
(2003) 05 DEL CK 0143
In the Delhi High Court
Case No : Suit No. 1039 of 1994

Central Bank of India

APPELLANT

Vs

Systems and Softwares and Others

RESPONDENT

Date of Decision : 14-05-2003

Acts Referred:

Citation : (2003) 4 AD 237 : (2003) 104 DLT 976 : (2003) 69 DRJ 56

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : D.K. Mehta, for the Appellant; Sandeep Sharma, for defendant No. 4, for the Respondent

Judgement

J.D. Kapoor, J.—This is a suit for recovery of Rs.5,40,191.80 on account of term loan of Rs.2,50,000/- and cash credit hypothecation limit of Rs.25,000/-. plaintiff is a bank constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act 5 of 1970. The case of the plaintiff in brief is as under:-

2. Defendant No. 1 is a proprietorship firm engaged in the business of laser type setting, word processing and computer service. Defendant No. 2 who is the sole proprietor of defendant No. 1 approached the plaintiff at its Janpath Branch and requested the plaintiff bank vide his loan application dated 21.10.1988 to grant credit facilities of Rs.2.58 lacs (Rs. two lacs fifty eight thousand) under the term loan and of Rs.23,000/- (Rs. Twenty three thousand eight hundred) under cash credit hypothecating head, as financial assistance for purchase of computers, air conditioner, furniture and fixture and to install desk top publishing work station and also as working capital for the smooth running and development of his business. The defendant No. 2 also forwarded with his loan application the project report and other various documents and gave assurances of bright future of their product in the market. Vide his letter dated 3.3.1989 defendant No. 2 reminded the plaintiff bank to grant credit facilities as early as possible. He also offered the surety and guarantee of Sh. K.N. Khanna and Sh. K.C. Singhal. plaintiff sanctioned and granted term loan of Rs.2,50,000 and cash credit limit of

Rs.25,000/- in respect of articles of agreement, letters of hypothecation, demand promissory note, letter of continuity, agreement of hypothecation to secure demand cash credit were executed by defendant No. 2 on behalf of defendant No. 1. Defendant Nos. 3 and 4 in consideration of credit facility granted to defendant No. 1 signed, executed and submitted a form of guarantee for a sum of Rs.2,75,000/- plus interest, charges and other expenses as personal surety and guarantee in their individual capacity for the repayment of the outstanding dues of the plaintiff bank, standing in the name of defendant No. 1.

3. The defendants did not adhere to the terms and conditions of the agreement and failed to keep up their commitments and deliberately failed to remit/repay/adjust the debit balance/outstanding dues of the plaintiff bank. The plaintiff made repeated requests, sent reminder after reminder and its staff contacted the defendants personally for payment/adjustments/remitting of outstanding dues of the plaintiff bank but the defendants continuously defaulted and failed to liquidate the outstanding dues of the plaintiff bank. Vide letter dated 12.3.1990 defendants made promises and commitments to liquidate the outstanding dues of the plaintiff bank in a short time but to no avail. Defendant No. 2 as proprietor of defendant No. 1 signed, executed and handed over a letter of balance confirmation under the Term Loan Account on 30.9.1991 admitting the liability payable to the plaintiff bank to the tune of Rs.3,02,936.80 as on 30.9.1991 and a sum of Rs.7565.50 under the Cash Credit Account as on 30.9.1991 and again admitted the liability to the tune of Rs.3,98,654.80 and Rs.10,455.50 respectively under two respective heads as on 31.3.1993 by signing and executing a letter of balance confirmation. Despite assurance and execution of the fresh documents defendants failed to liquidate the outstanding dues of the plaintiff bank and constrained the plaintiff bank to serve a legal notice dated 14.1.1994 upon the defendants. Despite service of legal notice, defendants failed to liquidate the outstanding dues. Hence this suit.

4. Defendants were duly served with summons of the suit. Defendant No. 2 appeared in person on his behalf as well as defendant No. 1. On 24th August, 1995, defendant No. 2 made a statement that he be permitted to liquidate the outstanding amount of the plaintiff bank in installments and undertook to pay Rs.2 lacs to the plaintiff bank within two months initially to which plaintiff bank did not have any objections. However, defendant No. 2 could not honour his commitment and sought time on 19th October, 1995. Thereafter neither did he appear nor did any person appear on his behalf. Similarly defendant No. 3 did not appear despite service of summons of the suit. As a consequence defendants 1 to 3 were proceeded ex parte vide order dated 8.10.1998.

