Appellate Jurisdiction.(a)

Special Appeal No. 304 *of* 1874.

ROBERT HODGES PIERCE and another.. *Special Appellants.*

OPENDRA SHETTI GANAPATHY.....*Special Respondent.*

In a suit by the plaintiffs to recover damages from the defendant, a surety upon a contract to deliver coffee to the plaintiffs, the plaint did not allege the willingness of the plaintiffs to pay on delivery.

Held on Special Appeal that such allegation was not necessary, its absence not having prejudiced the defendant.

The plaint alleged a contract to deliver on the 2nd March, and the evidence showed an extension of the time to the 31st March, but the pleadings alleged that the breach was on the 2nd March.

Held that this objection was not tenable, the defendant having been perfectly aware of the case he had to meet on this point.

The surety had begun to perform the duty which the principal had contracted to perform. *Held* that this circumstance did not preclude the plaintiffs from suing the defendant as surety.

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THIS was a Special Appeal against the decision of G. R. Sharpe, the District Judge of South Malabar, in Regular Appeal No. 1 of 1874, confirming the decree of the Subordinate Court of Cochin, in Original Suit No. 30 of 1873.

This suit was brought to recover Rupees 4,866-11-9 as the amount of principal and interest due on Rupees 4,679-8-9, alleged to be the extent of damages caused by the default of Opendra Chetty, Paradasy Chetty, who, on the 2nd December 1872, had entered into a contract with plaintiffs to deliver 1,000 hundred weights of native coffee to them within the 2nd March 1873 at Rupees 31 per hundred weight, and which contract plaintiffs had accepted upon defendant's guarantee, plaintiffs in consequence of the default having been compelled to purchase native coffee at the Tellicherry market at higher prices.

Defendant admitted the contract entered into by Paradasy Chetty, and stated that he (defendant) stood answerable, not as alleged in the plaint, but merely for Rupees 5,000 which were advanced to Paradasy Chetty, and for the penalty provided for by the contract in case of Paradasy Chetty's failure to fulfil the contract; that plaintiffs subsequently superseded the said contract by abstaining from having any dealing with Paradasy Chetty, and both the contract and the guarantee relied on had consequently become null and

(a) Present: Holloway and Kernan, JJ.

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void; that plaintiff's agent told defendant that they would give him advances of money according as the same might be required for procuring coffee, and also time till the 31st March, and that if he deliver the coffee agreed for at the stipulated rate, the coffee already delivered would be carried to his credit, and the money already received carried to his debit in the account, and he fully agreed thereto, but in the verbal contract there was no agreement that he would be liable to any damage in the event of a failure on his part to deliver the coffee which he had thus undertaken to deliver to plaintiffs.

The following is taken from the judgment of the Subordinate Judge:—At the first hearing of the suit the plaintiffs admitted certain facts affirmed by the defendant, namely, that he was allowed time till the 31st March 1873, to deliver the full quantity of coffee deliverable under Paradasy Chetti's contract dated the 2nd December 1873; that, on the 11th March 1873, the defendant applied to plaintiff's agent for an advance of Rupees 8,000 and the same was not given; that the advances made by the plaintiffs on account of the contract for the delivery of coffee amounted to Rupees 17,000, and that they told the defendant that they did not want the coffee delivered by the defendant on the 19th February and the 11th March 1873. The plaintiffs admitted also that an error had crept into the plaint by Rupees 59-6-0 expended seizing the coffee having been added to the amount claimed, and that the same must be struck out. On the other hand, the defendant admitted a certain fact affirmed by the plaintiffs, namely that the plaintiffs defrayed expenses to the amount of Rupees 122-14-8 on account of defendant for discount, sewing bags, garbling coffee, boat and cooly hire, &c. Several issues were settled, the first of which was whether subsequently to the date of the contract A, and in the same month of December the plaintiffs' agent verbally agreed with the defendant to make advances of money to the defendant according as the same might be required for procuring the coffee. Several other issues were settled and on the result the Subordinate Judge gave judgment for the plaintiffs for Rupees 198-10-0.

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The plaintiffs appealed to the District Court.

