24/05/2010

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

RFA No.02 of 2009

The State Bank of India,
Gangtok Branch Office : M. G. Marg,
Gangtok, East Sikkim. ..... **Appellant**

versus

1. Shri Vivek Garg,
   S/o Shri Saroj Garg (Agarwal)
2. Shri Saroj Garg,
   S/o Shri Laxmi Narayan
3. Shri Ganga Ram Sharma,
   S/o Late Ram Prasad Sharma,

   All resident of - Bhardwaj Niwas,
   Diesel Power House,
   Gangtok, East Sikkim.

..... **Respondents**

For Appellant	:	Mr. A. Moulik, Senior Advocate with Mr. N. G. Sherpa, Mr. Manish Kr. Jain and Mr. Leonard Gurung, Advocates.
For Respondents No.1 & 2	:	None present.
For Respondent No. 3	:	Mr. B. K. Rai, Advocate with Ms. Binita Thapa and Ms. Karishma Chettri, Advocates.

BEFORE : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE.

Last date of hearing : 17-05-2010

DATE OF JUDGMENT : 24-05-2010

J U D G M E N T

Wangdi, J.

This appeal is directed against the judgment and decree dated 25-11-2008 passed by the District Judge, East and

North Sikkim, at Gangtok, in Money Suit no.3 of 2005, by which the suit filed by the appellant-bank against the respondents for recovery of Rs.5,05,336.73 was dismissed.

2. The case of the appellant in the suit is that the respondents had jointly applied to the appellant-bank for a term loan amounting Rs.3,54,000/- under the "SBI Education Loan Scheme" as financial assistance to the respondent no.1 Shri Vivek Garg for undergoing B. Tech (Degree course) in Sikkim Manipal Institute of Technology, Mazitar, East Sikkim, which was sanctioned under agreed terms and conditions more specifically provided in the Agreement for Term Loan Exhibit-5 executed by and between the appellant bank and the respondents no. 1 and 2 and other related documents. The respondent no.1 and his father respondent no.2 were the principle borrowers with the respondent no.3 as their guarantor and, therefore, they were jointly and severally liable for the repayment of the loan with interest accruing thereon. As per the appellant, the respondent no.3 by a Guarantee Agreement marked Exhibit 3 executed by him, had agreed to repay the dues and payable by the borrowers, the respondents no. 1 and 2, to the bank with accrued interest, cost, charges, expenses, etc., in the event they defaulted in doing so and also would indemnify and keep the bank indemnified against all loss of the principle, interest and other moneys, etc. and that he would be treated as the principle debtor to the bank for all payments against the principal borrowers and further that the guarantee would be a

continuing one. According to the appellant, the respondents had applied for the loan in the prescribed form (Exhibit 1) which along with the proposal form (Exhibit 2) and the arrangement letter (Exhibit 4) were duly signed by all of them.

3. Letter dated 17-02-2004 of the appellant-bank sent to the respondents no.1 and 2 through speed post demanding repayment of the loan with interest was returned with the postal remark "addressee left without information". It was later learnt by the appellant-bank that the respondents no.1 and 2 had left the place and address shown in the prescribed application form and in other related documents without any trace, whereupon they lodged a FIR in the Sadar Police Station, Gangtok on 12-09-2004. Later coming to learn of their being at Naya Bazar, Kurseong, Darjeeling, W.B., the appellant issued to them in that address a legal notice on 17-11-2004 demanding repayment of the loan with accrued interest but was also returned by the postal authorities as unserved. Similar notice issued to the respondent no.3 at his address at Gangtok, was not responded to in spite of it being received by him. Thereafter, notices were published in "Janpath Samachar" (Hindi Newspaper) on 26-06-2005 with photographs of the respondents no.1 and 2 calling upon them to repay the dues of the appellant-bank, but that too failed to evoke any response. The total dues against the loan as on 10-08-2005 with interest computed @11.5% per annum was Rs.5,05,336.73, without prejudice to the future interest @11.5% until recovery of the

entire dues. Ultimately, the appellant-bank filed Money Suit no.23 of 2005 against all the respondents in the Court of the District Judge, East and North Sikkim at Gangtok on 23-08-2005 for recovery of the aforesaid sum and other consequential reliefs.

