

(2008) 09 CAL CK 0086

In the Calcutta High Court

Case No : GA No's. 1669 and 1670 of 1998, 1744 of 1999 and 1804 and 1806 of 2008, CS No's. 161 and 162 of 1998 and CC No's. 123 and 124 of 2008

Kailash Kumar Kanoria

APPELLANT

Vs

Shiv Shankar Pasari and Others

RESPONDENT

Date of Decision : 10-09-2008

Acts Referred:

Constitution of India, 1950 — Article 227

Contract Act, 1872 — Section 124, 125

Limitation Act, 1963 — Article 83

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 31

Citation : (2009) 1 CALLT 90 : (2009) 147 CompCas 231 : (2009) 3 CompLJ 528

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Tilak Bose, Jay Saha and Reetobroto Mitra, for the Appellant; S.N. Mitra, Arindam Mukherjee and D.K. Jain for Defendant No. 1, for the Respondent

Judgement

Sanjib Banerjee, J.—The facts and the legal issues involved in the applications in the two suits are more or less the same and the petitions are taken up and disposed of by this common order.

2. GA No. 1669 of 1998 and GA No. 1670 of 1998 had been disposed of by two similarly-worded judgments on March 28, 2008. The first defendant was not represented in either case and advocates appearing on behalf of the first defendant were given leave to retire before the two petitions were taken up and dealt with on merits in the absence of the first defendant. The first defendant in either suit submits that he had no notice of either matter appearing for final hearing and seeks recalling of the orders dated March 28, 2008 and for the matters to be heard afresh on merits. Considering the grounds urged for recalling the orders dated March 28, 2008, such orders are recalled and GA No. 1669 of 1998 and GA No. 1670 of 1998 are taken up for hearing afresh.

3. The contempt proceedings in either suit are for alleged violation of the orders

dated March 28, 2008. In view of the orders dated March 28, 2008 being recalled, the contempt proceedings are dropped.

4. The plaintiff says that he was the promoter of Kanoria Jute and Industries Limited (the company) which had been referred to the Board for Industrial and Financial Reconstruction (BIFR) under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The BIFR sanctioned a scheme of rehabilitation relating to the company that envisaged a change in management of the company. The first defendant was to take over the entire shareholding in the company and come in management thereof with the plaintiff relinquishing his interest in the company. Clause E(iii) of the package of reliefs/concessions approved by the BIFR under the scheme sanctioned on February 14, 1991 required the new promoter (the defendant No. 1) to enter into a suitable arrangement with the United Bank of India for payment of such bank's dues which are specified as Rs. 30.56 lakh as at March 31, 1989.

5. The scheme required the first defendant to furnish unconditional and irrevocable personal guarantees in favour of the existing/proposed loans of the banks and institutions obtained or to be obtained by the company. In short, the scheme contemplated the plaintiff's removal from the helm of the company and the first defendant's installation in the plaintiff's place and stead. In lieu of the plaintiff relinquishing his interest in the company the plaintiff's liabilities to the secured and other creditors of the company, in his personal capacity, were to be discharged. Such position appears plain from the sanctioned scheme and is the usual procedure where the erstwhile promoters are required to make way for new promoters at a token consideration for the controlling shareholding interest in the sick industrial company.

6. The plaintiff entered into a memorandum of understanding with the first defendant on October 17, 1989 which recorded that the first defendant would be the promoter of both the company and its wholly owned subsidiary Hanuman Cotton Mills Limited which was then under liquidation. The first defendant and his nominees were to buy the shares of the plaintiff and his nominees in the company at a rate of 40p. per share. Clause (b) of the memorandum of understanding provided as follows:

(b) If the personal guarantee of KKK is not released new shareholders of Kanoria Jute & Industries Ltd. alongwith SSP will collectively give a counter guarantee to KKK alongwith personal counter guarantee of SSP to indemnify against any loss or claims which KKK may incur due to this guarantee. Further till the guarantee is alive SSP and his nominee will give undertaking that they will not transfer the shares of Kanoria Jute & Industries Ltd. or create any lien on them without KKK's written prior approval. Alternatively release in writing from Bank of India all the personal guarantees of KKK on all advances and outstandings to Kanoria Jute & Industries Ltd.

Further KKK also reserves right to obtain necessary information as may be

required by him and SSP and his nominees undertake to supply those information to the best of their information till the guarantee is alive.

