# K.Krishnamoorthy vs Investment Trust Of India Limited on 5 March, 2012

## Author: R.Banumathi

## Bench: R.Banumathi

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2012

CORAM:

THE HONOURABLE MRS.JUSTICE R.BANUMATHI

AND

THE HONOURABLE MRS.JUSTICE S.VIMALA

A.S.No.135 of 2005 and 65 of 2012

A.S.No.135 of 2005:

K.Krishnamoorthy .... Appellant

Vs.

1.Investment Trust of India Limited,
No.1, Krishnama Road,
Nungambakam,
Chennai 34.

2.Elpas Private Limited, rep.by
its Directors, Suite No.2, B Block,
VIII Floor,
Parsn Gemini Apartments,
Chennai 6

3.C.S.M.Sundaram

4. Dr.K.S.Ram .... Respondents

A.S.No.65 of 2012:

C.S.M.Sundaram .... Appellant
Vs.
1.M/s.Investment Trust of India Ltd.,
rep.by its Secretary and Principal
Officer, Kothari Buildings,
117, Nungambakkam High Road,
Madras 600 034

2.M/s.Elpaas Private Limited,
rep.by its Directors, Suit No.2,
B-Block, 8th Floor,
Parsn Gemini Apartment,
Mount Road, Chennai 600 006

3.Dr.K.S.Ram

4.K.Krishnamurthy .... Respondents

Prayer: Appeals in A.S.Nos.135 of 2005 and 65 of 2012 are filed against the judg

For Appellant in A.S.No.135 of 2005 and for Respondent No.4 in A.S.No.65 of 2012 : Mr.P.B.Balaji

For Appellant in A.S.No.65 of 2012 and for Respondent No.3 in A.S.No.135 of 2005 : Mr.S.Devanathan

For Respondent No.1 in both Appeals. : Mr.V.Narayanaswami

For Respondents 2 and 4 in A.S.No.135 of 2005 and for respondents No. 2 and 3 in A.S.No.65 of 2012 : No Appearance

COMMON JUDGMENT

R.BANUMATHI,J.

Challenge in these appeals is the judgment and decree dated 11.07.2003 in O.S.No.7731 of 1996 on the file of VII Additional Judge, City Cviil Court, Chennai, in which the trial Court directed the defendants to pay a sum of Rs.5,87,563/- together with interest at the rate of 18% per annum from the date of plaint till the date of realisation.

2. The 2nd defendant is the appellant in A.S.No.65 of 2012 and the 4th defendant is the appellant in A.S.No.135 of 2005. The 1st defendant is the Private Limited Company and defendants 2 to 4 are the directors of 1st Defendant Company. On 12.4.1985, the plaintiff leased out certain machineries to the 1st defendant Company under Ex.A.2 equipment lease agreement dated 12.4.1985 on rental basis. For first sixty months, rent is payable at the rate of Rs.8,675/- per month and thereafter at Rs.100/- per annum till the equipments become scrap. The 1st monthly rental was payable on 12.5.1985 and the subsequent monthly rentals are to be paid on the same date of every succeeding months. On 12.4.1985, defendants 2 and 4 have executed Ex.A.3 - letter of undertaking in favour of plaintiff company undertaking to pay the monthly rentals and outgoings on the respective due dates without fail. On the same date (12.4.1985), the 2nd defendant had also executed Ex.A.4 personal guarantee in favour of plaintiff agreeing to reimburse and compensate in case of default of rents, adverse remarks, loss or damage to equipment that may be caused to the plaintiff company by the lessee or their agent.

3. Case of plaintiff is that the 1st defendant failed and neglected to pay the monthly rentals within the stipulated dates and the defendants are in arrears of Rs.2,66,150/-. As per clause 19 of Ex.A.2 - agreement, the defendants are liable to pay lease rentals with interest subject to a minimum rate of thirty percent per annum. Since the defendants failed and neglected to pay the rentals, the plaintiff had terminated Ex.A.2 - equipment lease agreement (dated 12.4.1985). As a result of such termination, as per clause 23 of the agreement, the 1st defendant is liable to pay lease rental and the interest totalling Rs.5,87,563/-. Defendants 2 to 4, being the guarantors, all the defendants are jointly and severally liable to pay to the plaintiff the suit claim of Rs.5,87,563/- together with interest at the rate of 18% p.a. from the date of suit till the date of realisation.

