State Bank Of Saurashtra vs Chitranjan Rangnath Raja And Anr on 30 April, 1980

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Author: D.A. Desai

Bench: D.A. Desai, A.C. Gupta, E.S. Venkataramiah

PETITIONER:
STATE BANK OF SAURASHTRA

Vs.

RESPONDENT:
CHITRANJAN RANGNATH RAJA AND ANR.

DATE OF JUDGMENT30/04/1980

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
GUPTA, A.C.
VENKATARAMIAH, E.S. (J)

CITATION:
1980 AIR 1528 1980 SCR (3) 915
1980 SCC (4) 516
CITATOR INFO :
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ACT:
Indian Contract Act, Section 141, scope of-Discharge of surety-Conditions under which surety can be discharged under sections 139-141 of the Act, -Security of pledged goods was lost on account of the negligence of the Creditor Whether the Surety would not be discharged in the instant case on a proper construction of clauses 5, 7 and 13 of the letter of guarantee.

Civil Procedure Code, 1908-Section 144 as amended by Amendment Act of 1976, scope of-Restitution-Directions by the Supreme Court, in the instant case, whether could be made- "Court of first instance", meaning of.

HEADNOTE:

The appellant bank allowed a cash credit facility limited to Rs. 75,000/- to the principal debtor Harilal Parmananddas Adatia on his pledging 5,000 tins of groundnut oil under the lock and key of the Bank and on personal guarantee of the surety, respondent No. 2. The principal debtor executed a demand promissory note Ext. 81 in favour of the Bank on September 16, 1957, and on the same day the principal debtor also executed a demand promissory note, Ext, 30, in favour of the surety which the surety endorsed in favour of the Bank. Along with the two demand promissory notes, simultaneously the surety executed a letter of guarantee Ext. 31 in favour of the Bank and the principal debtor executed a bond Ext. 83 in favour of the Bank. The principal debtor also passed letter of continuity of the bond and the promissory note Ext. 82. Thereafter the principal debtor enjoyed the cash credit facility by borrowing various amounts. By the end of February 1959 the principal debtor owed Rs. 76,368.04 P in this account to the Bank. Principal debtor died in November 1959. The Bank wrote to the surety letter Ext. 32 dated December 24, 1959, calling upon him to pay the outstanding balance of Rs. 70,879/- in cash credit account of principal debtor as in the circumstances mentioned in the letter the balance was required to be recovered from the surety. Some correspondence ensued thereafter between the Bank and the surety and ultimately the Bank filed the suit for recovery of Rs. 76,368.04 P. against defendant 1, the legal representative of principal debtor and defendant 2, the surety.

The trial court round that there was negligence on the part of the Bank with regard to the safe custody of the pledged oil tins but as the contract of guarantee entered into by the surety with the Bank was independent of the pledge of goods given by the principal debtor, the surety is not discharged from his liability under the guarantee. So observing the trial court decreed the suit. The surety paid the entire amount demanded and appealed to the High Court.

The High Court held that the two promissory notes, one executed by the principal debtor in favour of the Bank Ext. 81, and another by the principal debtor in favour of the surety and endorsed by the surety to the Bank, Ext. 30, and the letter of guarantee Ext. 31 executed by the surety in favour of the Bank as also the bond executed by the principal debtor in favour of the Bank Ext. 83

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and the letter of continuity Ext. 82 executed by the principal debtor in favour of the Bank, all on September 16, 1957, constituted one composite transaction and they evidenced that the principal debtor had offered two securities, one the pledge of oil tins and another personal guarantee of the surety. The High Court further held that the Bank was utterly negligent and had not exercised such

care as a prudent man would in the circumstances of the case which resulted in the loss of security, namely, pledged oil tins and, therefore, in view of combined operation of sections 139 and 141 of the Indian Contract Act, the surety is discharged. Accordingly, the appeal of the surety was allowed and the suit against him was dismissed. Hence this appeal by plaintiff Bank.

