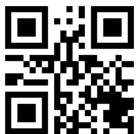

2026 INSC 247

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 13861 of 2024

CANARA BANK OVERSEAS BRANCH
REP. BY SENIOR MANAGER … APPELLANT(S)

VERSUS

ARCHEAN INDUSTRIES PRIVATE LIMITED
AND ANOTHER … RESPONDENT(S)

WITH

CIVIL APPEAL NO. 13862 of 2024

ARCHEAN INDUSTRIES PRIVATE LIMITED … APPELLANT(S)

VERSUS

GOLTENS DUBAI AND ANOTHER … RESPONDENT(S)

J U D G M E N T

R. MAHADEVAN, J.

1. Since both the appeals assail the same judgment and involve interconnected issues, they were heard together and are being disposed of by this common judgment.

Signature Not Verified
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VISHAL ANAND
Date: 2026.03.17
14:07:44 IST
Reason:

2. The present Civil Appeals arise out of the common judgment and decree dated 16.08.2021 passed by the High Court of Judicature at Madras[1] in O.S.A. No. 423 of 2012, whereby the Division Bench of the High Court allowed the appeal to the limited extent of decreeing the claim of Defendant No. 1 (Appellant in C.A. No. 13862 of 2024) against Defendant No. 2 (Appellant in C.A. No. 13861 of 2024) under the third-party procedure as prayed for, while affirming the judgment and decree dated 18.11.2010 passed by the learned Single Judge of the High Court in C.S. No. 933 of 1998 in all other respects.

3. The aforesaid Civil Suit was instituted by the plaintiff - Goltens Dubai (Respondent No. 2 in C.A. No. 13861 of 2024 and Respondent No. 1 in C.A. No. 13862 of 2024) seeking a judgment and decree against Defendant Nos. 1 and 2 *viz.*, Archean Industries Private Limited (Appellant in C.A. No. 13862 of 2024) and Canara Bank, Overseas Branch, Chennai (Appellant in C.A. No. 13861 of 2024) jointly and severally, for a sum of Rs. 48,26,750/- together with interest at the rate of 21% per annum on Rs. 43,00,000/- from the date of the plaint till realisation along with costs. By judgment and decree dated 18.11.2010, the learned Single Judge decreed the suit as prayed for only against Defendant No. 1 while dismissing the suit insofar as Defendant No. 2 is concerned, without costs.

[1] Hereinafter referred to as “the High Court”

4. The Plaintiff is a company engaged in ship repair and marine engineering services in Dubai. Defendant No. 1 is a company engaged in the export of granite and had chartered the vessel *Master Panos* for shipment of granite from Chennai to Newark in the United States of America. Defendant No. 2 acted as the banker of Defendant No. 1 and was entrusted with the remittance of the amount in question. For the sake of convenience, the parties shall hereinafter be referred to as per their status in the suit.

FACTUAL BACKGROUND

5. The facts giving rise to the present dispute, in brief, are that the plaintiff - Goltens Dubai, a ship repair company based in the United Arab Emirates, carried out extensive repair works on the vessel *Master Panos* during the period January to March 1998 at the request of its owner and operator/manager namely M/s. Royal Swan Navigation Co. Ltd. and M/s. Pevson Shipping Company S.A., respectively. The cost of the repair works was invoiced at US $ 435,232. As the payment remained outstanding, the plaintiff initiated legal proceedings which resulted in the arrest of the vessel at Dubai, thereby causing additional expenses of US $ 42,330 and raising the total outstanding liability to US $ 477,562.

5.1. Following negotiations between the plaintiff and the vessel owner, a Memorandum of Agreement dated 18.03.1998 was executed whereby the liability was reduced to US $ 377,562 on the condition that the entire amount

would be paid on or before 08.04.1998, failing which the original liability of US $ 477,562 would stand revived. Under the said settlement, the amount was to be paid from various sources, including a sum of US $ 100,000 which was to be remitted directly to the plaintiff through the owner Royal Swan.

5.2. In the meantime, Defendant No. 1 had entered into a Charter Party Agreement dated 09.03.1998 with the vessel owner for shipment of approximately 2,500 metric tonnes of granite from Chennai to Newark in the United States of America. Under the said arrangement, it was agreed that out of the freight payable by Defendant No. 1 to the vessel owner, a sum of US $ 100,000 would be paid directly by the owner to the plaintiff in partial discharge of the vessel owner's liability towards repair charges.

5.3. The vessel owner by communication dated 21.04.1998 addressed to Defendant No. 1, issued instructions to Defendant No. 1 that the said sum be remitted directly to the bank account of the plaintiff maintained with Standard Chartered Bank, Deira Branch, Dubai.

5.4. Pursuant thereto, Defendant No. 1 by communication dated 22.04.1998, acknowledged that a sum of US $ 100,000 had been retained from the freight payable to the vessel owner and confirmed that the amount would be remitted to the plaintiff upon the vessel reaching the port of Newark. Subsequently, on 25.04.1998, Defendant No. 1 issued a document styled as a "Corporate Guarantee" in favour of the plaintiff undertaking to pay the said amount upon the vessel's arrival at Newark and commencement of discharge operations.

5.5. The vessel arrived at Newark in May 1998 and Defendant No. 1 informed the plaintiff by communication dated 19.05.1998 that the remittance was being processed and that approval from the Reserve Bank of India was being obtained for the foreign exchange transaction.

5.6. Thereafter, on 21.05.1998, Defendant No. 1 addressed a letter to its banker, Defendant No. 2, namely Canara Bank, Overseas Branch, Chennai, instructing it to remit US $ 100,000 by telegraphic transfer to the account of the plaintiff. Defendant No. 1 also submitted Form A-2 containing the requisite particulars for the remittance.

