M/S. Sundaram Finacne Ltd vs Noorjahan Beevi & Anr on 29 June, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3183, (2016) 4 PAT LJR 33, (2016) 2 LANDLR 189, (2016) 5 SCALE 835, (2016) 133 REVDEC 107, 2016 (13) SCC 1, (2016) 5 ANDHLD 73, (2016) 4 CIVLJ 879, (2016) 3 CURCC 210, (2016) 3 CIVILCOURTC 834, (2016) 4 ICC 227, (2016) 2 CLR 245 (SC), (2016) 5 ALL WC 4367, (2016) 5 MAD LJ 535, (2016) 3 BANKCAS 474, (2016) 2 WLC(SC)CVL 420, (2016) 164 ALLINDCAS 216 (SC), (2016) 2 ALL RENTCAS 731, (2016) 4 CAL HN 28, (2016) 3 JCR 278 (SC), (2016) 3 CURCC 139, (2016) 2 RECCIVR 751, (2016) 3 JLJR 357, (2015) 223 DLT 132, (2017) 6 ALLMR 890 (SC), (2016) 117 ALL LR 702, 2016 (157) AIC (SOC) 19 (DEL), 2016 (3) KLT SN 102 (SC), 2016 (4) KCCR SN 398 (SC), (2016) 5 BOM CR 44

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Bench: Ashok Bhushan, Abhay Manohar Sapre

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPEALLATE JURISDICTION

CIVIL APPEAL NO.7245 OF 2008

M/S. SUNDARAM FINANCE LIMITED … APPELLANT

VERSUS

NOORJAHAN BEEVI AND ANOTHER … RESPONDENT

J U D G M E N T

ASHOK BHUSHAN, J.

The plaintiff-appellant has filed this appeal against the judgment dated 10th April, 2002 in A.S. No.388 of 1992 of Kerala High Court by which the High Court dismissed the appeal filed by the plaintiff-appellant in which appeal the judgment of the trial court dated 29.05.1991 dismissing the suit was assailed.

2. The brief facts necessary to be noted in this appeal are :

> The plaintiff-appellant is a public limited company carrying on a business of extending hire purchase facilities for commercial vehicles. The plaintiff and the first defendant had entered into an agreement dated 20.09.1983 by which plaintiff had financed an amount of Rs.1,47,000/-. The first defendant, the hirer was to clear off entire amount due in 36 monthly instalments. The first defendant committed default in payment of instalments with effect from 20th May,1984. The plaintiff seized the vehicle No. KLI2447 on 9th February, 1985. Thereafter,the plaintiff vide letter dated 12th February, 1985 called upon the defendants to settle the contract within 10 days from the date of the receipt of the notice. The defendants did not make any payment. The plaintiff on 30th May, 1985 sold the vehicle and after adjusting the amount received from sale of vehicle balance of Rs.40,138/- was further demanded. Notice dated 12th July, 1985/22.07.1985 was sent by the plaintiff. Reply to the notice was given on 30th July, 1985. The plaintiff filed Original Suit No.148 of 1988 on 25.5.1988 praying for decree of sum of Rs.40,138/- along with interest. The second defendant, the husband of first defendant was also impleaded as guarantor. A written statement was filed by the first defendant where execution of hire purchase agreement was admitted. The default in payment of instalments was admitted. It was further pleaded that provisions in Clause 4 of hire purchase agreement regarding termination without notice is contrary to the statutory provisions. It was further stated that the vehicle was not sold on best price. The defendant pleaded that plaintiff is not entitled for any relief. The trial court framed 8 issues. One of the issues, issue No.7 was: “whether the suit is barred by limitation”. The trial court after considering the facts held that suit is barred by limitation. It was held that default is from 20th May, 1984 the suit ought to have been filed within 20.5.1987. Suit was filed on 25th May, 1988 being beyond three years was to be dismissed.

3. The plaintiff filed an appeal in the Kerala High Court. The Kerala High Court also affirmed the judgment of the trial court and held that suit is barred by limitation. Plaintiff has come in this appeal questioning the correctness of the judgment of the High Court.

