

(2006) 01 KAR CK 0059

In the Karnataka High Court

Case No : Regular Second Appeal No. 564 of 2001

Radhakrishna Joshi

APPELLANT

Vs

Syndicate Bank

RESPONDENT

Date of Decision : 03-01-2006

Acts Referred:

Contract Act, 1872 — Section 126, 2 (d), 25, 62
Negotiable Instruments Act, 1881 (NI) — Section 13

Citation : (2006) 4 BC 180 : (2006) 131 CompCas 54 : (2006) ILR (Kar) 2365 :
(2006) 1 KarLJ 534 : (2006) 2 RCR(Civil) 240

Hon'ble Judges : Huvadi G. Ramesh, J

Bench : Single Bench

Advocate : Basava Prabhu and S. Patil, for the Appellant; M. Mohan Rao, for the Respondent

Judgement

Huvadi G. Ramesh, J.—This second appeal is by the defendant, Syndicate Bank being aggrieved by the judgment and decree passed by the Additional Civil Judge (Senior Division), Gulbarga in R.A. No. 52 of 1997 decreeing the suit of the plaintiff while reversing the finding of the Principal Munsiff, Gulbarga in O.S. No. 388 of 1995.

2. Plaintiff is a corporate body established under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having registered office at Manipal and having its branch at Super Market, Gulbarga. It is the case of the plaintiff that the son of the defendant Vijayakumar had obtained a loan of Rs. 16,000/- under the Self Employment Scheme for doing the business of television servicing situate at H.No. 8-426, Fort Road, Gulbarga. The loan was sanctioned at the rate of 10% interest with monthly installments of Rs. 250/- starting from 28-10-1988 and the last installment was due on 28-1-1994. After obtaining the loan from the Bank, due to ill-health the said Vijaya Kumar expired. According to the plaintiff, Rs. 16,000/- was paid directly to the material suppliers for TV repair shop i.e., Rs. 2,955/- was paid to M/s. Jagadamba Enterprises and Rs. 13,045 was paid to M/s. Moder Electronics for the material supplied and the goods were

also hypothecated. There is also an agreement executed by Vijay Kumar apart from the loan receipt and hypothecation. After the death of Vijay Kumar, the defendant who is his father came forward and promised to pay the loan amount with interest and also executed a guarantee letter dated 29-6-1990 to pay the entire loan balance in installments from the date of advance and in default, to pay the compounded rate of interest. Since the defendant did not adhere to the repayment schedule in terms of the agreement, he was liable to pay the penal interest. It is also stated that inspite of repeated reminders, defendant failed to repay the loan amount and after issuance of legal notice, a suit came to be filed for recovery of Rs. 28,250/- with 14% interest till the date of realisation of the amount.

3. The suit was resisted by the defendant denying all averments made in the plaint. According to the defendant, he had no knowledge of the transaction between his son Vijay Kumar and the Bank. On the death of Vijay Kumar, the manager of the Bank summoned the defendant and appraised him of the loan taken by Vijay Kumar and that he should repay the amount. As such, the manager of the Bank prevailed upon the defendant and sought some signatures on blank papers. Under bona fide belief, defendant put his signature with an intention to get back some money. The defendant never stood guarantee for the deceased Vijay Kumar nor he undertook to clear the loan borrowed. It is his further case that the suit of the plaintiff is barred by limitation. It is contended that the plaintiff ought to have brought the suit through Vijay Kumar through a legal notice and it has not been done.

4. Based on the pleadings, as many as seven issues were raised by the Trial Court. After trial and after hearing the parties, the suit of the plaintiff was dismissed. Aggrieved by the same, appeal was preferred before the Civil Judge (Senior Division), Gulbarga. The appeal was allowed and the suit of the plaintiff was decreed. Hence this second appeal by the defendant.

5. At the time of admission on 12-9-2001, the following substantial questions of law were raised by this Court for consideration:

1. Whether the lower Appellate Court has not erred in allowing the appeal and decreeing the suit when the defendant-appellant has admittedly not taken any loan from the Bank and he was never a guarantor for his deceased son, who had taken the loan?

2. Whether mere execution of an acknowledgement by the defendant would make him liable to be sued for the recovery of the amount owned by his son?

