
(2003) 06 KAR CK 0020
In the Karnataka High Court
Case No : M.F.A. No. 1539 of 2002

Can Fin Homes Ltd.

APPELLANT

Vs

A. Vittal Murthy and Others

RESPONDENT

Date of Decision : 24-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Provincial Insolvency Act, 1920 — Section 28 (6), 47 (2), 48 (2), 75 (2)

Citation : AIR 2003 Kar 440 : (2003) 4 KCCR 2897

Hon'ble Judges : S.R. Nayak, J;K. Ramanna, J

Bench : Division Bench

Advocate : M.V. Kini and Co, for the Appellant; Jayakumar S. Patil, Rangaramu Assts., B.N. Suresh, P. N. Hegde, H.M. Raveesh, G. Narayana Rao and S. Kaladhar, for the Respondent

Final Decision : Allowed

Judgement

S.R. NAYAK, J.—M/s. Can Fin Homes Ltd., a company registered under the Indian Companies Act - the appellant herein is the respondent in I. C. No. 13 of 1993 filed by the first respondent herein for being declared and adjudged as an insolvent. The appellant being aggrieved by the order dated 18-2-2002 passed in I. C. No. 13 of 1993 on the file of the Court of the VI Addl. City Civil Judge, Bangalore, has preferred this appeal u/s 75(2) of Provincial Insolvency Act, 1920, for short "the Act".

2. The facts leading to the filing of I. C. No. 13 of 1993 be noted briefly as under : The first respondent had earlier been granted a housing loan in 1990 by the appellant company on the security of a residential property which he purchased with the loan given by the appellant. Being unable to pay all the debts he owed to all his creditors, he filed the insolvency petition in I. C. No. 13 of 1993. The appellant was a secured creditor as the residential property the first respondent purchased was the security for the housing loan. In the insolvency case, the appellant sought disbursement of its dues as a secured creditor of Rs.

5,06,832/-. The appellant is the only secured creditor, which fact is not in dispute. In the said proceedings, the appellant relying on Section 47(2) of Act sought for payment of the "whole debt". The Court below, however, has passed an order for payment of dues as on 4-8-1994 at contractual rate of interest till the date of adjudication of the first respondent as insolvent with future interest only at the rate of 6% per annum till the payment. Hence, this Appeal.

3. We have heard Sri M. Kini, learned Counsel for the appellant and learned counsel for the respondents. The learned Counsel for the appellant would contend that u/s 47 of the Act, the secured creditor is entitled to the whole of the debt which includes not only the principal but also the interest at the contractual rate. Therefore, the Court below is not justified in passing the impugned order awarding interest at the rate of 6% per annum from the date of adjudication of the 1st respondent as insolvent till payment. Sri Kini would further contend that holding of the Court below that since the first respondent-petitioner was adjudged as an insolvent, the contract between him and appellant comes to an end and therefore, the first respondent is not liable to pay the agreed interest on the amount due, is untenable in law. The learned counsel for the first respondent, on the other hand would support the judgment of the Court below and contend that the appellant is not entitled to claim interest at the contractual rate even after adjudging the first respondent as an insolvent.

4. Having heard the learned counsel for the parties, what arises for our consideration is the interpretation of the term "whole debt" occurring in Sub-section (2) of Section 47 of the Act. In other words, the question is whether the entitlement of a secured creditor to "whole debt" includes the right to claim interest at the contractual rate even after adjudging an applicant as insolvent under the Act till payment of the whole debt.

5. Before dealing with the above question, it is profitable to notice relevant provisions of the Act. Sub-sections (1) and (6) of Section 28 read as follows :

"28 Effect of an order of adjudication -

(1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Sub-sections (1) and (2) of Section 47 of the Act read as follows:

"47. Secured creditors.-- (1) Where a secured creditor, realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt".

Section 48 reads as follows :

"48 Interest -- (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum -

(a) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication; or

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand, until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full."

