IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

LB Finance PLC,
No. 101, Vinayalankara Mawatha,
Colombo 10.

Now
No. 275/75,
Prof. Stanley Wijesundara Mawatha,
Colombo 07.

S.C. (C.H.C.) Appeal No. 64/2013 **Plaintiff**
C.H.C. Case No. 168/2008 (MR)

Vs.

1. Galolu Kankanamage Mithrapala,
'Muditha', Madola,
Avissawella.

2. Wattedurage Sanath Ranjith
Premarathne,
331/C, Pelpitiya,
Eheliyagoda.

Defendants

AND NOW BETWEEN

Wattedurage Sanath Ranjith
Premarathne,
331/C, Pelpitiya,
Eheliyagoda.

2nd Defendant – Appellant

Vs.

LB Finance PLC,
No. 101, Vinayalankara Mawatha,
Colombo 10.

Now
No. 275/75,
Prof. Stanley Wijesundara Mawatha,
Colombo 07.

Plaintiff – Respondent

Galolu Kankanamage Mithrapala,
'Muditha', Madola,
Avissawella.

1st Defendant – Respondent

Before: **E. A. G. R. Amarasekara, J.**

A. L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Dr. Jayatissa De Costa, P.C. with D. D. P. Dassanayake and Chanuka Ekanayake for the 2nd Defendant – Appellant

Kanchana Pieris with Nisal Fernando for the Plaintiff – Respondent

Written Submissions:

23.10.2019 and 12.10.2022 by the Plaintiff – Respondent

18.11.2019 by the 2nd Defendant – Appellant

Argued on: 27.09.2022

Decided on: 11.10.2024

Janak De Silva, J.

The Plaintiff-Respondent (Plaintiff) entered into a lease agreement (Lease Agreement) with one Galolu Kankanamlage Buddhika Amarajeewa (Lessee) in terms of which the Respondent purchased vehicle bearing No. 63-0807 and leased it to the Lessee.

The 1st Defendant-Respondent (1st Defendant) and the 2nd Defendant-Appellant (Appellant) entered into what is termed a "Guarantee and Indemnity" (Guarantee), jointly and severally guaranteeing the punctual payment by the Lessee to the Plaintiff of all rent interest and all other sums whatsoever due under the Lease Agreement.

The Lessor defaulted in the payment of rent due in terms of the Lease Agreement. The Plaintiff referred the dispute for arbitration as agreed. The sole arbitrator made an award in favour of the Plaintiff. The award was enforced by the High Court. However, it could not be executed.

Thereafter, the Plaintiff filed this action against the 1st Defendant and the Appellant. Trial proceeded *ex parte* against the 1st Defendant. The learned High Court Judge entered judgment in favour of the Plaintiff against both the 1st Defendant and the Appellant.

The Appellant has raised the following points in appeal:

1. The learned High Court Judge has failed to consider that despite a decree been entered by the High Court in favour of the Plaintiff against the Lessee allowing the Plaintiff to recover the amount due under the Lease Agreement, the Plaintiff has instituted this action against the Guarantors without pursuing the said decree;

2. The learned High Court Judge has failed to consider that the obligation of the Guarantors is to indemnify the losses of the Plaintiff and the failure on the part of the Plaintiff to recover the amount due under the said decree has resulted in the liability of the 1st Defendant and Appellant being unjustly increased;

3. The learned High Court Judge has failed to consider that the attempt of the Plaintiff to recover the amount due under the Lease Agreement from the 1st Defendant and Appellant demanding the same after Nine Years and One Month from the date of the termination of the Lease Agreement would inevitably be an unjust enrichment especially in view of the fact that at the termination of the Lease Agreement, the amount due was only Rs. 2,236,728.39 whereas by the alleged demand the Plaintiff has demanded Rs. 9,450,732/= from the 1st Defendant and Appellant;

4. The learned High Court Judge has failed to consider that the unexplained delay on the part of the Plaintiff to take steps against the 1st Defendant and Appellant has been for the benefit of the Plaintiff, especially in view of the fact that at the termination of the Lease Agreement, the amount due was only Rs. 2,236,728.39 whereas by the alleged demand, the Plaintiff has added further interest and demanded Rs. 9,450,732/- from the 1st Defendant and Appellant. This cannot be permitted in law since this attempt of the Plaintiff is in violation of the well-established principle that one cannot take advantage of his own wrongful act;

5. The learned High Court Judge has failed to address the issue regarding prescription from the correct perspective;

6. The learned High Court Judge has failed to consider that the Plaintiff, who without executing the decree against the Lessee, had slept over its rights and thus not entitled to maintain this action against the 1st Defendant and Appellant.

