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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
B.V. NAGARATHNA; J., UJJAL BHUYAN; J.
CIVIL APPEAL NO.3200 OF 2016; FEBRUARY 27, 2026

BHAGYALAXMI CO-OPERATIVE BANK LTD.
versus
BABALDAS AMTHARAM PATEL (D) THROUGH LEGAL REPRESENTATIVES & OTHERS

Indian Contract Act, 1872; Section 133 - Discharge of surety by variance in terms of contract - The Supreme Court held that any variance made in the terms of the contract between the principal debtor and the creditor without the surety's consent discharges the surety only as to transactions subsequent to the variance - The discharge of the surety is not absolute; they remain liable for the original amount for which they stood as guarantee before the unauthorized variance occurred.

Liability of Guarantors - Bifurcation of Liability - Supreme Court set aside the High Court's finding that guarantors are either liable for the entire amount or not at all. It held that liability can be bifurcated; sureties are liable to the extent of their original engagement (plus applicable interest) but are not liable for excess amounts permitted to be withdrawn by the creditor in connivance with the principal debtor without the sureties' intimation or consent - The cardinal rule is that a guarantor must not be liable beyond the terms of his engagement – noted that unless there is bad faith, misrepresentation, or a material variation to the prejudice of the surety, the creditor's actions within the contract terms do not automatically discharge the surety – Appeal allowed. *[Relied on State of Maharashtra vs. Dr. MN Kaul (D) by his LRs, AIR 1967 SC 1634; Syndicate Bank vs. Channaveerappa Beleri & Ors., (2006) 11 SCC 506; Paras 4-7]*

For Appellant(s): Mr. Raghavendra S. Stivatsa, Sr. Adv. Ms. Komal Mundhra, AOR Mr. Saurabh Agrawal, Adv. Mr. Aniket Bhattacharyya, Adv. Mr. Hari Vishnu Tiwari, Adv. Ms. Laxita Upadhyay, Adv.

For Respondent(s): Mr. Kedar Nath Tripathy, AOR Mr. Pranaya Kumar Mohapatra, AOR

J U D G M E N T

NAGARATHNA, J.

Briefly stated, the facts of the case are that on 30.10.1993, M/s Darshak Trading Company, respondent No.6 herein, obtained a cash-credit facility for withdrawal of Rs.4,00,000/- (Rupees Four Lakhs Only) as a loan from Bhagyalakshmi Co-Operative Bank Ltd., the appellant herein. Mercantile goods belonging to respondent No.6 were hypothecated to the appellant. Respondent Nos.1 and 2 herein, stood as guarantors/sureties for the said loan obtained by respondent No.6 and executed contracts of guarantee in favour of the appellant. It is the case of the appellant that respondent No.6 in connivance with some officers employed by the appellant withdrew amounts far in excess of the Rs.4,00,000/- (Rupees Four Lakhs Only) that had been sanctioned.

1.1 Respondent No.6 defaulted in repaying the loan to the appellant. As a consequence, the appellant filed Lavad Suit No.181/1995 before the Board of Nominees, seeking to recover a sum of Rs.26,95,196.75/- (Rupees Twenty-Six Lakhs, Ninety-Five Thousand, One Hundred Ninety-Six and Seventy-Five Paise Only) along with interest from respondent No.6. The borrower, respondent No.6 was arrayed as defendant No.1 and respondent Nos.1 and 2 herein, as sureties, were arrayed as defendant Nos.2 and 3 in Lavad Suit No.181/1995. By judgment dated 09.07.2001, the Board of Nominees decreed the suit and accepted the claim of the appellant only as regards respondent No.6 who was

the principal borrower to the extent of the Rs.26,95.196.75/- (Rupees Twenty-Six Lakhs, Ninety-Five Thousand, One Hundred Ninety-Six and Seventy-Five Paise Only). The said amount was directed to be recovered from respondent No.6 along with interest from 01.10.1994 at the rate of 21% per annum. However, the suit against respondents Nos.1 and 2 as sureties came to be dismissed by the Board of Nominees and the restraint order against their properties came to be vacated.

