RC
GIT G.2

Judgment
36/1965

IN THE PRIVY COUNCIL No. 38 of 1964

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

AT NAIROBI

1. DEVKUNVERBEN widow of POPATLAL KARMAN
2. MEGHJI KARMAN MALDE
3. DEVCHAND KARMAN MALDE and
4. NANDLAL POPATLAL MALDE in their capacity as the Executors of the Estate of POPATLAL KARMAN deceased and
5. MEGHJI KARMAN and
6. DEVCHAND KARMAN trading as POPATLAL KARMAN and COMPANY

- and -

AHAMED DIN BUTT S/O MOHAMED BUX BUTT

CASE FOR THE APPELLANTS

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

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B E T W E E N : -

1. DEVKUNVERBEN widow of POPATLAL KARMAN
2. MEGHJI KARMAN MALDE
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Appellants

- and -

AHAMED DIN BUTT S/O MOHAMED BUX BUTT Respondent

CASE FOR THE APPELLANTS

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1. This is an appeal from the Judgment and Order of the Court of Appeal for Eastern Africa dated the 26th day of March 1964 dismissing the Appellants' appeal from the Judgment and Order of the Supreme Court of Kenya dated the 11th day of February 1963 whereby the Appellants' suit was dismissed with costs.

2. By a plaint dated the 28th day of November 1960 the Appellants who were the two partners and

the executors of a deceased partner in the firm of Popatlal Karman and Company claimed payment of a sum of Shs.45,000/00 under a guarantee in writing dated the 15th day of August 1956 whereby the Respondent in consideration of the Appellants agreeing to supply sugar on credit to one Sayed Omar and Brothers of Kajiado in the Colony of Kenya agreed to be answerable and responsible to the Appellants for the due payment by Sayed Omar and Brothers for all such sugar which the Appellants might from time to time supply subject to a limitation of liability to a sum of Shs.30,000/00; in addition the Respondent agreed to mortgage certain land by way of equitable mortgage in favour of the Appellants to secure the said guarantee and further agreed that the Appellants would be at liberty to treat the Respondent in all respects as though he were jointly and severally liable with the said Sayed Omar and Brothers of Kajiado to the Appellants instead of being merely surety for them. By a supplemental guarantee dated the 19th day of January 1957 the liability was increased to Shs. 45,000/00 and was extended to cover the debts of Kajiado European Stores and other goods supplied in addition to sugar. The Appellants allege due sale and delivery of goods to the said Sayed Omar and Brothers and the Kajiado European Stores for a total sum of Shs.41,054/33 remaining unpaid; interest thereon from 1st January 1958 to 31st October 1960 a sum of Shs.11,903/60 making a total of Shs.52,957/93. The Appellants claimed the said sum of Shs.45,000/00 and interest and alternatively an account be directed to be taken by the Registrar of what was due to the Appellants under the terms of the aforesaid guarantees.

3. The Respondent by his defence admitted his signature on the said guarantees but maintained that he was unaware of the contents of any of the said documents, alleging that he had signed on misrepresentation by one Khan an agent for the Plaintiffs, or that the said guarantees were obtained by means of keeping silent as to material circumstances and further denied that the Appellants supplied the alleged or any goods to Sayed Omar and Brothers or Kajiado European Stores and further alleged that the guarantee was vitiated by illegality in that the Kajiado European Stores had no licence to purchase sugar.

4. The learned trial judge found against the Appellant on all his defences save that he found that the Appellants had failed to prove that the sum of Shs.45,000/00 or any sum remained due from Sayed Omar and Brothers or Kajiado European Stores.

5. The evidence for the Appellants was as follows : -

(1) Meghji Karman Malde, who said that the goods had been supplied and produced a document (Exhibit 4) extracted from the firm's books showing a balance of Shs. 41,054/33 owing by Messrs. Sayed Omar and Brothers and Kajiado European Stores to the Appellants but admitting in cross-examination that this was all due from Kajiado European Stores and not Sayed Omar and Brothers.

(2) Sayed Mohamed Allahadad a partner in the firm of Sayed Omar and Brothers and in the firm of Kajiado European Stores and admitted receiving the said goods and that the sum of Shs.41,054/33 was correct.

