
(1992) 04 AP CK 0019
In the Andhra Pradesh High Court
Case No : A.S. No. 1084 of 1980

State Bank of India

APPELLANT

Vs

Praveen Tanneries and Another

RESPONDENT

Date of Decision : 30-04-1992

Acts Referred:

Contract Act, 1872 — Section 128, 133, 139, 140

Citation : (1992) 3 ALT 353 : (1992) 2 APLJ 33

Hon'ble Judges : Ranga Reddy, J; Bhaskar Rao, J

Bench : Division Bench

Advocate : K. Sri Krishna and B.V. Rama Mohan Rao, for the Appellant; J.V. Suryanarayana Rao and Sadasiva Reddy for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Rao, J.—The State Bank of India plaintiff is the appellant. The suit was filed for recovery of a sum of Rs. 3,90,760-19 paise against the borrower - 1st defendant and the guarantor - 2nd defendant. The 1st defendant was a firm carrying on business in tanned skins and hides. The plain tiff on execution of agreements by D-1, viz., Exs.A-1, A-7, A-14 and A-15 and guarantee bonds by the surety D-2 viz., Exs.A-2, A-9, A-16, A-21 and A-27 along with transfer endorsements in favour of the plaintiff Bank on the promissory notes executed by D-1 in the name Of D-2 by the 2nd defendant, viz., Exs.A-3, A-8, A-15, A-20 and A-26 agreed to advance monies to the 1st defendant under five types of schemes namely (i) Cash credit (mundi type), (ii) Cash credit (lock & key), (iii) Outward Bill overdraft, (iv) Clean Cash credit and (v) Cash credit (Mundi & packing type) the ceilings respectively being upto a limit of Rs. 60,000/- Rs. 40,000/- Rs. 25,000/- Rs. 1,00,000/- and Rs. 1,00,000/-. Thereafter, the accounts in respect of the five schemes viz., Exs.A-6, A-13, A-19, A-24 and A-31 opened in some cases and continued in some others had their operation and ultimately by the date of the suit the debit balances recoverable from the 1st defendant stood respectively at Rs. 71,388-85, Rs. 70,904-04, Rs. 22,774-08 Rs.

1,10,474-75 and Rs. 1,15,241-56, making the suit amount put together. Since inspite of notice the amount could not be recovered the suit happened to be instituted.

2. The 1st defendant though filed a written statement remained ex-parte and therefore there was a decree passed against him for the suit amount as prayed for.

3. The 2nd defendant guarantor however resisted the suit mainly by contending in the Written statement that the advances made from time to time were in contravention of the terms of the agreement entered into that some of the account statements bring - in debit balances accrued for the period prior to the date of execution of the guarantee-bonds as well transfer endorsements made on the promissory notes in favour of the plaintiff for which he is not liable and that the contraventions and deviations from the agreed terms in the matter of making the advances had awefully impaired his rights and possibilities of recovering the sums from the 1st defendant and therefore he is discharged of his liability as surety. He accordingly prayed for dismissal of the suit.

4. Before the trial Court the plaintiff examined the Manager of the Bank as P.W. 1 and marked Exs.A-1 to A-43 while the 2nd defendant examined one witness besides himself and also marked Ex.B-1 to B-9. On a consideration of the entire material on record the trial Court decreed the suit against the 2nd defendant only for a sum of Rs. 5,500/-. Hence the present appeal for the balance amount.

5. the learned counsel for the appellant contended that the defendants besides executing the agreements guarantee bonds and the transfer endorsements on the promissory notes have also written renewal letters Exs.A-4, A-5, A-10, A-11, A-17, A-18, A-22, A-23, A-28 and A-29 undertaking their liability for the amounts due by the 1st defendant under the respective statements of account that there are no contraventions or deviations from the agreed terms and that even if there are any such the same cannot discharge the liability of the guarantor, and therefore the plaintiff is entitled to a decree against the 2nd defendant for the full suit amount.