Dismissing the appeal by certificate, the Court,

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HELD: 1. In order to attract section 141 of the Contract Act, it must be shown that the creditor had taken more than one security from the principal debtor at the time when the contract of guarantee was entered into and irrespective of the fact whether the surety knew of such other security offered by the principal debtor, if the creditor loses or without the consent of the surety parts with the other security the surety would be discharged to the extent of the value of the security. In the instant case as found by the High Court and not controverted, the principal debtor had offered two securities, (i) the pledge of goods, (ii) personal guarantee of the surety. Verily, the General Manager of the Bank accepted the proposal for cash credit facility on the specific condition that the principal debtor shall offer two securities, one the pledge of goods to be kept under the lock and key of the Bank to be supervised by the Bank's employee, and secondly, the personal guarantee of the surety. The surety himself agreed to give personal guarantee of the specific understanding and with the full knowledge of the Bank that the principal debtor was offering another security, namely, pledge of goods. The surety contracted on the good faith of the principal contract when entering into contract of guarantee in which case he is deemed so to contract that both the securities would be available to the creditor. If the two promissory notes Exts. 81 and 30 coupled with the letter of guarantee Ext. 31 executed by the surety and the bond Ext. 83 executed by the principal debtor at one sitting on September 16, 1957, evidence one composite transaction, it is an inescapable conclusion that the principal debtor offered two securities, one the pledge of goods and the other the personal guarantee of the surety. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion s. 141 of the Act will be indubitably attracted. [922 A-F]

Sanderson v. Aston, [1873] L R. 8 Exch. 73 at 76, quoted with approval.

2. Section 141 comprehends a situation where the debtor has offered more than one security one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the

surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by s. 141. [922 F-H]

State of Madhya Pradesh v. Kaluram, [1967] 1 SCR 266, followed.

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Wulff and Billing v. Jay, (1872) 7 QB 756, quoted with approval.

3. In the instant case, clauses 5, 7 and 13 of the letter of guarantee, Ext. 31 would be of no assistance to the Bank. [926 B, G, H]

(a) Clause 5 confers right upon the creditor Bank to grant any time or indulgence in payment of the debt or to determine, enlarge or vary its credit and to vary, exchange or take other securities or release any other securities held by the Bank but such an act on the part of the Bank would not have the effect of discharging the surety or in any manner affecting his liability under the letter of guarantee. It is not a case of granting time or indulgence to the principal debtor or variation of the credit or taking one set of security in substitution of some other security or release of any security. Release of security implies a volitional act on the part of the Bank. Loss on account of negligence cannot be equated with release. [925 G-H. 926 A-B]

(b) Clause 7 provides for non-discharge of surety even if the creditor Bank enters into a composition with the principal debtor and that the surety would nonetheless be liable even if the Bank has other guarantee, security or remedy guarantees, securities or remedies from the principal debtor. Upon a true construction of clause 7, the expression 'any other guarantee, security or remedy' therein mentioned must be security other than the pledged goods. [926 B-C]

Amrit Lal Goverdhan Lal and ors. v. State Bank of Travancore and ors.,[1968] 3 S.C.R. 724 @ 731, followed.

(c) Clause 13 provides for continuing the guarantee where the principal debtor is an association of persons and for continuance of the guarantee in the event of death, retirement etc. of one of such association of persons or the guarantee remaining intact and effective and legally enforceable irrespective of some defect arising from the internal management of such association of persons. First Security, namely, the pledged goods are lost to the Bank and the concurrent finding again incontrovertible is that the pledged goods were lost on account of the negligence of the creditor Bank. Whole of the security was lost and, therefore, the surety would be discharge in entirety because it is crystal clear that the principal debtor had agreed and

had in fact pledged 5,000 tins of oil which even if sold at the then current market price would have satisfied the Bank's entire claim. Accordingly, the surety would be discharged in entirety. [926 G-H, 927 A-B]

4. Accepting a contention that section 141 would not be attracted and the surety would not be discharged even if it is found that a creditor has taken more than one security on the basis of which advance was made and the surety gave personal guarantee on the good faith of other security being offered by the principal debtor which itself may be a consideration for the surety offering his personal guarantee and the creditor by its own negligence lost one of the securities, would tantamount to putting a premium on the negligence of the creditor to the detriment of the surety who is usually described as a 'preferred debtor'. A Court should not by its construction of such letter of guarantee enable the creditor to act negligently and yet be not in any manner accountable. [927 B-E]