5.7. However, instead of remitting the amount to the account of the plaintiff as instructed, Defendant No. 2 erroneously transferred the amount to the account of the vessel owner maintained with a bank in Baltimore, United States of America. The said mistaken remittance was subsequently acknowledged by Defendant No. 1 in its communication dated 03.06.1998 addressed to the brokers of the vessel.

5.8. By a further communication dated 12.06.1998, Defendant No. 1 reiterated that the amount had been inadvertently remitted to the vessel owner and reaffirmed its commitment to make payment to the plaintiff.

5.9. As the amount remained unpaid despite repeated communications and demands, the plaintiff issued a legal notice dated 29.07.1998 to Defendant Nos. 1 and 2 demanding payment of US $ 100,000 together with interest. Defendant No. 1 replied to the said notice disputing its liability and contending that the

document styled as a Corporate Guarantee was not a guarantee in law but merely an acknowledgment of a freight payment arrangement.

5.10. In these circumstances, the plaintiff instituted the aforesaid recovery suit. Defendant No. 1 contested the suit by filing its written statement and also raised a third-party claim against Defendant No. 2 alleging that the erroneous remittance made by the bank was responsible for the non-payment. Defendant No. 2 filed its written statement denying liability.

5.11. The parties adduced oral and documentary evidence before the learned Single Judge of the High Court. Upon appreciation of the pleadings, evidence and materials on record, the learned Single Judge by judgment dated 18.11.2010 decreed the suit in favour of the plaintiff and held that Defendant No. 1 was liable to pay the suit amount together with interest and costs, while dismissing the claim against Defendant No. 2. Aggrieved thereby, Defendant No. 1 preferred O.S.A. No. 423 of 2012 before the Division Bench of the High Court.

5.12. The Division Bench, upon consideration of the submissions of the parties, allowed the appeal to the limited extent by granting Defendant No. 1 the benefit of a third-party decree against Defendant No. 2 for recovery of the amount which had been erroneously remitted by the bank, while affirming the liability of Defendant No. 1 towards the plaintiff.

5.13. Aggrieved by the findings of the Division Bench holding it liable to the plaintiff, Defendant No. 1 has filed C.A. No. 13862 of 2024. Similarly, Defendant No. 2 has filed C.A. No. 13861 of 2024 challenging the direction of

the Division Bench permitting Defendant No. 1 to recover the sum of US $ 100,000 from it under third-party procedure.

SUBMISSION OF THE PARTIES

6. The learned senior counsel appearing for the Appellant in C.A. No. 13862 of 2024 / Defendant No. 1 contended that the courts below erred in fastening liability upon Defendant No. 1 by treating the communication dated 25.04.1998 as a contract of guarantee. It was submitted that the said document, described as a "Corporate Guarantee", does not satisfy the essential requirements of a valid contract of guarantee within the meaning of Section 126 of the Indian Contract Act, 1872. A contract of guarantee necessarily contemplates the existence of three distinct parties, namely the creditor, the principal debtor and the surety, wherein the surety undertakes to discharge the liability of the principal debtor in the event of default. According to the learned senior counsel, in the present case, Defendant No. 1 was itself a party to the freight arrangement under the Charter Party Agreement dated 09.03.1998 and was not a surety for any debt allegedly owed by the vessel owner to the plaintiff. The document relied upon by the plaintiff merely records an arrangement whereby Defendant No. 1 agreed to retain a portion of the freight payable to the vessel owner and remit the same to the plaintiff on its behalf.

6.1. The learned senior counsel submitted that the language of the communication dated 25.04.1998 itself demonstrates that Defendant No. 1 was acting on behalf of the vessel owner and under its authority. The arrangement was, therefore, in the nature of a freight assignment or payment arrangement between the vessel owner and the plaintiff, and Defendant No. 1 merely agreed to facilitate the remittance of a portion of the freight to the plaintiff. It was contended that such an arrangement cannot be construed as an independent and enforceable guarantee undertaken by Defendant No. 1.

6.2. It was further contended that the courts below failed to appreciate that the liability, if any, arose primarily from the underlying transaction between the plaintiff and the vessel owner and operator/manager. The vessel owner and the operator/manager were the alleged principal debtors in respect of the repair charges for the vessel *Master Panos*. However, no proceedings were initiated by the plaintiff against the vessel owner and operator/manager for recovery of the alleged dues. The learned senior counsel pointed out that even during the course of evidence, the witness examined on behalf of the plaintiff admitted that no legal proceedings had been initiated against the vessel owner. In such circumstances, fastening liability upon Defendant No. 1, who was neither the principal debtor nor a valid surety, was legally unsustainable.

6.3. The learned senior counsel further submitted that Defendant No. 1 had duly complied with the arrangement between the parties by issuing clear instructions to its banker, Defendant No. 2, for remittance of the amount of

US $ 100,000 to the plaintiff. Defendant No. 1 addressed a letter dated 21.05.1998 to its banker along with the requisite Form A-2 directing the bank to remit the said amount to the account of the plaintiff. It was contended that once such specific instructions were issued, Defendant No. 1 had fulfilled its obligation under the arrangement. The subsequent remittance of the amount to the vessel owner occurred solely due to the error committed by the bank. Instead of transferring the amount to the account of the plaintiff as instructed, the bank erroneously remitted the amount to the vessel owner. The evidence on record, according to the learned senior counsel, indicates that the bank itself acknowledged that such remittance may have occurred due to inadvertence on the part of its employee. In these circumstances, the resulting loss, if any, cannot be attributed to Defendant No. 1.

6.4. The learned senior counsel also submitted that the vessel owner, who had actually received the remitted amount of US $ 100,000, was necessary party to the proceedings. The failure to implead the vessel owner resulted in a situation where the party which had actually received the amount was not before the Court. It was contended that such omission caused serious prejudice to Defendant No. 1 as it was deprived of the opportunity to seek appropriate reliefs against the vessel owner.

