

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 30.11.2010
Judgment Pronounced on: 13.12.2010

+ **CS(OS) No. 2714/1998**

MRS. USHA

.....Plaintiff

- versus -

PUNJAB & SIND BANK & ANR.

.....Defendant

Advocates who appeared in this case:

For the Plaintiff:	Mr Vinay Kr. Garg and Ms. Namrata Singh, Advs.
For the Defendant:	Mr Sudhir Nandrajog, Sr. Adv. with Ms. Prerna Mehta, Adv.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers 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 Digest? | YES |

V.K. JAIN, J

1. This is a suit for recovery of Rs 65,84,252/-. The plaintiff, who is carrying business in the name and style of M/s Universal Exports claims to be a commission agent who used to introduce exporters/sellers to the buyers/importers and receives commission from the seller. In the suit filed

through her attorney Shri Gulshan Gandhi, the plaintiff has alleged that defendant No.2, which is a manufacturer of cotton yarn through the plaintiff as a commission agent agreed to supply yarn to M/s Exports India vide Revolving L.C. No. 44/95 for Rs 2 crores revolving three times. The plaintiff who had introduced defendant No.2 to the buyer was to receive commission at the rate of 5% FOB value of the L.C. The finalization of the deal is alleged to have been preceded by an agreement/Memorandum of Understanding (MoU) dated 22nd July, 1995 between the plaintiff and defendant No.2 for payment of commission to the plaintiff at the rate of 5% of the FOB value, after realization of export sale proceeds. The plaintiff also claims that defendant No.2 had also agreed not to entertain a buyer directly or indirectly. In terms of the MoU dated 22nd July, 1995, defendant No.1 being the banker of defendant No.2 furnished Bank Guarantee No. 31/90736/95 dated 21st September, 1995 for Rs 30 lacs, thereby standing guarantor for payment of commission amount under the L.C. merely on demand from the plaintiff and on failure of the seller to pay the amount of commission.

2. It has also been alleged that despite contractual

obligation in this regard, defendant No.2 failed to supply copies of all the invoices to the plaintiff. Later, the plaintiff came to know about certain invoices, whereby goods were shifted by defendant No.2 to Exports India. It is also alleged that despite demand raised by the plaintiff for payment of commission, the defendants connived with each other and instead of paying the amount of Rs 27,31,494/- which was due to the plaintiff, only a sum of Rs 13,65,747/- was paid to her. The case of the plaintiff is that defendant No.2 had sold goods worth more than Rs 9.5 crores and she was entitled to commission at the rate of 5% of that amount, but was paid commission only at the rate of 2.5% on the transactions amounting to Rs 5,46,29,903/-. The plaintiff has, therefore, claimed a sum of Rs 34,34,252 as principal sum towards commission payable to her alongwith interest thereon at the rate of 18% from 1st January, 1996 to 30th November, 1998, amounting to Rs17,51,468/-. She has also claimed a sum of Rs 13,50,000/- towards damages for mental agony, tension and loss of health and Rs 48,532/- towards documentation and miscellaneous expenses.

3. The suit has been contested by both the defendants. Defendant No.1 has taken preliminary

objections that the suit is barred by limitation and is also barred for the reason that a complaint made by her to the Banking Ombudsman on the same facts has been dismissed. Admitting issuance of Bank Guarantee No. 31/90736/95 dated 21st September, 2005 for Rs 30 lacs, defendant No.1 has pointed out that the bank guarantee stipulated payment of 50% of the commission on realization of the L.C. amount from Canara Bank and the remaining 50% of the commission amount was to be payable on completion of order and submission of proof thereto alongwith acknowledgement from defendant No.2. It is also claimed that since the bank guarantee was to remain in force only till 30th November, 1995, defendant No.1 stood discharged of all its obligations under the bank guarantee unless the demand was made on or before that date. It is also stated that in the written statement of defendant No.1 that though the bank guarantee was invoked by the plaintiff on 28th November, 1995, the documents submitted by her entitled her to payment of only 50% of the commission and payment of Rs 1365748 was accordingly released to her being 2.5% of the total FOB value. It is also alleged that FOB value of the contract executed till that date being Rs

5,46,29,903, 2.5% of that value stood duly paid to the plaintiff on payment of Rs 13,65,748/-. It is also alleged that defendant No.2 had informed defendant No.1 that the plaintiff had completed and performed only part of the contract and was entitled to commission at the rate of 2.5% of the FOB value.

