
(2014) 02 P&H CK 0089

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 3185 of 1985

State Bank of Patiala

APPELLANT

Vs

Shri Ganesh Trading Co.

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 4
Constitution of India, 1950 — Article 19
Contract Act, 1872 — Section 133

Citation : (2014) 175 PLR 1 : (2014) 3 RCR(Civil) 947

Hon'ble Judges : Paramjit Singh Patwalia, J

Bench : Single Bench

Advocate : Animesh Sharma, Advocate for the Appellant; R.M. Suri, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Paramjit Singh Patwalia, J.—Instant regular second appeal has been preferred by the appellant/plaintiff against the judgment and decree dated 01.11.1983 passed by learned Sub Judge, 1st Class, Batala whereby suit of the appellant-plaintiff for recovery has been decreed against defendant Nos. 1 to 4, as well as, against the judgment and decree dated 05.08.1995 passed by learned District Judge, Gurdaspur whereby decree of the Court of first instance has been modified to the extent that plaintiff is entitled to interest at the agreed rate from the date of the filing of the suit till the date of decree and from the date of decree till the realization @ 6% per annum. For convenience sake, hereinafter parties will be referred to as they were arrayed in the Court of first instance i.e. appellant as plaintiff and respondent as defendants.

2. The detailed facts are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, the brief facts relevant for disposal of this second appeal are that plaintiff filed a suit for recovery of Rs. 2,38,598.49 against the defendants. It was averred in the plaint that on

22.08.1977, defendant No. 1 through its partners defendant Nos. 2 to 4 approached the Manager of the plaintiff-Bank and requested for grant of cash credit (pledge/factory type) and hypothecation limit to the extent of Rs. 5 lacs on the basis of agreement to pay interest on the amount advanced at the rate of 1-1/2% above the State Bank of India advance rate rising and falling therewith with a minimum of 15-1/2% per annum from the date of advance till the date of repayment. The request was accepted and on 04.10.1977, plaintiff sanctioned the cash credit limit to the extent of Rs. 5 lacs in favour of defendant Nos. 1 to 4. In pursuance of that, defendant Nos. 1 to 4 executed the demand promissory note dated 04.10.1977 in favour of the plaintiff-Bank for Rs. 5 lacs received or to be received as consideration with interest at the above referred rate. The said limit was later on enhanced to Rs. 8 lacs on defendants' request dated 25.09.1978. Defendant No. 5 (who died during the pendency of the suit and is now represented by defendant Nos. 5-A to 5-E) and defendant No. 6 guaranteed the re-payment of the loan amount given to defendant Nos. 1 to 4 and they executed an agreement in that behalf. Defendant Nos. 5 and 6 also created equitable mortgage in favour of the plaintiff-Bank by way of deposit of sale deeds dated 01.06.1975 and 15.02.1966, details of which are given in the plaint. Defendant Nos. 1 to 4 had been availing the above said cash credit limit from time to time and a sum of Rs. 2,38,598.49 became due and payable by defendant Nos. 1 to 4 as principal debtors and by defendant Nos. 5 and 6 as guarantors which they have not paid.

3. Upon notice, defendants No. 1 to 4 appeared and contested the suit. They controverted the allegations made in the plaint and denied the liability to pay the suit amount to the plaintiff. Defendant Nos. 5 and 6 in their separate written statement denied having executed letter of guarantee in favour of the plaintiff and alleged that the alleged guarantee came to an end when the cash credit limit was increased without their consent. It was further alleged that suit is barred by time.

4. On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

- 1) Whether the suit is barred under the provisions of Order 2 Rule 4 C.P.C. If so, its effect? OPD
- 2) Whether the suit is liable to be dismissed as alleged in preliminary objection No. 1 in the written statement? OPD
- 3) Whether the plaint requires better particulars? OPD
- 4) Whether the suit is not properly signed and verified? OPD
- 5) Whether the suit is instituted through a competent officer? OPP
- 6) Whether defendant Nos. 2 to 4 are partners of defendant No. 1? OPP
- 7) Whether the plaintiff is entitled to the suit amount? OPP

8) If issue No. 7 is proved, whether the sureties/defendants are not liable to pay the suit amount? OPD

9. Relief.

5. The Court of first instance after perusal of the evidence led by the parties recorded issue-wise findings and decreed the suit of the plaintiff only against defendant Nos. 1 to 4 vide judgment and decree dated 01.11.1983. Against that, the plaintiff preferred an appeal upon which decree of Court of first instance has been modified by the lower appellate Court vide judgment and decree dated 05.08.1985 to the extent that plaintiff is entitled to interest at the agreed rate from the date of the filing of the suit till the date of decree and from the date of the decree till the realization of the amount at the rate of 6% per annum. Hence, this second appeal.

