
(1971) 03 BOM CK 0012
In the Bombay High Court
Case No : A.F.O.D. No. 863 of 1967

Abdul Hussain Shaikh Gulamali Jambawalla

APPELLANT

Vs

Bombay Metal Syndicate

RESPONDENT

Date of Decision : 29-03-1971

Acts Referred:

Contract Act, 1872 — Section 124 , 126
Limitation Act, 1963 — Article 113

Citation : AIR 1972 Bom 252 : (1972) 74 BOMLR 43 : (1972) ILR (Bom) 622 : (1972) MhLj 175

Hon'ble Judges : K.K. Desai, J

Bench : Single Bench

Advocate : K.P. Malkani, for the Appellant; Hemendra Shah and V.J. Jhaveri, for the Respondent

Judgement

1. This is an appeal on behalf of the original plaintiff from the judgment and decree dated November 16, 1966, of Mr. Judge Kapadia of the City Civil Court, Bombay, whereby the learned Judge tried the issue of limitation as preliminary issue and upon finding that the suit was barred by the Law of Limitation dismissed the same with costs.

2.The relevant facts are as follows:-

3.Between October 11, 1957 and January 3, 1958, the plaintiff had sold and delivered to the defendants certain different goods and had also recovered the price thereof. In the letter dated October 11, 1957, the defendants stated : "In respect of the transactions under your invoice x x x x x dated 25th September 1957 we do hereby indemnify you against any amount of sales tax that may be levied by the authorities with or without any guarantee thereof, as the case may be, as and when charged". Similar letter of indemnity was executed by the defendants on January 3, 1958. There is no dispute between the parties that in respect of the goods sold and delivered by the plaintiff to the defendants during the above period a contract of indemnity in the terms contained in the above

letters existed.

4. In connection with the sales tax relating to the goods sold by the plaintiff to the defendants as mentioned above, the sales tax authorities issued an order dated February 28, 1963, calling upon the defendants (plaintiff ?) to pay Rs. 3,101.25 by way of sales tax and Rs. 378/- as penalty. The plaintiff called upon the defendants to deposit the amount of tax and penalty, but the defendants failed to do so. An appeal filed by the plaintiff was dismissed on November 12, 1963. The revisional application filed by the plaintiff was dismissed in July 1963. Prior to the institution of the above appeal, between April 27, and July 1, 1963, the plaintiff deposited the aggregate sum of Rs. 3,479.25 with the sales tax authorities. To recover that amount the plaintiff filed the present suit on April 13, 1966. The parties were agreed before the learned Judge below that the claim in suit was governed by the provisions in Article 113 in the Schedule to the Limitation Act of 1963 which runs as follows :-

"113. Any suit for which no period of limitation three years. When the right to sue accrues is provided elsewhere in this Schedule."

Relying upon certain observations of Chagla J. (as he then was) in the case of Gajanan Moreshwar Parelkar Vs. Moreshwar Madan Mantri, the learned Judge below held that in the present case the right to sue that in the present case the right to sue had accrued in favour of the plaintiff when the order dated February 28, 1963, demanding and / or levying sales tax and penalty was issued. As three years" period had expired from that date prior to the date of the institution of the suit, he held that the suit was barred and dismissed the same.

5. Mr. Malkani for the plaintiff has submitted that the above finding of the learned Judge is contrary to the decision of the Supreme Court in the case of Lala Shanti Swarup Vs. Munshi Singh and Others, . The effect of the observations of the Supreme Court in this case, according to Mr. Malkani, was such that in the present case the right to sue on the contracts of indemnity between the parties should be held to have accrued to the plaintiff only upon the plaintiff being damnified and suffering loss of the sum of Rs. 3,479.25 by deposit and payment thereof between April 27 and July 1, 1963. He, therefore, submitted that the suit that was filed before expiry of three years from April 27, 1963, was within the prescribed period of three years and was not barred by the Law of Limitation.

6. Mr. Jhaveri for the defendants has submitted that on a true construction of the contracts of indemnity contained in the two letters mentioned above, the plaintiff became entitled to be indemnified immediately upon the levy of the sales tax and penalty. The levy was made by the order dated February 28, 1963. In fact, in accordance with the contracts of indemnity, the plaintiff had called upon the defendants to deposit the amount of the tax and the penalty. The true construction of the contracts of indemnity was that the right to sue accrued in favour of the plaintiff immediately upon the plaintiff receiving the order dated February 28, 1963. In this connection, he relied upon the observations of Chagla,

J., in the above referred case.