6. Mr. Suryanarayana Rao, the learned counsel for the 2nd defendant firstly contended that the statements of accounts covered by Exs.A-6 and A-13 show even by 22-11-67 the corresponding date of execution of the guarantee bonds by D-2 viz. A-2 and A-9 and transferring the promissory notes Exs.A-3 and A-8 debit balances recoverable from the 1st defendant of Rs. 39,974-24 and Rs. 9,989-10 paise and for those balances brought forward the 2nd defendant guarantor is not liable. In support of his contention the learned counsel drew our attention to the admission portions in the evidence of the Manager P.W.I. P.W.I admitted that the accounts Exs.A-6 and A-13 are continuations from the earlier period and not new ones opened consequent upon execution of Exs. A-1, A-7, A-2, A-9, A-3 and A-8 by the defendants, that Ex. A-6 was opened on 31-5-67 while A-13 was on 17-4-67 and that after balancing the different credit and debit entries pertaining

to the period prior to 22-11-67 there remained a debit balance of Rs. 39,974-24 in Ex.A-6 and Rs. 9,989-10 in Ex.A-13 by 22-11-67. Further in the guarantee bonds there is no term to the effect that for the past amounts covering the period prior to 22-11-67 the date of guarantee bonds with respect to Exs.A-6 and A-13 statements of account the 2nd defendant had undertaken any liability. In these circumstances we hold that the Court below has rightly excluded the amounts, viz. Rs. 39,974-24 and Rs. 9,989-10 from being reckoned against the 2nd defendant guarantor.

7. Mr. J.V. Suryanarayana Rao, the learned counsel for the 2nd defendant contended that under Exs.A-1, A-7 & A-25 agreements the 1st defendant pledged his raw materials finished and unfinished goods with the bank and that though the goods as per the terms of the agreements, are liable to be brought to sale at the instance of the plaintiff consequent upon the default committed by the first defendant in making the payments the plaintiff bank failed to act prudently in bringing them to sale at the earliest inspite of the default and that this has impaired the rights of the second defendant surety to have recourse against the said goods and that therefore he is discharged of the liability under the guarantee bonds.

8. We shall, to appreciate the contentions of the learned counsel, take up the different amounts covered by the five schemes one after the other.

9. Under the first scheme viz., Cash Credit (Mandi type) monies were advanced to the 1st defendant on pledge of the stock kept in the godowns indicated by the Bank the 1st defendant holding with him the lock and key of the same. The Bank maintains stock register for the same. The limits of advance allowed by the bank are at 30% on raw material, 40% on wool and 50% on the value of the stock in the process thus at an average of 40%. The 1st defendant has to submit periodical statements of stock maintained under this scheme. The evidence of P. W. 1 and Ex.A-6 the statement of account concerned show that the plaintiff stopped lending amounts to the 1st defendant after 18-9-69. It is also admitted by P.W.I that D-1 stopped manufacturing goods by December 1969. Ex.B-1 is the stock statement showing the value of the goods on 16-1-70 at Rs. 60,735/-. Ex.B-2 is another statement of stock as on 29-5-70 at Rs. 60,788-13 paise. The plaintiff has not produced any register or stock statements submitted by the 1st defendant from time to time nor the register maintained by the bank in regard to the goods pledged nor the Drawing Power Ledger though the 2nd defendant called upon it to produce the same in his written statement as well as in his notice Ex.B-9. In 1970 the amount due to the Bank under this scheme is about Rs. 61,000/- apart from Rs. 10,000/- and odd towards interest. Fromout of this amount Rs. 39,974-24 was already excluded as noted supra on the ground that the same was arrears outstanding and brought forward after execution of the agreements and guarantee bonds. The balance therefore remains is only about Rs. 21,000/-. The plea of the 2nd defendant is that had the plaintiff sold the pledged goods in time the plaintiff could have realised the balance amount. The

plaintiff sold the goods only after filing the suit in 1972. The goods by their nature decayed and therefore the total goods of the value of Rs. 2,60,000/- had only fetched an amount of Rs. 10,000/- in the auction. That apart as contended for the 2nd defendant the plaintiff also violated the terms and conditions in the agreement. The bank did not issue notice to the 2nd defendant bringing forth all these facts to his notice except informing him of this only after the suit is filed. Thus the plaintiff has impaired the rights of the 2nd defendant who is a surety and has the right to enter into the shoes of the creditor to realise the amount from the debtor after paying the amount to the creditor. Thus the plaintiff has violated the terms of the agreement and advanced amounts equal to the value of the pledged goods and also did not take steps at the proper time to realise the amounts by putting the goods to sale more so when the plaintiff came to know that the 1st defendant stopped business in December 1969 and allowed the goods to decay and perish. This is also admitted by P.W.I in his evidence.

