

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% RESERVED ON: JANUARY 23, 2012  
PRONOUNCED ON: JANUARY 31, 2012

+ **RFA(OS) No.28/2004**

KRISHAN KUMAR KARNANI .....Appellant  
Through: Mr.Sanjay Jain, Sr.Advocate with  
Mr.Ankur Mittal, Ms.Prabhsahay  
Kaur, Mr.Pranav Kumar,  
Advocates.

versus

M/S RELIANCE INDUSTRIES LTD. & ANR.....Respondents  
Through: Mr.B.B.Sahney, Sr.Advocate with  
Mr.R.Chandra Chand, Mr.Sunil  
Kumar, Advocates for respondent  
No.1.

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**  
**HON'BLE MS. JUSTICE PRATIBHA RANI**

**PRATIBHA RANI, J.**

1. The appellant Krishan Kumar Karnani has challenged the judgment and decree dated 28.09.2004 passed by a learned Single Judge of this Court exercising power under Order XXXVII Rule 6(3) CPC. The impugned order dated 28.09.2004 reveals that vide an earlier order dated 25.03.2003, leave to defend was granted to the appellant

herein (defendant No.2 in the suit), subject to the condition that he would deposit a sum of Rupees One Crore and Ninety Lakhs together with interest thereon calculated @12% per annum from the date of the issuance of cheques referred to in the order within four weeks. Compliance was not made and this resulted in the impugned order being passed.

2. The order dated 25.03.2003 was challenged by the appellant by filing an appeal which was registered as FAO(OS) No.153/03, but since interim stay of the order dated 25.03.2003 was declined, and notice alone was issued in the appeal, the learned Single Judge, exercising power under Order 37 Rule 6(3) of the Code decreed the suit in its entirety with costs.

3. On 26.10.2004, it was brought to the notice of the Appellate Court before which FAO(OS) No.153/2003 was pending, that the learned Single Judge has passed a decree for non-compliance of the order in challenge in the appeal. The appeal was disposed of with the observation that since the learned Single Judge has pronounced judgment and passed a decree, the remedy for the appellant was to challenge the decree by way of a Regular Appeal. However, it was specifically observed that the points agitated in FAO(OS) No.153/2003 could be agitated in the said Regular First Appeal. And this is how we have before us the instant appeal.

4. The appellant Krishan Kumar Karnani filed this appeal against M/s.Reliance Industries Ltd. (the plaintiff in Suit No.1567/97) as respondent No.1 and M/s.Imperial Pigments Pvt. Ltd. (which was defendant No.1 in the original suit

No.1567/97) has been impleaded as respondent No.2.

5. The plaintiff company i.e. M/s.Reliance Industries Ltd. filed a suit under Order 37 of Code of Civil Procedure against defendant No.1 M/s.Imperial Pigments Pvt. Ltd. which alongwith its associate/group firm had been purchasing PE/PVC resin products from the plaintiff. Defendant No.2 Krishan Kumar Karnani, was pleaded to be the Principal Officer of defendant No.1 and it was pleaded that he stood personal guarantee for repayment of the amount due and payable to the plaintiff against the supply of PVC resin to defendant No.1 and other associate firms. While defendant No.1, M/s.Imperial Pigments Pvt. Ltd. was sued on the basis of written contract i.e. invoices and delivery challans, defendant No.2 was sued as a guarantor on the strength of the letter dated 01.03.1995 written by defendant No.2 to the plaintiff company allegedly making himself personally liable for the entire liability of defendant No.1.

6. The issues raised in the present appeal are : Whether the letter dated 01.03.1995 prima-facie could not be termed as a guarantee as envisaged under Section 126 of the Contract Act and thus on the strength of this letter dated 01.03.1995, the defendant No.2 could not have been sued as guarantor in a suit under Order 37 of Code of Civil Procedure.

