the Indian Contract Act defines a contract of guarantee as follows-

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who

gives the guarantee is called the " surety"; the person in respect of whose default the guarantee is given is called the "principal debtor"; and the

person to whom the guarantee is given is called the "creditor".

It is obvious that there is an essential difference between a creditor and a debtor as such, and a creditor and surety. This is further made clear by

Section 132 of the Indian Contract Act and the illustration to it. The section is in these terms :-

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be

liable only on the default of the other, the third person not being a party to such a contract, the liability of each of such two persons to the third

person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its

existence.

The illustration runs as follows :-

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made.

The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

Then, once the relation is established between two persons as a creditor and a surety, it follows that all incidents applicable to it under the law

would be imported into the contract entitling the surety to take up defences inter alia under Sections 133, 134 and 135 of the Act, This being the

legal relationship, it is difficult to see how u/s 92 of the Indian Evidence Act it is open to a person to lead oral evidence to prove that he signed the

instrument merely as a surety when on the face of it it appears that he signed it as a debtor. If a joint promisee is allowed to prove that in joining his

co-promisee he was a surety, the result must be that the instrument cannot have the effect which on the face of it it purported to convey and must

operate differently from what was agreed upon in writing on the face of it. So far back as 1903 the Calcutta High Court held in Harek Chand Babu

v. Bishun Chandra Banerjee (1903) 8 C.W.N. 101 that oral evidence is not admissible to show that one of the executants of a note of hand signed

it only as a surety and that his liability was only to the extent of standing as a surety for one month. The same view was taken and this decision was

followed by Shaw J.C. in Nga Saing v. Nga Lu Aung (1905) U.B.R. Evi. 13 and the same view was also taken in the following cases : Maung Ko

Gyi v. U Kyaw ILR (1927) Ran. 168 Maung Kya v. A.P.R. Peria Kurpan Chetty AIR [1933] Ran. 15 Maung Sein v. Ma Saw AIR [1924] Ran.

360 Karam Bakhsh v. Mehtab Ram (1925) 26 P.L.R. 79 and Narasimma v. Ramasami (1912) 24 M.L.J. 91

5. The only plausible argument advanced is that the oral evidence proposed to be led is not for the purpose of contradicting the terms the insrument

but to show who the real parties were, or rather the character. But it is clear law that a person who signed in his own name cannot escape the

liability by being allowed to prove that he signed it as an agent for a third person, In Ebrahimbhoy Pabaney Mills Co Ltd. v. Hassan Mamooji

(1920) 23 Bom. L.R. 767 Mr. Justice Pratt held that where a contract was signed by the defendant personally, oral evidence to show that

contracted as agent and that the name of his principal was disclosed a the time of the contract was not admissible for the purpose of exonerating

him from his liability on the contract, for that would be substituting a different agreement from that evidenced by the writing. It is not easy to see

what difference there is between this case and the case of surety. It is true that by attempting to prove that he is a surety he does not disown the

liability but he certainly attempts to prove that the liability is conditional instead of what appears on the face of the instrument itself to be an

unconditional liability as a joint promissor. In my opinion the two contracts one between a creditor and joint debtors and the other between a

creditor and one of the debtors being a surety are essentially different in their nature. Counsel have referred to two Allahabad decisions. The first is

Shamsh-ul-jahan Begam v. Ahmad Wali Khan ILR (1903) All. 337 which purports to follow an earlier decision in Mulchand v. Madho Ram ILR

(1888) All. 421 These two cases are distinguishable on their facts. There is, however, a dictum in the latter case which seems to take a contrary

view. This is dissented from by Mr. Justice Doyle in Maung Ko Gyi v. U Kyaw ILR (1927) Ran. 168 It is clear from the judgment that the learned

Judges were influenced by equitable considerations such as prevailed with the English Courts, but since Balkishen Das v. Legge there is no doubt

that such equitable considerations are out of place in considering the applicability of Section 92 of the Indian Evidence Act. I will not, therefore,

allow Mr. Vakil to lead oral evidence, and as he has no documentary evidence, I will disallow the issue.

6. At this stage parties have come to a settlement, and the decree will be as between them by consent in terms signed by counsel, There will be a

decree against defendant No. 1 as prayed.