(1998) 08 DEL CK 0053

In the Delhi High Court

Case No : Suit No. 903 of 1977

Canara Bank APPELLANT

Vs

Four A Asbestos Pvt. Ltd. and Others RESPONDENT

Date of Decision : 26-08-1998

Acts Referred:

Citation : (1998) 75 DLT 430 : (1998) 47 DRJ 508 : (1998) 120 PLR 67

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Bk. Bikram Singh, for the Appellant; B.J. Nayyar, for the Respondent

Judgement

M.K. Sharma, J.—The present suit has been instituted by the plaintiff bank against the defendants for recovery of a sum of Rs.1,99,618.08 Along with interest accrued thereon from 1.9.1977 by sale of mortgaged properties and in the event of there being any shortfall after sale of the aforesaid mortgaged properties for a joint and several decree against the defendants for recovery of the aforesaid amount.

2. The suit was originally instituted by Lakshmi Commercial Bank Limited. The said bank was however, subsequently amalgamated with the Canara bank and all suits, appeals and proceedings pending at the time of the notification amalgamating the said bank with the plaintiff bank were authorised to be prosecuted and enforced by the plaintiff bank and accordingly, the Canara Bank is substituted as the present plaintiff.

3. The defendant No.1 was incorporated as a Private Limited Company with defendants No.2 to 9 as its Directors. The defendant No.1 was wound up by orders of this court in C.P. 26/1976 by an order dated 28.9.1976. After the order of winding up the plaintiff bank filed an application u/s 446 of the Companies Act which was registered as C.A.No. 187/197, seeking permission of the. High Court to institute the present suit. The Company Judge of this court by his order dated 22.8.1977 accorded the permission for filing of the suit.

4. The defendant No.1 initially opened a current account with the Lakshmi Commercial Bank Ltd., hereinafter called for short ''Commercial Bank'' at its Connaught Circus Branch, New Delhi on 18.6.1971. A request was made by defendant No.1 to the Commercial bank for making available to the defendant No.1 banking facilities to the tune of Rs.1,20,000/- which was to be bifurcated as Fixed Term Loan for Rs.80,000/- and Cash Credit Limit against security of stocks in trade for Rs.40,000/-. The Bank agreed with the aforesaid request of defendant No.1 and allowed the defendant No.1 banking facilities to the extent of an amount of Rs.1,20,000/- in all, out of which cash credit limit facility was advanced for an amount of Rs.40,000/- bearing interest at 11% per annum and secured against equitable mortgage of property bearing No.4/13, Roop Nagar, Delhi standing in the name of defendant No.2 and an amount of Rs.80,000/- as term loan bearing interest of 11.5% per annum against regular mortgage of machinery belonging to defendant No.1 and also property No.4/13, Roop Nagar, Delhi belonging to defendant No.2. In terms of the aforesaid request of defendant No.1 and consequent sanction by the bank the defendant No.1 was allowed cash credit limit of Rs.40,000/- by opening an account on 26.7.1971. It is stated in the plaint that the defendant executed various documents witnessing the account and the defendant No.2 acknowledged the aforesaid loan by depositing the title deeds of his property unto the bank and the defendants 2 to 9 executed sureties bonds. Similarly, a term loan of Rs.80,000/- was allowed by the Commercial bank in favor of defendant No.1 in terms of which a regular mortgage deed of the properties of defendants No.1 & 2 was executed on 21.7.1971, defendant No.1 mortgaging the machinery and defendant No.2 mortgaging the aforesaid property at Roop Nagar, Delhi unto the Bank. The aforesaid mortgage deed was also registered. Subsequent to the grant of the aforesaid facilities the defendant failed to operate the account regularly and diligently as agreed upon by them and the operation of the account, it is alleged, became irregular. It is further stated in the plaint that the defendants did not repay the term loan installments nor did they operate the cash credit amount in terms of the agreement. The defendants were called upon to pay the amount due to the plaintiff by serving a notice. Since no steps were taken for repayment of the dues the present suit was instituted for the aforesaid reliefs.

5. The suit was contested by the defendants by filing their written statements and on the pleadings of the parties altogether 18 issues were framed reading as under:

1. Whether the suit has been instituted, signed and verified by a duly authorised person? (OPP).

2. Whether the suit is within time? (OPP).

3. Whether the suit is barred under Order 34 of the Code of Civil Procedure? (OPD).

4. Whether suit is bad for mis-joinder of parties and/or causes of actions? (OPD).

5. Whether suit is not maintainable for the reasons stated in para 4 of the preliminary objections on behalf of defendants No. 2 and 4? (OPD 2 and 4).

