(2013) 03 KL CK 0001

In the High Court Of Kerala

Case No : AS. No. 631 of 1997

Canara Bank — APPELLANT

Vs

Paramount Paper Products and M/s. Kerala Distellaries and Allied Products Ltd. — RESPONDENT

Date of Decision : 19-03-2013

Acts Referred:

Citation : (2013) 03 KL CK 0001

Hon'ble Judges : Thottathil B. Radhakrishnan, J;B. Kemal Pasha, J

Bench : Division Bench

Advocate : M.C. Sen, Smt. Shahna Karthikeyan, Sri. S. Prakash, Sri. M.P. Sreekrishnan and Sri. Saji Varghese, for the Appellant; M. Pathrose Matthai (Sr.) Advocate, for the Respondent

Final Decision : Allowed

Judgement

B. Kemal Pasha, J.—The plaintiff in O.S. No. 67/1991 of the Subordinate Judge''s Court, Thrissur, whose suit as against the second defendant stands dismissed through the impugned decree and judgment, has come up in appeal. The appellant, a nationalised bank had granted various loan facilities to the first respondent proprietary concern by way of financial nursing. All the said loan accounts fell in arrears and finally the appellant was constrained to transfer the outstanding liability of Rs. 6,53,261.26 with subsequent interest at the rate of 15.5%, to the LPD account on 25-06-1982. Subsequently, the first respondent forwarded another request to the appellant to make advances to him against supply bills relating to supplies of goods by him to various purchasers by discounting the bills. As the said request was based on an undertaking that in the course of such business the first respondent would be able to clear off the entire liability to the appellant, the appellant agreed to the said proposal and thereby Ext.A1 agreement relating to it was executed by the first respondent in favour of the appellant. In addition to it, the first respondent executed Ext.A2 on demand promissory note for Rs. 1,80,000/- in favour of the appellant, thereby agreeing to pay the same with interest at the rate of 3.5% per annum above the Reserve Bank of India rate with a minimum of 13.5% per annum compounded quarterly for value received.

2. It was specifically agreed by the first respondent that they would not receive any amount from the purchasers directly, for the materials supplied to them. The first respondent authorised the appellant bank to receive amounts as per the supply bills directly from the purchasers. The second respondent, who was one of such major purchasers from the first respondent, was also informed of the said arrangement and all the parties have acted upon such an arrangement. On the basis of such an undertaking, the appellant used to discount the bills for the materials supplied by the first respondent to the second respondent. The second respondent used to effect payments to the appellant directly, on the supply bills for the goods supplied by the first respondent on the basis of the said agreement. The said practice was being followed during the course of the business. In addition to the above undertaking, the first respondent appointed the appellant as its lawful attorney through Ext.A4 Power of Attorney dated 05-04-1979 and Ext.A12 Power of Attorney dated 22-10-1988, thereby authorising the appellant to demand, receive, to issue receipts and discharges for, such amounts due to the first respondent from any of the purchasers. Exts.A4 and A12 Power of Attorneys are irrevocable and are still in force, by which the first respondent had declared that they should have no right to claim the amounts receivable on the bills without the consent of the appellant. The second respondent was also informed of the execution of Ext.A4 as well as Ext.A12. The second respondent has specifically acknowledged the contents of Ext.A4 Power of Attorney, on 27-061980 at the bottom of Ext.A5 copy of letter dated 25-06-1980 issued by the appellant to the second respondent. Similarly, through Ext.A13 letter dated 26-10-1988, the second respondent had in unequivocal terms confirmed that all the payments due from them to the first respondent in respect of all the supplies duly received and acknowledged by them, would be directly paid by them to the appellant after 60 days from the date of receipt. It was further acknowledged by the second respondent in Ext.A13 that the second respondent "confirm having registered the Power of Attorney".

3. In the course of such business, the second respondent took delivery of goods supplied by the first respondent to them through Ext.A6 series invoices (4 in numbers) for a total amount of Rs. 1,58,367.50. The first respondent presented the said invoices and bills at the appellant bank and had drawn a total amount of Rs. 1,56,032.50, which they were allowed to discount. Even after the actual delivery of the goods as per the said invoices and bills, the second respondent did not remit the bill amount to the appellant bank, in total violation of the terms agreed upon by them. After lapse of about one year, the first respondent acknowledged the liability through Ext.A7 letter dated 09-06-1989. As on 10-01-1991, an amount of Rs. 1,58,362/- was outstanding as principal amount and a sum of Rs. 45,861.10 was outstanding as interest.

4. The respondents/defendants filed separate written statements. The first respondent has challenged the rate of interest as unconscionable. The first respondent has further contended that the first respondent did not know whether the plaintiff had informed the second respondent, of the execution of the Power of Attorney and its contents, and whether the second respondent had confirmed the authority of the appellant. It is not known to the first respondent whether the second respondent had taken delivery of the goods noted in the plaint. The invoices mentioned in the plaint were duly drawn and signed by the parties concerned. The discounting of the bill is a matter, which is entirely within the discretion of the bank, and if the amount is not received from the purchaser, the first respondent is not liable to pay such amount. Further, according to the first respondent, there is no contract between the first respondent and the plaintiff that, in the event of failure of the second respondent to make the payment, the first respondent would be liable to pay the amounts defaulted by the second respondent.

