
(2008) 01 BOM CK 0143
In the Bombay High Court
Case No : Suit No. 485 of 1989

Bank of India

APPELLANT

Vs

Alibhoy Mohammed and Others

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 13, Order 18 Rule 4, Order 18 Rule 5
Evidence Act, 1872 — Section 3, 45, 47, 61, 62

Citation : AIR 2008 Bom 81 : (2008) 4 ALLMR 808 : (2008) 5 BomCR 847

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : R.K. Shukla, instructed by V.B. Tiwari and Co, for the Appellant;
None, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—The plaintiff (the bank) has filed the suit against the defendant No. 1 partnership firm, and it's partners, the defendant Nos. 2 to 5, holding them jointly and severally responsible for recovery of the suit claim.

The Factual Matrix

2. The plaint allegations reveal, sometime in the months of January and April, 1988 on the request of the defendant No. 1, who is engaged in the trading activities of import and export of leather merchandise, the plaintiffs Null Bazar Branch granted certain financial facilities to the defendant No. 1 which it failed to pay. Hence present suit was filed for recovery of their dues.

3. The plaintiff bank claims that the defendant No. 1 failed to repay financial facility granted against Letter of Credit (L.C.) inspite of repeated demands and reminders.

4. The plaintiff-bank also allege that the defendant No. 1 was granted over draft facility, in consideration of which it has executed Promissory Note on 31-12-1987

for Rs. 15,000/-; whereunder defendant No. 1 agreed to pay Rs. 15,000/- to the plaintiff with interest thereon at the rate of Rs. 6.5% over minimum 16.5% of the interest with quarterly rests.

5. The plaintiff allege that the defendant No. 1 has also executed continuing security letter; letter of lien and set off dated 31-12-1987, together with letter declaring partnership and holding all the partners, jointly and severally, liable to pay outstanding dues of the plaintiff-bank. According to the plaintiff, outstanding dues under the temporary over draft facility is in the sum of Rs. 11,238.25 with interest thereon.

6. The plaintiff-bank claims to have sent demand notice through it's Advocate on 7-12-1988 requesting defendants to pay outstanding dues, due and recoverable from them.

7. According to the plaintiff, aggregate amounts which it has to recover on various counts are in the sum of Rs. 1,20,456.48 ps. together with Rs. 12,372.83 pas in the L.C. account with interest thereon. Since this amount was not paid by the defendants, the plaintiff-bank has filed the present suit.

8. On being summoned, the defendants appeared and filed their written statement, denying their liability to pay suit claim.

9. Considering the rival pleadings, following issues were framed.

Issues:

1. Whether the plaintiffs prove that the Letter of Credit facility and Temporary Overdraft facility were opened on request of the defendants?

2. Whether the plaintiffs prove that pursuant to the Letter of Credit facility the plaintiffs have parted with money aggregating to Indian Rs. 94,936.68 to one M/s. K. Chhantwani of West Germany?

3. Whether the plaintiffs prove that the Bill of Exchange was noted and protested?

4. Whether the plaintiffs prove that the sum of Rs. 1,20,456.48 is due and payable by the defendants to the plaintiffs under Letter of Credit facility and a sum of Rs. 12,372.83 is due and payable by the defendants under the temporary overdraft facility?

5. Whether the defendants prove that it was the obligation of the plaintiffs to pay custom duty and Bombay Port Trust charges and Clearing Agents charges ?

6. Whether the defendants prove that he has cleared the goods from the Custom Authority ?

7. What reliefs?

8. What order?

Evidence

10. The parties were directed to file their documents and affidavit by way of evidence. Accordingly, the plaintiff has filed two affidavits; one duly sworn by Shri Rajkumar Bandi, Chief Manager, dated 13-9-2007; and another dated 17-12-2007 duly affirmed by Shri S.D Thakore, another chief manager of the plaintiff-bank. The documents in support of the suit claim are also produced on record.

11. In addition to the above two affidavits, plaintiff-bank has produced photostat copies of two applications dated 21-1-1986 and 30-4-1986 made by the defendant No. 1 for grant of documentary credit facility without producing originals thereof.

12. The plaintiff-bank has also produced original D.P. Note for Rs. 15,000/- letter of continuity letter of lien and set off dated 31-12-1987 alongwith undated letter of partnership. The photostat of the carbon copy of the typed demand notice dated 7-12-1988 without signature of any Advocate, without any proof of despatch or acknowledgment evidencing receipt thereof is produced on record. Two extracts of accounts without any certification under the Bankers Books Evidence Act are also produced on record, out of which, one extract of account contains only one entry with short signature of unidentified person; whereas another extract of account does not bear signature of anybody except round rubber stamp of the bank.

