
(1999) 05 AHC CK 0171
In the Allahabad High Court
Case No : C.M.W.P. No. 11130 of 1987

Punjab National Bank

APPELLANT

Vs

IVth Additional District Judge, Pilibhit and others

RESPONDENT

Date of Decision : 28-05-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Contract Act, 1872 — Section 128

Citation : (1999) 3 AWC 2385 : (1999) 3 CivCC 391

Hon'ble Judges : A.K. Yog, J

Bench : Single Bench

Advocate : K.L. Grover, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Yog, J.—Punjab National Bank (for short the Bank), a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having its banking branch at Puranpur district Pilibhit filed Original Suit No. 66 of 1982, Punjab National Bank v. Anwar Ahmad Khan and four others, for claiming a money decree on the ground that defendant No. 1, Anwar Ahmad Khan (respondent No. 2) borrowed a sum of Rs. 10,000 from the plaintiff bank on the basis of a pronote, which contemplated payment of interest under the agreement, executed by the parties. Defendant Nos. 2 to 5. Akil Khan and others (respondent Nos. 3 to 6) stood surety for defendant No. 1 Anwar Ahmad Khan and deed of surety/guarantee executed by them providing that liability of Anwar Ahmad Khan (respondent No. 2) was co-extensive with that of other defendants (respondent Nos. 3 to 6) for repayment of the loan as mentioned in para 4 of the plaint. On the failure of the defendants to pay loan, plaintiff bank instituted aforementioned suit in the Court of Civil Judge. Pilibhit : a copy of the plaint has been annexed as Annexure-1 to the petition.

2. Aforementioned suit proceeded ex parte against defendant No, 1 (Anwar Ahmad Khan). The other defendants (respondent Nos. 3 to 6) contested the suit

and filed two written statements (copies of which have been filed as Annexures-2 to 3 to the petition). Suit was decreed ex parte against Anwar Ahmad Khan, (respondent No. 2), who filed an application under Order IX, Rule 13 of CPC for setting aside of the decree and restore the suit to its original number, (copy of the application is annexed as Annexure-4 to the petition). After parties filed objections including affidavits, learned Civil Judge vide judgment and order dated 11th September. 1985. allowed the application and set aside judgment and decree dated December 20. 1983 being ex parte to the extent of respondent No. 2 only and directed the suit to be restored to its original number with respect to respondent No. 2 (defendant No, 1) alone.

3. Feeling aggrieved, a Misc. Civil Revision No. 53 of 1985, Anwar Ahmad Khan and others v. Aqil Ahmad Khan, was filed by the guarantor defendants (respondent Nos. 3 to 6) ; memo of revision has been annexed as Annexure-6 to the petition. Respondent No. 1 has allowed the aforesaid Civil Revision No. 53 of 1985 by means of judgment and order dated 3.10.1987, which is subject-matter of challenge in the present proceedings.

4. No one has appeared on behalf of the respondents. Heard learned counsel for the petitioner.

5. Before dealing with the contention raised on behalf of the petitioner, provisions of Order IX Rule 13 CPC and Section 128 Contract Act may be noted which are reproduced below :

"Order IX Rule 13. Setting aside decree ex parte against defendants.--In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside ; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also :

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and. answer the plaintiffs claim.

Explanation.--Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

(The Indian) Contract Act, 1872

Section 128. Surety's liability.--The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.

6. First proviso to Order IX, Rule 13 is an exception to main rule and it enables a civil court to set aside decree on merit, at the instance of unserved Defendant/s, against those Defendants also who were served and contested the suit. In case a Defendant/s is not served and ex parte decree is passed, the same can be set aside if the conditions contained in the proviso to Order IX, Rule 13. C.P.C- are satisfied. This enables a civil court to do substantial justice, and ensures to check possibility of coming into existence of conflicting decrees, which may cause embarrassment to the Court.

7. Section 128 of the Contract Act, provides that the liability of surety is co-extensive with that of principal debtor, unless otherwise provided by the contract. II. therefore, makes abundantly clear that the liability of a surety is dependent upon the liability of the principal. In other words, a surety shall have no liability to repay loan/debt in respect which is found not due to the principal debtor.

8. The said order in revision is sought to be challenged on the grounds :

(a) Under Order IX, Rule 13. C.P.C. ex parte decree could be set aside in favour of such defendants, only against whom it is ex parte and who had applied for it. Court had no jurisdiction to set aside the decree against those defendants against whom it is passed on merits after full trial, unless case is covered by first proviso.

(b) Ex parte decree could be set aside only against those who had applied for the same and not against those defendants who never applied for it.

