(1994) 07 BOM CK 0117

In the Bombay High Court

Case No : First Appeal No. 639 of 1997

Bank of Baroda APPELLANT

Vs

Abasaheb Sidu Chavan and Others RESPONDENT

Date of Decision : 27-07-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 6

Citation : (1995) 97 BOMLR 512

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Judgement

D.R. Dhanuka, J.—The Bank of Baroda has preferred this appeal against decree dated 25th February, 1977, passed by the Court of Civil Judge ,Senior Division, Sangli at Sangli in Special Civil Suit No. 90 of 1974. The parties to the appeal are hereinafter referred to as the "Plaintiffs and the Defendants".

2. On or about 1st July, 1974, the plaintiffs bank filed the above referred suit against the defendants for recovery of a sum ? of Rs. 49,161.60 alongwith interest thereon at 11% per annum from the date of filing of the suit till realisation and cost of the suit. It was averred in the plaint that defendant No. 1 was the principal debtor in respect of the said amount and defendants No. 2 and 3 were the guarantors. The plaintiffs also sought enforcement of the hypothecation as well as the mortgage created by defendant No. 1 in favour of the plaintiffs to secure the amount of suit claims as set out in the plaint. It was the case of the plaintiffs in the plaint that defendant No. 1 had inter alia executed a writing of hypothecation as well as Deed of Mortgage in favour of the plaintiffs to secure the amount of the suit claim. According to the plaintiffs, the said Deed of mortgage was executed by defendant No. 1 on 12th January, 1970. The defendant No. 1 executed Demand Promissory Note for Rs. 35.000/- (Exhibit 47), a Deed of Hypothecation in respect of machinery (Exhibit 49) as well as a registered Deed of Mortgage creating security on lands specified in the Deed of mortgage ''(Exhibit 48). The Plaintiff Bank is supposed to have obtained three

bearer cheques from defendant No. 1 as and by way of security i.e. cheques marked as exhibits 58, 61 and 62 respectively. It was the plaintiffs'' case in the plaint that the defendant No. 1 was liable to return the amount of the suit claim with interest as stipulated in various documents referred to in the plaint. The defendant No. 1 is an agriculturist. It was the case of the plaintiffs in the plaint that the defendant No. 1 had agreed to pay interest to the plaintiffs on the sanctioned amount of loan at the rate of 4% per annum above the bank rate of Reserve Bank of India subject to a minimum of 9% per annum. According to the plaintiff, the plaintiff paid a sum of Rs. 10.000/- to defendant No. 1 on 4th February 1970, a sum of Rs. 10.000/- on 22nd September, 1970, and a sum of Rs. 6400/- on 19th January. 1971. The plaintiff Bank debited the defendant No. 1 in sum of Rs. 8538.30 on account of amounts paid to Bhanu Cement Pipe Industries on 23rd February 1972 at instance of defendant No. 1. The defendant No. 1 did not admit the suit claim. The defendant No. 1 filed his written statement in the suit raising all sort of pleas.

3. The Deed of Mortgage was executed by Defendant No. 1, in favour of the plaintiffs on 12th January, 1970 i.e. somewhat earlier than 4th February, 1970 when the first installment of the loan amount was released by the plaintiffs in favour of defendant No. 1. The fact that the Deed of Mortgage was executed in favour of the Bank prior to release of loan does not affect the validity of mortgage. The mortgaged property is described in schedule to the Deed of Mortgage (Exhibit 48). The Deed of mortgage was duly registered.

4. At the trial of the suit, the trial Court framed issues as detailed in para 5 of its judgment. At the trial of the suit the plaintiffs bank examined several witnesses. The defendant No. 1 did not enter the witness box. The defendant No. 2, the guarantor, did not enter the witness box.

5. It was the plaintiffs'' case at the trial that the plaintiffs had advanced a sum of Rs. 10.000/- to defendant No. 1 on 4th February 1970, a sum of Rs. 8,538.30 on 23rd February, 1970, a sum of Rs. 10.000/- on 22nd September 1970, and a sum of Rs. 6,400/- on 19th January, 1971. It was the case of the plaintiffs at the trial that the defendant No. 1 had purchased cement pipes from Bhanu Cement Pipes Industries on 23rd February, 1970 for price of Rs. 8,538.30 and the plaintiffs bank had made the payment of the said amount to the said Supplier at the instance of defendant No. 1. Both the parties had their respective bank accounts with the plaintiff. The plaintiffs granted credit for the said amount of Rs. 8,538.30 in the accounts of the aforesaid supplier and debited the said amount to defendant No. 1. It further appears from the evidence led at the trial of the suit that the defendant No. 1 had passed a writing to the effect that he had received delivery of cement pipes in good condition and had also affixed his thumb impression on delivery challan in presence of witness Ghanshyamdas Maganlal Shah. The evidence of P.W. 3 Ghanshyamdas Maganlal Shah is reliable. The trial Court passed the impugned decree in favour of the plaintiffs bank and against defendants No. 1 and 2 only for recovery of Rs. 10,000/- and Rs. 6,400/-

