
(1971) 03 DEL CK 0040
In the Delhi High Court
Case No : First Appeal No. 82-D of 1960

Ishar Das

APPELLANT

Vs

The Punjab National Bank Ltd. and Another

RESPONDENT

Date of Decision : 29-03-1971

Acts Referred:

Displaced Persons (Debts Adjustment) Act, 1951 — Section 13, 2(6)

Citation : AIR 1971 Delhi 252

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : R.L. Aggarwal and J.N. Vijh, for the Appellant; H.R. Sawhney and C.V. Francis, for the Respondent

Final Decision : Allowed

Judgement

1. This is an appeal by Ishar Dass (now deceased and represented by his legal representative) against the Punjab National Bank. The appellant was the petitioner in an application u/s 13 of the Displaced Persons (Debts Adjustment) Act, 1951., In that application he claimed the recovery of Rs. 85,155/9/5 with interest against the Punjab National Bank. According to the application, the petitioner was a guarantee broker of the Bank with respect of various branches which are now in Pakistan. There was an agreement between the parties on 24th January, 1942, setting out the terms of the contract. The petitioner alleges that in furtherance of the said guarantee he gave a cash security of Rs.1,08,155/9/6 as well as the security of immovable property a life insurance policy and also some other securities. The Bank advanced loans to a number of debtors introduced by the petitioner on the security of moveable and other securities approved by it as well as against goods pledged by those debtors. However, on account of the partition of the country particularly all the debtors had to leave their original place of business and came to India and the pledged securities also became unavailable for the purpose of the loan. It was claimed that the petitioner's liability as guarantee broker had terminated as a result of the

communal disturbances before and after 15th August 1947, as the goods pledged and the securities furnished to the Bank had been looted, burnt or destroyed because of the Bank's failure to take proper precautions. Consequently, the Bank was responsible for the loss, destruction and non-availability of those goods and securities etc., and the Bank was Therefore disentitled to recover the debts from the guarantee given by the petitioner.

The Bank had further threatened the petitioner with suits and liability regarding all the debts of the principal debtors and thus was in a position to dominate the will of the petitioner to furnish a fresh settlement with the petition on 17th September, 1949. Under this agreement, the Bank had retained Rs.85,155/9/5 out of the cash, security furnished by the petitioner under original agreement dated 24th January, 1942. It was stated that the terms of the said agreement dated 17th September, 1949, was not a voluntary act of the petitioner but was brought about by the Bank under threat and undue pressure and the terms were thus unconscionable, unjust and inequitable and the agreement was void, unenforceable and contravened the provisions of Section 17(b) of the Displaced Persons (Debts Adjustment) Act and was thus not binding upon the petitioner. I have set out the main features of the case of the petitioner though it is not really necessary to do so for the purpose of this appeal.

2. The Bank was stated to have finally adjusted Rs.85,155/9/5, which was left as a result of the agreement dated 17th September, 1949, by debiting to the said amount two sums of Rupees 11,387/3/8 and Rs.71,003/1/10 which had been held to be irrecoverable by Shri. Yoh Raj, General Manager and Shri. B.N. Puri, Secretary which were respectively due from Kapur Singh Darshan Singh, Chuhan Khanna and Kaushal Singh Nirmal Singh, Chuhan Khanna, now in Pakistan. It was claimed by the petitioner that these amounts could not be appropriated and could not have been retained by the Bank and the same were liable to be refunded with interest to the petitioner. The Bank contested this position and took up on its part the plea that under the original agreement the 13,12,577/13/3 which was the amount which was guaranteed under the original agreement. The mutual settlement dated 17th September 1949, was intended to fully discharge and satisfy the claim of the Bank and thus a full and final settlement which cannot be reopened under Act No. 70 of 1951.

It was also pleaded that the petitioner was not a creditor of the Bank, but, rather the Bank was the creditor of the petitioner and hence the application was not maintainable u/s 73 of the Act. It appears that all the evidence was recorded but the petition has been decided on the preliminary issues which are in the following terms:

"1. Whether the present application is not competent?

2. Whether the cash security deposited by the applicant with the respondent Bank falls within the meaning of word 'debt' referred in Act. No. 70 of 1951?

I need not reproduce the other issues as they have not been decided by the

Judgment under appeal. The principal finding the Tribunal in disposing of the application u/s 13 of the aforementioned Act is, that the agreement dated 24th January, 1942 provided that the petitioner would be guarantee broker and the sum deposited by him as cash security amounting of Rs.1,08,155/9/6, was only a security for the due performance of the guarantee. Relying on Section 126 of the Contract Act it was held that a guarantee is merely a contract to discharge a debt of another on his default, and the liability of the guarantor was the same as that of the principal debtor. Reliance for this purpose was placed on Section 128 of the Indian Contract Act, which is in the following terms:-

"128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provide by the contract."