13. With the aforesaid quality of evidence, learned Counsel for the plaintiff prayed for decree in favour of the plaintiff-bank.

14. Now, first question which needs consideration is; whether the evidence tendered by the plaintiff-bank can be accepted as legal evidence by this Court. Secondly, whether the documents tendered by the bank can be accepted as proved as per the provisions of the Indian Evidence Act and can they be read in evidence.

15. During the course of hearing, I tried to put the learned Advocate for the plaintiff-bank on notice that looking to the quality of the affidavits and evidence on record, suit might fail. However, learned Counsel for the plaintiff-bank, without taking any hint, left it to the decision of this Court saying that the Court may decide the suit on its own merits in accordance with the law on the basis of material available on record.

16. Faced with the above situation and approach of the learned Advocate for the plaintiff-bank, suit in question is being decided.

Consideration and Findings:

17. The affidavits filed by the plaintiff-bank cannot be read in evidence. Firstly, because no legal authorisation are produced on record by any of the swearers of the affidavits. The original Power of Attorney held by them are not produced. What is produced on record are only the photostat copies of Powers of Attorney without any notarisation or authentication made by any person authorised by

law. The question is: can they be read in evidence?

18. Let me turn to the Legal Provisions; namely, Section 85 of the Evidence Act which lays down that the Court shall presume due execution and authentication of power of attorney when executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Counsel or it's Vice Counsel or representative of the Central Government, etc. This presumption is available in favour of the original Power of Attorney holder provided mandate of Section 85 is duly followed. In the case on hand, neither the original power of attorney was produced nor notarised photo copy was produced on record. Consequently, both affiants failed to prove that they are the duly authorized persons to give evidence on behalf of the plaintiff bank.

10. Now, the second question is: Can affidavits in support claim to be read as evidence? The legal position is that the affiants, filing an affidavit, are required to appear before the Court. They are required to enter the witness box to testify the contents of their respective affidavits as laid down by this Court in the case of F.D.C. Limited Vs. Federation of Medical Representatives Association India (FMRAI) and Maharashtra Sales and Medical Representatives Association, . The relevant extract of the said judgment is reproduced herein below for immediate reference

(A) Civil P.C. (5 of 1908), Order 18, Rule 4, examination-in-chief in each and every case is permitted in form of affidavit-taking affidavit on record-procedure to be followed in appealable cases is prescribed in Rule 5- in non-appealable cases procedure under Rule 13 is to be followed.

In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under R-5.

(Emphasis supplied)

20. The above judgment is approved by the Apex Court in the case of Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd., .

21. In the above view of the matter, since none of the affiants have entered the witness box, the said affidavits cannot form part of evidence. Thus, they cannot be read in evidence.

22. Apart from the above findings, assuming that the affidavits can be read in evidence, even then plaintiff-bank cannot succeed in the suit for want of proof of loan documents and extract of accounts as per the provisions of Indian Evidence Act.

23. If one turns to the contents of both the affidavits, which are identical in

material particulars, it would be clear that the affiants have not stated as to how they became conversant with the facts of the case and able to depose in support of suit claim. None of them have stated that they were in the subject branch either as Branch Manager or in any other capacity at the time when the subject loan documents were executed and loan amounts were disbursed. They do not say that they are the scribe of the documents. They do not say that documents were executed in their presence by either of the defendants. It has also not been stated as to on what basis the statements were made in the affidavits; whether on the basis of record or personal knowledge. Even the signatures of the defendants on the loan documents have not been identified by any of the affiants.

24. At this juncture, Sections 61, 62 and 63 of the Evidence Act need to be looked into. Section 61 lays down that contents of the documents may be proved either by primary or by secondary evidence. This Section is based upon the principal that "best evidence" in the possession or power of the party must be produced. What the best evidence is, it depends upon facts and circumstances of each case. Generally speaking, the original document is the best evidence. The contents of every written paper are, according to the ordinary and well established rules of evidence, required to be proved by the original document, and by that alone, if the document is in existence. It is, therefore, necessary that when a document is produced as primary or secondary evidence, it will have to be proved in the manner laid down in Sections 67 to 73 of the Evidence Act.

