
(2015) 12 DEL CK 0090

In the Delhi High Court

Case No : RFA 56/2014

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

Anuj Kumar Tyagi

RESPONDENT

Date of Decision : 17-12-2015

Acts Referred:

Contract Act, 1872 — Section 73
Limitation Act, 1963 — Section 3

Citation : (2016) 1 AD 531

Hon'ble Judges : Rajiv Shakdher, J.

Bench : Single Bench

Advocate : P. Rungta and Prashant Singh, Advocates, for the Appellant

Final Decision : Disposed Off

Judgement

Rajiv Shakdher, J.—This is an appeal preferred against the judgment and decree dated 16.09.2013, passed by the learned Additional District Judge (In short the ADJ). By virtue of the impugned judgement, the appellant's suit for recovery has been dismissed on the sole ground that it is barred by limitation.

1.1 The learned ADJ has come to this conclusion based on a perusal of the statement of accounts (Ex. PW1/9) filed by the appellant, which is dated 31.10.2009. As per the said statement of account, the last transaction with the respondent took place on 11.08.2008. The learned ADJ thus, concluded, that since, the suit was filed on 20.07.2012, it was "hopelessly" barred by limitation.

1.2 Since the respondent, during the course of the proceedings, chose not to appear before the trial court, he was proceeded ex parte, after the appellant's witness had been partially cross-examined.

1.3 A perusal of the impugned judgement shows that the trial court has taken recourse to Section 3 of the Limitation Act, 1963 (in short the 1963 Act) in deciding the issue pertaining to limitation.

2. The appellant being aggrieved, has approached this court by way of the instant appeal.

3. In order to adjudicate upon the appeal, the following brief facts are required to be noticed.

3.1 The respondent had approached ICICI Bank Ltd. in July, 2007, for grant of credit facility to purchase a TATA INDICA Vehicle. The respondent's request was considered and, accordingly, on 13.07.2007, he was sanctioned a loan in the sum of Rs. 3.28 lacs. The respondent, in this behalf, executed a credit facility application form, on even date i.e. 13.07.2007 (hereafter referred to as the loan agreement).

3.2 As per the loan agreement, the respondent was required to repay the sum borrowed, in 59 Equated Monthly Instalments (EMIs), amounting to Rs. 7544/- each. The first due date, as stipulated in the loan agreement, was 10.08.2007, with the date of maturity indicated as 10.06.2012.

3.3 The repayment clause contained in the loan agreement provided that the due date would be the tenth day of each successive month. The respondent also paid one instalment as an advance, which also amounted to a sum of Rs. 7544/-. Additional security in the form of four post dated cheques, was also given. The respondent also hypothecated the subject vehicle in favour of ICICI Bank Ltd., by executing an unattested deed of hypothecation. Furthermore, an irrevocable power of attorney was also executed in favour of ICICI Bank Ltd.

3.4 It appears that the loan account became irregular, as the respondent failed to adhere to the financial discipline in the payment of the EMIs. Since, the respondent, failed to regularize the account, a loan recall-cum-demand notice dated 26.06.2012 was issued to him, which was posted on 29.06.2012. By virtue of the said recall-cum-demand notice, the loan agreement was terminated and the respondent was called upon to repay the entire outstanding amount, and handover possession of the subject vehicle.

3.5 As, the respondent, failed to oblige, a suit for recovery was instituted against him. It is pertinent to note, that in the interregnum, ICICI Bank Ltd. had assigned the loan to an entity by the name of Asset Reconstruction Company (India) Ltd., which in turn, assigned the loan account, pertaining to the respondent vide assignment deed dated 31.12.2009, to the appellant herein.

3.6 It is, therefore, in this background that the appellant instituted the instant suit against the respondent, on 20.07.2012. It appears, that the respondent, despite being served in the suit, initially did not file his written statement, which resulted in his defence being struck out vide order dated 11.10.2012. On an application being moved, the said order was recalled and the respondent was permitted to file a written statement, subject to his surrendering the vehicle and paying a cost of Rs. 5,000/-. This direction was issued by the trial court vide order dated 20.10.2012.

