(2006) 01 GAU CK 0073

In the Gauhati High Court

Case No : FAO No.3 of 2005

Industrial Cooperative Bank Ltd. APPELLANT

Vs

Moniram Das RESPONDENT

Date of Decision : 09-01-2006

Acts Referred:

Civil Procedure Code, 1908 — Order 39 Rule 1, Order 39 Rule 2
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2008) 3 GLR 344

Hon'ble Judges : B.P.Katakey, J and D.Biswas, J

Bench : Division Bench

Advocate : N.Das, L.Talukdar, M.Islam, M.Devi, A.Z.Choudhury, H.K.Deka, Advocates appearing for Parties

Judgement

B.P. Katakey, J.—This appeal is directed against the order dated 14.9.2004 granting injunction under order 39, rules 1 and 2 of the Civil Procedure Code, restraining the appellant/defendant from acting upon the order dated 30.6.2004 passed in Bakijai Case No. 3/2004, till disposal of the suit filed by the respondent/ plaintiff.

2. A suit being Title Suit No. 332 of 2004 has been instituted by the respondent as plaintiff against the appellant as defendant No. 1 and one Bikram Hazarika, Bakijai Officer as defendant No. 2, in the court of the learned Civil Judge (Senior Division) No. 1, Kamrup at Guwahati praying for a decree declaring the certificate and that the notice of demand dated 8.4.2004, the order dated 30.6.2004 as well as the entire a proceeding in Bakijai Case No. B3 of 2004 are illegal, improper and not binding on the plaintiff, being collusive and fraudulent, for damages to the tune of Rs. One Crore Thirty Five Lakhs and also for perpetual injunction restraining the defendants from acting upon the order dated 30.6.2004. An application under order 39, rules 1 and 2 read with section 151 of the Code of Civil Procedure was also filed praying for a temporary injunction restraining the defendants/Opp. Parties from acting upon the order dated

30.6.2004 passed in Bakijai Case No.B3/2004, which was registered as Misc. (J) Case No. 79/2004.

3. The brief fact leading to the filing of the aforesaid still along with the application for temporary injunction is that, the appellant Cooperative Bank after obtaining a Cooperative Certificate of Demand instituted a Bakijai (recovery) proceeding being B3/2004 before the Bakijai Officer of Cooperative Societies against the respondent for recovery of the loan amount of Rs. 9,46,401.22 under the Bengal Public Demand Recovery Act, 1913 (for short ''1913 Act'') which amount was found due and payable by the respondent against the loan sanctioned by the appellant on 7.4.1998 under overdraft facility. The said overdraft facility was extended subsequently at the request of the respondent to Rs.5 lakh with landed property as security. The said loan taken by the respondent by way of overdraft facility for the purpose of a Chakki bill was again extended to Rs. 7 lakh and then to Rs. 12 lakh. On 3.4.2003 another amount of Rs. 1,65,000 was sanctioned to the respondent as per his application. The amount for which the Cooperative Demand Certificate was issued was found due and payable by the respondent against the said loan facilities. The respondent on receipt of the notice issued under section 7 of the 1913 Act, filed an application under section 9 of the said Act admitting taking of credit facility of Rs. 12 lakh against landed property as security but stating that there are certain irregularities in the account maintained by the bank, without specifying what are the irregularities and also that the rate of interest charged was highly irregular and in violation of the RBI guidelines. The said Bakijai proceeding was fixed on 10.5.2004 for hearing on the petition filed by the respondent, on which date the said application of the respondent was rejected, as the respondent did not turn up. The Bakijai Officer on 10.5.2004 directed the execution of the demand certificate. However, the Bakijai Officer gave another opportunity to the respondent for hearing on his said application under section 9 of the Act, which was heard on 30.6.2004 and by the order passed on the same day rejected the said application on merit by giving 15 (fifteen) days time to repay the certificate amount. It was also ordered that on failing to pay the amount, the certificate shall be executed. The respondent thereafter without filing any appeal as provided under section 51 of the Act, instituted the present suit together with an application for temporary injunction under order 39, rules 1 and 2 read with Section 151 of the Civil Procedure Code, alleging inter alia that the appellant Bank at the behest of its officers and staff made a mess of the loan account and filed the Bakijai proceeding on the basis of the said account which was not maintained in the usual and ordinary course of the Bank''s business, that there were discrepancies in the bank account, that though in the Bakijai proceeding the respondent prayed for supplying certain documents, all of those were not supplied, the Bakijai Officer heard the application filed under section 9 of the 1913 Act on 30,6.2004 and though declared in open Court that the order will be delivered on 2.7.2004, passed the order on 30.6.2004 itself, but denied to supply the certified copy though applied for, for which he had to approach the Registrar

