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of assessment, unless of course the statute suggests a contrary legislative intent; and that place is obviously Pathankot.

Dua, J.

For the reasons given above, I dismiss this appeal with costs.

B.R.T.

APPELLATE CIVIL

Before K. L. Gosain and Harbans Singh, JJ.

BHARAT NIDHI BANK Ltd., KHANNA,—Appellant.

versus

FIRM M/s RAJ KUMAR & Co., JULLUNDUR CITY AND OTHERS,—*Respondents.*

Regular First Appeal No. 96 of 1950.

1959

May 1st

Contract Act (IX of 1872)—Section 133—Guarantee broker's contract fixing the amount of advances to be made by the creditor to the principal debtor—Creditor exceeding that limit and varying security—New documents taken from the principal debtor—Guarantee broker's liability—Whether discharged.

Held, that the mere fact that the Bank for its own procedural purposes took a writing from the principal debtor authorising it to close the previous account and open a new account would not make any difference. The agreement of the guarantee brokers was for guaranteeing the advances to be made from time to time up to a limit of Rs. 80,000 and not for guaranteeing any specific pre-existing debt and consequently the closing of one account and opening of another would not materially affect the contract of guarantee. Similarly, the taking of collateral documents, like a pronote and a writing, dispensing with presentation etc., would, in no way, materially affect the contract entered into by the guarantee brokers.

Held, that the agreement of guarantee brokers taken as a whole did not put any limit on the Bank to advance

more than Rs. 80,000 but only limited the liability of the guarantee brokers. Furthermore, it limited the liability of the guarantee brokers to the advances made against cotton and grains and this general guarantee was not bound with any specific pre-existing contract between the principal debtor and the Bank, and could not be affected so far as it went by the latter agreeing to make larger advances to the principal debtor against these very commodities or without any security whatever, or against security of commodities other than cotton and grains.

First appeal from the decree of Shri Hans Raj, Sub-Judge, Ist Class, Ludhiana, dated 11th March, 1950, passing a decree for Rs. 33,250-13-6 with costs in plaintiff's favour against defendants Nos. 1 to 5 and dismissing the suit against defendants Nos. 6 to 8 with costs.

A. M. SURI and P. C. JAIN, and SHAMIR CHAND, for *Appellants.*

RAJINDAR SACHAR and HAR PRASHAD, *for Respondents.*

ORDER

HARBANS SINGH, J.—The suit out of which the present appeal has arisen was filed by Bharat Bank Limited in the following circumstances : Harbans Singh, J.

By an agreement dated the 8th February, 1945, firm M/s Raj Kumar and Co., defendant No. 6 (consisting of Raj Kumar, Shiv Chand and Budh Ram, partners, defendants Nos. 7 to 9) agreed to act as guarantee brokers of the plaintiff for various places including Khanna and Ludhiana. Clause 5 of this agreement, Exhibit P. 6, (printed at page 38) provided as follows :—

> "5. That the guarantee brokers shall be responsible to the Bank for due fulfilment and performance of all contracts and engagements guaranteed under this agreement and shall indemnify the

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Bank against all losses which may arise out of the breach thereof. A letter of confirmation from the said guarantee brokers that a particular transaction is covered by these presents shall be conclusive evidence in this respect."

According to clause 13 of the agreement whereever in Mandi business concerning advances against grains, seeds, cotton etc., the appointment of a godown keeper "is necessary the guarantee brokers shall nominate such godown keeper with the approval of the Bank. The salary of such godown keeper shall be fixed and paid by the Bank but he shall be deemed an agent of the guarantee brokers who will be responsible for all losses or damages which may be incurred by the Bank by reason of any act or default on the part of such godown keeper in the performance of his duties as such." Under clause 12 of the said agreement the guarantee brokers were entitled to one-twelfth of the interest on all advances under their guarantee and 20 per cent of the commission covered on all bills guaranteed by them.

