

(2014) 09 DEL CK 0398
In the Delhi High Court
Case No : RFA (OS) No. 37/2009

IFCI Ltd.

APPELLANT

Vs

T.T. Ltd.

RESPONDENT

Date of Decision : 11-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 11

Citation : (2014) 09 DEL CK 0398

Hon'ble Judges : Sunil Gaur, J;Gita Mittal, J

Bench : Division Bench

Advocate : Sandeep Sethi, Senior Advocate and Sanjay Bhatt, Advocates for the Appellant; Shilpi Jain Sharma, Advocates for the Respondent

Judgement

Sunil Gaur, J.—Impugned judgment of 23rd October, 2008 directs the appellant-defendant to refund the pre-payment premium of Rs. 22,19,000/- with pendente lite interest and future interest @12% p.a.

2. The facts giving rise to this appeal are already noticed in detail in the impugned judgment and need no reproduction. Suffice it would be to note that in this appeal the challenge is to refund of pre-payment premium in respect of Foreign Currency Loan advanced by appellant to the respondent under the Foreign Currency Loan Agreement of 10th September, 1992. Although Foreign Currency Loan Agreement does not provide for pre-payment premium but Clause-4.8 of the aforesaid agreement gives power to the lender to decide pre-payment premium and appropriate amount towards it. This right had been exercised by appellant vide communication of 8th August, 1997. Respondents vide letter of 11th September, 1997 had tendered Rs. 1,93,55,646/- towards payment of outstanding Foreign Currency Loan amount and had called upon the appellant to intimate if any balance amount is still payable.

3. While relying upon the aforesaid communication of the respondent, the learned Single Judge in the impugned judgment has held that communications

between the parties resulted in a concluded contract based upon the prevailing policy of pre-payment as it existed when letter of 8th August, 1997 was issued by the appellant.

4. Respondent's representation for waiver of the interest and pre-payment premium was rejected by the appellant on 19th September, 2000 and thereafter the respondent had filed a suit for recovery of excess payment of Rs. 49,52,000/- made to appellant under the Equipment Finance Scheme; Equipment Credit Scheme and Foreign Currency Loan under the Project Finance Scheme. Respondent vide letter dated 18th September, 1997 (Ex.P-16) had informed the appellant that the amount of Rs. 53,75,350/- demanded towards pre-payment premium for the four loans deserves to be revised, as the interest calculation had been made by the appellant up to 31st August, 1997 whereas pre-payment premium was paid by the respondent prior thereto. With regard to the Foreign Currency Loan, it was maintained by respondent that the lending Rate in Deutsche Mark (DM) and Current Prime Lending Rate (PLR) of Foreign Currency Loan was the same and therefore, nothing was payable.

5. The stand of appellant-defendant in the suit was that short fall of pre-payment premium towards Foreign Currency Loan was Rs. 50,60,864/- and appellant had conveyed this to respondent vide letter of 15th September, 1997 (Ex. P-15) and the calculation sheets were enclosed. Appellant had also informed the respondent vide their letter of 3rd November, 1997 (Ex. P-20) that respondent's request for spread over of 2.5% above Prime Lending Rate for the purpose of calculation of differential loss could not be accepted and accordingly, respondent was asked to pay the balance of Rs. 53,03,252/-. However, by another communication of 20th March, 1998 (Ex. P-21) the appellant had informed the respondent that the revised calculation for pre-payment premium was worked out at Rs. 51,49,392/- and the difference between the lending Rate in Deutsche Mark (DM) of Rs. 20.58 as on 12th September, 1997 and the actual rate prevailing on the date of realization of the cheque would be payable by the respondent.

6. Again vide letter of 20th April, 1997 (Ex. P-24) the appellant had informed the respondent that the pre-payment premium charges were based upon standard norms and policies of financial institutions and therefore, cannot be changed.

