

Punjab & Sind Bank vs Sh. Rajiv Nagpal on 16 August, 2007

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IN THE COURT OF SH. RAJ KUMAR CHAUHAN :
ADDITIONAL DISTRICT JUDGE : DELHI

Date of Institution : 5.11.2005.

Date on which the
Judgment has been
Reserved : 10.8.2007.

Date of Judgment : 16.8.2007.

In the matter of: -

RCA No. 78/2005.

Punjab & Sind Bank,
(Govt. of India Undertaking)
having its Head Office at
21, Rajindra Place,
New Delhi and its one amongst
many Branches at Asset Recovery
Branch-II, M-14, Connaught Place,
New Delhi.

... Appellant.

Contd... ..

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Vs.

1.Sh. Rajiv Nagpal
8/71, Punjabi Bagh,
New Delhi.

2.Smt. Geeta Nagpal
W/o Sh. Rajiv Nagpal
8/71, Punjabi Bagh,
New Delhi.

3.Sh. Suresh Birla

R/o B-18, Naraina Vihar,
New Delhi.

... Respondents.

- : ORDER : -

1. In this regular civil appeal, the judgment dated 1.8.2005 passed by the Ld. Civil Judge, Delhi has been challenged wherein the suit of the plaintiff/appellant against the defendant/respondent no. 1 was decreed Contd... ..

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whereas against the defendant/respondent no. 2 and 3, it was dismissed.

2. The matter in brief before the Ld. Civil Judge, Delhi was that the defendant/respondent no. 1 approached the plaintiff/appellant bank on 9.9.1994 for taking consumer loan of Rs. 2.50 lakh in order to purchase a Maruti Zen car; the request of the defendant/ respondent no. 1 was considered and accepted by the plaintiff/appellant bank and the defendant/respondent no. 1 executed various documents including debit voucher dated 23.9.1994 for a sum of Rs. 2.25 lakh, demand promissory note dated 23.9.1994; the defendant/respondent no. 2 and 3 stood as guarantor on behalf of the defendant/respondent no. 1 for the repayment of the said loan; the defendant/respondent Contd... ..

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no. 1 failed to make the payment of the monthly installments of Rs. 9,000/- per month despite repeated requests and reminders sent by the plaintiff/appellant bank; the plaintiff/appellant bank vide letter dated

3.2.1996 and 14.2.1997 called upon the defendants/respondents to regularise their account; on 31.3.1997, the defendant/respondent no. 1 has executed a balance and security confirmation letter whereby he acknowledged the debit balance in his loan account for Rs. 1,74,904/- as principal amount as on 30.3.1997 and also confirmed the execution of the security documents dated 23.9.1994 and asked the plaintiff/appellant bank for settlement of the loan amount shortly; the defendant/respondent no. 1 failed to adhere to the promise so made; accordingly, the plaintiff/appellant bank issued a legal notice dated Contd... ..

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1.6.1998 to all the defendants/respondents; on 6.10.1998, the defendant/respondent no. 1 in order to discharge his liability vide letter dated 6.10.1998 gave six cheques to the plaintiff/appellant bank for the total sum of Rs. 1.75 lakh and undertook to adjust the balance amount by 15.3.1999 but all the six cheques were dishonoured; on failure of all the defendants/respondents to repay the loan amount, the present suit was instituted by the plaintiff/appellant bank for recovery of Rs. 2,35,998/- alongwith pendente lite and future interest @ 18.75 per annum with quarterly rests.

3.A joint written statement was filed by the defendants/respondents wherein they took the preliminary objections that the suit has not been signed Contd... ..

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and verified by duly authorised person; the plaintiff/appellant has not shown the amount in the statement of account which was actually deposited by the defendant/respondent no. 1 and the copy of the same has not been supplied to the defendants/ respondents; the suit of the plaintiff/appellant was barred by limitation. On merits, it is stated that the defendant/respondent no. 2 and 3 did not stand as guarantor and they were not jointly and severally liable towards the loan amount of the defendant/respondent no. 1; that the defendant/respondent no. 2 and 3 were mere witnesses to the transaction and not the guarantor; that the defendants/respondents were made to sign several blank printed forms without knowing the documents to the defendants/respondents; those documents were misused by the plaintiff/appellant Contd... ..

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bank and as such not executed by the defendants/ respondents as per law. All other averments in the plaint have been controverted and denied stating that the suit was false and liable to be dismissed.

4.On 26.2.2003, the Ld. Trial Court framed the following issues: -

- 1.Whether the suit has been signed, verified and filed by duly authorised person? OPP.
- 2.Whether the suit is barred by limitation? OPD.
- 3.Whether the suit is not maintainable in view of the preliminary objection no. 3? OPD.