These issues must be examined based on the applicable law of the Guarantee. In ***Peoples Bank v Nizam and three Others*** **[S.C. (C.H.C.) Appeal No. 05/2007, S.C.M. 02.08.2024]**, I had the opportunity to consider the applicable law in relation to a guarantee given in favour of a bank by a party as a part of a banking transaction.

Although our common law is the Roman-Dutch law, in view of Section 3 of the Introduction of Law of England Ordinance, No. 5 of 1852 ("Civil Law Ordinance"), all questions or issues with respect to the law of banks and banking, the law to be administered shall be the same as would be administered in England in the like case.

In ***Peoples Bank*** **[supra.]**, the impugned transaction was part of a banking transaction. Hence that transaction was most closely connected with English law, which led me to conclude that the governing law is English law after applying the relevant conflict of law rule, i.e. the system of law with which the transaction was most closely connected.

However, the impugned transaction is not part of a banking transaction and will be governed by Roman-Dutch law.

The Guarantee uses the terms surety, guarantee and indemnity. Hence, I wish to begin by setting forth some general principles in Roman-Dutch law on surety, guarantee and indemnity and the differences between them which are material to the determination of this appeal.

Contract of Suretyship

The contract of suretyship is a contract whereby one party binds himself to be answerable for the debt of another person and has its origins in Roman Law. This contractual relationship was established by three methods, namely the verbal contract (*stipulatio*), the mandate and *constitutum debiti*.

According to Lee [*The Elements of Roman Law*, IV ed., Seventh Impression (1997, Reprinted in 2007, page 298] *stipulatio* consisted essentially in a formal question and answer. One party (stipulator or *reus stipulandi*) said to another (*reus promittendi*), e.g., "Do you promise to give me one thousand sesterces?". The other said "I promise". This

concluded the contract and gave rise to a legal obligation on the part of the promissor to do what he had promised.

The verbal contract (*stipulatio*) took three different forms depending on the form of words used by the stipulator (creditor) to the intended surety. The words were either *idem dari spondes*, *idem fidepromittis* or *idem fide tua esse jubes*? The ensuing contracts were referred to as *sponsio*, *fide-promissio* and *fidejussor* and the surety referred to as *sponsor*, *fidepromissor* and *fidejussor*. The only remaining type of verbal suretyship by the time of Justinian was *fidejussio*.

Suretyship was also created by Mandatum whereby the surety gave a mandate, known as *mandatum credendae pecuniae*, to the creditor to lend to the debtor resulting in the creditor being able to proceed against the surety by the *actio mandati contraria* should he fail to recover the money from the debtor.

Constitutum debiti was the third method by which suretyship was created in Roman Law. This was based on an informal promise.

In the early stages of its development in Roman Law, the liability of the surety was not merely secondary but primary in nature. Hence the creditor was able to, if he so chooses, proceed against the surety before even demanding from the surety. Overtime this position was changed by practice or legislation.

The changes to the benefit of the surety were made through the benefits of cession of action, division and of order.

Benefit of cession of actions (*beneficium cedendarum actionum*) involved the transfer of the rights of action to the surety which the creditor had against the debtor. It appears that from the early days of the Empire, there existed the practice for surety to demand

cession of actions as a condition precedent to satisfying the claim of the creditor. This gave the surety recourse of action against the debtor and any other co-sureties.