(c) Decree not being indivisible, entire decree could not be set aside.

(d) Each defendant is liable to satisfy the entire decree, as u/s 128. Contract Act, liability of the principal-debtor and surety is coextensive. Decree passed on merits against guarantor could not be set aside.

9. In the facts of the present case, grounds (a) and (b) are interdependent and they can be dealt with at one place. Petitioner has disputed Court's jurisdiction to set aside decree against those Defendants who had contested the suit while granting relief to the defendants-against whom decree is ex parte and without notice. The only issue in dispute is whether decree in the present case is severable and can be maintained even if it is set aside against other defendants.

10. Petitioner has relied upon the decision in Kewal Ram Vs. Smt. Ram Lubhai and Others, . In this case, plaintiff has obtained a decree against Kewal Ram, based on the right of pre-emption and that decree had to stand, to the extent of the right of Kewal Ram in the property. The Apex Court held that right of pre-emption sought against several defendants and the decree for the same cannot be said to be indivisible.

11. However, where the Bank has filed suit for recovery of loan against principal

debtor as well as sureties, it is entirely on a different footing. The relief claimed against principal debtor and surety, where the liability is one and the same, cannot be said to be separate or distinct, in other words, if principal debtor has no liability to repay an alleged debt, there will be no obligation of sureties to pay the said amount. The liability of a surety, therefore, is the same, which is sought to be discharged by claiming money from the principal debtor. To this extent, liability of the principal debtor and sureties is co-extensive and the decree is indivisible. It will be preposterous to say that though principal debtor, has no obligation to pay in law, but still the sureties should discharge a non-existent liability. Besides it, if decree against sureties is allowed to stand, there is possibility of conflicting decree being passed which may cause embarrassment to the Court.

12. In view of the above, first proviso to the Order IX. Rule 13, C.P.C. Is clearly attracted in the facts of the present case.

13. Section 128 Contract Act prescribes that liability of sureties is co-extensive with that of principal debtor unless otherwise provided in a contract. In the instant case, petitioner has neither pleaded nor placed any material to show that contract between the parties provided otherwise. In absence of any material or pleading to this effect before Courts below or in the writ petition, it cannot be said that liability of surety in the present case is not indivisible or not co-extensive with that of principal debtor. The petitioner has not filed copy of the agreement contract creating rights, liabilities and obligations of the principal debtor vis-a-vis the sureties. Gd (c) and (d) are thus unsustainable.

14. Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, , relied upon by the counsel for the petitioner is of no help to him. In this case. Supreme Court has considered a limited question, i.e., whether decree-holders, must exhaust his remedy against principal debtor first or it can be enforced against sureties without exhausting its remedy against principal debtor. It is not the question here.

15. Court below has referred to the following decisions. Muhammad Raza v. Mt, Barka AIR 1914 Oudh 220 ; Munshi Ram v. Malava Ram. AIR 1917 Lah 194 ; Bala Baksh Bhararia and Another Vs. Amiruddin Mian and Others, ; Khagesh Chandra v. Chandra Kanta Bana and another AIR 1954 gau 183 ; Baljeet Singh and another v. Munna Lal and others AIR 1959 251 and Ziley Singh v. Munshi and others 1969 ALJ 804 (DB).

16. Reference may be made to AIR 1914 Oudh 220 (1), where "surety" alone had applied under Order IX, Rule 13, C.P.C. for setting aside ex parte decree against them. The Court held that the decree against other defendant (principal debtor) has also to be set aside.

17. In the case of Ziley Singh (supra), a Division Bench of this Court, enumerated three categories (at page 805 left side column). Bench found that case before them belonged to IIIrd category.

18. However, the present case clearly falls in the category-mentioned in the said report. This decision, therefore, supports the view taken by the Court below.

19. A perusal of the revisional court's order dated 3.1.1987 (certified copy has been annexed with the writ petition) shows no error apparent on the face of record. Learned Additional District Judge has taken into account a very important as well as relevant circumstance, based on established principle of law and the same cannot be ignored. Reference may be made to that part of the judgment wherein Court observed--"If the decree against the defendant Nos. 2 to 5 is also not set aside, it shall result in inconsistent and conflicting decrees." The said observation of lower court has not been challenged before this Court.

20. The Court, therefore, declines to interfere with the judgment and order dated 3.1.1987 passed by IVth Additional District Judge. Petition in Civil Revision No. 53 of 1985 arising out of Regular Misc. Case No. 4 of 1984. Writ petition fails and it is dismissed with costs.