

(2008) 12 OHC CK 0068
In the Orissa High Court

Mahavir Ice and Cold Storage (P) Ltd.	APPELLANT
Vs	
Small Industries Development Bank of India, IPICO House and Another	RESPONDENT

Date of Decision : 02-12-2008

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2009) 107 CLT 51

Hon'ble Judges : B.S. Chauhan, C.J.; B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This Writ Petition has been filed seeking refund of Rs. 9.69 lakhs along with interest alleged to have been illegally collected from the Petitioner by force by the Opposite Party No. 1 - Bank.

2. The facts and circumstances giving rise to the case are that Petitioner had taken loan from the Opposite Party-bank to the tune of Rs. 64 lakhs. For that purpose an agreement dated 23rd December, 1995 was executed between the parties providing for a schedule of repayment, according to which the loan was repayable in 23 quarterly installments (22 installments of Rs. 2.79 each and last instalment of Rs. 2.62 lakhs) commencing at the end of 18th months from the date of disbursement of loan. Repayment dates were fixed on 1st day of March, June, September and December respectively. The agreement also contained the provisions for premature repayment, which reads as under:

Premature Repayment of SIDBI Loan :The borrower shall not prepay the outstanding principal amount of loan in full or part before the due dates except after obtaining prior approval of SIDBI in writing (which may be granted conditionally).

3. During the subsistence of the aforesaid agreement/contract, Petitioner applied for grant of further loan for expansion of its unit and for that purpose negotiation

continued for a long time. However, before it could be materialized, Petitioner had been sanctioned a loan by the State Bank of India. Petitioner wanted to get the title deeds/documents etc. released from the Opposite Party-Bank in order to pledge the same for taking loan from State Bank of India. Therefore, the Petitioner submitted a proposal of premature repayment to the Opposite Party-Bank vide letter dated 15th January, 1998. The Bank considered the same and replied vide letter dated 3rd February, 1998 (Annex.-5) that it was willing to accept the proposal subject to paying the pre-payment premium to the tune Rs. 9,69,000/- together with interest dues at the applicable rate till the date of payment with further interest/liquidated damages of Rs. 1,833 in addition to the entire outstanding dues.

4. Petitioner vide letter dated 12.02.1998 (Annex.-6) deposited the entire amount as asked by the Opposite Party - Bank with a request to release the original documents (security) at the earliest. The documents were released forthwith. This Writ Petition was filed on 20th April, 1998 for seeking aforesaid relief on the ground that Opposite Party- Bank had forcibly made the recovery of the aforesaid amount. Hence, Petitioner is entitled for refund with interest.

5. Shri S.P. Mishra, Learned Senior Counsel appearing for the Petitioner has submitted that the condition provided in the agreement is itself against the public policy. The terms and conditions imposed by the Opposite Party-Bank to that effect had not been acceptable to the Petitioner. The payment was made under coercion. The recovery of the aforesaid amount made forcibly was illegal and arbitrary. Therefore, the Opposite Party No. 1 be directed to refund the same with interest.

6. On the contrary, Shri Mr. B.M. Patnaik, Learned Counsel for the Opposite Party-Bank has submitted that recovery had not been made forcibly. Petitioner submitted three Bank Drafts dated 12.10.1998 voluntarily just to get its documents released, so that the same could be used for obtaining the loan from the State Bank of India. The petition involves enforcement of terms and conditions of the contract. No illegality and arbitrariness can be alleged on the part of the Opposite Party No. 1, therefore, the petition is liable to be dismissed.

7. We have considered the rival submissions made by the Learned Counsel for the parties.

8. Undoubtedly, the terms of agreement are crystal clear and we do not see any reason as to why the same should not be enforced between the parties. Submissions made by Shri S.P. Mishra that recovery had been made forcibly from the Petitioner is preposterous. In fact it was voluntarily act at the behest of the Petitioner as it was in hurry to get it's title deeds/documents etc. released from the Opposite Party - Bank, so that it can get the another loan from State Bank of India. The terms of agreement had been quite clear. Opposite Party No. 1 acted upon it. Anxiety of the Petitioner to get loan from another bank is evident from the correspondence between the parties as Petitioner had made all attempts to

seek additional loan from Opposite Party No. 1 itself and when it could not succeed, only then it made application before the State Bank of India.