7. At trial, seven issues were claimed and the issues which fall for consideration in this appeal are issues No. 1, 5 & 6, which are reproduced as under:-

"1. Whether any cause of action to file the present suit exists in favour of the plaintiff and against the defendant? (OPD)

5. Whether the premium charged by the defendant on prepayment of loan availed by the plaintiff under the Project Finance Scheme Equipment Finance Scheme and Foreign Currency Loan of the defendant is legal being in terms of the contract between the parties? (OPD)

6. Whether the plaintiff is entitled to a sum of Rs.55,46,000/- as detailed in paragraph 52 of the plaint? (OPP)"

8. The evidence led by the parties consisted of solitary depositions of Mr. Sunil Bhanot, Company Secretary of respondent-plaintiff (PW-1) and Mr. S.K. Majumdar, Deputy Manager of appellant (DW-1).

9. In this appeal, we are concerned with the findings returned on issues No. 1, 5 & 6 in respect of pre-payment premium relating to Foreign Currency Loan as well as the finding returned on Issue No. 1. The findings returned by the learned Single Judge on the afore-noted issues are as under:-

"44. With regard to the Foreign Currency Loan, the circular relied upon and quoted in para 3(xi) of the written statement by the defendant is dated 4th March, 1998. The said circular was not prevailing on the date when letter dated 8th August, 1997 (Exhibit P-9) was issued and in terms of which payment of the principal amount with interest was made on 11th September, 1997 (Exhibits P-10 to P-13). Circular dated 4th March, 1998 cannot be the basis for payment of premium. This will be contrary to the concluded contract between the plaintiff and the defendant. The defendant cannot rely upon a CS(OS) No. 944/2001 Page No. 28 subsequent circular dated 4th March, 1998 for a concluded contract based upon prevailing policy of prepayment as it existed when letter dated 8th August, 1997 (Exhibit P-9) was issued and offer was made in terms thereof. The said formulae therefore, as mentioned in para 3(xi) of the written statement, cannot be applied. As already observed above, the defendant has failed to discharge the onus and place on record the relevant prevailing standard norms for payment of prepayment premium on Foreign Currency Loan. Onus on the defendant in terms of Issue No. 5 has not been discharged by the defendant. The defendant has also withheld the relevant document and therefore has to face consequences. It is not the case of the defendant that the relevant standard norms as on that date are on record or were known to the plaintiff. Witness of the plaintiff was also not cross examined by the defendant on this aspect.

45. The aforesaid view taken by me is fortified and corroborated by the subsequent letters and correspondence exchanged between the parties. The defendant by their letter dated 17th September, 1997 (Exhibit P-15) had calculated prepayment premium with reference to Net Payable Value of the interest loss as calculated in terms of Circular dated 20th February, 1995 in form of a chart for both rupee loans and the Foreign Currency Loan. In the case of rupee loan the document rate of interest was reduced from PLR as on the relevant date and the difference was then discounted with a reference to the prevalent lending rate (PLR) + 1%. The net effect was that the plaintiff was liable to pay the difference between document rate of interest, which was higher and the PLR on the date when payments were made, which was lower. The resultant figure, i.e. net loss of interest was then discounted to arrive at the sum payable in case of rupee loans.

46. In response to this letter, the plaintiff wrote letter dated 18th September, 1997 (Exhibit P-16) making reference to the calculations for Net Payable Value. The only objection raised by the plaintiff was that the defendant had charged premium of 2.5% over prevailing lending rate when documents of loan were executed and therefore the same 2.5% premium should be added to the current prevailing PLR to calculate and the difference between the current prevailing PLR + 2.5% should be treated as interest loss. In other words, the plaintiff accepted the calculations in terms of Circular dated 20th February, 1995 except that 2.5% premium was charged on the lending rate at the time of execution of the document should also be added to the current prevalent PLR. It was also stated that the discounting should be done at the prevalent PLR + 2.5% instead of prevalent PLR + 1% as made by the defendant.

