(2012) 06 BOM CK 0155

In the Bombay High Court

Case No : Second Appeal No. 73 of 2003

Mrs. Antonette Coelho — APPELLANT

Vs

Bank of Baroda and Another — RESPONDENT

Date of Decision : 29-06-2012

Acts Referred:

Contract Act, 1872 — Section 37, 47
Evidence Act, 1872 — Section 115
Penal Code, 1860 (IPC) — Section 420, 468, 471

Citation : (2013) 2 ABR 492

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : J.J. Mulgaonkar, for the Appellant;

Final Decision : Dismissed

Judgement

U.V. Bakre, J.—This is plaintiff''s Second Appeal. The plaintiff had filed Regular Civil Suit No. 16/88/IISR for permanent and mandatory injunction to restrain the defendants (respondents of the present second appeal) from interfering with the operation of the Fixed Deposit Receipt No. 488225 by the plaintiff and to allow the plaintiff to operate/withdraw money from her Savings Bank Account No. 846 with the defendant bank.

2. Case of the plaintiff, in short, was as follows:-

She was having Savings Bank Account No. 846 with the Defendant No. 1 since September 1974 and had also a Fixed Deposit of Rs. 35,000/- bearing Receipt No. 488225. which would be due for renewal on 6.11.1988. On 18.2.1986, the defendant No. 1 arbitrarily denied the plaintiff right to withdraw money from her said savings bank account or to withdraw the said fixed deposit amount. The plaintiff served a notice dated 19.6.1987 on the defendant No. 1, who by reply dated 24.6.1987, informed the plaintiff that she would not be allowed to withdraw the amount because of the complaint filed by her husband.

3. In its Written Statement, the defendant No. 1 bank stated that the Fixed Deposit of Rs. 35,000/- has been discharged by the plaintiff and kept in the custody of the bank, on account of the complaint of her husband. On 12.9.1985, the plaintiff had received Rs. 50,000/- from N.R.E. Account No. 2705 of her husband Angelo Coelho and further a sum of Rs. 5.500/- was received on 25.11.1985 by cheque No. 494472 from the account of her husband. The said sum of Rs. 50,000/- was credited in the account of the plaintiff on the same date and out of the said funds, a Fixed Deposit Receipt of Rs. 35,000/- was taken out and a sum of Rs. 10,000/- was withdrawn by the plaintiff from her said account and subsequently credited the same on 22.2.1986. Somewhere, on or about 2.1.1986, the plaintiff''s husband approached the defendant No. 1 and alleged that the bank had negligently allowed various amounts to be withdrawn from his account illegally. The plaintiff thereafter came to the bank and gave in writing on 2.1.1986 stating that three cheques had been signed by her husband and that she had received the payment amounting to Rs. 50.000/- and Rs. 5,500/-, whereas, the sum of Rs. 6,000/- was received by her through her son. On 18.2.1986. the plaintiff wrote another letter to the defendant No. 1 stating that she was agreeable for keeping her account frozen and not to effect any payment from her said account and to indemnify the defendant against payment received by her from her husband''s account. The plaintiff had written the said letter in answer to the letter of the defendant No. 1 dated 18.2.1986 intimating that defendant No. 1 had received a complaint from plaintiff''s husband regarding withdrawals from his account No. 2705. Either there is a dispute between the plaintiff and her husband or both of them are playing fraud in collusion, on the defendant No. 1, with an intention to extract money from the defendant No. 1. The plaintiff''s husband has filed Special Civil Suit bearing No. 96/1987, against the defendant No. 1, in the Court of Civil Judge, Senior Division at Mapusa, for recovery of the sum of Rs. 71,293/- and interest thereon, in which the defendant has made an application for impleading the plaintiff and her son as necessary parties. The said Special Suit No. 96/1987, pending in the Court of Civil Judge, Senior Division has to be decided first, so as to verify and settle the claim of the plaintiff and her husband. It is also just and proper to implead the husband of the plaintiff as necessary party.

