IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE FAISAL ARAB
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO. 157-K OF 2016 &
C.M.A. NO. 1865-K OF 2018
(On appeal against the judgment dated 04.10.2016 passed by the High Court of Sindh, Karachi in First Appeal No. 50/2000)

Abdul Ghaffar Adamjee and others

... Petitioners

VERSUS

National Investment Trust Limited and another

... Respondents

For the Petitioners: Mr. Arshad Mohsin Tayebaly, ASC
Mr. K.A. Wahab, AOR

For the Respondents: Mr. Muhammad Masood Khan, ASC

Date of Hearing: 31.12.2018

JUDGMENT

CMA NO. 1865-K/2018

For the reasons stated, this application is allowed and the order dated 24.12.2018 dismissing the main appeal for non-prosecution is recalled, which stands restored to its original number. We now proceed to hear the main appeal.

CIVIL APPEAL NO. 157-K/2016

Faisal Arab, J.- National Investment Trust, the respondent No.1 herein, was one of the two major financial institutions which provided finance to Adamjee Polycrafts Limited, hereinafter referred to as 'the company', for setting up of its Polypropylene Film Manufacturing Plant in Hub Industrial Trading Estate, Lesbela, Balouchistan. The other financial institution was PICIC, which provided a long-term finance of Rs.95,000,000/-. Respondent No.1 provided a markup based short-term financial facility of Rs.22,500,000/- under an agreement of finance executed on 23.02.1988 repayable by 30.06.1990. The company made

certain repayments to respondent No.1 between 1990 and 1993 but failed to settle its account and a sum of Rs.18,500,000/- remained outstanding. After giving ample opportunities to the company to pay off its dues the respondent No.1 filed recovery suit in the banking court in the year 1996. Alongwith the company its sponsor directors were also sued as defendants No.2 to 4, who are appellants in this case. The manner in which recovery was sought from them was described in prayer clause 'D' of the plaint which reads *"Judgment and Decree, jointly and severally, against Defendants No.2, 3 and 4, for the amount which is left unsatisfied after the sale of all the hypothecated machinery as well as the mortgaged land and buildings, described in para 8 above."*

2. The respondent No.1's suit was decreed in the sum of Rs.18,500,000/- alongwith markup at the rate of 15% per annum on the basis of banking law then prevailing. Apart from the company, the decree was executable also against the appellants, who were treated as guarantors under Sponsors' Undertaking executed contemporaneously with the agreement of finance. The appellants appealed before the Division Bench of the Sindh High Court which failed vide impugned judgment dated 04.10.2016. As the defence put forward by the appellants was not accepted by the appellate court as well, the appellants preferred this appeal with the leave of the court.

3. Learned counsel for the appellants argued that the impugned judgment is bad in law and facts as the courts below erred in treating appellants as guarantors on the basis of undertaking as their liability was that of indemnifiers and that too confined to what has been set out in clauses 1 to 4 and nothing more. He submitted that as the appellants neither committed any breach of clauses 1 to 4 of the undertaking nor it can be read as a guarantee towards financial obligation of the company under the agreement of finance dated 23.02.1988, therefore, both the courts below erred in ordering recovery of decretal amount from them.

4. Learned counsel for the respondent on the other hand argued that when the second recital and clauses 6 and 7 of the Sponsors' Undertaking furnished by the appellants in their capacity as company's sponsor directors is read in the context of Section 126 and Section 128 of the Contract Act, 1872 it comes out as a contract of guarantee, making the liability of the appellants co-extensive with that of the company.

