Uco Bank Vs Ashok Gautam and Others

Court: High Court of Himachal Pradesh

Date of Decision: Dec. 13, 1991

Acts Referred: Limitation Act, 1963 â€" Section 18, 19, 20

Citation: (1993) 1 ShimLC 59

Hon'ble Judges: D.P. Sood, J

Bench: Single Bench

Advocate: K.D. Sood, for the Appellant; A.K. Goel, for Defendant No. 2 and Harish Behal, for Defendant No. 1, for the Respondent

Judgement

D.P. Sood, J.
Shri Ashok Gaotam, the Principal borrower intended to purchase a truck. For that purpose, he made an application Ex. P-I

dated 12-2-1982 clarifying that he himself is principal borrower that the loan of Rs. 1,80,700 would be guaranteed by Defendant No. 2 Shri Tilak

Raj Sharma. Accordingly, the loan, referred to above, was paid to the loanee, that is, Defendant No. 1 on 12-2-1982 The U. Co. Bank a Body

Corporate Constituted under the Banking Companies (Acquisition and transfer of undertakings), Act, 1970 (Plaintiff) sanctioned the loan pursuant

to which the principal borrower as also his principal guarantor executed the various loan, like, Memo of agreement-cum-guarantee deed (Ex. P-2),

term loan agreement (Ex P-3) and hypothecation agreement (Ex. P-4). Pursuant to the aforesaid arrangement made in between the parties, the

principal "borrower Ashok Gautam (Defendant No. 1) was to deposit an amount of Rs. 32,206 from his own pocket in addition to the loan so

advanced by the Plaintiff for the purchase of the truck. There is no dispute in between the patties regarding the purchase of the truck bearing No.

HPK-1885.

2. According to the terms and conditions of the agreement, interest agreed to be payable by Defendant No. 1 was at the rate of 6% over the bank

rate subject to a minimum of 15% with quarterly rests. The entire loan, including interest was repayable in 48 instalments, each instalment being of

Rs. 4.S00. The first instalment was to be paid on 12-3-15/82.

3. The Plaintiff"s case is bat the principal borrower (Defendant No. 1), became defaulter on the very first instalment, that is, on 12-3-1982 that

they thereafter made attempts to regularise the payments but failed to do so. However, Defendant No. 1, Ashok Gautam had been seeking time to

re-pay the entire amount by writing various letters which are Exts. P-14 to P-19. It is alleged that in between Defendant No. 1 also admitted the

liability by signing the balance confirmation letters and acknowledging the debt of the Plaintiff-bank. However, as per further assertions made, no

sum towards the liquidation of the loan amount was repaid by Defendant No. 1. It is alleged that as per the terms of the agreement (Ex. P-2) Tilak

Raj, Guarantor was also bound to repay the said amount, his guarantee being a continuing and co-extensive with that of the principal borrower.

Having failed to realise the loan amount, ultimately Plaintiffs filed the instant suit on 2nd June, 19 7 for the recovery of an amount of Rs.

4,61,310.55, inclusive of interest as on 31-5-1987.

4. Defendant No. 1 raised a preliminary objection that cause of action to the Plaintiff bad accrued on 12-3-1982 when he became a defaulter and

the Plaintiff having not taken legal steps to recover the amount by the sale of the hypothecated truck and allowing the same to increase, is not now

entitled to recover the same from him. On merits he took the plea that suit has not been filed through a competent person to do so; that agreed rate

of interest was 92% and not the interest which has been charged in the suit; that his signatures had been obtained on blank loan papers; that

Plaintiff is not entitled to the recovery of the sum towards the Insurance Premium or the guarantee under the C.I.O.G.C. scheme. He also

contended that the suit is time barred.

5. Defendant No. 2, on the other hand contended that he never stood guarantee nor executed any such document in favour of the Plaintiff.

According to him, he had signed the document as a witness. He further maintained that memorandum of agreement was not a guarantee deed and

even if it be deemed to be so, Defendant No. 1 had no authority to bind him by acknowledging the debts of the Plaintiff. His further contention is

that the suit is time barred. Apart from it, he contended that the suit is bad for misjoinder of parties and in case of a decree being passed against

them, its recovery should be made in the first instance by the sale of the hypothecated truck. According to him guarantee deed, if held to have been

executed by him had duly been revoked. He also raised the contention that the rate of Interest agreed to in between the parties was 9-1/2% per

annum and apart from it, signatures of the Defendants including him had been obtained by the Plaintiff on the loan documents on blank printed loan

''forms'' Thus, according to him, the suit, in question. 15 liable to be dismissed.