Benefit of division (*beneficium divisionis*) is the right of a surety to claim that his liability should be limited to a proportionate share of the debt [Grotious 3.3.28; Voet 46.1.21; Van Leeuwen *CF*1.4.17.28]. It was possible for a surety to renounce this benefit expressly or impliedly [Voet 46.1.24; Grotious 3.3.29].

Justinian provided a surety with the Benefit of Order or Excussion (*beneficium ordinis seu excussionis*) which required the creditor to first proceed against the debtor, if within the jurisdiction. Where the debtor was not, the surety was granted time by the judge to produce him, failing which the surety was exposed to action by the creditor.

This benefit of excussion was not available where:

(a) The debtor's estate was sequestrated [Grotious 3.3.27; Voet 46.1.15.17; ***Gaha v. Ordra Trust and Investments (Pty) Ltd 1954 (2) SA 129(T)***] or in the case of a company, in liquidation **[*Bank of Africa v. Hampson* (1884) 3 HCG 1]**.
(b) The surety failed to plead the benefit before *litis contestatio* [Grotious 3.3.29; Voet 46.1.15].
(c) The surety has expressly [Grotious 3.3.29; Voet 46.1.16] or impliedly renounced the benefit.

The contract of suretyship is part of Roman-Dutch law as well. Voet [Voet 46.1.1] states "*a surety is one who by a stipulation takes upon himself the obligation of another, whilst the latter, the principal debtor, remains bound*". This definition was approved in ***Malmesbury Board of Executors and Trust Co v. Duckitt and Bam*** **[1924 CPD 101 at 108]**.

The reference by Voet to stipulation as the basis of entering into a contract of suretyship highlights the cardinal principle in Roman law that parties must come together for the conclusion of the contract. This requirement is affirmed in the Institutes of Justinian where it is said that no verbal contract can be validly concluded without the presence of the parties (*item verborum obligatio inter absentes concepta inutilis est*).

Van der Linden [1.14.10] defines suretyship as a "*contract by which a person binds himself on behalf of a debtor, for the benefit of the creditor, to pay him the whole or part of what the debtor owes him, thus joining in the obligation*".

According to Grotius [3.3.12], a surety is one who, for greater security of the debt, binds himself by promise in favour of another principal debtor.

Van Leeuwen in *Censura Forensis* [1.4.17.3] states "*suretyship is an accessory obligation, by which a person, by means of a stipulation, pledges his credit on another's obligation, the principal debtor still remaining bound*".

These jurists unite in reinforcing one fundamental characteristic of a contract of suretyship in Roman-Dutch law, namely that the contract of suretyship establishes an accessory obligation to the principal obligation and has no independent existence. One of the earliest cases to emphasise this attribute of a contract of suretyship is ***Fitzgerald v. Argus Printing and Publishing Co. Ltd.*** **[(1907) 3 Buch AC 152 at 159]**. Hence, there cannot be any suretyship unless there is in existence a valid principal obligation. In the absence of it, the suretyship is void **[*Imperial Cold Storage and Supply Company Limited v. Julius Weil and Co.* 1912 AD 747 at 750]**.

Subsequently, several decisions have sought to provide a finite definition of a contract of suretyship. Innes C.J. in ***Corrans and Another v. Transvaal Government and Coull's Trustee*** **[1909 TS 605 at 612]** held that the undertaking of the surety is accessory to the main contract, the liability under which he does not disturb, but it is an undertaking that

the obligation of the principal debtor will be discharged, and, if not, that the creditor will be indemnified. This was cited with approval in ***Hutchinson v. Hylton Holdings and Another*** **[1993(2) SA 405(T) at 410H]**.

