*Khan* v. *Rajah Ojoodhyaram Khan*(1). We do not agree with Mr. Ramachandra Ayyar that this judgment is authority for the proposition that if anybody acquires property by fraud whether there is a fiduciary relationship between the parties or not, the true owner can recover possession. Sections 88 to 90 of the Trust Act show that the duty of restitution is cast only on persons occupying either a fiduciary position or who have a joint interest with the person defrauded. There is no authority for the broad proposition that no title can be acquired, if fraud has been used in its acquisition. We think the right to claim the benefit of a fraudulent advantage should be restricted to persons who are "under a duty to speak" or under some relationship as above indicated.

We must therefore hold that the plaintiff is not entitled to recover possession from the second defendant.

We must allow the appeal, reverse the decrees of the Courts below and dismiss the suit with costs of the second defendant in this Court. Parties will bear their own costs in the Courts below.

N.R.

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## APPELLATE CIVIL.

*Before Mr. Justice Ayling and Mr. Justice Napier.*

MUTHU RAMAN CHETTY (DEFENDANT), APPELLANT,

*v.*

CHINNA VELLAYAN CHETTY *alias* CHINNA KARUPPAN CHETTY (PLAINTIFF), RESPONDENT.*

1915. March 30, April 20 and 1916 January 16.

30 M.L.T.309

*Negotiable Instruments Act* (XXVI *of* 1881), *ss.* 30, 47, 59, 74 *and* 94.—*Hundi, payable to bearer—Surety—Contract of suretyship only between surety and creditor— Right of surety against principal debtor—Indian Contract Act* (IX *of* 1872), *ss.* 126, 140, 141, 145, 69 *and* 70—*Right of holder, not being holder in due course—Delivery of hundi payable to bearer, effect of—Holder, right of.*

A person who becomes a surety without the concurrence thereto of the principal debtor, gets as against the latter, only the rights given by sections 140 and 141 of the Indian Contract Act (IX of 1872) and not those given by

(1) (1866) 10 M.I.A., 540. * Second Appeal No. 960 of 1914.

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section 145. Such a person cannot invoke in his favour the aid of sections 69 and 70 of the Act.

*Hodgson* v. *Shaw* (1834) 3 My. & K., 183, referred to.

A person obtaining by payment, after dishonour by the drawee, delivery of a negotiable instrument payable to bearer, acquires the rights of a holder thereof and can, under section 59 of the Negotiable Instruments Act (XXVI of 1881) recover from the drawer, the amount due thereon, on proof of presentment and notice of dishonour as required by sections 74, 80 and 94 of the Act.

*Gajapathi Kistna Chandra Deo.* v. *Srinivasa Charlu* Appeal No. 25 of 1909, referred to.

*Nanak Ram* v. *Mehin Lal* (1878) I.L.R., 1 All., 487, distinguished.

SECOND APPEAL against the decree of R. GOPALA RAO, the Temporary Subordinate Judge of Sivaganga, in Appeal No. 429 of 1913, preferred against the decree of V. R. KUPPUSWAMI AYYAR, the District Munsif of Paramagudi, in Original Suit No. 204 of 1912.

One Yegappa Chetty owed a decree debt to one Chidambaram Chetty. The defendant with a view to help Yegappa Chetty who was his relation executed the suit hundi (Exhibit A) payable to bearer in discharge of the debt and drew it on one Raman Chetty and handed over the same to the plaintiff to be delivered to Chidambaram Chetty. But the latter wanted the plaintiff's guarantee for accepting the defendant's hundi and accordingly the plaintiff endorsed on the hundi that he stood surety for it. It was found by the lower Courts that the contract of suretyship entered into between the plaintiff and Chidambaram Chetty was without the concurrence of the defendant. Subsequently the hundi was presented for payment to Raman Chetty who was the drawee but was dishonoured by him. Thereupon Chidambaram Chetty demanded payment from the plaintiff who paid the amount due and obtained delivery of the hundi from Chidambaram Chetty. The plaintiff brought the suit to recover the amount due on the hundi from the defendant who was the drawer. The defendant pleaded that the plaintiff could not recover the amount from him as he was not a party to the contract of suretyship said to have been entered into by the plaintiff with Chidambaram Chetty, and also that the plaintiff was not competent to recover the amount due on the hundi as he was not a holder in due course. The lower Appellate Court held that the plaintiff was not entitled to recover the amount on the basis of the contract of suretyship but passed a decree in his favour for the amount due

on the hundi on the ground that the plaintiff was a holder who had acquired the rights of the previous holder Chidambaram Chetty. Thereupon the defendant preferred this second appeal to the High Court.

