

CASE- COMMENTARY "BANK OF BIHAR LIMITED V. DHARMDAS GHOSH"

Written by *Nilakhi Barman**, *Aradhya Srivastava*** & *Ashutosh Ranjan Srivastava****

* 3rd Year BALLB Student, Symbiosis Law School, Hyderabad

** 1st Year, B.A., Banathali Vidyapeeth, Niwai, Jaipur

*** 3rd Year BALLB Student, Symbiosis Law School, Hyderabad

INTRODUCTION

The case deals with the contract of guarantee and specifically with the rights of the creditor and surety and the liabilities of the surety with regard to creditor in this case the learned trial court of Patna has passed such a decree which has gave the right to surety to file the injunction petition before the court and this judgment is contradictory to the provisions of the *Indian contract act, 1872* and *Civil procedure code, 1908*. The main question arise about the “*coextensiveness*” and “*Joint and several*” nature of the contract of guarantee.

The Surety is always jointly and severally work with the principal debtor, the surety doesn't have any different liability or right other than Principal debtor although the surety somewhat enjoy the reliability with regard to the difference in the type of contract they get indulged into, sometimes the Surety has their liability for the limited amount of money not of the whole amount and for the creditor it was provisionally stated that if the principal debtor got defaulted the creditor may enforce his remedies from the principal debtor or by the surety it was a discretion of the Creditor.

In the instant case the discretion was restrained by the Learned trial court which was challenged before the high court who has dismissed the appeal without going into the merit of the case and proper view was taken by the Hon'ble Supreme Court of India they got deeply into the provisions of the Substantive and procedural law that was required in the case and they also

incorporated the segment of Civil procedure which has provided the way to check the insolvency of the Principal Debtor.

The Record evidences and surveys has clearly showed in this case that the principal debtor was not insolvent so there is no requirement of postponement of the recovery and Supreme court completely relied on the substantive act (Indian contract Act, 1872) that the recovery of the amount can be done by either of the party and there is no special equity of the case is required or present in the merit of the case.

Now coming again to the case that if we go to the judgment of the Trial court and High court we see that the jurist not thought of the consequences of the judgment. The motive behind the concept of guarantee is to recover money of the creditor easily and if the judgment like this will struck down the liability of the Surety the concept of the guarantee and collateral security become worthless.

The other prospect of the case is **“Guarantee Bond” & “Right of Subrogation”** this two prospects was discussed in length from the arguments as well as contentions of the jurist. The instant case consist of Guarantee bond which has been enforceable in nature at the time of recovery of the debt and subrogation also present in the case because the principal debtor got defaulted and now the creditor can approach to either of the party for their amount on the behalf of the bond present..

In Contract of guarantee there is triparted agreement which has some considerable binding with each other. “Bond of Guarantee” is a force b/w the Creditor and surety. In the instant case subrogation is a right available to the Creditor which can be enforced on the behalf of Guarantee bond and the validated agreement between the parties and all three parties are subject to bounded obligation given by the creditor if the principal debtor doesn’t follow the obligation then it was a duty of the Surety to make principal debtor to oblige the agreement otherwise it was treated as defaulted and subrogation right get activated thereafter in the favor of creditor.

CASE-FACTS OF BANK OF BIHAR LTD. V. DAMODAR PRASHAD

1)-FACT-SHEET NO.1-INTRODUCTION OF THE PARTIES IN CASE:

The plaintiff in the case is “**Bank of Bihar limited (Creditor)**” who has filed the case for the recovery of the loan amount. The defendant no.1 is “**Damodar Prashad(Principal debtor)**”who has borrowed the loan from the bank and defendant no.2 is “**Parasnath Sinha(Surety)**” who is a guarantor in the instant case.

FACT-SHEET NO.2- INTRODUCTION OF THE CASE AND STATEMENT OF JURISDICTION

The plaintiff Bank lent moneys to defendant No. 1 Damodar Prasad on the guarantee of defendant No. 2 Paras Nath Sinha. On the date of the execution of recovery Damodar Prasad was indebted to the plaintiff for Rs. 11,723.56 nP on account of principal and Rs. 2,769.37 nP on account of interest. In spite of demands neither he nor the guarantor paid the dues. The appeal will lie at the civil judge junior division because the valuation of the case is below Rs. 5,00,000 and then First appeal to the high court under revision petition and then second appeal to the Supreme Court under Civil Appellate Jurisdiction with the certificate of high court.

FACT-SHEET NO.3- INITIATION OF THE SUIT AT CIVIL COURT(J.D.)

