OCD-6

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE

AO-COM/8/2025
WITH
CS-COM/339/2024

MEERA DHANUKA
VS
BANK OF INDIA AND ANR

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE SMITA DAS DE
Date : 26th March, 2025.

Appearance:
Mr. Jishnu Chowdhury, Sr. Adv.
Mr. A. Agarwalla, Adv.
Mr. Varun Kothari, Adv.
Ms. Debashri Mukherji, Adv.
...for the appellant

Mr. Rudraman Bhattacharyya, Sr. Adv.
Mr. Victor Dutta, Adv.
Mr. Sourojit Dasgupta, Adv.
...for the respondent no.1.

Soumen sen, J. (Oral):

1. The appellant is a guarantor in respect of working capital facility extended to Riga Sugar Company Limited. The appellant is the wife of Mr. Om Prakash Dhanuka, Chairman-cum-Managing Director of the said company. In consideration of extending such working capital facility, initially a Deed of Guarantee was executed on 17th December, 2015. Clause 2 of the said Deed records that the guarantee would be a continuing guarantee for the purpose of securing the whole of the monies under the credit facilities not exceeding Rs.6.94 crores together with interest at rates mentioned in the said Clause. This was

followed by a Deed of Guarantee of 12th May, 2016 in which in Clause 3(a), a proviso was added which reads as follows:

> *"...**Provided always** the Guarantee of the Guarantor herein contained shall not at any time exceed the value of her residential property being a Residential Flat No.3 (Ground Floor) (front portion) having super built-up area 2206.00 Square feet on Plat area 990.00 Sq. Yards (828.07 square metres) [proposed] comprised in Plot No. W-52, Greater Kailash, Part-II, New Delhi (hereinafter referred to as "**the Guarantor's New Delhi Property**) proposed to be mortgaged in favour of the Lenders in order to secure the Guarantor's obligations and/or liabilities under these Presents the loans granted and/or agreed to be granted by the Lenders to the Borrower together with interest thereon and all other moneys payable thereunder.*
>
> *The Guarantor agrees and undertakes that in consideration of the Lenders having granted and/or agreed to grant to the Borrower Term Loans of the aggregate amount of Rs.9.25 Crore, the Guarantor shall create first pari passu mortgage and/or charge over "the Guarantor's New Delhi Property" in favour of the Lenders inter alia, to secure her obligations and/or liabilities under the Guarantee to the extent of the market value of the New Delhi Property proposed to be mortgaged in favour of the Lenders or the amount of Term Loan whichever is lower, inter alia, to secure the due repayment and redemption of the Loans granted and/or agreed to be granted by the Lenders to the Borrower together with interest, additional and/or compound interest in the form of liquidated damages, costs, charges and expenses payable or to become payable by the Borrower to the Lenders in connection therewith."   (emphasis added)*

2. Thereafter, on 7th September, 2016, the plaintiff gave a declaration to the following effect:

> *"…The said Term Loans shall be secured, inter alia, by the Guarantee of Meera Dhanuka, myself and in order to secure my obligations and/or liabilities under the Guarantee I shall create first mortgage and/or charge over and in respect of my said Flat as aforesaid to additionally secure the said Term Loans <u>provided always that my Guarantee as aforesaid shall be restricted to the value of the said Flat proposed to be mortgaged in favour of the said Lenders.</u>"* (emphasis added)

3. Subsequently, on 3rd November, 2017, the plaintiff agreed to reiterate its stand that the guarantee should be limited to the valuation of the residential property at New Delhi as would appear from Clause 1 of the recital of the said document which is reproduced below:

> *"1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs.82.50 Crore) together with interest, costs, charges, expenses and/or other moneys for the time being due to the Lead Bank in respect of or under the abovementioned credit facilities or any of them the Guarantor shall forthwith on demand pay to the Lead Bank the whole of such principal sum (not exceeding Rs.82.50 Crore) together with interest, costs, charges, expenses and/or any other moneys as may be then due to the Lead Bank in respect of the abovementioned credit facilities and shall indemnify and keep indemnified the Lead Bank against all losses of the said principal sum, interest or other money due and all costs, charges and expenses whatsoever which the Lead Bank may incur by reason of any default on the part of the Borrower <u>Provided always</u> that the liability of the Guarantor, notwithstanding anything to the contrary herein contained, shall always be restricted to the valuation of her residential property at New Delhi already offered as co-lateral security by the Borrower for securing its Term Loans".*