4. During the course of the proceedings before the trial Court, it appears that the notice of summons could not be served upon the respondents no.1 and 2, requiring the appellant taking resort to substituted service by publication in a local newspaper. The substituted service not having been responded to by the respondents no.1 and 2, they were proceeded *ex parte* vide the order of the trial Court dated 21-06-2006. From the proceedings of the trial Court available on record, it is seen that it was only the respondent no.3 who appeared diligently in each date fixed by the Court and contested the suit by filing written statement. It would not be necessary to deal with each and every averments contained in the written statement but suffice it to state that the respondent no.3 did not deny the factum of the respondents no.1 and 2 having taken the loan and him having stood as guarantor by executing the deed of guarantee marked as Exhibit 3. The suit was contested by him on the ground that since the appellant and the respondents no.1 and 2 had made material variation in the manner of disbursement of the loan without his consent, in as much as, it was deposited directly in the personal account of the borrowers, i.e., the respondents no.1 and 2, instead of the institution which was the agreed mode of disbursement, he stood discharged as a

guarantor. It was further stated that vide the application for loan Exhibit 1, the respondents no.1 and 2 had pledged an immovable asset, namely, "Krishna Restaurant" having the declared value of Rs.2,50,000/- which the appellant-bank allowed the respondents-borrowers to part with. The appellant having varied the terms of the contract and having allowed the borrowers to part with the pledged security which as per the respondent no.3, was in connivance with the borrowers, he stood discharged from the guarantee. In fact, on coming to learn of the manner of disbursement in violation of and contrary to the agreed terms, the respondent no.3 vide his letter dated 05-07-2003 addressed to the Assistant Bank Manager, SBI (HQ), Gangtok, conveyed his withdrawal from the guarantee, but as per the respondent no. 3, the bank chose not to respond.

5. Based upon the pleadings for the purpose, the trial Court framed the following issues:-

> "1. Whether the suit is maintainable against the defendant No.3?
>
> 2. Whether the defendant No.3 is liable to re-pay the educational loan taken by defendant Nos.1 and 2?
>
> 3. Whether the plaintiff altered the terms of the contract without the consent of defendant No.3?
>
> 4. Whether the plaintiff has violated the terms of guarantee agreement entered between the plaintiff, defendant Nos.1 and 2 and the defendant No.3?
>
> 5. Reliefs."

6. The learned trial Court after considering the pleadings and the evidence on record decided all the issues against the appellants and vide the impugned judgment came to a finding that the appellant-bank had altered the terms of the contract and, therefore, neither the suit was maintainable against respondent no.3 nor was he liable to repay the loan taken by the respondents no.1 and 2 thereby leading to the dismissal of the suit.

7. Before this Court, it was submitted by Mr. A. Moulik, senior advocate, appearing on behalf of the appellant-bank, that the findings of the trial Court in respect of issues no.3 and 4 were grossly erroneous and in total disregard to the various clauses of the Guarantee Agreement Exhibit 3 and that the issues no.1, 2 and 5 having been decided on the basis of the findings on issues no.3 and 4 in holding that the suit against the respondent no.3 as a guarantor was not maintainable, was also untenable in law and the facts and circumstances of the case and, therefore, the impugned judgment was liable to be set aside. The learned senior counsel submitted that the relationship between the appellant-bank and the guarantor respondent no.3 was the creation of the Guarantee Agreement Exhibit 3 executed by and between them and, therefore, his responsibility to the bank had to be considered in the light of the terms and conditions prescribed therein, notwithstanding the fact that the respondent no.3 along with the respondents no.1 and 2, had also signed on the other documents

being the application for loan - Exhibit 1, the proposal form - Exhibit 2 and the arrangement letter - Exhibit 4. Laying emphasis on the various clauses of the Guarantee Agreement, it was submitted that even if the respondent no.3 had acquired the legal right to be discharged from the surety for the reasons stated by him, such right stood waived by him.

