
(1958) 03 CAL CK 0015
In the Calcutta High Court
Case No : A.F.O.D. No. 108 of 1952

Dass Bank Ltd.

APPELLANT

Vs

Smt. Kali Kumari Debi and Another

RESPONDENT

Date of Decision : 27-03-1958

Acts Referred:

Constitution of India, 1950 — Article 141
Contract Act, 1872 — Section 134, 137

Citation : AIR 1958 Cal 530 : 62 CWN 493 : (1959) 1 ILR (Cal) 423

Hon'ble Judges : P.N. Mookerjee, J; P.K. Sarkar, J

Bench : Division Bench

Advocate : Bankim Chandra Dutt, Bhabani Sankar Bagchi, Braten Banerjee and Sanat Dutt, for the Appellant; Hariprasanna Mookerjee and Bankim Chandra Roy, for the Respondent

Final Decision : Allowed

Judgement

P.N. Mookerjee, J.—This is the plaintiff's appeal and it arises out of a suit for recovery of money to the extent of Rs. 19,999. The suit has been decreed in part by the court below, namely, for Rs. 8,113-5-9 pies and the plaintiff's appeal is directed against the refusal of its claim with regard to the balance, namely, Rs. 11,885-10-3 pies.

2. The suit arose under the following circumstances ;

The defendant No. 1, who is the husband of defendant No. 2, had an overdraft current account with the plaintiff Bank and was in the habit of faking loans under that account. Defendant No. 2, the wife, appears to have executed a surety bond (Ext. 1), guaranteeing repayment of the dues of defendant No. 1 to the plaintiff Bank in the above account to the extent of Rs. 20,000 and hypothecating for that purpose the properties, described in Annexure "A" of the present plaint. The plaintiff Bank brought the present suit on the allegation inter alia that the defendant No. 1 was its debtor under the above overdraft account to the tune of about Rs. 60,000. But, in view of the surety bond (Ext. 1), referred to above,

and having regard to the fact that no money could be recovered personally from defendant No. 1, the Bank felt obliged to bring the present suit for recovery of Rs. 19,999 only against both the above defendants, claiming, in effect, a charge decree in respect of the above properties.

3. The trial court dismissed the suit against defendant No. 1 principally on the ground that the claim against him was barred by limitation and it decreed, the suit against defendant No. 2 to the extent of Rs. 8,113-5-9 pies upon the finding inter alia that, in view of a certain payment, alleged to have been made and accepted by and between the parties, the defendant No. 1's liability in the above account for which defendant No. 2 would be liable under the above surety bond, would be to the extent of that amount. The decree is a charge decree in the preliminary form against the above hypothecated properties. From this decree the present appeal has been filed by the plaintiff Bank. The defendant No. 2 has not filed any appeal or cross-objection.

4. The alleged payment is stated to have been made by the purported endorsement and sale of a Bill (vide Exts. 3 and 3 (a)) to the tune of Rs. 49,907 for a consideration of Rs. 45,000 to the plaintiff Bank and to that extent, the defendants claimed credit against their liabilities. In the Bank's accounts (Ledger-Exts. 4 series), there was an entry of Rs. 45,000 with reference to the alleged bill aforesaid, crediting the said sum in the defendant No. 1's overdraft account and striking a balance after deducting that amount. The Bank's case, however, was that this entry was a fraudulent one and there was, in fact, no sale and purchase of the bill in question but the bill was only accepted by the Bank for collection on behalf of Defendant No. 1 and, as no collection could be made upon it, no credit could be claimed under or in respect of the said bill.

5. The learned Subordinate Judge has overruled this contention of the plaintiff Bank upon the view that, in the face of the credit of Rs. 45,000, entered in its own books (Ledger-Exs. 4 series), as aforesaid, which according to him, had not been proved to be fraudulent and in view of the fact that, according to him (the learned Subordinate Judge), the bill was actually purchased by the Bank from the defendants and its story of having accepted it only for collection purposes was not true, the plaintiff's case on the point could not be accepted. This, indeed, is the basis of the judgment of the court below and the propriety of this finding has been seriously challenged before us on behalf of the plaintiff-appellant.