6. Heard the Counsels for the respective parties.

7. It is the submission of the learned Counsel for the appellant that the Trial Court having considered in detail the material evidence and documents on record has dismissed the suit of the plaintiff; there is no privity of contract between the defendant and the plaintiff-Bank nor was the defendant a party to the loan

transaction between the Bank and his son as a guarantor nor any such agreement or acknowledgment has been made by the defendant in favour of the plaintiff-Bank voluntarily and that his signatures were taken by creating some impression. But the lower Appellate Court has committed an error in decreeing the suit relying upon the commentary in respect of "discharge of legal obligation by the son on the loan incurred by the father under pious obligation". It is also his submission that as per the submission made before the Trial Court, the loan advanced by the Bank in favour of deceased Vijay Kumar was under Self Employment Scheme of the Government for which the defendant is not a guarantor. It is further submitted that even before the Trial Court the submission made was that the loan amount was not given to the benefit of the estate of the defendant and as such, the judgment and decree passed by the lower Appellate Court in discarding the well-considered judgment of the Trial Court is erroneous. It is also argued that even the acknowledgment of a time barred debt cannot be enforced against the defendant. In support of his argument, learned Counsel relied upon the decision in the case of Sampuran Singh and Others Vs. Smt. Niranjana Kaur and Others, , to contend that acknowledgement of liability made after the expiration of the prescribed period would not revive the period of limitation and also on a Division Bench decision in the case of K. Appukuttan Panicker and Another Vs. S.K.R.A.K.R. Athappa Chettiar and Others, , to contend that in the absence of any contract to the contrary, the defendant cannot be made liable as he is not a guarantor and also that he has not duly executed the acknowledgment and mere putting of signature does not amount to due execution of the acknowledgment. Accordingly, he prayed for setting aside the impugned order.

8. Per contra, Counsel for the respondent-Bank submitted that the Bank had advanced the loan of Rs. 16,000/- to the son of the defendant. On the death of his son, defendant has approached the Bank and having owned the liability, has acknowledged to repay the loan with interest in installments and that the lower Appellate Court having rightly relied upon the commentary on Contract Act, 1872 referring to Section 2(d) and Section 25, has clearly held that the plaintiff-Bank has proved its case for having advanced the loan amount and the finding of the Trial Court is also to the effect that the plaintiff-Bank has advanced the loan to Vijay Kumar under the Self Employment Scheme and that finding has not been challenged by filing cross appeal before the lower Appellate Court. It is further submitted that the defendant has acknowledged the debt and also undertook to repay the same and having paid the installments for sometime, he became a chronic defaulter thereafter and the acknowledgment executed by the Bank is well-before the expiry of the period of limitation in view of the undertaking. Under such circumstances, the lower Appellate Court has rightly decreed the suit and accordingly submitted that no substantial question of law arises for consideration.

9. In the background of the above facts, let me now proceed to consider the substantial questions of law raised.

10. At the outset, there is a finding by the Trial Court regarding payment of loan by the plaintiff-Bank in favour of Vijay Kumar, son of the defendant in a sum of Rs. 16,000/- and that has not been challenged by the defendant. The 1st substantial question of law framed is "Whether the lower Appellate Court has not erred in allowing the appeal and decreeing the suit when the defendant-appellant has admittedly not taken any loan from the Bank and he was never a guarantor for his deceased son, who had taken the loan". In the instant case, the lower Appellate Court has relied upon two of the acknowledgments executed, one on 4-12-1989 and the other on 20-8-1992 whereas the loan is said to have been advanced by the Bank in March 1988 with a condition to repay the loan commencing from 28-10-1988 in monthly installment of Rs. 250/- and the last installment was due on 28-4-1994. After borrowing the loan and before commencement of repayment, Vijay Kumar died. Either the plaintiff must have made an attempt to secure the father of Vijay Kumar or the defendant must have approached the Bank in some context and under such circumstance, some signatures have been obtained. It is the submission of the appellant's Counsel that the signature was not duly executed and since the defendant was not a guarantor, he was not liable to pay the debt. In support of his argument, learned Counsel relied upon the decision in H. Mohamed Khan and Others Vs. Andhara Bank Ltd. and Others, , wherein this Court referring to Section 126 of the Contract Act has held as under:

Section 126 of the Contract Act which defines a "contract of guarantee" makes it clear that it involves three parties viz., the creditor, the surety and the principal debtor who should all be privy. Their express participation or implied assent to have such a contract should be proved by the person who wants to rely upon it. The plaintiff-Bank which relied on a letter of guarantee neither succeeded in proving execution thereof by the alleged guarantor nor on facts proved was any privity of contract possible between the guarantor and the principal debtor. Since several years prior to the alleged guarantee the principal debtor was trying to adjudicate the surety insolvent and the litigation went up to Supreme Court. There were other circumstances which too ruled out the liability of the surety. It was held that the plaintiff had not discharged the burden of proof.

Further, referring to Section 13 of the Negotiable Instruments Act, 1881, it has observed that:

"A" was said to have executed a letter of guarantee in favour of "B" who in turn assigned it to "C, a Bank along with the principal debtor"s promissory note. The letter of guarantee not being a negotiable instrument the Bank was not its holder in due course and claiming it by way of an equitable assignment the Bank should prove the assignment with absolute terms. For want of proper proof of execution of the letter and its assignment, the Bank was non-suited.