4. The only question which needs to be considered was as to whether suit filed by the plaintiff was barred by limitation. Relevant provisions of Limitation Act, 1963 are Article 55 and Article 113 which are to the following effect:

> |Article|Description of suit |Period of|Time from which | | | |limitatio|period begins to run| | | |n | | |55. |For compensation for the |Three |When the contract is| | |breach of any contract, |years |broken or (where | | |express or implied not | |there are successive| | |herein specially provided | |breaches) when the | | |for. | |breach in respect of| | | | |which the suit is | | | | |instituted occurs or| | | | |(where the breach is| | | | |continuing) when it | | | | |ceases. | | 113. |Any suit for which no period|Three |When the right to | | |of limitation is provided |years |sue accrues. | | |elsewhere in this Schedule. | | |

5. The submissions which have been pressed by the learned counsel for the plaintiff that last instalment was to be paid on 20th September, 1986 and the balance liability of the defendant could be ascertained only after the sale of the vehicle which took place on 30th May, 1985 and the suit was filed within three years from the date of sale of the vehicle as well as within three years from the last date of payment of instalment, hence, it could not have been said to be barred by time. The present was a case which was to be governed by Article 113 of the Limitation Act, 1963. The Courts below erred in applying Article 55. The case was fully covered by the judgment of the Madras High Court in Bell Alloys Steels Private Limited vs. The National Small Industries Corporation Limited(1980 Legal Surveyor

85). The default in payment of each of the instalments would constitute default. Therefore, a "continuing breach", hence, the suit is well within time from the date of default of payment of last instalment that is 20th September, 1986.

6. Learned counsel appearing for the respondents refuting submissions made by the learned counsel for the appellant contended that the trial court was correct in dismissing the suit as barred by time. Learned counsel for the respondent has also placed reliance on the judgment of this Court in Deepak Bhandari vs. Himachal Pradesh State Industrial Development Corporation Limited,2015 (5) SCC 518.

7. We have gone through the records and considered the submissions raised by the learned counsel for the parteis.

8. As noted above, the trial court framed issue No.7, as to whether the suit was barred by time. In paragraph 10 of the judgment this issue was dealt with in the following manner:

> "10.ISSUE NO.7 :- According to the learned counsel for the defendants the suit is barred by limitation for the reason that the date of agreement is 20.9.83 and the last date of payment is 20.4.84 but the suit is filed only on 26.5.88. He has invited by attention to clause 4 to the effect that if any instalment is not paid within the stipulated time whether legally demanded or not; break or fail to perform or observe any conditions on their part therein contained, then and in such cases the rights of the hirer under the agreement shall forth with be determined ipso facto, without any notice to the hirer. Therefore, according to him on 20.4.84 itself to contract was also determined. But the learned counsel for the plaintiff would argue that clause 4 contains provisions for seizure of vehicle and unless the vehicle is sold to balance in any cannot be ascertained and therefore the plaintiff would get course of action only on 30.5.85, the date of sale of the vehicle. Though I went through the different provisions of Ext.A2 agreement, I could not find any provision for sale of the vehicle. Even in Ext.A3 there is no such provisions. So this argument cannot hold good. In the case on hand, the default is from 20.5.84, the suit ought to have been filed within 20.5.87. Therefore, the suit is barred by limitation.

9. The trial court has elaborately considered the submissions of both the parties and has referred to relevant clauses of agreement dated 20.9.1983.

10. On the question of limitation while referring to Clause 4 of the agreement dated 20.9.1983 in para 4 of the judgment following was observed:

> "4.....Ext.A2 agreement dated 20.9.83 contains the terms and conditions to be followed by the parties. As per clause 4 of Ext. A2, the plaintiff is entitled to seize the vehicle even without notice in case of default of instalments or other conditions mentioned therein. Admittedly, the defendants have committed default of instalments. If the hirer commits breach of the agreement, the rights of the hirer commits breach of the agreement, the rights of the hirer under the agreement shall forthwith be determined ipso facto without any notice to the hirer and all the instalments previously paid by the hirer shall be absolutely forfeited to the owners who shall thereupon be entitled to enter any house or place where the said vehicle may then be seize, remove and retake possession of it and to sue for all the instalments due and for damages for breach of the agreement and for all the costs occasioned by the hirer's default. So, as per the defendants, the financier invoked Clause 4 of the agreement and the vehicle was seized and subsequently sold. The cause of action arose on 20.4.1984. The plaintiff ought to have filed the suit within three years from 20.4.1984. but the suit was filed only on 26.5.1988. The agreement between the parties were determined on the date of default itself."