5. It may be mentioned here that while recovery proceedings were pending, the company went into liquidation and as PICIC also had its substantial claim against the company, there is no likelihood that respondent No.1 could recover the decretal amount from the company. The respondent No.1 has, therefore, turned to the appellants for recovery in their capacity as guarantors under Sponsors' Undertaking which they had executed. The appellants are resisting the recovery against them on the ground that their undertaking does not make them personally liable to pay any defaulted sum owed by the company. The crux of the matter revolves around the controversy as to whether the Sponsors' Undertaking furnished by the appellants is a contract of guarantee and make them personally liable to settle the decretal amount on account of inability of the liquidated company to discharge its financial obligation under the Agreement of Finance dated 23.02.1988. The Sponsors' Undertaking (portions of which considered relevant have been highlighted) reads as follows:-

"SPONSORS' UNDERTAKING

> *We (1) Abdul Ghaffar Adamjee son of Late Zakaria Adamjee, residing at 9, Fatima Jinnah Road, Karachi. (2) Ms. Salma Adamjee wife of Abdul Gaffar Adamjee, residing at 9, Fatima Jinnah Road, Karachi and (3) Akbar Adamjee son of Abdul Gaffar Adamjee residing at 9, Fatima Jinnah Road, Karachi are sponsoring Directors of ADAMJEE POLYCRAFTS LIMITED, having its registered office at Adamjee House, I.I.Chundrigar Road, Karachi (hereinafter referred to as the "Company");*
>
> ***AND WHEREAS you have, on terms and conditions contained in the Investment Agreement dated 23-02-1988 made between yourselves and the Company, agreed to invest a sum of Rs.22.5 million (Rupees Twenty two point Five million) with the Company;***

AND WHEREAS you have agreed to make the above investment on the condition, inter alia, that we furnish you this guarantee;

NOW, THEREFORE, WE DO hereby agree, undertake and guarantee as follows:

1. *The funds so made available to the company by us and such other funds as may be made available by the NIT shall be fully and honestly invested in the project as required by you.*

2. *The Company shall, to your satisfaction, implement the project within the prescribed time-table or within such time as may be fixed by you and keep you fully posted/informed of the progress of the project as may be required by you. We also agree not to change the nature/score/capacity of the project without your prior written permission.*

3. *We shall engage a cause the Company to engage suitable technical personnel and consultants/advisers for the erection of its plant and machinery and employ professionals, technicians, financial and sales executives of the Company for carrying out its business.*

4. *We shall not sell/transfer/dispose of our shareholdings in the Company and/or transfer the management of the Company/Project without your prior written consent.*

5. ***Any breach of this undertaking shall be deemed to be an event of default under the aforesaid Agreement and we shall be personally liable to all the monetary obligations, detriments, losses that may be sustained by you due to any breach of the covenants herein.***

6. ***We shall indemnify and keep you always safe, harmless and indemnified.***

7. ***Our obligations hereunder are joint and several and the same shall be binding on us until the investment made by you in the Company is fully satisfied*** *and you notify the same to us.*

6. The first recital of Sponsors' Undertaking refers to the investment made by respondent No.1 in the company under the agreement of finance dated 23.02.1998 and the second recital states that respondent No.1 has agreed to make the investment on the condition that the appellants furnish this guarantee. Clause 6 of the undertaking stipulates that the appellants shall indemnify and keep respondent No.1 always safe, harmless and indemnified and clause 7 stipulates that appellants' obligations hereunder are joint and several and binding on them until the investment made

by respondent No.1 in the company is fully satisfied. Reading clauses 6 and 7 of the Sponsors' Undertaking together with its recitals what comes out is this: *'respondent No.1 has agreed to make investment in the company under Investment Agreement dated 23.02.1988 on the condition that the sponsor directors of the company have jointly and severally committed themselves to keep respondent No.1 always safe, harmless and indemnified until the investment made by respondent No.1 in the company is fully satisfied'.* From the text of the undertaking, it is clearly apparent that it was intended to further secure the finance by seeking personal undertaking from the appellants in case it no more remains possible for respondent No.1 to recover it from the company. It was for this reason that the appellants in terms of clauses 6 and 7 undertook that they would keep respondent No.1 indemnified until investment made in the company is fully satisfied. This very object which emerges from clauses 6 and 7 of the Sponsors' Undertaking cannot be ignored by confining its scope only to the appellants' commitments made in clauses 1 to 4. Hence it cannot be said that the appellants did not give personally assurance to respondent No.1 that in the event it becomes impossible for it to recover from the company, it can have recourse against them for the loss so incurred. We don't see any other way respondent No.1 could remain safe, harmless and indemnified as committed under clauses 6 and 7 of the Sponsors' Undertaking.

