



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3770 OF 1995

Deogiri Nagri Sahakari Bank Limited,
Aurangabad, (a registered Co-op.
Society, registered under the Maharashtra
Co-operative Societies Act) having its
Registered Office at Kranti Chowk,
Aurangabad and one of its branches at
Jawahar Colony, Aurangabad, through its
Branch Manager (Constituted Attorney)
Branch at Aurangabad

.. Petitioner

Versus

1. M/s. Powerup Electricals, Aurangabad
through its proprietor
Mahesh Rameshbhai Chauhan, Age Major,
Occu.Business, R/o. K-10/1, Pawannagar,
N-9, CIDCO, Aurangabad
2. Rajendra Ganpatrao Mhaske,
Age Major, Occu. Service,
R/o. 2-8-29, Fazalpur, ST Colony,
Aurangabad
3. Subhash Rameshbhai Chauhan,
Age Major, Occu. Business,
R/o. K-10/1, Pawannagar, N-9,
CIDCO, Aurangabad
4. Keshav Ladharam Patel,
Age Major, Occu. Business,
R/o. C/o. Patel Trading Co.,
Krantichowk, Aurangabad
5. Mohanlal Premji Ramani,
Age Major, Occu. Business,
R/o. 39, 7-Hills Colony,
Jalna Road, Aurangabad
6. Superintending Engineer, MSEB,
Circle Office, Yeotmal

7. Taluqa Dy. Registrar, Co-op. Societies,
Aurangabad
8. The Divisional Joint Registrar,
Co-operative Societies Aurangabad
9. The State of Maharashtra .. Respondents

**WITH
WRIT PETITION NO.2856 OF 1996**

Mohanlal s/o. Premji Ramani,
Aged 35 years, Occu. Bueiness,
R/o. Seven Hills Colony, Jalna Road,
Aurangabad

.. Petitioner
(Original Respondent No.5)

Versus

1. Deogiri Nagari Co-operative
Sahakari Bank Ltd., Head Office
At Kranti Chowk, Branch
Jawahar Colony, Aurangabad
through its Manager, Aurangabad
2. M/s. Power-up Electricals
Prop. : Shri. Mahesh Rameshbhai Chavan,
C/o. M/s. Vishwas Tin Repairing Works,
Sanjay Gandhi Tapri Market, N-9,
CIDCO (T.V. Center) Aurangabad
3. Rajendra S/o. Ganpatrao Mhaske,
Age Major, Occu. Service,
R/o. 2-8-89, S.T. Colony,
Fazalpura, Aurangabad
4. Subhash Rameshbhai Pawar,
Age Major, Occu. Business,
R/o. N-9, 10/1, Pawannagar, CIDCO,
Aurangabad
5. Keshav Ladharam Patel,
Age Major, Occu. Business,
R/o. C/o. M/s. Patel Trading
Company, Kranti Chowk,
Aurangabad

6. Maharashtra State Electricity Board,
through its Superintending Engineer,
M.S.E.B. (O & M) Circle, Yeotmal,
District Yeotmal
7. Divisional Joint Registrar,
Co-operative Societies,
Aurangabad
8. Taluka Deputy Registrar,
Co-operative Societies,
Aurangabad

.. Respondents
(Original Respondents
No.1, 4 and 6)

Mr. D. V. Soman, Advocate for Petitioner in W.P.3770 of 1995 and
Respondent No.1 in W.P.No.2856 of 1996;

Mr. M. N. Nawandar, Advocate for Petitioner in W.P. 2856 of 1996
and Respondent No.5 in W.P. No.3770 of 1995;

Mr. D. R. Markad, Advocate holding for Mr. N. K. Kakade, Advocate
for Respondent No.4 in W.P. 3770 of 1995;

Mr. H. M. Karwa, Advocate for Respondent No.6 in both petitions -
absent

CORAM : S. G. MEHARE, J.

Reserved on : 31-01-2024

Pronounced on : 10-04-2024

JUDGMENT :-

1. These writ petitions have been preferred against two
separate orders against the common defendant bank, who has
also preferred the Writ Petition No. 3770/1995.

2. Respondent No.4 in W.P. No. 3770/95 preferred the revision
bearing Case No.170 of 1994, respondent No.5 had preferred the

revision bearing Case No.232 of 1995, respondent No.6 had preferred the revision bearing Case No.176 of 1994 and the present petitioner had preferred the revision bearing Case No.194 of 1994 before the Divisional Joint Registrar, Co-operative Societies, under Section 154 of the Maharashtra Co-operative Societies Act, against the certificate of Deputy Registrar under Section 101 of the Maharashtra Co-operative Societies Act, dated 20.07.1994.

3. In cases No.176 of 1994 and 170 of 1994, the Divisional Joint Registrar discharged them from liability for paying the debt because the bank had extended the time to repay the loan without their consent. He dismissed the revision of the present petitioner bearing No.190 of 1994 and confirmed the certificate issued against the principal debtor.