The Tribunal held that the liability of the surety being co-extensive with that of the principal debtor the petitioner was in reality a debtor to a much larger extent than his cash securities and Therefore could not be said to be a creditor within the meaning of Section 13 of the Act.

Reliance was also placed on the decisions of the Punjab High Court in various unreported cases where the claims of persons who had pledged goods with Banks, before the partition o f the country, had been disallowed on the ground that a person who pledged goods with the Bank even though the goods were of a higher value than the loans taken from the Bank could no be held to be creditors within the meaning of Section 13 of the Act. So far, as doctrine of `frustration" is concerned, the court rejected the applicability of the doctrine to the case on the ground that the repayment of the loans from the principal debtors had not become impossible merely because the securities or pledged goods etc., had been destroyed, looted or otherwise become unenforceable due to the setting up to of the Dominions of India and Pakistan. In this way, the trial court decided issues Nos. 1 and 2 in favor of the Bank and thus held that the cash security deposited by the petitioner with the Bank did not fall within the meaning of `debt" as given in Act, No. 70 of 1951. No decision was given on the other issues in view of the fact that the application was held to be incompetent and cash security in question to be not a debt. The application was accordingly dismissed. Now the petitioner has appealed to this Court u/s 40 of the Act and I have to consider whether the decision given by the Tribunal is correct.

3. The first question in this case is whether the petitioner now appellant in this Court can be said to be a creditor of the Bank. For this purpose, it is necessary to refer to the agreement dated 24th January, 1942 and also to the agreement, dated 17th September, 1949. The said agreements are Exhibits R-2 and R-1 respectively on the record of this case. Under the original agreement of 24th January, 1942, the petitioner was a guarantee broker and it is necessary to set out some of the relevant terms for the purpose of this appeal. Clause 5 of the agreement is as follows:

"5. That the Guarantee broker shall be responsible to the Bank for the due

fulfillment and performance of all contracts and engagements guaranteed by him under this agreement. The guarantee broker shall indemnify the Bank for all losses, which may arise as hereinafter provided"

Clause 7 is as follows:

"7. In cases the Bank suffers any loss in any transaction which has been guaranteed by the Guarantee Broker, whether on account of non-payment by the customer or on account of any shortfall in the realization of its dues, the Bank after giving 15 days registered notice to the Customer shall take legal proceedings against him at the cost of Guarantee Broker if for a period of three months after obtaining the decree, the Bank fails to realise the amount of the decree from the judgment debtor, the Bank shall be entitled to recover its loss and all its dues from the Guarantee Broker and will if so required assign in writing the decrees to the Guarantee Broker before realizing such decretal amount from the Guarantee Broker".

But the question that arises from the purpose of this appeal is whether S. 128 above clauses of the agreement. As I read it Clause 7 of the agreement, which contains the liability of the guarantee broker does not become operative unless the Bank suffers any loss in any transaction which is guaranteed by the guarantee broker. In this respect the guarantee seems to be a kind of indemnity to the Bank for all losses as stated in the last portion of Clause 5. If there are no losses then the guarantee broker has to do nothing. If there is a short fall in the realization as provided by Clause 7 then the Bank is to take legal proceedings against the debtor at the cost of the guarantee broker and if three months pass after the obtaining of the decree consequent to the taking of such legal proceedings and the Bank is unable to realize all the amounts of the decree from its customers, the Bank is entitled to recover its losses and other dues from the guarantee broker and if so required, agrees to assign its decrees to the guarantee broker before realizing the amounts from the broker. The effect of the two clauses which I have reproduced above is that the guarantee broker becomes a debtor of the Bank, but, only after decrees have been obtained under Cl.7 and the period of three months has passed and the Bank is unable to realize the amounts due from the principal debtors. This is what one would have expected in such a contract. The Bank does not advance money without a pledge or security from the debtor. The guarantee broker only comes to the help of the Bank when there is a failure of the principal debtor. If the liability was concurrent as provided in Section 128 of the Contract Act, the Bank would always be realizing its debts from the guarantee broker without first attempting to realize the same from its debtors or from the pledges and securities given by them, I Therefore come to the conclusion that this guarantee does not provide for any existing liability for all the debts guaranteed by the guarantee broker but creates a contingent liability. On this view of the contract, it follows that at any given time the guarantee broker may be a creditor of the Bank and at another a debtor of the Bank inasmuch as the Bank may be entitled to realize larger sums from

the broker than the amounts secured by property, cash securities and other securities handed over to the Bank by the guarantee broker. It is Therefore not possible to give an instantaneous answer at any given time as to whether the petitioner is a creditor or a debtor or neither. It is all a matter of calculation.