7. Now, in connection, with the phrase "right to sue accrues" that appears in the third column of Art. 113, one may refer to the contents of Sections 22 and 23 of the Act which relate to continuing breaches and torts and suits for compensation for acts not actionable without special damage. Without quoting the contents of these sections it is sufficient to state that the Law of Limitation has recognized that liabilities for payments of damages and / or compensation may continue to accrue from day to day newly in respect of continuing breaches of contracts and torts. One illustration of a cause of action which may continue to come into existence under a contract from time to time and day to day will be a negative covenant agreed to between purchasers and sellers in deeds of conveyances and between lessors and lessees in the deeds of leases. But this is not the subject in which it is necessary to indulge too deep. It is sufficient to state that a contract of indemnity may be such as may give rise to two and different sorts of claims which may be enforceable in a Court of law. The ordinary common law cause of action on a contract of indemnity did not arise at any date prior to damnification and / or loss that the plaintiff suffered. In other words the cause of action arose only if and when the plaintiff was damnified and suffered losses. Now, it is true that this view of the nature of contracts of indemnity was by the Chancery and / or Equity Courts considered very harsh and not sufficient to carry out the entire and true purpose of such contracts. The common law was by rulings of Chancery and Equity Courts amended and it was held that the promisee in a contract of indemnity was entitled to additional and extra cause of action vesting him with a right to call upon the promisor to carry out his obligations by payments to the creditors and third parties and / or by deposits made in Court in anticipation of the actions and proceedings which such creditors and third parties may take against the promisee in the indemnity contract. The effect of the findings made by the learned Judge below is that the above additional relief which is afforded to a promisee in an indemnity contract by Law established under rulings of the Chancery and Equity Courts was sufficient to make a finding that a cause of action which would have accrued to such promisee only upon being damnified and suffering loss as originally at common law was not a separate cause of action. It appears to me that in spite of the discussion contained in the case of *Gajanan Moreshwar Parelkar Vs. Moreshwar Madan Mantri*, there is no justification in holding against the plaintiff-indemnified promisee that a fresh cause of action does not accrue to him under the same contract of indemnity when he is in fact damnified and / or suffers loss. It is true that by the law of indemnity as amended by the rulings of the Chancery and Equity Courts, promisee in an indemnity contract would have a cause of action to claim relief of directions that the promisor do make payment to the third party creditor so that in fact the promisor (promisee ?) is never damnified. It is true that in this very connection the promisee may claim relief of deposit of the relevant amount in a Court of law so that the promisee can have the deposited money in hand for payment to the third party creditor. This is a new cause of action created by the

rulings of the Chancery Courts. This has not wiped off the common law cause of action vested in a promisee under an indemnity contract for enforcement of obligation on the indemnity contract itself by seeking a direct decree against the promisee (promisor?). To such decree he was entitled at common law only upon damnification and sufferance of loss. This cause of action arises only upon damnification and sufferance of loss. The observations made above are in consonance with the observations of the Supreme Court in the case of Lala Shanti Swarup Vs. Munshi Singh and Others, where in paragraph 5, Their Lordships observed:-

"The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in the sale deed but also to relieve the vendors from the liability of the mortgages, and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damnified. The mere fact that a mortgage decree has been obtained against the plaintiff is not sufficient to put the statute in motion. In other words, the statute runs not when the event happens which caused the loss but on the actual damnification".

8. In view of the above observations of the Supreme Court, I do not deem it necessary to discuss the observations of Chagla, J., in the case of Gajanan Moreshwar Parelkar Vs. Moreshwar Madan Mantri, mentioned above as also the contrary statements of law contained in the judgment of Lokur, J. in the case of Shankar Nimbaji Shintre Vs. Laxman Supdu Shelke, , which both cases are referred to in the judgment of the learned Judge. In my view, on a true construction of the contracts of indemnity admitted between the parties, it was permissible for the plaintiff to call upon the defendants to pay the amounts claimed in the order dated February 28, 1963, directly to the sales tax authorities. That was because of the additional cause of action afforded by rulings of Courts of Equity. It was, however, permissible for the plaintiff to wait and institute the present suit on the basis of the original cause of action arising at common law upon damnification and sufferance of loss. The plaintiff was for the first time damnified and suffered losses for which he was entitled to be indemnified when he made payments between April 27 and July 1, 1963. The plaintiff's suit was within three years from the date of the above period and accordingly within the time prescribed by Article 113.

9. In the result, the finding of the learned Judge on the question of limitation is set aside. The decree dismissing the suit is set aside. The decree dismissing the suit is set aside. The suit is referred back to the trial Court for further disposal according to law. The defendants will pay costs of this appeal.

10. Order accordingly.