RAM AUTAR AND ANOTHER

v.

PENAIA ROKOVUNI

[COURT OF APPEAL, 1965 (Marsack V.P., Gould J.A., Hammett J.A.), 21st October, 25th November]

Civil Jurisdiction

Moneylending—written contract and receipt—whether memorandum for purposes of Moneylenders Ordinance—Moneylenders Ordinance (Cap. 207) s. 16(1)(2)(3)(4) —Moneylenders Act 1927 (17 & 18 Geo. 5, c.21) (Imperial) ss.6,12.

Contract—guarantee—indemnity—discharge of unenforceable debt by guarantors —whether entitled to indemnity—Indemnity Guarantee and Bailment Ordinance (Cap. 199) s.23.

The appellants and the respondent entered into a written agreement with a moneylender whereby the appellants guaranteed repayment of a loan by the moneylender to the respondent. On the same date the respondent signed a receipt for the amount advanced by the moneylender and was handed a copy of the agreement. There was no other memorandum of the loan.

During the currency of litigation in which the moneylender sought to recover the debt and in which, to the knowledge of the appellants, the respondent denied liability, the appellants paid off the debt to the moneylender and brought the present proceedings against the respondent.

Held: 1. The respondent not having been given a copy of a memorandum as required by section 16 of the Moneylenders Ordinance before the security was taken the agreement was not enforceable by the moneylender against the respondent or the appellants.

2. That the payment by the appellants to the moneylender was in the circumstances made "wrongfully" within the meaning of section 23 of the Indemnity Guarantee and Bailment Ordinance and was not recoverable by the appellants from the respondent.

Cases referred to: *Kasumu v. Baba-Egbe* [1956] A.C.539; [1956] 3 All E.R.266: Edgeware Trust Ltd. v. Lawrence [1901] 3 All E.R. (Rep.) 141: *Damodar Jamnadas v. Noor Mohammed Valji* [1961] E.A.615: *Eldridge and Morris v. Taylor* [1931] 2 K.B.416; 145 L.T.499: *Temperance Loan Fund, Ltd v. Rose* [1932] 2 K.B.522; [1932] All E.R. (Rep.) 690: *Central Advance and Discount Corporation Ltd. v. Marshall* [1939] 2 K.B.781; 62 L.T.237: *George Shaw Ltd. v. Duffy* [1943] S.C. 350; *Alexander v. Vane* (1836) 1 M. & W. 512; 150 E.R.537: *Sleigh v. Sleigh* (1950) 5 Exch.514: 155 E.R.224: *Chetwynd's Estate, Dunn Trust Ltd. v. Brown* [1938] Ch.13; [1937] 3 All E.R. 530.

Appeal from a judgment of the Supreme Court.

F. M. K. Sherani for the appellants.

A *K. A. Stuart* for the respondent.

The facts appear sufficiently from the judgment of Gould J.A.

The following judgments were read: [25th November, 1965]—

GOULD J.A.: Only two of the many issues which were before the Supreme Court in these proceedings have survived to the present B appeal. The facts essential to the consideration of those two issues can be shortly summarized.

On the 5th June, 1954, the respondent agreed in writing to sell his farm to the appellants. The farm was duly transferred and the appellants executed a second mortgage in favour of the respondent for £3,000, part of the purchase money, payable on demand and C providing for payment of interest. In 1957 the respondent bought a truck on credit from Burns Philp (South Sea) Company Limited and transferred his second mortgage to that company as security for his indebtedness on the truck. The payments on the truck being in arrears, Burns Philp (South Sea) Company Limited threatened to exercise its power of sale in the mortgage (which, as noted above, was payable on demand) and went so far as to advertise the farm D for sale.