4. Resisting the suit, 2nd defendant (appellant in A.S.No.65 of 2012) has filed written statement contending that he had resigned from the Board of Directors of the 1st defendant Company and ceased to be a Director on and from 5.3.1987 and thereafter the 2nd defendant was neither connected nor responsible for any of the acts of the 1st defendant Company. As per the clauses in the rental agreement, if the 1st defendant Company defaulted in paying the lease rentals, the rental for the balance of entire term shall thereupon become immediately payable by the lessee. The lease rental due on 12.6.1985 is stated to have been paid by the 1st defendant on 17.06.1985 and since the 1st defendant committed default in payment of lease rental for the month of June, 1985, as per clause 23 of the agreement, the balance of lease rental due for the remaining period became due and payable immediately in June, 1985. While so, the plaintiff has failed to take any legal proceedings against the 2nd defendant and the suit filed in 1991 is barred by limitation. Any acknowledgement of liability or the payment, if any, made by the 1st defendant Company therefore will not extend the period of limitation against the 2nd defendant, especially when the 2nd defendant ceased to be a Director of the 1st defendant Company from March, 1987 and therefore the 2nd defendant is not liable to pay any amount to the plaintiff.

5. The 4th defendant has filed written statement contending that the 4th defendant was kept away from the business activities of the 1st defendant Company by defendants 1 to 3. The 4th defendant has also contended that the suit is barred by limitation and there is no cause of action against the 4th defendant and prayed for dismissal of the suit.

6. The trial Court has framed five issues. Before the trial Court, the then legal Adviser of Plaintiff company (V.Prem Kumar) was examined as P.W.1. Exs.A.1 to A.10 were marked on the side of Plaintiff. On the side of contesting defendants, 2nd defendant C.S.M.Sundaram was examined as D.W.1. 4th Defendant Krishnamoorthy was examined as D.W.2. No document was marked on the side of the defendants.

7. Upon consideration of oral and documentary evidence, the trial Court held that Ex.A.10 statement of accounts clearly contains the lease rentals due and the interest payable. The trial Court negatived the 2nd defendant's plea that he resigned from the 1st defendant Company on the ground that 2nd defendant has not produced any document to substantiate his defence plea. In so far as the 4th defendant's plea on comparison of his disputed signature in Ex.A.3 with that of his admitted signature in written statement, the trial Court held that there is not much difference or dissimilarity. On those findings, the trial Court decreed the suit holding that defendants 1 to 4 are jointly and severally liable to pay the suit claim of Rs.5,87,563/- payable with interest at the rate of 18% per annum.

8. Mr.Devanathan, learned counsel for appellant/2nd defendant contended that since 2nd defendant resigned from 1st defendant company with effect from 5.3.1987 and therefore 2nd defendant is not liable to pay the rental arrears and his liability was discharged. It was further submitted that any payments made by 1st defendant or any acknowledgement of liability made by the 1st defendant would not save the limitation and that the suit is barred by limitation.

9. The learned counsel for 4th defendant/appellant in A.S.No.135 of 2005 contended that when the 4th defendant has denied his signature in Ex.A.3, the trial Court ought not to have taken the burden of comparing the 4th defendant's disputed signature in Ex.A.3 with his signature in the written statement. It was further submitted that in the absence of steps taken by the plaintiff to prove his case as contemplated under Sections 101 to 104 of the Evidence Act, the trial Court was not justified in exercising its power under Section 73 of the Evidence Act. The learned counsel has inter alia contended that no evidence was adduced to prove payment made by the 2nd defendant within the period of limitation and hence the suit is barred by limitation and the trial Court was not justified in decreeing the suit.

10. Countering the contentions, the learned counsel for the 1st respondent/ plaintiff contended that the nature of agreements/Exs.A.2 to A.4 would clearly show that it is a continuing liability and as per Article 55 of the Limitation Act, the suit is well within the period of limitation. In support of his contention, the learned counsel inter alia placed reliance upon number of decisions viz., OFFICIAL RECEIVER, COIMBATORE REPRESENTING THE ESTATE OF THE DEBTORS IN I.P.NO.19 OF 1977, SUB COURT, COIMBATORE VS. A.RAMALIGNAM AND OTHERS, (1995(II) MLJ 264), PUNJAB NATIONAL BANK LTD. VBS. SRI BIKRAM COTTON MILLS LTD., AND ANOTHER, (AIR 1970 SC 1973) and other judgments.