On 24th of July, 1945, defendant No. 6 nominated Budh Ram as a godown keeper under clause 13 of the agreement for Khanna Mandi. On 1st of May, 1946, the guarantee brokers,—*vide* letter Exhibit P. 9 (printed at page 54) confirmed the cash credit limit of firm Mehar Chand-Hans Raj (hereinafter referred to as the principal debtor) to the extent of Rs. 80,000 against the security of cotton and grains. On 1st of June, 1946, the debit balance in this cash credit account stood at Rs. 1,21,518-1-3. On that day the Bank got five documents executed from the principal debtor. Exhibit P. 1, a pronote for a sum of Rs. 1,25,000,

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Exhibit P. 2, a continuing security bond for advances up to a cash credit limit of Rs. 1,25,000, Exhibit P. 3, a letter dispensing with the presentation of the pronote, Exhibit P. 1, Exhibit P. 4, an agreement to pledge goods in the nature of cotton in fully pressed bales, grains and seeds loose and/or in bags stored and/or to be stored at Khanna to secure a 'demand cash credit' up to Rs. 1,25,000 and Exhibit P. 5, a letter addressed to the Bank authorising them to adjust the Bank's old account and to carry the balance to the fresh account in respect of which fresh documents had been executed that day. In pursuance of this arrangement advances were made by the Bank and repayments made by the principal debtor from time to time and on 1st of April, 1947, the following items of goods were pledged with the Bank stored in different godowns at Khanna—

(i) 175 bales of cotton.

(ii) 320 bags of groundnuts.

(iii) 350 bales of cotton.

Budh Ram godown keeper was in charge of these and retained the goods on behalf of the Bank. He effected deliveries to the principal debtor only against delivery orders issued by the Bank authorities. It appears that on 21st of April, 1947, Budh Ram gave the keys of the godowns, in which bales of cotton and bags of groundnuts were stored to Ram Swaroop, defendant No. 4, one of the coparceners of the principal debtor, who removed 175 bales of cotton and 320 bags of groundnuts without any authority from the Bank. That shortage was noticed on 26th of April, 1947, when the manager of the Bank went to Khanna for inspection. In view of this shortage in the stock the Bank gave notice to the principal debtor and failing to receive a proper response the Bank sold

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the remaining stock of the goods and credited the account with the sale proceeds thereof. The account finally showed a debit balance of Rs. 31,993-7-0. The guarantee brokers were duly informed that due to the negligence or collusion of the godown keeper Budh Ram with the principal debtor, 175 bales of cotton and 320 bags of groundnuts pledged with the Bank had been removed and that up to 31st of May, 1948, Rs. 31,993-7-0 were due to the Bank from the principal debtor, which the guarantee brokers were liable to make good to the Bank. On the failure of the guarantee brokers or the principal debtor to pay, the suit out of which the present appeal has arisen was filed on 31st of January, 1949, for the recovery of Rs. 33,250-13-6. The suit was decreed as against the principal debtor and we are, therefore, not concerned with the pleas taken on behalf of firm Mehar Chand-Hans Raj. On behalf of the guarantee brokers it was contended that the godown keeper was the nominee of the Bank. They further took up the position that in view of clause 7 of the agreement the suit against them was premature. Manohar Lal, Mukhtiar of the guarantee brokers firm made a statement before the issues were framed, on 12th of August, 1949, as follows:—

> "I admit Exhibit P. 6 to be a correct copy of the agreement which defendants 6 to 8 made with the plaintiff. Defendants 6 to 8, however, are not responsible for the advances which were not made against cotton and grains. Besides this the loss occurred due to the negligence of the bank people and as such defendants 6 to 8 are not liable. We admit the correctness of Exhibits P. 7, P. 8 and P. 9."

As a result of these pleadings the following issues were framed :—

(1) Did defendant No. 1 get 175 bales of cotton from the plaintiff through the godown keeper ? If so, when ?

(2) If issue No. 1 be not proved, what amount is defendant No. 1 entitled to deduct on this account ?

(3) Are the guarantee brokers not liable on account of the negligence and collusion of the servants of the plaintiff in their dealings with defendant No. 1 ?

(4) Was the liability of defendants Nos. 6 to 8 limited to advances against cotton and grain ?

(5) If issue No. 4 be proved, to what extent are defendants Nos. 6 to 8 liable ?

(6) Is the suit against defendants 6 to 8 premature by virtue of para 7 of the agreement ?

(7) If issue No. 1 be proved, what is the relative responsibility of the plaintiff and defendants Nos. 6 to 8 with regard to these 175 bales ?

(8) Relief.