1.2 Challenging the judgment of the Board of Nominees dated 09.07.2001, the appellant preferred an appeal before the Gujarat State Co-Operative Tribunal in Appeal No.552/2001. By order dated 31.01.2007, the Gujarat State Co-Operative Tribunal allowed the appeal of the Bank and directed the recovery of Rs.4,00,000/- (Rupees Four Lakhs Only) along with interest against respondent Nos.1 and 2 herein as sureties. An injunction also came to be issued by the said Tribunal against the sureties, restraining them from alienating their immoveable properties.

1.3 The order of the Gujarat State Co-Operative Tribunal came to be challenged by respondent Nos.1 and 2 herein in Special Civil Application No.17125/2007 before the High Court of Gujarat at Ahmedabad. By the impugned order dated 25.06.2008, the High Court allowed the said writ petition. This was on the basis that the Gujarat State Co-Operative Tribunal erred in holding that respondents Nos.1 and 2 would be liable for the loan as sureties, when it was the appellant that had permitted respondent No.6 to withdraw amounts in excess of the loan initially sanctioned. That under Section 139 of the Indian Contract Act, 1872, (for short, "the Act"), a surety would stand discharged if there was lapse on the part of the creditor and hence, the sureties could either only be held liable as to the entire loan amount or not at all. That there could be no bifurcation in terms of liability of the sureties as regards the loan amount that was initially sanctioned and the overdrawn amounts.

1.4 Hence, the instant civil appeal by the appellant-Bank.

Submissions:

2. Learned senior counsel Sri Raghavendra S. Srivatsa appearing for the appellant submitted that the High Court was not right in holding that under Section 133 of the Act, the sureties are liable for the entire amount or none at all. He drew our attention to Section 133 of the Act, which states that *any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance*. In this regard, he placed reliance on the following judgments:

a) Radha Kanta Pal vs. United Bank of India Ltd., AIR 1955 Cal 217 ("Radha Kanta Pal");

b) Bishwanath Agarwala vs. State Bank of India, AIR 2005 Jhar 69 ("Bishwanath Agarwala");

c) State Bank of India vs. M/s Indexport Registered, (1992) 3 SCC 159 ("M/s Indexport Registered");

d) Syndicate Bank vs. Channaveerappa Beleri, (2006) 11 SCC 506 ("Channaveerappa Beleri");

e) H.R. Basavaraj (Dead) by his LRs vs. Canara Bank, (2010) 12 SCC 458 ("Basavaraj"); and

f) T. Raju Setty vs. Bank of Baroda, AIR 1992 Kar 108 ("Raju Setty").

2.1 Learned senior counsel further submitted that having regard to the facts of the present case, the Bank being the creditor is entitled to recover the outstanding dues from the sureties till the time when the variation in the contract occurred. However, for the subsequent dues pursuant to the variation of the contract, which was without the consent of the sureties, the sureties may not be liable. He therefore submitted that having regard to the dicta of this Court as well as of the Karnataka High Court in ***Raju Setty***, the impugned judgment may be set-aside and the relief may be granted to the appellant Bank.

2.2 *Per contra,* learned counsel appearing for the respondents/sureties pressed into service Section 139 of the Act which states that *if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged*. He contended that the variation in the contract between the creditor and the borrower was without the knowledge of the respondent/sureties. In the circumstances, they are not liable to pay the outstanding dues. He submitted that had the respondents been made aware of the variation in the contract inasmuch as additional amounts were lent over and above what was contracted for, the sureties would have had the knowledge and awareness of what the dues were and as to whether they were liable for the additional dues. In absence of any such intimation or consultation with the respondent/sureties, the appellant/creditor cannot proceed against the sureties at all as they have been discharged of all their liabilities under the contract. Learned counsel for the respondents therefore submitted that there is no merit in this appeal and the same may be dismissed.