4. The husband of the plaintiff namely Angelo Coelho came to be added as Defendant No. 2. However, he did not file any written statement.

5. By judgment and decree dated 16.9.2000, in the said Regular Civil Suit No. 16/88. the 2nd Additional Civil Judge, Senior Division, Mapusa (Trial Judge) held that the plaintiff had consented to freeze her bank account and fixed deposit and accordingly the bank had done the same and that the plaintiff was aware of the suit filed by her husband against the bank alleging that the bank had wrongfully allowed her to withdraw the amounts, from his account and the plaintiff''s consent being unconditional and voluntary, cannot be withdrawn by issuing notice. He held that by virtue of Section 115 of the Evidence Act, the plaintiff is stopped from operating her account. The suit, therefore, came to be dismissed.

6. In the Regular Civil Appeal No. 182/2000, filed by the plaintiff, against the judgment and Decree of the Trial Judge, the learned Additional District Judge. Mapusa, (First Appellate Court) held that the action of the bank to refuse operation of the account cannot be said to be without justification since the Civil Suit filed by her husband against the bank is pending. The First Appellate Court did not find any error committed by the trial Judge, in appreciation of the material on record and in ultimate dismissal of the suit.

7. The plaintiff has filed the present Second Appeal against the said judgment and Decree dated 25.2.2003 passed by the First Appellate Court, which has been admitted on the following substantial questions of law :-

a) Whether the first Appellate Court erred in law in holding that the pendency of the suit of the plaintiff''s husband legally justified the Bank''s refusal to permit withdrawal from her accounts with them?

b) Whether the judgments of the Courts below are not contrary to the creditor-debtor relationship that exists between the plaintiff and the bank, which casts legal obligations on the bank to let the plaintiff withdraw moneys from her accounts?

c) Whether the Courts below ought not to have held that the privity of contract between the plaintiff and the bank made it legally obligatory for the bank to permit the plaintiff to operate her savings accounts and to pay to her the amount in her fixed deposit?

8. Mr. J.J. Mulgaonkar, learned counsel argued on behalf of the plaintiff. None was present on behalf of the respondents.

9. Mr. Mulgaonkar. learned counsel for the plaintiff, has submitted that the consent given by the plaintiff to freeze the account cannot be taken to operate forever. It was given till the disposal of the Criminal Case filed before the Judicial Magistrate First Class, which Criminal case has ended in acquittal of the plaintiff. He further submitted that Section 115 of the Indian Evidence Act is not applicable to the present case. According to Mr. Mulgaonkar, there is nothing on record to prove the claim of the defendant No. 2. He relied upon Sections 37 and 47 of the Contract Act and submitted that on account of the creditor-debtor relationship between the plaintiff and the defendant No. I, the defendant No. 1 is legally obliged to let the plaintiff withdraw money from her accounts. He pointed out that the defendant No. 2 has not contested the suit and has no claim against the plaintiff and the plaintiff is not a party to the said Special Civil Suit, allegedly filed by the defendant No. 2 against the defendant No. 1. He further pointed out that the defendant No. 1 has not led any evidence. According to the learned counsel, the suit of the plaintiff ought to have been decreed.

10. I have gone through the entire material on record.

11. Following established facts emerge out of the pleadings of the parties, evidence of P.W.1 and the documents produced in her evidence:-

(a) Plaintiff had withdrawn Rs. 50,000/-. Rs. 5,500/- and Rs. 6.000/- (total Rs. 61,500/-) from N.R.E. account of her husband, Angelo Coelho (Defendant No. 2).

(b) Out of the said amount, the plaintiff invested Rs. 35,000/- in the Fixed deposit, vide receipt No. 488225 dated 19.2.1986.

(c) Defendant No. 2 had lodged complaint with the police alleging that the plaintiff forged his signature on three cheques bearing Nos. 494471,494472 and 494473 and obtained cash of Rs. 61,500/- from the defendant No. 1, from the account of the defendant No. 2.

