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**(1996) 01 SHI CK 0023**

**In the High Court Of Himachal Pradesh**

**Case No : Regular Second Appeal No. 219 of 1984**

Anil Kumar and Others

APPELLANT

Vs

Central Bank of India and Others

RESPONDENT

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**Date of Decision :** 04-01-1996

**Acts Referred:**

Contract Act, 1872 — Section 128, 134, 137, 139, 141

**Citation :** AIR 1997 HP 5

**Hon'ble Judges :** Lokeshwar Singh Pant, J

**Bench :** Single Bench

**Advocate :** Bhupender Gupta and Praneet Gupta, for the Appellant; A.K. Sood, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

1. This appeal is directed against the judgment and decree dated 23-8-1984 passed by the District Judge, Mandi, Kullu & Lahaul Spiti Districts at Mandi in Appeal No. 92 of 1982, whereby the judgment and decree dated 30-4-1982 passed by Sub-Judge 1st Class, Kullu decreeing the suit of the Bank, was modified and decree for a sum of Rs. 13,849-73 paise with cost was passed in favour of the plaintiff and against defendants 1 to 3.

2. Central Bank of India is a corporate body. Its branch is situated at Bhuntar, tehsil" and District Kullu. The respondent No. 1-Bank herein was the plaintiff, M/s. Shere-Punjab Cloth Depot and its sole proprietor Sh. Dharam Singh Bhatia - the principal debtors (respondents 2 and 3 herein) were defendants 1 and 2. Sh. Roshan Lal (original appellant and Sh. Santokh Singh (respondent No. 4 herein) were guarantors-defendants 3 and 4. The respondent-Bank filed a suit for recovery of Rs. 13,849-73 paise along with interest at the rate of 15 per cent per annum and miscellaneous expenses incurred by it from time to time, in maintaining the accounts. The suit was based on the premise that respondents 2 and 3 applied to the respondent-Bank for "granting cash-credit facility from time to time. Appellant Roshan " Lal and respondent No. 4 Santokh Singh stood

guarantors for repayment of loan. The liability in repayment was joint of the appellant and other respondents. The respondents principal debtors committed default in payment of the loan therefore, the respondent-Bank was obliged to call upon them to pay the suit amount vide letter dated 21-1-1980. The respondents-principal debtors failed to liquidate the debt and hence the suit was filed.

3. The respondents-principal debtors have remained ex parte throughout. The suit was contested by both the guarantors, namely, original appellant and respondent No. 4. Roshan Lal in his written statement denied almost all the averments for want of knowledge. He pleaded that his signatures Were procured on some papers as he was dealing with the respondent-Bank. He was not made to understand the details of the papers on which his signatures were being procured and as such, he was not liable at all. He denied having received any notice from the respondent-Bank. He said that respondents-principal debtors had pledged their goods with the respondent-Bank and it was for the respondent-Bank to keep a watch on the said goods so as to ensure the repayment of the loan advanced by it. He pleaded that after the respondents-principal debtors left the place of business at Bhuntar, a lot of stock was lying in the shop" but respondent-Bank did not take steps to get the loan discharged.

4. Respondent Santokh Singh in his written statement raised preliminary objections to the extent that the suit was not properly constituted and that he vide letter dated 29-10-1979 had intimated the respondent-Bank through its Manager to absolve him from the liability of loan amount and to initiate timely action against the -principal debtors to realise the loan as sole proprietor Sh. Dharam Singh Bhatia intended to close his business at Bhuntar. He pleaded that despite his communication, the respondent-Bank went on advancing further loan to the principal debtors and as such, he was not in any way liable for repayment of the suit amount. He also denied if any notice or letter was received by him from respondent-Bank. In nutshell, his defence was that in view of his defence, intimation to the respondent-Bank through the aforesaid letter absolving him from the liability of guarantee given by him, he was not in any way liable for the payment of suit amount.

5. In its replication, the respondent-Bank reiterated the averments contained in the plaint traversed the statements contained in the written statements.