7. Admittedly, neither defendant No.1 nor defendant No.2 complied with the condition subject to which leave to defend was granted by learned Single Judge vide order dated 25.03.2003. Since defendant No.2 is challenging his liability as guarantor, it is necessary to reproduce the contents of the

letter dated 01.03.1995, since the decision in the appeal depends on the meaning that can be attached to this letter. It reads as under:-

*"Regional Manager,  
Reliance Industries Ltd.,  
New Delhi.*

*Dated 1-3-95*

*Kind Attn : MR.S.P.CHAKRABORTY*

*Dear Sir,*

*The responsibility of IMPERIAL PIGMENTS PVT. LTD. Business with RELIANCE INDUSTRIES LTD. IN P.V.C. RESIN THE ENTIRE LIABILITY IS MINE. The Business is done through M/s Aqua Cross Enterprises Pvt. Ltd."*

*Thanking you,*

*Yours Sincerely*

*Sd/-  
( KRISHNA KUMAR KARNANI)"*

8. On behalf of the appellant (defendant No.2), it has been submitted that a bare reading of the letter dated 01.03.1995, admittedly written by defendant No.2 to the plaintiff company would reveal that it cannot be termed as guarantee for the reason that contract of guarantee presupposes agreement between the main parties but here in the given case, there was no 'mother agreement'. Appellant was only a principal officer and authorized signatory with the defendant No.1 company, who was denuded of this power as authorized signatory vide Board Resolution dated 20.04.1995 and all the transactions between the plaintiff and defendant No.1 pertained to the period 24.04.1995 to 06.10.1995. So, neither there was any existing liability as on 01.03.1995 for which the guarantee could be given by defendant No.2 to the plaintiff nor he was

a principal officer or authorized signatory during the period 24.04.1995 to 06.10.1995 when the goods were supplied and payment was allegedly defaulted by defendant No.1 company. It has been submitted that in these circumstances, the order imposing the condition to deposit Rupees One Crore and Ninety Lakhs with interest while granting leave to defend was wholly illegal. To make good the legal point learned counsel for the appellant relied upon the decision reported as (1987) 33 DLT 237 Sahibabad Steels Pvt. Ltd. vs. Engineering Projects India Ltd. & Ors.

9. On behalf of respondent No.1, i.e. the plaintiff, it has been submitted that the letter dated 01.03.1995, undisputedly written by the appellant is clear and unambiguous. It was urged that by writing this letter, appellant who was principal officer and authorized signatory of defendant No.1 made himself personally responsible for the business of Imperial Pigments Pvt.Ltd. with Reliance Industries Ltd. in relation to PVC Resin. It was submitted that various cheques were signed by the appellant on behalf of defendant No.1. Learned counsel for the respondent referred to various correspondence between the parties which were signed by the appellant. Referring to the language used in the letter dated 01.03.1995 by the appellant i.e. allegedly holding himself responsible for the payment, relying on the decision reported as AIR 1937 Oudh 19 (Raja Jagannath Baksh Singh v. Chandra Bhukhan Singh & Anr.), it was contended that the language was sufficient to constitute a contract of guarantee.

10. We have adverted ourselves to the issue involved in this case i.e. the letter dated 01.03.1995 written by the

appellant to M/s.Reliance Industries Ltd. i.e. respondent No.1 before us. We are conscious of the fact that we are not deciding a suit post trial and are required to consider the issue from the point of view whether a triable issue arises.

11. As per letter dated 01.03.1995, the appellant has ostensibly held himself responsible for the transaction between M/s Imperia Pigments Pvt. Ltd. and M/s Reliance Industries Ltd. through M/s Aqua Cross Enterprises Pvt. Ltd., but the contents of plaint reveal that it also includes claims against M/s Sai Polymers, M/s Chemicals India and M/s Malav Polymers. Prima-facie, assuming the letter dated 01.03.1995 being in the nature of a guarantee, the appellant cannot be responsible for the entire suit amount as he could not be liable for the claims pertaining to M/s Sai Polymers, M/s Chemicals India and M/s Malav Polymers.

12. In the decision relied upon by learned counsel for the respondent i.e. AIR 1937 Oudh 19 (Raja) Jagannath Baksh Singh v. Chandra Bhukhan Singh & Anr. the issue was turning on the language of a letter Ex.1 which reads as under:-

*'Please lend ₹1,200 to Thakur Dukh Haran Singh. There will be no trouble (Nuks) in the payment of your money. Be assure, if there be any trouble, I hold myself responsible'.*

The contentions raised was that on its true interpretation, it could be regarded only as a contract of indemnity and not a guarantee. Noting what constituted a guarantee, in paras 4 and 5 of the decision it was held as under:-