4. Thereafter, the said property was sold with the consent of the competent authority at Rs.4 crores, notwithstanding the limited liability envisaged and clearly mentioned in the Deed of Guarantee. The bank has decided to enforce the Deed of Guarantee for realization of sums over and above the valuation of the flat to which the appellant had never agreed.
5. In such facts and circumstances, a suit was filed in which initially the plaintiff was enjoying an interim order, which, however, was vacated by the impugned order dated 10th January, 2025.
6. The appeal is arising out of the said order.
7. Mr. Jishnu Chowdhury, learned Senior Counsel appearing on behalf of the appellant, has referred to the various Deeds executed from time to time and has drawn our attention to the aforesaid Clauses in order to demonstrate that by reason of the sale of the residential property at Rs. 4 Crores (Approximately) the guarantee stands discharged and the bank has no legal right to enforce the said guarantee for any other claim against the principal borrower.
8. Per contra, Mr. Rudraman Bhattacharyya, learned Senior Counsel appearing on behalf of the bank, has referred to Clause 9 of the Deed of Guarantee dated 3rd November, 2017 to argue that the obligation of the borrower to pay a sum over Rs. 4 Crores is clearly established and this will also be reflected from the series of correspondence exchanged between the parties.
9. It is submitted that the conjoint reading of Clauses 1 and 9 of the deed of guarantee would make it clear that the obligation of the

borrower is not limited to the value of the residential flat at New Delhi but it extends to a sum of Rs.82.50 crores together with interest as may be found due and payable at the time of enforcement of the guarantee.

10. It is submitted that Clause 1 of the recital is required to be read harmoniously with Clause 9 of the Deed of Guarantee. It is a commercial contract. A clause in a commercial contract is bilateral and has been mutually agreed upon. In case of any ambiguity between Clause 1, 9 and 22, Clause 9 shall prevail upon Clause 1. In this regard, learned Senior Counsel has relied upon a decision of the Hon'ble Supreme Court in the case of ***State of Maharashtra v. M.N. Kaul (deceased by his Legal Representatives) & Ors.,***[1] particularly Paragraph 7 thereof, which is as under:

> "*7. These observations have been recalled in cases of guarantee and suretyship by the Judicial Committee and also this Court. See for example Pratapsing Moholalbhai v. Keshavlal Harilal Setalvad, and M.S. Anirudhan v. Thomco's Bank Ltd., (1934) 62 I.A. 23. To this there are some exceptions. In case of ambiguity when all other rules of construction fail the courts interpret the guarantee contra proferentem, that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement."* (emphasis supplied)

11. The appeal is arising out of an interim order. In deciding such application, the Court has to consider whether the plaintiff has been

[1] AIR 1967 SC 1634

able to fulfil the trinity tests, *namely*, prima facie case, balance of convenience and irretrievable and irreparable prejudice and damages, that are, likely to result if no interim protection is granted till a final adjudication takes place.

12. In the narration of facts, we have referred to the relevant Clauses of the deed of guarantee. Since Mr. Bhattacharya has relied upon Clause 9, the said Clause may be considered. It reads as follows:

> *"9. Notwithstanding the Lead Bank's right under any security which the Lead Bank may have obtained or may obtain the <u>Lead Bank shall have fullest liberty to call upon the Guarantor to pay the principal sum not exceeding Rs.82.50 crore together with interest as well as the costs (as between Advocate and client) charges and expenses, and/or other money for the time being due to the Lead Bank</u> in respect or under the abovementioned credit facilities or any of them <u>without requiring the Lead Bank to realise from the Borrower the amount due to the Lead Bank in respect of the abovementioned credit facilities and/or requiring the Lead Bank to enforce any remedies or securities available to the Lead Bank.</u>"* (emphasis supplied)

13. However, Clause 22 of the Deed of Guarantee cannot be ignored or brushed aside. It is pari materia with Clause 1 of the agreement. It reads as follows:

> *"22. In terms of sanction the Guarantor hereby agrees and undertakes to create mortgage over and in respect of her residential Flat being Flat No.3 (Ground Floor) (front portion) having super built-up area of 2206.00 Square feet on Plot area 990.00 Sq. yards (828.07 square meters) [proposed] comprised in Plot No. W-52, Greater Kailash, Part-II, New Delhi, in order to secure her obligations and/or liabilities under this guarantee and notwithstanding*

anything to the contrary herein contained, the liability of the Guarantor under this Guarantee shall be restricted to the value of her residential property as aforesaid i.e. Rs._______/- mortgaged and/or agreed to be mortgaged in favour of the Lead Bank."

14. In ***State of Maharashtra*** *(supra)*, the Hon'ble Supreme Court in deciding the enforceability of a deed of guarantee, has referred to the observation of Lord Westbury, in paragraph 6 of the said report where it was observed and held as follows:

> *6. The question is whether this guarantee is enforceable. That depends upon the terms under which the guarantor bound himself. Under the law he cannot be made liable for more than he has undertaken. It is often said that a surety is a favoured debtor, for in the expressive phrase of Lord Westbury L.C. in Blest v. Brown, (1862) 4 De G.F. J. 367 .*
>
> > *"you bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him."* (emphasis supplied)

15. What needs to be seen at this stage is how far the guarantor has agreed to bind himself under the Deed of Guarantee. We cannot extend the interpretation of the engagement beyond what it appears from a reading of the said document.