25. Where the execution of the document like promissory note was denied, it is required to be proved through the scribe, where the truth of the facts stated in the affidavit is in issue mere proof of handwriting and execution of the document would not furnish evidence of the truth of the facts stated in the document or contents. Truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of person who can vouchsafe for the truth of the facts in issue as held by the Apex Court in *Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import*, . Person with knowledge must be examined. Every document should first be started by some proof before the person who disputed that document can in any way be considered as proved because it's genuineness is not disputed by the opposite party. Documents do not prove themselves.

26. In the case on hand, person who can vouch for truth of the facts in issue has not been examined. Hence, documents cannot be said to have been proved in accordance with the provisions of Evidence Act.

27. Let me now deal with the photo copies of some of the documents filed on record. Section 63 of the Evidence Act provides- for leading secondary evidence. Secondary evidence cannot be accepted without sufficient reason being given for non production of the original. The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but was lost or misplaced (see *Filmistan Private Ltd. Vs. The Municipal Corporation for Greater*

Bombay,). The document unless shown to have been compared with original one, mere copy of the document does not become secondary evidence. The person giving oral evidence who accounts for the contents must have himself seen the original document and not a mere copy. "Seen" here will obviously mean "read". A person who proposes to testify the contents of a document, either by copy or otherwise, must have read it. The contents of private documents may be proved as secondary evidence by any witness who has in fact read them. The secondary evidence is required to be proved in the same manner in which primary evidence.

28. Section 65 of the Evidence Act provides that in each type of cases secondary evidence relating to the document may be given. This Section enumerates the seven exceptional cases in which secondary evidence is admissible. Secondary evidence is of the contents which cannot be admitted without the production of document in such a manner within one or the other of the cases as provided for in the Section.

29. The prior permission of the Court required to be taken for producing secondary evidence of the documents on the grounds that original documents were lost. To sum up, when anybody wants to lead secondary evidence, two things are required to be proved; there must be evidence of the existence of the original documents and there must be evidence of their loss. No permission to lead secondary evidence was obtained by the plaintiff-bank.

30. So far as the case in hand is concerned, the applications dated 21-1-1980 and 30-4-1986 and demand notice filed on record cannot be said to be primary evidence since they are mere photo copies. No evidence is on record to show that at any time in the past, original documents were in existence and that they are lost. Nobody has deposed with respect to the fact of having seen and compared original document with the copy produced. The secondary evidence of the contents of document is inadmissible until non production of the original is first accounted for, so as to bring it within one or the other category of the cases provided for in Section 65. For the reasons recorded above secondary evidence tendered is inadmissible and cannot be read in evidence. Hence, these three documents referred hereinabove are excluded from consideration.

31. So far as the demand notice is concerned, the same is a photo copy of the typed copy without having the signature of the Advocate; who had issued this demand notice. Nobody has proved contents thereof. There is no evidence on record showing despatch of this notice or receipt thereof by the defendants. Under these circumstances, this notice also cannot be said to be a legal evidence. It cannot be relied upon.

32. Moving ahead, so far as the other primary evidence/original documents; namely, D.P. Note, Letter of Continuity and letter of lien, all dated 31-12-1987 are concerned, none of these documents are proved by examining scribe or person acquainted with the contents of the documents or the signatures of the

executants. There is no statement made on oath to prove contents in either of the affidavits filed on record in lieu of examination-in-chief.

33. The mode of proving the contents of the documents has been dealt with in Sections 61-66. As already stated hereinabove the production of the document purporting to have been signed or written by a certain person is no evidence of its authorship. It is necessary to prove their genuineness and execution. Proof, therefore, has to be given of the handwriting, signature and execution of a document. No writing can be received in evidence as a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, by itself, is not evidence of the one thing or the other. A writing, by itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence.

34. Section 67 refers to documents other than documents required by law to be attested. It says that the signature of the person alleged to have signed a document (i.e. execution) must be proved by producing evidence to the effect that the signature purporting to be that of the executant is in fact in his handwriting as laid down by the Apex Court in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, and the other matter in the document (i.e. its body) must also be proved by the first (i.e. proof of handwriting), and the genuineness of the document is proved by the second (i.e. proof of handwriting), unless they are admitted by the other side. The term "execution" is not defined in any statute. It means completion, i.e. the last act or acts which complete a document and in English law this is known as "signing, sealing and delivering". The ordinary meaning of executing a document is signing it as a consenting party thereto.

