

PC
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Judgment
36/1965

IN THE PRIVY COUNCIL

No. 38 of 1964

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

Between

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LAW
- 9 FEB 1966
25 RUSSELL SQUARE
LONDON, W.C.1.
80975

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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 Appellants

- and -

AHAMED DIN BUTT S/O MOHAMED BUX BUTT Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from the Judgment of the Court of Appeal for Eastern Africa at Nairobi (Quashie-Idun, P; Gould, V-P; Crawshaw, J.A.) dated the 26th day of March 1964 whereby the said Court dismissed the Appellants' appeal from the Judgment of the Supreme Court of Kenya at Nairobi (W.H. Goudie, J.) dated the 11th day of February 1963 by which Judgment the Appellants' suit for the payment by the Respondent of Shs. 45,000 and other relief under alleged guarantees of the 15th day of August 1956 and the 19th day of January 1957 and under an alleged Equitable Mortgage of the 15th day of August 1956, was dismissed.

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p.52

p.138
p.140
p.139

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2. The main question raised by this appeal is whether, even if the said alleged guarantees can be construed as imposing upon the Respondent an obligation to guarantee certain payments by any identifiable principal debtors, the Appellants ever proved that the sum claimed or any sum was owing to them by any such principal debtors under the alleged

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guarantees. Both the Courts below held that on the evidence the Appellants had failed to prove that any sum was owed to them by the principal debtors and, it is submitted, these concurrent findings of fact are fatal to the Appellants' case.

p.1.

3. The Appellants commenced THE PRESENT SUIT by Plaint dated the 28th November 1960. The two last named Appellants sued as partners and the four first named as representatives of the Estate of a deceased partner in a firm known as Popatlal Karman and Company, Merchants. The said Plaint set out the effect of two Guarantees in writing dated respectively the 15th August 1956 and the 19th January 1957, alleged to have been given by the Respondent to the Appellants. These Guarantees were subsequently produced in evidence by the Appellants as Exhibit 1 and Exhibit 2 and are as follows:-

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Exhibit 1

p.138

"To,
Messrs. Popatlal Karman
Meghji Karman and Devchand Karman of
Popatlal Karman & Company,
Nairobi.

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IN CONSIDERATION of your agreeing to supply Sayed Omer & Bros. of Kajiado in the Colony of Kenya (hereinafter called "the Principals") with sugar on credit I HEREBY AGREE with you as follows:-

(1) I shall be answerable and responsible to you for the due payment by the said Principals for all such sugar as you may from time to time supply to them but subject to the limitation that my liability under this Guarantee shall not at any time exceed the sum of Shillings Thirty thousand (Shillings 30,000/00)

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(2) This Agreement shall be a continuing guarantee to you for all debts whatsoever and whensoever contracted by the said Principals with you in respect of sugar supplied to them subject always to the above limitation.

(3) In consideration aforesaid and for better securing the said guarantee of Shillings Thirty thousand (Shillings 30,000/00) I hereby agree to mortgage by way Equitable Mortgage in your favour ALL THAT piece or parcel of land known as Plot

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Number 1113, Section III, Eastleigh, Nairobi
together with the buildings thereon.

10 (4) You are to be at liberty without notice to
me at any time and without in any way discharging
me from any liability hereunder to grant time or
other indulgence to the principals and to accept
payment from them in cash or by means of negotiable
instruments and to treat me in all respects as
though I were jointly and severally liable with them
to you instead of being merely surety for them.

DATED at Nairobi this 15th day of August 1956.

WITNESSES

Bassett,
Box 2159, NBI"

Ahmed din

Exhibit 2

20 "To,
Messrs. Popatlal Karman
Meghji Karman and Devchand Karman
Popatlal Karman & Company,
Nairobi.

p.140

30 THIS GUARANTEE is made the 19th day of January
One thousand nine hundred and fifty seven and is
supplemental to a Guarantee dated the 15th day of
August, One thousand nine hundred and fifty six
(hereinafter called the Principal Guarantee)
WHEREAS the Guarantor Ahmed Din in consideration
of Messrs. Popatlal Karman, Meghji Karman and
Devchand Karman of Popatlal Karman & Company.,
Nairobi agreeing to supply Sayed Omer & Bros of
Kajiado and Kajiado European Stores of Kajiado
with sugar and any other goods HEREBY AGREES as
follows:-

(1) I shall be answerable and responsible to you
for the due payment by the said Principals for all
such sugar and any other goods as you may from time
to time supply to them to the extent of Shillings
Forty-five thousand (Shs.45,000/-) instead of the
sum of Shillings Thirty thousand (Shs.30,000/-)
as mentioned in the Principal Guarantee.

