has anything to do with the point now under consideration. What it decides is that a suit, which is partly under S. 92, and partly not under S. 92, (inasmuch as it seeks some reliefs against strangers and some reliefs not specified in the Section), is not a representative suit in so far as it goes beyond the Section. That does not touch the point that so far as a suit is within S. 92 it cannot be instituted without sanction, and there is no getting away from the fact that the present suit was instituted without sanction whether or no the plaint was allowed to be subsequently amended. I agree with the order proposed by my learned brother.

G.N./R.K. *Appeal allowed.*

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KANIA AND WASSOODEW JJ.

Jagannath Ganeshram Agarwala — Plaintiff — Appellant.

v.

Shivnarayan Bhagirath and others— Defendants — Respondents.

First Appeal No. 384 of 1936, Decided on 23rd November 1939.

(a) Surety — Managing agent of company standing surety for debt due by company to its creditor—Company wound up—Scheme under S. 153, Companies Act — Creditor receiving half sum in cash and other half in shape of preferential shares—This held did not discharge surety.

A managing agent of a company passed a writing in favour of the creditor of the company by which in substance he stood guarantee for the debt due by the company to the creditor. Ultimately, a petition was presented to wind up the company, and acting under S. 153, Companies Act, meetings of the creditors and share-holders of the company were held to consider a scheme of reconstruction which was suggested. Under the scheme every creditor (except preferential creditors) was to receive half the sum in cash and the other half in the shape of preference shares:

Held that the fact that the creditor received from the company half the amount in cash and received also preference shares for the other half did not discharge the surety. [P 248 C 2]

(b) Surety — *His liability is co-extensive but not in the alternative.*

The liability of a surety is co-extensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors. [P 249 C 1]

(c) Hindu Law — Joint family business — To justify manager's standing surety on ground of legal necessity requires strong evidence.

It requires strong evidence to justify the conclusion that the manager of a joint Hindu family, which has a business, has on the ground of legal necessity a right by standing surety to make the joint family estate liable. [P 249 C 2]

(d) Hindu Law—Joint family business—Question whether passing of letter of guarantee by manager is ordinary incident of business is question of fact.

The question whether the passing of a letter of guarantee by manager is an ordinary incident of the trade or business of the joint family is a question of fact on which evidence is necessary. The fact that in respect of some other creditors similar letters were passed is not helpful because an incident of trade could not be established by reason of some documents passed at about the same time in favour of other parties, especially when the circumstances relating to the passing of those documents are not on record. [P 249 C 2 ; P 250 C 1]

G. N. Thakor and S. G. Patwardhan — *for Appellant.*

Sir Jamshedji Kanga, B. R. Ambedkar, Ramnath Shivlal and A. S. Asyekar— *for Respondents.*

Kania J. — This is a first appeal filed in Civil Suit No. 47 of 1934 against a judgment of the First Class Subordinate Judge at Jalgaon. The short facts leading to the litigation are that the Bhagirath Mill, Limited, had borrowed money from various depositors. Originally Bhagirath, the father of the defendants, was the managing agent, and we are told that the managing agency agreement was made out between him and the mills. The agency agreement is not put in as exhibit, and the only materials before the Court which give some indication of some of the terms consist of stray statements in the evidence of defendant 1. He stated that there was a kararnama by which the agency should be perpetuated from generation to generation. At another place he stated that it was the managing agent's sole business to borrow sums and pay them for the company without consulting the directors. Bhagirath died and defendant 1 was substituted in his place as the managing agent. The mill company came into financial difficulties. On 17th January 1931, defendant 1 in the name of the managing agency firm passed a writing in favour of the plaintiff by which in substance he stood guarantee for the debt due by the mill company to the plaintiff. The plaintiff was one of the directors. Defendant 1 stated in his evidence that he had passed similar letters in favour of some other creditors also. The company got a little extension of life. Ultimately a petition was presented to wind up the company, and acting under S. 153, Companies Act, meetings of the creditors and shareholders of the company were held to consider a scheme of reconstruction which was suggested. The scheme was approved at the meetings. However, before it was presented to the Court for sanction on 29th August 1931, the plaintiff wrote to the

agents informing them that he did not agree to the proposal of the mill to give preference shares. The scheme was sanctioned by the Court on 11th January 1932. Even thereafter by his letter dated 28th June 1932, the plaintiff gave notice to the defendants putting on record that his rights against the defendants remained unaffected. Under the scheme every creditor (except preferential creditors) was to receive half the sum in cash and the other half in the shape of preference shares. In accordance with the scheme the plaintiff received Rs. 12,000 odd and a temporary receipt in respect of the preference shares which came to his lot. Thereafter he filed the suit against the three members of the managing agency firm, which is a joint family firm, claiming that they were bound to pay the deficit. In the plaint he has offered to return the preference shares which came to him under the scheme. He has stated that he has not dealt with them and that he holds them intact. He has not yet received the share certificates from the company.

