

(2011) 01 DEL CK 0403

In the Delhi High Court

Case No : CS (OS) 1061 of 2007 and I.A. No. 6752 of 2007

Dynamic Continental Pvt. Ltd.

APPELLANT

Vs

UCO Bank

RESPONDENT

Date of Decision : 21-01-2011

Acts Referred:

Citation : (2011) 3 BC 575 : (2011) 177 DLT 625 : (2011) 123 DRJ 312

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : R.K. Gupta, A.N. Aggarwala, Pawan Verma and Rekha, for the Appellant; C.M. Manktala, for the Respondent

Judgement

S. Ravindra Bhat, J.—The Plaintiff, a private company, sues through its Director, Mr. Pawan Garg. It claims a declaration that no amount is payable to the Defendant (hereafter called "the bank") as repayment, or prepayment charges.

2. The Plaintiff is involved in the real estate business, particularly in the development of shopping-malls-cum-multiplexes in Ludhiana. It decided to construct a shopping-mall-cummultiplex called "Flamez" at the premises, measuring 4140 square yards in area, owned by the Plaintiff at Gurdev Nagar, Ludhiana. For this purpose the Plaintiff applied for a term loan from the Defendant. The estimated total cost of the project at the time was approximately Rs. 33 crores.

3. The Bank sanctioned a term loan of Rs. 18 crore on 20.5.2005, to partly finance the cost of the project on certain terms and conditions. The loan sanction document stated that the loan would be repayable-

In 24 quarterly instalments to commence after an initial moratorium period of 24 months from the date of first disbursement.

The other terms and conditions in the sanction letter were as follows:

(i) Equitable mortgage of title deeds of land and building of the Plaintiff, being

two plots measuring 4140 sq. yards, at Ludhiana;

(ii) Personal guarantee of Shri Pawan Garg for Rs. 29.33 crores.

According to Special Covenants incorporated in the sanction letter (produced as Ex. P-1) the Plaintiff could execute the conveyance deed in favour of the prospective buyers of its commercial space after the bank's dues were fully repaid; till that time, it could issue allotment letters to such prospective purchasers, and could receive gradual payments linked with progress in construction of the building through escrow account. Special covenant Nos. 2 and 3 read as follows:

2. Sale proceeds and advance against sale should be deposited with us in the Escrow account to be opened with us.

3. If any space in the complex is sold on outright basis the entire sale proceeds to be deposited with Bank towards Part/Full liquidation of the loan. In no case proceeds of sale to be used for any other purpose.

4. At the request of the Plaintiff, the Bank agreed to amend some of the terms of the sanction letter. This letter dated 4.6.2005 is exhibited as Ex. P-2. The amended/clarified terms further provided that

2. The company is allowed to execute conveyance deed to prospective buyer before liquidation of bank finance subject to the receipt of full consideration from the buyers and depositing the same in the bank.

....

5. Prepayment charges shall be levied only when a company prepays our loans by borrowing from other sources....

5. During the construction, the project costs escalated and the Plaintiff approached UCO Bank for the enhancement of the loan amount to Rs. 25 crore from Rs. 18 crore, which was turned down by the bank. The Plaintiff again approached the bank - on 25.1.2007 - for a loan under a new scheme called the "UCO Rental Scheme" against the future lease/rent discounting scheme for Rs. 30 crores for the purpose of adjusting its outstanding loan and to meet the escalated costs. It is alleged that UCO Bank asked for more stringent conditions on the loan, by their response (Ex. P-3, dated 29.3.2007) and the Plaintiffs were unable to furnish the details required by them, and therefore, did not go ahead with the transaction. The Plaintiff, instead, proceeded with the offer of the Punjab National Bank (PNB) which had agreed to disburse the loan of the amount of Rs. 30 crores.

6. PNB apparently accepted the offer of the Plaintiff, and disbursed the loan under future rent/lease discounting scheme with the condition that the title deeds of the said commercial property would be submitted with the PNB as security. The PNB,(says the Plaintiff) issued a banker's cheque and cleared the outstanding loan amount on behalf of the Plaintiff, for an amount of Rs. 1820

lakhs and requested UCO Bank to deliver the title deeds to it. The UCO bank, through its letter to its Chief Manager (Ex. P-4) said that the amount, on being handed over by PNB, was for adjustment of the Plaintiff's outstanding. PNB, by its letter of 30th March, 2007, asked the UCO bank to acknowledge the pay order for Rs. 18.20 crores and deliver the title deeds forming the security for the transaction (Ex. P-5)

DYNAMIC CONTINENTAL

7. In these circumstances, by a letter marked as Ex.P-8, UCO Bank, on 7.4.2007, demanded Rs. 40,80,596.60 as charges payable by the Plaintiff in accordance with its guidelines. This was condition imposed by it towards release of No Objection Certificate and registration of satisfaction of charge with Registrar of Companies. The Ex. P-8 is reproduced below:

Ref. No. UCO/MCU/07-08/46/16 Date: 7.4.2007 M/s Dynamic Continental Pvt. Ltd.,

K-28, Green Park Extension,

New Delhi -110 016.

