IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 572 OF 1991

(1) Jugalkishore Pannalal Pitty
(2) Kesarbai w/o Pannalal Pitty ..Appellants

VERSUS

Central Bank of India, a Body Corporate established under the Banking Companies Acquisition and Transfer of Undertaking Act, 1970 having it's Head Office at Chander Mukhi, Nariman Point, Bombay and a Branch Officer *inter alia* at Jalna. ..Respondent

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Shri S.S. Bora, Advocate for Appellants and
Shri K.B. Deshpande, Advocate for Respondent

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CORAM : RAVINDRA V. GHUGE, J.
Reserved on : 5th May, 2015
Pronounced on : 7th May, 2015

JUDGMENT:-

1. This appeal was admitted on 14-02-1992 without framing a substantial question of law.

2. I have heard the learned Advocates for the respective sides at length, I have gone through the paper book placed on record and have considered their written notes of dates and events, dated 5.5.2015. Considering the pleadings of the parties, the evidence adduced, the impugned judgment dated 30-06-1984 delivered by the Trial Court in RCS No. 337 of 1992 and the judgment dated 31-12-

1984 delivered by the Appeal Court in Appeal No. 572 of 1991, I frame the following substantial question of law :-

> *" Whether, by virtue of documents dated 28-10-1977 (Exhibit 24) and 09-07-1980 (Exhibit 29), the suit preferred by the Bank, can be said to have been filed within limitation?"*

3. The admitted facts in this matter are as regards the appellant having sought loan of Rs. 8,000/- for the construction of a well in his agricultural land. Repayment tenure was of five years. A demand promissory note was executed on 08-05-1973 for an amount of Rs. 8,000/-. The loan amount of Rs. 4,000/- only was disbursed on 18.05.1973 and which was willingly accepted by the appellant No. 1. Appellant No. 2 is a guarantor.

4. Respondent- Bank was the original plaintiff who preferred RCS No. 337 of 1982 for a recovery of Rs.15,101.39. The appellant guaranteed the repayment of the loan with interest (with two guarantors and letter of guarantee) in equal annual installments to be paid in five years. Landed property was mortgaged with the bank as a security and the crop raised in the land was to be hypothecated.

5. The admitted documents under list of documents Exhibit 21 are admitted. The document `Demand Promissory Note' Exhibit 22

was executed on 18-05-1973. The balance was renewed and confirmed by the appellant on 06-01-1976 and 09-07-1980. A notice dated 15-04-1982 was issued to the appellant for payment of dues. Since he did not repay the amount, the suit was filed. The Trial Court had cast an issue as to whether the suit is barred by limitation.

6. The Trial Court has recorded the contentions of the sides in paragraph No. 6 which reads as under :-

> "6. Let us see as to whether the Promissory Note for Rs. 8,000 is for the said sum creating the liability. The note exhibit 22 is dated 18th May 1973. The extracts of accounts filed along with the plaint go to sow that Rs. 2,000 were paid to the Defendant No. 1 on 10th May 1973, and further Rs. 2,000 on 9th June, 1973. The extract of account filed by the Plaintiff Bank nor any other document show that the consideration is mentioned in Promissory Note had passed. As such, it cannot be held to be a valid Promissory Note forming the base of the present claim. If at all Rs. 4,000 were given as loan to the Defendant No. 1 till June 1973, a question arises as to whether the said claim is recoverable. On behalf of the Plaintiff more stress is laid on balance confirmation letter exhibit 23 dated 6th January 1976. This letter is said to have been executed by Jugalkishor which was confirmed the balance of Rs. 5,844-79 by the end of 31st December1975. Further it is urged by the Plaintiff that the promissory note executed on 28th October 1977 for Rs. 7,609 exhibit exhibit 24 can also be treated as the base of the claim. Under this note, no consideration in cash for the amount shown had passed to