5. By section 144 of Civil Procedure Code 1908, as amended by the Amendment Act, 1976, the jurisdiction to grant restitution is conferred upon "the Court which passed the decree or order". By an explanation added to section 144 by the Amendment Act of 1976, the expression "Court which passed the decree or
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order" shall be deemed to include where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance. [927 G-H, 928 A]

In the instant case (i) the appellant was the plaintiff and its suit was decreed by the trial Court, i.e. the Court of Civil Judge, Senior Division, Gondal, on November 18, 1960. The present appellant by its letter dated February 14, 1961, demanded from the surety a sum of Rs. 84,828.07 P. inclusive of costs and interests on the principal amount decreed. The surety respondent 1 in this Court paid the appellant Rs. 84,828.07 P. On April 3, 1961. In the appeal by the surety the High Court reversed the decree and dismissed the suit against the surety. Accordingly, the surety is entitled to restitution; and (ii) the present one is the simplest case where the suit in favour of the appellant and against the surety was decreed by the trial court, i.e. the Court of first instance, and this decree has been reversed by the trial Court in exercise of its appellate jurisdiction. In such a situation clause (a) of the explanation would be attracted and an application for restitution will have to be made to the Court of first instance, i.e. the Court of Civil Judge, Senior Division, Gondal. It is nowhere suggested that such a Court does not exist. Therefore, it would not be proper for this Court to direct restitution. However, there will be no justification for the appellant Bank to withhold the amount which was collected from the surety on a mere demand. Therefore, an

application for restitution made by the surety would not lie to this Court [928 B-D, F-H].

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1058 of 1970.

From the Judgment and Decree dated 25-4-1969 of the Gujarat High Court in Appeal No. 22/61.

S. N. Kackar, K. J. John and Sri Narain for the Appellant.

S. T. Desai, H. S. Parihar and I. N. Shroff for the Respondents.

The Judgment of the Court was delivered by DESAI, J. This appeal by certificate under Article 133(1)(a) of the Constitution is by the original plaintiff- State Bank of Saurashtra ('the Bank' for short)-whose suit for recovery of Rs. 76,368 04 P. from the legal representative of the deceased principal debtor Harilal Parmanaddas Adatia and his surety original defendant 2 Chitranjan Rangnath Raja. ('Surety' for short) was decreed by the trial court both against the legal representative of the principal debtor and the surety but on appeal by the surety, was dismissed by the High Court only against the surety.

Harilal Parmananddas Adatia, hereinafter referred to as 'principal debtor', approached the Manager of the Bagasra Branch of State Bank of Saurashtra seeking facility for cash credit upto Rs. 75,000/-. He submitted proposal form Ext. 66 on September 10,1957, offering to give security for the cash credit by pledge of groundnut oil tins as also a personal guarantee of defendant 2 Chitranjan Rangnath Raja.

After obtaining the approval of the General Manager of the Bank cash credit facility to the extent of Rs. 75,000/- was sanctioned against the pledge of approved goods under the lock and key of the Bank and on personal guarantee of the surety. The principal debtor executed a demand promissory note, Ext. 81 in favour of the Bank on September 16, 1957, and on the same day the principal debtor also executed a demand promissory note, Ext. 30, in favour of the surety which the surety endorsed in favour of the Bank. 'Along with the two demand promissory notes, simultaneously the surety executed a letter of guarantee Ext. 31 in favour of the Bankand' the principal debtor executed a bond Ext. 83 in favour of the Bank. The principal debtor also passed letter of continuity of the bond and the promissory note Ext. 82. Thereafter the principal debtor enjoyed the cash credit facility by borrowing various amounts. By the end of February 1959 the principal debtor owed Rs. 76,368.04 P. in this account to the Bank. Principal debtor died in November 1957. The Bank wrote to the surety letter Ext.32 dated December 24,1957, calling upon him to pay the outstanding balance of Rs. 70,879/- in cash credit account of principal debtor as in the circumstances mentioned in the letter the balance was required to be recovered from the surety. Some correspondence ensued thereafter between the Bank and the surety and ultimately the Bank filed the suit for recovery of Rs. 76,368.04 P. against defendant 1, the legal representative of principal debtor and defendant 2, the surety.