Contd... ..

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- 4.Whether the plaintiff is entitled to the recovery of the amount claimed? OPP.
- 5.Whether the plaintiff is entitled to any interest, if so, at what rate? OPP.
- 6.Whether the plaintiff is entitled to any penal interest, as claimed? OPP.
- 7.Relief.

5. On the basis of the evidence led by the parties, the Ld. Trial Court vide impugned judgment decided all the issues except the issue no. 2 in favour of the plaintiff/appellant. The issue no. 2 was partly decided in favour of the plaintiff/appellant and partly decided Contd... ..

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in favour of the defendant/respondent no. 2 and 3 and it was held that the suit against the defendant/ respondent no. 2 and 3 was barred by limitation. The suit against the defendant/respondent no. 1 was decreed.

6. Aggrieved by the impugned judgment, the present appeal has been filed praying that dismissal of suit against the defendant/respondent no. 2 and 3 is liable to be set aside and the suit of the plaintiff/appellant is required to be decreed against all the defendants/ respondents on the ground that the Ld. Trial Court has wrongly held that the guarantee agreement was void and hit by Section 23 of the Indian Contract Act; that the Ld. Trial Court has failed to appreciate the debt acknowledged by the principal borrower also extends Contd... ..

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the limitation period against the guarantor i.e. defendant/respondent no. 2 and 3 who have executed and delivered a continuing deed of guarantee for the repayment of the loan by the principal debtor i.e. the defendant/respondent no. 1; that the Ld. Trial Court has committed error while holding that the defendant/respondent no. 2 and 3 did not sign the balance confirmation letter thereby acknowledging their liability, as such, the suit was barred against them; that the Ld. Trial Court has wrongly held that by acknowledging the balance confirmation thereby acknowledging the debt by the principal debtor, there was variance in the terms and conditions of the guarantee agreement and as such the defendant/ respondent no. 2 and 3 were not liable for the amount for which the period of limitation has been extended by Contd... ..

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the defendant/respondent no. 1 in writing. It is, therefore, prayed that the impugned judgment is liable to be set aside so far as it has dismissed the suit against the defendant/respondent no. 2 and 3. It is prayed that the suit against the defendant/respondent no. 2 and 3 be also decreed alongwith decree passed against the defendant/respondent no. 1 because all the defendants/respondents are jointly and severally liable for repayment of the loan amount.

7. The defendants/respondents were sent notice of the appeal and were served through publication but no one appeared for the defendants/respondents. The plaintiff/appellant has also filed an application u/s 5 of the Limitation Act for

condoning the delay of 52 days in filing the present appeal on the grounds that the Contd... ..

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copy of the judgment dated 1.8.2005 was received on 11.8.2005 and was, accordingly, sent to the concerned Branch who had referred the matter to the competent authority at Zonal Office on 24.8.2005 for seeking further instructions; that there was some delay in seeking the permission for filing the present appeal due to administrative reasons; that the concerned Branch had done a bonafide mistake and inadvertently instructed the counsel to file execution petition instead of appeal because the suit was partly decreed in favour of the plaintiff/appellant. It is, therefore, stated that the delay due to above reasons may be condoned in the interests of justice. Since, there is no opposition by the opposite party of the application and the subject matter of the suit/appeal involve the public money, therefore, the delay in filing the appeal stands condoned.

Contd... ..

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8.I have heard the learned counsel for plaintiff/appellant who argued that the impugned judgment is liable to be set aside as the Ld. Trial Court has committed error in not decreeing the suit against the defendant/ respondent no. 2 and 3. It is argued that the defendant/respondent no. 2 and 3 have executed the continuing guarantee and by acknowledgment of the debt by the principal debtor, defendant/respondent no. 2 and 3 in the capacity of the guarantor are liable jointly and severally to repay the loan amount to the plaintiff/appellant as per the guarantee agreement which was a continuing guarantee. In support of his case, the learned counsel for plaintiff/appellant has referred and relied upon B.G. Vasantha Vs. Corporation Bank, Mangalore & Others cited as Contd... ..

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(2005) 10 SCC 215 wherein it was held as under: -

"We are in agreement with the view of the High Court that the suit was not barred by limitation. The guarantee being a continuing guarantee, so long as the principal debt remained due and payable, the guarantor also remained liable."

