Privy Council Appeal No. 47 of 1990

(1) Ramharry Garibdass
(2) Gowkaran Garibdass
(3) Parbattee Garibdass
(4) Sonny Garibdass
(5) Harridath Garibdass
(6) Thackoordath Garibdass and
(7) Ramharry Garibdass Brothers Contracting Limited *Appellants*

v.

(1) Gobin Singh and
(2) Herman Persad *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Jauncey of Tullichettle**]*

This appeal concerns the construction of two deeds. On 29th July 1980 the seventh named appellant ("the Company") granted in favour of the Royal Bank of Trinidad and Tobago Limited ("the Bank") a debenture which contained a charge by way of mortgage and floating charge over all the assets of the Company in security of all sums from time to time due to the Bank by the Company. The sums secured were payable and the security enforceable upon the happening of certain specified events. The Bank were entitled to appoint a receiver at any time after payment of the sums secured had been demanded. By January 1988 there had occurred one or more of the specified events which entitled the Bank to enforce the security. However the Bank forebore to exercise their powers under the debenture and instead on 11th January 1988 entered into a tri-partite deed of guarantee with the Company and the first respondent ("the Surety"). In terms of

this deed the Company and the Surety jointly covenanted to pay to the Bank the sum of $3,000,000 on 1st February 1993 with interest by equal monthly instalments of $70,000 commencing on 1st February 1988. The deed was expressed to be supplemental to the debenture and contained a condition to the effect that all the conditions, powers, rights and remedies contained in the debenture should be deemed to be incorporated in the deed.

During 1988 the Company failed to pay a number of instalments of interest and by November 1988 the arrears amounted to $240,000. The Bank thereupon called upon the Company and the Surety for payment of all sums secured by the debenture and covered by the deed of guarantee and on 21st November 1988 the Surety paid to the Bank the sum of $2,919,136.86. Thereafter by deed of assignment dated 5th December 1988 the Bank assigned to the Surety the whole debt due and owing to it upon the security of the debenture and deed of guarantee together with the full benefit of all covenants, conditions etc conferred upon the Bank by the debenture and deed. On 7th December 1988 the Surety demanded from the Company payment of the sum which he had paid to the Bank and on 9th December 1988 he appointed the second respondent as receiver and manager of the Company. The second respondent took possession of the assets of the Company but was, on 8th March 1989, dispossessed by some or all of the first to sixth appellants.

In December 1988 the appellants raised an action against the Surety and the receiver in which they sought *inter alia* declarations that the Surety was not entitled to appoint the receiver and that his purported appointment was null and void. On 29th June 1989 Permanand J. made an order which *inter alia* declared:-

(1) That the guarantees and securities which supported the debt of $2,919,136.86 due to the Bank on 21st November 1988 were spent and of no force or legal effect;

(2) That the purported assignment was of no force or legal effect;

(3) That the purported appointment of the receiver was null and void; and

(4) That the Surety was not entitled to appoint the second respondent as receiver.

The Court of Appeal (Des Iles, McMillan and Davis JJ.A.) by order dated 8th February 1990 quashed the orders made by Permanand J. on 29th June 1989 and declared *inter alia* that the second respondent was the lawfully appointed receiver entitled to exercise all the powers conferred by the debenture.

exercise the statutory powers of sale conferred by the Collateral Mortgages and the Surety has requested the Bank not to exercise such powers which the Bank has agreed to do upon the terms and conditions hereinafter appearing."

Clauses (1), (2) and (8) thereof were in the following terms:-

"(1) In consideration of the sum of $3,000,000.00 now due and owing by the Borrower to the Bank (the acknowledgement of which debt the Borrower and the Surety hereby acknowledge) the Borrower and the Surety hereby jointly and each of them hereby severally covenants to pay to the Bank the said sum of $3,000,000.00 on the first day of February, 1993 with interest at the prevailing Bank rate by equal monthly instalments of $70,000.00 commencing on the first day of February, 1988.

(2) The Surety shall upon the maturity of fixed deposit with United Bank of Trinidad and Tobago Limited of High Street in the Town of San Fernando, but in any event not later than the 31st December, 1989, deposit with the Bank the sum of $840,000.00 to be held by the Bank in a Cash Collateral Account in the name of the Bank and the Surety with the intent that during the repayment period as aforesaid there shall at all times be a cash balance of $840,000.00 in the said cash collateral account.