4. In its written statement, defendant No.2 has denied the alleged agreement/MoU and has claimed the same to be a false and fabricated document. Defendant No.2 has also taken a preliminary objection that the suit is time-barred. On merits, it is alleged that the order was not completed to the extent of Rs 6 crores before 30th November, 1995 and therefore, the offer to pay 5% commission of FOB value under the Bank Guarantee became null and void. It is alleged that as on 30th November, 1995, the order executed a FOB value realized against six invoices amounted to Rs 5,46,29,903/- and since the conditions precedent to balance 2.5% commission was not fulfilled, the plaintiff was not entitled to get the balance commission. It is further alleged that the terms and conditions of the contract between the plaintiff and defendant No.2 embodied in the Bank Guarantee dated 21st September, 1995 which was

valid up to 31st November, 1995 and the L.C. was to revolve three times for the total amount of Rs 6 crores. It is further alleged that as on 30th November, 1995, the contract completed with the buyer amounted only to Rs 5,46,29,903/- The case of defendant No.2 is that invoice Nos. 131 to 136 and 144 to 148 were not covered in the transactions between the parties and it is only invoices Nos. 104 to 106, 108 to 111, 112 to 115, 117 to 122, 123 to 126, 128, 129, 137 to 141, 143, 145, 149, 151, 152, 154, 155 and 158 for a total amount of Rs 5,46,29,903/- which was covered under the contract between the parties. According to defendant No.2, it was realization of LC amount from Canara Bank, completion of order and submission of Bank Realization Certificate and not the shipment of goods which was the criteria for payment of commission to the plaintiff.

5. The following issues were framed from the pleadings of the parties:-

- (i) Whether this Court has territorial jurisdiction to entertain and try the present suit? OPP
- (ii) Whether the suit is barred by limitation? OPD
- (iii) Whether the suit is not maintainable in view of the order dated 21.8.1997 passed by the Banking

Ombudsman (Maharashtra & Goa)? OPD

- (iv) Whether the plaintiff is guilty of suppression of facts/documents? OPD
- (v) Whether the document filed by the plaintiff alongwith the plaint at page 22 alleged as the agreement/MoU is a false and fabricated document? OPD
- (vi) Whether the terms and conditions governing the payment of commission to the plaintiff were not contained only in the Bank Guarantee dated 21.09.1995? If so to what effect? OPP
- (vii) Whether the plaintiff failed and neglected to fully perform its part of the agreement under the Bank Guarantee dated 21.09.1995 thereby disentitling the plaintiff to the balance 2.5% commission under the Bank Guarantee dated 21.09.1995? OPD
- (viii) Relief.

6. **Issue No. 1**

Admittedly, Letter of Credit in favour of defendant No.2 M/s Hanil Era Textiles Limited was opened by Canara Bank, Nehru Place, New Delhi. It is not in dispute that the sale price of the goods sold by defendant No.2 to Exportos

India was realized through the Letter of Credit opened by Canara Bank, Nehru Place, New Delhi in favour of defendant No.2. Since price of the goods sold by defendant No.2 to Exportos India was payable and also paid at New Delhi, it is difficult to dispute that part of the cause of action arose in Delhi. As per the terms and conditions of the Bank Guarantee dated 21st September, 1995, realization of LC amount from Canara Bank, New Delhi was a condition precedent for payment of 50% of the total commission of the plaintiff. Therefore, payment by Canara Bank, New Delhi to defendant No.2 through the Letter of Credit opened by it, constituted part of the cause of action for filing this suit. Section 20(c) of the Code of Civil Procedure, to the extent it is relevant, provides that the suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. Hence, Delhi Court has jurisdiction to try the present suit. The issue is decided against the defendants and in favour of the plaintiff.

7. **Issue No.3**

This issue was not pressed during arguments. The defendants have not been able to show how the orders passed by the Banking Ombudsman on 21st August 1997

renders the suit non-maintainable. The issue is decided against the defendant and in favour of the plaintiff.

