THE HON'BLE SMT. JUSTICE ANIS

CITY CIVIL COURT APPEAL No. 311 OF 2006

JUDGMENT:

This appeal, under Section 96 of the Code of Civil Procedure, 1908 (for short, 'CPC'), is directed against the judgment and decree, dated 24.07.2006, passed in O.S.No.196 of 2002 on the file of the XII Additional Chief Judge, City Civil Court, Hyderabad (Fast Track Court).

2. The appellant is the defendant No.3, while respondent No.1 is the plaintiff and the respondents 2 and 3 are the defendants 1 and 2 before the trial Court. For better appreciation of facts, the parties are hereinafter will be referred to, as they are arrayed before the trial court.

3. The suit is filed by the plaintiff for recovery of Rs.24,32,433/- together with further interest @ 30% per annum with monthly rents @ 2.5% till payment.

4. The brief averments made in the plaint are as follows:

The plaintiff is a registered firm and the first defendant is a limited company registered under the Indian Companies Act. For the purpose of its business, the first defendant borrowed a sum of Rs.10 lakhs from the plaintiff firm on 24.11.1998 and received the said amount by way of a cheque bearing No.245753 drawn in favour of the first defendant on

Syndicate Bank, Khairatabad Branch, Hyderabad. The first defendant acknowledged the receipt of said cheque and also encashed the said amount on 25.11.1998. The second defendant stood as guarantor and the defendants 1 and 2 executed promissory note and guarantee deed on 24.11.1998. Pursuant to the application under the guarantee undertaken by the third defendant, the said bank executed the Bank Guarantee No.18/1998 on the same day and it was valid up to 25.03.1999. After availing the loan, the defendants 1 and 2 did not discharge the loan amount. Then, the plaintiff invoked the bank guarantee dated 24.11.1998 and called upon the bank to pay the bank guarantee amount, but the third defendant also failed to pay the amount to the plaintiff. In all, the first defendant paid Rs.62,000/-, Rs.25,000/- and Rs.37,000/- on different dates. Therefore, all the three defendants are jointly and severally liable to pay the suit claim. According to the plaintiff, the suit is within time and prayed the Court to pass a decree in favour of the plaintiff.

5. The first defendant remained *ex parte.*

6. The second defendant filed written statement and taken a specific plea that the suit is barred by limitation. However, he admitted about the loan transaction and also admitted that he stood as a guarantor. He further stated that the amounts paid by the first defendant were towards interest only and not as a part payment of the loan amount, and

therefore, the suit is barred by limitation and finally prayed the Court to dismiss the suit.

7. The brief averments made in the written statement filed by the third defendant are as follows:

The defendant admitted that it was issued bank guarantee bearing No.18/1998 for a sum of Rs.10 lakhs at request of the first defendant in favour of the plaintiff and the validity of the bank guarantee was up to 23.06.1999. The first defendant by suppressing the true nature of the transaction obtained the bank guarantee and played fraud in collusion with the plaintiff, thereby this defendant refused to pay the amount to the plaintiff under the bank guarantee. The interest claimed by the plaintiff is excessive and finally prayed the Court to dismiss the suit.

8. Basing on the above pleadings, the trial Court framed the following issues for trial:

1. Whether the suit is barred by limitation as contended by the defendant No.2?
2. Whether the first defendant discharged the loan taken by him from the plaintiff as contended by the second defendant?
3. Whether the second defendant did not agree to pay interest on the loan advanced to the first defendant by the plaintiff?

4. Whether the third defendant did not give bank guarantee for the first defendant in respect of the suit transaction?

5. Whether the plaintiff is entitled to receive the amount claimed in the suit from the defendant Nos.1 to 3, which includes interest @ 30% per annum?

6. To what relief?

9. During the course of trial, on behalf of the plaintiff, PWs 1 and 2 were examined and Exs.A.1 to A.20 got marked. On behalf of the defendants, DW1 was examined, but no documentary evidence got marked.