In order to raise the money needed to pay off the debt on the truck, the parties entered into an agreement with Gurbuksh Singh, a moneylender, dated 29th April, 1958, which was signed by the appellants, the respondent and Gurbuksh Singh in the presence of Mr. R. D. Patel, solicitor, who had prepared the document. It will be necessary to set out the recital and paragraphs of the agreement, in which E the respondent is described as "the borrower" and the appellants as "the guarantors"; it reads:

> "WHEREAS the Borrower has requested the lender to lend the sum of £1085.0.0 (one thousand and eighty-five pounds) to the borrower *AND WHEREAS* the Guarantors have specially requested the lender to advance the said sum of F £1085.0.0 to the borrower *AND WHEREAS* the lender has agreed to lend to the borrower the said sum of £1085.0.0 on terms and conditions hereinafter following:

Now therefore it is hereby agreed by and between the parties hereto as follows :—

G "1. *THE* lender shall lend and the borrower shall borrow the sum of £1085.0.0 (one thousand and eighty-five pounds) (hereinafter called the Principal Amount) after the execution hereof.

2. *THE* borrower shall pay to the lender interest on the "Principal Amount" and further advances, if any, at the rate of H £12.0.0 (twelve pounds) per centum per annum as from the date hereof and as to further advances, if any, from the dates of such further advances.

3. *THE* Principal sum hereby agreed to be lent together with further advances, if any, and interest as aforesaid shall be payable by the borrower *UPON DEMAND* by the lender.

4. *THE* Guarantors hereby guarantee and undertake to pay to the lender the Principal Amount and further advances, if any, together with interest thereon as aforesaid on the borrower making default in payment of the amount as agreed herein.

5. *TO SECURE* the Principal amount, further advances, if any, and interest thereon as aforesaid the borrower shall transfer to the lender by way of security the Mortgage Registered No. 55071 which is at present declared to be held by Burns Philp (South Sea) Company Limited as transferees of the said Mortgage which will be retransferred to the borrower by the Burns Philp (South Seas) Company Limited on the borrower paying the amount due to the Burns Philp (South Seas) Company Limited out of monies hereby intended to be borrowed.

6. *UPON* the borrower repaying the Principal amount, further advances, if any, and interest thereon as aforesaid the lender shall retransfer the mortgage No. 55071 to the borrower.

7. *THAT* in consideration of the Guarantors procuring and guaranteeing the loan herein intended to the borrower, the borrower shall execute a Variation of Mortgage No. 55071 to the effect that :—

   (a) The balance of monies due to the borrower from the guarantors after paying off the lender shall be due to be paid by the guarantors to the borrower on the 31st day of December, 1961.

   (b) That no interest shall be payable by the guarantors to the borrower as from the date hereof until 31st December, 1961.

8. *THE* monies which may be paid by the guarantors to the lender herein shall be deducted from the amount payable by the guarantors to the borrower under the mortgage No. 55071 in which the guarantors are the mortgagors.

9. *THE* borrower hereby admits and acknowledges that until the execution hereof, the borrower has not received the Principal amount herein intended to be lent.

10. *THE* borrower and each of the guarantors hereby admit and acknowledge to have received certified true copies of this agreement.

11. *THE* costs of this agreement whether Solicitor's or otherwise and the similar costs of other acts, deeds, documents and things intended to be done herein or appurtenant hereto shall be paid by the borrower."

I will refer to this document as "the Agreement".

A receipt signed by the respondent and bearing the same date as the Agreement, was put in evidence. It is as follows :—

"I, Penaia Rokovuni acknowledge to have received from Gurbuksh Singh son of Man Singh of Vatuyaka, Ba Cultivator and Moneylender the sum of £1085.0.0, referred to in a certain agreement of even date.

2d. stamp cancelled.

Dated at Ba this 29th day of April, 1958.

Sgd. Penaia Rokovuni.

Witness :
Sgd. R. D. Patel
Solicitor, Ba.