6. Whether defendant No.4 is not liable for the amount claimed for the reasons stated in para No. 9 of the preliminary objections on behalf of defendants No. 2 and 4? (OPD 2 and 4).

7. Whether suit is not maintainable for the reason of non-compliance of Rule 117 of the Companies Court Rules? (OPD).

8. Whether suit is barred as against defendants No. 5 and 6 for the reasons stated in para 4 of the preliminary objections on behalf of defendants No.5 and 6? (OPD 5 and 6).

9. Whether defendants No. 5 and 6 are not liable for the claims made for the reasons stated in para No.5 of the preliminary objections on behalf of defendants No. 5 and 6?

10. Whether plaint is liable to be rejected for the reasons stated in para 6 of the preliminary objections on behalf of defendants No. 5 and 6?

11. Whether the surety bonds executed by defendants No.2 to 10 stand varied and/or against defendants is discharged? (OPD). (Placing of onus of proof objected to).

1.2. Whether plaintiff is guilty of any suppression of facts? If so, to what effect? (OPD).

13. Whether defendant No.2 did not deposit the title deeds of property No.4/13, Roop Nagar, Delhi with the plaintiff by way of equitable mortgage? (OPD 2).

14. Whether defendant No.2 did not mortgage the property No. 4/13, Roop Nagar, Delhi by way of regular mortgage in favor of the plaintiff?

15. Whether defendant No.2 is not liable to the plaintiff in his personal capacity?

16. Whether there was any understanding between the parties that plaintiff will not exercise the option for recovery of loan amount against defendant No.2? If so, to what effect?

17. To what amount is the plaintiff entitled to and from whom?

18. Relief.

During the course of trial, the plaintiff examined 3 witnesses whereas the defendant examined only 1 witness namely - Shri Sat Pal Khanna, who is defendant No.4.

6. I have heard the learned counsel for the parties and have given my thoughtful consideration to the issues involved in the suit.

ISSUE NO. 1:

7. P.W.I, Shri M.K.Madan, has stated on oath that he was the Secretary of Lakshmi Commercial Bank. He has placed on record the resolution of the Board of Directors of the Lakshmi Commercial Bank taken on 7.1.1977. The said resolution was passed by the Board of Directors of the Lakshmi Commercial Bank on 17.1.1977 and marked as Ex.P-23. It is stated on oath that Shri R.S.Sharma was the Assistant General Manager of Lakshmi Commercial Bank and that he was the holder of General Power of Attorney from the Commercial bank. It is also stated that Shri Apresh Rajan was the Secretary of the Commercial Bank. The witness has proved the writing as also the signatures of both Shri Apresh Rajan as also of Shri R.S.Sharma. The resolution of the Board of Directors is in the hand of Shri Apresh Rajan and is signed by Shri Ishwar Singh Bajaj. As against the aforesaid evidence led by the plaintiff no rebuttal evidence is led by or on behalf of the defendants to show that the suit has not been instituted, signed and verified by a duly authorised person, Therefore, I hold that the plaintiff has been able to prove through clinching evidence on record that the suit has been instituted, signed and verified by a duly authorised person. This issue stands decided in favor of the plaintiff.

ISSUE N0.2:

8. It is stated in the plaint that the cause of action for filing the suit arose from time to time when the term loan and installments became payable by the defendants to the plaintiff bank and also when the operation of the account was suspended as on 31.1.1975. The suit was instituted on 11.10.1977. It further appears from the evidence on record that the defendants confirmed their account on 30.12.1974. No rebutting evidence has been led by the defendants to prove and establish that the suit is not within period of limitation. Thus, it is held that the present suit has been instituted by the plaintiff within the period of limitation. The issue stands decided in favor of the plaintiff and against the defendants.

ISSUES NO.3,4,5 & 7:

9. The onus of proof of these issues was placed on the defendants. No evidence whatsoever has been led by the defendants to prove their case in respect of the aforesaid issues. Thus these issues are answered against the defendants and in favor of the plaintiff.

ISSUES NO.8 & 10: .

10. No evidence has been produced in the suit by the defendants No.5 & 6 and Therefore, I hold that the said defendants have failed to prove and establish the preliminary objections taken by them in paragraph 4 of their written statement. These issues are thus decided against the defendants.

ISSUE NO.12:

11. The onus of proving this issue was also placed on the defendants. No evidence has been led by any of the defendants to prove and establish their allegation that the plaintiff is guilty of suppression of any facts. This issue is

accordingly decided against the defendants and in favor of the plaintiff.

