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Punjab and
others
—
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that they can file objections under section 5-A' of the Act. In the present case, the notification was published in the Official Gazette on 6th May, 1960 and the objections were, admittedly, filed on 31st May, 1960, that is to say within 30 days of the publication of the notification. The same are, consequently, within time. Learned Counsel for the State conceded that if the objections were not barred by limitation, then the notification under section 6 of the Act would be bad in law, because those objections had to be disposed of before issuing this notification. Moreover, in the present case, the notification under section 4 clearly stated that the objections had to be filed within 30 days of the *publication* of the notification and various dates were fixed by the Land Acquisition Officer for hearing of the same. They were still pending and the said officer had not informed the petitioner that they were barred by limitation and would not be considered.

In view of what I have said above, this petition succeeds and the notification, dated 10th June, 1960 issued under section 6 of the Act and all proceedings taken thereunder are quashed. In the circumstances of this case, however I will make no order as to costs in these proceedings.

B.R.T.

APPELLATE CIVIL

Before Mehar Singh and Shamsher Bahadur, JJ.

BHAGWAN DASS MEHRA AND ANOTHER,—*Appellants.*

versus

BHARAT NIDHI LTD.,—*Respondent.*

Regular First Appeal No. 39 of 1956:

1962
October, 26th. *Limitation Act (IX of 1908)—Suit by a creditor against
guarantee broker—Article applicable to—Whether 57, 83 or*

115—Contract Act (IX of 1872)—S. 135—Extensions granted to principal debtor and adequate security not taken from him without reference to surety—Whether absolves surety of his liability.

Held, that a suit by a creditor against the guarantee broker for the sums which the principal debtor had failed to pay up according to agreement is really to enforce a contract to indemnify to which Article 83 of the Limitation Act is applicable. No amount having been left by the plaintiff to the defendant, Article 57 does not apply nor is article 115 attracted as it is not a suit for compensation for breach of any contract either express or implied.

Held, that a creditor cannot enforce the contract of indemnity against the surety when it had permitted the principal debtor certain facilities and concessions not envisaged by the contract. The extensions granted by the creditor to the principal debtor without reference to the surety amount to fresh contract which relieves the surety of his obligation and more than that the surety is absolved where the creditor permits itself to be denuded of the security either by lack of supervision or connivance.

First Appeal from the decree of the Court of Shri Ram Singh Bindra, Sub-Judge First Class, Amritsar, dated the 28th day of November, 1955 granting the plaintiff a decree for Rs. 21,103-8-0 with costs against the defendants.

D. N. AWASTHY, N. N. BHATIA, and V. C. MAHAJAN,
ADVOCATES, for the Appellants.

S. M. SIKRI, A. M. SURI and L. M. SURI, ADVOCATES, for
the Respondents.

JUDGMENT

SHAMSHER BAHADUR, J.—The plaintiff-Bank Bharat Nidhi Ltd. (now respondent) which was formerly known as the Bharat Bank Ltd., brought a suit for recovery of Rs. 21,103-8-0 against Bhagwan Dass Mehra and Jai Kishan as guarantee-brokers, on basis of the agreement Exhibit P. 2

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executed between the parties on 1st of May, 1944. This suit having been decreed both the defendants have come in appeal to this Court.

The loan transaction for which the defendants are sought to be made liable as guarantee-brokers originated on 26th of March, 1943, when a cash credit limit to the tune of one lakh was guaranteed to Messrs Ram Saran-Som Dev Grover, Cloth Merchants, Katra Ahluwalia, Amritsar. At first the security lodged with the Bank consisted of gold and silver bullion,—*vide* Exhibit P. 33, but at all relevant times the credit was advanced on the security of woollen and cotton pieces. The account with Ram Saran-Som Dev started on 11th of June, 1943. The arrangement originally was that the drawing power of the borrower would be 65 per cent of the value of the securities lodged with the Bank. The defendants entered into an agreement with the Bharat Bank on 1st of May, 1944 to become their guarantee-brokers,—*vide* Exhibit P. 2, and by a letter of 11th of July, 1944 (Exhibit P. 6), the cash credit limit of Rs. 75,000 of Messrs. Ram Saran-Som Dev against the pledge of cotton, artificial silk and woollen goods as security was confirmed. The period of cash credit guaranteed to Ram Saran Som Dev was in the first instance confined to one year but was extended subsequently for another term of the same duration. The renewal which was communicated by the head office on 12th of September, 1944 (Exhibit P. 54), was made subject to certain modifications. The cash credit limit was reduced to Rs. 25,000. The rate of interest was slightly raised but the margin of drawing power remained the same as before. The security was described to be that of “stock of woollen goods consisting of blankets, tweeds and patta cloth stored locally in effective possession and control of the Bank”. It appears from clause 4 of the proposal submitted on 29th of August, 1944 (Exhibit

