IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2331 OF 1988

Nirlon Limited (formerly knows as Nirlon Synthetic Fibres & Chemicals Ltd.) ...Plaintiff
Versus
Kamlaben M. Desai and others. ...Defendants

Mr. Sourabh Bachhawat, a/w Mr.Vinod Kothari and Ms. Gauri Joshi i/b Apex Law Partners for Plaintiff.

Mr.Karl Tamboly a/w. Ms.Sneha Jaisingh i/b Bharucha & Partners for Defendants.

CORAM : K.R.SHRIRAM, J.
DATE : 7TH SEPTEMBER 2018

P.C. :-

1 Plaintiff has approached this Court : (i) claiming as damages for breach of contract to supply certain goods a sum of Rs.4,36,98,839.40/- against Defendant Nos.1b and 1c out of the estate of original Defendant Nos.1/1a along with Defendant Nos.3; (ii) Defendant No.2 be ordered and decreed to pay plaintiff a sum of Rs.2,39,75,833/- plus liquidated damages of Rs.1,11,36,000/- ; and (iii) defendant No.1b and 1c out of the estate of original defendant Nos.1/1A and defendant Nos.3, 4, 5, 6 and 7 be ordered and decreed to pay jointly and severally to plaintiff a sum of Rs.2,39,75,833/- plus interest plus costs.

2 The facts as it appears are as under :-

In February, 1984, Plaintiff wished to purchase 'Caprolactum' from

Original Defendant No.1 and Defendant No.1a. Plaintiff wanted Defendant No.3 and Defendant No.4 to monitor the release of funds. Plaintiff was unwilling to release funds directly to Defendant No.1 and Defendant No.1a unless Defendant No.1 and Defendant No.1a imported 'Caprolactum' in accordance with the import formalities. Defendant No.1 and Defendant No.1a were unwilling to make import commitments unless their funds were secured.

3 Accordingly, Defendant No.3 and Defendant No.4 were requested to act as the monitoring agency. It was understood that Defendant No.3 and Defendant No.4 would indent Defendant No.1 and Defendant No.1a for 'Caprolactum' and in return receive the purchase price from Plaintiff which would be released to Defendant No.1 and Defendant No.1a only upon delivery from Defendant No.1 and Defendant No.1a to Plaintiff. On March 5, 1984, Defendant No.3 submitted a quotation.

This quotation on the face of it, did not create any obligation still less any liability on the part of Defendant No.3 and merely obliged Plaintiff to make all payments only to Defendant No.3. On March 16, 1984, Plaintiff claimed to have placed a purchase order with Defendant No.1. The existence of this document has been denied by Defendant No.3, Defendant No.4 and Defendant No.6.

On May 7, 1984, Plaintiff claimed to have written a letter stating

Plaintiff's acceptance to increase its demand of 'caprolactum' from 600 MT to 1000 MT based on which Defendant No.1 and Plaintiff entered into the First Contract dated 7th May 1984 as stated below. The existence of this document also has been denied by Defendant No.3, Defendant No.4 and Defendant No.6.

4 Under this first contract, it was agreed that Defendant No.1 would supply to Plaintiff 1000 Metric Tonnes (MT) of 'caprolactum' @ Rs.23.20/kg., payable to Defendant No.1 in instalments. Plaintiff was to pay the purchase price to Defendant No.3 for and on behalf of Defendant No.1. The demurrage charges incurred were to be paid by Defendant No.1. The relevant clause reads as :

> *"Clause 10. This transaction is brought by M/s. Nikira Trading, 1B, Suvas Apartments, 68F Nepean Sea Road, Bombay 400 006 who shall be responsible to see that the obligations of the parties are complied with an shall also execute a specific Deed of Indemnity."*

5 Defendant No.3 executed a Deed of Indemnity in favour of Plaintiff in case Plaintiff incurred any liability due to non-compliance of Defendant No.1 with the terms of the First Contract. By the Deed of Indemnity Defendant No.3 agreed to:

> *"… do hereby declare and under-take that we hold ourselves solely responsible to see that all the provisions of the current Import Policy of the Government, conditions of the said Import Licence and all the statutory obligations to the State or Central Government are complied with …*

> *…we further undertake that in the event of Messrs. Chaganlal & Sons making any default in procurement of importation, initial payment against import bills, clearance of goods within time, any demurrage charges or default of any nature which may be debited even at a later day by any Government Authorities, we will be solely Nirlon for such defaults and for the payments to be incurred or sustained by Nirlon*."

