

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **IA No.12526/2006 &CS(OS) No.1218/2000**

% **Date of Decision: May 05, 2009**

KUNSTOFFEN INDUSTRIE VOLENDAM (KIVO) C.V.

..... Plaintiff

! Through: Mr.Dinesh Agnani, Adv.

Versus

\$ MR.ASHOK K. CHAUHAN & ORS.

.....Defendants

^ Through: Mr.Rajiv Nayar, Sr. Advocate with
Mr.Vinay Garg, Adv. for defendant No.1
Mr.Arun Mohan, Sr. Advocate with
Mr.Rajesh Yadav, Mr.A.P.Singh, Adv.
for defendants No.2 to 11

CORAM:

HON'BLE MR. JUSTICE S.N. AGGARWAL

1. Whether reporters of Local paper may be allowed to see the judgment? **YES**
2. To be referred to the reporter or not? **YES**
3. Whether the judgment should be reported in the Digest? **YES**

S.N.AGGARWAL, J

This order shall dispose of an application under Order VII Rule 11 CPC filed by defendant No.1 for rejection of the plaint in a suit for recovery of Rs.9,85,04,084/- with pendente lite and future interest @ 18% per annum filed by the plaintiff against the defendants.

2. Briefly stated, the facts of the case relevant for the disposal of this application are that the suit is based on a continuing guarantee dated 19.11.85 given by defendant No.1 to the plaintiff, English translation of which filed along with the plaint is in the following

terms:-

"19 November, 1985

Dear Mr. Kwakman,

I hereby give you a personal, unlimited joint and several surety for all justified claims of KIVO GmbH Julianaweg, 198-202, NL 1131 DL Volendam, which exist now or in the future vis-a-vis Kunstoplast Chemie GmbH or another company or the group in which I participate."

3 Two more translations of the same guarantee dated 19.11.85 were filed by the plaintiff during the pendency of the present suit on 30.08.2002 and 27.07.2006 and they read as follows:-

"Translation filed on 30.08.2002

I give hereby personal, unrestricted absolute guarantee for all justified demands of the firm Kiro GmbH, Julianaweg, 198-202, NL 1131 DL Volendam, which exist now or in the future vis-a-vis Kunstoplast Chemie GmbH or another company or the group in which I participate.

Translation filed on 27.07.2006

I hereby give my personal, unlimited guarantee as a principal debtor for all justified claims which KIVO GmbH Julianaweg, 198-202, NL 1131 DL Volendam, may have now or in future against Kunstoplast Chemie GmbH or another group company in which I have an interest."

4 The plaintiff had business dealings with the German company M/s Kunstoplast Chemie GmbH (hereinafter to be referred as the 'German company'). Defendant No.1 is stated to be the then sole Director and Chief Operating Officer of the German company and had furnished alleged personal guarantee dated 19.11.85 (English

translation whereof is extracted above) to secure the payment of balance outstanding against the German company or its group of companies at any time.

5 This recovery suit has been filed by the plaintiff not against the German company but only against the guarantor alleging that an amount of NLG 1,19,83,861 was outstanding against the German company in respect of various supplies made during the period from July, 1993 till June, 1994. The details of supplies made to the German company are given in paras 5 to 12 of the plaint. It is stated that an amount of NLG 50,64,477.32 was also payable on account of interest till 23.11.1999 in accordance with Dutch Civil Code as the transaction between the parties was of commercial nature. However, the plaintiff while filing this suit, seems to have omitted to sue the defendants with regard to principal balance amount outstanding against the German company and has filed the present suit only for recovery of NLG 50,64,477.32 converted into Indian currency applying the conversion rate of Rs. 19.45 paise per guilder on the date of filing of this suit and has, therefore, claimed a recovery of Rs.9,85,04,084/- against the defendants.

6 In response to summons of the suit, three written statements have been filed, one by defendant No. 1, second by defendants No. 2 & 3 and third by defendants No. 4 to 11. The defendants, besides disputing their liability on merits, have taken a preliminary objection to the maintainability of the present suit on the ground of limitation.

7 Defendant No. 1 has filed an application under Order VII Rule 11 CPC, being IA No. 12526/2006, for rejection of the plaint in the present suit, as barred by limitation. Reply to this application has been filed on behalf of the plaintiff contending that this suit cannot be dismissed on the ground of limitation. The plaintiff in its reply has prayed for leave to refer and rely upon the averments contained in its plaint and replication to show that the suit is not barred by limitation.

