Citibank N.A. vs Juggilal Kamlapat Jute Mills Co. Ltd. on 17 May, 1982

Equivalent citations: AIR1982DELHI487, [1984]56COMPCAS509(DELHI), AIR 1982 DELHI 487

JUDGMENT

Jain, J.

1. In this somewhat unusual suit, under O. 37 of the CPC, 1908, the plaintiff, Citibank N. A., seeks a decree of Rs. 77,10,733.67 against the defendant, Juggilal Kamlapat Jute Mills Co. Ltd. (for short "the Jute Mills").

2. J. K. Manufacturers Ltd. (for short "the Manufacturers Ltd.") has a cotton textile manufacturing unit in Kanpur. This company was incurring heavy losses. In order to render the said textile unit into an economic, profitable and efficient unit and for the purpose of modernising and/or equipping it with additional plant, etc., the Manufacturers Ltd. agreed to grant to the Jute Mills license to use the said textile unit on terms and conditions as contained in the license was granted initially for a period of five years commencing from October 1, 1971, on payment of license fee of Rs. 50,000 per month or a sum equal to 50% of the net profits earned by the Jute Mills in the textile unit in each year, whichever was higher. supplementary agreement was executed between the Manufacturers Ltd. and the Jute Mills on October 3, 1973, making some modifications in the original agreement.

3. On July 2, 1973, the plaintiff sanctioned a term loan facility of Rs. 60 lakhs in factor of the Manufacturers Ltd. repayable by twelve six- monthly Installments of Rs. 5 lakhs each. Besides the principal amount, the bank was also entitled to be paid interest at 3 per cent. over the Reserve Bank of India rate subject to a minimum of 12.5 per cent. per annum. In the event of default in any payment of the principal or commitment fee/charge or of interest on the loan, the entire amount remaining due and unpaid on the date of the said default was to become due and payable to the plaintiff immediately. The term loan agreement was executed between the bank and the Manufacturers Ltd. on November 21, 1973. On November 22, 1973, the Manufacturers Ltd. also deposited the documents of title relating to their textile unit at Kalpi Road, Kanpur, and thereby mortgaging to the plaintiff al the properties of the textile unit to secure repayment of the aforesaid loan of Rs. 60 lakhs. On November 21, 1973, the Jute Mills executed in favor of the plaintiff a guarantee (Ex. P-14). This was to be considered a continuing guarantee for the purpose of securing the ultimate balance due, or that may be due from time to time, and at any time from the Manufacturers Ltd. to the plaintiff. On November 22, 1973, the Jute Mills also deposited with the bank at New Delhi various documents relating to their industrial unit situate at Kalpi Road, Kanpur, and thereby created a first and continuing mortgage charge over the said properties in favor of the plaintiff to secure repayment of the aforesaid sum of Rs. 60. lakhs.

4. The Manufacturers Ltd. paid the first Installment of Rs. 5 lakhs. It defaulted to make payment of any other Installment and, consequently, in October, 1976, the plaintiff served a legal notice calling upon them to r4e4pay Rs. 56,39791.66 being the amount outstanding under the aforesaid loan as on October 21, 1976. A similar notice was issued to the Jute Mills also which was duly served on it on October 31, 1976.

5. No payment having been made wither by the Manufacturers Ltd. or the Jute Mills, the plaintiff on or about July 21, 1977, filed a suit (No. 315 of 1977) in the Court of the Second Civil Judge, kanpur, for a mortgage decree against the Manufacturers Ltd. only for recovery of Rs. 55,27570.01 being the loan outstanding as on date plus interest. In those proceedings, the bank filed an application under O. 23, r. 2, CPC, praying for leave to subsequently file a suit in respect of this loan amount against the Jute Mills which is stated to have been allowed on October 15, 1977 (admittedly without notice and without hearing the Jute Mills).

6. In the Kanpur suit, the parties, i.e., the plaintiff here and the Manufacturers Ltd., filed an application dated October 15, 1977, under O. 23, r. 3 CPC, for recording a compromise. Under the terms of the compromise, it was agreed that a final mortgage decree for Rs. 55,27,570 with future interest at 12.5 per cent. per annum and costs be passed in favor of the plaintiff against the Manufacturers Ltd. It was further agreed that Mr. S. K. Kapoor, District Govt. Counsel (Civil), be appointed receiver to take immediate possession of the Manufacturers Ltd. "S" properties, including land, building, plant and machinery at Kamlapat Road, Kanpur, which was the subject-matter of the mortgage. The receiver was directed and empowered to take appropriate steps at the earliest to dispose of all mortgage property in one or more lots and to pay the sale proceeds of all assets so disposed directly to the plaintiff-bank towards satisfaction of the decretal amount. No sale was, however, to be effected without the prior consent of the plaintiff. It contained certain other terms which are not very relevant. A copy of the application is Ex. D-8. A decree in terms of the compromise was passed by the learned Second Civil Judge, Kanpur, on October 15, 1977 (Ex. D-4). The receiver, admittedly, sold the plant and machinery of the Manufacturers Ltd. for a sum of Rs. 45,50,101 in favor of M/s. C. Patel & Co. (P.) Ltd. The sale was, admittedly, confirmed by the court. A sum of about Rs. 8 lakhs is state to have been deposited by the auction purchaser with the receiver. The learned Second Civil Judge, Kanpur, vide his order dated December 4, 1978, directed the receiver to deliver the aforesaid plant and machinery to the auction purchaser. Necessity for direction, it appears, arose because the permission of the Textile Commissioner, which was necessary for effecting delivery, was not forthcoming, and the court, in the circumstances, that no reply was being received from the Textile Commissioner, passed the said order. A writ petition filed by the Textile Commissioner in this behalf was dismissed by the Allahabad High Court on May 8, 1979. A special leave petition against the dismissal of the writ petition by the High Court was also dismissed by the Supreme Court on December 20, 1979 (Ex. D-5).

7. However, in Company Petition No. 2 of 1980, the Allahabad High Court was pleased to order on March 10, 1980, that the receiver appointed by the civil court shall deliver the machineries sold to the auction purchaser upon Realizing sale proceeds but retain the said amount until further orders of the court. The amount so realised was directed to be deposited in a nationalised bank or scheduled bank or scheduled bank to earn interest. The sale of land and building was stayed in the

meantime.

8. Having thus failed to realise any amount in execution of the mortgage decree passed by the Kanpur court, the plaintiff-bank has brought the present suit for recovery of Rs. 77,10,733.67 - Rs. 55,27,570 towards unpaid principal (Rs. 55 lakhs) and interest for which the suit was filed against the Manufacturers Ltd., at Kanpur : Rs. 15,46,583.63 towards interest at 12.5% per annum on Rs. 55 lakhs with effect from July 22, 1977, till date and Rs. 6,36,580 towards costs incurred in the Kanpur suit.

9. The allegations are that both the Jute Mills and the Manufacturers Ltd. approached the bank for the grant of terms loan facility of Rs. 60 lakhs. Both of them represented that the said loan would be duly repaid to the plaintiff along with interest and bankers charges. They further represented that the repayment of the said loan would be duly secured by a first charge over the fixed assets of both the companies. The loan was sanctioned to both of them though in the name of the Manufacturers Ltd. only. In the guarantee deed executed by the Jute Mills on November 21, 1973, inter alia, it was agreed that their obligation to pay was to arise first when notice in writing was given to them by the bank requiring them to pay and any such notice could be given by the bank and the bank could proceed to enforce the obligations and liabilities of the Jute Mills under the guarantee deed without first proceeding, or resorting to all or any of the plaintiff's remedies against the principals. The Jute Mills further agreed that between the plaintiff and the Jute Mills, the latter was to be considered as principal debtor to the plaintiff to the extent mentioned in the guarantee deed i.e., Rs. 60 lakhs, in respect of all advances made and to be made and of all facilities granted and to be granted by the bank to the Manufacturers Ltd. The Jute Mills also waived their rights of suretyship which were in any way inconsistent with the provisions contained in the guarantee deed. For all these reasons, the plaintiff was entitled to the amount claimed with future interest at 12.5% per annum. It was also averred that Mr. Naresh M. Bahl, an assistant manager of the bank, had signed and verified the plaint. He was the principal officer of the plaintiff at New Delhi branch and he was also a duly constituted attorney of the plaintiff and was authorised to sign, verify and file suits and other pleadings for and on behalf of the plaintiff.

