A NEW INDIA ASSURANCE COMPANY LTD.

v.

SHRI KUSUMANCHI KAMESHWARA RAO AND ANR.

NOVEMBER 28, 1996

B [N.P. SINGH AND S.B. MAJMUDAR, JJ.]

Surety Bond—Contract of guarantee—Terms reduced into writing Demand of Execution of the bond on plea contrary to the terms—Held : guarantee bond is a repository of the obligations of the guarantor flowing from
C *the surety bond—The terms of the guarantee bond would govern the rights and obligations of the parties flowing from the contract of guarantee and any oral or documentary evidence would not be admissible to vary the terms of the written document—In the facts of the present case, on the basis of the surety bond, no liability can be foisted on the guarantor—Indian Contract Act, 1860—Evidence Act, 1872—Sections 91 and 92.*
D

The Plaintiff (respondent No. 1 herein) filed a suit against the insurance Company defendant No. 1 (the appellant herein) and defendant No. 2 (the respondent No. 2 herein) alleging that the plaintiff had entered an agreement with defendant No. 2 vide Dissolution Deed dated 23.4.1971
E **wherein the Defendant No. 2 had agreed to furnish guarantee bond for Rs. 1 lakh 25 thousand. On 26.4.1971 defendant No. 1 executed Surety Bond in favour of the plaintiff for the sum above mentioned. When defendant No. 2 failed to perform the terms of the above agreement, the plaintiff demanded the guarantee amount from defendant No. 1, which he failed to comply. The defendant in his written statement to the suit stated that the**
F **Surety Bond was executed on the basis of representation of the plaintiff and defendant No. 2 requesting the appellant to give guarantee for Rs. 1 lakh 25 thousand in respect of faithful performance of dealership of defendant No. 2 who was dealer of the plaintiff the wholeseller.**

G **The surety bond mentioned an agreement dated 23.4.1971 but the same was between the dealer (defendant No. 2) and the wholeseller (Plaintiff No. 1) in connection with sale of goods on credit and not dissolution of partnership between the plaintiff and defendant No. 2.**

The trial Court decreed the suit only against defendant No. 2. In
H **appeal by the plaintiff the High Court allowing the appeal held that in**

substance, the Surety Bond sought to cover the liability undertaken by defendant No. 2 in favour of plaintiff, by Dissolution Deed dated 23.4.1971, and as the liability was not discharged by defendant No. 1, plaintiff No. 1 was entitled to decree against appellant as well. Hence this appeal. Allowing the appeal, the court

HELD : 1. On the basis of the Surety Bond, no liability can be foisted on the appellant to meet the obligation of defendant No. 1 flowing from the Dissolution deed. On the express language of the Surety Bond, the appellant insurance company had never entered into any surety bond. The agreement dated 23rd April 1971 referred to in the Surety Bond has no nexus or connection with the Dissolution Deed. Surety bond, which is a repository of the guarantee given by defendant No. 1 has nothing to do with the liquidated and ascertained liability of defendant No. 1 on dissolution of partnership between the plaintiff and defendant No. 1. Therefore the said liability of defendant No. 2 as a partner on dissolution of partnership cannot be said to be covered by the surety bond. When the guarantee bond is reduced into writing, the terms of the guarantee bond will govern the question as to whether the Surety had given a guarantee as culled out from the said document. The terms of the guarantee bond would govern the rights and obligations of the parties flowing from the contract of guarantee and any oral or documentary evidence would not be admissible to vary the terms of the written document. [292-A-D]

2. When guarantee bonds were reduced to writing the express terms of the writing containing the guarantee bond would be the repository of the obligations of the guarantor flowing from the Surety Bond. As per Sections 91 and 92 of the Indian Evidence Act, evidence *de hors* the terms of agreement, whether documentary or oral, can be led by the parties to get out of the express terms thereof. Whether the express terms of the guarantee bond give rise to the contract of guarantee sought to be enforced will be the only limited enquiry which could be gone into by the courts while deciding the rights and obligations flowing from such contract of guarantee which is a tripartite contract between the creditor, principal debtor and the surety. Once such suretyship agreement is established on the clear terms of the bond, no latitude can be given to the contracting party, namely the surety or even the principal debtor to enable them to get out of the obligations of the suretyship agreement flowing from such contract, except in exceptional circumstances. [286-C-D]

A *U.P. Cooperative Federation Ltd.* **v.** *Singh Consultants and Engineers (P) Ltd.,* **[1988] 1 SCC 174;** *General Technical Services Company Inc.* **v.** *M/s Punj Sons (P) Ltd.,* **AIR (1991) SC 1994 and** *Hindustan Steel Workers Construction Ltd.* **v.** *G.S. Atwal & Co. (Engineers) Pvt. Ltd.,* **[1995] 8 SCC 76, relied on.**

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4656 of 1984.

