(2007) 01 MP CK 0017

In the Madhya Pradesh High Court

Case No : F.A. 128 of 1997

Sardar Gurjinder Singh (since dead) through L. Rs. and Another — APPELLANT

Vs

Central Bank of India and Another — RESPONDENT

Date of Decision : 16-01-2007

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 96
Limitation Act, 1963 — Article 115

Citation : (2008) 2 MPJR 316

Hon'ble Judges : R.C. Mishra, J;Deepak Verma, J

Bench : Division Bench

Advocate : Pranay Verma, for the Appellant; H.C. Kohli, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Verma, J.

This appeal u/s 96 of the Code of Civil Procedure, has been preferred by the principal debtor and one of the guarantors against the judgment dated 1.1.97, passed by District Judge, Shahdol in C.S. No. 1-B/92. Respondent No. 2, the other guarantor, has not filed any appeal against the judgment and decree making him and the Appellants, jointly and severally, liable to pay a sum of Rs. 3,55,667/- together with interest to Respondent No. 1, Bank.

During pendency of present appeal, principal borrower Appellant No. 1 Sardar Gurjinder Singh died, and his Legal Representatives have been brought on record.

Factual matrix is as under:

(A) Respondent No. 1 Bank had filed a suit for recovery of a sum of Rs. 3,55,667/- together with interest against Appellants and Respondent No. 2, or in the alternative for grant of decree for sale of hypothecated Truck bearing Registration No. MBJ-2115. The plaint averments are as under, K.J. Balapuriya

(PW-3) was holding a power of attorney executed in his favour by the Bank and by virtue of the said power of attorney, he was duly authorized and competent to sign and verify the plaint and to file it in the Court. Even otherwise, he being a Principal Officer of the Bank and fully aware with the facts of the case, was empowered to file the suit for and on behalf of the Bank. At the request of Appellant No. 1 Sardar Gurjinder Singh (since deceased), Respondent No. 1 Bank advanced a sum of Rs. 2,21,000/- as loan, for purchase of Tata Diesel Dumper with Jack Steel Body. It was repayable in 44 monthly and equal instalments together with interest @ 12.5% with quarterly rests. On 12.8.81, Appellant No. 1 executed Demand Promissory Note and Article of Agreement in favour of the Bank. The Dumper purchased with such financial aid of the bank and subsequently registered as Motor Vehicle No. MBJ-2115 was hypothecated with the Bank. Defendant No. 2 and 3 had taken guarantee for repayment of the said loan and accordingly executed the letter of guarantee in favour of the Bank. Even though Appellant No. 1 committed default in payment of instalments, he continued to acknowledge his liability to pay the balance amount from time to time. However, his account had become sticky. Since the Appellants and Respondent No. 2 did not come forth to clear the outstanding dues, Respondent No. 1 Bank was constrained to file the suit against them.

(B) Despite due service of summons, Respondent No. 2 did not submit any written statement. The suit proceeded against him ex-parte.

(C) In their written statement/averment, the Appellants also raised two legal objections while denying the plaint. Firstly, the suit was incompetent as K.J. Balapuriya did not have authority to file the suit on behalf of the Bank; and, secondly the suit was time barred. On facts, the suit was resisted on the ground that their signatures were obtained on certain blank forms, at the time when the Appellant had gone to open Savings Account with the Plaintiff bank. The execution of the Demand Promissory Note, the Hypothecation Agreement or the Letter of Guarantee in favour of the Bank was specifically denied. According to them, apparently the same blank forms were used for making the loan and guarantee documents produced by the Bank in support of the claim. Use of different inks in filing up the forms relied by the Plaintiff bank, also raised doubt with regard to genuine-ness of the documents. As such, the truck was never hypothecated with bank nor it was agreed that in case of any default in payment of loan, the same can be sold without the consent and permission of Appellant No. 1. This apart, several illegal and unauthorized entries were made in his account by Plaintiff.