6. I have heard learned counsel for the parties and perused the record.

7. At the time of admission of appeal, no substantial question of law was framed. However, during the course of arguments, learned counsel for the appellant submitted that the following substantial question of law arises in the present appeal:-

Whether the guarantee given by defendant Nos. 5 and 6 is a continuing guarantee and the same stands discharged in view of subsequent increase of limit without the consent of defendant Nos. 5 and 6?

8. Learned counsel for the appellant vehemently contended that original borrowers are defendant Nos. 1 to 4. Defendant Nos. 5 to 7 stood guarantee for defendant Nos. 1 to 4 for a sum of Rs. 5 lacs vide agreement of guarantee dated 04.10.1977. The appellant had initially provided, a cash credit facility for a sum of Rs. 5 lacs. Defendant Nos. 5 to 7 also created equitable mortgage in favour of the appellant-bank by mortgaging three properties i.e. two pucca double storied shops at Grain Market, Batala and one pucca single storied shop No. 996, Grain Market, Batala. Learned counsel for the appellant further contended that as per the request dated 25.09.1978 of defendant Nos. 1 to 4, the cash credit limit was extended to Rs. 8 lacs. Borrowers failed to repay sum of Rs. 2,38,598.49 with interest. They acknowledged their debt vide letters dated 25.01.1980 and 16.09.1980 and the suit for recovery was filed on 10.11.1981. Learned counsel for the appellant further contended that as per the terms of the guarantee deed dated 05.10.1977 (Ex. P.W. 3/H), the sureties have been clearly executed to repay the dues of the appellant-bank to the extent of Rs. 5, lacs and interest and balance thereof. Learned counsel for the appellant made reference to the terms of the guarantee deed and contended that it is continuing guarantee and until a notice in writing is given by the said bank to the guarantors, the terms of the earlier guarantee will continue. Learned counsel for the appellant made reference to the judgment of Hon"ble, Madhya Pradesh High Court in Chandan Kumar Vs. The United Western Bank Ltd. and Others, and the judgment of Hon"ble Supreme Court in Industrial Finance Corporation of India Ltd. Vs. The Cannanore

Spinning and Weaving Mills Ltd. and Others, Learned counsel for the appellant further contended that the suit is not barred by limitation qua the guarantors. In fact, it was equitable mortgage in favour of the bank by deposit of title deed by the guarantors i.e. defendant Nos. 5 to 7 and its limitation is 12 years. It is further contended that if the principal debtor has acknowledged the debt then the fresh period of limitation commences.

9. Per contra, learned counsel for respondents No. 5 and 6 contended that defendant Nos. 1 to 4 have executed agreement for cash credit hypothecation of stock in trade dated 04.10.1977. Defendant Nos. 5 and 6 did not sign any deed of guarantee other than on 04.10.1977. The cash credit limit was enhanced to Rs. 8 lacs on the basis of request of defendants No. 1 to 4 dated 25.09.1978 and fresh loan document was executed and defendant No. 1 had signed the document dated 16.09.1980. Defendant No. 5- Hari Kishan died on 23.12.1981. The guarantee deed executed by defendant Nos. 5 and 6 was only for a sum of Rs. 5 lacs to the extent of demand promissory note, but no loan document was signed for enhancement to Rs. 8 lacs. As such, revival letter dated 16.09.1980 was not signed by defendant Nos. 5 and 6 and is not binding upon them. Learned counsel further contended that the suit has been filed simplicitor for recovery for which the limitation period is three years as per Article 19 of the Limitation Act. The suit is not based on the mortgaged property, so it is clearly barred by limitation against defendant Nos. 5 and 6, for the last execution of the documents by them has been on 04.10.1977; however, the suit for recovery was filed on 10.11.1981. Otherwise also, the sureties stand discharged as and when variance is made in terms of contract. Like in the instance case where new document has been signed enhancing the case credit limit which is not signed by defendant Nos. 5 and 6 as same was without their consent. Reliance has been placed upon a judgment of Hon'ble Punjab High Court in Federal Bank of India (Punjab) Ltd. Vs. Som Dev Grover and Others, and also the judgment of the Privy Council in AIR 1935 21 (Privy Council)