6.5. The learned senior counsel further contended that the Courts below failed to properly appreciate the nature of the transaction and the defence raised by Defendant No. 1. According to the learned senior counsel, the evidence adduced

on behalf of Defendant No. 1 clearly demonstrated that the transaction was essentially a freight payment arrangement arising out of the Charter Party Agreement and did not create any independent contractual liability in the nature of a guarantee in favour of the plaintiff.

6.6. Reliance was also placed on the documents filed by the plaintiff in its pleadings, particularly paragraph 4 thereof, which records that Defendant No. 1 had been instructed by the vessel owner (Royal Swan) to pay a sum of US $ 100,000 directly to the plaintiff towards discharge of the owner's liability. According to the learned senior counsel, these materials demonstrate that Exhibit P11 was merely an agency letter authorising payment on behalf of Royal Swan, and not a guarantee.

6.7. In support of the above submission, reliance was placed on the decision of this Court in ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel***[2]**,** wherein it was held that the liability of a surety arises only when there is a clear and unequivocal undertaking to discharge the debt of the principal debtor upon default. It was submitted that no such undertaking is present in Exhibit P11.

6.8. The learned senior counsel also relied upon the judgment of this Court in ***Maitreya Doshi v. Anand Rathi Global Finance Limited and another***[3]***,*** wherein it was reiterated that the existence of a clear undertaking to discharge the liability of another is a fundamental requirement for a contract of guarantee under Section 126 of the Contract Act, 1872. According to the learned senior

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[2] (2021) 2 SCC 799

[3] (2023) 17 SCC 606

counsel, the arrangement evidenced in Exhibit P11 is merely an agency direction for payment and not a guarantee. In the absence of any unequivocal promise by Defendant No. 1 to assume liability for the debts of the vessel owner, Exhibit P11 cannot be treated as a guarantee in law

6.9. The learned senior counsel therefore submitted that both the learned Single Judge as well as the Division Bench of the High Court failed to correctly appreciate the legal character of the document *viz*., letter dated 25.04.1998 and the surrounding circumstances in which it was issued. The impugned judgment, according to the learned senior counsel, proceeds on an erroneous assumption that Defendant No. 1 had undertaken an independent guarantee in favour of the plaintiff, whereas in reality Defendant No. 1 had merely agreed to remit a portion of the freight payable to the vessel owner.

6.10. In the above circumstances, learned senior counsel submitted that the findings recorded by the Courts below suffer from errors of law and misappreciation of the nature of the transaction and therefore warrant interference by this Court.

7. The learned senior counsel appearing for the appellant in C.A. No. 13861 of 2024 / Defendant No. 2 Bank submitted that the decree passed by the Division Bench fastening liability upon the Bank is unsustainable both on facts and in law. It was contended that the High Court failed to properly appreciate

the limited role of the Bank in the transaction and the statutory framework governing foreign exchange remittances.

7.1. It was submitted that the repairs of the vessel *Master Panos* had been carried out by the plaintiff and the primary liability for payment of the repair charges was that of the vessel owner. The arrangement subsequently entered into between the vessel owner and Defendant No. 1 relating to payment of freight charges was essentially a commercial arrangement between those parties. According to the learned senior counsel, the Bank was not a party to that arrangement and had undertaken no independent contractual obligation either towards Defendant No. 1 or towards the plaintiff in relation to the alleged payment of US $ 100,000.

7.2. The learned senior counsel submitted that the Bank was acting merely in its capacity as an authorised dealer in foreign exchange and its role was confined to executing remittance instructions in accordance with the statutory regime governing such transactions. It was contended that any remittance of foreign exchange outside India during the relevant period was governed by the provisions of the Foreign Exchange Regulation Act, 1973, and the Bank was required to strictly comply with the statutory restrictions and regulatory directions issued by the Reserve Bank of India. In particular, reliance was placed upon Section 18(8) of the Foreign Exchange Regulation Act, 1973, which regulates the handling of export proceeds and foreign exchange transactions by authorised dealers.

7.3. It was further submitted that the remittance sought to be effected by Defendant No. 1 involved diversion of freight payable to the vessel owner in favour of the plaintiff, who was not the contracting party to the freight agreement. According to the learned senior counsel, such diversion of foreign exchange to a third party could not be effected by an authorised dealer without prior approval from the Reserve Bank of India.

7.4. The learned senior counsel drew attention to the contemporaneous correspondence to demonstrate that Defendant No. 1 itself had acknowledged this regulatory requirement. Reference was made to the communication dated 19.05.1998 addressed by Defendant No. 1 to the plaintiff wherein Defendant No. 1 had stated that the payment of US $ 100,000 was being processed with the Reserve Bank of India for necessary approval.

7.5. It was further submitted that the said position was clearly admitted by the witness of Defendant No. 1 during cross examination before the trial Court, stating that without the permission of the Reserve Bank of India there could be no question of the Bank remitting the amount to the plaintiff.

7.6. The learned senior counsel therefore submitted that the Bank, being an authorised dealer under the foreign exchange regime, was bound to act strictly within the statutory framework and the regulatory directions issued by the Reserve Bank of India. In the absence of the mandatory approval, the Bank could not lawfully remit the amount to the plaintiff.

7.7. It was accordingly contended that the Bank had merely acted within the statutory limitations governing foreign exchange transactions and had not undertaken any independent obligation towards the plaintiff. The dispute, if any, arose from the private commercial arrangement between Defendant No. 1 and the plaintiff, and Defendant No. 2 Bank cannot be made liable for the consequences thereof.

7.8. The learned senior counsel submitted that the Division Bench erred in passing a third-party decree against the Bank without properly appreciating the statutory limitations governing the Bank's role as an authorised dealer in foreign exchange. It was therefore prayed that the civil appeal filed by the Bank be allowed by setting aside the decree passed against the Bank.