10. Leave to defend having ultimately been granted, the Jute Mills filed a written statement resisting the suit. The allegations that the Jute Mills also approached the plaintiff for a term loan facility of Rs. 60 lakhs or made representation that the said loan would be duly repaid to the plaintiff with interest, etc., were denied. It was averred that the loan was, admittedly advanced to the Manufacturers Ltd. and the averments now made by the plaintiff were contrary to and inconsistent with the stand taken by it in the suit filed in the Kanpur court. It was, however, admitted that the defendant-Jute Mils executed the deed of guarantee date November 21, 1973, and also deposited with the plaintiff certain documents of title relating to the Jute Mills industrial unit situate at Kanpur, pursuant to the guarantee. The provisions of the deed of guarantee dated November 21, 1973, including, inter alia, cls. 4, 10 and 13 thereof, in so far as they purported to provide for waiver and/or of taking away and/or impairing and/or giving up of defendant's statutory right of redemption and/or the rights conferred by ss. 134, 135, 140 and 141 of the Indian Contract Act, 1972, were illegal, invalid, void and inoperative in law and could not be enforced against the defendant. It was next averred that the liability of the Jute Mills, the surety, stood discharged in view of the

provisions of s. 141 of the Indian Contract Act, 1872, on account of the acts and omissions of the plaintiff, namely, (1) by filing Suit No. 315 of 1977, in the court of the Second Civil Judge, Kanpur, without impleading the defendant Jute Mills therein as a party and further by entering into a compromise with the Manufacturers Ltd. without the concurrence of the defendant and obtaining a consent decree dated October 15, 1977, (2) by getting a receiver appointed by consent of the parties in the said suit of the properties of the Manufacturers Ltd. and agreeing to the sale/disposal by the receiver of the security that had been offered by the Manufacturers Ltd., and (3) because security having already been put to sale and sold by the receiver pursuant to the said court decree dated October 15, 1977, for a sum of Rs. 45,50,101. The plant and machinery of the Manufacturers Ltd., it was alleged, were sold with the consent of the plaintiff and the receiver had received an advance of Rs. 8,50,101 from the auction purchaser. The sale had been confirmed by the Second Civil Judge, Kanpur, and had become absolute, and the claim of the plaintiff against the defendant thus stood satisfied to the extent of Rs. 45,50,101. The acts done by the plaintiff, it was alleged, were inconsistent with the rights of the defendant-Jute Mills as surety or guarantor. The plaintiff had failed and neglected to take effective steps for realisation of the price of the plant and machinery after the sale thereof which had been confirmed and that the plaintiff was not entitled decree or the costs of that suit. It was also averred that this court had no territorial jurisdiction to try the case, because the plaintiff, while obtaining leave under O. 2, r. 2, CPC, in the Kanpur suit, had represented that the suit on the basis of the mortgage would be instituted, if at all, against this defendant in that court only. It was also pleaded that the plaint did not disclose any cause of action for claiming the amount of costs. It was also averred that, according to averments made in paras. 7, 8, 9 and 10 of the plaint, the defendant was a co-obligor with the Manufacturers Ltd. and, therefore, the suit was misconceived and not maintainable.

11. On the pleadings of the parties, the following issues were settled :

> (1) Whether the plaint has been singed, verified and the suit has been filed by a duly authorised person ? OPP (2) Whether the plaint does not disclose any cause of action for the claim with regard to the costs amounting to Rs. 6,36,580 and there is no right of action, basis or justification for this claim ? OPD (3) Whether the suit of the plaintiff against the defendants as a surety is misconceived and not maintainable ? OPD (4) Whether the defendant stands discharged from its liability as a surety on account of the acts of omission and/or commission on the part of the plaintiff as alleged in para. 5 of the preliminary objections contained in the written statement ? OPD (5) Whether this court has no jurisdiction to try this case as alleged in para. 28 of the written statement ? OPD (6) Whether defendants are not liable to pay the amount of loan sanctioned by the plaintiff in the name of M/s. J. K. Manufacturers Ltd., as a principal debtor or co-obligor ? OPD (7) What is the effect of the sale of the properties of L. K. Manufacturers by the receiver in pursuance of the decree obtained by the plaintiff against M/s. J. K. Manufacturers on the liability of the defendant ?
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> (8) Whether the plaintiff in the suit filed by it against M/s. J. K. Manufacturers in the court of Second Civil Judge, Kanpur ? If so, to what amount ?

(9) Whether the suit is barred in view of the previous suit filed by the plaintiff against M/s. J. K. Manufacturers Ltd., in the court of Second Civil Judge, Kanpur ?

(10) Whether the amount for which the decree has been passed by the Kanpur court can be claimed in this suit by the plaintiff ? OPP (11) Whether the loan was sanctioned both to the defendant and M/s. J. K. Manufacturers ?

(12) In case it was proved that the loan was not sanctioned in favor of the defendant, what is its effect on the maintainability of the suit ?

(13) To what amount, if any, is the plaintiff entitled ?

(14) Whether the defendant has no right to the benefit of the securities held by the plaintiff and furnished to it by M/s. J. K. Manufacturers Ltd., because of the agreement dated September 25, 1971, as modified on October 3, 1973, and in view of the term of the guarantee executed on November 21, 1973 ? OPP (15) Relief.

12. Issue No. 1 : Mr. N. M. Bahl, as PW 1, deposed that the plaint and been signed and verified by him. He was a duly constituted attorney of the bank by virtue of a power of attorney executed in his favor by Mr. A. H. Williams. He had brought the original power of attorney with him. Exhibit P-40 was its photocopy. He also produced Ex. P-41, photocopy of the power of attorney in favor of Mr. A. H. Williams duly authenticated by the notary public. Later on, the original power of attorney in favor of Mr. A. H. Williams was produced on record. It was exhibited as Ex. P-42A. In cross-examination, he stated that he did not remember as to who executed the power of attorney in favor of Mr. Williams. He did not know the procedure prescribed under the articles for the purpose of delegating the authority on behalf of the bank. He did not know whether any resolution ad been passed by the board of directors to execute a power of attorney in favor of Mr. Williams. He did not know what was the quorum required for a meeting for passing such a resolution. It was suggested to him that no resolution was ever passed for executing the power of attorney in favor of Mr. Williams and, in reply, he stated that there must have been a resolution, but he had no knowledge about it, nor had he seen it nor could he give its particulars.

13. Exhibit P-40 is a photocopy of the power of attorney executed by Mr. A. H. Williams in favor Mr. N. M. Bahl conferring on him various powers including powers to represent and defend the bank and its interest before any or all judges and courts of all classes and jurisdictions in any action, suit or proceeding in which the bank may be a party or may be interested, in administrative, civil and criminal contentions, whether as a plaintiff or defendant, with power to institute actions, etc. Thus, under the power of attorney, Mr. N. M. Bahl has been duly authorised by Mr. Williams to file suits and to sign and verify pleadings on behalf of the bank. The power of attorney is duly authenticated by a notary public, Mr. Damodar Devji Damodar. Therefore, under s. 85 of the Evidence Act, its due execution and authentication shall be presumed. This was not disputed. Thus, it has been proved that Mr. Williams had executed the power of attorney, copy Ex. P-40, in favor of Mr. N. M. Bahl, who has actually singed and verified the plaint and filed the suit, empowering him to sign and verify the plaint and file the suit.

14. Exhibit P-42A is the original power of attorney executed by Mr. Walter R. Humphrey (executing officer) and Mr. Carl W. Desch (cashier) for First National City Bank. It bears the seal of the bank. By this power of attorney, the bank conferred power on Mr. Williams including this powers of filing suit on behalf of the bank, etc. He was also empowered to sub-statute or delegate this power of attorney in whole or in part in favor of such one or more employees of the bank he may deem advisable, but with-out divesting himself of any of the powers granted to him by this power of attorney, and to grant an execute in favor of any one or more such employees, powers of attorney containing all or such authorisation as he may deem advisable.

15. This power of attorney has been authenticated by John R. A. Beatty, Notary Public, State of New York, and bears his seal. Mr. Norman Goodman, country clerk and clerk of the Supreme Court of the State of New York, in and for the county of New York, has certified that Mr. John R. A. Beatty, was a notary public in and for the State of New York, duly commissioned, sworn and qualified to act as such. The seal of the clerk of the country of New York, State of New York, USA, bears the certificate of Vice-Consul Consulate General of India, New York, for the legalisation only of the seal of the clerk of the county of New York, State of New York, USA. The authentication by the aforesaid notary public reads as under :

> "In the city country and State of New York, USA, on this 27th day of February, 1976, before me a notary public in and for the State and country of New York, USA, and the undersigned resident witnesses, legally qualified and personally known to me, appeared :
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> (1) Walter R. Humphrey (hereinafter referred to as 'the Executing Officer'), a banker domiciled in Central Islip, New York, and holding the office of vice-president in First National City Bank (hereinafter referred to as 'the bank'), a national banking association duly constituted, registered and in existence in accordance with the laws of the USA now in force, and (2) Carl W. Desch, a banker domiciled in Garden City, New York, the cashier of the bank (hereinafter referred to as, in his capacity of, 'cashier').

16. I, the notary public, being as attorney-at-law, as hereinbelow stated, do hereby certify and attest :

> A. That the executing officer and the cashier are of full age, competent to act in the premises to me personally known and that they are authorised to execute this instrument by virtue of the powers granted to them by and under the bye-laws of the bank and the laws of the USA, and that the executing officer said that he on the one hand hereby revokes and cancels any instrument of per of attorney previously executed, with the exception of that certain instrument executed on February 27, 1976, on behalf of the bank in favor of Allan Henry Williams (hereinafter referred to as 'the Attorney-in fact') of legal age, banker, and now residing in India, and that he (the executing officer), on the other hand, does hereby authorise and empower the attorney-in-fact, acting in the name or on behalf f the bank, or any of its branches, or any interest it or they may have or represent, as follows : ....."

17. It also contains the following recitals :

> "B. That the executing officer also said that the bank hereby ratifies and confirms all that the attorney-in-fact may or shall lawfully do or cause to be done within the powers conferred upon him by virtue of this instrument, including that which he may do or cause to be done after the revocation of the said powers but before notification of such revocation.
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> C. That the cashier is the secretary of the board of directors of the bank and that he exhibited to me the minute book of the bank which verifies each of the following to be true and correct :
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> The bye-laws of the said bank, as now in force, contain among others the following provisions :
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> 'Article IV : Officers and Agents :
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> Section 9 : Cashier : The board of directors shall appoint a cashier, who shall be the secretary of the board and of the executive committee, and shall keep accurate minutes of their meetings. He shall attend to the giving of all notices required by these bye-laws to be given. He shall be custodian of the corporate seal records, documents an papers of the association. He shall have and may exercise any and all other powers and duties pertaining by law or regulation to the office of cashier or imposed by these bye-kaws. He shall also have such further powers and duties as may from time to time be assigned to him by the board of directors, the chairman, the president, or the chairman of the executive committee .....
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> Section. 12 : Vice-Presidents : ..... Each vice-president shall .... also have such further powers and duties as may from time to time be assigned to him by the board of directors, the chairman, the president, or the chairman of the "executive committee".