the Defendant. The extract of account filed along with the plaint does not show that a balance of Rs. 7,609 was due on 28th October 1977. The balance as on 24th October was shown to be Rs. 7,593-84. To this cost of revenue stamp form Rs. 15 were added . Further on 29th October 1977, receipt stamp value of Rs. 1.60 was added and, thus, the balance struck on 28th October, 1977 is stated to be Rs. 7,609. In fact, if the 3 figures are taken together then the same comes to Rs. 7,610 and not Rs. 7,609. In this light it cannot be stated that this promissory note depicts a clear picture of a promise to pay the balance as mentioned in it. The burden on the Plaintiff therefore increases to prove the same. Further also much stress is laid on a letter exhibit 28 issued by Defendant No. 1 in the form of an application which is a type of general acceptance of paying of the dues of the accounts by himself and his other family members till the end of March. Still further exhibit 29 which is again an acknowledgment in the form of balance confirmation is relied upon whereby a sum of Rs. 11,687-98 as on 30th June 1980 is agreed to be paid. The above state of affairs would shown that the claim of Rs. 4,000 had originally lost its limitation by the end of May 1976. Even if the letter exhibit 23 dated 6th January 1976 is relied upon then a further limitation is extended up to 30th December 1978. The promissory note exhibit 24, as already pointed above, does not depict a correct picture. That does not give a fresh limitation for the recovery. Even if that is taken a base still the suit ought to have been filed by 27th October1980. The present suit is filed on 22nd June 1982. It is going out of limitation by a year or more. To save it, exhibit 28 is relied upon which in no way acknowledges the balance as on the ate of 26th October 1979. The acknowledgement, as contemplated by sections 18 and 19 of a previous date is required to be in specific words or at least an endorsement to that effect on either the original document or the account drawn, exhibit 28 does not fulfill any of those terms and hence, that cannot revive the period of limitation. Turning to exhibit 29 which is dated 9th July 1980 it is tried to be said that the limitation is saved because the balance of Rs. 11,687-98 was confirmed. By the various letters, it is urged on behalf of the Plaintiff that the amount to a fresh contract and even though being of a time barred. Defendant is executed as per section 25 (3) of the Indian Contract Act. Exhibit 29 gives the date of the Demand Promissory Note of Rs. 8,000 as 10th May 1973. I had observed above that the Promissory Note cannot form the base of the claim because no such consideration had passed under it which is the claim because no such consideration had passed under it which is clear from the statement of account filed by the plaintiff. The words *"I hereby acknowledge my liability to you in respect of the above loan. I hereby confirm that as on 30th June 1980, a sum of Rs. 11,687/- is due and owing to you by me."* This particular sentence if closely read, goes to show that it was an acknowledgement of a time barred debt. Section 25 (3) of the Contract Act does not contemplate an acknowledgment of a time barred debt, as a fresh contract. In this respect the plaintiff has cited certain case laws."

7. In the light of the observations of the Trial Court as recorded above, the whole issue, therefore, turns upon exhibit 29 which is a proved document. Contention of the plaintiff bank was that exhibit 29 was a promise given by the defendant/ appellant herein and as such the said document dated 09-07-1980 amounts to a fresh

contract or an extension of the demand promissory note dated 08-05-1973 and 28-10-1977.

8. Contention of the appellant was that exhibit 29 is a fabricated document. The appellant had signed on several blank pages and those papers were wrongfully utilized by the plaintiff-bank. The matter written on exhibit 29 was purely an acknowledgement of a time barred agreement/ debt. It did not constitute a fresh contract.

9. The specific conclusions drawn by the Trial Court as regards exhibit 29 are reproduced here-in-above. The Trial Court has concluded that the words written on exhibit 29 *" I hereby acknowledge my liability to you in respect of the above loan, I hereby confirm that as on 30th June 1980, a sum of Rs. 11,687 is due and owing to you by me"*, goes to show that it was an acknowledgement of a time barred debt.

10. The Trial Court concluded that there must be an express promise to pay a time barred debt and without such an express promise, no recourse can be taken to recover the same. The Trial Court, therefore, has discarded exhibit 29 terming it to be *"of no use"*.

11. The learned Advocate for the appellant has, therefore, relied upon Article 18 of the Limitation Act to contend that the limitation period was of three years and the time from which the period begins to run is when the loan is taken. It is not in dispute that the appellant had agreed to repay the loan within a period of five years.

12. The appellant has thereafter referred to Section 25 (3) of the Indian Contract Act, 1872 which reads as under :-

> ***"25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law-*** *An agreement made without consideration is void, unless-*
>
> *(1) ....*
>
> *(2)..*
>
> *(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract."*

13. Contention is that a promise must be made in writing and ought to be signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf to pay wholly

or in part a debt which the creditor might have enforced payment but for the law for the limitation of suits.

14. Learned Advocate for the appellant, therefore, contends that exhibit 29 does not fall within the parameters of Section 25 (3) of the Contract Act. He points out paragraph 7 of the judgment of the Trial Court wherein it has been concluded that the wording is different it does not indicate a clear intention to repay and is not a clear acknowledgement of outstanding dues, which would, therefore, render Section 25 (3) of the Contract Act inapplicable to this case.