From the Judgment and Order dated 21.6.83 of the Andhra Pradesh High Court in A. No. 245 of 1976.

C K.K. Jain, Ajay K. Jain, Shashi Bhusan and Pramod Dayal for the Appellants.

R. Venugopala Reddy and B. Kanta Rao for the Respondents.

The Judgment of the Court was delivered by :

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S.B. MAJMUDAR, J. This appeal on the grant of special leave to appeal under Article 136 of the Constitution of India brings in challenge the judgment and decree passed by Division Bench of the Andhra Pradesh High Court at Hyderabad whereby respondent no. 1's suit against the E appellant-insurance company, which was defendant no. 1 in the suit, came to be decreed. In order to appreciate the grievance of the appellant against the impugned decree a few background facts deserve to be noted at the outset. We shall refer to the appellant as defendant no. 1, respondent no. 1 as the plaintiff and respondent no. 2 as defendant no. 2 in the latter part of this judgment.

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The plaintiff filed a suit for recovery of Rs. 1,25,000 against both the defendants in the Court of Subordinate Judge, Kakinada, East Godavari District in the State of Andhra Pradesh. The plaintiff's case is that by a Deed dated 23rd April 1971 (Annexure A-2) entered into between the plaintiff and defendant no. 2, the 2nd defendant agreed and undertook to G pay to the plaintiff a sum of Rs. 1,68,499.32 being the amount settled to be due to the plaintiff. The 2nd defendant also agreed to furnish a guarantee bond from the 1st defendant-insurance company for the due payment of Rs. 1,25,000 from out of the said amount of Rs. 1,68,499.32. Accordingly at the request of the 2nd defendant the 1st defendant agreed to execute a H guarantee bond in favour of the plaintiff for the said amount of Rs.

1,25,000. The 1st defendant excecuted a guarantee bond dated 26th April 1971 (Annexure A-1) in favour of the plaintiff by and under which the 1st defendant agreed and undertook to pay to the plaintiff at Kakinada the said sum of Rs. 1,25,000 or such lesser amount as may be demanded by the plaintiff on failure of the 2nd defendant to fulfil the terms of the agreement dated 23rd April 1971 (Annexure A-2). It is the further case of the plaintiff that the first defendant also unconditionally and irrevocably agreed that the payment due under the guarantee bond, will be made to the plaintiff within ten days after the receipt of a written notice of demand from the plaintiff and without reference to 2nd defendant. The plaintiff contended that the said guarantee bond provided that it will be valid for a period of one year thereof. The plaintiff contended that as the 2nd defendant failed to perform the terms of the agreement (Annexure A-2) the plaintiff demanded the guaranteed amount of Rs. 1,25,000 from the 1st defendant by registered notice dated 27th March, 1972. As it was not complied with, the plaintiff filed the aforesaid suit against both the defendants.

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The 2nd defendant remained *ex parte* and did not file any written statement. But the 1st defendant-insurance company, appellant herein, filed written statement contending that it was not aware of any agreement dated 23rd April 1971 (Annexure A-2) said to have been entered into between the plaintiff and the 2nd defendant under which the 2nd defendant agreed and undertook to pay to the plaintiff a sum of Rs. 1,68,499.32 as being the amount settled to be due to the plaintiff. The plaintiff and the 2nd defendant represented that the plaintiff was a wholeseller for the sale of nylon yarn and fishing requisites and that he appointed the 2nd defendant as a dealer for the sale of nylon yarn and the fishing requisites and that in connection with credit facilities that were being given by the plaintiff to the 2nd defendant the 1st defendant might give a guarantee for the said sum of Rs. 1,25,000 in respect of the faithful performance of the said dealership. Based on the said representations of the plaintiff and the 2nd defendant, the 1st defendant executed a guarantee bond in favour of the plaintiff in a sum of Rs. 1,25,000 for the sale of nylon yarn and fishing requisites etc. The 1st defendant never agreed to furnish any guarantee to the plaintiff in respect of any amount that had been settled to be due to the plaintiff on dissolution of their partnership. The allegation that the 2nd defendant agreed to furnish an insurance guarantee bond for the due amount of Rs. 1,25,000 from out of Rs. 1,68,499.32 from the 1st defendant and at the request of the 2nd defendant the 1st defendant agreed to execute