Dear Sir,

Please refer to your letter dated 30.3.2007 whereby we were informed that Punjab National Bank, Ludhiana had agreed to release funds against rent securitization of the various leaseable spaces of the Mall. It was stated that PNB would be directly transferring /releasing the payment in our favour towards satisfaction of term loan taken by the company against mortgage of the Ludhiana Property. Accordingly, PNB was advised to transfer Rs. 18,20,00,000/- to your accounts towards full and final payment of the loan. The amount will cover outstanding dues and interest till date. It was also undertaken by the company that in case any future outstanding appears against the company due to any mistake, short charging or otherwise, the company shall be responsible for the same and undertake to make the payment of the same. A Pay Order No. 675456 dated 30.3.2007 for Rs. 18,20,00,000/- was forwarded to our C.L. Ludhiana Branch by PNB, Feroze Gandhi Market, Ludhiana Branch under cover of their letter No. FGM/L/IAP/ dated 30.3.2007. The Pay Order was placed in the clearing and the same was realized on 4.4.2007. On getting the intimation from our C.L. Ludhiana Branch, the proceeds of the Pay Order was credited to the loan account of your company on 4.4.2007.

In regard to the request of the company for release of the Title Deeds, issuance of NOC and registration of satisfaction of charges with ROC, we would request you to pay the prepayment charges as per the terms and conditions of the sanction of the loan. After receipt of the pre-payment charges, we would be able to accept what has been requested by the company.

As per the guidelines of the bank, the company is supposed to pay the following

amount as per-payment charges:

1. Amount of outstanding as of 4.4.2007 Rs. 18,17,79,963.46
2. Pre-payment charger @ 2% Rs. 36,35,599.26
3. Service tax @ 12.24% Rs. 4,44,997.34
4. Total Payable (2+3) Rs. 40,80,596.60

We advise you to pay the above mentioned amount as early as possible for release of the documents to PNB.

Thanking you,

Yours Faithfully

Asstt. General Manager.

8. It is submitted that the demand by the UCO Bank to the said sum of Rs. 40,80,596.60 is untenable and without justification as well as contrary to the contract. The Plaintiff relies upon the Special Covenant No. 3 of the original sanction letter which stipulated that if any space in the complex is sold on outright basis, the entire sale proceeds to be deposited with bank towards part/full liquidation of the loan. It is submitted that the Plaintiff had sold and realized Rs. 24,12,83,000/- as on 16.1.2007 towards part of the area sold in the complex and also realized Rs. 1,41,03,963.65 as on 23.3.2007. Consequently, the total realization of the sale proceeds exceeded the outstanding term loan of Rs. 17,99,84,620/-. The Plaintiff, therefore, urges that the loan became due for repayment as on 16.1.2007 as itself by operation of Special Covenant No. 3. It is, therefore, argued that in terms of standard of payments agreed upon by the sanction letter of 20.5.2005, the repayment was to commence after a moratorium period of 24 months from the first date of disbursement. Such condition, therefore, become inapplicable and the amount became repayable on 16.1.2007. The Plaintiff also submits that its representation for waiving of pre-payment/re-payment charges made on 7.4.2007 because the sale proceeds and advance against the sale proceedings had to be deposited towards full or partial liquidation of the loan as a result of which realization towards release rentals was deposited, was rejected. The Plaintiff's representation dated 7.4.2007 is produced as Ex. P-9; the UCO Bank's rejection by letter dated 13.4.2007 is marked as Ex. P-10. On these allegations, the Plaintiff claims a declaration that the letter by UCO Bank dated 7.4.2007 imposing pre-payment charges is illegal and also seeks a consequential permanent injunction restraining the bank from claiming Rs. 36,35,599.26 as pre-payment charges and as a condition for release of the title deeds.

9. The UCO Bank in its written statement does not deny the sanction letter issued to the Plaintiff for disbursement of the loan, and the modification. It, however, emphasizes that the Plaintiff was under an obligation to deposit the sale proceeds and advance received by it through Escrow Account with the bank itself.