The following is extracted from the judgment of the Appellate Court:—

"The contract sued on stipulated for the, delivery of goods and for the payment thereof on delivery, and in such circumstances our Contract Act (Section 51) provides that the one party need not deliver unless the other party is ready and willing to pay on delivery. It was incumbent, therefore, on plaintiffs to aver a readiness to perform their part of the contract by stating that they were ready and willing to pay on delivery, and consequently their plaint which contains no such averment must be held to be insufficient. I need quote no precedent to show that this would be so in cases governed by purely English law, and there is the authority of the Privy Council (II, Bengal Law Reports, 42) for saying that the same rule must prevail in our Courts even in cases between natives.

In strictness my judgment should stop here, but, as I have looked into the record, I may as well also express an opinion upon the objection raised by defendant as to plaintiff's title to recover irrespective of the above defect.

Now the plaint alleges a contract for the delivery of coffee on or before the 2nd day of March, and also states that "the cause of action arose on that date by defendant failing to perform his contract of guarantee." But how stand the facts on their own admission and evidence? There is actually their own confession that the time for delivery was extended up to 31st March, and I have not been able to obtain any information how under such circumstances their right to sue can have accrued earlier than such date. Our Contract Act (Section 62) expressly excuses the performance of the original contract where the parties have agreed to substitute a new contract for it, or to rescind or alter it, and plaintiffs having elected to extend the time are not now at liberty to recede therefrom. Into the thorny question of whether an extension of time constitutes a new contract, it is not necessary for me to penetrate. I am content to say that it certainly amounts to a variation of it,

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as illustration E to Section 133 of the Contract Act is sufficient authority to shew. Further, even if it were necessary for defendant to show the substitution of a new contract, it appears to me that plaintiff's own witnesses, the correspondence on record and the counterfoils of their cheques would abundantly shew that Paradasy Chetti was allowed to drop out of the matter altogether, and that plaintiffs, while the ink of the original contract was hardly dry, commenced to treat defendant as the principal debtor and not as a mere surety, in which latter capacity alone does he appear in the contract on which plaintiffs have chosen to base this suit.

It follows that in my opinion the judgment of the Lower Court has by no means given plaintiffs *less* than they were entitled to upon the present defective plaint, (which notwithstanding my objections during the argument no offer has been made to amend), and I think that in giving them so much the Subordinate Judge has run counter to the judgment of the Privy Council (1, Bengal 396) and has permitted "a new case to be brought forward which was not set up or hinted at in the plaint."

I affirm the decree of the Lower Court and dismiss this appeal with costs.

Plaintiffs specially appealed upon the following grounds:—

The District Judge erred in saying that the plaint is defective for want of an averment by the plaintiffs of their readiness and willingness to pay for the coffee on delivery.

The District Judge erred in saying that the original contract was avoided by the extension of the time for its performance.

The District Judge erred in supposing that the contract was with defendant as a principal and not as a surety.

J. H. S. Branson, for the special appellants, the plaintiffs.

Scharlieb, for the special respondent, the defendant.

The Court delivered the following

JUDGMENT:—We feel it necessary to remit this case for a judgment upon the merits.

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The first ground of the Civil Judge for refusing such a judgment is that there is no allegation of the willingness of the plaintiffs to pay on delivery. The plaint would have been more correctly framed if it had alleged the fulfilment of all conditions, the happening of all things and the lapse of all times entitling to the delivery. Such general statement would have been quite sufficient even in Westminster Hall. Its absence has in no way prejudiced the defendant, who has raised many matters which would be a traverse of such an allegation if it had been made.

The second ground is that the plaint alleges a contract to deliver by the 2nd March, and the evidence is that there was an extension of the time for delivery to the 31st March, and that the evidence, therefore, applies to a case not made by the pleadings which allege the breach on the 2nd March.

If this original agreement with the altered time had been regularly pleaded as a substituted contract under the law of England, the alteration in point of time would have been fatal to the action, (*Taylor* v. *Henry*).

The result now would be an amendment upon terms, and in this case complete justice will be done if the case is considered on the footing of the date being the 31st March. The amendment might have been made at the time but no possible injustice can accrue, for the defendant was perfectly aware of the case which on this point he has to meet.

The treatment of the surety as principal debtor is the third objection. We are unable to see that this was done. He himself at once began to perform that for the non-performance of which he had rendered himself liable. He was quite at liberty to do so and his liability for non-performance cannot be altered by his having done so. The case must be remitted for judgment upon the issues joined between the parties. The costs of this appeal will be provided for in the revised decree.