6. It appears that the Bill in question was in respect of a certain supply of silk cloths etc., alleged to have been made to the Commissioner of the Burdwan Division through the District Magistrate, Birbhum. The bill bears the date "May 25, 1945". It is the defendants' case that this was purchased by the Bank on 31-5-1945, crediting to the defendant No. 1's above account on the same date the purchase price of Rs. 45,000. This is sought to be proved and confirmed by evidence, given by defendant No. 1, and strong reliance was placed in this Court and also in the court below on the above credit of Rs. 45,000 entered in respect of the aforesaid bill in the Bank's ledger (Vide Ext. 4), in which the defendant

No. 1's above account appeared.

7. It seems to us, however, that, in deciding the above point in favour of the defence, the learned Subordinate Judge overlooked a very pertinent exhibit, namely, Ext. 2 (d), which was a letter written by the defendant No. 1 to the District Magistrate on 2-8-1945. The said letter clearly shows that the relationship between defendant No. 1 and the Bank in respect of the bill in question was not one of seller and purchaser but one of entrustment to the Bank for collection. This will appear from the first two paragraphs of the said letter where Defendant No. 1 wrote as follows :

"I shall be highly obliged if you please arrange to make early payment of the above bill direct to M/S Dass Bank Ltd. (My Financier), Suri.

Perhaps you can easily understand that I have pushed everything of my life in it. Moreover I am to bear unnecessary interest for the same."

This is directly contradictory to the defendant's plea that the bill in question had already been sold to the plaintiff Bank on 31-5-1945, for the sum of Rs. 45,000, of which credit was given to him in the Bank's accounts against his outstanding liabilities. If that were so, there would have been no reference to interest in the letter, quoted above, and the phrase "My Financier" is also of some significance. This aspect of the matter does not appear to have been considered by the learned Subordinate Judge and, in our opinion, this letter is almost a settlor on the question of relationship between the parties in regard to the disputed bill. It is true that in the Bank's ledger relating to the defendant No. 1's overdraft account, there is a credit shown to the extent of Rs. 45,000 against this bill. That, however, has been explained by the Bank as due to collusion between the Bank's the then Manager and defendant No. 1 and, on the evidence before us and in the circumstances disclosed in the present records, and having regard particularly to the defendant No. 1's above letter (Ext. 2 (d)), we feel convinced that the Bank's story is true. We are also wholly unimpressed by the defendant No. 1's explanation seeking to suggest that the letter (Ext. 2 (d)) was written by him in false terms, appearing therein, at the instance of the plaintiff Bank. It is to be noticed further that the bill in question bears no endorsement which would justify a court in holding that it was sold or intended to be sold. The only endorsement which appears on the bill is "for and on behalf of Atmaram Muralidhar" which was admittedly the firm of defendant No. 1. That is clearly consistent with the plaintiff's story that the bill was given to the Bank and accepted by it merely for collection and it prima facie militates against the defence version of purchase and sale. At any rate, it is more in accord with the plaintiffs case and with probabilities too.

8. We hold, therefore, that the credit of Rs. 45,000 in the defendant No. 1's account on the basis of the above bill should be disregarded and, in that view, the defendant No. 1's outstanding liability would be much above the claim in the present suit. The dismissal of the suit, therefore, to the extent of Rs.

11,885-10-3 pies, which is the subject-matter of the present appeal, cannot be supported.