The plaintiff filed a suit against them in the Court of the Subordinate Judge, 1st Court, Patna, claiming a decree for the amount due. The Trial Court decreed the suit against both the defendants. While passing the decree, the Trial Court directed that the "*plaintiff bank shall be at liberty to enforce its dues in question against defendant No. 2 only after having exhausted its remedies against defendant No. 1*"

FACT-SHEET NO.4- PETITION AT HIGH COURT OF PATNA

The plaintiff got affected by the judgment/direction of the Civil court (J.D.), the plaintiff has approached to the high court where the plaintiff filed an appeal challenging the legality and propriety of this direction. The High Court dismissed the appeal of the plaintiff without going into the merit of the case.

FACT-SHEET NO.5- PETITION AT SUPREME COURT

The Supreme Court went into the merit of the case and directed the surety to pay the decretal amount. The Supreme Court held that: - The direction must be set aside. In the absence of some special equity the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. For making an order under O.XX r. 11

(1) of C.P.C. the court must give specific reasons. The direction postponing payment of the amount decreed must be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal was of the vaguest character. It was not stated how and when the creditor would exhaust his remedies against the principal. The judgments of the lower courts are not appropriate to the provisions of the substantive and procedural law and the court also not mentioned any type of reason behind their judgment.

LEGAL ANALYSIS OF THE CASE

1)-Order 20 Rule 11(1) of Civil procedure Code, 1908-. Decree may direct payment by instalments

(1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason [230][incorporate in the decree after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that] payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

11(2) ORDER, AFTER DECREE, FOR PAYMENT BY INSTALMENTS

After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

2)-SECTION 128 OF INDIAN CONTRACT ACT, 1872- “The liability of the Surety is Coextensive with that of Principal Debtor, unless it is otherwise provided by the contract”

3) - SECTION 127 OF INDIAN CONTRACT ACT, 1872- “Anything done, or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee”

4) - SECTION 126 OF 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.”

4.1)-The person who gives the guarantee is called the “*Surety*”

4.2)- The person in respect of whose the guarantee is given is called “*Principal debtor*”

4.3)- The person to whom the guarantee is given is called the “*Creditor*”

“The contract of guarantee may be either oral or written”

4.4)-“MAIN FEATURES OF THE CONTRACT OF GUARANTEE”

4.4.1)-The contract of guarantee pre-supposes a principal debt or an obligation to be discharged by the principal debtor

4.4.2)-The sufficient amount of consideration is required.

4.4.3)- The contract may be in oral or written.

5)-SECTION-140 OF INDIAN CONTRACT ACT,1872-“RIGHT OF SURETY ON PAYMENT OR PERFORMANCE”(RIGHT OF SUBROGATION) “Where a guaranteed debt has become due or default of the principal debtor to perform a guaranteed duty has taken place the surety upon payment or performance of all that he is liable for is invested with all right which the creditor had against the principal debtor”

6)-SECTION -151 OF THE CIVIL PROCEDURE CODE,1908 “SAVING OF INHERENT POWERS OF COURT”— Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

ISSUES INVOLVED IN THE CASE OF “BANK OF BIHAR LTD. V. DAMODAR PRASAD”

ISSUE-1-WHETHER THERE HAS BEEN ANY BREACH OF THE CONTRACT CAUSING LOSS TO THE PLAINTIFF? IF SO, IS IT NECESSARY FOR THE PLAINTIFF TO ESTABLISH THE SAME?

ISSUE -2- WHETHER THE CREDITOR CAN SUE THE SURETY WITHOUT EXHAUSTING REMEDIES AGAINST THE PRINCIPAL DEBTOR?

EXPLANATIONS FOR THE ISSUES

Issue-1-*Since a contract of guarantee is a species of contracts, the general principles governing contracts are applicable here. Thus, all the essential requirements of a valid contract (such as free consent, valid consideration, etc.) are required to be fulfilled.*

Issue-1.1)- Establishing Breach of Contract-Breach of contract is necessary and to be more specific there must be valid agreement between the parties for any case of contractual element to be allowed in the court in this case.

Sub-Issue-1.1.1)-Flow of Consideration in Contract of guarantee-The Plaintiff is in triparted agreement with the defendant no.1 and defendant no.2. Firstly the Principal debtor (defendant No.1) has himself made a promise in the favor of the Creditor to perform its obligation mentioned in the agreement while signing the contractual document in the favor of bank (creditor) and then Surety (Defendant no.2) gave its undertaking in the form of “**Guarantee bond**”-in favor of the plaintiff bank is dated June 15, 1951. The surety agreed to pay and satisfy the liabilities of the principal debtor upto Rs. 12,000/- and interest thereon two days after demand. The bond provided that the plaintiff would be at liberty to enforce and to recover upon the guarantee notwithstanding any other guarantee security or remedy which the Bank might hold or be entitled to in respect of the amount secured”.