I think that in this respect the Tribunal has erred in law in proceeding to give a direct answer to the question by merely referring to the contract. This was in reality a matter concerned with the merits of the case. If the Tribunal has found on the facts that nothing was due from the Bank then the petition would in any case fail and if the Bank was the creditor and not the petitioner then certainly nothing could be due to the petitioner and the petition would fail. It was much more proper for the merits than to determine as to whether the petitioner was a creditor or not rather than to rely on the provisions of Section 126 and 128 of the Contract Act for the purpose.

4. I now turn to the agreement dated 17th September, 1949, which is Exhibit R-1. Under this agreement the liability was reduced to Rs.98,985/6/3 in all. This was provided for by Cl.9 of the agreement, which is in the following terms:-

"9. After the aforesaid sum of Rs.35,500/- is refunded the security deposit in the hands of the Bank will be reduced to Rs.98,985/6/3 and the guarantor's liability under the terms of the agreement dated 24-1-1942 will also be reduced in such a manner that if for any reason the Bank is not able to recover its full dues from debtors whose debts have been guaranteed by the guarantor vide Schedule 'A' hereof of the amounts due from the debtor become irrecoverable in the opinion of the Bank, the Bank's right of indemnity against the guarantor would be limited to the extent of the security deposit now held by the Bank under the terms of this agreement i.e. up to the extent of Rs.98,985/6/3 which will be held by the bank as under:-

(a) Cash security furnished by L. Ishar Dass Juneja Guarantee Broker Rs. 85,155/9/5

(b) Cash Security furnished by Dewan Bashesar Nath Chopra third party Rs.13,829/12/10."

This clause follows the various other clauses before it by which it is provided that the principal liability of the guarantor under the original agreement is Rs.13,12,577/13/3. In respect of this matter reference is necessary to Cl.5 of this agreement which is in the following terms:-

"5. That the guarantor and the third party admit that the former is presently indebted to the Bank as guarantor in the sum of RS.13,12,577/13/3 besides interest on account of the debts described in Schedule 'A' and further that the Bank would without proceeding against the original debtors be entitled to deduct rateably in proportion of their respective cash security deposits remaining with the Bank after the execution and completion of this agreement from the security deposit of the guarantee broker and the third party the amount of debt or debts

due from the original debtors which in the opinion of the Bank has become irrecoverable from the original debtors without instituting any suit against the original debtor or the guarantor and irrespective of the result of the suit if instituted"

If we look at Cl.9 as it stands, the liability of the guarantor has become limited to Rs.98,985/6/3 and against this amount the Bank is holding two cash securities, one furnished by the petitioner and the other furnished by Dewan Bashesar Nath who is the third party in this agreement of 17th September, 1949 and the total sum of these two securities is exactly equal to the full extent of the limit guaranteed in the agreement of 17th September, 1949. This means that whatever the liability might be under the principal agreement the liability under the renewed guarantee cannot exceed the cash securities in hand with the Bank. If that is so, the guarantor cannot be a debtor of the Bank any longer. In this agreement the petitioner has earlier stated in Clause 5 that he is indebted to the extent of Rs.13 lakhs odd, but this indebtedness ends by this agreement. The position that emerges after 17th September, 1949 is that either nothing is owned by the petitioner to the Bank or something is owned by the Bank to the petitioner. After the date the cash security amount of Rs.85,155/9/5 mentioned in Cl.9 is still available to the Bank and has to be adjusted in accordance with law. if such an adjustment cannot be made for any reason or the adjustment actually made by Shri Yodh Raj and Shri B.N. Puri as mentioned above is found to be invalid then the petitioner is entitled to refund of this amount and he is entitled to succeed in recovering the same from the Bank. It is undoubtedly true that there is a provision in the agreement of 17th September 1949 for adjusting this amount in particular manner, but, whether that has been rightly done or not is still to be decided. For this purpose, I reproduce Cl.10 of this agreement which is in the following terms:-

"10. That the Bank would be entitled to appropriate to its own use amount or amounts equivalent to debt or debts being irrecoverable from the original debtors from time to time which will be deducted rateably in proportion to the respective security deposits of the third party and the guarantee broker, and when that limit of such appropriate become equal to the amount of security deposit i.e. Rs.98,985/6/3 and the interest accrued thereon the monetary liability of the guarantor would come to an end.

