

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION PETITION NO. 11 OF 2015

Narinder Pal Agarwal	)	... Petitioner.
Of Mumbai, Indian Inhabitant,	)	(Org.Opponent No.2)
Aged 66 years, Residing at 4, 1 st floor,	)	
Gulab View Bungalow, Near Basant	)	
Theatre, Dr. C.G.Road, Chembur,	)	
Mumbai – 400 074.	)	

V/s.

1. Saraswat Co-operative Bank Ltd.,	)	
A Multi State Co-operative Bank,	)	
having its Registered head office	)	
at, Mittal Court, “A” Wing, 1 st floor,	)	
Nariman Point, Mumbai- 400 021.	)	

AND

Having its branch office at address	)	
at 74-C, Samadhan Building,	)	
Senapati Bapat Marg, Dadar (W),	)	
Mumbai – 400 028.	)	

2. Narendra Metal Converters Pvt. Ltd.,	)	... Respondents.
a Private Company formed and	)	
registered under the provisions of	)	
Companies Act, 1956 and having its	)	
Registered office at 209, Shrikant,	)	
Chembers V.N.Purav Marg, Chembur,	)	
Mumbai – 400 071.	)	

Mr. Ram Upadhyay, Advocate a/w. Mr. Dharmesh Singh i/by
Law Competere Consultus for the Petitioner.

Mr. Bhupesh V. Samant, Advocate for the Respondent No.1.

CORAM : S. C. GUPTE, J.

DATE : JANUARY 07, 2019.

ORAL JUDGMENT :

1 Heard learned counsel for the parties.

2 This Arbitration Petition challenges an award
passed by a Sole Arbitrator under section 84 of the Multi-State
Co-operative Societies Act, 2002.

3 The Petitioner, who was original Opponent No.2 in
the reference before the learned Arbitrator, was a Director of
one Narendrajay Metal Converters Ltd., the principal debtor of
the first Respondent-Bank, who is Respondent No.2 to this
petition and was Opponent No. 1 in this reference. The
Petitioner had guaranteed the advances made by Respondent
No.1 to Respondent No.2 under the financial limits sanctioned
in its favour. It is the Petitioner's case that after loan was
granted by Respondent No.1 to Respondent No.2 *inter-alia* on
the security of a guarantee by the Petitioner, disputes arose
within the family of the Petitioner [the Petitioner, his brother

and nephew, respectively, being Directors and Guarantors of Respondent No.2 Company] and as per a settlement agreed between the members of the family, it was decided that the Petitioner would resign as Director and the remaining Directors of the Company would take steps to get him discharged as a guarantor of Respondent No. 1-Bank and also for release of his residential bungalow at Chembur, Mumbai, given as a security for the financial limit sanctioned by Respondent No. 1 in favour of Respondent No.2. It is submitted that the Petitioner, accordingly, resigned as a Director of the Company and the requisite form in that behalf was filed with the Registrar of the Companies, Maharashtra. It is submitted that Respondent No.2 accordingly proceeded to inform Respondent No.1 about the Petitioner's resignation as Director and request it for discharge of the Petitioner, as a surety, and release of his bungalow as a security given for the sanctioned finance. It is submitted that while the Petitioner was thus awaiting discharge as a guarantor and release of the security, a letter was addressed by Respondent No.1, placing certain conditions for his release as Guarantor and also for release of the security of his bungalow. It is submitted that the conditions were fully complied with and, accordingly, the Petitioner stood discharged as guarantor and Respondent No. 1 was also liable to release his bungalow, as part of its security. It is submitted that Respondent No. 1-Bank proceeded to enter into a new contract with Respondent No. 2

and also granted further financial limits for which a fresh set of documents such as promissory note, guarantee bond, etc. were procured from the remaining Directors of Respondent No.2. It is submitted that neither the Petitioner's consent was obtained for this new contract nor an intimation was given to him of such fresh contract. It is, accordingly, the case of the Petitioner that after the new contract came into existence, the Petitioner stood discharged of his original obligations as a guarantor. Since the loan granted by Respondent No. 1 to Respondent No. 2 was outstanding, the former applied for reference under section 84 of the Multi State Co-operative Societies Act, arraigning both Respondent No.2, as the Principal Debtor, and the Directors of Respondent No.2, including the Petitioner herein, as Guarantors. The learned Arbitrator proceeded to pass an award in the reference against both - the Principal Debtor and the Guarantors. The Petitioner, as a guarantor, challenged this award, *inter-alia* on the ground that there was no service of arbitration proceedings on him. This court allowed the Petitioner's challenge and remanded the matter to the Arbitral Tribunal for a fresh hearing in accordance with law and after service of the proceedings upon the Petitioner. The matter was heard afresh on remand by the learned Arbitrator and thereafter, the award impugned in the present petition came to be passed.

