

\$~5 to 7

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

Reserved on: 30th October, 2019

Pronounced on: 18th November, 2019

+ **W.P.(C) 4802/2015**

RAJAN MALHOTRA & ANR. Petitioners

Through: Mr. H. P. Sharma with Mr. Paras
Joshi, Advocates.

versus

UNION BANK OF INDIA & ORS. Respondents

Through: Mr. Janendra Lal with Ms. Yasmin
Tarapore, Advocates for R1 and R2.

WITH

+ **W.P.(C) 4803/2015**

RAM RAGHUBIR PANDEY Petitioner

Through: Ms. Sonia Sharma with Mr. Mukesh
Anand and Ms. Neha Chugh,
Advocates.

versus

UNION BANK OF INDIA & ORS. Respondents

Through: Mr. Janendra Lal with Ms. Yasmin
Tarapore, Advocates for R1 and R2.

AND

+ **W.P.(C) 11928/2015**

UNION BANK OF INDIA

..... Petitioner

Through: Mr. Janendra Lal with Ms. Yasmin
Tarapore, Advocates.

versus

RAJAN MALHOTRA & ORS.

..... Respondents

Through: Mr. H. P. Sharma with Mr. Paras
Joshi, Advocates.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH**

J U D G M E N T

Talwant Singh, J.

1. By this common order above-mentioned three writ petitions are disposed of. First of these writ petition bearing No. 4802/2015 has been filed by Sh. Rajan Arora, Sh. Neeru Malhotra. Petitioner No.1 claims to be ex-director of Respondent No.3 company and Petitioner No.2 is the earlier guarantor of loan/credit facilities enjoyed by Respondent No.3 company from Respondent No.1 & 2 bank. Union Bank of India is Respondent Nos. 1 and 2. Respondent No. 3 is a company named M/s Faishan Flairs India Private Limited. Respondent No. 4 is Sh. Ram Raghubir Pandey, who is ex-director of Respondent No.3 company, Respondent No. 5 is Sh. Raman Mehta and Respondent No. 6 Smt. Geetha Mehta are the new directors of Respondent No.3 company and Respondent No. 7 Sh. Kuldeep Singh had mortgaged his property to Respondent Bank for the loan facilities extended to Respondent No.3 company. The Petitioners have challenged the order dated 25th March,

2015 passed by Debt Recovery Appellate Tribunal ('DRAT') in appeal No. 79/2014 by which the appeal filed by Respondent Nos. 1 and 2 Bank against the present Petitioners and Respondent No. 4 was allowed. The writ petitioner bearing No. 4803/2015 was filed by Sh. Ram Raghubir Pandey who was Respondent No. 4 in petition No. 4802/2015. He has also impleaded the Union Bank of India as Respondent Nos. 1 and 2, M/s Faishan Flairs India Private Limited as Respondent No. 3, Smt. Neeru Malhotra and Rajan Malhotra as Respondents No. 4 and 5 and Respondents No. 6, 7 and 8 are same i.e. Sh. Raman Mehta, Smt. Geetha Mehta and Sh. Kuldeep Singh. The impugned order is the same i.e. order dated 25th March, 2015 passed by DRAT in appeal No. 79/2015 against the Petitioner Ram Raghubir Pandey and Respondent No. 4 and 5 Neeru Malhotra and Rajan Malhotra. Sh. Ram Raghubir Pandey has died and has been substituted by his legal heirs.

2. The writ petition No. 11928/2015 was filed by Union Bank of India wherein Sh. Rajan Malhotra, Smt. Neeru Malhotra and Ram Raghubir Pandey (since deceased) have been impleaded as Respondent Nos. 1, 2 and 3 respectively and the company M/s Faishan Flairs India Pvt. Ltd. is Respondent No.4. Sh. Raman Mehta, Smt. Geetha Mehta and Sh. Kuldeep Singh have been impleaded as Respondent Nos. 5, 6 and 7. The Bank has also challenged the same order passed by DRAT as the bank is aggrieved from that portion of the order where DRAT had held that bank had failed to prove that Respondent Nos. 1, 2 and 3 had executed the deeds of guarantee dated 22nd July, 1995. For the sake of convenience we will be referring to the parties and pleadings in Writ Petition (Civil) No. 4802/2015 as all the

three petitions have emanated from the same order dated 25th March, 2015 and the parties as well as the facts are common although the relief claimed by Union Bank of India is different from the relief claimed by the Petitioners in Writ Petition No. 4802/2005 and 4803/2015.

3. The relevant portion of the impugned order of DRAT is as under:

“27. Without further multiplying the judgments which may be relevant in this regard, the discussion can be cut short as the issue apparently has now been decided by the Hon’ble Supreme Court in the case of **HB Basavaraj. (Dead) by LRs. & Anr. Vs. Canara Bank &Ors.**, 2010(1) KarLJ 588. This issue on the basis of this judgment was considered by this Tribunal while deciding Appeal No.320/14 titled **Sudhir Kumar Khuara.na vs. Punjab &Sind Bank &Ors.**, decided on 27.10.2014. This Tribunal considered the question on, the basis of various judgments to hold as under:

.... The Court in this case has considered the contract between the parties. After examining the agreement executed between the appellant and the bank, the Court has observed that one of the conditions clearly shows that the guarantee to be a continuing one under Section 129 of the Indian Contract Act. As per Section 130 of the Contract Act, a continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor The deed of guarantee in the case before the Court had mentioned that while between the guarantor and borrower, the guarantor is only a surety; yet between the bank and the guarantor, the surety is the principal debtor and his liability would be co-extensive to that of the borrower. The Court has accordingly observed that the guarantor himself waived off his rights under Chapter VIII of the Act which conferred on surety.