The Guarantee bond work as a ulterior and evidential consideration towards the Creditor if in case the Principal debtor comes at default. The next part of agreement is an inherent and implied promise by the principal debtor in favor of the surety that in case if the liability is discharged by the Surety then the principal debtor should indemnify the surety for the same.

Section 127 of the Contract Act provides that anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. Consideration is the legal detriment incurred by the promisee at the promisor's request and it is immaterial whether there is or is not any apparent benefit to the promisor. A contract of guarantee executed after the contract between the creditor and principal debtor and without consideration is void. It must be contemporaneous with the contract of the creditor and principal debtor. Past benefit to the principal debtor is not a good consideration.

“When a borrower and a guarantor both sign an agreement in the favor of a bank they are jointly and severally liable under the contract”- :(*State Bank of India v. Prem Das*)

In the instant case now establishment of the contract is furnished now let's discuss the Breach of the contract in present case for this we have to relied on the case facts and evidences-“On the date of the suit Damodar Prasad was indebted to the plaintiff for Rs. 11,723.56 nP on account of principal and Rs. 2,769.37 nP on account of interest. In spite of demands neither he nor the guarantor paid the dues.”

As they are Bounded by the contracts between them and Plaintiff (i.e., Bank) is a creditor of the Defendant no.1 and he get directly and economically affected by the Transaction and the loan is passed on the Guarantee bond of the Defendant No.2, So it was an established case of Breach of contract relying on the case facts and evidences on record.

Yes, It was necessary to prove the Breach of contract because in enforcing the Rights of Creditor he has to establish a cause of action under Order7 Rule1 of C.P.C., 1908 then he has mention the default of the principal debtor for the recovery from the Surety.

ISSUE-2- The main question that was raised before the court was that can creditor sue the surety without exhausting remedies against the principal debtor now in this case **the trial court or the learned lower court has given a direction that -the Bank first exhaust his remedy for principal debtor then move to the second pocket i.e., Surety** but when the provisions get interpreted it found something different.

Issue-2.1)-Objective of the Contract of Guarantee- A guarantee is non fund based credit facility; therefore banks do not need to deploy fund immediately. Often banks would not have called upon to pay liability under guarantee since principal debtor would have fulfilled his/her liabilities. Guarantee brings income to the banks without utilizing the resources. Guarantees

are one of the potential sources for enhancing the income of the bank. A Guarantee is the simple document which does not need any registration and hence less costly. The Guarantees are off balance sheet finance; hence do not affect the liability structure.

Issue-2.2)- Co-extensive nature of Surety- This case was explained in **Section 128 of the Indian Contract Act, 1872** where it was explained that “if the principal debtor makes a default i.e. he fails to perform his obligation the creditor can sue either the principal debtor or surety or both of them.

According to Lord Diplock: “*Whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as breach of his contract of guarantee whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor’s liability is also the measure of the guarantor’s liability.*”

Sub-Issue-2.2.1)-Extent of Co-extensiveness of Surety-the principle of co - extensiveness is not an immutable rule. The precise extent of the liability of the surety will always be governed by the provisions of guarantee on their true construction of the document, and the parties remain free to provide for limitations of the liabilities of the surety without detracting from the nature of the contract as guarantee. For example, the surety guarantees only the future transactions, and not the past indebtedness. Furthermore, the court has not always regarded itself as bound to treat the surety as co - extensively liable with the principal, and there are circumstances where the surety will remain liable notwithstanding the fact that the principal is not, or is no longer, liable for the principal obligation.

“The Surety liability may not be there to the full extent as that of the principal debtor but it has a subservient liability to that extent what he/she has confessed or agreed in the contract”-
“*Yarlagadda v. Devata China Yerakayya*”

In Aditya Nath Chaurasia v. Bank of India

If the Guarantor binds himself up to a certain maximum limit their liability cannot go beyond that” ***In Vyasya Bank Limited v. Deputy Director, D.G.F.T*** “If the liability of the guarantor mainly flows from the terms and condition of the guarantee bond, he/she should not be liable to pay other than something mentioned in the guarantee bond”

Lord Eldon observed in Wright v Simpson (1802) 6 Ves. Jr. 714, 734,- "But the surety is a guarantor, and it is his business to see whether the principal pays, and not that of the creditor".

