

(1968) 11 BOM CK 0020
In the Bombay High Court
Case No : First Appeal No. 86 of 1962

The Bank of Maharashtra Ltd.

APPELLANT

Vs

Vasant Dattatraya Datar

RESPONDENT

Date of Decision : 30-11-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 152, 153
Contract Act, 1872 — Section 128
Limitation Act, 1963 — Section 5
Provincial Insolvency Act, 1920 — Section 28

Citation : (1970) 72 BOMLR 709

Hon'ble Judges : Chandurkar, J;Bhole, J

Bench : Division Bench

Judgement

Chandurkar, J.—This is an appeal by the plaintiff-Bank challenging dismissal of the suit filed by it for the recovery of its dues on the basis of a cash credit account from defendant No. 1 and the surety-defendant No. 2, on the short ground that the entire suit was hit by the provisions of Section 28(2) of the Provincial Insolvency Act, 1920. In order to appreciate the question which arises in this appeal, it is necessary to state a few facts.

2. The original defendant No. 1 Rao Bahadur D. D. Datar was indebted to the plaintiff-Bank to the extent of Rs. 60,862-15-6 on the basis of a cash credit account in the name of Nagpur Tobacco Works, which was owned by him. Ultimately, the Bank obtained from him a pro-note on February 17, 1955 for the said amount with a letter of hypothecation charging the amount on his liquid assets. The original defendant No. 1 died on December 6, 1960 during the pendency of the suit. Defendant No. 2 is his widow, who executed a mortgage deed on March, 25, 1955 for Rs. 25,000, by way of security, for repayment of the amount borrowed by her husband. On December 80, 1957, the pro-note executed by the deceased defendant No. 1 was renewed for Rs. 37,206.80 P. which was the debit balance of the cash credit account on that date. Defendant No. 4 is a Co-operative Housing Society and is the prior mortgagee of the

property of defendant No. 2 which she mortgaged later in favour of the plaintiff. Defendant No. 3 is the subsequent mortgagee.

3. The plaintiff-Bank filed the suit on March 1, 1960 against all the four defendants. A "mortgage decree" was claimed against defendants Nos. 2 and 8 for sale of the mortgaged property; a personal decree for Rs. 30,408.50 P. was claimed against defendant No. 1; and it was also prayed that, if the sale-proceeds of the mortgaged property were found insufficient to discharge the liability, the plaintiff should be given the right to recover the deficit from the person and other property of defendant No. 2. It, however, transpired that, at the instance of some other creditors, the deceased defendant No. 1 was adjudged insolvent on September 24, 1958 and this order of adjudication was confirmed by this Court on July 1, 1960. Admittedly, the suit was filed after the order of adjudication was passed and no leave of the Insolvency Court was obtained before the filing of the suit, as required by Section 28(2) of the Provincial Insolvency Act. However, subsequent to the filing of the suit, an application was made by the plaintiff to the Insolvency Court on November 1, 1960, praying for leave to continue the suit and the leave was granted on July 28, 1961. As already stated, the original defendant No. 1 having died on December 6, 1960, his legal representatives, who are respondents Nos. 1 (a) to (d), were brought on record.

4. It is not necessary to go into all the defences raised by the several defendants on merits. It may be stated that defendant No. 1 denied the plaintiff's claim and defendant No. 2 challenged the maintainability of the suit on the ground that leave of the Insolvency Court was not obtained by the plaintiff. Out of the several issues framed by the trial Court, three issues which are material for the decision of this appeal were as follows, as issues Nos. (iv), (vii) and (viii) :

(iv) Is the plaintiff entitled to a mortgage-decree against the suit property when the debt was not proved in Insolvency and when defendant No. 1 could not have been personally liable for the debt (as contended) by the defendants ?

(vii) Is the present suit maintainable in view of the fact that no permission of the Insolvency Court was obtained by the plaintiff wherein defendant No. 1 was adjudged an, insolvent prior to the filing of the suit ?

(viii) Is the permission obtained on 28th July 1961 from the Insolvency Court, proper and valid as it was obtained behind the back of the defendants and receiver ?

