
(2011) 07 MP CK 0094
In the Madhya Pradesh High Court
Case No : S.A. No. 141 of 1994

Oriental Fire and General Insurance Co. Ltd.	APPELLANT
Vs	
Saifuddin and Another	RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Contract Act, 1872 — Section 124, 125
Limitation (Amendment) Act, 1872 — Article 113, 43, 83
Limitation Act, 1963 — Article 27

Citation : (2011) ILR (MP) 2811 : (2011) 4 MPHT 270 : (2011) 3 MPJR 148

Hon'ble Judges : A.K.Shrivastava, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.K. Shrivastava, J.—This second appeal has been filed by defendant No.2 against the judgment of reversal. The suit of plaintiff-respondent No.2 was decreed against defendant No. 1 and was dismissed against appellant-defendant No.2. However, learned First Appellate Court has decreed the suit against the present appellant also.

2. The plaintiff/respondent No.2 - Bank of Baroda filed a suit 32 years ago on 6.10.1979 for realisation of Rs.14,259.10 arraying Saifuddin- as defendant No. 1 while Oriental Fire and General Insurance Company Ltd. -appellant was arrayed as defendant No.2. The suit of plaintiff is that the plaintiff is a Nationalised Bank. Defendant No.1 - Saifuddin is a forest contractor and for due performance of the forest contract the Government of Madhya Pradesh through the Divisional Forest Officer, Balaghat directed defendant No. 1 to execute a guarantee bond and furnish the Bank guarantee in respect of Coupe No.B Calcutta Range-Godri Range for Rs.20,000/-. The defendant No. 1 (respondent No. 1) accordingly approached the plaintiff-Bank (respondent No.2) and requested for issuance of a Bank guarantee. He also deposited with plaintiff Bank a margin money of Rs.3,000/- by way of fixed deposit. For the rest of the guarantee amount, defendant No.2

appellant agreed to insure the same and in case the plaintiff is required to pay the amount to the Government when the Government invokes the guarantee, to reimburse the said amount to the extent of the amount of the policy.

3. It is the further case of plaintiff-Bank that it issued one Bank guarantee No.Gua/4/234 for Rs.20,000/- to the Government of Madhya Pradesh for defendant No.1. The defendant No.1 executed an agreement of counter indemnity in favour of plaintiff-Bank on 11.8.1970 agreeing to hold the Bank harmless and fully indemnified against all losses, claims etc. which may arise out of the guarantee furnished to the Government of Madhya Pradesh.

4. On account of the default committed by defendant No. 1 in execution of the forest contract, the Government of Madhya Pradesh through Divisional Forest Officer, Balaghat invoked the guarantee and demanded a sum of Rs. 17,446.20 during the subsistence of the guarantee. The plaintiff-Bank accordingly lodged a claim with the defendant No.2-appellant during the currency of the insurance policy. Since then, the defendants were avoiding to pay the amount claimed by the Government for one reason or the other under the terms of the guarantee. Since the plaintiff Bank could not dishonour its guarantee furnished to the State Government, it ultimately paid the entire amount of claim I.e. Rs. 17,446.20 to the Government (Divisional Forest Officer, Balaghat) on 31.8.1978. Hence, according to plaintiff-Bank, it had become entitled to realise the said amount from the defendants and after deducting the margin money deposited by the defendant No. 1 and interest accrued on it, a suit has been filed in the Trial Court for realisation of Rs. 14,259.10 and also prayed interest pendente-lite against both the defendants and prayed that they are jointly and severally liable to pay the said amount.

5. Despite defendant No. 1 - Saifuddin was served, he did not appear and the learned Trial Court proceeded ex-parte against him.

6. The appellant - defendant No.2 filed written statement and admitted that it had agreed to insure defendant No. 1 in case the plaintiff is required to pay the amount to the Government when the Government invokes the guarantee, to reimburse the amount to the extent of the policy. However, it has been pleaded that the policy was valid only upto 31.12.1971 and therefore, the suit which has been filed by plaintiff on 6.10.1979 is time barred. Hence, it has been prayed that it be dismissed.

7. Learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit only against defendant No. 1 = Saifuddin and dismissed against the appellant being time barred.

8. The plaintiff- Bank preferred first appeal before learned First Appellate Court which has been allowed and the suit has been decreed against appellant-defendant No.2 also by the impugned judgment and decree.

9. In this manner this second appeal has been filed by the appellant defendant

No.2 in this Court.

10. This Court on 8.3.1995 admitted the second appeal on the following substantial questions of law:

1. Whether in the facts and circumstances of the case, the present suit against the appellant could at all be decreed on account of the condition embodied in Ex.P-5, the Indemnity Bond?

2. Whether in the facts and circumstances of the case the appellant can take benefit of Article 43 of the Indian Limitation Act?

11. By inviting my attention to Ex.P-5, a guarantee policy of the appellant it has been contended by learned Senior Counsel Shri Rao that since it has been embodied in the policy that it shall remain in force upto 31.12.1971 only, therefore, the present suit which has been filed on 6.10.1979 is ex-facie time barred against it and therefore, learned First Appellate Court erred in substantial error of law in decreeing the suit of plaintiff-respondent No.2 against appellant also.

12. Having heard learned senior counsel for the appellant and after going through the record, I am of the view that this appeal deserves to be dismissed.

Regarding Substantial Question of Law No.1:

13. On going through the finding of learned First Appellate Court as well as that of learned Trial Court this Court finds that true the guarantee policy (Ex. P-5) was valid upto 31.12.1971 and by this document the insurance company has indemnified the Bank that in consideration of the premium if the Bank becomes liable to pay any amount on behalf of the contractor (defendant No. 1) under the guarantee, the insurer company will indemnify the Bank against all amounts which the Bank may so pay, but, not exceeding Rs.20,000/-. This arrangement being a contract and under this contract it was agreed between the plaintiff Bank and Insurance Company that whenever the damages would be caused to the plaintiff-Bank, the insurance company shall be liable to pay the amount upto the extent of Rs.20,000/-. This would also mean that the cause of action for a claim against the promisor (insurance company) in a contract of indemnity accrues to promisee (plaintiff-Bank) when the promisee is damnified and if a suit is filed before the actual loss has occurred it would be a premature suit.

14. A finding has been recorded by learned First Appellate Court that even if the State Government had made demand from the Bank on 16.10.1971 but until the plaintiff-Bank makes actual payment by encashing the Bank guarantee submitted to it by the State Government, it cannot be said that any damages have been caused to the plaintiff-Bank. A finding of fact has been recorded by the Courts below that the Bank paid a sum of Rs. 17,446.20 paise to the State Government only on 30.8.1978 vide Bank Draft No.G/0111/073 and therefore, the actual damage caused to the plaintiff-Bank was on this date (30.8.1978) when it had made the said payment to the State Government and for this purpose only the

insurance company executed the policy (Ex.P-5). Hence, according to me, the case of plaintiff cannot be diluted or it would never fail on the count that policy (Ex.P-5) was valid upto 31.12.1971 only.

15. Section 124 of the Indian Contract Act, 1872 pertains to the definition of "Contract of indemnity" and Section 125 speaks about "Rights of indemnity-holder when sued". According to the definition of "Contract of indemnity", a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called a "Contract of indemnity". According to Section 125, the promisee in a contract of indemnity, acting within the scope of his authority is entitled to recover from the promisor:-