P. 32), by the Branch Manager, that Messrs Ram Saran-Som Dev had restricted their business activities to the minimum and had transferred a number of properties situate locally "in the name of their ladies". It was accordingly recommended that "we have, therefore, reduced their previous report to the present as per our financial report attached".

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Under the agreement (Exhibit P. 2), the defendants became responsible to the plaintiff-Bank for due fulfilment and performance of all contracts and engagements guaranteed by them and to indemnify the Bank against all losses which may arise out of the breach thereof. The defendants as guarantee-brokers had to nominate godown-keepers for storing and delivering the stocks pledged in the account guaranteed by them and the plaintiff was to appoint such godown-keepers but they were deemed to be acting as agents of the defendants. Clause 7 of the agreement is to this effect:—

"In case the Bank suffers any loss in any transaction, which has been guaranteed by the Guarantee-Brokers, either on account of non-payment by the customer or on account of any shortfall in the realization of its dues, the Bank after giving 15 days notice by registered post to the customer and the Guarantee-Brokers shall take legal proceedings against the customer at the cost of Guarantee-Brokers. If for a period of 3 months after obtaining the decree, the Bank fails to realize the amount of the decree from the judgment-debtor, it shall, at any time thereafter, but in any case before taking legal proceedings against the Guarantee-Brokers for the

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realization of aforesaid amount give to the said Guarantee-Brokers a notice in writing giving them an option to pay the decretal amount together with costs, etc., of execution aforesaid to the Bank and to get the decree assigned to them in lieu of said payment."

Ram Saran-Som Dev having defaulted in payment of dues in the cash credit account the plaintiff-Bank sued them on 7th of October, 1949. In terms of the statement made by the debtor in this case a decree was granted by the Court of Mr. Hira Lal Jain, Subordinate Judge, 1st Class, Amritsar, on 1st of February, 1952. It appears that before the filing of the suit some criminal proceedings were also launched by the plaintiff against the defaulting firm at the suggestion of the guarantee-brokers. The criminal action, however, proved abortive and nothing came out of it. A decree for Rs. 20,000 was passed in favour of the Bank by the Subordinate Judge, who disallowed the expenses claimed by the Bank on account of criminal litigation culminating in the discharge of Ram Saran-Som Dev. According to the decree, if the decretal amount of Rs. 20,000 was paid by the judgment-debtors within two years the plaintiff-Bank would forego the proportionate costs but in case the amount was not so paid before 1st of February, 1954, the plaintiff-Bank would have been entitled to proportionate costs in addition to the decretal amount. The plaintiff-Bank was precluded from taking out execution of the decree before the expiry of two years. The defendants were allowed by the decree to take away the pledged goods from the godown after payment of the price to the Bank. The judgment-debtors could exercise this option of purchase upto 31st of December, 1952. If the option was not exercised by 31st of December, 1952,

the plaintiff-Bank could itself dispose of the pledged goods by means of public auction and credit the sale-proceeds towards the decretal amount. Messrs Ram Saran-Som Dev neither exercised their option to take away the goods nor did they pay the decretal amount within the period of two years. The pledged goods were sold by public auction and fetched only a sum of Rs. 356-4-0. Having failed in their endeavour to realise their dues from the principal debtor the plaintiff-Bank brought the present suit on 8th of November, 1954, for recovery of Rs. 21,103-8-0 against the appellants as guarantee-brokers.

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The defendants took up a variety of pleas and claimed that they stood exonerated from their liability in consequence of the variations in the agreement which had been made by the plaintiff-Bank in favour of the principal debtor. It was averred that the advances had been made in excess of the permitted margin. No efforts were made to realise the securities and in fact the Bank permitted the security to be abstracted and deteriorate. It was further pleaded that the suit was barred by time.

