With regard to the civil revision petition which has been argued before us, in my judgment, the jurisdiction of the High Court to revise the decision of the Board on the petitioner's claim is expressly excluded by section 21 of the Act. This is not a case of a provincial Act purporting to take away from the High Court a right to supervise Courts of inferior jurisdiction, for, as was held in *In re Chinnayya Gounder*(1), the power of control given to Collectors over village officers was never subject to the High Court's superintendence. I agree that both the petitions should be dismissed.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

R. M. M. S. T. VYRAVAN CHETTIAR (APPLICANT), APPELLANT,

1932, March 8.

v.

THE OFFICIAL ASSIGNEE OF MADRAS (RESPONDENT), RESPONDENT.*

Indian Contract Act (IX of 1872), ss. 126 and 141—Joint-debtors—When sureties as amongst themselves.

In the absence of a custom or contract to the contrary between joint-debtors who are jointly and severally liable to a creditor, each is not a surety to the other as defined by section 126 of the Indian Contract Act nor do they occupy a position analogous to that of surety strictly so-called so as to attract the provisions of section 141 of the Indian Contract Act.

APPEAL from the judgment of WALLER J. in the exercise of Insolvency Jurisdiction of the High Court in

(1) (1921) 41 M.L.J. 577.

* Original Side Appeal No. 98 of 1929.

VYRAVAN CHETTIAR v. OFFICIAL ASSIGNEE, MADRAS.

Application No. 366 of 1929 in Insolvency Petition No. 278 of 1925.

K. S. Krishnaswami Ayyangar for appellant.

O. T. G. Nambiyar for respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—The facts out of which this appeal arises may be stated as follows. Two Chetties, R. M. M. S. T. Vyravan Chettiar who is the appellant before us and M. A. R. N. Ramanadhan Chettiar carrying on business under the vilasam of M.A.R.N., were in the habit of borrowing from the banks in Madras on joint promissory notes and utilizing the amounts in equal shares. There were two such promissory notes with which we are concerned. On each occasion the amount borrowed was Rs. 50,000. The total amount borrowed being one lakh, each debtor took Rs. 50,000 for his own purpose. The dates of the two notes are 8th July 1924 and 22nd April 1925. On the 3rd August 1925 M.A.R.N. was declared insolvent. It is admitted that the insolvent paid interest on his share of the debt on the 8th July 1924, 8th October 1924 and 8th January 1925. He had certain shares in the Indian Bank from whom those debts were borrowed, and, under Article 19 of the Articles of Association of the Indian Bank, the bank had a lien on the shares. After the insolvency of Ramanadhan Chetty, the bank demanded the appellant for payment and he paid the whole debt. In respect of the moiety of the insolvent's debt he now claims to be subrogated to the benefit of the lien which the Indian Bank had over the shares, and this is claimed under section 141 of the Contract Act. The Official Assignee representing the insolvent claims that the shares had

vested in him free of any such lien. The matter came on before our brother WALLER J. and he found that no specific agreement as was alleged by the appellant to the effect that each debtor was to be surety for the other in respect of his moiety of the debt was made out. He therefore dismissed the application. This appeal is filed against his order.

We entirely agree with the learned Judge that the evidence does not make out any specific agreement between the parties to the effect that, though as between the Indian Bank and the debtors they were jointly and severally liable, as between themselves each should be regarded as a surety for the other in respect of his moiety of the debt. Under the Indian Contract Act the contract of guarantee is confined to cases where the guarantor agrees with the creditor to discharge the liability of a third person in case of his default. Cases where on the face of the contract two persons are both jointly and severally liable do not fall within the definition. In other words, the contract of guarantee as defined in section 126 of the Indian Contract Act is confined to cases of suretyship strictly so-called. In *Duncan, Fox, & Co.* v. *North and South Wales Bank*(1) Lord SELBORNE L.C. distinguishes between three kinds of cases at page 11. The first case there mentioned is the only case covered by the Indian Contract Act. The second and third cases there enumerated are cases of suretyship loosely described as such. The second case is a case where there is an agreement between the principal and the surety only, the creditor being a stranger to it. The third case is a case where, without any contract of suretyship, there is a primary and a secondary liability of two persons for

(1) (1880) 6 App. Cas. 1, 11.