9. On behalf of the respondent (Defendant No. 2), a point was raised that, as the claim of the plaintiff Bank against the principal debtor defendant No. 1 was admittedly barred by limitation, defendant No. 2 who was only a surety could not be made liable for any part of it and, although there was no cross-objection by her against the part decree, given by the trial court, she is at least entitled to support and maintain the decree, as made by that court, and resist any enhancement of the decretal amount by showing that the claim against her was irrecoverable in law. This argument of the defendant respondent was sought to be met by Mr. Dutt on two grounds, namely, (1) that, under the relative bond, which is Exhibit No. 1 in this case, the defendant No. 2, the wife, was not merely a surety for her husband (defendant No. 1) but also a principal debtor in respect of the sum of Rs. 20,000 for which liability was undertaken by her, and (2) that, even if the plaintiff's claim against the principal debtor defendant No. 1 was barred by limitation, that would not necessarily discharge the surety in the absence of a specific term to that effect in the said bond.

10. For our present purpose, it is not necessary for us to express any opinion on the first of the above two contentions of Mr. Dutt, as, in our opinion, his client is entitled to succeed on the second which has also been accepted by the learned Subordinate Judge on this point. In support of his said decision, the learned Subordinate Judge has relied on two authorities, namely, *Bireswar Chatterjee v. Saidpur Commercial Bank, Ltd.* 411 CWN 1361 (A) and *Kali Charan v. Abdul Rahman* 23 CWN 545: (AIR 1918 PC 226) (B). The first of these two cases appears to be a direct authority on this point, but an attempt was made by Mr. Mookerjee, appearing on behalf of defendant No. 2 respondent in this appeal, to distinguish the same. With regard to the other case cited, namely 23 CWN 545: (AIR 1918 PC 226) (B), Mr. Mookerjee's submission was that that was not a direct authority on the point and that also was distinguishable. There may be some substance in these submissions of Mr. Mookerjee, but, at the same time, it is to be observed that the point is practically concluded against his client by the decision of the Privy Council in AIR 1939 110 (Privy Council). There was, undoubtedly, a conflict of decisions on this particular question between the different High Courts, as noticed in the said Privy Council decision and also in Pollock and Mima's well-known commentary on the Indian Contract Act. The conflict, however, as the learned Commentators observe, appears to have been resolved by the above Privy Council case where their Lordships, relying on the majority view in this country and the law in England on the point as enunciated and explained in *Carter v. White* (1883) 25 Ch D 668 (D), and after pointing out inter alia that the law on this point is the same in this country and in England, accepted the conclusion and we quote here their Lordships' own words at p. 206 (of IA): (at p. 112 of AIR), of the Report, that "failure to sue the principal debtor until recovery is barred by the statutes of limitation would not operate as a discharge of the surety". If that is the law, and that has to be accepted in view of

the above Privy Council decision, there can be no escape from the conclusion that, although the claim against the principal debtor defendant No. 1 -- assuming that the defendant No. 2 did not become a principal debtor under the bond (Ext 1)-- has become barred by the law of limitation, the creditor's remedy against the surety would still be available and enforceable and the surety would be liable to make good his or her guarantee.

11. In support of our above view we have referred to the Privy Council decision AIR 1939 110 (Privy Council) , and to statement of the law appearing therein and also in Pollock and Mulla's commentary on the Indian Contract Act We would now quote here in some detail the relevant observations of the learned Commentators and explain the fuller implications of the above Privy Council decision. The observations appear in the Commentators' notes u/s 134 under the caption "Creditor's omission to sue principal within limitation period", and u/s 137 under the heading "Mere forbearance" at pp. 462-3 and 467 of Pollock and Mulla's Indian Contract and Specific Relief Acts, 7th Edition (1944). Those observations run as follows :

"CREDITOR'S OMISSION TO SUE PRINCIPAL WITHIN LIMITATION PERIOD -- The question whether a surety is discharged when a creditor allows his remedy against the principal debtor to become barred by limitation may be considered at this stage. On this point there have been two opposite views taken by the Indian High Courts; the majority however holding that the surety is not in such circumstances discharged. The conflict arises in great part from" the provisions of Section 137 (infra), & especially the words "mere forbearance" occurring in that section. It was conceded by the Bombay and Calcutta High Courts, that, if Section 134 stood alone, the omission of a creditor to sue the principal debtor within the period of limitation would discharge the surety under that section, as having the legal consequence of discharging the principal debtor; but the Madras High Court relied on the well-known distinction between the barring of the remedy by action (which is consistent with the debtor not being discharged for other purposes) and the complete extinction of a debt. It is also thought in England that omission of the creditor to sue within the period of limitation does not discharge a surety for another and more substantial reason, that "the surety can himself set the law in operation against the debtor". In a recent Privy Council case the reasoning of the majority of the High Courts has been preferred by their Lordships and the point, therefore, may now be regarded as settled."