6. On the pleadings of the parties, this Court vide order dated 20-9-J888 framed the following issues:

1. Whether the suit has been instituted by persons competent to do so? OPP

2. Whether the loan transaction was duly guaranteed by Defendant No. 2? OPP

3. In case above issue is proved in the affirmative, whether Defendant No. 2 revoked the said guarantee? If so when and with what effect? OPD-2

4. Whether the suit is within limitation? OPP

5. Whether the signatures of Defendants were obtained on blank forms? If so, with what effect? OPD

6. Whether the Plaintiff is entitled to recover insurance premium and guarantee fee from the Defendants? OPP

7. To what rate of interest is the Plaintiff bank entitled tore-cover? OPP

8. Whether the Plaintiff is entitled to recover 4,61,310.55 p. or any other amount from the Defendants? OPP

7. I have heard Learned Counsel for the parties at length and have also carefully examined the record.

8. ''At the very outset it is pertinent to detail that the factum of advancing the loan of Rs. 1,80,700 and consequent thereto purchase of the truck

bearing No HPK 1885 by Defendant No1 is not disputed nor the factum of the aforesaid truok having been hypothecated is in controversy.

Another in disputed act is that the principal borrower Shri Ashok Gautam, Defendant No. 1 became a defaulter on 12-3-1982. As observed

above, the entire loan amount was repayable in 48 instalments, each instalment being of Rs. 4,500 It is in the light of the above-said admitted facts

that this suit has to be decided issue-wise.

Issue No, 1

9. In support of this issue, PW-3 Shri P.C. Ajmera the then Branch Manager of the UCo. bank Ogli, Rala, Amb. District Sirmur has appeared as

a witness on behalf of the Plaintiff. The instant suit has filed through this witness in his testimony, he categorically stated that he was the principal

officer of the Plaintiff-bank and was competent to institute the suit, in question His aforesaid statement remains un-rebutted as no question to the

contrary has been asked in cross-examination. Defendants Ashok Gautam and Tilak Raj have appeared as their own witness DW-1 and DW-2

respectively. They have not stated anything that PW-3 was not empowered to Institute the suit. Thus, there being no rebuttal evidence, this issue is

decided in favour of the Plaintiff and against the Defendants.

Issues No. 2, 3 and 4

10. All these issues are inter-connected with each other. Thus in order to avoid repetition of the discussions of evidence, the said issues can be

conveniently disposed of together.

11. Ashok Gautam, Defendant No. 1 is the principal debtor. Tilak Raj Defendant No. 2 is his (Defendant No. 1''s) sister''s husband. Both are

literate Defendant No. 2 according to the Plaintiff has given guarantee to the loan given to Defendant No. 1. As per the statement of the said

guarantor, in his statement as DW-2. his brother in-law, Ashok Gautam, Defendant No. 1 was jobless at the material time and for settling him he

had sought loan for the purchase of the truck in question from the Plaintiff bankDW-2 Titak Raj. the guarantor Is dealing in utensils business since

the year, 1975 He admits that be is having transaction through the bank in relation to his shop since the inception of his business in the year, 1975

onwards and he has been getting the pay-in-slips and other relevant forms and over-drafts etc. filled in through the bankers in respect of his

transaction. He also admits that to his knowledge the banks do not advance loan without a guarantor. In the instant case, as per bis defence, he

signed the Memorandum of agreement-cum-guaran tee-deed (Ex P-2) as a witness and not as a guarantor. Perusal of said document shows that

each page thereof stands signed by both the Defendants No. 1 and 2''. Further it shows that Defendant No. 2 has been referred to as a

guarantor"". Also clauses 9, 12 and 18 to 21 of this document Ex. P-2 refers to the liability of the guarantor in certain circumstances with respect

to the loan advanced for the purchase of vehicle in question. Clauses 18 to 21 are material which are detailed below:

18. In consideration of the Bank having at the request of the Guarantor agreed to lend and advance to the Borrower the said sum of Rs. 1,80,700

only upon and subject to the terms and conditions hereinbefore mentioned and on the security hereby created the Guarantor doth hereby agree to

guarantee due repayment of the said sum of Rs. 1,80,700 together with interest thereon at the rate aforesaid and all other moneys, costs, charges

and expenses payable to the Bank under these presents or by operation of law or otherwise by the Borrower and due performance in the

observance of other terms, covenants and conditions herein contained and on the part of the borrower to be observed and performed and also all

loss and damages that may be suffered by the Bank on account of the breach of the terms, covenants and conditions by the Borrower Provided

Always and it is Hereby Expressly Agreed and Declared that any neglect or forbearance of the Bank in endeavouring to obtain payment of the

moneys hereby secured or any indulgence given by the Bank to the Borrower in the observance and performance of the terms, covenants and

conditions herein contained and on the part of the Borrower to be observed and performed or any time given by the Bank to the Borrower for

payment of the moneys hereby secured shall not in any way effect or prejudice the guarantee or the continuing liability of the Guarantor hereby

created.