11. Upon consideration of the evidence and materials on record, judgment of the trial Court and rival contentions, the following points arise for determination in this appeal:

"1. Whether the 2nd defendant/appellant in A.S.No.65 of 2012 is right in contending that he resigned as Director from the 1st defendant Company and therefore he is discharged from his liability?

2. Whether 4th defendant/appellant in A.S.No.135 of 2005 is right in contending that he Did not sign in Ex.A.3 undertaking and whether the trial Court was justified in exercising its power under Section 73 of the Indian Evidence Act in comparing 4th defendant's disputed signature in Ex.A.3 with his admitted signature in the court documents like written statement, etc.,?

3. Whether the suit is barred by limitation?

4. Whether the plaintiff has proved the suit claim of Rs.5,87,563/-?

5. To what relief the parties are entitled to?

12. Point No.4:- Under Ex.A2- Equipment Lease Agreement, the monthly rentals are payable in instalments at the rate of Rs.8,675/- per month for a period of 60 months. Even though the 1st Defendant company had initially committed default, after November 1985, 1st Defendant company seem to have regularly paid the instalments, which were credited to their account. As is seen from Ex.A10- statement of account, 1st Defendant company had made total payment of Rs.3,55,400/-. Amount debited to their account is Rs.6,22,550/-. Deducting the credit entry of Rs.3,55,400/-, the balance payable is Rs.2,67,150/-.

13. In fact, in Ex.A5 [16.07.1990] - termination notice issued to the Defendants, Plaintiff company has stated that an amount of Rs.2,66,150/- is due and payable by the 1st Defendant company. Learned counsel for 2nd Defendant has contended that Plaintiff had not come out with correct details, break up figures regarding the amount payable. Curiously, at the time of filing the suit, an entry [dated 02.07.1991] has been made under suspense account mentioning that an amount of Rs.3,20,413/- has been debited in the accounts of 1st Defendant company and arrived at the figure of Rs.5,87,563/- for which the suit has been laid.

14. Ofcourse, 1st Defendant company had initially committed default in payment of monthly rentals; but later, the 1st defendant had paid the monthly rentals. In case of default/delayed payment, the instalments should be payable with default interest at the rate of 30% per annum. But the Plaintiff has not come out with details as to how the suspense account of Rs.3,20,413/- has been arrived at. Suit claim of Rs.5,87,563/- has not been substantiated.

15. Learned counsel for Plaintiff has contended that Defendants have not raised any defence regarding suspense account in Ex.A10-statement of account and PW1 was also was not cross-examined on this aspect and while so, the Defendants cannot raise objection as to the entry of suspense account for Rs.3,20,413/-. It was further submitted that Defendants have not chosen to send any reply to Ex.A5- termination notice and while so, it is not open to the Defendants to raise objection regarding the entries in Ex.A10-statement of account.

16. Plaintiff's suit is for recovery of money. In Ex.A5 - termination notice, Plaintiff has claimed only Rs.2,66,150/-. As per Section 101 of Indian Evidence Act, burden rests on the person who makes affirmative allegations. When the Plaintiff has claimed only Rs.2,66,150/- in Ex.A5 - termination notice, the burden lies upon the Plaintiff to adduce evidence to substantiate the suit claim of Rs.5,87,563/-. Defendants cannot be blamed for non-sending any reply notice to Ex.A5 - termination notice. Ex.A5 - termination notice sent to the Defendants were returned with an endorsement "Left". Notwithstanding the defence plea, Plaintiff has to independently prove their claim. Ex.A10 - statement of account is only an extract of Accounts. Plaintiff has not produced any Books of account regularly kept in the course of business. In the absence of any supporting evidence, Plaintiff's suit claim could be decreed only to the extent of Rs.2,66,150/-, the amount claimed in Ex.A.5 termination notice.

17. Point No.1:- Re-contention - 2nd Defendant's discharge on account of resignation as Director:- Evidencing equipment lease, 1st defendant Company had executed Ex.A.2 equipment lease agreement (12.4.1985). Defendants 2 to 4, being the guarantors of 1st defendant Company, have executed Ex.A.3 - undertaking, both personal as well as in the capacity of the Directors of the Company undertaking that they are jointly and severally liable for the remittance of monthly rentals, tax liabilities, other incidental costs relating to the lease equipments payable to the plaintiff. They have also undertaken to pay the monthly rentals and other outgoings without fail.