8. **Issue Nos. 4,5 &6**

The case of the plaintiff, as set up in the plaint, is that an agreement/MoU dated 22nd July 1995, was executed between her and defendant No.2. No such document has, however, been proved by the plaintiff. Even the alleged agreement/MoU has not been produced in original. As far as PW-1 Mr. C.L. Babbar, Attorney of the plaintiff, is concerned, he has admitted in his cross-examination that he got associated with this case only after 06th March 2003, when the General Power of Attorney was executed in his favour. He has also admitted that he was neither a partner nor an employee of M/s. Universal Exports. He is an independent agent who can work for anyone. He has expressly admitted that he did not attend the matter when the Terms of Settlement of Bank Guarantee were negotiated.

9. In **Janki Vashdeo Bhojwani and Anr. Vs. Indusind Bank Ltd. and Ors.** (2005) 2 SCC 217, the husband of appellant No.2 Ms.Mohini Laxmikant Bhojwani, was allowed to appear in the witness box on behalf of the appellants. Taking into consideration the provisions

contained in Order 3 Rules 1&2 of the Code of Civil Procedure, Supreme Court observed that these provisions empower the holder of Power of Attorney to “act” on behalf of principal and the term “acts” would not include deposing in place and instead of the principal. It was held that if the attorney has rendered some "acts" in pursuance to Power of Attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. It was further held that the attorney cannot depose for the principal in respect of the matters of which only the principal can have a personal acknowledge and in respect of which the principal is entitled to be cross-examined. Supreme Court approved the view taken by Rajasthan high Court in **Ram Prasad v. Hari Narain and Ors**, AIR 1988, Rajasthan 185, wherein it was held that the word “acts” used in Rule 2 or Order 3 of CPC does not include the act of Power of Attorney holder to appear as a witness on behalf of a party. It was further held that the Power of Attorney holder can appear only as a witness in its personal capacity and whatever knowledge he has about the case he can state on oath, but, he cannot appear as a witness on behalf of the party in the capacity of

that party.

Since Mr C.L. Babbar was nowhere in the picture when plaintiff and defendant No.2 entered into an agreement for payment of commission to the plaintiff on the sales made by defendant No.2 to Exportos India and he had no personal knowledge of the terms and conditions settled between the plaintiff and defendant No.2, his testimony cannot and does not prove the terms of the agreement between the plaintiff and defendant No.2 in this regard. Thus, the plaintiff has miserably failed to prove the alleged agreement/MoU dated 22nd July 1995.

10. The plaintiff has not come in the witness box to prove any oral agreement between her and defendant No.2. No witness has been examined by the plaintiff to prove the terms of the agreement between her and defendant No.2. The plaintiff has examined only the bank officials, in addition to her attorney Mr. C.L. Babbar. The bank officials, obviously, cannot have any knowledge of the terms and conditions agreed between the plaintiff and defendant No.2. The plaintiff, therefore, has miserably failed to prove that she was entitled to commission on all the sales which were made by defendant No.2 to Exportos India. She has

also failed to prove any agreement between her and defendant No.2 for payment of commission to her on the transactions effected through 4th, 5th or 6th time revolving of the L.C. No. 44/95. Consequently, it is only the Bank Guarantee dated 21st September 1995 which can be looked into to ascertain the terms and conditions agreed between the plaintiff and defendant No. 2 with respect to payment of commission to the plaintiff. The issues are, therefore, decided against the plaintiff and in favour of the defendants.

11. **Issue No. 7**

The Bank Guarantee dated 21st September 1995, to the extent it is relevant, reads as under:

In consideration of M/s Hanil Era Textiles Limited Bombay (hereinafter called the Seller) agreed to supply Yarns to M/s Exportos India, New Delhi (hereinafter called 'the Buyers') vide revolving ILC No. 44/95 dated 31.0.1995 for Rs 2,00,000/- (Rupees Two Crores only) from Canara Bank, Nehru Place, New Delhi, through M/s Universal Exports, B-3/81, Paschim Vihar, New Delhi (hereinafter called 'the Commission Agent')

Under the terms of contract, the commission is payable to Commission Agent @ 5% on FOB value of the L/C amount realization by Canara Bank, New Delhi. And the amount of commission is payable by the seller to the Commission Agent as under:

(a) 50% of the total commission is payable to Commission Agent after realization of L/C amount from Canara Bank, New Delhi.

