

(2006) 04 CAL CK 0012

In the Calcutta High Court

Case No : G.A. No. 2773 of 2005 and C.S. No. 90 of 1997

M.M.T.C. Ltd.

APPELLANT

Vs

Bombay Art Jewellers and Others

RESPONDENT

Date of Decision : 13-04-2006

Acts Referred:

Limitation Act, 1963 — Section 15, 15(1)

Citation : AIR 2006 Cal 169

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—This motion has been taken out for judgment, upon admission against the defendant No. 2 for a sum of Rs. 90 lacs along with interest at the rate of 22 per cent. per annum amounting to Rs. 2,50,20,231 aggregating to Rs. 3,40,02,231. The suit has been filed claiming various reliefs namely amongst other : Declaration that the plaintiff is the owner and is entitled to get immediate delivery of the 50 kgs of gold particulars whereof will be appearing from Annexure (d) hereof and/or jewelleries made therefrom.

2. Declaration that the purported deeds of hypothecation dated 7th November, 1991 and 24th August, 1992 purportedly executed by the second defendant in favour of the first defendant is null and void and of no effect.

3. Decree directing that the said two purported deeds of hypothecation be delivered up and cancelled.

4. Decree directing the defendants to return 50 kgs. pure gold and/or gold jewelleries made therefrom to the plaintiff. In the alternative a decree against the defendants for such sum as this Hon'ble Court may deem fit and proper upon enquiry being the value of the said 50 kgs. of gold and/ or jewelleries made therefrom, on the date of passing of the said decree if the return of the same cannot be had.

5. Decree for Rs. 4.47.70.663 against the first defendant. Decree for Rs. 99.68,884.

6. The details of the case made out in the plaint is not required to be stated for the purpose of disposal of this application. However, the short fact relates to this application is slated hereunder .

7. Admittedly the plaintiff had given gold loan of 90 kgs. to the defendant No. 1 under the Central Government policy. Accordingly the plaintiff imported under the Government policy from the foreign countries of the said quantity of gold and it was handed over to the defendant No. 1 with export obligation within certain time and return of gold given on loan to the plaintiff after export obligation is complete. The defendant furnished bank guarantee for discharge of performance of export obligation within stipulated period and this bank guarantee was furnished by the defendant No. 2. The following was the export obligation of the defendant No. 1 and the guarantee given for performance thereof by the defendant No. 2.

M/s. Bombay Art. Jewellers and United Bank of India hereby jointly and severally undertake that the jewellerys manufactured out of such gold advanced by MMTC Ltd. shall be exported within a maximum period of 120 days from the date of advance of such extended period as it may be pleaded to allow after purchasing equivalent quantity from MMTC and paying for the same in full as per terms and conditions contained in REP Circular No. 22/88, dated June 15, 1988 but in the event of default or upon demand, we United Bank of India (Overseas Branch) No. 15C, Hemanta Basu Sarani, Calcutta, hereof agreed to pay you a sum up to Rs. 90 lacs within a period of 180 days from the date hereof. As such demand made on the Bank shall be conclusive as regards the amount due and payable by bank under this guarantee, however, our liability under this guarantee shall be restricted in an amount not exceeding Rs. 90 lacs.

We undertake to pay any money so demanded notwithstanding any dispute or disputes raised by M/s. Bombay Art Jewellers in any suit or proceedings pending before any Court or Tribunal relating thereto. Our liability under this premises being absolute and unequivocal. The payment so made by us under this guarantee shall be a valid discharge, or our liability for payment thereunder and that M/s. Bombay Art Jewellers shall have no claim against us for making such payment.

8. The defendant No. 1 admittedly failed and neglected to discharge the aforesaid obligation for various reasons. It appears from the plaint that Customs Authority raided the business place of the defendant No.] and seized the aforesaid quantity of gold which was taken on loan from the plaintiff. The action of search and seizure was challenged by the defendant No. 1 in the writ jurisdiction. In the writ jurisdiction several orders were passed. The learned trial Judge refused to grant any interim relief to the defendant No. 1. However, appeal Court granted relief allowing the petitioner to discharge his export obligation and

appointed Special Officer for taking possession of the seized gold.

9. In view of the failure as above the plaintiff by a letter dated 28th December, 1992 invoked the said bank guarantee as the export obligation was not discharged. But the payment of such invocation could not be received by the plaintiff as the Hon"ble Appeal Court in the writ jurisdiction by an order dated 18th March. 1993 directed the plaintiff not to enforce the Bank guarantee until the matter is finally disposed of by the first Court. On 27th March. 1993 the said writ petition came up for hearing before the learned single Judge. It was further ordered by the learned single Judge that neither the plaintiff (MMTC) will receive nor take any step for filing a suit or otherwise against the bank to recover any money from the bank. In the said judgment and order dated 27th September, 1993 it is specifically recorded and observed amongst others that bank guarantee had been invoked by the plaintiff and the bank concerned agrees that such invocation was in fact made, and does not dispute the validity thereof. However, by virtue of the order of the appeal Court the bank had been restrained from making any payment under the bank guarantee to the MMTC, and MMTC was restrained from recovering the amount covered by the bank guarantee. The bank guarantee having already been invoked question of renewing the same does not arise.