6. u/s 47, a secured creditor can stand outside the insolvency proceedings and retain the security for the due realisation of his dues. If, however, a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt. This is on the reasoning that if the mortgage property fetches enough amount, then being a secured creditor, he is entitled to full payment of his dues. Under Sub-section (1) of Section 47, a secured creditor even after realising his security, may prove of his balance due to him after deducting the net amount realised. Therefore, it is clear that the secured creditor is entitled to full payment of his dues at the contractual debt till the date of payment. In so holding, we may derive support from the judgment of Allahabad High Court in Jugal Kishore v. Bankim Chandra AIR 1919 All 255 (1) and Judgment of Madras High Court in V.R. Ramasubba Raju Vs. Seshamma and Others, .

7. In Jugal Kishore's case (AIR 1919 All 255 (supra), the appellants therein are mortgagees of the property of the insolvent. The mortgaged property had been taken possession by the receiver and sold. The learned District Judge, Jhansi thought that the mortgagee was only entitled to interest at the contractual rate up to date of insolvency. A Division Bench of the Allahabad High Court while reversing the holding of the learned District Judge, Jhansi held:--

"In our judgment the Court below was quite wrong. The mortgagee, according to law, is clearly entitled to receive out of the proceeds of the sale of the mortgaged property his principal, interest and costs. He is entitled to receive interest up to the date of payment. A mortgagee as mortgagee is not a person proving in the

bankrupt's estate, he is a secured creditor and entitled to look to his security to realize the amount of the debt secured thereon. We do not think that the cases cited by the learned District Judge have any bearing on the question involved in this appeal. We allow the appeal, modify the order of the Court below by directing that the mortgagees, appellants here, must be paid the principal and interest (the latter calculated up to the date of payment at the contractual, rate mentioned in the mortgage)".

8. In V.R. Ramasubba Raju Vs. Seshamma and Others, , Venkatasubba Rao, J. speaking for the Madras High Court held that where Court is administering insolvent's estate, the unsecured creditors are entitled to interest from the sale proceeds up to the date of the preliminary decree, while the secured creditors are entitled up to the date of payment. While holding so His Lordship was pleased to observe thus :

"Next, as regards secured creditors the question presents no difficulty at all. On the analogy of the rule that obtains in insolvency, they are entitled to interest, from the proceeds of the sale of secured property, up to the date of payment: See Jugal Kishore v. Bankim Chandra (AIR 1919 All 255 (supra) I give my ruling accordingly."

9. Where this is the position in law, learned Counsel for the first respondent insolvent placing reliance on judgments of this Court in Canara Bank Vs. K.S. Kushalappa and others, and Karnataka State Financial Corporation Vs. Sri Nithyananda Bhavan and Another, sought to support the judgment of the Court below awarding interest at the contractual rate only up to the date of adjudging the first respondent as insolvent and/ at the rate of 6% per annum for the subsequent period. The two judgments of this Court cited by the learned Counsel for the first respondent insolvent are out of context and those decisions in no way support the contention of the learned counsel.

10. In Canara Bank Vs. K.S. Kushalappa and others, , what fell for consideration of this Court was that whether the ad litem interest given from the date of suit to the date of decree and from date of decree to the date of realisation at 6% per annum is in conformity with Section 34 of the CPC (for short the Code") or opposed to it? In that case, a suit was filed for recovery of money advanced to the respondents therein for development of their coffee estate and the same was decreed, but ad litem interest was granted at 6% per annum, that is to say, the maximum permissible under Sub-section (1) of Section 34 of the Code. It was contended that the loan advanced for the development of the Coffee Estate should be treated as commercial loan and the discretion should have been exercised by the trial Court in accordance with the proviso to Sub-section (1) of Section 34 of the Code to come nearer the contractual rate so far as it related to ad litem interest and therefore, this court should interfere. This Court while placing reliance on the judgment of this Court in Canara Bank v. B. Seshagiri Prabhu (1984) 1 Kar LJ 121 rejected that contention by holding:

"3. We do not think there is any force in that contention. By no means can it be said that development of Coffee Estate is either business or trade or commerce or industry for the purpose of Section 34. We find force in the contention that it is more within the area agricultural or horticultural operation and not any other. Therefore, the 6% per annum awarded as interest ad litem at two stages i.e., from the date of suit to the date of decree and from date of decree to the date of realisation is at the maximum rate. In other words, if at all there is proper exercise of discretion, it has been against the defendants and not against the plaintiff".