10. After considering the oral and documentary evidence, the trial Court held that the first defendant failed to prove that he discharged the loan amount to the plaintiff. The trial Court further held that the second defendant also signed Ex.A.7 promissory note and that the promissory note does not speak about interest @ 30% as claimed by the plaintiff. The trial Court also held that the third defendant executed the bank guarantee and agreed to pay Rs.10 lakhs to the plaintiff if the first defendant failed to pay the borrowed amount and finally stated that the suit is not barred by limitation and the defendants 1 to 3 are jointly and severally liable to pay a sum of Rs.10 lakhs with proportionate costs and subsequent interest @ 6% per annum from the date of suit till realization.

11. The learned counsel for the appellant/defendant No.3 argued that the bank guarantee executed by the appellant is performance guarantee but not personal guarantee and that it is not proved whether the plaintiff supplied the goods to the defendants 1 and 2, and thereby the bank rightly refused to honour the conditions of Ex.A.9 and did not pay the amount under Ex.A.9. It is further argued that the suit is barred by limitation and that the plaintiff has no cause of action against the appellant, and prayed the Court to allow the appeal by dismissing the suit.

12. The learned counsel for the first respondent/plaintiff argued that the appellant only contested the suit in the trial Court and admitted the execution of the bank guarantee in favour of the plaintiff. It is further argued that the defendants 1 and 2 admitted their claim and they have not produced any evidence, as such all the defendants are jointly and severally liable to pay the suit claim to the plaintiff. It is further argued that if really the defendant No.1 played any fraud, it is not forthcoming what compelled the appellant for not taking any steps against the defendants 1 and 2. The learned counsel finally argued that the trial Court, after considering the oral and documentary evidence, rightly held that the suit is within time and not barred by limitation and that the appellant is liable to pay the suit claim along with other defendants.

13. Now, the points that would arise for consideration in this appeal are – 1) Whether the suit is barred by limitation? and 2) Whether the bank guarantee executed by the appellant is performance guarantee?

14. **POINTS**:

A perusal of the oral and documentary evidence produced by both sides, there is no dispute that the first defendant borrowed a sum of Rs.10 lakhs from the plaintiff on 24.11.1998, the plaintiff issued a cheque for the said amount and the same was encashed by the first defendant. It is also not in dispute that the said amount was taken by the first defendant for the purpose of its business.

15. The specific plea of the second defendant in the written statement that the first defendant discharged the entire loan amount to the plaintiff. Neither the first defendant nor the second defendant produced any oral or documentary evidence to support their contention. On the other hand, the part payments made by the first defendant clearly established that they have acknowledged the liability and that the suit is within time, therefore, the trial Court rightly held that the suit is not barred by limitation.

16. The further contention of the appellant is that Ex.A.9 is only issued by the bank towards performance guarantee and not personal guarantee as the plaintiff not filed any

documentary evidence that he supplied the goods to the defendant No.1. A perusal of the terms and conditions mentioned in Ex.A.9, it is clearly established that the first defendant borrowed a sum of Rs.10 lakhs from the plaintiff and if the first defendant failed to pay the amount borrowed within the stipulated time as mentioned in the bank guarantee, the third defendant has agreed to pay Rs.10 lakhs to the plaintiff. Therefore, the contention of the appellant that it is a performance guarantee cannot be accepted. Admittedly, the defendants 1 and 2 failed to repay the said amount to the plaintiff, as such the third defendant is liable to pay Rs.10 lakhs as agreed under Ex.A.9. Considering the evidence on record, the trial Court rightly decreed the suit with subsequent interest at 6% per annum as there is no condition stipulated to pay interest at 30%.

17. Basing on the oral and documentary evidence, the trial Court rightly decreed the suit in favour of the first respondent/plaintiff and the findings of the trial Court needs no interference

18. Accordingly, the City Civil Court Appeal is dismissed with costs, confirming the decree and judgment dated 24.07.2006 passed in O.S.No.196 of 2002 on the file of the XII Additional Chief Judge, City Civil Court at Hyderabad (Fast Track Court).

19. As a sequel thereto, miscellaneous petitions, if any pending shall stand closed.

ANIS, J

SEPTEMBER 18, 2017.
Anr

THE HON'BLE SMT.JUSTICE ANIS

CITY CIVIL COURT APEAL No. 311 OF 2006

18.09.2017

Anr