(b) Balance 50% of commission amount is payable to after completing the order and submitting the proof of following document (Xerox copy) and acknowledgement issued by M/s Hanil Era Textiles Limited.

(1) Bank Realization Certificate issued by Canara Bnk, New Delhi....

(3) Unless a demand or claim under this guarantee is made on us in writing on or before the 30th November, 1995, we shall be discharged from all liability under this guarantee thereafter.....

12. There is also a stamp affixed on the Bank Guarantee which expressly stipulated that unless a claim to enforce the Bank Guarantee was received by the bank on or before 30th November 1995, the bank shall be released and discharged from all liabilities thereunder.

13. Though the Bank Guarantee envisaged revolving of ILC No. 44/95 dated 31st July 1995 for Rs 2 crores only three times, for a total sum of Rs 6 crores, the evidence on record shows that it was later amended and it revolved six times. This fact has been admitted by DW-2 Mr. Rajender

Kumar Aggarwal, Chairman of M/s Hanil Era Textiles Limited. The case of the plaintiff is that she was entitled to commission on all the sales made by defendant No.2 Exportos India under ILC No.44/1995 dated 31st July 1995. As noted earlier, the plaintiff has miserably failed to prove the agreement/MoU set up in the plaint and no oral evidence has been led by her to prove the terms and conditions agreed between her and defendant No.2. Hence, the Court can give effect only to such terms and conditions as were contained in the Bank Guarantee dated 21st September 1995. The Bank Guarantee specifically refers to ILC No. 44/1995 revolving three times for a total sum of Rs 6 crores. Therefore, when the Letter of Credit was later amended and it revolved 4th, 5th & 6th time, resulting in the total sale by the defendant No.2 to Exportos India exceeding Rs 6 crores, the plaintiff did not become entitled to any commission on the transactional value exceeding Rs 6 crores. The commission payable to her under the Bank Guarantee dated 21st September 1995 was restricted to the transactional amount of Rs 6 crores and unless the plaintiff is able to prove, by producing evidence other than the Bank Guarantee dated 21st September 1995 that she was entitled

to commission on all the sales made by defendant No.2 to the plaintiff and not only to the sales up to the value of Rs 6 crores, her claim for payment of commission or any amount exceeding Rs 6 crores cannot be sustained.

14. Another important aspect in this regard is that the amount of the Bank Guarantee was Rs 30 lacs. The amount of commission on Rs 6 crores at the rate of 5% of the FOB value also comes to Rs 30 lacs. This is a strong indicator that the agreement between the plaintiff and defendant No.2 was confined to payment of commission on an amount not exceeding 6 crores, irrespective of the value of the goods actually sold by defendant No.2 to Exportos India.

15. Though the documents produced by the Canara Bank show that the total sale made by defendant No.2 to Exporter India against LC No. 44/95 far exceeded Rs 6 crores, there is no evidence to prove that it was the plaintiff who had procured all the orders which Exportos India had placed on defendant No.2. As noted earlier, the plaintiff has not come in the witness box. As far as PW-1 is concerned, he had no personal knowledge of the transactions since he came to be associated with this case only after the Power of

Attorney was executed in his favour during pendency of this suit. DW-2 Mr R.K. Aggarwal, Chairman of M/s Hanil Era Textiles Limited has specifically stated in his cross-examination that when the L.C. was amended as a new L.C. for a new contract, it had nothing to do with the earlier L.C. or the Bank Guarantee issued by the bank. When questioned about further amendment and revolving of the LC for the 5th time, he stated that this payment mode was against a new contract for new quality of goods to be supplied and had nothing to do with the contract of the plaintiff or the previous Bank Guarantee and LC. He also stated that as far as the plaintiff was concerned, the transaction was limited to Rs 6 cores, as stated in the Bank Guarantee and that they had dealings with Exportos India in past as well as later with which the plaintiff had nothing to do and it had not facilitated any of those transactions. Similar answers were given by him when questioned about revolving of the LC for the 06th time. Thus, there is no evidence to prove that the plaintiff was instrumental behind orders for purchases beyond Rs 6 crores.