Placing reliance on the above decision, learned Counsel contended that the Bank has failed to prove due execution of the acknowledgment to undertake to repay the loan in installments incurred by his son under the Self Employment Scheme

and the Bank cannot proceed against the defendant on such acknowledgment.

11. In Sampuran Singh's case, the Apex Court has held that if the acknowledgment of liability is made after the expiration of the prescribed period, it will not revive the period of limitation and that acknowledgment of liability should be made before the expiration of the prescribed period for a suit or other proceeding.

12. In the case of Appukuttan Panicker, referring to Section 62 of the Contract Act as regards novation of contract, the Division Bench of the Kerala High Court has held thus:

On the basis of the provisions in the document it has been contended by the appellants that there has been a complete alteration of the agreement contained in Ex. P. 2 and that the amount covered by the pronote need not be paid on demand. It is so contended on the basis of the provision in Ex. P. 1 that the payee of the promissory note, viz., the "financier", as he is termed in Ex. P. 1 should apply two-thirds of the collections from the theatres in discharge of the liability under the pronote Ex. P. 2 and for the discharge of a liability of the 1st defendant, "producer" to the Indian Bank. This, according to Counsel on behalf of the appellants, effectuates a novation. We may mention at the beginning that the parties to Ex. P. 2 viz., the appellants are not eo nomine or even by implication parties to the agreement Ex. P. 1. It would therefore be impossible to come to the conclusion that there has been a novation, which means the extinguishment of the terms of an earlier contract and the creation of another between new persons at least one of who was a stranger to the original contract and it is essential for the principal of novation to apply that there must be the mutual consent of all parties concerned.

13. The Trial Court has answered issues 2 and 3 in the negative while holding that the plaintiff failed to discharge the burden cast upon it. The Trial Court on some of the admissions by the plaintiffs witnesses, has noticed that the amount was not paid to Vijay Kumar directly but, to the material suppliers at their request and that the plaintiff has not produced any document for having paid the amount of Rs. 2,955/- to M/s. Jagadamba Enterprises though it is pleaded, except Ex. D. 1 and that it does not disclose any acknowledgment of the amount. Further, it has also noticed that there is no seal of the Bank for having received the bill in furtherance of advancement of cheque by way of payment to the material suppliers and accordingly believed the version of the defendant. Further, it appears that the plaintiff had produced certain documents said to have been executed by the defendant to highlight the signature of the defendant. The Trial Court except stating that it does not lighten the burden of plaintiff in proving its case, has not given a clear finding as to the due execution of the document of Exs. P. 2, P. 3 and P. 4 which are in the form of acknowledgment by the defendant to discharge the loan incurred by his son.

14. The lower Appellate Court while considering the aspect whether the

defendant would be liable to pay the amount though he was not a guarantor or had borrowed the loan on his own, in order to fix up the liability of the defendant, having relied upon the Commentary on Law of Contract and Specific Relief by Jaswanth Singh and Others on Section 2(d) of the Contract Act wherein it is observed. "An agreement to pay debt due from a third person is good consideration in law. Where a son signs an acknowledgment in respect of money due from his deceased father, to save the estate of his father from sale in execution of any decree that may have been passed against such estate, there is consideration for the acknowledgment and for assumption of personal liability by the son", and also relying on the commentary on Section 25 of the Contract Act, has come to the conclusion that the father was liable to pay the loan having acknowledged the loan of his son and for making some payments in that regard. At this juncture, it is the argument of appellant's Counsel that in the above stated illustration, to save the estate of his father son has discharged the debt as a matter of legal obligation much less to avoid attachment of the estate. It is also his argument that the loan was advanced by the Bank under the Self Employment Scheme for which there is no guarantor nor was the loan given to the benefit of the estate of the defendant to make him liable.

15. In the instant case, it is noted as per the pleadings, there was said to be hypothecation letter executed by the original borrower Vijay Kumar hypothecating the goods. There is also an undertaking, as a matter of fact finding, by the defendant acknowledging the debt and to pay back the loan amount on behalf of his son. Although such acknowledgments were disputed by the defendant, the lower Appellate Court has observed that in view of the undertaking by the defendant and in view of the fact that he had paid certain installments after the undertaking and thereafter had become a defaulter, he is estopped from denying such repayment and accordingly decreed the suit.