It appears that evidence of the Receiver was recorded in this case and he gave the details of the steps taken by him after he was appointed as Interim Receiver on September 22, 1955 in respect of the property of the deceased defendant No. 1. He deposed that he was not served with a copy of the application filed by the plaintiff in the Insolvency Court for permission to continue the suit. The Court came to the conclusion that the suit was not maintainable and was hit by the provisions of Section 28(2) of the Provincial Insolvency Act. The learned Judge

also came to the conclusion that after adjudication, the Receiver was a necessary party, because all the property of the insolvent had vested in him and that the order dated July 28, 1961 passed without the Receiver or other parties being made parties to the application for leave, was not binding on the Receiver. The learned Judge, relying on the decision in *Davood Mohideen v. Sahabdeen* AIR [1937] Mad. 667 of to that not and Section be A 28(6)< was> of the Provincial Insolvency Act and found that it was not attracted to the facts of the case. The result was that the learned Judge dismissed the whole suit. There was no occasion to decide whether the plaintiff was entitled to a mortgage decree against defendant No. 2 as the whole suit had been dismissed. The plaintiff has filed this appeal challenging the dismissal of the suit.

5. At the outset, learned Counsel appearing on behalf of the contesting defendants-respondents Nos. 1 and 2, raised a preliminary objection to the maintainability of the appeal. His contention is that the decree dated August 8, 1962, which, has been filed by the appellant along with the memo of appeal is not a subsisting decree in the suit, because that decree has been modified by the Court on August 27, 1962. This modification was the result of an application made by the plaintiff u/s 151, CPC read with Section 21 of the Bombay Pleaders Act, on August 16, 1962. By this application, the plaintiff's grievance was that both defendants Nos. 1 and 2 were represented by the same counsel and, therefore, the Bill of Costs was not correctly made as it indicated that two separate sets of costs including counsel's fees were given. This application was decided on August 25, 1962 by the Court and the Court directed:

The Bill of Costs in Special Suit No. 38-A/60 shall be so amended as to tax only one set of pleader's fee for defendant 1 and defendant 2. This order is made u/s 153 read with section 152, Civil Procedure Code...

The contention raised is that the decree which was passed on August 8, 1962 was superseded by another decree which came into being on August 27, 1962 and the plaintiff-appellant not having filed this decree, the appeal itself is incompetent. He relied upon several authorities, viz. *Shidramappa v. Gurushantappa* (1928) 31 Bom. L.R. 137 : AIR [1929] Bom. 183, *Brijbasi Lal v. Salig Ram* ILR (1912) 34 All. 282 and *Aditya Kumar Bhattacharjee Vs. Abinash Chandra Mukhopadhyaya and Others*, , for the proposition that where an original decree has been superseded by way of review under the provisions of Order XLVII, Civil Procedure Code, the appeal against the original decree becomes incompetent. He also relied upon a decision of the Supreme Court in *Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others*, .

6. In our view, the objection cannot be sustained. The Supreme Court decision, last cited, lays down the well established proposition, which can never be disputed, that the requirement that a certified copy of the decree should be filed along with the memorandum of appeal is mandatory, and in absence of the decree the filing of the appeal would be incomplete, defective and incompetent. But in the same decision their Lordships have observed that no hard and fast rule

of general applicability can be laid down for dealing with appeals defectively filed under Order XLI, Rule 1, Civil Procedure Code. In an exceptional case an appeal could be maintained in the absence of a copy of decree. (See Phoolchand and Another Vs. Gopal Lal,). All the other three cases above cited were dealing with the effect of the granting of an application for review made under Order XLVII of the Civil Procedure Code. In the Bombay case (Shidramappa's case), it was laid down that where during the pendency of an appeal the order for review supersedes the original decree, the original decree under appeal ceases to exist and the appeal cannot be heard. In the Allahabad case the same proposition is stated where the Division Bench has observed :

The effect of the granting of an application for review is to supersede the decree which is the subject of such application. No appeal can, therefore, be maintained against the decree anterior to the review, but only against the subsequent decree.

The same proposition is laid down in the Calcutta case which followed Shidramappa's case. We are unable to see how the propositions laid down in these decisions are applicable to the instant case. In the instant case, the decree which has been drawn and which bears the date July 30, 1962 and which was signed by the Court on August 8, 1962, is a decree of dismissal of the plaintiff's suit. It is true that the certified copy of the decree was obtained by the plaintiff before the Bill of Costs was amended. The application which was made by the plaintiff for correction of the Bill of Costs, was not an application under Order XLVII, Rule 1 of the CPC and even the order which the Court had passed on this application on August 25, 1962, the operative part of which has been reproduced above, cannot be said to have the effect of reviewing the decree of dismissal of the plaintiff's suit. In other words, the decree, in so far as it dismissed the plaintiff's suit, and drawn up in accordance with Order XX, Rule 6(1), Civil Procedure Code, was completely left untouched and an error in the Bill of Costs, which obviously was an accidental or clerical error, was corrected. Such correction of error in exercise of powers u/s 152 read with Section 153 of the CPC cannot have the effect of altering or substituting by another decree the decree of dismissal of the suit drawn on August 8, 1962 which has been left untouched in the instant case and which the plaintiff is challenging. We have seen the decree in original record and it shows that the Bill of Costs has been corrected in the decree which was drawn on August 8, 1962, Those corrections do not appear in the certified copy of the decree supplied to the appellant. But merely on that account it cannot be said that the plaintiff's appeal is incompetent because the fact remains that the decree challenged is the decree dismissing the plaintiff's suit drawn on August 8, 1962. The decisions relied upon by the respondents are really, therefore, of no assistance to them.