7. A deed of counter guarantee was executed by the first defendant on October 31, 1990 in favour of the plaintiff which recorded in its second recital that the United Bank of India had sanctioned bill discounting facilities to one Saket Exporters and Importers (India) Limited of bills duly accepted by the company. The dues of UBI were quantified at Rs. 30.56 lakh as at March 31, 1989. The third recital recognised that a personal guarantee had been executed by the plaintiff in favour of UBI for due repayment of money owed from the company. The document of October 31, 1990, in its first clause, recorded as follows:

1. In consideration of the premises, the Guarantor doth hereby agree to indemnify and keep KKK saved, defended, keep harmless and indemnified from and against the liability of Rs. 30.56 lacs and all other liabilities, actions, proceedings, loss damages, costs, charges and expenses which KKK may suffer or incur or be made liable for or for which any claim or demand may be raised on KKK by UBI under the aforesaid guarantee issued by KKK in favour of UBI in relation to supply of raw jute materials by the Company to KJIL.

8. The second clause of the counter guarantee asserted that such counter guarantee was to be irrevocable and unconditional and would remain in force till the guarantee of the plaintiff to UBI was discharged. The third clause spoke of the first defendant's obligation to pay to the plaintiff "any amount which the UBI may call upon (the plaintiff) to pay under his aforesaid guarantee to UBI notwithstanding any dispute or objection between the guarantor and UBI."

9. Prior to the memorandum of understanding of October 17, 1989 and, indeed, prior to the scheme of rehabilitation being sanctioned, UBI had instituted a suit before this Court in respect of the money due to it from the company. Following the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 coming into effect such suit stood transferred to the appropriate Debts Recovery Tribunal and has been renumbered as TA No. 227 of 1997. The plaintiff says in the petition that in December, 1997 it applied for dismissal of TA No. 227 of 1997 as against him by deleting his name and by impleading the first defendant in his place. Such petition was dismissed and despite an order of remand in the resultant application under Article 227 of the Constitution of India, on January 12, 1998 his plea stood rejected. The plaintiff says that the first defendant has neglected to relieve the plaintiff of his liabilities to the bank and has acted in breach of the obligation recognised by the sanctioned scheme and corroborated by the documents of October 17, 1989 and October 31, 1990.

10. The plaintiff insists that he is entitled to an order against the first defendant to put in the amount claimed by UBI so that upon UBI succeeding in its proceedings before the Debts Recovery Tribunal, such bank may be directed to the deposit to dissuade it to seek payment from the plaintiff. It was such case of the plaintiff that was accepted on March 28, 2008 and the first defendant was

called upon to deposit a sum of Rs. 25,70,220.78p. together with interest thereon at 16.5 per cent per annum reckoned from December 15, 1987 in the first suit and the first defendant was called upon to deposit a sum of Rs. 40,34,810.09p. together with interest thereon at 17.5 per cent per annum reckoned from April 4, 1986 in respect of the claim of Indian Bank in the second suit.

11. The first defendant says that the suits and the applications are premature as an indemnity holder may only sue upon being damnified. The ground on facts urged by the first defendant is that the wording of Clause (b) of the memorandum of understanding of October 17, 1989 should be seen as an indemnity in respect of a future claim and not one relating to a claim already made. Such contention appears to be unmeritorious, inter alia, as the sanctioned scheme puts a figure to the UBI claim which matches with the figure mentioned in the deed of counter guarantee. It does not stand to reason that the outgoing promoter of the company obtained an indemnity in respect of future liability or claim and left himself exposed to the claim made by the banks on account of the past dues of the company. Even if the figures were not mentioned, it is apparent from the terms of the scheme that the BIFR did not intend to throw the plaintiff out of the company and simultaneously make him liable for the past dues of the company to the extent of his personal guarantees. Such an order may not be inconceivable and may be made if the BIFR found the erstwhile management guilty of misappropriation of company funds or otherwise negligent in the conduct of the affairs of the referred company. But it is hardly the kind of order that would be left to be implied without being apparent from the scheme or the BIFR order sanctioning the scheme.

12. The first defendant's contention that the indemnity being the subject matter of either suit had been given for bank claims to be made subsequent to the execution of the memorandum of understanding of October 17, 1989 or for bank claims that may have been made subsequent to the execution of the relevant deeds of counter guarantee flies in the face of common sense. The deeds of counter guarantee (or indemnity) referred to the personal guarantees furnished by the plaintiff to either bank and the first defendant unequivocally professed to indemnify the plaintiff harmless against claims made in respect of such personal guarantees. For the first defendant to now suggest that the indemnity was not to cover the claims in the suits already filed would be dishonest and an attempt to wriggle out of his obligation to the plaintiff.