The Court, therefore, approved the decision of Karnataka High Court in **T. Raju Shetty vs. Bank of Baroda**, AIR 1992 KARNATAKA 108, whereby it had been held that surety can waive off his rights under various provisions of Chapter VIII of the Contract Act. It is further observed that it is in line with long established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public right or public policy. This principle was reiterated in **Lachoo Ma! Vs. Radhey Shyam**, (1971) 1 SCC 619. Further on the principles of continuing guarantee, the position was cleared by the decision of the Supreme Court in **Sita Ram Gupta vs. Punjab National Bank & Ors.**, (2008) 5 SCC 711. The Court in this case has held that it is not open to a party to revoke a guarantee when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee.

28. While coming to the above conclusion, this Tribunal had not only considered and taken note of the case in the case of **S. Perumal Reddiar vs. Bank of Baroda & Ors.**, AIR 1981 MADRAS 180, but the other judgments in the case of **Central Bank of India vs. All Mohammad & Anr.**, 1993 Civil Court Cases 668 (Bombay), **C. N. Sundaram vs. Chennai Finance Company Limited & Ors.**, 2006 3 Civil Court Cases 422 (A.P.) and **N. Sanjeeva vs. State Bank of Travancore**, 2006 (1) ISJ (Banking) 650, **State Bank of India vs. Machine Well Industries & Ors.**, (1983) 53 Comp Cas 830 (Delhi), In view of the law laid down by the Hon'ble Supreme Court, the other judgments relied upon by the counsel for the respondents may not require any further consideration in detail. It can, therefore, be said that the respondent Nos.1, 2 and 3 are not entitled to claim exemption from the liability arising out of contract of

guarantee in view terms of the of the guarantees dated 28.3.1994 and 17.10.1994. I am thus of the view that respondents are not entitled to claim any protection under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act. This could not be a case of novation of contract.

29. Respondent No.3 has also questioned the guarantee dated 22.7.1995 on the ground that by then he had already resigned from the Board and had written a letter to the bank in this regard. Contention is that the said respondent ceased to be a Director of the company and all the liabilities of the company was the responsibility of the other Directors. Respondent No.3 had also approached the bank to return the India Development Bonds which the bank failed to return. As per the said respondent, the bank had obtained his signatures on this guarantee on blank and misused them to fabricate documents. It is accordingly pleaded that the said respondent never gave guarantee dated 22.7.1995. This issue has been discussed by me in detail and the finding has been recorded above.

30. Since the liability has now been determined on the basis of those guarantees, which concededly had been signed by respondent No.3 as well and which had been held to be continuing guarantees, his liability in this regard has to be examined in view of the finding recorded above.

31. The counsel for respondent No.3 on this aspect would submit that recovery against the respondents on the basis of these guarantees would be barred by limitation. The submission by the counsel is that the recovery on the basis of the guarantee given in the year 1994 is barred by time. No such plea was taken in the written statement filed by this respondent. However, the said respondent has sought stay of the present suit in terms of Section 10 CPC as the matter in issue is also directly and substantially in issue in a previous suit instituted, which was pending before Civil Judge, Delhi. The plea of the appellant was also that he stood discharged of surety under Sections 134 and 139 of the Contract Act. The counsel has also relied upon

the provisions of Section 23 of the Contract Act to urge that the consideration or object of an agreement was not lawful as it involved or implied injury to the person or property of another. The counsel would submit that there is difference between waiver and estoppel and this is a case of waiver whereby the bank had waived its rights to recover the amount from the respondent by entering into a new agreement. The counsel would also plead that on account variance made without the consent of the respondent, the said respondent shall stand discharged of liability as to the transaction made subsequent to that.

32. The aspect of waiver has to be considered in the light of the provisions contained in Sections 133, 134, 135, 139 and 141 of the Contract Act. I have already made reference to clauses 7 and 8 of the guarantee deeds. The respondent having waived his right available to him under Sections 133, 134, 135, 139 and 141 of the Contract Act, cannot now be heard making complaint in this regard. The issue of limitation apparently does not arise and cannot be urged at this stage. The clauses in the deed of guarantee otherwise would also stand against the respondent. The respondent had agreed that in the event of principal being a limited company etc. then the guarantee shall remain effective notwithstanding any death, retirement, change, accession or addition, as fully as if the committee, firm, partnership, trustees or debtors or Joint account, at the date of principals' default or at any time previously was or were the same as at the date thereof. The respondent had also given guarantee that bank shall not be bound to enquire into the powers of the principal or any agents acting or purporting to act on the principal's behalf and the bank may recover against the respondent to the extent mentioned notwithstanding that any security given or to be given to the bank may be void, defective or formal or informal etc. In this view of the matter, the plea of the counsel for respondent No.3 is found without any merit.