(3) A document Exhibit 9 signed by the said Khan who was a partner in the firm of Kajiado European Stores acknowledging a debt of Shs.58,854/33 on behalf of the said Store.

(4) The said signature was identified as that of Khan by one Tilak Raj Johar an Advocate, the said Allahadad and by one Devjan Karman Malde who was present when the letter was signed.

6. The Respondent gave evidence himself saying that he signed the guarantees as a result of misrepresentations by Khan but did not deal or call any evidence to deal with the sales of sugar.

7. In the supplemental guarantee dated the 19th day of January 1957 (Exhibit 2) the recital referred to the principal guarantee by stating "whereas the Respondent in consideration of the Appellants agreeing to supply Sayed Omar and Brothers of Kajiado and Kajiado European Stores of Kajiado with sugar and any other goods" and

further said "and the said principal guarantee shall thenceforth be read and construed as if the sum of Shs.45,000/00 and the name of Kajiado Provision Stores were substituted in the principal guarantee".

8. The learned trial judge held -

> "In my view by far the most difficult part of this case is to decide what actual financial liability if any has been shown to have been incurred by Sayed Omar and Brothers and or Kajiado European Stores whom I have called the 'principal debtors'. This is due to the extreme confusion in the evidence with regard to the dates of the formation, composition and dissolution of these firms and of another firm Kajiado Provision Stores mentioned in the final paragraph of Exhibit 2. The difficulty is increased by the fact that the sums said to have become due from each firm are admittedly shown, if at all, only in a composite 'Sugar Account' and not as debits against the firms individually and that the signature on an alleged acknowledgment of the debt due from Kajiado European Stores on Exhibit 9, supposed to be that of Khan, is disputed; he is now dead, and no handwriting expert had been called to make a comparison of this signature with signatures admitted to be his on other documents. Although, therefore, it might be considered illogical to consider the question of avoidance of liability before prima facie liability has been first established, I have decided to leave the first issue until last. In so doing I shall leave what I consider to be the issue, the answer to which must necessarily be the most doubtful, and answer all the other issues, whatever I decide on the first issue, and this may be of advantage to any possible appellate Court."

He then held -

(a) that there was no evidence to show that a licence to deal with sugar was necessary;

(b) that there was no proof of

misrepresentation or that Khan was the agent of the Appellants at that be kept silence on material cir umstances.

He then continued -

> "Before it is possible to decide this issue it is necessary to consider the meaning of the three documents (Exhibits 1, 2 and 3). Exhibit 1 is quite clear and is a guarantee by the defendant for payment for sugar supplied to Sayed Omar and Brothers to a limit of Shs.30,000/00. Exhibit 3 is likewise clear and is a deposit of the title deeds of the Eastleigh property by the defendant with the plaintiffs by way of Equitable Mortgage as a supplemental security to this guarantee. Exhibit 2, the supplemental guarantee, is by no means so clear. This Guarantee is stated to be supplemental to Exhibit 1 to which it refers as the 'Principal Guarantee' and states that the defendant in consideration of the plaintiffs agreeing to supply Sayed Omar & Brothers and Kajiado European Stores with sugar and any other goods agrees to be answerable to the plaintiffs for the payment 'by the said Principals for all such sugar and any other goods as the plaintiffs may from time to time supply to them to the extent of Shs.45,000/-. instead of Shs. 30,000/- as mentioned in the Principal Guarantee'. The immediate difficulty is to determine what is meant by the words 'the said Principals'. In other words, did the defendant guarantee Sayed Omar & Brothers who were, "hereinafter called 'the Principals' in Exhibit 1 or was he guaranteeing both Sayed Omar & Brothers and Kajiado European Stores who were not specifically described as 'the Principals' in Exhibit 2? The position is then further confused so far as Exhibit 2 is concerned, in the last paragraph which reads :
>
> > "And the said Principal Guarantee shall 'Thenceforth' (sic) be read and construed as if the sum of Shs.45,000/- and the name of Kajiado Provision Stores were substituted in the Principal Guarantee."

