(2001) 04 DEL CK 0076

In the Delhi High Court

Case No : Suit No. 723 of 1986

Jammu and Kashmir Bank Limited APPELLANT

Vs

M/s. Mayur Exports and Another RESPONDENT

Date of Decision : 26-04-2001

Acts Referred:

Citation : (2001) 5 AD 802

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. V.K. Dhar, for the Appellant;

Judgement

A.K. Sikri, J.—plaintiff is a banking company constituted under the Jammu & Kashmir companies Act. One of its branch offices is at Baba Kharak Singh Marg (Irwin Road), New Delhi. The defendant No.1 is a sole proprietorship concern of the defendant No.2. The defendants approached the plaintiff bank with request to grant packing credit loan. The defendants also opened a current account No.710 with the aforesaid branch of the plaintiff bank. Packing credit loan of Rs.45,000/- was granted and this amount was credited in the aforesaid current account. Thereafter defendants requested for grant of export credit facilities and after examining the proposal of the defendants, the plaintiff bank granted the following export credit facilities:

a) Shipping Loan Rs.2,00,000/-] (Rupees Two lacs only)] Overall Rs.2,00,000/-] (Rupees Two lacs only)

b) Packing Credit Loan Limit] Rs. 75,000/-(Rupees Seventy] five thousand only)]

c) Purchase of Foreign] Documentary Bills of] Overall Rs.3,25,000/- Rs.3,00,000/-(Rupees] (Rupees three lacs three lacs only)] twenty five thousand] only)

d) Advance against duty draw] bank/cash incentive] Rs.25,000/-(Rupees twenty] five thousand only)] ---------------------- Overall Rs.5,25,000/- ----------------------

These facilities were granted against the hypothecation of stocks i.e. ready-made garments, handicrafts, packing material, machinery, plant and office equipment. The defendants also created equitable mortgage of land measuring 1008 sq.yrds. Out of Khasra No.96/98 situated in the area and revenue estate of village Holambi Kalan, Delhi. Defendants were to pay interest at the rate of 2.5 per cent above the Reserve Bank of India rate subject to a minimum rate of 12.5 percent per annum with quarterly rests on the aforesaid facilities. The defendants had deposited original title deed dated 31st October, 1981. The defendants also executed various documents and undertook to deal with the plaintiff bank exclusively, utilise the limits for the business of the defendants and not to create any charge, lien or encumbrance on the securities during the subsistence of the aforesaid limit. It is the further case of the plaintiff that the defendants availed packing credit facilities loan from time to time. However, following out of these were adjusted:

S.No PCL No. Date of Advance Amount 1. 60 20.01.1983 40,000.00 2. 62 03.02.1983 10,000.00 3. 71 12.03.1983 20,000.00 4. 83 28.04.1983 45,000.00 5. 94 23.05.1983 20,000.00 6. 95 23.05.1983 7,000.00 7. 100 28.05.1983 15,000.00 8. 103 01.06.1983 12,000.00 9. 114 01.08.1983 16,500.00

Further a sum of Rs.6,000/- was advanced to the defendants on 14th April, 1983 under the head ''advance against duty draw back/cash incentives''. The defendants also availed ''foreign documentary bills limit'' from time to time. However, following documents were returned dishonoured:

S.No. Bill No. Date of Advance Amount 1. CP/IR/25/83/15 08.04.1983 77,258.00 2. CP/PO26270/83/25 12.09.1983 26,676.50 3. CP/IR/26/83/14 20.05.1983 37,271.00 4. CP/IR/26/83/15 20.05.1983 28,982.00 5. CP/IR/26/83/18 20.05.1983 26,334.00 6. CP/IR/26/83/20 01.06.1983 16,213.00 7. CP/ C-026255/83/37 01.08.1983 22,230.00

The details regarding transaction of foreign documentary bills are mentioned in para 24 of the plaint. It is also stated in the plaint that the defendants had also overdrawn the amount in the current account which is also payable by the defendants. Since defendants were not remitting the amount of advance against the aforesaid facilities, the plaintiff bank called upon the defendants to pay the amount. Although defendants vide their communication dated 8th September, 18th November, 1983 and 21st May and 3rd December, 1984 kept on acknowledging the liability but did not make the payments. Registered notice dated 4th April, 1985 was served upon the defendants in reply to which again by communication dated 29th September, 1985 the defendants acknowledged their liability. However, as no amount was paid, the plaintiff filed the present suit for recovery in the sum of Rs.7,03,500/-. Dues in various accounts are as under:

a) Packing Credit loan facility : 1,79,840.00 b) Foreign documentary bills purchase limit : 3,63,623.80 c) Advance against duty draw-back/ cash incentive: : 3,481.70 d) Current account debit balance : 1,39,204.34 Interest from 12th January to date 17,350.16 ----------------- Total 7,03,500.00 -----------------

This suit is filed under the provisions of Order XXXIV of CPC as a mortgage suit.

2. The defendants appeared and filed the written statement taking various pleas. The plaintiff filed replication thereto. After the completion of pleadings, following issues were framed on 24th August, 1994:

1. Whether the suit has been signed, verified and instituted by duly authorised person? If so, its effect? Opp.

2. Whether the suit as framed is not maintainable? OPD.

3. Whether the plaintiff has realised the amount from the Export Credit Guarantee Corporation? If so, its effect? OPD.

4. Whether the suit is barred by means of misguide of parties and cause of action? OPD.

5. Whether suit is barred by time? OPD.

6. Whether the debit entries in the accounts of the defendant are unauthorised, illegal and exorbitant ? If so, its effect? OPD.