8. *Per contra,* the learned senior counsel appearing for the plaintiff / Respondent No.1 in CA. No. 13862 of 2024 and Respondent No.2 in CA No. 13861 of 2024, submitted that the liability of Defendant No. 1 arises from a clear and unequivocal contractual undertaking given in favour of the plaintiff. It was contended that Defendant No. 1 had expressly undertaken to remit a sum of US $ 100,000 directly to the plaintiff towards discharge of the liability owed by the vessel owner for the repair works carried out by the plaintiff. According to the learned senior counsel, this obligation arose pursuant to a specific arrangement under which Defendant No. 1 had agreed to retain the said amount

out of the freight payable to the vessel owner and remit the same directly to the plaintiff.

8.1. The learned senior counsel further submitted that Defendant No. 1 had issued written communication dated 22.04.1998 acknowledging its obligation to make the payment and had also executed a Corporate Guarantee by letter dated 25.04.1998 assuring payment of US $ 100,000 to the plaintiff upon the arrival of the vessel at the port of Newark. The undertaking was thereafter reiterated through subsequent communications wherein Defendant No. 1 confirmed that the payment was being processed and that the amount had been retained specifically for the purpose of remittance to the plaintiff.

8.2. It was submitted that Defendant No. 1 had also issued instructions to its banker dated 21.05.1998 for remittance of the said amount and had submitted the necessary banking documentation for transfer of funds to the account of the plaintiff. However, owing to an error on the part of the Bank, the amount was mistakenly remitted to the vessel owner instead of being transferred to the plaintiff.

8.3. The learned senior counsel contended that such an erroneous remittance by the Bank cannot absolve Defendant No. 1 of the contractual obligation voluntarily undertaken by it in favour of the plaintiff. At best, such an error may give rise to a separate claim available to Defendant No. 1 against the Bank, but the same cannot defeat the independent liability of Defendant No. 1 towards the plaintiff.

8.4. The learned senior counsel further submitted that Defendant No. 1 attempted to introduce certain defences at the stage of evidence which were not pleaded in the written statement. It was argued that portions of the affidavit of evidence filed by Defendant No. 1's witness sought to set up an entirely new case beyond the pleadings. In support of this submission, reliance was placed upon the decision of this Court in ***Union of India v. Ibrahim Uddin and another***[4], wherein it was held that evidence without foundational pleadings cannot be considered. Reliance was also placed upon ***Ram Sarup Gupta (Dead) by LRs. v. Bishun Narain Inter College and others***[5]**,** reiterating the settled principle that parties cannot travel beyond their pleadings while leading evidence.

8.5. The learned senior counsel also submitted that the legal position governing contract of guarantee clearly supports the case of the plaintiff. It was contended that past consideration constitutes valid consideration for a contract of guarantee and that even forbearance to sue the principal debtor amounts to sufficient consideration in law.

8.6. The learned senior counsel submitted that reliance placed by Defendant No. 1 on illustration (c) to Section 127 of the Contract Act is misconceived, as it is well settled that illustrations cannot control or limit the clear meaning of the substantive provision.

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[4] (2012) 8 SCC 148
[5] (1987) 2 SCC 555

8.7. The learned senior counsel therefore submitted that the documentary record, including the written undertaking, the Corporate Guarantee and the subsequent communications, clearly establishes Defendant No. 1's liability towards the plaintiff. Defendant No. 1 cannot escape its liability merely because the Bank mistakenly remitted the amount to the vessel owner, particularly when Defendant No. 1 itself had retained the amount specifically for the purpose of making payment to the plaintiff.

8.8. It was further pointed out that the Division Bench of the High Court, while affirming the decree in favour of the plaintiff, had granted a third-party decree in favour of Defendant No. 1 against the Bank, thereby safeguarding Defendant No. 1's right to recover the amount from the Bank in view of the mistaken remittance.

8.9. In these circumstances, learned senior counsel submitted that the findings recorded by the learned Single Judge, as affirmed by the Division Bench, are based on a proper appreciation of the pleadings, documentary evidence and settled principles of law governing contractual liability and guarantees. The learned senior counsel therefore prayed that the concurrent findings of the Courts below be affirmed.

9. By way of reply, the learned senior counsel for Defendant No. 1 submitted that the bank's own admission shows that the remittance was effected

due to inadvertence on the part of its employee. According to the learned senior counsel, this clearly establishes negligence in the discharge of Bank's duties.

9.1. It was further submitted that the Bank's reliance on the Charter Party Agreement is wholly misplaced, as the Bank was not a party to the said agreement. The obligations of the Bank arise solely from the mandate issued by its customer. Once instructions were issued by Defendant No. 1, the Bank was duty-bound to act strictly in accordance with those instructions. Even assuming that the Bank had reservations regarding regulatory approval, it ought to have sought clarification or declined to process the transaction. Instead, the Bank unilaterally remitted the amount to the vessel owner without authorisation, which was impermissible.

9.2. The learned senior counsel for Defendant No. 1 therefore contended that the unilateral act of the Bank in debiting Defendant No. 1's account and remitting the amount to the vessel owner, contrary to the specific instructions issued by Defendant No. 1, constitutes a clear breach of duty and cannot be justified in law.

<u>DISCUSSION AND FINDINGS</u>

10. We have considered the submissions made by the learned senior counsel appearing for the parties and perused the materials available on record.

11. This Court by order dated 20.10.2022 in SLP (C) No. 18106 of 2022 out of which Civil Appeal No. 13861 of 2024 arises, granted an interim stay of the judgment passed by the High Court. Further, by order dated 28.08.2023 in SLP (C) No. 19275 of 2023, out of which Civil Appeal No. 13862 of 2024 arises, this Court directed that the execution proceedings shall not be precipitated.

12. The challenge in the present civil appeals is to the judgment dated 16.08.2021 passed by the Division Bench of the High Court in O.S.A. No. 423 of 2012. C.A. No. 13862 of 2024 filed by Defendant No. 1 is confined to the finding holding it liable to pay the plaintiff. On the other hand, C.A. No. 13861 of 2024 filed by Defendant No. 2 Bank assails the direction of the Division Bench requiring it to indemnify Defendant No. 1 in the third-party proceedings.