E F G H

A a guarantee bond in favour of the plaintiff for the said sum of Rs. 1,25,000 was therefore not true. The 1st defendant executed a guarantee bond in favour of the plaintiff for a sum of Rs. 1,25,000 in case the 2nd defendant does not account to the plaintiff in respect of the sale of nylon yarn and the fishing requisites etc. that have been entrusted to him by the plaintiff to be sold. The allegation that 1st defendant executed a guarantee bond B under which it agreed to pay Rs. 1,25,000 to the plaintiff at Kakinada or such lesser amount as may be demanded by the plaintiff on failure of the 2nd defendant was not true.

In view of the aforesaid stand taken by the appellant-defendant no. C 1 insurance company the learned Trial Judge framed relevant issues and came to the conclusion that the plaintiff's claim could succeed only against defendant no. 2 who had not contested the suit, but so far as defendant no. 1, the appellant herein, was concerned as it had not executed any guarantee in favour of the plaintiff in connection with the agreement or Dissolution D Deed dated 23rd April 1971 Annexure A-2, the suit was liable to fail against defendant no. 1-insurance company. The plaintiff carried the matter in appeal and by the impugned judgment a Division Bench of the High Court took the view that in substance the surety bond Annexure A-1 sought to cover the liability undertaken by defendant no. 2 in favour of the plaintiff by the Dissolution Deed dated 23rd April 1971 and as that liability was not E discharged by defendant no. 2 the plaintiff was entitled to decree also against defendant no. 1 the guarantor insurance company and accordingly decreed the suit also against defendant no. 1. As noted above the said decree against defendant no. 1 has resulted in this appeal by the said defendant no. 1-insurance company.

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We have heard learned counsel for the parties and have gone through the relevant evidence on record. The only short point for determination in this appeal is as to whether defendant no. 1-insurance company's predecessor insurance company, namely, Howrah insurance Company had entered into any agreement of guarantee for covering the G liability of defendant no. 2 arising out of the suit agreement dated 23rd April 1971 Annexure A-2. For deciding this point in issue the express written terms of the surety bond Annexure A-1 will have to be seen and appreciated. It is now well settled that once a bank guarantee is given the bank which gives the guarantee would be liable to fulfil its obligations H flowing from the terms of the guarantee and the court would not intervene

with such obligations flowing from the bank guarantee executed by the concerned guarantor. In this connection a catena of decisions have been rendered by this Court. We may only refer to a few of them. In *U.P. Cooperative Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.* [1988] 1 SCC 174 Sabyasachi Mukharji, J. speaking for a two member Bench of this Court has made the following pertinent observations in this connection :

> "Commitments of banks must be honoured free from interference by the courts. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardised. Upon bank guarantee resolves many of the internal trade and transactions in a country."

Similar view is taken by a three member Bench of this Court in the case of *General Technical Services Company Inc.* v. *M/s. Punj Sons (P) Ltd.,* AIR (1991) SC 1994. We may also refer in this connection to a recent decision of this Court in the case of *Hindustan Steel Workers Construction Ltd.* v. *G.S. Atwal & Co. (Engineers) Pvt. Ltd.,* [1995] 6 SCC 76 wherein Paripoornan, J. speaking for a two member Bench of this Court has observed that in the case of confirmed bank guarantees/irrevocable letters of credit, the Court will not interfere with the same unless there is fraud and irretrievable damages are involved in the case and fraud has to be an established fraud.