47. As far as Foreign Currency Loan was concerned, the tabulation enclosed with the letter dated 17th September, 1997 (Exhibit P-15) had made reference to the rate of interest mentioned in the document i.e. 9.5% and the prevalent LIBOR rate of interest at 3.06% in respect of DM. However, for calculating the discounted Net Payable Value, calculations were done by the defendant with a reference to prime lending rate (PLR) + 1%. The plaintiffs in their letter dated 18th September, 1997 (Exhibit P-16) disputed the entire calculation of prepayment premium on Foreign Currency Loan. It was specifically stated that no prepayment premium should be charged since the lending rate mentioned in the document was 9.5% p.a. and the current lending rate for Foreign Currency Loan in DM is not less than 9.5% p.a. Thus, no loss was being caused to the defendant on prepayment and in case prepayment premium was to be discounted, the defendant would be liable to make payment to the plaintiff.

48. Defendant replied to this letter on 3rd November, 1997 (Exhibit P-20) rejecting the claim of the plaintiff, both in respect of Rupee loans and foreign currency loan stating that the same cannot be accepted as prime lending rate concept was not in existence at the time when the loans were sanctioned. However, the defendant did not specifically deny and give reply to the contention of the plaintiff that the interest rate of 9.5% mentioned in the Foreign Currency Loan document and the current lending rate of Foreign Currency Loan in DM was not less than 9.50 i.e. same as mentioned in the document or the loan agreement. If the current lending rate and the document rate were the same, no loss of interest was caused to the defendant. The defendant has not led any evidence to show loss on account of prepayment of foreign currency loan. PLR on 8th August, 1997 was much higher than the document rate of interest mentioned in Foreign Currency Agreement.

49. In view of the findings given above, it is held that as far as Indian rupee loans are concerned, the plaintiff is liable to pay prepayment premium in terms of para 3(x) of the preliminary submissions as mentioned in the written statement and in terms of circular dated 20th February, 1995 as calculated by the defendant as per chart enclosed with letter dated 17th September, 1997

(Exhibit P-15). However, with regard to the Foreign Currency Loan the defendant has failed to produce and prove the existing settlement norms as on 8th August, 1997 and the fact that there was a difference between the document lending rate and the current lending rate for Foreign Currency Loan in DM as on 8th August, 1997 in terms of their letter of even date marked Exhibit P-9. The defendant is, therefore, not entitled to claim any prepayment premium in respect of Foreign Currency Loan over and above 1% for which the plaintiff was/is agreeable and to which extent no claim has been made in the plaint also. It is accordingly held that the plaintiff is entitled to refund of prepayment charge of Rs.22,19,000/- as claimed in para 52 of the plaint.

50. With reference to claim of Rs.1,60,000/- on excess payment made by the plaintiff to the defendant, no evidence has been led to justify the claim. The said claim is accordingly rejected."

(Underlining by us)

10. In this appeal, CM No. 2675/2011, under Order 41 Rule 27 CPC, filed by the appellant was allowed vide order of 12th September, 2011 permitting the appellant to bring on record its circular of 6th December, 1993 and lead evidence in relation to it. Shri Harish Gupta (AW-1), Assistant Vice President of appellant, had deposed in respect of a circular of 6th December, 1993 relating to pre-payment of installments of principal under rupee loan and Foreign Currency Loan and he was duly cross- examined by the respondent.

11. At the hearing of this appeal, Mr. Sandeep Sethi, learned senior counsel for the appellant had assailed the impugned judgment on the ground that the learned Single Judge has directed the appellant to refund the pre-payment premium charged on the Foreign Currency Loan on the premise that the relevant prevailing standard norms for payment of pre- payment premium on the Foreign Currency Loan had not been proved. It was pointed out that by way of additional evidence, the applicable circular of 6th December, 1993 stands proved on record and so, the finding rendered in the impugned judgment deserves to be set aside.

12. It was also urged on behalf of the appellant that respondent had filed W.P.(C) No. 2497/1998 against the charging of pre-payment premium which was dismissed vide order of 25th January, 2000 which operates as res judicata rendering the suit of respondent not maintainable. No doubt, an issue on lack of cause of action was claimed by the appellant. On this issue No. 1, the finding returned in the impugned judgment is that an appeal was preferred against the aforesaid decision in the writ petition and the said appeal was not decided on merits as the writ petition itself was dismissed as withdrawn, so it was contended that plea of res judicata was very much available to the appellant and the finding on Issue No. 1 is clearly erroneous. Thus, quashing of the impugned judgment is sought in this appeal.

