APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Pakenham Walsh.

1929, October 29.

THE IMPERIAL BANK OF INDIA (PLAINTIFF), APPELLANT,

v.

AVANASI CHETTIAR (DEFENDANT), RESPONDENT.*

Surety in respect of a banking account—Information as to extent of customer's past indebtedness to bank—Duty of bank to disclose, if any.

If *A* agrees with a bank to stand surety for *B* for advances to *B*, the bank is under no legal obligation to volunteer to *A* any information as to the extent of *B*'s past indebtedness, which is a matter on which the surety has to inform himself. But if in reponse to *A*'s request, the bank gives false or wrong information, it might vitiate the contract of suretyship.

The general presumption is that a promissory note or bill given for reducing a liability only operates as a conditional discharge until it is honoured. If no intimation was given by the creditor to the debtor that he had appropriated any particular amount sent towards a particular debt, then the creditor is entitled to change and reappropriate it to another debt.

APPEAL against the decree of the Court of Subordinate Judge of South Malabar at Calicut in Original Suit No. 31 of 1924.

The plaintiff (the Imperial Bank of India) filed this suit (originally for Rs. 10,053 which was afterwards reduced to Rs. 8,470) alleging (*a*) that a firm of Nanchappa Chetti & Co., hereinafter called Nanchappa Chetti, had a current account with the Bank on which he was allowed to overdraw, (*b*) that the defendant, by a letter, dated 15th March 1923, undertook to be surety to

* Appeal No. 87 of 1926.

the Bank for the discharge of all the advances (past and future) that might be due from the said Nanchappa Chetti, to the extent of Rs. 10,000, (*c*) that in order to cover the said Rs. 10,000 the defendant executed a promissory note in favour of the said Nanchappa Chetti who endorsed it over to the Bank, (*d*) that the said Nanchappa Chetti thereafter opened a loan account with the Bank, (*e*) that the sum of Rs. 10,053 remained due to the Bank in the beginning of 1924 both on the current and loan accounts which, in spite of repeated demands on Nanchappa Chetti and the defendant, remained unpaid, and (*f*) that as the Bank had petitioned to have the said Nanchappa Chetti declared an insolvent, he was not added as a defendant in the suit.

The defendant pleaded *inter alia* (1) that he did not execute the letter of guarantee, (2) that he was not informed of its contents at the time of its alleged execution, (3) that he did not execute the promissory note to cover any such suretyship, (4) that even if he had executed any such letter, it was not for any account then due to the Bank by the said Nanchappa Chetti under his current account, (5) that the Bank did not then inform him of the extent of the amount due under the current account, (6) that his contract of suretyship was therefore vitiated by such fraudulent concealment, and (7) that the Bank having once credited the loan account with Rs. 3,000, the amount of three promissory notes endorsed in favour of the Bank by the said Nanchappa Chetti to whom they were executed by one Govindan Nayar, the Bank was not thereafter entitled to debit Nanchappa Chetti with that amount on account of later dishonour of the notes by Govindan Nayar by non-payment.

The Subordinate Judge found that the defendant executed the letter of guarantee, that by that letter he

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stood surety not for any amount due under the current account, but only for future advances under the loan account, that the Bank after having credited Nanchappa Chetti with Rs. 3,000 was not thereafter entitled to debit him with the said amount, that as the defendant did not stand surety for the amounts due under the current account, the question of fraudulent concealment did not arise, and that after excluding Rs. 3,000 and the liability of Nanchappa Chetti under the current account, the amount due to the Bank was only Rs. 2,334. A decree was accordingly given for Rs. 2,334.

The plaintiff filed this appeal for the balance.

S. Duraiswami Ayyar for appellant.—The defendant executed the letter of guarantee and thereby stood surety not only for future advances but also for past advances. Section 143 of the Contract Act only reproduces the English Law and lays down no further liability on the Bank. Under the English Law there is a difference between fidelity guarantees and those given to secure a banking account. Under the latter a banker is not bound to give to the surety any information as to customer's past indebtedness unless asked for, though if he gives false or wrong information, the contract of suretyship will be vitiated; see *Hamilton* v. *Watson*(1), *The North British Insurance Coy.* v. *Lloyd*(2), *London General Omnibus Coy., Ltd.* v. *Holloway*(3), *National Provincial Bank of England, Ltd.* v. *Glanusk*(4), *Wythes* v. *Labouchere*(5), *Balkrishna V. N. Kirtikar* v. *The Bank of Bengal*(6), Rowlatt on Principal and Surety, 2nd edn., page 158. A promissory note given in discharge of a debt is only a conditional payment. If it is dishonoured, the creditor can sue on the original debt; *Jambu Chetty* v. *Palaniappa Chettiar*(7), *Palaniappa Chetty* v. *Arunachellam Chetty*(8). If the creditor has not communicated to the debtor that he had appropriated a sum sent by the debtor towards any particular