*C. V. Anantakrishna Ayyar* for the appellants.

*C. A. Seshagiri Sastri* for *K. V. Krishnaswami Ayyar* for the respondent.

This Second Appeal coming on for hearing in the first instance before OLDFIELD and NAPIER, JJ., who delivered the following judgments :—

OLDFIELD, J.—The lower Appellate Court rejected plaintiff's contention based directly on his position as surety. It has however been relied on here, and therefore I deal with it before taking up the argument based on the negotiable character of Exhibit A, on which the lower Appellate Court decided in his favour. OLDFIELD, J.

The lower Appellate Court has adopted its findings of fact on this part of the case from the judgment of the Court of First Instance unreservedly. They are that defendant bound himself to pay part of his relative's debt to Chidambaram Chetty, that in order to do so he sent the suit hundi (Exhibit A) for delivery to Chidambaram Chetty by plaintiff, and that the latter created defendant's original liability by delivering it and (the distinctive feature in the case), made himself surety for its discharge by endorsing that fact on it. This entails, not only that defendant did not know of plaintiff's entering and did not ask him to enter into this contract of guarantee, but also that, if the consideration for it was anything done or promised for defendant's benefit, he had no opportunity to adopt or refuse to adopt it. The question is of the nature of his liability to plaintiff in these circumstances. Is there a contract of indemnity between them? Or, as the lower Appellate Court held, is plaintiff's remedy only that open to the original creditor? And then is it subject to the restrictions imposed on the latter as holder of the hundi, in which his debt was embodied?

It is clear that the distinction involved will be without importance in the majority of cases. For, unless (as here) recovery on the original security is trammelled by the requirements of a special law and unless (as I think is the case here) the establishment of a contract by the debtor to indemnify is

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impossible, it will not matter on which foundation the suit is brought. And perhaps it is for this reason that the two have not, so far as has been shown us, been explicitly distinguished in any Indian case. English authority however recognizes the distinction. For in *Hodgson* v. *Shaw*(1) it is said first "when a person pays off a bond, in which he is either co-obligor or bound *subsidiarie* he has at law an action against the principal for money paid to his use and he can have nothing more. The joint obligation towards the creditor is held to give the principal notice of his payment and also to prove his consent or authority to the making of that payment. This is necessary for enabling any man, who pays another's debt, to come against that other, because a person cannot make himself the creditor of that other by volunteering to discharge his obligations." But the decision goes on "The case standing thus at law, do considerations of equity make any alteration in its aspect? The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor and have all the rights, which he has, for the purpose of obtaining his reimbursement." To apply this distinction to the relevant provisions of the Indian Contract Act, we have section 140 and the particular application of it in section 141 representing the principle stated in the second of these extracts, and section 145 representing that stated in the first, the two first mentioned sections being the basis of the lower Appellate Court's decision on Exhibit A in plaintiff's favour and the last, of any claim independent of that document.

It has been necessary to make this clear on two accounts. Firstly, reference was made in argument to section 126; and the fact that its language does not require the principal debtor to be a party to the contract of guarantee was relied on as entailing that, whether or no he is privy to that contract, the surety can recover from him. The answer is that section 126 defines only the contract of guarantee between the surety and the creditor and not its incidents as between the surety and the debtor. They are defined elsewhere in sections 140, 141 and 145. And secondly the result of the distinction above insisted on is that the

(1) (1834) 3 My. & K., 183 at p. 190.

two grounds of the debtor's liability are distinct. There is his general liability, which may be supported on the ground of the implied promise to indemnify referred to in section 145; and there is his special liability under sections 140, 141, arising from the surety's right to the creditor's original remedies against him. That liability is no greater and no less than it would have been to the creditor. The point as to it, to which I return, is that in the present case the liability of defendant to the creditor is not alleged as based on the existence of any debt independent of Exhibit A or otherwise than on that document. If then plaintiff's claim cannot be supported with reference to section 145, it will be necessary to consider, not whether he can recover on the general ground of defendant's indebtedness to the creditor, but whether he can satisfy the requirements of the Negotiable Instruments Act with reference to Exhibit A.