13. The sum and substance of the submissions advanced on behalf of Defendant No. 1 is that the document in the form of letter dated 25.04.1998 executed by it does not constitute an undertaking or guarantee, but merely reflects a freight payment arrangement. It is further contended that Defendant No. 1 had issued clear instructions to the Bank to transfer the funds to the plaintiff and that the mistaken remittance occurred solely due to an error committed by the Bank. Hence, according to Defendant No. 1, no liability can be fastened upon it.

13.1. The contention of the Bank, against whom a decree has been passed under the third-party procedure, is that though instructions were issued to remit

the amount to the plaintiff, no approval had been obtained from the Reserve Bank of India and therefore, the remittance could not have been effected in favour of the plaintiff. It is further submitted that the Bank was not a party to the *inter se* arrangement between the parties and consequently, no decree could have been passed against it.

Civil Appeal No. 13862 of 2024 filed by Defendant No. 1

14. We shall first deal with the appeal filed by the appellant / Defendant No.1. A perusal of the record reveals that Defendant No. 1 had executed multiple documents expressing its commitment to pay the plaintiff including the letter dated 25.04.1998 styled as a "Corporate Guarantee".

15. Chapter VIII of the Indian Contract Act, 1872 deals with the law regarding "Indemnity and Guarantee". The relevant provisions are extracted hereunder, for better appreciation:

> ***"126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—*** *A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."*
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> ***"127. Consideration for guarantee****.—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."*
>
> ***"128. Surety's liability****.—The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract."*

> ***"137. Creditor's forbearance to sue does not discharge surety**.—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety."*
>
> ***"138.Release of one co-surety does not discharge others**.—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties."*
>
> ***"140.Rights of surety on payment or performance**.—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 the rights which the creditor had against the principal debtor."*
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> ***"141.Surety's right to benefit of creditor's securities**.—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 surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."*

15.1. A reading of the aforesaid provisions indicates that a contract of guarantee is an undertaking to perform the promise or discharge the liability of a third person, in case of his default. It is essentially a voluntary act of taking up the burden of a third party, who has received or is about to receive some benefit and has failed to make the payment. The guarantor is called the "surety" and person in default is called the "Principal Debtor".

16. It is well settled that it is not necessary for the guarantor to derive any direct benefit from the transaction. It is sufficient if the principal debtor derives the benefit. The consideration for a contract of guarantee may be past, present or

future. The guarantee is, in itself, a separate contract and enforceable independently, and the liability of the surety is co-extensive with that of the principal debtor unless otherwise provided by the contract. Consequently, both are jointly and severally liable. The creditor, to whom both the principal debtor and surety are liable, can sue either or both of them. In case, the creditor proceeds to recover only from the surety, the surety is at liberty to recover the same from the principal debtor as he would have stepped into the shoes of the original creditor by virtue of the doctrine of subrogation, and all the attendant remedies available to the creditor are available to him.

17. In this context, reference may be made to the judgment of this Court in ***Bank of Bihar Ltd. v. Damodar Prasad and others***[6], wherein it was held that the creditor is entitled to proceed against the surety without first exhausting the remedies against the principal debtor. The relevant paragraphs are usefully extracted below:

> *"3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor.*
>
> *4. Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson, [1802] 6 Ves Jun. 714 ; 31 E.R. 1272 "But the surety is a guarantee ; and it is his business to see whether the principal*

[6] (1969) 1 SCR 620: MANU/SC/0220/1968

pays, and not that of 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.

....

6…… But the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. 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 Section 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. .."

18. In ***State Bank of India v. V. Ramakrishnan and Others***[7], this Court reiterated the essential attributes of a contract of guarantee and the nature of the liability of a surety. In doing so, reliance was placed on the recommendations of the Insolvency Law Committee, one of which reads as under:

"5.9. A contract of guarantee is between the creditor, the principal debtor and the surety, whereunder the creditor has a remedy in relation to his debt against both the principal debtor and the surety [National Project Construction Corporation Limited v. Sandhu and Co. MANU/PH/0072/1990 : AIR 1990 P&H 300]. The surety here may be a corporate or a natural person and the liability of such person goes as far as the liability of the principal debtor. As per Section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence [Chokalinga Chettiar v. Dandayunthapani Chattiar MANU/TN/0285/1928 : AIR 1928 Mad 1262]. Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several [Bank of Bihar v. Damodar Prasad MANU/SC/0220/1968 : AIR 1969 SC 297]. The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost importance for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended."

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[7] (2018) 17 SCC 394

19. Similarly, in ***Phoenix ARC Private Limited*** *(supra),* while considering the scope of a guarantee in the context of enforcement proceedings, this Court underscored that a contract of guarantee is a guarantee "to perform the promise or discharge the liability of third person in case of his default". The Court noted that the expressions "perform the promise", and "discharge the liability", as used in Section 126 of the Indian Contract Act, 1872, necessarily relate to the obligation undertaken by the surety in respect of the liability of a third person.