"

Burns Philp (South Sea) Company Limited were paid off, but the re-assignment of the second mortgage was not registered until the 6th April, 1960. It was never transferred to Gurbuksh Singh pursuant to paragraph 5 of the Agreement. Disputes having arisen, Gurbuksh Singh commenced Action No. 137 of 1960 against the respondent as debtor and the appellants as guarantors. The course of proceedings in the Supreme Court thereafter is fully summarized in the following passage in the judgment of the learned Chief Justice from which the present appeal is brought :—

"In his defence, the plaintiff (as 1st defendant in that action) admitted borrowing the money, but pleaded *non est factum* and that the agreement for the release of interest on the second mortgage was obtained by fraud on the part of Gurbuksh Singh and the present 1st and 2nd defendants. The present 1st and 2nd defendants (2nd and 3rd defendants in Action No. 137 of 1960) also defended the claim. They claimed that it was a condition precedent to their liability under the guarantee that the second mortgage be transferred to Gurbuksh Singh. They pleaded, also, lack of consideration for the guarantee, and variation of the moneylending contract without their consent. Then in July 1961 the writ in the present proceedings was issued by the plaintiff, claiming specific performance of the undertakings of the 1st and 2nd defendants to execute a crop lien in his favour. At about the same time these defendants put in an amended defence in the first action seeking a variation in the second mortgage as provided for in the Agreement of 1958: alternatively, they admitted liability to Gurbuksh Singh subject to the agreed variation of the second mortgage being executed and they asked for an order compelling the plaintiff Penaia to execute such a variation. In his statement of claim in the present action the plaintiff alleged that the Agreement of 1958 was void and unenforceable but within particularising. In their statement of defence filed in September 1961 the 1st and 2nd defendants denied that the Agreement of 1958 was void and unenforceable. They claimed that the failure of the plaintiff to transfer the second mortgage to Gurbuksh Singh had rendered them liable to Gurbuksh Singh, under that mortgage. They referred to the provision in the Agreement of 1958 that any

moneys paid by them as guarantors to Gurbuksh Singh were deductible from the amount payable by them to the plaintiff under the second mortgage. In October 1961 a summons for directions was issued in the present action and an order was made as to the place and mode of trial, and for entry of the action for trial within 3 months. On the 23rd February 1962, the plaintiff Penaia filed an amended defence in the first action expressly claiming that the moneylending contract of 1958 was unenforceable for lack of a note or memorandum thereof as required by section 16(1) of the Moneylenders Ordinance (Cap. 207); alternatively that if a note or memorandum was signed it did not comply with the section in that it did not set out the required particulars: the date of the loan and the principal. This was filed pursuant to leave granted on the 14th July 1961 when the 1st and 2nd defendants were legally represented and the terms of the proposed amendment were before the parties and the Judge in Chambers. "

In this state of the pleadings the appellants on the 2nd March, 1962, paid to Gurbuksh Singh the whole of the moneys remaining owing to him on the Agreement. There were further pleadings which need not be set out in detail. They put in issue whether the appellants were entitled to set off the amount paid to Gurbuksh Singh (who died shortly after the payment was made) against the amount due under their mortgage to the respondent either under the terms of the Agreement or under the provisions of the Indemnity, Guarantee and Bailment Ordinance (Cap. 199).

The findings of the learned Chief Justice, so far as this appeal is concerned, were :—

(a) that there was no note or memorandum as required by section 16 of the Moneylenders Ordinance (Cap. 207 — Laws of Fiji 1955) and it followed that the Agreement was not enforceable by Gurbuksh Singh against the respondent or the appellants; and

(b) that having regard to the policy of the Moneylenders Ordinance and the conduct of the appellants the payment made by the appellants to Gurbuksh Singh was made "wrongfully" within the meaning of section 23 of the Indemnity, Guarantee and Bailment Ordinance (Cap. 199) and that therefore the appellants were unable to claim indemnity or right of set off in respect thereof.

Both of these findings are challenged on the appeal.