I think one's immediate reaction, without knowing anything of the formation, composition or dissolution of any of these firms, would be to say that Exhibit 2 was just badly drafted and that it was at least tolerably clear that the defendant intended to guarantee Kajiado European Stores in addition to Sayed Omar & Brothers, that they were hence-forward to be regarded as the 'Principals' and that the name of Kajiado Provision Stores was merely a clerical error and was intended to read Kajiado European Stores.

The evidence shows however that whilst the second plaintiff (Malde) professed never to have heard of a firm called Kajiado Provision Stores the witness Allahadad (PW.6) who was a partner in the firm of Sayed Omar & Brothers not only knew of such a firm but said that he was the sole proprietor and that it was a branch of Sayed Omar & Brothers. He further said that Kajiado European Stores was a continuation of Kajiado Provision Stores under another name and that it is now doing business under the name of Sheriff Provision Stores. This witness said he also started another firm called Malindi Stores when Kajiado Provision Stores ceased to function, but whether this was before the European Stores took over or was trading concurrently with it, or whether it had connection with Sayed Omar & Brothers and/or Kajiado Provision and/or European Stores, I have found it impossible to answer.

The contradictions, confusion, and complications are in some small measure shown by the following extract from the evidence of Allahadad (P.W.6.)

> "From 1955 in all business dealings we were using the name of Kajiado Provision Stores. We had to use the name of Sayed Omar & Brothers until June 1956 when we opened up Kajiado European Stores. We used both names until end of June 1956 and after this we used name of Kajiado European Stores. Until December 1956

the name of Sayed Omar continued. I made a mistake if I said we did not use name of Provision Stores or Sayed Omar after June 1956 ..... Goods delivered in name of Sayed Omar & Brothers as partners the same. The sugar was delivered to Provision Stores in name of Sayed Omar ..... After 1955 sugar was not sold by Provision Stores but I sold it under the name of Popatlal Karman & Company .... Plaintiffs did not agree to our using their money but we told them if they didn't get their money they would get interest."

The second Plaintiff (Malde) at one stage entered into an agreement (Exhibit 12) as trustee (apparently in bankruptcy) of the firm of Sayed Omar and Brothers agreeing to sell Kajiado European Stores to Khan for Shs.82,500/- but, hardly surprisingly, the sale did not go through as this witness now admits 'I sold a business and did not know whether it existed or not. Maybe it did not exist..... I received the first Shs.10,000/- but had to return it to Khan.'

In the face of this type of evidence I think it is impossible to say, as Mr. Khanna suggested in opening, that the words 'Kajiado Provision Stores' in the last paragraph of Exhibit 2 was obviously meant to read Kajiado European Stores, nor do I think that it is possible to say that the words were not a mistake but were meant to be substituted for Sayed Omar & Brothers in Exhibit 1, and I understood him to contend in closing. In my view it would be almost, if not entirely, impossible to say what is the proper construction to be placed on Exhibit 2. Fortunately, however, I do not think this affects the issue greatly since in my view whether the defendant agreed to guarantee Sayed Omar & Brothers, and/or Kajiado Provision Stores and/or Kajiado European Stores, the plaintiffs have entirely failed to show that the Shs. 45,000/- claimed, or any other sum, is now

due to them from any of these firms and that the firms are still in existence under any of these names, although the latter factor might not have been fatal to an action on the guarantee against the guarantor.

In-so-far as Sayed Omar & Brothers is concerned it is agreed that their account is cleared and nothing due. In-so-far as the Kajiado Provision Stores is concerned it is no part of the plaintiffs' case that anything is due from this firm. In-so-far as Kajiado European Stores is concerned, there is not a single witness who is able to produce a single invoice, statement, or entry in any books against this specific firm. The so-called statement, Exhibit 4, although addressed to Messrs. Sayed Omar and Brothers and Kajiado European Stores as being 'In account with' the plaintiffs, is merely extract from a composite so-called 'Sugar Account', it had been shown to contain omissions and the invoices are all to third parties as I understand the position. There is an alleged acknowledgment of indebtedness by deceased person purporting to have signed as proprietor of Kajiado European Stores in February 1958 but the signature is disputed and there is no evidence of anyone who saw him sign. The mere fact that this balance corresponds with the balance as at that date in the 'Sugar Account' is not in itself sufficient to satisfy me either that Shs.45,000/- or any sum remains due now from this firm to the plaintiffs.