2. The board of directors of the bank, at its organization meeting, duly held with a legal quorum on March 18, 1975, elected the executing officer as a vice-president and the cashier as such, of the bank, and such elections have continued, and are now in full force and effect.

3. That the cashier stated to me that under article IV, section 12 of the bye-laws of the bank as hereinbefore in "C" set forth, the executing officer has had duly conferred on him the power to execute this power of attorney.

D. That the bank exists in perpetuity in accordance with the laws of the United States of America.

E. That I am a notary public in the State of New York, residing in New York country of that State, and, as such, notary public, am duly authorised to act as such in the county of New York, that I am

also an attorney at-law, duly authorise to practise as such in the State of New York, and that I have my office at No. 399, Park Avenue, in the City and County of New York, that the executing office and the cashier are now in the exercise of their respective offices as hereinbefore stated, and that the executing officer and the cashier have declared before me under their most absolute responsibility that the particulars contained herein are in full force.

F. That this document is executed after I had made to the executing office and the cashier all the legal admonitions and after they had read this instrument; that it is executed in accordance with the laws of the United States of America and of the State of New York, USA, and with the extrinsic requisites and formalities that said laws require in order to constitute the same a public document.

For FIRST NATIONAL CITY BANK Sd/- Walter R. Humphrey (executing officer) Witnesses :

1. Sd/- Sd/Car W. Desch (cashier)

2. Sd/- S/d John R. A. Beatty (notary public)"

18. The contention of Mr. Anil Divan, learned counsel appearing for the defendant, is that there was no oral or documentary evidence to prove that the said two officers, namely, Mr. Walter R. Humphrey and Mr. Carl W. Desch, were duly authorised by the bank means of a resolution to execute this power of attorney in favor of Mr. Williams. Power of attorney was a document meant to identify as to who was the principal, i.e.,., the donor of the powers, who was the donee, and what the extent of the powers subject-matter of donation. All that could be presumed under s. 85 of the Evidence Act was that these two officer put their signatures on the power of attorney, that they were duly identified and were genuine persons and further that the power and further that the power of attorney contained authentication by the notary public, which in other words, meant that it contained genuine signatures of the notary public, proving the act of authentication, and nothing more. According to the learned counsel, on presumption could be raised that the said two officers were competent to execute the power of attorney on behalf of the plaintiff-bank.

19. On the other hand, Mr. Rajiv Sawhney, learned counsel appearing for the plaintiff, contended that under s. 85 of the Evidence Act, there is a presumption that a power of attorney duly authenticated was executed by the person executing it, the person, it was argued, would include a natural person as well as legal person like a corporate body. Exhibit P-42 was executed by the plaintiff-bank. The two officers signed on it for the plaintiff-bank. It contained the seal of the bank and it would thus be presumed that it was executed by the plaintiff-bank. He also contended that there was a lot of difference between "authentication" and "attestation". "Authentication" was a step forward than "attestation". The former meant that the power of attorney was in proper form of law which would mean that the officers executing it on behalf of the bank were duly authorised to do so.

20. Section 85 of the Evidence Act reads as under :

> "Presumption as to powers of attorney. - The court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any court, judge, magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated."

21. For raising a presumption under this section, the twin requirements to be fulfillled are : (1) that the document in question must purport to be a power of attorney, and (2) that it must purport to have been executed before and authenticated by a notary public, or any court, judge, magistrate, Indian consul, or vice-consul, or representative of to Central Government. Exhibit P-42A is a document which purports to be a power to be a power of a attorney. It further purports to have been executed before and authenticated by a notary public. Thus, both these requirements stand fulfillled and there is no dispute to this extent.

22. What presumption has to be raised under s. 85 of the Evidence Act ? Section 85 says that the court shall presume that such a document was so executed and authenticated. Executed by who : obviously by the person purporting to have executed the power of attorney before the notary public. Exhibit P-42A is purported to have been executed by Water R. Humphrey, executing officer, and Carl W. Desch, cashier, for the First National City Bank. It bears the seal of the bank. The real executant or the donor of powers is, therefore, the First National City Bank. Section 85 in terms makes no distinction between a natural person and legal person. Thus, a presumption would have to be raised under s. 85 that this power of attorney had been executed by the said bank. In other words, it will also be presumed that the two officers had the authority to execute the power of attorney on behalf of the bank.

23. The authentication is not merely attestation but something more According to Law Lexicon by T. P. Mukherjee and K. K. Singh, authentication connotes an attestation made by an authorised officer by which he certifies that a record is in due form of law. The words "due form of law" are very important and lend support to the contention of the learned counsel for the plaintiff, namely, that under s. 85 a presumption would arise that the two officers, who executed the power of attorney on behalf of the bank, were competent to do so. The nature ad manner of the authentication by the notary public also support this contention. If it was not required of the notary public to satisfy himself about the competence of these two officers to execute the power of attorney, there was no necessity for him to satisfy himself about their power to execute the power of attorney.

24. In the absence of any provision contained in s. 85 of the Evidence Act, any party to a suit, etc., relying on a power of attorney would have to prove it like any other document by producing in the witness- box the executant of the document, or the person in whose presence it was so executed, or the person acquainted with the signatures of the executant, etc., as the case may be. If that party is a company corporated in India or in any other country, it would be further required to prove that the person or persons executing the power executing the power of attorney on its behalf had been duly authorised by means of a resolution duly passed in accordance with law and the articles of

association. The purpose of s. 85, in my view, is to eliminate all this cumbersome evidence in case such a power of attorney is executed before and authenticated by a notary public, or other authorities mentioned therein. If evidence to prove these facts except the fact of execution by the executant was insisted upon, most of the purpose of s. 85 would be frustrated specially in these days of prevalent international trade.

25. This very question came up for consideration before this court in National & Grindlays Bank v. Radio Electronics Corporation P. Ltd. [1978] RLR 217. After detailed discussion, Gill J., upon examining the various authorities and meaning of the word "authentication", held as under :

> "In my view section 85 (of Evidence Act) does not draw any distinction between the kind of documents, viz :
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> Power of attorney executed by an individual and the one executed on behalf f a company. Authentication of any of these instruments by a notary public raised a legal presumption that the same has been duly executed and the person or persons, who had executed, had the authority to do so. Undoubtedly, such a presumption is not conclusive, being rebuttable. The other party is, therefore, legally entitled to disprove such a presumption. The reason to incorporate such a provision is quite obvious. Its inclusion is intended to obviate the production of evidence as is other wise enjoined to prove the execution of the document. Embarking on an inquiry and demanding proof about the authority of the executant would frustrate the very purpose for which section 85 has been engrafted. Moreover, asking for proof would have far reaching consequences. Apart from entailing delay and unnecessary expense, it would also hamper the entire trade, more particularly trade. Thus, the interpretation placed by the learned counsel for the defendants does not reflect or effectuate the real legislative intention. It, on the other hand, unwarrantedly restricts and whittles down the true meaning and legitimate scope of an unambiguous provision."

26. Similar view was taken by Sultan Singh J. in Suit No. 671/77, Bank of India v. Ajaib Singh Prittam Singh, decided on April 20, 1979. Repelling the contention of the defendants to the contrary, it was observed as under :

> "The contention of the learned counsel for defendants Nos. 1 to 3 is that there is a presumption of the execution of power of attorney, i.e., the signatures of the executant on the power of attorney, but there is no presumption that the persons executing the power of attorney on behalf of the plaintiff-bank were duly authorised to execute such power of attorney. I do not agree. If the contention of the learned counsel for the defendants is accepted, section 85 of the Evidence Act would become redundant. The purpose of section 85 of the Evidence Act is that the power of attorneys are executed throughout the world and if such power of attorney is executed and authenticated by a notary public or other officer as mentioned in section 85 of the Evidence Act, the court is bound to presume that the power of attorney was so executed and authenticated. This presumption, however, is a rebuttal

> presumption and the person challenging the authority of the attorney under such power of attorney is to prove that such power of attorney is invalid or that the person acting on the basis of such power of attorney is not duly authorised."

27. The decision of Gill J., referred to above, was followed.

28. In National and Grindlays Bank Ltd. v. World Science News, , the question whether the fact that the person who had executed the power of attorney on behalf of a body corporate had the authority to do so was to be the presumption or not, was not urged or decided as such, but on the production of a similar power of attorney duly authenticated by a notary public and relying on s. 85 of the Evidence Act, the onus to prove whether the suit had been instituted by a duly authorised person was placed on the defendant. The relevant observation at page 264 read as under :

> "The document is the present case is a power of attorney and again on the face of it shows to have been executed before, and authenticated by, a notary public. In view of section 85 of the Evidence Act, the court has to presume that it was so executed and authenticated. Once the original document is produced purporting to be a power of attorney so executed and attested as stated in s. 85 of the Evidence Act, the court has to presume that it was so executed and authenticated. The provision is mandatory and it is open to the court to presume that al the necessary requirements for the proper execution of the power of attorney haven been duly fulfillled. There is no doubt that the section is not exhaustive and there are different legal modes of executing a power of attorney, but once a power of attorney on its face shows to have been executed before, and authenticated by, a notary public, th court has to so presume that it was so executed and authenticated."

29. This court is thus constantly taking the view that under s. 85 of the Evidence Act, it would also be presumed that the person executing the power of attorney on behalf of a corporate body was competent to do so. I find no reason to take a different view.