Defendant 1 contested the suit, inter alia, contending that the court had no jurisdiction to hear the suit and he had no knowledge about the suit transaction. The allegation of fraud made against him in the plaint was denied. He also denied his liability for the claim of the Bank as heir and legal representative of deceased principal debtor. Defendant 2, the surety, contested the suit as per written statement Ext. 7, inter alia, contending that the Bank had agreed to grant cash credit facility to deceased principal debtor on the security of goods by way of pledge and that though the goods were to be kept in the godown in the compound of Vijay Oil Mills Pvt. Ltd., but the godown was to be kept under the lock and key of the Bank. It was also contended that the principal debtor would provide such quantity of goods as would provide full cover to the outstanding balance in the cash credit account and the Bank was to be responsible for the safe custody and keeping of the pledged goods. It was also contended that the principal debtor had all throughout pledged sufficient quantity of goods to provide full cover for the Bank's claim but the Bank either wrongfully lost the goods or was negligent in retaining the goods within its custody or the Bank wrongfully parted with the goods without the consent of the surety and, therefore, the surety was discharged.

The trial Court found that there was negligence on the part of the Bank with regard to the safe custody of the pledged oil tins but as the contract of guarantee entered into by the surety with the Bank was independent of the pledge of goods given by the principal debtor, the surety is not discharged from his liability under the guarantee. So observing the trial court decreed the suit.

On appeal by the surety, the High Court held that the two promissory notes, one executed by the principal debtor in favour of the Bank, Ext. 81, and another by the principal debtor in favour of the surety and endorsed by the surety to the Bank, Ext.30, and the letter of guarantee Ext. 31 executed by surety in favour of the Bank as also the bond executed by the principal debtor in favour of the Bank Ext. 83 and the letter of continuity Ext. 82 executed by the principal debtor in favour of the Bank, all on September 16, 1957, constituted one composite transaction and they evidence that the principal debtor had offered two securities, one the pledge of oil tins and another personal guarantee of the surety. The High Court further held that the Bank was utterly negligent and had not exercised such care as a prudent man would in the circumstances of the case which resulted in the loss of security, namely, pledged oil tins and, therefore, in view of combined operation of sections 139 and 141 of the Indian Contract Act, ('Act' for short), the surety is discharged. Accordingly, the appeal of the surety was allowed and the suit against him was dismissed. Hence this appeal by the plaintiff Bank.

Uncontroverted facts concurrently found and not sought to be reviewed in this appeal are that the principal debtor as per his application Ext. 65 sought cash credit facility to the extent of Rs. 75,000/- pursuant to which the Bagasra Branch of the Bank submitted a proposal Ext. 66 seeking permission of the General manager of the Bank to extend the facility. The General Manager of the Bank sanctioned advance, inter alia, on the following terms:

> "A cash credit limit of Rs.75,000/- (Rupees Seventy five thousand only) is hereby sanctioned against pledge of approved goods under Bank's lock and key and on the personal guarantee of Shri C. R. Raja, Junagadh.

Noted that the Bank's godown keeper already posted at Amrali would look after the goods pledged by the above party also.

All other terms as proposed." (underlining ours). Accordingly, on the strength of two pronotes Exts. 30 and 81 and on the strength of letter of guarantee Ext.31 and the bond Ext.83 cash credit facility was extended to the principal debtor. The pledged goods were kept in the godown in the compound of Vijay oil Mills under the lock and key of the Bank and the Bank had appointed a Godown keeper to look after the goods pledged by the principal debtor. Two promissory notes Exts. 30 and 81 and letter of guarantee Ext. 31 and the bond executed by the principal debtor Ext. 83 all of September 16, 1957, constituted one transaction. The High Court held that the surety had agreed to become surety, on the principal debtor pledging oil tins as and by way of security for the advance and, therefore, two securities were offered, namely, pledge of goods and the personal guarantee of the surety. The High Court also found that 5,000 tins of oil had come to be transferred by Vijay oil Mills in the name of the deceased principal debtor and they were treated as pledged with the Bank as security for cash credit facility. It is concurrently found that the Bank was utterly negligent with regard to the safe keeping and handling of pledged oil tins and the security of pledged oil tins was lost on account of the negligence of the Bank. Disagreeing with the trial court the High Court held that the pledge and the personal guarantee were not two independent transactions but they formed part and parcel of one composite transaction. The High Court, therefore, held that the creditor having lost one security, namely, the pledged goods, the surety was discharged to the extent of the value of security and that as in this case the entire security was lost, the surety was wholly discharged.