8 I have heard the arguments of Mr. Arun Mohan, learned senior counsel appearing on behalf of the defendants and of Mr. Dinesh Agnani appearing on behalf of the plaintiff. I have carefully gone through the contents of the English translation of bank guarantee dated 19.11.85 which is the basis of the present suit, plaint and replication filed by the plaintiff.

9 Mr. Arun Mohan, learned senior counsel appearing on behalf of the defendants had argued that the plaint of the present suit is liable to be rejected under Order VII Rule 11 (d) of the Code of Civil Procedure, 1908 because according to him, a plain reading of the plaint itself would show that the suit of the plaintiff is barred by limitation provided in Article 55 of the Limitation Act, 1963. The contention of Mr. Arun Mohan was that for deciding the objection of limitation at the thresh-hold, the Court need not look into the defence contained in the written statement of the defendants. The contention of Mr. Arun Mohan was that there was no dealing between the plaintiff and the German company or with the

guarantor (defendant No.1) any time during the last three years preceding the date of filing of the present suit, i.e., 25.05.2000. He showed by reference to the plaint that the alleged supplies were made by the plaintiff to the German company from July, 1993 till February, 1994, and protests against non-payment in terms of German law were also made during the same period. It was submitted that after June, 1994, no dealing of any kind took place between the plaintiff and the German company or even with the guarantor and, therefore, he vehemently argued that the suit filed by the plaintiff against defendants merits to be rejected as barred by law of limitation.

10 Mr. Dinesh Agnani, learned counsel appearing on behalf of the plaintiff, did not dispute the factual matrix to the effect that no dealing had taken place between the plaintiff and the German company or the guarantor after June, 1994 but his argument was that the present suit filed on 25.05.2000 is within limitation on account of the following two reasons:-

(i) Limitation for filing of suit to enforce the continuing guarantee is six years as per German law. It was submitted that since the last transaction between the plaintiff and the German company had taken place in June, 1994 and, therefore, the present suit filed on 25.05.2000 is within limitation of six years provided in the German law.

(ii) In the alternative, it was argued that there is no limitation for filing a suit against a guarantor on the basis of continuing guarantee. It was submitted that even if the claim of the creditor against the principal

borrower gets time barred still the creditor can sue the guarantor on the basis of continuing guarantee at any time unless the guarantee is either withdrawn by the guarantor or he refuses to make the payment under the guarantee and in that event, the creditor has a right to file the suit against the guarantor within three years of happening of any one of these contingencies.

11 The defendants have taken an objection of limitation in their written statements. The plaintiff in para 42 of its replication has stated as under:-

“... It is further submitted that the period of limitation commenced from the date of the unpaid transactions i.e. from 05.07.1993 right up to 03.02.1994 and in any event on the date when the principal debtor became insolvent. For the sake under the German law the claim under the guarantee has not become time barred....”

12 From the narration of facts pleaded in para 42 of the replication, the first question that has to be considered for deciding the objection of limitation is whether the German law of six years limitation will apply or the Indian law of three years limitation will apply, to the facts of the present case.

13 Admittedly, this is a suit based on a contract of guarantee executed in a foreign country i.e. in German. Section 11(1) of the Limitation Act, 1963 is relevant and the same reads as follows:-

“11. Suits on contracts entered into outside the territories to which the Act extends.- (1) Suits instituted in the territories to which this Act extends on contracts entered into in the State of Jammu and Kashmir

or in a foreign country shall be subject to the rules of limitation contained in this Act.”

14 On a plain reading of the above statutory provision contained in Section 11 (1) of the Limitation Act, 1963, it is clear that the provisions of limitation contained in the Limitation Act, 1963 will apply to the facts of this case. In view of Section 11(1) of the Limitation Act, 1963 there is absolutely no merit in the argument of the plaintiff's learned counsel that the limitation for the present suit is governed by German law.

15 Counsel for both the parties have agreed that it is Article 55 of the Limitation Act which is applicable for determining the limitation for filing a suit on the basis of a continuing guarantee. Article 55 reads as follows:-

55	<i>For compensation for the breach of any contract, express or implied not herein specially provided</i>	<i>Three years</i>	<i>When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases</i>
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16 It is clear from a plain reading of Article 55 referred above that the limitation for filing a suit for breach of any contract (in the present case contract of guarantee) is three years to be reckoned from the date when the contract is broken or when the breach occurs or when it ceases.