33. The liability of the respondents, therefore, would continue to remain. The finding returned by the Tribunal in holding

defendants 4, 5 and 6 (respondents 1, 2 and 3) not liable, therefore, is set aside and the appeal is allowed. Respondent Nos.1, 2 and 3 (defendants 4, 5, and 6 in the OA) shall be jointly and severally liable to pay the amount determined by the Tribunal below along with the other defendants in the O.A, already held liable. Recovery certificate may be amended accordingly by the Tribunal below.”

4. In brief, the facts narrated in Writ Petition No. 4802/20158 are that Respondent No. 3 is a registered company and the Petitioner No. 1, Respondent No. 4 were erstwhile directors of the said company. The Respondent No. 1 Bank on 28th March, 1994 granted Packaging Credit Limit of Rs.2.20 lakhs to the company and Petitioner No. 1 and Respondent No. 4, being the Directors, executed the necessary documents in this regard alongwith letters of guarantee for Rs.6.00 lakhs as Packaging Credit Limit was subsequently enhanced to Rs.6.00 lakhs. Petitioner No. 2 also signed a letter of guarantee dated 28th March, 1994 for a sum of Rs.6.00 lakhs. Respondent No. 4 mortgaged his Indian Development Bonds with the Respondent No.1 Bank as the Directors had no immovable property for giving as collateral security against the packaging limit. On 17th October, 1994 the Packaging Credit Limit (PCL) was enhanced and fresh documents were executed by Petitioner No. 1 and Respondent No. 4 of the value of Rs.10 lakhs in favour of the Bank. Accordingly, a guarantee deed of sum of Rs.10.00 lakhs and Rs.16.00 lakhs were executed.

5. Since the Respondent No.3 company was running into losses, so Respondent Nos. 5 and 6 were inducted in the Respondent No.3 company on 7th June, 1995 and on 22nd June, 1995 respectively and the said company

was sold to Respondent Nos. 5 and 6, and Respondent No.5 became the sole authority to sign cheques with effect from 14th July, 1995. The earlier directors resigned from the above company and Respondent No. 1 Bank was accordingly informed. Petitioner No. 2 sent a notice dated 17th July, 1995 for withdrawal of her personal guarantee owing to change in constitution of the company as Respondent Nos. 5 and 6 had taken over control and management of the company. However, the Respondent No. 1 Bank illegally declined her request. The Petitioners again intimated Respondent No. 1 on 25th August, 1995 to withdraw their guarantees but these letters were not replied to by Respondent No.1 Bank. Copies of Form No. 32 alongwith letters of resignation and withdrawal of guarantee have been filed on record. A resolution dated 8th June, 1995 was passed by the new Directors which was submitted to Respondent No.1/Bank alongwith a resolution dated 24th July, 1995 indicating that Respondent No. 5, the new director of the company is the only person who was authorised to sign the cheques and operate the company's account. On 19th July, 1995, the new guarantor (Respondent No.7) submitted a property worth Rs.40.00 lakhs to Respondent No.1 Bank as collateral security and the new Director requested the Bank to accept the said security. Respondent No. 7 also executed the required documents and deposited the original title deed document vide letter dated 24th July, 1985 as a security for repayment of all amounts advanced or likely to be advanced under various facilities granted or may be granted to the Respondent No. 3 company. The Petitioner No.1 had resigned from the company as Director as well as primary shareholder and had handed over the assets of the company to the new Directors of the company. Same is the case of Respondent No. 4 who had also resigned

from the company.

6. On 22nd July, 1995, PCL facility of the company was enhanced to Rs.11.00 lakhs and FDBP limit was enhanced to Rs.26.80 lakhs and Respondent Nos. 5 and 6 signed all the required documents including the agreement, promissory note and deeds of guarantee.

7. Stand of Petitioner No.1 and Respondent No. 4 (who is Petitioner in Writ Petition No. 4803/2015) is that since they had already resigned as Directors from the Respondent No.3 company on 7th June, 1995 and they have not signed any document for enhancement of loan facilities and all the assets and liabilities of the company have been taken over by new Directors and this change in management was duly acknowledged and consented to by Respondent No.1 Bank. Apart from this, Respondent No. 7 had also created equitable mortgage of his property in favour of Respondent No.1 Bank for the credit facilities extended to the Respondent No.3 company at the behest of new directors. The fresh Packing Credit Agreement was executed by Bank with new Directors; the terms and conditions have totally changed from earlier Packing Credit Agreement dated 28th March, 1994 and 17th October, 1994 as the interest rate was increased on 22nd July, 1995. Petitioner No. 2 had withdrawn her guarantee by notice dated 17th July, 1995 and accordingly Respondent No.1 had informed Respondent No. 3 company regarding the new credit facility on 1st September, 1995. This PCL was further enhanced on 11th November, 1995 and a Cash Credit Facility (CCL) was also obtained by new Directors for Respondent No.3 company, who executed fresh promissory note, Packing Credit Agreement and deed of

Guarantees. Petitioner Nos. 1 and 2 and Respondent No. 4 stated that they had not signed any deed of guarantee after induction of new Directors in the company.