20. Further, in ***Maitreya Doshi*** *(supra)* this Court delineated the distinction between a contract of indemnity, a contract of guarantee and a pledge. The relevant paragraph reads as under:

> *"34. It is true, as argued by Mr. Vishwanathan that contract of indemnity, contract of guarantee and pledge are not one and the same. The contract of indemnity is 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. In a contract of indemnity, a promisee acting within the scope of his authority is entitled to recover from the promisor all damages and all costs which he may incur. A contract of guarantee, on the other hand, is a promise whereby the promisor promises to 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 the principal debtor and the person to whom the guarantee is given is the creditor. 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. On the other hand, the bailment of goods as security for payment of a debt or performance of a promise is a pledge".*

21. Recently, in ***Asset Reconstruction Co. Ltd. v. Electrosteel Castings Ltd.***[8] this Court had occasion to consider the scope and ambit of Section 126 of the Contract Act and the essential ingredients of a contract of guarantee. The following paragraphs are apposite:

> *"**17.** We have given our thoughtful consideration to the rival submissions and have carefully perused the records. Section 126 of the Act defines a "contract of guarantee", as a contract to perform promise, or discharge the liability, of a third person in case of his default. The essential ingredients of a guarantee, therefore, are (a) existence of principal debt, (b) default by the principal debtor and (c) a promise by the surety to discharge the liability of the principal debtor upon such default. Thus, a guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of failure of another party, who is in the first instance, liable to such payment or performance [Conley, In re; Ex parte the Trustee v. Barclays Bank Ltd. [1938] 2 All ER 127, at 130-131 (CA).]. A guarantee is a security in the form of right of action against a third party. In order to constitute a guarantee, there has to be a specific undertaking or unambiguous affirmation to discharge the liability of a third person in case of their default.*
>
> ***18.** A guarantee is governed by principles of construction generally governing other documents [Raja Raghunandan Prasad Singh v. Raja Kirtyanand Singh Bahadur1932 SCC OnLine PC 3; AIR 1932 PC 131, Eshelby v. Federated European Bank Ltd. (1932) 1 KB 254 and Kamla Devi v. Takhatmal Land1963 SCC OnLine SC 131; (1964) 2 SCR 152; AIR 1964 SC 859.]. A guarantee being a mercantile contract, the court does not apply to it merely technical rules but construes it so as to reflect what may fairly be inferred to have been the parties' real intention and understanding as expressed by them in writing and to give effect to it rather than not [Halsbury's Laws of England, Volume 49, fifth edition and Perrylease Ltd. v. Imecar AG[1987] 2 All ER 378 (QBD).] .*
>
> ***20.** For an obligation to be construed as a guarantee under section 126 of the Act, there must be a direct and unambiguous obligation of the surety to discharge the obligation of the principal debtor to the creditor. The clause neither records an undertaking to discharge the debt owed to the creditor nor does it contemplate payment to the lender in the event of the default. The clause contains a promise, not to the creditor to pay the debt upon default, but to the borrower to facilitate compliance with the financial covenants. An undertaking to infuse funds into a borrower, so that it may meet its obligations cannot, by*

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[8] (2026) 264 Comp Cas 11 : 2026 SCC OnLine SC 26

itself be equated with the promise to discharge the borrower's liability to the creditor. A mere covenant to ensure financial discipline or infusion of funds does not satisfy the statutory requirements of section 126 of the Act.

22. *Section 126 of the Act mandates a guarantor to "perform a promise" or "discharge the liability" of a third person which necessarily implies a direct performance or discharge. A "See to it" guarantee in English common law refers to an obligation upon the guarantor to ensure that principal debtor itself, performs its own obligation and the guarantor, therefore, is in breach as soon as principal debtor fails to perform. However, a "see to it" guarantee does not include an obligation to enable the principal debtor to perform its own obligation. Such an arrangement would not be a guarantee under section 126 of the Act."*

22. In the present case, Defendant No. 1 has relied upon the decisions of this Court in ***Phoenix ARC Private Limited*** and ***Maitreya Doshi*** to contend that there must be a clear and unequivocal undertaking to make payment, which is absent in the present case. We have carefully perused the said judgments. In our view, the decisions do not advance the case of Defendant No. 1. The judgments merely reiterate the requirements necessary to constitute a valid contract of guarantee and explain the difference between contracts of guarantee, indemnity and pledge. To constitute a valid guarantee, the requirement is an undertaking or promise to make a payment to the creditor upon the default of the principal debtor for a benefit received by principal debtor.

23. Juxtaposing the aforesaid principles with the facts of the present case, it emerges from the record that the owner of the vessel had instructed Defendant No. 1 to pay a sum of US $ 100,000 to the plaintiff towards discharge of its liability for the repairs carried out to the vessel. A further perusal of the record

reveals that by a letter dated 22.04.1998, Defendant No. 1 addressed the plaintiff assuring that a sum of US $ 100,000 would be paid after the cargo was cleared, in clear and unequivocal terms. The contents of the said letter also indicate that Defendant No. 1 had undertaken to make the payment and had requested that the arrangement should not be disclosed to the owner of the vessel. The relevant portion of the letter is extracted below for ease of reference:

> *"You may be rest assured, we will fulfill this obligation as we are constrained to adopt this procedure only to safeguard our interest. The cargo on board has a substantial worth and we would not like to fail in any of our obligations towards the cargo. We would like to assure you that the money is safe with us and by this fax we are advising you that we would remit this money directly to your goodselves and would only like to ensure that the vessel reaches destination and commences discharge. ……….Please feel free to contact us any time and As discussed, would advise you to keep owners out of this understanding between us as otherwise they could insist on remittance of the money to them directly as it forms part of freight.*
>
> *Trust I have clarified the position and would deeply appreciate your co-operation in the interest of all parties concerned. We are a well recognised export House based in Madras and have a good track record in fulfilling various business obligations and enjoying dependable reputation."*

24. Defendant No. 1, in furtherance of its undertaking for payment, gave a corporate guarantee on 25.04.1998 by Exhibit P11, which reads as under:

> *"By this payment guarantee made on 25th April 1998 by us, we agree to hold at your disposal a sum of money not exceeding USD 100,000 (U.S. Dollars One Hundred Thousand only) from freight on behalf of the owners - Pevson Shipping Co., S.A., 73, Notara Street, 18535 Piraeus, Greece for repair work carried out on vessel "Master Panos". This is being done on authority from Owners of vessel.*
> *This guaranteed sum will be paid to you upon first written demand after vessel's arrival and commencement of discharge at Newark.*

> *This guarantee will be valid till the entire amount of USD 100,000/- is settled to your account subject to Charter Party dated 9th March 1998, conditions and amendments. The ETA of the vessel at Discharge Port, Newark is 17thMay 1998."*