(1) (1845) 12 Cl. & F. 109; 8 E.R., 1339.
(2) (1874) 10 Ex., 523; 156 E.R., 545. (3) [1912] 2 K.B., 72.
(4) [1913] 3 K.B., 335.
(5) (1859) 3 De. G. & J., 593; 44 E.R., 1397, 1403.
(6) (1891) I.L.R., 15 Bom., 585, 590. (7) (1902) I.L.R., 26 Mad., 526.
(8) (1911) 21 M.L.J., 432.

debt, he can change and appropriate it towards another debt; *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"*—*The "Mecca"*(1), *Cheggammull Sowcar* v. *Manicka Mudaliar*(2).

K. P. M. Menon for respondent—The guarantee was only for future advances. There is no difference between fidelity contracts and contracts of guarantee in respect of banking accounts. The question in each case is whether there is evidence to go to the jury that non-disclosure of past liability amounts to concealment of a material fact or not; *Lee* v. *Jones*(3), and *Railton* v. *Mathews*(4).

JUDGMENT.

[After stating the facts and holding that the letter of guarantee was given to cover not only future advances but also past advances, and that the defendant signed it knowing its contents, their Lordships proceeded as follow:—] The first question is whether in respect of these three promissory notes the Bank was entitled to make an entry in the current account debiting the amount when the bills were dishonoured. There can be little doubt that these notes were endorsed over to the Bank in order that credit may be given in the account for the amount of the bills and the Bank took them upon the expectation that the moneys would be paid by Govindan Nayar. When they were not paid, the Bank had a right to make the entries. It is not suggested that the Bank treated them as complete discharge. The general presumption is that a promissory note given for reducing a liability only operates as a conditional discharge of the liability. We need only refer to *Palaniappa Chetty* v. *Arunachellam Chetty*(5) and the judgment of BHASHYAM AYYANGAR J. in *Jambu Chetty* v. *Palaniappa Chettiar*(6). As regards the right to

(1) [1897] A.C., 286. (2) (1925) 50 M.L.J., 242.
(3) (1864) 17 C.B. (N.S.), 482; 144 E.R., 194.
(4) (1844) 10 Cl. & F., 934; 8 E.R., 993.
(5) (1911) 21 M.L.J., 482. (6) (1902) I.L.R., 26 Mad., 526.

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reappropriate, it is clear in this case that no intimation was given to the surety of the first appropriation and therefore the Bank, when they sent a letter through their vakil, had a right to reappropriate the amount. This is clear from the decision in *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"— The "Mecca"*(1) and *Cheggammull Sowcar* v. *Manicka Mudaliar*(2), where it was observed that so long as notice had not been given as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make reappropriation. If the defendant is liable, he is liable also for the amount of the promissory notes accepted as conditional payment by the Bank, which were dishonoured and on being dishonoured corresponding debits were made by the Bank in the account.

Then the last question is as regards the guarantee not being enforceable owing to concealment of facts. In this connection, reference is made to section 143 of the Contract Act which runs as follows :—

> "Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

It is argued that the material circumstance in this case is that the fact that at the date of the guarantee letter, Exhibit A, about Rs. 5,000 was due by the firm already to the Bank was not disclosed, and that on account of this non-disclosure the contract of indemnity is not enforceable. It is not disputed that on the date of Exhibit A the amount which was due by Nanchappa Chetti under the current account was not mentioned; and the question is whether such non-mention vitiates the contract of indemnity. We have already given our reasons for holding that Exhibit A, the letter of guarantee, covers past indebtedness also and that this

(1) [1897] A.C., 286. (2) (1925) 50 M.L.J., 242.

