SUPREME COURT OF INDIA

Mr.Krishna Gopal Kakani

Vs.

Bank of Baroda

Civil Appeal No.8448 of 2001

(Tarun Chatterjee and Harjit Singh Bedi)

30/09/2008

JUDGMENT

HARJIT SINGH BEDI, J.

1. This appeal arises out of the following facts.

2. The appellant, Krishna Gopal Kakani, the proprietor of M/s. Oriental Traders, a concern involved in the manufacture and import of goods, obtained a letter of authority from the Chief Controller of Imports and Exports, Bombay for the import of raw material for the benefit of a licensee who had been given an import licence. The appellant accordingly placed orders with a foreign supplier for the import of specified goods and for that purpose approached the respondent-Bank for opening Letters of Credit for two consignments. The bank thereupon opened two Letters of Credit, one on 24th August 1973, and the other on 21st September 1973 on which he also deposited 10% of the margin money of Rs.4560/- and Rs.4810/-. The other formalities having been completed, the Letters of Credit were duly negotiated on 21st January 1974 and 19th March 1974. The consignment arrived in India on 13th March, 1974 but despite the requests made by the appellant and his clearing

agent, the Bombay Customs refused to release the goods without assigning any reason, though on enquiry from the Joint Chief Controller of Imports and Exports, Bombay, the appellant was told that the controller had no objection to the release. Faced with a notice from the Port Trust threatening heavy demurrage charges and apprehending auction of the goods by the Trust, the appellant as a joint-holder of the property approached the Bombay High Court for orders. The Bank also, as joint-holder of the import licence by virtue of having paid the value of the import consignment, thereafter filed several Miscellaneous Applications before the Court and in one matter, Miscellaneous Application No. 950/1975; the appellant was also arrayed as respondent No.7. In this application, it was pleaded by the Bank that the action of the respondents therein in not releasing the consignments was unjustified and that the appellant-Bank also claimed their rights on the goods as being joint-holders thereof. The Bombay High Court in its order dated 19th November 1975 directed as under:-

"(a) That respondent No.6 do sell the goods by Public auction to the highest bidder preference to be given to the actual users holding Drugs Controllers Licenses.

(b) Respondent No.6 do deposit the net sale proceeds or the goods with the Prothonotary and Senior Master, High Court, Bombay to invest the net sales in fixed deposit with Bank of Baroda at Bombay Office.

(c) The sale proceeds shall represent in all respects as they were the "Goods" for all purpose including for the purpose of the Lien on the said goods, if any, of the 6th respondent.

(d) The said sale proceeds shall be held by the Prothonotary and Senior Master, High Court, Bombay subject to the rights of the parties and further orders of the High Court."

3. Pursuant to the aforesaid order, the goods were sold public auction and the sale proceeds of Rs.4, 72,714.16 were deposited with the Prothonotary and Senior Master of the Bombay High Court. Miscellaneous Application No. 950/1975 was finally disposed of by the Bombay High Court on 3rd October, 1979 with the direction that the Bank would be entitled to the amount deposited but would defray an amount of Rs.8044.18 to the Bombay Port Trust towards demurrage charges and was also liable to pay the customs duty. In the light of the above said directions, the Bank which had also filed a civil suit against the appellant in Indore on 31st December 1976 for the recovery of Rs.1, 27,282.93 with interest, withdrew the same on 3rd October 1980. In the background of this development, the appellant, by a telegram dated 19th November 1980, requested the Bank to refund the surplus amount along with the margin money lying in deposit with the Prothonotary with interest and (as per the present suit) the Bank intimated that the money would be paid after receiving orders from the Bombay Head Office. The appellant also wrote a letter to the Bank and also sent a reminder dated 11th November 1980 on which the Bank replied (on 2nd December 1980) that it was still awaiting instructions from the higher authorities. It appears that the appellant also addressed several letters to the higher echelons in the Bank and also met the concerned officials