ISSUES NO.6,9,11 & 13-18:

12. As the remaining issues are co-related I propose to discuss the said issues together and record my findings as hereunder:

It has been brought on evidence that defendant No.1 was availing two credit limits from the bank - (i) a term loan for an amount of Rs.80,000/- and (ii) cash credit limit for an amount of Rs.40,000/-. The plaintiff has also placed on record the original ledger pertaining to the account of the defendants. That the said statement of account has been proved as Ex.P-24 which is a correct copy of the account of the defendants drawn from the original ledger pertaining to both the accounts. The application for grant of loan given by defendant No.1 on 21.6.1971 is exhibited as Ex.P-1. The fact of giving loan to the defendant No.1 was also registered with the Registrar of Companies in support of which a statement of account being Ex.P-24 has been placed on record. My attention has been drawn to the application registered as LA. No.6878/1991 filed on behalf of defendants No.2 & 4. With the said application an affidavit of Shri S.P.Khanna, defendant No.4 in the suit has been annexed. Another affidavit of Shri R.P.Khanna, namely - defendant No.2 is also annexed to the said affidavit. In the said application the aforesaid two defendants have stated that the defendant has given an application for compromise with the bank. A photo copy of the aforesaid application is annexed to the aforesaid application marked Annexure ''A'' and exhibited in the trial as Ex.DW 1/4. Since the contents of the said application have a strong bearing in respect of the issues to be decided by me I feel tempted to extract the relevant portion of the said letter, which reads thus:-

You were pleased to sanction a limit to the above firm for Rs.1,20,000/-against hypothecation of stock and mortgage of Machinery belonging to the above company.

Due to internal dispute among the Directors, inefficient handling of the affairs of the company, and it being a small scale unit always short of funds, it failed to meet its commitments with the bank.

As you are aware that the Bank has filed a suit against all the Directors of the Company for the realisation of its dues. The original amount advanced was Rs. 1,20,000/- which at the time of filing the suit had become Rs. 1,99,618.08 as the directors were cheating the company and had nothing at stake.

I am the only one who is affected party and my only property is mortgaged with the bank. With my untiring efforts I have been able to get the machinery of the company located, which is in the possession of one of the Directors of the Company".

13. From the contents of the aforesaid letter it is apparent that the aforesaid defendants have admitted that although the original amount advanced to the defendant No.1 was Rs.1,20,000/-, the same came to be at the time of filing of

the suit as Rs.1,99,618.08, Thus in my considered opinion the claim of the plaintiff stands admitted in the aforesaid application filed by defendants 2 & 4, who are at the moment contesting the present suit.

14. Mr. Nayyar appearing for the said defendants sought to make out a case that the actual principal amount due from the defendants to the plaintiff was Rs.1,20,000/-only. He further submitted that the defendants, subsequent to the institution of the suit, have paid an amount of Rs. 1,29,363.10 and accordingly, the principal amount stands paid and therefore ,the defendants, if at all are liable, might be liable to pay interest at a reasonable amount.

15. The aforesaid submission of the learned counsel for the defendants stands nullified by the aforesaid admission made by the said two defendants in the aforesaid application. Mortgage deed executed by the defendant No.2 creating an equitable mortgage for Rs.40,000/- has been placed on record. The said mortgage deed which is a registered deed marked Ex.P-12 also indicates that there is an admission therein of the term loan for the amount of Rs.80,000/-. The surety bonds executed by the defendants No.2 to 9 have also been placed on record and exhibited as EX.P-20. The statement of account which is certified under the Bankers'' Book Evidence Act and placed on record as an exhibit also proves and establish that at the time of institution of the suit the amount due and payable by the defendant No.1 to the plaintiff as against the cash credit and term loan account was Rs.1,99,618.08.

Counsel appearing for the defendants submitted that an amount of Rs.60,000/- was deposited by the defendants prior to the filing of the suit as against the amount due and payable by the defendants which is not reflected in the statement of accounts filed by the plaintiff. The defendant No.4, who was examined as a witness, however, stated that he has neither any receipt nor any documentary proof to show that a payment of Rs.60,000/- was made before the suit was instituted. As against the aforesaid statement made on behalf of the defendants the witnesses examined on behalf of the plaintiff have categorically stated that no such payment of Rs.60,000/-has been made by the defendants and Therefore, it has not been reflected in the statement of account. Thus in the absence of any cogent and reliable proof it cannot be held that any such amount was paid by the defendants to the plaintiff. Counsel for the defendants also tried to rely upon the statement made by Shri Anil Kalra, who was examined as PW3 in rebuttal. The said witness had stated that the writing in PW3/D-3 which is a statement of account is in his hand. According to the counsel the correct entries therein and the balance amount shown are incorrect and Therefore, no reliable credence could be put on the documents produced by the plaintiff. The said submission of the learned counsel is also misplaced inasmuch as the witness has categorically stated that the credit entries in the said writing in Ex.PW3/D-3 are correct, except for the balance amount shown which is incorrect. He has also given an Explanation as to why the said balance amount shown is not correctly depicted when he states that the balance shown is not correctly shown as the amount of interest due has not been calculated when the aforesaid balance was drawn. The Explanation is reasonable and reliable and as such nothing turns out on the said discrepancy pointed out by the counsel for the defendant.

