

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

+ **CS(OS) NO. 1240/2007**

Date of Decision : 20.09.2010

M/s Ess Aar Universal Pvt. Ltd. & Ors. Plaintiffs

Through: Mr. D. K. Rustagi with Mr.
B. S. Bagga, Advs.

Versus

Shri Girish Mehra

..... Defendant

Through: Mr. Ashim Vachher, Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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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 the Digest ? | YES |

V.K. SHALI, J.

1. This order shall dispose of the question of maintainability of the suit itself which was raised by my learned predecessors on the ground of limitation.
2. Briefly stated the facts of the case are that the plaintiffs filed a suit for recovery of ₹ 70,00,000/- against Shri Girish Mehra the sole defendant under Order XXXVII Code of Civil Procedure on 05.07.2007. It was alleged that the plaintiff no. 1 M/s Ess Aar Universal Pvt. Ltd. is a company incorporated under Indian

Companies Act which is controlled and run by one of its Directors Shri Sudhir Rustagi. Previously the plaintiff no. 1 was known as Ess Aar Electrical Controls (P) Ltd. Plaintiff no. 1 also includes another company namely Ess Aar Finlease ltd. (formerly known as Kumud Mercantile Ltd.). The plaintiff no. 2 is stated to be a sole proprietor company of one Sunil Rustagi and the plaintiff no. 3/Ess Aar Leasing is stated to be yet another sole proprietary concern of M/s F.C. Rustogi, HUF.

3. It is alleged that there were certain business transactions between the plaintiffs and erstwhile company M/s Mehra Air products Pvt. Ltd. (lessee company) for leasing out certain empty oxygen cylinders to the plaintiff company for which various lease agreements were purported to have been signed between M/s Mehra Air Products Pvt. Ltd. and the plaintiff and its predecessor company. It is alleged that in order to secure all the payments in terms of the lease the said M/s Mehra Air Products Pvt. Ltd. issued post dated cheques and personal guarantees of its Directors, namely, Prem Mehra, Satish Mehra, Harish Mehra and its present Director Girish Mehra. It is alleged that one of the terms and conditions of this guarantee was as under:

“NOTWITHSTANDING the discontinuance of this guarantee as for one or more of the guarantors or the death of any one of them, the guarantee is to remain a continuing guarantee as to the other or the representatives and estates of the deceased

and here there is more than one guarantor, their liability under these presents being construed as joint and several.

All dividends, compositions and payment received from any person or persons in respect of the liabilities guaranteed hereunder are to be treated as payments in gross and the guarantors are not to have any right to participate except to the extent of the surplus remaining after satisfaction of the ultimate balance due to the lesser.

THIS GUARANTEE is irrevocable and shall be in addition to and shall not be any way be prejudiced or affected by any collateral or other security now or hereafter to be held by the Lesser(s)."

4. It is further alleged that the defendant company had defaulted in making certain payments as a consequence of which the plaintiffs filed a suit under Order XXXVII of Code of Civil Procedure for recovery of ₹ 27,65,882/- making M/s Mehra Air Products Pvt. Ltd. and three of its guarantors, namely, Prem Mehra, Harish Mehra and Satish Mehra as the defendants. Since the said persons did not file the appearance in response to the summons or the leave to defend in response to the summons for judgment consequently the Court was pleased to pass a decree for a sum of ₹ 27,65,882/- vide order dated 03.09.2002 along with the pendente lite and future interest @ 18% per annum till its realization. In pursuance to the said decree having been passed the plaintiffs/deGREE holders filed an execution petition no. 143/2004 on 03.09.2003 for realization of the decreetal amount of ₹ 27,65,882/-. It is alleged

that during the pendency of the said execution petition the decree holder made an application making the allegations that the judgment debtor had removed assets as a consequence of which an immovable property situated in Dharuhera was attached. It is in respect of attachment of this property that the defendant filed objections bearing no. EA No. 413/2005 on 26.11.2005 when the plaintiff realized that they had not made Mr. Girish Mehra as a party in the suit for recovery earlier, and therefore, they filed the present suit against Girish Mehra by making an averment that the guarantee which was furnished by the said defendant Girish Mehra was never invoked, and therefore, in terms of Article 54 of the Limitation Act read with Section 128 of the Contract Act the liability of the defendant be made absolute and independent of other guarantors as well as that of principal borrower/judgment debtor. It was alleged by the plaintiff that the omission to implead the defendant from array of parties in the previously instituted suit does not bar filing of the present suit. It is alleged that the guarantee in the present suit is a continuing one and the debt covered by the guarantee dated 14.03.1992 is not barred by limitation. It will be worthwhile to reproduce herein two paragraphs of the present plaint, one making the above-mentioned averments and other dealing with the cause of action clause, which read as under:

