

\$~15

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

%

Judgment delivered on 09.07.2012

+ **RFA 264/2012**

VARUN GAUBA

... Appellant

Versus

PUNJAB & SIND BANK & ORS.

... Respondents

Advocates who appeared in this case:

For the Appellant : Mr. Kapil Gaur

For the Respondents : None.

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (ORAL)

1. This appeal is directed against the judgment and decree dated 3rd March, 2012 whereby the application of the appellant for grant of leave to contest was dismissed and a decree for recovery of Rs.5,93,099/- along with simple interest on that amount at the rate of 9% per annum was passed against the appellant and three others. The facts giving rise to the filing of this appeal can be summarized as under:-

Ramesh Kumar Gupta, proprietor of New Orient Transport Company, which was defendant No.1 in the suit and is respondent No.2 in this appeal, had a current account with the plaintiff/respondent No.1 – Punjab & Sind Bank and in that

account, he availed overdraft facility on payment of interest at the rate of 6.5% per annum above the Reserve Bank of India rate subject to minimum rate of 16.5% per annum with quarterly rests. He also requested respondent No.1 bank to purchase three cheques of Rs.1,25,000/-, Rs.1,05,000/- and Rs.1,25,000/- respectively drawn by M/s. Quality Handloom in his favour. The cheques were purchased by the bank and the amount was credited to the account of respondent No.2/defendant No.1 on his assurance that the cheques were genuine and would be cleared by the drawee on being presented. The cheques when presented by the Bank were returned with endorsement "Refer to Drawer". There was thus a debit balance of Rs.3,64,038.39 in the current account which defendant No.1/respondent No.2 had with respondent No.1 bank. In August, 1989, he requested the Bank for the adhoc loan facility to the extent of debit of Rs.3,64,038.39 in his current account and the request was granted by the bank. He executed a promissory note for that amount. However, he failed to regularize the current account and, therefore, was asked by the bank to pay the amount which was debited in his account. He, however, failed to honour the demand of the bank and then another demand notice dated 24.10.1989 was issued to him demanding a sum of Rs.3,65,473.89. He again availed facility to the extent of Rs.3,50,376.03 in the current account and executed promissory note dated 05.04.1992 and also executed various other documents in favour of the bank. He agreed to pay the sum due to the bank, on demand from it,

along with interest at the rate 10.75% above the RBI rate, with a minimum of 22.75% p.a., with quarterly rests. It is alleged by the plaintiff/respondent No.1 bank that defendant No.1/respondent No.2 also had executed and delivered a letter of guarantee, guaranteeing the repayment of entire amount advanced to defendant No.1/respondent No.2 with all interests and charges with continuity, till the liability of the defendant No.1/respondent No.2 subsists. Two other defendants created an equitable mortgage of the immovable property in favour of plaintiff bank by depositing title deeds. Defendant No.1/respondent No.2 issued 30 cheques of Rs.10,000/- each of their concern M/s. Sahil Golden Transport Company which also were dishonoured when presented to the bank. A sum of Rs.5,39,099/- was due to the plaintiff Bank at the time of filing of suit which came to be decreed by impugned order.

2. The contention of the learned counsel for the appellant is that the document referred as a guarantee bond by the plaintiff bank is in fact an indemnity bond. He has contended that a suit based on indemnity bond cannot be filed under Order 37 of the Code of Civil Procedure. In support of his contention, he has relied upon the decision of the Supreme Court in **State Bank of Saurashtra vs. Ashit Shipping Services (P) Ltd. And Another** (2002) 4 SCC 736.

3. A perusal of the decision relied upon by the learned counsel for the appellant would show that in the case of Supreme Court, the first respondent was working as

an agent for a Company for a vessel which arrived at Kandla port carrying logs of timber. The second respondent sent a bond to the first respondent which *inter alia* provided as follows:-

“1. To Indemnify you and hold harmless in respect of any liability loss or damage or whatsoever nature which you may sustain by reason of delivering the goods of M/s. Vasani Brothers, Bhavnagar in accordance with our request.

2. To pay you on demand the amount of any loss on which the Mater / agent of the vessel or any other of your services or agents whatsoever may incur as a result of delivering the goods aforesaid.

xxx xxx xxx xxx xxx xxx

6. To produce and deliver to you the Bills of lading for the above goods duly endorsed as such as documents shall have arrived.

xxx xxx xxx xxx xxx xxx

We the undersigned hereby join in the above indemnity and jointly and severally guarantee due performance of the above contract and accept all the formalities expressed therein.”