of Cooperative Societies, that during pendency of the said bakijai proceeding the certificate was sought to be executed even before passing of the order dated 30.6.2004, that before issuing the certificate of demand no enquiry under the Assam Cooperative Societies Act was made, that the Bakijai Officer acted in collusion with the appellant Bank by abusing the process of law and he acted mala fide and arbitrarily.

4. We have heard Mr. H. K. Deka, learned senior counsel for the appellant Bank and Mr. L. Talukdar, learned counsel for the respondent/plaintiff. We have also perused the materials available on record.

5. Mr. Deka, learned senior counsel for the appellant has submitted that the learned court below has granted the injunction on mere asking without considering that the plaintiff/respondent in the Bakijai proceeding as well as in the plaint has admitted taking of loan but raised objection stating that there were some discrepancies, without specifying those. The learned counsel has further submitted that since the Bank''s money which was advanced to the respondent is public money and the respondent fails to repay the same, the court should be slow in grating injunction, which has the effect of stalling recovery proceeding instituted to recover the defaulted amount under the provisions of law, but in this case, according to the learned counsel, the trial court has granted injunction restraining the defendants from acting on the order dated 30.6.2004 passed in the bakijai proceeding, which has the effect of stalling the entire recovery proceeding instituted under the 1913 Act. It has further been submitted by the learned counsel that as the public money is involved and the respondent has filed to repay the loan amount, the balance of convenience is also in favour of the appellant and against the respondent. According to the learned counsel, no irreparable loss or injury would be caused to the respondent in the event injunction is refused. On the other hand injury is caused to the appellant as, because of the injunction order it is not in a position to recover the public money. It has further been submitted by the learned senior counsel that the suit filed by the respondent itself being not maintainable in view of the bar imposed by section 37 of the 1913 Act, the learned Trial Court ought not to have granted the injunction in favour of the respondent. Learned counsel has further submitted that the learned Court below while granting injunction has failed to take into consideration the said aspects of the matter, which was pleaded by the appellant in its objection filed against the prayer for injunction.

6. The learned counsel for the respondent, Mr. Talukdar, on the other hand supporting the order of injunction passed by the learned court below has submitted that the learned court below has rightly passed the order of injunction restraining the defendants from giving effect to the order passed in the bakijai proceeding as the certificate of demand was issued by the Certificate Officer without following the provisions of the Assam Cooperative Societies Act and the account produced by the appellant Bank was full of discrepancies. The learned counsel has h further submitted that fraud has been committed by the Bakijai

Officer in every stage of the bakijai proceeding i.e. by passing a back dated order on 30.6.2004, by not supplying the certified copy of the said order in time and by trying to execute the certificate even before passing of the order dated 30.6.2004. Countering the argument of the learned c counsel for the appellant that the suit is not maintainable, the learned counsel for the respondent has submitted that as fraud has been alleged in the plaint, the suit is maintainable in view of section 37 of the 1913 Act. It has further been submitted that bar on the jurisdiction of the civil court cannot be inferred unless there is a specific bar imposed by any law. Mr. Talukdar has further submitted that as the balance of convenience is in favour of the respondent and irreparable loss and injury would have been caused to the respondent if injunction is refused, as in that case the respondent''s property would have been put to auction, the learned court below has rightly passed the order of injunction.