between the years 1980 and 1988 but to no effect and ultimately addressed a letter dated 12th December 1988 threatening the Bank with legal action. It appears that in the interregnum, one R.M. Patwa, who was also a debtor to the Bank approached the appellant that his debts could be adjusted against the amount of the surplus dues of the appellant lying deposited with the Bank. The appellant consented to the said proposal and an application was accordingly moved on 4th March 1986 in the execution proceedings pertaining to R.M. Patwa's case. It appears that at one stage the Bank agreed to the adjustment but subsequently i.e., on 14th September 1990, withdrew its consent. The appellant thereafter filed Writ Petition No. 2840 of 1991 before the Bombay High Court claiming the same relief as in the present suit. The said petition was dismissed on 25th October 1991 on the ground of delay and a Special Leave Petition filed in this Court was also dismissed with the observation that the remedy by way of a Writ Petition was not a proper one in the circumstances. In the meanwhile, in the execution petition in R.M. Patwa's case, the court directed that R.M. Patwa's debt be adjusted against the appellant's dues. This order was maintained in a revision petition before the High Court in its order dated 10th May 1995 after a statement of accounts had been filed on 24th February 1995. The Bank challenged the order aforementioned in a Special Leave Petition before this Court and the appeal was duly allowed on 12th January 1996 and the order impugned was set aside. It is, thereafter, that the present suit has been filed on 8th September, 1997 and on the averments leading to the question of limitation, it was pleaded that the cause of action for filing the suit arose on 24th February 1995, when for the first time the Bank had filed a statement of accounts in the High Court. The appellant Bank filed its written statement on18th July 1998 pleading, inter-alia, that the submission of the statement of accounts could not be said to be an admission of the claim of the appellant/plaintiff or an acknowledgement of the debt and as such the plea that the cause of action accrued on the 24th February 1995 was erroneous and the suit having been filed after 17 years from 19th November 1980 was clearly and grossly time barred. It was also pointed out on facts that the appellant's money had never been at stake except to the extent of the margin money and he was, in any case, not entitled to the exorbitant amount claimed by him.

4. The trial court framed seven issues on 17th August 1988; issue No.1 being whether the suit was barred by limitation issue No.5 as to whether the appellant was entitled to a decree for Rs.23, 54,707.58. The appellant examined himself as PW1 and closed his evidence. By a judgment and decree dated 3rd February 2000, the trial court decreed the suit for the amount claimed along with simple interest at 11% from the date of the suit till the date of the payment. It was held, inter-alia that the appellant being the proprietor of M/s. Oriental Traders was entitled to the surplus amount which had been deposited with the Prothonotary on account of the auction of the goods. The court also concluded that the Bank was a trustee of the appellant's money and, therefore the suit was covered by Section 10 of the Limitation Act (hereinafter called the "Act"), which provided for no limitation and in the alternative the cause of action had arisen on 1st August 1997 when the demand notice had been issued by the appellant or from the 24th February 1995 when the statement of accounts had been submitted in the executing court in Patwa's case. The submission of the Bank that the limitation had expired in the year 1992 after the passing of the order of the Bombay High Court was rejected in view of the above findings. The matter was thereafter taken in first appeal before the Gujarat High Court which reversed the order of the trial court observing that the Bank was not a trustee of the money inasmuch that there was no deposit and the matter pertained to a commercial transaction relating to the opening of Letters of Credit and such transaction could not be said to be relatable to a trust so as to bring the matter within Section 10 of the Act. The court also observed that the appellant was aware of the directions given by the Bombay High Court in Miscellaneous Petition No.950 of 1975 for the public auction of the imported raw material and the deposit of the