6. On the pleadings of the parties, following issues were framed by the trial Court on 3-3-1982:

1. Whether the plaintiff can recover the said loan taken by the defendant No. 1 from the defendant No. 3 and defendant No. 4? OPP

2. Relief.

7. On that premise, the trial Court proceeded to pass an ex parte decree against the respondents M/s. Shere Punjab Cloth Depot and its sole proprietor Sh. Dharam Singh Bhatia, holding that the respondent-Bank had failed to prove that

it was entitled to recover the suit amount from the guarantors. The District Judge on appeal by the respondent-Bank modified the judgment and decree of the trial Court and passed decree in the following terms:--

"However, instead of coming to the Court with clean hands in spite of being a client of the plaintiff/Bank, Roshan Lal defendant opted to set up a plea which does not found true at the touch stone of logic. A businessman like Roshan Lal could not have blindly signed the printed pro form as of guarantee deeds. He did not even forewarned the plaintiff that his guarantee should be deemed to have been withdrawn. Here, we find, an inaction on the part of defendant No. 3 and as such he along with defendants Nos. 1 and 2 has become liable to the suit amount. With his discussion, I modify the impugned judgment and decree only to the extent that a decree for a sum of Rs. 13,849-73 paise with costs is passed in favour of the plaintiff and against the defendants Nos. 1, 2 and 3. The plaintiff is saddled with the cost of the defendant No. 4 throughout Before parting with this judgment, I would like to remark that the plaintiff shall try to recover the suit amount by getting sale proceeds of the property of the defendants "Nos. 1 and 2 in possession of the police and then to get the decretal amount satisfied from the insurance policy of the defendants Nos. 1 and 2. If any amount is found payable to them by the insurer, then to take an attempt to recover the suit amount from the defendant's Nos. 1 and 2, failing which to take necessary steps to recover the suit amount from the guarantor defendant No. 3 Shri Roshan Lal. It is only a guideline just to safeguard the interest of the guarantor who has become liable just because he at one point of time stood guarantee for respondents Nos, 1 and 2 with a view to in all probability help the loanee."

8. Feeling aggrieved against the impugned judgment and decree of the District Judge, Roshan Lal guarantor preferred this second appeal. The appeal was admitted by this Court on 3-3-1986 on the following sub-"stantial questions of law:--

(i)The Court having come to the conclusion that plaintiff Bank acted negligently and thereby discharged from liability one of the sureties, whether in these circumstances, the Court was justified in fastening" the liability qua the other surety.

(ii) The Court having invoked provisions of Sections 139 and 141 of the Contract Act, in discharging one of the sureties, whether in the circumstances the lower Appellate Court was justified in not discharging the liability of the appellant.

9. During the pendency of the appeal, appellant Roshan Lal died and his legal representatives were brought on record on 30-11-1994. Respondents 2 and 4 have failed to put in appearance in this Court despite actual date notices sent to them.

10. Heard Shri Praneet Gupta, learned counsel for the appellants and Shri Ashok Kumar Sood, learned counsel for respondent-Bank.

11. Shri Praneet Gupta contended that the respondent-Bank was utterly negligent in not realising the decretal amount "from the sale proceeds of the properties of the principal debtors which were in possession of the police and also from the Insurance Company with whom the hypothecated goods were insured. The learned District Judge discharged the other surety, namely, Shri Santokh Singh respondent No. 4 who was also liable for repayment of the loan amount for and on behalf of the principal debtors. In case respondent No. 4 was discharged of his liability, the appellants were also entitled to be discharged and the findings of the learned District Judge to the contrary is illegal.