10. Regarding the 2nd loan the plaintiff agreed to advance a maximum amount of Rs. 40,000/- on pledge of the goods at 40% on an-average of their value. Ex.A-7 is the agreement executed in respect of this scheme by the 1st defendant. Under this scheme P.W.I admitted that unlike in the case of the 1st scheme the goods pledged would be in the exclusive custody of the bank and that the 1st defendant can draw the goods only with the specific permission of the bank. P.W.I admitted in his cross-examination that by 31-12-68 the amount due to the bank from the 1st defendant under this scheme was Rs. 39,399-98 paise. The last advance made was on 14-12-68. However there is again another debit entry in Ex.A-13 for a sum of about Rs. 21,000/- on 13-9-69. This is made inspite of the fact that even by 14-12-68 the maximum amount agreed to be advanced was exhausted. As per the terms of the agreement Ex.A-7 under clause (13) the bank is not required to advance amount exceeding Rs. 40,000/-. Even this amount to be advanced is subject to pledging the goods so as to work out the amount at 40% of the value of the goods on an average. P.W.I admitted that the bank has to maintain a stock register in respect of the goods pledged under this scheme. Thus for advancing Rs. 40,000/- the bank should have in its possession goods pledged of the value of Rs. 1,00,000/-. From this it can rightly be inferred that in respect of this scheme there were goods of the value of Rs. 1,00,000/- under pledge with the bank. The plaintiff however has not produced any register though maintained according to P.W. 1 to show that goods of the value of Rs. 1,00,000/- were under pledge with it. Further P.W. 1 admitted that the total goods of the value of Rs. 2,60,000/- fetched only Rs. 10,000/- and odd in the auction conducted after the suit is filed, that too when the 1st defendant pleaded that the pledged goods were not put to sale, Thus the plaintiff has failed to take action at right time to put the goods to sale and thus allowed the goods to decay and perish. It is also admitted by P.W.I that the leather goods under pledge are liable to decay and decomposition.

11. Under the 5th scheme, the plaintiff is claiming an amount of Rs. 1,15,000/- and odd as per Ex. A-31 statement of account. As per the evidence of P.W.I

