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As we have said already, she was married in 1930, and is, therefore, presumably now out of the control of the defendant. Taking the view we do, we think that the defendant cannot be made liable to the plaintiff either for the return of the ornaments in question, or for the value of them.

Srivastava, C. J. and Smith, J.

The result is that we hold the decision of the learned Subordinate Judge to be correct, and we accordingly dismiss this second appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

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RAJA JAGANNATH BAKHSH SINGH (DEFENDANT-APPELLANT) *v.* CHANDRA BHUKHAN SINGH AND ANOTHER, PLAINTIFFS AND ANOTHER, DEFENDANT (RESPONDENTS)*

Contract Act (IX of 1872), sections 124 and 126—Indemnity, contract of—Guarantee, contract of—Essential elements of a contract of guarantee and a contract of indemnity—Person writing letter to another requesting him to advance loan to another and holding himself responsible if there be any trouble in repayment—Surety's liability, if arises—Stamp Act (II of 1899), section 36—Pronote insufficiently stamped—Pronote admitted in evidence without objection about insufficiency of stamp—Admissibility of pronote in evidence, if can be questioned subsequently.

For a contract of suretyship there should be concurrence of the principal debtor, the creditor and the surety, but this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. Where, therefore, *J* writes a letter to *S* to advance a certain sum of money to *D* assuring him that there will be no trouble in the repayment of his money and that if there was any trouble he would hold himself responsible and in pursuance thereof *S* advances the loan and obtains a pro-

*Second Civil Appeal No. 349 of 1934, against the decree of Babu Avadh Behari Lal, Civil Judge, Rae Bareli, dated the 21st of August, 1934, upholding the decree of S. Abbas Raza, Munsif of Rae Bareli, dated the 3rd of April, 1934.

note the same day and *D*, the principal debtor, was present at the house of *J* when he wrote the letter, all the necessary requirements of a contract of guarantee are satisfied in the case, and *J* is liable as a surety. *Periamanna Marakkayar & Sons* v. *Banians & Co.* (1), *Guild & Co. in re* (2), and *Mahabir Prasad* v. *Siri Narayan* (3), referred to.

Where a defendant admits a pronote without any objection regarding its admissibility in evidence and as a result of this the document is exhibited and admitted in evidence, no objection can be entertained at a later stage of the suit on the score of the pronote being inadmissible for want of proper stamp.

Messrs. *R. B. Lal* and *Suraj Sahai*, for the appellant.

Messrs. *Radha Krishna Srivastava* and *Chandra Prakash Lal*, for the respondents.

SRIVASTAVA, C.J. and SMITH, J.:—The appellant, who was defendant No. 2 in the trial court, wrote a letter to Sahdeo Bakhsh Singh, the deceased father of the plaintiffs-respondents, requesting him to advance a loan of Rs.1,200 to Dukh Haran Singh, defendant No. 1. In pursuance of this recommendation Sahdeo Bakhsh Singh advanced the loan and obtained a pronote (exhibit 3) the same day.

The plaintiffs sued on the basis of the aforesaid pronote, impleading defendant No. 2 as a surety. The pronote was admitted by both the defendants, but the suit was contested by the defendant No. 2 on the ground that he was not liable as a surety. He also questioned his liability for interest. Both the lower courts have disallowed the pleas raised in defence, and decreed the claim for the principal and interest against both the defendants.

The main question in this appeal is whether the letter (exhibit 1) makes the defendant-appellant liable as a surety in respect of the loan. The letter (exhibit 1) is in these words:

"Please lend Rs.1,200 to Thakur Dukh Haran Singh. There will be no trouble (*nuks*) in the pay-

(1) (1925) I.L.R., 49 Mad., 156. (2) (1894) 2 Q.B., 885.
(3) (1918) 3 P.L.J., 896.

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ment of your money. Be assured. If there be any trouble, I hold myself responsible."

Srivastava, C.J. and Smith, J.