(d) On account of that complaint, the plaintiff had informed the defendant No. 1 to freeze her said Fixed Deposit Receipt as well as her Savings Bank Account and the bank had accordingly frozen the same.

(e) On account of that complaint, the plaintiff had discharged the said F.D. Receipt and had kept the same in custody of the defendant No. 1.

(f) By letter dated 18.2.1986 (Exhibit P.W. 1/ DW/A) the plaintiff agreed with the bank that her account shall be kept earmarked and payments deferred. She has agreed to indemnify the bank against all the three payments under consideration.

(g) By letter dated 2.1.1986 (Exhibit PW. 1/ DW/B) the plaintiff stated that she received three cheques bearing Nos. 494471, 494472 and 494473, all drawn/ signed by her husband for Rs. 50,000/-, Rs. 5,500/- and Rs. 6,000/-, dated 12.9.1985, 2.11.1985 and 25.11.1985. The plaintiff undertook to indemnify the bank for any loss, damage, if any, in respect of the payment of the above cheques to her.

(h) Plaintiff was tried for offence punishable under Sections 468, 471 and 420 of I.P.C. in Criminal Case No. 273/87/A and by the judgment dated 7.5.1995, she has been acquitted.

(i) The husband of the plaintiff has, however, filed a Special Civil Suit No. 96/1987 in the Court of Civil Judge, Senior Division at Mapusa for recovery of Rs. 71,293/- against defendant No. 1 alleging that the defendant No. 1 had wrongfully allowed the plaintiff to withdraw amounts from his account.

(j) Initially the husband of the plaintiff was not made a party to the suit.

(k) Though the husband of the plaintiff was subsequently added as defendant No. 2, he did not file any written statement.

12. There is suppression of various material facts in the Plaint and the said facts have come on record through the cross-examination of P.W. 1. The evidence on record, duly establishes that the plaintiff has suo motu volunteered for freezing of the F.D.R. as well as the Savings Bank Account. The plaintiff has agreed to indemnify defendant No. 1 bank against the claim made by her husband. Though, the Criminal Case filed by the State against the plaintiff has ended in acquittal, however, that is not the end of the dispute between the plaintiff and

her husband. Admittedly, the plaintiff has filed Special Civil Suit No. 96/ 1987 against defendant No. 1 in the Court of Civil Judge, Sr. Division for recovery of the amount of Rs. 71,293/- and this pertains to the said amount of Rs. 61,500/-. It is not the case of the plaintiff that the said Special Civil Suit has been disposed of. The same is still pending. As has been rightly held by the First Appellate Court, the action of the defendant No. 1, to refuse operation of the Savings Bank Account and withdrawal of the F.D.R. Amount, cannot be said to be without justification. Hence, the substantial question (a) gets answered in the negative.

13. There is no dispute that the relationship of creditor and debtor exists between the plaintiff and defendant No. 1 which casts legal obligation on the defendant No. 1 to let the plaintiff withdraw money from her account., Section 37 of the Indian Contract Act, 1872 provides as follows :-

Obligation of parties to contract - The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Section 47 of the Indian Contract Act, 1872 provides as follows :-

Time and place for performance of promise, where time is specified and no application is to be made-

When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

14. Section 37 of the Contract Act deals with the obligation of parties to the contract whereas Section 47 refers to time and place for performance of promise, where time is specified. In the present case, since the plaintiff has herself agreed for freezing of the Savings Bank Account and the Fixed Deposit Receipt and to indemnify the defendant No. 1 against the claim made by the defendant No. 2, on the said amount, the plaintiff cannot force the defendant No. 1 to perform its earlier promise to allow the plaintiff to operate the said account, unless and until, the claim of the defendant No. 2 is finally decided.

15. In view of the above, substantial questions "b" and "c" are answered in the negative. There is therefore no substance in the present Second Appeal, which is dismissed, however, with no order as to costs.