7. Sponsors' Undertaking was executed by the appellants contemporaneously with the agreement of finance dated 23.02.1988 so it can be conveniently said that both the documents were part of the same scheme under which respondent No.1 provided finance to the company. Should the object emerging from clauses 6 and 7 of the Sponsors' Undertaking be allowed to be frustrated merely because it contains certain other commitments in the form of clauses 1 to 4 which relate only to proper management and running of the company by the appellants? Parties draft agreements in many ways. While interpreting covenants of a document it is to be seen what was the main purpose and object which brought them to the table to sign it.

When the real purpose of executing a document becomes evident, then in what order various covenants are arranged cannot be made basis to frustrate it by excluding such covenants from its scope that matter the most. So only that interpretation is to be adopted that serves and not vitiates the main purpose with which the document was executed. The respondent No.1 had no interest of its own in the company other than recovery of its financial investment along-with markup and this was the main object behind incorporating clauses 6 and 7 in the Sponsor's Undertaking so as to make the appellants personally liable in case the company is unable to settle the account under the Investment Agreement dated 23.02.1998. When the Sponsors' Undertaking is read in it's entirely, the principal object to seek its execution from the appellants, in their capacity as sponsor directors of the company could only be this and nothing else.

8. As to the question whether the Sponsors' Undertaking is a contract of guarantee or indemnity, a guarantor under a contract of guarantee takes upon himself the responsibility to fulfill a promise or discharge a liability of a third person and by virtue of Section 128 of the Contract Act his liability becomes co-extensive with that of third person unless the parties provide otherwise. Section 124 of the Contract Act defines contract of indemnity as *"A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person..."* Hence in a contract of indemnity the indemnifier undertakes to save a party from the loss caused to it either by his own conduct or by the conduct of a third party who has made certain commitments to the other party, hence he becomes liable only when the loss caused to the other party is finally determined and all possible recoveries have been effected from the party that caused the loss. The obligation of an indemnifier is therefore not co-extensive with that of the principal debtor and comes into existence only when it no more remains legally possible to recover from the principal debtor. From the contents of clauses 6 and 7 of Sponsors' Undertaking also it is evident that the liability of the appellants was not made co-

extensive with the company, hence it is a contract of indemnity. This is exactly what the respondent No.1 considered the appellants to be when in the prayer clause 'D' of the plaint it was stated *"Judgment and Decree, jointly and severally, against Defendants No.2, 3 and 4, for the amount which is left unsatisfied after the sale of all the hypothecated machinery as well as the mortgaged land and buildings...."* Clearly the appellants were sued in their capacity as indemnifiers and in such capacity recovery against them had to wait until all assets of the liquidated company were sold, which has already happened in the liquidation proceedings. In liquidation proceedings, the company has been wound-up and the sale proceeds of all its assets have apparently gone to settle PICIC's claim and respondent No.1's decree remains unsatisfied. The proper stage to initiate recovery against the appellants in their personal capacity as indemnifiers under the Sponsors' Undertaking has thus matured. The learned counsel for the appellants too has considered Sponsors' Undertaking to be a contract of indemnity but wants to confine its scope to clauses 1 to 4 only whereas the document does not stop there as it has three more clauses i.e. 5 to 7. The only avenue left for respondent No. 1 is to recover the loss from the appellants in their capacity as indemnifiers under Sponsors' Undertaking. This the respondent No.1 can now do by seeking execution of its decree. This appeal, therefore, fails and is hereby dismissed.

JUDGE

JUDGE

JUDGE

(For the reasons given in my judgment, I respectfully dissent)

Karachi, the
Announced on _____ at _____.

Approved For Reporting
***K**hurram*

Munib Akhtar, J.- I have had the advantage of reading in draft the judgment proposed to be delivered by my learned brother, Faisal Arab, J., with whom my learned brother Mushir Alam, J. is in agreement. It is with regret that I find myself unable to take the view as finds favor with the majority. For the reasons given below, I would have allowed this appeal.