aggregating to Rs. 16,400/- with interest at the rate of 10% per annum from the date of advancement till the date of suit and at the rate of 6% per annum from the date of the suit till the date of realisation and cost of the suit. The trial Court dismissed the suit as against defendant No. 3. The trial Court reached the conclusion that defendant No. 3 had nothing to do with the suit claim. The trial Court directed that a Commissioner be appointed to take the accounts of the amount due towards interest. The trial Court directed that a preliminary decree be drawn up in view of the suit being a mortgage suit and also a suit for enforcement of hypothecation in respect of machineries etc. as set out in exhibit, 49 and 48. The Defendant No. 2 had executed writing of personal guarantee in favour of plaintiff.

6. At the hearing of the appeal, the learned Counsel for the appellant has invited the attention of the Court to the evidence on record both oral and documentary. The Respondent No. 2 and 3 (i.e. original defendants No. 2 and 3) died during the pendency of the appeal. Heirs of original Respondent No. 2 and heirs of Respondent No. 3 are brought on record of this appeal. The respondent No. 2A is represented by counsel at hearing of this appeal.

7. It emerges from the evidence on record that the plaintiffs bank had sanctioned loan of Rs. 35.000/- for being advanced to defendant No. 1 and the said amount was not actually paid by the plaintiffs to defendant No. 1 on the said loan being sanctioned. It emerges from the record that on 4th February, 1970, the plaintiffs had advanced first installment of loan in sum of Rs. 10.000/- only to defendant No. 1. The trial Court has accepted the case of the plaintiffs that the plaintiffs had also advanced further sum of Rs. 6,400/- to defendant No. 1 on 19th January 1971.

8. The learned Counsel for the appellant has submitted that the trial Court ought to have accepted the case of the plaintiffs that defendant No. 1 and defendant No. 2 both were liable for payment of Rs. 8,538.30 made to Bhanu Cement Pipes Industries for and on behalf of and at the instance of defendant No. 1. I am considerably impressed by the submissions made by the learned Counsel for the appellants on this aspect of the case. One Ghanshyamdas Maganlal Shah was examined as P.W. 3 at the trial of the suit. The said witness was working as a Manager in Bhanu Cement Pipes Industries since 1996. The said witness clearly stated that the defendant No. 1 had received the delivery of cement pipes worth Rs. 8,538.30 and the delivery challan was duly signed by defendant No. 1 in the sense that the defendant No. 1 had affixed his thumb impression thereon in the presence of the witness. The said witness clearly stated that Bhanu Cement Pipes Industries had received the said amount from the plaintiffs bank by transfer of the amount to their account. There is no reason as to why this evidence and the evidence of other witnesses of the plaintiffs bank on this aspect should not be believed. No contrary evidence was led on behalf of the defence. It would be too far fetched to assume that the plaintiff bank might have granted credit for the said amount to the said party of its own merely because of lack of written

authorisation from defendant No. 1 to make the said payment. The defendant No. 1 did not object to the said debit at the relevant time. The defendant cross-examined the plaintiffs witnesses but never led any evidence on any of the issues.

9. The learned Counsel for the Respondent No. 2A submits that there is nothing on record to show that the plaintiffs bank had paid the said amount to Bhanu Cement Pipes Industries at the instance of defendant No. 1. I am not impressed by this submission. From the totality of evidence on record, reasonable inference shall have to be drawn on this aspect of the matter. It is clear that defendant No. 1 received delivery of cement pipes worth Rs. 8,538.30 from Bhanu Cement Pipes Industries. The defendant No. 1 did not pay the said amount to the said supplier. The plaintiffs bank paid the said amount to the said supplier. The defendant No. 1 was benefitted by the said payment. It must be therefore, inferred as a matter of common sense that the plaintiffs'' bank had paid the said amount to the said supplier, at the instance of defendant No. 1. The defendant No. 1 should have entered the witness box if he was serious about the defence. In the ordinary course of business, the plaintiffs bank debited the defendant No. 1 with the said amount and credited the said third party with identified amounts. The trial Court was in error in not accepting this part of the plaintiffs case. I, therefore, over-rule the finding of the trial Court on this aspect. I hold that both the defendants are liable in respect of the above referred amount. The defendant No. 2, is also liable to pay the said amount as a guarantor.