13. It is the legal issue that is raised by the first defendant which is more substantial. The first defendant says that the judgment relied upon by the plaintiff in the case reported at Profulla Kumar Basu Vs. Gopee Bullabh Sen and Another, is not the correct enunciation of the legal principle and refers to an earlier Single Bench judgment of this Court reported at Chand Bibi and Others Vs. Santoshkumar Pal, and a later Single Bench judgment reported at Chandmull Jain and Another Vs. General Assurance Society Ltd., in support of such

argument. The first defendant seeks to deliver the coup de grace by relying on a decision reported at Lala Shanti Swarup Vs. Munshi Singh and Others, The first defendant says that the judgment in the Profulla Kumar Basu case was an aberration as it was contrary to the view taken by a Division Bench of the Bombay High Court around the same time as will appear from the judgment reported at Shankar Nimbaji Shintre Vs. Laxman Supdu Shelke, .

14. In the Profulla Kumar Basu matter the plaintiff purchased certain shares on behalf of a person who subsequently relinquished his claim in the shares to the plaintiff and the plaintiff sold the shares to the first defendant in the suit. The first defendant applied for registration of the shares in his name which was rejected by the company. The company thereafter forfeited the shares following which the plaintiff applied to Court and the forfeiture was set aside. The plaintiff then entered into an agreement with the first defendant that the plaintiff would hold the shares in trust for the first defendant and the plaintiff would pass on the money due on the shares to the company if the first defendant made over the same to the plaintiff. The plaintiff agreed to receive the dividends on the shares and hand over the same to the first defendant and promised that the plaintiff would exercise voting rights according to the first defendant's directions. The company later sued the plaintiff for the unpaid calls whereupon the plaintiff give notice to the first defendant and called upon him to satisfy the company's claim. The first defendant refused to oblige resulting in the suit being brought for, inter alia, a declaration that the plaintiff was entitled to be indemnified by the first defendant against all calls and liabilities in respect of the said shares and the first defendant be directed to set aside or deposit such sum as would be sufficient to meet the company's claim against the plaintiff.

15. In such context a Single Judge of this Court held that Section 125 of the Contract Act was not exhaustive and did not set out all the reliefs which an indemnity holder may claim upon being sued. The following passage is appropriate:

...These equitable reliefs have been granted by the Courts in England and the English decisions have been accepted as being applicable to this country in respect of this branch of the law. In the very cases relied on by Mr. Ghose, namely, 41 All. 395 (Chiranjilal v. Naraini) and 37 Mad. 270 (Nallappa Reddi v. Vridhachala Reddi), the equitable principle laid down by the English Courts has been accepted and applied to contracts of indemnity in this country. In this connection I would also refer to the case in 56 Cal. 262 (Osman Jamal and Sons Ltd. v. Gopal Purshottam). I have no hesitation in following these cases and I propose to set out what I consider to be the equitable principle which will apply in a case like the present one. The principle appears to be this: When A has agreed to indemnify B against any loss or injury, B is entitled to have recourse to this indemnity and to call upon A to discharge his liability as soon as the loss or injury becomes imminent. B is not bound to wait until he actually suffers loss or injury. He may sue quia timet.

16. In the Chand Bibi decision the Court held that despite a demand made on the indemnity holder since no proceedings had been launched, no cause of action in respect of the indemnity had arisen. The reasoning appears from the following passage:

No cause of action under the second part of the contract has yet arisen. The plaintiffs have not yet had to pay anything in respect of the mortgage, though they have been called upon to do so. The mortgagee has not yet taken any proceedings on the mortgage, and the plaintiffs have not yet suffered any damage. The suit is premature so far as this cause of action is concerned.

17. In the Bombay judgment, on a construction of Section 124 of the Contract Act, it was held that under a contract of indemnity the cause of action arose when the damage which the indemnity intended to cover was suffered and a suit brought before the actual loss had accrued must be thrown out as premature.

18. In the context of a claim on account of a fire insurance policy it was held in the Chandmull case that "a contract of insurance, specially, fire insurance, is a contract of indemnity and when loss occurs it is for the assured to prove the actual amount of his loss." This is the solitary sentence from the judgment that the first defendant places.

