

Neutral Citation No. - 2023:AHC:123211

A.F.R.

Reserved On : 19.05.2023

Delivered On : 31.05.2023

Court No. - 2

**Case :-** MATTERS UNDER ARTICLE 227 No. - 5480 of 2023

**Petitioner :-** Raj Kumar @ Rajendra Srivas And 3 Others

**Respondent :-** Mohd. Kaukab Azim Rizvi And Another

**Counsel for Petitioner :-** Chandra Prakash Kushwaha, Ramendra Asthana

Hon'ble Neeraj Tiwari, J.

1. Heard Sri Ramendra Asthana, learned counsel for petitioners.
2. Present petition has been filed seeking following reliefs:-

“(a) set aside the judgments and orders dated 21.02.2023 passed by learned Additional District and Sessions Judge H.J.S. Banda, dismissing the S.C.C. Revision No. 19/2019, (Raj Kumar @ Rajendra Srivas, now dead through L.Rs., Mohd. Kaukab Azim Rizvi and another) and 12.12.2019 passed by learned Civil Judge (Junior Division) Banda rejecting Application 8(Ga) in Misc. Case No. 49/70/2018 Raj Kumar @ Rajendra Srivas vs. Mohd. Kaukab Azim and another) and 05.09.2013 passed by learned Civil Judge, Junior Division, Banda decreeing ex parte S.C.C. Suit No. 04/2011 Mohd. Kaukab Azim Rizvi and another vs. Raj Kumar Srivas.”

3. Learned counsel for petitioners submitted that in case an unregistered sale deed is produced before the Court as surety, same should have been accepted and application 8-C filed to deposit the security in compliance of Section 17 of Provincial Small Causes Court Act, 1887 (hereinafter referred to as ‘Act, 1887’) along with application 4-C under Order 9 Rule 13 of Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) may not be rejected on this ground. Secondly, the photocopy of any document is secondary evidence as per Indian Evidence Act, 1872 (hereinafter referred to as ‘Act, 1872’) therefore, same cannot be rejected as surety. He next submitted that finding of the court below is that photocopy of the sale

deed is not legible is also not correct as in fact the sale deed is very much legible, therefore, finding of Court below is bad. He assailed this finding before the Revisional Court, but the Court has also not returned any finding upon this ground. There is no compliance of Order 5 Rule 20 of CPC, therefore, Court may not proceed *ex parte* without compliance of the provisions of CPC. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as this Court in the matters of *S. Kaladevi vs. V.R. Somasundaram & Ors.; 2010(3) JT 610* and *Ishtiaq Hussain vs. Ashfaq Hussain (Civil Revision No. 132 of 1984)*, decided on 30.01.1985.

4. I have considered the submissions made by learned counsel for petitioners and perused the records as well as judgments relied upon.

5. Brief facts of the case is that earlier Suit No. 04 of 2011 was filed which was decided *ex parte* vide judgment and decree dated 05.09.2013. Upon that, petitioner has preferred application 4-C dated 31.07.2018 under Order 9 Rule 13 of CPC along with same dated application 8-C to deposit the security in compliance of Section 17 of Act, 1887. Court has rejected the said application on the ground that photocopy of the sale deed has been placed, which is not legible and registered. Against the said order, Revision No. 19/2019 was filed, which was also rejected vide order dated 21.02.2023 with specific finding that photocopy of the unregistered sale deed cannot be accepted as surety.

6. Order of Revisional Court has been challenged basically on the following grounds; first ground is that an unregistered sale deed cannot be rejected, secondly, photocopy of the sale deed is legible and it may also be accepted as surety as it is treated secondary evidence as per Act, 1872.

7. Now, issue before this Court is to decide as to whether photocopy of registered sale deed can be accepted as surety for the

purpose of Section 17 of Act, 1887 read with Section 145 of CPC or not. For ready reference, Section 17 of Act, 1887 is quoted below:-

**“17. Application of the Code of Civil Procedure-**

(1) [The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes, in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an application for an order to set aside a decree passed ex parte or for a review of judgment shall, at any time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give [such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by Section 145 of the Code of Civil Procedure, 1908 (5 of 1908).”

8. Section 17 of the Act, 1887 provides that security may be realised in manner provided in Section 145 of CPC, therefore, Section 145 of CPC is also quoted below:-

**“145. Enforcement of liability of surety-** Where any person [has furnished security or given a guarantee]-

(a) for the performance of any decree or any part thereof, or  
(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an Order of the Court in any suit or in any proceeding consequent thereon,

[the decree or Order may be executed in the manner therein provided for the execution of decrees, namely :-

(i) if he has rendered himself personally liable, against him to that extent;

(ii) if he has furnished any property as security, by sale of such property to the extent of the security;

(iii) if the case falls both under clauses (i) and (ii) then to the extent specified in those clauses, and such person shall, be deemed to be a party within the meaning of section 47 :]

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

STATE AMENDMENT

Uttar Pradesh- In its application to the State of Uttar Pradesh, for the existing Section 145, the following shall be substituted:

“145. Where any person has become liable as surety or given any property as security,-

- (a) for the performance of any decree or any part thereof; or
- (b) for the restitution of any property taken in execution of any decree; or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an Order of the Court in any suit or in any proceeding consequent there on, the decree or Order may be executed in the manner herein provided for the execution of decree:-
  - (i) if he has rendered himself personally liable, against him to that extent; and
  - (ii) if he has given any property as security, by sale of such property to the extent of the security;

and such person shall, for the purposes of appeal, be deemed to be a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Explanation:-For the purposes of this section a person entrusted by a Court with custody of any property attached in execution of any decree or Order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b)." [Vide U.P. Act No. 24 of 1954, sec. 2 and Schedule Item 5, Entry 8 (w.e.f. 30-11-1954)].”

9. From the perusal of both the provisions, it is apparently clear that for compliance of Section 17 of Act, 1887, surety can be accepted in accordance with the provisions of Section 145 of CPC, which provides enforcement of liability of surety and Section 145(II) of CPC provides furnishing of security of property by sale, which may be sold out to the extent of security, therefore, it is apparently clear that surety should have been of the nature, which may be sold out as and when required.

10. So far as present controversy is concerned, surety so placed before the Court is photocopy of the sale deed on the basis of that, no

sale of property can be made, therefore, such surety cannot be accepted.

11. So far as second argument about photocopy of the document can be accepted as secondary evidence is concerned, it is not a case of evidence, but a case of surety and it should have been of such nature that may be sold out at any point of time either under the orders of Court or as per circumstances. Certainly, on the basis of photocopy of the sale deed, no sale proceeding can be executed, therefore, photocopy of sale deed cannot be accepted as surety. Further, judgments so relied by counsel for petitioners only deals with the acceptances of secondary evidence, therefore, the same are having no relevance in the present controversy.

12. Considering the facts so mentioned here-in-above, this Court is of the firm view that photocopy of the sale deed cannot be accepted as surety for the purpose of Section 17 of Act, 1887 read with Section 145 of CPC.

13. Third issue was about legibility of document. Once Court is of the opinion that photocopy of sale deed cannot be accepted as surety, therefore, there is no occasions for the Court to give its finding about the legibility of documents.

14. So far as last argument about Order 5 Rule 20 of CPC is concerned, law is very well settled that in case of deficiency of notice, it has to be raised by the petitioners on the very first instance of the rebuttal and in the present case, even in application under Order 9 Rule 13 of CPC, no such averment has been made, therefore, at this stage, same can not be accepted.

15. Under such facts of the case, petition lacks merit and is accordingly **dismissed**.

16. No order as to costs.

**Order Date :- 31.5.2023**

Sartaj