30. On behalf of the defendant, reliance has been placed on various authorities. The first judgment is in Suit No. 316 of 1966 (Caltex (India) Ltd. v. Faridabad Glass Works Private Limited) decided by P. N. Khanna J., on November 8, 1969. The decision in this judgment is of no help to the defendant. The suit in that case had bee filed by one Tej Pal Singh and to prove that he was duly authorised to do so, he produced power of attorney executed in his favor by one Vincent de Paul Ryan, General Manager of Caltex (India) Limited, in India. To prove that the said Ryan was competent to execute the power of attorney on behalf of the company, the plaintiff earlier produced a copy of the resolution of the board of directors of the plaintiff company, but later on, on being permitted to lead additional evidence, produced an affidavit, of the plaintiff attested by a notary public and countersigned by the India consul in New York stating therein that the resolution, reproduced in the affidavit, had been passed by the board of directors of the plaintiff company. It was held that the said affidavit, though duly attested, was not sufficient to prove the board resolution. The question of the extent of the presumption which is to be raised under s. 85 was not at all involved in that case.

31. In Harihar Prasad Singh v. Deonarayan Prasad, AIR 1956 SC 305, the question which came up for determination was regarding the presumption to be raised under s. 90 of the Evidence Act. It was held that the presumption enacted in s. 90 could be raised only with reference to original documents and not to copies thereof. It was further held that if the document happended to be signed by the agent of the person against whom the presumption is sought to be raised and there is no other proof that he was an agent, s. 90 does not authorised the raising of a presumption as to the existence of the authority on the part of the agent to represent that person. Much help cannot be obtained from this decision for the simple reason that the extent of presumption which has to be raised under s. 85 was not involved in that case. Section 90 empowers the court to presume in the case of a thirty years' old document, the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed or attested. In certain circumstances, that signatures and every other part of that document, which purported to be in the handwriting of any particular person, was in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purported to be executed. It does not speak about the presumption regarding the authentication. As observed above, authentication is something more than attestation.

32. In Siva Pratap Bhattadu v. CIT, AIR 1924 Mad 880, it was held that a statement contained in a power of attorney that a particular firm was a joint family would not prove the fact itself. There is n quarrel so far as the principle is concerned, but this principle is not helpful in determining the scope of the presumption to be raised under s. 85.

33. In Bhagwat Pratap v. Zafar Mohammad, AIR 1926 Oudh 241, to prove that one Ram Bahadur purported to act as agent of his father, reliance had been placed on the endorsement made by the Sub-Registrar at he time of registering a mortgage deed. It was held tat that endorsement was prima facie evidence that the power of attorney under which it was presented was regular in all respects and nothing more. This decision is not applicable to the question involved in this case which is entirely different.

34. The last authority relied on is the decision of Allahabad High Court in Wali Mohammad Chaudhari v. Jam al Uddin Chaudhari, . In this case, it was held that the authentication under s. 85 was not merely attestation. It means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution. I fail to understand as to how this authority helps the defendant. It was nowhere held that, under s. 85, it could not be presumed that the person executing the power of attorney on behalf of a corporate authority had the requisite authority to execute it on behalf of that authority.

35. It was then argued that the statement made by the notary public in the power of attorney regarding the articles of plaintiff-bank being contents of documents could be proved only by producing memorandum of articles. Reliance was placed on a decision of the Judicial Commissioner in Nar Bahadur Gurung v. Anil Krishna Bhattacharya, AIR 1970 Manipur 57. In this case, it was held that the statements contained in the powers of attorney have to be proved like any other statements.

There is no quarrel so far as the principle of law is concerned. But, I have referred to these statements not for the purpose of using them as evidence to prove those facts but only to show the act of notarisation. Those statements do show that the notary public had satisfied himself about the authority of the executants of the power of attorney.

36. It was also contended that the contention canvassed on behalf of the plaintiff, if accepted, may result in absurdities inasmuch as anybody may execute a power of attorney purported to be on behalf of a legal person and get it notarised and then the person in whose favor it has been executed may execute similar power of attorney and so on, which was likely to create chaos. There is no merit in this contention for the simple reason that the presumption raised is a rebuttable presumption.

37. I, consequently, hold that Mr. M. M. Bahl was competent to sign and verify the plaint and file the suit. Issue is decided in favor of the plaintiff.

38. Issue No. 2 : The plaintiff, inter alia, has claimed a sum of Rs. 6,36,580 towards costs incurred by it in the suit filed in the Court of Second Civil Judge, Kanpur, for enforcement of the mortgage created by the Manufacturers Ltd., in its favor. For the purpose of recording a finding, if the plaint disclose a cause of action regarding this claim, the court has to see the allegation in the plaint only and has to take into consideration the defense plea. The plaintiff's claim is that under the guarantee deed dated November 21, 1973 Ex. P-14), it was entitled to the costs. Under para. 1 of the guarantee deed, the defendant-Jute Mills had guaranteed due payment and to discharge all the principal liabilities under the loan agreement including the interest and in respect of costs, etc. In presence of these averments, it cannot be said that the plaint does not disclose any cause of action regarding this claim. Whether, on an examination of the entire document and other documents and circumstances of the case, the plaintiff is entitled to this amount or not is a different matter. But, it cannot be said that the plaint did not disclose any cause of action regarding this claim. The plaint does disclose a cause of action. This issue is decided against the defendant.

39. Issue No. 5 : In para. 28 of the plaint, it was pleaded that the loan was advanced by the plaintiff at New Delhi and it was repayable in New Delhi, and, therefore, the court had the jurisdiction to dispose of the case. These allegations were not denied by the defendant in its written statement. It was, however, pleaded that while seeking the relief under O. 2, r. 2 of the CPC, in the Kanpur suit of enforcing the mortgage created in its favor, the plaintiff has averred that the said on the basis of the mortgage would be instituted, if all, against the present defendant, only at Kanpur. These allegations, even if correct, make no difference. First of all, according to the defendant, it was not a party to those proceedings. That order, therefore, does not affect its rights and, consequently would not create rights in its favor. Moreover, it is not a suit for enforcing the mortgage. It is a suit under O.37 for recover of the money as observed earlier. As a matter of fact, this issue was not pressed. The issue is decided against the defendant.

40. Issue NO. 5 : In para. 28 of the plaint, it was pleaded that the loan was advanced by the plaintiff at New Delhi and it was repayable in New Delhi, and, therefore, the court had the jurisdiction to dispose of the case. These allegations were not denied by the defendant in its written statement. It was, however, pleaded that while seeking the relief under O. 2, r. 2 of the CPC, in the Kanpur suit of

enforcing the mortgage created in its favor, the plaintiff has averred that the said suit on the basis of the mortgage would be instituted, if at all, against the present defendant, only at Kanpur. These allegations, even if correct, make no difference. First of all, according to the defendant, it was not a party to those proceedings. That order, therefore, does not affect its rights and, consequently, would not create rights in its favor. Moreover, it is not a suit for enforcing the mortgage. It is a suit under O. 37 for recovery of the money as observed earlier. As a matter of fact, this issue was not pressed. The issue is decided against the defendant.

41. Issues Nos. 3, 4 and 7, 12 and 14 : The claim in the present suit is based on a deed of guarantee (Ex P-14) admittedly executed by the defendant-Jute Mills in favor of the plaintiff. The plaintiff's case in the plaint is that the request for loan was made to it by the Manufacturers Ltd. and the defendant-Jute Mills. Loan was sanctioned in favor of both of them. The relationship created under the deed of guarantee between the plaintiff and the defendant was that of a creditor and principal debtor and liability of the defendant-Jute Mills was that of a principal debtor. On the other hand, defendant's contention is that it had executed a deed of guarantee (Ex. P-14) whereby it guaranteed the due payment and discharge of the principal liabilities to the bank, under the loan agreement executed in favor of the plaintiff-bank by the Manufacturers Ltd. on November 21, 1973, subject to the conditions contained in the said deed of guarantee. Its liability was that of a surety and its liability stood discharged on account of various acts and omissions committed by the plaintiff, which will be noticed later on.

42. The question whether the defendant's liability was that of a principal debtor would be decided under other issues, if need be. For purposes of deciding these issues, it would be presumed that the liability of the defendant-Jute Mills was that of a surety.

43. According to s. 126 o the Indian Contract Act, 1872, a "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety" : the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

44. In the present case, it is the defendant's own case that the defendant was the surety and the plaintiff-bank was the creditor. Examination of s. 126 reveals that the liability of the surety arises only on the default of the principal debtor. It is not disputed in the present case that the principal debtor, i.e., the Manufacturers Ltd., has failed to discharge its liability under the loan agreement dated November 21, 1973, which liability the defendant has agreed to discharge under the deed of guarantee (Ex. P-14. It is admitted that the plaintiff-bank filed a suit for the recovery of the amount due to them under the said agreement and obtained a decree for Rs. 55,27,570 with interest at the rate of 12.5% from the date of the suit till repayment. It is otherwise clear from copy of the decree (Ex. D-8). It is not disputed that the plaintiff-bank has not been paid a single penny in execution of the said decree against the Manufacturers Ltd. passed by the Second Civil Judge, Kanpur. In para. 23 of the plaint, it was pleaded by the plaintiff that it had not recovered any money under the said decree passed by the Kanpur Court. This allegation as such was not denied in the written statement. It was, however, pleaded that in pursuance of the decree passed by the said court on October 15,

1977, the machinery and plant had been sold for Rs. 45,50,101 and because of the said sale which had been confirmed by the court, the defendant's liability, if any, stood discharged. There is no specific plea in the written statement that any amount out of this sale amount or otherwise had been paid to the plaintiff in execution of the said decree. I have already observed that the payment had been stayed by the Allahabad High Court on a petition filed by Ram Achhvavar Sigh against the Manufacturers Ltd., vide its order dated March 10, 1980, copy Ex. D-6. It has been proved that the plaintiff-bank has not been paid anything is execution of the decree against the Manufacturers Ltd. Thus, in my view, there is a clear default on the part of the principal debtor giving rise to the liability of the surety. As a matter of fact, this fact was not much disputed.