Furthermore, if any space in the complex was sold on outright basis, the entire sale proceeds was to be deposited with the bank towards part or full liquidation of the loan and under no circumstances any amount to be used for any other purpose. The repayment of loan in part or full could attract pre-payment charges in accordance with existing guidelines (of the Bank) and also prepayment charges could be levied in case the Plaintiff liquidated the advance amount payable by borrowing from other sources.

10. The UCO Bank submits that it was not convinced about the Plaintiff's requirement for a further loan of Rs. 30 crores towards the new scheme since it (the Plaintiff) had already sold and realized Rs. 24,12,83,000/- as on 16.1.2007 and also realized an additional amount of Rs. 1,41,03,963.65 as on 23.3.2007. The Defendant alleges that these amounts were not deposited in the Escrow Account as agreed upon in the sanction letter and further modified terms dated 4.6.2005.

11. The UCO Bank asserts that pre-payment charges became available after payments were received on behalf of the Plaintiff through borrowing from other sources i.e. the Punjab National Bank. It is submitted that the bank had to secure its interest and ensure that all the contractual terms including the commission, interests, costs and any other charges which were payable by the borrower were in fact disbursed or paid. Since the Plaintiff did not make payment in respect of the pre-payment charges, there was no question of releasing the title deeds.

12. The Plaintiff in the replication denies the averments in the written statement. It reiterates that the liability to repay the term loan amounts was to be only out of the sale proceeds of the area sold on outright basis in terms of Special Covenant No. 3 or by 24 quarterly installments after the initial moratorium period of 24 months. As a result, says the Plaintiff, the liability to repay the loan commenced on sale of the space as on 16.1.2007 and, therefore, there was no question of pre-payment of the loan since the liability to repay the loan had not even commenced.

13. Since the question arising for consideration and adjudication in this case lies within the narrow compass i.e. the interpretation of the term of the contract stipulating repayment/prepayment as per the sanction letter dated 20.5.2005 and 4.6.2005 which are in turn integrally connected with the deed of commencement of Plaintiff's liability - to make the repayments by instalments or otherwise - this Court had recorded the consent of parties on 19.4.2010 that suit could be finally heard in terms of the pleadings and existing documentary evidence without the necessity of oral evidence. The Plaintiff had, however, deposed by then, and his cross examination had been recorded. The Court had, therefore, on that date recorded the following order:

It is agreed that even though the cross-examination of the Plaintiff's witnesses has been conducted, the nature of the dispute in the suit is such that oral

evidence is not necessary and that it can be decided on the basis of documentary evidence as it involves interpretation of contractual terms. Learned Counsel for the parties, therefore, submit that Court may set down the suit for final disposal on convenient dates on the basis of existing material i.e. the affidavits of the Plaintiff's witnesses, existing statements as well as documents available on the record. It is submitted that in these circumstances the parties waive the right to lead the further oral evidence. In the light of the submissions, the existing material which includes the affidavits/deposition of the parties shall be treated as a part of the record along with depositions/statements made by the Plaintiff's witness, so far.

14. In view of the above, the sole issue which arises for consideration in the present case is whether the Plaintiff is liable to pay the sum of Rs. 36,35,599/26 to the Defendant UCO Bank and is consequentially entitled to declaratory and injunctive reliefs.

15. The crux of the dispute is about whether the Defendant bank is entitled to prepayment charges on the loan amount, payable by the Plaintiff. There is no dispute between the parties about the following facts:

(1) A loan of eighteen crores was sanctioned to the Plaintiff, to "part finance the cost of the project", by the UCO Bank, on 20.5.2005.

(2) The loan was repayable in 24 quarterly installments to commence after an initial moratorium period of 24 months from the date of first disbursement. The sanction letter contains only a reference to repayment.

(3) The amendment letter dated 4.6.2005 Ex. P-2 stated that prepayment charges were leviable if the loan was repaid by borrowing from another bank.

(4) No indication of the rate, of the said repayment or prepayment charges were indicated; the only reference point here was in the original sanction letter of 20th May, 2005, which stated that the repayment charges would be as per Bank's guidelines. No guidelines were produced along with the list of documents entered by the Bank.