VYRAVAN CHETTIAR v. OFFICIAL ASSIGNEE, MADRAS.

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one and the same debt, the debt as between the two being of one of those persons only, and not equally of both. After eliminating the cases of suretyship strictly so-called, the noble Lord discusses, at page 12, how far the person secondarily liable as surety is entitled to be subrogated to the rights of the creditor in the second and third cases. He refers to Lord ELDON'S dictum in *Yonge* v. *Reynell*(1) and finally winds up by saying that even in the second and third cases the surety has some right to be placed in the shoes of the creditor where he paid the amount. The learned Advocate for the appellant strongly relied upon this dictum and also the case of *Rouse* v. *Bradford Banking Company*(2). But in this case there was an express agreement between the parties. He also referred to Rowlatt on Principal and Surety, second edn., page 7. But the passage at page 7 relies on the case, *Duncan, Fox, & Co.* v. *North and South Wales Bank*(3), and does not carry the statement of the law beyond it. To make this passage applicable, the case must be one where the debt must be wholly of one and not equally of both. The whole foundation for the equitable doctrine of the English Courts of Equity is the argument of Sir Samuel Romilly in *Craythorne* v. *Swinburne*(4). That was a case of contract of guarantee in the strictest sense of the term. So also the cases of *Yonge* v. *Reynell*(1) and *Wythes* v. *Labouchere*(5). Mr. Krishnaswami Ayyangar relied on Sheldon on Subrogation, second edn., section 169. But that section does not very much help the appellant. The opening sentence shows that even in some States in America (Georgia, Albana and Vermont) the right of

(1) (1852) 9 Hare. 809; 89 R.R. 689.
(2) [1894] A.C. 586.
(3) (1880) 6 App. Cas. 1, 11.
(4) (1807) 14 Ves. 160; 9 R.R. 264.
(5) (1859) 3 De G. & J. 593; 121 R.R. 238.

subrogation among the parties jointly bound as principals is denied, though in other States such right of subrogation seems to have been recognized. There is no case in England where the Courts have gone to this length. On the other hand, the statement of the law in *Duncan, Fox, & Co.* v. *North and South Wales Bank*(1) makes it subject to the limitation that the debt should not be equally of both. The case of *Goverdhandas Goculdas Tejpal* v. *The Bank of Bengal*(2) is also a case of contract of suretyship strictly so-called. The only point held there was that unless the surety pays down the whole money he is not entitled to the transfer of the security. We are not prepared to extend the legal position as laid down in English cases on the mere authority of the cases cited in Sheldon. The appeal fails and is therefore dismissed with costs.

MADHAVAN NAIR J.—The facts of this appeal are very simple. The appellant, Vyravan Chetty, and another who became an insolvent on the 3rd August 1925, borrowed from the Indian Bank on two occasions, 8th February 1924 and 22nd August 1925, a sum of Rs. 1,00,000, the loan on each occasion being Rs. 50,000. The amount was borrowed under two promissory notes signed by both of them. On the face of the notes the liability of the executants is joint and several. It is admitted that each of the promisors took for himself on each occasion half of the amount borrowed, so that each owed the bank Rs. 50,000. The insolvent owned 153 shares of the Indian Bank. Under Article 19 of the Articles of Association, the bank had a lien over these shares for the amounts due to it from the insolvent. The Indian Bank realised from the appellant the entire amount due to it from both the promisors. The

(1) (1880) 6 App. Cas. 1, 11. (2) (1890) I.L.R. 15 Bom. 48.

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entire money due to the bank from himself and the insolvent having been paid off by him, the appellant contends that he is a surety for the insolvent for the amount due from him, and that he is entitled under section 141 of the Indian Contract Act to the benefit of the security held by the bank against the principal debtor, the insolvent, i.e., in other words, he is entitled to have a charge on the insolvent's shares in the bank and the dividends accruing therefrom. The claim was opposed by the Official Assignee.

