
(1997) 02 KL CK 0008
In the High Court Of Kerala
Case No : A.S. No. 176 of 1988

New Bank of India, Trivandrum

APPELLANT

Vs

Sajitha Textiles and Another

RESPONDENT

Date of Decision : 27-02-1997

Acts Referred:

Contract Act, 1872 — Section 126
Evidence Act, 1872 — Section 73
Limitation Act, 1963 — Article 55

Citation : AIR 1997 Ker 201

Hon'ble Judges : T. Ramachandran, J

Bench : Single Bench

Advocate : P. Sukumaran Nayar, B. Radhakrishnan and G. Unnikrishnan, for the Appellant; M. Balagovindan, for the Respondent

Final Decision : Dismissed

Judgement

T. Ramachandran, J.—This appeal is filed from the judgment and decree of the Second Additional Sub-Judge of Trivandrum in O.S. No. 99 of 1984.

2. The appellant was the plaintiff in O.S. No. 99 of 1984. The appellant is the New Bank of India. The first respondent is the pro-prietary firm called M/s. Sajitha Textiles. The first respondent had taken a loan advanced by the M.G. Road Branch at Trivandrum of the plaintiff-Bank. It was as per cash-credit facility to the tune of Rs. 20,000/- as on 12-8-1978. As security for the said cash-credit facility the first respondent executed an agreement of hypothecation on 12-8-1978 hypothecating his entire stock-in-trade stored in his shop M/s. Sajitha Textiles and he hypothecated the entire furniture and fixtures like ceiling fans etc. in the shop and agreed to pay interest at the rate of 15% per annum with quarterly rests on all the amount due as per the cash-credit account in the name of the first. respondent. On the same date, the first respondent executed a pronote for Rupees 20,000/- with interest at the rate of 15% per annum with quarterly rests. He also executed a letter of waiver regarding the pronote and a

letter of continuity. The second defendant executed a deed of guarantee in favour of the bank on 12-8-1978. The first defendant was operating the account and when the amount due to the bank exceeded the sanctioned limit, the bank asked the first defendant to regularise the account. When the amount came to Rs. 30,000/- the first respondent executed another pronote for that amount with interest at the rate of 15% per annum with quarterly rests and a letter of waiver and a letter of continuity were executed with a fresh agreement of hypothecation on 6-8-1979. The first respondent executed a letter of undertaking. Then the second respondent executed a fresh deed of guarantee for the amount of Rs. 30,000/- on 6-8-1979. Later the amount drawn by the first respondent came to Rs. 40,000/- and on 22-4-1981 fresh pronote and agreement of hypothecation with letter of undertaking were executed by the first respondent. The stand taken by the appellant was that the guarantee given by the second respondent extended and covered all further sum due as per the loan account in the name of the first respondent.

Thus the suit was filed when the first respondent did not regularise the loan account in spite of repeated demand,

3. The first respondent remained ex parte and the second respondent contended before the trial Court that he was a party to the transaction and that he had not executed any letter of guarantee. According to him he accompanied the first respondent to the appellant Bank with a salary certificate and that he had not signed any document. Thus according to him the alleged deed of guarantee was only a forged one. Thus he denied the liability to pay the amount as claimed in the plaint.

4. After framing necessary issues the trial Court examined P.W. 1 and D.W. 1 and marked Exts. A1 to A12. After hearing both sides the lower Court considered the matter and held that the second respondent was not liable. Thus the suit was decreed only against the first respondent with costs. As the liability of the second respondent was exonerated, this appeal is filed by the plaintiff Bank.

5. Counsel for both sides were heard. According to the learned counsel appearing for the appellant the second respondent is also liable for the suit claim in view of the letter of guarantee. In view of the fact that D.W. 1 admitted his signature in Ext. A12 acknowledgement and in view of the fact that no reply notice was sent by the second respondent, it was argued that the second respondent was liable in view of Ext. A6 deed of guarantee executed by the second respondent on 6-8-1979. It was also argued that the lower Court was not correct in holding that the signature of the second respondent differ from the admitted signatures. It was also argued that the lower Court should not have compared the signatures without calling for expert's opinion. Thus the point arising for consideration is as to whether the lower Court was correct in exonerating the liability of the second respondent.