In the light of the aforesaid settled legal position we will have to see whether defendant no. 1 had given any guarantee to meet the liability of defendant no. 2 qua the plaintiff arising from the Deed of Dissolution dated 23rd April 1971 Annexure A-2. If such a guarantee is culled out from the express language of the guarantee bond Annexure A-1 then obviously the plaintiff can succeed in the absence of any fraud being alleged to have been perpetrated on the insurance company by the plaintiff and/or defendant no. 2 qua the said guarantee bond. No such fraud has been pleaded

A by defendant no. 1-insurance company. But its defence is to the effect that the insurance company-defendant no. 1 had never agreed to give any guarantee for meeting the liability of defendant no. 2 qua the plaintiff as flowing from the Dissolution Deed dated 23rd April 1971. That contention has to be appreciated in the light of the express language of the guarantee bond Annexure A-1. It is obvious that when such guarantee bonds are B reduced to writing the express terms of this writing containing the guarantee bond would be the repository of the obligations of the guarantor flowing from the surety bond. As per Sections 91 and 92 of the Indian Evidence Act no evidence *de hors* the terms of the agreement, whether documentary or oral, can be led by the parties to get out of the express terms thereof. C Whether the express terms of the guarantee bond give rise to the contract of guarantee sought to be enforced will be the only limited enquiry which could be gone into by the courts while deciding the rights and obligations flowing from such contract of guarantee which is a tripartite contract between the creditor, principal debtor and the surety. Once such suretyship D agreement is established on the clear terms of the bond, then as laid down by the aforesaid decisions of this Court no latitude can be given to the contracting party, namely, the surety or even the principal debtor to enable them to get out of the obligations of the suretyship agreement flowing from such contract, except in exceptional circumstances as indicated in these decisions.

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Keeping this settled legal position in view we, therefore, have to see whether the guarantee bond Annexure A-1 covers the obligations of defendant no. 2 qua the plaintiff as flowing from the Dissolution Deed Annexure A-2. The plaintiff seeks to rope in defendant no. 1-insurance company only F on the basis of such obligation of defendant no. 2 flowing from Annexure-2 qua the plaintiff. If the guarantee bond Annexure A-1 does not cover such liability there will be no contract of guarantee for covering such an obligation between the parties and hence the plaintiff's suit would be required to be dismissed as was done by the Trial Court. On the other hand if the G guarantee bond Annexure A-1 on its express terms creates suretyship contract on the part of the insurance company and constitutes it as a guarantor for discharging liability of defendant no. 2 qua the plaintiff pursuant to the Dissolution Deed Annexure A-2 then obviously the plaintiff would be entitled to the decree on the basis of the said contract of guarantee even against the appellant-insurance company as held by the H High Court. In this connection, therefore, we have to keep in juxtaposition

the guarantee bond Annexure A-1 with the Deed of Dissolution Annexure A-2 with a view to finding out whether there is any nexus or connection between the two as alleged by the plaintiff. Relevant recitals of the guarantee bond Annexure A-1 dated 26th April 1971 read as under :

> "WHEREAS SRI SATYANARAYANA & COMPANY, KAKINADA, hereinafter called the Dealer have entered into an agreement Dt. 23rd April, 1971 with Sri KUSUMANCHI KAMESWARA RAO, KAKINADA, hereinafter referred to as Sri Kusumanchi Kameshwara Rao for the sale of Nylon & Fishing requisite etc.
>
> AND WHEREAS UNDER the terms and conditions of the aforesaid agreement the Dealer has agreed to furnish to Sri Kusumanchi Kameswara Rao Insurance Guarantee for Rs. 1,25,000 (RUPEES ONE LAKH TWENTY FIVE THOUSAND ONLY) for faithful performance of the said Agreement.
>
> AND WHEREAS THE DEALER HAS REQUESTED THE HOWRAH INSURANCE COMPANY LIMITED to execute a guarantee as above, which the said HOWRAH INSURANCE COMPANY LIMITED, has agreed to do on certain terms and conditions.
>
> NOW, THEREFORE, in consideration of the agreement and at the request of Sri SATYANARAYANA & COMPANY KAKINADA, (Dealer), We, HOWRAH INSURANCE COMPANY LIMITED do hereby agree and undertake to pay to Sri Kusumanchi Kameswara Rao at Kakinada a sum of Rs. 1,25,000 (Rupees ONE LAKH TWENTY FIVE THOUSAND only) or such less amount as may be demanded by Kusumanchi Kameswara Rao, Kakinada on the failure of the Dealer to perform faithfully all or any terms and conditions of the aforesaid agreement.
>
> WE ALSO AGREE UNCONDITIONALLY AND irrevocably that payment due hereunder will be made to Kusumanchi Kameswara Rao by us within Ten days after receipt of a Written notice of demand from Kusumanchi Kameswara Rao notwithstanding dispute or disputes if any, between Kusumanchi Kameswara Rao

A and the Dealer, without demur and without any reference to the said Dealer.