12. Shri Ashok" Kumar Sood, learned counsel for respondent-Bank on the other hand has sought to support the judgment of the lower Appellate Court and contended that the respondent-Bank was never negligent in realising its loan from the principal debtors. The Manager of the respondent-Bank issued notices to the original appellant and other respondents on 21-1-1980 asking them to pay the loan amount. The respondent-Bank filed affidavit on 28-10-1995 in this Court. It is stated in this affidavit that respondent-Bank could not recover any amount from" the principal debtors or from sale proceeds in possession of the police or from Insurance Company. The respondent-Bank made best efforts for attachment and sale of goods recovered by the police in criminal case of theft. The said goods were got attached and sold by one Jai Ram who had earlier obtained decree against the principal debtors in execution petition No. 8/10 of 1981 and realised a sum of Rs. 5,581 / - as sale proceeds of the said goods. The executing Court finally dismissed as partly" satisfied the decree on 31-8-1981. The respondent-Bank preferred objections under Order 21, Rule 58 on 31-8-1981 before the. executing Court in Execution Petition No. 8/10 of 1981 but the executing Court dismissed the said objections on 15-9-1981 without deciding the rights of the Bank and it is stated that the respondent-Bank preferred another application before the Sub-Judge, Kullu under Order 38, Rule 5, Order 21, Rule 58 and Sections 47 and 151, CPC and also in 39, Rules 1 and 2, CPC for having the said hypothecated goods attached and sold with a further prayer for injunction before sale of the said goods: Another Application No, 17/6 of 1981 was also moved which was also dismissed on 15-9-1981. All these facts would make it clear that the respondent-Bank tried to have attached the sold goods which were recovered by the police to recover the amount due against the principal debtors, but no goods were left for attachment of sale to satisfy the decree of the respondent-Bank. It is stated that the principal debtors had absconded even prior to "filing of the suit and their whereabouts were not traceable till date despite the best efforts made by the Bank. The respondent-Bank also inquired from the guarantor Sh. Roshan Lal about the whereabouts of the principal debtors but he was also not able to furnish their addresses and whereabouts and further it was the duty of the guarantor to make the principal debtors available or trace out their whereabouts to escape his liability in this behalf. Similarly, no recovery could be made from the Insurance Company due to the reason that the goods which were stolen were recovered by the police on the

spot and the thieves were caught red-handed and all goods stolen were "recovered from them. Since the goods were recovered by the police, no claim could be preferred against the Insurance Company.

13. Principal debtor Dharam Singh Bhatia executed a promissory note (Ex.P-2) on 20-5-1979 in favour of the respondent-Bank for a sum of Rs. 15,000/- and he filed an application (Ex.P-3). Defendant Dharam Singh Bhatia executed an undertaking (Ex. P-6) to pay a sum of Rs. 15,000/- to the respondent-Bank. Hypothecation deed executed by the principal debtors was placed as (Ex.P-4). Shri D.K. Khanna, Deputy Chief Officer, Divisional Office, Shimla appeared as PW-1 on behalf of the respondent-Bank and placed on record the demand promissory-note (Ex. P-2), letter of interest (Ex. P-5), letter of credit (Ex.P-6), copy of statement of accounts (Ex.P-7), letter of guarantee (Ex.P-8), demand promissory note (Ex.P-9), letter of interest (Ex.P-10), letter of non-presentment of demand promissory note (Ex.P-11) another letter (Ex. P-I 2), hypothecation deed (Ex.P-13), another letter (Ex.P-14), letter of non-encumbrance (Ex.P-15), and another non-presentment of promissory note (Ex.P-16),

14. Roshan Lal and Santokh Singh guarantors had not denied their signatures on these documents. The defence of guarantor Shri Roshan Lal was that his signatures had been procured on blank papers could not be accepted. There is not even any iota of evidence on record to suggest that his signatures were obtained on blank papers by the respondent-Bank". It is not believable that a prudent man like Roshan Lal who was having dealings with the respondent-Bank could put his signatures on blank papers. Admittedly, he was one of the guarantors on behalf of the principal debtors.

15. Another guarantor-respondent Santokh Singh had proved on record letters (Exts. D-1, D-2 and D-3) sent by him to the respondent-Bank. Yash Paul Jain (PW-2) the Bank Manager, admitted that he had received letter (Ex.D-1) from respondent Santokh Singh on 31-7-1980. He also admitted receipt and two other letters (Exts. D-2 on 22-9-1979 and D-3 on 29-10-1979). He stated that respondent Santokh Singh had desired to get himself absolved of the guarantee given by him on behalf of the principal-debtors. Admittedly, no action in writing was taken by the Bank Manager on the communications of respondent Santokh Singh. By virtue of letter (Ex.D-1) dated 31-7-1980 respondent Santokh Singh had desired the Branch Manager of respondent-Bank to close all the three of his accounts as the Bank was not maintaining any secrecy. By letter (Ex. D-3) respondent Santokh Singh had intimated the Manager of respondent-Bank that the principal debtors were likely to wind up their business and as such his guarantee may be cancelled and necessary steps be taken immediately to recover the amount of loan from them. It finds mentioned therein that the guarantee given by him should be deemed as withdrawn w.e.f. the date of the letter, that is 29-10-1979. This letter was admittedly received by the Manager on 19-10-1979 whereas the notice for demand of the payment of the loan was given to the respondents 2 to 4 on 21-1-1980. It has come in the evidence of the