On the said Bond the following notation appeared with the stamp of the Appellant Bank and the signature of their Manager:

"We the undersigned hereby join in the above indemnity and jointly and severally guarantee due performance of the above contract and accept all the formalities expressed therein.”

In their application for leave to defend, the appellants before the Supreme Court had, *inter alia*, contended that the suit was for recovery of the price of the goods and the interest paid on that amount and the document in question was an indemnity bond. It was also pleaded by them that the respondent No.1 should prove that they had suffered a loss. They pointed out that in the plaint, the first respondent had not averred that they had suffered any loss or damage. It was pointed out by them that the said bond purporting to be signed by respondent No.2 and counter-signed by the Manager of the defendant No.1 was in flagrant violation of the bank's Procedure. In para 12 of the judgment, Supreme Court observed that there was a dispute as to whether the document was a guarantee or merely an Indemnity. It was further observed that since the 1st respondent termed the document to be an indemnity, the Court was required to consider the nature and meaning of the document. This, Supreme Court was of the view that, by itself, necessitated granting of leave to defend. It was further observed that the document was contrary to no other practice. The Manager of the appellant bank had merely affixed the stamp of the Appellants and signed under a paragraph which stated that they had joined in the indemnity. It was noted that the Appellants had made serious allegations of fraud and collusion and had stated that such a document did not exist in their records. The Court felt that This was not a defence which could be characterised, as sham or illusory and therefore,

triable issues haing arisen, the application for leave to contest the suit should not have been rejected.

4. However, in the case before this Court, the terms and conditions of the document referred by the plaintiff bank as a guarantee and by the appellant as an indemnity bond are altogether different. The document in question, *inter alia*, reads as under:-

In consideration of your agreeing to open and/or continue, at my/our request an account or accounts in your books and/or opening a letter(s) of credit in the name of M/s. New Orient Transport Company (hereinafter called “the Customers”) either in one or more of your branches in Delhi or the Head Office and Branches in New Delhi or any other branches in any part of India or or outside India, I/We Varun Gauba, S/o. Jagdev Chand, R/o. 74 BA, Shalimar Bagh, New Delhi, hereby agree and undertake to save you harmless and keep you indemnified from and against all claims, demands, losses, damage, costs, charges and expenses whatsoever you may sustain or incur in respect of all moneys already advanced and paid to such Customers and in respect of any liability incurred by you for such customers or in respect of any moneys you may at any time advance or pay to or any liability you may incur for the use or accommodation or on the credit of the Customers whether on current, overdraft, cash credit or any other account or by way of opening or continuing any new account special or otherwise or by opening letters of credit from time to time and negotiating bills thereunder or by way of discount or otherwise in respect of bills of exchange, promissory notes or other negotiable securities drawn, accepted or endorsed by such customers or otherwise howsoever together with all interest, discount, commission and other banking charges legal

and other costs, charges and expenses which may be or may become payable in connection therewith PROVIDED NEVERTHELESS that my/our liability under these presents shall not exceed in the aggregate the sum of Rs.3,50,376.03 (Rupees Three lacs fifty thousand three hundred and seventy six and paise three and interest thereon at the rate of percent over Reserve Bank rate subject to a minimum of percent per annum from the date on which demand for payment thereof shall have been made by you upon me/us.

My/Our liability under these presents shall remain in full force until three calendar months after I/we shall have given or sent to you notice in writing of my/our intention to discontinue and determine these presents and shall have paid to you all moneys up to the limit of my/our liability due at the expiration of such notice and in the event of my/all or any of us dying or being under any legal disability the liability of the survivors or survivor of us and of the estate(s) and executors, administrators or legal representatives of the deceased guarantor shall continue until the expiration of three calendar months notice in writing given to you by such survivor and executors administrators or legal representatives of such deceased guarantor to determine these presents and you shall be at liberty on receipt of such notice any time within the said period of three calendar months to open a fresh account or accounts for the customers and to appropriate thereto all payments subsequently made to you by such customers and not expressly appropriated by such customers to the old accounts, without in any way affecting my/our liability under these presents to the extent aforesaid.

I/We hereby consent to your making any variance that you may think fit in the terms of your contract with the principal debtor to your determining, enlarging, or varying any credit to him to your making any

composition with him or promising to give him time or not to sue him and to your parting with any security you may hold for the guarantor debt. I/We also agree that I/we shall not be discharged from my/our liability by your releasing the principal debtor or by any act or omission of yours the legal consequence of which may be to discharge the principal debtor or by any act of yours which would, but for this present provision, be inconsistent with my/our rights as sureties or by your omission to do any act which, but for this present provision, your duty to us would have required you to do. Though as between the principal debtor and ourselves I am/we are sureties only, I/we agree that as between yourselves and us, I am/we are principal debtors jointly with him and accordingly I/we shall not be entitled to any of the rights conferred on sureties by Sections 133, 134, 135, 139 and 141 of the Contract Act.

