

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Rajiv Sharma and Mr. Justice Harinder Singh Sidhu.

PUNJAB NATIONAL BANK and others – Petitioners,

Versus

M/S. CHINTPURNI SCHOOL EDUCATIONAL SOCIETY and others – Respondents.

CWP-20773-2019 (O&M)

Contract Act. S. 133, 135

Guarantee – Loan taken by Society – Restructuring/Reschedulement of payment by Bank – It is mentioned in one of the conditions that the society would ensure execution of all the necessary documents for FITL & reschedulement of repayment period along with fresh guarantees from all obligants – Bank have never insisted for execution of fresh guarantee from the guarantors – Respondents tendered their resignation from the membership of the society – It was conveyed to the bank by the management of the society – The loan was restructured – The members of the society furnished fresh guarantees – Since the variation were made in terms of the original contract/demands – Cannot be made liable beyond the terms of engagement.

[Para 12]

Cases referred to:-

1. AIR 1935 Privy Council 21 titled "*Seth Pratapsingh Moholalbhai v. Keshawlal Harilal Setalwad.*
2. AIR 1938 Madras 585 *Messrs. Nuserwanji Cursedji Bhesania and Co. v. Mahamayi Ammal.*
3. AIR 1961 Punjab 281, *Union of India v. Pearl Hosiery Mills*
4. AIR 1967 SC 1634, *State of Maharashtra v. Dr.M.N. Kaul (dead) by his legal representatives*

Mr.Arvind Rajotia, for the petitioners. Mr.Aman Arora, for respondent no.15-caveator. Mr.Chetan Mittal, Senior Advocate with Mr.Udit Garg, for respondent no.16-caveator.

JUDGMENT

Rajiv Sharma, J. -(Reserved on : 13.01.2020 Date of decision : 12.02.2020) –

CM-482-2020

The application has been filed seeking amendment of the petition for adding following

paragraphs after para no.12 of the writ petition:-

“13. That the impugned orders deserve to be set aside on the ground that the IA no.834/2017 was filed by respondent no.16 as there is no signature of respondent no.15 on the application whereas the Ld.DRAT & Ld.DRT deleted the name of respondent no.15 in an erroneous manner.

14. That the Authorised Officer had issued demand notice under section 13(2) of the SARFEASI Act, 2002 to the respondent no.15 and 16 but they never raised any objections. Meaning thereby the respondent no.15 and 16 admits that they stood guarantors for the borrower society.”

The application is allowed. Amended writ petition is permitted to be taken on record.

CWP-20773-2019

The brief facts necessary for adjudication of this petition are that the petitioners have sanctioned the consortium loan of Rs.110 crore to the borrower firm. The firm failed to maintain the financial discipline and therefore, the account of respondent no.1 was declared NPA on 02.09.2015 by petitioner no.1, on 24.09.2015 by petitioner no.2 and on 19.10.2015 by petitioner no.3.

2. The petitioners filed O.A. no.2778 of 2017 for recovery of Rs.115,06,69,605/-. Respondents no.15 and 16 were also arrayed as defendants before the learned Debts Recovery Tribunal-1, Chandigarh.

3. Respondents no.15 & 16 filed an application bearing no.834 of 2017 before the learned Debts Recovery Tribunal-1, Chandigarh for deleting their names from the array of the defendants. The petitioners filed detailed reply to the same. The learned Debts Recovery Tribunal, Chandigarh allowed the application of respondents no.15 & 16 vide order dated 28.09.2018. Thereby the names of respondents no.15 and 16 were deleted from the array of the parties. The petitioners filed an appeal before the Appellate Authority. The Appellate Authority dismissed the same on 13.05.2019. It is, in these circumstances, the present writ petition has been filed.

4. A preliminary objection has also been taken that respondent no.15 had not signed the application and it was filed by respondent no.16.

5. We have gone through the reply. This objection was not taken in the reply filed by the petitioners. Moreover, the matter had been argued by the learned counsel appearing on behalf of the parties and the matter was adjudicated on its merits.

6. Learned counsel for the petitioners has argued that respondents no.15 & 16 have executed guarantees on 21.08.2009 and these were subsisting till date.

7. The case set up by respondents no.15 and 16 in IA no.834 of 2017 was that they have submitted resignation letter on 15.07.2011 to Mr.Sunil Joshi, who was the then Secretary of

the Society. According to the averments made in the original application, defendant no.1-society approached the Union Bank of India vide an application dated 22.12.2012 and requested the bank to restructure its repayments and funding of unpaid interest. This application was independently considered by the Union Bank of India. The same was approved vide letter dated 26.12.2012. The society in order to avail restructuring of repayment executed the following documents in favour of the Union Bank of India:-

- “(i) Demand promissory Note date 31.12.2012 for an amount of 17,73,20,000/- bearing interest @ 3.85% over the base rate which at time was 10.50% and total interest payable comes to 14.35% P.A. with monthly rest.
- (ii) General Term Loan Agreement along with two annexure i.e. annexure I and II for the amount as above and rate of interest as above.
- (iii) Five individual Letters of guarantee executed by defendant no.2, 3, 4, 13 and 14 all date 31.12.2012.”