parties that after respondents 2 and 3 had closed their business, theft had taken place in their shop regarding, which the police had initiated action. Undoubtedly, inaction on the part of the respondent-Bank had impaired the right of respondent Santokh Singh who had warned by issuing letters to the Manager of the Bank to take necessary steps to recover the suit loan from respondents No. 2 and 3, the principal debtors. The first Appellate Court was right in holding that the respondent Santokh Singh was not liable for payment of the loan amount as guarantor as he had withdrawn his guarantee well in time by showing his unwillingness in the aforesaid letters on which no action was taken by the Manager of the respondent-Bank. The first Appellate Court was right in its findings that a businessman like Roshan Lal (original appellant) could not have blindly signed the printed proformane of guarantee deeds. He had not taken any steps to inform the respondent-Bank that his signatures on the guarantee deed were taken" by force or without his knowledge. Further, he had not even forewarned the respondent bank that his guarantee should be deemed to have been withdrawn as the respondent-Bank was negligent in not realising the loan-amount from respondents 2 and 3 principal debtors. The first Appellate Court was right in holding that the original appellant Roshan Lal was liable along with respondents 2 and 3 for payment of the suit amount.

16. Under Clause 8 of Guarantee Deed (Ex. D-6), the guarantor was liable to pay the loan amount in case the principal debtors fail to discharge the liability of the bank. The relevant extract of the clause reads as under:--

"Though as between the principal/principals and myself/ourselves sureties only we agree that as between yourself and me/us. I/ we am/ are principal debtor/debtors jointly with him/them and accordingly. I/we shall not be entitled to any of the rights conferred on sureties by Sections 133,134,135,139 and 141 of Contract Act."

17. A reading of this clause shows that guarantor has not waived his rights under the relevant provisions of the Contract Act.

18. Shri Praneet Gupta learned counsel for the appellants next contended that the first Appellate Court was not justified in discharging the liability of the appellants once it had invoked the provisions of Sections 139 and 141 of the Contract Act in discharging second surety, namely, Santokh Singh respondent. In support of his contention, he placed reliance in *State Bank of Saurashtra v. Chitrangan Rangnath* AIR 1980 SC 128 *State Bank of India v. Quality Bread Factory, Batala*, *State Bank of India Vs. Quality Bread Factory and Others*, *Chemiequip Ltd. and Another Vs. Bank of Baroda and Others*, and *Jose Inacio Lourence v. Syndicate Bank* (1989) 65 Com Cas 698 (Bom).

19. I have perused these judgments. In *State Bank of Saurashtra Vs. Chitrangan Rangnath Raja and Another*, the Hon"ble Judges of the apex Court held in para 10 thus:

"In the circumstances, Section 141 would be attracted. Section 141 comprehends

a situation where the debtor has offered more than one surety, one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet "once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of Sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by Section 141 State of Madhya Pradesh Vs. Kaluram, Rel. on."

Further in para 15, it was held:--

"Through the agreement provided to vary, exchange or take other securities or release any other securities, loss on account of negligence could not be equated with release.. Release of security implies a volitional act on the part of the Bank. Further that the clause for non-discharge of security even if the Bank enters into composition with the principal debtor as to other securities would not include pledge goods."

20 In the light of the observations made by the apex Court in the case cited above, there is no dispute about the legal proposition summarised therein. In the present case, as has been discussed above, the respondent bank was not negligent in discharging its duty of realising the loan amount from respondents 2 and 3 principal debtors.