THIS AGREEMENT WILL BE VALID for a period of one year from the date hereafter."

B

A mere look at the aforesaid surety bond shows that the predecessor-in-interest of the appellant-insurance company, namely, Howrah Insurance Company Limited had guaranteed to pay on behalf of defendant no. 2 an amount of Rs. 1,25,000 or any lesser sum to the plaintiff in connection with the agreement of 23rd April 1971 by which defendant no. 2 as dealer had C entered into a contract with the plaintiff to purchase nylon yarn and fishing requisites etc. on credit upto the limit of Rs. 1,25,000 and towards the sale price of the said commodities agreed to be sold on credit the defendant no. 2 as purchaser had undertaken a liability to pay to the extent of Rs. 1,25,000 to the plaintiff and if that liability was not discharged by defendant D no. 2 the guarantor insurance company had to make good the said liability on behalf of defendant no. 2 in favour of the plaintiff. Thus on the express terms of this document the contract of continuing guarantee undertaken by the insurance company in favour of the plaintiff was in connection with the goods, namely, nylon yarn and fishing requisites which were to be sold on credit by the plaintiff to dealer of those goods, namely, defendant no. E 2 and that guarantee was confined up to the limited amount of Rs. 1,25,000 and it was to enure for one year meaning thereby that from 26th April 1971 for a period of one year if nylon yarn and fishing requisites etc. were sold by the plaintiff to defendant no. 2 on credit, the insurance company as guarantor was to make good the liability of unpaid purchase price thereof F incurred by defendant no. 2 to the extent of Rs. 1,25,000 in favour of the plaintiff if the sale price to that extent was not made good in the first instance by defendant no. 2. On the express terms of this surety bond, therefore, it must be held that it was to operate in future for guaranteeing the payment of sale price of nylon yarn and fishing requisites which might be sold by the plaintiff on credit to defendant no. 2 within that period and G to the extent of Rs. 1,25,000 of such unpaid price by defendant no. 2 the insurance company had agreed to stand as guarantor. It is no doubt true that this guarantee bond refers to an agreement dated 23rd April 1971 but that agreement is stated to be the agreement between the dealer-defendant no. 2 and the plaintiff in connection with sale of nylon yarn and fishing H requisites on credit. It is interesting to note that no such agreement is relied

upon by the plaintiff for foisting the liability on defendant no. 1-insurance company pursuant to the said document. On the contrary it is the case of the plaintiff that the insurance company had agreed to underwrite liability of defendant no. 2 flowing from an entirely different agreement dated 23rd April 1971 regarding dissolution of their partnership, Annexure A-2 which is purported to be executed on that day between the plaintiff on the one hand and the defendant no. 2 on the other. When we turn to Annexure A-2 we find that it is entirely a different document. It is a Deed of Dissolution between the partners for dissolution of partnership. It recites that this Dissolution Deed was made on 23rd day of April 1971 between plaintiff and defendant no. 2. The relevant recitals of this document deserve to be noted at this stage. They read as under :

> "1. Whereas the party number one, Gannavarapu Subbarao is the working partner and whereas the party number two Kusumanchi Kameswara Rao is the financing partner in the partnership firm called M/s Sri Satyanarayana and Co., Kakinada and whereas the parties hereto hereby declare that the said partnership between them carried on under the name and style of M/s Sri Satyanarayana and Company under the deed of partnership dt. 1.10.1968 be dissolved from 1.4.1971 and whereas the party number two Kusumanchi Kameswara Rao has to get from the firm a sum of Rs. 1,68,499.32 Ps (Rupees one Lakh Sixty Eight thousand four hundred and ninety nine and paisa Thirty two only) towards the amount that was invested by him and whereas the party number one Ganavarapu Subbarao has agreed to pay the said amount and retain the said partnership firm for himself and whereas the party number two Kusumanchi Kameswara Rao on the other hand is willing to retire from the firm after taking the said amount of Rs. 1,68,499.32 from the party number one Sri Gannavarapu Subbarao and the said partnership dated 1.10.1968 carried on under the name and style of Sri Satyanarayana and Company shall be deemed to have been dissolved by mutual consent as and from 1.4.1971 and the said business shall henceforth be carried on by the said party number one Gannavarapu Subba Rao under the same name, as Sri Satyanarayana and Co., as a sole-proprietor.
>
> 2. The said amount of Rs. 1,68,499.32 ps agreed to be paid by the party number one Sri Gannavarapu Subbarao *was paid by the said*