“15. That the present claim of the plaintiff as against the defendant is not barred by Limitation in as much as the guarantee of defendant no. 4 was never invoked and thus the Limitation period have never commenced in terms of Article 55 of the Limitation Act. As regards the provisions of Section 128 of the Indian Contract Act the liability of the defendant is absolute and independent of other guarantors as well as the principal borrower/judgment debtor. In any case the defendant no. 4 already accepted to have no notice of demand on the guarantee dated 14.03.1992. The omission to array the defendant in the previously instituted suit does not bar the filing of the present suit as the guarantee is continuing one and the debt covered by the guarantee dated 14.03.1992 are not barred by limited.

19. That the cause of action has arisen to file the present suit when the defendant (guarantor no. 4) has signed the guarantee dated 14.03.1992 and stood as a personal guarantor holding himself liable jointly and severally for the payment to dues to the judgment Debtor Company in terms of the lease agreement dated 14.03.1992 and subsequent decree dated 03.09.2002 as passed pursuant thereto in the erstwhile suit; the cause of action has further arisen on various dates when the defendant/judgment debtor company failed to make the payment of dues from time to time; the cause of action has further arisen during the cause of the execution proceedings in EA No. 143 of 2003 where the defendant company neither made payment of the decretal amount nor shown any capability of making the payment; the cause of action further arisen on filing the affidavit by the judgment debtor nos. 2, 3 and 4 (guarantor nos. 1, 2 and 3) during the above

execution proceedings affirming having no capability for realization of the decretal amount from them; cause of action further arisen on filing of the EA No. 413 of 2005 asserting ownership on the property situated part of Mustil No. 20 in Khasra No. 16/2, 17/2, 23, 24, 25/1 and 25/2; Mustil No. 21 in Khasra no. 20/2 in Village Malpura, Dharuhera, Rewari admeasuring 1.468 acres of land; cause of action further arisen in 2006 when plaintiff company discovering defendant to the fourth guarantor for the decretal amount; cause of action is continuing one.”

5. Thus, on the basis of the aforesaid fact a prayer for a decree of ₹ 70,00,000/- against the sole defendant Girish Mehra was prayed along with the interest.
6. The suit was listed for the first time on 13.07.2007 when at the request of the learned counsel for the plaintiff it was adjourned to 23.07.2007 and on the said date the plaintiff sought further time to argue on the question of limitation and for one reason or the other the suit continued to remain on board and the question as to whether the suit was barred by limitation or not remained pending.
7. I have heard the learned counsels for the parties and have also gone through the record.
8. The main contention of the learned counsel for the plaintiffs has been that as the guarantee dated 14.03.1992 which was furnished by the defendant Girish Mehra was an independent guarantee therefore, the same having been invoked by the plaintiffs at a later

point in time, does not foreclose the right of the plaintiff to file a suit for recovery. It is stated that the plaintiffs having not impleaded the defendant Girish Mehra as a party in the earlier suit, does not foreclose the right of the plaintiffs to sue him now for recovery of the aforesaid amount. It was also contended by the learned counsel for the plaintiffs that he has already filed an application bearing no. 7645/2010 under Order VI Rule 17 of the Code of Civil Procedure seeking amendment in the cause of action clause by deleting the word cause of action accrued to the plaintiff on 14.03.1992 when the guarantee was signed as the said averment in the plaint is trying to create an ambiguity. If this amendment is permitted to be carried out the suit of the plaintiff would be within time.

9. This plea of the learned counsel for the plaintiff was contested by the defendant on the ground of constructive res judicata, under Order 2 Rule 2 CPC as well as Limitation. It was urged that the plaintiff of his own admission has stated that the cause of action accrued to him on 14.3.1992 then the period of limitation of three years is to be reckoned from the next day that is 15.3.1992 and the suit had to be filed within three years while as it has been filed much beyond three years and thus it is hopelessly barred by limitation.

