

# **CALCUTTA HIGH COURT**

Notional and Grindlays Bank Ltd

Vs.

Tikam Chand Daga

Suit No. 714 of 1960

(U.C. Law, J.)

16.04.1964

## **JUDGMENT**

### **U.C. Law, J.**

1. The plaintiff has brought this action for recovery of sum of Rs. 1,80,414/- against the defendants as guarantors. The facts out of which this action arises shortly as follows:

2. A company known as the Central Jute Co. Ltd. having its registered office at Narayanganj in East Pakistan (to be called hereafter as the Company) maintained an overdraft account with the plaintiff then carrying on business of banking in the name and style of National Bank of India Ltd., Narayanganj Branch. Subsequently, the name of the plaintiff bank was first changed to National Overseas and Grindlays Bank Ltd. with effect from 1st January, 1958 and later on the name was again changed to National and Grindlays Bank Ltd. with effect from 1st January, 1959.

3. By the Deed of Hypothecation dated 8th November, 1954, the Company hypothecated in favour of the plaintiff the stocks of jute described in the Hypothecation Deed to secure a loan to be granted by the plaintiff up to a limit of Rupees 10 lakhs (Pakistan Rupees). On the same date i.e., 8, November, 1954, the defendants Nos. 1, 2 and 3 executed in Calcutta a Deed of Guarantee in favor of the plaintiff in its Calcutta Branch by which the defendants jointly and severally agreed repayment of monies due in the said overdraft account of the Company in Narayangan Branch with the agreed interest at 1% over State Bank of Pakistan rate of interest with a minimum of 4½% per annum. It was further agreed that the amount of the principal together with interest was to be paid by the defendant when called upon to do so; and lastly the amount of the liability was to be calculated in Indian Rupees at the rate of exchange declared by the State Bank of Pakistan.

4. On 21 October, 1955, the defendant no. 2 executed in Calcutta a Letter of Lien in favor of the plaintiff and deposited by way of pledge 20100 shares of Swatantra Bharat Paper Mills Ltd., for the purpose of creating security in respect of the overdraft on certain terms mentioned in the Letter of Lien. It is said that as the said amount outstanding in the overdraft account was not paid on demand, the plaintiff in or about September, 1957, sold the shares and realized Rs. 18,894/- as the sale proceeds thereof in the Union of India and the Reserve Bank of India having objected to the said sum being remitted to Narayanganj, the same could not be credited to the said overdraft account in Narayanganj. By letter dated 31st March 1958 and two separate letters both dated 28th July, 1959 the plaintiff called upon the defendant No. 1 to pay Rs. 1,82,335-0-9 and the defendant Nos. 2 and 3 to pay Rs. 1,94,887-0-9 with interest as money due on 31 March, 1958 and 28 July, 1959 respectively. On 31 December, 1959 the overdraft account was increased to Rs. 1,99,308/- by addition of interest for the period between 28th July and 31 December, 1959 and became payable to the plaintiff by the defendants by reason of the liability undertaken by them by and under the said Letter of Guarantee and by the Letter of Lien. After giving credit for Rs. 18,898/- the plaintiff claims Rs. 1,80,414-0-9 in Indian Currency as due and owing to the plaintiff by the defendants on 31st December, 1959. The defendants having failed to pay the said sum the plaintiff has brought this action against the defendants as guarantors under the Deed of Guarantee dated 8 November, 1954 for recovery of the amount claimed.

