Sunil Poddar & Ors vs Union Bank Of India on 8 January, 2008

Equivalent citations: 2008 (2) SRJ 308, AIR 2008 SUPREME COURT 1006, 2008 (2) SCC 326, 2008 AIR SCW 556, 2008 (2) ALL LJ 174, 2009 CLC 455 (SC), (2011) 1 BANKCAS 155, (2008) 64 ALLINDCAS 166 (SC), (2008) 2 CTC 686 (SC), 2008 (1) SCALE 153, (2008) 5 ALLMR 18 (SC), (2008) 1 CLR 292 (SC), 2008 (5) ALL MR 18 NOC, (2008) 4 ICC 516, (2008) 1 CIVILCOURTC 696, (2008) 1 ALL WC 386, (2008) 141 COMCAS 597, (2008) 2 CAL HN 165, (2008) 1 MAD LJ 1193, (2008) 4 MAD LW 152, (2008) 3 MAH LJ 84, (2008) 3 MPLJ 65, (2008) 1 PUN LR 767, (2008) 1 SCALE 153, (2008) 1 WLC(SC)CVL 410, (2009) 1 CGLJ 190, (2008) 5 MPHT 2, (2008) 71 ALL LR 318, (2008) 1 BANKCLR 500

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Bench: C.K. Thakker, Altamas Kabir

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           CASE NO.:
Appeal (civil)  86 of 2008

PETITIONER:
SUNIL PODDAR & Ors.

RESPONDENT:
UNION BANK OF INDIA

DATE OF JUDGMENT: 08/01/2008

BENCH:
C.K. THAKKER & ALTAMAS KABIR

JUDGMENT:
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J U D G M E N T (Arising out of SLP (c) No. 3935 of 2006) C.K. Thakker, J.

1. Leave granted.

2. The present appeal is directed against the order dated November 23, 2005 passed by the High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No. 67297 of 2005. By the said order, the High Court dismissed the writ petition filed by the appellant-writ petitioners and confirmed the order of Debt Recovery Appellate Tribunal, Allahabad dated September 13, 2005 which in turn affirmed the order passed by the Debt Recovery Tribunal, Jabalpur on December 20, 2001.

3. To appreciate the controversy raised in the present appeal, few relevant facts may be stated. It is the case of the appellant in Suit No. 44A of 1993 instituted by respondent-Union Bank of India) was incorporated as Company under the Indian Companies Act, 1956. There was another Company also known as Adhunik Synthetics Ltd. which was floated by the Directors of Adhunik Detergent Ltd. According to the appellants, initially, Adhunik Detergent Ltd. had seven Directors, namely, (1) Satyanarayan Jalan, (2) Krishna Jalan, (3) Chakrapani Jalan, (4) K.K. Jalan, (5)Sunil Poddar, (6) Sushil Kumar Kanodia and (7) Radhey Shyam Poddar. Adhunik Detergent Ltd. had taken loan from the respondent-Bank. The appellants herein as Directors of Adhunik Detergent Ltd. at the relevant time became guarantors for repayment of loan and executed certain documents in favour of the respondent-Bank. It is the say of the appellants that there was division of business among the Directors of Adhunik Detergent Ltd. and Adhunik Synthetics Ltd. Consequent upon the division, the appellants herein, who were Directors 5, 6 and 7 had resigned as Directors from Adhunik Detergent Ltd. on August 18, 1989 and they got exclusive control over Adhunik Synthetics Ltd. From that date onwards, the appellants no more remained as Directors of Adhunik Detergent Ltd.

