(2012) 04 CHH CK 0012

In the Chhattisgarh High Court

Case No : F.A. No. 119 of 1993

State Bank of India APPELLANT

Vs

M/s. Meghraj Contractor and Others RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Contract Act, 1872 — Section 128, 25, 25(3)
Limitation Act, 1963 — Section 18

Citation : AIR 2012 Chh 149 : (2012) 3 CGBCLJ 313

Hon'ble Judges : Nawal Kishore Agarwal, J

Bench : Division Bench

Advocate : Goutam Bhaduri, for the Appellant; Ajay Singh, for the Respondent

Final Decision : Allowed

Judgement

N.K. Agarwal, J.—This is plaintiff''s first appeal u/s 96 of the CPC (for brevity ''the C.P.C.'') against the judgment and decree dated 24-12-1992 passed in Civil Suit No. 64-B/1991 by the 1st Additional District Judge, Raipur dismissing the plaintiff''s suit. Facts of the case in brief are as under :--

(i) The plaintiff filed a civil suit for recovery of Rs. 27,086,14 against the respondents/defendants. In pursuance of application for loan, the plaintiff sanctioned the loan to the tune of Rs. 10,000/- under the Cash Credit account, on 27-12-1976 in favour of respondent No. 1-Firm. The respondent Nos. 2 to 5 are partners and respondent No. 6 is guarantor.

(ii) While obtaining loan, respondent-Firm, its partners and the guarantor, i.e., respondent No. 6 executed a demand promissory note worth Rs. 10,000/- in favour of the plaintiff Bank. Respondent Nos. 1 to 5 also executed an agreement for hypothecation and guarantee on the same day while respondent No. 6, i.e., the guarantor executed the agreement for guarantee, by virtue of which, the defendants are liable to repay the loan jointly and severally.

(iii) The loan was not liquidated by the respondents instead they executed promissory note (Ex. P.1) and D.P. Note Delivery Letter (Ex. P.2) dated 26-6-1983 whereby they entered into independent contract to repay the time barred debt in terms of the original contract. Vide Ex. P.3, respondent No. 2, i.e., Meghraj on behalf of respondent No. 1 - Firm deposited a sum of Rs. 500/- against the dues on 26-6-1983.

(iv) Respondent Nos. 1 & 2 have further, executed balance confirmation letter vide Ex. P.4 on 16-6-1983. Ex. P.5 on 31st December. 1984, acknowledgment (Ex. P.6) on 8-3-1985 and Ex. P.12 on 15-7-1986.

(v) The trial Court deciding all other issues in plaintiff''s favour, dismissed the suit as barred by limitation. Hence, this appeal.

2. Shri Goutam Bhaduri, learned counsel appearing for the appellant submits: the trial Court has erred in dismissing the suit on the ground of limitation treating promissory notes (Ex. P.1 and Ex. P.2) dated 26-6-1983 as acknowledgment u/s 18 of the Limitation Act, 1963 (hereinafter referred to as ''the Act of 1963'') and not an independent contract to pay time barred debt u/s 25(3) of the Indian Contract Act, 1872 (henceforth ''the Act of 1872''). According to Mr. Bhaduri, vide Ex. P.1 and Ex. P.2, the parties entered into independent contract whereby the respondents have agreed to pay a time barred debt u/s 25(3) of the Act of 1872 on the terms as enumerated in the original contract. After execution of above contract, the dues were acknowledged by the respondent Nos. 1 and 2 vide Ex. P.4 to Ex. P.6 and Ex. P.12. Ex. P.12 is dated 15-7-1986, and therefore, the suit filed on 7-5-1988 was well within limitation. It was further contended, though the documents Ex. P.4 to Ex. P.6 and Ex. P.12 were not executed by respondent No. 6-guarantor but u/s 128 of the Act of 1872, the liability of the guarantor is co-extensive and the acknowledgment executed by the respondents/borrowers will be deemed to be acknowledgment of guarantor and in this way, respondent No. 6 is also jointly and severally liable for payment of debt to the plaintiff-Bank.