It is argued that on its true interpretation the letter can be regarded only as a contract of indemnity, and not as a contract of guarantee. Section 124 of the Indian Contract Act defines a contract of indemnity as "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person." Section 126 of the same Act defines a contract of guarantee as a "contract to perform the promise, or discharge the liability, of a third person in case of his default". The person who gives a guarantee is called "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". Reference has been made to *K. V. Periamanna Marakkayar & Sons* v. *Banians & Co.* (1), wherein it was laid down that in all cases of suretyship privity is necessary between the three parties, namely, the creditor, the principal debtor and the surety. The importance of this lies in the result which follows, namely, that the surety, having undertaken the obligation at the request of the debtor, becomes entitled to recover from him whatever sums he has rightfully paid under the guarantee, as is provided in section 145 of the Contract Act; whereas in the contract of indemnity the indemnifier cannot on the performance of the obligations of the debtor, in the absence of an assignment from the creditor, sue in his own name the debtor, as there is no privity of contract between them, and there is no subrogation to the creditor's rights. Reliance was also placed on the following observations of DAVEY, L.J., in *Guild & Co.* (2), as quoted in *Mahabir Prasad* v. *Siri Narayan* (3). These observations are as follows:

(1) (1925) I.L.R., 49 Mad., 156. (2) (1894) 2 Q.B., 885.
(3) (1918) 3 P.L.J., 396(400).

"In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment and a promise to keep a person who has entered or is about to enter into contract of liability indemnified against that liability independently of the question whether a third person makes default or not."

Srivastava, C. J. and Smith, J.

There is no dispute about the correctness of the principles enunciated in the cases above cited. The only question is about their application to the facts of the present case. It is not denied that for a contract of suretyship there should be concurrence of the principal debtor, the creditor and the surety, but this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. An implied request will be quite sufficient to satisfy this requirement. In the present case it is in evidence that the principal debtor, Thakur Dukh Haran Singh, was present at the house of the defendant No. 2 when the latter wrote the letter (exhibit 1) to Thakur Sahdeo Bakhsh Singh. The same day Thakur Sahdeo Bakhsh Singh advanced the money and the pronote was executed at the house of defendant No. 1. These circumstances are quite ample to show that the letter must have been written at the request of Thakur Dukh Haran Singh. Though there is no direct evidence of such a request being made, yet it is clearly implied in the terms of the letter and the circumstances of the transaction. It is also important to note that the appellant made himself responsible in case there was any trouble in the "payment" of the money, which must necessarily mean payment by the principal debtor, and not in case there was any difficulty in the realisation of the money by the creditor. We are therefore of opinion that all the necessary requirements of a contract of guarantee are satisfied in the case, and have no hesitation in agreeing with the court below that the appellant is liable as a surety.

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Next, as regards interest, it is argued that the pronote was insufficiently stamped and was therefore inadmissible in evidence. The argument proceeded that in the circumstances interest should not be decreed at the rate provided for in the pronote. We are of opinion that no question of admissibility arises when both the defendants admitted the pronote without any objection regarding its admissibility in evidence, and as a result of this the document was exhibited and admitted in evidence. Section 36 of the Stamp Act provides that where an instrument has been admitted in evidence such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The lower appellate court was therefore right in refusing to entertain the objection on the score of the pronote being inadmissible for want of a proper stamp. The liability of a surety being co-extensive with that of the principal debtor, we are of opinion that the courts below were right in making the appellant also liable for interest at the rate provided for in the pronote.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

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MANGALI AND OTHERS (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Conflicting versions of a crime—Police must make up their mind and send accused for trial on one version alone.

Where there are two versions of the occurrence of a crime which cannot be reconciled and both of which cannot possibly be true, it is clearly improper that persons should be sent up

*Criminal Appeal No. 156 of 1936, against the order of S. Shaukat Husain, Additional Sessions Judge of Kheri, dated the 23rd of April, 1936.