The indemnity was only to make sure that Defendant No.1 complied with the import control regulations and would take effect only if Defendant No.1 flouted the regulations.

6 On June 25, 1984, Defendant No.3 gave another quotation to Plaintiff. This quotation on the face of it, did not create any obligation still less any liability on the part of Defendant No.3 and merely obliged Plaintiff to make all payments only to Defendant No.3.

7 On June 26, 1984, Plaintiff claimed to have placed another purchase order and in furtherance of such alleged purchase order claims to have entered into a contract (**Second Contract**) with Defendant No.1 for supply of 2200 MT of 'Caprolactum' @ Rs.23.20/kg payable to Defendant No.1 in instalments. Plaintiff allegedly was to pay the purchase price to Defendant No.3 for and on behalf of Defendant No.1. Demurrage charges incurred were to be paid by Defendant No.1. The relevant clause reads as under : -

> *"Clause 10 : This transaction is brought by M/s. Nikira Trading, 1B, Suvas Apartments, 6BF Nepean Sea Road, Bombay 400 006 who shall be responsible to see that the obligations of the parties*

> *are complied with and shall also execute a specific Deed 'of Indemnity."*

The existence of this document has been denied by Defendant No.3, Defendant No.4 and Defendant No.6.

8 On 26th June 1984, Defendant No.3 executed a Deed of Indemnity in favour of Plaintiff in case Plaintiff incurred any liability due to non-compliance of Defendant No.1 with the terms of the Second Contract. By the Deed of Indemnity Defendant No.3 agreed to:

> *"… declare and undertake that we hold ourselves solely responsible to see that all the provisions of the current Import Policy of the Government, conditions of the said Import Licence and all the statutory obligations to the State or Central Government are complied with …*
>
> *…We further undertake that in the event of Messrs. Chaganlal & Sons making any default in procurement of importation, initial payment against import bills, clearance of goods within time, any demurrage charges or default of any nature which may be debited even at a later day by any Government Authorities."*

The indemnity was only to make sure that Defendant No.1 complied with the import control regulations and would take effect *only* if Defendant No.1 flouted the regulations.

9 On July 16, 1984, Defendant No.1 allegedly drew 4 Bills of Exchange on Plaintiff in favour of Central Bank of India for a sum of Rs.38,28,000 each under the which Plaintiff accepted and made payments for and on

behalf of Defendant No.1 on their respective due dates. Plaintiff, on Defendant No.1's request made a further payment of Rs. 6,49,600 towards discounting charges of the bank. On August 8, 1984, Plaintiff had directly dealt with Defendant No.1 and payments were directly made by Defendant No.1 to Plaintiff. Such dealings are evident from Plaintiff's own submissions under paragraphs 33(b) to 33(d) of the Plaint.

10 On April 24, 1985, Plaintiff and Defendant No.1 allegedly entered into a Supplemental Agreement under the First Contract where the price of 600 MT was increased by Rs. 3/kg. Defendant No.1 allegedly acknowledged the receipt of Rs.41,76,000 towards 30% advance price for 600 MT. It was allegedly recorded that Defendant No.1 had received a further sum of Rs. 10 lacs towards increase in the price. Defendant No.3, Defendant No.4 and Defendant No.6 deny the existence of any such agreement.