Firstly as to section 145, to the application of which defendant objects on the ground that he did not know of and was in no way privy to plaintiff's contract of guarantee. It would, he argues, be anomalous that the debtor's position should be liable to alteration in consequence of the intervention of a third party between him and his creditor without his knowledge or request and whether or no he had had an opportunity to adopt or refuse any benefits it might confer; and in particular that the debtor should be subjected to a different rule of limitation. For under article 81, schedule I of the Limitation Act, a suit can be brought by the surety within three years after he has paid the creditor; that is after the date, on which the liability would normally have been defunct, when perhaps the debtor's evidence as to the original debt or its discharge has been lost and he will have to meet evidence as to the making of a contract of guarantee, of which he had no contemporaneous knowledge. There is then in defendant's favour the English law, stated in *Hodgson* v. *Shaw*(1) already referred to and other cases, that the implied rights possessed by the surety are available, when the suretyship has been undertaken at the request, actual or constructive of the principal debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. In these circumstances, the

(1) (1834) 3 My. & K., 183.

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opposite view must be supported unambiguously by section 145, if it is to be sustained.

Plaintiff contends that it is so, because the section imposes no qualification on the debtor's liability under an implied contract of indemnity. But that is to misread its terms. For, in fact, it does not refer to a contract of indemnity at all, but only to a promise to indemnify; and a promise, as sections 2 (*d*), (*f*) and (*g*) and 25 show, is ordinarily void, when, as here, no consideration has passed between promisor and promisee. Section 25 (2), it should be noticed, has no application, because defendant's promise must be held to have been made in accordance with the terms of section 145 in the contract of guarantee and at the date of that contract plaintiff had done nothing for him and nothing, which he was legally compellable to do. A kindred argument to that suggested by section 25 (2) has however been based on the description of the promise in section 145, as implied, and the alleged intention of the Legislature to bring under it relations between promisor and promisee of the kind dealt with in sections 69 and 70. But firstly this construction does violence to the definition of an implied promise in section 9. For that definition recognizes only the distinction between the ways, in which an actual promise may be expressed, not the existence of relations, involving no actual promise, but from which one must be presumed. And next, if the language of the section is to be treated as a lapse into English legal phraseology (vide for example Addison on Contracts, 9th Edition, page 424), it has still to be shown how either section 69 or 70 is applicable. As regards the former, it cannot be said that the present plaintiff was interested in the payment, which he made. For the interests postulated in the section have always been restricted to those arising either in course of law or through mistake or in virtue of some existing relation with the person, on whose behalf the payment is made and have never been held to include interests created officiously, such as that now in question. Section 70, it is no doubt conceivable, might cover cases in which the debtor enjoys the benefit of some postponement of liability in consequence of the surety's promise. But here, the plaint averment is only that, the hundi amount, having been demanded of the firm designated by defendant without any result except a promise to obtain defendant's instructions,

was at once paid by plaintiff on demand; and there is no allegation that the creditor at any time intended to sue defendant or expressed any intention to do so or was induced to put off doing so by plaintiff's standing surety. And in any event the authorities do not sanction recovery, when the person primarily liable has no knowledge, actual or imputed, that expenditure is or probably may be necessary on his behalf: and I see no reason for extending the doctrine to cover cases of this nature. Two decisions only, so far as has been shown, deal with instances of expenditure incurred, as here, for another person without any sort of consciousness on his part that it would be or was likely to be incurred. In *Gajapathi Kistna Chandra Deo* v. *Srinivasa Charlu*(1), SADASIVA AYYAR, J., no doubt illustrated his argument by reference to expenditure incurred by way of neighbourly service, when the person benefited had neither knowledge of nor option to refuse what was done. But with all respect, I doubt whether the illustration, which was not essential to the argument, represents the law; *Nanak Ram* v. *Mehin Lal*(2) in some respects no doubt resembled the present case; but it was decided with reference to section 127 and the absence of consideration for a contract between the surety and creditor; and I therefore do not rely on it here. But the foregoing entails the conclusion that in this case the promise to be implied under section 145 does not amount to a contract of indemnity between plaintiff and defendant, either directly or with reference to section 69 or 70. And accordingly plaintiff must succeed, if at all, on his claim as based on sections 140 and 141.