10. The said writ petition was finally disposed of by the learned single Judge by an order dated 25th April, 1996. Liberty was given to the plaintiff to take action for enforcement of bank guarantee and for recovery of gold given in terms of REP Circular 22/88 dated 25th June, 1988. Defendant No. 1 herein preferred appeal from the said order but the same was dismissed. Thereafter the present suit has been filed in the year 1997. Meanwhile the bank also initiated proceeding before the learned Debt Recovery Tribunal in or about 23rd August, 1995 claiming various reliefs against the defendant No. 1 herein including the claim of the bank guarantee amount. The plaintiff herein also was added as party respondent without any notice whatsoever.

11. It further appears that the bank also demanded of the defendant No. 1 for making payment and/or securing the claim of the bank guarantee amount.

12. The application was made for obtaining various reliefs relating to possession of the said Gold. However, that is not relevant here. The plaintiff could not proceed against Bank filing any application of this nature because of the order of the Court whereby the dispute was referred to High Power Committee, in view of the Supreme Court Judgment. The High Power Committee failed to resolve the dispute and finally released the parties to proceed in the suit for resolution of dispute.

13. On the aforesaid factual background Mr. Shibaji Sen learned Advocate submits that the defendant No. 2 has made admission in writing by a letter as stated above and also admitted in their pleading filed before the learned Debt Recovery Tribunal for making payment of the aforesaid amount of bank

guarantee. The plaintiff neither filed suit earlier nor enforced the claim of bank guarantee in view of the restrain order passed by the Writ Court as stated above. As such the plea of limitation taken by the defendant No. 2 is not tenable in view of the provision of Section 15 of the Limitation Act, 1963.

14. Moreover, legality and validity of the invocation of bank guarantee cannot be raised now as it has been observed judicially factum of invocation of bank guarantee and further scrutinized validity and legality of enforcement of the same. In view of the judicial observation and findings which still remained unchallenged and further submission made as above this Court should pronounce the judgment as claimed herein. In support of his submission he has relied on two decisions of the Supreme Court Bank of Bihar Ltd. Vs. Mahabir Lal and Others, and State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, .

15. Mr. Dhandhanial learned Counsel for the defendant No. 2 submits that the claim is barred by limitation as invocation was made in 1992 whereas the suit has been filed in 1997 almost after 5 years and he further contends that the invocation of bank guarantee has not been done in terms of the Clause of the bank guarantee. He elucidated this submission that the bank guarantee could not be enforced unless there is complaint of suffering loss and damages on account of failure of the defendant No. 1. In the letter of invocation there is no such complaint of suffering loss and damages,

16. It is true judicial observation is there but then claim in connection with bank guarantee amount will ripen only when there is lawful invocation of bank guarantee if the foundation of the case is without any strength observation of judicial findings in collateral proceedings is of no value. As such this claim should be dismissed.

17. I have carefully considered contention and rival contention of the parties and the documents placed by them. In the pleadings as well as in the argument Mr. Dhandhanial appearing for the bank has taken plea of limitation. I do not think this claim is barred by limitation for the suit, so far this claim is concerned, was filed on 27th March 1997, and the bank guarantee was invoked on 28th December, 1992 apparently the time lag is less than 5 years. From the documents I find the judgment and order dated 18th March, 1993 of the Appeal Court, plaintiff was restrained from making any claim for enforcing the bank guarantee and thereafter by an order dated 27th September, 1993 learned single Judge was accepted the said Appeal Court's order till the disposal of the writ petition being Matter No. 3697/92. On 25th April 1996 the said writ petition was dismissed as such under the provisions of Section 15(1) of the Limitation Act, 1963 the period during which order of injunction was in operation for the purpose of computation of limitation has to be excluded, naturally from 18th March, 1993 till 25th April, 1996 nearly over more than 3 years has to be excluded. If this period is excluded the filing of the suit is perfectly within the period of limitation of the period of 3 years. In this context provision of Section 15(1) of the said Act is quoted hereunder.

Exclusion of time in certain other cases : In computing the period of limitation for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be exercised.