13. Ms. Shilpi Jain, learned counsel for respondent had painstakingly taken us through the evidence and the material on record to vehemently assert that the

impugned judgment is duly supported by reliable evidence on record. It was pointed out by learned counsel for respondent that the circular of 4th March, 1998 relied upon by appellant is of no avail in respect of loan in question which terminated on 8th August, 1997. It is further submitted that even if the applicable circular is of 6th December, 1993, the same has not been proved on record even in the present appeal.

14. It was highlighted by learned counsel for respondent that the basic idea behind the aforesaid circular is that the premature repayment of Foreign Currency Loan has to be in the context of overall financial position of the sub-borrowers, their current profitability and ability to discharge outstanding repayment liability without undue restraint on their liquidity. It was pointed out by learned counsel for respondent that, the respondent, vide its letter dated 15th September, 1999, had brought to the notice of appellant that the respondent's project i.e. Gajroula Spinning Mills financed by appellant-IFCI was in losses and the audited balance-sheet of aforesaid project was forwarded to the appellant. However, while rejecting the respondent's representation for waiver of prepayment premium, the respondent's aforesaid communication was not considered by the appellant. It was also pointed out by Ms. Shilpi Jain, learned counsel for the respondent that in its communication dated 23rd March, 1998 the respondent had sought waiver of prepayment premium and issue of "no dues certificate" while highlighting that the appellant had given waiver to the tune of Rs. 40 crores to Modern Group of Industries although the aforesaid group of industries was not bankrupt.

15. Lastly, it was submitted by learned counsel for respondent that by waiving pre-payment premium on the Foreign Currency Loan, appellant suffers no loss as the lending rate of appellant was 9.5 % per annum and the then current lending rate for Foreign Currency Loan in D.M. was also 9.5% per annum. Thus, it was contended that impugned judgment is sound on facts and law and deserves to be maintained.

16. After having heard both the sides and on scrutiny of the impugned judgment and the evidence on record, we find that the issue of res judicata needs to be adverted to first. On this issue, the findings returned in the impugned judgment is as under:-

"ISSUE NO. 1

17. Issue no.1 as framed is rather vague and not specific. Defendant in the written statement has raised preliminary objection to maintainability of the suit on the ground of estoppel. However, on that aspect a separate issue being issue no.3 stands framed.

18. During the course of arguments, learned counsel for the defendant had submitted that the orders passed in the writ petition and the Letters Patent Appeal being judgment dated 25th January, 2000 and Order dated 31st August, 2000 operate as res judicata. Plea of res judicata has not been specifically raised

in the written statement. Plea of res judicata requires reference to earlier proceedings including pleadings and orders passed in the earlier proceedings. In most cases plea of res judicata is one of law as well as facts. Normally, therefore, a party should not be permitted to raise a plea of res judicata without specific contention in the pleadings, as the other side may be well taken by surprise and denied opportunity of a fair trial. Moreover, for judgment dated 25th January, 2000 passed in Writ Petition No. 2497/1998 to apply as res judicata, the same should have attained finality. By Order dated 31st August, 2000 passed in LPA No. 68/2000, the Writ Petition was itself dismissed as withdrawn and therefore it was observed that the appeal does not survive and was disposed of. The appellate court did not go into the merits but had allowed the plaintiff herein to withdraw the writ petition as if the same was never filed. The plea of res judicata therefore even on merits has no force and is liable to be rejected. Issue no.1 is accordingly decided in favour of the plaintiff and against the defendant."

17. To find out as to whether the orders passed in the earlier litigation operates as res judicata or not, order of 31st August, 2000 passed in LPA No. 68/2000 deserves to be taken note of. It reads as under:-

"Learned counsel for the appellant submits that this Later Patent Appeal arise out of the order of the learned Single Judge dated January 25, 2000 whereby the writ petition filed by the petitioner has been dismissed, states that he has instructions to withdraw the writ petition itself on the ground that the appellant will approach respondent- bank by means of a representation and plead with it for grant of benefit including waiver of interest and pre-payment premium on loans prematurely paid by the appellant to the respondent-bank. Consequently, the writ petition is dismissed as withdrawn. The appeal therefore does not survive and the same is also disposed of as such.

