(2009) 09 BOM CK 0006

In the Bombay High Court

Case No : Summary Suit No. 2403 of 1999

Jayantilal D. Doshi (Since deceased through his heirs Smt. Indira Jayantilal Doshi and Others) — APPELLANT

Vs

Mr. Bharat Hiralal — RESPONDENT

Date of Decision : 24-09-2009

Acts Referred:
Bombay Money Lenders Act, 1946 — Section 10
Civil Procedure Code, 1908 (CPC) — Section 34

Citation : (2010) 2 BC 259 : (2009) 111 BOMLR 4172

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : S.K. Jain and N.P. Jain, for the Appellant; Shailesh Shah, Lijan P.P. and Hemant R. Haryan, instructed by M and M Legal Venture, for the Respondent

Judgement

Anoop V. Mohta, J.—The suit is filed on 15th April, 1999 for recovery of Rs. 16,23,130/with interest. The defendant is a registered Broker and a proprietor of M/s. Hiralal Liladhar.

2. The plaintiff out of his saving lent and advanced to the defendant the amount as per the claims, as and by way of business loan. The defendant agreed to pay the interest at the varied rates from time to time. The defendant, as agreed, made part payment of interest and on closing of the financial years; the defendant sent confirmation statement showing the amount due and payable lastly on 27th May, 1996. Therefore, as on 01/04/1996, the amount was Rs. 11,26,978/. The defendant paid Rs. 23,232/on 15/06/1996 and Rs. 23,232/on 01/02/1996 which were duly credited in the Account and therefore, the suit based on balance principal amount on Rs. 10,81,514/with interest of Rs. 5,41,616/as on the date of the filing of the suit.

3. The plaintiff, therefore, demanded through the advocate notice dated 27th March, 1999. Though received, the defendant failed and neglected to make the payment. Hence, the present suit.

4. The defendants resisted the case/claim in his Written Statement, mainly on the ground of limitation, interest rate was never agreed, improper Account and credit and lastly no balance amount is due and payable as it was paid in full and final settlement. Therefore, denied the claim but not the confirmation letters.

5. As the plaintiff died, his heirs were brought on record. Plaintiff No. 1, therefore, filed examination in chief on 19th July, 2007 along with compilation of documents. The Commissioner was appointed. The evidence was recorded. The defendant did not examine himself nor filed any compilation of documents. The defendant admitted the document from Serial Nos. 1 to 8. The document at Serial Nos. 10 to 12 are the certified copies of income tax return. They are public documents.

6. In the suit, following issues are framed:

1. Whether the Plaintiffs have proved the claims with interest as prayed?

2. Whether the suit is within limitation?

3. Whether the defendant proves that so far as the confirmation letter dated 27.5.1996 is concerned the same was given at the request of the plaintiff for Income Tax purposes as alleged in para 8 of the written statement.

4. Whether the defendant proves that the amount of Rs. 23,232/paid on 15.6.1996 and Rs. 23,232/paid on 1.7.1996 by the defendant to the plaintiffs was in full and final settlement of the plaintiffs claim as alleged in para 9 of the written statement?

5. What relief and order?

7. Issue No. 1:The defendant is a registered broker and proprietor of M/s. Hiralal Liladher. The plaintiff advanced various loan amount to the firm for Vyaj Badla transaction. There is no denial to the "Vyaj Badla" Account. When the defendant closed the transaction, balance of Rs. 2,17,740/was due and payable. It was converted to loan account and accordingly, the defendant open loan account in 1989. The defendant, from time to time issued loan confirmation letters in favour of the Plaintiff. Thus, confirmation letters to every year ranges from the period from 01/04/1989 upto 31/03/1996 including the agreed accrued interest. Thus, the documents are exhibited (Exhibit P1 to P5). The defendant admitted that all the confirmation letters are signed and issued by him to the Plaintiff. The defendant unable to deny the amount due and payable from time to time, as specific questions were put for the period from 1992 to 01/04/1996. The defendant also admitted that the extracts of General Ledger (exhibit P2) were issued by him to the Plaintiff.

8. The defendant, admittedly made two part payment of Rs. 23,232/on 15/6/1996 and Rs. 23,232/on 01/02/1996. The rate of interest agreed and varied from time to time. The last agreed rate of interest was of 24% p.a. for the financial year 199596.

9. The original plaintiff died on 13/04/2005. Income tax return for the assessment year 199697 to 20042005 shows Rs. 11,27,978/as due to the defendant as on 01/04/1996. At the time of filing of the suit on 01/04/1997 the amount was Rs. 10,81,540. (document at serial Nos. 10 to 12).

10. The defendant though received demand notice dated 27/03/1999 of Rs. 10,81,514/with further interest, there was no denial or reply by the defendant. (Exhibit P8).

11. As original plaintiff died, her heirs were brought on record. The plaintiff''s son, plaintiff No. 9 filed an affidavit of examination in Chief on 19th July, 2007, along with compilation of documents. The defendant admitted the documents at Serial Nos. 1 to 8. Document at Serial Nos. 10 to 12 are certified copies of income tax returns of the plaintiff. The defendant, therefore, admitted the confirmation letters. There is no denial to the contents of the same.

