
(2008) 03 BOM CK 0030
In the Bombay High Court
Case No : Suit No. 2154 of 1990

Canara Bank

APPELLANT

Vs

Eastern Mechanical Works and Another

RESPONDENT

Date of Decision : 04-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 2, Order 18 Rule 13, Order 18 Rule 4, Order 18 Rule 5, Order 8 Rule 5
Evidence Act, 1872 — Section 34, 73

Citation : AIR 2008 Bom 188 : (2008) 6 BomCR 670 : (2008) 5 MhLj 720

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

Bench : Single Bench

Advocate : Umesh Shetty, instructed by Umesh Shetty and Co, for the Appellant; Jayesh Bhatt, for defendant No. 1, for the Respondent

Judgement

V.C. Daga, J.—Heard learned Counsel for the rival parties.

2. This suit is filed by Nationalized Bank against defendant Nos. 1 and 2 for recovery of their dues with interest thereon. Defendant No. 1 is proprietorship concern; whereas, defendant No. 2 is a guarantor. The defendant No. 2 has expired. His heirs and legal representatives were not brought on record. Consequently, the suit stood abated against him.

The Factual Matrix:

3. The factual matrix reveal that defendant No. 1 enjoyed cash credit facility in the sum of Rs. 80,000/- against hypothecation of cinema equipments, spare parts and other goods lying in the office premises of defendant No. 1 located at Purushottam Building, 25-A, Tribhuvan Road, Bombay 440004.

4. The defendant No. 1, in consideration having sanctioned cash credit facility had executed various loan documents including promissory note, deed of hypothecation and pledge of goods with various other documents on 22-5-1987. The details of which are to be found in para 4 of the plaint. In addition to the

execution of the loan documents, he had also pledged life insurance policy and furnished guarantee of defendant No. 2, who guaranteed repayment of the outstanding dues of the bank due and recoverable from defendant No. 1.

5. The defendant No. 1 on execution of the aforesaid loan documents utilised the aforesaid financial loan facility.

6. The defendant No. 1 did not repay the loan amount and committed default in payment of interest and/ or part thereof. Consequently, demand notice was issued calling upon the defendants to pay the outstanding dues of the bank. The defendants did not pay their outstanding dues payable to the bank. Consequently, bank has filed the present suit for recovery of their outstanding dues with interest thereon and has also claimed future interest from the date of the suit till realization with costs.

7. On being served with the writ of summons, defendant Nos. 1 and 2 appeared and filed their joint written statement on 4-8-1995 raising various pleadings in defence and denied liability to pay the outstanding dues of the bank. The defendants have also raised a plea in defence that pursuant to the order dated 8-7-1993 passed by learned Single Judge (Variava, J. as he then was) defendant No. 1 has made payments without prejudice to its rights and that as per the said order the amount ought to have been credited towards principal dues of the bank payable by the defendants. The defendants in the entire written statement have not denied the execution of loan documents though the plaintiffs have specifically pleaded execution thereof by the defendants in para 4 of the plaint. The defendants in reply have stated that for want of inspection of the loan documents, it is not possible for them to comment about the contents thereof and reserved their right to file their additional written statement as and when inspection would be given to them. The defendant No. 1 denied to have given letter of acknowledgement dated 18-7-1998.

The Issues:

8. Considering rival pleadings of the parties on 10-9-1987 the issues were framed reading as under:

1. Whether the defendants prove that the suit is barred by limitation?....(No)
2. Whether the plaintiffs prove that the defendants owe to the plaintiffs a sum of Rs. 2,45,356.00 along with further interest @ 20% p.a. compounded at quarterly rests?....(Yes.)
3. Whether the liability of the defendants for payment of interest till the last installment would be at future rate of interest, in view of the payment already made by the defendants in terms of the Order dated 8th July, 1993?....(No.)
4. Whether the defendants prove that the plaintiffs are seeking to recover interest on interest and the suit filed by the plaintiffs is not maintainable and is, therefore, liable to be dismissed with costs?....(No)

5. Whether the defendants prove that the guarantee executed by the defendant No. 2 is time barred and therefore the suit as against defendant No. 2 is ex-facie bad in law and liable to be dismissed?....(Does not survive)

6. Whether the defendants prove that the plaintiffs have wrongly surrendered the LIC policy of the proprietor of the defendant No. 1 and therefore the defendants have suffered loss and damage due to the wrongful surrender of the said policy?....(No.)