5. Defendant No. 4 alone contested the suit by filing written statement. The main plank of the averments of defendant No. 4 is that suit is barred by limitation as the form of guarantee was executed on 26.3.1989 for a sum of Rs.2,75,000/- and in 1993 fresh documents were executed between the plaintiff and defendants 1 and 2 thereby superseding the documents executed earlier. It is

further averred that the plaintiff has been grossly negligent in not pursuing the security of hypothecated machineries and goods inasmuch as when the business could not run and the installments could not be paid by defendant Nos. 1 and 2, plaintiff bank instead of proceeding against hypothecated machines and goods gave further facilities to defendants 1 and 2. According to defendant No. 4, the renewal or execution of any document dated 8.9.1993 was never done either with the consent or to the knowledge of defendant No. 4 and without any notice to defendant No. 4. He has taken an alternative plea that the documents of guarantee etc were signed by him when these were blank and signed at the instance of defendants 1 and 2 in a bonafide belief. According to him, plaintiff Bank itself being guilty of delays, laches, lapses and negligence in securing recovery of the loan and not acting diligently as per terms of agreement inasmuch as no profit and loss accounts were submitted by defendants 1 and 2 after November, 1989, did not bother to see and ascertain the periodical financial position of defendants 1 and 2 nor periodical inspection of the hypothecated machines and goods was done nor perused. It is also averred that defendant took all possible steps to see that the outstanding amount be paid and recovered and Therefore produced defendant No. 2 in person in court as well as moved an application under Order 39 Rule 1 & 2 CPC being is 12791/2000 on which injunction was granted against defendants 1 and 2 from transferring or alienating two properties.

6. As many as three witnesses were produced by the plaintiff bank. None of them was cross-examined by defendant No. 4. These witnesses have proved the aforesaid documents executed by defendants 1 and 2. PW-1 Mr. N.K. Chatwal, Manager of plaintiff bank proved the documents which are (i) confirmation statement dated 30.9.1991 (Exhibit PW 1/1 and PW 1/2); (ii) balance confirmation statement dated 31.3.1993 (Exhibit PW 1/4). PW-2 Mr. D.P. Chandel who was Chief Officer in 1993 proved Articles of Agreement, Hypothecation deed, Demand Promissory Note, Letter of Continuity, Letter of Interest, Letter of Waiver and Letter of Sole Proprietorship as these documents were duly executed by defendants 2 and 3 in his presence and are Exhibit PW 2/1 to PW 2/8. Apart from this he also proved letter dated 9.11.1993, legal notice served upon the defendants and Statement of Account as Exhibit PW 2/9, Exhibit PW2/10 and Exhibit PW 2/11 respectively. The documents which were executed and signed by defendants 1,2 and 3 and 4 in the year year 1989 were proved by PW-3, Mr.N.D.Wadhwa, Senior Manager of the plaintiff bank as PW 3/1 to PW 3/7. However, defendant No. 4 examined himself as a sole witness. His statement in brief was that "He was called to sign as a witness to the documents executed by defendants 1 and 2 and that he signed the documents some time in March, 1989 and that some printed papers were brought in his presence and he was asked to sign them and his signatures appear only on form of guarantee." According to him he signed it at the behest of brother-in-law of defendant No. 2 who introduced him to them.

7. Vide order dated 8.10.1998, following issues were framed for determination:-

1. Whether the suit has been instituted and the plaint has been signed and verified by a duly authorised person. OPD
2. Whether the suit is barred by limitation? OPD
3. Whether the loan documents were got signed by the plaintiff and defendants 1 and 2 from defendant No. 4 in blank? OPD
4. Whether the signatures of defendant No. 4 appearing in the loan documents were forged by the plaintiff and defendants 1 and 2? OPD
5. Whether the plaintiff is entitled to recover from the defendants an amount of Rs.5,40,191.80 p? OPP
6. If the aforesaid issue is answered in favor of the plaintiff, whether the defendants are jointly and severally liable for repayment of the aforesaid amount?
7. Whether the plaintiff is estopped in any manner from claiming the amount from the defendant No. 4? If so, its effect? OPD
8. Whether the loan documents signed by defendant No. 4 got and/or stood cancelled and/or there was privity of contract between the defendant No. 4 and the plaintiff? OPD
9. Whether the plaintiff is entitled to any interest, if so, at what rate and for which period? OPP
10. Relief?

8. Issue No. 1

This issue is no more pressed and is decided in favor of the plaintiff.

9. Issue Nos. 2 to 9

All these issues are inter-connected and inter-dependent in view of defense of defendant No. 4.

10. There is only one Form of Guarantee dated 22.3.1989 executed by defendant Nos. 3 and 4 and thereafter no document was executed and the present suit was filed in 1994 i.e. after five years. It is admitted case that on promise of defendant Nos. 1 and 2 to liquidate the outstanding dues of plaintiff bank in short term, fresh documents were executed and facilities already provided were renewed on 8.9.1993. The documents executed were Articles of Agreement for a sum of Rs.2.5 lac and letter of hypothecation in the sum of Rs.2.5 lacs, Demand Promissory Note, Letter of Continuity, Letter of Waiver, Agreement of hypothecation, Letter of agreed interest and undertaking and letter of sole proprietorship. Admittedly no Form of Guarantee was got executed or signed by defendants 3 and 4.