16. However, assuming that all the orders for defendant No.2 were procured by the plaintiff and she had a

role to play in all the purchases made by Exportos India, she would, in the absence of any agreement for payment of commission to her, on all the sales made by defendant No.2 to Exportos India, still not be entitled to any commission on the transactions beyond Rs 6 crores. This is not the case of the plaintiff that at the time the Bank Guarantee was issued, there was an agreement, to her knowledge, between defendant No.2 and Exportos India for supply of goods worth Rs 9.5 crores. Had that been the position, the Bank Guarantee would not have been restricted to transactions up to Rs 6 crores. In any case, nothing prevented the parties from agreeing that irrespective of the value of the goods to be sold by the defendant No.2 to Exportos India, the commission of the plaintiff would be restricted to 5% of the FOB value not exceeding Rs 6 crores. The truth of the matter appears to be that at the time the Bank Guarantee was furnished, the plaintiff and defendant No.2 estimated that the total value of the goods to be sold by defendant No.2 to Exportos India would be about Rs 6 crores and accordingly, it was decided to give commission to the plaintiff at 5% of the FOB value up to Rs 6 crores. Since the agreement between the parties expressly stipulated payment

of commission only on FOB value of Rs 6 crores, the plaintiff, in the absence of an agreement to the contract, is not entitled to any commission on the supplies beyond the selling of Rs 6 crores stipulated in the Bank Guarantee.

17. It is not in dispute that the plaintiff has been paid only Rs 13,65,747/- though the commission on transactional value of Rs 6 crores would come to Rs 30 lacs. Hence, the next question which comes up for consideration is as to whether the plaintiff is entitled to the balance amount of Rs 16,34,253/- and if so from whom.

18. As noted earlier under the terms and conditions contained in the Bank Guarantee, defendant No.1 was to stand discharged of all its obligations and liabilities under the Bank Guarantee unless a demand was made on it in writing on or before 30th November, 1995. Under the Bank Guarantee, 50% of the commission was payable to the plaintiff after realization of LC amount from Canara Bank, New Delhi and the balance 50% of the commission amount was payable after completion of order and submitting of Bank Realization Certificates, issued by Canara Bank, New Delhi and acknowledgement issued by M/s Hanil Era Textiles Limited. Vide its letter dated 28th November, 1995,

which is Ex.P-13, the plaintiff submitted certain Bank Realization Certificates to defendant No.1 and requested it to send to it commission calculated at 5% of the FOB value on actual realization amount from Canara Bank, Nehru Place, New Delhi. No particular amount was demanded in this letter nor did the plaintiff seek commission on a particular amount. It is not in dispute that the Bank Realization Certificates sent to defendant No.1 amounted to Rs 5,46,29,903/-. This is noted in the letter of defendant No.1 dated December 8, 1995 which is Ex.P-2 and is an admitted document. This has also been conceded in the notice Ex.P-4 sent by the plaintiff to defendant No.2 through its Advocate Mr Mahavir Parsad, wherein it is stated that the plaintiff had submitted to the branch documents/Bank Realization Certificates for Rs 5.45 crores on 28th November, 1995. Admittedly, 2.5% of the aforesaid amount was paid by defendant No.1, to the plaintiff, as commission vide its letter dated 06th December, 1995. Since the plaintiff had furnished Bank Realization Certificates only to the extent of Rs 5.6 crores and not to the extent of Rs 6 crores, she was entitled to an amount of Rs 13,65,748/- and not to Rs 15 lacs towards the commission payable on realization of the

LC amount.