19. The Supreme Court considered a contract of indemnity in the light of a point of limitation in the Shanti Swarup case. Paragraph 5 of the report needs to be noticed:

(5) It was then contended by Mr. B.C. Misra that even if there was a contract of indemnity the cause of action for the plaintiff arose on February 4, 1937 when the final mortgage decree was passed and not on February 25, 1943 when the plaintiff was dispossessed. It was argued that the suit must be held to be brought beyond the period of limitation and the plaintiff was not entitled to succeed. It is not possible for us to accept this argument as correct. The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in the sale-deed but also to relieve the vendors from the liability of the mortgages, and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damnified. The mere fact that a mortgage decree has been obtained against the plaintiff is not sufficient to put the statute in motion. In other words, the statute runs not when the event happens which cause the loss but on the actual damnification. "Where the covenant is to indemnify or save harmless, no action can be brought till some loss has arisen; so it is also where the covenant is to acquit from damage by reason of a bond or some particular thing; and in either case the proper plea is non damnificatus". - (1 Wms. Saund. 117, No. 1;). In Collinge v. Heywood (1839) 9 A and E 633, the plaintiff at the request of the defendant prosecuted an action, on receiving an undertaking to indemnify him from the said distress, actions, costs, damages, and expenses, which are now, or may be hereafter, commenced or otherwise

incurred by reason of the claim of the distraining party. The plaintiff incurred costs of the suit and his own attorney thereafter delivered him a bill on account of them. But it was held by the King's Bench that he was not damnified till he had paid the bill. In the present case, the damage occurred to the plaintiffs not on February 4, 1937 when the final mortgage decree was passed in favour of the mortgagees but on February 25, 1943 when the Collector directed the execution by the plaintiffs of a self-liquidating mortgage of three-fourths of the half shares of the property of which they were the owners. We are, therefore, of the opinion that, in the present case, time runs under Article 83 of the Limitation Act from February 25, 1943 when the plaintiffs were compelled to execute the self-liquidating mortgage for the purpose of satisfying the claim of the mortgagees.

20. In the Chand Bibi and the Bombay cases the Court reckoned the damage that the indemnity intended to cover had not occurred as neither had any proceedings been initiated nor had the plaintiff been required to make payment or actually suffered any loss. The indemnity in either case was construed to be triggered off upon proceedings being launched or the plaintiff actually suffering any loss. The circumstances surrounding the contract of indemnity in the present case are somewhat different.

21. The Chandmull case considered a fire insurance policy and compared such policy to a contract of indemnity. It goes without saying that a fire insurance policy cannot be invoked without there being any fire much like there being no smoke without fire.

22. The Supreme Court judgment has to be read on the basis of the facts and the question of law decided. The guarantor had suggested that the indemnified had brought the action beyond the period of limitation and the verdict was rendered in such context. The first defendant's suggestion that the law laid down at paragraph 5 of the report is the inflexible principle is probably without taking into account the discussion at the previous paragraph. The Supreme Court found that if a conveyance contained a covenant to pay off an encumbrance on the property sold, the failure of the purchaser to do so may give rise to different causes of action. First, the failure of the purchaser to discharge the encumbrance within the time provided expressly or by implication would entitle the promisee to bring an action. The period of limitation would start from the moment that the time to pay passed. In the second place, it is open to the vendor to bring a suit on the contract of indemnity if upon failure to discharge the encumbrance the vendor suffered a loss. The Supreme Court considered the matter to be covered by the second scenario and it was in such context that the decision was made.

23. None of the judgments that the first defendant cites detracts from the principle laid down in the Profulla Kumar Basu case. There is no legal principle that immediately comes to mind that would not permit a quia timet action to be brought on a contract of indemnity, though that is not to suggest that either suit here is a quia timet action.

24. In the present case there was a clean break of the plaintiff from the company. The BIFR scheme provided so. The memorandum of understanding of October 17, 1989 contemplated the plaintiff moving out from the company and the first defendant and his nominees coming in. The document of October 31, 1990 is not a stand-alone agreement. The first defendant indemnified the plaintiff "from and against the liability of Rs. 30.56 lacs and all other liabilities, actions, proceedings, loss, damages, costs, and expenses which (the plaintiff) may suffer or incur or be made liable for or for which any claim or demand may be raised on the plaintiff by UBI...." Under the third clause the first defendant promised to pay the plaintiff "any amount which the UBI may call upon" the plaintiff to pay "without any reference or recourse."