fact was within the knowledge of the defendant when he signed it. The evidence of the defendant, who is the only witness examined on his behalf, does not touch any of the questions which were argued before us. In his evidence he says that he executed Exhibit B and that he also signed another and then he signed in Exhibit C and that P.W. 2 did not explain to him any document. This has been disbelieved. He refers to copies of letters Exhibits IV to VI, VIII and XI and the originals Exhibits XV series. He then says that N. Nanchappa Chetti & Co. became insolvents and he and some others filed a petition for declaring them insolvents, that he has mentioned in paragraph 3 of that petition the amount he was liable to pay to the Bank for the firm, which figure he got from a letter of the Bank, that the other figure Rs. 2,823-9-0 mentioned in the petition was also taken from a letter of the Bank and that, if the Bank had given the amount of both the accounts, he would have mentioned the whole amount. This really does not touch any question of estoppel. There is, therefore, no statement of the defendant that if he had been informed of this already existing debt of Rs. 5,000 he would not have signed the letter of guarantee. We must, therefore, treat the argument as being that there is a duty cast on the Bank to disclose the past indebtedness under the current account of N. Nanchappa Chetti irrespective of the defendant's knowledge, and we are asked to presume that that duty not having been performed the guarantee is invalid. We do not think that the authorities cited by Mr. Menon lead to this conclusion. The balance of authority is that there is a difference between fiduciary guarantees and guarantees by persons in favour of banks and that though, in the former case, there may be a duty to disclose all material facts, there is no such duty in the case of a Bank which takes a guarantee

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from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee. In *Hamilton* v. *Watson*(1), it was held by the House of Lords that a surety is not of necessity entitled to receive, without enquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and the party and that, if he wants to know any particular matter, he must make it the subject of a distinct enquiry. The learned Judges who took part in this decision were Lord LYNDHURST L.C., Lord BROUGHAM and Lord CAMPBELL. In *The North British Insurance Company* v. *Lloyd*(2), it was held that the rule which prevails in assurance upon ships and lives that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantees and that in the latter case, the concealment, to vitiate the guarantee, must be fraudulent. In *Wythes* v. *Labouchere*(3), a similar view was taken. In that case, Lord CHELMSFORD observes as follows :—

"I will consider the question of concealment solely upon the footing of the duty of the defendants towards the plaintiff as surety. It must of course be conceded that if the plaintiff had applied to the bankers, and they had given him a false account of the transactions between them and M'Gregor, the plaintiff would be entitled to be relieved from his suretyship. But not only was there no application to the defendants by the plaintiff, but they never came into communication with each other directly or indirectly in the transaction. Was there under these circumstances any legal, or I would add, any moral obligation upon the bankers, when they learnt that the plaintiff was willing to become security to them for a large advance to M'Gregor, to search for him and warn him against the danger of such a step, by communicating the condition of his old

(1) (1845) 12 Cl. & F., 109; 8 E.R., 1339.
(2) (1854) 10 Ex., 523; 156 E.R., 545.
(3) (1859) 3 De. G. & J., 593; 44 E.R., 1397.

account, the security which they had taken, and the circumstances connected with the Parliamentary qualification? No case which has been cited goes this length or near it. Indeed the case of *The North British Insurance Company* v. *Lloyd*(1), expressly decides that the obligation of the creditor to communicate even material circumstances that are known to him is not co-extensive with the rule which prevails in insurance upon ships and lives; and that unless the non-disclosure amounts to a fraud upon the surety, he is not entitled to relief."

These cases have been considered in *London General Omnibus Company, Limited* v. *Holloway*(2), where it was held that suretyship for the fidelity of a servant is distinct from a guarantee in respect of a banking account. In that case FARWELL L.J. observes:—

"There is a wide distinction between a case like the present and the cases which have been cited of guarantees for overdrafts given to bankers, such as *Hamilton* v. *Watson*(3) and *Wythes* v. *Labouchere*(4)"

and he points out the difference. He further observes:—

"No surety asked to guarantee a banking account is entitled to assume that the customer of the Bank has not been in the habit of overdrawing; the proper presumption in most instances is that he has been doing so, and wishes to do so again. That is a legitimate carrying on of business, and that is what the surety is asked to guarantee."

KENNEDY L.J. observes:

"On the other hand in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure, constitute only extrinsic circumstances. They may be material circumstances such as might affect the judgment of the person who is asked to be surety. But in the language of Sir Frederick Pollock (Principles of Contract, 8th Edn., page 568) 'the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the

(1) (1854) 10 Exch., 523; 156 E.R., 545. (2) [1912] 2 K.B., 72.
(3) (1845) 12 Cl. & F., 109; 8 E.R., 1379.
(4) (1859) 3 De. G. & J., 593; 44 E.R., 1397.

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suretyship relates, and on this point there is no difference between law and equity. The bank or other creditor cannot reasonably be taken as affirming by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee' ".