7. Whether the loss to goods was due to the negligence, Ommission and commission of the plaintiff bank as prayed in para 9 of the Preliminary Objections in the written statement? If so, its effect? OPD.

8. Whether the plaintiff bank was negligent in taking up the follow up action in respect of the consignment exported by the defendants as alleged in para 10 of the Preliminary Objections in the W.S.? If so, its effect? OPD.

9. To what amount the plaintiff is entitled?

10. To what amount of interest and from which date, the plaintiff is entitled? OPP

11. Relief.

3. The plaintiff led evidence by examining three witnesses. However, at this stage counsel for defendants sought withdrawal from the case on the ground that he was not receiving any instructions from the defendants. He did not cross-examine these witnesses although opportunity was given. Since no evidence was led on behalf of the defendants nor anybody appeared, by order dated 25th October, 1999 right of the defendants to lead the evidence was also closed and the matter was fixed for final hearing.

4. The aforesaid facts disclose that the defendants are ex-parte. Evidence of the plaintiff bank remains unrebutted as there is no cross-examination of the plaintiff''s witnesses and the defendants have not led evidence in rebuttal either.

Under this background issue wise findings are recorded as under:

Issue No: 1 To prove this issue, PW-1, Sh.Shamas Farooq appeared to prove Power of Attorney dated 4th November, 1976 as per which Board of Directors of the plaintiff bank authorised Dr.B.L.Wanchoo to sign and verify the same and to institute the suit. The plaintiff bank has also proved on record certified copy of the Minutes of the resolution of the Board of Directors which is Ex.PW-1/1 executing Power of Attorney (Ex.X) in favor of Dr.Wanchoo. This issue is accordingly decided in favor of the plaintiff bank and against the defendants.

Issues No: 2, 3, 4, 5, 6, 7 & 8. The burden of proving these issues was on the defendants. The defendants have not led any evidence. These issues are accordingly decided against the defendants and in favor of the plaintiff bank.

Issues No. 9 and 10 In order to prove these issues the plaintiff bank has produced two witnesses namely Mr.Nazir Ahmed, PW-2 and Mr.Ashok Kumar Yecho, PW-3. Mr.Nazir Ahmed has testified to the effect that from April, 1985 to April, 1987 he was posted as Manager (Foreign Exchange) in Connaught Place branch of the plaintiff bank. There was an account of defendant No.1 with this branch. Before joining the branch some advances had been sanctioned by his predecessor to the defendant No.1. Account was in default. He contacted the defendant No.2, the proprietor of the defendant No.1 number of times so that the account could be adjusted. However, he did not make the payment. He has proved on record three promissory notes dated 7th November, 1985 as Ex.P-1 to Ex. P-3.. He also brought original ledgers of the plaintiff bank for the period from 23rd September, 1982 to January, 1986. Copy of the statement of account prepared on the basis of these ledgers, and duly certified under the Bankers'' Book Evidence Act is proved as Ex.PW-2/4 as per which the defendants owe an amount of Rs.7,03,500/-.

5. Mr. Ashok Kumar Vecho, PW-3 has stated that he worked as Manager (Foreign Exchange) from April, 1981 to April, 1985 in Connaught Place, New Delhi. He has stated that during this period various facilities, the details which are given in the plaint, were sanctioned to the defendants and availed by the defendants. He had also stated that defendants created equitable mortgage of land measuring 1008 sq.yrds. out of Khasra No.96/68 situated in the revenue estate of village Holambi Kalan, Delhi. The defendants had also hypothecated the stock with the plaintiff bank. Documents to these effect were executed in his presence which are Ex.P-2 to Ex.P-223. He has also proved on record deed of hypothecation as Ex.PW-3/1. Bills discounting debit vouchers are also proved as Ex.PW-3/3 to Ex. PW-3/5. Covering letter for purchase of foreign documentary bills signed by defendant No.2 is proved as Ex.PW-3/6. Demand promissory note dated 23rd October, 1982 executed by defendant No.2 in presence of PW-3 is proved as Ex.PW-3/7. This witness has further deposed to the effect that at the relevant time the rate of interest 12.5 per cent with quarterly rests. Whatever money had been availed against these facilities by the defendants, the same was debited to their accounts in the bank which is outstanding as the defendants have not paid any amount.

The aforesaid testimony coupled with documents proved on record amply proves the case of the plaintiff bank and the plaintiff bank is held entitled to recover the sum of Rs.7,03,500/- from the defendants. The plaintiff is also entitled to interest as the rate of 12.5 per cent per annum from the date of institution of the suit till payment thereof. These issues are accordingly decided in favor of the plaintiff.

Relief:

6. Preliminary decree in the sum of Rs.7,03,500/- Along with interest at the rate of 12.5 per cent annum and pendentelite interest with costs is passed. The defendants are directed to pay into the court the decretal amount within six months from today. If no payment is made, the plaintiff bank would be entitled to seek final decree.

7. Suit stands disposed of.