8. It is further stated that Respondent No. 1 bank filed O.A. No. 722/1996 before Debt Recovery Tribunal ('DRT') against Respondent No. 3 company in which the Petitioner No. 1 and Respondent No. 4 were impleaded as Directors and Petitioner no. 2 as guarantor apart from the new Directors and the new surety. Petitioners and Respondent No.4 filed their written statements denying the allegations of the bank and reiterating that Respondent No. 1 Bank had dealt with new Directors independently without the consent of Petitioners and Respondent No. 4 and such variance in the earlier terms of contract had absolved and discharged the Petitioners and Respondent No. 4 from any liability of guarantee for the loan/limits advanced by Respondent No.1 Bank to Respondent No. 3 company through its new Directors being Respondent Nos. 5 and 6. No guarantees were given after 7th June, 1995 by these 3 persons.

9. Respondent No. 3 company and its new Directors as well as the new surety i.e. Respondent Nos. 5 to 7 did not appear before DRT and they were proceeded ex-parte. It is pleaded on behalf of the Petitioners and Respondent No. 4 that information regarding resignation from directorship was furnished to the bank which accepted the change in the constitution and composition of the company. Fresh guarantees were obtained, limits were enhanced as well as new and fresh charges were filed with Registrar of the Companies and the cumulative effect of all this was that the Petitioners as well as

Respondent No. 4 stood absolved/discharged from any liability towards the Bank. It has been reiterated that the value of the mortgaged property was more than the loan outstanding and the bank had dealt only with Respondent Nos. 5 and 6 i.e. new Directors on 22nd July, 1995, 11th November, 1995 and 16th January, 1996 and all these enhancements of limits were not in the knowledge of the Petitioners and Respondent No.4. The learned Tribunal framed the following issues:

“1. Whether the applicant bank granted credit facility to D1?

2. Whether the agreements with D2 and D3 after 21.07.1995 discharged D4, D5, and D6?

3. What is the extent of liability of D4, D5 and D6?

4. Who are liable to the claim of the applicant and the amount to which the applicant is entitled to?

5. Relief.”

10. Respondent No. 1 Bank as claimant produced three witnesses, namely, Shri V.K. Kaul, Manager, Shri Onkar Sharma, Manager and Shri N.R. Aggarwal, Manager. During their cross-examination, all of them had deposed that Petitioner No. 1 had never signed any paper in their presence or visited the bank on the day when the signatures were purported to have been made. Respondent No.4, who has filed Writ Petition No. 4803/2015, had set up a case that on the date when the purported bank guarantee was executed, he was not in town. The said ex-director had also requested for release of his India Development Bonds on 11th May, 1996 and 10th June, 1996 but the

said bonds were not returned. Sh. Ram Raghubir Panday had also filed a suit bearing No. 329/1996 in a Civil Court against the Bank wherein interim relief was granted to release and return the bonds to him. Despite a direction of the Civil Court, said bonds were not returned by Bank and in the meanwhile the said bonds had elapsed and Mr. Panday sustained loss of interest. Subsequently, the O.A. No. 772/1996 was filed before the DRT by the bank which was contested by Mr. Pandey on the ground that he had not executed any document as on 22nd July, 1995 (wrongly written as 22nd August, 1995) as he was in Mumbai from 17th July, 1995 to 12th August, 1995 and the Bank had obtained his signatures on blank papers which were later on forged and fabricated.

11. The DRT vide judgment dated 23rd April 2012 in O.A.No.772/1996 held that the Petitioners as well as Respondent No. 4 have no liability towards the Bank on account of the deeds of guarantee and only Respondent No. 3 Company and its two new directors i.e. Respondent Nos. 5 and 6 and mortgagor Sh. Kuleep Singh/Respondent No. 7 were held to be jointly and severely liable for the debt due to Respondent No. 1 Bank. It was also held that Respondent No.7 had mortgaged his property by depositing the title deed to collaterally secure repayment of all dues of Respondent No. 1 Bank. O.A.No.772/1996 was dismissed against the Petitioners and Respondent No.4.

12. Respondent No. 1 Bank filed an appeal before the DRT challenging the judgment and order of DRT dated 23rd April, 2012 against present Petitioners and Respondent No. 4 praying for holding the Respondents No. 3

to 7 as well as both the Petitioners jointly and severely liable to pay the amount determined by Tribunal to be due to Respondent No.1 Bank. Vide impugned judgment, the appeal of the Bank has been allowed.

13. The said order of DRAT has been challenged on the ground that DRAT had erred in allowing the appeal of the Bank by Failing to appreciate that there was no cause of action against the Petitioner and Respondent No.4; the learned DRAT failed to appreciate that Petitioner No.1 and Respondent No.4 had resigned from Respondent No. 3 Company and there was a change in Board of Directors with induction of Respondent Nos.5 and 6 and the Bank was duly informed; the DRAT had not considered resolution dated 24th July 1995 and the letter written by directors stating that new directors being Respondent No. 5 and 6 jointly and severely guaranteed to the Respondent No. 1 Bank for repayment of all loans/limits enjoyed by Respondent No.3 company from time to time and the said new Directors were authorized to sign all documents to secure loan/limits on the collateral security of property of Respondent No.7 herein.