45. The plea of the defendant, however, is that this liability stood discharged on account of the acts and omissions on the part of the plaintiff, namely, (1) filing of Suit No. 315 of 1977 in the court of the Second Civil Judge, Kanpur, for the recovery of the loan amount against the principal debtor, i.e., the Manufacturers Ltd., without impleading the defendant-Jute Mills as a party therein and, further, by entering into a compromise with the Manufacturers Ltd., without the concurrence of the present defendant and obtaining the consent decree dated October 15, 1977, and (2) by getting the receiver appointed by consent of the parties in that suit and agreeing to sale/disposal by the receiver of the security that had been offered by the Manufacturers Ltd. and getting a part of the security, i.e., the plant and machinery, put to sale and sold by the receiver in pursuance of the said court decree and giving its consent to the sale which was later on confirmed by the court.

46. Section 135 of the Indian Contract Act, 1872, reads :

> "A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract."

47. Whether the act of the plaintiff in obtaining a consent decree against the Manufacturers Ltd., the principal debtor, amounts to "composition" within the meaning of s. 135, is the question which requires determination. To decide this question, it is necessary to examine the claim of the plaintiff in the suit filed in the Kanpur Court, the terms of the compromise and the decree passed on the basis of the compromise.

48. Ex. D-1 is the copy of the plant is Suit No. 315 of 1977 filed by the plaintiff against the Manufacturers Ltd. in the court of the Second Civil Judge, Kanpur. A persual of this document shows that the suit was filed by the plaintiff only against the Manufacturers Ltd. The suit was based on the basis of the equitable mortgage created by the Manufacturers Ltd. in favor of the plaintiff as a security for the loan of Rs. 60 lakhs advanced to the Manufacturers Ltd. The plaintiff sought a preliminary decree against the Manufacturers Ltd. for a sum of Rs. 55,27,57.01 (Rs. 55 lakhs towards unpaid principal and Rs. 27,57.01 towards unpaid interest up to the date of the filing of the said suit) with future interest from the ate of the suit till the date of the decree and, thereafter, on the decretal amount till payment, at 12.5% Per annum. The plaintiff also prayed for a final decree for the sale of the mortgage property comprising the Manufacturers Ltd.'s factory, land, building, plant and machinery installed/affixed and/or lying therein together with affixations and fittings, etc., at

Kamlapat Road, Kanpur, U.P., in the event of the said Manufacturers Ltd. failing to comply with the preliminary decree.

49. Ex. D-8 is the copy of the application made under O. 23, rule 2, CPC, by the parties in the said suit. According to the document, the parties to the suit agreed to compromise the suit on the following terms :

> (i) That the suit be decreed and final mortgage decree be passed in favor of the plaintiff for Rs. 55,27,570 with interest from the date of the suit till final repayment @ 12.5% per annum. Further, costs of the suit be awarded to the plaintiff as prayed for.
>
> (ii) That Shri S. K. Kapoor, advocate, advocate, District Government Counsel (Civil), Kanpur, be appointed receiver to take immediate possession of defendant-company's properties including land, buildings, plant and machinery at Kamlapat Road, Kanpur, mortgaged to the bank and to immediately prepare an inventory thereof.
>
> (iii) That the receiver be directed and empowered to take appropriate steps at the earliest to dispose of the mortgaged properties in one or more lots. The sale proceeds of all assets so disposed of be paid over directly to the plaintiff towards the decretal amount.
>
> (iv) That the receiver be empowered to dispose of the assets by public auction and/or by private sale and the expenses will be paid by receiver to the plaintiff. However, no sales shall be effected without the prior consent of the plaintiff.
>
> (v) That pending the sale of the godowns and the buildings at Kamlapat Road, Kanpur, the receiver be empowered to license out the same with prior written consent of the plaintiff and on such terms as the plaintiff shall have previously approved. Compensation, license fee, etc., realised thereupon shall be paid over directly tot he plaintiff towards the decretal amount.
>
> (vi) That the receiver's remuneration be fixed by this Hon'ble court at Rs. 500 per month plus out of pocket expenses. The fees payable to the receiver shall be costs in the suit but at the first instance shall be paid by plaintiff/decree holder.
>
> (vii) That on the decree being satisfied, the remaining assets and funds, if any, in the hands of the receiver shall be handed/paid over to the defendant.
>
> (viii) That the parties be empowered to move this Hon'ble court for further directions, as may be required, from time to time.

50. Exhibit D-4 is the copy of the judgment of the Second Civil Judge dated October 15, 1977, deciding the suit in terms of the compromise which was to form part of the decree. The final decree

was directed to be prepared accordingly.

51. An examination of the claim in the plaint and the terms of the compromise reveal that the consent decree was for the full amount of Rs. 55,27,570 with future interest from the date of the suit till final payment at 12.5% Instead of a preliminary mortgage decree, a final mortgage decree was passed. I fail to understand as to how such a decree can fall within the purview of the provisions contained in s. 135 of the Indian Contract Act. if the principal debtor, the defendant in a suit, concedes judgment by filing the written statement admitting the allegations in the plaint as correct and a decree following, can it be said that the plaintiff in that case had made a "composition" with the principal debtor within the meaning of s. 135. Obviously, no such conclusion can be drawn unless it is the result of a fraud or collusion. An honest defendant is not supposed to contest the suit when there is no defense open to him. In the present case, the terms contained in the application under). 23, r. 3, CPC, amount to admitting the claim of the plaintiff in toto. Such a consent decree would not be covered by the provisions of s. 135. Filing a suit by the creditor against the principal debtor and obtaining a decree for the full amount would not by any stretch of imagination amount to "composition" resulting in the discharge of liability of the surety. It would not make the slightest difference if the decree is a consent decree, especially in this case when the creditor by way of the consent decree got 100% relief. Ordinarily, the plaintiff would have been entitled to a preliminary mortgage decree for the amount in suit, but it obtained a final decree, such a decree has not in any way impaired or prejudiced the right of the defendant-surety and, in my considered opinion, there is no question of discharge of its liability. It may be added here that there is no suggestion even that the consent decree obtained from the Kanpur court was a result of any fraud or collusion between the creditor and the principal debtor. My view finds support from a Division Bench decision of the Bombay High Court in the case of Amin Abdul Kadar Murtasa v. Jivraj Otmal Ratnagiri Bhagidari, .

52. The fact that a reviver was appointed with the consent of the parties by the Kanpur court while passing a final decree would also not make the slightest difference. Section 51 of the CPC provides various modes for the execution of the decree and one of the modes contained in clause (d) of the said section is by appointing a receiver. Appointment of a receiver was, therefore, a step in the execution of the decree and it does not in any way affect the rights of the surety. I, consequently, hold that by filing Suit No. 315 of 1977 in the Kanpur court and obtaining a consent decree and by getting a receiver appointed under the final decree, the liability of the defendant surety does not stand discharged.

53. Section 141 of the Indian Contract Act, 1872, reads :

> "A surty is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security of 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."

54. This action confers a right on the surety 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. The word

"security" has been defined under the Indian Contract Act. What was meant by the expression "security" came for consideration before the Supreme Court in State of Madhya Pradesh v. Kaluram, . The relevant observations at pages 1108-1109 read as under :

> "The expression 'security' in s. 141 is not used in any technical sense; it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefit of the rights of the creditors against the principal debtor which arise out of the transaction which gives rise to the right or liability : he is, therefore, on payment of the amount due by the principal debtor, entitled to be put in the same position in which the creditor stood in relation to the principal debtor."

55. Similar observations have been made in Amrit Lal Govardhan Lalan v. State Bank of Travancore, .

56. It is admitted in para. 16 of the plaint itself that on November 22, 1973, the Manufactures Ltd. had deposited documents of title relating to their textile unit at Kalpi Road, Juhi Khurd, Kanpur, and thereby mortgaged in favor of the plaintiff all the said properties of the textile unit to secure the repayment of the loan of Rs. 60 lakhs. Thus, by virtue of the provisions contained in s. 141, the defendant- Jute Mills, the surety, was entitled to the benefit of this mortgage.

57. "Mortgage", according to s. 58 of the Transfer of Property Act, 1882, is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or the performance of an engagement which may give rise to a pecuniary liability. The plaintiff-creditor, therefore, had the right to realise the loan amount by enforcing its right under the mortgage. A mortgagee, under s. 67 of the Transfer of Property Act, has a right, after the mortgage money has become due to him, to obtain from the court a decree for the property to be sold. In other words, the plaintiff-mortgage had a right to realise the loan amount by getting a decree for the sale of the mortgaged property and getting it sold. The defendant-surety has the benefit of this very right by virtue of s. 141 of the India Contract Act.

58. By getting the plant had machinery, which were admittedly a part of the mortgaged property, sold in execution of the decree passed by the Kanpur court, which sale has since been confirmed, can the plaintiff- creditor be said to have lost or parted with such security, resulting in the discharge of the surety under s. 141 ? In my vie, the answer to this query must be in the negative. Losing or parting with the security of a part of it, in my judgment, would mean depriving itself and, consequently, the surety of the right to enforce the security, i.e., the right to realise the loan amount by getting the mortgaged property sold. No such thing has been done by the mortgagor. On the other hand, the plaintiff-creditor had enforced the right by getting a part of the machinery and plant sold. This was the only right which a mortgage had under the equitable mortgage, and, therefore, it cannot be said that the plaintiff-creditor had lost or parted with its right in respect of this security. The plaintiff-creditor by this act has not impaired in any way the remedy of the defendant-surety against the principal debtor. If the defendant pays the loan amount for which it is liable to the surety under the deed of guarantee, it will stand subrogated by operation of law in place of the plaintiff

decree- holder in that case. Section 140 of the Indian Contract Act vests this right in the surety. It is entitled to the remedy which the creditor has against the principal debtor, i.e., the right to enforce the security and al means of payment. Under s. 145 of the Indian Contract Act, he has a right to be indemnified and to recover from the principal debtor whatever sum he has originally paid under the guarantee, and to stand in place of the creditor. The act of the plaintiff-creditor in obtaining a decree and in getting the part of the mortgaged property sold in execution thereof, is in no way inconsistent with these rights of the surety. The defendant-surety would be entitled to the benefit of sale, i.e., sale money of the plant and machinery. There is no suggestion that the sale was not bona fide or there was any negligence on the part of the receiver or the plaintiff in conducting the sale of the plant and machinery of the Manufacturers Ltd. In such a situation, I am of the considered view that the creditor had neither lost nor parted with a part of the security which it had against the principal debtor, i.e., the Manufacturers Ltd.