9. More so, we fail to understand, as if the Petitioner had voluntarily submitted the Bank Drafts to get it's documents released and which were made available to it for taking the loan from another Bank and Petitioner deposited the said Title deeds etc. as Security with the State Bank of India, under what circumstances such a grievance can be raised. The conduct of the Petitioner itself amounts to acquiescence and it cannot be permitted to agitate any issue in this regard. More so, in the counter affidavit it has been explained as to how the Opposite Party - Bank accepted the proposal of pre-payment of entire outstanding dues and how the premium to the tune of Rs. 9,69,000/- (nine lakh sixty nine thousand) was determined. Letter dated 20.02.1998 (Annex.-A/1) filed by the Opposite Party No. 1 is in fact a receipt of the title documents from the Opposite Party No. 1 and the last paragraph there of reads as under:

we declare that we have no claim against SIDBI whatsoever.

10. It is nobody's case that such a stipulation in the aforesaid letter was also obtained by the Bank forcibly. The aforesaid letter was given by the Petitioner after eight days of its earlier letter dated 12.2.1998. The aforesaid letter also does not suggest that Petitioner was by any means forced to deposit the said amount. Letter dated 12.2.1998 reads as under:

Date: 12.2.1998 Ref No. MICSPL/SIDBI/97-98

To The General Manager, The Small Industries Development Bank of India, OCHC Building, 4th Floor, Bhubaneswar (Orissa). Dear Sir,

We refer to your letter No. 2700 dt. 3.2.1998 regarding pre- payment of assistance under PFS.

However, we are surprised in receiving your said letter indicating to pay pre-payment premium of Rs. 9,69,000/- (Rupees Nine Lakhs sixty nine thousand only) except principals and other expenditure. It is too high on our part.

We are forcefully making payment of the said amount which is not acceptable to us.

We are enclosing the following three numbers of Banker's pay order for your kind consideration.

- i) Pay order No. 534477 dated 12.2.98 for Rs. 64,00,000.00 lakhs., towards principal.
- ii) Pay order No. 534475 dated 12.2.98 for Rs. 2,58,271.00 towards interest as on 13.2.98 for 75 days and liquidity damages of Rs. 1833.00.
- iii) Pay Order No. 534476 dated 12.2.98 for Rs. 9,09,000.00 towards prepayment penalty.

We request your goodself to kindly receipt of the same and release our-documents (security) at an early date.

Thanking you, Yours faithfully, For Mahavir Ice and Cold Storage (P) Ltd.
(Anand Kumar Agarwal)

11. We fail to understand if it was not acceptable to the Petitioner, it should have challenged the same before some appropriate forum, agitating the issue. Merely mentioning that it was not acceptable to the Petitioner was not enough. Petitioner accepted the terms, acted upon it and took benefit of the same by getting its title deeds etc released, it clearly amounts acquiescence and Petitioner is estopped to raise the grievance. The letter was served upon the Respondent-Bank Dasti. It shows that Petitioner wanted to get its documents released at the earliest.

12. Acquiescence, being the principle of equity, must be made applicable where the order has been passed and complied with and the other side has taken the benefit of it. After taking benefit of the order/action/transaction, he cannot be permitted to raise any grievance. A person cannot be permitted to challenge an order merely because he has sustained some loss or failed in the examination etc. Such-persons cannot be permitted to turn around and contend later when they found they were not successful, challenging the said order. (vide Pannalal Binraj Vs. Union of India (UOI), ; Manak Lal Vs. Dr. Prem Chand, ; Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, ; G. Sarana Vs. University of Lucknow and Others, ; Major Chandra Bhan Singh Vs. Latafat Ullah Khan and Others, ; Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, ; Madan Lal and Others Vs. State of Jammu and Kashmir and Others, ; and Utkal University Vs. Dr. Nrusingha Charan Sarangi and Others, .

13. In State of Punjab and others Vs. Krishan Niwas, , the Apex Court examined a case where the services of the employee were terminated in exercise of the powers under Article 311(2)(b) of the Constitution. The Appellate Court reduced the punishment imposed by the Trial Court. In the Departmental Appeal, the order of dismissed was also converted into that of a lesser punishment. The employee had acted upon it and joined the post. He was held not entitled to challenge the reduced punishment as he was stopped by his conduct.

