
(1994) 11 DEL CK 0057

In the Delhi High Court

Case No : Suit No. 2013 of 1985 and Interim Application No. 8974 of 1994

Jammu and Kashmir Bank Ltd.

APPELLANT

Vs

Gartex International and Others

RESPONDENT

Date of Decision : 10-11-1994

Acts Referred:

Citation : (1994) 4 AD 869 : (1995) 1 BC 520 : (1994) 56 DLT 630 : (1995) 32 DRJ 253

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : V.K. Dhar, V.K. Malik and Amit Khemka, for the Appellant;

Judgement

P.K. Bahri, J.

(1) This is a suit for recovery of Rs.1,39,270.00. The case of the plaintiff is that defendants 2 & 3 as partners of defendant No. 1 had opened a current account with the plaintiff bank on September 23, 1977 and from time to time deposits and withdrawals were made in the said account No.268 and on request of the defendants, on October 11, 1977, the defendants were permitted to have over-withdrawals in the said account and the defendants were to pay interest at the rate fixed by the Reserve Bank of India in respect of the said over-withdrawals from time to time.

(2) It is also averred that the defendants had undertaken to bring the said account to credit at least once a year and it is only on July 16, 1980 that account was brought to credit when some credit balance was shown in the account. It is also mentioned that last entry appearing in the account is dated December 22, 1981 when a sum of Rs.53,500.00 was credited in the account of the defendants. It is further averred that defendants on October 1, 1983 had executed a balance confirmation document admitting the debit balance as Rs.97,290.41 paise as on September 30, 1983. It is alleged that defendants had undertaken to repay the amount due in Installments but despite the letter dated December 26, 1983

issued by the plaintiff, the defendants did not bring the account to credit and after serving the legal notice dated May 4, 1984, the present suit has been brought for recovery of the aforesaid amount.

(3) The defendants have contested the suit pleading that the suit is barred by limitation inasmuch as defendants had not executed any confirmation of balance documents, as alleged. It is also pleaded by the defendants that plaint has not been signed or verified and suit instituted by any duly authorised person on behalf of the plaintiff.

(4) On merits, the defendants admitted the opening of the said account with the plaintiff bank and also admitted the factum of plaintiff allowing the over-withdrawals from the said account to the defendants but defendants pleaded that there was no agreement to pay interest at the rate fixed by the Reserve Bank of India from time to time in respect of such over withdrawal facility. The plea taken is that plaintiff bank had agreed to charge only interest @ 9% per annum on the withdrawals. The defendants denied that the plaintiff is entitled to charge 18% per annum interest compounded quarterly, as alleged in the plaint.

(5) In replication, the pleas of the defendants were controverted and pleas raised in the plaint were reiterated and it was controverted that there was any agreement to charge only 9% per annum as interest and in that connection it was asserted that no bank could have agreed to charge interest at a lesser rate than the bank rate of interest which was and is 10%. It was reiterated that current rate of interest at the time of filing of the suit was 18% per annum on such over- withdrawal facility. Later on, in the replication filed to the amended written statement, it was pleaded that in fact the rate of interest was to be charged on the rate fixed by the Reserve Bank of India from time to time which was to be compounded quarterly and at one time it was 13% per annum.

(6) On the pleadings of the parties, following issues were framed:-

1. Whether the plaint has been filed and verified and suit is instituted by a duly authorized person ? 2. Whether the suit is within limitation ? 3. To what amount plaintiff is entitled 4. Whether plaintiff is not entitled to charge interest as claimed in the suit ? 5. Relief.

FOLLOWING additional issue was also framed:- 1. Whether the balance confirmation dated 1.10.1983 is forged, as claimed by the defendant ? If so, its effect ?

(7) Before I deal with the case on merits, I would like to dispose of the application moved by the defendants (I.A.8974/94) seeking to produce a handwriting expert. This application has been moved belatedly. The suit has been pending since 1985. The defendants have categorically taken a plea in the amended written statement that the balance confirmation document is a forged and fabricated document and the same does not bear the signatures of defendant No.3. Under the practice directions issued by this Court and under the

rules framed by this Court governing the Original Side of this Court, in case the defendants wanted any handwriting expert to be summoned, they ought to have got a report prepared from the handwriting expert and placed it on the record before the suit was listed in "Long Cause".

(8) Under the practice directions, after issues have been framed and additional issues have been framed, the suit was to be made ready for trial in "Long Cause" and parties were required to file list of witnesses. The defendants never cited any handwriting expert as a witness at anytime prior to moving the present application. This application is moved when the case has been taken up for recording evidence in "Long Cause". The application is moved quite belatedly with a view to delay the disposal of the suit which has been pending for the last nine years in this Court.

(9) As far as the balance confirmation document is concerned, it has come in the evidence that the account in favor of the defendants was opened by the plaintiff bank when the defendants were introduced to the plaintiff bank by Sh.S.P.Gupta who was account holder of the said bank. It has now come out in evidence that S.P.Gupta is no other person than the husband of defendant No.3. The balance confirmation document dated October 1, 1983, Ex.PW3/1 purports to bear the signatures not only of defendant No.3 but also of her husband S.P.Gupta. The defendants had sought amendment of the written statement in order to take the plea that said balance confirmation is a forged document and it does not bear signatures of defendant No.3 but no plea was sought to be raised that this document does not bear signatures of S.P.Gupta, husband of defendant No.3.