59. The contention of Mr. Anil Divan, learned counsel appearing for the defendant, is that the surety was entitled to the security in exactly the same condition in which it existed at the time when the contract of surety was entered into. The part of the security, i.e., machinery and plant, has been sold and, therefore, the part of the security was not intact or in the same position and, consequently, the defendant- surety would stand discharged. Reliance was placed on Pledge v. Buss, 123 Revised Reports 281. The relevant observations at p. 283 read as under :

> "The law is now well established, that a person having a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt which he has guaranteed, to take the security in its original condition unimpaired."

60. These observations, in my view, do not help the defendant-suerty, if examined a bit carefully. It is not in dispute that the surety on paying the amount which he has guaranteed is entitled to the benefit of the security in its original condition unimpaired. This, however, does not obtaining a decree and get the mortgaged property sold. In that case, the principal debtor having become bankrupt, the creditor instead of going in under the bankruptcy, as he might have done, and applying to have the security realised and to be admitted to proof for the balance, in effect, purchased the equity of redemption, the price being the surrender of his right of proof. This affected the right of the surety inasmuch as all that the creditor could then give to the surety was a security taking priority from a suit for enforcement of the mortgage of the mortgage which, as a matter of fact, was his duty to do and was the only course open to enforce the payment of loan. It cannot be said that the security had been impaired in any way.

61. Reliance was then placed on Strange v. Fooks, 141 Revised Reports 254. The facts of that case were quite different and have no application to the facts of the present case. Reference was also made to para. 12A in the case of State of M. P. v. Kaluram, , where the law stated by Hannen J. in Wulff and Billing v. Jay [1872] 7 QB 756, 763, has been quoted with approval. These observations read :

> "..... I take it to 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 fulfill 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 notes in Rees 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 thought 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'."

62. This rule of law not help the defendant at all. By obtaining a decree and getting the part of the mortgaged property sold in execution thereof, it cannot be said that the creditor had put security out of its power to hand over to the surety. On payment, the defendant-surety can stand in the shoes of the creditor and take the place of creditor- decree-holder in that case.

63. Decisions in Amrit Lal, and the State Bank of Saurashtra v. Chitaranjan Rangnath Raja, , do not apply to the facts of this case.

64. The rule of law laid down in Forbes v. Jackson [1881-85] Reprint All ER 863, does not help the defendant at all, because it cannot be said that the surety on account of the sale of the part of the mortgaged property in execution of the mortgage decree had ceased to be entitled to the benefits of the original security. Making of such sale cannot amount to any impairment of the rights of the surety.

65. It was held in Polack v. Everett [1874-80] Reprint All ER 99I, that the question whether the surety is benefited when the principal creditor deprives him of any right is not to be looked into. But, in the present case, as stated earlier, the question of depriving the surety of the rights does nit arise. The act of the creditor in filing the suit, obtaining the mortgage decree, getting the part of the property sold was all in good faith, bona fide act and by way of enforcement of its rights under the loan agreement and the mortgage. These acts do not impair the rights of the surety in any way.

66. Section 91 of the Transfer of Property Act confers a right on the surety, on the payment of the mortgage debt or any part thereof, to redeem the mortgaged property or institute a suit for redemption of the mortgaged property. It was urged on behalf of the defendant that this right had been impaired by the act of the plaintiff-creditor in filing a suit in Kanpur without impleading there defendant-surety and obtaining a decrees and getting the part of the mortgaged property sold. What

is examination of s. 60 of the Transfer of Property Act, is a right to require the mortgage to deliver to the mortgagor or anybody else who is entitled to redeem a mortgage deed all documents relating to the mortgaged property which are in the possession or power of the mortgaged on payment or tender at a proper time and place of the mortgaged money. How this right of the surety can be said to have been impaired by obtaining a final mortgage decree and getting the part of the property sold ? The rights under the said decree on payment of the amount agreed to be paid under the deed of guarantee would vest in the defendant-surety by virtue of the provisions contained in ss. 140 and 141 of the Indian Contract Act. The decision of the Privy Council in Mohammad Shere Khan v. Raja Seth Swami Dayal [1922] 2nd 44 ALL 185; AIR 1922 PC 17, has no application to the facts of the present case. The filing of the suit and obtaining the mortgage decree in getting the mortgage property sold does not amount to a clog on the equity of redemption or affects the statutory right of the surety to redeem the property for the reasons already recorded.

67. Similarly, the decision in Mehrban Khan v. Makhna [1930] 2nd 11 Lah 251; AIR PC 142, has no application to the facts of the present case.

68. For all these reasons, I am of the considered opinion that the defendant-surety does not stand discharged on account of the said acts on the part of the plaintiff-creditor.

69. It was then contended on behalf of the defendant that the defendant- surety was a necessary party in the Kanpur suit and by not adding it as a party to that suit, its right had been impaired. Non-joinder of the necessary party in the Kanpur suit, in my opinion, would not affect the present case, so fat as the rights of the plaintiff are concerned. It may be stated that under O.1,r. 13, CPC, all objections on account of non-joinder of the parties are required to be taken at the earliest possible opportunity and in parties are required to the taken at the earliest possible opportunity and in all case where issues are settled on or before such settlement, unless the ground of objection has subsequently arisen and any such objection not so taken, shall be deemed to have been waived. The objection of non- joinder of a necessary party was required to be taken by the Manufacturers Ltd. Who was the only defendant in that case. The fact that is did no take this objection would have the effect of waiver of this right. In any case, this does not affect the rights of the defendant in the present suit. It may be stated that the provisions contained in O.2, r. 2, CPC,are not at all attracted because the present suit is not in respect of the same cause of action. The earlier suit was based in the mortgage created in favor of the plaintiff by the principal debtor, the Manufactures Ltd. The claim in this suit is based on the deed of guarantee, which is entirely a different cause of action. The fact that the consideration was the same is of no consequence. An independent separate suit against the surety was competent.

70. The surety would stand discharged, under s. 135, if the creditor makes a "composition" with or promises to give time to, or not to sue the principal debtor the surety assents to such a contract. Similarly, under s. 141, the surety stands discharged if the creditor loses or without the consent of the surety parts with such security. Under the terms of the deed of guarantee (Ex. P-14), the defendant-surety has given its content for all these acts as is clear from a perusal of cls. 4 and 10 of the said document, which read as under :

"4. We hereby confirm and declare that notwithstanding anything herein contained, we have agreed with you that although as between the principal and ourselves we are to be considered as sureties only for the principals, yet as between your bank and ourselves, we are to be above, viz., Rs. 60 lakhs, in respect of all advances made and to be made and of all facilities granted and to be granted by your bank to the charged or exonerated (a) by any variance made without our consent in the terms of any contract or transaction between your bank and the principals, or (b) by any contract made between your bank and the principals by which the principals be released, or (c) by any act or omission of your bank the legal consequence of which may be the discharge of the principals, or (d) by your bank making a composition with, or promising to give time to or not to use the principals without our previous assent thereto, or (e) by any other act, omission, dealings or arrangement between the principals, their successors and assigns and the bank, its successors and assigns, whereby we or of us as sureties for the principals would have been so discharged or exonerated.

10. The guarantee shall remain in full force and effect for the ultimate balance of your dues against the principals in terms of the loan agreement and this will not be vitiated by any indulgence or time granted by you to us and/or to the principals and /or your obtaining nay promissory notes and/or other securities and/or guarantees from the time to time. This guarantee shall also not be vitiated by any act of omission or commission on your part and/or on the part of the principals under the loan agreement and this guarantee shall also remain in full force and effect notwithstanding any changes in the constitution of your bank and/or the principals and/or ourselves and notwithstanding the winding up of the principals and/or ourselves."

71. These clauses contain the consent envisaged under ss. 135 and 141. Such a consent, in my view, could be given at the time of original agreement of surety ship and it is not necessary that it should be given only at the time of making the composition, etc.

72. The following observations of Chitty on Contracts, 24th edn., Vol. II, p. 1014, para. 4803, may be helpful :

"Contract of suretyship as against principal debtor alone. - It is by no means unusual for a party to a contract to be a contract to be a principal debtor as against the creditor, but a surety as against another debtor. Such an arrangement is commonly entered into where the creditor wishes to avoid the technical rules relating to contracts of suretyship under which the surety may become discharged from liability in various circumstances. In this event, the transaction takes effect according to its terms, that is to say there will be a contract of suretyship between the principal debtor and the surety, but there will be no contract of suretyship between the surety and the creditor. The creditor is, accordingly, entitled to treat the surety as a principal debtor in every respect."

73. From these observations, it is clear that a surety can enter in to an agreement with the creditor giving up his rights relating to the contract of suretyship under which the surety may be discharged from its liability in various circumstances.