14. It has been further case of the Petitioners and Respondent No.4 that the DRAT had also not considered that the credit facilities were enhanced from time to time on execution of documents by Respondent Nos.5 and 6 alone and fresh collateral security was executed without the knowledge of the present Petitioner No.1 and Respondent No. 4; the learned DRAT has also not examined relevant provisions of Indian Contract Act; the Petitioner No.1 and Respondent No.4 had not signed the so-called guarantees after their resignation; their names, addresses and even identities have not been

mentioned on the so-called deeds of guarantee dated 22nd July, 1995; the law laid down by various courts in this regard has been ignored by DRAT; the act of Respondent No. 1 by entering into subsequent contract with Respondent No. 3 Company through a new Board of Directors amounted to novation of the earlier contract. The learned DRAT has misconstrued the established principle of law that no debt barred by time can be recovered; the earlier guarantees cannot continue if new set of documents, including guarantees were executed by the new directors/guarantor. No acknowledgment of guarantee or confirmation of loan liability was signed by the Petitioner No.1 and Respondent No.4 after they had resigned from the company, so the case against the erstwhile Directors is barred by limitation. The DRAT failed to consider that the present case is covered under Article 55 of the Limitation Act; the observations of the DRAT that the point of limitation and the suit being barred by time was not taken in the written statement is wrong as specific stand was taken that there was no cause of action against the Petitioners and Respondent No.4. On this ground the Petitioner in both the Writ Petitions i.e. W.P.(C) Nos. 4802/2015 and 4803/2015 have prayed that the judgment dated 25th March, 2015 passed by DRAT in appeal No. 79/2014 be set aside and the order dated 23rd April 2012 passed by DRT in O.A.No.772/1996 be upheld.

15. The prayer in the writ petition filed by the Union Bank of India is confined to quashing and setting aside the findings/observations in the order dated 25th March, 2015 passed by DRAT in appeal No.79/2014 to the extent that the bank had failed to prove the execution of guarantee deeds dated 22nd July, 1995 by Petitioner No.1 and Respondent No.4.

16. We have heard arguments advanced on behalf of all the contesting parties. It is to be noticed that DRT had framed issues in the OA pending before it. After going through all the documents and evidence on record the DRT had reached to a reasoned conclusion that issue No.1 be decided in favour of the Bank as the Bank was able to prove that present Respondent No.3 company had availed the credit facility through present Petitioner No.1 and Respondent No.4, who also stood guarantors alongwith present Petitioner No. 2.

17. As far as the issue No. 2 as to whether the agreements with D2 and D3 after 21.07.1995 discharged D4, D5, and D6 is concerned, the DRT had discussed the entire evidence available on record and since this issue is connected with issue No.3 regarding the extent of liability of present Petitioners and Respondent No. 4, it was observed as under:

“The company had a change in the Board of Director and the Bank was informed of it. AW2/11 is the letter written by D2 and D3 disclosing that the account of the company will be operated by D2 and D3. AW-2/25 dated 24.07.1995 is the copy of the Resolution. This is produced by the Bank. This Resolution says the new Directors D2 and D3 will jointly and severally guarantee to the bank for the payment of all amounts availed by the Company from time to time under all the aforesaid facilities. AW-2/28 resolved that D2 and D3 are authorised to sign all the securities documents to secure the bank advance given to the company. AW-2/1 is letter written by D2 to the bank on 16.06.1995 furnishing the bio data of D3 and D2. The Collateral security of D7 was offered. Aw-2/2 and AW-2/3 are profiles of D2 and D3. Aw-2/4 is the letter written by D-7 agreeing to mortgage his immovable property towards the collateral security for the credit facilities enjoyed by the company. As per AW-2/8 D4 communicated the bank

that she was withdrawing from the personal guarantee. D5 and D6 also informed the bank that they had resigned from the Directorship of the company. They would say thereafter new contract was entered into by the new Directors D2 and D3 and enhancement of credit facilities to which they are not personally liable. The Bank was aware of the fact that new Directors came in place of D4 and D5. The bank immediately had entertained the new Directors and fresh proposals came from new Directors, there was sanctioning and disbursement of credit facilities without D4 to D6 as parties. AW-2/10 is Demand Promissory note dated 27.07.1995 executed by D3 and AW-2/11 is its covering letter. AW-2/12 and AW-2/13 are fresh contracts with D2 and D3. AW-2/14 is another promissory note by D3 and AW-2/15 is its covering letter. AW-2/19 to AW-2/23 are the documents related to the mortgage created by D7. The sale deed AW-2/24 was deposited with the bank creating equitable mortgage. It shows the bank receipt the fresh collateral security. AW-2/6 is the letter dated 17.07.1995 intimating the sanctioning of additional facility and by AW-2/7, D2 thanks for the same the bank. Fresh agreements were executed on 16.01.1996 by the bank with D2 and D3 as seen by AW-2/42 and AW-2/43.

What is the implication of these subsequent agreements entered into by the bank with the new Directors D2 and D3? D4, D5 and D6 have contended that the bank by entering into such fresh agreements had new contract without the consent and knowledge of the earlier sureties/guarantors, there has been a novation of contract and the guarantors got discharged. There cannot be any doubt that the liability of D3 and D4 is only as guarantors. It was D1 the company that had enjoyed the credit facility and the liability of D1 will continue to exist. The question to be answered is whether the liability of D3 to D6 continued even after the new batch of sureties/guarantors executed fresh guarantee deeds for the credit facilities enjoyed by the company.