11 On April 24, 1985, Plaintiff and Defendant No.1 allegedly entered into a Supplemental Agreement under the Second Contract where the price of 1300 MT was increased by Rs. 3/kg. Defendant No.1 acknowledged receipt of Rs.90,48,000/- towards 30% advance price for 1300 MT. It was further recorded that Defendant No.1 had received a further sum of Rs.39 lacs towards increase in the price. Defendant No.3, Defendant No.4 and Defendant No.6 deny the existence of any such agreement.

12 On April 26, 1985, in view of the above, Defendant No.3 allegedly covenanted with Plaintiff and further agreed and guaranteed to pay to Plaintiff following the Supplemental Agreement under the First Contract Rs.59,76,000 on demand with interest @ 24% p.a. from date of receipt till payment, subject to other terms under the Deed of Guarantee. Defendant No.3, Defendant No.4 and Defendant No.6 deny the existence of any such agreement.

13 Plaintiff alleges that Defendant No.3 further covenanted with Plaintiff and agreed and guaranteed to pay to Plaintiff under the Supplemental Agreement under the Second Contract Rs.1,29,48,000 on demand with interest @ 24% p.a. from date of receipt till payment, subject to other terms under the Deed of Guarantee. Defendant No.3, Defendant No.4 and Defendant No.6 deny the existence of any such agreement. It is also stated that Plaintiff has failed to place on record any document evidencing such transactions nor produced any evidence in support of such allegations. Plaintiff allegedly paid to Defendant No.1 Rs.27,00,000 by way of advance payment under both the contracts towards increased price of 900 MT. Defendant No.3, Defendant No.4 and Defendant No.6 deny the existence of any document to such effect.

14 On July 24, 1985, an alleged agreement between Plaintiff and Defendants was entered into whereby Defendant No.2 undertook to supply 2400 MT of 'Caprolactum' in consonance with the terms of the agreement. The alleged Agreement was executed by Plaintiff, Defendant No.1, Defendant No.2 and Defendant No.3 whereby it was recorded that Plaintiff has allegedly fulfilled all its obligations under the First and the Second Contracts and Defendant No.2 will now discharge the obligations of Defendant No.1 as per the terms of the original contract. Consequently, Plaintiff released and discharged Defendant No.1. The relevant clauses read:

> *"… Chhaganlal and Nikira Trading have requested Nirlon to release Chhaganlal from further obligation of delivering the remaining 2400 tons of Caprolactam under the Principal Contract...*
>
> *…*
>
> *3. In consideration of the Company agreeing to deliver the Caprolactam as aforesaid and in consideration of Chhaganlal returning the said amount of Rs.1,88,53,600/- paid by NIRLON to Chhaganlal under the Principal Contract in the manner hereinafter set out the Principal Contract in so far as the same has not been performed by Chhaganlal shall be treated as rescinded and NIRLON releases and discharges Chhaganlal from further performance of the Principal Contract as to supply of the remaining 2400 metric tons of Caprolactam as stated aforesaid and all claims and demands whatsoever in respect thereof and accepts the liability of the Company to sell and deliver 2400 metric tons of Caprolactam on the terms and conditions as contained in the terms of the draft agreement annexed hereto in lieu of the liability of Chhaganlal.*
>
> ….

4. Chhagartlal and the Company agree and confirm that the said sum of Rs.1,88,53,600/- paid to Chhaganlal under the Principal Contract shall be and stands adjusted and paid towards payment by Nirlon for supply of 2400 metric tons of Caprolactam it being agreed and understood that the said sums of Rs.1,88,53,600/- shall be deducted from the price payable by NIRLON to the Company under the Agreement in letter form, draft whereof is annexed hereto and Chhaganlal shall pay the said sum of Rs.1,88,53,600/- directly to the Company and the Company shall not look to NIRLON for payment of the same."

The existence of this document has been denied by Defendant No.3, Defendant No.4 and Defendant No.6. Plaintiff has failed to prove the existence of this document.