The Moneylenders Ordinance of Fiji follows closely the English legislation, though it is not entirely the same, and it may be well to preface the discussion of the questions for decision by a statement on the policy of the legislation taken from the judgment of the Privy Council in *Kasumu v. Baba-Egbe* [1956] 3 All E.R. 266. The question there was whether a borrower, in claiming the return of a security in respect of a loan from a moneylender which was unenforceable,

should be put on terms before he could succeed. Their Lordships, having discussed the approach of the courts of equity under the Usury Acts said, at pp. 271-2 :—

A "But the Usury Acts disappeared in 1854, and much of the Moneylenders Act, 1900, and the Moneylenders Act, 1927, is directed to enforcing measures of control that have no concern with the intrinsic nature of the contract made. Such requirements as that the moneylender must be registered or licensed, must use his authorised name, must procure a note or memorandum of the contract signed personally by the borrower, must B keep a book in which is entered a contemporary record of the transaction strike indifferently at all moneylenders' loans, however moderate the terms of any particular transaction. When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognise the lender as having a right at law to get his money back. That is C part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made."

In Fiji the provisions requiring a "note or memorandum" are set out in section 16 of the Moneylenders Ordinance, which (omitting D two provisoes in subsection 1) is as follows :—

"16. (1) No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent after the commencement of this Ordinance or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract, shall be enforceable E unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract or their respective agents, or in the case of a loan to a partnership firm, by a partner in or agent of the firm, and unless a copy thereof authenticated by the lender or his agent be delivered to the borrower or his agent or, in the case of a loan to a partnership firm, to a partner in or agent of the firm, before the money F is lent, and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given as the case may be:

.....

(2) In this section the expression "borrower" includes a surety.

G (3) The note or memorandum aforesaid shall contain all the terms of the contract and in particularly shall show separately and distinctly —

(a) the date of the loan;
(b) the principal; and
(c) the rate of interest per centum per annum payable in H respect of such loan or, where the interest is not expressed in terms of a rate per centum per annum, the amount of such interest.

All dates and numbers shall be written in the English language notwithstanding that they are also written in any other way.

(4) Where a promissory note in the English language given by a borrower to a moneylender in respect of a loan contains in the body of the note or by writing thereon all the terms of the contract and is countersigned by the lender or his agent, such promissory note shall in itself be a sufficient note or memorandum of the contract for the purpose of this section."

Subsection 1 differs in two respects from the corresponding English section (Moneylenders Act, 1927, s.6); the English requirement that the note or memorandum be signed by "the borrower" is in Fiji "the parties to the contract" and in England the copy of the note or memorandum must be delivered within seven days of the making of the contract, whereas in Fiji there is the more stringent provision "before the money is lent". There is no material difference however, in the last part of the subsection touching the time at which the memorandum was signed. Subsections (2) and (4) have no counterparts in the English legislation.

In the present case the respondent was handed a copy of the Agreement signed by all parties with an endorsed certification by Gurbuksh Singh that the copy was a true copy. In dealing with the question whether that constituted a memorandum within the meaning of section 16(1) the learned Chief Justice considered, on the authority of *Edgeware Trust Ltd. v. Lawrence* [1901] 3 All E.R. 141 (Rep.), that the Agreement and the receipt for the advance could be read together: that the inference was that the advance was made contemporaneously with the execution of the two documents: that the two documents sufficiently complied with the requirements of section 16(3) if they constituted a memorandum: but that the Agreement was both a contract and a security and in view of the wording of section 16(1) a document could not be both a note or memorandum and either a contract or a security. Section 16(4) supported that view. He found accordingly that there was no note or memorandum.