In ***Union Government v. Van der Merwe*** **[1921 TPD 318 at 321]**, Wessels J.P. expounded the institute of suretyship and its incidents as follows:

> "*The contract of suretyship presupposes a principal obligation which has the same object, in the sense used by Continental jurists, as the contract of the surety. This is expressed by the maxim una eadem res vertitur in obligatione. Troplong, Cautionnement, sec.22. The legal scope of the surety's contract is identical with that of the principal debtor --- accessorium sui principalis naturam sequitur. The surety undertakes the same obligation as the debtor, and undertakes to perform this same obligation so soon as the debtor, when called upon, fails to perform it. Troplong, caut:46. It is true there are two contracts, the one between the creditor and the debtor and the other between the creditor and the surety. But the contract between the creditor and the surety is not an independent contract with an obligation of its own but an accessory contract with the very same obligation that exists between the principal debtor and the creditor. Although it is true that the suretyship contract may be entered into by an agreement different to that of the principal contract, yet immediately the surety agrees to become such, whether by a written or a verbal agreement, then his contract with the creditor is of the same nature as that of the principal debtor, because it becomes accessory to it, or is, as it were, absorbed by it.*" (emphasis added)

Caney's The Law of Suretyship [Forsyth & Pretorius (eds.), 5th edition (Juta & Co. Ltd., 2002), page 27] sought to provide a definition of suretyship as:

> "*[…] an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, he, the surety will perform it, or failing that, indemnify the creditor*."

This definition of a contract of suretyship has been approved in ***Trust Bank of Africa Ltd v. Frysch*** **[1977 (3) SA 562 (A) at 584F]**; ***Sapirstein & Others v. Anglo African Shipping Co. S A Ltd*** **[1978 (4) SA 1 (A) at 11H]**; ***Nedbank Ltd v. Van Zyl*** **[1990 (2) SA 469]; *Basil Read (Pty) Ltd v. Beta Hotels (Pty) Ltd. and Others*** **[2001 (2) SA 760(C) at 766F].**

However, this definition has been critiqued by Stegmann, J. in his dissenting judgment in ***Carrim v. Omar*** **[(2001) 4 All SA 691 at 698C]** on the basis that an undertaking that the principal debtor will perform his obligation is not necessary to the existence of suretyship. In ***Orkin Lingerie Co. (Pty) Ltd v. Melamed and Hurwitz*** **[(1963) 1 SA 324 (W) 326]**, Trollip, J. provided an ordinary meaning of a contract of suretyship. He held that:

> "*[…] a contract of suretyship in relation to a money debt can be said to be one whereby a person (the surety) agrees with the creditor that, as accessory to the debtor's primary liability, he too will be liable for that debt.*
>
> *The essence of suretyship is the existence of the principal obligation of the debtor to which that of the surety becomes accessory.*"

In view of the existence of diverse definitions, it is not possible to provide a universally accepted general definition of what is meant by a contract of suretyship. Nevertheless, the fundamental feature is that in a contract of suretyship, the obligation of the surety is accessory to the principal obligation of the debtor and not an independent obligation.

Difference between Contract of Suretyship and Contract of Guarantee

According to Weeramantry [*The Law of Contracts*, Vol. I, page 190], contracts which charge a person with the debt, default or miscarriage of another are contracts of suretyship or guarantee. He appears to proceed on the basis that "suretyship" and "guarantee" are interchangeable.

Indeed, many writings and judicial decisions do reflect this understanding [See Caney's The Law of Suretyship, 1st and 2nd editions; Walter Perera, Laws of Ceylon, Vol. II, page 629; Geraldine Andrews and Richard Millet, Law of Guarantees [6th ed. (Thomson Reuters, 2011), page 271]; Institutes of Holland, Van Der Linden, Translation by Henry Juta, (3rd ed., 1897), Chapter XIV, Section X; Institutes of Holland, Van Der Linden, Translation by J. Henry, (1828), Chapter XIV, Section X. See also, ***Mouton v. Die Mynwerkersunie*** **(1977(1) SA 119(A) at 136B)**; ***Hazis v. Transvaal and Delagoa Bay Investment Co Ltd*****. (1939 AD 372 at 384)**; ***Hermes Ship Chandlers (Pty) Ltd v. Caltex Oil (SA) Ltd*****. (1973 (3) SA 263 (D) at 266-7)**; ***IIG Capital LLC v. Van Der Merwe and Another*** **(2008) EWCA Civ 542, para. 19**; ***Sri Lanka Insurance Corporation Ltd. v People's Bank*** **(2017) B.L.R. 206**].