11. The High Court has come to conclusion that as per Clause 4 if the hirer commits breach of the agreement, the rights of the hirer under the agreement shall forthwith be determined ipso facto without any notice to the hirer and all the instalments previously paid by the hirer shall be absolutely forfeited to the owners who shall thereupon be entitled to enter any house or place where the said vehicle may then be seize, remove and retake possession of it. Further in paragraph 6 of the judgment of the High Court following further was observed:

> "As per the agreement, the financier is at liberty to terminate the agreement ipso facto and also seize the vehicle without notice. There is no question of surrender of the vehicle and as stated above, the vehicle belonged to the first defendant at the time of the agreement. The suit is being one for damages for breach of contract of hire purchase, it is governed by Article 55 of the Limitation Act and therefore, the suit should have been filed within three years from the date of the breach. Here, the breach has been committed on 20.4.84. In pursuance of clause 4 of the agreement, the vehicle was seized by the plaintiff. So, he ought to have filed the sit within three years from the date of breach of the agreement. The contract was determined on 20.4.84 itself. The argument of the learned counsel for the plaintiff that the vehicle was sold only on 30.05.1985 and the amount was credited and then only the cause of action will arise cannot be accepted since it is a loan transaction between the parties and the contract has ipso factor determined on the date of breach of contract. It is clear from clause 4 of the agreement that the financier is at liberty to forfeited the

> previous payment made by the hirer and also seized the vehicle and sue for all the instalments due and for damages for breach of the agreement and for all the costs of retaking possession of the said vehicle and all costs occasioned by the hirer's default. Since the plaintiff invoked the said provision, the argument advanced by the learned counsel for the plaintiff that the last instalment is due only on 20.09.1986 and the suit is within time cannot be accepted. Since, there is no provision to sell the vehicle and credit the amount to the loan advanced there is no question of waiting till the sale of the vehicle."

12. There is no dispute between the parties that the hirer committed default in payment of instalments on 20th May, 1984. The High Court has further held that there is no clause in agreement permitting the plaintiff to sell the vehicle. The submission of the learned counsel for the appellant that limitation to file the suit for recovery of balance amount shall begin with effect from the date of sale this is 30th May,1985, does not appeal to us. The contract was to be determined ipso facto on default being committed. The power of seizing the vehicle and to take possession as contemplated under Clause 4 of the agreement was consequent to default being committed by the hirer.

13. This Court on 12th June, 2012 passed the following order:

> "Learned counsel for the appellant shall place on record a copy of the hire purchase agreement dated 20th September, 1983.
>
> List thereafter." The copy of the agreement dated 20th September, 1983 having not been placed before us, we have no option except to rely on the contents of Clause 4 as noted by the High Court in its judgment. The High Court has noted that agreement does not contain any provision for sale of the vehicle hence, taking starting point of limitation from the date of sale of vehicle cannot be accepted.

14. As noted above, in paragraph 4 of the judgment of the High Court while noticing the contents of Clause 4 of the agreement it has been observed that "if the hirer commits the breach of the agreement, the rights of the hirer under the agreement shall forthwith be determined ipso facto without any notice to the hirer and all the instalments previously paid by the hirer shall be absolutely forfeited to the owners who shall thereupon be entitled to enter any house or place where the said vehicle may then be seize, remove and retake possession of it and to sue for all the instalments due and for damages for breach of the agreement...." (underlined by us).

15. Thus, as per Clause 4 the right to sue accrues when the hirer commits breach of the agreement. Committing default in payment of instalement is nothing but a breach of the agreement and thus courts below has rightly taken a view that period of limitation for filing a suit under Article 55 shall begin with effect from 20th May, 1984 when the default was committed by the hirer.

