State Of Maharashtra & Anr vs M/S National Construction ... on 9 January, 1996

Equivalent citations: 1996 SCC (1) 735, JT 1996 (1) 156, AIR 1996 SUPREME COURT 2367, 1996 AIR SCW 895, (1996) 1 SCR 293 (SC), 1996 ( ) ALL CJ 546, (1996) 1 JT 156 (SC), (1997) 4 COMLJ 47, (1996) 2 IJR 587 (SC), 1996 (2) IJR 587, 1996 (1) SCC 735, (1996) 1 KER LT 16, (1996) 2 SCJ 58, (1996) 1 ALL WC 529, (1996) CRILR(RAJ) 16, (1996) 2 WLC (RAJ) 736, (1996) 1 CURCC 61, (1996) 3 LANDLR 285, (1996) 2 RRR 20, (1997) 1 BANKLJ 102, (1996) 1 BANKCAS 371, (1996) 1 ICC 490, (1996) 28 ALL LR 26, (1996) 2 BLJ 170, (1997) BANKJ 229, (1996) 1 CIVLJ 636, (1998) 92 COMCAS 21, (1996) 1 CURLJ(CCR) 681, (1996) 2 RAJ LW 27, (1996) 1 BANKCLR 399

Author: A.M Ahmadi

Bench: A.M Ahmadi, S.C. Sen

PETITIONER:
STATE OF MAHARASHTRA & ANR.

Vs.

RESPONDENT:
M/S NATIONAL CONSTRUCTION COMPANY,BOMBAY & ANR.

DATE OF JUDGMENT: 09/01/1996

BENCH:
AHMADI A.M. (CJ)
BENCH:
AHMADI A.M. (CJ)
SEN, S.C. (J)

CITATION:
1996 SCC (1) 735 JT 1996 (1) 156
1996 SCALE (1)176

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T Ahmadi, CJI.

The appellants are the State of Maharashtra and its Executive Engineer who was posted at the Masonry Dam Division, Nathnagar, during the relevant period. In 1967, the appellants invited tenders for performing work on the masonry portion of the Paithan Dam on Godavari River, as part of the Jayakwadi Project, Stage-I (hereinafter called "the work"). The first respondent, M/s National Construction Company, Bombay (hereinafter called "the contractor") submitted its tender offer for the work which was conditionally accepted by the appellants on 30.3.1967.

On 6.1.1968, the second respondent, the Central Bank of India (hereinafter called "the Bank"), executed performance guarantee No.57/22 whereby it guaranteed that the contractor would faithfully conform to the terms and conditions of the contract to be entered into between the appellants and the contractor. Under the terms of the guarantee, the Bank was jointly and severally liable with the contractor for the latter's default in performance; the liability of the Bank being limited to Rs.14,12,836/-, i.e. 5% of the contract price. The guarantee was to remain in force till 3.7.1972. Soon thereafter, on 8.1.1968, the contract for commencing construction was executed. However, no work was initiated for almost two years. On 11.12.1969, the appellants gave an ultimatum to the contractor to begin work. It is alleged that instead of commencing work, the contractor abandoned the work on 19.12.1969. The appellants allege that the contractor did not respond to their repeated requests for recommencing work, forcing them to employ other agencies for completing the work. In the process, by 31.5.1972, they claimed Rs. 1,13,27,298.16, with interest, from the contractor by way of damages for breach of contract. This was inclusive of their claim for Rs.14,12,836/- against the bank under the performance guarantee.

On 28.7.1992, the learned Civil Judge dismissed the suit holding that as the cause of action was identical to the one in the former suit, it was barred by res judicate under Explanation IV to S.11 as also Order 2 Rule 2 of the Civil Procedure Code, 1908 (hereinafter called "the Code"). The appellants appealed against this order on the ground that the two suits were based on separate causes of action and the dismissal of the former on a technical ground could not act as a bar against the latter. On 9.7.1993, a Division Bench of the Bombay High Court by the decision impugned herein dismissed the appeal. Feeling aggrieved, the appellants have approached this Court by way of special leave.