15 It is stated that a Letter dated July 24, 1985 was addressed by Plaintiff to Defendant No.2 containing the terms upon which Defendant No.2 would perform its part of the Agreement allegedly entered into by it with the Plaintiff on July 24, 1985. It was allegedly recorded that the Plaintiff would be liable to pay to Defendant No.2 Rs.15,344.53 per MT.

The existence of this document also has been denied by Defendant No.3, Defendant No.4 and Defendant No.6.

16 On, July 27, 1985, Plaintiff once again approached Defendant No.3 and Defendant No.4 and represented to Defendant No.3 and Defendant No.4 that although Defendant No.1 and Defendant No.1a has arranged for

imports of ‘caprolactum’ as per Plaintiff’s requirements, certain deliveries were required in the future and for business purposes, these orders for 'caprolactum' had to be novated to an entity controlled by Plaintiff. For their internal compliances, Plaintiff required to show a guarantee. Defendant No.3 and defendant No.4 state that it was represented to Defendant No.3 and Defendant No.4 that the guarantees would not be acted upon as everything with regard to the import was in place. Accordingly, Defendant No.3 and Defendant No.4 signed the Deed of Guarantee. The relevant clauses read as under : -

> “*4. In order to give effect the Guarantee herein contained Nirlon shall be entitled to act as if the Guarantors were the Vendors. of Nirlon for all payments and covenants guaranteed by them as aforesaid to Nirlon.*
>
> *5. The guarantee herein contained shall not be determined or affected by the death of any of the Guarantors or change in constitution of the firm but shall in all respects and for all purposes be binding and operative upon the survivors or survivor of them and the heirs executors and administrators of the deceased Guarantor and the person or person for the time being representing the reconstituted firm as the case may be until repayment of all moneys due to Nirlon as aforesaid.*
>
> ….
>
> *8. The Guarantors hereby declare that their liabilities under these presents shall be irrevocable, joint and several and co-extensive with, that of the Nikita Traders Limited.*
>
> …
>
> *10. The Guarantors further declare that this Guatantee, shall not in any manner be affected by reason of any laches on the part of Nirlon to recover the amount due from Nikira Traders Limited.”*

Defendant No.3 and Defendant No.4 also state that this was not a continuing guarantee.

17 On October 10, 1985, Defendant No.1 allegedly paid to Plaintiff Rs. 6,00,000/- towards part payment of their outstanding dues.

18 On February 11, 1986, Plaintiff allegedly wrote to Defendant No.1 to confirm the sum of Rs. 5,55,80,449.03 as due and payable as on September 30, 1985. It appears that Plaintiff and Defendant No.1 had engaged in direct dealings and Defendant No.1 owed Plaintiff for other deliveries. It is the case of Defendant No.3 and Defendant No.4 that indemnities that provided by Defendant No.3 and Defendant No.4 came to an end and stood rescinded. On February 13, 1986, Defendant No.1 allegedly confirmed the amount of Rs. 5,55,80,449.03 as outstanding.

19 On July 22, 1988, Plaintiff filed the present Suit originally against Defendant No.1, D-1a as Proprietor of Defendant No.1, Defendant No.2 and Defendant No.3.

20 After the suit was filed the following events took place :

On April 25, 1990, Plaintiff, by their Advocate's letter to Defendant No.1, Defendant No.3 to Defendant No.7, invoked the alleged guarantee dated July 27, 1985. On May 21, 1990, Defendant No.3 through their Advocate's letter denied liability and sought inspection. Other Guarantors did not reply to the notice.

