

PRIVY COUNCIL.

A. E. MITCHELL

v.

C. L. PHILLIPS

P. C.
1931
April 30 ;
May 18.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Guarantee—Construction—Debt secured by mortgage—Debt “ultimately” due—Suit on guarantee before realization of mortgage.

The three respondents executed a contract, by which, in consideration of S. having, at their request, obtained a loan of Rs. 40 lakhs to G. to be secured by a mortgage from him to S, they guaranteed to S. payment by G. of the said sum up to the aggregate extent of Rs. 18 lakhs, their individual liability of Rs. 6 lakhs to be reduced proportionately if their aggregate liability was less than Rs. 18 lakhs. Clause 3 provided that, within the above limits of liability, the guarantee was to extend to the whole debt that should “ultimately be due” from G., not merely to so much thereof as should be co-extensive with their maximum liability. G. having failed to repay any part of the loan when requested, the executors of S., without having first realized the mortgage, sued the respondents claiming Rs. 6 lakhs from each.

Held that, upon the true construction of the guarantee, the respondents' liability was not restricted to a deficiency after realization of the mortgage, and that they were, therefore, liable for the amounts claimed.

Decree of the High Court (1) reversed.

Appeal (No. 72 of 1930) from a decree of the High Court in its appellate jurisdiction (August 29, 1929) reversing a decree of the Court in its original jurisdiction.

The appellants, as executors of A. Stephen deceased, sued the three respondents, claiming Rs. 6 lakhs from each, under a contract of guarantee dated February 9, 1927, and signed by them in favour of the deceased. The liability of the respondents depended upon the construction of the contract.

The facts appear from the judgment of the Judicial Committee.

The trial Judge, Buckland J., made a decree for Rs. 6 lakhs against each defendant.

An appeal was heard by C. C. Ghose and Page J.J. and was allowed, the suit being dismissed.

**Present* : Lord Blanesburgh, Lord Tomlin and Sir John Wallis.

W. A. Greene K. C. (with him *G. D. McNair*) for the appellants. It is an established principle of the law as to guarantees that the guarantor is liable, even without notice, as soon as the principal debtor makes default, subject to any stipulation to the contrary: Rowlatt on Principal and Surety, 2nd edition, pages 142, 174, 175. Liability up to Rs. 6 lakhs each is imposed in clear terms in clause 1 of the contract. The mortgage was not part of the consideration for the guarantee. Clause 3 is a clause commonly used even where there is no mention of a mortgage or other security given by the debtor: Encyclopædia of Forms and Precedents, 2nd edition, Vol. 2, p. 16. The object of the clause is to provide for the receipt of dividends in bankruptcy; properly construed it reinforces the liability under clause 1. [Reference was made to *Goodwin v. Gray* (1) considered in *Goverdhandas Goculdas Tejpal v. Bank of Bengal* (2).]

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DeGruyther K. C. (with him *A. T. Macmillan*) for the respondents. The law as to guarantees depends in India upon the provisions of the Contract Act. [Reference was made to sections 126, 140, 141, 142, 145.] Reading the contract as a whole, the liability was in respect only of the sum ultimately due after realization of the mortgage referred to. Further, the appellants, by suing upon the mortgage, had debarred themselves and the respondents from obtaining a personal decree against Galstaun except as to any deficiency.

The judgment of their Lordships was delivered by LORD TOMLIN. In the suit out of which this appeal arises the appellants, as legal personal representatives of a deceased creditor, are seeking to recover from the respondents, as guarantors, part of a debt due and owing from the principal debtor.

Before the trial Judge, the appellants succeeded, but on appeal, the High Court of Judicature in

(1) (1874) 22 W. R. (Eng.) 312. (2) (1890) I. L. R. 15 Bom. 48, 65.

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Bengal reversed the trial Judge and dismissed the suit.

On the 14th February, 1927, one Galstaun mortgaged real estate in and near Calcutta and personal estate of various kinds to Arathoon Stephen, the appellants' testator, to secure a loan of Rs. 40,00,000 and interest.

Stephen, in fact, borrowed the money from the Imperial Bank, in order to lend it to Galstaun

On the 9th February, 1927, the respondents, in connexion with the transaction, had executed, in favour of Stephen, a guarantee in writing in the following form:—

1. In consideration of your having, at our request, agreed to obtain a loan of Rupees forty lakhs, bearing interest at six per cent. per annum, from the Imperial Bank of India, for the sole benefit of John Carapiet Galstaun, for the purpose of satisfying certain decrees and paying certain pressing debts, such sum of Rupees forty lakhs to bear interest at the rate aforesaid and the re-payment thereof to be secured by a mortgage to be executed by the said John Carapiet Galstaun in your favour of the properties included in the mortgages held by Framroz Edulji Dinshaw and a second mortgage of the properties included in the mortgage executed by the said John Carapiet Galstaun in favour of the Prudential Assurance Co., Ltd. We the undersigned CARR LAZARUS PHILLIPS of No. 33, Alipore Park Road, Alipore, ARATHOON MACKERTOON ARATHOON of No. 3, Rawdon Street, in Calcutta, and ARRATHOON THEODORE CREET of Ghusick Colliery in the District of Raneeganj hereby guarantee to you the payment by the said John Carapiet Galstaun of the said sum of Rupees forty lakhs to the limit of our aggregate and individual liability hereinafter prescribed.

2. This guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not, under any circumstances, exceed the sum of Rupees eighteen lakhs and the liability of each of us individually in respect of the said sum shall not exceed the sum of Rupees six lakhs, being the sum placed opposite our respective signature at the foot hereof and should the common liability be less than the said maximum aggregate sum, the share due from each one of us in respect thereof shall be in strict proportion to his individual liability hereunder and not otherwise.

