MANU/MH/1853/2010

Equivalent Citation: 2011(1)BomCR439, [2011]161CompCas186(Bom)

IN THE HIGH COURT OF BOMBAY

Appeal (L) No. 319 of 2006 in Company Petition No. 570 of 2005

Decided On: 21.06.2010

Appellants: **Reunion Engineering Co. P. Ltd.**
Vs.
Respondent: **Mrs. Uma Kumar, Proprietor, Kandhan Electricals and Engineers**

Hon'ble Judges/Coram:
D.K. Deshmukh and R.P. Sondurbaldota, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: B.P. Saraf, Nikhil Rajani, Advs., i/b., V. Deshpande and Co.

For Respondents/Defendant: S.C. Naidu, Y.C. Naidu, Advs., i/b., C.R. Naidu and Co.

Case Note:
Company - Admissibility of company petition - Company petition filed for winding up as it was claimed that by reply to the statutory notice a promise to pay admitted amount was made therefore under Section 25(3) of the Indian Contract Act, 1872 - Trial Court passed the order of payment of money - Order challenged under appeal - Held, it was clear that for enabling a person to institute a suit for recovery of a time barred debt on the basis of the provisions of Section 25(3) of the Indian Contract Act, there has to be express promise to pay and not implied promise - Submission of c form cannot be advanced by the original Petitioner in the absence of filing any affidavit putting the Appellant on notice that such a contention was intended to be advanced in the appeal - Trial Court could not have made an order for payment of Rs. 9,00,000 in the company petition - Petitioner had not filed a civil suit for recovery of the amount, which according to the original Petitioner was due to him - Appeal allowed.

JUDGMENT

1. By this appeal the Appellant challenges the order dated March 2, 2006, passed by the learned single judge admitting Company Petition No. 570 of 2005 (Uma Kumar v. Reunion Electrical Manufacturers P. Ltd. [2008] 145 Comp Cas 823 (Bom)). That company petition was filed for winding up of the Appellant-company on an allegation that it is not in a position to pay its debts. According to the Respondent, the Appellant by its letter dated November 5, 2001, acknowledged its liability to pay a sum of Rs. 6,61,540.27 to the Respondent. This debt was not paid by the Appellant-company though promised. Ultimately, a statutory notice was issued. It was claimed that in the reply to the statutory notice, again the debt was acknowledged but the payment was not made. Therefore, the company petition was filed.

2. There was only one defence raised by the company, namely, that the debt is time barred. Before the learned single judge, it appears two contentions were raised (i) that giving of C form along with letter dated September 19, 2003, amounts to

payment of part of the debt under Section 19 of the Limitation Act, 1963, and (ii) it was claimed that by reply to the statutory notice a promise to pay admitted amount was made therefore under Section 25(3) of the Indian Contract Act, 1872 claim was made within the period of limitation.

3. The learned single judge, however, rejected the argument based on the provisions of Section 19 of the Limitation Act, 1963. The learned single judge, however, held that by reply to the statutory notice there was implied promise made to pay the debt. The learned judge, therefore, held that debt for which the statutory notice was issued and the company petition filed was not the debt barred by the law of limitation. However, surprisingly the learned single judge made a direction in the company petition for payment of Rs. 9,00,000 within twelve weeks to the Petitioner by the Respondent-company. Failure to make the payment was to result in admission of the petition. It is this order which is challenged in the appeal.

4. We have heard learned Counsel for both sides. In our opinion, even accepting the finding recorded by the learned single judge that in the reply to the statutory notice there is an implied promise made to pay the debt, which was barred by limitation, still in our opinion, it will not amount to promise to pay the time barred debt as contemplated by the provisions of Sub-section (3) of Section 25 of the Indian Contract Act. The Division Bench of this Court in its judgment in the case of Canara Bank v. Vijay Shamrao Ghatole MANU/MH/0534/1992 : [1996] 5 Bom. CR 338, has clearly held that an implied promise to pay a time barred debt is not covered by Section 25 of the Indian Contract Act. Observations made by the Division Bench in paragraphs 15 and 16 of that judgment are relevant. They read as under:

