**SUPREME COURT OF INDIA**

Sita Ram Gupta

Vs.

Punjab National Bank

C.A.No.1878 of 2008

(Tarun Chatterjee and Harjit Singh Bedi JJ.)

10.03.2008

**JUDGMENT**

**Tarun Chatterjee, J.**

1. Leave granted.

2. This appeal arises out of the final judgment and decree dated 11th of May, 2006 passed by the High Court of Delhi at New Delhi in RFA No.71 of 1985 whereby the High Court had set aside the judgment and decree dated 12th of November, 1984 passed by the Additional District and Sessions Judge dismissing the suit filed against the appellant who was a guarantor in respect of loans advanced by the Punjab National Bank [ in short 'the Bank'] respondent no.1 to M/s Rangaa Trades and Exports Pvt. Ltd. Respondent no.2 in this appeal. By the impugned judgment, the High Court affirmed the decision of the Additional District and Sessions Judge and held that the suit filed by the Bank be decreed against the original defendant Nos.1 to 4 for a sum of Rs.42,874/- including interest at the rate of 19.5 per cent per annum with quarterly rests from the date of filing of the suit till realization. At this stage, we may note that the said decree against the defendant nos.1 to 4 has now become final as no appeal was preferred by the said defendant nos. 1 to 4 against the said decree. Feeling aggrieved by the aforesaid judgment of the High Court, this special leave petition has been filed by the guarantor appellant in respect of which leave has already been granted.

3. The only question that was raised on behalf of the appellant was that in view of the statutory provision under section 130 of the Indian Contract Act, 1872 (in short "the Act"), whether the High Court was justified in holding that the appellant who was a guarantor of the loan advanced to the defendant nos. 1 to 4 was liable to pay the decrials amount on the ground that the appellant had revoked the guarantee before such loan was actually paid to the defendant Nos. 1 to 4 and long before the suit was filed by the bank against the defendants for recovery of such loan.

4. In order to decide the question raised by the learned counsel for the appellant, we may look into the agreement of guarantee entered into by the bank with the appellant as guarantor, which reads as under:

> "The guarantors hereby guarantee jointly and severally to pay the bank on demand all principal, interest, costs, charges and expenses due and which may at any time become due to the Bank from the borrower, on the accounts opened in respect of the said limits (hereinafter called the 'said accounts') down to the date of payment and also all loss or damages, costs, charges and expenses and in the case of legal costs, costs as between attorney and client occasioned to the Bank by reason of omission, failure or default temporary or otherwise in such payment by the Borrower or by the Guarantors or any of them including costs (as aforesaid) of enforcement or attempted enforcement of payment by suit or otherwise or by a sale or realization or attempted sale or realization of any security for the said indebtedness or otherwise howsoever or any

costs (which costs to be as aforesaid) charges or expenses which the Bank may incur by being joined in any proceeding to which the Bank may be made or may make itself party either with or without others in connection with any such securities or any proceeds thereof. The Guarantors hereby declare that this guarantee shall be a continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that at any time the said accounts may show no liability against the Borrower or may even show a credit in his favor but shall continue to be guarantee and remain in operation in respect of all subsequent transactions." (Emphasis supplied)

5. Keeping the agreement of guarantee, as noted hereinabove, in mind, let us now look into the facts of the present case. It is an admitted position that the guarantee issued by the appellant to the Bank was subsequently cancelled by his letter dated 31st of July, 1980 written to the Manager of the Bank and in that view of the matter, the appellant sought to substantiate his case that since his guarantee had stood revoked before the loan was in fact taken by the defendants from the bank, in view of Section 130 of the Act, he was not liable to pay the loan taken by the defendants in respect of which the appellant was a guarantor. The trial court, as noted herein above, dismissed the suit against the appellant and in appeal by the Bank, the High Court had reversed the decree passed by the trial court and granted decree in favor of the Bank and against the appellant. Subsequent to the revocation of guarantee by the appellant, there were transactions in respect of the loan between the defendant Nos. 1 to 4 and 6 and the bank. The suit was filed for recovery of loan by the Bank against the appellant as well as the other defendant Nos. 1 to 4 and 6.