35. The execution of authorship of a document being a question of fact, it can be proved like any other fact by direct or circumstantial evidence. The internal evidence provided by a document may also be of some help. In most cases the nature of evidence will depend on the nature of the documents and the circumstances of each case. Section 67 does not require any particular mode of proof that any writing or signature is in the hand of a particular person. If it is a letter, it must be proved as to who was the writer and who signed it. If it is an entry in a diary or notebook, its authorship must be proved, i.e. it is the diary or note book of the person whose statement it is alleged to contain. In a suit for money on account of sale of goods, the ledgers, challans and corresponding bills have to be proved to be in the handwriting of the person who has written them.

36. The definition of "proved" given u/s 3 must be read along with Section 67 which requires that there must be specified evidence that the signature purporting to be that of the executant is in the handwriting of the executant. Until this is proved the Court cannot proceed to consider whether execution is proved. In other words Section 67 makes proof of execution of a document something more difficult than proof of matter other than execution of a document. Original of the public document must be proved in the manner required by the provisions of the Act (See *C.H. Shah Vs. S.S. Malpathak* and

Others,).

37. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting in the manner laid down in Sections 45 and 47 (H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others,).

38. A party seeking to prove the execution of a document is not required to prove that the executant knew the contents thereof when the execution denies having signed it and pleads forgery, but if the executant pleads ignorance then in certain circumstances it may be necessary to satisfy the Court that the executant had knowledge of the contents (Dattatraya Vs. Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others,). So where the correctness of the contents of a document is in issue, it should be proved by calling the person who executed the document. It is not sufficient to merely prove through a witness the signature of the handwriting of the person who signed or wrote it Madholal Sindhu Vs. Asian Assurance Co. Ltd. and Others, : Mohammed Yusuf and Another Vs. D. and Another, . The signature of the executant of a sale deed must be proved before it can be admitted in evidence. A sale deed cannot be proved by mere production of the Register in which it is copied out in the registration office. Consequently, documents could not be said to have been proved in accordance with the Evidence Act. Similar is the case, with regard to the letter of partnership. Hence, documents produced on record though originals or primary evidence cannot be read in evidence for want of legal proof. As such, they are required to be excluded from consideration.

39. So far as the particulars of claim are concerned, it can hardly be said to be document in the eye of law. Apart from the fact that the figures stated therein are also not proved by any cogent evidence.

40. Having said so, now what now remains to be considered is the extracts of account produced on record. None of the extracts bear certification under the Bankers Books Evidence Act. Apart from this there is no reference to these two documents in any of the affidavits filed on record by way of examination-in-chief. As such these documents can hardly be said to have been proved by plaintiff in accordance with the law of Evidence.

41. Had these extracts of accounts documents carried the certification under Bankers Books Evidence Act, then they could have been read in evidence. Even this basic requirement has not been complied with by the plaintiff-bank. Under these circumstances, there is absolutely no legal evidence on record in support of the suit claim. None of the documents, referred hereinabove, are proved by the plaintiff-bank in accordance with the provisions of the Evidence Act.

42. Having said so, there is no legal evidence on record to show that loan amounts were disbursed by the plaintiff-bank to the defendants by way of various loan facilities.

43. In para 11 of the affidavits affiants (by both the witnesses of the bank) have stated that the defendant No. 3 has stated as under:

I further state that they have noted and protested the said bill on 4-10-1988. In the report, defendant No. 3 has stated that they are ready and willing to make payment of the said payment in 2-3 weeks.

44. However, no evidence in support of the above statement is tendered on record. One fails to understand on what basis above statements are made in para 11 of the affidavits. There is no mention in the affidavits, whether any of the affiants had personally contacted defendants or in their presence any such statements was made by any of the defendants No. 3. Hence, statement made cannot be relied upon.

45. I may place it on record that affidavits placed on record appears to have been prepared in the mechanical manner without looking into the provisions of Evidence Act or without doing any home work by the plaintiff. The suit is getting dismissed only because of negligence on the part of plaintiff-bank in conducting this suit, though this Court tried to put plaintiff on notice with regard to the deficiencies suffered by them out without success.

46. In the aforesaid scenario, looking to the quality of the affidavits and evidence tendered, I have no option but to hold that the bank has failed to prove issue Nos. 1 to 4, hence these issues are answered against them. The defendants chose to remain absent. They did not lead any evidence. Consequently, issue Nos. 5 and 6 are answered against defendants.

47. In the totality of the circumstances, for the reasons recorded, suit is dismissed with no order as to costs.

48. Decree be drawn accordingly.