25. A conjoint reading of the documents on record, particularly the letter dated 22.04.1998 and the Corporate Guarantee dated 25.04.1998, clearly establishes that the undertaking to pay was not merely a freight-sharing arrangement but an independent guarantee satisfying the requirements of Sections 126 to 128 of the Contract Act. Exhibits P10 and P11 constitute a valid undertaking by Defendant No. 1 to discharge the liability of the vessel owner in the event of its default in payment of the repair charges. Further, after the cargo had been delivered by the owner of the vessel, and upon the plaintiff demanding payment, Defendant No. 1, by Exhibit P14, requested Defendant No. 2 Bank to transfer a sum of US $ 100,000 to the plaintiff along with the requisite Form A2. This conduct clearly reflects the intention of Defendant No. 1 to honour the undertaking given by it. Furthermore, during cross examination, DW- 1 deposed that Exhibit P11 was a conditional guarantee letter, thereby acknowledging that the letter dated 25.04.1998 was in the nature of a guarantee, as was expressly stated by him in his testimony. We therefore, concur with the findings recorded by the High Court and reject the contention of Defendant No. 1 that the document merely reflects a freight payment arrangement.

26. Yet another submission of the learned senior counsel for Defendant No. 1 is that the letter dated 25.04.1998 was expressly made subject to the Charter Party conditions and amendments which, under Clause 30, contemplated payment of freight to Royal Swan, and that the said Charter Party was never amended so as to enable payment to the plaintiff.

26.1. Significantly, Defendant No. 1 itself did not treat the said purported condition as mandatory. On the contrary, it proceeded to act upon the arrangement despite the absence of any amendment to the Charter Party Agreement by processing the necessary papers for approval from the Reserve Bank of India and issuing instructions to Defendant No. 2 Bank for remittance of the said amount to the plaintiff. A reading of the letter dated 25.04.1998 in its entirety, coupled with the subsequent communications and the specific remittance instructions issued by Defendant No. 1 to the Bank clearly indicates that Defendant No. 1 had unequivocally undertaken to arrange payment of US $ 100,000 to the plaintiff out of the freight payable. In such circumstances, the Division Bench rightly held that having acted upon the letter dated 25.04.1998, Defendant No. 1 is estopped by its conduct from contending that Clause 30 of the Charter Party Agreement was never amended and that no liability had consequently arisen.

27. The next contention advanced on behalf of Defendant No. 1 is that the owner of the vessel ought to have been impleaded as a party to the suit and that,

had such impleadment been made, Defendant No. 1 could have sought appropriate relief against the said party. We are unable to agree with the said contention.

27.1. It is well settled that the plaintiff is the *dominus litis* and it is for the plaintiff to determine the cause of action and the parties against whom the suit is to be instituted. In ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd.***[9], this Court reiterated that a plaintiff cannot ordinarily be compelled to sue a person against whom he does not seek any relief, unless such person is shown to be a necessary party whose presence is indispensable for the effective adjudication of the dispute. The following paragraphs are pertinent:

> *"**13.** The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:*
>
> > *"10. (2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."*
>
> ***14.** The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even*

[9] (2010) 7 SCC 417

without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

***15.** A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.*

***22.** Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice.*

***23.** This Court in Ramji Dayawala & Sons (P) Ltd. v. Invest Import [(1981) 1 SCC 80] reiterated in SCC p. 96, para 20 the classic definition of "discretion" by Lord Mansfield in R. v. Wilkes [(1770) 4 Burr 2527 : 98 ER 327 : (1558-1774) All ER Rep 570] (ER p. 334) that "discretion"*

> *"when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular."*

***25.** In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts*

> *and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party."*

28. In the present case, the owner of the vessel was admittedly not impleaded as a party to the suit. Even assuming that the vessel owner had been impleaded as a defendant, Defendant No. 1 could not have ordinarily maintained a counterclaim against another defendant, as a counterclaim is directed primarily against the plaintiff [See: ***Rohit Singh & Others v. State of Bihar***[10] and ***Sanjay Tiwari v. Yugal Kishore Prasad Sao & Others***[11]***].***

29. However, there is an exception to the above settled position where the third-party procedure contemplated under Order VIII-A of the Code of Civil Procedure is applicable, wherever such procedure has been introduced by the High Courts through appropriate amendments. The Madras High Court has incorporated such a procedure. Order VIII-A of CPC enables a defendant to claim contribution or indemnify from a third party or even from a co-defendant by issuing a third-party notice.

30. The Madras High Court in its Original Side Rules under Order VA has incorporated the third-party procedure under Order VIII-A CPC. Rules 1 to 5 of Order VIII-A deal with issuance of notice to the third party and the consequences of default in appearance. Rule 6 speaks about the grant of leave to defend the suit. Rules 8 and 9 speak about contribution from co-defendant and

[10] (2006) 12 SCC 734
[11] 2025 LiveLaw (SC) 1097

issuance of a third-party notice by a person who himself has been issued a third-party notice. The procedure contemplated under order VIII-A is essentially summary in nature and is intended to avoid multiplicity of proceedings by enabling all connected claims to be adjudicated in the same suit.

31. Defendant No. 1, in the instant case, claimed contribution only from the co-defendant Bank and did not take recourse to the third-party procedure by issuing notice to the owner of the vessel for the purpose of claiming contribution from them. We may hasten to add that either of the defendants could have taken steps to issue notice to the owner of the vessel under third party procedure, particularly Defendant No. 2 bank, which committed the mistake. Defendant No. 1, having conveniently failed to invoke available procedural remedy under law, cannot now shift the burden upon the plaintiff, which being the *dominus litis*, was entitled to choose the parties against whom the relief was sought. The failure of the defendants to implead other potentially liable parties cannot, therefore, be used to defeat the claim of the plaintiff.