(D) It was further asserted that there was no question of executing balance of confirmation slip in favour of the Plaintiff on 2.5.89, as Appellant No. 1 remained admitted in Triveni Nursing Home, at Jabalpur during the period from 1.5.89 to 6.5.89. The said acknowledgment was nothing, but a forgery committed by Bank Officials and, therefore, not binding on him. Appellant No. 1 has no income whatsoever either from the truck or otherwise.

On the strength of the aforesaid pleadings of parties, trial court framed issues. Parties went to trial and adduced evidence in support of their respective claims. As mentioned hereinabove, on appreciation of evidence available on record, trial court has decreed the suit of the Plaintiff against the Appellants as also against Respondent No. 2. Hence, this appeal.

We have accordingly heard learned Counsel for the parties at length and perused the record.

Shri Pranay Verma, appearing for Appellants, has contended that following questions would arise for consideration in this appeal:

(i) The suit filed by Plaintiff is beyond period of limitation and as such, should have been dismissed on this ground alone.

(ii) Acknowledgement said to have been executed by Appellant No. 1 on 2.5.89 (Ex.P/37) was not executed by him as on the said date he was admitted in Triveni Nursing Home, Jabalpur.

(iii) In absence of proper and legal proof of power of attorney, said to have been executed in favour of K.J. Balapuriya (PW-3) by Plaintiff bank, the suit deserves to be dismissed.

(iv) Lastly, the rate of compound interest with quarterly rests is exorbitantly high and atleast deserves to be modified suitably.

We shall accordingly take up the aforesaid questions ad seriatim.

Ex.P/37 is the letter of confirmation with regard to the amount due and outstanding against Appellant No. 1 in favour of Respondent No. 1/Bank. The said letter of confirmation was executed on 2.5.89 in Khalesar Branch, Umaria. It bears the signatures of Accountant of Bank, as also Appellant No. 1. To prove his signatures, the same has been compared with Ex.P/39, Vakalatnama undisputedly executed by him and filed in the said suit. Critical examination and comparison of the signatures would show that both belong to the same person that is Appellant No. 1. It raises no amount of doubt in our mind that Ex.P/37 was signed by Appellant No. 1. The suit came to be filed on 15.1.92. If Appellant No. 1 had confirmed his balance as per Ex.P/37, on 2.5.89, then obviously the suit would be deemed to be within the period of limitation. Appellant No. 1 has taken the plea that on the said date he could not have executed the same, as he was admitted in Triveni Hospital, at Jabalpur. To prove this fact, he has relied on discharge ticket (Ex.D/1) and certificate

(Ex.D/2). Ex.D/1 shows that he was first admitted on 25.11.86 and was discharged on 22.12.86 and was again admitted on 24.1.87. Second date of discharge in the same is not given. He was admitted for compound fracture of tibia and fibula, commuted upper 1/3 left side. Ex.D/2 shows that he was again admitted in the hospital on 1.5.89 and was discharged on 6.5.89, but this does not show if he was advised any bed-rest for any particular period and by what date he could have returned to work. All these places are lying blank in Ex.D-2. Evidence of DW-1 Dr. Jitendra Jamdar is also on record. From his evidence also, it could not be established with certainty that on 2.5.89, Appellant No. 1 was admitted in his hospital, at Jabalpur. He has not produced the original record showing the entries thereof. Ex.D/2 is only a certificate issued in favour of Appellant No. 1 which also does not disclose the basis on which the said certificate has been prepared Not only this, had he really been admitted during the aforesaid period, then he must have been issued an admit card and discharge ticket also, but the same have been filed. Despite the evidence of DW-1 Dr. Jitendra Jamdar, we are of the opinion that Appellant No. 1 has not been able to prove that on 2.5.89, he was admitted in hospital at Jabalpur and, therefore, was not able to execute the confirmation of accounts vide Ex.P/37. It is clear from the evidence of Defendants that they have tried to build up false and baseless story so as to defeat the just and proper claim of the Plaintiff. Had it really been so, then it was incumbent on Appellant No. 1 to have brought it to the notice of Plaintiff as soon as notice of demand with regard to the amounts due, was sent to them. Thus, according to us, Appellant No. 1 had confirmed his balance with the bank on 2.8.89. If that is so, then the suit having been filed within a period of 3 years would be deemed to be within the period of limitation.

