1913.

*Present:* Wood Renton J. and Pereira J.

COLES *v.* CARUPPEN.

*344—D. C. Kandy, 21,543.*

*Promissory note granted by kangany to his superintendent as surety—When superintendent may sue on the note.*

A kangany who grants a promissory note to the superintendent of a tea estate as security that he would maintain on the estate his gang of sub-kanganies and coolies till their debts were paid off is in the position of a surety. His liability on the note is suspended so long as the labour force which he brings with him to the estate remains on the estate as a working labour force in its entirety. But whenever it either quits the estate altogether, or becomes disorganized, under circumstances importing a breach of contract on the part of the surety, the promissory note becomes enforceable at once.

THE facts are set out in the judgment.

*H. A. Jayewardene* (with him *Arulanandam*), for appellant.—It cannot be said that the note cannot be sued on so long as at least one cooly out of the gang remains on the estate. *Imray v. Palawasan*[1] was decided on different facts. The payee of the customary note could sue for the amount due from the coolies who have failed to carry out the terms of the agreement, *i.e.*, pay off the debt by working on the estate (*Muttiah v. Ramasamy* [2]). In the present case the appellant has used only for the amount found to be due from the coolies who had left with the kangany. Further, the kangany himself, by giving notice to the appellant, has put it out of his power to fulfil his part of the agreement as surety. Counsel also cited *Walker v. Cooke*,[3] *Periasamy v. The Anglo-American Direct Tea Trading Co., Ltd.*[4]

*Wadsworth*, for respondent.—Plaintiff is not entitled to sue so long as the bulk of the coolies remain on the estate. The Supreme Court has held repeatedly that the kangany is not the principal debtor in these cases (*Witham v. Pitchche Muthu Kangany* [5]). It is for the superintendent to show how much is due on the note. This is not proved.

February 13, 1913. WOOD RENTON J.—

The plaintiff-appellant, the superintendent of Nilambe estate, sues the defendant-respondent, who was formerly his head kangany on that estate, on a promissory note dated October 18, 1910, for the

[1] *(1900) 4 N. L. R. 113.*
[2] *(1903) 6 N. L. R. 323.*
[3] *(1910) 14 N. L. R. 161.*
[4] *(1911) 14 N. L. R. 365.*
[5] *(1900) 6 N. L. R. 289.*

sum of Rs. 3,844·86. The note was payable on the face of it on demand. But it is common ground that it was merely a note of the usual kind in cases of this nature, and that the appellant's remedy on it was suspended so long as there was no breach of the real customary obligation in security, for the performance of which it was granted, viz., the maintenance by the respondent on Nilambe estate of his gang of sub-kanganies and coolies. Before I say anything further as to the facts, it may be well to deal with the point of law that was taken in the District Court, and that formed indeed one of the grounds on which the learned District Judge has disposed of the action. It was contended that, while a note of this character purports to embody a promise to pay on demand, the payee cannot enforce the note at all so long as the labour force which the kangany brings with him to the estate remains on the estate in whole or in part. In my opinion that contention is unsound, and is not supported by any decisions of the Supreme Court, if properly understood. The grantor of a note of this kind is in the position of a surety. His liability on the note is suspended so long as the labour force which he brings with him to the estate remains on the estate as a working labour force in its entirety. But whenever it either quits the estate altogether, or becomes disorganized, under circumstances importing a breach of contract on the part of the surety, the promissory note becomes enforceable at once. That clearly results, I think, from the decision of Sir Charles Layard and Mr. Justice Wendt in the case of *Muttiah v. Ramasamy*.[1] The judgment of Sir Charles Layard in particular in that case contemplates the enforcement of the note by the payee wherever there is a breach on the part of the kangany, or of any of his sub-kanganies or coolies, of the implied term of the agreement. Where such a breach occurs, the payee of the note is entitled to sue the maker for the full amount of the note, giving him credit for the indebtedness of the sub-kanganies and the coolies to the head kangany, who is the surety, in so far as that indebtedness can be ascertained. All that the payee of the note has to do is to prove a breach of the condition which suspended the operation of the note at its inception. When that has been done, the burden changes to the shoulders of the surety. There is no need to say much in regard to the facts of the present case. I have dealt with the point of law forming the first ground on which the appellant's action has been dismissed. It is, in my opinion, untenable. The learned District Judge has, however, gone a step further, and has proceeded to consider the case to some extent on the evidence. The respondent gave notice to the appellant and left. Five of his coolies, still in debt to the estate, went with him. The rest of the gang elected to remain. Under these circumstances, the promissory note became immediately enforceable. The appellant is prepared to credit the respondent

[1] *(1903) 6 N. L. R. 323.*

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with a sum of Rs. 1,104·76, the indebtedness—so far as they are prepared to admit it—to the respondent of the sub-kanganies and the coolies formerly in his gang and still at Nilambe estate. Deducting that sum from the total amount of the promissory note, the appellant claims in the present action only the sum of Rs. 2,740·10. The learned District Judge has, however, laid hold of, and, as I venture to think, misinterpreted, another portion of the evidence dealing with the relations between the appellant and the respondent. The appellant stated that he had credited the respondent with a sum of Rs. 2,880·57. The learned District Judge regards this sum as part of the indebtedness which forms the subject of the present action, and has rejected the affirmative evidence by the appellant that it relates to a total sum of Rs. 8,000 due to him by the respondent, and including not only the amount of the promissory note sued on in this case, but other advances amounting to about Rs. 5,000. The evidence of the appellant is that this sum of Rs. 8,000 had been reduced by previous payments, including the sum of Rs. 2,880·57, to the sum actually sued upon here. I can see no ground on which that evidence should be rejected. It is perfectly clear, and it is uncontradicted by the evidence of the respondent himself at the trial. The respondent's counsel—if I understood him aright—almost tacitly admitted that the decision of the learned District Judge could not be supported on that ground. But he did support it, not only in respect of the point that I have dealt with already, but on the further ground that the respondent had in fact proved at the trial that the sum of Rs. 1,104·76, which has been credited by the appellant, is an entirely inadequate statement of the amount due to him by his sub-kanganies and coolies. The respondent in his answer set up a claim in reconvention for Rs. 11,535, and it is clear from the pleadings and the evidence, and indeed from the admission of the respondent's counsel himself, that this sum comprised both the alleged amount of the actual indebtedness of the sub-kanganies and the coolies to the respondent, and further claim for damages. The entire claim in reconvention was abandoned at the trial. The respondent was content to go to trial on issues not one of which raised the contention that he was in a position to prove a state of indebtedness between his sub-kanganies and coolies and himself which would completely wipe out the appellant's claim. We have carefully considered, in the course of the argument, whether the case should be sent back to the District Court, with a statement of our view as to the law, for further inquiry and adjudication in regard to this aspect of the litigation. But in view of the issues accepted by the respondent, and of his entire abandonment, at the trial of his claim in reconvention, without indicating to the District Judge in any way that he desired the evidence in support of it to be considered from another point of view, I am of opinion that this facility should not be granted to him.

I would set aside the decree of the District Court, and direct that judgment should be entered in favour of the appellant for the sum which, in his evidence, he states that he now actually claims, namely, Rs. 2,740·10. The appellant is entitled to the costs of the action and of the appeal.

PEREIRA J.—I agree.

*Appeal allowed.*