Only contention canvassed in this appeal is that in view of clauses 5,7 and 13 of letter of guarantee Ext.31 even if it is found as a fact that negligence of the creditor Bank was responsible for the loss of security of pledged oil tins, yet the surety would not be discharged. Before we refer to clauses 5, 7 and 13, it is necessary to notice section 141 of the Indian Contract Act under which the surety claims the relief of discharge. Section 141 reads as under:

"141.A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

In order to attract s. 141 it must be shown that the creditor had taken more than one security from the principal debtor at the time when the contract of guarantee was entered into and irrespective of the fact whether the surety knew of such other security offered by the principal debtor, if the creditor loses or without the consent of the surety parts with the other security the surety would be discharged to the extent of the value of the security. In the instant case as found by the High Court

and not controverted, the principal debtor had offered two securities, (i) the pledge of goods, (ii) personal guarantee of the surety. Verily, the General Manager of the Bank accepted the proposal for cash credit facility on the specific condition that the principal debtor shall offer two securities, one the pledge of goods to be kept under the lock and key of the Bank to be supervised by the Bank's employee, and secondly, the personal guarantee of the surety. The surety himself agreed to give personal guarantee on the specific understanding and with the full knowledge of the Bank that the principal debtor was offering another security, namely, pledge of goods. The surety contracted on the good faith of the principal contract when entering into contract of guarantee in which case he is deemed so to contract that both the securities would be available to the creditor (see Sanderson v. Aston) If the two promissory notes Exts. 81 and 30 coupled with the letter of guarantee Ext. 31 executed by the surety and the bond Ext. 83 executed by the principal debtor at one sitting on September 16, 1957, evidence one composite transaction, it is an inescapable conclusion that the principal debtor offered two securities, one the pledge of goods and the other the personal guarantee of the surety. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion s. 141 of the Act will be indubitably attracted. Section 141 comprehends a situation where the debtor has offered more than one security one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by s. 141.

In Halsbury's Laws of England, 4th Edn., Vol. 20, para 280, p. 52, the statement of law bearing on this point reads as under:

> "280.Effect of loss of securities.-On paying the guaranteed debt the surety is entitled to have all securities held by the creditor for the debt handed over to him by the creditor in exactly the same state and condition in which they were originally provided whether they were in existence at the date of the contract of suretyship or came into existence subsequently. Consequently, any act of the creditor interfering with or impairing that right will, to the extent, at all events, of any loss inflicted, relieve the surety from liability, and, if it has the effect of altering or purporting to alter the contract of suretyship, discharge him altogether. Thus, where there is a mortgage security given in respect of a debt which is subsequently guaranteed, the creditor must hold the security for the benefit of surety, so that, on paying the debt, the surety may obtain a transfer of mortgage in its original unimpaired condition. If the creditor does not fulfil his duty in this respect the surety is discharged."

This statement of law is reflected in ss.140 and 141 of the Act.

In State of Madhya Pradesh v. Kaluram the facts were that one Kaluram had executed a surety bond undertaking to discharge the liability arising out of any act or omission or negligence or default of a forest contractor whose bid was accepted at an auction held for sale of felled trees and who was required to pay the bid amount in four instalments. The forest contract rules provided for preventing the contractor from removing the forest goods in case he made default in payment of the instalments due. The authorities responsible for supervising the contract allowed the contractor to remove the felled trees without making the subsequent payments. Subsequently the State of Madhya Pradesh initiated proceedings to recover the balance of the amount through surety Kaluram. The surety Kaluram contended before this Court that because the State had lost or parted with the security, namely, forest produce, he stood discharged. Upholding this contention this Court quoted Wulff and Billing v. Jay, wherein Hannen, J., stated the law as under:

> "....I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiff, and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the note in kees v. Barrington-2 White & Tudor's L.C. 4th Edn. at p. 1002-As a surety on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands."