16. In this case it is relevant to refer the judgment of this Court in Himachal Pradesh Financial Corporation vs. Pawna and others, 2015 (5)SCC

617. In the above case Himachal Pradesh Financial Corporation had given a loan to a partnership firm. As security for that loan, a mortgage deed was executed. Clause 7 of the mortgage deed contemplated that without prejudice to the rights and powers conferred on the Corporation under the State Financial Corporations Act, 1951, in the event, the partners of the industrial concern fail to pay the said principal sum with interest, the Corporation shall be entitled to realise its dues by sale of the mortgaged properties, and if the sale proceeds thereof are insufficient to satisfy the dues of the Corporation, to recover the balance from the partners of the industrial concern. Clause 7 of the agreement was to the following effect:

> "3. Clause 7 of the mortgage deed is important. It reads as follows:
>
> "Without prejudice to the above rights and powers conferred on the Corporation by these presents and by Sections 29 and 30 of the State Financial Corporations Act, 1951 and as amended in 1956 and 1972 and the special remedies available to the Corporation under the said Act, it is hereby further agreed and declared that if the partners of the industrial concern fail to pay the said principal sum with interest and other monies due from them under these presents to the Corporation in the manner agreed, the Corporation shall be entitled to realise its dues by sale of the mortgaged properties, the said fixtures and fittings and other assets, and if the sale proceeds thereof are insufficient to satisfy the dues of the Corporation, to recover the balance from the partners of the industrial concern and the other properties owned by them though not included in this security." (emphasis supplied)"
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> 17. In the above case the assets were sold on 28.3.1984 and 14.3.1985.

The sale amount could not satisfy the outstanding hence, the notice was issued on 27.5.1985 and thereafter suit was filed on 15.9.1985. The High Court has dismissed the suit as barred by limitation. In the appeal this Court set aside the judgment of the High Court by making following observations in paragraphs 10 and 11:

> "10. Whilst considering the question of limitation the Division Bench has given a very lengthy judgment running into approximately 50 pages. However, they appear to have not noticed the fact that under Clause 7 an indemnity had been given. Therefore, the premise on which the judgment proceeds i.e. that the loan transaction and the mortgage deed are one composite transaction which was inseparable is entirely erroneous. It is settled law that a contract of indemnity and/or guarantee is an independent and separate contract from the main contract. Thus, the question which they required to address themselves, which unfortunately they did not, was when does the right to sue on the indemnity arose. In our view, there can be only one answer to this question. The right to sue on the contract of indemnity arose only after the assets were sold off. It is only at that stage that the balance due became ascertained. It is at that stage only that a suit for recovery of the balance could have been filed. Merely because the Corporation acted under Section 29 of the Financial Corporations Act did not mean that the contract of indemnity came to an end.

> Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract. It may be that on the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient.
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> 11. In this case, it is an admitted position that the sale took place on 28-

3-1984 and 14-3-1985. It is only after this date that the question of right to sue on the indemnity (contained in Clause 7) arose. The suit having been filed on 15-9-1985 was well within limitation. Therefore, it was erroneous to hold that the suit was barred by the law of limitation."

18. The above case was based on Clause 7 of the agreement as well as a specific power given to the Corporation under the State Financial Corporations Act, 1951, there is no such clause akin to Clause 7 of the mortgage deed in the present case.

19. In Deepak Bhandari vs. Himachal Pradesh State Industrial Development Corporation Limited,2015 (5) SCC 518 while considering Article 55 of the Limitation Act, 1963, this Court was considering the question whether the limitation period begins from notice recalling loan amounts or from realisation of sale proceeds of mortgaged/hypothecated assets. It was held that limitation for such suit beginsfrom the date when amount of dues for recovery are ascertained, and that can take place only after adjusting amounts received from sale of mortgaged/hypothecated assets. In paragraph 11 and 12 facts of the case were noted which are to the following effect:

> "11. As per the defendants, the cause of action for filing the recovery suit arose on 21-5-1990 when recall notice was issued by the Corporation to the Company and the guarantors. Therefore, the suit was to be filed within a period of 3 years from the said date and calculated in this manner, last date for filing the suit was 20-5-1993. It was, thus, pleaded that the suit filed on 26-12-1994 was beyond the period of 3 years from 21-5-1990 and, therefore, the same was time-barred.