18. In his evidence, D.W.1 has stated that he resigned from the Board of Directors of the 1st defendant Company and ceased to be a Director on and from 5.3.1987 and his resignation was accepted by the 1st defendant Company and the same was well known to the plaintiff Company in the year 1987 itself. Contention of 2nd defendant is that on and from 5.3.1987 2nd defendant having ceased to be the Director of the 1st defendant Company, and in view of the resignation, the liability under Ex.A.3 Letter of undertaking and personal guarantee - Ex.A.4 came to an end and that plaintiff was also aware of the 2nd defendant's resignation on and from 5.3.1987. Learned counsel for 2nd defendant further submitted that trial Court ought to have seen that after the resignation of the 2nd defendant from 1st defendant Company with effect from 5.3.1987, series of payments and bulk payments were made by 1st defendant Company as rental arrears and the said payments were credited into the accounts and these facts would clearly show that the letter of undertaking (Ex.A.3) and personal guarantee (Ex.A.4) also came to an end and 2nd defendant stands discharged from his liability.

19. There is no force in the contention of 2nd defendant that he is discharged from his liability on account of his resignation on and from 5.3.1987. As pointed out earlier, all three Directors have executed Ex.A.3 undertaking to pay the monthly rentals and other outgoings on the respective due dates without fail.

20. As per clause 6 of Ex.A.3 undertaking, whenever any change occurs in the constitution of the Company, the Directors have undertaken to inform the plaintiff Company immediately in writing about the change. As per clause 6 of Ex.A.3, the Director's responsibility and liability to the plaintiff company will continue until the 1st defendant Company received from the plaintiff Company, the acknowledgement of the change in 1st defendant's constitution. Even though the 2nd defendant

(D.W.1) has spoken about his resignation, the 2nd defendant has not produced any document to show that he resigned from the 1st defendant Company.

21. When the 2nd defendant along with other Directors has categorically undertaken to pay the monthly instalments, the 2nd defendant cannot contend that he is discharged from the liability. In the absence of any supporting evidence to show that the plaintiff company has acknowledged the change in 1st defendant's constitution, the 2nd defendant cannot contend that he is discharged from the liability.

22. Apart from Ex.A.3 undertaking, the 2nd defendant had also given personal guarantee and executed Ex.A.4 to the effect that the personal guarantee shall remain in force until the lease agreement comes to an end. Having so given personal guarantee, the 2nd defendant is not right in contending that he is discharged from the liability on account of his resignation.

23. Re-contention Variation of terms of contract:- Learned counsel for 2nd defendant contended that after the retirement of the 2nd defendant, series of payments and bulk payments made by the 1st defendant and received by the plaintiff company would amount to variation to the terms of the agreement Ex.A.2. It was further submitted that in Ex.A.5 termination notice dated 16.7.1990, plaintiff had not given the break up details, thereby the conduct of plaintiff amounts to varying and violating the terms and conditions of the contract (Ex.A.2) and therefore the said agreement ceased to be in force and cannot be enforced as against the 2nd defendant for recovery of the suit claim. In essence, the contention of 2nd defendant is that the receipts of payments by the plaintiff company would amount to variation in terms of the contract, which would have the effect of discharging the personal guarantee and undertaking Exs.A.4 and A.3 executed by the 2nd defendant.

24. There is no force in the contention of 2nd defendant that receipt of series of payments and bulk payments by the plaintiff Company would have the effect of variation in the contract and his undertaking (Ex.A.3) and the personal guarantee (Ex.A.4) stands discharged. As discussed earlier, apart from oral evidence of D.W.1, no documentary evidence was adduced to show that the plaintiff Company was informed about the resignation of 2nd defendant and that plaintiff Company had acknowledged the change in the constitution of the 1st defendant Company. As per the terms in Ex.A.3 undertaking, all the Directors have undertaken to pay the monthly rentals and in case of default of payment of rentals, the Directors have undertaken to remit the same individually. As per the terms of Ex.A.4 deed of personal guarantee executed by the 4th defendant, the guarantee shall remain in force until the lease agreement comes to an end. As per recitals in Ex.A.4, the plaintiff Company is entitled to enforce the guarantor's contractual liability at its option. Lease rentals are payable in sixty monthly instalments. So long as principal debtor continues, the liability of the guarantor shall also continue.