2. The appellants are aggrieved by the dismissal of their appeal by a learned Division Bench of the High Court. The impugned judgment is reported as *Adamjee Polycraft Ltd. and others v. National Investment Trust Ltd.* 2017 CLD 380. That appeal arose out of judgment and decree of the learned Banking Court made in favor of the present respondent, in a banking suit filed by the latter under the finances/loans recovery law. The defendants in the suit were the company to which the finance was provided (in terms of an investment agreement dated 23.02.1988; herein after "the Agreement") and the present appellants, who were its directors. The company defaulted in repaying the finance (there being only part payment), which led to the filing of the banking suit. (The capacity in which the appellants were sued will be stated shortly.) Two issues were framed and found against the defendants; the suit was accordingly decreed. Both the company and the present appellants appealed against the judgment and decree, which was dismissed by means of the impugned judgment. The company has gone into liquidation, and is not an appellant before us. It is on the record only as a pro forma respondent, and the matter has attained finality against it. The appellants contend that the suit against them ought to have been dismissed, as their liability was only on the basis of a "Sponsors' Undertaking" ("Undertaking") executed by them. It is their case that no occasion arose for the respondent to make a claim in terms thereof, which according to them was only in the nature of an indemnity. The respondent's case is that the Undertaking, on its true interpretation and application, was a guarantee by which, inter alia, the appellants guaranteed repayment of all unpaid amounts due from the company. Since there was a default in payment the appellants were liable in terms of the Undertaking. The suit was rightly decreed against them (along with the company). Leave to appeal was granted in this Court vide order dated 13.12.2016 to, inter alia, consider whether the Undertaking was in the nature of a guarantee or otherwise.

3. The Undertaking has already been set out in full in the majority judgment and therefore need not be reproduced here. It was in form addressed to the respondent (the "you" therein). It may be noted that the Undertaking was

executed by the appellants in their individual capacities as sponsor directors. It then went on to state as follows:

> "We, ADAMJEE POLYCRAFTS LIMITED shall, to your satisfaction perform our part of the obligation as envisaged herein above."

This statement was followed by an execution for and on behalf of the company.

4. The learned Banking Court framed an issue specifically with regard to the appellants' liability, and held them liable for the outstanding and unpaid amount of the finance by reason of clause 6 of the Undertaking.

5. The learned High Court took a different approach. In the judgment, the learned Division Bench reproduced various clauses from the Agreement and also from the Undertaking (pp. 386-389). However (and pertinently), clauses 1 to 4 of the Undertaking were not reproduced. Reference was made to ss. 126 and 128 of the Contract Act, 1872. It was observed that the appellants had become sureties, while the company was the principal debtor and the respondent a creditor (pg. 389, para 11). The learned Division Bench held that "*it is an undeniable fact that the Sponsors' Agreement is a part and parcel of the Investment Agreement* dated 23.2.1988 since it was a mandatory condition as per the agreement entered into between the [company] and the respondent that the company has to furnish an undertaking from all the directors of the company with regard to providing of the funds in the project and for other necessary formalities" (pg. 390, para 13; emphasis supplied). It is clear that for the learned Division Bench its conclusion that the Undertaking was an integral part of the Agreement was vital for holding the appellants liable to the respondent. Thus, it was observed as follows (pg. 391; emphasis supplied):

> "14. A perusal of the Sponsor Undertaking clearly stipulates that the investment by the respondent would only become effective when the sponsors furnish[] guarantee to the company in the shape of Sponsors Undertaking. In the said agreement it has also been provided that the said sponsors/guarantors in view of the specific condition imposed by the respondent with regard to the investment made by them have agreed, undertaken and thereafter given the guarantee with regard to the various clauses of the Sponsors Undertaking. Now if the company has defaulted a question would arise who will bear the liability of the respondent to clear out the same? In our view, in case of default made by the company which was the principal debtor definitely the sponsors/guarantors becoming sureties due to the implication of the agreement have to payout those liabilities of the principal debtor in accordance with the terms of the