4. The petitioner of W.P.No.2856/1996 had preferred a revision bearing No. 232/1995. He had a case that the District Deputy Registrar did not issue him a notice of the proceeding under section 101 of the Maharashtra Co-operative Societies Act. He had signed the agreement at the behest of one of the Directors of the Bank. He was told that the surety was nominal and that it was only for two months. He was also told that money would be recovered from the borrower only. Believing in him, he signed the documents. He knew nothing about it. He also claimed the

discharge as there was a novation of contract between the creditor and the principal debtor.

5. Respondent No.6 had a case that his office never was the guarantor for the principal debtor nor issued any letter to that effect. Whatever the documents produced before the bank were forged. Therefore, he cannot be held liable for repaying the loan jointly or severally. When the petitioner learnt about it and had it filed a criminal complaint against the principal debtor. By filing such a complaint they have principally admitted that the fraud had been played in the name of respondent No.6.

6. Most of the facts are admitted. The principal debtor/respondents No.1 to 3 had applied for a temporary overdraft facility. Respondents No.4 and 5 were the guarantors for respondent No.1. The principal debtor and guarantors executed a promissory note and agreement of loan and letter of continued security. It is admitted that the term loan was only for two months i.e. up to 22.06. 1992. The principal debtor has agreed to repay the loan in ten instalments. However, the said period was over, and respondents No.1 to 3 applied to the Branch Manager of the petitioner to extend the time to repay the loan on 18.07.1992. His request was accepted, and time was extended till September 1992.

7. The learned counsel for the petitioner in Writ Petition

No.3375 of 1995 referred to the documentation of temporary overdraft and argued that it was a continuing surety. Therefore, merely extending the time to repay the loan is not a novation of the contract. Respondent No.2 played a fraud not only with the petitioner bank but also with M.S.E.B. The guarantors were the conspirators. Therefore, they cannot be a nominal guarantor. The principal debtor has absconded and is left with no property to recover the loan. It is a public money. Hence, it must be recovered from guarantors who could not be discharged. The extension of time does not affect the rights of the bank and absolve the guarantors. Therefore, Section 133 of the India Contract Act does not apply. The Divisional Joint Registrar erred in holding that it's a novation of contract. Hence, guarantors have been discharged.

8. To bolster his arguments, he relied on the case of **(i) Industrial Investment Bank to India Limited vs Biswanath JhunJhunwala, (2009) 9 SCC 748, (ii) Ramkishun and others vs State of Uttar Pradesh, (2012) 11 SCC 511, (iii) Central Bank of India vs. C.L. Vimla and othes (2015) SCC 337, (iv) Mukesh Gupta vs. Sicom Limited Mumbai, (2004) (1) Mh.L.J. 159, (v) State Bank of India vs. M/s. Indexport Registered and others, (1992) 3 SCC 159.**

9. Per contra, learned counsel for respondent No.4 has argued that the guarantee was only for two months. The request of

principal debtor to extend the time to repay the loan was accepted without the consent of the guarantor. Therefore, it was a novation of contract, and such a new contract is not binding on the guarantors. He relied on the case of (i) **Keshavlal Harilal Setalvad vs. Pratapsing Mohanlalbhai Seth LEX (PVC) 1931 9 29** and (ii) **T. Raju Setty vs. Bank of Baroda, of the Karnataka High Court, decided on 20.12.1990**, (iii) **S. Peramal Reddiar vs. Bank of Baroda, A.I.R. 1991 Madras 180**.

10. Mr. Navandar, learned counsel in Writ Petition No.2858 of 1996 vehemently argued that he was the guarantor to the same person. A recovery certificate was never served upon him. However, the Divisional Registrar did not consider this material aspect and issued a certificate without notice to him. He also argued that the guarantor cannot be made liable beyond the terms of his engagement. Therefore, the petitioner was also liable to be discharged. He relied on the case of **State of Maharashtra vs. Dr. M. N. Kaul (dead) by his L.Rs. and another, A.I.R. 1961 SC 1634**.

11. On hearing respective learned counsels, the question revolves around is whether extending the time to the principal debtor by the by the creditor is a novation of contract. Hence, the guarantors are not bound by such a contract, and the next

question is, was a notice served upon the petitioner in Writ Petition No.2856 of 1996 by the Deputy Registrar, Co-operative Societies before issuing the certificate under Section 101 of the M.C.S. Act?

12. The guarantors signed the loan agreement. In the said agreement, the guarantors and the principal debtor agreed to release the loan on the promissory note. However, to make the repayment convenient, monthly installments were allowed. It was a temporary overdraft facility for the principal debtor for two months only. It was the responsibility of the guarantors to repay the loan anyhow. On 22.04.1992, the guarantors executed the continue security letter and thereby, they agreed that the demand promissory note is to be treated as continuing security for the balance and interest from time to time due to the bank and the said hypothecation (TOD) account was not to be considered to be closed for the purpose of the security.