8. It was submitted by Mr. Moulik that by the application of Section 137 of the Indian Contract Act, 1872, the responsibility of respondent no.3 as a guarantor could not be discharged even assuming that there was forbearance, omission or any other indulgences by the bank shown in favour of the borrower which as per the learned senior counsel, had also been categorically agreed upon in terms of clause (2) of the Guarantee Agreement. It was pointed out that by clause (11) of the Guarantee Agreement, the respondent no.3 had consented, amongst others, to any variation that may be effected in the terms of the loan arrangement of any composition between the bank and the borrower, and in event of such variation, the guarantor would not be released or discharged from his obligations under the Guarantee Agreement. Having thus agreed by executing the Guarantee Agreement Exhibit 3 which was to be a continuing one in terms of clause (7) and, having agreed to be treated as the principle debtor to the bank for all payments guaranteed by him as per clause (6) therein, the respondent no.3 was bound to discharge his obligations under the Guarantee Agreement. In other words, those were the terms

of a legal and valid concluded contract entered between the appellant-bank and the respondent no.3 and that being so, neither of the parties could resile therefrom.

9. In support of his submission, Mr. Moulik referred to the case of ***Sita Ram Gupta*** vs. ***Punjab National Bank & Ors.*** : 9***2008) 5 SCC 711***, paragraph 8 of which reads as under:-

> **"8.** The question is whether the appellant, having entered into such an agreement of guarantee with the Bank, had waived his right under the Act. In our view, the High Court has rightly held and we too are of the view that the appellant cannot claim the benefit under Section 130 of the Act because he had waived the benefit by entering into the agreement of guarantee with the Bank. In Lachoo Mal v. Radhey Shyam this Court observed that the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public principle. In Halsbury's Laws of England, Vol. 8, 3rd Edn., it has been stated in para 248 at p. 143 as under:-
>
> > *"248. Contracting out.– 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.* Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void." (emphasis supplied)**"**
>
> **[emphasis supplied]**

10. Next, reliance was placed upon in the case of ***T. Raju Setty*** vs. ***Bank of Boroda*** : ***AIR 1992 Karnataka 108***, in which the Division Bench of Karnataka High Court in paragraph 11 held as follows:-

> **"11.** We are of the view that as the provisions contained in Chapter VIII of the Act relate to indemnity and guarantee, they deal with one subject and they are to be read together. The liability of the surety as stated in general terms in S. 128 of the Act is no doubt co-extensive with that of the principal debtor, but this liability is also subject to the terms of the contract; because S. 128 of the Act itself specifically provides that the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Thus the liability of the surety is subject to the terms of the contract as may be arrived at between the parties. The words "unless it is otherwise provided in the contract" occurring in Section 128 of the Act will also govern the other provisions contained in Chapter VIII of the Act and enable the surety to give up the rights available to him under Sections 133, 134, 135, 139 and 141 of the Act. ....."
>
> **[emphasis supplied]**

11. The third case relied upon by Mr. Moulik was the case of ***Central Bank of India*** vs. ***M/s. Multi Block Private Ltd. & Ors.*** : ***AIR 1997 Bombay 109***, in which paragraph 27 reads as follows:-

> **"27.** The defendants have waived their rights conferred under Sections 133, 134, 135, 139 and 141 of the Contract Act. But, in my view, the said waiver will not affect the validity and efficacy of the transaction of advancement of loan and furnishing of the guarantee by the guarantors. Section 23 of the Indian Contract Act is mainly concerned with the consideration or object of the agreement of guarantee or consideration of the contract and the rights available under Chapter VIII in Indian Contract Act can be waived by the guarantors and such waiver will not defeat any provision of law. It is not possible to say and view the various clauses in the guarantee bond are such which are opposed to public policy or tainted with immorality. On the other hand, the public policy should be that one should not allow to defeat the debt of the creditor. ....." **[emphasis supplied]**

