

(1990) 08 SHI CK 0044
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 30 of 1985

Oriental Bank of Commerce	Vs	APPELLANT
Dila Ram and Others		RESPONDENT

Date of Decision : 30-08-1990

Acts Referred:

Contract Act, 1872 — Section 74
Limitation Act, 1908 — Section 19, 21
Limitation Act, 1963 — Section 18, 19, 20

Citation : (1991) 1 ShimLC 68

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

Advocate : Chander Paul, for the Appellant; Deepak Gupta, for Defendant No. 1 and Praneet Gupta, for Defendant No. 2 and L.Rs. for Defendant No. 3, for the Respondent

Judgement

D.P. Sood, J.—This is a suit filed by the Plaintiff-bank, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 for the recovery of Rs. 3,40,777.41 P.

2. Shortly stated, the Plaintiff's case is that a loan of Rs. 2,00,000 was sanctioned in favour of Defendant No. 1 for the purchase of a truck against the execution of a pronote Ex. P-10. The truck was hypothecated with the Plaintiff-bank vide hypothecation deed Ex. P-11. Defendant No. 1 had also handed over a letter waiving his right to take advantage of any default in presentment for payment of the aforesaid promissory note as required by law. Besides, to cover the loan or the over draft he had also given letter Ex. P-13 creating security for the sum remaining unpaid towards the aforesaid loan account. Defendant No. 2 and late Kr. Sunder Singh now represented through his legal representatives stood surety for due repayment of the aforesaid loan amount by executing guarantee deeds Exs. P-17 and P-18, which were of continuing nature in favour of the Plaintiff-bank. The aforesaid loan was repayable with interest at the agreed rate in monthly instalments of Rs. 7,000. The Defendants committed default in

repayment of the instalments to whom notices Exs. P-4 to P-9 were sent.

3. The Plaintiff-bank pursuant to the aforesaid loan had prepared debit vouchers Exs P-14 to P-16 and also sent balance confirmation letters Exs. P-19 to P-22 to Defendant No. 1. who had duly acknowledged the same by putting his signatures thereupon on June 30, 1981, November 31, 1981, July 10, 1982 and August 19, 1983 respectively. On August 7, 1982, another notice Ex. P-23 requiring Defendant No. 1 to repay the loan amount was issued by the Plaintiff-bank but of no avail. Thus, the Plaintiff instituted the present suit on April 3, 1985 for the recovery of Rs. 3,40,777.41 p. inclusive of the interest as on that date.

4. In the written statement filed by Defendant No. 1, the main objection raised by him that the Plaintiff-bank has not charged the interest at the agreed rate viz., 13.5% per annum simple interest. Besides, he was not liable to pay penal interest in terms of Section 74 of the Contract Act not other items like guarantee-fee, charges of legal notice etc., under the agreement. The additional plea taken by him is with regard to the competency of Mr. M.L. Sharma, PW 1, to file the instant suit on behalf of the Plaintiff-bank. Defendants No. 2 and 3 in their written statement have averred that the suit is barred by time qua them as the acknowledgement made by Defendant No. 1 will not extend the period of limitation so far as they are concerned. It has also been pleaded by them that the signatures were contained on blank forms containing blank spaces and the rate of interest has been interpolated with the result that their guarantee stands discharges. An additional plea raised by them is that the Plaintiff-bank had been highly negligent in not making recoveries of the loan amount from the primary security i.e. the truck so hypothecated despite request made by Defendant No. 1 and as such none of the Defendants are liable to pay interest nor the liability can be fastened against them. As regards the rate of interest, the objection raised by Defendant No. 1 has been reiterated.

The parties were taken to trial on the following issues framed on September 27, 1985:

1. Whether Shri M.L. Sharma is duly authorised to file this suit on behalf of the Plaintiff-Bank? OPP.
2. Whether the Plaintiff-Bank took no action on the request made by Defendant No. 1 for the sale of truck and, therefore, is not entitled to recover any interest? OPD. No. 1
3. Whether the Plaintiff-Bank has validly charged guarantee fee, insurance premia and other charges like photostat and for sending notices added in the statement of account? OPP.
4. Whether the Plaintiff has been highly negligent in making recoveries of the loan amount from Defendant No. 1 and, therefore, Defendants 2 and 3 are not liable to pay the suit amount? OPD. Nos. 2 and 3.
5. Whether the suit is within limitation qua Defendants 2 and 3? OPP.