Defendant 1 who signed the letter of 27th January 1931, had raised numerous defences which have been dealt with in detail by the learned trial Judge. The defence failed on all points except one. Defendant 1 contended that as the plaintiff had received half the amount in cash and the shares of the mill company, he was discharged from his debt and that no obligation of the surety survived. This contention found favour with the trial Court. All the other contentions of defendant 1 were rejected and they were evidently considered to be bad. Although the plaintiff lost his suit, defendant 1 was ordered to bear half the costs. As regards defendants 2 and, 3, the claim in the plaint is to proceed against the joint family estate in their hands. In para. 3 of the plaint it is alleged:

> Defendant 1 is and was the karta and manager and agent and managing partner. He has given the writing in suit for self and for the said firm... The agency of the mill is a great source (of profits) to the undivided family and business of the defendants. And their responsibility to pay the debts borrowed by them for the mill is falling on them in pursuance of that also. The defendant and his undivided family and the two firms have derived benefit from the writing. . . . Therefore the defendants and their property are responsible for the plaintiff's suit.

In the written statement of defendants 2 and 3 it was denied that the transaction was binding on the joint family, and that there was any legal necessity. Issue 6 which was raised in the trial Court was

> whether the managing agency was the ancestral business of the defendants, and, if so, whether the writing was passed for the legal necessities of that business?

The defence of defendant 1, in our opinion, fails. The fact that the plaintiff received from the mill company half the amount in cash and received also preference shares for the other half does not discharge the surety. The statement of law is found in all recognized books on company law and also in Halsbury's Laws of England, (Edn. 2), Vol. 5. In (1875) 10 Ch A 211,[1] where the acceptor of a bill of exchange presented a petition for liquidation or composition under the Bankruptcy Act, 1869, and the creditors passed a resolution for liquidation or composition, the acceptor was held as discharged by operation of law, but the drawer was not thereby discharged from his liability. It was also held that it made no difference whether the bill-holder was present at the meeting or not, or whether he voted in favour of the resolution or against it. The drawer in the particular case stood in the position of a surety under the Negotiable Instruments Act. This decision shows that as a result of bankruptcy the debt due by the principal debtor may become unenforceable against the debtor, but the liability of the surety is not thereby discharged. In the case of a limited company in (1893) 3 Ch 540[2] it was held to the same effect. It was there pointed out that it was unnecessary to insert in the scheme of reconstruction a reservation of the rights of sureties for the company's debts, when an order for winding-up had been made, because the scheme did not affect the liability of the sureties. Vaughan Williams L. J. in the course of his judgment observed as follows (pp. 546-547):

> Now, with regard to the first point, no one intends that the scheme shall deprive the creditors of the Bank of their rights against those who have guaranteed payment of the deposits and current accounts due from the Bank. The principle upon which it is anticipated that the scheme of arrangement might have that effect is, either that the effect of the scheme is satisfaction of the guaranteed debt, so that there no longer exists any debt which the sureties can be called on to pay, or because the remedy over which the sureties would have against the Bank is inconsistent with the scheme of arrangement, which is intended to liquidate, once, and for ever, all liabilities of the Bank. The scheme contains no release of the Bank or the contributories; it contains no covenant not to sue, and it is by operation of law that the scheme becomes effective to relieve the company and contributories

1. Ex-parte Jacobs : In re Jacobs, (1875) 10 Ch A 211=44 L J Bk 34=31 L T 745=23 W R 251.
2. In re London Chartered Bank of Australia, (1893) 3 Ch 540=62 L J Ch 841=3 R 696=69 L T 593=42 W R 14.

from further liability than that contemplated or imposed by the scheme. The scheme of arrangement . . . is . . an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the pending winding-up. . . . It seems to me, then, that the discharge being clearly by operation of law consequent upon pending statutory liquidation, the principles laid down by Mellish L. J. in (1875) 10 Ch A 211[1] apply, and that therefore there is no need, and it would not be right, to introduce a reservation of rights against sureties into the scheme of arrangement.

