
(1986) 06 BOM CK 0006
In the Bombay High Court

Ram Nagappa Shetty

APPELLANT

Vs

Syndicate Bank and others

RESPONDENT

Date of Decision : 09-06-1986

Acts Referred:

Citation : (1987) 2 BomCR 362 : (1986) 88 BOMLR 409 : (1987) 62 CompCas 10

Hon'ble Judges : S.P. Bharucha, J;Desai, J

Bench : Division Bench

Judgement

Bharucha J.

1. This appeal is directed against an order of pendse j. allowing a chamber summons for amendment of a plaint " subject to the contention o limitation to be raised by defendants". The appellant is one of the five defendants to the suit.

2. The plaintiffs (the first respondent to the appeal) are a nationalised bank. Defendant No. 1 is public limited company of which defendants nos. 2,3 and 4 were, at the relevant time, directors. On august 21, 1973, defendant no.1 asked the plaintiffs for a packing credit loan for the export of diamonds. on August 24, 1973, the plaintiffs sanctioned the loan for Rs. 7,25,000. In connection therewith, defendant No 1 executed certain documents. On September 28, 1973, defendant No.1. His resignation was accepted on October 27, 1973, and this was communicated to the Registrar of Companies. on November 22, 1973, certain further documents were executed. According to the plaintiffs, these included an individual deed of guarantee in the sum of Rs. 2, 30, 000 by defendant no,4. on august 19, 1976, the plaintiffs issued a notice of demand to each of the defendants. The notice recorded, inter alia, that by three separate deeds of guarantee, all dated november 22, 1973, defendants Nos. 2, 3 and 4 had jointly and severally guaranteed repayment of the loan advanced to defendant No. 1 to the extent of Rs 2,30,000 together with interest thereon. The notice called upon defendants Nos. 2, 3 and 4 to make payment of the amounts so guaranteed.

3. on august 21, 1976, the plaintiffs filed this suit. The plaint recited that

defendants Nos. 2, 3, and 4 were liable under their guarantee dated November 22, 1973, copies whereof were annexed. On February 21, November 22, 1973, copies whereof were annexed. On February 21, 1977, defendant No. 4 filed a written statement contending, *inter alia*, that he had not signed any deed of guarantee dated November 22, 1973, and that the document relied upon by the plaintiffs was fabricated.

4. On November 13, 1981, the plaintiffs took out a chamber summons for amendment of the plaint in terms of the draft annexed as a schedule thereto. The sum and substance of the amendment was that defendant No. 4 had, on January 24, 1972, executed a deed of guarantee in favour of the plaintiffs guaranteeing repayment of all present and future advances, liabilities, bills and promissory notes through or for defendant No. 1. In the affidavit in support of the chamber summons it was stated that since defendant No. 4 had challenged the guarantee dated November 22, 1973, on the ground that the signature thereon was not his, the plaintiffs had made searches in their records and had found the guarantee dated January 24, 1972, executed by defendants Nos. 2, 3 and 4. In the affidavit filed by defendant No. 4 in reply to the chamber summons, it was contended that the guarantee dated January 24, 1972, was also not signed by him and that the amendment should not be granted as it was signed by him and that the amendment should not be granted as it was barred by the law of limitation.

5. The order passed on that chamber summons is under challenge. Thereunder, the amendment was allowed, subject, as has been quoted above, to the defendants' contention in respect of limitation.

6. By reason of the order on the chamber summons, defendant No. 4 can only urge at the hearing of the suit that the claim on the guarantee dated January 24, 1972, could not have been laid on the date of the filing of the suit, namely August 21, 1976, being barred by the law of limitation. It will not be open to him to urge that the claim on it was barred on the date of the chamber summons, namely, November 13, 1981. This is because the amendment, when granted, related back to the date of filing of the suit. That this is the correct interpretation of the order is not in dispute.

7. Mr. Chagla, learned counsel for appellant (defendant No. 4), submitted that a suit on the guarantee dated January 24, 1972, could not have been filed on November 13, 1981, and that, therefore, a valuable right that had accrued to defendant No. 4 had been taken away by reason of the impugned order. In his submission, there was no special circumstance disclosed in the affidavit in support of the chamber summons which enabled the court to permit an amendment by limitation.

