

(2013) 01 BOM CK 0119

In the Bombay High Court

Case No : Appeal No. 243 of 2012 in Chamber Summons No. 2125 of 2011 in Summary Suit No. 1450 of 2011 With Notice of Motion No. 1851 of 2012

Gouri Prasad Goenka

APPELLANT

Vs

Rabo India Finance Limited

RESPONDENT

Date of Decision : 07-01-2013

Acts Referred:

Citation : (2013) 2 ALLMR 771 : (2013) 3 BomCR 235 : (2013) 2 MhLj 195

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : D.D. Madon, with Mr. Mikhail Behl, Mr. Khushnood Akhtar, Mr. Rigved Sawant and Mr. Levi Ruters instructed by Vigil Juris, for the Appellant; Simil Purohit with Mr. Bhavik Manek and Mr. Yashesh Kamdar instructed by y Wadia Ghandy and Co., for the Respondent

Final Decision : Dismissed

Judgement

1. In a Summary Suit instituted under Order XXXVII of the Code of Civil Procedure, 1908, leave was granted under Clause-XII of the Letters Patent. The Defendant, who is in appeal in these proceedings, has been sued on the basis of guarantees executed by him in favour of the Plaintiff in consideration of two facilities granted by the Plaintiff to a company, of which the Defendant was at the material time a principal director. A Chamber Summons was taken out by the Defendant seeking revocation of the leave granted under Clause-XII of the Letters Patent. The Chamber Summons for revocation has been dismissed by the learned Single Judge on 12 March 2012, against which judgment the Defendant is in appeal. The basis on which the Defendant sought revocation of the leave which had been granted under Clause-XII of the Letters Patent was stated as follows in the affidavit-in-support filed by the Defendant in the Chamber Summons:

I. The Deed of Guarantees are entered into at Kolkata;

II. The Deed of Guarantees does not have any jurisdictional clause;

III. All the terms and conditions of the Credit Facility Letters are not binding on me;

IV. Deed of Guarantees are separate agreements and the terms and conditions contained in the Credit Facility Letters cannot be read into the Deed of Guarantees.

2. The plaint contains averments on the basis of which the jurisdiction of this Court to entertain and try the suit is set up. Paragraph 37 is as follows:

37. The Plaintiff says that the documents for which the credit facilities were granted by the Plaintiff were subject to the jurisdiction of the courts in Mumbai as agreed in the documents. The amounts disbursed under the aforesaid credit facilities were disbursed in Mumbai and the Company who is the principal borrower has made part payments of the outstanding amount under the credit facilities in Mumbai. The Defendant and the Company who are jointly and severally liable to make payments of the outstanding dues of the Plaintiff as aforesaid, have agreed to pay the outstanding amounts under the credit facilities to the Plaintiff in Mumbai. The Plaintiff therefore says that material part of cause of action has arisen in Mumbai. The Defendant however resides and has his office in Kolkata. The Plaintiff therefore states that upon this Hon''ble Court granting leave under Clause XII of Letters Patent to the Plaintiff, this Hon''ble Court will have jurisdiction to try, entertain and dispose off the above suit.

3. The facilities which were granted by the Plaintiff to the principal borrower required the execution of a personal guarantee by the Appellant-Defendant. Clause-22 stipulates that the facilities would be subject to the exclusive jurisdiction of the Courts at Mumbai. Now, it is undoubtedly well settled that a clause conferring exclusive jurisdiction upon a Court is of consequence only in a situation where that Court would otherwise have jurisdiction to entertain and try the suit. If a Court does not possess jurisdiction in the first place, a clause conferring exclusive jurisdiction upon that Court would be of no avail. In the present case, Annexure-I which contains general terms and conditions, inter alia, contains following provision:

2. Method of calculation and payment:.....

In case any interest/principal payment/repayment date falls on a day on which Banks in Mumbai are not open for business, then such payment/repayment shall be made on the Banks'' business day immediately preceding such date.

The personal guarantees were executed by the Appellant in Kolkata in consideration of the Respondent having granted credit facilities to the principal borrower. The personal guarantees were addressed to the Appellant at its office situated at Forbes Building, 1st Floor, Charanjit Rai Marg, Mumbai-400 001. Under the personal guarantees, the Appellant undertook to pay the amount that would be due and payable by the principal debtor to the Respondent under the

facilities.

4. On these facts, the learned Single Judge dismissed the application for revocation of the leave granted under Clause-XII of the Letters Patent by holding that Clause-2 of Annexure-I (extracted above) contemplated that payment would be made in Mumbai. In consequence, parties provided that if amounts, whether by way of principal or interest, fell due on a day on which banks in Mumbai were not open for business, the payment would be made on a business day immediately preceding such day. The learned Judge has placed reliance on the averments contained in paragraph 37 of the plaint that the principal debtor had made part payment in Mumbai, which was not denied in the affidavit-in-support of the Chamber Summons for revocation. The learned Single Judge has also observed that what has been submitted in the affidavit-in-support of the application for revocation is that the guarantees do not contain a specific clause providing for payment to be made in Mumbai which, in the opinion of the learned Judge, was a guarded pleading. In the alternative, the learned Judge held that there was an implied obligation on the part of the Defendant to make payment under the guarantee in Mumbai.