under this scheme the stocks are pledged to the bank and the plaintiff advanced money upto 18% of the firm orders for contract. Irrevocable letters of credit would be given by the foreign buyers in favour of the 1st defendant and deposited with the bank. The stocks of the 1st defendant were also deposited with the bank. The bank maintained an account of stocks pledged and the stock so pledged was also subject to periodical inspection by the officers of the bank, The 1st defendant was to submit the periodical statements of his stock and the bank staff would verify the valuation given. Here also the advances are at 40% on an average of the value of the goods pledged. The bank advanced money to the 1st defendant under this head between 7-6-68 and 24-7-68. On 24-7-68 the bank advanced a sum of Rs. 50,000/-. In all the bank has advanced a sum of Rs. 99,500/- under this scheme to the 1st defendant. The case of the 2nd defendant is that under this scheme the 1st defendant pledged goods of the value of Rs. 1,68,200/- and the plaintiff allowed the stock to deteriorate and perish without putting the same to sale and adjusting with the proceeds thereof the amount that was due from the 1st defendant. In view of this the contention advanced on behalf of the 2nd defendant is that the rights of the 2nd defendant guarantor are impaired as against the security available with the plaintiff-bank. P.W.I admitted that Exs.B-3 and B-4 stock statements sent between 26-1-70 and 29-5-70 show the value of the stock under pledge in this respect at Rs. 1,00,920/-. The bank did not sell the stock till 25-11-72 though the 1st defendant did not pay the amount due from him. As per the evidence of P.W.I the bank came to know that the 1st defendant stopped the business in December 1969. Still the bank did not take any steps to sell the stocks pledged. It was only after filing of the suit and after the 1st defendant pleaded that the plaintiff failed to bring the stocks to sale the auction was conducted and in that goods put at the value of Rs. 2,60,000/- had fetched an amount of Rs. 10,000/- and odd. Apart from this the plaintiff did not file the record to show the actual quantity of stock available on 25-11-72 the date of auction the rate at which the goods were sold or the list of goods sold. Further there were certain deletions for which there was no explanation forthcoming. It is also in the evidence of P.W.I that the bank gave a notice Ex.A-32 dated 8-5-70 to the 1st defendant pointing out certain irregularities in the accounts. P.W.I was not present at the time of sale of the goods. He could not say whether the articles were taken from the godown and sold or any articles were left out in the go-down. He could not also say whether the goods were in a highly decomposed state at the time of sale though he denied the suggestion that the bank was careless in not realising the amounts from pledged goods in proper time and allowing the security to be impaired by deterioration and pilferage, etc. The plaintiff further failed to show the goods that were sold in the auction except filing the bid-list which simply shows that a particular variety of skin was sold at such and such a rate per K.G. Though the plaintiff is bound to account for the goods under pledge, it failed to do the same. Thus due to the conduct of the plaintiff the goods under pledge were perished and decayed and became worthless. It is amazing to note that goods valued at Rs. 2,60,000/- and were under pledge with the bank fetched an amount of Rs. 10,000/- when put to

auction. This conduct of the plaintiff therefore as found by the Court below has impaired the right of the surety - 2nd defendant, who is entitled to enter into the shoes of the creditor to realise the amount from the debtor after paying back the amount due from the debtor.

12. Under the 3rd scheme, Outward Bill Overdraft the plaintiff agreed to advance a maximum amount of Rs. 25,000/-. Ex. A-14 is the agreement executed by D-1, Ex.A-15 is the transferred pronote while Ex.A-16 is the guarantee-bond executed by D-2 in this behalf. An amount of Rs. 22,233-13 paise is claimed by the plaintiff on this account. Ex. A-19 is the statement of account in relation to this scheme. It is in the evidence of P.W.I that under this scheme D-1 sells goods to another, despatches the goods either by railway or road-way and produces the railway-receipt or lorry-receipt along with the bill for the value of the goods before the plaintiff-bank. The plaintiff -bank would negotiate the same with another bank and recover the money. As soon as the R.R. or lorry-way-bill is produced the bank advances 75 to 90% of the value of the goods. After recovering the full amount from the consignee bank the plaintiff bank would first adjust the advance made to the 1st defendant and then pay D-1 the balance amount. In these transactions, the goods undertransit covered by the R.R. or lorry-way-bill would be the security to recover the money advanced. In case the consignee bank does not pay the amount and returns it for any reason the bank will demand the 1st defendant to pay back the amount advanced and it is only on such repayment the R.R. or the lorry-way-bill would be handed over to the 1st defendant. All this procedure is spoken to by P.W.I. The contention of the learned counsel for the 2nd defendant is that contrary to the terms and conditions of the agreement, the plaintiff in cases where the consignee-bank returned the R.R. or the lorry-way-bill to the plaintiff-bank, the plaintiff did not demand for repayment of the advance made to the 1st defendant and on the other hand gave back the R.R. or the lorry-way-bill soon after its return and thus it resulted in impairment of the security that would have been available to D-2 the surety. The last transaction in this loan is on 12-9-69. The debit entry made on that day is for Rs. 16,500/-. As against this transaction the contention of the 2nd defendant is that the plaintiff having received the R.R. returned by the consignee-bank did not demand D-1 for repayment of the advance made and on the other hand handed over the bill to D-1. The explanation of P.W.I is that it was so handed over to enable D-1 to find out another purchaser. It is also admitted by P.W.I that the bank was handing over returned R.R. or lorry-way- bill to D-1 without demanding repayment of the advance given. This is exactly contrary to clause (xiv) of Ex.A-14. On account of this return of the R.R. or lorry- way-bill the amount advanced of Rs. 16,500/- remained unpaid. Had the plaintiff brought the goods covered by the R.R. to sale without returning the same to D-1 the amount would have been cleared of. On account of the negligence of the plaintiff-bank in this behalf the amount could not be realised. In view of this irregular action and violation of the terms and conditions of Ex.A-14 the court below has rightly excluded the amount of Rs. 16,500/- along with the interest calculated thereon

(viz. Rs. 233-13 paise) and granted decree only for the balance of Rs. 5,500/-.