9.It is, therefore, argued on behalf of the plaintiff/appellant that the facts of the case of the appellant are similar and the ratio of the case relied by the learned counsel for plaintiff referred (supra) applies to their case and the impugned judgment is, therefore, liable to be set aside and the suit against the defendant/respondent no. 2 and 3 i.e. the guarantors was not barred by limitation and as

such needs to be decreed as has been done against the defendant/ Contd... ..

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respondent no. 1 i.e. the principal debtor.

10.I have gone through the said citation as well as other material on record and also read the impugned judgment carefully. A short question involved in the present appeal is as to whether the suit of the plaintiff/appellant was barred by limitation against the defendant/respondent no. 2 and 3 as they have not acknowledged their liability under the guarantee agreement for the purpose of extending the period of limitation. The relevant portion of the impugned judgment is contained in para no. 22 which is reproduced as under: -

"22. In that situation Section 135 of the Indian Contract Act, 1872, comes into picture. Through aforesaid balance and security Contd... ..

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confirmation letter the plaintiff cannot extend the liability of the guarantors because that confirmation is not given by the guarantors. Section 18 of the Limitation Act, on the basis of which, plaintiff intends to extend the limitation period, has to be read in consonance with Section 135 of the Indian Contract Act. In this respect, there is a clause in Ex PW1/12 i.e. the guarantee agreement. It is stated in the third para of this agreement that guarantors shall not be entitled to any of the rights conferred on surety by Section 133, 134, 135, 139 and 141 of the Indian Contract Act. I find this clause of this agreement to be unsustainable, being hit by Section 23 of the Indian Contract Act, which is reproduced herein as under: -

What considerations and objects are lawful, and what not- The consideration or object of an agreement is lawful, unless-It is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent or involves or implies, injury to the person or property of another, or the court regards it as immoral, or opposed Contd... ..

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to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The aforesaid clause of the guarantee agreement amounts to override the provisions of Indian Contract Act, which provide for certain rights of a surety. There is an objective behind such enactment and that is to protect the surety and to limit the liability cast on him under certain circumstances. Thus, if there is some arrangement

between creditor and the borrower, which has effect either to extend the time of payment or to vary the terms of loan agreement, it is mandatory for the creditor to obtain consent of the surety as well, in order to keep the guarantee given by such surety alive under the changed circumstances. Section 135 of the Contract Act is enacted with such objective only. Such right of the surety to limit his liability, in absence of his fresh consent about the changed scenario and terms between the creditor and borrower, can not be overridden by a contract before such exigency has arisen to obtain consent of the surety within Contd... ..

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the provisions of Section 135. Such an agreement amounts to defeat the provisions of law within the meaning of Section 23 of the Indian Contract Act.

In this respect, I would like to refer one judgment of Hon'ble Supreme Court cited as AIR 1984 SC 50. In this case there was a condition in a bill which limited the liability of the carrier. The Hon'ble Supreme Court held that such condition amounted to defeat the provision of Carriers Act and hence the agreement was void in view of Section 23. Though, even in this case there would have been an argument that both parties have mutually agreed to limit the liability of the carrier and the other party i.e. consignor had relinquished/waived off his rights confirmed under the Carrier Act. However, the Hon'ble Supreme Court negated such situation.

Similarly, in the present case, it cannot be said that parties to the agreement had agreed to a particular term, wherein the guarantors had waived off their rights, as provided under Indian Contract Act. Otherwise, also the Contd... ..

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present agreement is a standard form of contract and such inference (waiving of rights by the surety), is not equitable to be gathered from the existing facts. In these circumstances, in fact, I come to the conclusion that the guarantee agreement is void, being hit by Section 23 of Indian Contract Act. Thus in all circumstances, suit is time barred against the defendant no. 2 and 3. Though, the suit is within time against the defendant no. 1 as Ex PW1/15 has the effect to extend the limitation under Section 18 of the Limitation Act. This document has not been rebutted by the defendant. Issue is decided accordingly."

11. On perusal of the above findings recorded by the Ld. Trial Court it becomes clear that the Ld. Trial Court seems to have misguided itself as it has declared the whole guarantee agreement as null and void on the ground that a portion of the guarantee agreement was void due to Section 23 of the Indian Contract Act.

Contd... ..

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There is no doubt that the findings recorded by the Ld. Trial Court so far as it has held that the part of the guarantee agreement void wherein the rights conferred on surety u/s 133, 134, 135, 139 and 141 of the Indian Contract Act were taken away, the said finding is apt and accurate and that portion of the guarantee agreement is hit by Section 23 of the Indian Contract Act. But the Ld. Trial Court has not given any reason as to how the whole guarantee agreement is null and void because only that portion which is repugnant to any law is only to be declared null and void if the other portion of the agreement can be separated. On perusal of the guarantee agreement, it is found that the portion wherein the rights of the guarantee u/s 133 to 141 of the Indian Contract Act were taken away is separable from the whole guarantee agreement between the Contd... ..