7. The learned Counsel for the respondents also relied upon a decision in Soudamini v. Nabalak Mia for the same proposition that, in the instant case, the appeal was rendered incompetent because it was not filed against the amended decree. Now, the facts in this Calcutta case were that in a suit upon a mortgage

a decree was made directing the mortgagor to redeem on payment of a certain sum and on subsequent application by the mortgagor, the amount was reduced. The mortgagee thereupon appealed, questioning the right of the mortgagor to redeem. The appeal was time-barred as regards the original decree but was within limitation from the date of the amended decree. The Division Bench has held that it was really the amended decree against which an appeal would lie, and that no appeal would lie from the original decree. But on the facts of that case it was held that even on the basis that an appeal from the original decree would be the proper appeal in which the question of mortgagor's right to redeem could be raised, the case was a fit one for extension of time u/s 5 of the Limitation Act. It will thus appear that the facts of that case were entirely different because as a result of the subsequent modification the mortgage amount had undergone a change and that had affected the rights of the parties. In the instant case, the only clerical correction which has been made is in the Bill of Costs. The operative part of the decree, viz., that the plaintiff's suit was dismissed, was never touched and, in our view, there is no substance in the objection that the plaintiff's appeal must be dismissed as incompetent.

8. Coming to the merits of the appeal, we wish to make it clear at the outset, that the only question which we are deciding in this appeal is whether the learned Judge was right in dismissing the entire suit on the ground that it was barred by Section 28(2) of the Provincial Insolvency Act. The learned Counsel for the appellant did not challenge the finding of the trial Court that so far as defendant No. 1 and now his legal representatives are concerned, the suit was barred by the provisions of Section 28(2) of the Provincial Insolvency Act. For the purposes of this appeal, he also did not contest the finding that the permission subsequently obtained could not have the effect of validating the institution of the suit as against the deceased defendant No. 1. But he vehemently contested the finding that the entire suit was liable to be dismissed. It was argued that the question whether the suit was maintainable against defendant No. 2 without obtaining such leave or not, was never in issue and, according to him, issue No. 4 did not arise for consideration at the stage when the two issues referred to above were tried as preliminary issues. His contention is that if there was an independent contract of guarantee, the plaintiff was entitled to enforce it and, if for the purpose of enforcement of that contract no part of the insolvent's property was either required to be dealt with or sold, then, to such a case, Section 28(2) of the Provincial Insolvency Act did not apply and the entire suit could not, therefore, be dismissed on the ground that no leave was obtained as required by Section 28(2) of the said Act. In our opinion, the contention of the learned Counsel must be accepted.

9. The plaintiff-appellant, in this case, is seeking to enforce a contract of guarantee which is contained in the mortgage deed executed by defendant No. 2 in favour of the plaintiff-bank on March 25, 1935. u/s 128 of the Contract Act, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The mortgage bond does not in any way

provide for anything contrary to the provisions of Section 128 of the Contract Act. It is also well established that it is not obligatory on the creditor to first proceed against the principal debtor and take recourse to his remedies against the principal debtor before he decides to proceed against the surety. A creditor may well choose to proceed exclusively against the surety without taking recourse to his remedies against the principal debtor. This proposition is now well established, and a reference to it is to be found in a decision of the Supreme Court in *Bank of Bihar Ltd. v. Damodar Prasad* [1968] 2 S.C.W.R. 381. The facts in that case were that the plaintiff-bank had filed a suit against the principal debtor and the surety, claiming the amount due from the principal debtor. The trial Court decreed the suit against both the defendants but gave a direction in the decree that the "plaintiff-bank shall be at liberty to enforce its dues in question against defendant No. 2 only after having exhausted its remedies against defendant No. 1", Defendant No. 1 was the principal debtor and defendant No. 2 was the surety. The bank challenged this direction by an appeal to the High Court, but the High Court dismissed the appeal and, therefore, the matter went to the Supreme Court by way of an appeal by the bank. The bond which was executed by defendant No. 2 in favour of the bank required the surety to pay and satisfy the liabilities of the principal debtor upto Rs. 12,000 and interest thereon two days after demand, and it also provided that the plaintiff would be at liberty to enforce and to recover upon the guarantee notwithstanding any other guarantee, security or remedy which the bank might hold or be entitled to in respect of the amount secured. Holding that the direction given by the trial Court was not justified, the Supreme Court observed :

The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. u/s 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is so co-extensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor.