7. It is not in dispute that the respondent has availed the credit facility from the appellant Cooperative Bank to the tune of Rs. 12 lakh by means of overdraft facility for the purpose of his business of Atta Chakki mill, for which landed property of the respondent was given as collateral security. The appellant with a view to recover the unpaid loan amount together with interest and cost got a certificate of demand issue by the Certificate Officer, which was filed in Bakijai Case No. B3/2004 before the Bakijai Officer for execution in terms of the provisions of the 1913 Act. The Bakijai Officer on filing such demand certificate, issued notice g to the respondent, who is the certificate debtor. The respondent thereafter filed an application before the Bakijai Officer which was treated as one filed under section 9 of the 1913 Act. In the said application, the respondent has raised objection to execution of the certificate of demand stating inter alia as follows :

"Now, sir, in spite of our good turnover, good business and also providing good income for the Bank, the bankIndustrial Cooperative Bank Ltd., Maligaon Branch, abruptly stopped transaction; in the a/c w.e.f. April, 2003 and called for repayment of entire outstanding, thus inviting ''Halt'' to our unit. Immediately, we took up the matter with the bank authority and requested them not to finish a running unit, which has already created a strong reputation, goodwill and demand for its produce in the market and thus to permit us to transact in the a/c, since were exclusively banking with them only. We has also produced ad submitted before them the copy of the certificate issued by the office of the Joint Director of Health Services, Kamrup, Assam certifying on the "Standard" of our products. The said copy is enclosed and marked as Annexure1.

We had also submitted proposals for enhancing the limit to cover up the excesses at the request of the Branch Manager, Maligaon branch along with necessary papers like balance sheet, fresh valuation report, stock statement and other documents.

But, unfortunately, all our efforts went in vain and the bank did not agree to our request and as usual stopped transaction in the a/c paving the way for natural death of the unit.

That Sir, in our desperate attempt to ensure running of the Unit, which involved our reputation, goodwill attained after had labour and huge investment in the market and also to maintain bread and butter for 12 more families directly involved with the Unit, we had requested the bank vide our letter dated 19.05.2003, copy enclosed and marked as AnnexureII, to adjust our Fixed Deposit with paid up value of nearly Rs. 7.00 lakh to the a/c to brig down the limit and excess as well and to cover the outstanding with the security of landed property valued nearly Rs. 29.00 lakh. The said letter of us was followed by our another letterdated 29.5.2003, copy enclosed and marked as AnnexureIII. The Bank in their letter dated 02.06.2003, copy enclosed and marked as AnnexureIV, firmly denied to adjust the excess or bring down the outstanding with my Fixed Deposit receipt, held with the bank. On 09.08.2003, by our letter addressed to the Chairman of the Bank, copy enclosed and marked as AnnexureV, sought his intervention to help a SSI unit for its survival.

But on, 16.8.2003,in response to our above letter (marked as AnnexureV) Secretary, Authorized Officer of the Bank, copy enclosed and marked as AnnexureVI, informed us that they can''t oblige us in any way for g running the unit and rather advised for closing down the unit. In their said letter, they refused to credit the Fixed Deposit receipts to the a/c for bringing down the outstanding (page No. 2, ParaI). The same letter in Page 2 para2 also mentioned as "the Bank has right to restrain us in operating the a/c". And in page3, para3, the Bank has also informed that they can''t enhance the limit as requested by us.

Now Sir, on the date of stoppage of operation in the a/c (i.e., 30.04.2003), the balance in the a/c was Rs. 16,38,566.22. Since then till 15.12.2003, though we have deposited in the a/c Rs. 81,000.00. Though we were not allowed any withdraw from the a/c since 30.4.2003 but bank has charged interest usual and debited Rs. 1,81,496.00 to the a/c as interest till January, 2004 and raised the outstanding amount to Rs. 16,91,001.22.

Interestingly, the Fixed Deposit of Rs. 5.00 lakh held with the Bank as a security and to which we requested to the Bank for credit in the a/c to bring down the limit on 19.05.2003 which was subsequently denied by the Bank now credited to the a/c by the Bank on 4,02.2004 for Rs. 7,55,600.00 and thus bring down the outstanding from Rs. 16,91,001.12 to Rs. 9,36,401.22 and against which Bank has filed a case with your office.

In the background of above, your honour will admit that initially bank has deliberately acted to run a promising and established unit and now attempted to cause further damage by filing a suit with your office. The said actions of the Bank against a SSI Unit is violative of all rules and norms of the land, acted against a established, otherwise good SSI Unit c in a most uncivilized and criminal way with deep rooted conspiracy to halt the "brand" for its marketability.

