
(1961) 06 GAU CK 0001

In the Gauhati High Court

Case No : First Appeal No's. 22 and 27 of 1956

Brajabala Barua and Others

APPELLANT

Vs

Gauhati Bank Ltd. and Others

RESPONDENT

Date of Decision : 29-06-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : AIR 1962 Guw 85

Hon'ble Judges : Haliram Deka, C.J.;G. Mehrotra, J

Bench : Division Bench

Advocate : S.K. Ghose, H. Goswami and B.M. Goswami, for the Appellant; S.C. Das, for Respondent No. 1, S.M. Lahiri and T.N. Phukan, for the Respondent

Judgement

G. Mehrotra, J.—These are two first appeals on behalf of two sets of Defendants which can be disposed of by one common judgment.

2. The appeals arise out of a suit brought by Gauhati Bank Ltd. for recovery of Rs. 1,15,341-0-9 pias against Defendants Nos. 1, 2 and 3 jointly and severally subject to a deduction of Rs. 11,400/- in case the suit is decreed against Defendant No. 4. A further prayer has been made for grant of a decree of Rs. 9,000/- plus Rs. 2,400/- as interest from the 28th February 1945, to the 30th June 1948, against Defendant No. 4 together with proportionate costs and future interest at Rs. 6 per cent per annum.

3. The Plaintiff's case is that it is a bank carrying on banking business at various places. The bank has a branch at Colaghat. From 31st October 1942 to 14th November 1945, the Defendant No. 3, whose heirs are the Appellants in First Appeal No. 22 of 1956, was the Managing Director of the Plaintiff-Bank at Colaghat branch, and the Defendant No. 4, who is the Appellant in First Appeal No. 27 of 1956, was one of the Directors of the Plaintiff-Bank. During this period, Defendant No. 5 stood surety for Defendant No. 2 to the extent of Rs. 2,000/-. Defendant No. 1 was carrying on business at Colaghat, and on the 2nd December 1943, he made an application for an over-draft arrangement of Rs. 30,000/- to

Rs. 35,000/- a month. On 15th December 1943, Defendant No. 2 on behalf of the Bank entered into an agreement with Defendant No. 1 by which the former agreed on behalf of the Bank to make advances to Defendant No. 1 from time to time to the extent of Rs. 35,000/-. The Defendant No. 1 offered a security for the due repayment of the advance to be made (sic) all his contract works under Military, Forest, P.W.D. etc. The Defendant No. 1 further agreed to execute a pro-note for the said amount. There were other terms of agreement between the Bank and the Defendant No. 1. In pursuance of the aforesaid agreement, the Defendant No. 1 executed the pro-note. The Defendant No. 1 was allowed to take advances through a Cash-Credit account opened in his name from the 4th December 1943. An advance of Rs. 8,000/- was allowed to him on that account. From time to time the Defendant No. 1 took advances from the Bank and deposited some amount in payment of the over-draft account. The Defendant No. 1 acknowledged his liability and on the basis of the overdraft account the present suit has been filed against the various Defendants.

4. The case against the Defendants Nos. 2 and is that Defendant No. 2 in excess of the authority conferred on him went on advancing money to the Defendant No. 1 and thus he is liable for the amount advanced to the Defendant No. 1. As against Defendant No. 3 the allegation is that he acquiesced and approved the action of Defendant No. 2 when he without any authority and sanction of the Board of Directors advanced a large sum of money to the Defendant No. 1. He is thus guilty of negligence and breach of the clear direction contained in the memorandum of association and is liable to reimburse the Bank the amount payable by Defendant No. 1 to the Bank.

5. As against Defendant No. 4 the case is that on the 28th February 1945, he wrote a letter to the Agent of the Bank to the effect that the Defendant No. 1 had deposited a cheque for Rs. 9,260/- and as he, as against that amount, had issued a cheque for Rs. 9,000/- in favour of the Defendant No. 4, the said cheque should be cashed and he held himself responsible if the Head Office objected to such a payment. It is contended that the Defendant No. 4 is liable to pay this sum of Rs. 9,000/- which was advanced to Defendant No. 1 on the 28th February 1945 in order to meet the cheque issued in favour of Defendant No. 4.

6. The Defendants Nos. 3 and 4 filed a written statement challenging the claim of the Plaintiff both on facts and various questions of law.