13. Under the 4th scheme, Clean Cash Credit Scheme, the plaintiff agreed to advance a maximum amount of Rs. 1,00,000/- to the 1st defendant. Ex.A-20 is the transferred promissory-note Ex.-21 is the guarantee-bond executed by D-2 while Ex.A-24 is the statement of account in relation to this scheme. The amount claimed by the bank under this scheme is Rs. 1,10,474-70. As per the evidence of P.W.I under this scheme loans are advanced to D-1 for exporting goods to foreign-buyers. D-1 concludes the contract with the foreign-buyer and the foreign-buyer arranges with the foreign-bank for issuance of a letter of credit to the lending-bank (plaintiff-bank). Through the letter of credit the foreign bank guarantees payment on receipt of the goods shipped. No doubt there will be a mention to time within which the payment is guaranteed. After receipt of the letter of credit the 1st defendant ships the goods, and produces the letter of credit, bill of lading and invoice before the plaintiff-bank. On such a production the plaintiff advances 70% of the value of the goods to the 1st defendant, sends the letter of credit to the foreign bank, collects the amount covered by the invoice and then adjusts the account of D-1 with the money collected to the extent it has already advanced the loan and thereafter pays the balance to D-1. In this context, the complaint of the 2nd defendant is that the plaintiff having received the amount under the letter of credit, has failed to first adjust the amount towards the loan advanced to D-1 and on the other hand advanced the full amount received without any other letter of credit and thereby acted irregularly and against the terms and conditions of the agreement. The learned counsel for the 2nd defendant pointed out some such instances as under. On 23-4-1968 there is a credit entry of Rs. 10,291-70. Though P.W. 1 could not say whether this amount was realised in respect of a foreign bill negotiated by the bank, it is in his evidence that "The bank allowed the D-1 to draw Rs. 10,200/- on the same day". Letter of Credit No. 8220 was negotiated by the plaintiff-bank and realised an amount of Rs. 31,838 -05, It is in the evidence of P.W.I that "It is true that D-1 is allowed to draw Rs. 29,800/- on the same day". P.W.I could not also say whether there was any valid letter of credit on the day when Rs. 29,000/- was drawn by D-1. So much so on 30-4-68 an amount of Rs. 21,134-35 was realised by the plaintiff from a foreign bill. Between 30-4-68 and 5-5-1968 the 1st defendant was allowed to Rs. 43,900/-. Further on 3-5-68 the amount of Rs. 22,000/- without being paid was debited to the account of D-1 by means of transfer. Apart from this irregularity, the learned counsel for the 2nd defendant contended that the plaintiff had irregularly and unauthorisedly extended the letters of credit after negotiation and thereby jeopardised the interests of the surety D-2. To support this contention the learned counsel pointed out that on 17-6-68 a bill for Rs. 32,505-10 under LC1477/M/2992 dt. 17-4-68 was negotiated. The letter of credit was to expire on 30-6-68, but was admittedly extended by P.W.I upto 31-12-68. Again on 27-6-68 the bank negotiated LC 810819 dt. 27-5-68 and that was to expire on 30-6-68. The record according to P.W.I, discloses that on the same day the 1st defendant was allowed to draw Rs.

38,500/- . This was again without any new letter of credit. Above all this the plaintiff bank failed to file any letter of credit or any other proof to show that the transactions and entries made were as per the terms and conditions of the agreements entered into. Apart from all this, not only the bank gave up certain amount received in discharge of his liability as was existing but also realised a sum of about Rs. 60,000/- under the scheme in question from ECGC on 17-8-1974 no doubt after filing of the suit.