17 The admitted facts are that the guarantee on the basis of which the defendants have been sued was executed by defendant

No.1 on 19.11.85. The default of non-payment by the German company admittedly took place lastly in June, 1994 and thereafter there was absolutely no dealing between the plaintiff and the German company or the guarantor and in this backdrop, the real question that has to be considered is whether the present suit filed by the plaintiff on 25.05.2000 is within limitation of three years prescribed in Article 55 of the Limitation Act referred above.

18 The argument of Mr. Agnani appearing on behalf of the plaintiff was that since the guarantor (defendant No.1) had not broken the contract of guarantee dated 19.11.85 till the filing of the present suit, the limitation of three years prescribed in Article 55 did not begin to run and therefore according to him, this suit filed on 25.05.2000 was within the limitation.

19 Article 55 provides that limitation of three years for filing a suit in regard to cause of action arising on account of breach of contract starts either when the contract is broken or the date of alleged breach of contract. The real question is what is the starting point of limitation for filing a suit for recovery on account of breach of contract. Admittedly in the present case, defendant No.1 who has been sued in his capacity as guarantor had not withdrawn his guarantee till the date this suit was filed and therefore the question of his breaking the contract does not arise. The limitation of three years can also be reckoned from the date of alleged breach of contract on the part of the guarantor. The breach of contract of guarantee on the part of the guarantor can take place only if

demand is made by the creditor and the same is refused by the guarantor either expressly or impliedly. In fact the right to sue a guarantor accrues only when a demand for payment was made and it was refused by the guarantor. Admittedly, in the present case, the plaintiff being the creditor did not make any demand from defendant No.1 on the strength of alleged guarantee dated 19.11.85 till the date of filing of the present suit and hence the question of breach of contract of guarantee on the part of defendant No.1 does not arise.

20 The plaintiff has relied upon a Division Bench judgment of Kerala High Court reported as Parmanand Gulabchand & Co. Vs. Mooligi Visanji, **AIR 1990 Kerala 180** in support of his argument that a guarantor can be sued on the basis of a guarantee even if the claim against the principal debtor has become barred by time. This judgment, except referring to Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd. **AIR 1979 SC 102** says nothing new. It was on its own facts where; (i) the account was still live and (ii) debt against the principal debtor had not become time barred. In that case, not only the account was live, but the principal debtor had acknowledged the liability also thereby extending the limitation. Reference to this judgment does not take the case any further than what the Supreme Court has held in Margaret Lalita Samuel' case (Supra) that so long as the account is live, the limitation does not begin to run. The discussion in the body of the judgment that the debt will not be extinguished but only barred is

more of obiter dicta because it was not a case of time barred. In fact in the above referred Division Bench judgment of the Kerala High Court relied upon by the plaintiff's counsel the question that was considered by the Division Bench was the effect of acknowledgment of liability by the principal debtor on the liability of the guarantor. In that case the principal debtor had acknowledged his liability within the limitation period when the account was live and in that backdrop, it was held by the Division Bench that defendants No. 2 & 3 being the guarantors in that case were also liable as they had furnished their personal guarantees for repayment of debt due against the principal borrower. The judgment of the Division Bench of Kerala High Court was on its own facts and has no applicability to the facts of the present case. Be that as it may, even if we take it as a finding (which it was not), the Supreme Court in Syndicate Bank Vs. Channaveerappa Baleri **(2006) 11 SCC 506** has clarified that once a claim against the principal debtor is barred then the claim against the guarantor is also barred.

21 The plaintiff has also relied upon another judgment of the Supreme Court in Industrial Finance Corporation of India Ltd. Vs. Cannanore Spinning and Weaving Mills Ltd and Ors, **(2002) 5 SCC 54**. This judgment of the plaintiff's learned counsel in fact supports the case of the defendants and not of the plaintiff. It is held by the Hon'ble Supreme Court even in this case that the suit against a person on the basis of guarantee can be filed only within three

years to be reckoned from the date when the account ceased to be a live account. In Industrial Finance Corporation of India Ltd's case (Supra) the account was very much live when the guarantee was invoked in that case. Hence the judgment of the Hon'ble Supreme Court in Industrial Finance Corporation of India Ltd. case does not help the plaintiff for deciding the objection of limitation raised on behalf of defendant No.1.

