

**(1980) 01 KL CK 0014**  
**In the High Court Of Kerala**  
**Case No : A.S. No. 138 of 1975**

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|---------------------------------------------------|------------|
| Kerala Electrical and Allied Engineering Co. Ltd. | APPELLANT  |
| Vs                                                |            |
| Canara Bank and Others                            | RESPONDENT |

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**Date of Decision :** 25-01-1980

**Acts Referred:**

Contract Act, 1872 — Section 28

**Citation :** AIR 1980 Ker 151 : (1980) 1 ILR (Ker) 516

**Hon'ble Judges :** V. Balakrishna Eradi, C.J.;K.K. Narendran, J

**Bench :** Division Bench

**Advocate :** K.P. Radhakrishna Menon and K.K. Ravindranath, for the Appellant;  
T.R. Govinda Warriyar and K. Ramakumar, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Narendran, J.—The plaintiff is the appellant. The facts are stark and simple. The 3rd defendant, the proprietor of a business concern at Dindigul, entered into a contract with the plaintiff-company on 17-1-1970 for the purchase of 39 motors. On 16-1-1970 the 2nd defendant, Manager of the 1st defendant-Bank at Nattam, executed a bank guarantee (Ext. A1) to the plaintiff. As per Ext. A1, the 2nd defendant agreed on behalf of the 1st defendant-Bank that if the plaintiff supplied motors and other electrical appliances to the 3rd defendant on credit, the Bank will be responsible to the plaintiff up to Rs. 15,000/- of the amounts, if any, found due from the 3rd defendant. Ext. A1 was a continuing guarantee for a period of one year. As per the contract, on 17-1-1970 the plaintiff supplied to the 3rd defendant 39 motors. The bill amount of 22 motors was duly paid. But the bill for the remaining 17 motors was not paid. The plaintiff made a demand to the 2nd defendant and an amount of Rs. 3000/- was paid on 18-1-1971. On 30-3-1971 the plaintiff issued a lawyer notice to the 2nd defendant. But the 2nd defendant repudiated the liability. Thereupon, the plaintiff filed the suit on 4-10-1971 for realisation of the balance due. The 3rd defendant remained ex parte and defendants 1 and 2 contested the suit. The main contention in the

written statement filed was that no claim could be made against the 2nd defendant under the bank guarantee after 16-7-1971 as the plaintiff lost his rights under the guarantee as he did not institute a suit within a period of 6 months from the date of the expiry of the period of guarantee. A contention that the 2nd defendant was not competent to execute the bank guarantee on behalf of the 1st defendant-Bank was also taken in the written Statement. The trial court found that since the suit was filed after one year and 6 months from the date of Ext. Al bank guarantee, the plaintiff lost all rights under Ext. Al and hence could not enforce the claim against defendants 1 and 2. The trial court however found the 3rd defendant liable for the plaint claim and gave a decree against the 3rd defendant and his assets. It is the above judgment and decree of the trial court that is challenged by the plaintiff in this appeal.

2. Clause 6 of Ext. Al bank guarantee dated 16-1-1970 reads:

"This guarantee will remain in force for a period of one year from the date hereof and unless a suit or action to enforce claim under the guarantee is filed against us within six months from the date of expiry of (the guarantee) all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liability thereunder."

The short point that arises for consideration is whether the condition in Clause 6 that a suit or action to enforce claims under Ext. Al is to be filed within 6 months from the date of expiry of the guarantee is hit by Section 28 of the Indian Contract Act, 1872.

3. Section 28 of the Indian Contract Act, 1872 reads:

"28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Section 28 makes two kinds of agreements void. What we are concerned in this case is the second of the two kinds, namely, an agreement which limits the time within which a party thereto may enforce his rights under or in respect of a contract by the usual legal proceedings in the ordinary tribunals. It is the limiting of the time within which the rights are to be enforced that is made void. So, it goes without saying that rights to be enforced under the contract should continue to exist even beyond the shorter period agreed for enforcing those rights, to make such an agreement void under the section. If, for example, beyond the shorter period agreed upon the rights under the contract cannot be kept alive, no limiting of the time to enforce the rights under the contract arises and hence the agreement putting a time limit to sue will not be hit by Section 28. So, a condition in a contract that the rights thereunder accruing to a party will be forfeited or released if he does not sue within a time limit specified therein will not offend Section 28. This is because, as per the contract itself, the rights accrued to the party cease to exist by the expiry of the limited period provided