6 To what rate and amount of interest is the Plaintiff-Bank entitled to recover? OPP.

7. To what amount is the Plaintiff-Bank entitled to recover? OPP.

8. Relief.

Issue No. 1

5. The competency of Mr. M.L. Sharma to file the suit on behalf of the Plaintiff-bank has been assailed. However, he has appeared as PW-1 and proved his power of attorney Ex. P-I on record. No evidence in rebuttal has been adduced by any of the Defendants nor Defendant No. 2 has stated anything to the contrary in his statement, on oath before this Court. The careful perusal of the terms of the aforesaid power of attorney Ex. P-I shows that PW 1 Mr. M.L. Sharma was duly authorised to institute, conduct, defend suits, appeals, revisions etc. and also to sign, verify pleadings etc. with respect to the recovery of the loan. The plaint has been duly signed and verified by PW 1. Thus, he was a competent person duly authorised to institute this suit. Issue No. 1 is accordingly decided.

Issue No. 2

6. Onus of this issue to prove that the Plaintiff-bank failed to take due action for the sale of the truck and recover the loan amount therefrom in the first instance, was upon Defendant No. 1 who neither appeared as witness himself nor adduced any evidence to this effect. Thus, this issue is decided against Defendant No. 1.

Issue No. 3

7. In support of this issue, the Plaintiff has proved agreement of loan-cum-hypothecation of the vehicle Ex. P-11. Reference has been invited to Clause 16 thereof whereunder the Plaintiff-bank is entitled to be indemnified with respect to charges pertaining to guarantee-fee, insurance premium etc. In view thereof, the learned Counsel appearing on behalf of the Defendants has not pressed this issue and rather in view of the aforesaid agreement entered into between the parties, has admitted the right of the Plaintiff-bank to recover the expenses so incurred. Even no evidence in rebuttal has been adduced. In view of this, the issue is decided in favour of the Plaintiff and against the Defendants.

Issue No. 4

8. Onus to prove this issue heavily rests upon Defendants 2 and 3. In their pleadings the said Defendants alleged that on the commission of the initial default by Defendant No. 1 in making repayment of the loan amount, they bad informed the Plaintiff requesting to get the loan recovered from the former (Defendant No. 1). Their allegation is that the Plaintiff allowed to deteriorate the guarantee i.e. the hypothecated truck which the Plaintiff could seize and sell the same. It is to be noted that Defendant No. 2 while appearing as his own witness has not categorically supported the allegation. Rather he stated that the bank took no steps to sell the hypothecated truck to realise the loan amount. How and

under what circumstances and whether the Plaintiff-bank was or was not informed by either of Defendants Nos. 2 and 3 as contended by them in their pleadings could seize the vehicle has not been substantiated in his statement on oath. In the circumstances, the said Defendants have miserably tailed to support this issue and the same is decided against them accordingly.

Issue No. 5.

9. The question to be determined under this issue is whether the suit is within limitation qua Defendants No. 2 and 3. There is no dispute with respect to the suit qua Defendant No. 1 being within limitation. The careful perusal of the record shows that the suit was filed on April 3, 1985. The loan as advanced on October 22, 1980 against the due execution of various documents, referred to above, Defendant No. 1 is the principal-debtor. He signed various balance confirmation letters on the dates as under towards the part liquidation of the loan amount.

Ex.	Date	Amount	acknowledged	P-19	30-6-1981	Rs.	2,06,819.00	P.	P-20	
	31-12-1981	Rs.	2,07,855.20	P.	P-21	10-7-1982	Rs.	2,18,375.40	P.	P-22
	19-8-1983	Rs.	2,54,924.06	P.	10.					