21 Thereafter, Plaintiff took out chamber summons No.134 of 1993 for adding Defendant Nos.4 to 6 and 7 and this chamber summons was allowed by an order dated 17th February 1997. Substantial prayers after this amendment stood as under :-

> *"(a) that Defendant Nos.1b and 1c be ordered and decreed to pay to the Plaintiffs, out of the estate of Original Defendant No.1/1a coming to their hands, alongwith Defendant No.3 a sum of Rs.4,36,98,839.40/- as per particulars of Claim Exhibit "L" hereto with further interest on the sum of Rs.2,68,09,104/- at the rate of 21% per annum from the date of the suit till payment and or realization.*
>
> *(b) that Defendant No.2 be ordered and decreed to pay to the plaintiffs a sum of Rs.2,39,75,833.00 as per particulars of claim, Exhibit 'M' hereto with further interest on Rs.1,47,09,100.00 at the rate of 21% per annum from the date of the suit till payment and/or realization.*
>
> *(c) In addition to the amount referred to in prayer (b) above, Defendant No.2 be ordered and decreed to pay to the Plaintiffs liquidated damages of a sum of Rs.1,11,36,000/- as per particulars of claim Exhibit 'N' hereto with interest thereon at the rate of 21% per annum from the date of the suit till payment and/or realization.*
>
> *(c-1) that Defendant Nos.1b and 1c be ordered and decreed to pay to the Plaintiffs, out of the estate of Original Defendant Nos.1/1a coming o their hands and Defendant Nos.3, 4, 5, 6 and 7 be ordered and decreed to pay jointly and severally to the Plaintiffs a sum of Rs.2,39,75,833.00 as per particulars of claim Exhibit 'M' hereto with further interest on Rs.1,47,09,100/- at the rate of 21% per annum from the date of the suit till payment and/or realization."*

22 Defendant Nos.1 and 2 never filed written statement. The newly added Defendant Nos.1A and 1B also did not file any written statement. Only Defendant Nos.3, Defendant No.4 and Defendant No.6 filed written

statement and are contesting Plaintiff's claim. The suit as against Defendant No.2 was dismissed on 3rd May 1991. Defendant Nos.5 and 7 were served by substituted service but have not entered appearance or filed written statement. Therefore, the duel is between Plaintiff on one side and Defendant Nos.3, 4 and 6 on the other side. Issues were framed on 16th June 2014 and the same read as under :-

> *"1. Whether the Defendants prove that the suit are barred by Law of Limitation?*
>
> *2. Whether Plaintiff proves that the guarantee dated July 27, 1995 is a continuing guarantee as set out in paragraph 14A of the plaint?*
>
> *3 Whether the Defendant Nos. 3 and 4 prove that the Dees of Guarantee / Indemnities (Exhibits "B"/ "D"/ "D-3" to the plaint) executed in favour of Plaintiff stood rescinded / revoked as averred in paragraph 3(b) of the Written Statement filed by the Defendant Nos. 3 and 4?*
>
> *4 Whether the Defendant No. 3 and 4 prove that they were induced to sign the Deeds of Guarantee/Indemnities (Exhibits "B"/ "D"/ "D-3" to the plaint) by concealment and /or is representation on the part of Plaintiff as averred in paragraph 3(c) & (d) of the Written Statement filed by the Defendant No. 3 and 4?*
>
> *5 Whether the Defendant Nos. 3 and 4 prove that the Deeds of Guarantee/Indemnities (Exhibits "B"/ "D"/ "D-3" to the plaint) are illegal (i) in their object and consideration and (ii) for want of consideration as averred in paragraph 3 (f) and (j) of the Written Statement of the Defendant Nos. 3 and 4?*
>
> *6 Whether Plaintiff is entitled to a decree against Defendant No. 3 in terms of particulars of claim at Exhibit L to the plaint?*
>
> *7 What order and further reliefs to Plaintiff?*
>
> *8 What rate of interest?"*

23 Shri Bachhawat and Shri Tamboly agreed that in issue No.1, the

onus should be on the Plaintiff to prove that the suit filed is within limitation.

24 Plaintiff led evidence of two witnesses, one Jasmin Kirit Bhavsar (PW-1) and one George Benedict Lewis (PW-2). Defendant Nos.3, 4 and 6 hereinafter who are collectively referred to as Defendants, did not lead any evidence.