25. As per Section 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Both in his capacity as Director and in his personal capacity, 2nd defendant had executed Ex.A.3 letter of undertaking and Ex.A.4 personal guarantee. When the lease rentals are payable in sixty monthly instalments, under no stretch of imagination, can it be said that the payments made by the 1st defendant

Company and acknowledgement by plaintiff Company would amount to variation in the terms of the contract so as to discharge the guarantor.

26. In a contract of guarantee, the surety is entitled to insist on rigid adherence to the terms of his obligation by the creditor and is liable only for such loss as arises directly from a breach of the terms of the contract actually guaranteed i.e., any arrangement between a creditor and his borrower inconsistent with the continuance of the surety, has the effect of cancellation such party's liability. Any variation in the terms of the contract or giving of time for the performance of it would have the effect of discharging the surety. As pointed out earlier, under Ex.A.2 equipment lease agreement, the rentals are payable for sixty months at Rs.8,675/- per month. Thus, the liability to pay the lease rentals is a continuing guarantee. While so, series of payments or bulk payments made by the 1st defendant Company cannot amount to variation in the contract. The contention of the 2nd defendant does not merit acceptance and is liable to be rejected.

27. Point No.2:- The 4th defendant (K.Krishnamoorthy), who is one of the Director of 1st defendant Company is also said to have executed Ex.A.3 (dated 12.4.1985) personally undertaking to pay the monthly rentals. The 4th defendant, who was examined as D.W.2, both in his written statement as well as in his evidence has denied his signature in Ex.A.3. In the light of denial of his signature in Ex.A.3, the trial Court compared the 4th defendant's disputed signature in Ex.A.3 with that of his admitted signature in the written statement and observed that there is not much difference between the disputed signature of 4th defendant in Ex.A.3 with that of his admitted signature in the written statement.

28. Assailing the approach of the trial Court, Mr.P.B.Balaji, learned counsel for 4th defendant contended that in the absence of any steps taken by the plaintiff to prove the disputed signature, the trial Court ought not to have taken upon itself the responsibility of comparing the disputed signature with that of his admitted signature in the written statement. Learned counsel placing reliance upon a decision of the Supreme Court in the case of AJIT SAVANT MAJAGAVI VS. STATE OF KARNATAKA, (AIR 1997 SC 3255) contended that Court should not normally take upon itself the responsibility of comparing the disputed signature with that of admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts. But it does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under Section 73. In the said judgment, it was held as under:

> "37. This section consists of two parts. While the first part provides for comparison of signature, finger impression, writing etc. allegedly written or made by a person with signature or writing etc. admitted or proved to the satisfaction of the Court to have been written by the same person, the second part empowers the Court to direct any person including an accused, present in court, to give his specimen writing or fingerprints for the purpose of enabling the Court to compare it with the writing or signature allegedly made by that person. The section does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act, it is clear that such comparison may either be made by a handwriting expert under

> Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself.
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> 38. As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under Section 73 of the Act."

29. There is no quarrel over the proposition that Courts should be slow in taking up the burden of comparing the disputed signature with that of the admitted signature. That does not mean that the Court has no power to compare the disputed signature with that of the admitted signature as this power is clearly available under Section 73 of the Act. In Paragraph No.38 of the above said judgment, the Supreme Court has held that such power of comparison is available under Section 73 of the Act. Therefore, it cannot be contended that the approach of the trial Court in comparing the disputed signature of 4th defendant in Ex.A.3 with that of 4th defendant's admitted signature in the written statement was erroneous.

30. Defence plea of 4th defendant denying his signature in Ex.A.3 has to be considered in the light of facts and circumstances of the case. On the same date of execution of Ex.A.2 equipment lease agreement (12.4.1985), all the Directors of 1st defendant Company have executed Ex.A.3 personal undertaking. It is not in dispute that the 4th defendant was one of the Directors of 1st defendant Company. Since 4th defendant was one of the Directors, in all probability, he would have joined with other Directors in executing Ex.A.3 personal undertaking for taking the equipments on lease. Only in that context, the trial Court proceeded to compare the disputed signature of 4th defendant in Ex.A.3 with that of his admitted signature in the written statement. We do not find any error in such an approach.