6. The first respondent was drawing amounts from the appellant Bank at M.G.

Road Branch, Trivandrum under cash credit facility for the purpose of his textile firm called Sajitha Textiles. Ext. A1 is the pronote and Ext. A2 is the deed of hypothecation executed by the first respondent for an amount of Rs. 20,000/- on 12-8-1978, Ext. A3 was the letter of guarantee executed by the second respondent on 12-8-1978. When the amount came to Rs. 30,000/- Ext. A4 fresh pronote was executed by the first respondent and Ext. A5 agreement of hypothecation was executed afresh by the first respondent on 6-8-1979. Ext. A6 is the fresh agreement of guarantee executed by the second respondent on 6-8-1979. Later when the amount came to Rs. 40,000/- the first respondent executed Ext. A7 pronote and Ext. A8 agreement of hypothecation on 22-4-1981. The first respondent did not contest the suit. Thus he has admitted his liability. But the second respondent contended that he had not executed Exts. A3 and A6 agreement of guarantee. On a purusal of the signatures in Exts. A3 and A6 with that of the admitted signature in the summons and vakalat, the lower Court held that the signatures differ. Thus the lower Court exonerated the liability of the second respondent. The case of the second respondent was that he went along with the first respondent to the plaintiff bank along with Ext. A9 salary certificate and that he did not sign any documents. In view of the denial of the signature, the burden of proof was on the plaintiff to prove that the signature in Exts. A3 and A6 was that of the second respondent. In the absence of an expert opinion it was only just and proper on the part of the lower Court to compare the signatures with the admitted signature. Thus the lower Court held that the signatures differ in Exts. A3 and A6 from the admitted signatures of the second respondent. As the expert's opinion was not called for at the instance of the plaintiff, the learned counsel appearing for the appellant was not justified in blaming the lower Court for comparing the signature with the admitted signature. It is true that reasons were not stated by the lower Court to show how the signatures differ. Even if Exts. A3 and A6 were signed by the second respondent, it is to be noted that Ext. A6 was dated 6-8-1979, whereas Ext. A3 is of an earlier date, i.e. 12-8-1978. u/s 73 of the Indian Evidence Act the Court can compare the signature in the disputed documents with the admitted signatures. The learned counsel appearing for the appellant argued that the lower Court ought to have directed the second respondent to put his signature in a blank paper in open Court and then ought to have compared the signature with the admitted signature. But in view of the admitted signature in Ext. A12 acknowledgement, summons and vakalat, there was no necessity to get a further signature of the second respondent in open Court. Further to prove signature u/s 73 of the Indian Evidence Act, to get a signature of the second respondent in open Court was only directory and it was not mandatory. When the Court is satisfied that there are admitted signatures of the second respondent available in Court, there was no necessity to get another signature of the second respondent in open Court.

7. Even if Ext. A6 is the letter of guarantee executed by the second respondent the suit ought to have been filed within the period of three years from the date of

Ext. A6, Ext. A6 is dated 6-8-1979 and the suit is not filed against him within the period of three years from 6-8-1979. The period of limitation is three years coming under Article 55 of the Limitation Act. The decision reported in United Commercial Bank, Bangalore Vs. B.M. Mahadeva Babu and another, held that the suit against the guarantor for enforcement of guarantee should be filed within the period of three years from the date of guarantee as the period of limitation is as prescribed by Article 55 of the Indian Limitation Act. As the suit was not filed within the period of three years from the date of Ext. A6, the appellant cannot enforce the guarantee against the second respondent. For that reason the appellant cannot get a decree against the second respondent. In this context the learned counsel appearing for the appellant argued that the question of limitation was not taken up by the second respondent in his written statement or before the lower Court. But a question of law can be taken up even before the appellate Court. Thus it is futile to contend that the question of limitation cannot be urged by the second respondent before this Court. Under Article 55 of the Indian Limitation Act the period fixed is three years. Thus as the suit was not filed within the period of three years from the date of Ext. A6, the second respondent is not liable for the suit claim. Thus, I do not find any reason to interfere with the judgment and decree of the lower Court.

For the above reasons the judgment and decree of the lower Court are confirmed and this appeal is dismissed. In the peculiar circumstances, both parties are to bear their costs.