> **15.** It is, thus, clear from the perusal of Section 25(3) of the Contract Act that when there is a promise to pay the time barred debt made in writing as envisaged therein, it is treated as a contract and therefore such a promise would furnish a fresh cause of action to the creditor. The dispute between the parties upon the construction of Section 25(3) of the Contract Act is that according to learned Counsel for the Plaintiff-bank, any implied promise is covered by Section 25(3) whereas according to learned Counsel for Respondent No. 1 the promise to pay the time barred debt must be express and in writing. In support of his submission, learned Counsel appearing for the Plaintiff-bank has relied upon the judgment of the learned single judge of this Court in the case of *R. Sureshchandra and Co. v. Vadnere Chemical Works* MANU/MH/0010/1991 : [1990] Bank. LJ 536 :AIR 1991 Bom 44, and also upon the judgment of another learned single judge of this Court in the case of *Manekchand Mohanala v. Shah Bhimji and Co.* [1969] M. LJ 698.
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> **16.** Learned Counsel appearing for Defendant No. 1 has, however, relied upon the decision of the Division Bench of this Court in the case of *Maganlal Harjibhai v. Aminchand Gulabji,* MANU/MH/0053/1928 : AIR 1928 Bom 319, and in the case of *Balkrishna Mansukhram v. Jayshankar Narayan,* MANU/MH/0052/1938 : AIR 1938 Bom 460. Besides the judgment of the Division Bench *Maganlal Harjibhai v. Aminchand Gulabji,* MANU/MH/0053/1928 : AIR 1928 Bom 319, he has also relied upon the judgment of the erstwhile Lahore High Court in the case of *Basheshar Nath Goela v. Baji Nath,* AIR 1938 Lah 264, and the judgment of the Full Bench of the Kerala High Court in the case of *Chacko Varkey v. Thommen Thomas MANU/KE/0010/1958 : AIR 1958 Ker 31. The judgments of the Division Bench of this Court cited supra have taken the view that the promise to pay*

*the time barred debt must be express so as to constitute the contract under Section 25(3) of the Contract Act.*The said view taken by the Division Bench is binding upon us in preference to the view taken by the Single Bench of this Court in the judgments (cited supra) relied upon on behalf of the Plaintiff-bank.

emphasis1 supplied

5. It is, thus, clear that for enabling a person to institute a suit for recovery of a time barred debt on the basis of the provisions of Section 25(3) of the Indian Contract Act, there has to be express promise to pay and not implied promise, as has been held by the learned single judge. Therefore, the finding of the learned single judge is clearly contrary to the law laid down by the Division Bench in the case of Canara Bank MANU/MH/0534/1992 : [1996] 5 Bom. CR 338 referred to above. Learned Counsel appearing for the original Petitioner tried to submit that the learned single judge was not justified in rejecting his submission made under the provisions of Section 19 of the Limitation Act. According to him, submission of C form on September 19, 2003, amounts to part payment. In our opinion, that submission cannot be advanced by the original Petitioner in the absence of filing any affidavit putting the Appellant on notice that such a contention is intended to be advanced in the appeal. In our opinion, in any case the learned single judge could not have made an order for payment of Rs. 9,00,000 in the company petition. The most that could have been done by the learned single judge was to issue a direction for deposit of the amount. In our opinion, also considering the fact that till today the original Petitioner has not filed a civil suit for recovery of the amount, which according to the original Petitioner was due to him, the appropriate order would be to set aside the order passed by the learned single judge.

6. In our opinion, therefore, the following order would meet the ends of justice.

ORDER

(i) The appeal is allowed. The order passed by the learned single judge impugned in the appeal is set aside. Company Petition No. 570 of 2005 is rejected.

(ii) Any amount that may have been deposited by the Appellant pursuant to interim order passed by the appellate court be refunded to the Appellant, with accruals, if any, after a period of six weeks from today.