My own view is that the business dealings of Sayed Omar Brothers, Kajiado Provision Stores, and Kajiado European Stores and others are, on the evidence, inextricably mixed up and it is not for this Court to unravel them for the plaintiffs to enable them to establish their claim, particularly when I suspect, as I do in this case, that there have not been a series of separate transactions by separate firms, but

that in many cases the same persons have been trading under different trade names at different times and even at the same time as and how it suited them for their own private purposes, and there would be no reasonable possibility of the guarantor knowing whether he was rendering himself liable for genuine transactions of a specific firm or guaranteeing the transactions of a number of different firms, some of whom were not envisaged by him. I even note that Allahadad effected sugar transactions in the name of the Plaintiffs, and in my view it is not beyond the realms of possibility that some of the items in Exhibit 4 may include such transactions, although I am not saying this is proved or that the plaintiffs are proved to have known of any possibility;"

and dismissed the plaint with costs.

9. The Appellants appealed to the Court of Appeal of Eastern Africa, who dismissing the appeal held that the learned trial judge had misdirected himself in saying that there was no evidence of any one who saw Khan sign Exhibit 9, whereas Devjan had given evidence that he had been such a witness. The judgment of Sir Trevor Gould continued -

"It was common ground on the appeal that the 'letter' referred to was Exhibit 9. There are, however, some peculiar features in the evidence relating to Exhibit 9. In the passage quoted Devjan said both partners (Khan and Sayed Mohamed (Allahadad)) signed; how he could say that when the document obviously had only one signature is difficult to understand. He said also that it was signed in Nairobi after the checking of the accounts. Allahadad's evidence was subject to characteristic confusion. In chief he gave the impression that Exhibit 9 was brought to Kajiado for signature. He identified Khan's signature but said he was

> not present. In cross-examination he said that he did not know where Exhibit 9 was signed but he himself was present when the accounts were checked. In view of Devjan's evidence that both partners signed after the accounts were checked it is permissible to wonder why Allahadad did not sign Exhibit 9, and why, if Khan signed it, he did so as "proprietor" and not "partner". The learned judge was fully entitled to place little reliance upon evidence of this calibre. At one stage in his judgment he characterised the evidence of all the non-professional witnesses in the case as "utterly unreliable and much more concerned with painting a picture favourable to his own case than with any strict regard for the truth". If the learned judge had said that he was not satisfied on the evidence that anyone had seen Khan sign Exhibit 9 that would have been unassailable, but he went further than that and when he said that "there is no evidence of anyone who saw him sign" that was certainly a misdirection and it now falls to be considered what (if any) importance should be attached to it."

but held that it was unlikely that the learned judge would have come to any other conclusion if he had appreciated that there was a witness who claimed to have seen Khan sign Exhibit 9 and dismissed the appeal.

10. Final Leave to appeal to Her Majesty in Council was granted by Order of the Court of Appeal of Eastern Africa on the 30th day of July 1964.

11. The Appellants humbly submit that this appeal should be allowed with costs, the Judgment and Order of the Eastern African Court of Appeal be reversed and Judgment entered for the Ap ellants for the following (among other)

R E A S O N S

1. BECAUSE the Court of Appeal and the learned trial judge treated the case solely as one of enforcing a guarantee and failed to appreciate that "the principle guarantee" made the Respondent jointly liable with the principle debtors.

2. BECAUSE the Court of Appeal were wrong in holding that it was open to the learned trial judge to disregard the admission of debt (Exhibit 9) when the signature had been identified by three witnesses.

3. BECAUSE the Court of Appeal and the learned trial judge failed to consider the claim in the plaint for an account.

4. BECAUSE if the Appellants had not established the amount due, they had established that goods were sold and some amount due and an account was an appropriate remedy.

5. BECAUSE the uncontradicted evidence of the Appellants established the claim.

THOMAS O. KELLOCK

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