(8) It is hereby agreed and declared by and between the Bank and the Borrower and the Surety that all the covenants, conditions, provisions, proviso for redemption, powers, powers of sale rights and remedies both express and implied which are contained in or conferred by the Debenture and Collateral Mortgages shall be deemed to be incorporated in these presents and shall extend and apply in the same manner and in all respects as if all the said covenants, conditions, provisions, powers proviso for redemption, power of sale, rights and remedies has been specifically set out in these presents."

Mr. White, for the appellants, argued that although the debenture and deed of guarantee fell to be read together, clause (1) of the latter deed distinguished the sum which was at the date thereof due and owing to the Bank from the sum of $3,000,000.00 due in terms of that clause on 1st February 1993 and the monthly instalments of $70,000.00. From the date of its execution the deed of guarantee created the primary obligations and the only sums which could be recovered prior to 1st February 1993 were instalments due and unpaid. It followed that clause 2 of the debenture

In order to understand the appellants' argument before this Board it is necessary to set out certain provisions of the debenture and deed of guarantee. Clause 2 of the debenture provided:-

"2. The moneys and liabilities hereby secured shall become due and the security hereby created shall become enforceable:-

(a) Immediately upon demand in writing being made by any Manager or Officer of the Bank upon the Company or left at the company's registered office or principal place of business for the time being.

(b) If the company makes a default in payment of any interest hereby secured.

(c) If the company makes default in the observance or performance of any of the covenants herein expressed and implied and on the part of the company to be observed and performed.

(d) If an order is made or an effective Resolution is passed for the winding up of the Company and remains unsatisfied for thirty days.

(e) If the Company stops business.

(f) If any Judgment shall be obtained against the Company.

(g) If any alteration or alterations in the Articles of Association of the Company be made without the previous consent in writing of the Bank in that behalf first had and obtained."

Clause 8 provided *inter alia*:-

"8. At any time after the Bank shall have demanded payment of the moneys hereby secured the Bank may appoint by writing any person (whether an officer of the Bank or not) to be a Receiver of all or any part of the property hereby charged ..."

The deed of guarantee started with the following narrative:-

" WHEREAS:-

1. This Deed is intended to be supplemental to:-

a. The Deed of Debenture ...

2. The Bank has become entitled to exercise the powers contained in the Debenture and to

became restricted in its application solely to such instalments and that clause (8) of the deed of guarantee was intended to have similar limited application. Mr. White also pointed out that the deed of guarantee contained no clause providing for the calling up of the principal sum in the event of a failure to pay the instalments but did provide in clause (2) for the deposit of a substantial sum in security. This, it was argued, showed that the parties had considered the possibility of a default in instalment payments and had made a specific and all embracing provision to deal with this situation. Ingenious though this argument was, their Lordships have no doubt that it was entirely unsound.

Looking at the matter first of all from a purely practical point of view, at the date of the deed of guarantee the bank was in a position to enforce the security rights under the debenture in relation to the whole sum then due to them. To have then waived the right to demand payment of the whole sum for five years and to have exchanged those security rights for substituted security rights which extended not to the whole sum but merely to such instalments thereof as might from time to time remain unpaid would have made little or no commercial sense. It would require very clear words to achieve so unusual a result.

When the relevant parts of the two deeds are examined in detail, it is clear that the parties never intended to achieve the results sought for by Mr. White. The deed of guarantee is expressed to be supplemental to the debenture. Clause (8) of the deed of guarantee provides that there shall be deemed to be incorporated therein all the provisions of the debenture. If the words "moneys and liabilities" in clause 2 of the debenture fall to be given the restricted meaning of instalments due and unpaid, sub-clauses (a) to (g) would have little content. For example, if the Company failed to perform its obligation to insure its property under clause 6(b) the Bank's remedy under clause 2(c) would be restricted to demanding payment of instalments which were already due and there would be no remedy in respect of the principal sum. A similar result would ensue if the Company went into liquidation.

To achieve such results would involve construing the deed of guarantee not as supplemental to the debenture but as substantially varying and restricting its effect. Their Lordships are satisfied that there is no justification for placing so forced and artificial a construction upon the deed of guarantee. It is perfectly clear that when the two deeds are read together, without straining their language, the effect is that the Bank agreed to waive their right to call up the sums due by the Company so long as the Company and the Surety performed their obligations under the deed of guarantee. As soon as there was a failure of

performance in those obligations the Bank were entitled to exercise their powers under clauses 2 and 8 of the debenture. It follows that the appointment of the receiver by the surety as assignee of the Bank was valid and effective.

Their Lordships entirely agree with the conclusions of the Court of Appeal as to the construction of the above two deeds and the appeal must therefore be dismissed with costs.