12. It was further submitted by Mr. Moulik that in so far as the respondent no.3 is concerned, it was necessary to consider the Guarantee Agreement executed by him as regards his liability to

the bank while necessarily excluding the other documents executed by the respondents including the respondent no.3 who was the guarantor. The Guarantee Agreement constituted a separate, distinct and independent contract between the bank and the guarantor and that it is independent of the main agreement entered between the appellant-bank and the respondents no.1 and 2. Reference in this regard was made to the case of ***Hindustan Construction Co. Ltd.*** vs. ***State of Bihar & Ors.*** : ***AIR 1999 SC 3710***, particularly to the following portion of paragraph 20:-

> **"20.** As pointed out above, Bank Guarantee constituted a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. ....."

13. On the other hand, Mr. B. K. Rai, advocate appearing on behalf of the respondent no.3, submitted that the respondent no.3 had agreed to be the guarantor only after being satisfied of the terms and conditions contained in all the documents being Exhibit 1, Exhibit 2, Exhibit 3, Exhibit 4 and Exhibit 5. As per him, all those documents had to be read together as that formed the basis of his agreeing to be the guarantor and not in exclusion of each other as was being contended on behalf of the appellant. It was his case that in the Agreement For Term, Loan Exhibit 5, the manner of disbursement had been clearly set out in clause (2) thereof as per which the disbursement of loan would be made directly to the institution towards payment of tuition fees and that only such part of the loan necessary towards purchase of books for

the prosecution of studies of the course undertaken would be paid to the student from time to time on the condition that he produces the related receipts evidencing purchase of the books before the bank within a reasonable time from the disbursement of the amount made to him. Mr. Rai also drew the attention of this Court to clause (10) of the arrangement letter Exhibit 4 in terms of which in sub-clause (a) the very term provided in clause (2) of the agreement for term loan Exhibit 5 had been stipulated. On the strength of these clauses, Mr. B. K. Rai submitted that those being the essential conditions of the contract of loan, it was necessary for the parties to have strictly complied with them, which was not done. Contrary thereto, the appellant had made material variation in the said terms in connivance with the principal borrowers, i.e., respondents no.1 and 2, and got the major portion of the loan transferred in the account of the borrowers directly except a sum of Rs.77,300/- that was paid to the institution directly. Mr. Rai further submitted that on coming to learn of this fact, the respondent no.3 by his letter dated 05-07-2003, addressed to the Assistant General Manager, SBI (HQ), Gangtok (Exhibit B2), conveyed his withdrawal as the guarantor. It was argued that the way in which the appellant and the respondents no.1 and 2 had conducted themselves after the loan had been sanctioned and the documents executed by the respondent no.3, clearly indicated their fraudulent intention and that in order to succeed in their fraud they had mis-represented the facts to the respondent no.3 and, on such mis-representation the loan documents including the Guarantee

Agreement were got executed by him. It was, therefore, submitted that by application of the provisions of Sections 142 and 143 of the Contract Act the Guarantee Agreement entered into by him was rendered invalid and was a nullity in the eye of law. It was further submitted that even assuming that the Guarantee Agreement remains valid, he cannot be held responsible for more than the amount of the first disbursement that was made in due compliance of the terms of the agreement. In other words, as the first instalment of Rs.77,300/- had been disbursed as per the agreed terms and conditions, he would be liable only to that extent and nothing further. In support of his submission, Mr. Rai referred to the case of ***State Maharashtra*** vs. ***Dr. M. N. Kaul (dead) by his legal representatives & Anr.*** : ***AIR 1967 SC 1634*** in paragraph 6 of which it has been 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. .....
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> .....
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> ..... 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." **[emphasis supplied]**

14. It was further urged by Mr. B. K. Rai that there was a serious negligence on the part of the appellant-bank in not having secured the assets pledged by the borrowers, i.e., respondents no.1 and 2, which consisted of one-seventh of joint ancestral

property in Kurseong worth about Rs.50 lacs, M/s. Krishna Restaurant, NH-31A, Gangtok valued at Rs.2.5 lacs and LIC policy no.451159 for Rs.50,000/- and that instead of liquidating those assets belonging to the borrowers, they chose to remain idle and allowed the borrowers to part with them. Therefore, as per the learned counsel by application of Section 141 of the Contract Act the respondent no.3 was discharged to the extent of the security which in any case was more than the value of the loan and the amount which is now due and payable to the appellant. Therefore, the District Judge having considered all these aspects of the case, had rightly passed the impugned judgment dismissing the suit filed by the appellant and, therefore, the appeal ought to be dismissed for the same reasons.