4. It was alleged by the respondent-Bank that since Adhunik Detergent Ltd. did not repay the loan amount, a civil suit came to be filed by the Bank in the Court of District Judge, Raipur, Madhya Pradesh for recovery of Rs. 1,07,17,177.60 p. In the said suit, over and above the Company, all the Directors were also joined as defendants. A prayer was made in the plaint to hold all the defendants jointly and severely liable to pay the amount claimed by the plaintiff-Bank along with interest, costs and other expenses. Summonses were issued by the Court and the defendants appeared. So far as the present appellants are concerned, they were not served with the summonses but when they came to know about the filing of the suit, they appeared and filed written statement on March 9, 1995 contending inter alia that they had resigned from the Directorship of the Company (Adhunik Detergent Ltd.) with effect from August 18, 1989 and the Bank was intimated about such resignation. It was, therefore, contended that they were not responsible for repayment of loan amount and suit against them was not maintainable. The appellants, therefore, prayed that they may be deleted from the array of parties. On March 14, 1995, the appellants also filed an application by raising preliminary objection as to maintainability of civil suit against them. It was stated in the said application that preliminary objections were raised in the written statement by the appellants (defendant Nos. 7, 8 and 9) that no suit against them would lie. It was stated that the preliminary objection raised by them was fundamental in nature and went to very root of the jurisdiction of the Court. It was, therefore, prayed that an issue as to maintainability of suit against defendant Nos. 7 to 9 be framed and decided as preliminary issue before trying the suit on merits. Another application was also made in November, 1995 raising a similar objection contending that the suit was not instituted in accordance with law. The plaint which was filed was not signed by a person authorized to do so and on that count also, the suit was not tenable. It was further stated that suit against defendant Nos. 7 to 9 was not maintainable. A prayer was made to frame two issues under Order XIV, Rule 1 of the Code of Civil Procedure, 1908 (Code for short) as preliminary issues and to decide them as such.

5. It may, however, be stated that during the pendency of the suit before the Civil Court, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Act) came into force and in 1998 the suit filed by the respondent-Bank came to be transferred to

the Debt Recovery Tribunal, Jabalpur (DRT for short). The appellants had no knowledge about the transfer of the suit to DRT nor summonses were issued by DRT to the appellants at the new address. In the circumstances, nobody appeared before the DRT and the DRT vide its ex parte judgment and order dated December 15, 2000 decreed the suit filed by the plaintiff-Bank holding that the Bank was entitled to recover 1,07,17,177/- with interest and cost from the defendant Nos. 1-9 jointly and severely. The defendants were also restrained from transferring, alienating or otherwise dealing with or disposing off the hypothecated/mortgaged properties without the prior permission of DRT.

6. It is asserted by the appellants that they were not aware of the proceedings before the DRT and no summonses were served upon them. In the circumstances, they could not remain present before the DRT. It was on December 16, 2000 when Mr. G. Karmakar, who was working for the appellants, happened to visit the office of M.P. Audyogik Vikas Nigam Ltd. at Bhopal for some official work that the officials of the Nigam informed him that a suit pending in the Civil Court, Raipur was transferred to DRT, Jabalpur and an ex-parte decree had been passed against the appellants. Immediately on December 18, 2000, Mr. Karmakar went to DRT, Jabalpur for getting requisite information and came to know that notice was sent to the appellants at the old address though new address was available. An advertisement was also published in a Hindi daily. He also came to know that since nobody appeared on behalf of the appellants, ex-parte decree had been passed. In the circumstances, the appellants herein made an application under Section 22(2)(g) of the Act on January 10, 2001 for setting aside an ex-parte order passed by the DRT. The DRT, however, on December 20, 2001 dismissed the application. The appellants appealed against the order passed by the DRT, but the Debt Recovery Appellate Tribunal, Allahabad (DRAT for short) also dismissed the appeal. A writ petition filed against the order of DRAT also met with the same fate. The High Court dismissed the writ petition. All these orders have been challenged by the appellants in the present appeal.

7. Notice was issued by this Court on March 6, 2006. After hearing the parties, execution proceedings were stayed and the matter was ordered to be posted for final hearing. That is how the matter has been placed before us.

8. We have heard the learned counsel for the parties.

9. The learned counsel for the appellants contended that DRT committed grave error of law and jurisdiction in proceeding with the application and deciding it on merits ex-parte in absence of the appellants. It was submitted that no summonses were served upon the appellants and thus no opportunity of hearing was afforded to them before passing the impugned order which is liable to be set aside. The DRT in the circumstances, ought to have allowed the application for setting aside ex-parte order. By not doing so, the DRT had committed grave error and the said order deserves to be quashed. It was also submitted that appellants were not informed about the transfer of case from Civil Court to DRT and no summonses were served upon them. According to the appellants, they had changed their address and new address was available with the Bank. In spite of that, with mala fide intention and oblique motive, summonses were sought to be served upon appellants at an old address but the appellants were not served because of change of address. Summonses were then