74. In Hodges v. Delhi and London Bank Ltd. [1900] 27 IA 168, the appellants, in becoming sureties to the respondent, covenanted that though as respects the principal debtors they should be considered as sureties only, yet as regards the bank they should be considered as principal debtors, so as not to be exonerated from liability by any dealing between the bank and the principal debtor which would otherwise have that effect. IT was held that the appellants became liable as principal debtor to the bank immediately on the default of the principal debtor and were not discharged by reason of time having been given to him. The effect of the deed being plain, neither the appellant could escape liability except by proof of mis, representation nor undue influence. To the same effect is the decision of the Division Bench of the Madras High Court in Krishnaswami Aiyar v. Travancore National Bank Ltd. [1940] 10 comp Case 162 (Mad); AIR 1940 Mad 437. On behalf of the defendants, reliance was placed on a Division Bench decision of the Punjab High Court in Union of India v. Pearl Hosiery Mills, , where a contrary view has been taken. In this case, it was held in clear terms that the provisions of s. 133 were not subject to a contract to the contrary between the parties to the contract. The said section was in unqualified terms. It was not necessary to put in the words : notwithstanding any contract to the contrary" in this section, because wherever the Legislature wanted that the terms of the contract between the parties should take precedent over the provisions of any section, the words "in the absence of any contract to the contrary" or "in the absence of any special contract" have been inserted in that particular section as has been done in ss. 152 and 163 of the Contract Act and, there fore, this right could not be waived. With utmost respect, I have not been able to persuade myself to accept this view. In my opinion, there was no necessity for the Legislature to provide the words "in the absence of any contract" in s. 133 or 141, because the sections themselves speck of consent of the surety, regarding variance in the terms of the contract between the principal debtor and the creditor, composition with the principal debtor, etc. In the presence of the words "without the surety's consent", the words "in the absence of any contract to the contrary" would have been surplus. With utmost respect, therefore, I would follow the Privy Council and the Madras judgments and hold that the rights conferred on the surety under s. 133, 135 or 141 could be waived by specific agreement in the deed of guarantee. As a matter of fact,such an agreement would amounts to consent within the meaning of those sections.

75. The plaintiff has also raised the plea that the defendant had no right to the benefit of the securities held by the plaintiff and furnished to it by "Manufactures Ltd." because of the agreement dated September 25, 1971, as modified on October 3, 1973. These documents are annexures I and II to the plaint. So far as the agreement dated September 25, 1971, is concerned, it does not contain any terms from which it can be said that the defendant had given up its right to the benefit of the securities held by the plaintiff and furnished to it by the Manufactures Ltd. Reliance was, however, placed on cls. 5(a) and 5(b) of the supplementary agreement. These provide that the licenser, i.e., the Manufactures LTd., may if so required by the licensee, i.e., the defendant-Jute Mills, and in order to meet the terms and conditions of the bank or financial institutions, obtain for the license loan and/or advance of moneys for various purposes, the between the licensor and the licensee, the licensee shall be liable for payment of the principal money, interest, costs, etc. The licensee was also

authorised to give to the bank such securities/guarantees as may be required by the bank or financial institutions. These clauses do not help the plaintiff at all. From this clause, in my view, it cannot be said that the defendant had given up the right of the securities, which the licensor, i.e., the Manufacturers Ltd., were required to give to the bank for loans.

76. Plaintiff has also led evidence to prove that besides the consent contained in the deed of agreement (Ex. P-14), the acts of obtaining the consent and machinery of the Manufacturers Ltd., were done with the consent of the defendant's surety. Mr. N. M. Bahl, PW-1, deposed that, after the suit had been filed at Kanpur, a series of meetings took place between the bank, Dr. Gaur Hari Singhania, who represented the Jute Mills as a director thereof, and Mr. P. D. Singhania, who represented the Manufacturers Ltd., as well as the defendant-Jute Mills. The suit at Kanpur was decreed on the basis of the compromise arrived at between the bank, Dr. Gaur Hari Singhania and Mr. P. D. Singhania. He also stated that the name of the receiver was suggested by Dr. Gaur Hari Singhania to which the bank greed. After the receiver had taken possession of the assets of the Manufacturers Ltd. in pursuance of Kanpur court decree, the bank with Dr. Gaur Hari Singhania pressed the receiver to advertise for sale of the plant and machinery of the Manufacturers Ltd. and the receiver accepted the offer regarding the sale of the plant and the machinery for Rs. 45, 50,101 with the consent of all the parties, namely, the bank Mr. P. D. Singhania and Dr. Gaur Hari Singhania, who represented the Jute Mills.

77. In rebuttal, Dr. Gaur Hari Singhania, appearing as DE-1, deposed that there were never any discussion between the Jute Mills, the Manufacturers Ltd. and the bank, regarding the compromise of the Kanpur suit. The receiver was not appointed at his suggestion. There was no discussion regarding the advertisement and sale of the property of the Manufacturers Ltd. In cross-examination, he admitted that he assured the bank that all steps would be taken for lifting of the attachment so that there was no delay in the sale of the assets of the Manufacturers Ltd.

78. On behalf of the plaintiff, reliance was also placed on Ex. P-31, a letter dated February 5, 1979, written to Mr. Bahl of the plaintiff- bank by Dr. Gaur Hari singhania. It was stated in this letter that he was unable to appreciate that the progress in delivering the plant and machinery to the buyers, M/s. C. Patel & Co., was due to any default on their part. It was admitted that the plant and machinery was attached for realisation of the ESI dues, but it stated that, at no time, delivery had been held up on account of non-payment of ESI dues. It was also stated that liability of the ESI was met as soon as it was pointed out.

79. I have carefully examined the entire evidence. I am unable to accept the oral evidence regarding the alleged consent. It is mainly for the reason that the bank, admittedly, maintained minutes of the important discussions, but the said minutes have not seen the light of the day. So far as the letter, Ex. P031, is concerned, it appears that the bank complained to Dr. Gaur Hari Singhania that there was delay of delivery of the plant and machinery to the auction-purchaser because of the default on their part which allegation was refuted. This, in my view, strictly speaking, would not amount to consent, as contemplated by s. 141 of the Indian contract.

80. In any case, there is nothing on the record to show that Dr. Gaur Hari Singhania or Mr. P. D. Singhania who were directors of the Jute Mills had any authority to give the requisite consent on behalf of the Jute Mills. Giving of the consent was not a ministerial or just an administrative act. It was a very important act which had the effect of creating a liability which otherwise would have been discharged and, therefore, such a consent could be given by the directors only on the authority of the board resolutions and not otherwise.

81. The learned counsel referred me to a copy of the board resolution dated June 13, 1974 (Ex. P-5), passed by the board of directors of the Jute Mills. By this resolution Mr. P. D. Singhania and Mr. Banshidhar Kasera, directors of the company, were authorised to execute a hypothecation deed and to affix the common seal of the company on the document in their presence. The document was to be executed in favor of the U.P. Financial Corporation. I fail to understand as to how this resolution authorised Dr. Gaur Hari Singhania or Mr. P. D. Singhania to give the requisite consent on behalf of the Jute Mills. Similarly, the resolution July 20, 1973 (copy Ex. P-45), authorised Dr. Gaur Hari Singhania as director of the Jute Mills to deposit with the plaintiff- bank title deeds of the properties to create and equitable mortgage. The power to give the requisite consent cannot be spelled out from this resolution.

82. I would also add here that the plaintiff has not raised any specific plea in the plaint regarding the alleged consent by the defendant the sale of the plant and machinery, etc., except the terms of the agreement contained in Ex. P-14.

83. It has also been argued that the plaintiff has claimed the amount in the suit on the plea of the existence of the relationship of creditor and principal debtor between the plaintiff and the defendant and it cannot be allowed to claim an amount on the basis of the relationship of creditor and surety. This contention is fallacious. The suit is based on the deed of guarantee (Ex. P-14). It is correct that, according to the contention of the plaintiff raised in the plaint, the relationship created under the said deed of guarantee was that of a creditor and the principal debtor. That plea, however,does not make much difference for the simple reason that it was the plea of the defendant itself that its status was that of a surety. Moreover, parties have been put to issue and no prejudice whatsoever has been caused.

84. For all these reasons, I hold that the suit filed by the plaintiff against the defendant as surety was competent and maintainable. The defendant-surety does not stand discharged from its liability as a surety on account of the various acts of omission and commissions on the part of the plaintiff.

85. The sale of the plant and machinery of the Manufacturers Ltd. in pursuance of the decree obtained from Kanpur court has no effect on the liability of the defendant. Issue Nos. 3,4, 7, 12 and 14 are decided accordingly.

86. Issues Nos.6,9 and 11 :

> In view of my finding on issues Nos. 3,4,7,12 and 14 that the suit against the defendant as a surety was maintainable and it does not stand discharged of its

liability, I need not go in to the question whether there existed the relationship of creditor and principal debtor between the parties to the suit.

87. Issues Nos. 8,10 and 13 :

Under s. 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

88. What is the liability of the principal debtor in this case ? An examination of the decree passed by the Kanpur court, buy consent, shows that a final decree for Rs. 55,27, 570.01 with interest at 12.5% per annum from the date of the suit till realisation and costs amounting to Rs. 4, 15,030 was passed in favor of the plaintiff-bank, the creditor, against the principal debtor, the manufacturers Ltd. The liability of the principal debtor was, therefore, Rs.55,27,570.81 toward unpaid principal and interest up to the date of filing of the suit in the Kanpur court; interest at 12.5% per annum on the said amount which from the date of that suit till the date of the filing of the present suit, came to Rs. 15,46,583.67; costs amounted to Rs. 4,15,030.