Then the learned Judge quotes with approval a passage from Mr. Justice ROWLATT's work on Principal and Surety, 1st Edn., page 155. At page 154, 1st Edn. (page 158 in Second Edition), the following passage occurs :—

"A guarantee will fail if the creditor misrepresents to the surety the state of accounts between the principal and himself. But a surety proposing to guarantee a banking account should inquire whether there is any adverse balance already existing; he is not entitled to assume there is not."

So far as the Indian cases are concerned, in *Balkrishna V. N. Kirtikar* v. *The Bank of Bengal*(1), Sir CHARLES SARGENT C.J. and BAYLEY J. took a similar view and held that the expression "keeping silence" in section 143 of the Contract Act "clearly implies intentional concealment as distinguished from mere non-disclosure" and "the withholding must be fraudulent," as necessarily is "the case when a material circumstance is intentionally concealed". This case, so far as we are aware, has not been dissented from and is on a line with the English cases we have referred to. It is contended by Mr. Menon that there is no difference between fidelity contracts and contracts of guarantee in respect of banking accounts, that some eminent English Judges have dissented from the view that there should be any such difference and that in each case the question is whether there is evidence to go to the Jury to say that the non-disclosure of the past liability which was existing at the date of the

(1) (1891) I.L.R., 15 Bom., 585.

guarantee amounts to concealment of a material fact or not; and *Lee* v. *Jones* (1) is referred to. In that case there was a difference of opinion; CROMPTON J., CHANNELL B., BLACKBURN J. and SHEE J., taking one view and POLLOCK C.B. and BRAMWELL B. taking another view. We may state that BLACKBURN J. refers to the decision in *Hamilton* v. *Watson*(2), and notes the distinction between the contracts referred to. He says:

"Now whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In *Hamilton* v. *Watson*(2), the transaction was a security for a banker's cash account, and the decision of the House of Lords was that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not."

Although SHEE J. took the view that there was no difference in principle between the contracts and that the question in the case was whether there was evidence for the jury to say that the suppression was material POLLOCK C.B. and BRAMWELL B. took the opposite view. Reference was also made by Mr. Menon to *Railton* v. *Mathews*(3), where the judges were of opinion that undue concealment need not be wilful or intentional with a view to the advantages the employers were thereby to gain, but it was sufficient if it was material. This case related to a fidelity contract. A party became surety in a bond for the fidelity of a commission agent to his employers. The commission agent was entrusted with the property of his employers.

(1) (1864) 17 C.B. (N.S.), 482; 144 E.R., 194.
(2) (1845) 12 Cl. & F., 109 at 118; 8 E.R., 1339.
(3) (1844) 10 Cl. & F., 934; 8 E.R., 993.

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The employers discovered irregularities in the agent's accounts and put the bond in suit. The surety then instituted a suit on the ground of concealment by the employers of material circumstances. It was held by the House of Lords that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional or with a view to any advantage to himself. We think that the balance of authority is clearly in favour of the view that where a person stands surety for another as regards an advance to be made by a bank, the bank is under no obligation to disclose any past indebtedness existing at the date of the contract or suretyship and that it is a matter on which the person standing as surety has to inform himself. If, of course, he wanted information and the bank gave wrong information, it might vitiate the contract of suretyship. In the present case the defendant did not require any information as to the state of the account between the firm and the Bank on the date of the suretyship. There can, therefore, be no question of the guarantee being invalid because of the non-disclosure by the Bank that about Rs. 5,000 was due. Further, the defendant does not plead this in his written statement as a ground; he does not state that if he had been aware of this fact he would not have become surety. Even assuming that in every case it is for the jury, there is nothing in the evidence which would enable the jury to hold that if the defendant had been told that Rs. 5,000 was due by the firm he would not have stood surety. We find that Rs. 7,000 went in discharge of the indebtedness under the current account under which money was already due by the firm.

[Their Lordships then dealt with the question whether the plaintiff was estopped from holding the defendant liable for past transactions and for the Rs. 3,000 and, deciding it in the negative on the evidence in the case, concluded as follows :—]

We do not think that the decision of the Subordinate Judge can be supported on any of the grounds stated by him. The decree of the Subordinate Judge is set aside and, in lieu thereof, there will be a decree in favour of the plaintiff for Rs. 8,470–10–7 with interest at 6 per cent from the date of the plaint to the date of payment with costs in this and the lower Court on the entire amount decreed.

The Subordinate Judge's decree allowing any costs to the defendant will be set aside.

[The case having been set down for being spoken to on a later date, the Court made the following ORDER :—]

Credit will be given for the amounts already collected and no interest will run on the amounts collected.

Moresby and *Thomas* : Attorneys for appellant.

N.R.