*"4. The person who gives a guarantee is called "surety", the person in respect of whose default the*

guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the creditor". Reference has been made to *K.V.Periamanna Marakkayar & sons v. Banians & Co.* AIR 1926 Mad 544, wherein it was laid down that in all cases of suretyship privity is necessary between the three parties, namely, the creditor, the principal debtor and the surety. The importance of this lies in the result which follows, namely, that the surety, having undertaken the obligation at the request of the debtor, becomes entitled to recover from him whatever sums he has rightfully paid under the guarantee, as is provided in Section 145, Contract Act; whereas in the contract of indemnity the indemnifier cannot on the performance of the obligations of the debtor, in the absence of an assignment from the creditor, sue in his own name the debtor, as there is no privity of contract between them and there is no subrogation to the creditor's rights. Reliance was also placed on the following observations of Davey, L.J. in *Guild v. Conrad* (1984) 2 QB 885, as quoted in *Mahabir Prasad v. Siri Narain* AIR 1918 Pat 345 3 Pat LJ 396, at p.400. These observations are as follows:

*In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment and a promise to keep a person who has entered or is about to enter into contract of liability indemnified against that liability independently of the question whether a third person makes default or not.*

5. There is no dispute about the correctness of the principles enunciated in the cases above cited. The only question is about their application to the facts of the present case. It is not denied that for a contract of suretyship there should be concurrence of the principal debtor, the creditor and the surety, but this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. An implied request will be quite sufficient to satisfy this requirement. In the present case it is in evidence that the principal debtor, Thakur Dukh Haran Singh, was present at the house of defendant 2 when the latter wrote the letter Ex.1 to

*Thakur Sahdeo Bakhsh Singh. The same day Thakur Sahdeo Bakhsh Singh advanced the money and the pro-note was executed at the house of defendant 1. These circumstances are quite ample to show that the letter must have been written at the request of Thakur Dukh Haran Singh. Though there is no direct evidence of such a request being made, yet it is clearly important to note that the appellant made himself responsible in case there was any trouble in the "payment" of the money which must necessarily mean payment by the principal debtor, and not in case there was any difficulty in the realization of the money by the creditor. We are therefore of opinion that all the necessary requirements of a contract of guarantee are satisfied in the case, and have no hesitation in agreeing with the Court below that the appellant is liable as a surety."*

13. The facts of the present case are clearly distinguishable, for the reason even as per para 4 of the judgment noted above, in all cases of suretyship, privity is necessary between the three parties, namely the creditor, the principal debtor and the surety. Further, in the said case assurance was given by the surety holding himself responsible in case of any trouble and taking the words of the surety, the amount of ₹1200/- was lent. So the creditor was held acting upon the guarantee given by the surety for money lent to Thakur Dukh Haran Singh.

14. In the decision relied upon by learned counsel for the appellant, i.e. the decision reported as (1987) 33 DLT 237 Sahibabad Steels Pvt. LTd. v. Engineering Projects (India) Ltd. & Ors., in para 13 it was observed as under:-

*"13. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default." (See Section 126 of the Indian Contract Act). The contract of guarantee, as is clear from the above definition, involves three parties – a principal debtor, whose liability may be actual or*

*prospective; a creditor, and a third party called surety who promises to discharge the debtor's liability if debtor failed to do so. Surety's liability is collateral. The guarantee, thus envisages two contracts- one between the principal debtor and the credit and the second between the creditor and the surety. The first is called primary contract and the second the collateral contract. The guarantee, though, has its genesis in the primary contract between the principal debtor and the creditor, yet it is an autonomous and independent contract as held, and in our view, rightly, by the learned Single Judge."*

15. The question whether such letter can be termed as guarantee, indemnity was considered in the decision reported as AIR 1940 Bom 315 Ramchandra B. Loyalka v. Shapurji N.Bhownagree. The facts were that the defendant was a broker dealing in shares and securities. The plaintiff agreed to work as a sub-broker to the defendant on terms contained in a letter (Exhibit-A), which he wrote to the latter and which stated he shall be answerable and responsible to him for all business secured by him from any constituents and to be answerable and responsible for the due payments by the said constituents for all moneys due in respect of such business as he may from time to time transact at his request and he agree on demand to make good any default on the part of his said constituents and also to pay all damages, costs, charges and expenses that may be incurred by him or due to him by reason of such default.