On issue No. 1 it was held that 175 bales of cotton were removed from the godowns by the principal debtor without the Bank's consent. On issue No. 2 it was held that the value of 175 bales of cotton and 320 bags of groundnuts was Rs. 33,985. Issue No. 3 was not dealt with by the learned trial Court and on issues Nos. 4 and 5 it was held that as a

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result of the contract between the principal debtor and the Bank entered into on 1st of June, 1946, the guarantee brokers were relieved altogether from their undertaking guaranteeing the cash credit account as per their letter dated the 1st May, 1946, and that inasmuch as the advances against 175 bales of cotton and 320 bales of groundnuts, which are now in dispute, were made after the 1st of June, 1946, the guarantee brokers are not at all liable. Issue No. 6 was found in favour of the plaintiff Bank because the present suit was filed under clause 13 of the agreement under which the guarantee brokers were liable for any loss to the Bank due to the negligence or default on the part of the godown keeper. On issue No. 7 it was held that if defendants Nos. 6 to 8 were to be held liable, their liability will be to the extent of Rs. 25,479, the amount advanced by the plaintiff Bank to the defendants Nos. 1 to 5 against the security of 175 bales of cotton and 320 bags of groundnuts, as stated by the learned counsel for the plaintiff in the trial Court in his statement recorded on the date of the judgment. In view of the finding on issues Nos. 4 and 5 the suit was dismissed as against defendants Nos. 6 to 8, but was decreed against defendants Nos. 1 to 5. Defendant No. 9 Budh Ram was the godown keeper against whom no relief was claimed. The Bank has filed this appeal.

The main point urged by the learned counsel for the appellant was that defendants Nos. 6 to 8 did not take up the plea in their written statement that there was any new contract not covered by the guarantee or that the original contract had been varied so materially that the guarantee brokers would stand relieved of their guarantee and that consequently there was no specific issue on this point and that the learned trial Court was not justified either in allowing any evidence to be

brought on the record or, in any case, giving any finding, in this respect. In the written statement the only plea taken by defendants Nos. 6 to 8 was that the godown keeper was not their agent and that the goods were lost due to the acts or negligence of the Bank's employees. Nothing was said with regard to any variation of the original contract between the Bank and the principal debtor. In the statement of Manohar Lal Mukhtiar, before issues, as given above, apart from the above-mentioned plea of the loss having occurred due to the negligence of the Bank's employees, it was pleaded that defendants Nos. 6 to 8 were not responsible for the advances which were not made against cotton and grains. It was urged by the learned counsel for the appellant that in view of this plea the only point that could be taken into consideration by the learned trial Court was that the advances made by the Bank against the security of groundnuts would be excluded so far as the guarantee brokers were concerned. On the other hand, the learned counsel appearing for the guarantee brokers argued that the factum of a new contract having come into existence, which was materially different from the contract on the basis of which the guarantee brokers stood surety, was obvious from the pleadings in the plaint itself. To begin with, the contract was to make advances up to the extent of Rs. 80,000 as against cotton and grains. The subsequent contract was for Rs. 1,25,000 and against the commodities including groundnuts and that this was, on the face of it, a contract different from the one for which the guarantee brokers had stood surety. The learned counsel for the appellant, however, urged that if the plea had been specifically taken and put in issue, the Bank would have been able to bring on the record, material to show that there was no material alteration and that, even if there was any

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new contract, the guarantee brokers derived benefit under the same and are, therefore, estopped from taking up this plea.

Having given our best consideration to the case, we feel that, though it would not be proper to shut out defendants Nos. 6 to 8 from taking up this plea of discharge of their liability on account of the variation of the contract yet the Bank should have an opportunity to produce such evidence as it may deem fit in this connection. We, therefore, set down the following issues :—

(1) Has there been such material variation of the original contract entered into between the plaintiff Bank and defendants Nos. 1 to 5, as would result in the discharge of the liability undertaken by defendants Nos. 6 to 8 as guarantee brokers, for a cash credit account to the extent of Rs. 80,000 as per their letter Exhibit P. 4 ?

(2) Did the defendants Nos. 6 to 8 receive benefits under the new contract and are they, for this reason, estopped from taking the plea as above ?