10. The learned Counsel for the appellant submits that the trial Court ought to have accepted the case of the plaintiffs to the effect that on 22nd September, 1970, the plaintiff had paid over a sum of Rs. 10.000/- to defendant No. 1. I have carefully gone through the evidence of all the witnesses examined on behalf of plaintiffs for the purpose of scrutinising this aspect of plaintiffs'' case. None of the witness examined on behalf of the plaintiff stated that on 22nd September 1970, the plaintiff bank had advanced or paid a sum of Rs. 10.000/- to defendant No. 1 as alleged by the plaintiff. Having regard to the totality of facts and circumstances of the case it cannot be presumed that the plaintiff bank must have paid the said amount to defendant No. 1, merely on the basis of cheque, exhibit'' 61. The said cheque was obtained by the plaintiffs in February 1970, There are several anomalies in the case of the plaintiffs on this aspect as pointed out in the judgment of the trial court. The plaintiffs had obtained the thumb impression of defendant. No. 1 even on the Promissory Note dated 4th February, 1970 for entire sum of Rs, 35.000/- even though only one installment of Rs. 10.000/- was paid over by the plaintiffs to defendant No. 1 on that day. I cannot accept the claim of the plaintiffs on this aspect of the controversy in absence of proper evidence on behalf of the plaintiff. On this aspect of the case I agree with the reasoning and finding of the trial Court and hold that the plaintiff has failed to prove that the plaintiff had in fact paid a sum of Rs. 10.000/- to defendant No. 1, on 22nd September, 1970 as alleged. In the said cheque dated 22nd September 1970 (Exhibit 61) appears the signature of one K.S. Chavan, brother of defendant No. I 1 and not defendant No. 1 himself. In view of various

discrepancies pointed out in the judgment of trial Court, I have no hesitation in rejecting this part of the appellants case on the footing that the plaintiffs have failed to prove the payment of said sum of Rs 10,000/ to defendant No. 1. The Court cannot decide the suit on basis of assumption or presumption. I hold that the decree passed by the trial Court is erroneous in so far as it failed to accept the plaintiffs case in respect of the abovereferred payment of Rs. 8,538.30 p.

11. In the result, the appeal is partly allowed. Decree passed by the trial Court is substituted by the following decree.

(a) The defendants No. 1 and 2 do pay sum of Rs. 10.000/-, Rs. 8,538.30 and Rs. 6,400/- aggregating to Rs. 24,938/- along with simple interest at the rate of 10% per annum from 4th February, 1970, 19th January 1971 and 23rd February 1971 to defendant No. 1, till the date of the filing of the suit and at the rate of 6% per annum (simple interest) from the date of filing of the suit till payment. Parties shall bear their own costs of the suit and the appeal. The order of costs is passed in request of proceedings herein till today.

(b) It is not necessary to appoint a Commissioner to take accounts between the parties. This part of the direction issued by the trial Court is deleted from the decree.

(c) Time of six months is granted to defendants Nos. 1 and 2 for making payment of the said amount as ordinarily granted in mortgage and hypothecation suits. The defendant Nos. 1 and 2 shall be at liberty to redeem the mortgage and the hypothecation by making payment of decretal amount to the plaintiff as aforesaid or by depositing the said amount in trial Court. All further and consequential directions to be issued by the trial Court.

(d) Preliminary decree is passed in terms aforesaid.

(e) If the defendant Nos. 1 and 2 fail and neglect to pay the above referred amount to the plaintiffs bank within six months from today, the plaintiffs shall be at liberty to apply to the trial Court for passing of decree absolute for sale i.e. for sale of the mortgaged lands etc. and hypothecated machineries through the trial Court in accordance with law. If there is a deficit, the plaintiffs shall be at liberty to apply to the trial Court, personal decree for the amount of deficit as contemplated under Order XXXIV Rule 6 of the Code of Civil Procedure.

(f) In the event of there being any difficulty, the parties shall be at liberty to apply to the trial Court for further directions concerning the execution and implementation of this decree and all matters incidental thereto.

12. The Registrar, High Court, Appellate Side is directed to return the record to the trial Court alongwith the writ and an ordinary copy of the order duly authenticated by Shiristidar of this Court expeditiously and latest within one month from today. The trial Court is directed to take further steps in the matter in terms of the decree passed by this Court as may be deemed necessary in accordance with law. Decree to be drawn up expeditiously.

13. Issue of certified copy is expedited.