8. The real question, therefore, that arises is; was the cause of action on the guaranteed date January 24, 1972, barred on November 13, 1981. Mr. Mehta, learned counsel for respondent No. 1 (the plaintiffs) submitted that the cause of

action on the guarantee dated January 24, 1972, was not barred by the law of limitation on November 13, 1981. By this guarantee defendant No. 4 had agreed to pay to the plaintiffs "on demand such sums and moneys as were then or would at any time be owing" to them on any account whatsoever from the first defendant No.4 on demand and no demand under the guarantee had been made upon defendant No. 4 at any time prior to November 13, 1981.

9. In *J.Brown's Estate, in re : Brown v. Brown* [1893] Ch 300, Chitty J. held that there was a distinction in law between a present debt and a promise to pay on demand on the one hand and a promise to pay a collateral sum on request on the other hand. Where there was a promise to pay a collateral sum on request, the request had to be made before the action was brought. This is also the view taken by the Court of Appeal in *Bradford Old Bank Ltd. v. Sutcliffe* [1918] 2 KB 833. The guarantee which was considered there was a guarantee to pay on demand. It was held that a demand before the action was an essential part of the cause of action against the guarantor and that the statute would not commence to run until the necessary demand was made. We may mention that this position in law is also set out in Halsbury's Laws of England, 4th edition (para 159, volume 20) and in Rowlatt on Principal and Surety, 4th edition (page 115).

10. The guarantee dated January 24, 1972, is a guarantee to pay on demand. The notice of demand dated August 19, 1976, refers only to the guarantee dated November 22, 1973. So does the plaint. There was, therefore, no invocation of the guarantee dated January 24, 1972, at any time prior to January 13, 1981. We are, therefore, unable to hold that the cause of action on the guarantee dated January 24, 1972, did not survive on January 13, 1981.

11. Mr. Chagla submitted that the notice of demand dated August 19, 1976, ought to be read reasonably. It made a demand for moneys that were guaranteed not only by the guarantee dated November 22, 1973, but also by the guarantee dated January 24, 1972. The notice of demand ought, therefore, to be read as claiming the moneys due under the guarantee dated January 24, 1972.

12. We find it difficult to accept Mr. Chagla's submission. The demand that must be made is for the amount covered by the particular guarantee. Where the same amount is covered by more than one guarantee, though given by the same guarantor, each such guarantor, each such guarantee must be invoked in the demand. Until each guarantee is involved, the bar of limitation there against does not begin to run. The guarantee dated January 22, 1972, not having been invoked until November 13, 1981, we are unable to hold that no suit thereon could have been filed on that date.

13. Mr. Chagla referred to the judgment of the Supreme Court in *Mrs. Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd.*, . It was there held that in the case of a continuing guarantee, so long as the account of the principal debtor was a live account in the sense that it was not settled, and there was no refusal on the part of the guarantor to carry out his obligation, the period of limitation

could not be said to have commenced running ; limitation would run only from the date of his breach. mr. Chagla submitted that defendant No.1's account with the plaintiffs was not a live account when the suit was filed, and therefore, the period of limitation in respect of the guarantee dated January 22, 1972,, commenced to run from the date of the suit. This argument does not take into account the dual requirement that the Supreme Court has set out, namely, that the principal debtor's account must have ceased to be a live account and there must be a refusal on the part of the guarantor to carry out his obligation. Only after a demand has been made,, can there be a refusal Up[on refusal, there is a breach and limitation begins to run. Lastly Mr. Chagla submitted that if no demand had been made on the guaranteed dated January 24, 1972, no cause of action had arisen thereon, the amendment was without value and ought, therefore, not to have been allowed. it is not possible to to hold that the amendment is wholly worthless and reject it on that ground. it will be open to defendant No. 4 to contend, if so advised at the hearing of the suit, that the cause of actin on the guarantee dated January 24, 1972, had not arisen.

14. In the result, the appeal is dismissed.

15. No order as to costs.

16. Appeal dismissed.