published in a Hindi newspaper which had no wide circulation . That action was also taken with a view to deprive the appellants from knowing about the proceedings before the DRT so that they may not be able to appear and defend themselves and the Bank would be able to obtain ex parte order. The appellants had led the evidence in support of their say that they were not in Mumbai at the relevant time and they were not subscribers of Hindi newspaper Navbharat Times . They had produced necessary particulars and yet the DRT failed to consider the said evidence in its proper perspective and dismissed the application observing that the appellants must be deemed to be aware of the proceedings. According to the DRT, the appellants appeared in Civil Court, filed written statement but all those facts were suppressed by them while filing the application before the DRT for setting aside ex parte order. The same mistake has been repeated by the Appellate Tribunal as also by the High Court. It was submitted that all those facts were not relevant in the present proceedings. On all these grounds, the orders are liable to set aside by directing the Debt Recovery Tribunal, Jabalpur to consider the matter afresh and to decide it in accordance with law.

10. The learned counsel for the respondent-Bank, on the other hand, supported the order passed by the DRT, confirmed by the DRAT as well as by the High Court. An affidavit-in-reply is filed by Senior Manager (Law) of the respondent-Bank, wherein it was submitted that the appellants were aware of the proceedings initiated by the Bank against them. In civil suit, the appellants were joined as defendant Nos. 7-9. They appeared before the Court through an advocate and filed written statement in March, 1995. They also raised preliminary objections by filing applications, requesting the Court to treat the issues as to maintainability of suit and liability of the appellants as preliminary issues. It was, therefore, clear that they were served with the summonses and were in know of the proceedings. It was thereafter their duty to take care of their interest, when the suit was transferred to DRT, Jabalpur. It was further stated that summonses were issued to the appellants at the addresses at which they were earlier served. In fact, according to the respondent-Bank, it was the same address which was given by the appellants themselves before both the Tribunals and before the High Court. But with a view to deprive the Bank of the legitimate dues and to delay the proceedings initiated against them, they did not appear before the DRT. Though it was not necessary for the Bank to serve the appellants once again, they made a prayer to the Bank to get the summonses published in a newspaper which was done and in Navbharat Times , Bombay as well as Navbharat Times , Raipur summonses were published. Navbharat Times is having very wide circulation at both the places, i.e. Bombay as well as at Raipur. It was, therefore, not open to the appellants to contend that they were not subscribing and/or reading a Hindi newspaper by producing a bill from a newspaper agent. Such a bill can be obtained from any vendor. No reliance can be placed on such evidence. Moreover, an extremely important fact which weighed with both the Tribunals as well as with the High Court was that in an application under Section 22(2)(g) of the Act for setting aside ex parte order passed by DRT, the appellants have suppressed material and extremely important fact that they had appeared before the Civil Court and had filed written statement. The application proceeded on the footing as if the appellants were never aware of any proceedings initiated against them by the plaintiff-Bank. The DRT was, therefore, wholly right in dismissing the application and the said order was correctly confirmed by the DRAT and by the High Court. No case can be said to have been made out by the appellants to interfere with those orders and the appeal deserves to be dismissed.

11. Having heard the learned counsel for the parties, in our opinion, the appellants have not made out any ground on the basis of which the order passed by the DRT, confirmed by the DRAT and by the High Court can be set aside. From the record, it is clearly established that the suit was instituted by the plaintiff-Bank as early as in August, 1993. The appellants who were defendant Nos. 7 to 9 were aware of the proceedings before the Civil Court. They appeared before the Court, engaged an advocate and filed a written statement. They raised preliminary objections as also objections on merits. They filed applications requesting the Court to raise certain issues and try them as preliminary issues. It was, therefore, obligatory on their part to appear before the DRT, Jabalpur when the matter was transferred under the Act. The appellants, however, failed to do so. We are not impressed by the argument of the learned counsel for the appellants that they were not aware of the proceedings before the DRT and summonses could not be said to have been duly served. As is clear, summonses were issued earlier and on the same address, summonses were sought to be served again after the case was transferred to DRT. There is substance in the submission of the learned counsel for the respondent-Bank that the appellants had avoided service of summons as they wanted to delay the proceedings. We are also inclined to uphold the argument of learned counsel for the Bank that in view of the fact that the appellants were appearing before the Civil Court, it was not necessary for the Bank to get summonses published in a newspaper after the matter was transferred in accordance with law to the DRT, Jabalpur. But even that step was taken by the respondent- Bank. In Navbharat Times , a Hindi newspaper having wide circulation in Bombay and Raipur, summonses were published. It cannot be argued successfully that the appellants were not the subscribers of the said newspaper and were not reading Navbharat Times Hindi Edition. But even otherwise, such contention is wholly irrelevant. As to bills said to have been produced from the newspaper agent, to us, both the Tribunals were right in observing that such a bill can be obtained at any time and no implicit reliance can be placed on that evidence. It is immaterial whether appellants were subscribers of the said newspaper and whether they were reading it. Once a summons is published in a newspaper having wide circulation in the locality, it does not lie in the mouth of the person sought to be served that he was not aware of such publication as he was not reading the said newspaper. That ground also, therefore, does not impress us and was rightly rejected by the Tribunals.