In AIR 1935 P C 21 Pratap Singh vs. Keshavlal it was held:

“The principle is that the surety, like any other contracting party, cannot be hold bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contracts no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can bind, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place”

In 1 (1990) BC 221 Indian Bank vs. S. Krishnaswami and Others the Madras High Court held that the variance in the terms and conditions or the contract by the creditor without notice or consent of the surety would discharge the surety of the liability.

The subsequent contract entered into by the bank with D1 company which had an entirely different Director Board amounted to the novation of contract. The defendants were no more directors of the company. It was made known to the bank. They had informed the bank about their resignation. The bank had two options. Ask the sureties and the principal debtor to pay off the debt and get discharged. The other option was allow the principal debtor to arrange his own new sureties and continue the arrangement with the new parties. The bank opted the second one, the new set of sureties was accepted, a property was brought in as collateral security by way of creating equitable mortgage by D7. When the bank opted for the second option the bank can never say that the liability of the earlier sureties continued. Suppose a case where the mortgage created subsequently was found to be fake and the bank could not realise any amount from the mortgage property. The entire liability shifts on to the guarantors. At the time when the guarantee deed was executed the limit was certain and the obligation was made known to the sureties. But after D2 and

D3 came to the picture there has been a subsequent enhancement to the credit facilities and it was only D2 and D3 who were executing the documents. Thus, the contracting parties changed, the amount was enhanced periodically, the constitution and composition of the principal borrower changed with the knowledge of the bank. How can the defendants 3, 4 and 5 be responsible for the subsequent credit facilities enjoyed by D1 in such circumstances?

The applicant points out to the three letters of guarantees AW-2/16, AW-2/17 and AW-2/18. The signatures in these documents have no resemblance to the admitted signatures of the contesting defendants. The names of the signatories are not mentioned. The signature of D6 is apparently different from his admitted signatures available in AW-1/11, AW-1/1 and AW-1/4. D6 has taken a contention that he was in Mumbai on that day and he could have signed at Delhi the document on the relevant date. He has also filed the evidence of one witness Budhiraj. The witnesses coupled with the documents to establish the plea of alibi do not inspire confidence to believe the same. It has come out in evidence that the duo with another man boarded on 17.05.1995 from 'Delhi and returned on the same day. The hotel documents and taxi bills are not worth of discussions and the plea has to be rejected. But having due regard to the fact that the company was taken over by D2 and D3 and D4 to D6 having no interest by longer in the company, they having addressed the bank, the new directors informing the change in constitution and composition of the company and admitting and taking all the responsibilities and pending liabilities there was no change for D3, D4 and D5 to execute the guarantee deeds Aw-2./16, Aw-2/17 and AW-2/18. I hold that the sureties/guarantors are discharged from the liabilities bound by them as per the guarantee deed executed by them in favour of the bank for the dues to the company, D1. They were not getting an onerous discharge. While resigning from the company they had made provisions for the same as revealed by Ex. R6/2 dated 7.6.1995.

Point No. 3

While answering point No. 2 I have found that the sureties are discharged by the subsequent contracts entered into by the company with the bank. The result is that D3, D4 and D5 are discharged from all the liabilities. D6 had pledged the bonds with the bank. It was offered as security in the personal capacity. When the security is discharged the defendant is entitled to get back the bonds. In Ex. R6/2 provision was made with regard to these bonds. It was mentioned that the existing securities i.e. foreign currency bonds of U S \$ 20,000 standing in the name of Shri R.R. Pandey mortgaged to Union Bank of India will be got released from the bank by new directors, after lifting bank's lien. That the personal guarantee of Mrs. Neeru Malhotra W/o Shri, Rajan Malhotra will be got released from the bank; that the bonds and personal guarantees of the existing Directors and Mrs. Neeru Malhotra will be waved after the deposit of Rs2,15,000/- with the bank. Clause 3 says D5 and D6 had to pay a sum of Rs. 2,15,000/- to the companies Account within month June, 1995. It is not known whether D5 and D6 complied this part. Anyhow as the liability of the sureties stand discharged by the conduct of the bank and the Principal borrower the bank has no authority for retention of the India Development bonds. The bank is directed to return the bonds to D6.

The bank has a case that the immovable property of D4 and D5 was mortgaged. No documents have been produced except an affidavit to prove the mortgage. By filing an affidavit that the title holder will mortgage the property when the title document is received no mortgage can be created and there is no valid mortgage at all. D4 and D6 have no liability towards the bank on account the deeds of guarantee/pledge made by them."

18. The DRT was cautious of the fact that it was the Bank which had produced on record copy of resolution dated 24th July, 1995 of the Company for creating enhanced credit facility and the said resolution was signed by the new directors, namely, Rajan Mehta and Geetha Mehta who are

Respondent Nos. 5 and 6 herein. Last para of the said resolution reads as under:

“Further resolved that Mr. Raman Kumar Mehta and Mrs. Geetha Mehta Directors of the company be and are hereby requested jointly and severally be personally guarantee to the Bank repayment of all amounts availed by the company from time to time, under all the aforesaid facilities.”