3. Within the aforesaid limit of liability, this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder.

4. You shall be at liberty, without discharging us from liability hereunder, to grant time or other indulgences to the said John Carapiet Galstaun and to accept payment from him in cash or by means of negotiable instruments or otherwise.

On the 14th May, 1927, Stephen died and, on the 12th October, 1927, the appellants, as his executors and trustees, demanded from Galstaun immediate payment of the loan and interest and gave him notice

that, in default of payment within 3 months, they would sell the mortgaged properties.

On the 15th October, 1927, the respondents were notified of the appellants' demand against the principal debtor.

The principal debtor failed to pay and, on the 8th June, 1928, the appellants notified the respondents of this fact and demanded under the guarantee payment of 6 lakhs from each of them.

On the 12th July, 1928, this suit was instituted by the appellants against the respondents, who had failed to satisfy any part of the demand made upon them.

On the 8th April, 1929, the appellants instituted a suit against Galstaun to enforce the mortgage. What has happened in that suit does not appear.

On the 26th April, 1929, judgment in the present suit was given in favour of the appellants for 6 lakhs and interest against each of the respondents.

The respondents appealed and, on the 29th August, 1929, the judgment of a division bench of the High Court was given, allowing the appeal and dismissing the suit.

The Judges who heard the appeal appear to have taken the view (1) that, upon its true construction, the guarantee only provided for a guarantee of the balance, which should remain owing after the creditor had exhausted his remedies under the mortgage against the principal debtor and (2) that these remedies, not having been exhausted, the suit was premature and ought to be dismissed.

Mr. Justice Ghose, who delivered the leading judgment, was influenced by the fact that, upon the construction for which the present appellants contend, Galstaun might have been asked to repay immediately after the execution of the mortgage and that the guarantee would have then become immediately enforceable. He thought it must have been the intention of the parties that the security specified in the mortgage should be realised first and that the guarantee should only operate in respect of any

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deficiency remaining after such realisations. He further took the view that the word "ultimately" in the 3rd clause of the guarantee indicated that the guarantee only covered the final deficiency.

The other Judge, Mr. Justice Page, came to the same conclusion, but only after much consideration. He thought that all reference in the guarantee to the mortgage by Galstaun was unnecessary except upon the footing that the mortgage was to be realised first and, as supporting the view which he adopted, he laid stress upon the phrase "the whole debt that shall ultimately be due."

Their Lordships are unable to agree with the judgments of the appellate Judges. The language of clause 1 is plain. By it, the guarantors guarantee the payment by Galstaun of the sum of Rupees 40 lakhs to the limit of their aggregate and individual liability thereafter prescribed.

Clause 3 is the clause commonly employed in the case of a limited guarantee to enable the creditor, at any rate, up to a point, to retain as against the guarantor dividends received in the bankruptcy of the principal debtor.

The form of the guarantee appears to have been based upon a precedent appropriate to a continuing guarantee, although the guarantee in question was not in fact a continuing guarantee, but one for a fixed sum. This may account for the presence of the word "ultimately." The word is not aptly employed, but, in their Lordships' judgment, the meaning of the clause in which it occurs is plain. A contrast is therein being drawn between (1) the whole of what may eventually become due from the principal debtor for principal and interest, and (2) a part of the total debt co-extensive with the guarantors' maximum liability, and it is indicated that it is the whole debt and not a part which is guaranteed, although part only has to be paid under the guarantee. In other words, it does not cut down but reinforces the obligation imposed by clause 1.

Their Lordships are unable to appreciate the force of the criticism that the guarantors' liability might, upon the construction of the guarantee, contended for by the appellants, become immediately enforceable.

The same criticism might be applied to every guarantee where there is a mortgage with a covenant by the principal debtor to repay on demand or at the expiration of some short period such as six months.

In transactions of this kind, it is normal practice to make the liability to pay under the mortgage arise on demand or within a short period, even though the anticipation of the parties may be that the loan will remain outstanding for a substantial time.

Nor do their Lordships understand how the reference to the mortgage in the guarantee can be treated as unnecessary. Having regard to the rights of a surety in respect of the securities taken by the creditor, it is a matter of first importance to the surety to know what those securities are. Further the fact that such a mortgage was to be taken may well have been the determining factor in inducing the guarantors to give their guarantee.

In this connection, their Lordships desire to point out that, while it is unnecessary for them in this appeal to express an opinion as to what will be the rights of the respondents in respect of the mortgage after their liability under the guarantee has been discharged, they must not be taken to approve the statement of Mr. Justice Ghose that :

Not until the sureties in the present case have paid off the entirety of the mortgage debt due to Stephen would they be entitled to the securities which Stephen held, *i.e.*, even if the sureties paid off a sum of rupees 18 lakhs they would not be entitled to the said securities until the balance of 40 lakhs was realised. The sureties would in such a case be without any security whatsoever during the interval.

Lastly, their Lordships do not think that the construction of the guarantee is in any way affected by the practice of the courts in India under Order XXXIV of the Civil Procedure Code in relation to suits to enforce a mortgage.

In the result, therefore, their Lordships are of opinion that the appeal should succeed and that the

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judgment of the appellate court should be reversed and that of the trial Judge restored. Their Lordships will humbly advise His Majesty accordingly.

The appellants will have their costs here and below.

Solicitors for appellants: *Morgan, Price, Marley & Rugg.*

Solicitors for respondents: *Nisbet, Drew & Loughborough.*

A. M. T.