Sub-issue-2.2.2)-Surety as a trusteeship- The nature of the guarantor is as similar to that of trustee because he/she has to take care of the amount of money till it will be repaid to the Creditor and Surety has come across liability of the creditor when there is default from Principal debtor-*"It is within the knowledge of the guarantor that the money is being advanced on the strength of the confidence reposed in the guarantor and in such cases, the position of the guarantor is very near to that of a trustee"*

In the case V.Velayudhan v State Bank of India:- "The bank had obtained a decree for recovery of a loan on the basis of a guarantee and since the principal debtor died, the bank took execution proceedings against the guarantor"

Ratio-decedendi of above mentioned case-"The court further held that the surety who guaranteed repayment had an obligation to account in *fiduciary capacity*."

Fiduciary Capacity- the expression 'Fiduciary Capacity' is concerned it is not restricted to technical or express trusts, but includes imparting of a confidence on the basis of which a person acts as a guarantor while giving an undertaking.

"Duty of Surety"- It is the duty of the Surety to check whether the principal debtor is paying the money back or not then his credibility is on two fold first is on the principal debtor to ensure the money and time of return and then to the creditor that money should reach him with proper interest that the creditor is entitled to get.

"Liability of Surety" is a term which has defined in Section 126 of Indian contract act, 1872 in which the liability of the surety is enforceable at law which means the surety can't be forced to pay the money back if the agreement was properly made or having some special equity regarding the contract of guarantee.

The Supreme Court in Chattanatha Karayalar v Central Bank of India Ltd-"laid down that if a transaction is contained in more than one document between the same parties, they must be read and interpreted together. Although a guarantor may join the principal debtor in executing the promissory note he will not be a co - obligant where the underlying transaction and the conduct of the parties show that he is a surety under Section 126 of the Contract Act."

Coming to our case there was a proper “**Guarantee Bond**” in the favor of Plaintiff i.e., Bank of Bihar Ltd and it was properly signed by the parties and witness. From the parol evidence and facts it was also seen that there is misrepresentation or concealment from the side of the Creditor and his limit is also equivalent to money in demand. So, it was a legally enforceable Guarantee.

The Supreme Court in the State of Maharashtra v Dr. M.N.Kaul confirmed the view that under the law a guarantor cannot be made liable for more than he has undertaken; a surety is a favoured/Preferred debtor and he can be bound "to the letter of his engagement".

In the year 1869, ***the Bombay High Court in the case Lachman Joharimal v BapuKhandu and another*** stated as under:-*"This Court is of the opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt".*

On the Explanation presented and cited cases I would like to conclude that liability of the surety is independent in nature and consequently the contract also between the Principal debtor and Surety is also independent so the Creditor is on liberty to exhaust his remedy from any one of the principal debtor or Surety only on the default by the Principle debtor regarding the payment of money.

In the present case the Principal debtor i.e. Damodar Prasad got defaulted with regard to payment of the money to the creditor and surety i.e. Parasnath Sinha has a independent contract of guarantee with the legal consideration of “Guarantee Bond” and thus the Creditor has a right to exhaust his remedy towards the surety and prior action against the Principal Debtor is not necessary it was a discretion of the Creditor.

RIGHTS OF THE SURETY:-

1)-Right of Subrogation(Section 140 of Indian Contract Act,1872)-:

When the Principal debtor got defaulted then the creditor could approach to the surety for the recovery of payment and surety has to make necessary payments as mentioned in the letter of engagement of guarantee after this Indian contract act provides right to the Surety to recover from the Principal Debtor all the amount that he has incurred to the creditor.

The main benefits of this Right are twofold:-

1.1)-The surety can claim indemnification from the Principal debtor for all the payment and losses that he incurred under the guarantee agreement.

1.2)- The Surety will take benefit of all the securities that the creditor has against the principal debtor.

2)-Right of Indemnify against the Principal Debtor(Section 145 of Indian Contract Act,1872)-

“In every contract of Guarantee there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principle debtor whatever sum he has rightfully paid under the guarantee but no sums which he has paid wrongfully”¹⁰

Explanation- The surety can claim that amount of money which is paid in a rightful manner, the right of subrogation is coupled with the rights of indemnification of the surety. Surety can't claim the amount which has no justification of payment so the amount that is indemnified which are rightfully paid under the contract of guarantee.