19. The liability of the Guarantor under these presents shall be Co-extensive with that of the Borrower.

20. The Guarantor doth hereby agree to pay on demand all moneys which may become payable under these present from the Borrower and not

paid by the Borrower.

21. It shall be lawful for the Bank to proceed against the Guarantor without first proceeding against the Borrower and reserving the Bank''s right

against the said security and the Borrower.

12. Onus to prove that Defendant No. 2 stood guarantee to the loan advanced was upon the Plaintiff. In order to substantiate this fact, Mr. B.S.

Thakur, the then Branch Manager of the Plaintiff Bank has appeared as a witness. He has categorically denied that Defendant No. 2 signed Ex. P-l

the loan application and P-2, the Memorandum of agreement-cum-guarantee deed as a witness and not as a guarantor According to him he had

given the guarantee to the loan advanced to Defendant No. 1. This witness has also proved-application Ex P-l. The close perusal of the application

Ex. P-l also shows that loan was applied for by Defendant No. 1 and it was signed just above the column indicating ""signature of guarantor

therein. Also this application shows that Defendant No. 2 had also given information about his property and income to the bank authorities which

bad been detailed therein. This application was submitted to the bank on the same date when loan was advanced and Memo. Ex. P-2 was

executed. Admittedly no other person is shown to have stood guarantor to the loan advanced to Defendant No. 1 Ashok Gautam, a close relation

of Defendant No. 2. This fact was not disputed by the principal borrower in any one of the letters Ex P-14 to P-19 but on the other hand he had

been assuring the Plaintiff bank that he would be liquidating the loan amount at the earliest and he could not earlier regularise the payment as per

the terms because of unavoidable circumstances. All these letters are in English and handwritten and also signed by Defendant No. 1. Defendant

No. 2, no doubt, in reply to Ex. P-7 claims to have sent reply dated 18-8-1983 Ex DX) just after about 21 days allegedly informing the bank that

he never stood as a guarantor but he signed the document as a witness. However, he did not indicate as to who gave the guarantee to the loan

advanced to his brother-in-law nor he replied the letters Issued by the Plaintiff bank to Defendant No. 2 as well which are dated 16-9-1985, 10-

9-1985, 18-5-1985 and 24-10-1982. Thus the earliest intimation to Defendant No. 2 as per letter P. 28 regarding his having stood as a guarantor

for the loan in question of his brother-in-law Ashok Gautam, Defendant No. 1, was given to him on 24-10-1982. Had he signed documents Ex.

P-l and P-2 as a witness, he would have immediately replied this letter. Remaining silent as to his status, vis-a-vis, the loan document from 24-10-

1982 till 18-8-1983, i.e., for a period of ten months shows that subsequent stand taken by Defendant No. 2 is absolutely false to his knowledge.

This Court in view of the oral as also documentary evidence on record cannot believe and consequently held that Defendant No. 2 had signed the

loan document as a witness. PW-1 denies the receipt of any such letter as Ex DX. Thus it appears that such letters were not written and even if

written, it was not at all sent to the Plaintiff"s bank. Thus it is held that Defendant No. 2 had stood as a guarantor for the loan in question for and on

behalf of Defendant No. 1 and by letter Ex OX it cannot be said that such guarantee had been revoked by Defendant No. 2 by merely giving an

intimation to the Plaintiff bank in view of his previous and subsequent acts and conduct to the aforesaid letter.

13. Regarding the stand that the suit is within limitation, the Plaintiff has relied upon the documentary evidence, prove by PWs 1 to 3 Admittedly,

the loan was advanced on 12-2-1982 and default was committed by the leanee on 12-3-1982 giving the Plaintiff bank a cause of action to file the

suit. Instead of referring to oral evidence or any other documents proved on record, reference to letters dated 23-11-1983, (P-17) and letter

dated 15-10-1994 (Ex. P-19) written by Ashok Gautam, Defendant No. 1 to Plaintiff bank are sufficient to hold the issue in favour of the Plaintiff.