4 The only ground of challenge pressed by learned counsel for the Petitioner against the award passed on remand is that, by reason of variation of the contract as between Respondent No.1-Bank and Respondent No.2 - principal debtor, to which the Petitioner was not a party and of which he had no intimation, the Petitioner stood discharged as a guarantor by reason of the provisions of Section 62 of the Contract Act. Learned counsel relies on several judgments of Supreme Court as well as our Court and the Privy Council in support of his contention that any variation of the original contract as between the creditor and the principal debtor, results in the discharge of the surety, if such variation is without his consent.

5 Learned counsel for the first Respondent-Bank, on the other hand, submits that the Respondent- Bank has not varied the contract between itself and the principal debtor but has simply renewed its terms. Learned counsel submits that the guarantee given by the Petitioner, being a continuing guarantee and there being no revocation of it, the Petitioner is not discharged as a surety. As regards future transactions as between the creditor and the principal debtor, learned counsel submits that there has been no notice issued by the Petitioner, as a surety, under section 130 of the Contract Act. Learned counsel further submits that the petitioner, as a surety, has given his consent or, at any rate, waived his rights to seek

discharge, for any variance in the terms of the contract as between the principal debtor and the creditor. Learned counsel, in support of his submissions, relies on the judgment of the Supreme Court in the case of **Sita Ram Gupta vs. Punjab National Bank & Ors.**, reported in (2008) 5 Supreme Court Cases 711, and also a decision of our Court in the case of **Mukesh Gupta vs. SICOM Ltd.**, reported in AIR 2004 BOMBAY 104.

6 It is not in dispute that the guarantee given by the Petitioner in the present case is a continuing guarantee. It is also not in dispute that there is no notice given by the Petitioner to Respondent No.1 Bank/Creditor in terms of Section 130 of the Contract Act. In other words, the guarantee extends even to future transactions, and is not revoked by the petitioner, as a surety, and accordingly, the Petitioner continues to be liable on the guarantee. What is submitted by the petitioner is that there has been variance of the terms of the contract as between the principal debtor and the creditor and such variance being made without the surety's consent or knowledge, the surety is discharged as to the transactions subsequent to the variation. Learned counsel also submits that, apart from the provisions of section 133 of the Contract Act, even under the provisions of section 62 of the Contract Act, which deals with the effect of novation, rescission and alteration of contracts, the petitioner, as a party

to a contract, which is substituted by a new contract, is not bound to perform the original contract of surety-ship.

7 Before we consider the substance of the argument of learned counsel for the Petitioner concerning discharge of the surety, we must clear a few cobwebs. Section 62 of the Contract Act has no significance from the point of view of the present dispute between the parties. Section 62 talks of novation, rescission and alteration of a contract. It deals with substitution of a contract by a new contract or its rescission or alternation. The contract between the creditor and the principal debtor, on one hand, and the contract of surety-ship, on the other, are two separate contracts. It is nobody's case that the contract of surety is either substituted by a new contract or rescinded or altered. What is claimed to be substituted or rescinded or altered [though there is no proven case even as regards that] is the contract between the creditor and the principal debtor. If such contract is either substituted or rescinded or altered, it need not be performed by the principal debtor. It, however, has nothing to do with the contract of surety-ship or its performance by the surety. If, on the other hand, the surety, seeks a discharge of his liability by reason of variance of the contract as between the creditor and the principal debtor, his case is typically covered by Section 133 of the Contract Act, which provides for discharge of surety for variance in terms of the contract as between the

principal debtor and the creditor. Any variance made in such contract without the surety's consent discharges the surety as to transactions subsequent to such variance. Thus, what we have to consider in the present case, is really the petitioner's case of discharge under Section 133 of the said Act and not a case under Section 62, and we shall do so presently.