With respect to the payment of balance 50% of the commission amount, it was expressly stipulated in the Bank Guarantee that it would be paid only after completion of order and submitting of not only the Bank Realization Certificates, but also the acknowledgment issued by M/s Hanil Era Textiles Limited. Admittedly, the plaintiff did not furnish acknowledgement issued by M/s Hanil Era Textiles Limited to defendant No.1, while invoking the Bank Guarantee on 28th November, 1995 or even thereafter. Hence, the Bank was not obliged to pay and in fact could not have paid the balance 50% of the commission amount to her on receipt of the letter dated 28th November, 1995. In fact, there is no evidence even of the order up to Rs 6 crores having been completed by 28th November, 1995. But, assuming that orders up to Rs 6 crores had been completed, the plaintiff was still not entitled to balance of 50% of the commission amount till the time acknowledgement issued by M/s Hanil Era Textiles Limited was furnished by it to defendant No.1. Demand of balance 50% of the commission amount, without requisite document furnishing of which to the bank was a mandatory requirement and a condition

precedent for payment by the bank, would not constitute a valid demand and a valid invocation of Bank Guarantee, with respect to the balance 5% of the commission amount. Had defendant No.1 paid the balance 50% of commission amount to the plaintiff, without obtaining acknowledgement issued by M/s Hanil Era Textiles Limited, it might not have been able to recover that amount from defendant No.2 which could have taken the stand in the absence of acknowledgement from it, the bank was not expected to pay balance 50 of the commission amount to the plaintiff.

19. There is yet another reason, why defendant No.1 is not liable to make any payment to the plaintiff. There is no evidence of the orders having been completed by 30th November, 1995. Assuming that the orders were completed after 30th November, 1995, the bank was not obliged to make any payment towards balance 50% of commission amount to the plaintiff for the simple reason that it stood discharged of all its obligations and liabilities on 30th November, 1995. The bank could not have paid the balance 50% of the commission amount pursuant to the invocation dated 28th November, 1995 since acknowledgement from M/s Hanil Era Textiles Limited was not provided to the bank

at that time. Any demand made after 30th November, 1995 was not binding on the bank and did not oblige it to pay the balance 50% of the commission amount to the plaintiff even if the orders had been completed and acknowledgement from M/s Hanil Era Textiles Limited were to be furnished at that time. I, therefore, hold that plaintiff is not entitled to any amount from defendant No.1.

20. Vide letter dated 05th December, 1995, which is Ex.P-3, written to defendant No.1, the plaintiff claimed commission with respect to the goods sold by defendant No.2 vide invoices No. 160-170 dated 27th November, 1995 the documents for which were negotiated on 04th December, 1995. Since the bank stood discharged of all its liabilities and obligations under the Bank Guarantee on 30th November, 1995, it was not required to pay any commission to the plaintiff on the transactions effected after 30th November, 1995 and, therefore, could not have paid commission on the sale of the goods documents for which were negotiated on 04th December, 1995.

21. Coming to the liability of defendant No.2, it is not in dispute that it was required to pay 5% of the transactional value up to Rs 6 crores to the plaintiff as

commission. It is also an admitted case that defendant No.2 has sold goods worth more than Rs 6 crores to Exportos India. This is also not the case of defendant No.2 that supplies up to Rs 6 crores have not been completed. Therefore, defendant No.2 cannot escape from its liability to pay commission at the rate of 5%, on Rs 6 crores, to the plaintiff, which comes to Rs 30 lacs. Since defendant No.1 has already paid a sum of Rs 13,65,747/- to the plaintiff, defendant No.2 is liable to pay the balance amount of Rs 16,34,253/- to the plaintiff. This, of course, is subject to the claim having not become barred by limitation.

22. The liability of defendant No.2 to pay the aforesaid amount to the plaintiff accrued as soon as supplies to the tune of Rs 6 crores to Exportos India were completed. The plaintiff has claimed interest at the rate of 18% per annum from 1st January, 1996 to 30th November, 1998. Admittedly there was no agreement between the plaintiff and defendant No.2 for payment of interest. This is not a suit for price of goods sold and delivered. Hence, interest cannot be awarded to the plaintiff under Sale of Goods Act. This is not a suit based on negotiable instrument. Hence, interest cannot be awarded to the plaintiff under Section 80 of Negotiable

Instruments Act.

23. Section 3 of Interest Act, to the extent it is relevant, provides that in any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, if the proceedings relate to a debt payable by virtue of written instrument at a certain time, then, from the date when the debt is payable, to the date of institution of the proceedings. It further provides that if the proceedings do not relate to any such debt then interest can be awarded from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.