The case is remanded to the Court of the Senior Sub-Judge under Order 41, rule 25, Civil Procedure Code. The parties are directed to appear in the Court of the Senior Sub-Judge. Ludhiana, on 1st of November, 1958, who will give an opportunity to the parties to lead such evidence as they might deem fit and be considered relevant, and the learned Senior Sub-Judge will, after hearing arguments, submit a report to this Court within three months of the date of the appearance of the parties before him. On receipt of the report, the parties' counsel will be given notice who will be entitled

to file objections within a week of the receipt of the notice whereafter the case will be set down for hearing finally.

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HARBANS SINGH, J.—The facts giving rise to this appeal have been stated by us in our order, dated the 1st of October, 1958, and the present order will be read in continuation of the same. For the reason given in that order the following two issues were settled and the case was remanded to the Court of the Senior Subordinate Judge, Ludhiana, under Order 41, rule 25, Civil Procedure Code, to enable the parties to lead evidence on these issues and for a report to be submitted to this Court:—

(1) Has there been such material variation of the original contract entered into between the plantiff-Bank and defendants Nos. 1 to 5, as would result in the discharge of the liability undertaken by defendants Nos. 6 to 8 as guarantee brokers for a cash credit account to the extent of Rs. 80,000 as per their letter Exhibit P.4?

(2) Did defendants Nos. 6 to 8 receive benefits under the new contract and are they, for this reason, estopped from taking the plea as above? Only the Counsel for the appellant put in objections against the report submitted by the Senior Subordinate Judge.

On 1st of May, 1946, the guarantee brokers confirmed the cash credit limit of the firm, Mehar Chand-Hans Raj, principal debtor to the extent of Rs. 80,000 in the following terms,—*vide* Exhibit P.9:—

"I take this opportunity of confirming, as required by clause 5 of our agreement, dated 8th of February, 1945, that

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the cash credit limit of Rs. eighty thousand to Messrs Mehar Chand-Hans Raj at Khanna against the pledge of cotton and grains security is covered by the aforesaid agreement."

Thereafter the Bank entered into another agreement with the principal debtor on 1st of June, 1946, by which the cash credit limit was raised to Rs. 1,25,000 against the pledge of oil-seeds in addition to cotton and grains which were covered by the previous agreement. The Bank further got five documents executed from the principal debtor as already detailed in the remand order. It was urged in the Court below on behalf of the guarantee brokers that the previous contract, the performance of which they had undertaken to guarantee, had been materially varied in three particulars (1) the old account was closed and the balance was brought forward to a naw account opened with the Bank, (2) the limit was raised from Rs. 80,000 to Rs. 1,25,000 and (3) oil-seeds were added as a commodity against which advances could be made, which item of commodity, was not included in the earlier agreement.

The learned Senior Subordinate Judge in his report came to the conclusion, that the opening of a new account and the raising of the limit of advances to be made to the principal debtor did not materially alter the original contract of guarantee but that the alteration as to the nature of the commodities against which advances were to be made, was a material one because incident of fluctuation in the market rates may be different in case of different commodities. The learned

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Senior Subordinate Judge, however, observed as follows:—

> "If the advances against different commodities could be separated the sureties might still be liable for those against commodities agreed to by them though not for others. My attention was, however, not invited to any material upon the record to show that they were so severable though clubbed together under one count."

On issue No. 2, it was held by the learned Senior Subordinate Judge that the material brought on the record clearly indicated that the guarantee brokers did receive the commission even after 1st of June, 1946, relating to the advances made to the principal debtor ; but it has not been established that they could know that the commission paid to them was in respect of advances exceeding Rs. 80,000 or in respect of advances made against commodities other than cotton and grains and that the mere fact that the guarantee brokers have received commission in respect of advances beyond the amount guaranteed by them without any knowledge would not operate as ratification of the subsequent changed contract.