6. The learned counsel appearing for the appellant, relying on Section 130 of the Act, sought to argue that in view of the fact that Section 130 clearly provides for revocation of a continuing guarantee as to future transactions by notice to the creditor and as in the present case, the guarantee was revoked long before the loan was given and the suit filed, the appellant was not liable to pay the decrial amount to the Bank. Accordingly, he submitted that the High Court was not justified in reversing the judgment of the trial court and in decreeing the suit against the appellant. This submission of the learned counsel for the appellant was seriously contested by Mr. Dhruv Mehta, the learned counsel appearing on behalf of the Bank. According to Mr. Mehta, the submission of the learned counsel for the appellant cannot be accepted in view of the clause in the agreement of guarantee itself, as noted herein earlier. Before we proceed further and in order to decide the submissions made on behalf of the parties before us, it would be appropriate to reproduce Section 130 of the Act, which reads as under: -

"Revocation of continuing guarantee a continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor."

7. We have carefully examined the submissions made on behalf of the parties and also the relevant clauses in the agreement of guarantee. In our view, the High Court was perfectly justified in holding that the appellant was liable to pay the decrial amount to the Bank in view of the clause, as mentioned herein earlier, in the agreement of guarantee itself. The agreement of guarantee clearly provides that the guarantee shall be a continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that at any time, the said accounts may show no liability against the borrower or may even show a credit in his favor

but shall continue to be a guarantee and remain in operation in respect of all subsequent transactions. This was an agreement entered into by the appellant with the Bank, which is binding on him. Therefore, the question arises whether the statutory provision under Section 130 of the Act shall override the agreement of guarantee. In our view, the agreement cannot be said to be unlawful nor have the parties alleged that it was unlawful either before the Trial Court or before the High Court. Let us, therefore, keep in mind that the agreement of guarantee entered into by the appellant with the Bank was lawful.

8. The question is whether the appellant, having entered into such an agreement of guarantee with the Bank, had waived his right under the Act. In our view, the High Court has rightly held and we too are of the view that the appellant cannot claim the benefit under Section 130 of the Act because he had waived the benefit by entering into the agreement of guarantee with the Bank. In *Shri Lachoo Mal Vs. Shri Radhey Shyam*[1], this Court observed that the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public principle. In Halsbury's Laws of England, Vol. 8, 3rd Edn., it has been stated in Para 248 at page 143 as under: -

> "As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void." (Emphasis supplied)

9. In *Brijendra Nath Bhargava and anr. Vs. Harsh Wardhan and ors*[2], it has been observed at page 461 in para 10 that if a party had given up the advantage he could take of a position of law, it was not open to him to change and say that he could avail of that ground. The same principle has been followed in *Bank of India and Ors.Vs. O.P.Swarnakar & Ors*[3]

10. Keeping this principle in mind, we now look at the clause in the agreement of guarantee, as noted herein earlier. There cannot be any dispute that the appellant had clearly agreed that the guarantee that he had entered into with the Bank was a continuing guarantee and the same was to continue and remain in operation for all subsequent transactions. Having entered into the agreement in the manner indicated above, in our view, it was, therefore, not open to the appellant to turn around and say that in view of Section 130 of the Act, since the guarantee was revoked before the loan was advanced to defendant Nos. 1 to 4 and 6, he was not liable to pay the decrial amount as a guarantor to the Bank as his guarantee had already stood revoked. In this view of the matter, we are not in a position to accept the submissions of the learned counsel for the appellant and we hold that in view of the nature of guarantee entered into by the appellant with the Bank, the statutory provision under Section 130 of the Act shall not come to his help. The findings arrived at by the High Court while deciding the first appeal were that the amount shown due in the accounts of the Bank against the appellant and the defendants was neither cleared by the defendants nor by the appellant. Therefore, even if a letter was written to the Bank by the appellant on 31st of July, 1980 withdrawing the

guarantee given by him, it was contrary to the clause in the agreement of guarantee, as noted herein earlier. Therefore, it was not open to the appellant to revoke the guarantee as the appellant had agreed to treat the guarantee as a continuing one and was bound by the terms and conditions of the said guarantee. For this reason, it is difficult to accept the submissions of the learned counsel for the appellant that in view of the statutory provision under Section 130 of the Act, after the revocation of the guarantee by the appellant, he was not liable to pay the decrial amount to the Bank. No other point was raised by the learned counsel for the appellant. Accordingly, there is no merit in this appeal. The appeal is thus dismissed. There will be no order as to costs.

[1]*(1971) 1 SCC 0619*

[2]*(1988) 1 SCC 0454*

[3]*(2003) 2 SCC 0721*