It has been pointed out that under those sections he is restricted to the remedy available to the creditor, that is, to a suit on the hundi (Exhibit A). I agree with my learned brother that he can sue on it with reference either to the sections referred to or as a holder with reference to section 59, Negotiable Instruments Act. It is objected that the plaint does not contain the averments appropriate to that cause of action and that it was first relied on in argument before the District Munsif. The defendant however in his written statement—paragraph 8-had pleaded that the notice of dishonour required by section 30,

(1) Appeal No. 25 of 1909. (2) (1878) I.L.R., 1 All., 487.

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Negotiable Instruments Act, had not been given; and, as he obtained no issue on the point, it is possible that he and the Court overlooked section 140, Indian Contract Act, and section 59, Negotiable Instruments Act, and assumed that plaintiff's payment discharged the hundi and concluded the matter. In the circumstances, I would remand the appeal to the lower Appellate Court for findings on the issues whether—

(1) Exhibit A was presented for payment within a reasonable time after it was received by the holder with reference to section 74, Negotiable Instruments Act.

(2) Due notice of dishonour was given with reference to section 30.

Fresh evidence may be taken.

Findings are due within six weeks after the re-opening of the lower Appellate Court. Seven days are allowed for filing objections.

NAPIER, J.

NAPIER, J.—This is an appeal from a decision of the Temporary Subordinate Judge of Sivaganga in Appeal Suit No. 429 of 1913. The suit was brought by one Chinna Vellayan Chetti alias Chinna Karuppan Chetti against the drawer of a hundi for Rs. 1,000, A, Peri N. N. Muthuraman Chettiar. The hundi was drawn to bearer and given to one Chidambaram Chettiar. It bears the following words: "Security for this is Chinnakaruppan Chettiar alias Peria M. Chinna Vellayan Chettiar." The lower Appellate Court has found that this endorsement was made at the request of Chidambaram Chettiar who refused to take the hundi without the endorsement, but that the drawer did not consent to this. This being a finding of fact we are bound to accept it. The Court held that the drawer not being a party to the guarantee agreement, the surety could not recover from him on that footing but gave plaintiff the decree on another ground.

It appears that the drawee not having paid the amount, the holder Chidambaram Chettiar called on the surety to pay. The surety paid the amount and took the hundi from Chidambaram Chettiar. On these facts the lower Appellate Court held that he was a holder and as such entitled to recover the amount from the drawer. It is argued in appeal that he was not a holder in due course and that notice of dishonour had not been given to the drawer. In my view it is immaterial whether he is a holder

in due course or not. He is admittedly the holder for value. A hundi drawn to bearer is negotiable by delivery thereof (vide section 47 of the Negotiable Instruments Act XXVI of 1881). Under section 59, the holder of a negotiable instrument who acquired it at after dishonour by non-payment has only as against the other parties the rights thereon of his transferor. The right of Chidambaram Chettiar to whom the hundi was delivered, was to recover the amount from the defendant (the maker) after dishonour, and that right is vested in the plaintiff (the holder), the maker not having made payment in due course of the amount due within the meaning of section 82.

The only question that remains is whether the plaintiff has put himself in a position to sue. Section 30 provides that the drawer of bill in case of dishonour by the drawee is bound to compensate the holder provided that due notice of dishonour has been given to, or received by, the drawer. Section 94 provides that this notice must be given within a reasonable time after dishonour. But section 98 provides for certain cases where no notice of dishonour is necessary. These questions have not been considered by the lower Appellate Court and if the respondent is to succeed on his footing as a holder, findings must be called for on those issues.

A further point is taken by the appellant that, under section 74, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. This question also has not been considered and a finding would be necessary.

The respondent has, however, sought to support the decree in his favour by the contention that the lower Appellate Court was wrong in dismissing his suit on the footing of surety, his argument being that the consent of the drawer to the contract of guarantee is not necessary to enable the surety to sue. Section 126 of the Contract Act is 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.' A guarantee may be either oral or written."

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Section 128: "The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

Section 140: "Where a guaranteed debt has become due, the surety, upon payment, is invested with all the rights which the creditor had against the principal debtor."

Section 145: "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee."