3. Having heard learned senior counsel and learned counsel for the respective parties, the point that arises for our consideration is, whether, respondents are entitled to the benefit under Section 139 of the Act or they are liable as sureties in terms of Section 133 of the Act? In our view, respondents are liable in accordance with Section 133 of the Act.

4. We shall discuss the relevant provisions of the Act and would apply the same to the facts of the present case.

4.1 Chapter VIII of the Act deals with indemnity and guarantee. Section 126 of the Act defines a contract of guarantee, surety, principal-debtor and creditor. A contract of guarantee is a contract to perform the promise, or to discharge the liability of a third person, in the case of default. The person who gives the guarantee is called the surety or the guarantor; the person in respect of whose default, the guarantee is given, is called the principal-debtor; and the person to whom the guarantee is given, is called the creditor. A guarantee may be either oral or in writing. Section 127 of the Act deals with consideration for guarantee while Section 128 of the Act deals with surety's liability. The liability of the surety is coextensive with that of the principal-debtor, unless the contract of guarantee provides otherwise, is what Section 128 of the Act states. Discharge of surety is dealt with under Sections 133 to 139 of the Act.

4.2 Sections 133 and 139 of the Act read as under:

"**133.Discharge of surety by variance in terms of contract.—** Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

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"139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.—If the creditor does any act which is inconsistent with the rights of the surety, or omits

to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

4.3 In this case, we are concerned with discharge of surety. While learned senior counsel for the appellant has placed reliance on Section 133 of the Act, learned counsel for the respondents has pressed into service Section 139 of the Act. As already noted, Sections 133 to 139 of the Act provide for circumstances in which a surety is discharged.

4.4 As per Section 133 of the Act, any variance made without the surety's consent, in the terms of the contract between the principal-debtor and the creditor, discharges the surety as to transactions *subsequent to the variance*. This Section deals with situations of actions prior to a suit and cannot include a post decretal situation where the judgment debtor is granted time for making payment in instalments. Discharge of surety by variance in terms of the contract means that the surety cannot be bound to something for which he has not contracted. This would imply that if the surety had not assented to certain new terms, he cannot be bound for the final obligation of the principal-debtor which would be different from the obligations which the surety initially guaranteed. This is owing to variation in terms of the original contract. In such a situation, a surety is discharged forthwith on the contract made being altered without his consent. This is because the liability of the surety extends only to what contract he guaranteed and not something for which he had not contracted for. Therefore, in order to bind the surety to a contract of guarantee, he must be consulted.

4.5 In ***Bonar vs. Macdonald, (1850) 3 HLC 226,*** it was observed that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though notwithstanding such variance, the original agreement may be substantially performed, will discharge the surety.

4.6 Thus, the cardinal rule is that the guarantor must not be liable beyond the terms of his engagement *vide* ***State of Maharashtra vs. Dr. MN Kaul (D) by his LRs, AIR 1967 SC 1634.*** However, any alteration made in an instrument, after its execution, in some particular which is not material, does not discharge the surety from liability. But where the alteration is material, the surety can claim to be discharged. In other words, if a change in the contract between the guarantor and the principal-debtor materially affects the position of the surety, then it would absolve the surety from liability. However, the guarantor is not discharged by any variation of the principal contract made with his consent. The consent has to be proved by the person who seeks to enforce the guarantee. A stipulation in a contract of guarantee whereby the surety purports to waive all his rights, legal, equitable, statutory or otherwise, which may be inconsistent with the guarantee, will not deprive him of his right to discharge under Section 133 of the Act.

4.7 In ***Basavaraj,*** it was observed that the surety can waive all rights available to him under Chapter VIII of the Act because these are advantages for his benefit. The surety continues to be liable for transactions effected before such variation. The surety is discharged as to the transactions subsequent to the variance. In this judgment, it was observed that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and do not infringe upon the public rights or public policies. As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. This is called contracting out. Thus, in the case of continuing guarantee, it was not open to a party

to revoke a guarantee when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee, the legal representatives of the deceased are also liable to repay the loan.