The facts in the present case are very similar to those found in (1937) 1 Ch 594.[3] There T. Ltd. claiming to be creditors of G. M. Ltd., a company in voluntary liquidation, claimed £379-5-0. The creditors claimed that under an order of the Court G. M. Ltd. and another company called S. W. Ltd. became jointly and severally liable to pay to the creditors the said sum. The liquidator of G. M. Ltd. contended that the company was discharged from its liability as a scheme of arrangement between S. W. Ltd., and its creditors was sanctioned by the Court. It was held that it was not so. In the judgment it is stated as follows (pages 598-599) :

. . . . in my judgment a discharge of one of several joint debtors by operation of law does not discharge the other debtors. In my judgment, the effect of S. 153, Companies Act, 1929, is to give to a scheme when sanctioned by the Court under the Section a statutory operation. The scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. It becomes a statutory scheme. In my judgment, therefore, the discharge of Sentinel Waggon Works, Ltd., from the debt to Temple Press Ltd., which was effected under cl. 15 of the scheme . . . . did not have the effect of discharging Garner's Motors, Ltd., from its liability in respect of the debt.

The present case is not of co-debtors but of a debtor and a surety. The reasoning however clearly applies to their case also. This point does not appear to have been argued before the trial Court, but having regard to these decisions defendant 1 has no answer. It was argued on behalf of respondent 1 that if the debt is considered alternative, satisfaction having been received from one party, the debt did not survive. But the basis of this contention is unsound. The liability of a surety is co-extensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors. The discussion on this line is therefore not profitable. As the sole defence of defendant 1 fails, the appeal must be allowed as against him. As I have pointed out, on all other facts the trial Court had found against defendant 1 and we see no reason to differ from the conclusion arrived at on those points.

As regards defendants 2 and 3, it was found in the lower Court that the business was ancestral, but there was no legal necessity. The facts as found from the record show that the managing agents were under no legal obligation to procure money for the mill company. They had the authority and the sole authority to receive deposits and pay the same to the company. If, however, sufficient deposits were not forthcoming, they were under no legal liability to find funds and to make themselves personally liable. The contract found in the writing of 17th January 1931 is clearly one of guarantee. The agency firm did not receive for their own use a pie out of the amount for which they stood guarantee. The whole amount was received by the mill company and used for the benefit of the mill company. On the facts as proved I am unable to consider that any case of legal necessity has been made out. It requires much stronger *evidence to justify* the conclusion that the manager of a joint Hindu family, which has a business, has on the ground of legal necessity a right by standing surety to make the joint family estate liable. Stated in its bare form, the proposition is negatived by judicial authority. There are no particular aspects here which would justify a distinction. The case of legal necessity, in my opinion, fails and the conclusion of the trial Court is correct in that respect.

It was urged on behalf of the appellant that apart from legal necessity in the present case, the passing of a document of this nature was an ordinary incident of the joint family business. Relying on 34 Bom 72,[4] it was therefore urged that the joint family estate was liable. In my opinion, it is not open to the appellant to urge this contention at all. His statements in the plaint were not understood by him to mean that, no issue was raised to suggest this contention, and throughout the judgment of the trial Court this point has not been dealt with. The question whether the passing of a letter of guarantee is an ordinary incident of the trade or business of the joint family is a question of fact on which evidence is necessary. Mr. Thakor referred us to certain statements in the evidence of defendant 1 in support of this contention.

3. Garner's Motors Ltd., In re, (1937) 1 Ch 594=106 L J Ch 365=157 L T 258=81 S J 218=(1937) 1 All E R 671.

4. Raghunathji Tarachand v. The Bank of Bombay, (1910) 34 Bom 72=2 IC 173=11 BomLR 255.

Those statements were evidently admitted as relevant evidence on the issue of legal necessity. From that it is not right for the Court to consider that a case of an ordinary incident of trade had been suggested or made out. The fact that in respect of some other creditors similar letters were passed is not helpful because an incident of trade could not be established by reason of some documents passed at about the same time in favour of other parties, especially when the circumstances relating to the passing of those documents are not on record.