Learned counsel for the appellant on instructions, states that the appellant shall deposit a sum of Rs.40 lakhs with the respondent within 24 hours and will deposit an amount of Rs.12 lakhs in this court within 2 days. It is also stated that the appellant agrees that the amounts so deposited shall be subject to the decision of the Board of the respondent- bank.

Having regard to the submissions of the learned counsel for the appellant, we direct that in case Board of the respondent- bank takes a decision on aforesaid representation in favour of the appellant, the amount of Rs.12 lakhs or any other sum which may be liable to be refunded by the bank, the same shall be made over to the appellant. However, in case the representation of the appellant is rejected, the amount deposited in Court shall be made over to the respondent-bank by the Registry. On the appellant making deposit of Rs.40 lakhs with the respondent-bank and Rs.12 lakhs in this Court, the bank guarantee shall be returned by the Registry to the appellant within 2 days of the furnishing of the proof of payments. The learned counsel for the appellant state that the appellant shall be liable by the aforesaid directions.

A copy of this order be given dasti to counsel for the parties."

18. The Rule of res judicata incorporated in Section 11 of the Code of Civil Procedure prohibits the court from trying an issue which has been directly and finally decided by the said court. It has been so reiterated by the Apex Court in Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc., , in the following words:-

"While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission."

19. The aforesaid legal position has been crystallized by the Apex Court in Erach Boman Khavar Vs. Tukaram Shridhar Bhat and Another, as under:-

"34. From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits. It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation."

20. In the instant case, a bare perusal of the afore-noted order makes it abundantly clear that there is no adjudication, as the writ petition itself was permitted to be withdrawn and respondent was permitted to make a representation. Thus, plea of res judicata stands repelled and the finding of the learned Single Judge on Issue No. 1 is affirmed.

21. The finding returned in the impugned judgment that appellant /defendant has failed to discharge the onus to prove the prevailing standard norms for payment of the pre-payment premium on Foreign Currency Loan was sought to be negated by the appellant, by way of additional evidence. A copy of circular dated 6th December, 1993 (Ex. AW-1/2) has been placed on record. Appellant had also got examined Shri Harish Gupta (AW-1) to prove the aforesaid circular and the said witness had placed on record the photocopy of the afore-referred circular and had not produced its original.

22. Attention of this court was drawn to the additional evidence of Sh. Harish Gupta (AW-1) who was got examined in appeal after appellant's application for additional evidence was allowed. It was pointed out that this witness (AW-1) has deposed in no uncertain terms that original circular of 6th December, 1993 has not been brought on record and its photocopy is placed on record as Ex. AW-1/2. It was pointed out that this witness (AW-1) has clearly said in his evidence that the same is an internal circular of the appellant and that he is not aware if the

internal circular of 6th December, 1993 (Ex.AW-1/2) was ever circulated or communicated to the respondent.

23. Attention of this court was drawn to the deposition of appellant's witness- S.K. Majumdar (DW-1) to point out that this witness has categorically admitted that there is no provision in the Foreign Currency Loan Agreement for charging pre-payment premium and that transaction of Foreign Currency Loan is very different from Rupee Term Loan. It was also pointed out that appellant's witness could not tell about the whereabouts of Sh. S.P. Banerjee, who had signed the circular (Ex.AW- 1/2) nor had identified his signatures on the aforesaid circular.

24. Even at the stage of final hearing of this appeal, sufficient opportunities were given to appellant's counsel to produce the original circular dated 6th December, 1993. It stands noted in our order of 1st September, 2014 that appellant's counsel has expressed his inability to produce the original of the circular dated 6th December, 1993.

25. Though it was maintained by learned counsel for respondent that the circular of 6th December, 1993 (Ex.AW-1/2) is inadmissible in evidence, but it was pointed out that the calculation sheets enclosed with appellant's communication (Ex.P-15) are not in conformity with the aforesaid circular as different guidelines are provided for institutions who park their funds with RBI and the ones who do not. It was pointed out that appellant's witness was unable to state in evidence as to whether in the instant case funds were parked with the RBI or not.