I will first deal with the effect of section 16(2) which, as I have mentioned, does not appear in the English legislation. No submissions as to its meaning were made by counsel in the appeal though Mr. Stuart quoted it to distinguish a decision of the Court of Appeal for Eastern Africa which was relied upon by Mr. Sherani for the appellants. That was the case of *Damodar Jamnadas v. Noor Mohamed Valji* [1961] E.A. 615 in which it was held (on legislation following the English pattern) that a guarantor was not a borrower within the meaning of the corresponding section and there was no necessity for a note or memorandum to be signed by the guarantor. At p.619 of the report there is the following passage in the judgment of Newbold, J.A. :—

> ".... I cannot see why a guarantor should be said to be a borrower within the meaning of the section. It is true that a guarantor is vitally interested in the terms of the contract; it is also true that he is in an intimate relationship with the lender and the borrower; but neither interest nor relationship can transform one party, who is a guarantor, into another party, who is a

borrower. To do so would disregard one (but not the only) essential difference between a contract to repay money and a contract to guarantee the repayment of money by another. In the first case an immediate and primary liability to repay exists; in the other only a contingent and secondary liability to pay arises. This difference can be seen immediately on examining a contract of guarantee. Mr. Nazareth also pointed out further difficulties which would arise if a guarantor were to be regarded as a borrower within the meaning of the section — for example where the guarantee related to part only of the debt or was contingent upon terms different from those agreed with the borrower: in any such case are there to be separate and different memoranda?"

It would appear that a tentative opinion contrary to this decision was expressed in *Eldridge and Morris v. Taylor* [1931] 2 K.B. 416 at 420 by Scrutton L.J. but that was a case of a joint and several promissory note and the learned Lord Justice expressly refrained from deciding the point.

In Kenya, however, as in England, there is no provision equivalent to section 16(2) in Fiji, and it would seem that, whatever may be the position elsewhere, in Fiji a guarantor is a borrower (for the purposes of section 16 only) and the difficulties referred to in the passage from the East African case quoted above might have to be faced. In the present case, however, the evidence appears to indicate that copies of the Agreement similar to that given to the respondent were handed also to the appellants, and the appellants of course, having paid the amount in question, do not rely on any plea of unenforceability.

As to the general effect of section 16(2), I have formed the view (though without the benefit of any argument), that the purpose of the subsection is to ensure that a surety shall have safeguards of the same type as the borrower —that he is entitled to a note or memorandum, and that his contract to repay and any security which he himself has provided in support of his guarantee will, in the absence of a memrandum or if the memorandum be defective or not handed over at the proper time, be unenforceable. I do not think (and this is the point of the discussion) that there is any intention to interfere with the law of contract or diminish the differences between the contract for repayment and the contract of guarantee, pointed out in *Jamnadas v. Valji* (supra). The presence of section 16(2) does not, therefore, in my opinion, prevent the contract of guarantee in the Agreement from being a security given by the appellants within the meaning of section 16(1). That it is such a security for the purpose of moneylending law I accept on the authority of *Temperance Loan Fund Ltd. v. Rose* [1932] All E.R. (Rep.) 690 and *Central Advance and Discount Corporation Ltd. v. Marshall* [1939] 2 K.B. 781; and I respectfully therefore agree with the learned Chief Justice that the Agreement was both a contract and a security. I do not think it necessary to deal with clause 5 of the Agreement in this connection, as to which I have formed the tentative view that it would be a sufficient disclosure of the security if the Agreement were otherwise good as a memorandum.

The opinion of the learned Chief Justice that there was no memorandum was based on the following words in section 16(1) — "and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given as the case may be". Consistently with that provision, in the judgment of the learned Chief Justice a document could not be both a note or memorandum and either a contract or a security for a loan at the point of signature. He quoted *George Shaw Ltd. v. Duffy* [1943] S.C. 350 in which all members of the court held that, conceding the basis that a promissory note was a security for the purpose of the Moneylenders Act 1927, it could not at the same time be a note or memorandum because that document had essentially to be signed before the security was taken. So far as the finding that a document cannot be both a memorandum and a security is concerned, I respectfully agree with this finding. I am not however able to share the view that the same document may not function as both memorandum and contract. The memorandum may well be the only writing, and is required by law to contain all the terms of the contract and to be signed by the parties. The section requires that the memorandum be signed, not before the contract is made, but before the money is lent. I think that envisages the actual handing over of the loan money. There is a passage in the judgment of the Lord Justice-Clerk in *Shaw v. Duffy* (supra) at p.356 which tends to support the view I have expressed. It reads :—

> "I have difficulty in understanding why such notes are still employed in connection with such transactions. If they are a "security" within the meaning of the section, they cannot be granted until the "note or memorandum" has first been signed, and, when that has been done, the promissory notes would seem to be superfluous. Even if they are not a "security", there must still be a "note or memorandum", and it is not easy to see why the moneylender should not be content with that "note or memorandum" as the record of the contract and the basis of any action which he may require to raise."