for in the contract. In such a case, in effect, there is no limiting of the time to sue. So, an agreement which provides for a simultaneous relinquishment of rights accrued and the remedy to sue for them will not be hit by Section 28. But, at the same time, an agreement relinquishing the remedy only, by providing that if a suit is to be filed that should be filed within a time limit--the time limit being shorter than the period of limitation under the Limitation Act -- will be hit by Section 28. This is because the rights accrued continue even beyond the time limit as the same is not extinguished. In such a case, there is really a limiting of the time to sue prescribed by the Limitation Act. In the instant case, it is clear from Clause 6 of Ext. A1 guarantee extracted earlier in this judgment that the liability of the bank will be alive only for a period of six months after the expiry of the period of duration of the guarantee. It is also specified in Clause 6 that the plaintiff's rights under the guarantee will also be forfeited by the end of that six months. There is an extinction of the right of the plaintiff under the contract and a discharge of the defendants from liability. So, the time limit imposed in Clause 6 cannot be hit by Section 28 of the Contract Act. The findings of the trial court are perfectly legal and valid.

4. Incoming to the above conclusions we find support in certain decisions cited at the bar which we will presently refer to. In *Haji Shakoor Gany Vs. H.E. Hinde and Co. Ltd.*, the High Court of Bombay considered a contention whether a condition in a bill of lading that the claim if not brought within one year of delivery will be barred, will be hit by Section 28 of the Indian Contract Act, 1872. The suit in that case was brought after the one year period specified in the condition. The court held:

"..... the effect of the incorporation of Article 3, Clause 6, into the bills of lading in this case is that the rights of the holders have been extinguished in respect of the claim made in this case. As therefore the plaintiffs have no rights to enforce, there is in my view no question of the remedy being barred, and Section 28, Contract Act does not assist the plaintiffs."

In *Dawood Tar Mahomed Bros. v. Queensland Ins. Co.* AIR 1949 Cal 390 a clause in an Insurance Policy that the company will not be liable for loss after expiry of 12 months from happening of loss, came up for consideration. The Court held:

"The plaintiff is not limited as to the time within which he may bring a suit; the restriction is on the time during which the company will accept liability for loss."

In *Ruby General Insurance Co. Ltd. v. Bharat Bank Ltd.* AIR 1950 P&H 352 it is held:

"It is open to any two parties to agree that the promisor would only be liable if he is informed of the indemnification within the stipulated period, and there seems to be a great deal of sense in it particularly in the case of fire insurance or insurance against accident where the liability to the extent of the damage caused, when the matters are fresh, can be measured with a certain amount of accuracy. Lapse of time in such cases may result in all kinds of claims which are

not capable of determination with any amount of exactitude and when memories of men may become rather hazy."

In the above judgment it is further said:

"..... such a clause did not defeat any provision of law, it was not opposed to public policy and it neither contravened Section 28, Contract Act, nor Article 86, Limitation Act."

In *Pearl Insurance Co. Vs. Atma Ram*, a clause in an insurance policy which said that in no case whatever shall the company be liable for any loss or damage after the expiry of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration, came up for consideration. Repelling the contention that the clause was rendered void by Section 28 of the Indian Contract Act, 1872, the Full Bench said:

"As the clause does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain alive it is not hit by the provisions of Section 28 of the Contract Act."

In *State of Maharashtra Vs. Dr. M.N. Kaul* (Deceased by his Legal Representatives) and Another, the question that arose for consideration was whether a guarantor can be made liable beyond the terms of his engagement. The Supreme Court held:

"Under (i) time for enforcement was available till Apr. 15, 1965. Under (ii) (a) as the guarantee was executed on Mar. 23, 1962 one year expired on Mar. 23, 1963. Thus the last date for enforcement of the guarantee was Apr. 15, 1965. An attempt was made so to enforce it and the guarantee was not available thereafter. The guarantee in this form was accepted by the party concerned as well as this Court and it was impossible to ignore the time limit which was an integral part of the guarantee. The contention of the Bank that the guarantee was no longer enforceable was, therefore, right."

5. In the result, the appeal is dismissed, but, in the circumstances, of the case, without costs.