26. To assert that there is marked difference between the now relied upon circular of 6th December, 1993 (Ex.AW-1/2) and the circular of 4th March, 1998 relied upon by appellant during the trial, attention of this court was drawn by respondent's counsel to the following chart to indicate the marked difference between the two circulars. The comparative chart of the aforesaid two circulars adverted to by the learned counsel for respondent is as under: -

27. Shri Harish Gupta (AW-1) has conceded in his evidence that he is unable to identify the signatures of the person who has signed the circular of 6th December, 1993 (Ex.AW-1/2), which according to this witness is an internal circular. He has expressed ignorance as to whether this circular (Ex.AW-1/2) was ever communicated to respondent. This witness (AW-1) is even unable to state as to what was the prevailing LIBOR rate at the time of disbursement of the Foreign Currency Loan and as to whether what was the nominal institutional spread for the period in question. Thus, it becomes quite evident that this witness has miserably failed to prove the circular dated 6th December, 1993 (Ex.AW-1/2), which cannot be looked at for any purpose.

28. More importantly neither this witness (AW-1) nor appellant's witness- Shri A.K. Majumdar (DW-1) has proved on record that the calculation sheets of the appellant, on the basis of which pre-payment premium has been worked out or the method of calculation as detailed in the written statement, was on the basis of circular dated 6th December, 1993 (Ex.AW-1/2).

29. In fact, the case of appellant in the written statement and in the evidence before the learned Single Judge was that the pre-payment premium of Foreign Currency Loan has been worked out on the basis of the circular dated 4th March, 1998. This pleading has not been amended.

30. It was required to be pleaded and proved that the pre-payment premium on the Foreign Currency Loan has been worked out on the basis of circular dated 6th December, 1993 because there is material difference between this circular and the relied upon circular dated 4th March, 1998. This aspect is highlighted in the comparative tabular chart. Copy of this tabular chart was given to the appellant's counsel during the course of hearing. No meaningful argument was addressed by appellant's counsel to dislodge the tabular chart, which has been reproduced by us in paragraph No. 26 of the judgment.

31. Even otherwise, appellant has not brought on record as to what was the prevailing/ current six months LIBOR and normal institution spread or the other inputs on the basis of which the pre-payment premium in respect of the Foreign Currency Loan is to be worked out. Thus, it can be unhesitatingly said that there was material difference between the circular dated 4th March, 1998 which was relied upon by the appellant before the learned Single Judge and the circular dated 6th December, 1993 which has been now relied upon but not duly proved on record. Since the appellant has not been able to prove that the pre-payment premium has been worked out on the formula as highlighted in the circular dated 6th December, 1993, therefore, the learned Single Judge has rightly directed the appellant to refund the pre-payment premium received in respect of the Foreign Currency Loan.

32. The object of the two circulars in question i.e. of 6th December, 1993 and 4th March, 1998 is with reference to profitability and ability to discharge the outstanding pre-payment liability without undue strain on the liquidity of the borrower is an aspect which is required to be considered. Undisputably, the respondent- plaintiff vide its letter dated 15th September, 1999 had brought it to the notice of the appellant that respondent's project i.e. Gajroula Spinning Mills, financed by the appellant, is in losses and the audited balance sheet of the aforesaid project was forwarded to the appellant. But still, respondent's representation for waiver of the pre-payment premium has been rejected by the appellant, although it was pointed out that appellant had given the waiver of Rs. 40 crores to the Modern Group of Industries, which was not bankrupt. This fact is not disputed by the appellant. In our view, this is an unfortunate aspect of the matter. To say the least, the object of the aforesaid two circulars has been completely ignored by the appellant. Thus, the impugned judgment asking appellant to refund the pre-payment premium on the Foreign Currency Loan to respondent suffers from no illegality or infirmity.

33. In view of the afore-going narration, we are of the considered view that there is no substance in this appeal. Hence, while affirming the impugned judgment, this appeal is dismissed with costs quantified at Rs. 50,000/-.