Ex.P-20 is the notice sent by the plaintiff to defendant No.2, demanding the suit amount which includes interest at the rate of 18% per annum w.e.f. 1st December, 1995. Hence, the plaintiff is entitled to interest from

defendant No.2 on the amount of Rs 16,34,253/- from the date contacts to the extent of Rs 6 crores were completed, till the date of filing of the suit. The rate of interest, considering the nature of the transaction between the parties, in my view, should be 12% per annum.

24. Though the plaintiff has claimed an amount of Rs 13,50,000/- towards damages for mental agony, tension and loss of health, she has not proved any mental agony, tension and loss of health to her on account of non-payment of the balance amount of commission to her by defendant No.2. The transaction between the plaintiff and defendant No.2 being a commercial transaction, it is difficult to accept that non-payment of the balance amount of commission resulted in mental agony or tension to the plaintiff or loss of health to her. In any case, the plaintiff has not come in the witness box to prove the damages claimed by her. I, therefore, hold that she is not entitled to any amount towards damages. The plaintiff has also claimed for Rs 48,532/- towards documentation and miscellaneous expenses. No evidence has, however, been led by her to prove these expenses. Moreover, there is no agreement between the plaintiff and defendant No.2 for payment of

such charges to her by defendant No.2. I, therefore, held that the plaintiff is not entitled to any amount towards documentation and miscellaneous expenses. The issues are decided accordingly.

25. **Issue No.2**

The plaintiff invoked the Bank Guarantee on 28th November, 1995, vide letter dated Ex.P-30. The plaintiff wrote to defendant No.1 that she had written to M/s Hanil Era Textiles Limited for her omission, but had not received any response from it. She further wrote that under the terms of Bank Guarantee, the bank was liable to pay commission without any delay. Defendant No.1 was asked to send commission against the Bank Guarantee dated 21st September, 1995 in the account of the plaintiff with Allahabad Bank. Thus, while invoking the Bank Guarantee dated 28th November, 1995, the plaintiff did not grant any time to defendant No.1 to make payment of commission to her, meaning thereby that the notice required the bank to make immediate payment of amount of commission. Article 55 of Limitation Act, to the extent it is relevant, provides that limitation in a suit for compensation for breach of any contract is three years from the date when the contract is

broken. Article 113 of Limitation Act which is the residuary Article prescribes a limitation of 3 years from the date when the right to sue accrues and this Article applies to any suit for which no period of limitation is provided elsewhere in the Schedule of Limitation Act, 1963.

26. Supreme Court in **Syndicate Bank Vs. Channaveerappa Beleri and Ors.** 2006 (11) SCC 506, held that the liability under the guarantee would arise on the guarantors only when a demand is made. It was noted that Article 55 of Limitation act provides that the time will begin to run only a demand is made. It was further noted that even if Article 113 is to be applied, the time begins to run only when the right to sue accrues and that such a right accrues only when a demand for payment is made by the Bank and is refused by the guarantors. It was further held that when a demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. It was further held that if while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or right to sue accrues, when the demand is served on the guarantor. The

Court was also of the view that a condition precedent for the liability of the guarantor is that the demand should be for payment of a sum which is legally due and recoverable from the principal debtor and if the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise.

Since no period for payment was stipulated by the plaintiff when the Bank Guarantee was invoked, the right to sue defendant No.1 accrued as soon as the letter dated 28th November, 1995 invoking the Bank Guarantee was served on defendant No.1. The endorsement made on the letter Ex.P-13 dated 28th November, 1995 shows that it was served on Punjab and Sind Bank on 29th November, 1995. Computed from that date, the prescribed period of limitation for filing the suit against defendant No.1 expired on 29th November, 1998. A perusal of the plaint would show that though the plaint purports to have been typed on 30th November, 1998, stamp papers on which the plaint has been typed were purchased on 07th December, 1998. As per the record of the registry, the plaint was registered on 09th December, 1998. Assuming the suit to have been filed on

07th December, 1998, it is still bared by limitation, since the prescribed period for this purpose expired on 29th November, 1998. Though it appears from the objection sheet available in the file that some filing defects were found by the Registry on 01st December, 1998 and those objections were removed by 08th December, 1998, neither there is any order of the Court nor an application by the plaintiff for condonation of delay in re-filing. Even the *Vakalatnama* in favour of the learned counsel for the plaintiff has been executed on 05th December, 1998. Since the Court Fee was purchased only on 07th December, 1998, it could not have been filed before that date. No application for extension of time for payment of the Court Fee was filed by the plaintiff. In the absence of payment of requisite Court Fee and an order of the Court condoning the delay in re-filing, the period of limitation did not get extended. I, therefore, hold that the suit was filed on 08th December, 1998.