12. The Corporation, on the other hand, contended that action for selling the mortgaged/hypothecated properties of the Company was taken under the provisions of Section 29 of the Act and the sale of these assets were fructified on 21-3-1994. It is on the realisation of the sale proceeds only, that the balance amount payable by the guarantors could be ascertained. Therefore, the starting point for counting the limitation period is 31-3-1994 and the suit filed by the Corporation on 26-12-1996 was well within the period of limitation." This Court has also referred to the judgment of the Himachal Pradesh Financial Corporation(supra). In paragraph 27 of the judgment the following was stated:

> "27. We thus, hold that when the Corporation takes steps for recovery of the amount by resorting to the provisions of Section 29 of the Act, the limitation period for

recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern. As the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realised, only after the sale of the mortgaged/hypothecated assets. This is clear from the language of sub- section (1) of Section 29 which makes the position abundantly clear and is quoted below:

"29. Rights of Financial Corporation in case of default.—(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation." This Court while taking the above view has referred to the statutory power given to the Corporation under the State Financial Corporations Act.

20. The above judgment of this Court was a case where the Court had taken into consideration the statutory power given to Financial Corporation under Section 29 of the State Financial Corporation Act,1951 where the Corporation is entitled to take possession of the assets and transfer by way of lease or sale. Present is not a case where plaintiff can claim to exercise any power akin to Section 29 of the State Financial Corporations Act, 1951. The rights of the parties have to be determined as per terms and conditions of the agreement dated 20.9.1983. The terms of the agreement as noted by the High Court and referred to by us as above clearly indicate that on committing a breach of terms and conditions of the agreement the rights shall accrue to the plaintiff to sue for balance instalments and the damages for breach of contract. Thus, the right to sue shall not stand differed till either sale which took place on 20th May, 1985 or till the last date of payment of the instalment that is 20th September, 1986. Both the courts below have rightly taken the view that limitation shall start running from the date the hirer defaulted in making payment that is on 20.5.1984 and suit has been filed beyond three years from the above date was clearly barred by time. Article 55 of the Limitation Act, 1963 has also come for consideration before this Court in Syndicate Bank vs. Channaveerappa Beleri and others,2006 (11) SCC 506. In paragraph 13 of the judgment following was stated:

"13. What then is the meaning of the said words used in the guarantee bonds in question? The guarantee bond states that the guarantors agree to pay and satisfy the Bank "on demand". It specifically provides that the liability to pay interest would arise upon the guarantor only from the date of demand by the Bank for payment. It also provides that the guarantee shall be a continuing guarantee for payment of the ultimate balance to become due to the Bank by the borrower. The terms of guarantee,

thus, make it clear that the liability to pay would arise on the guarantors only when a demand is made. Article 55 provides that the time will begin to run when the contract is "broken". Even if Article 113 is to be applied, the time begins to run only when the right to sue accrues. In this case, the contract was broken and the right to sue accrued only when a demand for payment was made by the Bank and it was refused by the guarantors. When a demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. If while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or right to sue accrues, when the demand is served on the guarantor."

21. In exercise of power under Clause 4 of the agreement dated 20.9.1983 the plaintiff had taken possession of vehicle on 9.2.1985 and had immediately vide letter dated 12.2.1985 called upon the defendant to pay them due within 10 days from the receipt of the letter. The notice dated 12.2.1985 was received by the first defendant which was also replied by the first defendant as has been pleaded in the written statement. Thus,in any event of the matter contract stood broken on the default and right to sue accrued to the plaintiff on demanding the amount to be paid within 10 days. Thus, in any view of the matter suit filed by the plaintiff was beyond three years and has rightly been dismissed by the trial court. The High Court has also not erred in dismissing the appeal by taking the view that the suit was barred by limitation.

22. In view of the foregoing, we do not find any merit in this appeal.

The appeal is dismissed accordingly.

.....J. (ABHAY MANOHAR SAPRE) .....J. (ASHOK BHUSHAN) NEW DELHI, JUNE 29, 2016.