The pleadings gave rise to the following issues:—

- (1) Whether the Bharat Bank Ltd., has now changed its name to Bharat Nidhi Ltd.?
- (2) If issue No. 1 is proved whether the plaintiff has no *locus standi* to maintain suit?
- (3) Whether the suit is within time?
- (4) Whether the plaintiff had advanced the loan to Messrs Ram Saran-Som Dev on the terms and conditions as originally agreed to between them and on the

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terms and conditions mentioned in Exhibit P. 1?

- (5) If issue No. 4 is proved then whether the plaintiff has been guilty of breach or variations of the terms contained in Exhibit P. 1, or of the terms of the guarantee deed Exhibit P. 2 and if so, to what effect?
- (6) What amount, if any, is owing due to the plaintiff from Messrs Ram Saran-Som Dev?
- (7) Whether the plaintiff is estopped from maintaining the suit?
- (8) Whether there has been any breach or variations of the terms of the agreement of loan between the plaintiff and Messrs Ram Saran-Som Dev, which had been guaranteed by the defendants and if so to what effect?
- (9) Whether the objection incorporated in issue No. 8, cannot be raised by the defendant?
- (10) Relief.

Very little oral evidence has been adduced by the parties. On behalf of the Bank, Raja Ram Kapur, the Bank Manager at the relevant time, appeared as a witness while Bhagwan Dass Mehra, the first defendant, appeared on behalf of the guarantee-brokers. The learned Judge having found all the relevant issues in favour of the plaintiff has decreed the suit. Before us Mr. Awasthy, the learned counsel for the appellants, has challenged the decision of the trial Judge mainly on the questions of limitation (issue No. 3) and the variation of the cash credit agreement between the Bank and the principal debtor (issue No. 8). The other

points which have been decided in favour of the plaintiff have not been pressed in the arguments addressed before us by Mr. Awasthy.

To take up the question of limitation first. There are only three articles in the Indian Limitation Act, which can possibly apply to a suit of this nature, these being:—

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Description of suit	Period of limitation	Time from which period begins to run
57. For money payable for money lent	Three years	When the loan is made
83. Upon any other contract to indemnify	Three years	When the plaintiff is actually indemnified
115. For compensation for the breach of any contract express or implied, not in writing registered and not herein specially provided	Three years	When the contract is broken, or (where there are successive breaches when the breach in respect of which the suit is instituted occurs) or (where the breach is continuing) when it ceases

It has not been seriously challenged by the learned counsel that articles 57 and 115 are inapplicable. The plaintiff never having actually loaned any sum to the defendants article 57 is out of the picture. The plaintiff has sued the defendants as guarantee-brokers for the sums which the principal debtor had failed to pay up according to agreement. It is not a case for compensation for breach of any contract either express or implied and article 115 is not attracted. The suit is really to enforce a contract to indemnify and in our opinion article 83 is the appropriate one to apply to the facts of the case. Under the decree the amount was to be paid by the principal debtor by the 1st of February, 1954, and the present suit having been brought only a few months after the default had taken place, it is well within the time prescribed.

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In a case where a sum was advanced on mortgage on the surety of it was held by a Division Bench of the Bombay High Court (Rangnekar and N. J. Wadia, JJ.), in *Maneklal Kalidas Seth v. Shivalal Dayaram Luvar* (1), that the creditor could enforce his claim against the surety under article 83 of the Indian Limitation Act. In that case proceedings were taken against the principal debtor in the first instance. The liability of the surety could arise only after a default had been committed by the principal debtor and we do not really see how it could ever be contended that the suit is barred by time.

Mr. Awasthy has next argued that the contract of indemnity cannot be enforced by the plaintiff as the defendants were induced to enter upon it under misrepresentation. It is suggested that the real state of affairs about the advances and the securities was never disclosed to the guarantee-brokers. While not denying the confirmation letter (Exhibit P. 6), by which the appellants undertook the responsibility for the adjustment of the cash credit limit guaranteed to Ram Saran-Som Dev, it is asserted that the Bank did not disclose that sufficient security had not been lodged and the drawing power had been exceeded. It is also submitted that the facts disclosed in the report made by the local Manager of the Bank on 29th of August, 1944 (Exhibit P. 32), that Ram Saran-Som Dev had transferred their properties were not made known to the guarantee-brokers. Mr. Awasthy contends that even if a misrepresentation may have been innocent the defendants would be exonerated. He has invited our attention to the statement of law in Halsbury's Laws of England (Simonds Edition), Volume 18, paragraph 916 at page 499, based on the dictum of Lord Atkin in the Privy Council decision of *Jean Mackenzie v. Royal*

(1) A.I.R. 1939 Bom. 26.