22 The matter being so clear on principle, it was also held by this Court in Central Bank of India VS. Systems & Softwares, **104 (2003) DLT 976** as under:-

*“If a party is left with no remedy to recover the loan from the principal debtor, it cannot recover it from the guarantor also as the liability of the guarantor emanates and flows from the liability of principal debtor. **If claim against principal debtor gets time barred so does the claim against guarantor.** The liabilities are joint and several and cannot be segregated or bifurcated much less for the purpose of limitation. If the document executed by principal debtor towards cash credit facility or loan term facility cannot be invoked on account of claim of the creditor being time barred, the document executed by the guarantor for the same reason also cannot be executed.”*

23 In the present case, I am not going into the question of veracity of the alleged guarantee dated 19.11.85 and I assume that the said guarantee is a valid document. The plaintiff has filed three translations of the same document purported to be the guarantee of 19.11.85 and all these three translations more or less, are to the

same effect that defendant No.1 had given his personal unrestricted guarantee to repay the amount that may be outstanding against the German company at any point of time. On a perusal of the English translation of the alleged guarantee dated 19.11.85, it is revealed that the said guarantee does not contain a clause that the payment was agreed to be made by the guarantor on demand. There is a marked distinction between a guarantee simplicitor and a guarantee which is payable on demand. The Hon'ble Supreme Court has categorically held in the case of Syndicate Bank (Supra) that an action on a guarantee which does not contain clause of 'payment on demand' can be brought within three years from the date the account ceased to be a live account treated as breach of contract of guarantee and an action on a guarantee payable on demand can be brought within three years when the payment was made and it was refused by the guarantor provided the demand was made when the claim against the principal debtor has not become time barred or when the account was a live account. This enunciation by the Hon'ble Supreme Court in Syndicate Bank's case (Supra) is very clear from the illustration given in para 14 of the said judgment which is extracted below:-

“ Let us say that a creditor makes some advances to a borrower between 10.04.1991 and 01.06.1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 01.04.1991. Let us further say a demand is made by the creditor against the guarantor for payment on 01.03.1993. Though the limitation against the

*principal debtor may expire on 01.06.1994 as the demand was made on 01.03.1993 when the claim was 'live' against the principal debtor, the limitation as against the guarantor would be 3 years from 01.03.1993. **On the other hand, if the creditor does not make a demand at all against the guarantor till 01.06.1994 when the claims against the principal debtor get time barred, any demand against the guarantor made thereafter say on 15.09.1994 would not be valid or enforceable.***

24 Applying the ratio of law laid down by the Hon'ble Supreme Court and by this Court in the abovementioned cases to the facts of the present case, I am of the considered view that the present suit filed by the plaintiff against the defendants on the basis of alleged guarantee dated 19.11.85 is apparently barred by limitation because admittedly the plaintiff has not pleaded any cause of action that might have accrued to him after February/June, 1994 till the filing of the present suit and for this reference may be made to para 23 of the plaint. The argument of the plaintiff's learned counsel that there is no limitation for filing a suit in the case of continuing guarantee on the face of it appears to be preposterous and not tenable in law. In case this argument of the plaintiff's learned counsel is accepted, then there will no limitation for filing a suit on a continuing guarantee as in that event the suit can be filed till eternity and the sword of Damocles forever remain hanging on the head of the guarantor. This can never be the intention of the law. There has to be a certainty and it is this certainty which article 55 embodies. In the present case, the suit was filed by the plaintiff

on 25.05.2000 though the account between the plaintiff and the German company had admittedly become dead long ago on or around June, 1994. There was no demand at any point of time after February/ June, 1994 by the plaintiff from defendant No.1 . The contention of Mr. Agnani learned counsel appearing on behalf of the plaintiff that the plaintiff was prevented from filing the suit against the guarantor because of pendency of bankruptcy and winding up proceedings against the German company in the German Court, hold no water. Despite opportunity given, the counsel for the plaintiff could not cite any statute which prohibits filing of a suit by the creditor against the guarantor because of pendency of bankruptcy/winding up proceedings against the principal debtor. Normally a creditor would never delay the filing of a suit against the guarantor after commencement of bankruptcy/winding up proceedings against the principal debtor and therefore pendency of bankruptcy/winding up proceedings against the German company is of no legal consequence and does not save limitation.

25 In view of the above and having regard to the facts of the case culled out from the plaint itself, I have no hesitation in holding that the suit of the plaintiff against the defendants is barred by limitation and is liable to be dismissed in view of provisions contained in Section 3 of the Limitation Act, 1963 read with Order VII Rule 11 (d) of the Code of Civil Procedure, 1908. The application of defendant No.1 being IA No. 12526/2006 under Order VII Rule 11

CPC stands therefore allowed and the plaint is rejected as barred by law of limitation. However, in the peculiar facts of this case, the parties are left to bear their own costs.

May 05, 2009
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S.N.AGGARWAL
[JUDGE]