> contract entered between them and the respondent. We are fully conscious of the fact that in determining the liability, so far as sponsors/guarantors are concerned, the terms of the contract entered between the parties is of prime importance and each case is to be adjudged by looking to the peculiar facts and circumstances of the agreement entered between the parties. *In the present case, as noted above, in our view since the Sponsor Undertaking being an integral part of the main agreement could not be read in isolation or it could be said that the terms of the Sponsor Undertaking entered between the parties is limited to the extent of the clauses of the said undertaking only*. In view of the facts and circumstances of the case and after reading the agreement and the sponsor agreement this argument is not found to be plausible.
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> 15. In our view the Sponsor Undertaking, *being an integral part of the agreement*, has to be read in conjunction with the agreement entered between the Appellant No.1 and the respondent and the Appellants Nos.2 to 4 cannot absolve themselves from the liability accruing and arising on the Appellant No.1 to be the liability of Appellant No.1 only as the Appellants Nos.2 to 4 in our view are co-extensively liable to payout the liability of the Appellant No.1…."

6. Learned counsel for the appellants submitted that both the learned Banking Court and the learned High Court erred materially in concluding that the appellants were liable to the respondent. It was submitted that the appellants' liability was only as set out in the Undertaking, and not otherwise. That liability was limited to the obligations set out in clauses 1 to 4. Learned counsel submitted that no evidence was led before the learned Banking Court that the appellants had been in breach of those obligations. Thus, no occasion had ever arisen for the respondent to invoke the Undertaking. The appellants had been wrongly sued, and the suit erroneously decreed against them. As to the nature of the Undertaking, learned counsel submitted that it was, on the face of it, an indemnity and not a guarantee. Reference was made to clause 6. Insofar as the recitals of the Undertaking were concerned, where the term "guarantee" was used, learned counsel submitted that in terms of well settled principles of interpretation of deeds and contracts, the recitals could not override the substantive clauses nor used to interpret or supplement the latter when there was no ambiguity or uncertainty regarding them. That, it was submitted, was the position with the Undertaking. The appellants' liability was spelt out in clear and categorical terms. Reliance was placed on *State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd.* AIR 2007 SC 2361, both to show the distinction between an indemnity and a guarantee and the relevant rules regarding interpretation of contracts. It was prayed that the appeal be allowed.

7. Learned counsel for the respondent strongly opposed the appeal and prayed for its dismissal. It was submitted that the appellants' liability to make

payment on the company's default was clear. A proper reading of the Undertaking established unequivocally that it was a contract of guarantee and not, as claimed, an indemnity. In this regard, it was submitted that reliance could be placed on the recitals, where the obligation was clearly stated to be a "guarantee". Without prejudice to this submission, learned counsel submitted that clause 6 was in any case sufficient to establish the appellants' liability. Reliance was also placed on clause 7 and it was emphasized that it expressly provided for the continuing joint and several liability of the appellants till such time as the respondent was repaid in full. In support of his submissions learned counsel also relied on certain case law, being the following decisions of this Court: *State Engineering Corporation Ltd. v. National Development Finance Corporation* 2006 SCMR 619 (leave refusing order), *Rafique Hazquel Masih v. Bank Alfalah Ltd. and others* 2005 SCMR 72 (leave refusing order), *Shipyard K. Damen International v. Karachi Shipyard Engineering Works Ltd.* PLD 2003 SC 191 (leave refusing order) and *United Bank Ltd. v. Pakistan Industrial Credit and Investment Corporation Ltd. and another* 2002 CLD 1781. A judgment of the Lahore High Court, *Ch. Muhammad Sadiq v. Small Business Finance Corporation and others* 2005 CLD 1680, was also relied upon.