25 After Shri Bachhawat took the Court through the plaint, the written statement and the evidence, the Court felt that unless Plaintiff is able to prove that any amount is payable to Plaintiff, the question of dealing with the other issues does not arise. In my view, Plaintiff has miserably failed and there is no evidence worth the paper to prove what Plaintiff has averred in the plaint.

26 The evidence of PW-1 has to be discarded. The entire evidence of PW-1 was based on information/records and beliefs and PW-1 confessed that she had no personal knowledge. It is also a copy, cut and paste of the plaint, can't even be called a testimony. In answer to question no.5 in cross-examination, PW-1 agreed that in effect, her evidence is hearsay. Question nos.1, 3, 4 and 5 and answers thereto reads as under :-

> *"1 Q. : Is it correct to say that you have no personal knowledge of events that occurred in the Plaintiff Company prior to 6th March 2006?*

Ans.	*:*	*Yes.*
		...
3 Q.	*:*	*Is it correct that the remaining documents at Sr. Nos.2 to 18 to this compilation (Exhibit P2 to P18) are all on information, record and belief?*
Ans.	*:*	*Yes, that is so.*
4 Q.	*:*	*Is it also correct to say that your evidence is also based on information, record and belief?*
Ans.	*:*	*Yes.*
5 Q	*:*	*Is it true that the persons who gave you information on behalf of Plaintiffs are Mr.George Lewis, Mr.Vitthal Gandhi, Mr.Dalia and Mr.Harsh Shetty?*
Ans.	*:*	*Yes, that is correct."*

Shri Bachhawat, as an officer of the Court, in fairness, also agreed that evidence of PW-1 cannot be looked into.

27 Coming to PW-2, the evidence of PW-2 is no better. As in the case of PW-1, the evidence of PW-2 is also copy, cut and paste of the plaint. PW-2 was called to give evidence after retirement because in question no.6 in cross-examination of PW-1, PW-1 answered that apart from one Mr.Dalia, Mr.Harsh Shetty and Mr.Vitthal Gandhi, one of the person was Mr.George Lewis who gave her information.

28 PW-2 has not made any effort to prove any of the documents or contents of any of the documents. As recorded in the order dated 8th July 2014, only Exh.P-2, Exh.P-7 and Exh.P-16 were admitted documents.

Exh.P-6, Exh.P-10 and Exh.P-15, Defendants have admitted the existence of the documents but denied the contents and the remaining documents were denied. All the documents were nevertheless marked as Exh.P-1 to Exh.P-18 for convenience. In the evidence of PW-2, no attempt has been made to prove the contents of Exh.P-6, Exh.P-10 and Exh.P-15. Exh. P-6 and Exh.P-10 are alleged Deeds of Indemnity by Defendant no.3 in favour of Plaintiff and Exh.P-15 is a letter from Plaintiff's advocates to original Defendant No.1 and Defendant No.3 to Defendant No.7. Exh.P-2 and Exh.P-7 are quotations from Defendant No.3 to Plaintiff and Exh.P-16 is a letter to Plaintiff's advocate from the erstwhile advocates of Defendant no.3.

29 In the cross-examination of PW-2 in answer to question no.5, PW-2 has stated that paragraphs 3 to 29, 32 to 35 and 37 of the evidence affidavit of PW-2 are all based on records. The Court has also ordered that paragraph 31, 32 (except the portion that referred to documents), paragraph 33 and paragraphs 38 to 41 are in the nature of submissions and arguments and not testimony. Those paragraphs are not admissible in evidence and are liable to be ignored without fear of adverse inference or consequence. Question no.5 and the answer thereto read as under :

> ***"5 Q. :*** *Which part of your evidence affidavit is based on records maintained by Plaintiff-company?*
>
> ***Ans.*** *: Paragraphs 3 to 29, 32, 35 and 37 are all based on records. (It appers that paragraphs 31, 32 (except the portion that refers to documents), paragraph 33 and paragraphs 38 to 41 are all in the nature*