27. Coming to the claim against defendant No.2, a perusal of the Bank Guarantee would show that the bank was required to pay the commission to the plaintiff only in the event of failure of defendant No.2 to pay the same to the

plaintiff. The relevant clause of the Bank Guarantee reads as under:-

“We, Punjab and Sind Bank, (hereinafter referred to as the ‘Bank’) at the request of M/s Hanil Era Textiles Ltd. (Seller) do hereby undertake to pay the Commission Agent an amount not exceeding @ 5% on FOB actual realization value against L/C No.44/95 against any loss caused to or suffered by the Commission Agent by reason of non-payment by the said seller.”

Therefore, the Bank Guarantee could have been invoked only on failure of defendant No.2 to pay the amount of commission to the plaintiff. A perusal of the letter dated 28th November, 1995 would show that the plaintiff had written to defendant No.2 for commission, but had not received any response from it. This statement in the letter clearly shows that defendant No.2 had committed breach of its agreement with the plaintiff for payment of commission, on or before 28th November, 1995, when the Bank Guarantee was invoked. Computed from 28th November, 1998, the suit filed on 08th December, 1998 is clearly barred by limitation even against defendant No.2. This is not the case of the plaintiff that contracts up to Rs 6 crores were completed on or after 08th December, 1995. Had the

contracts been completed on or after 08th December, 1995, the plaintiff would have been entitled to recover Rs 16,34,253/- from defendant No.2. But, since that is not her case, the claim against defendant No.2 is patently time-barred.

The plaintiff also wrote a letter dated 05th December, 1995 to defendant No.1, again asking it to pay the balance 50% of the commission to her. It was in this letter that the plaintiff referred to the shipment made by defendant No.2 vide invoices No. 160-170, negotiated on 04th December, 1995. Even if computed from the date of this letter, the suit filed on 08th December, 1998 is barred by limitation against both the defendants.

28. The learned counsel for the plaintiff has referred to the decision of Supreme Court in **Mst. Rukhmabai Vs. Lala Laxminarayan and Ors.** AIR 1960 SC 335, where the Court, while dealing with Article 120 of Limitation Act, 1908 was of the view that there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

This judgment, however, is of no help to the

plaintiff since the right to file suit accrued to the plaintiff on or before 28th November, 1995 when the Bank Guarantee was invoked. Even with respect to the shipment made by invoice No. 160-170 dated 28th November, 1995 alleged to have been negotiated on 04th December, 1995, the right to sue had accrued to the plaintiff by 05th December, 1995 when she wrote to the bank demanding commission also on the goods sold vide those invoices.

The learned counsel for the plaintiff has referred the decision of Privy Council, **AIR 1940 Privy Council, 63**, where the Court considering the provisions of Section 20 of Limitation Act, 1908 which is equivalent to Section 19 of Limitation Act, 1963, inter alia, observed as under:

“In the Limitation Act, Section 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise: and it is difficult to see why Section 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The Indian Legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable. The words in Section 20 by which the matter must be judged are "where part of the

principal of a debt is paid". As it is not prescribed by the Section that the payment should be intended by the debtor to go towards the principal debt at all, the words 'as such' having no place in this part of the Section, it is not in their Lordships' view correct to require that the payment should have been made of part as part."

This judgment, however, does not help the plaintiff qua defendant No.2 since no part payment is alleged to have been made by it to the plaintiff. It also does not help the plaintiff against defendant No.1 for the simple reason that even if a fresh period of limitation is computed from the date of payment of Rs 13,65,747/- was made by defendant No.1 to her the suit, having been filed on 08th December, 1998 would still be barred by limitation. The issue is, therefore, decided against the plaintiff and in favour of the defendant.

Order

In view of my findings on the issues, the suit is hereby dismissed without any order as to costs. Decree Sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

DECEMBER 13, 2010
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