A *Gannavarapu Subbarao* to Sri Kusumanchi Kameswara Rao *by furnishing Howrah Insurance Company Guarantee Bond for a sum of Rs. 1,25,000 (One lakh Twenty Five thousand Rupees)* and by executing two pronotes one for Rs. 25,000 (Twenty five thousand rupees) and another for Rs. 15,000 (fifteen thousand rupees) with different sureties for the said two pronotes along with him and by creating mortgages on the properties of the said sureties according to law and by paying cash of Rs. 3,499.32 ps. The said party number one Gannavarapu Subbarao further undertakes to pay interest at the rate of one per cent per mensem on the said insurance guarantee bond amount of Rs. 1,25,000 or the balance that may be outstanding after deducting the payments made if any on the first every month to the party number two the said Kusumanchi Kameswara Rao. Whereas the said Kusumanchi Kameswara Rao assigns to the party number one Gannavarapu Subbarao all that the money and the interest of the said party number two, the said Sri Kusumanchi Kameswara Rao in the said partnership from Sri Satyanaryana and Company, Kakinada and the business, the goodwill property assets and liabilities book debts and the outstanding payable and the other debts and the partnership outstanding against other persons to hold the same to the said party number one Sri Gannavarapu Subbarao absolutely. All the moneys payable to the said Sri Kusumanchi Kameswara Rao, the party number two by the party number one Sri Gannavarapu Subbarao shall be supported by receipts and payments made without receipts shall not be valid and shall not be countenanced."

[Emphasis supplied]

The aforesaid recitals in this Dissolution Deed make an interesting reading. As seen from these recitals especially found in paragraph 2 of the agreement Annexure A-2 it becomes clear that on 23rd April 1971 defendant no. 2 was alleged to have paid to the plaintiff towards the sum of Rs. 1,68,499.32 an amount of Rs. 1,25,000 by way of guarantee bond furnished by Howrah Insurance Company. When we turn to the guarantee bond Annexure A-1 we find that it was executed not on 23rd April 1971 but on 26th April 1971. It, therefore, becomes highly doubtful whether the Dissolution Deed said to be dated 23rd April 1971 would have seen the light of the day on 23rd April 1971 itself or at any time after 26th April 1971 if

at all there was any connection between the guarantee bond Annexure A-1 and Deed of Dissolution Annexure A-2. Not only that but the further recitals in paragraph 2 of the Dissolution Deed Annexure A-2 show that two promissory notes seem to have been got executed from defendant no. 2 by the plaintiff and mortgages were also executed on the properties of sureties in connection with those promissory notes. Neither the promissory notes are on record, nor the mortgages are no record. Therefore, it appears highly doubtful whether the Deed of Dissolution Annexure A-2 was at all in existence on 23rd April 1971. It appears to be a highly suspicious and spurious document. But leaving aside that aspect of the matter on the express language of the surety bond Annexure A-1 no doubt is left in our minds undoubtedly that the appellant-insurance company or its predecessor had never entered into any surety bond as per Annexure A-1 dated 26th April, 1971 for securing the payment of Rs. 1,25,000 in favour of the plaintiff in connection with the amount found due from defendant no. 2 at the foot of partnership account. There is no whisper about such liability in the guarantee bond Annexure A-1. Therefore, the agreement dated 23rd April 1971 referred to in the surety bond necessarily has no nexus or connection with the Dissolution Deed Annexure A-2. It is not the case of the plaintiff that any other document of 23rd April 1971 containing the terms and conditions of sale of nylon yarn and fishing requisites on credit to defendant no. 2 during a span of one year thereafter was ever executed between the parties. On the contrary the plaintiff's case is that defendant no. 2 had undertaken the liability to pay Rs. 1,68,499.32 as per the Dissolution Deed and towards that amount a security of Howrah Insurance Company was offered by defendant no. 2 in favour of the plaintiff to the extent of Rs. 1,25,000. As we have seen earlier, Annexure A-1 which is a repository of the guarantee given by defendant no. 1, has nothing to do with the liquidated and ascertained liability of defendant no. 2 on dissolution of partnership between the plaintiff and defendant no. 2. Therefore, the said liability of defendant no. 2 as a partner on dissolution of partnership cannot be said to be covered by the surety bond Annexure A-1. The learned judges of the High Court have taken the view that in substance the surety bond Annexure A-1 has sought to cover the liability of defendant no. 2 against the plaintiff pursuant to the Dissolution Deed. With respect it is difficult to sustain such a finding as the contract of guarantee is reduced into writing and hence the express terms of the guarantee bond Annexure A-1 have only to be seen with a view to finding out whether any such guarantee was ever given by the appellant-defendant no. 1 in favour