12. While dealing with the contention raised by the appellants, the DRT observed; When summons are published in newspaper, the Court has to be cautious that it is published in a newspaper, circulated and widely read in an area where the defendant stays. Navbharat Times is a national newspaper read not only in Mumbai but also elsewhere in this country. The summons were published also in a newspaper circulated in Raipur from where the loan was disbursed. As stated in the main order, the Court is satisfied that summons were properly published and summons has been properly served .

13. But the fundamental objection which had been raised by the respondent-Bank and upheld by the Tribunals is legally well- founded. In the application filed by the appellants before the DRT, Jabalpur under Section 22(2)(g) of the Act, there is no murmur that the applicants were defendants in the suit instituted in Civil Court; they were served and they appeared through an advocate and also filed a written statement and other applications requesting the Court to try certain issues as preliminary issues. It was expected of the appellants to disclose all those facts. Apart from

suppression of fact as to service of summons and appearance of defendants before the Court, even on legal ground, it was not obligatory that the appellants should have been served once again.

14. In this connection, we may refer to the provisions of Section 22 of the Act which lays down procedure to be followed by the Tribunals. The relevant part of the said section reads thus;

22. Procedure and powers of the Tribunal and the Appellate Tribunal. (1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;

(h)

15. Bare reading of the above provision makes it clear that the DRT and the DRAT have, for the purpose of discharging their functions under the Act, the same powers as are vested in Civil Court under the Code of Civil Procedure, 1908. Clause (g) of sub-

section (2) of Section 22, therefore, has to be read with Rule 13 of Order IX of the Code which provides for setting aside ex parte decree passed against a defendant. Rule 13 of Order IX as originally enacted in the Code of 1908 read thus;

13. Setting aside decree ex parte against defendant. 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 .

> 16. Original Rule 13 of Order IX of the Code thus provided that when a decree had been passed ex parte against the defendant who satisfied the Court that summons was not duly served upon him, the Court was bound to set aside the decree. It was immaterial whether the defendant had knowledge about the pendency of suit or whether he was aware as to the date of hearing and yet did not appear before the Court. The Law Commission considered that aspect and the expression duly served . In its Twenty-seventh Report, the Commission stated;

> 1. Under Order IX, rule 13, if the court is satisfied either that the summons has not been served, or that the defendant was prevented by sufficient cause from appearing, etc., the ex parte decree should be set aside. The two branches of the rule are distinctive and the defendant, whatever his position may be in respect of one branch, is the court that he has made good his contention in respect of the other branch.

> 2. Now, cases may arise where there has been a technical breach of the requirements of due service , though the defendant was aware of the institution of the suit. It may well be, that the defendant had knowledge of the suit in due time before the date fixed for hearing, and yet, apparently he would succeed if there is a technical flaw. This situation can arise e.g., where the acknowledgement on the duplicate of the summons has not been signed. There may be small defects in relation to affixation, etc., under Order V, rule

> 15. At present, the requirements of the rules regarding service must be strictly complied with, and actual knowledge (of the defendant) is immaterial. (There are not many decisions which hold that even where there has not been due service, yet the decree can be maintained, if the defendant knew the date of hearing.)