15. The learned Advocate for the appellant has, therefore, adverted to the judgment of the Appeal Court. Contention is that exhibit 29 has been read out of context and it has been erroneously concluded that the said document would indicate that a fresh contract has been signed and an undertaking is given to repay the loan. As such, the cause of action will have to be calculated from the date of exhibit 29.

16. It is not in dispute that the Appeal Court has set aside the judgment of the Trial Court on the ground that the cause of action needs to be calculated from the date of exhibit 24 which is 28.10.1977 Exhibit 24 and, therefore, suit preferred by the

respondent Bank was within limitation in the light of the document dated 09-07-1980 Exhibit 29.

17. Learned Advocate for the appellant has vehemently questioned the conclusions of the Appeal Court in paragraph Nos. 14, 15, 16 and 17 which read as under :-

> *"14. If we ignore the mortgage for a time being, then the last admitted document is of 28th October, 1977. It is D.P.note exhibit 24. Thereafter, there are two document which according to the Bank bring the suit for recovery of money within limitation of three years. They are exhibit 28 and 29. So far as exhibit 28is concerned, it is specifically mentioned in list exhibit 21 that the execution of the said letter is admitted, but the date of 26th October 1979 is subsequently written. Perusal of exhibit 28 shows the entire writing including the signature to be in one hand-writing and in one ink. However, the date written at the top in one corner is not only initially written in pencil and re-written in ink, but the ink used is a different ink. There is no endorsement of receipt of the letter by the Manager of the Bank. Such endorsement with date would have been sufficient evidence of the actual date, on which the document is executed / tendered. as stated earlier, it is say of Respondent No.1 - Jugakishore that this letter exhibit 28 is written by him as undertaking, but it was not written on 26th October 1979."*
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> *15. Almost there is no cross-examination on this part of the witness Jugalkishore. There is not even a suggestion of*

denial about exhibit 28. The plaintiff Bank examined Ashok Shirodkar as its witness at exhibit 27and stated that Respondent No. 1 had come and gave application, assuring repayment and it is exhibit 28. He stated that it is dated 26th October 1979. He did not say that the document was written in his presence. He did not say that in his presence the date was put. It is suggested to him that the date was put on exhibit 28 lateron to bring the suit within limitation. Clearly,the document is suspicious in view of the fact that it does not bear endorsement for receiving the application by the Bank Manager or even Inward Clerk. There is no inward number or even endorsement of filing the Application. The date written is clearly in different ink. Moreover, this is a document which is not referred in the plaint. So it is a suspicious document. The learned Advocate of the Respondents relied upon the case of Ms. Arun Trading Co. Vs. Indian Overseas Bank 1989 M.A.H.L.R. 236. In that case the Bank has not pleaded the acknowledgement dated 15th December 1975. No cause of action was found on the said document. It is observed that for want for specific pleadings as required by order VI of the Code, the plaintiff. Cannot be permitted to lay his claim and being action within limitation. Relying on said authority, it is argued that in this case exhibit 28 is not made foundation for bringing the suit within limitation. It is not document referred in the plaint, and in these circumstances, the document exhibit 28 cannot be relied upon as document bringing the suit within limitation of three years. Therefore, I hold that on the basis of letter exhibit 28, the suit cannot be said to be within limitation of three years.

16. Now we turn to another document exhibit 29, which is acknowledgement dated 9th July 1980 and seek whether it bring the suit within limitation . So. far as this document is concerned, it is specifically denied by the Respondent. All that is stated to prove this document by witness Ashok Shirodkar at exhibit 27 is that on 9th July 1980, the Respondent No. 1 approached the Bak and confirmed the balance upto 30th June 1980. He only proved signature of Respondent No. 1 on exhibit 29. It is specific case of Respondent No. 1 in the Written statement so also on oath that he did not execute confirmation letter exhibit 29 dated 9th July 1980. In his cross-examination , he denied that he executed it. It is his case that while granting loan, his signatures were taken on 10-12 blank papers. It is argued that exhibit 29 is one such document. It is hard to believe story of signing on blank papers. It appears that the Respondent No. 1 is not only an agriculturist, but he is also a business man that is admitted in his cross-examination. So, such business- man would not sign blank papers. At least he would have protested against execution of such papers. But there was not even a whisper of complaint till the suit was filed. By the said confirmation letter exhibit 29 dated 9th July 1980, the Respondent No. 1 is said to have confirmed guarantee letter and D.P. Note executed on 10th May 1973.