proceeds with the Prothonotary and that this amount had indeed been deposited with the said officer and finally released to the Bank by the order dated 3rd October 1979 and in this view of th matter it was not for him to plead ignorance of the aforesaid proceedings. It was further opined that it would have been appropriate that he should have raised some objection at that stage or filed another suit but instead; the appellant had continued to send legal notices and had also made a futile attempt at an adjustment in the year 1990 in R.M. Patwa's case. The High Court also observed that the undertaking given at one stage by the Bank agreeing to the adjustment which had been subsequently withdrawn had no force as the orders of the executing court and the High Court had been set aside by the Supreme Court and as such any undertaking given in those proceedings was in any event nonest. The High Court also expressed its surprise at the fact that though th appellant had deposited a sum of Rs. 4560.00 and Rs.4810.0 only as margin money for the Letters of Credit, yet an astronomical amount without any rational basis had been decreed by the trial court. The court also observed that a suit for money payable by the defendant to the plaintiff for money received for the plaintiff's dues lay within 3 years only from the date of money received as per Article 24 of the Act, and in the light of the fact that the Bombay High Court in its final order passed on 3rd October 1979 in Misc. Application No. 950/1975 had directed that the money should be paid to the Bank was the date from which the 3 years period would be deemed to have commenced and that this was also the appellant's understanding as he had given a demand notice telegraphically on 19th January 1980, confirming the same in writing on 13th October 1980 but despite this, the suit had not been filed within 3 years of that specific date. The Court also noted that in the year 1990, he had once again tried for an adjustment of the amount in R.M. Patwa's case and though the offer for adjustment at one stage had been accepted by th Bank but it would still amount to an acknowledgment to sav limitation (which would have to be within the original period of limitation). The High Court further opined that the appellant had been associated with the matter relating to Miscellaneous Petition No.950/1975 in the Bombay High Court and had also admitted that he had not spent any amount with respect to those proceedings and had not made any attempt to claim his rights from the year 1980 to 1988 and that in any case after the Supreme Court had dismissed his Special Leave Petition on 10th February 1992 with the observation that the remedy by way of a writ petition was not a proper remedy on which the appellant had made a statement that he would file a civil suit, the suit had not been filed within 3 years but had been filed after more than 5 years on 8th September 1997. The High Court then examined the broad arguments in principle that ordinarily a Bank should not take a plea of limitation but went on to hold that in the light of the circumstances of the case and the complete inaction of the appellant to pursue his remedies despite several opportunities before him, did not justify any special consideration. The court finally held in the circumstances that the suit would be governed by Articles 22 and 24 of the Act and that limitation of three years would start from the date of receipt of the money or 3 years from the date when the demand had first been made. The plea made on behalf of the Bank with respect to the suit being barred under the principles of res-judicata in view of the writ petition filed by the appellant in the Bombay High Court which had been dismissed and the Special Leave Petition also dismissed on the ground of laches was, however, not gone into by the High Court. The High Court, accordingly, allowed the appeal and set aside the order of the trial court and dismissed the suit.

5. Mr. Tapan Ray, the learned senior counsel for the appellant has submitted that the suit was governed by Section 10 of the Act or in the alternative, Article 113 thereof and the finding of the High Court that it was governed by the provisions of Articles 22 and 24 ibidem was erroneous. It has also been submitted that it was not open to a Public Sector Undertaking such as the respondent-Bank to take the plea of limitation as the taking of the plea was to defeat a cause which was not only

just but on the admitted facts of the case the money belonged to the appellant. The learned counsel for the respondent has, however, pointed out that Section 10 of the Act pertained to suits against trustees and their representatives and a bare perusal of the facts of the case would show that there was no element of the creation of a trust and that this was not even the case set up by the appellant at the initial stages. It has also been pointed out that Article 113, even if applicable, provided for a limitation of 3 years from the time when the right to sue accrued and as the appellant had himself admitted in Writ Petition No.2840/1991 and in several other court proceedings that a demand had been made on several occasions from the year 1980 onwards for the payment of the amount but had not been accepted, the right to sue would have accrued from that date and the suit having been filed in the year 1997 was clearly out of limitation. It has, accordingly, been pleaded that as the suit was one for recovery of money simplicitor, it would be governed by Article 22 or 24 of the Act, as had been found by the High Court. It has finally been submitted that though it was perhaps not proper for a Public Sector Undertaking to take a plea of limitation, but in the facts of the case inasmuch as the appellant had slept over the matter for years together, all pleas were open to the defendant.

6. We take up Mr. Ray's first argument with regard to the applicability of Section 10 of the Act. Section 10 reads as under:

"Section 10.Suits against trustees and their representatives.- Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

7. A bare perusal of this section would reveal that it applies where a property had been vested in trust for any specific purpose and for certain other purposes stipulated in the provision. We are of the opinion that there is nothing to suggest that a trust had been created merely because some money had been deposited with the Bank at the instance of the Court on account of the auction of the goods and it was not a mere deposit simplicitor.