Defendant No. 1 in his pleadings has not denied the factum of acknowledging the liability. Apart from it, statement of account prepared under the Bankers Book Evidence Act shows that cash amounts of Rs. 2,000 and Rs. 3,000 were credited towards the account of the principal-debtor on January 18, 1981 and January 20, 1981 respectively. However, as observed above, the balance confirmation letters were subsequently duly signed by the principal-debtor. The ancillary question involved is whether Defendant No. I-principal-debtor had acted as the agent duly authorised for and on behalf of Defendants No. 2 and 3? The well settled principle is that the surety can appoint the principal-debtor as his agent for the aforesaid purpose in relation to the applicability of Sections 18 to 20 of the Indian Limitation Act. Evidently, in such an eventuality, the principal-debtor while making the acknowledgement or part payment would not only be binding himself alone but also the surety because the acknowledgement or payment then would be deemed to have been made on behalf of the surety as well. At this stage it would be pertinent to detail last two clauses of the guarantee deed which state as under:

My/our liability under these presents shall be a continuing liability and shall not be considered satisfied by payment of any sums of money towards the said accounts but shall extend to cover all moneys due to your Bank notwithstanding such payments,

Even though 3 years may have passed from the date thereof, my/our liability under these presents shall continue as long as the liability of the customers subsists and is alive.

11. In the opening clause of the aforesaid deed Ex. P-17, principal-debtor has been adjudged as "Customer" with reference to the deeds executed by him as also by the surety in the instant case.

12. Adjudging the aforesaid clauses in view of the settled principles, it is clear that Defendant No. 1 had the express/implied authority to acknowledge the liability not only on his behalf but also on behalf of Defendants 2 and 3 and, thus, to extend the limitation. Sections 18 to 20 of the aforesaid Limitation Act do not contemplate that the authority to be given to the agent must in every case be express authority. Here, the Defendants-guarantors have been bound themselves to be liable to repay the loan amount till the time the liability of the principal debtor continues/exists or remain alive. The said principles have been laid down in *Kamta Rai and Others Vs. Rani Jaduraj Kunwari*, and I am in full agreement with respect to the interpretation of the expression "agent duly authorised" in Sections 19 and 21 (old) and corresponding Sections 18 and 20 (new) of the Limitation Act. Thus, from whatsoever angle the case may be viewed, it is within limitation even qua Defendants 2 and 3. Thus, issue No. 5 is decided in favour of the Plaintiff and against Defendants 2 and 3.

Issue No. 6

13. There is no controversy about the rate of interest so far as Defendant No. 1 is concerned. In para 2 of his written statement he has admitted that he is liable to pay interest at the rate of 13.5% per annum. However, Defendants Nos. 2 and 3 have contended that the interest claimed is highly excessive. While appearing as his own witness, Defendant No. 2 has not adverted to this aspect of the case. Also Clause 12 of the hypothecation deed (Ex. P-11) shows that agreed rate of interest was 4.5% per annum over the Reserve Bank of India rate with a minimum of 13.5% per annum with half yearly or monthly rests. However in Exs. P-17 and P-18, the rate has been shown to be 13.5% per annum without indicating the rests referred to above. Thus, reading the two documents together, to my mind, the contention of Defendant No. 1 that agreed rate was 13.5% simple interest, appears to be correct. The variation of rate of interest in different documents got executed from the Defendants does show gross negligence on the part of the officials of the Plaintiff-bank in not having taken care of explaining as to whether the rate of interest to be charged was simple or at half yearly/quarterly/monthly rests. In any case, this variation supports the case of Defendant No. 1. Cumulatively, I hold that the Plaintiff bank is entitled to charge simple interest at the rate of 13.5% per annum. This issue is decided accordingly.

Issue No. 7

14. The Defendants are sured for a sum of Rs. 3,40,777.41 P. However, according to the calculation made by PW 3 regarding the recoverable amount at simple interest of 13.5% per annum, the same comes to Rs. 2,70,873.14 P. on the date of the suit. As such the Plaintiff-bank is held entitled to recover a sum of Rs. 2,70,873.14 P. only. Issue No. 7 is decided accordingly.

Issue No. 8

15. In view of the above, a decree in the sum of Rs. 2,70,873.14 P is passed in

favour of the Plaintiff-bank and against the Defendants with costs. The Plaintiff-bank is also held entitled to simple interest at the rate of 13.5% per annum from the date of the decree till its realisation. The decree-sheet be prepared and the file after due completion be consigned to the record room.