7. What order?....As per final order.

Evidence:

9. Pursuant to the order dated 10-9-2007, the plaintiff-bank was called upon to file affidavit of evidence by way of examination-in-chief and documents in support of suit claim. Accordingly, the plaintiff has filed as many as 15 documents, viz. right from, original Account Opening Form, Original Cash Credit Agreement, Demand Promissory Note, original Letter of Pledge of Insurance Policy, original acknowledgement of debt and security dated 18-7-1988 together with letters of demand issued from time to time. The plaintiff has also filed certified extract of Statement of Account right upto the date of filing of the suit and even for a period subsequent to the filing of the suit till the date of filing of the affidavit of evidence.

10. On being served with the notice to admit documents, Advocate for the defendant No. 1 has admitted correspondence between parties to the suit with contents thereof. Consequently, on admission those documents were exhibited as Exhibits P-1 to P-6.

11. The plaintiff-bank has filed affidavit of documents and the affidavit of evidence in support of suit claim by way of examination-in-chief duly sworn by Prakash Mangle, Manager of the plaintiff bank, who has verified the signatures of the defendants on loan documents on the basis of the signatures of the defendants appearing on account opening form dated 9-4-1981 delivered by the defendants to the plaintiff bank at the time of opening their bank account. Thus, on the basis of those signatures of the defendants/executants, the loan documents were sought to be identified and proved by the bank's witness.

12. The plaintiffs' witness entered witness box and verified his affidavit dated 21-11-2007 as per the law 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, and affirmed by the Supreme Court. The relevant extract of the said judgment is reproduced hereinbelow for immediate reference.

(A) Civil P.C. (5 of 1908), Order 18, Rules 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 Rule 5.

(Emphasis supplied)

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

14. Mr. Prakash Mangle, the plaintiff's witness was cross-examined by the learned Advocate appearing for the defendant No. 1. The plaintiff's witness proved his authority to depose based on the power of attorney (Exh.1). The said witness has proved the cash credit agreement dated 25-2-1987 together with the contents thereof. He also proved the balance confirmation letter dated 18-7-1988 wherein, the outstanding dues in the sum of Rs. 1,62,077.97 were acknowledged and admitted by the defendants inclusive of interest upto 30-6-1988. He has also proved the original Letter of Pledge and Third party Letter of Pledge signed by the defendant No. 1. He has also identified signatures of the defendants on the loan documents on the basis of the signature of the defendant No. 1 appearing on the account opening form. The defendant No. 1 was introduced to the bank by the defendant No. 2. His signature is to be found in the said form as introducer of defendant No. 1.

15. He has also produced account opening form and signatures of the defendants maintained by the plaintiff bank. However, the witness appearing for the bank could not prove the account opening form and the subsequent signatures, as such that particular document along with loan documents could not be taken as proved. Consequently, they were not exhibited during the course of examination-in-chief.

16. Plaintiff-bank has also produced extracts of account duly certified under the Bankers Books Evidence Act which were proved by Mr. Prakash Mangle since he himself had certified the extracts of accounts under his own signature. Accordingly, extracts of accounts were taken as proved in accordance with the provisions of the Indian Evidence Act read with Bankers Books Evidence Act. The learned Counsel for the defendant No. 1 during the course of examination-in-chief made statement that extracts of account can be taken as proved and be exhibited. Accordingly, the extract of accounts were exhibited as Exhs.P-1 and P-2 on admission. As already stated, the documents at Serial Nos. 9, 10, 11 and 12, namely, correspondence exchanged between the parties were already exhibited as P-1, P-3 to P-6. at the stage of hearing of the suit.

17. With the above evidence on record, the defendant No. 1 was permitted to cross-examine witness treating that documents which were not exhibited as unproved.

18. The learned Counsel for defendant No. 1 cross-examined Mr. Prakash Mangle. During the course of examination, witness was confronted with the account opening form dated 9-4-1981 and the same was for cross-examination of the plaintiff's witness. Consequently, the said document was taken as proved and exhibited as Exh.P-1/7. In the cross-examination, the witness deposed that pursuant to the order dated 8-7-1993 (passed by Variava, J. as he then was) whatever the amounts were deposited by the defendant No. 1 and withdrawn from the Court were credited in the loan account of the defendant No. 1. He also deposed that some amounts which were received directly by the bank were also credited to the account of the borrower.