> 3. Where a literal conformity with the C.P.C. is wanting, the second part of column third of article 164, Indian Limitation Act, 1908 (now article 123, Limitation Act, 1963) applies. As to substituted service, see discussion in under-mentioned decision.

> 4. The matter was considered exhaustively by the Civil Justice Committee, which recommended a provision that a decree should not be set aside for mere irregularity.

> Local Amendments made by several High Courts (including Allahabad, Kerala, Madhya Pradesh, Madras and Orissa) have made a provision on the subject, though there are slight variations in the language adopted by each. Such a provision appears to be useful one, and has been adopted on the lines of the Madras Amendment.
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> 17. The Commission again considered the question and in its Fifty-fourth Report, reiterated;
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> 9.12. Under Order 9, rule 13, if the court is satisfied either that the summons has not been served, or that the defendant was prevented by sufficient cause from appearing, etc., the ex parte decree should be set aside. The two branches of the rule are distinctive, and the defendant, whatever his position may be in respect of one branch, is entitled to benefit of the other branch, if he satisfies the court that he has made good his contention in respect of the other branch.
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> 9.13. In the earlier Report, several points were considered with reference to this rule, and amendments suggested on one point,-the broad object being to ensure that a decree shall not be set aside merely on the ground of irregularity in service, if the defendant had knowledge of the decree.

After consideration of the points discussed in the earlier Report, we have reached the same conclusion.

18. Accepting the recommendations of the Law Commission, the rule was amended by the Code of Civil Procedure (Amendment) Act, 1976. Rule 13 of Order IX with effect from February 1, 1977 now reads thus;

13. Setting aside decree ex parte against defendant 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 plaintiff s 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 that ex parte decree. (emphasis supplied)

19. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff s claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside.

20. In our opinion, the Tribunals were also right in commenting on the conduct of the appellants/defendants that they were appearing before Civil Court through an advocate, had filed written statement as also applications requesting the Court to treat and try certain issues as preliminary issues. All those facts were material facts. It was, therefore, incumbent upon the appellants to disclose such facts in an application under Section 22(2)(g) of the Act when they requested the DRT to set aside ex parte order passed against them. The appellants deliberately and intentionally concealed those facts. There was no whisper in the said application indicating that before the Civil Court they were present and were also represented by an advocate. An impression was sought to be created by the defendants/appellants as if for the first time they came to know in December, 2000 that an ex parte order had been passed against them and immediately thereafter they had approached the DRT. The Debt Recovery Tribunal, Jabalpur, therefore, in our opinion was right in dismissing the said application. In an appeal against the said order, the DRAT observed that the appellants had willfully suppressed the fact that they were not in the know of the proceedings when the same was proceeding in the Civil Court . The DRAT correctly stated that even if it is taken to be true that the appellants did not receive notice from the DRT, it was their duty to make necessary inquiry in the proceedings when the case had been transferred to the DRT. The Appellate Tribunal rightly concluded;

In the present case, the appellants very artistically have suppressed the fact of their filing of written statement in the case while it was proceeding in the Civil Court and were being represented by their

lawyer till the date of its transfer to the Tribunal at Jabalpur .

21. The High Court, in our judgment, was equally right in dismissing the petition confirming the finding of the DRAT that the appellant had artistically suppressed material fact and no interference was called for.

22. Finally, we are exercising discretionary and equitable jurisdiction under Article 136 of the Constitution. From the facts and circumstances of the case in their entirety, we do not feel that there is miscarriage of justice. On the contrary, we are convinced that the appellants had not come forward with clean hands. They wanted to delay the proceedings. Though they were aware of the proceedings pending against them, had appeared before the Civil Court, but then did not care to inquire into the matter. Even after ex-parte order was passed, in an application for setting aside the order, they had not candidly disclosed all the facts that they were aware of such proceedings and were represented by a counsel. In the light of all these facts and keeping in view the provisions of Section 22 (2)(g) of the Act read with Rule 13 of Order IX of the Code, if the Debt Recovery Tribunal dismissed the application and the said order was confirmed by the Debt Recovery Appellate Tribunal and by the High Court, it cannot be held that those orders were wrong and ex parte order should be quashed. The prayer of the appellants, therefore, has no substance and cannot be accepted.

23. For the foregoing reasons, the appeal deserves to be dismissed and is accordingly dismissed with costs.