This Court concluded that subject to certain variations s. 141 of the Indian Contract Act incorporates the English law relating to discharge from liability of a surety where the creditor parts with or losses to security held by it.

Mr. Kackar, however, contended that in view of clauses 5, 7 and 13 of the letter of guarantee, Ext. 31, even if it is held proved that security of pledged goods was lost on account of the negligence of the creditor Bank, yet the surety would not be discharged from the obligation undertaken under the letter of guarantee. Clauses 5, 7 and 13 may be extracted:

> "5. You shall in any case, be at liberty and without my/our further assent or knowledge, at any time, to grant to the customer or any person liable with or for his, whether as guarantor or otherwise, any time or indulgence and to determine, enlarge or vary its credit and to vary exchange or take other securities or release any other securities held or to be held by you for or on account of the moneys intended to be

hereby secured or any part thereof or to renew any bills, notes or other negotiable security and to compound or make any other arrangements with the customer or any person so liable with or for the customer as you may think fit without discharging or in any manner affecting my/our liability under this guarantee."

"7. To the extent that you may obtain satisfaction of the whole of your claim against the customer, I/we agree that you may enforce and recover upon this guarantee the full amount hereby guaranteed and interest thereon notwithstanding any such proof or composition as aforesaid, and notwithstanding any other guarantee, security or remedy, guarantees, securities or remedies which you may hold or be entitled to in respect of the sum intended to be hereby secured or any part thereof, and notwithstanding any charges or interest which may be debited in your account current with the customer, or in any other account upon which the customer may be liable."

"13. Should the customer be a limited company, corporate or an incorporate body, committee, firm, partnership, trustees or debtors on a joint account, the provisions hereinbefore contained shall be construed and take effect where necessary as if the words importing the singular number included also the plural number. This my/our guarantee shall then remain effective notwithstanding any death, retirement, change, accession or addition as fully as if the person or persons constituting or trading or acting as, such body, committee, firm, partnership, trustees, or debtors on joint account, at the date of the customer's default or at and time previously, was or were the same as the date hereof. And further you may recover against me/us to the extent here in before mentioned notwithstanding that any security given or to be given to you may be void, defective, or informal, or notwithstanding that the customer being a limited company, corporate or unincorporated body or committee, may exceed its borrowing powers or that the borrowing from you may have been ultra vires."

Clause 5 confers right upon the creditor Bank to grant any time or indulgence in payment of the debt or to determine, enlarge or vary its credit and to vary, exchange or take other securities or release any other securities held by the Bank but such an act on the part of the Bank would not have the effect of discharging the surety or in any manner affecting his liability under the letter of guarantee. We fail to see how clause 5 can help the creditor Bank in any manner. It is not a case of granting time or indulgence to the principal debtor or variation of the credit or taking one set of security in substitution of some other security or release of any security. Release of security implies a volitional act on the part of the Bank. Loss on account of negligence cannot be equated with release. Therefore, clause 5 would not assist the Bank in this case.

Clause 7 provides for non-discharge of surety even if the creditor Bank enters into a composition with the principal debtor and that the surety would nonetheless be liable even if the Bank has guarantee, security or remedy, guarantees, securities or remedies from the principal debtor. Upon a true construction of clause 7, the expression 'any other guarantee, security or remedy' therein mentioned must be security other than the pledged goods. In an almost identical situation with

regard to an identical clauses in Amrit Lal Goverdhan Lalan v. State Bank of Travancore and Ors, this Court after referring to clause 5 in the letter of guarantee which is in pari materia with clause 7 of the letter of guarantee under discussion, held as under:

> "On behalf of the respondent Bank reference was made to cl. 5 of Ex. P-4 which has already been quoted. It was contended that on account of this clause in Ex. P-4 the appellant has opted out of the benefit of s. 141 of the Indian Contract Act. We are unable to accept the argument put forward by the Attorney General on behalf of the respondent Bank. In our opinion, the expression "any security" in cl. 5 of Ex. P-4 should be properly construed as "any security other than the pledge of goods mentioned in the primary agreement, Ex. P-1 between the Bank and the firm."

We consider that there is nothing in cl. 5 of Ex.P-4 to indicate that the appellant is not entitled to invoke the provisions of s. 141 of the Indian Contract Act."