In *Jamnadas v. Noor Valji* (supra) the East African case I have referred to, Newbold J.A. dealing with a point of evidence, said at pp.620-621 :—

> "Section 11 of the Ordinance requires that a note or memorandum in writing be made containing all the terms of the contract. The law thus requires that the terms of the contract be reduced to the form of a document, and, this being so, under s.91 of the Act" (i.e. the Indian Evidence Act) "no evidence can be given of such terms except the document itself, unless, of course, it is a case in which secondary evidence of the document is admissible."

I think, therefore, that a memorandum under the section could embody the whole contract, including the promise to repay, express or implied. The finding that the Agreement is not valid as a memorandum, therefore, in my view, must be based only on the fact that it was not handed over before the security was taken. (I put aside for the moment its possible deficiency in the matter of the date of

the loan). I have been in some doubt whether, in the circumstances, it was a possible construction of section 16(1) that the contract for repayment might be regarded as enforceable though the security was unenforceable. I have regard to the concluding words of the passage from the subsection quoted above "... before the money was lent or before the security was given as the case may be", as grouping the memorandum in relation to the contract with the money being lent, and in relation to the security with the latter being given. On consideration I do not think there is anything in this which assists the appellants. It cannot, in my judgment, have been intended that a memorandum could be good for one purpose and bad for another, and, reading the section as a whole in the light of the object of the legislation, I think it is clear that the memorandum is bad if the whole of the requirements of the section are not fulfilled.

For these reasons I respectfully agree that the Agreement cannot be relied upon as a memorandum. It is therefore unnecessary for me to consider other questions which do not appear altogether free from doubt, i.e. whether it would be permissible to read the receipt for the loan moneys with the Agreement as a memorandum sufficiently indicating the date of the loan and whether, if the receipt is regarded as part of the memorandum it does not show on its face that it was given after the money was lent.

I turn now to the second finding of the learned Chief Justice which is challenged on the appeal, viz: that the payment made by the appellants was a payment made "wrongfully" within the meaning of section 23 of the Indemnity Guarantee and Bailment Ordinance (Cap. 199) which reads :—

> "23. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sum which he has paid wrongfully."

In considering whether this section was applicable at all the learned Chief Justice noted that unlike four other sections in the Ordinance, it did not contain such words as "unless otherwise provided by the contract", and concluded that it was applicable. No argument against this finding was addressed to the Court on the appeal. For the reason given by the learned Chief Justice and for the additional reason that I do not find section 23 to be inconsistent with paragraph 8 of the Agreement, I respectfully agree that the section applies. Paragraph 8 I think, provides a method whereby the appellants could recover payments made under the guarantee but must be taken to include only payments "rightfully" made under the implied term. There can be no challenge also to the finding, on the authority of *Temperance Loan Fund v. Rose* (1932) 2 K.B. 522 and *Eldridge and Morris v. Taylor* (1931) 2 K.B. 416 that under the moneylending legislation, where the contract by the borrower is unenforceable for want of a memorandum the contract of guarantee is likewise unenforceable.