12. The present suit, therefore, based upon such confirmation of account and amount in writing and as duly acknowledged from time to time which is also inclusive of agreed accrued interest which varied from time to time ranging from 24% to 36% p.a. In a commercial transaction like this, when both the parties are doing commercial transactions and are fully aware of the transactions and concluded the contract and accordingly from time to time confirmed in writing and promised to pay the amount, as well as, the accrued interest as acknowledged and calculated in such confirmation letters/ documents, therefore, the present suit based upon the same writing contract, which are not in dispute, in view of above, stands proved as per issue No. 1.

13. In view of above itself, I am not inclined to accept the case of the defendant that plaint does not disclose the material particulars or cause of action. Turning to the point of excessive interest and of compound interest, in view of above itself, and as there is nothing contra material placed on record by the defendant and as those confirming letters/ documents remained unchallenged throughout and as a defendant signed and acknowledged the liability from time to time, covering the rate of interest as charged from time to time, the case that there was no agreement for payment of compound interest is unacceptable. Having once agreed and acknowledged the principal amount, as well as, the interest amount based upon then agreed rate of interest in a commercial transaction like this, it is unacceptable that there was no agreement of payment of the compound interest and the plaintiff is not entitled to claim compound interest. The evidence of both the parties shows that the rate of interest were not less than 24% agreed and charged from time to time. There is no contra material placed on record by the defendant to show any such material/evidence to show that it was not agreed the rate of interest and or not permitted to charge compound interest. Therefore, the submission based upon Section 34 of CPC (CPC) and above two Acts as referred, is also need to be rejected. The Judgments so cited by the parties in view of above facts itself are distinct and distinguishable.

14. The defendant himself agreed that there was fixed rate of interest decided. He paid the interest as per the market practice. He also admit that the rate was calculated by the original plaintiff. It also means that there was no objection at any point of time at the earlier. The defendant, in fact, admitted that due of Rs. 5,05,857/was paid by him and amount Rs. 3,62,400/was paid towards the principal amount and Rs. 1,63,358/- paid towards the interest as per his books of account. The defendant admitted that an amount of Rs. 11,27,978/was due and payable to the original plaintiff as on 01/04/1996. Therefore, merely because the "interest" word was not mentioned, but the defendant all the time admitted the liability including of compound and agreed interest, any challenge with this regard, therefore, now is unsustainable.

15. The defendant''s case that the suit is barred u/s 10 of the Bombay Money Lenders Act and based upon the transaction under Usurious Loans Act, 1918, are also unacceptable being commercial transaction between the commercial minded person. The reliance of the defendant based upon the Judgments in view of above admitted documents, are not applicable on fact itself. There is no question of reopening of transactions on the ground of excessive, unfair and unilateral rate of interest. Whether the rate of interest is excessive or charged by compound interest, ought to have been agitated and or protested at the relevant time before confirming the amount of their liability from time to time, since 1989 to 1996. The defendant''s case that the amount should have been appropriated firstly, towards the principal amount, is also not incorrect in view of above, specially when there is nothing on record to show contra material by the defendant.

16. Issue No. 2: In view of above fact itself, it is clear that the suit is within a period of limitation.

17. Issue No. 3 : The defendant failed to prove, in view of the confirmation letters under writing, as referred above, to show that it was given at the request of the plaintiff for income tax purposes. The writing documents so given and as part payment, was also made accordingly, and further submitted that it was towards the full and final payment, that itself shows that the defendant has given this documents which is recognized and permissible mode of acknowledging the liability and the payment towards the principal, as well as, agreed rate of interest. Now, to deny the same without any contra material, is therefore, impermissible. The defendant therefore, failed to prove issue No. 3 also.

18. Issue No. 4: The defendant, except the averments on record, unable to place any substantial documents or any material to support that the last payments were in full and final settlement except putting some suggestions in the cross-examination to the Plaintiffs'' witness, and merely because last 2 figures were not odd figures, as contended, that itself is insufficient to accept the case that it was made in full and final settlement. The plaintiff''s witness may not be aware of this, but still the defendant failed to place any contra material on record including any such receipts or acknowledgment. There is no such case made out

by the defendant, at any point of time, in spite of the due demand notice served upon him at the relevant time. There was no such positive case made by the defendant and in fact, failed to substantiate the same in view of above itself. Therefore, defendant failed to prove issue No. 4 also.

19. However, considering the facts and circumstances of the case and the amount of interest so claimed ranging from 24% to 36% at some point of time and considering the market practice and as there was no agreed rate of interest, I am inclined to modify the claim, restricting the same to the extent of 24% p.a. from 01/04/1989 to 15/04/1999 i.e. the date of filing of the suit.

ORDER

1. The defendant is directed and ordered to pay to the plaintiff a sum of Rs. 14,59,790/and interest on Rs. 10,81,514/@ 12% p.a. from the date of filing of the suit till realization.

2. Decree be drawn accordingly. No order as to costs.

20. The learned Counsel appearing for the Defendant seeking stay to the effect and operation of this order. It is, accordingly granted for eight weeks.