5. The second respondent contended that the second respondent is not a party to the agreement executed between the appellant and the first respondent. There is no agreement in between the second respondent and the appellant. No communication was given to the second respondent by the appellant, as to the loan advanced to the first respondent on discounting of bills. The second respondent had given the amounts specified under the bills to the plaintiff bank, as per the Power of Attorney noted in the plaint. Though the second respondent was given intimation with regard to the Power of Attorney executed between the appellant and the first respondent, the second respondent was unaware of the contents of the Power of Attorney. The allegation that as per letter dated 26-10-1988, the second respondent had confirmed the authority of the appellant bank is denied. According to the second respondent, as per letter dated 26-10-1988, the second respondent had simply informed the appellant that the amount under the bills for the supply of goods to the second respondent would be given to the appellant. Ext.A6 series invoices were brought into existence as a result of collusion between the first respondent and the appellant, and that the second respondent had never taken delivery of the goods covered by the same. The second respondent is not answerable to the money, if any, advanced by the appellant through discounting of such bills. No one had signed the said invoices for and on behalf of the second respondent company. In letter dated 24-07-1989, the first respondent had admitted that no goods were supplied to the second respondent as per the said invoices, and that the first respondent would deposit the entire amount with the appellant bank.

6. The court below, after analysing the evidence, concluded that there was no privity of contract between the second defendant and the plaintiff and, on that ground, the suit as against the second defendant was dismissed. At the same time, the suit as against the first defendant was decreed.

7. According to the learned counsel for the appellant, the court below has grossly

erred in finding that there was no privity of contract between the appellant and the second respondent, and that the second respondent is not bound to make the payments to the appellant bank, in respect of Ext.A6 series invoices and bills discounted by the first respondent. Per contra, the learned counsel for the second respondent has fully supported the findings entered by the court below, and further contended that no goods were received by the second respondent from the first respondent through Ext.A6 series bills and invoices.

8. Ext.A1 is the agreement dated 28-02-1984 executed by the first respondent in favour of the appellant in respect of the bill discounting facility for an amount up to Rs. 1,80,000/-. Ext.A2 is the pro note for Rs. 1,80,000/- executed by the first respondent in favour of the appellant. Ext.A3 is an acknowledgment of liability executed by the first respondent in favour of the appellant on 07-06-1986. Ext.A4 is the Power of Attorney executed by the first respondent in favour of the appellant on 05-04-1979. Ext.A5 is letter dated 25-06-1980 issued by the appellant bank to the second respondent, which reads as follows:-

Dear Sirs,

Sub : Goods Supplied/to be supplied to you by M/s. Paramount Paper Products, Ramavarmapuram, Trichur-1.

...

We enclose herewith the Power of Attorney executed by the party in our favour. We request you to register the same in your books. Please note to make payment of the bills directly to us. Please confirm and return the P.A. to us after registering it in your books.

Thank you,

Yours truly, Sd/- K.M.D. Menon, Manager encl : P.A.

9. At the bottom of Ext.A5, it seems that the Manager, for and on behalf of the second respondent, has affixed his signature with date as 26-07-1988, after noting down the term "Acknowledged". Ext.A5 clearly reveals that the Power of Attorney executed by the first respondent in favour of the appellant was also enclosed along with Ext.A5. The Manager of the second respondent had clearly acknowledged Ext.A5 letter as well as the receipt of the Power of Attorney. Matters being so, there is no meaning in contending that the second respondent was not aware of the contents of Ext.A4 Power of Attorney executed by the first respondent in favour of the appellant bank. By acknowledging the terms in Ext.A5 letter as well as the Power of Attorney, the second respondent had clearly agreed to make the payments of the bills directly to the appellant. That itself creates a vingulam juris of a binding nature on the part of the second respondent also in the transaction.

10. Ext.A12 is Power of Attorney dated 22-10-1988 executed by the first respondent in favour of the appellant, thereby empowering the appellant bank to

receive all the payments from the purchasers of the first respondent, in respect of the bills tendered to the purchasers for payment, through the appellant bank. Ext.A13 is letter dated 26-10-1988 issued by the second respondent in their letter head to the Senior Manager of the appellant bank, the contents of which read as follows:-

Dear Sir,

We have been informed by M/s. Paramount Paper Products, Ramavarmapuram-680 631, Trichur District, that you have sanctioned the bill discounting facilities to them under which all payments for supplies by them are made to you. We confirm that we shall make payments directly to you for all supplies duly received and acknowledged by us after 60 days from date of receipt. We confirm having registered the Power of Attorney.

Thanking you,

Yours faithfully, for Kerala Distilleries and Allied Products Limited Sd/- (Manager) cc: Paramount Paper Products, Trichur.