21 In Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, the apex Court observed:-- "Under Section 128 of the Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate. It is not deferred until the creditor exhausts his remedies against the principal debtor. In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against principal in some other proceedings. It is the duty of the surety to pay the decretal amount. On such payment he would be subrogated to the rights of the creditor u/s 140.. The security would become useless if rights against the security could be so easily cut "down." "

22 In State Bank of India Vs. Messrs. Indexport Registered and others, the apex Court observed:-- "Where the money decree was against all the defendants including the guarantor and a mortgage decree against one of the defendants who had mortgaged the shop with the plaintiff bank, so far as the said shop was concerned and the decree did not put any fetter on the right of the decree-holder to execute it against any party whether as a money decree or as a mortgage decree, the decree-holder would be entitled to proceed against the guarantor first for the execution of the decree. Moreover, it is the right of the decree-holder

to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract." If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. In such a case, when the said decree had become final all pleas as to the rights which the guarantor had to be taken during the trial and not after the decree while execution is being levied." (See also: *State Bank of India, Bathri and Vs. Balak Raj Abrol and Another etc. etc.*, *R. Lilavati Vs. Bank of Baroda and Others*, *Bank of India, Bombay Vs. Yogeshwar Kant Wadhera and Others*, *Sunder Singh Vs. Punjab National Bank, Dehradun*, and *Bhabani Sankar Patra Vs. State Bank of India and Another*,

23 Chapter VIII of the Indian Contract Act, 1872 (hereinafter referred to as the "Act") deals with indemnity and guarantee. Section 124 defines the expression "contract of indemnity", Section 125 defines "rights of indemnity holder when sued"; Section 126 defines the expressions "contract of guarantee", "Surety", "Principal Debtor" and "Debtor". Section 127 provides regarding the consideration for guarantee; Section 128 deals with "Surety's liability"; Section 129 states as to the "continuing Guarantee", Sections 130 and 131 deal with revocation of continuing guarantee and revocation of continuing guarantee by surety's death respectively; Sections 132, 133, 134, 135 and 136 deal with liability of the sureties and discharge of their liabilities, Section 137 provides that the creditor's forbearance to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety, Section 138 provides that where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free surety so released" from his responsibility to the other sureties; Section 139 deals with the discharge of surety by creditor's act or omission impairing surety's eventual remedy; Sections 140 and 141 deal with the rights of surety on payment or performance and surety's right to benefit of creditor's securities respectively; Sections 142 to 144 deal with the guarantee; Section 145 deals with the implied promise to indemnify-, surety; Section 146 deals with co-sureties liable to contribute equally and lastly Section 147 deals with liability of co-sureties bound in different sums. Thus, it is relevant to notice that all these provisions contained in Chapter VIII of the Act are closely linked together and one is connected with another. Therefore, all these provisions pertaining to surety and "guarantee and the principal debtor have to be read together and not in isolation. Section 128 of the Act specifically provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The rights available to the surety under Chapter VIII of the Act, as already pointed out, can be waived by the surety. Therefore, such waiving of right by the surety is neither intended to defeat nor does it defeat any provisions of law. Therefore, it is also not possible to hold that

the consideration and the object of the agreement of guarantee have the effect of defeating"" any provisions of law. A recital in the guarantee deed (Exhibit P-6) under clause 8 in question that surety will not be entitled to any of the rights conferred by Sections 133,134; 135,139 and 141 of the Act cannot be held to defeat the provisions of Chapter VIII of the Act. The rights conferred on the surety under Chapter VIII are not inalienable rights nor those rights have anything to do with the public policy as such. Those rights relate to the contracts entered into by individuals. It is not the case of appellants that the aforesaid recital in the guarantee deed has been obtained either fraudulently or it involves or implies injury to them or their property. It is also not possible to view such a recital as immoral or opposed to public policy. Public policy is not to defeat the debt of the creditor, it is to ensure that the money of the creditor is secured and is recoverable in accordance with law; and the debtor or the security is not absolved from his liability to discharge the debt except in accordance with law. Therefore, I am of the view that the judgment and decree passed by the first Appellate Court against respondents 2,3 and original appellant Roshan Lal is valid and legal. The contentions raised by the learned counsel for the appellants are not accepted.

24. For the reasons stated above, the appeal fails and is accordingly dismissed. The judgment and decree of first Appellate Court are maintained. However, the parties are left to bear their own costs.