14. Thus the second defendant has amply proved that the bank acted irregularly and in violation of the terms and conditions of the agreements entered into and advanced loans beyond the scope of the agreements and behind the back of the 2nd defendant-surety, resulting in impairment of the security against which the surety 2nd defendant could have proceeded by entering into the shoes of the creditor-plaintiff.

15. Now the question to be considered is, whether the conduct of the creditor in not acting prudently by bringing the goods to sale at the right time, varying the terms and conditions of the contract without notice to the surety, resulting in the impairment of his rights would discharge the liability of the surety under the guarantee-bonds.

16. No doubt Section 128 of the Indian Contract Act stipulated the liability of the surety to be co-extensive with that of the debtor, but subject to the terms and conditions of the agreement. In this case as noted supra there are contraventions made by the plaintiff of the terms of the agreement and therefore the liability contemplated by Section 128 of the Act is of no help to the plaintiff. Section 133 of the Act postulates discharging the surety of his liability in relation to the transaction that took place subsequent to the variance in the terms of the agreement effected between the debtor and the creditor without consent of the surety. This is a crucial provision in the present context that handing over the R.R. or lorry-way-bill back to the 1st defendant on its return by the plaintiff without insisting upon payment of the amount advanced already is one of the variations brought in by the 1st defendant and the plaintiff without notice to the surety D-2. Section 139 of the Act also refers to the discharge of the surety in cases where the creditor does any act inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, resulting ultimately in the impairment of the remedy available to the surety against the debtor. There is already a finding recorded supra that the rights of the surety have been impaired due to the improper conduct of the plaintiff. Section 140 of the Act is the provision enabling the surety to enter into the shoes of the creditor after repaying the amount due from the debtor to the creditor for purposes of recovering the amount from the debtor.

17. Apart from these provisions in the Contract Act the case law on the subject is positive and specific on the question of discharge of the surety of his liability consequent upon variance of the agreement without notice to the surety, contravention of the terms and conditions of the contract and omission to do an

act expected of by the plaintiff and is also duty bound from the view point of the surety.

18. The oldest case on the subject is the one in *Rees v. Berrington*, 30 Eng. Reports 765. The facts in brief therein are; Thomas, Daniel and Richard Blackford carried on a business as lacemen in partnership till the death of Thomas. On taking the accounts a balance of ? 2972,3s. 5d. appeared to be due from the partnership to Robert Pope Blackford, to secure which sum joint and several bond was executed by the surviving partners and by James Rees as surety with the condition to be void on payment of the said sums with interest by instalments upon 31-12-1789 and 31- 12-1790. In September 1790 Robert Pope Blackford died. Thereupon James M'Kenzie on behalf of the executors of Robert Pope Blackford came to an arrangement with the surviving partners concerning the money due on the bond and the interest whereunder five promissory notes were taken in relation to the 1st instalment payable under the bond - the last promissory note being payable on 21st of April, 1792 and three promissory notes in relation to the 2nd instalment the last promissory note being payable on 21st January 1793. Further after paying the first three promissory notes in relation to the 1st instalment under the bond, by a new arrangement all the remaining promissory notes were exchanged for four other notes the last one being payable on 25th December, 1793. Ultimately some amount stood due and unpaid resulting in an action brought against the surety, Rees, upon which the surety filed a bill for an injunction. After referring to the 1st and 2nd arrangements noted supra to be behind the back of the surety, Lord Chancellor observed at page 767:

"It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

It is also observed:

"The transaction in this case was much more mischievous after circumstances of communication that showed great embarrassment, great difficulty, and great distress, indulgence was from time to time given under circumstances apparently very hazardous without any communication with this man who had so great an interest and who in.....".

So observing the injunction sought for by the surety was granted.