40 (2) In consideration aforesaid I hereby mortgage

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the property being Plot No.1113 more fully described in the Principal Guarantee for the sum of Shillings Forty-five thousand (Shs.45,000/-) instead of the sum of Shillings Thirty thousand (Shs.30,000/-) mentioned in the Principal Guarantee.

And the said Principal Guarantee shall thenceforth 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.

DATED at Nairobi this 19th day of January 1957. 10

WITNESS

Bassett
Box 2159
Nairobi

Ahmed din"

p.4,1.20

4. The Plaintiff also alleged that a Memorandum of Equitable Mortgage was executed by the Appellants and the Respondent on the 15th August 1956 pursuant to paragraph 3 of the alleged Guarantee of the 15th August 1956, and was registered five days later. 20

5. The Plaintiff further alleged as follows:-

"7. The Plaintiffs duly sold and delivered goods to the said Sayed Omar and Brothers of Kajiado and the Kajiado European Stores of Kajiado for a total sum of Shs.41,054/33, which still remains unpaid.

8. There is now due to the Plaintiffs on the security of the said Guarantees and the Equitable Mortgage: 30

(a) The sum of Shs.41,054/33 as aforesaid for goods; and

(b) The sum of Shs.11,903/60 for interest thereon computed from 1st January 1958 down to and including the 31st day of October 1960, and accordingly the aggregate sum due is Shs.52,957/93.

9. The Plaintiffs duly demanded payment of the aforesaid aggregate sum of Shs.52,957/93 from the Defendant but the Defendant has refused 40

and/or neglected to pay the same, or any part thereof."

The Appellants sued the Respondent on the Guarantees for Shs.45,000/00, interest and costs and for an account, and sued also for the said sum of Shs.45,000/00 or in default of payment of that sum with interest and costs for sale of the property under the Equitable Mortgage. p.5, 1.8

10 6. The Respondent in his Defence dated the 24th March 1961 admitted that the signatures on the Guarantees and the Equitable Mortgage were his, but denied liability on the grounds of fraudulent misrepresentation or alternatively that the documents were obtained by means of keeping silence as to material circumstances. In paragraph 2 the Respondent alleged that he could not read nor write English except for being able to sign his own name in English script. There was a further defence of illegality. The Respondent also denied that the Appellants were entitled to claim against him in respect of commission on sugar or in respect of interest, and further pleaded as follows:- p.7.

30 9. Further or in the alternative and without prejudice to the foregoing, the Defendant denies that the Plaintiff supplied the alleged or any goods to Sayid Omer & Brothers or Kajiado European Stores or that they did so (if at all) under the alleged guarantees or in accordance with the terms thereof."

7. At the hearing the two last-named Appellants gave evidence, namely Meghji Karman Malde and Devjan Karman Malde.

40 8. Meghji Karman Malde testified that sometime in the latter part of 1956 Kajiado European Stores commenced business. He said that Sayed Omar and Brothers had existed for a long time, that in 1955 they made a composition in Bankruptcy and he was appointed by the Official Trustee as Trustee in the bankruptcy. During 1956 the Appellants supplied sugar to Sayed Omar and Brothers up to the end of that year. He described how he was told by Sayed Mohomed Allahadad and Abdul Khan that they were partners in the firm of Kajiado European Stores, Khan being now dead, but Allahadad being still alive, how he was not prepared to p.12,1.30 p.13,1.5

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p.13,1.16 supply that firm with sugar without the guarantee, Exhibit 1, and the Mortgage Exhibit 3, and how accordingly the arrangement was entered into.

p.13,1.29 The witness dealt with Khan. He did not suggest that he had at any time seen the Respondent, but he produced a letter to Popatlal, Karman & Co. dated p.132 27th July 1956 (Exhibit 5), dealing with arrangements for the mortgage, and purporting to be signed by the Respondent. He also said he "got" the title deeds of the property to be mortgaged. 10

p.14, 1.1 The witness went on "they also wanted a supply (Allahadad and Khan) in the name of Kajiado European Stores. I told them that some new Guaranty could be given to him". Accordingly the second guarantee p.14, 1.12 (Exhibit 2) was arranged. p.140

p.14, 1.13 The witness said that he had never supplied goods to Kajiado Provision Stores, of which he had p.16,1.22 himself never heard, and that after the 17th January 1957 until October 1957 "all sugar went to Kajiado European Stores". 20

p.15,1.12 He said that the arrangement was that the Appellants would supply the sugar at F.O.R.Kajiado. He went on "All sugar collected at Kajiado rested in our name Popatlal Karman and Company released on our instructions to Station Master to deliver to Kajiado European Stores".