25. The contract of indemnity, in such circumstances, obliged the first defendant to take over the plaintiff's liability to UBI and, probably, apply to have himself impleaded in the bank's proceedings with an averment that he would be the person liable to pay such amount as would be adjudicated in the proceedings to be due from the plaintiff to the bank. He could have taken a cue from the plaintiff's application in the bank's recovery proceedings and volunteered to be impleaded and take over the responsibility. But he has waited in the wings to watch the plaintiff's attempt to ward off the bank. The first defendant bound himself, under the arrangement with the plaintiff, to take over the liability on the bank's demand on or notice to the plaintiff and there could be no better demand than the bank resisting the plaintiff's application to have the first defendant impleaded in the bank proceedings.

26. The first defendant is directed to have himself impleaded in UBI's TA No. 227 of 1997 within a period of four weeks from date and make a statement therein that the first defendant would be liable to discharge the bank's claim against the plaintiff subject to all the defence as to the maintainability of the action and the merits of the claim that the plaintiff or the first defendant may urge in such proceedings. The first defendant's liability in respect of such debt of the plaintiff owed to the bank is beyond question. The first defendant will also be entitled to seek a waiver of the bank's claim or a part thereof as he is liable only to the extent of the claim and if the bank chooses to give up the claim or the claim otherwise fails, the plaintiff can have no recourse against the first defendant for the quantum indicated in the guarantee.

27. The facts indicated above mostly relate to the first suit and GA No. 1669 of 1998 and the parties agree that apart from the quantum and irrelevant details, the issues involved in the second suit and GA No. 1670 of 1998 are identical. The relevant clause in the deed of counter guarantee in the matter relating to Indian Bank reads as the one in the UBI case and the first defendant has not cited any distinguishing feature in the Indian Bank matter that would require additional consideration.

28. There will, accordingly, be a direction on the first defendant to have himself impleaded in Indian Bank's TA No. 41 of 1997 within a period of four weeks from

date and make a statement therein that the first defendant would be liable to discharge the bank's claim against the plaintiff subject to all the defence as to the maintainability of the action and the merits of the claim that the plaintiff or the first defendant may urge in such proceedings. The first defendant's liability in respect of such debt of the plaintiff owed to the bank is beyond question. The first defendant will also be entitled to seek a waiver of the bank's claim or a part thereof as he is liable only to the extent of the claim and if the bank chooses to give up the claim or the claim otherwise fails, the plaintiff can have no recourse against the first defendant for the quantum indicated in the guarantee.

29. There is a second part to the present suits. In addition to the plaintiff requiring the first defendant to be held liable to meet the company's debt to the banks, the plaintiff has sought reliefs against the banks on the ground that the banks were parties to the proceedings before the BIFR and in view of the order of February 14, 1991 sanctioning the scheme of rehabilitation, the banks could no longer proceed against the original promoter or the original guarantor covering the company's dues.

30. This second part of the suit, prima facie, appears to be without basis in the context of the said Act of 1993. Section 31 of the said Act of 1993 bars the jurisdiction of civil courts in respect of all matters that are to be adjudicated upon by the tribunal set up thereunder. It is open for the plaintiff here to take, as a defence in the banks' proceedings, the point that the plaintiff makes in respect of the second part of the suit but no relief against the banks may be granted here as that falls within the exclusive domain of the Tribunal constituted under the 1993 Act. The fact that the banks are incidentally parties to the two suits would not alter the position as the plaintiff cannot indirectly obtain what would be impermissible in view of the bar under the 1993 Act.

31. By the order dated March 28, 2008 passed in the second suit (CS No. 162 of 1998) a further application in such suit being GA No. 1744 of 1999 was also disposed of which is reopened as the entirety of the order dated March 28, 2008 has been recalled. In such application the plaintiff seeks an order in the nature of attachment before judgment. But no case in support of such high order is made out.

32. GA No. 1804 of 2008 and GA No. 1806 of 2008 stand allowed without costs. Upon GA No. 1669 of 1998 and GA No. 1670 of 1998 reviving following the orders dated March 28, 2008 being recalled, such petitions are now disposed of as above. GA No. 1744 of 1999 is dismissed without any order as to costs. The plaintiff will be entitled to costs of 600 GMs each in GA No. 1669 of 1998 and GA No. 1670 of 1998. The two contempt petitions being CC No. 123 of 2008 and CC No. 124 of 2008 are dismissed without any order as to costs.

33. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Later:

34. The first defendant seeks a stay of operation of the orders made on GA No. 1669 of 1998 and GA No. 1670 of 1998 which is refused.