3.7 The record shows that the trial court framed the following issues in the matter vide order dated 21.11.2012:

"..1. Whether the suit is barred by limitation? OPD

2. Whether plaintiff is entitled for a decree of the suit amount? OPP

3. Whether plaintiff is entitled for pendente lite and future interest on decree amount? If so, at what rate? OPP

4. Relief..."

3.8 The appellant cited one witness, namely, Mr. Vipin Goswami (PW1). Mr. Vipin Goswami (PW1), was partially cross-examined by the respondent. Since the respondent chose, albeit midway, not to participate in the trial of the suit, vide order dated 22.08.2013, he was proceeded ex-parte.

3.9 The learned ADJ, however, decided issue No. 1, pertaining to limitation, in favour of the respondent, and thus, logically, decided issue Nos. 2 to 4 also against the appellant.

4. A perusal of the written statement would show that the respondent had, inter alia, contended that the suit was barred by limitation under the provisions of Article 37 of the 1963 Act, as the last default took place on 13.08.2008.

4.1 However, before this court, despite service, the respondent has not entered appearance. The respondent was, therefore, proceeded ex parte vide order dated 18.08.2015.

5. Arguments on behalf of the appellant have been advanced by Ms Rungta. Learned counsel has submitted that the learned ADJ has erred in dismissing the suit on the ground of limitation. It is the learned counsel's submission that since the last EMI was payable on 10.06.2012, the limitation for filing a suit for recovery would commence only from that date. The learned counsel, in support of this submission, relied upon Article 55 of the 1963 Act.

6. Therefore, in order to consider the submission of the learned counsel for the appellant, one would have to advert to Article 55 of the 1963 Act., The said article reads as follows:

7. It is pertinent to note that Article 55 is the last Article in Part II of the Schedule, which is titled: Suit Relating to Contracts. It is in that sense a residuary Article in Part II. This aspect is also clear upon a bare perusal of Article 55, which provides that in a suit for "compensation" for breach of any contract, express or implied, not herein specifically provided for the limitation would be 3 years.

7.1 As noted above, under Article 55 period of limitation provided is 3 years, which, commences from the date when the contract is broken, or (where there are successive breaches), when the breach, in respect of which the suit is instituted, occurs, or (where the breach is continuing) when it ceases.

7.2 Clearly, to trigger the provisions of Article 55; firstly, the action instituted should be a suit for "compensation" for breach of contract, which may be express or implied. Secondly, it should not be an action qua which limitation is provided in other Articles of the same Part of the Schedule to the 1963 Act. Therefore, one has to examine, as to whether the term "compensation" would include only an action for damages, which involves recovery of unliquidated damages or, would it also cover a claim for recovering debt, that is, a sum certain. Apart from this, one would also have to examine whether the action can be covered under any other Article in Part II falling in First Division of the Schedule.

8. Taking the second aspect first, the only Articles which, perhaps, would have come in the way, were Article 19 and 21 of Part II to the Schedule to the 1963 Act. The said Articles are extracted hereinbelow for the sake of convenience:

9. A closer scrutiny of Article 19 would show that it relates to an action for recovery of money which has been lent (i.e. loaned) without prescription of any period of repayment. Therefore, Article 19 would relate to those loans which are repayable forthwith, that is, as soon as they are disbursed. 9.1 Article 21, on the other hand, would cover that transaction where money is lent under an agreement which is payable on demand. As noticed in the case of Jailebdeen Vs. Mohammed Basheer, by the Kerala High Court, the expression "on demand" is used in a legal sense, that is, the amount is payable "forthwith and without demand". The other possible way in which the expression "on demand" can be understood, is that the demand has to be made within a period of three years of the loan being made. Article 19 and Article 21, in that sense, overlap and, therefore, appear to have no applicability to a loan agreement where time is fixed for repayment.

10. This brings me to the other aspect, as to whether the word compensation would also include an action for recovery i.e. a sum certain. In Jailebdeen v. Mohammed Basheer's case, which is referred to hereinabove, dealt with this aspect of the matter in some detail.

10.1 In that case the defendant had availed of a loan from the State Bank of India. On the defendant's failure to repay the amount borrowed, an action for recovery of the amount was instituted. The suit was decreed. Pursuant to the decree being passed, revenue recovery proceedings were initiated against the defendant. In those proceedings, the defendant sought and obtained a leeway for repayment of the decretal amount in twelve instalments at the rate of Rs. 6000/-. Since, the defendant, failed to comply with the order passed in his favour, the revenue proceedings were revived. At the request of the defendant, once again, the revenue proceedings were deferred on the condition that he would pay the money in six instalments, with interest, on demand, at the stage of payment of the sixth instalment.