p.15,1.16 The witness added that no goods were supplied to his knowledge to Sayed Omar and Brothers after the 17th July 1957.

p.14,1.45 He said that Shs.52,957/93 was owed by Kajiado European Stores for goods and sugar supplied under p.19,1.8 the Guarantees. Nothing was claimed to be owing from Sayed, Omar and Brothers. He also produced, as Exhibit p.12,1.23 4, what was described as a "statement of Account", p.133 which he said he had extracted from the Appellants' books and which purported to be an Account of the transactions relied on, but starting with a debit item of Shs.33,246/32 before the date of the guarantees viz. on 31st July 1956. This did not purport to be an exact p.12,1.25 copy of anything in the Appellants' books but was made 40 p.20,1.45 out from their books, and was not supported by any p.17,1.18 invoice or Statement of Account relating to Kajiado European Stores or Sayed Omar and Brothers. The invoices referred to in Exhibit 4 were invoiced to the Appellants from their suppliers. The witness said that they, the Appellants, had never invoiced the goods

supplied to Sayed Omar or Kajiado European Stores, and his explanation for this was that they did not sell the goods to these firms at all, but the goods remained the Appellants' property and these firms endeavoured to dispose of the goods as the Appellants' agents. He added that the Appellants did make out invoices for actual sales but that this claim was not for goods sold and delivered.

p.17,1.43 -
p.18, 1.18

p.18,11.9-12

10 9. In the course of his evidence this witness testified as follows:-

p.16, 1.42-
p.17, 1.6.

"According to letter Exhibit 5 defendant liable for supply of sugar prior to 15th August, 1956. The guarantee was an assurance. The letter is a gentleman's agreement. I consider Exhibit 5 sufficient guarantee for gentleman and business man. I hold defendant liable from 27th July, 1956. Prior to 27.7.56 debit in our books to Sayed Omar Bros."

p.18,11.23-
36.

20 "I could not say if I ever saw a cheque made out in name of European Stores. If you say no account in that name in any bank I could not deny it. I never received any letter from them. I have not seen the name on any cheque or letter-head myself. I have myself never seen anything to show there was such a firm, - only what I was told. I was owed money by Sayed Omar before statement Exhibit 4 started but not in account as no connection with this transaction. The account only deals with sugar and goods supplied under the Guarantee. I am claiming under the letter and not under the Guarantee for the first consignment".

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"I put Sayed Omar as this was the account which was running since 1956 July. Nothing due from Sayed Omar Bros.

p.19,11.11-25

Payment for 1956 Account paid. Account treated as one since it was opened.

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I have no separate account for Sayed Omar Bros. since July 1956. Since that date I have only "Sugar A/C No.3". No Dr. against Kajiado European Stores. I have nothing in books to

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show Kajiado European Stores liable nor any invoice.

In books there is an account with Kajiado European Stores opened on 15th June, 1956. Due to us from them on 31st December, 1960, was Shs.41,054/33. No mention of Sayed Omar. Shs.41,054/33 is a balance carried forward".

p.20, 11.35-37

"I have no delivery note signed by K.E. Stores. I have no receipts".

p.21, 11.14-18

"I was told at end of 1956 that business of Sayed Omar Bros. was to be closed and Kajiado European Stores only to continue. No sugar supplied to K.E. Stores in 1956 or to Sayed Omar shown in books".

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p.22, 11.8-13

"From July 1958 with consent of two partners the debit on Sugar Account was transferred to Kajiado European Stores Account Shs.54,054/33 odd. This is wrong.

This was money they had collected for us from sale of sugar and failed to pay us."