8 Before we do so, one more aspect needs to be borne in mind. In the present case, the Respondent has not only continued the original finance but has also enhanced the limit made available to the principal debtor and granted further loan. So far as the enhancement of the debt owed by the principal debtor is concerned, admittedly no liability is being foisted on the petitioner as a surety. He has not been made liable for the further loan granted by Respondent No. 1 - Bank to Respondent No.2. In this petition, we are dealing with the petitioner's liability, as a surety, under the original loan made available by Respondent No.1 to Respondent No.2 and continued from time to time.

9 Coming now to the Petitioner's case under Section 133 of the Contract Act, it is submitted by learned counsel for the Petitioner that if the original contract as between the creditor and the principal debtor is varied without the consent of the surety, the surety-ship is discharged. It is submitted that

if the contract be altered without his consent, no matter whether such alteration be innocently made, the surety is entitled to say that the contract no longer exists for which he engaged to be a surety; the contract for which he offered to be a guarantor has been put to an end to; the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. On this issue, learned counsel relies on the decision of the Privy Council in the case **Seth Pratap Singh Moholalbhai vs. Keshavlal Harilal Setalwad** (AIR 1935 PC 21). In that case, the principal debtor had originally created a charge upon four immovable properties. On the strength of this original contract, the surety had guaranteed repayment of the debt of the principal debtor. This contract was subsequently altered by releasing the charge upon property no. 4. The advance made by the creditor to the principal debtor was treated as reduced from the original advance of Rs.1 lakh 25 thousand to Rs. 1 lakh, and the security was reduced from four properties to three. Their Lordships of the Privy Council held that for this performance, for which the surety had not contracted, the surety could not be held liable. The original contract of finance of Rs. 1 lakh 25 thousand on the security of four properties was gone and what was substituted in its place was a contract for advance of Rs.1 lakh on the security of three properties. The surety had not assented to this new contract. It was not this contract for the performance of

which he could be bound. Unless the surety assented to the new terms there was nothing to which he could be bound and, accordingly, the contract of surety-ship was treated as discharged. This is nothing but the effect of section 133 of the Contract Act, where variance of the contract between the principal debtor and the creditor, without the surety's consent, discharges the surety. The facts of this case are materially different from the facts of our case. In our case, there is no alteration or substitution of the original contract as between the creditor and the principal debtor. The original finance made by the creditor to the principal debtor was simply continued by a document of renewal of the contract and the guarantee of the surety for this contract being a continuing guarantee, and there being no notice of revocation of such continuing guarantee under section 130 of the Contract Act, the obligation of the surety clearly continued to operate. There is no discharge, thus, either under Section 133 or Section 130.

10 Even the case of **Satish Chandra Jain vs. National Small Industries Corporation Ltd.**, (AIR 203 SC 623), referred to by learned counsel for the Petitioner, stands entirely on an altogether different footing. The original contract of hire-purchase agreement, for which the appellant before the Supreme Court stood as a guarantor as per his contract (contract dated 7th June, 1983), was superseded by a

new agreement (agreement of 02nd April, 1986). The latter agreement did not say that the earlier agreement of guarantee had either stood terminated or it was continued. In fact, in the latter agreement of 02nd April, 1986 there was no mention of the earlier agreement entered into by the appellant as a guarantor. The court observed that the conduct of the parties showed that after 2nd April, 1986, the respondent itself did not regard the appellant as one of its guarantors. In fact, the agreement of 2nd April, 1986 amounted to a fresh hire-purchase agreement and two other individuals stood as guarantors for the same. On these facts, the Supreme Court found that the second agreement of 2nd April, 1986 amounted to novation of contract, as a result of which the earlier guarantor had stood discharged and a fresh guarantee of two other individuals was accepted by the Respondent. The Court held that the argument of continuing guarantee could not, in the premises, be applied in the case before it.

11 In the case of **Central Bank of India vs. Ali Mohammad & Ors**, (1992 (7) Civil CC (BOMBAY), decided by a learned single Judge of our court, it was held that in view of the subsequent transaction, which took place between the creditor and the principal borrower, the respondent surety had stood discharged, essentially on the footing that the surety's consent was not given to such variance simultaneously with the variance but at a time when there was no variance either