It is argued that the language of section 126 does not require the principal debtor to be a party, and that therefore even when there is no consent by the principal debtor the surety has all the statutory rights against the principal debtor. Clearly the principal debtor need not be a party to give the creditor his rights against the surety, but the rest of the proposition does not necessarily follow. The language of section 145 raises a difficulty. The section carries the rights of the surety against the principal debtor a little further than section 140. The latter section gives the surety the rights of the creditor. Section 145 makes the principal debtor liable "on an implied promise" for any sum above the amount due on the note which he has rightfully paid. Illustration (*a*) is a case where the surety defends a suit by the creditor, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from the principal debtor the amount paid by him with costs. The importance of this section is that it speaks of an implied promise *in* the contract of guarantee. The statute does not say that every guarantor shall have a right to recover sums rightfully paid, only; but it seems to base that right on the implied promise of indemnity given by the principal debtor. If the section had contained the latter words only, there would have been nothing in the Act to require the principal debtor to be a party to the contract, but it seems very difficult to hold that a term can be implied *in* a contract when the party so liable is not necessarily a party, and so, if this section is carried to its logical conclusion, it would follow that there must be more than a consent by the principal debtor; he must be a party to the contract between the surety and the creditor to get the full benefit of the section.

It is unfortunate that the legislature has not used the clear and unambiguous language to be found in the Mercantile Law Amendment Act, 19 & 20 Vict., cap. 97, section 5, where the right is given to every person, who is surety for "a debt or is liable with another for any debt, to recover from the principal debtor or any co-debtor indemnification for the advances made and loss sustained." The right in this statute is not founded on contract or implied promise. Prior to this Act there were many decisions, some not easily reconcilable, on the rights arising out of surety-ship. The learned vakil for the respondent relies on *Hodgson* v. *Shaw*(1), as establishing the principle that without consent the surety had no right against the principal debtor. The language used is "consent is necessary, for a person cannot make himself a creditor of another by volunteering to discharge his obligations" (*vide*, page 191 of the judgment of the Lord Chancellor). The same proposition was relied upon in argument in *Ex parte Bishop*(2), but was found not necessary for decision. THESIGER, Lord Justice, referred to the observations of Mr. Justice WILLES in *Cook* v. *Lister*(3), and declined to accept it as established; and the Court decided the case on the broad principle that "every one of the Company's bills in circulation impliedly authorized every holder of the bill to indorse it over and thus transfer to the indorsee his rights against the acceptor, and if the indorsee pays the bill, he does so under compulsion undertaken by the implied authority of the acceptor." This proposition (substituting the drawer for the acceptor, the bill not having been accepted) is that to be found in the sections of the Negotiable Instruments Act above referred to and is in fact the basis of the Subordinate Judge's decision. The result of this proposition is that a surety to a negotiable instrument who has become such without the concurrence in the contract of the drawer (or acceptor as in the last case referred to) gets no higher rights than an ordinary holder and if section 145 is to be construed strictly the same result seems to follow.

I feel convinced that the legislature did not intend this limitation but that it intended to embody the law to be found in the Mercantile Law Amendment Act and to make no distinction between sureties in a bilateral contract and those in a trilateral

(1) (1834) 3 My. & K., 183. (2) (1880) 15 Ch.D., 400.
(3) (1863) 13 C.B. (N.S.), 543 at p. 594.

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contract but I am not prepared to hold that section 145 can be construed as giving effect to that intention. The plaintiff must therefore fall back on section 140 where his rights are entirely statutory. This section gives him his suit on the original obligation but subject to the same limitations as affect the creditor. This being so it does become necessary to have findings on the issues above referred to. I would like to add that I see no hardship in a surety being enabled by law to become a creditor without the consent of the original debtor. Since the Judicature Act, all choses in action have been transferable without consent of the debtor and even prior to the Act, the Courts of Equity recognized equitable assignments without such consent; *vide*, *Brandt* v. *Dunlop Rubber & Co.* (1) and the law in this country has followed the English Law up to the date of the Amending Act to the Transfer of Property Act (Act II of 1900), which has even gone beyond the English Statutory Law.

In compliance with the order contained in the above judgment the temporary Subordinate Judge of Sivaganga submitted findings on both the issues in favour of the plaintiff, to the effect that there was due presentment of the hundi for payment as well as due notice of dishonour, as required by sections 74 and 30 of the Negotiable Instruments Act, respectively.

This Second Appeal coming on for final hearing the Court delivered the following

AYLING AND NAPIER, JJ.

JUDGMENT.—We accept the findings and dismiss the appeal. There is no order as to costs.

K.R.

(1) (1915) A.C., 454.