In the application in support of this claim the appellant relied on two specific agreements of suretyship—one agreement each time the money was borrowed—alleged to have been entered into between himself and the insolvent. In his evidence he set up a general "custom" amongst the Nattukottai Chetties that in such borrowing transactions each borrower becomes a surety for the amount taken by the other. The learned Judge held neither the "agreements" set up nor the "custom" was proved and so dismissed the petition.

On the evidence it is not seriously contended that the learned Judge's conclusions are incorrect. The evidence does not establish the agreements of guarantee set up nor does it support the alleged custom. Sections 140 and 141 of the Indian Contract Act regulate as against the principal debtor the rights of a surety who performs or otherwise discharges the liabilities of the principal debtor. These sections are as follows :—

Section 140.—

"Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."

Section 141.—

"A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

Section 140 lays down a general principle of which the most important practical application is to be found in section 141; see Pollock and Mulla, Indian Contract Act, sixth edn., page 497. Under section 141 a surety is entitled to the benefit of every security which the creditor has against the principal debtor. This was the section relied on by the appellant before WALLER J. If this section applies there can be no doubt that the appellant is entitled to claim a charge on the shares of the bank held by it (the creditor) as a security against the insolvent. Having regard to the finding of the learned Judge and our opinion that the agreements set up by the appellant have not been proved, what is now urged is, not that section 141 of the Contract Act is directly applicable, but that the general principle of equity underlying that section would apply to the appellant who, though he is not a surety strictly speaking, occupies a position analogous to that of a surety; and since he has admittedly discharged the liability of the insolvent by paying the creditor his portion of the debt, viz., Rs. 50,000, he is in equity entitled to the benefit of the security held by the bank (the creditor) against the insolvent. This argument is sought to be supported by the decision in the well-known case of *Duncan, Fox, & Co.* v. *North and South Wales Bank*(1). It is doubtful if this argument was put before the

(1) (1880) 6 App. Cas. 1.

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learned Judge but it is stated that the case was quoted before him. The question is purely one of law. It was held in that case:

"The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his endorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship."

The facts of the case were these: R. & Sons offered a bill of exchange for a portion of the price due from them for a cargo of corn purchased from D. & Co. D. & Co. declined to take the bill of exchange. They were customers to North and South Wales Bank. One of the partners of R. & Sons had deposited with this bank the title-deeds of two of his own freehold properties and these were held by the bank as securities for what the bank might advance in the way of discounts. R. & Sons told D. & Co. that if they would inquire of the bankers they would find it would be all right with their bill. The bank manager refused to discount the bill without the endorsement of D. & Co. but said that he believed D. & Co. would incur no more than a nominal liability by making the endorsement, placing the amount to the credit of D. & Co. R. & Sons later on stopped payment of the bill when it became due and the bill was dishonoured. D. & Co. then became acquainted with the fact that securities had been deposited with the bankers by R. & Sons to cover advances on their bills and brought an action against the bank to have the benefit, so far as they would go, of the securities deposited with them, claiming to be sureties to the bankers for what was due upon the bill.

It was held that D. & Co. were sureties on their bill and that as such they were entitled to the benefit of these securities (see the head-note). In examining the principles and authorities applicable to the question to be decided, the Lord Chancellor 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 the 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* (the italics are mine) so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. In all these three kinds of cases it was pointed out by their Lordships that the person who discharges 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 debtor" in case of his default (see section 126 of the Indian Contract Act). Obviously classes (2.) and (3.) are not cases of suretyship strictly so-called. Their Lordships observed that the case before them did not fall within the first or second class as admittedly there was no agreement either between R. & Sons and D. & Co. constituting the relation of principal and surety to which the bank was a party, or a similar agreement between the two, to which the bank

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was a stranger, and that the case fell within the third class in which though there is, strictly speaking, no contract of suretyship

> "there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other."