In approaching this problem the learned Chief Justice pointed out that the payment to Gurbuksh Singh was made at a time at which the appellants were parties to proceedings in which the respondent was

resisting payment on the ground that the debt was irrecoverable by virtue of the provisions of the Moneylenders Ordinance. He said that the payment was made on legal advice and the money was obtained by way of loan from one Jagendar Singh, a particularly close associate of Gurbuksh Singh. He found that the object of the appellants in making the payment was to enforce payment of the possibly unenforceable debt on the respondent as a means of depriving him of his right to rely on the Moneylenders Ordinance as a defence; the appellants were not only cognisant of the fact that the debt might well be irrecoverable when they chose to pay Gurbuksh Singh, but acted *mala fide* — neither of the appellants gave evidence. It is hardly necessary to add that the appellants no doubt had in view paragraph 8 of the Agreement as a method of recoupment.

In his judgment the learned Chief Justice observed that section 23 of the Indemnity Guarantee and Bailment Ordinance was derived from the Indian Contract Act. That Act follows generally the principles of the English law of contract and it is permissible to look at English authorities to see whether guidance may be had in considering in what sense the words "rightfully" and "wrongfully" are used in section 23.

There is the early case of *Alexander v. Vane* (1836) 1 M. & W.512; 150 E.R. 537, in which a guarantor paid the balance of the price of some harness on the default of the principal debtor. He was held entitled to recover it from the principal debtor though, by reason of non-compliance with the Statute of Frauds he, as guarantor, was not legally compellable to make the payment to the creditor. The basis of the decision was that as the plaintiff had promised in the presence of the defendant, to pay if the defendant did not, there was an implied authority from the defendant for him to do so which had not been countermanded. That was a case in which the principal debtor's liability was not in doubt.

Sleigh v. Sleigh 5 Exch. 514; 155 E.R. 224 was decided in 1850. The plaintiff drew a bill of exchange for the accommodation of the defendant, who accepted it, but failed to pay it. The plaintiff, paid part of the amount though he was not legally compellable to pay as he had not been given notice of dishonour. The action was for money paid for the use of the defendant (the plaintiff having paid only part was not the holder and could not sue on the bill) and it was held that the plaintiff could not recover. The following passage is from the judgment of the Court (at pp.225-6 E.R.) :—

> "Now there is no doubt, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him *(Byles on Bills*, p.94); and this no doubt is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties; and whether

this be a payment of the whole bill, or of only a part of it, makes no difference. But the defendant, as the person accommodated, has not, we think, undertaken to indemnify the plaintiff against the consequences of any payment which the plaintiff may voluntarily make with knowledge of the circumstances. Whether it is so in cases in which the legal obligation has been discharged by circumstances unknown to him, as for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant."

That again was a case in which the principal debtor was undoubtedly liable.

Both of the cases last mentioned were considered in *Re Chetwynd's Estate, Dunn Trust Ltd. v. Brown* [1937] 3 All E.R. 530, which was a moneylending case, and which is relied upon by counsel for the appellants. S. signed a joint and several promissory note with C. to secure a loan to C. The memorandum required by the moneylending legislation was defective but neither S. nor C. knew that the contract was thereby rendered unenforceable. C. having failed to pay, S. discharged the whole liability and C. later wrote a letter to S. ratifying the payment. It was held that S. could recover from C's estate. Counsel for the appellants relied upon the following passage from the judgment of Sir Wilfred Green M.R. at p.532 :—

"When they went there, the intention to be imputed to both of them, and, to my mind, the only intention, was that Sir Guy Chetwynd intended to pay, that Mr. Stephenson intended to pay if called upon, and that Sir Guy Chetwynd intended to reimburse Mr. Stephenson if Mr. Stephenson paid. It never entered into the head of either of them, so far as anything appears from the evidence, that sect. 6 had any effect on the validity of the contract. Nor am I prepared to assume for one moment that, if they had learned of the existence of the section, and had known that it affected the contract, their actions would have been in any way different. Nor do I think that the implication which the law raises would have been at all different in such a case."