31. Point No.3:- Whether Suit is barred by limitation? - Ex.A.2 lease equipment agreement dated 12.4.1985 entered into between the plaintiff and the 1st defendant under which the 1st defendant Company was under obligation to pay the rental every month. The 1st defendant made one payment in June 1985. In respect of the 2nd instalment for July 1985, the 1st defendant Company had issued a Cheque for Rs.8,675/-, which was returned. The Cheques issued in the months of October and November 1985 were also returned.

32. Contention of the 2nd defendant is that since the default has occurred in July 1985 the suit ought to have been filed within three years from the default i.e., before June 1988. Learned counsel for the appellant/2nd defendant would further contend that when the 1st defendant had committed default in payment of lease rentals before resignation of the 2nd defendant on 5.3.1987, the plaintiff Company failed and neglected to take any legal proceedings and the plaintiff having instituted the suit in the year 1991, the suit is barred by limitation. It was further submitted that the plaintiff ought to have taken legal proceedings to institute the suit as and when the default occurred in July 1985 itself and the suit filed in 1991 is barred by limitation.

33. The above contention does not merit acceptance. As per Ex.A.2 equipment lease agreement, the monthly rentals are payable in sixty instalments. Ex.A.2 is dated 12.4.1985 and the 1st monthly rental is payable on 12.5.1985. As per Ex.A.2, the lease rentals are payable for sixty months i.e., till March 1990. The suit was filed in the Original Side of the Madras High Court in C.S.No.1171 of 1991. On account of enhancement in pecuniary jurisdiction, the suit was transferred to City Civil Court and re-numbered as O.S.No.7731 of 1996. The suit filed in 1991 is well within the period of three years from the last instalment due in the month of 1990.

34. The contracts to be performed by payment in instalments every month stretch over for a period of sixty months. Such cases are governed by Article 55 of the Limitation Act. Article 55 reads as under:

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| Art. 55. | For compensation for the breach of any contract, express or implied not herein specifically provided for. | Three years | When the contract 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." |

The term "successive breaches" implies that the contract has to be performed in different times. Where the party agreed to pay instalments for a period of certain years (in this case, sixty months), the cause of action for the breach for failure to pay the instalments arises at very month when there was default. In such cases, the limitation would begin either at the beginning of each month where the individual breach occurs or the end of sixty months. When the Contract is governed by Article 55 of the Limitation Act, the 2nd defendant is not right in contending that the suit is barred by limitation.

35. Since the monthly rentals, being payable in sixty monthly instalments, the liability under Ex.A.2 and the personal guarantee of 2nd defendant (Ex.A.4) is a continuing guarantee. Whether in a particular case the guarantee is a continuing guarantee or not is a question of the intention of the parties. Since the lease rentals are payable in sixty monthly instalments and there is continuing guarantee for payment of lease rentals, the suit is not barred by limitation.

36. Learned counsel for the 1st respondent/plaintiff has drawn our attention to the judgment of single judge of this Court in the case of OFFICIAL RECEIVER, COIMBATORE REPRESENTING THE ESTATE OF THE DEBTORS IN I.P.NO.19 OF 1977, SUB COURT, COIMBATORE VS. A.RAMALIGNAM AND OTHERS, (1995(II) MLJ 264). Considering the scope of continuing guarantee and Article 55, in the said judgment, the learned single judge has held as under:

> "14. Art. 55 of the Limitation act says that the limitation starts 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. A period of three years is provided for instituting the suit. The question came for consideration in the decision reported in Mrs.Margaret Lalita Samuel v. Indo Commercial Bank Limited, A.I.R. 1979 S.C. 102: (1979) 2 S.C.C. 396 : (1979) 1 S.C.R. 914. In that case, their Lordships have held thus;
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> "In the case of a continuing guarantee and an understanding by the defendant to pay any amount that may be due by a company to a Bank on the general balance of its account or any other account, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of guarantor to carry out the obligation, the period of limitation for a suit to enforce the bond could not be said to have commenced running. Limitation would only run from the date of breach under Art.115. (old Act of 1908)".

Referring to other judgments, the learned single Judge held that when the debt is alive, the suit filed cannot be held to be barred by limitation.

37. The 2nd defendant has not sent any notice to the plaintiff Company informing his intention to terminate the contract. In the absence of any such notice, it must be deemed that the contract was kept alive. Therefore, it cannot be said that his liability to pay the amount has ceased or that the guarantee is not in force. In Ex.A.4 guarantee, the 2nd defendant has categorically stated that the guarantee shall remain in force until the lease agreement comes to an end and the obligations of the lessee are fully discharged. When the payment of instalments of lease rentals are stretched over from 12.4.1985 to March 1990, it is not open to the 2nd defendant to contend that he is discharged from his liability because of the default committed in payment of future instalments.