7. The trial court has decreed the suit ex parte against the Defendant No. 1 and against the other Defendants on the following terms:

The Defendants Nos. 2 and 3 will be jointly liable for the decree against the Defendant No. 1 as follows:

(a) the Defendant No. 2 will not be liable for Rs. 10,000/- and Rs. 9,000/- out of the amount of the claim with interest and proportionate costs thereon and for future interest in respect of those amounts and for the rest of the amount he will be jointly liable along with the Defendants Nos. 1 and 3;

(b) the Defendant No. 3 will not be liable for the decree for Rs. 9,000/- of the claimed amount with interest and proportionate costs and future interest thereon, for the rest, he will be jointly liable with the Defendants Nos. 1 and 2 subject to the limitation in respect of the Defendant No. 2 as pointed out above. The Defendant No. 4 will be jointly liable for Rs. 9000/- with interest along with the Defendant No. 1 in respect of the decree in suit.

The decree will be executed against the Defendant No. 1 at the first instance, and then the unrecovered amount, if any, may be realized from the other Defendants to the extent as indicated above.

8. During the pendency of the suit, Defendant No. 3 died and his heirs were brought on the record as Defendants Nos. 3(a), (b) and (c). Defendant No. 1 has filed no appeal. Defendant No. 2 also has not come up in appeal against the decision of the lower court but he has been impleaded as a Respondent in these appeals and we will consider his case later.

9. It is contended by Mr. Lahiri, who appears for the heirs of Defendant No. 3, the Managing Director that there was no cause of action against him. It is not alleged that any of the advances were made by him to the Defendant No. 1. The only allegation against him is that he was negligent and acquiesced in the act of the Defendant No. 2 in making advances to the Defendant No. 1 beyond the powers conferred on him under the memorandum of association. He is thus guilty of negligence. With regard to a sum of Rs. 10,000/- it is contended that it was advanced to the Defendant on his approval and thus it cannot be regarded directly as an advance made by him.

In our opinion the suit is wholly misconceived so far as the Defendant No. 3 is concerned. The suit had been brought primarily against Defendant No. 1 as a debtor for the advances made to him. If on account of any negligence of the Defendant who may be regarded as the Agent of the Bank, the Bank has suffered any loss, the Bank may have been entitled to bring a suit against him for recovery of the damages in a properly framed suit. In that case, the negligence of Defendant No. 3 had to be established and the damage had to be proved. But having brought this suit against Defendant No. 1 treating him as the debtor, it is not open to the Plaintiff in the same suit to assume that the advances made to Defendant No. 1 were no advances in the eye of law, as it was done in excess of the power given to the Agent or the Managing Director and that the Managing Director was thus liable for his negligence or for acting beyond the scope of his authority. The Plaintiff if at all had a distinct and separate cause of action against Defendant No. 3 even assuming the allegations to be correct; but, such a cause of action could not be joined in suit against the debtor for recovery of the loan advanced to him. The cause of action as against Defendant No. 3 is distinct from the one against the Defendant No. 1, and, in our opinion, they could not be joined together nor on the allegations made in the plaint the Plaintiff has any cause of action against the Defendant No. 3. It is nowhere alleged that the advance was actually made by the Defendant No. 3. The mere fact that from

time to time the position of the over-draft account of the Defendant No. 1 was brought to the notice of Defendant No. 3 in a routine manner, no inference can be drawn that he acquiesced in or approved the conduct of Defendant No. 2 in making advances to Defendant No. 1 and that he can be said to be negligent in the discharge of his duties or that he acted beyond the scope of his authority.

10. As regards the sum of Rs. 10,000/ -, the Agent of the Bank wrote to the Managing Director a letter placing the entire circumstances under the Defendant No. 1 had asked for a further advance of Rs. 10,000/ -. A telegram referring to the said letter was again sent on the 29th December 1944, by the Agent to the Managing Director. Thereupon the Managing Director replied on the 30th December, 1944 by telegram, which are Exts. 15 and 15(1), and reads as follows:

If these requirements as per our letter dated 13th December 1944, are complied with the questions of allowing Rs. 10,000/ - to draw may be considered.

Thereafter a letter by the Defendant No. 1 was sent to the Managing Director in which he had stated his requirements and the mode of paying up the loan. On that the Agent advanced the sum of Rs. 10,000/ - to Defendant No. 1. Therefore Rs. 10,000/ - cannot be said to have been advanced on the approval of Defendant No. 3. All the matters were placed before him by the Agent and after consideration of those representations he in the normal course directed the Agent, the Defendant No. 2, to exercise his power and advance the loan to the Defendant No. 1. It cannot be said that this sum was advanced by Defendant No. 3 himself so as to make himself liable for the repayment of the said amount. There is, in our opinion, no case against the Defendant No. 3.

11. The suit against Defendant No. 4, who is the Appellant in the other appeal, also should be dismissed. The entire case against Defendant No. 4 is based on the letter (Ext. 41), which reads as follows:

.... In this connection I beg to say that Mr. Marwa has deposited his C/C a/c today by a cheque for Rs. 9,260/ - only. As he owed me a good amount he has to draw Rs. 9,000/ - out of the above amount. As he issued a cheque for Rs. 9,000/ - in my favour, I shall be glad if you would please allow the amount to be drawn and credit the same in my C/D a/c. shall be responsible for this if your H.O. objects to it.