Bank of Canada (2), to the effect that "if a contract of guarantee is induced by a material misrepresentation by the creditor, it may be set aside, even if the misrepresentation was made innocently". In our opinion, the appellants, however, cannot derive any benefit even assuming that there was any misrepresentation on the part of the plaintiff-Bank for the simple reason that such a plea or position was never taken in the written statement or adopted in the correspondence between the parties preceding the suit. Moreover, when Raja Ram Kapur appeared as P.W. 1, on behalf of the Bank, it was never suggested to him that any material, even though innocent, misrepresentation had been practised on the defendants by the Bank or its officials. This argument now taken up for the first time in this appeal must fail devoid as it is of any material for its sustenance.

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We now come to the real question of importance in this appeal as to whether the plaintiff can enforce the contract of indemnity when it had permitted the principal debtor certain facilities and concessions not envisaged by the contract. It is mentioned in the letter of the head office to the Branch Manager at Amritsar (Exhibit P. 54) that the stock pledged with the Bank "should be kept moving and no individual consignment should remain with us for more than three months". According to the conditions of the cash credit agreement, the principal debtor was to over-draw with a margin of 35 per cent of the pledged goods. In other words, if the pledged goods were of the value of Rs. 10,000, the power of drawing was extended upto 65 per cent of the value of the stock. This stock was to be kept moving presumably to ensure that fresh goods would ever remain available as security for the loan. It has been admitted

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by Raja Ram Kapur (P.W. 1), the only witness produced by the Bank, that "it was agreed that stocks were to be kept moving and each individual consignment was not to remain with the Bank for more than three months". The learned trial Judge has observed that this condition was never agreed to by the principal debtor and was only embodied as a stipulation in the letter sent by the head office to the Branch Manager at Amritsar. Be that as it may, there is no manner of doubt that the Bank regarded it as a binding condition and it was its business to see that the term was complied with.

It seems to have been established from the evidence of Raja Ram Kapur, that seven bales which were of the value of about Rs. 25,000, as stated in Exhibit P. 49, remained in the godowns of the Bank throughout the currency of the cash credit account and ultimately when sold these fetched a price of Rs. 356-4-0 only. It has been argued, and in our opinion legitimately, that either adequate security was not taken or it was permitted to be substituted or deteriorate. In either event the responsibility is that of the Bank and Bank alone. Raja Ram Kapur conceded in his statement made in Court that the Bank did not get the rates of the pledged goods "checked from the bazar" and contended himself with the confidence which he reposed in the integrity of Ram Saran-Som Dev. It was the responsibility of the Bank to have ascertained the quality and value of the pledged goods which under clause 3 of the Bank's letter of the 12th of September, 1944 (Exhibit P. 54), were to be in "effective control and possession of the Bank".

The facts as have emerged from the documentary evidence and the statement of Raja Ram Kapur are briefly these. The second extension granted to the principal debtor expired on 12th of

September, 1945. After that date, many letters were issued to the principal debtor to pay the balance due from them. Time for repayment of the loan was extended by the letter of 31st of October, 1945 (Exhibit P. 7) upto 31st of December, 1945, "on the existing terms and conditions". It was mentioned in this letter that the principal debtor had not taken delivery of the goods as asked for on many occasions. On 27th of March, 1946, the letter (Exhibit P. 9) was written to Messrs Ram Saran-Som Dev that if "the advance should remain outstanding in our books on 30th of March, 1946" the goods would be disposed of by public or private auction. The Bank kept on giving extension after extension and according to Raja Ram Kapur, this was "on the oral instructions of the defendants". On or about the 15th of September, 1947, when seven bales in question were opened they contained shortages. When the matter was put to the principal debtors they pleaded their dire necessity and the Bank then on the advice of the guarantee-brokers brought a criminal complaint under section 420, Indian Penal Code, on 19th of July, 1948. This complaint was dismissed and the accused acquitted by the Magistrate on 30th of December, 1948. A suit was brought on 14th of October, 1949, for recovery of Rs. 22,269-15-9 by the Bank against Ram Saran-Som Dev. The decree passed in the suit is Exhibit P. 52, and is obviously based on a statement made on behalf of the principal debtor who was the defendant in that case.

