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Janwatraj Vs. Jethmal

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Court : Rajasthan

Decided On : Apr-11-1958

Reported in : AIR1958Raj343

Judge : I.N. Modi, J.

Acts : Contract Act, 1872 - Sections 124 and 126; Limitation Act, 1908 - Schedule - Articles 83 and 115

Appeal No. : Second Appeal No. 34 of 1954

Appellant : Janwatraj

Respondent : Jethmal

Advocate for Def. : Sumerchand, Adv.

Advocate for Pet/Ap. : Hastimal, Adv.

Disposition : Appeal allowed

Judgement :

I.N. Modi, J.

1. This is a second appeal by the plaintiff Janwatraj in a suit for money. The suit was decreed by the trial court but has been dismissed by the learned Civil Judge, Balotra.

2. The plaintiff's case, put briefly, was that there was a partnership firm consisting of himself, the defendant Jethmal and certain other persons, which carried on business in the name and style of Oswal Brothers, The firm did business in the manufacture of pen-holders and required some machinery for that purpose. The plaintiff's case 'was that a sum of Rs. 3000/- was given to one Umar Bhai for purchasing the machinery and thereby a loss of Rs. 3000/- had been incurred. This loss was divided between the partners of the firm, and the defendant executed a khata for a sum of Rs. 561/8/- on Sawan (Second) Sudi 4 of Smt. 2004 (equal to 20th August 1947) by which it was agreed that the defendant would pay the aforesaid amount to the plaintiff if the said Umar Bhai refused to pay it.

Umar Bhai did not pay anything to the plaintiff, and, consequently the latter tiled the present suit for the sum of Rs. 561/8/- as principal plus Rs. 118/13/- as interest, total Rs. 680/5/- on the 2nd of March, 1951 in the court of Munsiff Bhinmal.

3. The defendant admitted the partnership though he denied knowledge of the fact whether the plaintiff had given a sum of Rs. 3000/- to Umar Bhai. He, however, further admitted that he had executed the suit Khata for Rs. 561/8/- in favour of the plaintiff by which he agreed that if the said Umar Bhai did not return the machine, he (Jethmal) would be responsible to pay 561/8/- to the plaintiff.

The defendant's case further was that Umar Bhai had returned the machine to the plaintiff, and, therefore, the latter had no cause of action against him. On these pleadings, the trial court framed three issues including the general issue for relief. The first issue was whether Umar Bhai did not pay Rs. 561/8/- to the plaintiff and, therefore, the defendant was responsible to pay that sum to the plaintiff. The second issue was whether no loss had at all occurred to the firm and, therefore, the suit khata was without consideration.

4. The trial court found in favour of the plaintiff on both these issues and decreed the plaintiff's suit. On appeal the findings on the aforesaid issues, as arrived at by the trial court, were not challenged before the Civil Judge, and instead a point of limitation was pressed before him. It may be pointed out at this place that this point of limitation, though it was not at all taken up in the written statement and was not

made the subject-matter of any issue, appears to have been taken before the trial court at the stage of arguments.

The contention raised on behalf of the defendant was that the suit was governed by Article 115 of the Marwar Limitation Act (which provided a period of three years only) but this was repelled and the trial court decreed the suit. This contention as to limitation was made the principal ground of attack against the judgment of the trial court before the lower appellate court.

It was contended on the side of the plaintiff that Article 65 applied to this case, while the contention on the other side was that that Article was not applicable, and that the proper Article that applied to the case was Article 115 of the Limitation Act. The submission made on behalf of the defendant found favour with the learned Civil Judge, and consequently, he dismissed the plaintiffs suit. The present appeal has been filed from the aforesaid judgment and decree.

5. The only point which emerges for consideration in this appeal, therefore, is whether the suit is barred by time or not.

6. I should like to observe at the very outset that the question of limitation in this appeal has been argued at very great length and is by no means simple. I am also disposed to think that, as argued by learned counsel for the defendant, the point involves the consideration of certain questions of fact and that being so, so far as I think, a question like that should not have been allowed by the learned Judge of the lower appellate court to have been raised before him practically for the first time. At the same time it is too late in the day to allow this appeal on that ground alone.

7. Be that as it may, the position taken up by learned counsel for the defendant respondent is briefly this. His contention was that the position of the defendant was really that of a surety and by no means of a debtor himself. Learned counsel drew support for his submission from the deposition of the plaintiff in the trial court wherein he said that he had given the sum of Rs. 3000/- to Umar Bhai, and that he had taken a registered document from him in his own name and that that document was with him.

Reliance was further placed for the same conclusion on the circumstance that the suit khata had been obtained by the plaintiff in his own name from the defendant and that he alone had brought the suit. Lastly, it was pointed out that even according to the language of the Khata the defendant had undertaken the liability to pay the amount for which the Khata had been executed on behalf of Umar Bhai and if he did not pay.