It was for this reason that D. & Co. were held to have the rights of sureties though they were, strictly speaking, not sureties on the bill. In the case before us no contract between the appellant and the insolvent constituting the former a surety for the latter to which the bank was a party has been pleaded and the specific contracts of suretyship pleaded have not been substantiated. The appellant, therefore, argues that, though he is not strictly speaking a surety, he falls within the third class enumerated above and that he occupies in equity a position analogous to that of a surety as mentioned therein as he has discharged the liability of the insolvent to the bank. If he does, then he is, by extension of the principle applicable to the case of sureties strictly so-called, entitled to the benefit of the security held by the Indian Bank. To fall within class (3.) mentioned above and to assimilate his position with that of a surety strictly so-called, a person who discharges the liability to the creditor should be only secondarily but not primarily liable to the creditor. This was the position of D. & Co. in *Duncan, Fox, & Co.* v. *North and South Wales Bank*(1). Having regard to the facts of the present case, it cannot be said that this is the position of the appellant with respect to his liability on the promissory notes. As already pointed out, the liability on the promissory notes of the appellant and the insolvent is joint and several. There is only one debt

(1) (1880) 6 App. Cas. 1, 11.

in the present case, a debt which is equally a debt of both the parties. The Indian Bank can recover the entire amount either from the appellant or from the insolvent. Thus there is no question of one person being primarily liable for the debt and the other only secondarily liable. In these circumstances the principle of the decision in *Duncan, Fox, & Co.* v. *North and South Wales Bank*(1) has no application to the present case, and on the strength of that decision the appellant cannot claim that his position is analogous to that of a surety and that, therefore, he is entitled to the benefit of the security held by the creditor.

Various other cases were cited by the appellant's learned Counsel, but all of them are distinguishable. In the case of *Rouse* v. *Bradford Banking Company*(2) there was an express agreement between the parties. The case of *Craythorne* v. *Swinburne*(3) is one of co-sureties and the cases of *Yonge* v. *Reynell*(4) and *Wythes* v. *Labouchere*(5) are all cases of strict suretyships. The case of *Goverdhandas Goculdas Taejpal* v. *The Bank of Bengal*(6) is also a case of a contract of suretyship. Reference was made to a passage in Sheldon on Subrogation, second edn., chapter 4, section 169, which shows that the right of subrogation between joint-debtors exists in some States in America but the existence of such rights is denied in some other States. However, no English decision has been cited in support of the contention that such right exists in England. In my opinion, persons who are jointly and severally liable on promissory notes are not sureties under section 126 of the Indian Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so-called

(1) (1880) 6 App. Cas. 1.
(2) [1894] A.C. 586.
(3) (1807) 14 Ves. 160; 9 R.R. 264.
(4) (1852) 9 Hare. 809; 89 R.R. 689.
(5) (1859) 3 De G. & J. 593; 121 R.R. 238.
(6) (1890) I.L.R. 15 Bom. 48.

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so as to attract the provisions of section 141 of the Contract Act.

For the above reasons, I must hold that the appellant is not entitled to the benefit of the security held by the Indian Bank against the insolvent. I would therefore dismiss this appeal with costs.

Attorney for appellant—*N. T. Shamanna.*

Attorneys for respondent—*Moresby and Thomas.*

G.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Krishnan Pandalai.

1932, March 15.

P. P. V. P. L. CHOCKALINGAM CHETTIAR AND ANOTHER (RESPONDENT AND HIS LEGAL REPRESENTATIVE), PETITIONER,

v.

K. P. S. A. R. PALANIAPPA CHETTIAR (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 24 (1) (a)—"Competent to try"—Meaning of—District Munsif's small cause jurisdiction—Suit beyond, and within Subordinate Judge's small cause jurisdiction—Transfer to District Munsif of—Competency of Munsif to try suit—Provincial Small Cause Courts Act (IX of 1887), sec. 16.

A suit, which was within the small cause jurisdiction of the Subordinate Judge of Devakotta and beyond the small cause jurisdiction of the District Munsif of Devakotta, was transferred by the District Judge of Ramnad to the file of the District Munsif of Devakotta.

Held that the District Munsif was "competent to try" the suit within the meaning of section 24 (1) (*a*) of the Code of Civil Procedure.

"Competent to try" in section 24 (1) (*a*) of the Code must be understood to mean "of jurisdiction competent to try"; and section 24 of the Code must be understood to constitute an

* Civil Revision Petition No. 430 of 1930.