We shall deal with issue No. 2 first. The learned counsel for the Bank could not indicate from the record that while receiving commission the guarantee brokers did come to know either that the cash credit limit had been raised or that the advances were being made against commodities other than cotton and grains. It is, however, clear that the commission received by the guarantee brokers after the month of September, 1946, did include the commission in respect of the advances made to the principal debtor. The learned counsel

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for the guarantee brokers, however, urged that the documents on the record did not indicate that they have ever received commission after the 1st of June, 1946, in respect of the advances to the principal debtor. He admitted that a sum of Rs. 17,024 was received from the Bank but urged that no details were actually sent to the guarantee brokers. The Manager of the Bank P.W. 5 had clearly stated in his evidence that with the remittances, details of the accounts, in respect of which the payments were sent, were also supplied. Furthermore, it does not stand to reason that though the guarantee brokers had guaranteed a a number of agreements for advances, they would not either keep the details of the advances with them or get the details from the Bank and would feel satisfied on just receiving whatever lump sum amount was sent to them by the Bank. We therefore, agree with the finding of the learned trial Court that the guarantee-brokers did receive commission in respect of the advances made to the principal debtor. This would show that even after the 1st of June, 1946, they treated their contract of guarantee, as evidenced by Exhibit P. 9, as still subsisting and in force.

With regard to issue No. 1, the mere fact that the Bank for its own procedural purposes took a writing from the principal debtor authorising them to close the previous account and open a new account would not make any difference. It is clear that before the execution of the documents, Exhibit P. 1 to P. 5. the actual amount outstanding against the firm was Rs. 1,21,518-1-3 (Exhibit P. 11, printed at page 43 of the paper book) and all that was done was that this amount was transferred in the books of account to the new account in the name of the principal debtor and there was no actual payment made resulting in

the final discharge of the previous debt. The agreement of the guarantee brokers was for guaranteeing the advances to be made from time to time upto a limit of Rs. 80,000 and not for guaranteeing any specific pre-existing debt and consequently the closing of one account and opening of another wuld not materially affect the contract of guarantee. Similarly, the taking of collateral documents, like a pronote and a writing, dispensing with presentation, etc. would, in no way materially affect the contract entered into by the guarantee brokers.

So far as the increase in the cash credit limit is concerned it was vehemently argued by the learned counsel for the guarantee brokers that it made a very material change in the contract of guarantee and that the Bank could not increase the burden on the guarantee brokers by advancing to the principal debtor more than Rs. 80,000 without their consent. This argument, however, has no force. The liability of the guarantee brokers does not extend beyond the limit of Rs. 80,000 and, if the Bank advances to the principal debtor any amount exceeding this limit, the Bank does so at its own risk and the excess of the amount is not covered by the guarantee. It could not be denied that the mere fact that the guarantee brokers had guaranteed loans up to Rs. 80,000 would not prevent the Bank from making other advances, in a separate account, with or without security to the principal debtor. If the guarantee brokers wanted to make sure that the parties introduced by them or for whom they had given a guarantee should not, under any circumstances, be advanced money exceeding the guarantee limit, such a provision should have been expressly made by the guarantee brokers with the Bank. In the absence of any such stipulation the Bank is obviously at liberty to advance any

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amount that it may deem fit though the guarantee brokers would indemnify the Bank, in case of loss, only in respect of advances not exceeding the amount guaranteed by them.

So far as the subsequent agreement allowed the advances to be made even as against oil-seeds, such advances were not covered by the guarantee, Exhibit P. 9, given by the guarantee brokers and it was conceded on behalf of the Bank that to the extent of the advances made against ground-nuts, the guarantee brokers are not liable. The question, however, is whether the mere fact that the Bank, in the subsequent agreement, undertook to, and did actually, advance money against the security of oil-seeds as well would render the original agreement of the guarantee brokers guaranteeing advances against cotton and grains wholly inoperative. As already discussed, the Bank was at liberty to make advances in a separate account to the principal debtor apart from the advances covered by the agreement of the guarantee brokers. If the Bank made advances against a commodity not covered by the guarantee brokers' undertaking, to that extent, the advances must be treated to be in a separate account and would not stand guaranteed by the guarantee brokers. Such advances, however, cannot, in any way, be taken to affect their guarantee *qua* the advances made against cotton and grains up to the limit of Rs. 80,000. On behalf of the guarantee brokers, however, it was urged that by increasing the cash credit limit from Rs. 80,000 to Rs. 1,25,000 and by allowing advances against oil-seeds in addition to cotton and grains, the original contract between the principal debtor and the Bank, which had been guaranteed by the guarantee brokers, had been materially changed and that the guarantee brokers, in fact, had never guaranteed the new