8. We heard learned counsel as above and considered the record and case law relied upon. The rules of interpretation in relation to contracts, as presently relevant, are well established. For a conspectus reference may be conveniently be made to *House Building Finance Corporation v. Shahinshah Hamayun Cooperative House Building Society and others* 1992 SCMR 19, where it was held as follows (pp. 27-29):

> "9. While interpreting the terms of contract the Court has to first ascertain the intention of the parties….
>
> 10. The contract has to be construed strictly and literally without deviating or implying anything which is not supported by the intention of the parties and the language of the document. It is a sultry principle of consideration of document that nothing can be implied in a contract which is inconsistent with its expressed terms. In *West Pakistan Industrial Development Corporation, Karachi, v. Aziz Qureshi* PLD 1973 SC 222, it was held that a stipulation not expressed in a written contract should not be implied merely because the Court thinks that it would be a reasonable thing to imply it. Such an implication can be made only on consideration of the terms of the contract in a reasonable manner and if the Court is satisfied that it should necessarily have been intended by the parties when the contract was made….
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> 11. The main purpose of construction of terms of a written agreement is to find out the intention of the parties to the agreement. By looking to the

> words used one has to construe the intention which has persuaded the parties to enter into the agreement….
>
> In construing the deeds the words are to be taken in their literal plain and ordinary meaning. Where the plain and ordinary meaning may lead to inconsistency with other expressions used in the document or absurdity then such plain and ordinary meaning can be modified to avoid absurdity and inconsistency because the law favours to save a deed, if possible. In order to avoid inconsistency and absurdity resulting from plain and ordinary construction the Courts are always anxious to adopt a reasonable construction by which the intention of the parties can be spelt out….
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> … [I]t is clear that the intention of the parties has to be collected from the document as a whole and every part of the deed should be examined and read together….”

In addition to the above, there is another rule that must be kept in mind, which is that a contract is to be read *contra proferentem*, i.e., when there is any doubt or ambiguity as regards the meaning of it or any words used therein, it will be construed against the person who puts it forward.

9. In my view, when the Undertaking is read in light of the foregoing principles, it is clear that the principal obligation was as set out in clause 5 thereof. That clause can be regarded as having two parts. The first part made any breach of the Undertaking an event of default under the Agreement. Now, the appellants were not party to the Agreement. However, as noted, the company also executed the Undertaking, thereby agreeing to perform its obligation “as envisaged herein above”. Thus, the first part of clause 5 became an additional event of default under the Agreement and any breach thereof entitled the respondent (under clause 6.01 of the latter) to, inter alia, demand immediate payment of the finance provided. This was of course without derogation of the events of default already specified in the Agreement. This was the consequence insofar as the company was concerned. As regards the appellants, their obligation was contained in the second part of clause 5. That made them “personally liable to all the monetary obligations, detriments, losses that may be sustained by you *due to any breach of the covenants herein*” (emphasis supplied). The plain meaning of these words is that the liability of the appellants as regards the monetary losses etc. suffered by the respondent was conditional upon, and limited to, such being sustained on account of any breach of the covenants contained in the Undertaking. Those covenants were contained in clauses 1 to 4. None of these clauses contained any obligation to make payment to the respondent if the company failed to repay the finance or any part thereof. As correctly submitted by learned counsel for the appellants, the evidence led at the trial did not show any breach at all of the said

clauses. It follows that insofar as both the appellants and the company were concerned, their obligation and liability under clause 5 was never actualized. There was no (deemed) event of default under the Undertaking as would, under the Agreement, have allowed the respondent to demand immediate repayment of the finance from the company, nor were there any monetary obligations, detriments etc incurred or suffered by the respondent (on account of the breach of clauses 1 to 4) as would make the appellants liable to it.

10. It is important to keep in mind that clause 5 had two distinct consequences, one for the company and the other for the appellants. While both were linked to clauses 1 to 4, they were separate from each other. For the company a breach of any of the said obligations resulted in there being an event of default entitling the respondent to demand immediate repayment of the finance. For the appellants such breach would make them liable to the respondent for detriments, losses etc sustained by it on account thereof. However, there was no intermingling of the consequences. More precisely, a nonpayment of any amount due from the company to the respondent did not make the appellants liable for the same in terms of clause 5. Thus, on the facts as established at the trial, clause 5 could not have been invoked against the appellants, either directly or even indirectly by way of an event of default (deemed or otherwise) by the company under the Agreement.