Therefore, cl. 7 is of no assistance to the Bank.

A bare perusal of clause 13 would show that it provides for continuing the guarantee where the principal debtor is an association of persons and for continuance of the guarantee in the event of death, retirement, etc. of one of such association of persons or the guarantee remaining intact and effective and legally enforceable irrespective of some defect arising from the internal management of such association of person. We fail to see how it can render any assistance to the Bank.

First security, namely, the pledged goods are lost to the Bank and the concurrent finding again incontrovertible is that the pledged goods were lost on account of the negligence of the creditor Bank. Whole of the security was lost and, therefore the surety would be discharged in entirety because it is crystal clear that the principal debtor had agreed and had in fact pledged 5,000 tins of oil which even if sold at the then current market price would have satisfied the Bank's entire claim. Accordingly, the surety would be discharged in entirety.

It is difficult to entertain a contention that s. 141 would not be attracted and the surety would not be discharged even if it is found that a creditor has taken more than one security on the basis of which advance was made and the surety gave personal guarantee on the good faith of other security being offered by the principal debtor which itself may be a consideration for the surety offering his personal guarantee and the creditor by its own negligence lost one of the securities. Acceptance of such a contention would tantamount to putting a premium on the negligence of the creditor to the detriment of the surety who is usually described as a preferred debtor. Should a Court by its construction of such letter of guarantee enable the creditor to act negligently and yet be not in any manner accountable ? Was the guarantee a guarantee against proper performance of the contract evidencing advance of loan and methods of its repayment, or a guarantee covering Bank's utter disregard of its responsibility or to use the words of the High Court, the Bank's utter negligence in failing to exercise the care of a prudent man which one would expect in management of one's own affairs ?

The appeal accordingly fails and is dismissed with costs.

The respondent surety has made an application that in compliance with the decree made by the trial court he had paid the entire amount and he should not be exposed to second round of litigation for restitution of the amount and that this Court should give a direction to the Bank as part of this judgment that the amount be returned with interest at current rate to the respondent surety.

By s. 144 of the Code of Civil Procedure, 1908 as it stood prior to amendment by the Code of Civil Procedure (Amendment) Act, 1976, the jurisdiction to grant restitution was conferred upon the 'Court of first instance'. Since the amendment the expression the Court of first instance' has been substituted by 'the Court which passed the decree or order'. An explanation has been added to s. 144 by the Amendment Act of 1976, the relevant portion of which reads as under:

> "Explanation-For the purposes of sub-section (1) the expression "Court which passed the decree or order" shall be deemed to include-
>
> (a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance."

In the instant case the appellant was the plaintiff and its suit was decreed by the trial court, i.e. the Court of Civil Judge, Senior Division, Gondal, on November 18, 1960. The present appellant by its letter dated February 14, 1961, demanded from the surety a sum of Rs. 84,828.07P. inclusive of costs and interest on the principal amount decreed. The surety respondent I in this Court paid the appellant Rs. 84,828.07P. on April 3, 1961. In the appeal by the surety the High Court reversed the decree and dismissed the suit against the surety. Accordingly, the surety is entitled to restitution.

The limited question is whether this Court can grant restitution. Prior to Amendment Act, 1976, an application for restitution under s. 144 in all cases had to be made to the Court of first instance. Ever since the amendment the substituted expression 'the Court which passed the decree or order' would as per clause(a) of the explanation, mean the Court of first instance because the expression 'the Court which passed the decree or order' has been deemed to include where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance. The present one is the simplest case where the suit in favour of the appellant and against the surety was decreed by the trial court, i.e. the Court of first instance, and this decree has been reversed by the High Court in exercise of its appellate jurisdiction. In such a situation clause (a) of the explanation would be attracted and an application for restitution will have to be made to the Court of first instance, i.e. the Court of Civil Judge, Senior Division, Gondal. It is nowhere suggested that such a Court does not exist. Therefore, it would not be proper for this Court to direct restitution. However, there will be no justification for the appellant Bank to withhold the amount which was collected from the surety on a mere demand. Therefore, an application for restitution made by the surety would not lie to this Court and it would stand disposed of accordingly.

S.R. Appeal dismissed.