Similarly, as per the averments made in the original application, the defendants approached the Oriental Bank of Commerce vide an application dated 30.11.2013 and requested the bank to restructure repayments and funding of unpaid interest. The application was independently considered by the management of Oriental Bank of Commerce. The sanction letter is dated 21.12.2013 and the various undertakings given by defendant society were annexed with the original application. The defendants executed the following documents in favour of the Oriental Bank of Commerce:-

- “(i) Funded Interest Term Loan for an amount of Rs.2.42 crore date 30.12.2013 repayable at rate of interest 3.75% a over base rate which at that time was 10.25% making it net @ 14% P.M. with monthly rest.
- (ii) Term Loan Agreement dated 30.12.2013, for the amount of Rs.16.49 crore repayable at rate of interest 3.75% above base rate which at that time was 10.25% making it net @ 14% P.M. with monthly rest.
- (iii) Supplementary Hypothecation Agreement dated 30.12.2013 for rescheduling of Term Loan Rs.18.91 crore at the net rate of 14% p.a. with monthly rests along with penal interest @ 2% p.a. in case of any default.
- (iv) Common Agreement dated 30.12.2013 stipulating various other terms and conditions of the loan and liberties allowed to the bank.
- (v) Two individual Agreements of guarantee executed by defendants no.10 & 12, both dated 30.12.2013 securing the repayment of loan/credit facilities advanced defendant no.1. Said defendants also executed balance confirmation letters dated 30.12.2013 confirming the balance outstanding of Rs.17,55,94,607/- as on 30.11.2013.”

8. It is further averred in the original application that the defendants approached the Punjab National Bank vide an application dated 10.10.2013 and requested the bank for

restructuring its repayments and funding of unpaid interest. The application was independently considered by the Punjab National Bank. The approval was accorded on 26.12.2013. The terms and conditions of the restructuring were conveyed to defendant no.1 by the Branch Office Batala Road vide letter dated 30.12.2013. The defendants executed the following documents in favour of the Punjab National Bank:-

- “(i) Supplementary Agreement dated 30.12.2013 for rescheduling of Term Loan Rs.47,72,66,957/- at the net rate of 14% after making various adjustments in the rate of interest as mentioned in the agreement in 27 quarterly installments commencing from July 2014. Apart from this defendants also agreed to adhere the terms & conditions mentioned in earlier agreement dated 23.02.2010.
- (ii) Funded Interest Term Loan Agreement dated 30.12.2013 for the amount of Rs.7.83 crore repayable at the net rate of 14% after making various adjustments in the rate of interest as mentioned in the agreement.
- (iii) Hypothecation Agreement dated 30.12.2013 for total outstanding amount of Rs.55,55,66,957 (i.e. Rs.47,72,66,957 in TL and Rs.7,83,00,000/- in FITL) at 14% p.a. with monthly rest rate of interest as above said.
- (iv) Three individual Letters of guarantee executed by defendant no.10, 11 and 12 all dated 30.12.2013.”

9. Thus, respondents no.15 & 16 ceased to be member of the Management Committee and even as per letter of the Management dated 14.12.2011, the Management has requested the banks that their personal guarantees may be considered ineffective as these were given in the capacity of members of the society.

10. The attention of the Court was drawn to one of the communication dated 30.12.2013 whereby the request made by the Chairman / Secretary of the society was accepted for restructuring/reschedulement of repayment. It is mentioned in one of the conditions that the society would ensure execution of all the necessary documents for FITL & reschedulement of repayment period along with fresh guarantees from all obligants. Respondents no.15 & 16 have not given any fresh guarantee as per communication dated 30.12.2013 issued by the Punjab National Bank, as well as, as per the statement of learned counsel appearing on behalf of them for reschedulement and repayment accorded by the Union of India and the Oriental Bank of Commerce. Even according to the averments made in the original application, five individual letters of guarantee were executed by defendants no.2, 3, 4, 13 and 14 dated 31.12.2012. Similarly, Supplementary Hypothecation Agreement dated 30.12.2013 for rescheduling of Term Loan of Rs.18.91 crore at the net rate of 14% p.a. with monthly rests along with penal interest @ 2% p.a. in case of any default, was executed. Two individual agreements of guarantee were executed by defendants no.10 & 12 on 30.12.2013. Three individual letters of guarantee were executed by defendants no.10, 11 and 12 on 30.12.2013 for restructuring of Term Loan in favour of the Punjab National Bank. Defendant no.5 has also offered to provide additional guarantee for the Funded Interest Term Loan amounting to Rs.7.83 crore vide its resolution dated

28.12.2013. Defendant no.5 gave agreement of guarantee dated 30.12.2013. No new individual letter of guarantee was executed by defendants no.15 & 16. The banks have never insisted for execution of fresh guarantee by defendants no.15 & 16. The management has sent communication dated 14.12.2011 to the banks. It reads as under:-