(1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

16. These provisions have been taken into account by Lahore High Court in AIR 1935 974 (Lahore) and it has been held that Section 125 of the Contract Act has to be read in context to Article 83 of the Limitation Act, 1872. It has been further held that under a contract of indemnity, cause of action would arise only when the damage is suffered by plaintiff and if a suit is brought before actual loss it will be a premature suit. The same proposition has been held by Bombay High Court in Shankar Nimbaji Shintre Vs. Laxman Supdu Shelke, and the Judicial Commissioner of Nagpur in Ranganath vs. Pachusao and others, AIR 1935 Nag 147 has also reiterated the same law. In the case of Ranganath (supra) a suit was filed by the plaintiff before actual damages caused to it and it was held that the same is premature. In this context I shall also place reliance on Mulla's Indian Contract and Specific Relief Acts, Twelfth Edition Vol.II page 1733 wherein the eminent author has mentioned that"...It has also been held that the cause of action for a claim against the promisor in a contract of indemnity accrues to the promisee when the promisee is damnified; a suit before actual loss being premature".

17. Applying the aforesaid propositions of law in the present facts and circumstances of the case, since the actual damages were caused to plaintiff-Bank only on 30.8.1978 when it paid the amount of Rs. 17,446.20 paise to the State Government, the cause of action accrued to it on this date and not earlier

to it and within three years from this date the suit has been filed which is within limitation in terms of Article 113 and 27 of the Limitation Act, 1963 (hereinafter referred to as "the Act of 1963").

18. Article 113 is the residuary article, according to which a suit for which no period of limitation is provided elsewhere, three years limitation has been fixed by the legislature to file the suit when the right to sue accrues. Under Article 27 of the Act of 1963 the compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, three years" period is prescribed for filing the suit from the date the time specified arrives or the contingency happens. It will be profitable to quote Article 27 of the Act of 1963 which reads, thus:

Description of suit

Period of limitation

Time from which period begins to run

For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.

Three years

When the time specified arrives or the contingency happens.

According to me, the word "or" is having a great significance in this Article as this word also authorises plaintiff to sue when the contingency has happened. On going through the document Ex.P-5 this Court finds that there is a contract between the plaintiff and the insurance company that if the Bank becomes liable to pay any amount on behalf of the contractor (defendant No. 1) under the guarantee, the insurance company will indemnify the Bank against all amounts which the Bank may so pay but not exceeding the sum of Rs.20,000/-. Thus, under Article 27 since the word "or" has been used in the column of "description of suit", it empowers to file suit "upon the happening of a specified contingency" as well as in the column "time from which period begins to run" the words "or the contingency happens" authorises plaintiff to sue within three years from the date when loss is actually caused to it. Thus, the cause of action accrued to the plaintiff only on 30.8.1978 when on encashment of the Bank guarantee by the State Government, the plaintiff-Bank paid an amount of Rs. 17,446.20 paise to the State Government and within three years from 30.8.1978 it had filed the suit.

19. I have gone through the reasonings assigned by learned First Appellate Court holding that appellant - defendant No.2 is also liable to pay the said amount. According to me, the said findings are based on correct appreciation of law and evidence placed on record.

20. The substantial question of law No. 1 is thus answered against the appellant and it is hereby held that appellant-defendant No.2 is also jointly and severally liable to pay the decretal amount and the condition embodied in Ex.P-5 would

not come in the way.

Regarding Substantial Question of Law No.2:

21. According to me, the applicability of this Article has not at all been pleaded by defendant No.2 - appellant in its written statement. This objection is being taken by it for the first time in this second appeal. This plea is having nexus with the facts, therefore, same cannot be raised for the first time and in this context I may place reliance upon the decision of Supreme Court C. Mackertich Vs. Steuart and Co., Ltd, as well as Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and Others, . Apart from this, there is no plea of appellant - defendant No.2 that it had paid in excess to his own share. The substantial question of law No.2 is, thus, answered against the appellant.

22. Resultantly, this appeal fails and is hereby dismissed. The impugned judgment and decree passed by learned First Appellate Court is hereby affirmed. Since nobody has appeared on behalf of the plaintiff-respondent No.2. the parties are hereby directed to bear their own cost of this appeal.