38. Re.Contention - No extension of limitation against the 2nd Defendant on payments made by the 1st Defendant Company Case of 2nd Defendant is that after he resigned from the Board of Directors on and from 05.03.1987, 2nd Defendant had no relationship with the 1st Defendant company and therefore, any payment after March 1987 made by 1st Defendant company will not extend the period of limitation against the 2nd Defendant.

39. Learned counsel for 2nd Defendant contended that 1st Defendant company cannot be treated as an agent of 2nd Defendant for the purpose of saving limitation under Sections 18 and 19 of Limitation Act. In support of his contention, learned counsel placed reliance upon a decision of a single judge of this Court reported in 2001 (4) CTC 164 (TKT. Alagappan and five others v. Vimala Balasubramanian rep. by Power Agent B.Swaminathan No.2/54, East Raja Street, Pudukottai-1). In the said decision, dealing with the scope of Sections 18, 19 and 20 of Limitation Act, the learned single Judge held that under Section 18 of Limitation Act, acknowledgement to be valid and binding should be signed by party and payment of amount by one mortgagor cannot constitute acknowledgement against the other mortgagors in the absence of authorisation in writing or by implication or by surrounding circumstances.

40. In the present case, neither Section 18 nor Section 19 of Limitation Act is applicable. Section 18 deals with acknowledgement. As per Section 18 of Limitation Act, essentials of a valid acknowledgement are (i) an admission or acknowledgement; (ii) that such acknowledgement must be in respect of a liability in respect of a property or right; (iii) that it must be made before the expiry of the period of limitation; (iv) that it should be in writing and signed by the party against whom such property or right is claimed. Thus Section 18 of the Act mandates that the acknowledgement in order to extend the limitation must be in writing.

41. Section 19 of Limitation Act deals with effect of payment on account of a debt made before the expiry of the period. To attract the operation of Section 19, two conditions must be satisfied:- (i) the payment must be made within the period prescribed of limitation and (ii) it must be acknowledged by some term of writing either in the handwriting of the payer himself or signed by him. It is the payment which really extends the period of limitation under Section 19 of Limitation Act. In order to save the limitation, payment under Section 19 of the Act must be a conscious act.

42. In our considered view, neither Section 18 nor Section 19 of Limitation Act is applicable to the facts of the present case. As per Ex.A2 - Equipment Lease Agreement, the monthly rentals are to be paid for 60 months from 12.04.1985 i.e. from 12.04.1985 to 11.03.1990. Lease agreement shall remain in force for the entire period of 5 years, during which the monthly rentals are payable by instalments. For the said lease rentals, 2nd Defendant had extended his personal guarantee - Ex.A4 [dated 12.03.1985] and all the Directors have executed Ex.A3 - letter of undertaking [12.03.1985]. Ex.A4 - personal guarantee executed by 2nd Defendant shall remain in full force, when lease agreement comes to an end. Liability of 1st Defendant company is a continuing one for the entire period of 60 months. Payment of monthly instalments as per the terms of agreement shall not amount to acknowledgement of liability within the meaning of Section 18 or payments made within the meaning of Section 19 of Limitation Act. The arguments advanced by the 2nd Defendant is to be negatived.

43. Point No.5:- Trial Court had not adverted to various contentious issues raised by the Defendants. Trial Court did not properly appreciate the entries in Ex.A10-statement of account. As discussed earlier, Defendants are jointly and severally liable to pay only a sum of Rs.2,66,150/-, which is payable with interest at the rate of 18% per annum from the date of plaint till the date of decree and thereafter, the said amount of Rs.2,66,150/- is payable with interest at the rate of 9% per annum till realisation.

44. In the result, the judgment and decree dated 11.07.2003 made in O.S.No.7731 of 1996 on the file of VII Additional Judge, City Civil Court, Chennai are modified and these appeals are partly allowed. It is ordered that the Defendants 1 to 4 are jointly and severally liable to pay a sum of Rs.2,66,150/- payable with interest at the rate of 18% per annum from the date of plaint [16.07.1991] till today (2.3.2012) and thereafter 9% per annum till the date of realisation. However, the parties are directed to bear their respective costs in this appeal.

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VII Addl.City Civil Court, Chennai