14. In Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd., the Apex Court held as under:

Acquiescence is sitting by, when another is invading the rights. It is a course of conduct inconsistent with the claim... The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the Defendant....

15. Similar principle had been made applicable even in contractual matters. (Vide State of Orissa and others Vs. Narain Prasad and others, etc. etc., ; and State of Rajasthan and Ors. v. Anil Kumar Sunil Kumar & Party and Anr. AIR 2000 SC

1441).

16. Mr. Mishra has placed reliance upon large number of Judgments, particularly in Union of India (UOI) Vs. Jethabhai Jesinbhai Patel and Co., ; Shri Krishnan Vs. The Kurukshetra University, Kurukshetra, ; Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, ; Indira Bai Vs. Nand Kishore, ; and Central Bank of India Vs. Ravindra and Others, . The ratio of the said Judgments is not applicable as the facts are quite distinguishable. In those cases the terms of contract were found to be exit by public policy or constitutional provisions or acceptance had been in ignorance of legal rights or where a fraud could not be understood by a party in spite of full diligence.

17. Several letters had been issued and particularly letter dated 6th January, 1998 written by the Opposite Party-Bank to the Petitioner to furnish explanation for seeking additional loan for extension of their unit before completion of one year of commercial production. The Petitioner vide letter dated 15th January, 1998 (Annex.-G/1) wrote to the Opposite Party-Bank to inform as what would be the total outstanding amount as on 16th January, 1998, so that the entire amount can be paid and the documents of security can be released at the earliest.

18. Again letter dated 29th January, 1998 (Annex.-1/1) reveals that a Cheque of Rs. 64.00 lakhs had been sent to the Opposite Party -Bank for settling the entire amount and in the said letter the Petitioner had given undertaking that "company will pay the interest due & other dues whenever asked".

19. Vide letter dated 3rd February, 1998 (Annex.-J/1) the Opposite Party-Bank returned the said Cheque of Rs. 64.00 lakhs as no decision had been taken by the Opposite Party-Bank to accept the pre-payment.

20. In the counter affidavit the Bank has explained that the terms of the loan agreement were governed by the by-lateral agreement between the parties and the said amount of Rs. 9.69 lakhs had been calculated not only in terms of the agreement but also which was applicable in all such cases.

It has been revealed in the counter affidavit that pre-payment had been charged as per the practice prevalent with All India Financial Institutions and is based on the estimated loss due to prepayment taking into account the cost of raising of funds and the cost of reinvesting the funds. The said premium of Rs. 9.69 lakhs had been worked out on the basis of present value of Interest differential between document rate and prime lending rate. In fact the prime lending rate was spread over the currency of the loan worked out to Rs. 12.45 lakhs. However, taking a lenient view and showing the fairness, it was fixed Rs. 9.69 lakhs which was the value of those future cash flows arrived at by discounting the Petitioner at the prevalent prime lending rate.

21. In the rejoinder affidavit such figures have not been disputed. What has been

submitted therein that charging such a rate was arbitrary and unreasonable.

22. The Opposite Party-Bank is not like an ordinary money lender or a Bank which lends money. It only arranges the finance for an individual applicant-borrower from the Government or other-financial institution on certain terms which also include the period of repayment. In such a fact situation imposing a condition of extra interest etc. in case of pre-payment can not be held to be arbitrary or unreasonable.

23. However, in the facts and circumstances, of the case the Petitioner as explained hereinabove was, willing to get his documents released from the Opposite Party-bank after making pre-payment of the loan amount voluntarily. The Opposite Party-bank had acted in turn and its conduct cannot be held to be unreasonable or arbitrary. The Opposite Party-bank had taken a lenient view otherwise the amount of interest could have been more than twelve lakhs.

24. In view of the aforesaid facts and circumstances, Petitioner cannot be permitted to approbate and reprobate and blow hot and cold in the same breath. The recovery had been made in terms of the agreement. Thus, we do not find any cogent reason to interfere in the matter. The petition lacks merit and is accordingly dismissed.

B.N. Mahapatra, J.

25. I agree.