13. Section 135 of the Indian Contract Act deals with the discharge of surety when the creditor compounds with, gives time to, or agrees not to sue the principal debtor. Such acts are the novation of contracts that discharge the surety.

14. The case of Industrial Investment (supra) relied upon by learned counsel by the petitioner bank was under Section 128 of the Indian Contract Act, which speaks of surety's liability. In the absence of any novation of contract without the consent of the

guarantor, the surety is liable to pay the loan. Therefore, the case law has no relevance to the issue involved in this case. The case **Ramkishun** (supra) was again dealing with Section 128 of the Indian Contract Act. The said section provides that the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain the execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is a business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate the terms of the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance. The ratio laid down in the said case does not assist the petitioner. The facts of the case of Mukesh Gupta (supra) were that there were terms of the agreement that the suit could be instituted against the appellant treating him as principal debtor, and it was not necessary for the respondent to sue the principal debtor before instituting the said suit against the guarantor and the guarantee given by the appellant is enforceable against him notwithstanding the fact the respondent against the company has taken no action. In the case at hand, there was no such contact. The Hon'ble Division Bench referring to the judgment of the Privy Council in the case **Hodges vs Delhi and London Bank limited**,

1990 27 ind -App 168, in which it was held that it is not possible to accept the view expressed by the learned Judges of the Punjab High Court in Pearl Hosiery Mill's Case. In any event, that was the case in which without consent of the surety, variations were made in the terms of original contract. Therefore, in view of Section 133 of the Act, it was held that surety stood discharged. The case of the **State Bank of India** (supra) was on a different issue. It is also not helpful to the petitioner.

15. In the case of **T. Raju Setty** (supra), the Court held that *Section 133 of the Act makes it clear that any variance made in the contract between the principal debtor and creditor without the consent of the surety, discharges the surety as to transaction subsequent to variance.* The consent of the surety can be obtained either at the time the contract is made between the principal debtor and the creditor to which the surety gives a guarantee for making any change or alteration in the contract to be made or not to claim any right or benefit under Chapter VIII of the Act. In other words, in the surety - bond, guarantee - bond itself, the surety can agree to waive the right available to him under the various provisions contained in Chapter VIII of the Act. Such waiving of his right by surety is permissible under Section 133, read with Section 128 of the Act. In the case at hand, there was no such agreement executed by the sureties at the time of the loan agreement. The promissory note was collateral subject to the terms of the surety.

The Madras High Court in *S. Perramal (supra)* held that alterations made in the deed with respect to amount of guarantee, rate of interest charged for amount guarantee, and debt of contract without knowledge of surety discharge the surety. In the case of **Dr. M. N. Kaul** (*supra*), the Hon'ble Supreme Court held that the guarantor cannot be made liable beyond the terms of engagement.

16. Admittedly, the consent of the guarantors was not obtained while extending the time. Section 135 of the Indian Contract Act specifically provides for the discharge of the surety when the creditor gives time to the principal debtor, and that is the variance in the terms of the contract under Section 133 of the Act. In other words, a novation of contract discharged the surety.

17. The facts of the case are clear that the petitioner did not obtain the consent of the guarantors before extending the loan repayment period to the principal debtor. Therefore, this is a case of novation of contract that discharges the surety.

18. The above discussion leads this Court to conclude that there was a novation of contract without the consent of the sureties. Hence, they are not liable to repay the loan and respondent No.6 never consented to pay the bills under the temporary overdraft facility. There is no substance in the petition of the petitioner/bank. Hence, it is liable to be dismissed.

19. Besides the grounds for no service of notice to the petitioner Mohanlal (W.P. No.2856/1995), he succeeded in proving that he was not the party to the novation of the contract. In such circumstances, there would be no propriety in remitting the matter to the Divisional Joint Registrar for *de novo* consideration. Hence, the following order;

ORDER

1. Writ Petition No.3770 of 1995 stands dismissed.
2. Writ Petition No.2856 of 1996 is allowed, and the certificate issued against him by the Deputy Registrar, Co-operative Societies Aurangabad, issued in Case No.170 of 1994, dated 20.07.1994 and the judgment and order of the Divisional Joint Registrar Co-operative Societies Auranabad passed in case no. 232/95 dated 22.1.1996 stand quashed and set aside.
3. The amount recovered from the bank account of the petitioner in Writ Petition No.2856 of 1996 be refunded forthwith to him with prevailing rate of interest by the bank.
4. No orders to costs.
5. Rule stands discharged in Writ Petition No.3770 of 1995 and Rule stands absolute in Writ Petition No. 2856 of 1996.

**(S. G. MEHARE)
JUDGE**