19. The defendant No. 2 did not enter witness box. He did not examine any witness on his behalf.

20. With the aforesaid evidence on record, the suit was heard including on the question of proof of documents.

Submissions:

21. Learned Counsel for the plaintiff urged that the account opening form dated 9-4-1981 having been proved in view of Apex Court judgment in the case of Ram Janki Devi and Another Vs. Juggilal Kamlatpat, . The signatures of defendant Nos. 1 and 2 appearing thereon can be used to establish proof of the documents. He submits that once those signatures are proved, this Court can very well compare the signatures of the defendants on the loan documents i.e. primary evidence has been Section 73 of the Evidence Act. He further submits that all original loan documents i.e. primary evidence has been produced on record including promissory notes. He submits that none of those documents are denied by the defendants in their written statement hence they are deemed to have been admitted. He submits that at any rate so far as the agreement of hypothecation is concerned that has not been denied though it was specifically pleaded in the plaint. He placed reliance on Order VIII, Rule 5 of CPC in support of his submission. He, thus, submits that the said document should be taken as admitted for want of denial. He further submits that at any rate extracts of accounts having been admitted, the defendant would be bound by the said admission. The extracts of account coupled with the evidence of P.W.1 Prakash is sufficient to prove the claim of the bank against the defendant in view of the Apex Court judgment in the case of State Bank of India Vs. Yumnarn Gouramani Singh, . He further submits that the revised statement would be supplied to this Court showing adjustments of the part payment made by defendant No. 1 from time to time. To this learned Counsel for defendant No. 1 did not object.

22. Per contra, learned Counsel appearing for defendant urged that none of the loan documents are proved by the plaintiff-bank. He further submits that pursuant to the order dated passed by Justice Variava, J. (as he then was) whatever payments made and credited ought to have been credited towards principal amount and if that is done, the suit claim would not survive since it

stood satisfied. He further submits that admissibility of the documents could not have been postponed by the Court. As such, at this stage, the Court cannot decide the admissibility of the documents. Hence the suit is liable to be dismissed.

23. He placed reliance on Parmanand v. Emperor AIR 1940 Nag 341 and; Om Prakash Berlia and Another Vs. Unit Trust of India and Others, in support of his submissions.

Consideration:

24. Having heard rival parties, none of the contentions raised by the defendant can be accepted. At any rate, the suit is liable to be decreed.

25. It is not in dispute that the Advocate for defendant has admitted the extracts of accounts duly certified under Bankers Books Evidence Act without keeping any reservation. Apart from the admission, they were also independently proved by the plaintiffs' witness, Mr. Prakash Mangale, in accordance with the provisions of the Indian Evidence Act. In this view of the matter, once the document is admitted, the contents thereof cannot be disputed by the defendant as per the law laid down by the Apex Court in the case of P.C. Purushothama Reddiar Vs. S. Perumal, .

26. In view of above the contents of extracts of accounts can be read in evidence. Apart from this, even u/s 34 of the Evidence Act, once the extracts of accounts are proved, then the oral evidence can be treated as corroboration as per the law laid down by the Apex Court in the case of State Bank of India (cited supra).

27. Apart from this, during the course of cross-examination, the defendant has referred and used the account opening form which carried signatures of defendant Nos. 1 and 2 to cross-examine witness of the plaintiff-bank. Consequently, this document cannot be disputed by the defendant No. 1 as held by the Apex Court in the case of Ram Janki Devi and Another Vs. Juggilal Kamlapat, . If this be so, then, the signatures of the defendants appearing thereon can always be used to compare their signatures appearing on the other loan documents in view of Section 73 of the Evidence Act.

28. So far as the stage of deciding the question about proof of document is concerned, when the proof of document was sought to be postponed by this Court, learned Counsel for the defendant did not raise any objection. Thus, on the doctrine of waiver and acquiescence, he is not entitled to raise such objection at the late stage of the suit. Had he objected at that point of time, itself, this Court would have decided objection then and there only. Thus, the submission needs out right rejection. As per the law laid down by the Apex Court in the case of Bipin Shantilal Panchal v. State of Gujarat and Anr. AIR 2001 SC 1158 admissibility of proof of documents can be decided at the end of trial. Therefore, the submission advanced by Mr. Bhatt, learned Counsel for defendant No. 1 that

objection to the admissibility or proof of the document needs to be decided at the time when the objection was raised does not hold good.

29. In that view of the matter, the documents such as loan agreement dated 22-5-1987 and the acknowledgement of debt dated 18-7-1988 can conveniently be taken as proved. Consequently, those documents can very well be exhibited as Exhs.P-1/8 and 9 respectively.