The argument of learned counsel, therefore, was that the character that the defendant filled in the present case was that of a surety and nothing else, and that the liability of a surety being co-extensive with that of the principal debtor as a rule, and in the absence of a contract to the contrary, it could not be rightly contended that the suit was governed by Article 65 of the Marwar Limitation Act which provided a period of six years (the language of the Article is otherwise the same as that of the Indian Act).

In other words, it was contended that the liability of the defendant Jethmal in this case started as soon as he had executed the khata on the 20th August, 1947, and that it did not depend on any contingency such as contemplated under Article 65 of the Limitation Act, and the suit, it was submitted, was, therefore, governed by Article 115 of the Marwar Limitation Act which like the Indian Act provided a period of three years only. It may be conceded at once that if this suit is governed by three years limitation, then it must be held to be barred by time. It is also important to mention at this place that Article 83 of the Marwar Limitation Act provided a period of six years and it is equally incontrovertible that if that Article applies, the suit must be held to be within time.

8. The main question to consider in these circumstances is whether the suit out of which this appeal arises is a suit brought by a creditor against the surety, because if that is the right view to take, then there is authority for the view that such suits arc governed by Article 115 of the Limitation Act.

9. I have carefully considered this question and have arrived at the conclusion that the precise position which the defendant held in this case, or should be considered to have held in law, is not that of a surety. The chief reason which has induced me to come to this conclusion is this. Section 126 of the Contract Act defines the

contract of guarantee. According to that section, a contract of guarantee or suretyship requires three parties : 'the creditor', 'the principal debtor' and 'the surety'.

The surety is the person who gives the guarantee. The person in respect of whose default the guarantee is given is the principal debtor. The creditor is the person to whom the guarantee is furnished. It would be convenient to give at this place the definition of a contract of indemnity also, vide Section 124 of the Contract Act. The definition is this :

'A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity'.'

Section 128 lays down, with respect to the liability of a surety, that it is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The next important section to which, reference must be made is Section 145 of the Contract Act. That section provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he had paid wrongfully.

Having regard to the position of a surety under the Indian Law, the decided cases have established a distinction between a contract of guarantee and a contract of indemnity. That distinction may be briefly stated to be somewhat like this. A contract of guarantee pre-supposes three parties, the creditor, the principal debtor and the surety. First of all, there is a contract between the principal debtor and the creditor.

It may be said to be the base of the entire transaction. Then there must be a contract between the surety and the creditor by which the former guarantees the debt to the latter. This, however, is not enough to constitute a contract of guarantee; because, so far, one essential element is still missing, and that further element is that there must be a further contract by which the principal debtor asks the surety to act as such, though such a request need not always be express and

may be implied.

Until this whole chain is complete, a contract of guarantee as contemplated in the Indian Law of Contracts does not come into play, and the reason is that until there is privity of contract between the respective three parties mentioned above, namely, the creditor, the principal debtor and the surety, it will not be possible to work out the rights and liabilities of the surety and the principal debtor in accordance with the scheme of our law,

Putting the whole matter in simple language, if a person undertakes to reimburse another for some loss which may be caused to him, say, by a third party, or by himself, but not at the request, express or implied, of a third party, then the person who having undertaken the liability and having been called upon to make good the loss will not be able to recover the loss so caused to him from the principal debtor, the latter being not privy but virtually a stranger to the undertaking given to the promisee.

I should like to invite reference to Periyamianna Marakkayar and Sons v. Banians and Co., AIR 1926 Mad 544 (A), in support of the view propounded above. Speaking of a contract of surety, Krishnan J. laid down that such a contract was a tripartite contract to which the surety, the principal debtor and the creditor were all parties, and that such a contract resulted only when, at the instance of the debtor, the surety guaranteed payment to the creditor. It was further observed that though Section 126 of the Act does not expressly say that the debtor should be a party to the contract, it clearly implies, taken with the other provisions of the Contract Act such as Section 145 that in every such contract, the debtor must be a party. The same view has been adopted in Ramchandra v. Shapurji, AIR 1940 Bom 315 (B), in which Beaumont C. J. after considering the definitions of Sections 124 and 126 of the Contract Act proceeded to observe as follows :--

'It is I think true that a contract might fall within both these definitions, but it is clear from Section 126 that a contract of guarantee involves three parties -- the creditor, the surety and the principal debtor -- and I agree with the view taken by the Madras High Court in ILR 49 Mad 156 : (AIR 1928-Mad 544) (A), that a contract of guarantee involves a contract to which these parties are privy. Of course, the

contract need not be embodied in a single document, but I think there must be a contract or contracts to which the three parties referred to in Section 126 are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my opinion, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible in my view to work out the rights and liabilities of the surety under the Contract Act. Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. It is impossible to imply a promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. A promise cannot be implied against a stranger to the transaction of guarantee. Again, the right of a surety to call upon the principal debtor to discharge the debt of the creditor which has become due, -- a right which is referred to in Mulla's note to Section 145, Contract Act, and is illustrated by the English case there referred to, Ascherson v. Tredegar Dry Dock and Wharf Co. Ltd. (1909) 2 Ch 401 (C), cannot be worked out, unless the principal debtor has authorised the contract of suretyship. Unless he has done that, the surety is not in a position to compel the principal debtor to pay the debt.'