15. Having considered the rival contentions and upon perusal of the records of the case and the evidence of the parties, the question that needs determination for the purpose of this appeal appears to be a limited one. It was an admitted position of the parties that emerged during the course of hearing of the appeal that the primary question to be answered for the disposal of the appeal is as to whether having regard to the terms and conditions of the Guarantee Agreement Exhibit 3, is the respondent no.3 discharged from his obligation as the guarantor by application of Section 133 of the Contract Act? For this purpose, it is immaterial to go through the evidence adduced by the parties as it can be decided on the basis of the documents, more particularly, the

Guarantee Agreement filed in the case. We may consider clauses 2, 6, 7, 8, 9 and 11 of the said Guarantee Agreement Exhibit 3:-

"2. The Bank shall have the fullest liberty without affecting this guarantee to postpone for any time or from time to time to enforce or forbear to enforce any remedies or securities available to the Bank and the Guarantor(s) shall not be released by any exercise by the Bank of its liberty with reference to the matter aforesaid or any of them or by reason of time being given to the Borrower or any other forbearance act or omission on the part of the Bank or any other indulgence by the Bank to the Borrower or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantor(s).

6. In order to give effect to the guarantee herein contained the Bank shall be entitled to act as if the Guarantor(s) was the principal debtor to the Bank for all payments guaranteed by him / them as aforesaid to the Bank.

7. The guarantee herein contained is a continuing one for all amounts due to the Bank by the Borrower under or in respect of the aforesaid advance granted as aforesaid as also for all interest costs and other moneys which may from time to time become due and remain unpaid to the Bank hereunder.

8. The guarantee shall be irrevocable and enforceable against the Guarantor(s) notwithstanding any dispute between the Bank and Borrower.

9. The guarantee herein contained shall be enforceable against the Guarantor(s) notwithstanding the student at any time leaving the said **Sikkim Manipal Inst. of Tech.** (name of the institution) and / or giving up the studies for the course of **B.Tech** or changing the said course to some other course.

> 11. It is agreed by the Guarantor(s) that notwithstanding any variation made in the terms of the aforesaid arrangements of any composition between the Bank and the Borrower or any promise given by the Bank to the Borrower to give time to or not to sue or the Bank parting with any of the securities given by the Borrower, the Guarantor(s) shall not released or discharged of his / their obligations under this guarantee and in the event of such variation, composition, promise or parting with security the Guarantor(s) shall be deemed to have consented to the same."

16. As can be seen from the above, clause (11) clearly stipulates, *inter alia*, that notwithstanding any variation made in the terms of the arrangement of any composition between the bank and the borrower, the guarantor shall not be relieved or discharged of his obligations under the guarantee and, in the event of such variation or composition or promise the guarantor shall be deemed to have consented the same. The question that would then arise would be as to whether by having agreed in the manner as stated above, has the guarantor, the respondent no.3, waived his right that was available to him under Section 133 of the Contract Act and result in him being discharged as the guarantor? In the case of ***Corporation Bank*** vs. ***Mohandas Baliga*** : ***ILR 1993 KAR 201***, this very question was came up for consideration before a Division Bench of the Karnataka High Court. The Court after considering a catena of decisions of various High Courts and the Supreme Court, held as follows:-