3)-Right to securities with the creditor (Section 141 of Indian Contract Act, 1872):-

“A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into whether the security knows of the existence of such security or not ; 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”¹¹

Explanation- The right of the surety with regard to that of security furnished at the time of contract of guarantee by the surety as well as the rights over the instrument of principal debtor after furnishing the money on the default of principal debtor.

3.1)-It was a duty of the Creditor to have due care over the instrument provided by the surety.

3.2)-It was a right of the Surety over the instrument provided by the principal debtor to the creditor. It was duty of creditor to furnish the instruments to the surety in same manner as provided at the time of contract.

DEFENCE BY THE SURETY IN THIS CASE¹²

Surety's Liability when Principal is Insolvent—"Usually if the principal is known to be insolvent, the creditor will bring his action against the surety instead. He may prove in the bankruptcy or liquidation of the principal. However the question may arise as to the creditor's right to claim against the surety if a payment made by the principal to the creditor is set aside as wrongful preference, and he has to repay the money to the liquidator or trustee in bankruptcy. The position appears to be that if the creditor was not a party to the preference, he probably can recover the money from the surety, on the grounds that there was no valid payment to him and he has not done anything to discharge the surety on equitable grounds."

Comparative study with foreign legislations:-

In American law¹³- The guarantor in American law has direct liability or primary liability and principal debtor has secondary liability with regard to consequences of the duties owned by the principal debtor that is if the debtor doesn't performed obligation or duties towards the creditor then it was a direct responsibility of the surety or guarantor to perform the obligation.

In Lord Halsbury's Laws of England— "a guarantee is defined as "an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promisee must exist or be contemplated".

In Indian Law of Contract- 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.

In England, a guarantee to be enforceable at law must be in writing. By the Statute of Frauds (29 Car. II, c.3) Section 4, it is enacted that -"no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

On comparison it was found that the Law of England and Indian Contract law are somewhat similar to that of content but in original they were differ in the process of documentation because in law of England there is no scope for oral guarantee but in India there is a validation of both oral and written.

In American law the scope of the due care is more and direct consequence of the debt is on the Surety or Guarantor while in India and England it is treated as second pocket or secondry liability.If we come on this case there would be no defense available to the Defendant no.2 i.e. Paras Nath Sinha and he has to give all his debt if the trial was conducted on American law.

Concept of Special equity¹⁴- Special equity means a special reason to deviate from the real provision this was a foreign principle but used as an inherent power of the court for determining any case it was special or exception to the ordinary laws. In terms of contract of guarantee there is a special Equity in two fold -:

- 1) - There is a clause or condition mentioned in the contract of guarantee.
- 2) - Condition precedent governing that circumstances.

Both of the terms are lacked in the present case so it will not come in the ambit of the Special equity because there is no settled precedent governing in the favor of the Surety in this circumstances nor anything was mentioned in the clauses of the agreement (as per facts and evidences) for special equity or reason.

JUDGEMENT OF THE CASE

HELD: The direction must be set aside. In the absence of some special equity the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. For making an order under O.XX r. 11 (1) of C.P.C. the court must give specific reasons. The direction postponing payment of the amount decreed must be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal was of the vaguest character.

Ratio decedendi of the case:-

On giving this judgment the supreme court has taken the two major prospects that was discussed in length while giving this judgment one of which is *co-extensive nature of the*

*surety*¹⁵ and second is subrogation right of the surety and it was observed that Supreme Court also taken future prospects and mentioned the objective of guarantee that if the liability claim of the Surety easily cut down by taking defense of insolvency then it will become unreasonable provision for the creditor.

It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under s. 140 of the Indian Contract Act. And he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety.

In Wright V. Simpson- "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor."

In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings. The special Equity means when any statute or provisions or precedent has same facts and circumstances and in which restraint is granted then the surety could claim the right or the same should be mentioned or agreed by the Parties in the contract of guarantee or any bond or legally enforceable document mentioning the same.

The Court explained the advantage of section 128 of the Indian Contract Act where the liability of the surety was defined the court told that in terms of liability the surety and Principal Debtor has independent Contract for obliging the promise mentioned and this section also explains that if the principal debtor is on default then it was a discretion open to creditor to claim recovery from anyone of the surety or the Principal debtor or both of them concurrently.