With these observations I am, if I may say so with respect, in substantial agreement.

10. Applying then the test which has been discussed above, let us see whether defendant Jethmal in the present case fulfils It. It is true that he undertook the liability to save the plaintiff from loss, in case Umar Bhai did not pay the money which was due from him to the plaintiff. The further question which, however, at once arises is whether the defendant did so at the request, express or implied, of Umar Bhai for whose default the particular undertaking was given by the defendant.

There is no evidence on this record whatsoever to show that Umar Bhai ever requested the defendant to give any such guarantee to the plaintiff on his behalf, nor are there any circumstances placed on this record from which it can be concluded with any justification that the undertaking given by the defendant to the plaintiff was, in all probability, given at the request of Umar Bhai.

That being so, I have no hesitation in coming to the conclusion that the position of the defendant in this case was not that of a surety. As I consider it, the contract, made between the plaintiff and the defendant, which has been made the subject-matter of this suit was purely a contract of indemnity within the meaning of Section 124 of the Contract Act and nothing more.

11. The next question is which article of the Limitation Act would govern such a contract. Having given my careful consideration to this matter, I am disposed to hold that the proper article which is applicable to the present case is Article 83 of the Marwar Limitation Act which corresponds to Article 83 of the Indian Act save for the period prescribed. So far as the Marwar Limitation Act goes, Article 81 deals with a suit by a surely against the principal debtor, and provides a period of six years' limitation beginning from the point of time when the surety pays to the creditor.

Article 82 deals with a suit by a surety against a co-surety and also provides a period of six years, and the time from which the period begins to run is when the surety pays anything in excess of his own share. Then comes Article 83. This is as follows :

'83. Upon any other Six When the plaintiff is contract to years actually damnified.' indemnify.

Having regard to the scheme of these Articles, I am of opinion that this last-mentioned Article is a residuary Article in this chain and should be held to govern all other contracts to indemnify. Obviously Articles 81 and 82 do not apply to this case, but I am unable to see how the application of Article 83 in this series can be resisted so far as the present case is concerned.

As already held above, the suit contract was a contract of indemnity, and the plain language of this Article clearly seems to me to apply to it. The period of limitation provided with reference to this Article is six years, and, therefore, the suit would certainly be within time. It is, however, contended that the time from which the period has been prescribed to run under this Article is not when a contract of indemnity may have taken place, but when the plaintiff is in actual fact damnified or put to loss.

What is argued is that the plaintiff gave his cause of action in the plaint to have arisen on the date on which the contract was entered into, namely, the 20th August, 1947, and not when he actually suffered the loss. Having given my careful consideration to this point, I do not feel that there is any real force in it. All that turns out from the argument of learned counsel is that the plaint was not as happily drafted as it should have been.

The substance of the plaintiff's case, as I see it, is clearly that Umar Bhai had not paid the money, and, therefore, the plaintiff was compelled to bring his suit against the defendant the latter having promised to pay the same upon Umar Bhai's default. In other words, the plaintiff was undoubtedly damnified. It may be that this damnification occurred not on the date the contract of indemnity was executed, that is, the 20th August, 1947, but later, and if that is so, it is enough to say that if the suit is held to be within time even from the date of the contract, it would be much more so if the limitation is computed from some date later than that. Once it is held that Article 83 is attracted into application in this case, I have no hesitation in saying that the application of Article 115 must be excluded.

The reason is that Article 115 is a residuary Article enacted to apply to cases relating to breach of contracts not in writing registered where no other Article can be applied. But where a more specific Article applies to and governs a given case, Art 115 is not attracted at all. I am, therefore, definitely of the view that Article 115 of the Limitation Act can have no application to this case.

12. Having regard to the discussion made above, I am clearly of the view that the learned Civil Judge was quite wrong in throwing out the plaintiff's suit on the ground of limitation, and I hold it to be within time.

13. Learned counsel for the defendant then contends that in any case the plaintiff is not entitled to get any interest from the date of contract up to the date of suit. This contention has force. The khata contains no stipulation to pay interest. In these circumstances, the plaintiff, in my opinion, is not entitled to receive such interest.

14. Consequently, I allow this appeal, set aside the judgment and decree of the learned Civil Judge and decree the plaintiff's suit for Rs. 561/8/-. The plaintiff will also be entitled to receive interest at 4 per cent. per annum simple from the date of suit up to the date of realisation. The plaintiff will be entitled to his costs in the two courts below but costs in this Court will be borne by the parties themselves.

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