5. The defendants have filed their respective written statements separately. Their main defense is that the claim of the plaintiff is barred by Law of Limitation. The other defenses are as follows :

- (a) That at all material times they are citizens of India.
- (b) That the Deed of Guarantee dated 8th November, 1954 was executed to guarantee payment of loan on the overdraft account of Central Jute Co. Ltd., to be granted by the plaintiff at its Narayanganj Branch with effect from the date subsequent to the date of the Deed of Guarantee and not of any alleged loan already granted by the plaintiff's said branch at Narayanganj prior to the said Deed.
- (c) The Deed of Guarantee was in contravention of the provisions of the Foreign Exchange (Regulation) Act, 1947, then in force in India and/or in force in Pakistan and the provisions of the Deed are illegal and as such the Deed of Guarantee was illegal, void and of no effect and not binding on the defendant.
- (d) It was an essential term of the Deed of Guarantee and/or condition precedent to the attachment of any liability under the said Deed upon the defendants that the monies payable could be legally transmitted to the account of Central Jute Co. Ltd., in Narayanganj Branch of the plaintiff in East Pakistan.
- (e) That the contract of Guarantee has become impossible of performance as no money could be or can be transmitted to Narayanganj.
- (f) The Letter of Lien is illegal or in contravention of the respective Foreign Exchange (Regulation) Act, 1947 in force both in India or in Pakistan and as such void.
- (g) That the sale of the shares in Swatantra Bharat Paper Mills was in contravention of the

Foreign Exchange (Regulation) Act then in force in India as no permission of the Reserve Bank of India had been obtained prior to or after the alleged sale and in any event the alleged sale was without proper notice to the defendants and not made by proper advertisement or by public auction and/or in accordance with law and as such the plaintiff is bound to return the said shares to the defendants.

6. Upon these pleadings the following issues were raised :

ISSUES:

1.(a) Did the defendants guarantee payment of the dues of the plaintiff in respect of the advances made in the overdraft account of Central Jute Co. Ltd. with the plaintiffs Narayanganj Branch subsequent to the date of Deed of Guarantee dated 8 November, 1954 as alleged in paragraph 8(b) of the written statement of the defendants ?

(b) Was the said guarantee to include and was in respect also of all overdraft granted in the said overdraft account of the Central Jute Co. Ltd., Narayanganj prior to the date of the Letter of Guarantee dated 8 November, 1954 and up to the date of the suit ?

2.(a) Was the Deed of Guarantee in contravention of the provisions of the Foreign Exchange (Regulation) Act of 1947 which was in force both in India and/or in Pakistan and as such illegal or void or of no effect as alleged in paragraph 8(c) of the written statement of the defendants ?

(b) In the event which has happened is the said Deed illegal, void and inoperative ?

(3) Was it an essential term of the guarantee or a condition precedent to the attachment of liability to the guarantee that -

(a) the defendant would make payment under the Deed of Guarantee in Calcutta in respect of the overdraft debt of a foreign company in Pakistan ?

(b) That such payment is to be made by the defendants under the guarantee for the purpose of being remitted to Pakistan for credit in the overdraft account of the foreign company ?

(4) Has the contract of guarantee become impossible of performance as no money could be and/or can be transmitted to Narayanganj ?

(5) Was the Letter of Lien illegal or in contravention of the Foreign Exchange (Regulation) Act of 1947 in force both in India and/ or in Pakistan and as such void as alleged in paragraph 9 of the written statement ?

(6)(a) Did the plaintiff have no right to sell the shares and/or acted illegally in selling the shares without permission of the Reserve Bank ?

(b) Was any permission from the Reserve Bank necessary for selling those shares ?

(c) Was the alleged sale of the shares and securities without proper notice to the defendant No. 2 and as such not proper or legal as alleged in paragraph 10 of the written statement ?

7. Is the plaintiff bound to return the shares ?

8. Is the plaintiff's claim or any part thereof barred by limitation against the defendants or any of them ?

9. Has the plaintiff any cause of action against the defendants or any of them ?

10. Is the plaintiff entitled to the amount claimed in the plaint ?

11. To what relief, if any, is the plaintiff entitled ?

7. The first question to be considered is as to whether the plaintiff's claim is barred by the Law of Limitation. This was argued as a preliminary issue. In my opinion, this case can be disposed of on this issue of law. Order 14, r. 2 of the Code of Civil Procedure is mandatory and so I proceed to consider this issue of law in the first instance.

8. This question has to be considered from two aspects –

(1) Liability of the three defendants under the Deed of Guarantee, (2) Liability of the defendant No. 2 under the Deed of Lien.