(10) PW-3, Sh.Kala Ram Behl, who worked in the Connaught Place Branch of the plaintiff bank as Manager (Accounts) from 1982 to 1984, had deposed that defendants were called to the bank for executing the balance confirmation but defendant No.3 alone came to the bank. As she was not known to the manager, the manager required her to bring Sh.S.P.Gupta who had introduced the defendants when the account was opened in the name of the defendants initially and thereafter Triveni Devi brought S.P.Gupta, her husband, who signed the balance confirmation slip, Ex.PW3/1, as token of identifying defendant No.3 and defendant No.3 also signed the balance confirmation slip.

(11) In cross-examination, it has been suggested to this witness that in fact defendant No. 3 had not signed the said document but no categorical suggestion has been given that this document had not been signed by S-P.Gupta, husband of defendant No.3. S. P.Gupta has neither been cited as a witness by the defendants nor he has been sought to be examined during recording of the evidence in this case. S.P.Gupta is not a stranger. He is the husband of defendant No.3 and he had introduced the defendants when the account was opened initially in the name of the defendants. So, no useful purpose would be served by allowing the defendants to now engage any handwriting expert for giving any opinion with regard to the purported signatures of defendant No.3 appearing on the said document, Ex.Pw3/1 I have myself compared the disputed signatures

with the admitted signatures of defendant No.3 and I have no hesitation in coming to the conclusion that it is defendant No.3 who had made the disputed signatures on Ex.PW3/1.

(12) I dismiss the application of the defeats seeking permission of the Court for examining any handwriting expert moved so belatedly by the defendants in light of the above discussion. Issue No.1

(13) PW-1, Raj Nath Kundu, who has worked as Branch Manager of the plaintiff bank at its branch in Connaught Place from October 30, 1984 to October 1985, has deposed that he had signed and verified the plaint and so also the power of attorney in favor of counsel for plaintiff. He states that original power of attorney executed in his favor had been lost because of turmoil in Jammu & Kashmir and he proved on record a photocopy of the said original power of attorney, Ex.PW1/1. He also identified the signatures of the two directors of the plaintiff bank appearing on the original power of attorney. The original power of attorney was stated to have been attested by a Notary Public. The photocopy of the power of attorney also depicts that the original had been attested by a Notary Public.

(14) Learned counsel for defendant has vehemently argued that there is no convincing evidence laid by the plaintiff to prove the loss of the original document and so secondary evidence could not be taken into consideration. He has argued that in case the original power of attorney had been lost, the plaintiff ought to have proved that any report regarding the loss had been lodged with the police.

(15) I do not find any merit in these contentions. There is no reason for the plaintiff to have kept back the original power of attorney from this Court. I have no reason to disbelieve the testimony of PW1 that the original power of attorney had been lost in the turmoil in Jammu & Kashmir. There is no legal necessity of the plaintiff to have lodged any report with the police with regard to the loss of a particular power of attorney. So, I hold that the plaintiff was entitled to prove the photocopy of the power of attorney as secondary evidence as the original power of attorney was no longer available with the plaintiff having been lost.

(16) It has also been contended by learned counsel for defendants that PW1 was not competent witness to have proved the signatures of the executants of the power of attorney inasmuch as he admittedly had not worked under the said two directors who purported to have executed the original power of attorney. There is no merit in this contention because the witness has categorically deposed that he has been seeing the signatures of the said two directors namely Mohd.Amin and Mohd. Ibrahim Shahyad during the course of his duties and was familiar with their signatures. So, in my view, he was competent witness to have identified the signatures of the said two directors appearing on the power of attorney.

(17) It has been then urged that plaintiff ought to have proved any resolution of the Board of Directors of the plaintiff to show that any power has been given to the said two directors for executing any power of attorney in favor of this

witness. The power of attorney is duly attested by a Notary Public. u/s 85 of the Evidence Act, there is a presumption that the executants who had executed the power of attorney were having the power to do so. So, it was not necessary for the plaintiff to have produced and proved on record any resolution of the Board of Directors which finds mention in the power of attorney. In case the defendants had any doubt about the existence of any such resolution, the defendants could have summoned any evidence from the plaintiff in the shape of the minute books containing the resolution to repudiate the presumption that there exists any such resolution.

(18) In view of the above discussion ,I hold that the plaint has been signed and verified and the suit has been instituted by a duly authorised person on behalf of the plaintiff. This issue is decided in favor of the plaintiff. Issue No.2 & Additional Issue No.1

(19) Both these issues being interconnected are, hence, taken up together.

(20) I have already discussed above the point with regard to proof of the balance confirmation document Ex.PW3/l. PW3 has no reason to make any false statement in this Court that in fact Ex.PW3/l has been duly signed by defendant No.3 on October 1, 1983 confirming the balance amount due as on 30th September 1983 to the tune of Rs.97,290.41 paise. It is not even the case of the defendants that PW3 has any ulterior motive in making a false statement in Court. Mere fact that he is an officer of the plaintiff bank is not a ground to hold that he would give a false statement in Court in order to just prove that the claim of the plaintiff bank is not barred by limitation.