By, this letter no undertaking was given by Defendant No. 4 to repay the entire liability of the Defendant No. 1 in case he failed to pay up the amount; nor any liability is taken under this letter to pay the Bank the sum of Rs. 9,000/ - in case the Bank failed to realise the amount due in the Cash-Credit account of the Defendant No. 1 from him. On the 28th February 1945 the Defendant No. 1 had deposited a cheque for Rs. 9,260/ - in the Bank in his account. It was open to the Defendant No. 4 to have realised his sum of Rs. 9,000/ - out of the proceeds of that cheque and not allow the Defendant No. 1 to deposit the said cheque in his account. If that had been done by the Defendant No. 4, he could have realised his money without taking the risk of discharging the liability of

Defendant to the extent of Rs. 9,000/ - to the Bank against his Cash-Credit account. What Defendant No. 4 did by this letter was only to ask the Agent to cash his cheque as against the deposit of a cheque by Defendant No. 1 and in case the Head Office objected to this procedure, he was prepared to pay back Rs. 9,000/ - which he had withdrawn as against that cheque. But there is no undertaking to pay up the liability of the Defendant No. 1 even with regard to the sum of Rs. 9,000/ -.

Moreover, this sum was paid to Defendant No. 4 on the 28th February 1945 and the suit was brought on the 26th January 1919, beyond the period of limitation. It cannot be said by the Plaintiff that the Bank had no knowledge of this transaction earlier. According to the statement of Kabindra Ram Das (P.W.1), who was the Managing Director of the Bank when he made the statement, the statement showing a credit Rs. 9,260/ - and debit of Rs. 9,000/ - on the same day 20th February 1945, appears in the daily statement of account in the name of Marwa and the Head Office record it on the 5th March 1945. The suit could only have been brought within three years of the date of the knowledge. The suit so far as this sum of Rs. 9,000/ - is concerned, on the face of it, is beyond time. Any acknowledgment given by Defendant No. 1 regard to his liability cannot the limitation against Defendant No. 4. In any few of the matter, the suit against Defendant No. 4 also reliable be dismissed.

12. It is further contended by Mr. Lahiri has by filling present suit and acknowledging the Defendant No. 1 as debtor, the Bank has ratified the act of Defendants Nos. 2 and 3 in advancing loan to the Defendant No. 1 even though such advances may be beyond the powers conferred on them under the memorandum of association. It is not open to the Plaintiff to accept the act of Defendant Nos. 2 and 3 by recognising the Defendant No. 1 as the debtor and then hold that the act is illegal as it is beyond the powers of Defendants Nos. 2 and 3 under the memorandum of association. Reliance is placed on the case of *Re Portuguese Consolidated Copper Mines, Limited* reported in (1890) 45 Ch D. 16. In this case it was held that although the original allotment of shares was invalid, it had been ratified by the company and was binding on the allottees; with regard to one of the properties, such ratification was completed on the 24th of December 1888, when the action against him was commenced. Further reliance is placed on the case of *Firth v. Staines* reported in 1897-2 QB 70. Reference is made to the following observations at page 75:

"To constitute a valid ratification three conditions must be satisfied; first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and thirdly, at the time the ratification the principal must be legally capable of doing the act himself. I think that all those conditions were satisfied here. Therefore, upon the approval of the vestry being given the acts of the committee became valid as from the time when they were done".

The question whether the act of Defendant No. 3 was ratified by the Bank by

filing a suit against Defendant No. 1 does not arise for consideration in the view which we have taken.

13. It is also contended by the Defendant No. 2 who is arrayed as pro forma Respondent, that although he has filed no appeal, and his application for leave to appeal in forma pauperis was rejected, he is entitled to a relief in his favour under Order 41, Rule 33 of the CPC on the findings arrived at by this Court. It is contended that the decree was a joint decree in favour of Defendants Nos. 2 and 3 and any appeal by Defendant No. 3 will ensure for his benefit also. We do not think that Defendant No. 2 can get the benefit of the appeal filed by Defendant No. 3, particularly when his application for leave to appeal in forma pauperis has been rejected. Moreover, his appeal is time barred and a right has accrued to the Plaintiff and this Court will not grant any relief Defendant No. 2 under Order 41 Rule 33 when it affects a right acquired by the Plaintiff as against this Defendant, no appeal having, been filed by him in time. Defendant No. 2 is thus not entitled to any relief in this appeal.

14. In these result, therefore, we allow the appeals, set aside the decree of the court below in so far as these Defendants Appellants are concerned. But in the circumstances of the case, we make no order as to costs in these appeals.

H. Deka, C.J.

15. I agree.