16. The construction that is placed on the contract by the Plaintiff is that the amended terms implied that the prepayment charges could only be levied till the time the liability to pay does not arise. The effect of the amended terms was that the liability to pay could arise on the sale of the property on an outright basis, as the proceeds of the sale had to be deposited to the Defendant directly, or on the completion of the 24 month moratorium period, whichever is earlier. Since, the premises had been sold and the money realized was more than what they were liable to pay, the liability to pay had already arisen and so no pre-payment charges could be levied, as it was no longer "pre-payment". The loan had already become due. The Plaintiff here concedes in the suit averments itself that a sum in excess of Rs. 25 crores had been received by it, towards sale or part sale of some of the portions of the shopping complex. In the circumstances, it was

necessary for it to prove that there was full compliance with terms of Special Covenant No. 3, as modified by stipulation No. 2, in the letter of 4.6.2005, i.e. that the amounts were kept in a designated Escrow account. The evidence on this regard is ambiguous and vague. In the pleadings, the Plaintiff does not specifically state that the Escrow account had been opened, and that the Defendants had the benefit of the amounts, with them, as a result of which the repayment period never began, for the prepayment charges could be recovered. The UCO Bank has, in the Written Statement denied that such account was opened, or that any amount was deposited.

17. The cross-examination of the Plaintiff reveals a confusing state of affairs, which does not inspire too much confidence as far as his testimony or version is concerned, particularly on two aspects. The first one relates to the deposit of the sale proceeds in the bank account, with regard to which he first stated that the sale proceeds were deposited in the bank account and then retracted to state that "it is a matter of record whether any amount was deposited in the loan account". The second relates to the utilization of the loan taken from Punjab National Bank. At first, he suggested that the loan taken from PNB was not utilized for repayment of the loan to UCO Bank and later on stated that it was actually the loan from PNB that had been utilized to settle the loan taken from the UCO Bank. Eventually, he stated that he did not recall whether the loan raised from PNB was utilized for paying back the loan to UCO Bank. In view of this discussion, it is held that in the absence of any document, disclosing that the Plaintiff had complied with the requirements spelt out in the amended sanction letter, it is held that the Plaintiff did not in fact deposit the amount, as required of it, in a designated Escrow account. Consequently, the Plaintiff did not deposit the amount as agreed.

18. That brings the discussion to the tenability of the Plaintiff's argument that the repayment liability had not commenced, since it had sold and realized about Rs. 25 crores, which made Special Covenant No. 3 of the original sanction letter operative, and resultantly, there was no question of pre-payment. In short, the Plaintiff contends that having realized such amount, by virtue of conditions imposed, the bank cannot call the amounts as pre-payments, and levy the impugned amount of Rs. 36 lakh. Though such a submission is attractive, the Court is not inclined to accept it. The moratorium period of 24 months from the date of first disbursement, is an agreed milestone. The payment to be made as per the mechanism provided under Special covenant 3 provided for a contingency, i.e. prospective sale. In case such sales did not realize the expected potential, the bank was exposed to loss. Furthermore, as held previously, in the absence of anything to show that the Plaintiff had acted on or complied with such condition, its liability to fulfil all parts of the contract, could not be absolved. Here, the Court is not unmindful of the circumstance that the Plaintiff had not paid any amount towards the outstandings; virtually the entire amount was paid by PNB. This fact itself undercuts the Plaintiff's argument that amounts had to be or were deposited with the bank. The Plaintiff was in a hurry to avail of further

loans, which the PNB was willing to offer to it; it therefore, borrowed the outstanding amount and repaid the same to UCO Bank. It is therefore held that the Plaintiff was liable to pay prepayment charges for liquidating the liabilities of UCO Bank, by borrowing from other sources. This is in terms of Clause 5 of the letter Ex. P-3, which states that-

5. Prepayment charges shall be levied only when a company prepays our loans by borrowing from other sources....

19. The last aspect pertains to the question of what is the rate of "prepayment charges". It seems that the bank calculated the same at 2% of the outstanding amount. The original sanction letter, as well as the amended or modified terms, do not clearly spell out the rate of prepayment charges. The first document merely refers to some guidelines; no guidelines have, however been produced. The materials on record, on the other hand, do not show that the Plaintiff any time had any objection to the inclusion of a prepayment clause. The Plaintiff, in his evidence, or pleadings does not impeach the amount on the ground that it was not according to the guidelines, or that such prepayment condition did not exist as a matter of contract. What the Plaintiff argues in the case, is that the precondition for applicability of the said condition was not fulfilled. In these state of pleadings and evidence, it has to be concluded that the Plaintiff had knowledge and awareness about the rate of prepayment charges applicable.

20. For the above reasons and in view of the conclusions outlined above, the Court is of opinion that the suit has to fail. It is accordingly dismissed, without any order as to costs.