contract which had came into being and that the guarantee brokers were the sole judges of the fact whether alteration made in the original contract had the effect of relieving them from the guarantee. In support of this arguement, the learned counsel relied on *Keshavlal* v. *Pratapsingh* (1). In that case defendant No. 1 was in financial difficulties and his four properties were mortgaged to different persons. Defendants Nos. 2 and 3, who were the wife's brothers of defendant No. 1, desired to help the latter in bringing the scattered mortgages into the hands of a single party. A contract was entered into between the plaintiffs and defendant No. 1, according to which the plaintiffs were to lend to defendant No. 1 a sum of Rs. 1,25,000. This sum was, however, not to be paid in cash to defendant No. 1, but was to be advanced to him for redeeming the four properties which were the subject-matter of different mortgages, and these four properties were to be given over to the plaintiffs by way of security for the amount to be advanced by them. Defendants Nos. 2 and 3 stood surities for the performance of this contract and to pay the amount advanced by the plaintiffs under this contract if defendant No. 1 failed to do so. Later on, without reference to defendants Nos.2 and 3, the plaintiffs and defendants No. 1 entered into an agreement by which one of the four properties was allowed to be sold to the original mortgagee and a total sum of Rs. 1,00,000 was advanced against the security of the other three properties which had been redeemed. A Division Bench of the Bombay High Court held that the contract which was ultimately entered into between the plaintiffs and defendant No. 1, i.e. advancing Rs. 1,00,000 on the security of three of the properties, was not a contract for the performance of which defendants Nos. 2 and 3 stood sureties and that this contract

(1) A.I.R. 1932 Bom. 168

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was substantially different from the original contract. At page 171 of the report it was observed as under :—

> "It is not merely that the sum advanced has fallen short of the amount agreed to be advanced. Instead of the mortgagor being enabled to redeem four properties, he has been enabled to redeem only three of them. It is conceivable that the sureties were induced to undertake their burden out of sentimental consideration for the preservation of a particular piece of property in the family. It is possible to imagine circumstances in which a surety who would be willing to undertake a burden for the sake of preserving the entire property of his relative might not desire to undertake the same burden for the sake of preserving only a portion of it."

The sureties were, therefore, held not to be liable under the new contract. The matter went to the Privy Council and the case is reported as *Pratapsingh* v. *Keshavlal* (1), The relevant portion of headnote (a) runs as under :—

> "The surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety has assented to the new terms there is nothing to which he can be bound, for the final obligation of the

(1) A.I.R. 1935 P.C. 21

> principal debtor will be something different from the obligation which the surety guaranteed."

Their Lordships of the Privy Council, however, made, it clear that the application of the principle above-enunciated depended upon the correct analysis of the contract in fact made and observed as follows :—

> "Guarantees frequently relates to obligations without special reference to any specific contract between the creditor and the principal debtor. In such a case the doctrine referred to have a very limited operation. In the present case, as in many others, the contract between the creditor and the principal debtor was the basis of the surety bond. It was shown to the sureties before the bond was executed and is referred to in the body of the document."

We feel that these observation of their Lordships of the Privy Council give a real clue to the distinction between the instant case and the reported case. Here, as already indicated, the guarantee given by the guarantee brokers was of a general nature. The relevant portion of Exhibit P. 9 goes on to say that the guarantee brokers confirm that "the cash credit limit of Rs. 80,000 to Messrs Mehar Chand Hans Raj against the pledge of cotton and grains" is guaranteed in terms of their agreement, dated 8th of February, 1945, with the Bank. In other words, this would mean that the advances already made, or to be made, by the Bank from time to time to the principal debtor against cotton and grains were guaranteed by the guarantee brokers to the extent of Rs. 80,000 on payment of certain commission, etc. This guarantee, as already

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discussed, was not for the performance of any specific agreement that had already been entered into between the principal debtor and the Bank. It was in the nature of a continuing guarantee for advances made to the principal debtor to the extent indicated.