10. I have carefully considered the respective submissions of the learned counsel for the parties and have also gone through the record.
11. There is no dispute about the fact that the guarantee purported to have been signed by the present defendant was a common guarantee signed along with the three others, namely, Prem Mehra, Harish Mehra and Satish Mehra, therefore, once the same is invoked qua one of the defendant then notwithstanding the fact that the notice of such invocation is not given to the other co-guarantors, he is deemed to have notice, and therefore, he has to be impleaded as a co-defendant in any suit for recovery filed against the guarantor to whom notice is given. In other words, it means that if there is a common guarantee signed by four persons, as was done in the instant case, then invoking of guarantee by the plaintiff against one would be invocation against all the co-guarantors and the suit filed earlier by the plaintiff against the company and the guarantors ought to have been filed against the present defendant also. Any interpretation to the contrary, as is sought to be given, by the learned counsel for the plaintiff regarding piecemeal invocation would not but only the provisions of Order 2 Rule 2 CPC and the doctrine of Constructive res-judicata but would also defeat the very purpose of prescribing the period of limitation. Order II Rule 2 of the Code of Civil Procedure which also lays down as under:-

2. Suit to include the whole claim. – (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.”

(2) Relinquishment of part of claim. – where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. – A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

12. The aforesaid provision under Order II Rule 2 CPC clearly shows that when the plaintiff filed the first suit for recovery they ought to have impleaded every guarantor as a party. Having chosen not to implead the present defendant deliberately or by inadvertent mistake, it precludes them from maintain the present suit. On the basis of the same analogy, the doctrine of constructive res judicata laid in Exp. IV of Section 11 of the CPC specifically lays down that all ground of defence must attack or be made in the first suit otherwise they would be barred by doctrine of constructive res judicata.

13. This clearly shows that the plaintiff again bifurcated his suit for recovery based on the guarantee into two separate suits and the plaintiff having chosen to file a suit for recovery based on the guarantee to the tune of ₹ 26,00,000/- and so. It is not open to the plaintiff now after expiry of almost 13 years to file a fresh suit for recovery of the balance amount or a larger amount.
14. Another angle from which the suit of the plaintiff can be seen is that the plaintiff in para 19 of his plaint categorically states that the cause of action to file the present suit arose in his favour on 14.03.1993 when the guarantee was signed by the defendant. If that be so then the suit for recovery whether it is based on guarantee or otherwise has to be filed within a period of three years. Section 9 of the Limitation Act clearly lays down that once the period of limitation starts running no subsequent act of disability would stop the same. Meaning thereby, once the clock of limitation has started ticking then subsequent act of disability or inability does not stop the time or the period of limitation. The only exception to this Rule is the exclusion of time spent bonafide by a person in a wrong forum as envisaged under Section 14 of the Act or when there is acknowledgment under Section 18 or 20 of the Limitation Act. Therefore, the period of limitation of three years is to be reckoned from the day next

to the date on which the cause of action has accrued and the suit ought to have been filed within three years which in the instant case would have expired some time on 13.03.1995 while as the suit itself has been filed in the year 2000 and thus the suit is hopelessly barred by time. The later averments made in the para 19 of the cause of action are of no consequence to get any relief to the plaintiff.

15. The plaintiff during the course of arguments noticed and realized that the suit as framed is barred by limitation and in order to overcome the said disability he filed an application under Order VI rule 17 of the Code of Civil Procedure seeking permission to amend the plaint especially the cause of action clause mentioned in para 19 seeking deletion of the words that cause of action has accrued to plaintiff on 14.03.1992. It was sought to be averred that cause of action accrued to the plaintiff only in the year 2006 during the pendency of the execution application. This application is totally misconceived and cannot be allowed as the question of amendment would arise in a suit of this nature, only when the suit as framed earlier was maintainable originally. If the suit itself is not maintainable or is liable to be rejected on various grounds under Order 7 Rule 11 CPC because of the averments made in the plaint, it is not open to the plaintiff to circumvent the same by trying to seek amendment of the

plaint. Accordingly, the application of the plaintiff seeking amendment whereby he wants to withdraw/retract his admission that the cause of action accrued to him on 14.03.1992 cannot be permitted to be done.

16. Order VII Rule 11 (d) of the Code of Civil Procedure specifically lays down that the plaint which is barred by any law is liable to be rejected. In the instant case, the plaint as framed is barred by limitation, Order II Rule 2 CPC and the doctrine of constructive Res judicata and accordingly, the suit itself is liable to be rejected on this ground.
17. For the reasons mentioned above the suit of the plaintiff is accordingly rejected.
18. Parties to bear their own costs.

V.K. SHALI, J.

September 20, 2010
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