> *of submissions and arguments. These are not testimony. They are not admissible in evidence and are liable to be ignored without fear of adverse inference or consequence."*

The evidence affidavit of PW-2 comprises of only 41 paragraphs. This would leave only paragraphs 1, 2, 30 and 34 to be looked at. Paragraph 1 introduces the witness and paragraph 2 describes the parties to the suit. Paragraph 30 reproduces what is stated in clause 15(c) of the Agreement dated 24th July 1985 (Exh.P-12 and not proved) and paragraph 34 only says that Defendant no.1 paid a sum of Rs.6 lakhs to Plaintiff towards part payment of outstanding dues to Plaintiff. Therefore, there is no evidence at all led by Plaintiff worth a mention to pin liability on any of the 7 defendants. Exh.P-2, Exh.P-7 and Exh.P-16 do not show any admission of liability by defendants and contents of Exh.P-6, Exh.P-10 and Exh.P-15 are not proved. As observed earlier, other un-admitted documents are also not proved.

30 In the circumstances, I would hold that Plaintiff has miserably failed in proving its claim and hence I see no reason, working backwards to answer issue Nos.2 to 5.

31 On the issue of limitation also, Plaintiff has not led any evidence to prove that the suit filed was within limitation and based on the pleadings it does not make out a case that the suit filed was within limitation.

32 Under the provisions of Order VII Rule 1(e) of Code of Civil Procedure, 1908, it is for the Plaintiff to give particulars in the plaint with respect to the facts constituting the cause of action and when it arose. The Hon'ble Supreme Court in the case of ***K.S. Nanji & Co. Vs. Jatashankar Dossa*** [1] has held in paragraph 12 that it is for the plaintiff to first allege the date on which his cause of action arose and to prove the same and it is only thereafter that the burden shifts upon the defendant. Thus it is for the Plaintiff to prove in the first instance that the suit is within limitation, and it is only upon such burden being discharged that the same shifts upon the Defendants to show that the suit is time barred.

33 In the present case, the plaint was originally filed on July 22, 1988. The Plaintiff has not anywhere in the suit as originally filed set out the date / dates on which its cause of action arose to recover the amounts claimed against the Defendants. The plaint originally contained paragraph 39 which reads as follows :-

> "*The Plaintiffs say and submit that no part of their claim against the Defendant is barred by the Law of Limitation. The Plaintiff shall in any event, rely upon the part payment of Rs.6,00,000/- and the letter of acknowledgment dated 13th* February, 1986, *Ex.'K' hereto to save the bar of limitation, if any.*"

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1 *(1962) 1 SCR 492*

34 Subsequently the plaintiff filed Chamber Summons No. 134 of 1993 by which the Plaintiff sought deletion of certain portions of the Suit and additions to the same. The same came to be allowed. Pursuant to the same, the Plaintiff has deleted paragraph 39 of the Plaint as it originally stood and has replaced the same with the following paragraph:

> "*39. The Plaintiffs say and submit that their cause of action against Original Defendant 1, 1a and 4 to 7 as guarantors arose for the first time in April 1990 after the plaintiffs addressed a written notice to each of the said guarantors vide their Advocates' letter dated 25th April,1990 making get first demand calling upon ach of them to jointly and severally pay the suit claim. The Plaintiffs say and submit that no part of their claim against the defendants is barred by the law of limitation. While filing the suit the Plaintiffs relied upon the part payment on account made of Rs.6,0,000/- on 24th October, 1988 and the letter of acknowledgment of debt dated 13th February, 1986 (Ex.K hereto) to save the bar of limitation, if any. In the circumstances, the entire claim of the Plaintiff against the said Defendant is within time.*"

35 The Plaint as framed does not disclose the date on which the Plaintiff's cause of action to file the suit arose. There is not even a whisper about the same in the Plaint. The Plaintiff has sought to recover various sums which it claims were due and payable by Original Defendant No.1 but has not disclosed when these payments became due. The Defendants are sought to be sued under a Deed of Guarantee dated 27th July, 1985. It is the Plaintiff's case that the Defendants have guaranteed the payments due to the Plaintiff from Defendant No.1 under the Suit transactions.