However, Courts have also held that the word "guarantee" is open to a number of meanings and its meaning when used in a specific document depends on the context in which it is used. In ***Walker's Fruit Farms Ltd v. Sumner*** **[1930 TPD 394 at 398]**, Greenberg, J. held that the ordinary meaning is to assure a person of the receipt or possession of something. In ***Dempster v. Addington Football Club (Pty) Ltd.*** **[1967(3) SA 262(D) at 267]** and ***Cazalet v. Johnson*** **[1914 TPD 142 at 145]** it was held to mean 'pay'.

An example of the interpretation of the word *"guarantee"* in the context of the contract as a whole is found in ***Hutchinson v. Hylton Holdings and Another*** **[supra.]**. The defendant had signed a document in which he guaranteed specific performance of the contract for the sale of land in his personal capacity. The purchaser of the land was non-existent so there was no principal obligation and no suretyship. The Court held that the clause resulted in an independent undertaking. The defendant had contracted as a co-principal debtor and not surety. His undertaking was held not to be dependent upon the non-performance of the purchaser but was in the form of an indemnity. Here the use of the word *guarantee* was construed to create an independent obligation and hence the undertaking was not a suretyship. Such result is not possible if one were to assume that "suretyship" and "guarantee" are interchangeable.

Similarly, in ***List v. Jungers*** **[1979(3) SA 106 (A) at 117-119]** the use of the word *guarantee* was held by Court to mean an original undertaking whereby the promissor bound himself as principal debtor and not as surety.

These authorities support the statement in Caney's The Law of Suretyship [Forsyth & Pretorius (eds.), 5th edition (Juta & Co. Ltd., 2002), page 27], that "guarantee" is a distinct although difficult concept and seeks to provide a precise definition and explore its relationship with suretyship. Caney [supra. page 31] goes on to state that with a contract of guarantee, the guarantor undertakes a principal obligation to indemnify the promisee on the happening of certain events.

According to Caney [supra., page 32]:

> "*What then is the difference between a guarantee that a debtor will perform and suretyship? Lubbe makes one point of distinction clear :* ***the guarantor's obligation, as an obligation independent of that of the debtor, is to indemnify the creditor in respect of losses suffered through the debtor's non-performance****, whereas the*

surety, as we have seen, is only liable for losses resulting from the debtor's breach of contract *[...]* ***suretyship is an undertaking,*** *in the first instance****, that the debtor himself will perform, and only secondarily that if he fails to perform that the surety will do so. With guarantee, on the other hand, the guarantor undertakes to pay on the happening of a certain event but does not promise that that event will not happen****.*" (emphasis added)

Thus, it appears that in Roman-Dutch law, a "guarantee" given by a guarantor to a promisee in relation to a promise by a third party to the promisee, does create an independent obligation to that of the debtor. It is at this point that one sees a difference in the approach between Roman-Dutch law and English law since in English law, a "true guarantee" created an accessory obligation to that of the debtor whilst in specific cases such as on-demand guarantees and performance guarantees, the obligation undertaken is an independent obligation [See ***Peoples Bank*** **(supra., pages 10-12)**].

Finally, in the context of English law, the distinctions sought to be drawn between a guarantee and indemnity has been criticised for raising a barren controversy and raising many hair-splitting distinctions of exactly that kind which bring the law into hatred, ridicule and contempt of the public **[*Yeoman Credit Ltd. v. Latter*** **[(1961) 1 W.L.R. 828, 835]**.

Caney [supra. page 34] states that there is no difference between a contract of guarantee and a contract of indemnity. The differences, if any, are only of nuance and degree.

I have sought to expound a few general principles governing contracts of suretyship, contracts of guarantee and indemnities in Roman-Dutch law. Nevertheless, freedom of contract generally permits parties to determine their respective rights and obligations. Hence the rights of the Plaintiff, 1st Defendant and Appellant must be determined based on the language of the Guarantee. Where the language establishes that the parties

intended to create specific rights and duties which may be at variance with the meaning assigned to specific terms in the governing law, the intention of the parties must prevail. Let me now examine the Guarantee upon which the Plaintiff sued the Appellant in order to determine the rights and obligations of the parties.