19. In *Wulff v. Jay* 1872 (7) QB 756 deciding the question as regards the discharge of the surety Hannen, J., stated the law thus:

"I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged as well as his own credit

to the plaintiffs and he was entitled therefore to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety and to pay the debt for which he had so become surety. He will however be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in *Rees. v. Barrington*, 2 White and Tudor's L. C. 4th Edn. at p. 1002. As a surety on payment of the debt is entitled to all the securities of the creditor whether he is aware of their existence or not even though they were given after the contract or suretyship if the creditor who has had or ought to have had them in full possession or power loses them or permits them to get into the possession of the debtor or does not make them effectual by giving proper notice the surety to the extent of such security will be discharged."

20. In *Holme v. Brunskil* 1877 (3) QBD 495 the question again relates to the discharge of the surety consequent upon variation in the terms of the contract without the consent of the surety. There the plaintiff having agreed to let to G.B., as yearly tenant a farm including certain hill pastures and a flock of 700 sheep the defendant gave the plaintiff a bond to secure the redelivery to him at the end of the tenancy of the flock in good order and condition. In November there was an unsuccessful attempt by the plaintiff to evict G.B., and ultimately on 8th April there was another agreement entered into whereunder G.B. should surrender a field to the plaintiff that G.B.'s rent should be reduced 10% and the notice to quit should be considered as withdrawn. Thus G.B., continued to be tenant of the farm less the field at the reduced rent. Again in October 1876 the plaintiff gave a quit notice. On giving up the farm it was ascertained that the flock was reduced in number and deteriorated in quality and value. The plaintiff therefore sued the surety defendant on the basis of the bond. In that set of facts it was held:

"that the contract of the surety was that the flock should be delivered up in good condition together with the farm as originally demised to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting and not having been asked to assent he was discharged from liability."

21. The other decision in *Polak v. Everett* 1876 (1) QBD 669 is also one dealing with interference with the rights of the surety and the consequent discharge. The facts in that case are: N was indebted to the plaintiffs and by deed agreed first to pay them 3400 pounds on 15-2-1874 secondly within a certain time after the allotment of shares in a company to which he was about to assign his business to transfer to them shares in it to the nominal value of 6000 pounds and redeem them at par within twelve months from 1-1-1874 and fourthly it was agreed between him and the plaintiffs that the book debts due to him to the nominal amount of 8000 pounds should be collected and one half paid to the plaintiffs to be applied towards redemption of the shares and when they had received a sum equal to or a multiple of the amount of a share they were to deliver to him

shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N so far as concerned the redemption of the shares of the value of 6000 pounds. Subsequently an arrangement was made between the plaintiffs and N., by which for an equivalent in shares and cash they released to him their interest in the book-debts that he might dispose of them to the company. The defendant having been sued on his guarantee for a deficiency of 2250 pounds in the amount of shares it was held that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him.

22. In AIR 1935 21 (Privy Council) the Privy Council was dealing with the question as regards discharge of the surety on alteration of the original contract. It was held by the Privy Council:

"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."

23. In State of Madhya Pradesh Vs. Kaluram, one Jagatram was the highest bidder in the auction held for sale of "felled trees". The bid amount was to be paid in four instalments and an agreement was accordingly entered into for which Nathuram and Kaluram stood sureties. Subsequently Jagatram removed almost the entire quantity of trees but since he did not pay the balance three instalments the State of Madhya Pradesh laid action against the surety, Kaluram for recovery of the amount. This attracted a counter-action from Kaluram against the State for a declaration that he was not liable to pay the arrears of forest dues recoverable from Jagatram mainly on the ground that the forest authorities gave time to Jagatram and omitted to take steps which their duty to the surety required them to take i.e. prompt seizure and sale of the trees after the second instalment fell due, and since on that account his eventual remedy against Jagatram was impaired. Adverting to this contention the Supreme Court after referring to the decision in Wulff v. Jay (2 supra) wherein the principle laid down in the decision in Rees v. Barrington (1 supra) received the approval held:

"12. The State had a charge over the goods sold as well as the right to remain in possession till payment of the last instalments. When the goods were removed by Jagatram that security was lost and to the extent of the value of the security lost the surety stood discharged....