11. To show the liability of Defendants 3 and 4 and the suit being within limitation, Mr. D.K. Mehta, learned counsel for the plaintiff has drawn support

from clauses 2 and 7 of Form of Guarantee executed by defendants 3 and 4. These are:-

"Clause 2

"It is also agreed that any admission or acknowledgment in writing by the principal debtor of the amount of indebtedness of the principal debtor or otherwise in relation to the subject matter of this guarantee or any judgment or award obtained by you against the principal debtor shall be binding on me/us and I/we accept the correctness of any statement of account served on the principal debtor which is duly certified by any Manager or officer of the Bank and the same shall be binding and conclusive as against me/us also, and I/we further agree that in making an acknowledgement or making a payment he shall be treated as my/our duly authorised agent for purpose of Indian Limitation Act, of 1963."

Clause 7

This guarantee shall not be revoked by me/us and shall remain in force till all the amounts due and payable to you by the principal(s) are paid up in full inclusive of interest, charges etc., I/We further specifically agree that this guarantee shall continue to remain in force and I/We shall continue to be liable there under for all the amounts due and payable to you by the principal/s even though the principal/s has/have/not renewed the documents and even though the amounts due from the principal/s gets time barred and you cannot recover the same from principal/s by filing a suit or any legal proceeding against the principal/s."

12. According to Mr. Mehta this clause suo moto extended the period of limitation the moment defendants 1 and 2 had executed the documents acknowledging the liability in the year 1993 and Therefore the plea of suit being barred by limitation is not available to defendant No. 4.

13. On the contrary, Mr. Sandeep Sharma, learned counsel for defendant No. 4 has contended that all these documents were executed at the time of sanction of the loan facility and cash credit facility in the year 1989 and those very documents were executed on 8.9.1993 also except Form of Guarantee. It was incumbent upon the plaintiff to get the form of guarantee executed from defendant Nos. 3 and 4 in the year 1993 when the aforesaid facilities were renewed and fresh documents were executed. The very fact that documents were got executed from defendants 1 and 2 at the time of grant of sanction were again renewed and executed on 8.9.1993 shows that it was nothing but a renewal of term loan facility and cash credit facility.

14. There is force in the contention of Mr. Sharma. Had the plaintiff intended to obtain acknowledgment of liability as on 8.9.1993, execution of a letter of acknowledgment was sufficient and to get these documents executed afresh from defendant Nos. 1 and 2 shows that it was renewal of aforesaid facilities. Nothing prevented the plaintiff to get fresh Form of Guarantee executed from defendants

3 and 4. Recalcitrant and indifferent attitude of the plaintiff Bank is demonstrated from the circumstance that in spite of the fact that defendants 1 and 2 did not adhere to the terms and conditions of the agreement and failed to keep up their commitments, they were again extended the facilities in 1993 by way of execution of relevant documents by them.

15. As regards clause 2 it relates to facilities granted vide document executed on 22.3.1989 and the renewal of the facility again in 1993 without any notice to defendants 3 and 4 or without getting fresh form of guarantee executed from defendant No. 4 absolved defendants 3 and 4 from their liability flowing from the document executed by them on 22.3.1989. If the contention of counsel for the plaintiff is accepted it would mean that defendants 3 and 4 shall remain liable for all times to come in spite of the fact that after four years, plaintiff got other set of documents executed from defendants 1 and 2 either by way of renewal of the facility. This was neither the intention nor was the purpose of clause 2 of Guarantee Form.

16. Similarly clause 7 does not help the plaintiff inasmuch as it is not only against public policy but against the law and principles of natural justice as defendant Nos. 3 and 4 who had executed the documents at the time of furnishing Form of Guarantee in 1989 shall be liable for the liability of defendant Nos. 1 and 2 even if the amount due from them gets time barred and is not recoverable from defendants 1 and 2.

17. If a party is left with no remedy to recover the loan from the Principal Debtor it cannot recover it from the Guarantor also as the liability of the Guarantor emanates and flows from the liability of Principal Debtor. If claim against Principal Debtor gets time barred so does the claim against Guarantor. The liabilities are joint and several and cannot be segregated or bifurcated much less for the purpose of limitation. If the documents executed by Principal Debtor towards cash credit facility or loan term facility cannot be invoked on account of claim of the creditor being time barred, the document executed by the Guarantor for the same reason also cannot be executed. Had the plaintiff bank any intention to get the renewal of facility secured by way of guarantee it was incumbent upon the plaintiff bank to get Form of Guarantee also renewed as other documents were got executed from defendants 1 and 2.

18. Thus from any angle we may examine the claim of the plaintiff against defendants 3 and 4 it is not only barred by limitation but also is not maintainable in view of plaintiff's failure to get Form of Guarantee renewed when cash credit facilities were renewed and fresh set of documents were got executed and signed by defendants 1 and 2.

19. As a consequence, suit against defendants 3 and 4 fails. However, suit of the plaintiff against defendants 1 and 2 succeeds on the basis of documents which were executed on 8-9-1993 and particularly the acknowledgment of liability as well as statement made by defendant No. 2 on 24.8.1995 in the court.

20. In the result, suit is decreed for Rs.5,40,191.80 with pendente lite and future interest @ 20.75% per annum with quarterly rest till its realisation against defendant Nos. 1 and 2 only. Decree Sheet be drawn up accordingly.