Mr. Awasthy has contended that the liability of the guarantee-brokers in the circumstances could arise only if the Bank had accepted good and adequate security. It is only when this essential prerequisite is fulfilled that the guarantee-brokers under clause 7 of the agreement can be made liable for non-payment by the customer or on account of any shortfall in the realisation of its dues. The repeated extensions granted by the

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Bank and their continued failure to put the pledged goods to sale relieved the guarantee-brokers of their liability. It has been urged by him that the variations made in the rates of interests and the extensions of time are covered by section 135 of the Indian Contract Act which says that "a contract between the creditor and the principal debtor, by which the creditor makes a composition with or promises to give time to, or not to sue the principal debtor, discharges the surety unless surety assents to such contracts". It is pressed that even after the decree was granted the Bank did not enforce the surety for a period of two years. There is no substance in this argument as in the decree itself it was provided that the principal debtor was to be given a period of two years within which to take delivery of the pledged goods. We, however, consider that the extensions granted to the principal debtor after the expiry of the extended term of the second cash credit agreement did amount to a fresh contract which relieved the surety of his obligation, but more than that, the Bank had permitted itself to be denuded of the security either by lack of supervision or connivance. Though the godown-keepers were the nominees of the guarantee-brokers, the godowns were to be in effective control and possession of the Bank. The Bank alone was under an obligation to examine the pledged goods and ascertain their valuation from the market. The Bank singularly failed in its primary duty and this is evidenced by the letter which was sent by the head office to the Branch Manager on 13th of February, 1948 (Exhibit P. 11). The head office when apprised that the principal debtor had declined to take delivery of the stock against full payment of the Bank's dues took to task the Branch Manager and wrote to him as follows:—

"If you turn over the pages of the party's file maintained at yours and refer to our

letter No. HO/LA/5/B. 1211, dated the 13th November, 1945, it will be clear without the least ambiguity that time for final adjustment of the account under reference was extended up to the 31st December, 1945, with definite instructions to you for positive clearance by that time of the stocks against payment of Bank's dues. But despite our repeated requests to you even subsequently to have the account adjusted, you did not take any effective steps to have needful done and kept on simply putting us off by giving evasive replies assuring that the account would be adjusted by the end of one or the other month.

Besides, you have all through in your monthly Inspection report even as late as December, 1947, certified the stocks pledged in this account to be in good condition and readily salable...

Now suddenly in January, 1948, when you feel that the party is not prepared to take delivery of stocks against full payment of Bank's dues you give out that 'the stocks of woollen goods have mostly been affected and rendered useless'. We are constrained to remark that you have all along been irresponsible inasmuch as, the stocks having been pledged as far back as May, 1944 you never cared to ascertain whether they had been very adversely affected. You may sell the goods for what they fetch, with the aid of the Guarantee Broker, since, however, you have been grossly negligent in not protecting Bank's interests

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for over two years, we hold you solely responsible for any shortfall.”

It admits of no dispute that the seven bales in question had huge shortages and the deception was discovered when these were opened on or about 15th of September, 1947. Nothing was done till they were sold for a paltry sum of Rs. 356-4-0 when their actual book value in Exhibit P. 49 was shown in the neighbourhood of Rs. 25,000. Every single entry in the register Exhibit P. 49 shows that actual amounts overdrawn were far in excess of the drawing power. All the documentary evidence, in our opinion, brings home the neglect of the Bank and it had itself in the letter quoted above fastened the blame on its Branch Manager. In our opinion, the suit of the plaintiff against the guarantee-brokers should not have been decreed and we would accordingly allow this appeal and dismiss the suit with costs.

Mehar Singh, J. MEHAR SINGH, J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before D. K. Mahajan, J.

TRIBHUWAN PARKASH NAYYAR,—*Petitioner.*

versus

MEHAR SINGH CHADDAH AND OTHERS,—*Respondents.*

Civil Writ No. 323-D of 1958.

1962
November, 1st.

Displaced Persons (Claims) Supplementary Act (XII of 1954)—S. 5—Chief Settlement Commissioner—Whether can revise order passed under the Displaced Persons (Claims) Act, 1950—Constitution of India (1950)—Article 226—Writ of certiorari—Relevant evidence ignored and decision based on pure surmises—Whether an error of law.