8. Mr. Ray has also referred us to Sections 9,10,14 and 19 of the Indian Trusts Act 1894 with respect to the creation of a trust and drawn our particular attention to Section 88 thereof which deals with the question of an advantage gained by a fiduciary. Section 88 is reproduced below:

"Section 88.Advantage gained by fiduciary.- Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary

advantage, he must hold for the benefit of such other person the advantage so gained."

9. An analysis of this Section would show that the Bank, to whom the money had been entrusted, was not in the capacity set out in the provision itself. The question of any fiduciary relationship therefore arising between the two must therefore be ruled out. It bears reiteration that there is no evidence to show that any trust had been created with respect to the suit money.

10. The learned counsel has, however, placed reliance on Canbank Financial Services Ltd. Vs. Custodian & Ors. (2004) 8 SCC 355 to contend that a Banker holding a customers money would do so in a fiduciary capacity and as such the matter would fall within section 88 and ipso facto make Section 10 of the Act applicable. We, however, see from a perusal of this judgment that it related to a situation where funds in the account of one Hiten Dalal were utilized by two stock-brokers to purchase units in a Mutual Fund under instructions of Hiten Dalal. The units were handed over to Hilen Dalal and the interest accruing thereon was handed over to him. It was in this situation that the Court held that a fiduciary relationship was created with the appellant financial service and Dalal. Clearly, this is not the case herein. Section 10 of the Act is, therefore, not relevant to the circumstances.

11. We now examine Mr. Ray's primary arguments with regard to the applicability of Article 113 of the Act. This Article is reproduced hereunder:

Description of suit	Period of Limitation	Time from which period begins to run
"113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

12. A reading of this provision reveals that the time of three years would start running from the date when the right to sue accrues. It has been submitted by Mr. Ray that the limitation would start from 24th February 1995 i.e., the date when the accounts had been submitted by the Bank in Court. The learned counsel for the respondent has, however, pointed out that the appellant had made his first demand for the money due to him by a telegram dated 19th November 1980 and as the said demand

had not been honoured, the period of limitation would start from that day. It has also been argued that a demand had been made on several occasions thereafter as well but no suit had been filed till the year 1997.

13. We have considered this argument very carefully. It appears from the documents on record that several notices etc. had been issued by the appellant to the Bank and in response to some of them, the Bank had made its reply that it was awaiting instructions from its Head Office. The learned counsel for the respondent has pointedly drawn our attention to a registered notice dated 12th December 1988 wherein after giving a chronology of what had happened, it was stated in paragraph 3 as under:

"This is, therefore, finally to call upon you to settle my clients account by making appropriate payment to it within seven days of the receipt of this notice else my client shall be constraint to file suit for account against the bank treating it as refusal on the part of the bank to settle the account at the entire risk or the x x x as to costs and consequences which please note carefully."

14. Concededly, the suit was not filed even within 3 years from 12th December 1988 despite the above said notice and the suit was, in fact, filed in the year 1997. The learned counsel for the appellant has, however, referred us to paragraphs 39 and 40 of the plaint to identify the date for the start of limitation. These paragraphs are reproduced below:

"Para 33.On 24.2.1995 the defendant Bank submitted statement of account of Plaintiff before the Hon'ble High Court therein showing the credit and debit entries made by them in account of plaintiff with an application and undertaking for giving interest @ 19% on the surplus amount of the plaintiff lying the defendant Bank and specifically requested to the Hon'ble High Court to decide the account as submitted by the Bank on above mentioned terms for interest on surplus.

Para 39.That the cause of action for the present suit accrued in favour of the plaintiff and against the defendant on 24.2.95 when the plaintiff, as stated in para 32 and 33 here-in-above, for the first time came to know, through the statement of account submitted by the defendant in the High Court, about the amount received by the defendant from sale proceeds of the goods, and illegal deduction made by them from the said amount, therefore, the suit is within limitation.