In both these letters, the principal borrower Defendant No. 1, Ashok Gautam has detailed the circumstances under which he could not make the

payments. Ordinarily the statutory period for filing a suit under the law of limitation is three years. According to the terms of-P-2, the Plaintiff bank

could have filed the suit within three years from the date on which Defendant No. 1 Ashok Gautam became a defaulter, i.e., the suit could have

been filed on or before 12-3-1982. Admittedly, letters Ex P-17 and Ex P-19 are in the handwriting and under the signatures of Ashok Gautam,

the principal borrower which u/s 18 of the Limitation Act extended the limitation In other words, the Plaintiff bank became entitled to file the suit on

or before 15th October. 1987, The instant suit was filed on 2-6-1987. Thus the suit is admittedly within limitation as against Ashok Gautam, the

principal borrower, Defendant No. 1.

14. Now the question is whether Defendant No. 1 Ashok Gautam had the authority to act as an agent for and on behalf of Defendant No. 2 Tilak

Raj, the guarantor. It is well established principle that a surety like any other contracting party, cannot be held bound to something for which he has

not contracted and if the original parties have varied the terms of the original contract then unless the surety has assented to the new terms of the

contract the surety cannot he held to be liable for the repayment of the loan. The security is discharged forthwith on the contract being altered

without surety''s consent as the parties make it impossible for the guaranteed performance to take place. It is also an established fact that in respect

of any debt incurred by the principal during the currency of the guarantee, the surety is liable so long as the debt is recoverable from principal. It

does not matter that the principal has kept the debt alive by acknowledgements u/s 19 of the Limitation Act or by payments u/s 20, for by these

acts the limitation for filing a suit is only extended. In otherwise case too the debt is not extinguished nor it is modified, only remedy is barred. The

contract is not varied. Original contract continues without any change. The debtor acknowledgement thus, does not create a contract different from

the one the performance of which the surety had guaranteed. If a debt barred by limitation is not extinguished an acknowledgement designed to

place it beyond the pale of unenforceability cannot certainly alter its nature or character, or that of the contract on which it is founded, so as to

enable the surety to disown his obligation. Such an acknowledgement or part payment can be made through the agent duly authorised in this behalf.

In other words, the surety can appoint the principal debtor as his agent for the aforesaid purpose. Evidently, in such an eventuality, the principal

debtor while making the acknowledgement or part payment, would not be binding himself alone but also the surety because the acknowledgement

or payment then would be deemed to have been made on behalf of the surety as well. The principal debtor would then be acting as the agent of the

surety in addition to acting for himself.

15. Adjudging the material Clauses 18 to 21 of Ex. P-2 with the touch-stone of the above said well established principles, the liability of the

guarantor under the terms and conditions of (Ex. P-2) is not only continuing liability but also a co-extensive with that of the principal borrower.

Also it states that guarantor agrees to pay all moneys which may become payable under the terms of P-2 from the borrower and not paid by him.

Thus any extension of limitation by the borrower not only binds himself but also the guarantor, that is to say, the cumulative reading of all the above

said clauses indicate that principal borrower has been empowered to act as an agent of the guarantor by the latter. Thus in the instant case not only

Defendant No. 1 alone is liable to liquidate the loan amount but it also extends on the shoulder of the guarantor. Thus in view of the entire facts and

circumstances discussed above, the suit is within limitation against Defendant Nos. 1 and 2. Issues 2 to 4 are decided accordingly.

Issue No. 5

16. This issue pertains to the question whether signatures of Defendants were obtained on blank forms and if it is held so to what effect?

Defendants No1 and 2 have appeared as their own witness as DW-1 and DW-2 respectively. No other witness has been produced by them.

Under discussion of issues No. 2 to 4, I have already observed that Defendant No. 1 wrote several letters to Plaintiff bank admitting his liability to

repay the amount and liquidate the loan in question. He never disputed that signatures on loan documents were obtained by the Plaintiff bank with

blank columns. This fact was also not disputed by Defendant No. 2 at any time. So much so that he while writing letter Ex DX he had also cot

indicated this fact. On the other hand, Defendant No. 2 has admitted that according to his knowledge Banks do not advance loan without a

guarantor Apart from this fact this plea has for the first time been taken in the written statement which was filed in the year 1986. At no point of

time the Defendants pointed out or lodged a complaint against the Plaintiff bank to the police On the other hand advancement of loan for the

purchase of the truck is admitted. Truck was owned and possessed by Defendant No. 1 for a sufficiently long time and it was plied by him to the

knowledge of Defendant No. 2 Only the Defendants have now stated that blank loan forms were got signed from them. On the other hand in

rebuttal, PW-1 has come forward and stated on oath that the said loan forms were filled in before the aforesaid documents Ex P-l and Ex. P-2

were signed by Defendants No. 1 and 2 respectively Not only this, rather non-judicial papers were purchased by Defendant No. 1 for entering

into an agreement This also bears his signatures on the back of it. The above said act and conduct of the Defendants show that they knew the

purpose for which the non-Judicial stamps were purchased and for which they had signed the loan documents. PW-1 is a dis-interested person

being a stranger to the Defendants. In such circumstances the statements of DWs 1 and 2 cannot be believed. The cumulative effect is that the

Defendants have miserably failed to discharge their obligation in respect of the proof of this issue which is decided against the Defendants and in

favour of the Plaintiff.