Interpretation of the Guarantee

The Plaintiff sued the Appellant on document titled "Guarantee and Indemnity" (P6). This by itself is confusing given the differences between a guarantee and indemnity identified above. Nevertheless, one cannot interpret a contract based purely on internal linguistic considerations. As I pointed out in ***Peoples Bank*** **[supra.]**, the mere use of a descriptive term cannot affect the reality of the transaction. The agreement must be objectively construed as a whole to determine the intention of the parties.

Clause 1 of the Guarantee reads as follows:

> *"[…] (hereinafter called "the Lessee" which expression shall include its successors-in-title and permitted assigns) and* ***Guarantors and each of them do hereby jointly and severally guarantee the punctual payment by the Lessee to the Lessor of all rent interest and all other sums whatsoever due under the Lease Agreement*** *including the payment of any award taken by the Lessor in any arbitration commenced under article 25 of the Lease Agreement and the* ***due performance of all the Lessee's obligations thereunder*** *and the Guarantors further jointly and severally* ***undertake to indemnify the Lessor on demand against all losses****, expenses (including Legal costs on a full indemnity basis) charges and damages incurred or* ***suffered by the Lessor in consequence of any failure by the Lessee to perform any of the Lessee's obligations*** *under the Lease Agreement.*" (emphasis added)

In terms of this clause, the Appellant and the 1st Defendant have jointly and severally guaranteed the punctual payment by the Lessee to the Plaintiff of all rent interest and all other sums whatsoever due under the Lease Agreement including the payment of any award taken by the Lessor in any arbitration commenced under Article 25 of the Lease Agreement and the due performance of all the Lessee's obligations thereunder.

This part of Clause 1 of the Guarantee brings it within the first part of the definition of a contract of suretyship as expounded above, namely an undertaking that the Lessee will perform his obligations in terms of the lease Agreement.

Clause 1 of the Guarantee goes on to show that the Appellant and the 1st Defendant further jointly and severally undertook to *indemnify* the Plaintiff on demand against ***all losses***, expenses (including Legal costs on a full indemnity basis) charges and damages incurred or suffered by the Lessor *in consequence of any failure by the Lessee to perform any of the Lessee's obligations under the Lease Agreement*. This obligation to indemnify against all *losses* suffered consequent to the failure to perform is more akin to the impugned Guarantee being an indemnity rather than a contract of suretyship.

Clause 2 of the Guarantee reads as follows:

> *"The guarantor further declare and specifically agree that the liability of the guarantors under this guarantee and Indemnity shall be* ***as principal debtors and not merely as sureties*** *and that* ***this Guarantee and Indemnity shall be a continuing security*** *and shall be irrevocable and the liability of the Guarantors shall not be in any way discharged, diminished or affected by the granting of time or indulgence to the Lessee by the Lessor or by the Lessor effecting any compromise with the Lessee-or entering into any agreement not to sue the Lessee or effecting any variations of the Lease Agreement or any change in the constitution of the Lessee and liability hereunder shall subsist whether or not the Lessor has a legal right and whether or not the Lessor has availed itself of its legal remedies against the Lessee and the* ***liability of the Guarantors shall also extend to cover any renewal or renewals of the Lease Agreement and that this Guarantee and the Indemnity shall not be affected or prejudiced by any other guarantees and/or indemnities and any other forms of security now or hereafter held by the Lessor****."* (emphasis added)

This clause provides an important insight into the intention of the parties. The Appellant and the 1st Defendant have declared and specifically agreed that their liability under the Guarantee shall be as principal debtors and not merely as sureties. This is a categorical dissecting of the Guarantee from the principal of co-extensiveness which is an important

element of any contract of suretyship. Both the Appellant and the 1st Defendant have undertaken an independent and primary obligation rather than an ancillary or secondary obligation.