> **"11.** We are of the view that as the provisions contained in Chapter VIII of the Act relate to Indemnity and Guarantee, they deal with one subject

and they are to be read together. The liability of the surety as stated in general terms in Section 128 of the Act is no doubt co-extensive with that of the principal debtor, but this liability is also subject to the terms of the contract; because Section 128 of the Act itself specifically provides that the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Thus the liability of the surety is subject to the terms of the contract as may be arrived at between the parties. The words "unless it is otherwise provided in the contract" occurring in Section 128 of the Act will also govern the other provisions contained in Chapter VIII of the Act and enable the surety to give up the rights available to him under Sections 133, 134, 135, 139 and 141 of the Act. It is a settled legal position of law that a legal right can be given up provided such giving up of legal right under any contract is not hit by Section 23 of the Act. Section 133 of the Act makes it clear that any variance made in the contract between the principal debtor and the creditor without the consent of the surety, discharges the surety as to transactions subsequent to variance. This consent of the surety can be obtained either at the time of contract is made between the principal debtor and the creditor to which the surety gives the guarantee for making any change or alteration in the contract to be made or not to claim any right or benefit under Chapter VIII of the Act. In other words, in the surety bond/guarantee-bond itself the surety can agree to waive his rights available to him under the various provisions contained in Chapter VIII of the Act. Such waiving of his right by the surety is permissible under Section 133 read with Section 128 of the Act.

11.1 ..... 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 surety is not absolved from his liability to discharge the debt except in accordance with law. .....

20. Thus from the aforesaid Decision it is clear that the provisions contained in Sections 23, 128, 133, 134, 135, 139 and 141 of the Contract Act have been considered and it has been held that the agreement of surety is also like any other agreement, it is open to the person to give up his right under a contract or under any law. Similarly, the surety also can give up his right and the act of giving up of the right arising under the provisions of the Contract Act by a surety, does not amount to an act contrary to Section 23 of the Contract Act and as such it would not be opposed to public policy. While deciding the aforesaid question in Raju Setty's case, reliance has

> also been placed on the Decisions in (1) Union of India, Ministry of Food and Agriculture (Department of Food) New Delhi v. Pearl Hosiery Mills and Ors. MANU/PH/0085/1961 (2) Citibank N.A. New Delhi v. Juggilal Kamalapat Jute Mills Co. Ltd., Kanpur MANU/DE/0004/1982 Hodges and Anr. v. Delhi & London Bank Ltd. Law Reports 27 Indian Appeals 168; (4) A.R. Krishnaswami Ayyer and Anr. v. Travancore National Bank Ltd AIR 1940 Madras 437; and (5) Smt. R. Lilavati v. Bank of Baroda and Ors. MANU/KA/0097/1987." **[emphasis supplied]**

We may also refer to the case of ***Krishan Lal*** vs. ***State of J & K*** : ***(1994) 4 SCC 422*** with regard to the above legal position.

17. The position of law that emerges from the above is that the rights of the surety as laid down under Chapter VIII of the Contract Act can be varied by entering into a contract and would be subject to the terms of such contact. The surety by an agreement can give up the rights available to him under Sections 133, 134, 135, 139 and 141 of the Contract Act provided that it is not hit by Section 23 thereof. Such consent can be obtained from the surety at the time when the contract is being entered into between the principle debtor and the creditor. In other words, the surety can waive his rights available to him under the various provisions contained in Chapter VIII of the Contract Act by making provisions in the contract agreement to that effect. Such an agreement would not be opposed to public policy because public policy is not to defeat the debt of the creditor but to ensure that the money of the creditor is secured and recoverable in accordance with law. As held in the case of ***Lachoo Mal*** vs. ***Radhey Shyam*** relied upon by the Apex Court in the case of ***Sita Ram Gupta vs.***

Punjab National Bank (supra) cited by Mr. Moulik, everyone has a right to waive and agree to waive the advantage of a law or rule made solely for the protection of the individual in his private capacity which may be dispensed with without infringing any public right or public principle.