Issue No. 6 I

17. Regarding this issue, Clause 14 of the Memorandum of agreement Ex. P-2 is material where under it was the duty of the borrower, i.e. Ashok

Gautam, Defendant No. 1 to insure and keep insured the vehicle in question in the name of the bank and keep it in good condition under a

comprehensive policy. Admittedly the borrower has failed and he has been negligent to effect such insurance as agreed to and in turn the bank has

incurred expenses towards this item. Clause 14 of aforesaid document clearly lays down that all expenses incurred and all premium paid for such

insurance shall be added to the principal moneys so secured and the borrower shall also be liable to pay interest thereupon Even borrower

appearing as DW-1 has no where stated in his statement on oath before this Court that he had complied with Clause 14 referred to above. Thus in

the circumstances the Plaintiff is entitled to recover insurance premium from the Defendants.

18. As regards the recovery of the guarantee-fee. though there is no specific clause in Ex P-2 or other loan documents, Clause 11 of

Memorandum of agreement-cum-guarantee-deed (P-2) impliedly gives the power to the bank to safeguard its interest by exercising its powers

under the agreement or by operation of law or by otherwise. The guarantee fee is paid in order to safeguard the loan amount in case it is not paid

by the borrower. None of the Defendants have stated that they have not agreed to any exercise of such powers by the Plaintiff bank Thus in that

view of the matter too. the Plaintiff is entitled to recover the guarantee fee. This issue, as such, is decided in favour of the Plaintiff and against the

Defendants.

Issue No. 7

19. To determine this issue, documents Ex P-l to P-3 are material. Ex. Pl is the loan application whereby principal borrower had intended to pay

an interest at the rate of 15% per annum which application was sanctioned by the then Manager of the Plaintiff bank. This sanction was followed

by the execution of the Memorandum of Agreement-cum Guarantee deed (Ex P-2) wherein the interest as printed in the form is 9-1/2% It is to be

noted that this document is signed by both the Defendants i e, the borrower and the guarantor Ex. P-3 is the agreement relating to the term loan

executed by the borrower (Defendant No. 1) alone. There in the rate of interest has been agreed to be paid at the rate of 6% over the reserve

bank rate subject to the minimum of 15% per annum or at such other rate as may be notified to the borrower by the bank from time to time as on

30th June and 31st December The balance confirmation letters do not indicate any rate of interest to he charged from the borrower Thus the rate

of interest as depicted from three documents does not tally with each other. In other words it cannot be said what was the rate of interest was

agreed to by the borrower and the guarantor in view of the advancement of the loan. In such a situation, the rate of interest which is depicted from

the documents of the same date and which is varying in nature, executed by both the borrower and the guarantor and which is the lowest one is to

be taken to have been agreed to be paid by them, i.e., the Defendants. In other words, the rate of interest payable by them was agreed to be paid

at 9-1/2%. Accordingly as per the evidence adduced by the Plaintiff, the rate of interest agreed to in between the parties can be only taken to be

chargeable at the rate of 9-1/2% per annum on the loan so advanced to the Defendants. This issue is decided accordingly.

Issue No. 8:

20. Admittedly, the loan of Rs. 1,80,700 was advanced to Defendant No. 1 for which Defendant No. 2 stood guarantee Under discussion of issue

No. 7,1 have already held that the Plaintiff is entitled to interest at the rate of 9-1/2% per annum. Thus suit has been filed on 2nd June, 1987. Thus

at that rate the recoverable amount comes to Rs. 2,84,566.57 as disclosed by PW 4 in his testimony. Thus in view of the discussion made'' above,

the Plaintiff is not entitled to recover the suit amount but is only entitled to the recovery of the aforesaid amount of Rs. 2,84,566.57 from the

Defendants jointly and severally. Issue No. 8 is decided accordingly.

21. In view of the above, a decree for Rs. 2,84,566.57 is passed in favour of the Plaintiff and against the Defendants with costs proportionately

jointly and severely. The Plaintiff is also held entitled to the recovery of the future interest at the rate of 9-1/2% from the date of the filing of the suit

till the date of its realisation.