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p.23, 11.35-39

"There is no entry in books of delivery of sugar to Sayed Omar & Bros. from 15th June onwards. No delivery note. No debit against Sayed Omar in respect of transfer to European Stores of the sugar account.

p.24, 1.33

The witness referred in the course of his evidence to another account "in our books against 'Kajiado European Stores' which was outside this case". This document was referred to as Exhibit

p.25, 1.10

10, and, although it was ruled that it should not be included in evidence, the witness was allowed to go

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p.141

through it referring to each entry. Exhibit 10 purports to be a Statement of Account addressed to Kajiado European Stores in account with Popatlal Karman and Company, Nairobi", and covers a period from the 15th June 1956 to the 21st March 1957,

p.141

upon which date the amount shown by this statement to be outstanding was paid in full. The entries in Exhibit 10 do not tally with any of the entries in Exhibit 4.

p.133

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p.28

10. Devjan Karman Malde, the other of the Appellants who gave evidence, did not give any further evidence as to the amount of goods delivered to Kajiado European Stores or any other firm or as to what sum remained unpaid, but he produced a document (Exhibit 9) dated the 25th February, 1958, which purported to be an acknowledgment by A.M. Khan as Proprietor of Kajiado European Stores that this firm at that time owed Popatlal Karman and Company Shs.58,854/33 and confirming that this was "on account of sugar and other goods etc." The witness said that this letter was signed in his presence and that Syed Mohamed was present as well as Khan.

p.28,11.12-19.

20 This witness appeared to have disagreed with the former witness Maghji Karman Malde as to whether goods had been sold to Kajiado European Stores or merely supplied to them as agents of Popatlal Karman and Company.

p.28,1.27

30 11. The Appellants also called Sayed Mohamed Allahadad who was a partner in the firm of Sayed Omar and Brothers and in Kajiado European Stores. He said that the firm of Sayed Omar and Brothers was not now in existence. His evidence as to when it ceased business appears to have been contradictory. In one passage he said that this firm ceased business in 1954, but elsewhere he said that it re-started after this and closed again in June 1956 and in yet another passage he said that Sayed Omar and Brothers continued until December 1956 and took supplies of sugar from Popatlal Karman and Company between July 1956 and December 1956. He said that Kajiado European Stores took supplies of sugar from January 1957, but were not trading after October 1957. With regard to Kajiado Provision Stores, his evidence was that it was started in May 1955, although it was doing business before 1955 in some one else's name, was a branch of Sayed Omar and Brothers and had dealings with Popatlal Karman & Co., during 1956 and 1957. He added that this firm was -

p.31

p.34,1.35

p.34,1.13

p.35,1.16
p.31,1.27

p.31,11.29-32

p.33, 11.4-14

"Still existing but now under the name of Sheriff Provision Stores. The Kajiado Provision Stores lasted until June 1956. In 1956 we changed the name of Kajiado European Stores.

p.33,11.27-36

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Kajiado European Stores was a continuation of Kajiado Provision Stores under another name. We took supplies of sugar. Exhibit 11 relates to partnership of business previously Kajiado Provision Stores and name altered to Kajiado European Stores".

- p.130 Exhibit 11 was dated the 14th July 1956 and provided for a partnership between Khan, who had purchased the business on the 19th June 1956, and this witness. 10
- p.33,1.13 The witness said that Kajiado Provision Stores did not owe any money.
- p.35,1.46 He also testified that he had no documents or written evidence of any account to show what was owing from any firm in which he was interested to Popatlal Karman and Company. He said that he did not see Khan sign Exhibit 9 and was not present when it was actually signed.
- p.32, 1.36
p.36, 1.25
p.142 12. The Appellants also called the Station Master of Kajiado Station who said that he was in charge of records at the station and had looked for the records in connection with sugar railed to Popatlal Karman and Company, but these were only kept for one or two years and he had not been able to find any. 20
- p.27,1.27
- p.40-p.47. 13. The Respondent gave evidence on his own behalf, testifying that he could not speak or read English, that Mr. Khan was a clerk employed by the Respondent's advocate in 1956 and as such had other dealings with the Respondent with regard to the property alleged to have been mortgaged, and that his signatures on Exhibit 1 and Exhibit 2 and his handing over of the title deeds were procured by Khan by misrepresentation and fraud. He denied ever having signed or sent the letter Exhibit 5, and said that he had never been asked to sign a Guarantee for Sayed Omar and Brothers or for Kajiado Provision Stores or for Kajiado European Stores, and that he had never known a man called Sayed Allahadad. 30
- p.52 14. On the 11th February, 1963, W.H. Goudie, J. gave judgment dismissing the plaint with costs. 40
- p.56, 1.24
p.57,1.18 The learned judge rejected the Respondent's plea of illegality, and also the plea of fraudulent misrepresentation and fraudulent silence on material

circumstances, saying with regard to the evidence on the latter pleas "I accept it as unproved, but as a possibility, that Khan may not have told the Defendant in detail just what the documents were, and that he may, even possibly have misled the Defendant as to the contents of the documents. But in my view there is no sufficiently reliable evidence on which I could properly hold that a specific misrepresentation was made by Khan to the Defendant which induced him to sign the documents".