3. Per contra, Shri Ajay Singh, learned counsel appearing for respondent No. 5 supports the judgment and decree impugned and submits: the documents Ex. P.1 and Ex. P.2 cannot be termed as independent contract u/s 25(3) of the Act of 1872 but are invalid acknowledgments u/s 18 of the Act of 1963, inasmuch as, the same have not been executed within the period of limitation.

4. I have heard learned counsel for the parties and perused the record of trial Court including judgment and decree impugned.

5. Two questions arise for determination of this Court :

(i) Whether Ex. P.1 and Ex. P.2 are acknowledgments u/s 18 of the Act of 1963 or independent contract to pay time barred debt u/s 25(3) of the Act of 1872?

(ii) Whether the subsequent acknowledgments executed by the respondents/ borrowers would also bind upon respondent No. 6 u/s 128 of the Act of 1872?

6. Section 18 of the Act of 1963, Section 25(3) and Section 128 of the Act of 1872 read as under:

18. Effect of acknowledgment in writing.-- (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.-- For the purposes of this section,--

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right.

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

...

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--

XXXX XXXX XXXX

(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) ***

128. Surety''s liability.--The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

7. The distinction between Section 18 of the Limitation Act and sub-section (3) of Section 25 is that, in case of Section 18, the written acknowledgment of liability must be made before the expiration of period of limitation for a suit, and the

promise under sub-section (3) of Section 25 may be made after the expiration of period of limitation.

8. Section 25(3) of the Act of 1872 validates a promise to pay a debt barred by limitation. Document (Ex. P.2) refers to the amount of loan advanced by the plaintiff on 27-12-1976, dues of Rs. 15,549.12 ps. as on 26-6-1983 and promise to pay the same. As per illustration (e) of Section 25 of the Act of 1872, if A owes B Rs. 1,000/-, but the debt is barred by the Limitation Act, A signs a written promise to pay B Rs. 500/- on account of the debt, this is a contract. In the instant case, vide Ex. P.2, the respondents agreed to pay Rs. 15,549.12 ps. subject to and on the same terms and conditions as stipulated in the original agreement dated 27-12-1976. Therefore, the contents clearly satisfy the requirement of Section 25(3) of the Act of 1872 and the trial Court has grossly erred in treating the promissory note and D.P. Note Delivery Letter (Ex. P.1 & P.2) as acknowledgment u/s 18 of the Act of 1963, while dismissing the suit.

9. Coming to the second question, the respondent No. 6 by executing Ex. P.2 promised to pay the time barred debt on the same terms and conditions as stipulated in the original agreement dated 27-12-1976. Guarantee given in the case is a continuing guarantee. The Supreme Court, in the case of Kailash Nath Agarwal and Others Vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Another, while considering the scope of Section 128 of the Indian Contract Act, has held in para 10 of its judgment that considering the clause of guarantee executed by the guarantor in favour of borrower, it shows that the liability of the guarantor was to remain unaffected by the failure of borrower. It further provides that borrower and guarantor are jointly and severally liable u/s 128 of the Indian Contract Act.

10. Where the guarantee is a continuous one, acknowledgment of debt made by the principal debtor is binding on the guarantor. Therefore, considering the terms in the agreement of guarantee (Ex. P.9) in the light of Section 128 of the Act of 1872, in my considered opinion, the acknowledgment of debt by the borrowers will be binding upon the guarantor, as such, the suit is also not barred by limitation against respondent No. 6.

11. In the result, the appeal is allowed. The judgment and decree impugned is set aside. Instead, the appellant/plaintiff-Bank is granted a decree of Rs. 27,086.14 ps. along with interest @ 6% per annum from the date of suit on the principal sum adjudged till its recovery. Cost of the suit as well as the appeal shall be borne by the respondents. A decree be drawn accordingly.