17. Secondly, it is argued that document has to be proved not merely by proving signature, but it must be proved that the contents were known to the executant. This is particularly so in a case of allegation of execution of blank papers. Reliance was placed on te case of Ethirajula Naidu Vs. K.R.C. Chettiar A.I.R. 1975 MADRAS 333. In that case, it is observed that execution of a document implies intelligent *and conscious appreciation of the content thereof. Hence where the admitted only that he put his signature on a blank piece of paper which he alleged had possibly been utilised for fabricating the document, the onus of proving due execution of the document must be thrown on the plaintiff. So, mere proof of his signature is not sufficient. The witness Shirodkar did not state in his examination in chief that in his presence the Respondent No. 1 signed. It is brought in the cross-examination of this witness that he (Mr. Shirodkar) had filled in the blank spaces of exhibit 29. So, witness was present when the document was executed and it must be presumed that he got it completed. So, the cross-examination has thus proved that the document was prepared in presence of Respondent No. 1. The witness even stated that the revenue stamp for exhibit 29 was brought by the Respondent No. 1. So, this cross-examination fills in all lacunas and it proves that the document was voluntarily signed by Respondent No. 1."*

18. Shri Bora further contends that the Appeal Court has totally mis-directed itself and has failed to consider the effect of Section 25 (3) of the Contract Act. Much importance has been given to exhibit 29 than it deserves and as such, the impugned judgment is rendered perverse. It is, therefore, prayed that this Second Appeal be allowed and the judgment and of the Trial Court be upheld by quashing and setting aside the judgment of the Appeal Court.

19. He relies upon the observations of this Court (Division Bench) in paragraph No.4 in the case of *Reunion Engineering C. Pvt. Ltd. Vs. Uma Kumar [2011 (1) Bom. C.R. 430]*, which reads as under:-

> *"4. It is, thus, clear that for enabling a person to institute a suit for recovery of a time barred debt on the basis of the provisions of Section 25(3) of the Indian Contract Act, there has to be express promise to pay and not implied promise, as has been held by the learned single judge. Therefore, the finding of the learned single judge is clearly contrary to the law laid down by the Division Bench in the case of Canara Bank : [1996] 5 Bom. CR 338 referred to above. Learned Counsel appearing for the original Petitioner tried to submit that the learned single judge was not justified in rejecting his submission made under the provisions of Section 19 of the Limitation Act. According to him, submission of C form on September 19, 2003, amounts to part payment. In our opinion, that submission cannot be advanced by the original Petitioner in the absence of filing any affidavit putting the Appellant on notice that such a contention is intended to be advanced in the appeal. In our opinion, in any case the learned single judge could not have made an order for payment of Rs. 9,00,000 in the company petition. The most that could have been done by the learned single judge was to issue a direction for deposit of the amount. In our opinion, also considering the fact that till today the original Petitioner has not filed a civil suit for recovery of the amount, which according to the original Petitioner was due to him, the appropriate order would be to set aside the order passed by the learned single judge."*

20. The learned Advocate for the sole respondent has strenuously defended the impugned judgment. Contention is that exhibit 29 was a creation of the appellant. In the first five years which were the term period for repayment of the loan, the appellant indicated to the bank that he had every intention to repay. The bank believed that the repayment terms were enough for the appellant to repay the loan. He himself visited the bank and executed exhibit 29 duly signed. The appellant, therefore, made the bank to believe that he had every intention to repay and when all his assurances appeared to be empty words, the plaintiff bank was left with no option but to initiate proceedings against the appellant for recovery of the said amount.

21. It is further submitted that exhibit 29 needs to be interpreted to mean a valid document by which the appellant created a new hope and a legitimate expectation (with the bank) that he was repaying the loan and the bank would be able to recover the loan. He could have very well declined to repay the loan. He has shrewdly refrained from a clear denial to repay the loan so as to ensure that the bank spent time in believing his intentions.

22. It is, therefore, submitted that the view taken by the Appeal Court is perfectly legal, equitable and is aimed at ensuring that borrowers like the appellant herein do not take advantage of their

own wrong and deprive the bank of the loan amount by raising technical objections.

23. It is further submitted that the wording used in exhibit 29 is based upon the language used by the borrower. It cannot be said in all cases that the language used in such undertaking should be in a particular form. It is, therefore, submitted that appeal deserves to be rejected.

24. Despite the above submissions of both the learned Advocates, the whole issue revolves around Exhibit 24 dated 28-10-1977 and Exhibit 29 dated 09-07-1980. The Appeal Court has dealt with exhibit 28. On analyzing the evidence, it has come to a conclusion that the said document Exhibit 28 appears to be suspicious in view of the fact that it does not bear the endorsement for receiving the application by the Bank Manager or even the inward Clerk. The said document was not referred to in the plaint. It is a suspicious document and as such no conclusions can be drawn as regards limitation of three years based on the said document exhibit 28.

