

(2012) 10 AHC CK 0043

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 14464 of 2000

Smt. Shanti Devi

APPELLANT

Vs

Additional District Judge (E.C. Act) and Others

RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

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

Citation : (2013) 5 ADJ 37 : (2013) 4 ALJ 145

Hon'ble Judges : B. Amit Sthalekar, J

Bench : Single Bench

Advocate : H.M. Srivastava, for the Appellant; Vipin Sinha and Satish Chaturvedi, for the Respondent

Final Decision : Allowed

Judgement

B. Amit Sthalekar, J.—By this writ petition the petitioner is seeking quashing of the revisional order dated 29.2.2000 and the order dated 10.8.1998. The facts of the case, in brief, are that the respondent No. 3, Bank of India filed an original suit No. 169 of 1987 against the respondent Nos. 4, 5 and 6 as well as the petitioner, who were all arrayed as defendants in the said suit. The said suit was decreed ex parte on 11.4.1988 without any notice to the petitioner or respondent Nos. 4, 5 and 6. An application for setting aside the ex parte decree was filed by the respondent No. 4. The Court by its order dated 1.8.1994 allowed the said application filed by the respondent No. 4 and set aside the ex parte decree dated 11.4.1988 only to the extent of the respondent No. 4 with certain conditions therein.

2. Aggrieved by the said order the respondent No. 4 filed Civil Misc. Writ Petition No. 27548 of 1974, in which an interim order was granted on 31.8.1994 with a direction to the petitioner to furnish security for an amount of Rs. one lakh, other than cash or bank guarantee and subject to that condition the order dated 1.8.1994 was stayed and a further direction was given that the trial Court shall

ensure the expeditious disposal of the suit. The proceedings in the suit thereafter has been commenced again. Power of Attorney, guarantee letter and demand letter were filed as an evidence.

3. Thereafter a prayer was made by the petitioner for reference to the Collector that there was a deficiency of the stamp duty paid with respect to the demand draft. This application was marked as paper No. 168 Ga II. These two applications, namely, 167 Ga and 168 Ga II were, however, rejected by the Civil Judge on the ground that the suit has not been restored as against the petitioner and, therefore, she had no right to file the application. Accordingly the application were rejected by the order dated 10.8.1998.

4. Aggrieved by the order dated 10.8.1998 the petitioner filed a civil revision No. 139 of 1998 which, however, was dismissed on 14.7.1999 without any notice to the petitioner, on the ground that she had no right to move the application for recall of the said order dated 10.8.1998, as the original suit had not been restored as against her. This order was challenged by the petitioner by filing a civil" revision which too was rejected by the respondent No. 1 by the impugned order dated 29.2.2000.

5. I have heard Shri H.M. Srivastava, learned counsel for the petitioner and the learned standing counsel appearing for the respondent Nos. 1 and 2. List has been revised. No one appears for the respondent Nos. 3, 4, 5 and 6.

6. The submission of learned counsel for the petitioner is that since the petitioner was a surety for the respondent No. 4 M/s. Ravi Brick Works, therefore, if the ex parte decree dated 11.4.1988 had been restored in favour of the respondent No. 4 it would automatically mean that it would restore so far as the petitioner was concerned. The petitioner has referred to the provisions of Order IX Rule 13 of CPC (the Code) as well as Section 128 of the Contract Act. The Order IX Rule 13 of the Code reads as under:

O.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.

7. From a perusal of the proviso (1) to Order IX Rule 13 it will be seen that the natural and logical interpretation would be that where the decree is of such a nature that it cannot be set aside as against such defendant only then it should be set aside as against all or any of the defendants also which implies that since the interest of the surety was common with that of respondent No. 4, if the suit of the respondent No. 4 was restored, the same ought to have been restored so far as the petitioner was concerned also and it could not have been restored only in respect of the respondent No. 4. The learned counsel has also referred to the provisions of Section 128 of the Indian Contract Act, 1872. Section 128 refers to the liability of a surety and reads as follows:

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.

8. The provisions of Section 128 of the Indian Contract Act in certain terms provides that the liability of surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

9. In the present case there is no dispute between the parties that the petitioner was a surety for M/s. Ravi Brick Works and, therefore, even if the suit had been decreed ex parte when an application for restoration under Order IX Rule 13 of the Code on behalf of M/s. Ravi Brick Works was moved and the suit was restored by the Court by its order dated 1.8.1994, the Court ought to have restored the suit so far as the petitioner was concerned also but the Court committed not only an error of fact but also a grave error of law in confining its order only to M/s. Ravi Brick Works and impliedly declined the claim of the petitioner for setting aside the ex parte decree.

Learned counsel for the petitioner has also referred to a judgment of this Court in Punjab National Bank Vs. IVth Additional District Judge, Pilibhit and others, , wherein also this Court interpreting the Order IX rule 13 of the CPC read with Section 128 of the Indian Contract Act has held that where the interest and liability of the surety is co-extensive with that of the principal debtor, when the suit is restored on an application of the principal debtor and the ex parte decree is set aside, it would automatically imply that the suit has been restored so far as the other defendants whose rights and liabilities were no-extensive of the principal debtor also.

10. In view of the aforesaid facts and the law laid down by this Court, the impugned orders dated 10.8.1998, 14.7.1999 and 20.2.2000 are absolutely illegal and based on a misinterpretation of law and, therefore, deserves to be quashed.

11. Accordingly, the writ petition is allowed. The impugned order dated 10.8.1998, 14.7.1999 and 20.2.2000 are quashed. Since the proceedings of the original suit No. 169 of 1989 had been stayed by this Court by order dated

30.3.2000, a further direction is now given that the respondent No. 2 shall proceed with the civil suit and the petitioner will have a right to participate in the proceedings and the respondent No. 2 shall thereafter take the suit to its logical conclusion preferably within a period of four months from the date a certified copy of this order is received by him.