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15. The question as to whether any money had been shown to have been owing by Sayed Omar and Brothers or Kajiado European Stores to the Appellants was referred to by the learned judge as "by far the most difficult part of this case", the difficulty being "due to the extreme confusion in the evidence with regard to the dates in the formation, composition and dissolution of these firms and of another firm Kajiado Provision Stores mentioned in the final paragraph of Exhibit 2".

The learned judge first dealt with the question of the construction of Exhibit 1 and 2, expressing himself as follows:-

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"This guarantee [Exhibit 2] 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

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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."

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The learned judge then considered the evidence relating to the history of the various firms and concluded -

p.60, l.47
~p.62, l.14

"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."

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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 has 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 such possibility".

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- p.67
pp.106-123
16. The Appellants appealed by Memorandum of Appeal dated the 18th day of April 1963 to the Court of Appeal for Eastern Africa at Nairobi, which on the 26th March 1964 dismissed the said appeal with costs.
- p.106
p.113, 1.1
17. The principal judgment was delivered by Gould V.P., who reviewed the evidence relied upon by the Appellants as establishing deliveries of goods by the Appellants' firm and monies owing to them and concluded that the Appellants had failed to prove the deliveries that they alleged and that monies were owing as alleged. The learned judge referred to Exhibit 4 and said about it -
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- p.113,11.23-
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- "Unfortunately for the weight of this testimony there is nothing to support it and it is in essence no more than a sworn assertion that these transactions took place. As the learned judge pointed out there were no invoices - he said that he understood they were "all to third parties" but the evidence is clear I think that the invoice numbers in Exhibit 4 related to the invoices of the firm supplying Popatlal Karman & Company. The explanation of the lack of invoices was said to be that the sugar was supplied to Kajiado European Stores on some sort of sale or return or agency basis - an unconvincing reason in relation to any commercial firm operating on business-like methods. A stationmaster from Kajiado was called to say that he had looked for records in relation to sugar railed to Popatlal Karman & Co. but could find none, as records were only retained for one or two years. This would imply that the directions for delivery from the station were in writing but no copy of any has been produced. No orders for sugar nor any correspondence relating to orders have been produced. Exhibit 4 was made up from a composite sugar account in Popatlal Karman's books. No statement of account in relation to either of the two firms said to have been supplied was produced".
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- p.115, 1.15
18. The learned judge referred also to Exhibit 9 and the contention on behalf of the Appellants that the trial judge had misdirected himself in saying that there was no evidence of any one who saw Khan sign this document, whereas there was the evidence of Devjan Karman Malde that he had seen Khan signing.
- p.118,1.14

The learned judge held that Exhibit 9 was admissible in evidence but that its weight was very slight, referring to certain features in the evidence relating to the document in the following passage -

p.119,1.21

10 "There are, however, some peculiar features in the evidence relating to Exhibit 9. In the passage quoted Devjan said both partners (Khan and Sayed Mahomed (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 20 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".

p.116,11.11-
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30 The learned judge concluded that no miscarriage of justice had been caused by the judge's error in directing himself as to the evidence relating to Exhibit 9. Although this document was admissible in evidence -

p.119, 1.47

40 "the weight must be less than that of the evidence, of Allahadad who could give sworn evidence and be cross-examined. It does nothing to clear up the doubts which influenced the learned judge in relation to the actual supply of goods to the various firms which had existed; this is implicit in what the learned judge himself said i.e. that the mere fact that the balance in Exhibit 9 corresponded with the balance in the sugar account was not in itself sufficient to satisfy him that the money was owing by Kajiado European Stores to the appellants. It does no more than did the

p.119, 11.21
- 47

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evidence of Allahadad, to compensate for the absence of invoices, delivery orders, receipts for goods, orders for the correspondence in relation to goods. It must be remembered that it was insufficient for the appellants to prove that some money may have been owing or even that something was owing if they could not prove what the something was; the respondent was entitled to prove of an exact amount or at least of a minimum amount.

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Evidence of the creditor and of the principal debtor would normally be able to discharge this burden but the learned judge had good reason in the present case for refusing to accept what was before him as sufficient"

p.121
p.122

Concurring judgments were delivered by Quashie-Idun P. and Crawshaw J.A.

p.124

19. The appellants were given Final Leave to appeal to the Judicial Committee of the Privy Council by the Court of Appeal for Eastern Africa at Nairobi on the 30th July 1964.