16. In Exhibit P. 2 dated 4-12-1989, there is said to be the signature of the defendant acknowledging the amount to the extent of Rs. 18,582/-with interest. Ex. P. 3 is the stamp paper on which the defendant is said to have executed a letter of guarantee on behalf of Vijay Kumar. Ex. P. 4 reveals another acknowledgment undertaking to repay the loan at the rate of Rs. 500/- p.m. till final settlement. Ex. P. 5 is also another acknowledgment letter. On the basis of these documents, the lower Appellate Court has come to the conclusion that defendant has executed the acknowledgments dated 4-12-1989 and 20-8-1992; the suit was filed on 16-8-1995 and the loan is said to have been borrowed on 9-3-1988. The lower Appellate Court having accepted the guarantee letter/ acknowledgment, has concluded that defendant was due of the amount as he has not paid as per the undertaking given by him. Having regard to the nature of the transaction and from the material on record, it is clear that there is no privity of contract between the plaintiff and the defendant and it is also the case of the parties as well that there is no guarantee for the said loan transaction and the loan was sanctioned under the Self Employment Scheme of the Government. However, there is hypothecation of the goods by the Bank. Now it remains to be

seen whether on the basis of the acknowledgment executed by the father of the borrower the loan could be enforced against him and, if such acknowledgement is made after expiration of the period of loan, whether it would revive the period of limitation.

17. The plaintiff in support of their case have produced the ledger maintained by them marked as Ex. P. 1 for having opened an account and having made entries regarding the interest accrued from time to time and payments being made on some accounts. Further, some payments are also said to have been made and the same are debited. It is also their case that the defendant has paid the amount due for some time and thereafter, he became a defaulter. As per Ex. P. 2-acknowledgment letter of the year 1989 for Rs. 18,582/-, it appears there is some crediting to the account of Vijay Kumar between 21-12-1988 and thereafter, out of the subsidy amount. However, it is not made clear as to what is the subsidy given for Rs. 16,000/-. Before filing of the suit, as on 1-1-1994 the balance amount to be paid is shown as Rs. 28,250/- including interest. The lower Appellate Court referring to Section 25 of the Contract Act, has taken the view that acknowledgment can form the basis for the suit. It is relevant to extract Section 25 of the Indian Contract Act:

Section 25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law. -- An agreement made without consideration is void, unless --

(1) it is expressed in writing and registered under the law for the time being in force for registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other, or unless;

(2) it is a promise to compensate, wholly or in part a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless;

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

18. In the exemptions provided, it is held to be an agreement where it can be enforced. In the decision in *The Commissioner of Wealth Tax, Mysore Vs. Her Highness Vijayaba, Dowager Maharani Saheb of Bhavnagar Palace, Bhavnagar and Others*, , it is held contractual obligations entered into or arising out of family settlement are binding, the consideration being purchase of peace for the family, which is a good consideration. In the instant case, as a matter of fact finding, the defendant has executed Exs. P. 2 to P. 5 which are in the form of undertaking and acknowledgment of the debt due. These acknowledgments are made well-

within the period of limitation. Under such circumstance, it cannot be said that there is no such obligation on the part of the defendant to repay the loan incurred by his son although he is not a guarantor for the transaction and also when it is clear that some payments have been made by him. At the time of the original transaction between the parties, the interest sought by the plaintiff is at the rate of 14%. However, the interest charged at the relevant point of time is at the rate of 10%. Admittedly, the loan is advanced to the son of the defendant under the Self Employment Scheme. It is also seen that the acknowledgment said to have been executed by the defendant is well-within the period of limitation. As such, the question of acknowledgment being time barred does not arise. Furthermore in view of the decision of the Apex Court in the case of Commissioner of Wealth Tax, Mysore, the undertaking given by the father to pay the loan incurred by the son is a good consideration to purchase peace for the family and to save the estate of his son from attachment and sale in execution. In that view of the matter, the substantial question of law raised has to be answered in favour of the respondents.

19. However, the scheme under which the son of the defendant has obtained the loan is for self-employment and the interest charged was at 10%J. The prayer of the plaintiff is to award interest at the rate of 14% and the lower Appellate Court has decreed the suit of the plaintiff in entirety as prayed for. So far as interest part is concerned, having regard to the nature of the transaction and the current rate of interest, the plaintiff would be entitled to interest at the rate of 6% on the amount of Rs. 28,250/- from the date of suit till payment.

20. For the foregoing reasons, the appeal is allowed in part. While modifying the decree of the lower Appellate Court, it is ordered that the plaintiff would be entitled to a sum of Rs. 28,250/- with 6% interest from the date of filing of the suit till payment. Further, it is made clear that since the goods were hypothecated by the plaintiff, they shall realise the amount out of the hypothecated goods and if still some amount falls short, the plaintiff may proceed against the defendant. In the circumstances of the case, parties to bear their own costs.