10. I have considered the contentions raised by learned counsel for the parties and perused the record.

11. Admittedly, defendant Nos. 5 and 6 gave a guarantee dated 04.10.1977 and it was for Rs. 5 lacs. It is also admitted fact that the amount was enhanced to Rs. 8 lacs vide request dated 25.09.1978 of defendant Nos. 1 to 4. Thereafter, no document has been executed by the defendant Nos. 5 and 6. Thus the crucial question for determination is whether the sureties stand discharged in view of enhanced cash credit limit and execution of new documents including promissory note in favour of the appellant-Bank by the defendants No. 1 to 4. In these circumstances, the liability of the surety in such case will have to be determined. It would be appropriate to reproduce Section 133 of the Indian Contract Act, 1872 which reads as under:

133. Discharge of surety by variance in terms of contract.- Any variance, made without the surety's consent, in the terms of the contract between the principal

debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

12. The Hon^{ble} Privy Council in *Seth Pratapsingh Mohalalbai* (supra) dealt with the issue of liability of surety in the event of variance in the original contract without consent of the surety and held as under:

It appears to their Lordships that the law on the discharge of sureties has been somewhat obscured by the emphasis laid in the cases on an agreement between the parties to vary the terms of the original agreement. The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed: Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made, it impossible for the guaranteed performance to take place. In the vast majority of cases a different performance of the original contract is due to an express variation of the terms between the parties; and it is natural that the reported cases should mainly deal with this situation. But it is important that the underlying principle should not be obscured. A good illustration of the essential rule is afforded by the case of *4 De G.F. & J. 367 (1)* at p. 375. In that case the surety had guaranteed the payments by a baker to the flour merchant for flour to be delivered to the baker for the purpose of baking bread that he supplied for army requirements. The flour was to be of specified quality. The merchant delivered flour which was not of the contract description. The surety commenced a suit in Chancery to have it declared that the surety bond was void in equity by reason of misrepresentations and "by reason of the conduct of the parties". After dealing with the case based upon misrepresentation, the Lord Chancellor, Lord Westbury, proceeded as follows:

It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound therefore merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say: The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation therefore is at an end." Now, I construe this engagement to be an engagement to be answerable for flour supplied in conformity with the requisitions of this contract. Then I ask de facto was any flour supplied to Millar in conformity with the requisitions of this contract. The answer of the defendants themselves is an admission that none such was supplied. The conclusion is plain therefore that no legal obligation so

far as the surety is concerned arises upon what has been done under this contract so construed, as I hold it ought to be construed, and as involving the representation that I have stated.

A similar application of the principle may be found in (1920) I Ch. 14 (2). There a number of persons as co-sureties had deposited their title deeds with the creditor to secure a debt of the principal debtor. The creditor allowed one of them to create a prior charge in favour of a third person. It was held that though the creditor had not released his charge yet he had permitted a prior charge to be created which interfered with the rights of the other co-sureties to have the securities marshalled: and that performance being altered in this way they were all discharged. It is unnecessary to consider whether the case might not have been treated as one where a security was sacrificed, in which case the sureties might only have been discharged to the extent of the value of the security lost. Its value for the present purpose is that without any agreement between the creditor and the surety to vary the contract, the fact that the creditor stood by and permitted something to be done which made the original performance impossible discharged the other sureties whose consent had not been obtained. In their Lordships' opinion, therefore, the sureties are being used in respect of an obligation which they did not contract to make good, and are entitled to succeed.

13. In view of the judgment of the privy council, it is clear that once the cash credit limit of Rs. 5 lacs was extended to Rs. 8 lacs and new documents were executed, the guarantors stood discharged and they are not bound for the subsequent act which is without their consent.

14. Now the question arises whether the acknowledgment made by defendant Nos. 1 to 4 also binds defendant Nos. 5 to 6. This question has been clearly answered in *The Federal Bank of India (Punjab) Ltd.* (supra) in terms that unless it appears otherwise the principal debtors extension and acknowledgment of the subsequent debts does not extend the limitation against the sureties. Thus, the sureties were only bound with regard to the amount which was given on 04.10.1977. The terms were varied in the year 1978, as such, from the date of variation liability of sureties stood discharged in view of Section 133 of the Contract Act. Acknowledgment subsequently made by the principal debtors does not extend the period of limitation qua the sureties.

15. Concurrent findings of fact have been recorded by the Courts below which do not call for interference in second appeal. Learned counsel for the appellant has failed to show that the said findings are perverse or illegal or based on misreading, non-reading or misappreciation of the material evidence on record. No question of law, much-less substantial question of law, as claimed, arises in this second appeal.

16. No other point has been argued. In view of above, I do not find any illegality or perversity in the impugned judgments and decrees of the Courts below.

Dismissed.

No order as to costs.