30. Having said so, now the question that needs consideration is the effect of the order passed by this Court (Justice Variava) (as he then was). What do you mean by "principal sum"? The Apex Court in the case of Central Bank of India v. Ravindra AIR 2001 SCW 4468; has decided this question wherein its earlier view expressed in the case of Corporation Bank v. D.S. Gowda AIR 1994 SCW 2721 has been approved. The legal position emerging from this judgment is as under:

(1) Subject to a binding stipulation contained in a voluntary contract between the parties and/or an established practice or usage interest on loans and advances may be charged on periodical rests and also capitalised on remaining unpaid. The principal sum actually advanced coupled with the interest on periodical rests so capitalised is capable of being adjudged as principal sum on the date of the suit.

(2) The principal sum so adjudged is "such principal sum" within the meaning of Section 34 of the Code of Civil Procedure, 1908 on which interest pendente lite and future interest i.e. post-decree interest, at such rate and for such period which the Court may deem fit, may be awarded by the Court.

(3) Corporation Bank Vs. D.S. Gowda and Another, and Bank of Baroda v. Jagannath Pigment and Chem. have been correctly decided.

31. In this view of the matter, so far as the banking transactions are concerned the total outstanding debt inclusive of interest charged from time to time constitute the principal sum. The submission made by Mr. Bhatt in this behalf is also liable to be rejected.

32. So far as the issue of limitation is concerned, the suit has been filed on 28-6-1990 whereas, the loan documents were executed on 22-5-1987. Thus, the suit is well within a period of limitation from the date of execution of the loan documents as well as acknowledgement of debt dated 18-7-1988.

33. Defendant No. 1 is a businessman carrying on business. A businessman cannot run business without maintaining accounts. It was, therefore, expected on the part of the defendant No. 1 to produce his books of accounts to disprove the suit claim. The Apex Court in the case of Hiralal and Others Vs. Badkulal and Others, , observed as under:

Suit for recovery of account due on basis of adjustment of accounts signed by defendant. Defendant denying correctness of amount found due. Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court. He cannot be heard to say,

relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so.

Thus, the defendant has failed to establish his defence. The above view is reiterated by the Apex Court in the case of Khushalbhai Mahijibhai Patel Vs. A Firm of Mohmadhussain Rahimbux, .

The Apex Court in the case of Nathuji v. Narendra Vasanjibhai 1981 Mh.L.J. 446 has ruled that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself for examination by the other side, presumptive case set up by him is not correct.

34. In this case, defendant No. 1 did not state the facts pleaded in the written statement on oath and avoided to enter in the witness box, so that he cannot be cross-examined. This, by itself, is enough to reject the defence of the defendant No. 1.

35. The Privy Council in the case of AIR 1927 230 (Privy Council) observed as under:

It is the bounden duty of a party, personally knowing the whole circumstance of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case.

36. This Court has also taken a similar view in the case of Pirgonda Hongonda Vs. Vishwanath Ganesh and Others, . The following is the material head-note:

Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness-box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons....

37. The above view has been followed by this Court in the case of Nathuji v. Narendra (cited supra). Thus, the defence sought to be put up by the defendant No. 1 is liable to be rejected.

38. The defendants in spite of having executed the loan documents and borrowing the amount of loan ventured to deny the execution of the documents and called upon the plaintiff to prove the same. As per the provisions of Order XII, Rule 2 of the CPC where a party called upon the other party to admit document after service on him of the notice to admit document refuses or neglects to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, court can direct him to pay costs to the other party by way of compensation.

39. In the instant case, in spite of service of the notice to admit documents, the defendant No. 1 ventured to deny the loan documents executed by him which were proved by the plaintiff. Under these circumstances, defendant No. 1 is liable

to pay costs quantified in the sum of Rs. 10,000/- over and above, the cost to which the plaintiff would be entitled as per Schedule.

So far as plaintiff's claim against defendant No. 2 is concerned, it will not survive in view of abatement of the suit against him. The suit is, therefore, dismissed against defendant No. 2 as abated. Whereas the decree would follow against defendant No. 1 for the reasons stated herein. The transaction in question being a commercial transaction the plaintiff would be entitled for interest @ 12% per annum.

40. Thus, the plaintiff bank would be entitled to recover from defendant No, 1 sum of Rs. 2,45,356.77 ps. Hence the following order.

ORDER

(i) The suit is decree against defendant No. 1 and dismissed against defendant No. 2.

(ii) The defendant No. 1 do pay to the plaintiffs Rs. 2,45,356.77 ps. with interest thereon @ 12% per annum from the date of the suit till realization of decretal amount in full and final with costs in addition to the cost of Rs. 10,000/- as indicated in para 39 of this judgment.

(iii) Decree be drawn in terms of this order.