19. Another factor which weighed with DRT in reaching to a conclusion that there was no occasion for present Petitioners and Respondent No. 4 to give their personal guarantees and especially for Respondent No.4 to continue the security given by him of IDBI bonds is that on 19th June, 1995 present Petitioner No.7 Sh. Kuldeep Singh had submitted the original sale deed of his property worth Rs.40.00 lakhs and had addressed a letter to the Respondent No. 1 while creating mortgage of collateral security. The said letter is reproduced hereunder:

“To
The Chief Manager
Union Bank of India
Overseas Branch, Co. Pl.
New Delhi

SUB: Mortgage of Collateral Security

Dear Sir,

I Kuldeep Singh S/o Shri Dewan Singh R/o WZ-32, Krishna Park, Tilak Nagar, Delhi hereby, agree to mortgage my Mahavir Nagar Plot measuring 425 Sq. Yds worth of Rs.40,00,000 appr. with your bank for my first cousin Raman Kumar Mehta, for his Co. M/s Faishan Flairs (I) Pvt. Ltd.

I also agree to give guarantee and sign the necessary bank papers as and when Bank required and will not withdraw

my mortgage Bank guarantee till the bank loan of M/s Faishan Flairs (I) Pvt Ltd. will be fully cleared off.

Thanks and regards,

Sincerely yours,
Sd/ in English
(Kuldip Singh)”

20. The DRT has also observed that signatures of Sh. Ram Rabhubir Pandey who is Respondent No. 4 here on the alleged personal guarantee deed are apparently different from his admitted signature on record and this Court agrees with the said findings as even to the naked eyes it is quite clear that alleged signatures on the personal guarantee dated 22nd July, 1995 of Sh. Pandey do not tally with his admitted signatures on the documents executed prior to the said date by him. The Petitioners and Respondent No.4 had taken a stand before DRT that their signatures were obtained on blank papers and that appears to be a correct stand and these personal guarantee bonds were filled later on without even mentioning the names of the persons or addresses of the persons who had allegedly executed the said personal guarantees. Another factor which has to be kept in mind is that Mr. Pandey had submitted a letter dated 20th June, 1995 to the bank requesting for release of Indian Development Bonds given by him as collateral security, the said letter is reproduced herein:

“Dated 20.6.95

To
The Senior Manager
Union Bank of India
Overseas Branch, New Delhi-1

SUB. Release of India Development Bond as Collateral security.

Dear Sir,

We have submitted property papers worth Rs.40 LACS as collateral Security for all our future credit from Bank as per decision of Directors. Hence now we request for release of old security of I.D. Bond as soon as possible.

Thanking and Regards,

Sd/- in English
(Ram Raghubir Pandey)
234, JAGRITI ENCLAVE
Delhi-92

Received -
Sd/- (Bank Manager)
23.6.95"

21. The said letter was received by the bank on 23rd June, 1995. Respondent No. 4 here had even withdrawn his collateral security vide this letter, so he has no occasion to go back to the bank and execute a personal guarantee on 22nd July, 1995 for fresh limits granted to Respondent No.3 company, with which he was left with no interest. This Court is mindful of the fact that the DRT did not find favour with the alibi set up by Mr. Pandey that he was not in town on the date. The subsequent documents were also executed by the new Directors being Respondent Nos.5 and 6 including their personal guarantees on 22nd July, 1995 and thereafter in 1995 and 1996 for loan limits enhanced from time to time.

22. The DRT's view in the facts and circumstances of the case was that new

management had taken over the Respondent No.3 company i.e. Respondent No.5 and 6 and they had executed documents for enhancement of their limits and accordingly they had given the collateral security of the property of Respondent No. 7 and on that basis new agreement of loan was entered into by the Respondent Bank with Respondent No.3 company through its new set of directors, namely Sh. Rajan Mehta and Smt. Geetha Mehta and apart from their personal guarantees, collateral security of the adequate worth was also given by Respondent No.7 Sh. Kuldeep Singh. Hence, the earlier agreements of personal guarantees as well as the earlier collateral security of IDBI bonds given by Sh. Ram Raghubir Pandey (Respondent No.4) stood discharged. Feeling aggrieved, the bank preferred an appeal before the DRAT which had reversed the said findings and had reached to the finding that present Petitioners as well as Respondent No.4, who were Respondent No.1 and 3 in appeal before DRAT, were liable for debts of the company on the basis of the earlier set of personal guarantees executed by them and the collateral security of IDBI bonds given by Sh. Pandey.

23. It is interesting to note that as far as the guarantee bonds dated 22nd July, 1995 set up by the bank are concerned, DRAT has agreed with the conclusion arrived at by DRT, however on different grounds and has also returned the finding that there was no occasion for these persons to execute the said guarantee bonds on 22nd July, 1995. This finding has been challenged by the Bank in writ petition filed by it.

24. This case squarely falls under Section 62 of the Indian Contract Act,

which is reproduced hereunder:

“Section 62. Effect of novation, rescission and alteration of the contract: If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C, that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangements, B still owes C 1,000 rupees and no new contract has been entered into.”