Moreover, The Appellant and the 1st Defendant goes on to agree in Clause 2 that the Guarantee shall be a continuing security and shall be irrevocable and their liability shall not be in anyway discharged, diminished or affected by the granting of time or indulgence to the Lessee by the Plaintiff or by the Plaintiff effecting any compromise with the Lessee or entering into any agreement not to sue the Lessee or effecting any variations of the Lease Agreement or any change in the constitution of the Lessee.

These reflect the intention of the parties to maintain the validity of the Guarantee irrespective of certain incidents relating to the debtor which fortify the conclusion that it is akin to a guarantee rather than suretyship. This is fortified by the obligation that the liability of the Appellant and 1st Defendant shall also extend to cover any renewal or renewals of the Lease Agreement and that the Guarantee shall not be affected or prejudiced by any other guarantees and/or indemnities and any other forms of security held by the Lessor.

Clause 4 of the Guarantee reads as follows:

> *"The Guarantors specifically agree that the* ***Lessor shall be at liberty either in one action to sue the Lessee and the Guarantors (or some or any of them) and also any other person or persons all jointly or severally or to proceed in the right to claim that the Lessee should be excused or proceeded against by action in the first instance*** *and the* ***right to claim that the Lessor should divide its claim and bring actions against the Guarantors or any other person or persons whomsoever each for his portion pro rata*** *and* ***the right to claim in any action brought against the Guarantors (with or without all or any other person) that the Lessor should only recover from the Guarantors a pro rata share of the amount claimed*** *and all other rights and benefits to which sureties are or may be by law entitled IT BEING AGREED that the* ***Guarantors are liable in all respects hereunder as principal***

debtors to the extent aforementioned including the liability to be sued before recourse is had against the Lessee*."* (emphasis added)

Clause 4 of the Guarantee provides the answer to some of the issues raised by the Appellant in this appeal. It provides that the Appellant and the 1st Defendant have specifically agreed that the Plaintiff shall be at liberty either in one action to sue the Lessee and Appellant and the 1st Defendant or some of them and also any other person or persons all jointly or severally. They have also agreed that the Appellant and the 1st Defendant are liable in all respects as principal debtors to the extent aforementioned including the liability to be sued before recourse is had against the Lessee.

The Appellant contends that the learned High Court Judge has failed to consider that despite a decree been entered by the High Court in favour of the Plaintiff against the Lessee allowing the Plaintiff to recover the amount due under the Lease Agreement, the Plaintiff has instituted this action against the Guarantors without pursuing the said decree.

However, as expounded above, One of the defences available to a surety is the benefit of excussion (*beneficium ordinis seu excussionis*). It means that the creditor must exhaust his legal remedies against the principal debtor for payment right up to the execution against his property [See Grotious 3.3.27; Voet 46.1.14; Van Leeuwen *CF* 1.4.17.18; ***Hurley v. Marais*** **(1883) 2 SC 155;** ***Wolfson v. Crowe*** **1904 TS 682;** ***Worthington v. Wilson*** **1918 TPD 104**].

However, this benefit can be renounced by the surety expressly [Grotious 3.3.29; Voet 46.1.16; ***Neon and Cold Cathode Illuminations (Pty) Ltd v. Ephron*** **1978 (1) SA 463(A)**] or impliedly.

In the present case, the Appellant and the 1st Defendant have expressly waived off this benefit. Nevertheless, the Plaintiff in fact instituted action initially against the Lessee and sought to execute the writ it obtained against the Lessee. According to the evidence of Anil Krishantha Salgadu, Assistant Manager of the Plaintiff, the writ could not be executed since the Lessee was dead by then. Therefore, the contention of the Appellant that the Plaintiff cannot maintain this action without pursuing the decree against the lessee is devoid of any merit.

The Guarantee is an on-demand guarantee. The obligation on the part of the Appellant and 1st Defendant arises only upon a demand made by the Plaintiff. The Plaintiff made a demand after failing to recover the amount due from the Lessee. Therefore, the contention of the Appellant that the learned High Court Judge failed to consider that the obligation of the Appellant and 1st Defendant is to indemnify the losses of the Plaintiff and the failure on the part of the Plaintiff to recover the amount due under the said decree has resulted in the liability of the Guarantors being unjustly increased is devoid of any merit as well.