9. It cannot be controverted that the actual liability of the defendants is in respect of the overdraft account of the Central Jute Co. in Narayanganj Branch of the plaintiff. It is contended on behalf of the defendants that if the liability in respect of the said overdraft account of the company is barred by the Law of Limitation the guarantee is gone because under section 128 of the Contract Act the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. It is admitted that this action has been brought by the plaintiff on the Deed of Guarantee and also on the Letter of Lien. I am inclined to accept this contention. It has been held in *Brojendra Kishore Roy Chowdhury v. Hindustan Co-operative Insurance Society, Ltd.*<sup>1</sup> that Section 128 of the Contract Act which is in the nature of an interpretation clause and is directed to defining the liability of a surety upon the terms of a contract of guarantee was not intended to affect the application of Statute of Limitation.

10. Looking at the account itself it appears that the last debit entry was on 30 January 1956. In fact, the plaintiff did actually stop giving overdraft sometime in 1955, but certain wages and expenses which were incurred by the plaintiff were debited on 30 January, 1956 as the account itself shows. The account further shows that on 27 January, 1956 the sale proceeds of the hypothecated goods amounting to Rs. 90,000/- were credited. Then it appears on 14 February, 1956, a letter of demand (Ext. 1) was sent by the plaintiff bank to all the guarantors. There is sufficient evidence on record to establish that this notice of demand was in fact sent to all the defendants and was duly received by them. Nripen Banerji stated in his evidence that the letter of 14 February, 1956 was sent to all. This letter is signed by Mr. W.R Gibson, Sub-Manager of

National Bank of India, Calcutta. Reading the evidence on records as a whole there cannot be any doubt that three similar letters were duly received by the three guarantors. P.R. Daga also admitted that he received a letter of demand from the Bank. There cannot be any question also that this letter of 14 February 1956 was the first letter of demand from the plaintiff upon the guarantors as it says "We now demand the implementation of your guarantee by immediate payment of the overdraft plus interest". That the guarantors were served with the letter of demand dated 14 February, 1956 is again confirmed by the Bank's letter dated 20 February, 1956 (Ext. 12) where the Acting Manager of the Calcutta Branch of the plaintiff Bank wrote to Narayanganj Branch "We have accordingly despatched by registered post with acknowledgment due letters to the guarantors demanding payment of the Company's indebtedness at your Branch in terms of guarantee signed by them". The demand letter referred to in this letter was no doubt the letter dated 14th February, 1956. This letter (Ext. 12) was further acknowledged and replied to by the Narayanganj Branch on 23 February, 1956. Thus, it cannot be doubted that the Bank admitted in clear words

<sup>121</sup> Cal WN 482 : AIR 1918 Cal 707

that it had dispatched the letter dated 14 February, 1956 to all the guarantors. The defendants have also admitted having received the letter of demand dated 14 February, 1956.

11. Next it appears that on 18 May, 1956, there is credit entry for Rs. 8633-14-6 in the over draft account of the Company. The counsel for the defendants denied any payment by the defendants on 14 May, 1956. It appears that nobody explained what it was for.

12. Apart from the letter dated 14 February 1956, which was served on all the defendants as I have said before there are some other letters so far as Tikamchand Daga is concerned. The letters are dated 13 March, 1955, 9 May, 1956, 20 June, 1956, 6 August, 1956 and the telegram dated 7 March, 1957. Of these letters the letter of demand dated 6 August, 1956 no doubt is an unconditional demand after the entire account had come to a standstill. If any of these be taken as a letter of demand, the claim is barred against Tikamchand. So far as H.R. Daga and P.R. Daga is concerned, it should be remembered that the letter of demand dated 14th February, 1956, which was served on them is no doubt very material although it also applies to all the defendants as stated before.