10.2 The plaintiff agreed to this proposal based on an obligation undertaken by the defendant that he would repay the amount with interest, albeit on demand,

after the remittance of the sixth instalment. Since the defendant failed to discharge his obligation a suit for recovery was instituted, in which, the defendant took the plea of limitation.

10.3 While discussing the plea of limitation, the Kerala High Court examined the scope of Article 55 in the context of Article 19 and 21. The court concluded that Article 19 and 21 had no application to the case at hand, and that Article 55 would operate in the facts of that case. Importantly, qua the aspect as to whether the term compensation would include a suit for debt based upon a breach of contract, the court made the following observations in paragraph 15. For the sake of convenience the same are extracted hereinbelow:

"15. The wording of Article 55 of the present Act and that of Article 115 of the old Act are identical. The basis of the above argument of the learned counsel for the respondent is that the word "compensation" may not comprehend the concept of debt and as such a suit for a debt based upon a breach of contract as in this case may not come within the purview of Article 55 of the Act (Article 115 of the old Act). Dealing with the term compensation used in Article 115 , Mookerjee, J. has made the following observations in the decision reported in Mahamed Mozaharal Ahad Vs. Mahamed Azimaddin Bhuinya--> :

"..... the term used in Article 115 and Article 116 is not damages but compensation, which also occurs in Section 73 of the Indian Contract Act. As Lord Esher observed in *Dixon v. Calcraft* (1892) 1 QB 458 the expression compensation is not ordinarily used as an equivalent to damages, although as remarked by Fry, L.J. in *Skinner's Co. v. Knight* (1891) 2 QB 542 compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation as pointed out in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand; constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term compensation etymologically suggest the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent..... "

It has been held in *Rameshwar Mandal Vs. Ram Chand Roy and Another*, that a suit on a verbal agreement to repay on a specified date is governed by Article 115 of the old Act. It was also held in that decision that neither Article 57 nor Article 59 of the old Act (corresponding to Articles 19 and 21 of the new Act) would apply in such cases. It is interesting to note that Beverley, J. expressed in so many words his doubt as to whether the suit in that case is properly one for compensation and found himself convinced that it was so on the basis of the meaning given to the word compensation in *Nobocoomar Mookhopadhaya Vs. Siru Mullick*, which was quoted with approval in that decision. In series of decisions reported in *Maneklal Mansukhbhai Vs. The Suryapur Mills Co. Ltd.*, ; *Ram Rachhya Singh Thakur and Others Vs. Raghunath Prasad Misser and*

Others, ; Ram Raghubir v. United Refineries Ltd., , AIR 1931 Rangoon 139 ; Fate Chand Bokaria and Others Vs. Nagendra Kishore Roy Choudhury and Others, and Ajitkumar Basu Thakur Vs. Chairman of the Commissioners of Dacca Municipality, , it has been held that even suit for debts would be governed by this Article (Article 115 of the old Act) and the word compensation would comprehend a money claim made on the basis of a breach of contract. The discussion contained in the decisions dealing with Article 115 of the old Act and Article 55 of the new Act would clearly show that the word "compensation for breach of contract" would comprehend also a claim for money due under a contract alleging breach of contract. In this view, it is clear that Article 55 may properly be considered as the Article which would apply to the suit in question as the loan in this case was made on the basis of an agreement specifying a fixed time for its repayment."

11. To my mind, Article 55 could have possibly been made applicable, to this case as well, as the loan agreement had a tenure extending from 10.08.2007 till 10.06.2012, but for one aspect of the matter which I have adverted to in the following paragraph. In so far as Article 55 is concerned, the fact that that the respondent failed to adhere to the schedule of repayment, would not deprive the right of the appellant to treat each breach as a fresh cause of action. The last breach, quite clearly, in the instant case, would have occurred only in May-June, 2012, assuming the last instalment was to be adjusted by virtue of the respondent having paid an initial amount of Rs. 7544/- as an advance. The suit, admittedly, was instituted on 20.07.2012.

12. Having said so, there is, as stated above, another aspect of the matter, as regards this case, which is that, under the loan agreement, the appellant, in terms of clause 481, is conferred with the power, in an event of a default, to give a notice in writing to the borrower(s) [in this case the respondent], without prejudice to other rights and remedies that may be available to it under the said agreement or any other transaction document or otherwise. By way of such a notice, the appellant is empowered, inter alia, to call upon the borrower(s) [in this case the respondent], to pay all dues in respect of the facility given. In addition, the appellant is also empowered to declare the security, if any created, enforceable.