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The facts of the present case are similar to those of the cases reported as *Hajee Moosa* v. *Abdul Kareem* (1) and *Suwalal* v. *Fazle Hussain* (2), and are distinguishable from the facts of *Pratapsingh's case* (3), and of *Holme* v. *Brunskill* (4), which was referred to in the above mentioned case of *Pratap singh* (3), and which was also relied upon by the learned counsel for the guarantee brokers before us. In *Holme's case* (4), lease of certain hill pastures was given together with a flock of 700 sheep for a period of one year on payment of certain annual rent and the surety had guaranteed the return of the flock in its original condition and had undertaken to indemnify the lessor for any deterioration in the flock. Later, by an agreement between the landlord and the lessee, possession of a portion of the pasture land was returned to the landlord in consideration of reduction of rent to the extent of £10 a year. At that time of the return of the flock, the same was found to be in a deteriorated condition and the question was whether the surety was liable to make good the loss or not. The evidence led, indicated that the Bog Field, which had been returned to the landlord, was used occassionally for pasturing sheep to a certain extent and was also used during the lambing season and that "the giving up of the Bog Field would make an appreciable difference to the tenant in the spring, and that it might make a

(1) A.I.R. 1937 Mad. 360
(2) A.I.R. 1939 Nag. 31
(3) A.I.R. 1935 P.C. 21
(4) (1877) 3 Q.B.D. 495

difference of perhaps fifteen in the number of the sheep that the farm would carry, and that it would compel the tenant to find hay either for the cattle or the sheep elsewhere." The question having been left to the jury, it was found that the return of the Bog Field would not make any material difference in the capacity of the lessee to do the things mentioned in the original agreement. The view taken by Cotton, Lord Justice, was that—

> "In the present case, although the Bog Field contained seven acres only, yet it cannot be said to be evident that the surrender of it could not prejudically affect the surety. Some of the witnesses for the plaintiff admitted that it was occasionally used for pasturing, that its loss would be appreciable in the spring and that it might make a difference of fifteen in the number of the sheep which the farm would carry."

It was further held that the guarantee was to deliver up "the flock of sheep therein referred to at the termination of the tenancy of the Riggindale Farm, which, in our opinion, must mean Riggindale Farm as then demised to George Brunskill, and the bond certainly implied that he should continue to hold the farm as then demised till the flock was given up." Brett, L. J., though he disagreed with the other two Lord Justices on the question whether the matter should have been left to the jury or not, expressed the law at page 508 of the report in the following terms:—

> "The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract

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the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

In view of finding of the jury that the alterations was immaterial, Brett, L. J., held that the surety was not released.

In *Hajee Moosa's case* (1), the surety was regarding supply of goods and the relevant portion of the undertaking was as followings :—

> "Please supply the bearer * * *
> Goods in current account up to the extent of Rs. 250 and have debit and credit transactions in his name. For the said amount, I shall be surety for a period of one year".

During the period in question goods were supplied on four occasions. On two such occasions, goods of the value of more than Rs. 250 were supplied. In a suit brought against the surety for the recovery of Rs. 256-1-6, being the amount due in respect of the goods supplied, the surety contended that he was not liable because the goods supplied were in contravention of his agreement and that the same should not have been more than the value of Rs. 250. After referring

(1) A.I.R. 1937 Mad. 360

to the judgment of Lord Atkin in *Pratapsingh's case* (1), mentioned above, Venkataramana Rao, J., held that on a construction of the document as a whole, the intention of the parties seemed to be "to define the duration and limit of the liability of defendant No. 2 and not to impose a limit on the supply of goods. The words 'up to the extent of Rs. 250 do not mean that, once the goods of the said value have been supplied no further goods should be given * * * * Therefore, the words 'up to the extent of Rs. 250' must be construed in relation to what follows, namely, 'for the said amount I shall be surety for a period of one year' thereby plainly indicating that the extent of defendant 2's liability is limited to the said amount." It was held that that the surity was liable to the extent of Rs. 188 which was the value of the goods unpaid for by the principal debtor, because the amount was less than the limit of Rs. 250 guaranteed by the surety. This case was followed in *Suwalal's case* (2), mentioned above in which the facts were similar.

As already discused, in the present case too Exhibit P. 9 taken as a whole did not put any limit on the Bank to advance more than Rs. 80,000 but only limited the liability of the guarantee brokers. Furthermore, it limited the liability of the guarantee brokers to the advances made against cotton and grains and this general guarantee was not bound with any specific pre-existing contract between the principal debtor and the Bank, and could not be affected so far as it went by the latter agreeing to make larger advances to the principal debtor against these very commodities or without any security whatever, or against security of commodities other than cotton and grains.