Their Lordships further observed :

Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in *Wright v. Simpson* (1802) 6 Ves. Jun. 714 : 31 E.R. 1272. But the surety is a guarantee; and it is his business to see, whether the principal pays, and not that of the creditor." In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.

It is thus clear that the liability of the surety is capable of being enforced without the creditor taking any steps to exhaust his remedies against the principal

debtor. The liability of the surety and the liability of the debtor, no doubt, arise out of the same transaction; but they are separate, though they are co-extensive.

10. At this stage a reference must be made to the provision of Section 28(2) of the Provincial Insolvency Act, because it is that provision, which the learned Judge held, barred the entire suit. Sub-section (2) of Section 28 reads as follows :

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

(italics are ours).

It is clear from the words of this Sub-section (2) of Section 28 that they create a bar against a creditor if he wants to proceed against the property of the insolvent in respect of a debt which is "provable in insolvency and when the suit or any other proceeding is to be commenced during the pendency of the insolvency proceedings". The bar also is not an absolute one because such a suit or any other legal proceedings can be commenced with the leave of the Court. The obvious object of this provision is that when management of the insolvent's property is taken over by the insolvency Court, the interest of all the creditors must be safeguarded, because the property vests in the insolvency Court or the Receiver for the benefit of the creditors. But the section is unambiguous, that it is only the property of the insolvent which can not be proceeded against. The words "commence any suit or other legal proceeding" in Section 28(2) must be read as referring to a suit or proceeding against an insolvent and relating to the property of the insolvent which vests in the Court or the Receiver. The phrase, "suit or other legal proceeding" in Section 28(2) of the Provincial Insolvency Act came in for construction before a Division Bench of the Calcutta High Court in *Damodar Mukherjee and Others Vs. Bonwarilal Agarwalla and Others*, and taking the similar view the Divisional Bench observed (p. 473):

...the words "suit or other legal proceeding" (in Section 28(2)) mean suit or other legal proceeding against the property of the insolvent, which vests in the Receiver and the remedy against which is controlled by that Sub-section.

It is, therefore, clear that the only suit or legal proceeding which is hit by the bar u/s 28(2) is a suit or proceeding in respect of the property of the insolvent which has vested in the Court or in the Receiver and becomes divisible among the creditors as provided by sub-s,(2) of Section 28. If property of a guarantor who has guaranteed payment of a loan taken by the insolvent is sought to be proceeded against by the creditor by a suit against the surety himself, Section

28(2) is not at all attracted and, in our view, such a suit by the creditor cannot be covered by the words "any suit or other legal proceeding" in Section 28(2) of the Act. The learned Judge, though he was right in holding that the suit in so far as it sought a relief against defendant No. 1 was barred by Section 28(2), was not justified in dismissing the suit so far as it sought a decree against defendant No. 2 on the solitary ground that it was also barred by the said provision.

11. Admittedly, the property mortgaged by defendant No. 2 did not belong to the insolvent-defendant No. 1 and that is also the finding of the learned Judge. The learned Judge has in terms found that the security furnished by Durgabai (defendant No. 2) by mortgaging her property related to an independent property of Durgabai herself. But even with that finding, the learned Judge has come to the conclusion that a claim against Durgabai would also be barred, and it is obvious from the fact that he has dismissed the entire suit without finding out whether the plaintiff was entitled to prosecute its claim against defendant No. 2 alone on the basis of the contract of guarantee. We are, therefore, unable to sustain the wholesale dismissal of the plaintiff's suit. As already stated, the plaintiff is not challenging the finding that the provisions of Section 28(2) of the Provisional Insolvency Act barred the suit as against defendant No. 1. That finding will, therefore, have to be affirmed. But the decree of the trial Court dismissing the entire suit will have to be set aside and the suit will have to be remitted back to the trial Court for a decision in accordance with law and after taking into account the pleas that may be raised by both the parties.

12. The result, therefore, is that the decree passed by the trial Court dismissing the plaintiff's entire suit is set aside. The findings, so far as the issues Nos. (vii) and (viii) are concerned, are, however, affirmed. The suit is remitted back to the trial Court, and the trial Court is directed to decide the suit in accordance with law. The contesting defendants are entitled to raise any objections which they may have to the maintainability of the suit against them. In the circumstances of the case, we make no order as to costs.