25. In the present case there is no denial of the fact that initially the loan was taken by the Respondent No. 3 Company on the basis of the documents executed by the Petitioners and Respondent No. 4. As the Petitioner No.1 and Respondent No.4 are concerned, they were also Directors; Petitioner No.2 is wife of Petitioner No.1 and she stood surety; the collateral security was of the India Development Bonds pledged by the Respondent No.4. In June, 1995, the entire set of Directors changed and the Respondent Nos.5 and 6 were inducted as new Directors of Respondent No. 3 company and the Petitioner No.1 and Respondent No 4 resigned as Directors of the company. As per the inter-se agreement between Petitioner No.1 and Respondent No.4 on one side and the newly inducted Directors being Respondent Nos.5 and 6,

the entire management was taken over by the new Directors with the consent of the Bank as is evident from the documents produced by Respondent No. 1 Bank itself before the DRT. As far as the collateral security was concerned, Respondent No.7 stood in and he submitted a collateral security by mortgaging his property by depositing its title deed. The said property is stated to be valued at around Rs.40 lakhs, which is more than new limits/loan granted by the Respondent No.1 Bank. In these circumstances, the Petitioner No. 2 requested the Bank for releasing her from her personal guarantee and Respondent No. 4 also requested the Respondent No.1 Bank to return his Bonds which was given as collateral security. It is pertinent to note here that all these documents have been produced on record by none else but the Respondent No.1 Bank itself.

26. Both the DRT as well as DRAT have negated the stand of the Respondent No.1 Bank that on 22nd July, 1995, the erstwhile Directors of the company i.e. Petitioner No.1 and Respondent No.4 again executed their personal guarantee bonds. The moot question here is what was the consideration for executing the said personal guarantee bonds after the erstwhile directors have already sold all their shareholdings and have handed over entire assets and liabilities of Respondent No.3 company to new set of Directors, who in their capacity as Directors of the Respondent No.3 company had executed the promissory note, loan agreement and guarantee bonds as well as they brought in a new surety Respondent No. 7, who had submitted the title deed of the property and had secured the interest of the Respondent No. 1 Bank qua the new limits/loan granted to Respondent No.3 company.

27. This is a clear-cut case of novation of the earlier contract of loan. The novation contains two elements i.e. the discharge of the earlier debts or the debtors and substitution by new debts or the debtors. It is open to the parties to the earlier debt to either enter into new contract of debt or to substitute the debtors by new set of debtors. In the present case, the original loan contract comes to an end when the Petitioner No.1 and Respondent No.4 walked out of the Respondent No.3 company by resigning as its Directors with the consent of the Respondent No.1 Bank. A new set of Directors walked in who had not only re-casted the debt with the express consent of Bank but Respondent No. 1 also enhanced the limits on their asking. They also executed a new set of documents i.e. promissory note, the loan agreement and their personal guarantee bonds and the collateral security by mortgage of the property by Respondent No. 7. The substitution of a new contract is the core of novation and once a subsequent contract has been executed between the parties, net effect is that the earlier obligations stand discharged and it is the new contract that will define the relationship of the parties and it is a new cause of action which arises on execution of the new contract between the parties. The intention of the parties is very clear from the chain of events as mentioned hereinabove.

28. Moreover, there is material of change in the amount being financed by the Respondent No.1 on execution of new set of documents in between the bank and Respondent No.3 company acting through Respondent Nos.5 and 6, the new directors. There is no occasion for the Bank to plead that although the new directors and surety executed the personal guarantee bonds dated

22nd July, 1995 and an immovable property worth much more than the value of loan/limits was given in mortgage, still earlier personal guarantee bonds executed by two erstwhile Directors and Petitioner No.2 are still in force. Because as soon as the Bank opted to deal with Respondent Nos.5 and 6 as new Directors of the Respondent No.3 company in place of Petitioner No.1 and Respondent No.4, who were the erstwhile Directors and a new mortgage has been created on the property of Respondent No. 7 and fresh loan documents were executed granting enhanced limits/loan on mutually agreed rate of interest, then there is no occasion to fall back upon the earlier personal guarantees and surety bonds etc. executed by Petitioners and Respondent No.4. The DRT was right in coming to the conclusion that the Respondent No. 1 Bank has a right to recover its dues from Respondent No.3 company as well as from Respondent Nos.5 and 6, i.e., new set of Directors and it also has the right to proceed against the property mortgaged by Respondent No.7 and all of them are jointly and severally liable.

29. In view of the above, judgment dated 25th March, 2015 of DRAT in appeal No. 79/2014 is hereby set aside and the judgment of DRT in O.A.No.722/1996 is hereby ordered to be restored.

W.P.(C) 4803/2015

30. Now the order in the writ petition No. 4802/2015 is to be read as the order in this writ, which stands allowed in terms of order passed in W.P.(C) No.4802/2015.

31. The writ petition is disposed of accordingly.

W.P.(C) 11928/2015

32. In view of the order passed in Writ Petition No. 4802/2015, this writ petition filed by the Union Bank of India is hereby dismissed.

TAWANT SINGH, J

S. MURALIDHAR, J

NOVEMBER 18, 2019

mr