11. In Karnataka State Financial Corporation Vs. Sri Nithyananda Bhavan and Another, , the appellant was a Financial Corporation. The respondent, Narayana Ramchandra Naik, was a businessman and proprietor of a hotel called "Nityananda Bhavan" at Ramadurg, Belgaum District. In 1970, the Corporation sanctioned a loan of Rs. 2 lakhs for expanding the hotel business, out of which the respondent obtained Rs. 1,59,000/-. The loan was repayable with interest at 9% per annum in twenty half yearly equal instalments and the first of such instalments was payable on 22nd February, 1972. If the instalments were not paid on due dates, they should carry interest at 11% per annum from the due date up to the date of payment. The respondent committed default in payment of the instalments. The Corporation, therefore, moved the District Judge u/s 31 of the State Financial Corporation Act, 1961, for a declaration that the respondent was due in a sum of Rs. 2,00,348-36 and interest at 11% per annum on Rs. 1,59,000/- from the date of petition till the date of payment. The respondent resisted the claim of the Corporation contending inter alia that the Corporation did not maintain proper accounts and it has not credited to the account all the amounts paid by him from time to time. He also disputed his liability to pay interest at 11% per annum. The learned District Judge decreed the suit, but while allowing interest during pendency of the proceedings and further, he awarded only 6% per annum. In other words, the learned District Judge allowed 11% interest in regard to the arrears of instalments from the date of default, but limited the current interest to only 6% during pendency of the proceedings till payment. Aggrieved by that part of the decree relating to current interest, the Corporation preferred the appeal. On behalf of the Corporation, it was contended that the loan given to the respondent was a commercial transaction and 11% interest was a contractual rate of interest agreed upon between the parties and, therefore, the Corporation is entitled to collect it. It was also contended that learned District Judge did not give any reason why that contractual rate of interest should be reduced to 6% when particularly, it was not disputed that the respondent has admittedly defaulted to pay the installments as per the schedule of repayments.

12. In the above factual background and in premise of the contentions advanced before the Court, this Court in paragraph-11 held thus:

"11. The Court, under the proviso to Section 34 of the CPC, has to exercise a

judicial discretion whether to award more than 6% per annum. The Court being a donee of the statutory power, has a "duty to act fairly" in the discharge of its discretionary duty. The discretion conferred on the Court to award interest exceeding 6% appears to have an object behind. It expressly pertains to commercial transactions. It impliedly distinguishes a commercial loan from an agricultural loan. Probably it expects a quick return from commercial investments unlike in the agricultural investments."

13. We are at a loss to understand how the judgments of this Court in *Canara Bank Vs. K.S. Kushalappa and others*, and *Karnataka State Financial Corporation Vs. Sri Nithyananda Bhavan and Another*, would in any way support the contention of the learned Counsel for the first respondent-insolvent. In both the cases, this Court was called upon to decide the validity of the discretion exercised by the Civil Court u/s 34 of the Code and scope of its exercise. Be that as it may, when the Act itself enacts specific provisions in Sections 47 and 48 of the Act in the matter of awarding interest, there is no necessity to fall back upon the provisions of Section 34 of the Code and the case laws handed down by the courts in interpreting Section 34 of the Code.

14. In this case, under the loan agreement it is specifically agreed between the parties that the loanee has the liability to pay interest at the rate of 15.5% per annum and 24% per annum on delayed payments. Under Sub-section (2) of Section 47 of the Act where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt. Section 48 deals with award of interest. Under Sub-section (2) of Section 48 of the Act the creditor could be entitled to interest at the rate of 6% per annum only if there is no agreement for payment of interest and if the creditor is an unsecured creditor. In this case, the agreement between the parties specifically provides that interest should be paid at the rate of 14.5% per annum and at the rate of 24% on delayed payments. Therefore, the secured creditor is entitled to interest at the contractual rate and not at 6% as envisaged in Sub-section (2) of Section 48 of the Act.

15. In conclusion, we cannot sustain the impugned order. In the result, we allow M. F. A. No. 1539 of 2002 with no order as to costs. In modification of the impugned order dated 18-2-2002 passed by the Court of the VI Additional City Civil Judge, Bangalore, we direct payment of interest at the contractual rate of 14.5% per annum on the amounts due on the outstanding dues till payment.