made or in contemplation. This aspect of the decision has been dissented from by a Division Bench of our court in **Mukesh Gupta's** case (supra). The Division Bench held that the proposition of law stated in **Ali Mohammad's** case that the surety's consent must come simultaneously with the novation of the contract between the creditor and the principal debtor, was not correct. The Court held that the view expressed by the learned Judge to this effect ran counter to the decision of the Privy Council in **Hodges vs. Delhi and London Bank Ltd.** (1900-27 Ind App 168). In the Privy Council case, it was held that the right conferred on the surety under the Contract Act could be waived by a specific agreement in the deed of guarantee. Learned counsel for the Petitioner submits that even if this part of the case could be said to be overruled by the Division Bench in **Mukesh Gupta's** case (supra), that any alteration of the contract as between the creditor and the principal debtor, not assented to by the surety, discharges him still holds as good law. No doubt that is so. But, as observed above, there is no variance here so far as the original contract of finance as between the creditor and the principal debtor is concerned and accordingly, the law stated in **Ali Mohammad's** case has no application here.

12 Even the decision of Madras High Court in the case of **Indian Bank, Madras vs. S. Krishnaswamy**, (AIR 1990 Mad115) is clearly distinguishable. In that case, the appellant

bank had not kept the guarantor informed about the securities taken by the bank from the principal borrower. The creditor had lost some of these securities. Neither the losing of the movables such as LIC policy and shares taken control of nor the shortfall in the securities was communicated by the creditor to the guarantor. So also, there was some additional security taken by way of second mortgage without the knowledge of the respondent-guarantor. The respondent guarantors were not parties to this fresh arrangement with the principal debtor by which all outstanding accounts were adjusted and converted into a term loan for Rs. 35 lakhs. In these facts, the court held that the respondent sureties had stood discharged from their liabilities by (a) negligence of the bank in losing goods in their custody, and (b) by virtue of a fresh agreement between the appellant bank and the principal debtor, which the respondent sureties were neither party to nor made aware thereof.

13 Even otherwise, as far as the renewal of the contract of finance is concerned, the Petitioner, as a surety, had clearly given his consent, waiving his rights under the relevant provisions of the Contract Act in respect of such renewal or variance. The particular clauses of the security-ship contract in this behalf are quoted below :

“... ... And I/ We expressly agree that you shall have full discretionary power, without any further consent from me /us and without in any way affecting my / our liability under this guarantee, to renew any advance, and to hold over, renew, or give up in whole or in part, and from time to time, any bills, notes, mortgages, charges, liens or other securities received or to be received from the Principal, either alone or jointly with any other person or persons or from any other person or persons or bearing the name of the principal. You shall be at liberty without in any way affecting my/ our liability under the guarantee and I/We hereby give my / our consent to you to vary any contract or any term or terms of any contract entered into with, or to release or discharge or to do any act or omission the legal consequences of which is to discharge or to enter into any composition or compound with or promise to grant time or any other indulgence or not to sue, either the Principal or any other person or persons liable to any such bills, notes, mortgages, charges, liens or other securities or any person liable as surety, or collaterally liable for the Principal, or any other person or persons.”

“ I/We waive in favour all of my /our rights against you or the Principal so far as may be necessary to give effect to any of the provisions of this guarantee. And I/We agree that I/We shall not be entitled to claim the benefit of any legal consequences of any variation of any contract entered into by the Principal with you the liability in respect of which is guaranteed by me/us aforesaid.”

14 As held by the Supreme Court in the case of **Sita Ram Gupta's** case (supra), the surety cannot claim the benefit of section 130 or any other provision of the Contract Act by reason of waiver of such benefit whilst entering into the agreement of guarantee with the creditor. As a general Rule, any person can enter into a binding contract to waive the benefit conferred upon him by any Act of parliament, unless it can be shown that such agreement or waiver is, in the circumstances of the particular case, contrary to public policy. The advantage of any law or rule, made solely for the benefit or protection of the individual in his private capacity, may be dispensed with by him without infringing any public right or public principle.

15 In the premises, the impugned award of the learned Arbitrator does not suffer from any infirmity. There is no breach of public policy in the impugned award. So also, there is no patent illegality appearing on the face of the award.

16 There is accordingly no merit in the Arbitration Petition. The Petition is dismissed. The Petitioner shall pay costs, quantified at Rs. One lakh, of this petition to the Respondent-Bank.

17 Learned counsel for the Petitioner applies for extension of ad-interim protection in his favour. After having heard the matter extensively and rejected it, there is no question of this court granting any further protection to the petitioner. The application of the petitioner for further protection is rejected.

(S. C. GUPTE, J.)

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