12.1 Quite clearly, in terms of clause 48, the appellant had discretion to decide when to trigger the recall of loan upon occurrence of an event of default. The fact that EMIs were to be paid over a period spanning from 10.08.2007 till 10.06.2012, gave the appellant, under clause 48 the right to treat any of the defaulted EMI's (that is, after the due date for its payment had passed) as an event of default. [See clause 46(i)2 and clause 183 of ICICI Bank (All India) Standard Terms and Conditions].

12.2 Once, such an event of default occurred, the appellant under clause 48 could set in motion the process for recall of the loan. The commencement of the period of limitation, would thus be triggered, once, the said notice was issued,

which in turn would relate to the defaulted EMI, that the appellant, chooses to treat, as an event of default. In the instant case, as noticed above, the recall-cum-demand notice dated 26.06.2012 was dispatched to the respondent, on 29.06.2012. Quite clearly, the period of limitation, would, relate back to last defaulted EMI as, vide the aforementioned notice the appellant gave a final opportunity to the respondent to repay the amount, which was due and payable on the date of notice. The right to sue would occur, in my opinion, each time when, there is a default in payment of an EMI on its due date. The appellant in terms of clause 48 is, however, at liberty to take a decision to treat the non-payment of a particular EMI, as an event of default. The period of limitation would, though, commence from the date of the last defaulted EMI, which is made the subject matter of the notice and not from the date of the notice itself. Therefore, in such a situation, Article 113 of the 1963 Act would become applicable as against Article 55.

13. The trial court while dismissing the suit has not alluded to any specific Article of the 1963 Act. Recourse has been taken by the trial court to Section 3 of the 1963 Act. Section 3, inter alia, only empowers a court to dismiss a suit which is barred by limitation even if limitation is not set up as a defence. The section by itself could not have helped the trial court in coming to the conclusion as to what should be the period of limitation in a case such as this. Furthermore, the reference to Article 37 in the written statement is also of no relevance as the appellant did not sue either on a promissory note or a bond.

14. Having regard to the above, the appeal is allowed and, consequently, the impugned judgement is set aside. The learned trial Judge will thus proceed to decide the remaining issues i.e. issue No. 2, 3 & 4 in line with the evidence and the relevant provisions of law. The trial court will issue fresh notice to the respondent before it recommences proceedings in the matter.

15. The appeal is, accordingly, disposed of. There shall be, however, no orders as to cost.

148. On the happening of any of the Events of Default, ICICI Bank may, by a notice in writing to the borrower/s and without prejudice to the rights and remedies available to ICICI Bank under the Loan Terms or any other Transaction Document or otherwise: (a) call upon the Borrower/s to pay all the Borrower/s? Dues in respect of the Facility and otherwise, and/or (b) declare the security, if any, created in terms of/pursuant to the Loan Terms and/or the other Transaction Documents to be enforceable, and ICICI Bank, its representatives and/or such other person in favour of whom such security or any part thereof is created shall have, inter alia, the following rights (notwithstanding anything to the contrary in the Loan Terms and/or the other Transaction Documents and irrespective of whether the entire Facility or Borrower/s? Dues has/have been realised) namely:--i. to enter upon and take possession of the Asset(s) in accordance with the provisions of the Loan Terms; and/or

ii. to transfer or deal with the Asset(s) by way of lease, leave and license, sale or otherwise in accordance with the provisions of the Loan Terms.

246. The following acts, as set out below, shall each constitute an "Event of Default" by the Borrower/s for the purposes of the Loan Terms :

(i) Default (including, but not limited to any payment default) has occurred in the performance of any covenant, condition or agreement on the part of the Borrower/s under the Loan Terms or on the part of any other person.

318. If the Borrower/s default/s in making payment of any Instalment/s or any other amounts comprising the Borrower/s Dues to ICICI Bank to the respective Due Date(s), the Borrower/s shall be liable to pay further interest at the rate specified in the Application Form (plus application interest tax or other statutory levy) on all such outstanding/unpaid amounts from the relevant Due Date till the date of payment of such entire amount. Such further interest shall be in addition to any other charges, which the Borrower/s is liable to pay to ICICI Bank in terms of the Loan Terms.