16. Mr. Bhattacharyya has submitted that in case of ambiguity the terms are to be interpreted against the guarantor.

17. If the two parts or clauses of a deed are repugnant, the first shall prevail and be received and the latter rejected with the exception in a will is not of universal application and only to be resorted to when all else fails.

18. Repugnancy in the later clause may not necessarily make it redundant and unenforceable. The rejection, however, of a repugnant clause or proviso is not based on the fact that it comes after another, but that its rejection is necessary to effectuate the real intention of the parties

19. A bare reading of Clause 1 and 22 would make it clear that while the earlier part of the Clauses refers to a principal sum not exceeding Rs.8.50 crores together with interest which was similar to the opening phrase of Clause 9 of the said deed, there is a proviso towards the end in Clause 1 and 22 which is in the form of an exception being curved out in respect of the liability of the guarantor.

20. The primary purpose of a proviso has been lucidly explained in ***Kandla Export Corporation & Anr. v. OCI Corporation & Anr.***[2] in paragraph 13 of the said report it was stated as follows:

> *"13.... The primary purpose of a proviso is to qualify the generality of the main part by providing an exception, which has been set out with great felicity in CIT v. Indo-Mercantile Bank Ltd. [CIT v. Indo-Mercantile Bank Ltd., 1959 Supp (2) SCR 256 : AIR 1959 SC 713] , thus : (SCR pp. 266-67 : AIR pp. 717-18, paras 9-10)*
>
> *"9. ... <u>The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment.</u> Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an*

[2] 2018 (14) SCC 715

> *addendum or dealing with a subject which is foreign to the main enactment.*
>
> > *'8. … it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso.'*

Therefore, it is to be construed harmoniously with the main enactment. (Per Das, C.J. in Abdul Jabar Butt v. State of J&K v. State of J & K, 1957 SCR 51 : AIR 1957 SC 281 : 1957 Cri LJ 404] , SCR p. 59 : AIR p. 284, para 8). Bhagwati, J., in Ram Narain Sons Ltd. v. CST, (1955) 2 SCR 483 : AIR 1955 SC 765] , said : (SCR p. 493 : AIR p. 769, para 10)

> *'10. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. <u>It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.</u>'*

10. Lord Macmillan in Madras & Southern Mahratta Railway Co. Ltd. v. Bezwada Municipality [Madras & Southern Mahratta Railway Co. Ltd. v. Bezwada Municipality, 1944 SCC OnLine PC 7 : (1943-44) 71 IA 113] laid down the sphere of a proviso as follows : (IA p. 122 : SCC OnLine PC)

> *'… <u>The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case</u>. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude, from it by implication what clearly falls within its express terms.'*

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the

> *same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. (Vide also Toronto Corpn. v. Attorney-General of Canada [Toronto Corpn. v. Attorney-General of Canada, 1946 AC 32 (PC)] , AC p. 37.)"* (emphasis supplied)

21. To borrow the expression of Lord Westbury, the guarantor has bound himself "to the letter of his engagement" which *prima facie* shows that he agreed to make himself liable to the valuation of the residential property at New Delhi. In ***State of Maharashtra*** (*supra*) the objection of the National Grindlays Bank Limited against enforcement of the guarantee was upheld on the ground that it was beyond the time limit which was an integral part of the guarantee.

22. The contra proferentum rule for interpretation of a document can be applied in the case of doubt while construing the words. Words are to be construed, in the case of doubt, against the person or party who uses them, provided this construction works no wrong. This rule can be applied only in case of ambiguity as a last resort and when all other rules of construction fail.

23. The guarantee on a proper meaning and effect of the written engagement appears to have agreed to discharge his liability that corresponds to the valuation of the immovable property at New Delhi. The intention of the guarantor prima facie was to secure the claim of the bank to the aforesaid extent. Clause 9 of the deed of guarantee made the liability of the surety coextensive with the principal borrower

for the principal amount whereas Clause 1 and 22 restricted the liability to the valuation of the residential flat at New Delhi.

24. We have been informed that the valuation of the property is Rs.6.97 crores as per the valuation report. However, it is not in dispute that with the consent of the bank the property was sold at Rs.4 crores (approximately) reserving a right to claim further sum towards the principal amount together with interest. On 15th January, 2025 this court passed the following interim order:

> *"12. There shall be an order of injunction restraining the Bank of India from enforcing the Deed of Guarantee for realization of any other sum and shall not declare the appellant as defaulter till the disposal of the appeal."*

25. The guarantor for the time being shall be liable for the differential sum, subject to the result of the suit and shall deposit the same amount with the respondent within three weeks from date failing which the interim order stand vacated. The said deposit shall abide by the result of the suit. The views expressed are *prima facie* and shall not influence the trial of the suit.

26. The appeal is, accordingly, disposed of.

27. The instant appeal is confirmed**.**

(SOUMEN SEN, J.)

(SMITA DAS DE, J.)

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