89. The plaintiff's case is that it had spent Rs. 6,36,580 towards costs. In other words, according to its claim, it had incurred Rs. 2,21,570 towards costs after the passing of the decree. To prove this fact, the plaintiff examined Mr. H. K. Dhadhwal (PW-3), Manager, Citibank, Parliament Street, New Delhi. He deposed that the had brought the original ledger, photocopy, Ex. PW-3/1, relating to the account of the Manufacturers Ltd. and that a sum of Rs. 2,21,570 had been incurred in the suit after the decree which included the remuneration paid to the receiver @ Rs.1,500 per month and the payments made to watch and ward staff. I see no reason to disbelieve his statement. It is correct that the requisite vouchers, though available, have not been proved but his statement finds corroboration from the entries in the ledger. It may be added that in the written statement, the correctness of this fact was not disputed. All that was disputed was the right of the plaintiff to realise this amount from the defendant. thus, the liability of the principal debtor on the date of the filing of the suit was Rs. 77,10,733.67, the amount claimed in the plaint.

90. It is an admitted fact that the receiver appointed under the content decree by the kanpur court has since sold the plaint and machinery, part of the property mortgaged, of the Manufactures Ltd. for a sum of Rs. 45, 50, 101 which sale has since been confirmed. The action- purchaser has, admittedly, deposited a sum of about RS. 8 lakhs with the receiver. It has also not been disputed that the payment of the amount to the plaintiff-creditor(decree-holder in that case) has been stayed by the Allahabad High Court, vide its order dated March 10, 1980 (Ex. D-6). This order, admittedly, is still in force. Can it be said, these circumstances, that the claim of the plaintiff-creditor stands satisfied to the extent of Rs. 45,50,101 or a part of it ? The answer to this question must be in the negative. Unless the amount is paid to the creditor, it will not be discharge of the legal obligation. similarly, the mere passing of the decree by Kanpur court, in the absence of any realisation of the decretal amount, would not discharge the liability or a part of it, of the principal debtor or the surety. The amount for which decree has been passed by the Kanpur court can be claimed in the suit by the plaintiff against the surety. It is, however, subject to the limit, if any, fixed in the deed of guarantee. By obtaining the decree alone, the claim would not stand satisfied.

91. The last question which is quite important is whether the liability of the defendant-surety is limited under the deed of guarantee and, if so, to what extent. The relevant clauses of the deed of guarantee (Ex. P-14) for the purpose of deciding this question may be reproduced :

"Gentlemen :

92. In consideration of your making advances at our request or otherwise giving creditor or financial accommodation to J. K. Manufacturers Ltd., an existing company within the meaning of the Indian companies Act, 1913, having its registered office at Kamla Tower, Kanpur, U.P. (hereinafter called 'the principals"), in terms of or manner recorded in the loan agreement dated November 21,1973, executed by the with you (herein after called 'the said loan agreement'), we, the undersigned (wherein I/we are referred to as 'the guarantors') do hereby guarantee the due payment. and discharge of all the principals' liabilities to you, whether incurred before or after the date hereof on the strength of or under the said loan agreement or in terms there of and whether incurred before or after the date hereof on the strength or or under the said loan alone or jointly with others, and in whatever capacity whether as principals or contingent, including all liabilities, if any, in respect of advances, letters of credit, cheques, hundis, bills, notes, drafts and other negotiable or non-negotiable instruments drawn, accepted, endorsed, or guaranteed by the principals, and in respect of interest with monthly rests, commission and other usual or reasonable banking charges and in respect of all costs, charges and expenses which you may incur in paying any rent, rates, taxes, duties, calls, Installments, legal or other professional charges, or other outgoings whether for the insurance immovable or any chattels or actionable claims of scrip securities or title deeds pledged or to be pledged or mortgaged, to be mortgaged or assigned or to be assigned to or deposited with you as security for the due payment and discharge of the principals' liability to you.

93. And following are the general conditions :-...

4. We hereby confirm and declare that notwithstanding anything herein contained, we have agreed with you, that although as between the principal and ourselves, we are to be considered as sureties only for the principals, yet as between your bank and ourselves, we are to be considered as principal debtors to your bank to the extent mentioned above, viz., Rs. 60 lakhs, in respect of all advances made and to be made and of all facilities granted and to be granted by your bank to the principals, so that none of us nor our successors and assigns shall be discharged or exonerated.

> (a) by any variance made without our consent in the terms of any contract or transaction between your bank and the principals, or (b) by any contract made between your bank and the principals by which the principals be released, or (c) by any act or omission of your bank the legal consequence of which may be the discharge of the principals, or (d) by your bank making a composition with, or promising to give time to or not to sue the principals without or previous assent thereto, or (e) by any other act, omission, dealings arrangement between the principals their successors and assigns and the bank, its successors and assigns, whereby we or any of us as sureties for the principals would have been so discharged or exonerted.....

10. The guarantee shall remain in full force and effect for the ultimate balance of your dues against the principals in terms of the loan agreement and this will not be vitiated by any indulgence or time granted by you to us and/or to the principals and/or your obtaining any promissory notes and/or other securities and/or guarantees from the principals or otherwise and/or renewing the same from time to time. this guarantee shall also not be vitiated by any act of omission or commission on your part and/or on our part and/or on the part of the principals under the loan agreement and this guarantee shall also remain in full force and effect notwithstanding any changes in the constitution of your bank and/or the principals and/or ourselves and notwithstanding the winding up of the principals and/or ourselves."

94. It is settled law that the terms of the surety bond should be construed strictly in a manner most favorable to the surety or the guarantro. It is said that the surety is a favored debtor : see Pannaji Devichand v. Basappa Virappa Bellari, AIR 1943 Bom 243 and Subhankhan Ramjankhan v. Lalkhan Haji Umarkhan, AIR 1948 Nag 123.

95. An examination of the deed of guarantee reveals that the first part of the document is all inclusive. In this para, the defendant-surety guaranteed the due payment and discharge of all the principals ' liabilities in respect of the principals, interest, commission, costs, ect. This para. thus covers the entire liability which the principal debtor has towards the creditor, However, clause 4 limits that liability. The relevant portion of this clause says :

> "4. We hereby confirm and declare that notwithstanding anything herein contained, we have agreed with you, that although as between the principal and ourselves, we are to be considered as sureties only for the principals yet as between your bank and ourselves, we are to be considered as principals debtors to your Bank to the extent mentioned above, viz., Rs. 60 lakhs, in respect of all advances made and to made and to be made and of all facilities granted and to be granted by your Bank to the principals,....."

(emphasis Here printed in italics supplied)

96. A plain reading of the terms contained in this clause is first that it over ides the terms contained in another clause of the document. this is clear from the words "to the extent mentioned above, viz., Rs. 60 lakhs", show that the liability was limited to Rs. 60 lakhs. No doubt the words "mentioned above" after the words "to the extent" may have reference to the terms contained in para. 1 of the document, according to which, the liability was all inclusive. but the next following words, "viz., Rs. 60 lakhs", explain the extent to which the liability was undertaken, "viz." according to Webster's Dictionary, means, "namely". The words "mentioned above" have thus been explained by the next following words, "viz., Rs. 60lakhs". The words "viz., Rs. 60 lakhs", quantify and limit the extent of the liability of the defendant up to Rs. 60lakhs only. Thus, the liability under the redemption bond, in my view, was limited to Rs. 60 lakhs.

97. The learned counsel appearing for the plaintiff contended that the words "to the extent mentioned above, viz., Rs. 60lakhs", mean only principal and have been used only to identify the

principal amount and not the liability.

98. This contention cannot be accepted. The word "extent", according to chambers 20th Century Dictionary, means - the space or degree to which a thing is extended; bulk, compass, scope, degree or amount : to some extent", a stretch or extended space, evaluation of property, ect. The word "extent", in my view, means the scope of liability which has been named as Rs. 60 lakhs. It the purpose was only to refer to the loan agreement or the loan amount, then ordinarily after the words "to the extent mentioned above", there was no necessity of adding the words, "viz., Rs. 60 lakhs ". The liability of the defendant was, therefore, to the extent of Rs. 60 lakhs only. It may be added here that the liability would remain the same even in case even in case the relationship of the plaintiff and the defendant was that of a creditor and a principal debtor.

99. Mr. Rajiv Sawhney then contended that the plaintiff may be allowed interest in equity. Reliance was placed on the decision of the Supreme Court in Mahabir Prasad Rungta v. Durga Dutta, . It was laid down in this case that interest for a period to the commencement of a suit is claimable either under an agreement or usage of trade or under a statutory provision or under the Interest aCt, for a sum certain where notice is given. Interest is also awarded in some cases by courts of equity. In the present case, there is no specific agreement regarding interest in the deed of guarantee. there is no plea or proof or usage of trade. It was conceded by the learned counsel for the plaintiff that the provisions of the Interest Act were not attached.

100. Now, it has to be seen whether circumstances existed to invoke equitable jurisdiction to allow interest. The circumstances relied upon are : (1) that it was a commercial transaction; (2) the creditor was a bank and it was its business to advance loans on interest and on all its transactions the payment of interest was involved; and (3) that under the deed of guarantee, the liability of the surety was arise first when notice in writing was given to it by the bank requiring it to pay and that such a notice has been given as far back as October 27, 1976, copy annexure VII to the plaint. The defendant did not make the payment in spite of the notice.

101. These circumstances would not help the plaintiff much in claim against the surety.

102. In any case, in Maine and New Brunswick Electrical Power Co. Ltd. v. Alice M. Hart, AIR 1929 PC 185, it was held that when once a contract has been executed, then apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction and interest cannot be allowed on equitable principle. Consequently interest on equitable principle cannot be allowed. Even otherwise, it is not a case of hardship inasmuch as the remedy of the plaintiff-creditor for the balance amount would still be available against the principal debtor under the decree passed by the Kanpur court.

103. The result is that the plaintiff is entitled to recovered only Rs. 60 lakhs from the defendant. Issues are decided accordingly.

104. In conclusion, a decree for Rs. 60 lakhs (rupees sixty lakhs) with proportionate costs and future interest at 12.5% per annum on Rs. 55 lakhs (rupees fifty-five lakhs) from the date of the suit till

realisation is passed in favor of the plaintiff against the defendant.