

(1985) 04 AP CK 0030
In the Andhra Pradesh High Court
Case No : Second Appeal No. 241 of 1985
In Re: Union Bank of India

Date of Decision : 02-04-1985

Acts Referred:

Limitation Act, 1963 — Article 37

Citation : (1985) 04 AP CK 0030

Hon'ble Judges : P.A. Choudary, J

Bench : Single Bench

Advocate : T.S. Haranath, for the Appellant;

Final Decision : Dismissed

Judgement

P.A. Choudary, J.—This second appeal has been filed against a judgment of the learned District Judge, West Godavari, allowing the defendant's appeal dismissing the plaintiff's suit filed before the trial court for recovery of a sum of Rs. 9,522.90. The plaintiff-bank sanctioned a medium term loan of Rs. 4,300 to the defendant and that amount was secured by a promissory note executed by the defendant on the same day in favour of the plaintiff-bank agreeing to pay the said amount together with interest at 3 1/2% over the rate of interest fixed by the Reserve Bank of India subject to a minimum of 10 1/2% per annum with half-yearly rests. The defendant agreed to repay the said amount in five equal annual instalments commencing from June, 1976. She had hypothecated her property undertaking to repay the amount borrowed from the bank. Clause 14 of the hypothecation agreement reads as under:

" In the event of one or more of the following events occurring, namely, (1) if the borrower shall make default in payment whereof is hereby secured or any part thereof or in the performance or observance of any term or undertaking contained in this security, and on the part of the borrower to be observed and performed or.....then the entire balance thereof outstanding shall become forthwith due and payable."

2. Under the aforementioned agreement, the first instalment had fallen due for

payment in June, 1976. But the defendant had not paid that instalment amount; nor did the defendant pay the instalments due by 1977, 1978, 1979 and 1980. The plaintiff-bank had, therefore, issued a registered notice on May 16, 1979, demanding the payment of the entire amount and filed the suit, OS. No. 194 of 1980, on the file of the principal District Munsif, Eluru, for the recovery of the entire loan amount. The learned District Munsif had decreed the suit, but on appeal by the defendant, the suit was dismissed by the learned District Judge who held that the suit was barred by limitation under article 37 of the Limitation Act. It is against that judgment this second appeal has been filed.

3. The facts which have been briefly narrated above and the findings recorded by the learned District Judge would show that the suit was filed, not on the basis of the agreement. If the suit were to be construed as having been filed on the basis of the promissory note, the suit should be held to have been barred even by the year 1976. We should, therefore, consider whether the suit was filed within time even on the basis of the above-mentioned agreement. Now, the agreement provided that the amount of loan advanced by the bank should be payable in five equal annual instalments beginning with June, 1976, and ending with June, 1980. The defendant admittedly failed to pay the first instalment itself which was due in 1976. Now, article 37 of the Limitation Act prescribes the period of time allowed for suing on a promissory note or a bond securing payments by instalments. That article of the Limitation Act says that the time should be three years counted from the day the defendant commits default in making payment of one or more instalments. The meaning of this provision is not at all obscure. It lays down that the entire amount payable by reason of the promissory note or bond becomes due and payable by the defendant's first and single act of default committed. Such default was committed in this case in June, 1976, by not paying the first instalment. For the purposes of article 37 of the Limitation Act, the question of subsequent defaults would not be material. The period of limitation would start running in this case from June, 1976. Limitation once it starts running, never stops on its own for rest and has run out by June, 1979. The suit which had been filed in 1980 should be held to have been barred by limitation. It has been so held and, in my opinion, has been rightly held by the learned District Judge in a well-considered judgment. But the argument of the bank which is the appellant before me is that the bank had waived the benefit of the provisions of article 37 of the Limitation Act by not demanding the whole amount till May 16, 1979, when the registered notice was issued by the bank to the defendant. It is argued by the bank that by then the defendant had committed subsequent defaults in her obligation to pay the instalments for the years 1977, 1978 and 1979 and that, therefore, those defaults had given the bank extended periods of limitation to file the suit. It may be mentioned that the plaint in this case says that the cause of action as having arisen in favour of the plaintiff in suing for the entire amount on June, 1976, when the defendant had committed the first default. The suit notice dated May 16, 1979, also alleges in similar vein that the cause of action for instituting the proposed suit for the recovery of the entire

amount had arisen in June, 1976. These allegations are clearly inconsistent with the present argument of the bank. It is clear that the plaintiff had not waived the benefit of Article 37 of the Limitation Act. If the plaintiff had waived the benefit of the provisions of Article 37 of the Limitation Act, the plaintiff would not have demanded the payment of the entire amount on the basis of the default committed by the defendant in June, 1976. If there was a waiver of the first default, no amount of June, 1976, could have been demanded as due and payable. Once the plaintiff had not waived the benefit of Article 37 of the Limitation Act, the question of the defendant committing further defaults in payment of instalment amounts would not arise, because by reason of the first default itself, the entire amount had become due and payable. Strictly speaking, the question of subsequent defaults can never arise unless the previous defaults are waived. It may also be mentioned that the suit filed on February 28, 1980, for the recovery of the entire amount can be maintained only on the basis that the entire suit amount had become due and payable by reason of the first default committed by the defendant in June, 1976. Otherwise, the last instalments could not have become due and payable. In view of the above, I am clearly of the opinion that the suit was barred by limitation. In "Mitra's Law of Limitation" 18th edition, page 410, it is noted that:

"Where the bond provides that on default of payment of one instalment the entire amount shall become due, the creditor is at liberty either to sue for the whole amount as soon as a default is made or to waive the provision and bring a suit for recovery of each instalment as it falls due (i.e., for recovery of those subsequent instalments as are not barred at the date of the suit)...if the creditor elects to sue for the whole amount, the period of limitation runs from the date of the first default; but if he chooses to sue for the instalments that are not barred at the date of the suit, the period is to be counted from the date on which each of those instalments falls due."

4. In *Sarat Lakshi Dassya Vs. Narendra Singha and Another*, and *Shahaji v. Tukaram* AIR 1946 Nag 117 it was held that if the creditor sues to recover the whole amount and the claim is found to be barred by reason of the suit not having been brought within three years of the date of the default, the plaintiff cannot be allowed to fall back upon the claim to recover the instalments that fell due within three years before the suit. I have, therefore, no doubt in holding that the suit as filed by the bank was barred by limitation. But the learned counsel for the appellant relied upon *Jagat Jit Singh v. Manodal* AIR 1936 Oudh 384. That was a case where the plaintiff had waived the benefit of Article 37 of the Limitation Act on the occurrence of the first default. The court held that it was still open to the plaintiff to avail himself of that benefit of waiver when a similar default takes place in the payment of subsequent instalments. That case has no application to the facts of the present case where there was no waiver at all.

5. The theory of the plaintiff that it has waived the benefit of Article 37 of the Limitation Act is clearly contradicted by its own statement contained in the

registered notice and also in the plaint and also in suing for the entire amount. It cannot therefore be accepted.

6. The second appeal fails and is dismissed.