4.8 Section 139 of the Act, on the other hand, states that if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal-debtor is thereby impaired, the surety is discharged.

4.9 The essence of the said Section is the curtailment of the surety's remedy or enhancement in his liability. Surety has the right to discharge all his liability when debt itself is subsisting and the remedy of the surety against the principal-debtor is unimpaired. It is said that Section 139 of the Act is in the nature of a residuary Section, the object of which is to ensure that no arrangement different from that contained in the surety's contract is forced upon him and the surety, if he pays the debt, has the benefit of every remedy which the creditor had against the principal-debtor. Thus, the surety is discharged if the creditor:

(i) does an act inconsistent with the rights of the surety; or

(ii) omits to do any act which his duty to the surety requires him to do, and as a result the surety's eventual remedy against the principal-debtor is thereby impaired.

4.10 Circumstances where acts are inconsistent with the rights of the surety could be referred to at this stage. The surety was held discharged -

(i) where the creditor, without the surety's consent, granted time to the debtor and allowed instalments *vide* ***Pirthi Singh vs. Ram Charan Aggarwal, AIR 1944 Lah 428.***

(ii) where the court obtaining a security bond by hypothecation of immovable property for securing the proper disposal of money due to minors, acted inconsistently with the rights of sureties *vide* ***Bhagwan Das vs. M Ghulam Mahommad, AIR 1935 Lah 863.***

(iii) where the creditor consented to the release of attachment over the properties *vide* ***Ram Prasad vs. Gordhan, AIR 1934 All 616.***

(iv) where the creditor bank which had advanced loan for the purchase of a vehicle failed to register the charge with the Regional Transport Office *vide* ***Jose Inacio Lourence vs. Syndicate Bank, (1989) 65 Com Cas 698.***

(v) where the creditor in a contract for sale or a tea garden failed to execute the conveyance of the property to purchaser, payment of price by whom had been guaranteed by the surety *vide* ***Probodh Kumar Das vs. Gillanders Arbuthnot & Co., AIR 1934 Cal 699.***

(vi) Where the creditor prepays any instalment of payment before the debtor had rendered that performance upon which the payment fell due *vide* ***Calvert vs. London Dock Co., (1838) 2 Keen 638. [Source: Pollock and Mulla on the Indian Contract & Specific Relief Acts, 16th Edition]***

5. In the case of ***Radha Kanta Pal***, the predecessor of the plaintiff before the High Court had signed a bond with one Comilla Banking Corporation Limited that had since amalgamated with and was represented by the defendant-Bank. By virtue of this bond, in consideration of the appointment of his relation to the post of cashier and in consideration for the due discharge of his duties, the predecessor of the plaintiff stood as a guarantor to

the extent of Rs.10,000/- for himself, his heirs, executors and assigns. The service of the relation came to be terminated but the deposit money was alleged to not have been returned to the plaintiff. In response, the defendant-Bank claimed that the relation of the predecessor of the plaintiff was the cause of shortage of the Bank's cash amounting to Rs.8,800/- and the Bank is therefore entitled to deduct money out of the security deposit. The plaintiff claimed that neither he nor his predecessor had any knowledge of the defalcation or breach of duty committed by the relation and the Bank gave no notice to them regarding the same. The High Court of Calcutta observed that in order to attract Section 139 of the Act, it is not only that an act or omission that is inconsistent with the rights of the surety is done by the creditor but also that the eventual remedy of the surety against the principal debtor is impaired. As there was no such impairment of the eventual remedy of the surety against the principal debtor, the plaintiff's case was said to have failed.