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A of the plaintiff. On the express terms of the guarantee bond Annexure A-1 it must be held that it had nothing to do with the liability of defendant no. 2 under the Dissolution Deed Annexure A-2 and that liability was not secured and no guarantee was given by Howrah Insurance Company qua that liability of defendant no. 2 pursuant to the said bond. The learned B judges of the High Court had placed great reliance on the circumstance that the insurance company had not produced any other agreement dated 23rd April 1971 if that was relied upon for giving the guarantee. It is difficult to appreciate the line of reasoning. When the guarantee bond is reduced into writing the terms of the guarantee bond will govern the question as to whether the surety had given a guarantee as culled out from C the said document. If the plaintiff wanted to show that there was any other guarantee given by defendant no. 1 *de hors* this surety bond it was for the plaintiff to produce such a document which the plaintiff failed to do. Even that apart such an affort on the part of the plaintiff would not have been permissible in law as the terms of the guarantee bond would govern the D rights and obligations of the parties flowing from the contract of guarantee and any oral or documentary evidence would not be admissible to vary the terms of this written document as seen earlier. The learned counsel for the appellant, however, vehemently submitted that to the suit notice given by the plaintiff to defendant no. 1 no stand was taken by the appellant in its reply that it had not entered into any such agreement. Strictly speaking E such notice correspondence would not be much relevant for deciding the moot question whether there was any contract of guarantee between the parties for covering the transaction in question when the document itself is available on record. However even if we turn to the plaintiff's advocate's notice dated 27th March 1972 on which strong reliance was placed by F learned counsel for the plaintiff we find that all that was stated in that notice was to effect that the appellant had executed an agreement dated 23rd April 1971 in favour of the plaintiff whereby they had undertook to pay to his client at Kakinada a sum of Rs. 1,25,000 (One lakh and twenty five thousand rupees) or such less amount as may be demanded by his client on the failure of the dealer, Sri Satyanarayana and Company, G Kakinada to perform all or any of the terms and conditions of the agreement dated 23.4.1971 entered into between his client and the said company. The reply of the insurance company dated 4th May 1972 advised the plaintiff to exhaust all means of recovery from defendant no. 2 according to the agreement. However it is pertinent to note that even in the suit H notice given by the plaintiff to defendant no. 1 the emphasis is on the