That Sir, today, because of irresponsible, conspiratorial and vindictive action of the Bank, we are compelled to close down the unit and a product of "consumer good" is now withdrawn from the market. Our reputation, d as quality producer of the consumer product and our goodwill as well as now totally lost. It also invited unemployment and starvation for 12 families who were directly involved with the Unit.

When we are in the midst of total uncertain further and also in the mind to seek redressed of our losses from the Bank by taking up the matter e with the appropriate authorities, the present claim of the Bank is illegal, unwarranted and untenable and thus request you to call for the details from the Bank and to make an enquiry for such huge losses and untimely death of an otherwise good SSI unit in the hands of the Industrial Cooperative Bank Ltd.

Since, your honour has presently ceased the matter we will request your good self to protect the norms and rules framed by the Government and Reserve Bank of India as well to promote, nourish and protect SSI Units in the country, like us, and thus to ensure equality, justice as guaranteed by our constitution."

8. It is evident from the aforesaid stand taken by the respondent in, the Bakijai proceeding that the respondent, has not disputed availing credit facility from the appellant Bank. The objection of the respondent against the execution of the Cooperative Demand Certificate was basically on the ground that because of not extending the credit limit the respondent had to close down his business and the fixed deposit to the tune of Rs. 5 lakh was not adjusted against the amount found due and payable by the respondent in time, which, however was adjusted at a later point of time. Further the respondent has stated that the RBI guidelines relating to charge of interest are not being followed. From the objection of the respondent it is apparent that the allegations are general in nature. The respondent has not been able to give any instance of discrepancies in the bank account, as alleged by him. By the said objection, the respondent in fact has not specifically denied its liability as contemplated in section 9 of the 1913 Act, but asked the Bakijai Officer to protect the norms and rules framed by the Government and RBI, without specifying how and in what respect any Government and RBI norms or rules have been violated, and to promote, nourish and protect SSI Units in the country like the respondent''s unit. The respondent in his objection before the Bakijai Officer never pleaded that the certificate of demand was issued in violation of any provision of the Assam Cooperative Societies Act or the appellant and the Bakijai Officer acted in collusion to raise any untenable claim. In fact, as stated above, the respondent admitted the claim except nonadjustment of fixed deposit amount against the dues payable in time. The respondent also did not object to, the jurisdiction of the Bakijai Officer in entertaining the cooperative demand certificate as well as the bakijai proceeding.

9. Though the Bakijai Officer vide order dated 10.5.2004 initially rejected the application filed by the respondent against the prayer for execution of the cooperative demand certificate, on the ground of default, the application was heard by the learned Bakijai Officer on 30.6.2004 and was rejected on merit. The

respondent did not challenge the said order by filing an appeal as provided under section 51 of the 1913 Act, which, apart from providing for an appeal also provides for a revision under section 53 and review under section 54 of the Act. Instead the respondent filed the present suit together with the application for injunction, which has been granted by the learned court below by restraining a statutory authority from proceeding with the statutory proceeding, in which the respondent has participated without challenging its jurisdiction.

Section 37 of the 1913 Act provides that every question arising between g the certificate holder and the certificate debtor or their representatives, relating to the making, execution, discharge or satisfaction of a certificate duly filed under the said Act, or relating to .the confirmation or setting aside by an order under the said Act of a sale held in execution of such certificate, shall be determined, not by suit, but by order of the Certificate , Officer before whom such question arises. But a suit may be brought in a civil court in respect of ay such question upon the ground of fraud. The appellant has argued that the suit of the respondent is not maintainable in view of the said provisions in the 1913 Act, as the suit is not on the ground of fraud and on the other hand, according to the respondent, the suit is maintainable as it is based on fraud and the jurisdiction of the civil court cannot be ousted lightly unless there is a specific bar under any statute. We are, in the present appeal, not deciding the question of maintainability of the suit of the respondent, in view of the provisions contained in section 37 of the 1913 Act, as the appeal, in our view, can be decided on the point whether the respondent is entitled to any order of injunction.

11. Granting of injunction is not a charity. It cannot also be granted on mere asking. The power of granting injunction is a discretionary power based on the sound exercise of judicial discretion. Court should always be very cautious either to grant injunction or refusing the same, as it may cause grave injustice to either of the parties. Therefore, the court while granting injunction is to see whether the plaintiff has a strong prima facie case, in whose favour the balance of convenience lies and whether any irreparable loss or injury would be caused to the plaintiff, in the event order of injunction is refused. At the same time the court is also required to see whether any injustice would be caused to the defendant if injunction in granted. The court is, therefore, required to balance the loss or injury that may be caused to the parties. The injustice that may be caused to the plaintiff is to be weighed against the corresponding need of the defendant to be protected against the injury resulting from preventing him from exercising his legal rights.