The Appellant contends that the learned High Court Judge has failed to address the issue regarding prescription from a correct perspective. The general principle is that where the debt of the principal debtor is barred by prescription, the remedy against the surety is also barred. Nevertheless, as adumbrated above, the Guarantee is not a contract of suretyship and the obligation undertaken by the Appellant and the 1st Defendant is an independent and primary obligation rather than an ancillary or secondary obligation to that of the Lessee. Moreover, the Plaintiff instituted action against the Lessee prior to that claim being prescribed. Therefore, this contention must also necessarily fail.

In any event, the Guarantee is payable on-demand. The obligation on the part of the 1st Defendant and Appellant arises upon a demand being made **[**See ***L.B. Finance Ltd. v. Manchanayake*** **[(2000) 2 Sri.L.R. 142 (CA);** ***Hatton National Bank Ltd. v. Sellers Sports (Pvt) Ltd. and Others*** **[(2000) 3 Sri.L.R. 326 (SC)]**. The Plaintiff made the demand on 13.03.2008 by letters of demand marked "P22(a)" and P22(b)". This action was instituted on or about May/June, 2008 [29/02/05/06/2008]. Accordingly, this action is not prescribed.

Interest above Principal

The only remaining point to be determined is whether the learned High Court Judge has failed to consider that the unexplained delay on the part of the Plaintiff to take steps against the Guarantors has been for the benefit of the Plaintiff especially in view of the fact that at the termination of the Lease Agreement, the amount due was only Rs. 2,236,728.39 whereas by the alleged demand, the Plaintiff has added further interest and demanded Rs. 9,450,732/- from the 1st Defendant and Appellant.

The arbitration award against the Lessee awarded the Plaintiff a sum of Rs. 148,000/=, being arrears of lease rentals as at the date of the termination of the lease, namely 21st July 1999, payable with interest at the rate of 4% per mensem from 22.07.2001 till payment in full and a further sum of Rs. 2,236,728/39, being the amount due as at 13.06.2001, being the balance of the total lease rentals payable together with interest thereon at the rate of 4% per mensem from 14.06.2001 till payment in full.

According to the statement of accounts relating to the Lessee, G. K. B. Amarajeewa, marked P8, the total commitment was Rs. 2,458,110/=. The total claimed from the 1st Defendant and Appellant is Rs. 9,450,732/=. The learned High Court Judge entered judgment as prayed for in the plaint.

In ***Harankaha Arachchige Menaka Jayasankha and Another v. Standard Credit Lanka Limited*** **[S.C. (CHC) Appeal No. 72/2013, S.C.M. 23.11.2023]**, I had the occasion to examine the relevant principles in Roman-Dutch law governing the amount recoverable as interest, in the context of Section 5 of Civil Law Ordinance, which states that the amount recoverable on account of interest shall in no case exceed the principal amount, and Section 192 of the Civil Procedure Code. I held that:

1. Section 5 of the Civil Law Ordinance applies only to the amount of interest due on the principal sum as at the date of the institution of the action.
2. This prohibition does not apply to the power vested in Court in terms of Section 192 of the Civil Procedure Code to award interest on the principal sum according to the rate agreed between parties from the date of action to the date of decree and on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date determined by Court.

Accordingly, I hold that the Plaintiff is not entitled to claim as interest, any sum more than Rs. 2,458,110/= for the period up to the date of the institution of this action. In other words, the total sum (principal plus interest) that the Plaintiff is entitled to up to the date of the institution of this action is Rs. 4,916,220/= (Rs. 2,458,110/= x 2).

In terms of Section 192 of the Civil Procedure Code, the Plaintiff is entitled to interest on the principal sum according to the rate agreed between parties (48% per annum) from the date of action to the date of decree and on the aggregate sum so adjudged from the date of the decree to the date of payment.

The judgment of the High Court dated 18.062013 is varied to that extent. The learned High Court Judge is directed to enter decree accordingly.

Parties shall bear their costs.

Appeal partly allowed.

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara, J.

I agree.

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT