
(1983) 03 P&H CK 0005
In the Punjab And Haryana At Chandigarh
Case No : Company Petition No. 98 of 1977

Punjab Co-Operative Bank Ltd.

APPELLANT

Vs

The Official Liquidator Attached to Punjab and Haryana High Court

RESPONDENT

Date of Decision : 07-03-1983

Acts Referred:

Companies (Court) Rules, 1959 — Rule 164
Companies Act, 1956 — Section 460(6)
Contract Act, 1872 — Section 43

Citation : (1983) 2 ILR (P&H) 507

Hon'ble Judges : Rajendra Nath Mittal, J

Bench : Single Bench

Advocate : H.L. Mittal, for the Appellant; A.C. Jain, for the Respondent

Judgement

Rajendra Nath Mittal, J.—This is an appeal against the order of the Official Liquidator dated 16th February, 1977, u/s 460(6) of the Companies Act, read with Rule 164 of the Companies (Court) Rules.

2. Briefly, the facts are that the Appellant-Bank had Sanctioned the overdraft limit of the Northern India Finance Corporation Ltd., Jullundur City (hereinafter referred to as the Company), to the extent of one lakh rupees, on the joint and several liability of the Company and all its Directors. Later, the Company was ordered to be wound up. After the winding up order had been passed, the Appellant filed a suit for the recovery of Rs. 20,983.30, the amount due from the Company against the Directors only on the basis of their personal liability, on 11th March, 1971. The Company was not impleaded as a party therein. The suit was dismissed on 5th June, 1974, against which a First Appeal was filed in this Court. The appeal has been accepted by me and the case remanded to the trial Court for fresh decision, -vide judgment, dated 22nd February, 1983.

3. The Appellant filed a claim before the Official Liquidator for Rs. 23,218.60 which, besides the amount of the suit, includes Rs. 330 as lawyer's fee and Rs.

1,904.80 as Court fee for filing the suit. The claim has been rejected by the Official Liquidator on the ground that the suit filed by the Appellant against the Directors bars its claims against the Company. Hence, this appeal.

4. The question for determination is that if a suit is filed for recovery of a debt against some of the joint debtors, whether a claim can be filed before an Official Liquidator against another joint debtor, a company in liquidation. Section 43 of the Contract Act inter alia provides that when two or more persons make a joint promise, the promise may, in the absence of express agreement to the contrary, compel any one or more of such joint creditors to perform the whole of the promise. From a reading of the Section, it is evident that a promise can institute a suit against one or more of the joint promises, as he chooses, to perform whole of the promise and it is not necessary that he should sue all the joint promises together. Thus, it can be inferred that in case he files a suit against some of the promises, the second suit against the other joint promises is not barred. The position in English law is different. In *King v. Hoare* (1844) 13 M&W 494, it was held that a decree obtained against one of several joint debtors is a bar to a subsequent suit against others. In *Kendall v. Hamilton* (1879) 4 A. C. 504, the above Rule was adopted by majority. Section 43 and the above cases were noticed in *Punjab Co-operative Bank Ltd. v. The Official Liquidator* attached to Punjab and Haryana High Court, Chandigarh. (B.N. Mittal, J.) by a Division Bench of the Allahabad High Court in *Muhammad Askari v. Radhe Ram Singh and Ors.* ILR (1900) All 307, where Sir Arthur Strachey, C.J. speaking for the Bench, in view of Section 43, did not follow, the Rule laid down in the above-said English cases and held as follows:

As explained in those judgments, the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their co-contractors joined as Defendants in any suit to enforce the joint obligation. That right was in England enforceable before the Judicature Acts by means of a plea in abatement, and since the Judicature Acts by an Application for joinder which is determined on the same Principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by Section 43 of the Contract Act, and therefore the basis of the doctrine being absent, the doctrine itself is inapplicable. Cessante ratione legist, cessat ipsa lex.

(Emphasis supplied by underlining).

Banerji, J., other member of the Division Bench, while agreeing with the learned Chief Justice, made the following observations:

Where the liability is joint and several and the judgment first obtained has remained unsatisfied a second suit is not barred. This is a proposition which admits of no doubt and is supported by the authorities cited by the learned Chief Justice in his judgment. Therefore, since the enactment of Section 43 of the

Contract Act, the recovery of a judgment against one of several joint debtors does not bar a subsequent suit against his co-debtors.

5. The above view was followed In *Re: Vallibhai Adamji*, . In that case, the creditor had filed a suit against the son regarding the debt of a partnership business and obtained a decree for Recovery of certain amount against him. Later, he came to know that the father was also a partner with him and he proceeded against him under the insolvency law on the same debt. The father contended that on account of the decree having been obtained against his son, as a partner, there was no debt due and payable by him and, there-fore, the creditor could not get him declared as an insolvent. It was held that Section 43 of the Contract Act applied as much to partners as to other co-contractors. A judgment against one partner was no bar to a subsequent suit on the contract or obligation against the other partners, so long as the debt was not extinguished, as the liability of partners was a joint and several one. In view of Section 43, the principle laid down in *Hare's case* (supra), was not followed in this case too.

6. Similar view was taken by the Madras High Court in *B.R. Nagendra Ayer and Ors. v. R.V. Subburamachari and Anr.* AIR 1935 Mad 1055, and *T. Radhakrishna Chettiar and Anr. v. K.V. Muthukrishnan Chettiar and Ors.* AIR 1970 Mad 337. The learned Chief Justice in *B.R. Nagendra Ayer's case* (supra) observed that a promise has a cause of action against all the joint Promises. He can, if he chooses, file a suit impleading all the joint and several promises as co-Defendants or he can file a suit against any one of them and obtain judgment against him. It is further observed that unless that judgment is satisfied it does not operate as a bar to his claim against the other joint promises and he has his right of action against them. To the same effect are the observations in *T. Radhakrishna Chettiar's case* (supra). Further, the Patna High Court has also taken the same view in *Traders Co-operative Bank Ltd. Patna v. A.K. Mallick and Ors.* AIR 1934 Pat 52(2).

Pollock and Mulla in their commentary on the Indian Contract Act (Ninth Edition), while dealing with Section 43 of the Act, at page 364, noticed the conflict between the views of the Indian and English authorities and observed as follows:

We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining Un-satisfied, ought not, in British India, to be held a bar to a subsequent action against the other promissory or promises. I am in respectful agreement with the above view.

7. The filing of a claim before the Official Liquidator in the case of a company into liquidation stands on the same footing as instituting a suit. I am, therefore, of the opinion that if a suit is filed for recovery of a debt against some of the joint debtors and the amount is not recovered from them, a claim can be filed before an Official Liquidator against another joint debtor-a company in liquidation. In the circumstances, the order of the Official Liquidator in rejecting the claim of the

Appellant on the ground that the suit filed by it against the Directors bars its claim against the company is erroneous and liable to be set aside.

8. For the aforesaid reasons, I accept the appeal, set aside the order of the Official Liquidator and remand the case to him to decide the matter afresh on merits.