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parties. The Ld. Trial Court was, therefore, not legally justified in declaring the whole guarantee agreement as null and void. The findings recorded by the Ld. Trial Court is not sustainable in the eyes of law wherein it was held as under: -

"Thus, if there is some arrangement between creditor and the borrower, which has effect either to extend the time of payment or to vary the terms of loan agreement, it is mandatory for the creditor to obtain consent of the surety as well, in order to keep the guarantee given by such surety alive under the changed circumstances."

12.It is so because the Ld. Trial Court has again misguided itself to hold that by acknowledgment of debt by principal debtor there was variance in the terms and conditions of the loan agreement and there Contd... ..

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was requirement of fresh consent of the surety u/s 135 of the Indian Contract Act. The law on this point is well settled and in this context, the judgment of Hon'ble Kerala High Court cited as AIR 1980 Kerala 190 is relevant wherein it has been held as under:-

"Acknowledgment of the debt under Section 18, Limitation Act which provides for a fresh period of limitation would itself be sufficient, in the context of a contract of guarantee, to keep the surety's liability alive. Surety's contract being separate and collateral could not be equated to that of a co-debtor or joint contractor within the meaning of Section 20 (2), Limitation Act so that the surety could not plead that the written acknowledgment by the debtor could not keep his (surety's) liability alive. The surety could not also plead discharge under Section 133, Contract Act since the debtor's acknowledgment would not create a contract different from the one the

performance of which the surety had guaranteed. The acknowledgment does not involve the making of another contract under Section 134 and 135 Contd... ..

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(Contract Act) whereby the creditor discharges the debtor or makes a composition with him. Nor is Section 137 (Contract Act) attracted because mere forbearance to sue even for a time beyond the period of limitation does not operate to discharge the surety. An acknowledgment does not also impair the remedy of the surety against the debtor, under Section 139."

13. Thus, the law laid down by the Hon'ble Kerala High Court referred (supra) is squarely applicable to the facts of the matter in hand. Since, the portion of the guarantee agreement wherein the rights of the surety were taken away is separable and is held to be void and as such all the rights of the surety u/s 139 and other relevant sections of the Indian Contract Act are available to the guarantors i.e. defendant/respondent no. 2 and 3 and as such they have every remedy available with them in law against the principal debtor.

Contd... ..

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Since the guarantee executed by the defendant/ respondent no. 2 and 3, in the facts and circumstances of the case is a continuing guarantee and as such by acknowledging debt by the principal debtor wherein the repayment of the loan amount was acknowledged by the principal debtor, therefore, the law laid down by the Hon'ble Apex Court in (2005) 10 SCC 215 referred (supra) also become squarely applicable to the present case. The findings so recorded by the Ld. Trial Court wherein the suit is held to be barred by limitation against the defendant/respondent no. 2 and 3 is, therefore, not legally sustainable in the eyes of law.

The said finding is, accordingly, reversed. The impugned judgment to that extent is liable to be set aside. The suit of the plaintiff/appellant is, therefore, found within the period of limitation against the Contd... ..

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defendant/respondent no. 2 and 3. The suit of the plaintiff/appellant already stands decreed against the defendant/respondent no. 1 and finding so recorded by the Ld. Trial Court on all the issues in that regard stands confirmed. The suit of the plaintiff/appellant also stands decreed on the same terms and conditions as has been done against the defendant/respondent no. 1 in favour of the plaintiff/appellant and against the defendant/respondent no. 2 and 3 also. The appeal is, accordingly, accepted. Therefore, the suit of the plaintiff/appellant stands decreed against all the

defendants/respondents for a sum of Rs. 2,35,998/-

alongwith interest @ 18.75% per annum w.e.f. date of filing of the suit till the date of realisation of the decretal amount. The cost of the suit is also awarded in favour of the plaintiff/appellant and against the Contd... ..

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defendants/respondents. All the defendants/ respondents are jointly and severally liable to make the payment of the decretal amount to the plaintiff/ appellant. Decree sheet be drawn, accordingly. A copy of this order be sent to the Ld. Trial Court alongwith TCR. Appeal file be consigned to the record room after due compliance.

Announced in the open Court on 16.8.2007.

(RAJ KUMAR CHAUHAN) ADDITIONAL DISTRICT JUDGE, DELHI Contd... ..