(1) A.I.R. 1935 P.C. 21
(2) A.I.R. 1939 Nag. 31

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In the present case the guarantee brokers are being made liable under clause 13 of their agreement, the relevant portion of which runs as follows:—

> "Whenever in mandi busines concerning advances against grains, seeds * * the appointment of a godown keeper * * is necessary, the guarantee brokers shall nominate such godown keeper * * * the approval of the Bank * * * such godown keepers shall be deemed as agents of the guarantee brokers who shall be responsible for all losses * * * damages * * which the Bank may incur or be put to by reason of any act, neglect or default on the part of the godown keepers in the performance of their duties as such."

The loss that has occured due to the default of the godown keeper is in respect of 175 bales of cotton and 320 bags of ground-nuts. While dealing with issue No. 2, the learned trial Court (*vide* judgment under appeal) came to the conclusion that the value of 175 bales of cotton was about Rs. 30,000 and that of ground-nuts about Rs. 4,000. The total loss as claimed by the Bank was Rs. 33,985. Out of this, obviously the loss of 320 bags of ground-nuts through the negligence of the godown keeper cannot be claimed by the Bank against the guarantee brokers because these were not covered by the agreement of the guarantee brokers and consequently *qua* the custody of these bags of ground-nuts, the godown keeper cannot be treated as the agent of the guarantee brokers. But the godown keeper would be the agent of the guarantee brokers as per clause 13

above *qua* 175 bales of cotton—a commodity covered by the agreement—and in case of loss of the same, the guarantee brokers would be liable to the Bank for its value to the extent of the limit of Rs. 80,000 guaranteed by them. Here, the value of the bales, as stated above, has been found to be Rs. 30,000 and the Bank cannot claim more than Rs. 30,000 from the guarantee brokers for the loss of 175 bales of cotton. The learned counsel for the plaintiff, however, made the following statement in the trial Court, on 11th of March, 1950:—

> "The present claim against defendants Nos. 6 to 8 which is enforceable under clause 13 of Exhibit P. 6 relates to 175 bales of cotton and 320 bags of groundnuts valued at Rs. 33,985 less 25 per cent and this comes to Rs. 25,480."

Apparantly, the loan advanced against any particular commodity was 75 per cent of the value of the commodity and according to the statement of the plaintiff's counsel, the guarantee brokers were liable to pay to the Bank damages to the extent of the loan advanced against 175 bales of cotton. It is not necessary to go into the question whether under clause 13 of the agreement, the Bank is entitled to get full price of the commodity lost or only to the extent of the loan advanced against such commodity, because the statement made by the counsel on behalf of the plaintiff-Bank amount to giving up to the claim to the extent of 25 per cent of the price of the commodity, for the loss of which the guarantee brokers may be held liable. We feel, therefore, that the amount of damages that can be recovered by the Bank from the guarantee brokers is Rs. 30,000 less 25 per cent, i.e., Rs. 22,500; and we

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feel that the Bank is entitled to a decree against the guarantee brokers for this amount.

For the reason given below, we accept this appeal and grant a decree to the plaintiff for Rs. 22,500 against Messrs Raj Kumar and Company with proportionate costs throughout.

B.R.T.

APPELLATE CIVIL.

Before D. K. Mahajan, J.

FAQIR SINGH AND OTHERS,—Appellants.

versus

Mst. GURBACHAN KAUR AND ANOTHER,—Respondents.

Regular Second Appeal No. 514 of 1954.

1959
May, 19th.

Administration of Evacuee Property Act (XXXI of 1950)—Sections 10(2)(0) and 46—Jurisdiction of the Civil Courts—How far barred—Dispute between two claimants to property allotted—Civil Court—Whether can determine—Jurisdiction of Special Tribunals—Extent of—How to be determined.

Held, that where the dispute is between two rival sets of heirs to the property, the allotment of which has taken place and is not in dispute, it does not fall for decision by the Custodian under either of the provisions of the Administration of Evacuee Property Act, 1950 and the jurisdiction of the Civil Courts is not excluded. The jurisdiction of the civil Court is excluded only to the extent that it will not entertain a suit respecting any matter which the Custodian-General or the Custodian is empowered by or under the Act to determine and it is within the jurisdiction of the civil Court to determine whether the matter involved in the suit falls to be determined by the Custodian-General or the Custodian under the Act or not.

Held, further that it is well-settled proposition of law that when any special Tribunals or Courts are created, the