In LachhmanJoharimal V. BapuKhandu and Surety TukaramKhandoji:-

"The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt"

ANALYSIS OF THE CASE OF BANK OF BIHAR LTD V. DAMODAR PRASAD

While taking the case in hierarchical term we see that the trial court of Patna has taken a very vague ratio while giving the judgment although they delivered the judgment in the favor of the Plaintiff i.e. Bank of Bihar limited but the direction in the judgment of exhausting the remedy first by the Principal Debtor and then move to the Surety was very debatable because the direction was very contrary to the provisions because in *section 128* of the Indian Contract Act, 1872 it was clearly mentioned that the liability of the Surety is co-extensive in nature and the surety perform same liability as it was performed by the principal debtor in the terms of the recovery of the amount borrowed by the creditor, Although there is a limit in the guarantee which was taken by the guarantor this was depend upon the fact, amount and circumstances of the loan and if he has fixed the amount then he will not incurred more than that amount.

The trial Court has not taken proper care of the consequences of the judgment they were making and the direction provided thereafter because this direction has infringed the objective of the Contract of guarantee and Right of subrogation provided there at *Section-140 of Indian Contract Act, 1872* because if the Creditor first exhaust his remedy against the Principal Debtor then objective to preserve the Amount of the Creditor is useless and it will make the surety very passive towards the liability and this direction will allow the Surety to bring the injunction petition easily for recovery of money by the Creditor.

The high Court has not taken any interest in the judgment and they simply upheld the position and proposition taken by the trial court they even didn't went into the merits of the case this shows the how less cognizant the judiciary is towards the interpretation of the provisions, laws and judgment of the lower court and also towards the interest of the litigant and the parties present.

THE SUPREME COURT VIEW- The Supreme Court has taken a very keen interest in the interpretation of the this case are the provisions and precedent related herein. The Supreme Court has interpreted that the obligation of the liability and performance according to the undertaking given in the bond is the only instrument to enforce the liability of the Principal Debtor and Guarantor. It was evident from the Case fact and the parol evidences present before the court that nor the Principal debtor nor has the Surety has responded to their demand of

performance of liability. The Supreme Court said that the liability for the Surety was immediate and not consequential they are secondary in terms of duties not in terms of rights and liabilities.

The Supreme Court has criticized the direction of trial court because it hinders the objective to prevent the debt of the creditor and it was also opined that it was a duty of the Surety to take care of the instruments and money of the Creditor and ensured that it should be returned on time and in a proper way to the Creditor.

Right of Subrogation is only made to prevent the interest of the surety and if the remedy first get exhausted towards the principal debtor then what is the scope of the guarantee bond what is if the Creditor will suffer so much in getting claim of his money by first suit claiming for principal debtor and then to the Surety create a long struggle for the creditor to get his own money and this will create pendency of suits regarding this provision which is very open and shut to the law in force.

To avoid this the supreme court came in a conclusion that the creditor will be at liberty to claim his debt from either of the surety or the principle debtor to whole of his amount and when the principal debtor will be at default then the surety will have to incurred the amount debt to the principal debtor and consequently the surety will get the subrogation right and security rights over the instruments of the principal debtor.

CONCLUSION AND RECOMMENDATIONS

This case is very important in terms of proper interpretation of the liability and rights of the surety and also about the liberty of the creditors in terms of the claiming the recovery of the money from the surety or the principle debtor and it was also a judgment which a proper precedent for the lower courts to get into the merits of the case deeply and try to interpret the case in the terms of the objective, hypothesis ,and future consequence of the judgment that the court is going to occur.

The Supreme Court has cleared the point of special equity where he said that this was the exception part which would be enforceable only when there is a clause specifically mentioned in the contract they got engaged and when there well settled precedent or provisions governing the same.

The Supreme Court also cleared that the postponement in the payment of money or making the payment in instalment was an immunity given only with special or adequate reasons mentioning the principal debtor or Surety will depend upon the case facts and evidences and it was shown that there is no incompetency present to the Principal debtor or Surety so they could not get this defense under Order 20 Rule 11 (1) and Section 151 of C.P.C, 1908.

So on concluding part it will be said that this case was a settled precedent for most of the cases governing the provisions of the Liability of the Surety and Rights governing the same.

It was recommended that in India the courts are little lethargic in terms of the interpretation of the provisions present in the case mostly the lower courts they were not taking any interest in the deep cognizance of the provisions and the precedent.

In American they made such a mechanism for loan transaction that the guarantor will occur primary liability and direct consequence will be dealt by the Guarantor so it will be dual task in American law for the guarantor first with regard to Creditor and second with that of the principal debtor but in India we form joint and several and co-extensive nature of the sureties liability, For some instances it will be dependent and for liabilities it would be independent. So the provisions need some reformation and amendment.