18. Next objection taken by the Bank is that the invocation of the bank guarantee not in accordance with the terms of the bank guarantee, as there has been no statement as required by the bank guarantee that the plaintiff has suffered loss and damages by reason of the breach by the defendant No. 1. In my view as rightly contended by Mr. Sen the validity and legality of the invocation of bank guarantee is no longer res-integra by reason of the fact that in the judgment and order dated 27th September, 1993 the learned single Judge while passing interim order recorded, rather found that the United Bank of India which is respondent in this proceeding agrees, that such invocation was in fact made, and does not dispute the validity thereof. However, by virtue of the appeal Court's order the bank has been restrained from making any payment under the bank guarantee to the MMTC plaintiff herein, and MMTC plaintiff herein is entitled to recover the amount covered by the bank guarantee. The bank guarantee having already been invoked question of renewing the same does not arise. With the aforesaid interim order ultimately writ petition was disposed of and against the aforesaid disposal of the writ petition an appeal was preferred which was also dismissed.

19. Therefore the plea raised by the bank at this stage is not only untenable in law but the Bank is estopped from raising this plea. There has been no appeal against the aforesaid findings by the bank. Each and every word recorded by the learned single Judge in a proceeding wherein a particular person is a party is binding unless the same is apparently contrary to the law. If there has been any statement that affects a particular person it is not open for him to challenge or dispute the same in any collateral proceeding. The remedy available to this party is to approach the same Court where such statement was made and to draw the attention of the Court such a statement is erroneous and needs to be rectified and/or expunged or the same can be ignored by consent of both the parties. On this proposition of law two Supreme Court decisions cited by Bank of Bihar Ltd. Vs. Mahabir Lal and Others, and State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, are very helpful. In the case of Bank of Bihar Ltd. Vs. Mahabir Lal and Others, the Apex Court observed as follows:

In our opinion where a statement appears in the judgment of a Court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties to the litigation agree that the statement is wrong, or the Court itself admits that the statement is erroneous. If the High Court had proceeded on an erroneous impression that Mr. De had conceded that the money was taken along with him by Ram Bharosa Singh to Patna, there was nothing easier for the Bank than to

prefer an application for review before the High Court after the judgment was pronounced or if the judgment was read out in Court immediately draw the attention of the Court to the error in the statement.

20. Again in case of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, the Supreme Court reiterated substantially the same proposition of law which I usefully quote the same:

If the Judges say in their judgment that some thing was done, said or admitted before them. That has to be the last word on the subject. The principle is well settled that statements of facts to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges to cases the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was statement that had been made in error (Per Lord Buckmaster in Madhusudan v. Chandrabati AIR 1917 PC 30). That is the only way to have the record corrected.

21. In the aforesaid situation I do not think the contention raised by Mr. Dhandhanian in any way deserves consideration.

22. The bank guarantee is a stake between the beneficiary and the banker. Ordinarily the bank is bound to honour the commitment unless there has been a fraud, special equity or irretrievable injury. Here is no such case having been made out. Now the question is as to whether the above commitment or breach thereof constitute together any admission for recording judgment and to sign decree consequently.

23. Fortunately, I find here the bank, all the time has admitted to make payment not only in document namely dated 18th January, 1993 written by the bank to the defendant No. 1 but also in pleading filed by it in the Debt Recovery Tribunal which is against the defendant No. 1. In paragraph V (29) of the said application is stated by bank as follows.

...The said bank guarantee was invoked by MMTC on 14th January, 1993, but in the said order dated 18th March, 1993, the Hon"ble Court, Mr. Justice Ajit Sengupta and the Hon"ble Justice N. A. Chowdhury had inter alia directed that the MMTC shall not enforce the bank guarantee until the matter is finally disposed of by the learned trial Court. In view of the said order dated 18th March, 1993, the applicant has not made payment of the said sum of Rs. 90 lacs to MMTC but in view of the fact that MMTC has already invoked the said bank guarantee, the liability of the applicant to pay the said sum of Rs. 90 lacs to MMTC subsists. Hence the said sum of Rs. 90 lacs has been included in the total claim of the applicant made herein against the respondent Nos. 1 to 5....

24. However, the petitioner could not make this application in view of the order passed by the learned single Judge referring disputes to High Power Committee as per judgment of the Apex Court and this Committee ultimately failed to resolve the disputes and thereafter instant application has been made.

25. I have no hesitation to conclude that there is unequivocal admission at all stages except in the affidavit-in-opposition in the instant application. I think denial in this affidavit is of no relevance either on fact or in law to the bank. Hence this application succeeds and there will be judgment on admission for a sum of Rs. 90 lacs to be paid by the defendant No. 2 to the plaintiff. However, I do not find there is any agreement not to speak of admission to pay interest at the rate of 22 per cent. per annum allegedly accrued as claimed by the plaintiff. So I cannot pass any decree on account of interest at the aforesaid rate. But the plaintiff is entitled to claim interest and interest on judgment under the provision of CPC the moment decree is passed by the Court. Having regard to the facts and circumstances of this case the plaintiff is entitled to interest and interest on judgment at the rate of 9 per cent. per annum, and this shall be paid from the date of filing of the suit and till the date of making payment. The rest of the claim and the plaintiff inclusive of interest at the rate claimed by it shall decide in the trial of the suit.