13. The Forest Officers of the State of Madhya Pradesh parted with the goods before receiving payment of the amount due by the contractor, Jagatram. Thereby the charge in favour of the State was seriously impaired and the

statutory power to sell the goods for non-payment of the amount remaining due became, for all practical purposes, ineffective. Again under the terms of the contract the Forest Authorities had the right to prevent removal of goods sold until the price was paid: that right was also lost."

In those circumstances, the Supreme court agreeing with the view of the High Court discharged the surety Kaluram from the liability to pay the amount undertaken by him under the terms of the surety bond.

24. The latest decision of the Supreme Court that has bearing on the present facts in the matter of discharge of the surety from the liability is the one in *State Bank of Saurashtra Vs. Chitranjan Rangnath Raja and Another*, . There "A" bank has given Cash Credit facility to a businessman to the tune of Rs. 75,000/- as against two securities offered by him, namely, (1) the pledge of goods to be kept under lock and key under supervision of the Bank and (2) personal guarantee of the surety. The pledge and the personal guarantee were not two independent transactions but they formed part and parcel of one composite transaction. The surety himself agreed to give personal guarantee on the specific understanding and with the full knowledge of the Bank that the principal debtor was offering another security, namely, pledge of goods. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor bank. It was concurrently found that the bank was utterly negligent with regard to the safe keeping and handling of pledged goods and the security of pledged goods was lost on account of the negligence of the Bank. In those circumstances, the Supreme Court after referring to the decision in *Wulff v. Jay* (2 supra) wherein reliance was placed upon the decision in *Rees v. Barrington* (1 supra) as noted above, held;

"Section 141 comprehends a situation where the debtor has offered more than one security 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 of 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."

Apart from these decisions the notes by the renowned author Frederick Thomas White and Owen Dacies Tudor in their Eighth Edition on "Leading Cases in Equity" while referring to the decision in *Rees v. Berrington* (1 supra) refers to the different situations wherein the surety stands discharged of his liability. They are (i) giving farther time to the principal debtor without notice to or consent of the surety, (ii) misrepresentation of the material fact or fraudulent concealment of the existing material fact from the surety by the creditor would invalidate the

contract, (iii) where there is a departure from the terms of the contract, (iv) where the creditor without the assent of the surety gives time to the principal debtor, (v) where the creditor takes another surety or additional security in satisfaction of the first surety, the first surety will stand discharged. The following passage with reference to the discharge of the surety on the creditor's farthinger the time to repay the debt without notice to the surety has a material bearing on the present facts. It runs:

"This produces no inconvenience to any one; for it only amounts to this that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor, you cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." (at page 575).

Referring to the impairment of the security which also results in discharge of the surety, the learned authors at page 601 stated;

"So a surety will be released if the creditor cannot on payment by his surety, give him the securities, in exactly the same condition as they formerly stood in his hands, and this may, if course extend even to discharging the surety entirely from his liability...."

From the above decisions and provisions of law referred to, it is clear that not only the variance in the terms and conditions of the contract by the creditor without notice to or consent of the surety would discharge the surety of the liability, but it would equally discharge him if the creditor cannot on payment by his surety, give him the securities in the same condition as they formerly stood in his hands, thereby rendering impairment. This doctrine enunciated in *Rees v. Berrington* (1 supra) has been approved by the Supreme Court and thus continues to be good law even after two hundred years. The facts in the case on hand as held supra reveal that not only the creditor-bank had varied the terms of the contract but had also rendered the securities not available to the surety for being proceeded against as he is entitled to, after making the payment to the Bank and thereby caused the impairment.

25. The learned counsel for the appellant no doubt, sought to place reliance upon a decision of the Supreme Court in *Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others*, . That decision is of no help to the appellant. In that case the credit limit of Rs. 1,00,000/- was reduced to Rs. 50,000/- and again raised to Rs. 1,00,000/-, for which there was no written agreement between the creditor and the principal debtor. That was reflected only through the entries in the creditor's account books resultant of private instructions to the cashier. Such instructions were held to be not binding on the debtors and could not vary the

term in the formal agreement. That decision therefore cannot be read as one where there was variance in the terms of the contract and still the surety was not discharged.

26. In the result, for the reasons aforementioned we find no merit in this appeal for interference. The appeal accordingly is dismissed. No costs.