5. Learned Senior Counsel appearing on behalf of the Appellant submits that:

- i. Clause-2 of Annexure-I extracted earlier, only provides for a method for calculation and payment of interest and is not susceptible of the inference that payment was to be made in Mumbai;
- ii. The learned Single Judge was in error in finding fault with the Appellant for not leading evidence since it was primarily the burden of the Plaintiff to establish that this Court has territorial jurisdiction to entertain and try the suit;
- iii. The averments contained in paragraph 37 of the plaint do not expressly make a reference to the provisions contained in Clause-2 of the general terms and conditions; and
- iv. As regards the alternate finding, a term can be implied in a contract only in a situation where in the absence of an implied term the obligation under the contract would fail.

6. On the other hand, it has been urged on behalf of the Respondent that:

- i. In paragraph 37 of the plaint it has been specifically averred that the documents for which credit facilities were granted by the Plaintiff were subject to the jurisdiction of the Courts in Mumbai; that the amounts under the credit facilities were disbursed in Mumbai; that the principal borrower had made part payments under the credit facilities in Mumbai; and that the Appellant and the principal borrower who are jointly and severally liable to pay the outstanding dues of the Respondent have agreed to pay the outstanding amounts under the credit facilities to the Respondent in Mumbai; to which there is no effective denial.
- ii. Admittedly, the guarantees were issued to the Respondent at its office in

Mumbai. This would certainly constitute a part of the cause of action;

iii. The appellant was a Principal Director of the borrower and had executed the personal guarantees and undertaken to pay the amounts that may be due and payable to the Respondent under the facilities. The liability of a guarantor is co-extensive with that of the principal borrower;

iv. Clause-2 of the general terms and conditions is an added circumstance which shows that payment was to be made in Mumbai. Otherwise, there was no reason to refer to banks in Mumbai;

v. The order passed by the learned Single Judge declining to revoke the leave under Clause-XII of the Letters Patent, therefore, does not fall for interference.

7. The relevant averments in the plaint on the issue of jurisdiction are that (i) The documents on the basis of which credit facilities were granted by the Plaintiff-Respondent were subject to the jurisdiction of the Courts in Mumbai; (ii) Amounts under the credit facilities were disbursed in Mumbai; (iii) The principal borrower made part payments of the outstandings due under the credit facilities in Mumbai; (iv) Both the Appellant and the principal borrower who are jointly and severally liable to make payment of the outstanding dues, agreed to pay the outstandings under the credit facilities to the Respondent in Mumbai.

8. The basis on which the Appellant sought a revocation of the leave which was granted by the learned Trial Judge of this Court under Clause-XII of the Letters Patent, is that the deeds of guarantee were executed at Kolkata; that they do not have any jurisdictional clause; and that the terms and conditions of the credit facilities contained in the letters are not binding on the Appellant and the deeds of guarantee are separate agreements into which the terms and conditions governing the credit facilities cannot be read.

9. The liability of a guarantor is co-extensive with that of the principal borrower. The guarantee executed by the Appellant, ex-facie, was addressed to the Plaintiff at its office in Mumbai.

In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, , the Supreme Court has held that "ordinarily, acceptance of an offer and its intimation results in a contract and hence a suit can be filed in a Court where the acceptance was communicated." In Bharumal Udhomal and Others Vs. Sakhawatmal Veshomal and Others, , a Division Bench of this Court presided over by Chief Justice M.C. Chagla held that "the common law rule..... recognises the obligation of the debtor to pay his debt and that obligation can only be discharged by the debtor going to his creditor and repaying the amount, and the common law rule imposes this obligation only when there is no express contract to the contrary". In that case, the Plaintiffs and the Defendants were displaced persons from Pakistan and a loan was advanced by the Plaintiffs to the Defendants in Pakistan. On the date when the suit was filed, the Plaintiffs were residing in Greater Bombay, while the Defendants were residing at Kolhapur. The Plaintiffs invoked the jurisdiction of

the City Civil Court at Bombay, inter alia, contending that apart from the agreement between the parties, there was an obligation under common law upon the Defendants to seek out their creditors, the Plaintiffs and to repay the amount. A Division Bench held that the City Civil Court had jurisdiction to try the suit. Where a suit is filed on a guarantee, the suit can be instituted in a Court within whose jurisdiction the guarantee was furnished by the guarantor to the person to whom the guarantee is furnished. Apart from this, while moving the Single Judge for revocation of the leave granted under Clause-XII, the Appellant did not deny that amounts under the credit facilities were disbursed in Mumbai and that the principal borrower had made part payment of the outstandings under the credit facilities in Mumbai. But the submission which has been urged on behalf of the Appellant is that the mere fact that the credit facilities were disbursed to the principal borrower at Mumbai or that part payments of the outstandings were made in Mumbai, would not constitute a part of the cause of action unless there was an agreement between the parties that repayment would be made in Mumbai. Now insofar as the issue of repayment is concerned, paragraph 37 of the plaint postulates that both, the Appellant and the principal borrower who are jointly and severally liable, had agreed to pay the outstanding amounts under the credit facilities to the Respondent in Mumbai. All that the Appellant averred in paragraph 8 of the affidavit-in-support of the Chamber Summons is that on a true interpretation of the credit facility letters or the deed of guarantee, there is no specific clause that provides that payments were to be made in Mumbai.