The last sentence in that passage appears to imply an opinion that the result would have been the same even if the parties had known they were under no enforceable liability. If that is so, it appears to lessen in some small measure the force of the distinction drawn by the Master of the Rolls in relation to *Sleigh v. Sleigh* (supra) where, at pp. 533-4 he said —

"It appears to me that, in that case, the real distinction is this. That was a case where the well known machinery with regard to bills of exchange was at the very heart of the transaction, because everybody knew that notice of dishonour was required, and everybody knew that due presentation was required. In a case of that kind, where you are dealing with a very special type of contract, such as that which arises under a bill of exchange, it appears to me quite reasonable that the court should treat the

> case as one where the only implied authority to pay was to pay in accordance with the rules affecting that particular subject matter, and where it could not imply, from the facts, any authority or request by the accommodated party to pay otherwise than in accordance with the ordinary routine applicable to bills of exchange. In the present case, no question of that sort arises."

That distinction of course is very applicable to the actual circumstances of the Chetwynd case, but would tend to become rather artificial on the basis of the *dictum* relied upon for the appellants. If, in a bill of exchange case, the implied request is to be "If I fail, pay only if you are rendered liable by an intervening step", it is hard to see that the request in another type of case should be "If I fail pay even though you know neither you nor I are liable".

Be that as it may there is no case which is parallel to the present one. In *Alexander v. Vane* (supra) emphasis was placed by the Court on the fact that the implied request to pay had not been countermanded. In the Chetwynd case not only had the request not been countermanded, but there was a ratification of the payment. In the present case the appellants themselves filed various defences to an action by Gurbuksh Singh and the respondent disputed his own liability to pay by reason (inter alia) of the lack of a memorandum — to the knowledge of all parties. Those circumstances were sufficient, in my opinion, to countermand the implied request to the appellants to pay the debt to any extent that the respondent could lawfully countermand it. If it turned out that the appellants were liable to Gurbuksh Singh, of course no countermanding could be effective. But on the basis (justified by the outcome of the litigation) that neither the appellants nor the respondent could legally be forced to pay, it would be going a very long way to deny to the respondent the right to say — "Neither of us is legally liable. I will not pay and you must not pay on my behalf".

Section 23 of the Indemnity Guarantee and Bailment Ordinance uses the words "rightfully" and "wrongfully", and the learned Chief Justice in the judgment under appeal refers to "*bona fide*" and "*mala fide*". While I consider these terms are associated, I do not accept that in the context they are so-extensive and the learned Chief Justice may not so have intended. There might arise questions of figures — a moneylender might *bona fide* pay a debt in ignorance that the principal debtor claimed to have paid part of it already. Whether the guarantor had paid rightfully as well as *bona fide* would be open to argument and perhaps depend on circumstances. A payment by the guarantor for his own honour could not be described as *mala fide* but *wh*ether it was wrongful or rightful must depend on the particular facts. In both *Alexander v. Vane* and *Sleigh v. Sleigh* there was no doubt as to the liability of the principal debtor to the creditor though the guarantor was not liable legally — even then in the particular circumstances of *Sleigh v. Sleigh* the guarantor could not recover and his payment was presumably "wrongful".

In the present circumstances I respectfully agree with the learned Chief Justice that the payment by the appellants to Gurbuksh Singh was wronful within the meaning of the section. I think the case is equivalent to one in which an implied request to pay was lawfully

countermanded before it was acted upon. I think that is enough of itself but the basis of that opinion may be augmented by the finding of the learned Chief Justice that the object of the appellants was to enforce payment of the possibly unenforceable debt on the respondent as a means of depriving him of his right to rely on the Moneylenders Ordinance. That seems to me to involve conflict with the policy of the legislation as laid down in *Kasumu v. Baba-Egbe* (supra) in the passage quoted above ". . . no court of law is to recognise the lender as having a right at law to get his money back". I do not overlook that Chetwynd's case was one of moneylending, but there the whole transaction was carried through in ignorance that any provision of the legislation was applicable.

For the reasons given I would dismiss the appeal with costs.

MARSACK V.P.: I am in agreement with the judgment of Gould J.A. and have nothing to add. The appeal is dismissed with costs.

HAMMETT, J.A. : I concur.

Appeal dismissed.