Para 40.That the transaction took place at Indore, the cause of action accrued at Indore and the disputed amount is lying with the defendant Bank at Indore at its Indore Branch, therefore, this suit is within territorial jurisdiction of this Court."

15. We are of the opinion that the appellant's plea of ignorance is clearly untenable in view of the documents referred to above and even from a perusal of the proceedings in the present civil suit. In his cross-examination, the plaintiff-appellant has admitted that in Misc. Application No. 950/1975 he had been served a notice but had not appeared in Court, but was fully aware that the goods had been sold under the orders of the High Court for Rs.4, 72,714.16 and that on 3rd October 1979, when Misc. Application 950/1975 had been finally disposed of, he knew that the aforesaid amount had been deposited with the Bank. The appellant also admitted that from 3.10.1979 to 14.3.1991, when the Writ Petition had been filed in the Bombay High Court, no steps had been taken to recover the amount though several notices, threatening action had been issued. Further even assuming for a moment that a statement of accounts had been tendered by the Bank on 24.2.1995 in Patwa's proceedings that would not amount to an acknowledgement to save limitation, as limitation had long since expired.

16. There is yet another circumstance which clearly militates against the case set up by the appellant. In paragraphs 16, 20 to 24 of Writ Petition 2840/1991 this is what the appellant had to say.

"16. The petitioner now requested the Respondent Bank to refund the surplus amount to them. In a telegram to the Branch Manager, Industrial Estate Branch, Indore on 19.1.1980, the petitioners demanded the surplus amount along with the margin money lying as a deposit with the respondent Bank.

20. The petitioner wrote letters to the Chairman, Managing Director, General Manager, Assistant General Manager and Regional Manager of the respondents complaining about the tacit silence and the uncooperative approach of the respondents in settling the matter of the petitioners inspite of the directions given by this Hon'ble Court.

21. The respondents having failed to even respond to all the letters mentioned in the foregoing para No.20, the petitioner now tried to get succour from the Reserve Bank of India, Under-Secretary, Government of India, Ministry of Finance, New Delhi, between June 1988 to August, 1988.

22. The petitioner states that they approached the Branch Managers of the Respondents on innumerable occasions from Jan.1980 to August, 1988 but regretfully these officers of the Respondents failed to give any information regarding the appropriation of the said amount or the surplus payable to the petitioner, or any statement of account.

23. Finally the petitioners by their advocate called upon the Respondents by their letter of12.12.1988 to settle the petitioners' account or face legal action for illegally withholding the

moneys of the petitioner without any justifiable cause and depriving them of the fruits of their business and profitability.

24. After their inaction for eight years the respondents replied to the notice of 12.12.1988 on 15.12.1988 denying the petitioner's contentions and raising frivolous objections regarding payments of the legitimate dues of the petitioners and merely calling the petitioners to move a "Proper Court" for obtaining appropriate orders.

17. It will be clear from a perusal of the aforesaid averments that, taken at its very best in favour of the appellant, his claim had been finally denied on 15th December 1988. It must, therefore, be held that the right to sue started from that day. The appellant's plea that the limitation would deem to have started w.e.f. 24.2.1995 is therefore, on the face of it, unacceptable. It is further significant that on the dismissal of W.P. No. 2840/1991 on 25.10.1991 by the Bombay High Court, the appellant filed a Special Leave Petition in this Court. This petition too was dismissed in- limine on 10th February, 1992 with the following observations:

"The Special Leave Petition is dismissed. The remedy by way of Writ Petition was certainly not a proper remedy. Learned counsel for the petitioner states that he wants to file a suit. We are not concerned with any such thing. Mr. Agarwala, learned counsel for the respondent will file Vakalatnama within two days."

18. From a reading of the aforesaid order it transpires that despite the statement that a civil suit would be filed, no suit was filed within three years. The suit was filed but in the year 1997 i.e. beyond the period of three years.