12. As discussed above, the appellant has instituted the Bakijai proceeding against the respondent under the statutory provisions of 1913 Act for realization of amount due under the Gooperative certificate of demand in respect of the loan amount payable. The respondent on receipt of notice under section 7 of the Act filed objection under section 9 of the said Act, which objection was rejected vide order dated 30.6.2004 and against which no appeal has been preferred by

respondent, though such an appeal is provided for under the 1913 Act. In the said objection, the respondent neither raised any objection about the jurisdiction of the Bakijai Officer to entertain such proceeding for execution of certificate of demand nor raised any objection to the effect that certificate of demand was issued without following the provisions of the Assam Cooperative Societies Act. The only objection that was raised was relating to late adjustment of fixed deposit amount against the amount due and another relating to violation of norms and guidelines of RBI, without specifying any such guidelines, which have been violated and how. The respondent in fact admitted availing of credit facility and nonpayment of dues.

13. The respondent filed the suit raising the dispute raised in the said objection filed before the learned Bakijai Officer and alleging fraud against the said Officer, as according to the respondent, the order on the objection was passed backdated as the date for delivery of order was fixed on 2.7.2004. The respondent has not been able to produce anything to show that 2.7.2004 was the date fixed for delivery of such order, on the other hand, it appears from the ordersheet of the bakijai proceeding produced by the appellant that no such date was fixed and the order was delivered on 30.6.2004. The other material on which the fraud, according to the respondent based, is delay in supply of certified copy and steps taken by the said authority to execute the certificate. It appears from the record that the steps were taken as the respondent''s application was earlier rejected on 10.5.2004 for nonprosecution. The allegation of delay in supply of certified copy alone, in our view, do not constitute fraud.

14. In the instant case, the respondent having failed to get any relief and without taking further recourse to the provisions of the 1913 Act, filed the suit along with an injunction petition. The learned court below granted injunction which has the effect of restraining the appellant from pursuing his legal right of getting the certificate of demand executed under the provisions of the 1913 Act. As discussed above, the objection of the respondent before the Bakijai Officer was relating to delay in adjusting the fixed deposit amount and violation of RBI Guidelines, without specifying any guideline allegedly violated. It has already been held that court should always be very cautious in granting injunction restraining any party from pursuing legal remedies. The appellant has instituted the bakijai proceedings for realization of the amount due to, it by the respondent against the credit facility availed by him, which is ho doubt the depositors amount. The learned court below granted the injunction on the basis of the allegations that the certificate of demand was issued without following the provisions of the Assam Cooperative Societies Act, though no such plea was taken by the respondent before the Bakijai Officer, which was required to be taken under the 1913 Act. The order of injunction was also issued on the ground that steps for execution of the certificate was taken before passing the order dated 30.6.2004, without taking into consideration the order dated 10.5.2004 by which the said application was initially rejected for nonprosecution. The learned court below has failed to take into consideration the fact that the Bank is taking

steps for recovery of money advanced to the respondent, which money comes from the members of the said Cooperative Bank and availing such credit facility h was not denied by the respondent. The learned court below also, while granting injunction, did not consider the respective loss and injuries of the parties, as the appellant was restrained from pursuing the remedy available to it under the 1913 Act.

15. From the aforesaid discussion, it is evident that the respondent do not have a strong prima facie case for the purpose of granting injunction. The balance of convenience is also riot in favour of the respondent No irreparable loss or injury would also be caused to the respondent if injunction is refused as the appellant Bank will recover the amount due by the respondent against the loan advanced to him by taking recourse to the provisions of the 1913 Act.

16. In view of the above, we have no alternative but to set aside the order of injunction passed by the learned court below, which we accordingly do. Before parting with the record, we make it clear that any finding recorded by us in this order is for the purpose of injunction only and shall not be taken into consideration by the learned court below while deciding the suit on merit.

17. The appeal is accordingly allowed. No costs.

