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BURNS PHILP (S.S.) CO. LTD.

v.

ELAHI MOHAMMED HANIF

[SUPREME COURT, 1962 (MacDuff C.J.), 27th July, 17th August]

B

Appellate Jurisdiction

Bills of Sale—construction—whether party joined as guarantor surety or principal debtor—whether liable for moneys owing on seperate account by borrower—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) s.13.

Contract—guarantor—whether on true construction of Bill of Sale surety or principal debtor—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) s.13.

C

One Suresh Singh gave a Bill of Sale to the appellant company to secure £580, the balance of the purchase price of a motor vehicle, and interest. Clause 11 provided that the security should be a running and continuing security and extend to cover any sum of money which might thereafter become due from Suresh Singh to the appellant com-

D pany on any account whatsoever.

The Bill of Sale recited that the transaction was entered into by the appellant company at the request of the respondent and subject to Suresh Singh and the respondent entering into the Bill of Sale to secure payment of the balance of the purchase price (£580). The respondent, who was called "the Guarantor", and Suresh Singh, both

E covenanted to pay on demand "the said principal sum and all moneys whatsoever owing hereunder at the time".

Held: 1. By virtue of clause 11 the security of the Bill of Sale was extended to cover moneys owing on any account whatsoever and moneys owing by virtue of that provision fell within the words, "all moneys owing hereunder at the time"; the respondent and Suresh

F Singh were accordingly jointly and severally liable for such moneys.

2. The respondent and Suresh Singh being jointly and severally liable, the respondent was not a surety for Suresh Singh and time given to the latter by the appellant comapny did not discharge the respondent.

Appeal from a judgment of the Magistrate's Court.

G *K. A. Stuart* for the appellant.

S. A. Jan for the respondent.

The facts sufficiently appear from the judgment.

MACDUFF C.J.: [17th August, 1962]—

H The Appellant sued one Suresh Singh and the Respondent in the Magistrate's Court, Lautoka, for the sum of £122.12.11, being the balance due by them under a convenant in a Bill of Sale dated the

13th day of November, 1959, registered as No. 59/1797. Suresh Singh, in 1959, purchased from the Appellant a Holden Station Wagon for the purchase price of £730, paying £150 by way of deposit and securing repayment of the balance of £580 by executing the Bill of Sale referred to above. At the end of 1960, Suresh Singh having made default, the Appellant seized the vehicle under the powers contained in the Bill of Sale in its favour, carried out certain repairs to facilitate the sale of the vehicle, and eventually sold the vehicle for £600 at the end of January, 1961. After crediting this amount against the balance due by Suresh Singh in respect of principal and interest under the Bill of Sale and various amounts owing under what was known as his "goods and maintenance" account, there remained a balance due to the Appellant of the amount claimed. This was, in effect, a balance of the amount owing by Suresh Singh to the Appellant on his "goods and maintenance" account.

Clause 11 of the Bill of Sale Reads :

"11. THAT this security shall be a running and continuing security so long as any dealings shall take place between the parties hereto irrespective of any sums which may be paid to the credit of the account of the Grantor with the Grantee and notwithstanding any settlement of account or any other matter or thing whatsoever such security shall remain in full force and extend to cover any sum of money which may hereafter become owing from the Grantor to the Grantee on any account whatsoever and such security shall not be deemed to have been released or discharged or in any way vacated until a memorandum of satisfaction thereof shall have been executed by the Grantee."

In respect of the claim against Suresh Singh the learned Magistrate found :

"There is no defence to this claim against Suresh Singh in my opinion. I have no doubt whatsoever that the vehicle had to be repaired in order to obtain a buyer and under the wide terms of the Plaintiff's Bill of Sale, particularly clause 11, the Plaintiff Company can sue Suresh Singh for any other account he owes.

They could, of course, sue him for goods sold and delivered, because the second car account has been paid off in full. As against Suresh Singh, judgment is entered for Plaintiff Company for £122.11.11, the amount shown in Ex. A, and costs."

The learned Magistrate apparently overlooked an admission by Mr. Wright, Credit Manager of the Appellant Company, that credit had not been given for a refund of insurance premium, amounting to £25.17.4, and that the correct amount owing was £96.15.7d. Suresh Singh has not appealed but in exercise of the powers conferred by Order XXXVI Part VI Rule 19 of the Magistrates' Courts Rules the judgment against him is set aside and in place thereof is substituted judgment for the sum of £96.15.7d. and costs to be taxed as on that amount.

The learned Magistrate gave judgment for the Respondent, the second Defendant, on the claim, his reasons for doing so being as follows :

"Now, what is the 2nd defendant? In my opinion he is a surety to contractor in part of the Bill of Sale to perform the promise of the 1st defendant. Surety as defined in section 4 of the Indemnity, Guarantee and Bailment Ordinance, Cap. 199.

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What promise did he guarantee to perform? The promise is set out in Clause 1 and 2 of the Bill of Sale. A promise to pay 'the said principal sum and all moneys whatsoever owing thereunder at the time' and a further promise to pay upon demand and until such demand to pay by certain monthly instalments and interest at 7% per annum.

B

This principal since he has been repaid together with interest the 2nd defendant as surety bound to pay and sum due under clause 11 of the Bill of Sale? I don't think so. As I read the document he guarantees the payment of the balance due on that purchase by 1st defendant of the car mentioned in the schedule and nothing more. There is no recital that he agreed to clause 11.

C

Furthermore, I think that the 2nd defendant, if he is bound by clause 11 (and I don't think he is), is discharged by virtue of section 13 of Cap. 199. The Plaintiff Co. seized the vehicle to pay for the goods account and then released it on the 1st defendant paying £25. This is a creditor making a composition with debtor and I have no doubt that the 2nd defendant as surety did not consent to such a contract.