Learned Counsel for the Appellant has placed reliance on a judgment of the Supreme Court reported in Mrs. Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd., , (Mrs. Margaret Lalita Samuel v. Indo Commercial Bank Ltd.) and Ramashre Chandrakar Vs. Dena Bank and Another, , to show as to when the period of limitation would commence in such type of litigation. In both the cases, it has been held that in case of continuing guarantee and an undertaking given by Defendant to pay the amount that may be due to the Bank, the period of limitation for a suit to enforce the bond could not be said to have commenced running, it would only commence to run from the date of its breach as contemplated under Article 115 of the old Limitation Act. Similar is the view expressed by learned Single Judge of this Court in the matter Ramashre Chandrakar (supra). Essentially there can not be any dispute with regard to aforesaid proposition of law. In the case in hand, since it has been held that Appellant No. 1 had executed letter of confirmation of accounts in favour of the Bank on 2.5.89, and the suit was filed within a period of 3 years, thus it would be deemed that the suit was filed within the period of limitation only. The right to file the suit to the bank arose, again after the breach committed by Appellant No. 1, despite execution of confirmation letter on 2.8.89. In a recent decision rendered in Syndicate Bank Vs. Channaveerappa Beleri and Others, , a case based on continuing guarantee, while reiterating the well settled position of law on the point, the Supreme Court observed:

11. But in the case on hand, the guarantee deeds specifically state that the guarantors agree to pay and satisfy the bank on demand and interest will be payable by the guarantors only from the date of demand. In a case where the guarantee is payable on demand, as held in the case of Bradford (supra) and

Hartland (supra), the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand.

In this view of the matter, we are of the opinion that the suit was filed by Plaintiff bank within the period of limitation and is not liable to be dismissed on this ground.

Now, coming to the third ground. It is to be seen that K.J. Balapuriya (PW-3) has categorically deposed that he was posted in the said Branch between 1989 to 1993, and the power of attorney was executed in his favour by the Head Office. The said power of attorney was lost and FIR with the police was lodged in this regard. Its Photostat copy was filed and finds place on record. No doubt it is true that ordinarily the power of attorney should have been filed, but there is no reason to doubt the statement of PW-3 K.J. Balapuriya. The Defendants/ Appellants had also failed to submit any document to question his authority. The ground urged by learned Counsel for the Appellants is apparently hyper technical in nature. Moreover, it is well settled that where the suit is instituted by a Public Corporation, public interest should not be permitted to be defeated and Plaintiff should not be non-suited on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. See: United Bank of India Vs. Naresh Kumar and others, .

Now, coming to the last question with regard to rate of interest, we are of the opinion that Appellants had entered into an agreement with Plaintiff bank with their open eyes and after fully understanding the contents thereof. No ground has been made out to show that the rate of interest charged is either exorbitant or on higher side. It is also to be seen that Appellant No. 1 continued to be in possession of the truck till he died in the year 2006, and now his legal representatives are in possession thereof. It is not their case that the said truck was not in running condition and they are not able to earn any profits out of the same. Therefore, on the one hand they are earning profit out of the said truck and on the other they are praying for reduction of interest. This would be against the principles of equity. Defendants can not be allowed to have the best of the two worlds.

No other point was urged before us.

In the light of the foregoing discussion, we are of the opinion that there is no merit or substance in this appeal. It is accordingly hereby dismissed as such, with costs throughout. Counsel fee Rs. 2000/-.