We may first dispose of the plea based on Section 11, Explanation IV, of the Code. That section deals with the doctrine of res judicate and provides that any matter which might or ought to have been made a ground claim they had incurred expenses totalling Rs.1,44,18,970.24.

At this stage, on 21.6.1972, the appellants filed Short Cause Suit No. 491/72 only against the Bank on the original side of the Bombay High Court praying for the recovery of Rs.14,12,836/-, which was the amount stipulated in performance guarantee No.57/22, with interest. It would be pertinent to note that the suit was filed before the guarantee lapsed on 3.7.1972. On 17.1.1983, the Bombay High Court dismissed the suit for non-joinder of parties, holding that the contractor was a necessary party for deciding the issue of default and the bank's consequent liability. In appeal against this order, Appeal

No.303/83, the appellants included the contractor as a party in the cause title of the memo of appeal but the appeal was dismissed on 7.4.1983 on the very same ground. It may, however, be clarified that the contractor was not impleaded as a party by the Court's order.

On the same day, 7.4.1983, the appellants filed Spl. Civil Suit No.29/83 against both the contractor and the bank in the Court of the Civil Judge (Senior Division) at Aurangabad. In this suit, the appellants for defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Since the plea of res judicate can be disposed of on a narrow ground, it is not necessary to examine the ambit of Explanation IV. The main text of Section 11 reads thus :

> S.11 Res Judicata. -- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."
>
> The important words are "has been heard and finally decided". The bar applies only if the matter directly and substantially in issue in the former suit has been heard and finally decided by a Court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicate.
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> In its impugned order, the High Court of Bombay has taken note of the fact that the Short Cause Suit was dismissed on the technical ground of non-joinder of a necessary party i.e. the contractor. It has, however, stressed the fact that in the appeal against the Order of the lower Court, the appellants had made the contractor a party and yet the appeal was dismissed. The High Court has relied on this fact to come to the conclusion that the second suit was barred by res judicata. However, the High Court did not take note of the fact that in rejecting the appeal, the appellate Court had held that the suit was bad since there was no adjudication or legal determination of the plaintiff's dues and, for this reason, the suit was not maintainable against the 2nd Defendant only. The High Court, therefore, failed to take note of the fact that the appellate court did not consider the merits of the case, but confirmed the dismissal of the suit by the lower court on a technical ground.
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> This statement of the law by the High Court is, with respect, incorrect in view of the decision of this Court in Sheodhan Singh V. Daryao Kuanwar [AIR 1966 SC 1332 at p.1336 = [1966] 3 S.C.R. 300 at 307] where, while considering the meaning of the words "heard and finally decided", used in S.11 of the Code, it was held:-

> "Where, for example, the former suit was dismissed by the Trial Court for want of jurisdiction .... or on the ground of non-joinder of parties .... and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be res judicata in a subsequent suit"

(Emphasis supplied) This Court in its recent decision, Inacio Martins v. Narayan Hari Naik [(1993) 3 SCC 123] has reiterated this proposition. It is, therefore, clear that the dismissal of the Short Cause Suit and the subsequent appeal could not have operated as a bar to Spl. Civil Suit No. 27/83. The plea based on the principle of res judicata fails.

We may now deal with the issue involving Order 2 Rule 2 of the Code which reads as under:

> "2. Suit to include the whole claim. -
>
> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
>
> (2) Relinquishment of part of claim. -

Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

(Explanation omitted) Both the principle of res judicata and Rule 2 of Order 2 are based on the rule of law that a man shall not be twice vexed for one and the same cause. In the case of Mohd. Khalil Khan v. Mahbub Ali Khan [AIR 1949 PC 78 at p.86], the Privy Council laid down the tests for determining whether Order 2 Rule 2 of the Code would apply in a particular situation. The first of these is, "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit." If the answer is in the affirmative, the rule will not apply. This decision has been subsequently affirmed by two decisions of this Court in Kewal Singh v. Lajwanti [AIR 1980 SC 16] at p.163 = (1980) 1 SCC 290] and in Inacio Martins's case (supra).