25. While dealing with the exhibit 29, the Appeal Court considered the language used in the said document which was proved in the Trial Court. The Appellant No.1 Appeal Court had confirmed the balance of the dues through exhibit 29. The

signature of the appellant was also proved. The Appeal Court was unable to accept the contention of the appellant that he had signed on blank papers and the same were misused by the bank.

26. The Appeal Court considered the fact that the appellant herein was not merely an agriculturist, but was a business-man and that was admitted in the cross-examination. The view of the Appeal Court that a business-man would not sign on blank papers, needs to be accepted. He would have surely protested against the execution of such documents. There was not even a whisper from the appellant as regards such alleged documents until the suit was filed.

27. The Trial Court, therefore, concluded that vide exhibit 29 dated 09-07-1980, the appellant had confirmed the balance amount and had, therefore, confirmed the guarantee letter and the demand promissory note dated 18-05-1973 .

28. This Court, in the case of *Kasturchand Jiwaji Vs. Manekchand Devchand, A.I.R. (30) 1943 Bombay 447*, had an occasion to deal with a similar situation. This Court considered the necessary conditions which would constitute a promise within Section 25(3) of the Contract Act. It was noted that the requirements primarily are that such a document which amounts to /constitutes a promise, should be made in writing, should be signed by the person to be charged

therewith and must be a promise to pay wholly or a part of the debt which the Creditor might have enforced payment but for the law of limitation for suits. The relevant observations were made after considering the Gujrathi word available in a similar document stating " *Nagad Rokada Olia Lidha Te Deva*". This Court came to the conclusion that it would amount to a promise renewed.

29. In the instant case, the appellant had written *"I hereby acknowledge my liability to you in respect of the above loan, I hereby confirm that as on 30th June 1980, a sum of Rs. 11,687 is due and owing to you by me"*. Nevertheless, it indicates that the appellant acknowledges his liability towards the bank in view of the loan and confirms that a sum is due and he owes the said amount of the bank. This document dated 09-07-1980 is executed within three years from the date of the document 28-10-1977 Exhibit 24. Exhibit 24 is an admitted document.

30. It has been proved through oral evidence that exhibit 29 was executed by the appellant. He was present when the document was executed. He had produced a revenue stamp which were affixed on exhibit 29 and signed by the appellant. Exhibit 24 is an admitted document.

31. The case of the appellant rests on the submissions that exhibit 29 cannot be read so as to mean a fresh assurance or guarantee. It is contended that Section 18 (1) of the Limitation Act, 1963 would, therefore, not be applicable. Section 18 (1) reads as under :-

> *"18. Effect of acknowledgment in writing- (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed."*

32. The Apex Court, in the case of *Food Corporation of India Vs. Assam State Cooperative Marketing[(2005) SCCR 84]*, has held in paragraph No.14 as under:-

> *"14. According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is well-settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be*

accompanied by a promise to pay either expressly or even by implication."

33. The fact remains that the appellant No. 1 agreed to repay the loan within a period five years after executing a demand promissory note on 18-05-1973. The normal period for repayment was, therefore, upto 17-05-1978. Balance confirmation letter dated 06-01-1976 Exhibit 23 was executed by appellant No.1. The Appellant has then executed the Demand Promissory Note dated 28-10-1977 Exhibit 24 thereby renewing the contract. Within 3 years from the same he has executed the document dated 09-07-1980, Exhibit 29. As such, Section 25(3) of the Indian Contract Act is not applicable. Exhibit 29 cannot be said to be a document covered within the meaning of Section 25(3). In fact, it is rendered squarely covered by Section 18 (I) of the limitation Act.

34. In the light of the above, Exhibit 29, read with Exhibit 23 and Exhibit 24, amounts to an acknowledgement of the liability before the expiration of the prescribed period for a suit. It shall therefore amount to computing a fresh period of limitation from the date 09-07-1980 on which Exhibit 29 has been signed, under Section 18(1) of the Limitation Act.

35. It is for the above recorded reasons that I am not interfering with the conclusions drawn by the First Appeal Court and the

directions issued by the said Court in paragraph No. 27. I am affording a last opportunity to the Appellants to repay the entire amount outstanding, with interest as ordered by the First Appeal Court, within 60 days from the date of this judgment, failing which, the respondent Bank will be at liberty to recover the said amount as is directed by the First Appeal Court in paragraph No. 27 of its judgment.

36. As such, the substantial question of law is answered accordingly. This Appeal is devoid of merit and is, hence, dismissed.

37. No costs.

(**RAVINDRA V. GHUGE, J.**)

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