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p.138
p.140

20. It is respectfully submitted that it is not possible to spell out from the alleged guarantees of the 15th August 1956 and the 19th January 1957 the precise nature of the obligation alleged to have been undertaken by the Respondent, and in particular the identity of the principal debtor or debtors payment by who, it was the Appellants' case was guaranteed by the Respondent.

21. It is further submitted that if it is possible to construe the said alleged guarantees so as to impose an obligation on the part of the Respondent to guarantee payments by any identifiable principal debtor, such principal debtor cannot on any acceptable construction of the documents, be Kajiado European Stores. However, Kajiado European Stores is the only firm which the evidence of the Appellants was directed to show owed the Appellants money. Sayed Omar and Brothers, who are "the Principals" in the said guarantees, admittedly owed the Appellants nothing, and it was not part of the Appellants' case that any goods were supplied to or any money owed by Kajiado European Stores.

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22. Upon any view, it is submitted, and even if the alleged guarantees operated so as to make the Respondent liable to pay monies owed by Kajiado

European Stores in respect of the supply of goods to them by the Appellants, such liability would not extend to payment in respect of goods supplied before the date of the 2nd guarantee viz. 19th January 1957, or alternatively before the date of the first guarantee, viz. the 15th August 1956. The evidence showed that Kajiado European Stores opened an account with the Appellants on the 15th June 1956, that the said Khan purchased this firm on the 19th June 1956 and took Sayed Mohamed Allahadad as his partner on the 14th July 1956. The Respondent submits therefore that there is nothing to show that the principal debt, if there was any, was not incurred by Kajiado European Stores before the date that the guarantee of the 19th January 1957 or indeed that of the 15th August 1956 came into existence.

p.140
p.138

p.19,1.21

p.33, 1.33
p.130

23. The Respondent further respectfully submits that, if the said guarantees can be construed so as to impose the obligation of guarantor upon the Respondent, then upon a proper construction the only thing guaranteed was payment for goods sold by the Appellants to the principal debtor or debtors. The evidence of the 2nd Appellant who was the principal witness for the Appellants, viz, Meghji Karman Malde, was explicit, that no goods were ever sold by the Appellants to Sayed Omar and Brothers, Kajiado European Stores or Kajiado Provision Stores, but that any indebtedness by any of these firms to the Appellant was in respect of a wholly different sort of transaction.

pp.17-18,
20,22

24. Upon the evidence, it is submitted, in any event, the Appellants failed to prove the supply of goods to or the owing of money by Kajiado European Stores. In face of the inconsistencies and contradictions in the Appellants' evidence and in the absence of proper or contemporaneous documents and accounts showing delivery of goods and monies owing therefor, the Courts below rightly rejected the Appellants' claim as failing in proof.

25. The Respondent humbly submits that this appeal should be dismissed with costs for the following (among other)

R E A S O N S

1. BECAUSE there are concurrent findings of fact which are fatal to the Appellants' case.

Record

2. BECAUSE the Courts below rightly concluded on the evidence that the Appellants had failed to prove that goods were supplied to Kajiado European Stores or that Kajiado European Stores owed the Appellants anything in respect of the supply of goods.

3. BECAUSE it is impossible to spell out from the said alleged guarantees the precise nature of the obligation alleged to have been imposed upon the Respondent, or the identity of the principal debtor or debtors. 10

4. BECAUSE on any view the Respondent did not by the said alleged guarantees guarantee payment by Kajiado European Stores.

5. BECAUSE if there was any indebtedness of Kajiado European Stores to the Appellants, there was nothing to show that this did not arise before the 19th January 1957, or alternatively before the 15th August 1956.

6. BECAUSE if the Respondent was under any liability under the said alleged guarantees as guarantor, all that he guaranteed was payment for goods sold by the Appellants and the evidence of the Appellants' principal witness was that no goods were at any time sold by the Appellants to Kajiado European Stores or any associated firm. 20

7. BECAUSE the Judgments of the Courts below were right for the reasons therein stated and should be affirmed. 30

E.F.N. GRATIAEN

MONTAGUE SOLOMON

No. 38 of 1964

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL FOR
EASTERN AFRICA AT NAIROBI

Between

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

Appellants

- and -

AHAMED DIN BUTT S/O
MOHAMED BUX BUTT

Respondent

CASE FOR THE RESPONDENT

M. KEAN,
44 Welbeck Street,
London W.1.
Solicitor for the Respondent