36 The Supreme Court in the case of ***Syndicate Bank v. Channaveerappa Belari & Ors.***[2] held that the demand under a deed of guarantee must be made within the time when the claim against the principal borrower is still live and has not become time barred.

The Plaintiff has not averred or proved as to when its cause of action arose in this matter and therefore the Plaintiff has not discharged its burden in demonstrating that the suit has been filed within limitation.

37 I must add that it was one of the most difficult task I have faced to understand from the plaint what this Plaintiff really wanted and what Plaintiff's case really was. This I had to make out with the assistance of Shri Bachhawat and Shri Tamboly.

38 The case in short is that Plaintiff has made certain payments to Defendants for supply of certain quantity of caprolactum (the said goods). According to Shri Bachhawat, by taking into account the 1st, 2nd and 3rd Agreements, Plaintiff had paid a sum of Rs.5,46,12,694/- in advance and Defendant was to supply about 3200 MT of the said goods and therefore, the amount payable was only Rs.5,41,34,515/-. Therefore, according to Plaintiff it had paid an excess amount of Rs.4,78,179/-. Plaintiff has also stated that demurrage charges of Rs.19,32,550/- and custom duty of

2 *(2006) 11 SCC* 506

Rs.11,263/- was paid in excess due to reasons attributable to defendants. According to Plaintiff, it was the responsibility and liability of Defendants and hence Plaintiff is entitled to be reimbursed these amounts.

39 There is no evidence at all to indicate that : (a) the responsibility and liability to pay demurrage and customs duty was that of Defendants and Plaintiff had incurred those amounts. That would leave only a sum of Rs.4,78,179/- if we take Plaintiff's case as stated by Shri Bachhawat further, as payable. Even for this amount, there is no evidence.

40 Shri Tamboly submitted that from the plaint, it appears that Plaintiff has paid only Rs.2,56,21,600/- and not Rs.5,46,12,694/- as claimed by Shri Bachhawat. Shri Bachhawat states that in paragraph 26 of the plaint, Plaintiff has stated that '..................*Plaintiff had no option but to clear the said goods and take delivery thereof by paying the entire CIF value of the said 1822.250 M.T. of the said goods......”.* Therefore, the amount paid, according to him, is Rs.5,46,12,694/-. Shri Bachhawat also, in fairness, states that the affidavits filed do not even mention to whom these amounts were allegedly paid. Shri Tamboly points out that the agreement dated 25th July 1985 (Exh.P-12 which is not admitted in evidence), on which Plaintiff is relying also shows that Plaintiff has only paid Rs.2,56,21,600/- and

therefore, if Plaintiff has received goods worth Rs.5,46,12,694/- as stated by Shri Bachhawat and Plaintiff has only paid Rs.2,56,21,600/-, then it is Plaintiff who has to return monies to Defendants and not in the other way around. I would agree with Shri Tamboly.

41 It should also be noted that paragraph 5 of Exh.P-5 and Exh.P-7, (both un-admitted documents) provide that customs duty leviable on the clearance of the goods shall be on Nirlon Synthetic Fibres & Chemicals Ltd., i.e., Plaintiff. Therefore, Plaintiff has paid excess customs duty which was the responsibility of Plaintiff and it could not have claimed this amount from Defendants. To that extent, an incorrect statement has been made in the plaint and in the evidence filed.

42 Of course, there is no counter-claim and it is not the case of Defendants in the written statement either. I felt it necessary to highlight these portions to only show how bad Plaintiff's case was and that the suit deserves to be dismissed. Suit dismissed with costs in the sum of Rs.5 lakhs that Plaintiff has to pay Defendant Nos.3, 4 and 6.

Issues are answered accordingly.

(K.R. SHRIRAM, J.)

SKT