13. It is argued on behalf of the defendants that an overdraft account is purely a loan account and therefore Article 59 of the Limitation Act, applies. The learned counsel has relied on *Motigavri v. Naranji*<sup>3</sup>, and *Uma Shanker Prasad v. Bank of Bihar Ltd*<sup>4</sup>. in support of his contention and has urged that the Statute of limitation runs from the date of each loan and as the last debit entry was on 30 January, 1956, the plaintiff's claim is barred. At best the plaintiff can take advantage of the last debit or credit entry in the overdraft account or even the disputed and unexplained credit entry dated 18 May, 1956, which is denied by the defendants and in that case also the claim is barred. Lastly, it is said that in any event even if the amount is payable on demand as is contended by the plaintiff, the demand having been made on 14 February, 1956 and the suit

having been filed on 20 May, 1960 the claim is also barred as three years limitation will apply in any case. Under Articles 65 and 115 the period is also three years. Therefore, from whatever aspect the matter may be considered the claim is barred. I am inclined to accept this contention.

14. Mr. Mitter for the plaintiff contends that the agreement of guarantee provides that payment is to be made 'when called upon to do so.' Therefore, demand is necessary. I do not agree because in any judgment, the words 'when called upon to do so, mean payable on demand, that is there is a present debt which is payable without demand. Therefore, I am inclined to hold that Article 59 applies, that is to say the period of limitation is three years from each loan and as such the entire claim of the plaintiff is barred as the last loan was on 30 January 1956 or even if the disputed credit entry of 18 May, 1956 is taken to be the last credit entry the claim is barred.

15. If however it is payable after the demand is actually made as Mr. Mitter argues even then the claim is barred because the demand no doubt was made on all the defendants on 14 February, 1956, but the suit was not filed till 20 May, 1960, that is beyond three years from the date of demand. Article 65 and Article 115 whichever may apply make no

<sup>3</sup> AIR 1927 Bom 362

<sup>4</sup> AIR 1942 Pat 201

difference as the period of limitation is three years under both the articles.

16. But Mr. Mitter argues that demand was not made on 14 May, 1956, as the Calcutta Branch had no authority to make such demand. According to him demand was legally made by Sandersons and Morgans on 28 July, 1959. I cannot agree. The first demand was no doubt made on 14 February, 1956 in unequivocal terms. It is admitted that the Calcutta Branch of the plaintiff had full authority of the London Head Office to take the guarantee in question. The legality of the Deed of Guarantee is accepted by the plaintiff and is relied on, as the suit is based on the Deed of Guarantee. Not a single question was asked or put suggesting that the Calcutta Bank had no authority to make demand for payment under the Deed of Guarantee. In my judgment, authority to take guarantee carries with it the authority to make demand for payment from the guarantors. Therefore, the demand on 14 February, 1956 was a legal demand and the time would therefore run from that date. In that case also the claim is barred.

17. A creditor cannot by making successive demands extend the time for limitation of a claim. The time is to run from the first demand if the claim is payable upon actual demand being made. There can be no doubt in the present case that the first demand was made on all the defendants on 14 February, 1956. Thus the time will run from that date. The letter written by Sandersons and Morgans on 28 July, 1959 cannot extend the period of limitation.

18. Therefore, if the starting point of limitation be either the date of each advance or the last debit or credit entry or the date of demand that is 14 February 1956 if the debt is payable on actual demand being made, the claim is barred.

19. So far as the lien is concerned, Mr. P.R. Daga is only concerned. The claim in the plaint is only a money claim and not enforcement of the lien. Therefore the plaintiff's claim as against P.R. Daga also stands on the same footing. The cause of action arose either on the date of lien or at most when demand was made in respect of the lien on 20 March 1957 and 26 March 1957 according to the particulars supplied by the plaintiff by its letter dated 22 November 1961. It is well settled that a party is bound by his particulars. Thus it appears that limitation in each case would be three years and therefore the claim of the plaintiff on the letter of lien is also barred by limitation.

20. That disposes of the issue of law and the suit.

21. For the reasons stated the suit is bound to be dismissed. In the facts and circumstances of the case I do not feel called upon and/or required to consider the other issues which were raised in the suit.

22. The suit is dismissed with costs. Certified for two counsel.  
Suit dismissed.