* * * * "MERE FORBEARANCE".This section (Section 137) deals with the case of "mere forbearance" to sue, as distinguished from forbearance springing from a contract, and provides that the surety shall not be discharged in such a case. Now the forbearance to sue, which does not arise from a contractual obligation, may be exercised for a period short of the period of limitation prescribed for the suit, or it may continue until the expiration of the limitation period. The illustration to the section affords an instance of the former case, the limitation period for the suit being three years, and the forbearance exercised

only for a year. The surety is not discharged in such a case, and it is equally clear that he would not be discharged even if the forbearance continued for a longer period provided it fell short of the period of limitation. It seems, moreover, according to the weight of decision and English opinion, that it makes no difference if the forbearance continues until the period of limitation has elapsed."

The passages quoted are plain enough. They speak for themselves and need no explanation or elaboration.

12. A word now on the Privy Council decision. As already, stated, it clearly affirms the view that the time bar against the principal debtor would not discharge the surety. The decision, however, appears to be of wider import, namely, that a mere failure to sue the principal debtor within the time, specified by the statute of limitation, or an inability to sue him (the principal debtor) by reason of a rule of procedure does not discharge the surety, the reason being that, in such circumstances, the creditor's remedy (that is, the remedy by action) against the debtor is barred but his right and the corresponding liability is not discharged, or, in other words, the debt is not released or discharged. In making the above statement of the law, their Lordships refer to all the relevant provisions of the Indian Contract Act, namely, Sections 134, 137 and 139, and, although the Privy Council case can possibly be distinguished as the Board's actual decision also rested on the other ground that, in the circumstances of that case, the creditor clearly reserved his right against the surety, while releasing or purporting to release the principal debtor, that would not affect the validity or the binding character of the above statement of the law. As we read the report, that statement appears to be one of the alternative grounds for the decision but, even otherwise, that is, as an obiter dictum of the Privy Council, containing as it does an enunciation of principle or exposition of a rule of law, the statement would be binding on the Courts here unless and until the law is held to be different by the Supreme Court (Vide *Sm. Radharani Das Vs. Sisir Kumar and Others*, ; *Shrinivas Krishnarao v. Narayan Devji*, (1954) SCA 878 at p. 896 and Articles 225 and 141 of the Constitution *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*,).

13. We have practically concluded our discussion of the law and all that remains to be said is that the case of *Salig Ram Misir Vs. Lachhman Das*, on which Mr. Mookerjee strongly relied, was exclusively based on the earlier Allahabad decisions, the latest amongst which was expressly overruled by the Privy Council in AIR 1939 110 (Privy Council), and, accordingly, upon the words of the learned Allahabad Judges themselves, the said decision *Salig Ram Misir Vs. Lachhman Das*, cannot be accepted as good law.

14. In the above view, we overrule Mr. Mookerjee's submission on this point and hold that he cannot be allowed to support and maintain the decree at Rs. 8,000 and odd, the amount for which the suit has been decreed by the learned Subordinate Judge.

15. In the result then, we allow this appeal and decree the plaintiffs suit in full with costs both in this Court and in the court below. Interest is allowed, as was done by the learned Subordinate Judge, at three per cent per annum till realisation. The defendant No, 2 will deposit the decretal amount into the Court below within six months from this date. In default, the charged properties or a sufficient part thereof shall be sold.

16. A preliminary decree in terms of this judgment will be drawn up afresh by the court below.

P.K. Sarkar, J.

17. I agree.