18. When we consider clause (11) of the Guarantee Agreement the irresistible conclusion is that the respondent no.3, the guarantor, has waived his rights provided under Section 133 by which he would have been entitled to be discharged from his obligations as a guarantor. By use of the expression **"the guarantors shall be deemed to have consented to the same"** contained in clause (11) of the Guarantee Agreement, there can be no manner of doubt that the guarantor had agreed to waive his rights available under Sections 133, 137, 139 and 141 of the Contract Act when read with clauses 2, 6, 7, 8, 9 reproduced above. As held in the case of ***A. R. Krishnaswami Ayyer & Anr.*** vs. ***Travancore National Bank Ltd.*** : ***AIR 1940 Madras 437***, such an agreement would amount to consent within the meaning of the aforesaid Sections of the Contract Act.

19. The position of law that has been discussed would also apply with equal force to the other part of the argument on behalf of the respondent no.3 that the appellant had lost or parted with the security in the form of the one-seventh share in the joint ancestral property of the borrowers having the value of Rs.50 lacs, a restaurant Rs.2.5 lacs and one LIC policy for Rs.50,000/- thereby

entitling him to be discharged from the guarantor. The decisions cited by Mr. Moulik, learned senior counsel for the appellant, also support this view. The principle of law laid down in the case of **M. N. Kaul (supra)** placed by Mr. B. K. Rai, the learned counsel for the respondent no.3, is a well-settled one but has no application in the facts and circumstances of the case.

20. The trial Court while deciding issues no.3 and 4 which form the basis for deciding issues should be 1, 2 and 5, appears to have completely lost sight of the above legal position and ventured into areas that are obviously irrelevant for a just decision in the suit and misdirected itself in passing the impugned judgment and decree.

21. As regards the plea of fraud and mistake alleged to have been committed on him by the appellant-bank allegedly in connivance with the borrowers/the respondents no.1 and 2 is concerned, it is found that it has neither been pleaded nor proved by the respondent no.3 before the trial Court. It is a settled position of law that allegations of fraud and mistake being questions of fact, require specific pleading and proof. Since this is found wanting in the present case, the plea accordingly stands rejected.

22. There is no doubt that the respondent no.3 has been severely let down by the respondents no.1 and 2 on whom he had reposed complete faith and had accordingly agreed to be the

guarantor with the pious object to help the respondent no.1 in attaining higher education. But then, we are governed by the Rule of Law and in law there is no place for sympathy but only justice. It is, however, observed that the respondent no.3 is not bereft of any redress as he has the right to sue the borrowers, respondents no.1 and 2, for recovery of the amount which he has been obliged to pay to the appellant under a Guarantee Agreement.

23. Before parting, it may be observed with a sense of deep ~~consternation~~ consternation that the pleadings of the parties and the evidence on record clearly reflect the recalcitrant and casual attitude of the appellant-bank with respect to the transactions in question and is found grossly wanting in sincere performance of its part of the contract. Before venturing to transfer the balance amount of the loan directly in the account of the borrowers which was in clear variance to the agreed mode of transfer, it had an obligation to seek the consent of the guarantor/respondent no.3 in view of the consequences that he would be required to face in the event of the loan going bad having regard to the stringent conditions of the Guarantee Agreement. But they chose to ignore him completely resulting in the borrowers absconding. For the appellant-bank there was nothing to lose as it had the convenient remedy under the Guarantee Agreement Exhibit 3 of fixing the liability upon the respondent no.3. There can be no manner of doubt that had this document not been there, he would have been entitled to be discharged from his obligations thereunder. The appellant-bank being a public body has the obligation to act with

corrected in terms of order dated 17.06.2010 18/06/2010

more responsibility. Considering the facts and circumstances of the case and the position of law discussed above, this court expresses its helplessness in dealing with the situation. It is only hoped, as is expected of them, that the concerned authorities of the appellant-bank will take due notice of these observations and deal appropriately with those who are responsible for the dereliction with the necessary seriousness it deserves in accordance with law.

24. In the result, the appeal is allowed.

25. The impugned judgment and decree passed by the District Judge, East and North Sikkim is set aside.

26. Decree be drawn accordingly.

27. No order as to costs.

28. Records of the trial Court be returned forthwith.

29. A copy of this judgment be transmitted to the Court of the District Judge, East and North Sikkim at Gangtok for its due compliance.

(S. P. Wangdi)
Judge
24-05-2010