19. This Court in Mst. Rukhmabai vs. Lala Laxminarayan & Ors. AIR 1960 SC 335 has observed as under:

33. The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrue when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

34. The facts relevant to the question of limitation in the present case may be briefly restated: The

trust deed was executed I 1916. The suit house was constructed in 1920. If, as we have held, the trust deed as well as the construction of the building were for the benefit of the family, its execution could not constitute any invasion of the plaintiff's right. Till 1926, the plaintiff's father, Ratanlal was residing in that house. In 1928 when Daga challenged the trust deed, the family compromised the matter and salvaged the house. From 1936 onwards the plaintiff has been residing in the suit house. It is conceded that he had knowledge of the litigation between Rukhmabai and Chandanlal claiming the property under the trust deed; but, for that suit he was not a party and the decision in that litigation did not in any way bind him or affects his possession of the house. But in execution of the decree, the Commissioner appointed by the Court came to the premises on February 13, 1937, to take measurements of the house for effecting partition of the property, when the plaintiff raised objection, and thereafter in 1940, filed the suit. From the aforesaid facts, it is manifest that the plaintiff's right to the property was not effectively threatened by the appellant till the Commissioner came to divide the property. It was only then there was an effectual threat to his right to the suit property and the suit was filed within six years thereafter. We, therefore, hold that the suit was within time.

Applying the aforesaid principle, it would be clear as per the appellant's own showing that there had been a denial of the appellant's claim on several occasions before 15th December 1988, but unequivocally on the 15th of December 1988. This judgment was followed subsequently in M.V.S. Manikayala Rao vs. M.Narasimhaswami & Ors. AIR 1966 SC 470. It bears notice that Article 120 of the Limitation Act of 1908 largely corresponds to Article 113 of the Act, with the period of limitation now being reduced from six to three years.

20. We are, therefore, of the opinion that Mr. Ray's primary argument with regard to Article 113, does not advance the case of the appellant. In the face of the above undeniable facts, the large number of judgments cited by the learned counsel for the parties with regard to the date on which the cause of action would accrue need not be examined.

21. Mr. Ray has also submitted that it would be inappropriate for a Public Sector Undertaking such as the respondent-Bank to raise a plea of limitation especially when the amount was due to the appellant. In this connection, the learned counsel has cited The Madras Port Trust vs. Hymanshu International AIR 1979 SC 1144 and UCO Bank vs. Hem Chandra Sarkar AIR 1990 SC 1329. The learned counsel for the respondent has, however, argued that no proper calculation with respect to the amount that had been decreed, had been made and whereas the appellant had deposited in all less than Rs.10,000/- towards margin money in the year 1979, there was no basis for decreeing the suit as claimed for a sum of about Rs.24 Lakhs. It has also been submitted that the appellant had threatened to initiate legal proceedings from the year 1980 onwards and had actually gone to court on several occasions and had remained unsuccessful up to the Supreme Court in the year 1992 but had filed the suit in the year 1997 and as such the Bank was justified in taking the plea of limitation in the facts of the case. We find merit in this argument. In Madras Port Trust's case (supra) the suit had been decreed in favour of the private party in the sum of Rs.4838.87 and special leave had been granted by this Court subject to the payment of the aforesaid amount irrespective of the result of the appeal, the more so as the claim of the private party had been supported by the Government

Department concerned and it is in that situation that the Supreme Court made the observation that a plea of limitation should not be raised. In the UCO Bank's case (supra), the appellant Bank had received the price of the goods from the opposite party but had failed to deliver the goods thereafter. This fact had been virtually admitted by the representative of the Bank and in that backdrop this court observed that it was not open to the Bank to contend that it was not called upon to return the goods or in the alternative to pay an equivalent as price to the plaintiff and it was observed (Para 17) that:

"We may also state that in practice Bankers do not set up the statute of limitations against their customers or their legal representatives, and we see no reason why this case should be an exception to that practice."

22. The facts of the case before us are starkly different, as would be seen from what has been narrated above. Significantly also, the appellant, though a party to the proceedings in Miscellaneous Application No. 950 of 1975, did not put in appearance, nor shared the expenses (as admitted by him in his evidence), but he wants to take advantage of the situation now created. In this background the Bank was fully justified in taking the plea of limitation. We, therefore, find no merit in this appeal. It is accordingly dismissed.