It is well settled that the cause of action for a suit comprises of all those facts which the plaintiff must over and, if traversed, prove to support his right to the judgment.

It is the contention of the appellants that the two suits are in respect of two separate causes of action. The first suit was filed to enforce the bank guarantee, while the second suit was filed to claim damages for breach of the contract relating to the work.

In the plaint of the Short cause suit, the foundation of the appellants claim rested upon the performance guarantee No.57/22. The basis of the appellants' claim was that under the terms of the bank guarantee, the Bank was liable to make good to the appellants all losses that became due by reason of any default on the part of the contractor in the proper performance of the terms of the contract. The appellants annexed particulars and laid out facts to show that the contractor had, by allegedly abandoning the work, failed to observe the terms of the contract. The appellants further alleged that these actions of the contract had caused them to incur losses of Rs.76,37,557.76. However, in view of the limitation prescribed in the bank guarantee, the appellants had limited their claim to Rs.14,12,836/-.

At this juncture it seems necessary to analysis the law relating to bank guarantees. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contract is not barred and the cause of action for the same is independent of enforcement of the guarantee. See UCO Bank vs. Bank of India, (1981) 3 SCR 300 at 325; Centax (India) Ltd. V. Vinmar Impex Inc. (1986) 4 SCC 136; and U.P. Cooperative Federation Ltd. V. Singh Consultants & Engineers (P) Ltd. (1988) 1 SCC 174.

The legal position, therefore, is that a bank guarantee is ordinarily a contract guite distinct and independent of the underlying contract, the performance of which it seeks to secure. To that extent it can be said to give rise to a cause of action separate from that of the underlying contract. However, in the present case we are handicapped because the High Court (both the learned Single Judge and Division Bench) had no occasion to analysis the nature of the bank guarantee. We, therefore, refrain from making any observation regarding the true nature of the bank guarantee except pointing out that the two causes of action may not be identical. That would be a matter for the Trial Court to consider on a true analysis of the bank guarantee at the appropriate stage.

In the plaint of the Spl. Suit, the main relief sought by the appellants was on the basis of the contract entered into between the appellants and the contractor. The appellants alleged and laid out facts and particulars to the effect that the abandonment of work by the contractor was in breach of the contract and this had caused the appellants to suffer losses worth Rs. 1,13,27,298.16. This amount was inclusive of the claim of Rs.14,12,836/- based on the performance guarantee No.57/22 for which the contractor and the Bank were jointly and severally liable.

The relief sought in the Short Cause Suit was therefore based on a different cause of action from that upon which the primary relief in the Spl. Suit was founded.

In Sidramappa v. Rajashetty [AIR 1970 SC 1059 at pp. 1060-61 = (1970) 1 SCC 186 at 189], this Court held that where the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit, and in the earlier suit, the plaintiff could not have claimed the relief which he sought in the subsequent suit, the plaintiff's subsequent suit is not barred by order 2 Rule 2. Applying this ruling to the facts of the present case, it is clear that, in the first suit, the appellants could only claim reliefs in respect of Rs.14,12,836/- which was the maximum amount stipulated in the performance guarantee. They could not have claimed reliefs of Rs.1,13,27,298.16 which they did in the second suit on the basis of the contract relating to the work to be performed by the contractor.

It is, therefore, clear that when the appellants, by way of Short Cause Suit No.491/72, sought to enforce the performance guarantee no.57/22, they were seeking reliefs on the basis of a cause of action which was distinct from the one upon which they subsequently based their claim in Spl. Civil Suit No. 29/83.

In the result, both the issues are decided in favour of the appellants. The appeal succeeds. No costs.