11. Clause 5 being found inapplicable, it is necessary to consider clause 6. The obligation contained therein was, in my view, an indemnity. This was what the clause said, on the face of it. But, and this is the crucial question, an indemnity against what? Clause 6 was itself silent on this: it simply said that the appellants would keep the company indemnified. Section 124 of the Contract Act speaks of the promise to indemnify saving the indemnity-holder (here the respondent) “from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person”. Thus, clause 6 could have applied in relation to either the appellants’ conduct or that of the company (or both). However, neither this aspect, nor the conduct against which the respondent was indemnified, were specified therein. In other words, the clause was ambiguous and uncertain. Learned counsel for the appellants submitted that the clause indemnified the respondent against any loss suffered by it on account of any breach by the appellants of their obligations under clauses 1 to 4, and no more. With respect, I am unable to agree. That would reduce the clause to redundancy and mere surplusage since clause 5 already expressly secured the respondent as regards the first four clauses. The

indemnity granted in terms of clause 6 had to cover contingencies, situations, acts and/or omissions (i.e., conduct) beyond those identified in clauses 1 to 4. The question is: what were those contingencies and situations?

12. The answer that learned counsel for the respondent would undoubtedly give to the question just posed is that, regardless of whatever the full scope of the indemnity was, it certainly covered the defaulted amount due from the company. That was the conclusion that, in effect, found favor with the learned Banking Court. In support of such a conclusion could be marshaled the recitals contained in the Undertaking to which, arguably, resort could be had to resolve the uncertainty and ambiguity regarding clause 6. In this regard the third recital would be relevant, which provided that the finance was being granted the company on condition that the appellants gave "this guarantee". Now clearly the recital could not affect the legal nature of the substantive provision and, as it were, "convert" the indemnity contained in clause 6 into a guarantee. However, it could resolve the uncertainty and ambiguity, and assist in establishing that the scope of the indemnity did indeed cover any defaulted amount due from the company. Would this be a proper reading and application of clause 6? It must be kept in mind that since the clause was uncertain and ambiguous the *contra proferentem* rule would also be applicable here. As was confirmed by learned counsel for the respondent on a specific query from the Court, the Undertaking was in form and language as determined by the respondent itself. The clause would therefore have to be read against the respondent. During the course of his submissions learned counsel for the appellants drew attention to the invariable practice adopted by financial institutions when giving finance, of taking what are known as "personal guarantees" from the directors or partners of the concern. Such guarantees clearly and expressly provide for the directors' liability for any unpaid or defaulted amount. Learned counsel submitted that had that been the intent of the parties, the respondent could easily have obtained such guarantees from the appellants. Alternatively, such a liability could have been expressly spelt out in the manner of clauses 1 to 4. However, the respondent chose not to adopt any such course. It was content to provide for, and obtain, an indemnity as given in clause 6. The respondent could not thereafter be allowed to improve its position and bring within the scope of the said clause what would, in effect, be a guarantee.

13. The competing positions just noted are not easy to resolve. The principles of interpretation relevant for present purposes have been set out above. After a careful consideration of the record, in my view the balance must tilt in favor of

the appellants and against the respondent. In the end, the *contra proferentem* rule ought to be regarded as prevailing. As was said in the Supreme Court of Canada in *Co-operators Life Insurance Co. v. Gibbons* 2009 SCC 59: "Whoever holds the pen creates the ambiguity and must live with the consequences" (para 25). And in *Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong Ltd* [1996] UKPC 69, the Privy Council said as follows:

> "…the basis of the *contra proferentem* principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not."