32. Reference in this regard may also be made to the judgment of this Court in ***Kanaklata Das and others v. Naba Kumar Das and others***[12], wherein it was reiterated that the plaintiff cannot be compelled to implead a third party unless such party is shown to be a necessary party without whose presence the dispute cannot be effectively adjudicated. The following paragraphs are pertinent:

[12] MANU/SC/0041/2018: (2018) 2 SCC 352

*"**17.** Fourth, the Plaintiff being a dominus litis cannot be compelled to make any third person a party to the suit, be that a Plaintiff or the Defendant, against his wish unless such person is able to prove that he is a necessary party to the suit and without his presence, the suit cannot proceed and nor can be decided effectively.*

***18.** In other words, no person can compel the Plaintiff to allow such person to become the co-Plaintiff or Defendant in the suit. It is more so when such person is unable to show as to how he is a necessary or proper party to the suit and how without his presence, the suit can neither proceed and nor it can be decided or how his presence is necessary for the effective decision of the suit. (See-Ruma Chakraborty v. Sudha Rani Banerjee and Anr., MANU/SC/0919/2005 : 2005(8) SCC 140)*

***19.** Fifth, a necessary party is one without whom, no order can be made effectively, a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. (See-Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and Anr. MANU/SC/0045/1962 : AIR 1963 786)"*

33. The other contention that without the clearance of RBI, the payments cannot be made to the account of the plaintiff, also does not merit acceptance. As rightly held by the High Court, the said plea was not raised in the pleadings. It is a settled principle that no amount of evidence can be looked into in the absence of proper pleadings. The Judgments relied upon by the plaintiff in ***Union of India v. Ibrahim Uddin*** *(supra) and* ***Ram Sarup Gupta v. Bishun Narain*** *(supra)* are squarely applicable in this regard. It is relevant to note here that Defendant No. 1 itself had communicated by letter dated 19.05.1998 (Exhibit P13) that necessary documents were being processed with the Reserve Bank of India. In any case, as evident, there is a valid undertaking by way of a guarantee executed by Defendant No. 1, and Defendant No. 1 cannot absolve

from its liability. Further, the interests of Defendant No. 1 are protected as its right to recover the amount from the owner of the vessel is preserved under Section 140 of the Contract Act, and the High Court has also granted a third-party decree in its favour against the Bank. Therefore, we find no reason to interfere with the impugned judgment of the High Court and the appeal filed by Defendant No. 1 is liable to be dismissed.

CA. No. 13861 of 2024 filed by Defendant No. 2 Bank

34. We now turn to the appeal filed by Defendant No. 2 Bank. No evidence was brought on record to show that the approval of the Reserve Bank of India had been obtained or that the Bank had sought any clarification in that regard. The Division Bench of the High Court concurred with the findings of the trial Court that the Bank had been instructed by Defendant No. 1 through Exhibit P14 and the accompanying Form A-2 to remit a sum of US $ 100,000 to the plaintiff. We are in agreement with the view taken by the High Court.

35. The communication regarding the processing of documents with the Reserve Bank of India (Exhibit P13) was not addressed to the Bank. Once clear instructions had been issued by its customer, the Bank was required either to comply with those instructions or to seek clarification regarding the necessity of regulatory approval and whether such approval had been obtained to facilitate the remittance. The Bank could not have unilaterally remitted the amount to the

vessel owner. According to the learned senior counsel, the Bank had no discretion in the matter and could only act in accordance with the mandate contained in the Charter Party Agreement dated 09.03.1998, which provided that freight payment was to be made by Defendant No. 1 to the vessel owner. However, as rightly held by the Division Bench, the Bank, not being a party to the Charter Party Agreement, cannot rely upon the terms thereof to justify the remittance made to Royal Swan in the face of the express instruction issued by Defendant No. 1 directing payment to the plaintiff. The Bank was bound to act in accordance with the instructions issued by Defendant No. 1. In any event, the role of the Bank was confined to honouring the instructions of its customer, namely Defendant No. 1. Even in the absence of any RBI approval, the Bank ought to have withheld the amount and awaited further instructions from its customer or sought the requisite clarification. The funds in question belonged to the customer, and the Bank could not have acted contrary to the mandate given by it. Therefore, the act of the Bank in transferring the funds to the owner of the vessel, who had clearly instructed the Defendant No. 1 to remit the money to the plaintiff, cannot be sustained.

36. The Division Bench reversed the decision of the trial Court insofar as it had denied a decree under the third-party procedure and proceeded to grant a decree in favour of Defendant No. 1 which had raised a specific plea in its written statement. We have already discussed in detail the scope and

applicability of the third-party procedure under Order VIII-A of the CPC. The suit was instituted in the year 1998 under the Original Side Jurisdiction of the Madras High Court. Order V-A of the Original Side Rules, wherein the provisions of Order VIII-A of CPC are incorporated comes into operation automatically. The facts of the present case reveal that the Bank, despite clear instructions to remit the US $100,000 to the account of the plaintiff, failed to do so due to an error on its part. This mistake was also admitted by the Bank. Exhibit P17 was a communication addressed to the Bank pointing out the erroneous transfer and requesting retrieval of the amount and its remittance to the account of the plaintiff. The Bank did not respond stating that the remittance could not be effected for want of approval from the Reserve Bank of India. The Division Bench has carefully considered these aspects and rendered its findings in paragraphs 27 to 30 of its judgment, which we fully endorse. Defendant No.1 was therefore rightly held entitled to a third-party decree against Defendant No.2 Bank.

37. We find no infirmity in the reasoning adopted by the Division Bench of the High Court warranting interference by this Court.

CONCLUSION

38. In view of the foregoing discussion, both the appeals fail and are accordingly dismissed. There shall be no order as to costs.

39. Pending application(s), if any, stand disposed of.

………………………….J.
[J.B. PARDIWALA]

………………………….J.
[R. MAHADEVAN]

NEW DELHI;
MARCH 17, 2026