16. The question for consideration was whether the letter (Exhibit-A) is a letter of guarantee or indemnity. While delivering the concurring judgment, in para 2 and 3, Justice Kania, as His Lordship then was, observed as under :-

2. Exhibit A in this case is the general arrangement made between the plaintiff and the defendant and shows that the plaintiff agreed to save the defendant from any loss which he would suffer by reason of the defendant effecting transactions at the request of the plaintiff. The general scheme is that the plaintiff agreed to be responsible for due payments in respect of transactions which were to be effected at his request, to make good any default and to pay the damages, costs and expenses that may be incurred due to such default. I, therefore, think that the very first element required to make it a contract of guarantee, when the letter of March 12, 1935, was passed, is wanting in this case. *Sutton & Co. v. Grey* 1894 1 Q. B. 285 and *Montagu Stanley & Co. v. J. C. Solomon, Ltd.* [1932] 1 K. B. 625, where the contracts between the broker and a person who stood in the position of a sub-broker were in almost similar terms, decided that the contract was one of indemnity and not of guarantee. The test there laid down is where the sub-broker is interested in the transaction to be effected, apart from the fact that he had agreed to be liable, the contract is one of indemnity. There is nothing to show that Sections 124 and 126 give a go-by to this distinction which has been so well recognized in England.

3. *Periamanma Marakkayar v. Banians & Co.* (1925) I.L.R. 49 Mad. 156 was also relied upon by the appellant. It seems to me that in the absence of three parties, in which one is a principal debtor and another a creditor, unless the third party, who is the surety, agrees to make good the loss, the transaction is not complete. Individual contracts between the principal debtor and creditor, and between the creditor and surety, are not sufficient to spell out a contract of guarantee. There must be a third contract either expressly made or arising by the conduct of the parties by which the principal debtor agrees to satisfy the claim of the surety. If the surety satisfies the claim of the creditor without such contract, the action of the surety would be voluntary, and the debtor may repudiate all liability for the payment made by the surety, on the ground that he had never requested the surety to make any payment.

17. While considering applications seeking leave to defend, the principles to be considered by the Court were set out by the Supreme Court in para 7 of the decision reported as (1977) 1 SCR 1060 M/s Mechalec Engineers and Manufactures v. M/s Basic Equipment Corporation, as under:-

(a) *If the defendant satisfies the Court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.*

(b) *If the defendant raises a triable issue indicating that he has a fair and bona fide reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.*

(c) *If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.*

(d) *If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.*

(e) *If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defense to proceed if the*

*amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense.*

*In these circumstances, the defense taken in the application does not appear to be bona fide and appears to be sham and illusory."*

18. In the decision reported as 1991 Supp (1) SCC 191 Raj Duggal v. Ramesh Kumar Bansal, while considering the principles for grant of leave to defend, in para 3, it was observed as under :-

*"3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency." **(Emphasis supplied by us)***

19. We would not like to render a conclusive opinion but would certainly highlight that there is a fair dispute to be

tried as to the meaning of the letter stated to be a guarantee. We would be highlighting that as per the Stamp Act, a guarantee has to be drawn on a stamp paper of adequate value. Certainly, triable issues arise for consideration as above. Before parting we may also note that as per clause-22 of the invoices, where the terms of the contract are printed by the respondent No.1 itself, exclusive jurisdiction is vested in the Courts at Greater Bombay.

20. Two triable issues arise. Firstly, whether the letter in question is a guarantee and secondly, if the same is a guarantee, whether the same encompasses the claims against M/s Sai Polymers, M/s Chemicals India and M/s Malav Polymers.

21. The appellant is thus held entitled to unconditional leave to defend and thus the decree dated 28.09.2004 in which the order dated 25.03.2003 has merged is set aside and so is the order dated 25.03.2003, but only against the appellant and the application filed by him seeking unconditional leave to defend is allowed.

22. The suit is restored to be adjudicated after trial and the appellant is granted six weeks time to file a written statement, which would be filed positively within six weeks from today with advance copy to learned counsel for respondent No.1.

23. Before we forget, we must recite the usual mantra. Nothing stated by us herein above shall be construed as an expression on the merits of the controversy and reference to facts made by us herein above is limited to what was needed to be discussed on the subject of grant of leave to defend.

The final decision would obviously be with reference to the evidence led at the trial.

24. Parties shall bear their own costs in the appeal.

**(PRATIBHA RANI)**  
**JUDGE**

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**JANUARY 31, 2012**  
**dkb**