Notwithstanding anything hereinbefore contained my/our liability under these presents shall extend to all accounts of the customers whether the same are the account or accounts of such customers solely or are accounts on which such customers may become liable jointly in any manner whatsoever with company or firm or person or persons and in whatever name the same may stand and the same shall not be affected by any change in the constitution or name of the customer's firm or company or any change in the constitution of the Bank its successors or assigns or by its absorption in or by its amalgamation with any other Bank or Banks.

You shall also be at liberty to release or discharge any of us from the obligation of this guarantee, or to accept any composition from or make any other arrangements with any of us without thereby prejudicing or affecting your rights and remedies against the other or others of me/us.”

5. On a careful analysis of the covenants contained in this document, there can be no doubt that it is in fact a guarantee bond whereby the appellant/defendant No.2 undertook to pay to the plaintiff/respondent No.1 bank whatever amount it advanced to defendant No.1/respondent No.2, along with interest on that amount. Of course, the liability of the appellant was not to exceed Rs.3,50,376.03 and the interest on that amount at the rate agreed by the borrower. The document specifically refers to all accounts such as current, overdraft cash, credit, discounting bills, promissory notes etc. The liability of the appellant was to remain in force until three months of his sending a notice to the bank expressing intention to discontinue his obligation and determine the agreement which he had executed with the bank. He had also undertaken to pay whatever amount was due to the bank at the time of expiration of any such notice. The plaintiff bank was also given liberty to make such variations as it might deem appropriate in the terms of its contract with defendant No.1. The amount of the credit to defendant No.1 could be enlarged or varied but that was not to discharge the appellant from his liability. Even if the principal debtor was to be released from his liability, that was not to release the appellant of his obligation under the agreement he executed with the bank. In para 3 of the document, the appellant specifically stated that though as between the principal debtor and himself, he was surety only, agreed that as

between him and the bank, he was principal debtor jointly with defendant No.1 and accordingly shall not be entitled to any of the rights conferred on sureties of Sections 133, 134, 135, 139 and 141 of the Contract Act. This specific term in the document leaves no doubt that in fact the appellant had executed a guarantee bond and not an indemnity bond with the bank and that is why he has referred to himself as a surety qua defendant No.1. In fact, in terms of this contract with the bank, he became the principal debtor, along with defendant No.1 in the suit. I also notice that in the last para of the document, the document has specifically been referred as a 'guarantee'. I therefore agree with the learned Trial Judge that this document is a 'guarantee letter'/bond.

6. Even if it is accepted for the sake of arguments that the document, executed by the appellant in favour of the plaintiff bank, is not a letter of guarantee, it can certainly not be disputed that it is a written contract between him and the plaintiff bank and a suit in which the plaintiff seeks only to recover a debt or liquidated demand in money with or without interest arising on a written contract, can be filed under the summary procedure prescribed in Order XXXVII of the Code of Civil Procedure. Admittedly, the plaintiff bank had claimed only the principal sum and the interest due to it. This is also the case of the plaintiff bank that the defendant No.1, who was the principal borrower, had committed default in repayment of the loan taken from the bank and that the suit amount of Rs. 5,93,909/- was due from

him. Therefore, this is a suit for recovery of a debt, with interest, and is based on a written contract. From whatever angle it may take, it is difficult to dispute that the suit is covered under Order XXXVII of the Code of Civil Procedure.

7. It was lastly contended by the learned counsel for the appellant that he has disputed the correctness of the statement of accounts filed by the bank. In my view, correctness of the statement of accounts pertaining to the loan taken by defendant No.1 (the principal borrower), can be challenged by the principal debtor and not by the guarantor. In any case, there is no prima facie material in record to indicate any inaccuracy in the statement of account.

As regards the rate of interest, I find that the borrower had, while executing the promissory note, agreed to pay interest at the rate 7.5% above the RBI rate, with a minimum of 22.5% p.a. This is not the case of the appellant that interest has been charged at a higher rate.

8. For the reasons stated hereinabove, I find no merit in the appeal and the same is, therefore, dismissed. There shall be no order as to costs.

The appeal stands disposed of accordingly.

V.K. JAIN, J

JULY 09, 2012

'sn'