5.1 In the case of ***Bishwanath Agarwala***, the facts were that one Joydeb Panja, the principal debtor had approached the respondent-State Bank of India for a cash credit facility for the purposes of running his business up to the sum of Rs 2,50,000/- (Rupees Two Lakhs and Fifty-Thousand Only) for which the petitioner therein stood as a guarantor to pay the dues in case of default of the principal debtor. The principal debtor is alleged to have availed of the cash credit facility but failed to carry out the terms and conditions, including routing the cash credit account and also committed certain irregularities. Similar to the case at hand, at the request of the principal debtor, the Bank allowed overdrawing of amounts from the cash credit account. Later, upon failure of the principal debtor to repay the loan amounts, the Bank sought to recover the entire amount, including the overdrawn amounts from both the principal debtor as well as the surety, holding them both to be jointly and severally liable. The High Court of Jharkhand observed that the creditor could not be constrained to first attempt to exhaust its remedy against the principal debtor, as the liability of the principal debtor and guarantor was joint and several. However, while the guarantor would still be liable to the extent of the earlier-borrowed Rs.2,50,000/-, he would not be bound by the overdrawn amounts permitted by the Bank and availed of by the principal debtor, i.e. that the surety would only be discharged in respect of transactions subsequent to the variance of the contract.

5.2 In the case of ***M/s Indexport Registered,*** a three-Judge Bench of this Court upheld the salient principle that the liability of the surety is co-extensive with that of the principal debtor and that the creditor was not required to exhaust his remedies as against the principal debtor necessarily before proceeding against the sureties to recover the loan amount, and the guarantor can even be proceeded against first.

5.3 In the case of ***Channaveerappa Beleri,*** a two-Judge Bench of this Court observed that the liability of the guarantor and the question as to when it would arise would depend entirely on the terms of his contract, and the guarantee itself could be in the nature of a continuing guarantee, an ordinary guarantee, may stipulate that the guarantor is liable to pay only on demand by the creditor and may limit the liability of the guarantor to a particular sum. It further observed that even a time-barred claim against the principal debtor may still be enforceable as against the guarantor.

5.4 In the case of ***Basavaraj,*** in a similar factual matrix, the appellants in the said case had stood as a guarantor to a loan availed of by a trust to the extent of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) along with interest at the rate of 15% per annum from the respondent-Bank. Further, additional amounts came to be borrowed on the basis of agreements that were subsequently executed between the trust and respondent-Bank.

The respondent- Bank filed a suit against the appellants seeking recovery of the loan amount. The appellant sought discharge from the guarantee on the basis that granting further loans amounted to varying the terms of the contract, thus resulting in the novation of the agreement. A two-Judge Bench of this Court affirmed a decision of the Karnataka High Court in ***Raju Setty***, wherein the High Court had held that the surety can waive the rights available to him under Chapter VIII of the Act. On an analysis of the facts in the said case and on a perusal of the agreement, it was revealed that the guarantee was to continue to all future transactions except when the guarantor disclaimed from his liability explicitly through a written statement. Further, that the contract between the principal debtor and guarantor was in the nature of a guarantee but that between the guarantor and the respondent-Bank was in the nature of a creditor and principal debtor and the liability of the guarantor was coextensive with that of the principal debtor.

6. According to Chitty on Contracts, 28th Edition, Volume 2, at 1348, paras 44-097, "*short of bad faith, misrepresentation or concealment amounting to misrepresentation, connivance with the default of the principal-debtor, or variation of the terms of the contract to the possible prejudice of the surety the creditor can act as he chooses*".

6.1 Thus, in order to attract Section 139 of the Act, there must not only be an act inconsistent with the rights of the surety, or the omission to do an act which it is the creditor's or employer's duty to do, but it is essential that thereby the eventual remedy of the surety is impaired. Thus, a surety will be discharged by acts or omissions of the creditor which, though not having the legal consequences of discharging the principal, impair the eventual remedy of the surety against him. For instance, a surety will be released if the creditor, due to what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands. However, where the creditor withdrew the suit against the principal-debtor, but continued the suit against the surety, the latter was not discharged because his remedy against the principal-debtor was not impaired.