On the evidence on record I do not think such an incident is established in any event. The contention against defendants 2 and 3 therefore fails. The suit is dismissed against defendants 2 and 3. That order is confirmed. Therefore there shall be a decree for the plaintiff-appellant against defendant 1, respondent 1, for Rs. 11,900 with interest at six per cent. on Rs. 23,930 from 15th September 1931 till 1st July 1932 and on Rs. 11,900 thereafter till judgment, costs of the suit and costs of the appeal. Interest on judgment at six per cent. The plaintiff is ordered to hand over to defendant 1 the temporary receipt which he received in respect of the preference shares duly endorsed and to sign such other documents as may be necessary to enable the preference shares to be transferred to the name of defendant 1 or his nominee. The appeal as against respondents 2 and 3 is dismissed with costs.

D.S./R.K. *Order accordingly.*

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LOKUR J.

Baliram Narayan Naik and others — *Decree-holders*—Appellants.

v.

Sakharam Ramji Gujar and another— *Judgment-debtors*—Respondents.

First Appeal No. 262 of 1936, Decided on 24th February 1939.

(a) Civil P. C. (1908), O. 21, R. 11 (2) (j) — Property already attached — Application for sale mentioning that property to be sold is already attached without describing it— O. 21, R. 11 (2) (j) is sufficiently complied with — Application must be deemed to be in accordance with law within meaning of Art. 182 (5), Limitation Act—O. 21, R. 13, has no application to such case.

Where the property is already attached or the attachment is unnecessary for any reason, then prima facie the Court is presumed to know what property is to be sold. Hence a mere reference in the darkhast application that the property sought to be sold is attached already is a sufficient specification of that property, and if merely its sale is asked for in execution of the decree, the requirements of O. 21, R. 11, sub-r. (2), cl. (j) are sufficiently complied with : *A I R 1931 Bom 550, Rel. on; A I R 1931 Bom 128, Explained and Disting.* [P 251 C 2]

The application therefore must be deemed to be in accordance with law within the meaning of Art. 182 (5), Limitation Act: *A I R 1926 Cal 1077* and *A I R 1934 Bom 307, Rel. on.* [P 252 C 2]

Order 21, Rule 13, Civil P. C., has no application to such a case. [P 251 C 2]

(b) Civil P. C. (1908), O. 21, R. 57—Attachment before judgment — Application for sale disposed of on judgment-debtor agreeing to pay decretal amount by instalments and to continue attachment—It is not open to judgment-debtor to say that attachment ceased after disposal of application for sale.

Where an application is made for sale of property attached before judgment and is disposed of on judgment-debtor undertaking to pay the decretal amount by instalments and allowing the attachment to continue, it is not open to the judgment-debtor subsequently to say that the attachment ceased after the application for sale was disposed of : *A I R 1924 Mad 494 (F B) and A I R 1931 Bom 550, Disting.* [P 252 C 1]

H. B. Gumaste — *for Appellants.*

P. V. Nijsure — *for Respondents.*

Judgment. — The point in this appeal is simple. The appellants' shop by name "Baliram Narayan Naik" obtained a money decree against the respondents for Rupees 4995 and costs on 24th July 1924. During the pendency of that suit some property of the respondents had been attached before judgment, and the attachment was ordered to continue by the decree. The appellants presented a darkhast, No. 830 of 1924, to execute the decree for recovering the decretal amount by the sale of the attached property. The respondents tendered Rs. 1000 and were allowed to satisfy the decree by annual instalments beginning from 31st January 1927. The attachment of the respondents' property was allowed to continue with their consent, and the darkhast was disposed of on 23rd December 1925. It was ordered that in case of two defaults the entire balance of the decretal amount then in time should be recovered at once. Thereafter the appellant presented darkhast No. 230 of 1931 to recover the balance of the decretal amount by the sale of the property attached. That darkhast was presented on 31st January 1931, and was duly registered under O. 21, R. 17, cl. (4), Civil P. C.; but certain defects, including the absence of the list or the description of the attached property sought to be sold, were noticed, and the appellants were called upon to give an explanation of those defects. The appellants took time; but as they failed to put in any explanation, the darkhast was dis-