Clause 6 was ambiguous and uncertain. That was a consequence of the respondent's own drafting. It must now live with that. If it had wanted to impose a liability on the appellants regarding payment of any amount defaulted by the company it could easily have done so, either by inserting appropriate language in the Undertaking or by obtaining personal guarantees from them. Neither course was adopted. The parties must be held to the bargain as struck. It would be inappropriate for the Court to intervene and alter that bargain, and read into clause 6 an obligation simply because it would be convenient, reasonable or commercially sensible to do so. This is all the more so when the terms of the Undertaking were determined and settled by the respondent. As noted by this Court in the aforementioned judgment (see para 8 above), something ought not to be read or implied into a contract simply because it appears to be reasonable to do so. In the Privy Council decision cited above, the Board also had this to say: "Consistency with a liability which could have been expressed is no ground for imposing a liability which was not expressed". Clause 6 was ambiguous, and that uncertainty left its scope indeterminate. It is not for the Court to find ways to breathe life into the provision so as to enable the respondent to look to the appellants in addition to the company for payment of any amounts defaulted by the latter. All that can safely be said of the clause is that it indemnified the respondent against any loss suffered by it that could be directly attributable to conduct on the part of the appellants, over and above the contingencies and situations particularized in clauses 1 to 4. But that is not the situation with regard to the defaulted amount. Certainly, as a bare perusal of the plaint shows, the respondent did not plead its case against the appellants in such terms. Clause 6 could not therefore be invoked and applied in the manner as sought. With respect, the learned Banking Court erred materially in finding liability in terms thereof,

and the submissions made with regard thereto by learned counsel for the respondent cannot also, with respect, be accepted.

14. I turn to consider clause 7, on which also reliance was placed by learned counsel for the respondent. With respect, the reliance was misconceived. Clause 7 created no independent or substantive obligation. Its effect was procedural: it made clear that the liability of the appellants was joint and several. As is well known, when there is joint liability, each of the parties is liable for the full amount of the claim. Where the liability is several each bears only his own share of the burden of the claim, and is liable accordingly. As here relevant, the effect of joint and several liability is the same as liability that is joint. Thus, clause 7 enabled the respondent to (at its option) sue any one, some or all of the appellants, as it chose, for the full amount of its claim. However, that claim had to arise in terms of the other clauses of the Undertaking. Clause 7 did not create or add to that liability. Indeed, this is made clear by the opening words of the clause, which tied the joint and several liability to the appellants' obligations "hereunder". Furthermore, the reference at the end of the clause, to the appellants remaining liable till such time as the respondent received full satisfaction of its claims against the company, was only as regards the inter-se nature of their liability, i.e., that it would remain joint and several.

15. This brings me to the impugned judgment. As noted above, the learned Division Bench reached two conclusions. Firstly, it held that the Undertaking was a contract of guarantee and the appellants were liable as sureties. Secondly, the Undertaking was regarded as "part and parcel" or an "integral part" of the Agreement. With respect, I am unable to agree with either conclusion. The Undertaking and the Agreement were obviously part of the same transaction, but only in the sense of relating to the finance that the respondent proposed to give to the company. The Undertaking was not in any legal sense (and certainly none as presently relevant) "part" of the Agreement. Equally, the Undertaking had to be construed and applied on its own terms. It was not a guarantee within the meaning of s. 126 and, with respect, the learned Division Bench erred materially in so concluding. In this context, the learned High Court appears to have been swayed by the fact that the Agreement contained an express requirement that the sponsors give an undertaking. However, there is a clear distinction between the obligation to give an undertaking, and the terms thereof. The respondent's obligation to disburse the finance under the Agreement was, inter alia, conditional upon the appellants giving the undertaking. But that did not make the Undertaking a part of

the Agreement, nor could it affect the legal nature and the proper construction and application of the former. That depended on the actual terms of, and language used in, the Undertaking itself. The approach taken by the learned High Court cannot therefore be sustained.

16. The cases relied upon by learned counsel for the respondent do not require detailed consideration since they all involved instruments that were admittedly guarantees. No question of the nature as raised here was in issue in the cited judgments. They are clearly distinguishable.

17. For the foregoing reasons, I would have allowed this appeal and, insofar as it relates to the appellants, have set aside the impugned judgment. I would have, likewise, varied the judgment and decree of the learned Banking Court and dismissed the respondent's suit against the appellants.

Judge

ORDER OF THE COURT

By majority of 2 to 1 (Munib Akhtar, J dissenting), this appeal is dismissed and it is held that the Sponsors' Undertaking is clearly a contract of indemnity and the sponsor directors are liable for any amount that is not recoverable from the company under agreement of finance dated 23.02.1988.

JUDGE

JUDGE

JUDGE

Announced on **03rd of April, 2019** at **Islamabad**.