10. The learned Single Judge has relied upon Clause-2 of the general terms and conditions governing the credit facilities that were granted to the principal borrower. Clause-2 postulates the method of calculation and payment and provides that in case any interest or principal payment/repayment debt falls on a day on which banks in Mumbai are not open for business, such payment/repayment should be made on the business day of the banks immediately preceding such day. This clause must be ascribed a commercial understanding and it would have no rational explanation if payments were to be made at a place other than Mumbai. Clause-2 in fact is indicative of the contractual understanding that payment was to be made in Mumbai. Clause-2 of the general terms and conditions must be coupled with the circumstances that: (i) under the terms of the guarantee the Appellant undertook to pay the dues of the principal borrower to the Respondent under the credit facilities; (ii) the borrower of which the Appellant at least at the material time was a principal director made part payment of the outstandings in Mumbai to the Respondent; (iii) The guarantees were issued by the Appellant to the Respondent in Mumbai. On this conspectus of the facts, the learned Single Judge was, in our view, justified in holding that leave under Clause-XII had appropriately been granted and that no case for revocation had been made out.

11. We now deal with the decisions on which reliance has been placed on behalf of the Appellant. In I.C.I.C.I. Limited Vs. Sri Durga Bansal Fertilizers Ltd. and

others, , a learned Single Judge of this Court, while dismissing a Chamber Summons for revocation of the leave granted under Clause-XII of the Letters Patent had clarified that the observations in the order of the Court were only for the purposes of considering the application for revocation of leave and that the Defendants would be at liberty to take an objection u/s 9A of the Code of Civil Procedure, 1908. The Division Bench accepted the contention that the course of action adopted by the learned Single Judge would result in a multiplicity of proceedings; and that the appropriate procedure to follow would be to decide the question by giving an opportunity to the parties, if the facts and circumstances of the case so required, to lead evidence unless the parties were to agree that for all purposes the question of jurisdiction may be decided only prima facie and should be left to be decided finally at the trial of the suit. The Division Bench while directing the learned Single Judge to decide the question on merits finally, observed that whether the parties would be required to be given an opportunity to lead evidence or not was left open to be determined by the learned Single Judge. In the present case, it may be noted that parties desired a final determination of the issue of revocation at this stage before the Single Judge and the alternate course of action that was adverted to in the decision in ICICI Limited (supra) was not sought or suggested.

12. In the judgment of a Division Bench of the Calcutta High Court in Secy. of State Vs. Golabrai Paliram, , one of the issues which arose for the consideration of the Court was whether the Secretary of the State for Council was a person who carried on business within the meaning of that expression in Clause-XII of the Letters Patent. The learned Single Judge of the Calcutta High Court held that old rulings holding that the Secretary of the State does not carry on business would no longer apply to modern conditions. The Division Bench in appeal came to the conclusion that this was a question of complexity and that it will be appropriate to dismiss the application for revocation and to direct that the Courts shall proceed in the usual way by allowing the Defendant to file a written statement and apply for determination of the question of jurisdiction as a preliminary issue. In the present case, no such question of complexity arises. The simple question is whether leave under Clause-XII was correctly granted for bringing a suit before the Court on guarantees executed by the Appellant. The suit has been instituted under Order XXXVII of the Code of Civil Procedure, 1908. Whether or not the suit goes to trial would depend on the view which the Trial Judge may take at the stage of the hearing of the Summons for Judgment. The Appellant sought revocation of the leave that was granted under Clause-XII of the Letters Patent. As the learned Single Judge noted, parties chose not to lead evidence. Under Clause-XII of the Letters Patent, this Court would, upon the grant of leave, have jurisdiction to entertain and try the suit where, inter alia, a part of the cause of action has arisen within its jurisdiction. The Appellant failed to establish that the grant of leave by the Court was improper or that leave was liable to be revoked.

13. In the view which we have taken, it has not become necessary to express

any finding on the alternate finding of an implied obligation in the order of the Single Judge.

14. We accordingly dismiss the appeal. In view of the dismissal of the appeal, Notice of Motion No. 1851 of 2012 does not survive and shall stand disposed of as such. There shall be no order as to costs. In order to enable the Appellant to have recourse to the remedy available in appeal, on the request of the learned counsel for the Appellant, we direct that the hearing of the Summons for Judgment shall stand over for a period of four weeks from today.