agreement of dealership by which defendant no. 2 as a dealer was under an obligation to perform the terms and conditions of the agreement. Nowhere it is stated that the defendant no. 2 as retiring partner had undertaken liability under the Dissolution Deed to pay the amount falling due to the plaintiff from defendant no. 2 when the firm was dissolved. As by Annexure A-1 the insurance company had already undertaken liability to pay the unpaid sale price of the goods sold by the plaintiff to the defendant no. 2 dealer it is obvious that in reply to the notice the appellant would rely upon the very same terms and conditions of the surety bond Annexure A-1. Therefore, it could not be said that the said reply to the notice implied any admission on the part of the appellant that it had given guarantee to pay up the dues of defendant no. 2 on the basis of the Dissolution Deed Annexure A-2. The learned counsel for the respondent-plaintiff would have been on a firmer ground if the notice had recited that the insurance company had undertaken the liability to pay Rs. 1,25,000 which were payable on dissolution of partnership between the plaintiff and defendant no. 2 and despite such recitals in the notice the insurance company had not objected. Besides such an attempt remain impermissible in law as express terms of the bond could not be varied by any oral or documentary evidence to the contrary. In any case as there was no allegation in the notice itself connecting it with the liability of defendant no. 2 flowing from the Dissolution Deed Annexure A-2 there was no occasion for the appellant to deny its obligation as a surety qua such a liability. Similarly Annexure B-1, a guarantee bond executed by defendant no. 2 in favour of defendant no. 1 on which reliance was placed by learned advocate for the plaintiff also is of no avail to enable the plaintiff to get out of the express terms of surety bond Annexure A-1. As discussed above it is found that the appellant-insurance company or its predecessor had not given any guarantee to cover the liability of defendant no. 2 to the extent of Rs. 1,25,000 flowing from Dissolution Deed Annexure A-2. The guarantee given was for entirely a different transaction, that is for securing the payment of unpaid price of goods to be sold on credit by the plaintiff to dealer defendant no. 2 over a course of period and the guarantee was to continue for such future period upto one year. It is not the case of the plaintiff that defendant no. 2 had during that period failed to pay purchase price of the goods, namely, nylon yarn and fishing requisites. Nor has the plaintiff invoked suretyship agreement in that connection. The suit is based on entirely a different alleged guarantee said to have been given by the insurance company to cover the liability of defendant no. 2 flowing from

A B C D E F G H

A the Dissolution Deed. For such an obligation of defendant no. 2 flowing from Annexure A-2 there is no contract of guarantee at all given by defendant no. 1. In short on the basis of the surety bond Annexure A-1 no liability can be foisted on the appellant to meet the obligation of defendant no. 2 flowing from the Dissolution Deed Annexure A-2. As the saying goes
B मूलो नास्ति कुतः शाखा i.e., if there is no root where is the question of having branches. Consequently it is not possible to agree with the finding of the High Court as recorded at page 37 of the impugned judgment to the effect that the agreement mentioned in para 1 of Ex. A-1 has reference to Ex. A-2 agreement executed between the 2nd defendant and the plaintiff and that the parties understood the Dissolution Deed Ex. A-2 dated 23rd April
C 1971 as being in the nature of sale of nylon yarn and fishing requisites in favour of defendant no. 2 represented by G. Subbarao, the other partner. This finding flies in the face of the express terms of the guarantee bond Annexure A-1 and with respect amounts to re-writing the guarantee bond itself. Such a new guarantee bond cannot be culled out from the language
D of Annexure A-1. Such an exercise is totally impermissible on the facts and circumstances of the case.

For all these reasons, therefore, the appeal is allowed. The judgment and decree passed by the Division Bench of the High Court against the
E appellant are quashed and set aside and the suit of the plaintiff against the appellant-defendant no. 1 is dismissed and the decree of dismissal of the suit against defendant no. 1 as passed by the Trial Court is restored. Pending this appeal by an order dated 23rd November 1984 this Court had ordered that the amount already deposited by the appellant in the Trial
F Court shall be paid to the First Respondent on security being furnished by the said Respondent to the satisfaction of the Trial Court for repayment of the amount to the appellant in the event of the appeal being allowed by this Court. As the appeal is allowed it is directed that if the first respondent-plaintiff has withdrawn the deposited amount from the Trial Court on furnishing security to the satisfaction of the Trial Court then first respon-
G dent-plaintiff shall refund the said amount to the appellant-insurance company with six per cent interest from the date of such withdrawal till repayment to the appellant-insurance company. Such repayment with interest shall be made by the respondent-plaintiff to the appellant-insurance company within four months from today. If on the other hand the amount
H has remained deposited in the Trial Court and respondent-plaintiff has not

withdrawn the same the said amount shall be permitted to be withdrawn by the appellant-defendant no. 1 insurance company from the Trial Court. If such deposited amount is already invested by the Trial Court then the appellant-insurance company will be entitled to withdraw the said amount along with total accrued interest on such invested amount. In the facts and circumstances of the case there will be no order as to costs. Orders accordingly. A B

K.T. Appeal allowed.