11. Ext.A13 clearly reveals the confirmation from the part of the second respondent that they shall make payments directly to the appellant bank for all supplies duly received and acknowledged by them from the first respondent, after 60 days from the date of receipt. They have further confirmed, of having registered Ext.A12 Power of Attorney. The copy of Ext.A13 confirmation letter, which is clearly an undertaking executed by the second respondent in favour of the appellant, was issued to the first respondent also. After having issued Ext.A13, the second respondent could not have successfully contended that the said arrangement could not create any vingulam juris of a binding nature on the part of the second respondent in the transactions.

12. Ext.A6 series invoices are for a total amount of Rs. 1,58,367.50. It is the admitted case of the first respondent that the first respondent had discounted the said bills for Rs. 1,56,032.50. The Manager of the second defendant was examined as DW1. Even though the case of the second respondent in the written statement was only that they have not received the goods allegedly supplied through Ext.A6 series, DW1 has gone further by contending that they had not placed any orders with the first respondent for the supply of the goods covered by Ext.A6 series. The second respondent has no such case in the written statement. DW1 has admitted that he had no personal or direct knowledge with regard to the transactions allegedly made through Ext.A6 series, as he had joined the second defendant company in the year 1994 only.

13. Ext.A16 is invoice No. 354 dated 17-02-1987 for Rs. 39,800/-, Ext.A16(a) is invoice No. 355 dated 23-02-1987 for Rs. 45,800/-, Ext.A16(b) is invoice No. 359 dated 09-05-1987 for Rs. 41,200/-, Ext.A16(c) is invoice No. 360 dated 21-05-1987 for Rs. 39,750/-, Ext.A16(d) is invoice No. 371 dated 24-07-1987 for Rs. 38,400/-, and Ext.A16(e) is invoice No. 392 dated 07-01-1988 for Rs.

39,550/-, for goods issued to the second respondent by the first respondent.

14. Ext.A6 is invoice No. 393 dated 14-01-1988 for Rs. 39,000/-, Ext.A6(a) is invoice No. 412 dated 08-06-1988 for Rs. 39,550/-, Ext.A6(b) is invoice No. 422 dated 20-09-1988 for Rs. 39,902.50, and Ext.A6(c) is invoice No. 424 dated 27-10-1988 for Rs. 39,950/-, for goods issued to the second respondent by the first respondent. The amounts claimed by the appellant/plaintiff as amounts not paid in this case is the amounts discounted by the first respondent by placing Ext.A6 series bills. The case of the second respondent is that they have not received the goods allegedly supplied through Ext.A6 series. The first respondent has taken a contention in the written statement that the truth of the averment that the second respondent had taken delivery of the goods supplied by the first respondent through Ext.A6 series was not known to the first respondent.

15. It is pertinent to note that the second respondent has not challenged the genuineness of Ext.A16 series. According to the appellant, Ext.A16 series bills were also discounted by the first respondent. Those invoices are also relating to the supply of goods by the first respondent to the second respondent. In each one of Ext.A16 Series, a signature with date after noting the endorsement "Received the goods" has been affixed by somebody for the second respondent with the seal of the second respondent. Ext.A17 document is clearly admitted by DW1. Ext.A17 is in respect of the payment of Rs. 38,400/- effected by the second respondent to the appellant, for the goods covered by Ext.A16(d), and the payment was made by the second respondent through DD dated 13-06-1988. Similarly, Ext.A18 is letter dated 30-09-1987 issued by the second respondent to the appellant showing the payment in respect of Ext.A16 (b), through a cheque. Matters being so, the second respondent cannot challenge the genuineness of Ext.A16 series. On a perusal of the signature and endorsement made for and on behalf of the second respondent at the bottom of Ext.A16 series as well as Ext.A6 series, it is evident that all the said signatures were subscribed by the very same person, and the said acknowledgments were made in the handwriting of the very same person. The seal affixed as that of the second respondent at the bottom of such acknowledgments in Ext.A16 series as well as Ext.A6 series is one and the same. Therefore, it is evident that Ext.B6 letter allegedly issued by the first respondent to the second respondent stating that he had not supplied the goods covered by Ext.A6 series to the second respondent is the result of collusion between the first respondent and the second respondent with a view to defrauding the appellant. It has clearly come out that the respondents have joined hands to defraud the appellant. Both the respondents are jointly and severally liable to pay the appellants, the amounts discounted by the first respondent by placing Ext.A6 series invoices and bills. It is evident that the goods covered by Ext.A6 series were also received by the second respondent. The endorsement in Ext.A5 by the second respondent and the contents of Ext.A13 letter of undertaking issued by the second respondent to the appellant have clearly created specific undertakings by the second respondent to pay the amounts directly to the appellant bank in respect of goods received by

them from the first respondent. Matters being so, the appellant bank is entitled to a decree as against the second respondent also. That part of the decree and judgment, by which the suit against the second respondent was dismissed, are liable to be set aside.

In the result, this appeal is allowed, and that part of the impugned decree and judgment, by which the suit was dismissed as against the second respondent, are set aside. The suit is decreed by allowing the appellant to realise an amount of Rs. 2,04,223.10 with interest at the rate of 18.5% for the principal amount of Rs. 1,58,362/-, and with costs, from the date of suit till realisation, from the respondents and their assets.