16. It is however, an admitted position that subsequent to the filing of the suit the defendants have made payment to the plaintiff in respect of the aforesaid two accounts in the following manner:-

20.08.1990 39,363.00

08.05.1991 25,000.00

20.06.1991 25,000.00

10.10.1991 15,000.00

16.05.1992 25,000.00

1,28,363.00

Thus a total amount paid by the defendants to the plaintiff subsequent to the filing of the suit is Rs. l,29,363.10. For due recovery of the amount advanced against the aforesaid term loan and cash credit limit facilities the defendant No.2 executed a mortgage deed mortgaging his property situated at 4/13, Roop Nagar, Delhi. Similarly, defendant No.1 also mortgaged the machineries as detailed in the said mortgage deed. This court took necessary steps for sale of the machineries hypothecated to the plaintiff bank by the defendant No.1 in order to credit the sale proceeds to the account of the defendants. The defendants No.2 to 4 however, failed to ensure delivery of the machines although by an order dated 25.3.1992 defendants 2 to 4 were permitted to recover possession of the machines from defendant No.8 even through police aid.

This court on consideration of the entire facts and circumstances of the case by order dated 13.10.1992 relied upon the statements made by the counsel for the defendants 2 to 4 that it was not possible to recover the machines and hand over the same to the plaintiff in view of the fact that the machinery in question had been burnt in the year 1984 and is no longer available and came to the conclusion that there is no justification for pursuing the matter of recovery of machines and sale thereof. Thus it is proved and established that the machineries mortgaged with the plaintiff bank are not available for taking into custody and possession and sale thereafter. The only mortgaged property Therefore, now left under the custody and protection of this court in the suit is the property of defendant No.2 situated at 4/13, Roop Nagar, Delhi, which is mortgaged in favor of the bank by defendant No.2, for due recovery of any sum due to the plaintiff in respect of the aforesaid two accounts. The defendants No.2 to 10 have all executed surety bond on 26.7.1971 for being liable for repayment of the amount due to the plaintiff bank from defendant No.l. The said surety bonds have also been exhibited and the witness produced on behalf of the plaintiff has proved the same.

21. In view of my foregoing discussions, I am of the considered opinion that at the time of filing of the suit a total amount of Rs. 1,99,618.08 was due and payable by all the defendants jointly and severally to the plaintiff as against the cash credit account and term loan account. The defendant No.1 has since been wound up and Therefore, the remaining defendants namely - defendants No.2 to 10 are liable jointly and severally to pay the said amount to the plaintiff bank.

22. The next issue that arises for my consideration is whether any interest is payable by the defendants on the aforesaid amount. The evidence adduced by the parties and the application filed by the defendants No''.2 & 4 indicates that the defendants were willing to pay a reasonable rate of interest on the amount found due from the plaintiff. The defendants No.2 and 4 had also in fact suggested that they were agreeable to pay 10% interest on the principal amount due to the plaintiff. On the other hand, according to the counsel for the plaintiff atleast 17% per annum interest should be levied on the principal amount due and payable to the plaintiff if not higher rate of interest, which could be @ 21% per annum.

23.1 have given by anxious consideration to the aforesaid submissions of the counsel for the parties and I am of the considered opinion that defendant No.1 has been wound up the defendant No.2 who had mortgaged his properties and other defendants who stood as surety deserve sympathetic consideration and exercise of my dis- correction in this regard. I, Therefore, levy an interest of 12% per annum on the aforesaid principal amount found due and payable by the defendants to the plaintiff which in my considered opinion would be reasonable in the facts and circumstances of the case. Thus a preliminary decree is granted in favor of the plaintiff for an amount of Rs.1,99,618.08 with interest @ 12% per annum from the date of filing of the suit till the date of realisation minus the amount of Rs. 1,29,363.10 deposited by the defendants on different dates. It is however, made clear that the interest aforesaid will be calculated on the reducing balance.

24. Thus the defendants shall pay unto the court within six months from today the aforesaid amount including interest and costs found due and payable by all the defendants jointly and severally to the plaintiff. It is also ordered that in default of payment as aforesaid the plaintiff may apply to the court for a final decree for the sale of the mortgaged property and for recovery of the balance due, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold.