It is also agreed by the Bank that the guarantor's liability will not in any case exceed the sum of Rs.98,985/6/3 and any amount or amounts that may be in deposit with the Bank in any other account of the guarantor whether singly or jointly with others those amounts would not in anyway be charged with liability or withheld by the Bank on account of the debt due from the debtors described in Schedule `A".

It will be seen from the clause that after the security deposit amount mentioned in Cl.9 is adjusted nothing will be due from the guarantor. The only question for determination in this case was as to whether this amount had been fully adjusted

or not. This of course depends on whether this agreement dated 17th September, 1949, is itself not void for any of the reasons mentioned by the petitioner. However, I do not think that it is possible to hold without going into the question on merits as to whether the petitioner is or is not entitled to get back the whole or part of this cash security. I Therefore come to the conclusion that the Tribunal was entirely wrong in coming to the conclusion that the petitioner was not a creditor of the bank.

5. The definition of `debt" in the Displaced Persons (Debts Adjustment) Act is very widely framed. The provisions of Section 2(6) which define it are in the following terms:-

"2(6) `Debt" means any pecuniary liability, whether payable presently or in future, or under a decree or order of a civil or revenue court or otherwise, or whether ascertained or to be ascertained which:-

(a) in the case of a displaced person who has left or been displaced from his place of residence in any area now forming part of West Pakistan was incurred before he came to reside in any area now forming part of India.

(b) in the case of a displaced person who, before and after the 15th day of August, 1947 has been residing in any area now forming part of India, was incurred before the said date on the security of any immovable property situate in the territories now forming part of West Pakistan;

Provided that where any such liability was incurred on the security of immovable properties situate both in India and in West Pakistan, the liability shall be so apportioned between the said properties bears the same proportion to the total amount of the debts as the value of each of the properties as at the date of the transaction bears to the total value of the properties furnished as security, and the liability, for the purposes of this clause, shall be the liability which is relatable to the property in West Pakistan;

(c) is due to a displaced person from any other person (whether a displaced person or not) ordinarily residing in the territories to which this Act extends;

and includes

any pecuniary liability incurred before the commencement of this Act by any such person as is referred to in this clause which is based on and is solely by way of renewal of, any such liability as is referred to in sub-clause (c);

Provided that in the case of a loan whether in cash or in kind, the amount originally advanced and not the amount for which the liability has been renewed shall be deemed to be the extent of the liability.

but does not include

any pecuniary liability due under a decree passed after the 15th day of August, 1947, by any court situate in West Pakistan or any pecuniary liability the proof of

which depends merely on an oral agreement;

This definition is wide enough to cover the claim of the petitioner, I do not think it is possible to hold that nothing is due merely by looking at the two agreements. In any case, it is not possible to hold without going into the merits of the case that there is no pecuniary liability of the Bank under either of these agreements and that the cash security has been wiped out. It is possible of course that after deciding the case on merits the Tribunal may come to the conclusion that there is no pecuniary liability existing under either of these two agreements. In the circumstances, I come to the conclusion that the decision of Issue NO. 2 that the amount of cash security is not a 'debt' is not a correct decision. The amount is a debt within the meaning of Section 2(6) but the question is as to whether it has rightly been adjusted by the Bank or not.

6. It is unnecessary to interpret the various unreported authorities relied upon in the Tribunal's judgments,. None of these cases deals with a case like the present. here there is a cash security deposited with a Bank. In those cases there was no pecuniary liability of the Bank as such, because debtors had pledged goods or securities with the Bank as such, because debtors had pledged goods or securities with the Bank as debtors of the Bank. Here the liability of the guarantee broker is a fluctuating liability dependent on varying circumstances. The broker may at any stage be a creditor and he may be a debtor. Under the original agreement of 1942, Cls. 5 and 7 specified the circumstances in which the guarantee broker could be a debtor for a larger sum than the amount of the security. Under the second agreement, he cannot be a debtor, so that under this agreement he could either be a creditor or be entitled to get nothing. He could not be a debtor.

7. In view of the construction, I have placed on the two agreements, I come to the conclusion that the Tribunal was wrong in dismissing the application of the petitioner as being incompetent. He should have decided the case on merits.

8. I have now to consider what to do. The counsel for the respondent submits that I should myself decide case on the merits. However, as the issues concerning the merits have not even been looked at by the Tribunal, I do not think that that would be a proper course. I, Therefore, remand the case back to the Tribunal for deciding the remaining issues Nos. 3 to 8. In view of the fact that it is stated that the entire evidence is on record, this means that perhaps, arguments only have to be addressed to the Tribunal.

9. The case is accordingly remanded back to the Tribunal. The appellant will have his costs in this Court.

10. Appeal allowed; case remanded.