“....It is in relation to the term loan account of Chintpurni School Educational Society and in continuation of our earlier letter dated 21.11.2011 where in change in constitution of the general body of the society was intimated to you. The change has been approved by the registrar of the societies and thus names of Smt.Anuradha Prasad and Smt. Maya Shankar has been removed from the general body of the society and names of Sh.Sudhir Shukla and Smt. Sujata Kumar introduced. Thus as Smt. Anuradha Prasad and Smt.Maya Shankar are no longer member of the society, their personal guarantees executed may be considered ineffective as they were provided in capacity of the members of the society and after cessation of their membership their personal guarantees are not enforceable. It is requested to please get the personal guarantees of Sh.Sudhir Shukla and Smt. Sujata Kumar executed at the earliest.”

11. Learned counsel for respondents no.15 & 16 have also argued before the Debts Recovery Appellate Tribunal, Delhi that though in the original guarantee deeds executed by them in 2009, there was a clause that the bank could vary the terms of loan etc. without their consent, but in the fresh guarantee deeds executed by them in 2010 there was no such clause. Thus, they were entitled to invoke Section 133 of the Indian Contract Act. It was not rebutted by the bank.

12. Respondents no.15 & 16 tendered their resignation from the membership of the society. It was conveyed to the bank by the management of the society. The loan was restructured. The members of the society furnished fresh guarantees. Respondents no.15 & 16 were never asked to furnish fresh guarantees. Respondents no.15 and 16 neither contracted for restructuring nor executed any documents. Since the original documents have been varied, the same would not bind respondents no.15 & 16. Respondents no.15 & 16 stood discharged. Since the variations were made in the terms of original contract/documents, respondents no.15 & 16 cannot be made liable beyond terms of their engagement as per settled law.

13. In AIR 1935 Privy Council 21 titled “*Seth Pratapsingh Moholalbhai and another v. Keshawlal Harilal Setalwad and another*”¹ their Lordships have held that 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 principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. Their Lordships have held as under:-

“The principal is that 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 principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place."

14. In AIR 1938 Madras 585 titled "*Messrs. Nuserwanji Cursedji Bhesania and Co. v. Mahamayi Ammaland others*"², the Division Bench has held that it is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted. Any variation in the original contract cannot bind the surety unless he has assented to the variation. The Division Bench has held as under:-

".....it is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted."

15. These principles were reiterated in AIR 1961 Punjab 281 titled "*Union of India v. Pearl Hosiery Mills and others*"³ by the Division Bench. The Division Bench has held that when there is variation in terms of original contract between debtor and creditor without consent of surety, surety bond executed in favour of creditor stands discharged. The Division Bench held as under:-

"34. We have also heard the criticism of the learned counsel for the appellant regarding the findings given by the trial Judge against defendant no.3. I am of the view that the finding of the trial Court on issue no.4 is correct, namely that the surety bond executed by defendant no.2 in favour of defendant no.3 stands discharged, because of the variations having been made in the terms of the original contract, dated the 3rd July, 1954, without the consent of the surety (defendant no.2)"

16. In AIR 1967 Supreme Court 1634 titled "*State of Maharashtra v. Dr.M.N. Kaul (dead) by his legal representatives and another*"⁴, their Lordships of the Supreme Court have held that guarantor cannot be made liable beyond terms of his engagement. Enforceability of the guarantee also depends upon its terms. Their Lordships have held as under:-

"(6) The question is whether this guarantee is enforceable. That depends upon the terms under which the guarantor bound himself. Under the law he cannot be made liable for more than he has undertaken. It is often said that a surety is a favoured debtor, for in the expressive phrase of *Lord Westbury L. C. in Blest v. Brown* (1862) 4 De G F & J. 367 at p. 376; "you bind him to the letter of his engagement."

"Beyond the proper interpretation of that engagement you have no hold upon him."

These observations have been recalled in cases of guarantee and suretyship by the Judicial Committee and also this court. See for example *Pratapsing Moholalbhai v. Keshavlal Harilal Setalvad*, 62 Ind App 23 at p.33 = (AIR 1935 PC 21 at p.24) and *M. S. Anirudhan v. Thomco's Bank Ltd.*, 1963 Supp I SCR 63 at p.77 = (AIR 1963 SC 746 at p.752). To this

there are some exceptions. In case of ambiguity when all other rules of construction fail the courts interpret the guarantee contra proferentem, that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement."

17. Accordingly, there is no perversity or illegality in the orders passed by the learned Debts Recovery Tribunal, Chandigarh dated 28.09.2018 and the learned Debts Recovery Appellate Tribunal, Delhi dated 13.05.2019.

18. Consequently, there is no merit in the petition and the same is dismissed.

Sd/- Harinder Singh Sidhu, J.

R.M.S.

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Petition Dismissed.