(21) As discussed above, this document not only bears the signatures of defendant No.3 confirming the balance amount but also bears the signatures of her husband who identified defendant No.3. In case this document had not been signed by husband of defendant No.3, nothing prevented the defendants to take such plea in the written statement or examine the husband of defendant No.3 as a witness to rebut the statement of PW3. The statement of defendant No.3, coming as DW-1, leaves much to be desired. She, at one point of time deposed that she was not able to read as she had not brought her spectacles in Court but she categorically went on to state that in fact PW3/1 does not bear her signatures with regard to confirming the balance amount. It is not understood that in case she could not possibly read the documents as she had not brought her spectacles, how could she give a categorical statement that the said document does not bear her signatures.

(22) In the Written statement, the defendants had even denied the receipt of the registered notice issued by the plaintiff before filing the suit. PW3 proved on record the copy of the legal notice sent to the defendants, Ex.PW3/2 and the postal receipts Ex.PW3/3, PW3"/4 and PW3/5 and the A.D. receipts Ex.P-4 and PW3/6. Ex.PW3/4 is A.D. receipt in respect of the registered notice served on defendant No.3 and she admitted her signatures on Ex.PW3/4 in cross-

examination but still she had the guts to say that she had not received the registered letter pertaining to this A.D. receipt. The Court had repeatedly explained the position to this defendant that if she had signed the A.D. card, she must have received the registered notice as well but she stuck to her position that she did not receive the registered notice but went on to state that whenever any postal letter in respect of business was received, the same was handed over by her to her father-in-law who is one of the partners of defendant No.1 and who, according to defendant No.3, has been looking after the business of the partnership. It is evident that defendants have falsely taken a plea in the Written statement that no registered notice had been served on them before the filing of the suit. The defendant No.3 went on to depose in cross-examination that she was not in a position to identify either the signatures of her husband or of her daughter.

(23) In view of these facts, it is evident that defendant No.3 is not a truthful witness when she had denied her signatures on the balance confirmation slip, Ex.PW3/1. In view of the above discussion, I hold that suit having been filed within three years of execution of the balance confirmation slip, Ex.PW3/1, by defendant No.3, the same is not barred by limitation and is within time and the said document, ExPW3/1 is not a forged or fabricated document. These issues are decided in favor of the plaintiff and against the defendants. Issues No.3 & 4

(24) Both these issues being interconnected are, hence, taken up together.

(25) The plaintiff has proved on record the statement of account of the defendants which is Ex.PW2/1 and have also proved on record all the cheques issued by the defendants for making withdrawal from the account which are Ex.P-1. The amount claimed in the suit as due from the defendants is evident from the statement of account. The only point urged before me by learned counsel for defendants is that defendants were not liable to pay any interest at the rates fixed by the Reserve Bank of India from time to time and defendants were liable to pay interest only @ 9% per annum.

(26) It is not disputed in the written statement that on the withdrawals of the nature taken by the defendants, the Reserve Bank of India had been fixing different rates of interest from time to time. The plea of the plaintiff that at the time of the filing of the suit, the rate of interest was 18% per annum was not controverted in the written statement but plea taken was that agreed rate of interest was only 9% per annum. Except for the bald statement of defendant No.3 that the agreed rate of interest was 9% per annum there is no documentary evidence to show that such rate of interest was agreed. The statement of account filed on the record shows that the interest has been calculated and debited every quarterly on the different rates of interest which may be prevalent on the basis of the rates of interest fixed by Reserve Bank of India.

(27) The defendants have not taken the plea in the written statement that the amount of interest mentioned every quarterly in the statement of account has

not been calculated on the basis of rate of interest fixed by Reserve Bank of India from time to time. The defendants, in my opinion, have failed to prove that the rate of interest agreed between the parties was 9% per annum. It is not possible to believe that the bank would have agreed to allow this over- withdrawal facility to the defendants at any rate of interest which was less than the rate of interest fixed by the Reserve Bank of India for such facility from time to time.

(28) The counsel for defendants has brought to my notice certain calculations of interest recorded in the statement of account which shows that at different times different rate of interest had been charged. It is quite clear that rate of interest must have varied from time to time in accordance with the rates fixed by the Reserve Bank of India. In case the defendants had pleaded that the entries in the account books have not been made in accordance with the rates of interest fixed by the Reserve Bank of India from time to time, the plaintiff would have brought on record necessary circulars of the Reserve Bank of India issued from time to time fixing the rate of interest in respect of such over-withdrawal facility given to the defendants.

(29) In view of the above discussion, I hold that plaintiff has been able to prove that a sum of Rs.1,39,270.00 is due from the defendants and plaintiff is entitled to have interest @ 18% per annum. The issues are decided accordingly in favor of the plaintiff. Issue No.5

(30) The suit is liable to be decreed. I decree the suit for recovery of Rs.1,39,270.00 with costs and grant interest @ 18% per annum from the date of suit till realisation.