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For either of these reasons I do not think Plaintiff Company can succeed against 2nd defendant."

It is against this judgment that the Appellant now appeals, his grounds being;

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"1. The learned Magistrate erred in law in holding that the respondent was merely a surety and that he had contracted to perform the promise of Suresh Singh in case the said Suresh Singh defaulted.

2. That having held that Suresh Singh was liable to the appellant it followed by the terms of the Bill of Sale that the respondent was also liable.

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3. That the learned Magistrate erred in holding that the respondent was discharged under section 13 of Cap. 199 by the release of the vehicle after Suresh Singh had paid £25.0.0."

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The first two grounds are to all intents and purposes the same. The only issue is what was the position of the Respondent. For the Appellant it is contended that the whole intention and effect of the Respondent's execution of the Bill of Sale was to make that document a joint and several convenant by Suresh Singh and the Respondent. For the Respondent it is contended that the effect of the Bill of Sale is to constitute the Respondent no more than a guarantor or surety for Suresh Singh for payment of the principal sum and interest secured. Some of the terms used, and the manner in which the Respondent has been included in the Bill of Sale, would appear to

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lend some support to his contention. The recital in the Bill of Sale giving the reason for the Respondent being joined in the document reads :

> "WHEREAS the Grantor has requested the Grantee to sell to the Grantor the chattels more fully described in the schedule hereto for the price of SEVEN HUNDRED AND THIRTY POUNDS (£730.0.0) which the Grantee has agreed to do but only at the special instance and request of ELAHI MOHAMMED HANIF Father's name Elahi of Naviti Street in the Town of Lautoka aforesaid Taxi Proprietor (hereinafter called 'the Guarantor') and subject to the payment of the sum of ONE HUNDRED AND FIFTY POUNDS (£150) by way of deposit and subject further to the condition precedent that both the Grantor and the Guarantor enter into these presents to secure payment of the balance of the purchase price, namely, FIVE HUNDRED AND EIGHTY POUNDS (£580.0.0) which said sum is payable in manner hereinafter appearing."

The Bill of Sale then goes on to provide :

> "AND the Grantor and the Guarantor do hereby covenant with the Grantee as follows :—
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> 1. THAT the Grantor and the Guarantor will pay to the Grantee the said principal sum and all moneys whatsoever owing hereunder at the time UPON DEMAND PROVIDED HOWEVER that until such demand is made the Grantor and the Guarantor will pay all such moneys by equal monthly instalments of not less than THIRTYONE POUNDS (£31) each payable on the last day of each and every calendar month until all moneys owing hereunder have been fully paid : the first of such monthly instalments to be paid on the 31st day of December 1959 AND IT IS HEREBY AGREED AND DECLARED that any default in the due and punctual payment of any of the above moneys shall be deemed to be a default hereunder entitling the Grantee to exercise the powers conferred upon the Grantee by these presents.
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> 2. THAT the Grantor and the Guarantor will pay to the Grantee interest on all sums of money owing hereunder from time to time at the rate of SEVEN POUNDS (£7) per centum per annum (computed from the date hereof and calculated with monthly rests on the last day of each month upon the unpaid balance at the commencement of each such month) payable on demand and until such demand is made it shall be deemed to be included in the monthly instalments mentioned in the preceding clause hereof."

The remaining covenants are expressed to be by the Grantor only.

On the other hand in the first covenant the Grantor and the Respondent have covenanted "to pay to the Grantee the said principal sum and all moneys whatsoever owing hereunder at the time *upon demand*". Certainly by virtue of clause 11 the security of the Bill of Sale is extended to cover "any sum of money which may hereafter become owing from the Grantor to the Grantee on any account whatsoever" so that these moneys would come within the scope of "all

moneys owing hereunder at the time". There is also the fact that there is in the Bill of Sale no full clause saving the rights of the Grantee against the Guarantor on the happening of certain eventualities which is usual when a guarantee *qua* guarantee is included in the same document with the original liability. Again in this type of security one would expect even a guarantor to be responsible for expenses of seizure and sale which requires the words "all moneys owing hereunder at the time" in the first covenant to extend beyond just the principal amount and interest. On all these considerations and despite the actual wording of the document itself, I hold the view that the effect of the first covenant is to make the Grantee and the Respondent jointly and severally liable for all moneys owing or to become owing under the Bill of Sale. In consequence the Respondent is jointly liable with the Grantor for any moneys owing by the Grantor to the Appellant by virtue of clause 11 or clause for selection number 5 in the Bill of Sale.

In view of my decision in respect of the first two grounds of appeal it necessarily follows that the third ground of appeal must also be upheld. The second reason on which the learned trial Magistrate based his decision was that the Respondent was discharged from liability by virtue of the provisions of Section 13 of the Indemnity, Guarantee and Bailment Ordinance (Cap. 199 Laws of Fiji). That section refers to the discharge of a surety by a creditor giving time to the principal debtor, and in view of my decision that the Respondent was jointly and severally liable with the debtor himself and was not a surety for him the section has now no application.

In parenthesis I think I should sound a note of warning. The question does not arise in this case because the Respondent neither pleaded that he was unaware that he was any more than a guarantor, nor did he give evidence to that effect. In the case of a complicated document, as this Bill of Sale undoubtedly is, and the manner in which the Respondent was joined in it, if he denied a full explanation of its terms and effect having been given him, I, as a trial magistrate, would require extremely cogent evidence that in fact such explanation had been given and that he appeared to understand the full effect of the document.

In the result the appeal is allowed and the judgment of the learned trial Magistrate for the Respondent is set aside, and in place thereof judgment will be for the Appellant against the Respondent for £96.15.7d. with costs here and in the Court below.

Appeal allowed.