7. In the instant case, the undisputed facts are that respondent No. 6 obtained a cash-credit facility for withdrawal of Rs.4,00,000/- (Rupees Four Lakh Only). It is to the extent of this amount alone that respondent Nos.1 and 2 herein stood as sureties. Whether by virtue of allegedly conniving with employees of the Bank or otherwise, it is admittedly true that amounts far in excess of the Rs.4,00,000/- (Rupees Four Lakh Only) (that was initially sanctioned) were withdrawn by respondent No.6 from the appellant-Bank. This functions as a fundamental variation of the terms of the initial contract of guarantee, wherein the extent of the liability to which respondent Nos.1 and 2 consented to be liable for has been exceeded. Under Section 133 of the Act, any modification of the contract between the creditor and the principal debtor, that has been made without the consent of the sureties, cannot subsequently bind them. Critically, however, a plain reading of the said provision reveals that such discharge of the surety is not absolute in nature. The surety is discharged only in respect of transactions that occurred subsequent to the variance of the terms of the contract. Thus, the observation of the High Court in the impugned order that the sureties must either be liable for the entire loan amount or not at all is erroneous, as the discharge of the sureties in the instant case can only be in respect of the amounts in excess of the Rs.4,00,000/- (Rupees Four Lakhs Only) that were withdrawn as under Section 133 of the Act, as it is only these amounts that would constitute a variance of the contract. The said bifurcation that was deemed to be impermissible by the High Court is, in fact, mandated by the statute in order to determine the extent of the sureties' liability as per Section 133 of the Act.

7.1 The contention of learned counsel for the respondents that the discharge of the sureties in the instant case would be covered by Section 139 cannot be accepted. The discharge of a surety under Section 139 is under an altogether different set of circumstances, as elucidated in the aforementioned discussion. For Section 139 to apply, the creditor must (1) either act in a manner that is inconsistent with the surety's rights or omit to act in a manner that the creditor is duty bound to and (2) such act or omission must impair the eventual remedy of the surety as against the principal debtor. In the instant case, while the rights of the surety could be said to have been affected by the appellant-Bank's allowance of the principal debtor to overdraw amounts from the cash credit facility in excess of the Rs.4,00,000/- (Rupees Four Lakhs Only) that had initially been sanctioned, there is no impairment of the eventual remedy of the respondent Nos.1 and 2 - sureties against the respondent No.6 – principal debtor. It is also a well-established principle that no bar can be placed on the creditor so as to restrict their ability to recover the amounts owed from the sureties before proceeding as against the principal debtor.

7.2 In this backdrop, we find no hesitation in holding that the applicable provision to the instant factual matrix is that of Section 133 of the Act. By virtue of the application of the said provision, respondent Nos.1 and 2 -sureties are liable to the extent of Rs.4,00,000/- (Rupees Four Lakhs Only) with applicable interest that was initially sanctioned to respondent No.6 – principal debtor and for which respondent Nos.1 and 2 consented to stand as sureties. However, they are not liable for the excess amounts permitted to be withdrawn from the cash-credit facility of the appellant-Bank by respondent No.6- principal debtor.

7.3 The High Court was not right in holding that guarantors may be either liable to pay the entire amount which is deemed payable by the principal borrower or not at all and that there cannot be a bifurcation of the liability. This is contrary to Section 133 of the Act which speaks about discharge of surety by variance in terms of contract and that any variance made without the consent of the surety only can be resisted. Hence, in the instant case, since there was no intimation to the respondent-sureties about the over drawing from the cash credit facility, they are liable to the extent of their liability till the variance was made in the instant case, which is of the original amount of Rs.4,00,000/- (Rupees Four Lakhs only) with applicable interest.

7.4 In the result, the appeal is allowed and the impugned order of the High Court of Gujarat dated 25.06.2008 in Special Civil Application No.17125 of 2007 is set aside.

Parties to bear their respective costs.