
(1997) 10 BOM CK 0009

In the Bombay High Court

Case No : First Civil Appeal No's. 21 and 22 of 1990

Mrs. Nalini Abraham and another

APPELLANT

Vs

Indian Overseas Bank and others

RESPONDENT

Date of Decision : 08-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 41 Rule 23, Order 9 Rule 6, 34, 96

Limitation Act, 1963 — Section 18, 3

Citation : (1998) 3 ALLMR 592 : (1998) 2 BomCR 518

Hon'ble Judges : R.M.S. Khandeparkar, J; R.K. Batta, J

Bench : Division Bench

Advocate : E.P. Lobo, for the Appellant; G.V. Tamba, for the Respondent

Judgement

R.K. Batta, J.—Since both the appeals arise out of the same judgment, it is proposed to dispose of the same by common judgment. First Appeal No. 21 of 1990 is filed by appellant Mrs. Nalini Abraham who is defendant No. 2 and partner of defendant No. 1. First Appeal No. 22 of 1990 has been filed by defendant No. 4 who is guarantor for cash credit facility.

2. The respondent Bank (hereinafter referred as plaintiff) had filed a suit for recovery of money against the appellants (hereinafter referred as defendants Nos. 2 and 4, respectively) and others. The case of the plaintiff is that defendant No. 1 is a partnership firm duly registered of which defendants No. 2 and 3 are partners and defendant No. 4 is the Manager of the said firm. The partners of the said firm, namely defendants Nos. 2 and 3, were granted cash credit facility for the purpose of business upto a sum of Rs. 40,000/-. Defendants Nos. 2 and 3 executed demand promissory note and also hypothecated telephone parts and raw materials as security for the said loan. Defendant No. 4 was guarantor in respect of the said loan. The said cash credit account was to carry interest at the rate of 5% per annum over the Reserve Bank of India rates with minimum of 14% per annum. Subsequently, key loan of Rs. 70,600/- was sanctioned by the

plaintiff to defendant No. 1 who kept 21 cartoons of carbon granules as security for the said loan. The said loan was to carry minimum interest at the rate of 12.5% over and above 3.5% over the Reserve Bank official rate. Defendant No. 1 executed promissory note in favour of the plaintiff for the said amount.

3. The amounts due in the said accounts were not cleared. In the meantime, letters of acknowledgement of liability were sent and the last letter of acknowledgement is that of defendant No. 1 who wrote a letter on 14-4-1982 to the plaintiff acknowledging the liability of payment of the said loan. On account of non-payment of dues under the said loan account, suit was filed by the plaintiff claiming a sum of Rs. 67,129-24 towards the cash credit facility and Rs. 56,574-08 towards the key loan account with 16.5% interest on the said amounts with effect from 20th January 1983.

4. In the written statements filed by defendants Nos. 2 and 4, the main stand taken was that the suit was barred by limitation and that defendant No. 4 was guarantor only in respect of the cash credit loan of Rs. 40,000/- and had nothing to do with the key loan of Rs. 70,600/-. Otherwise, the liability under the said loans was not disputed. The said defendants had also alleged in the written statements that the security which was furnished was allowed to deteriorate as a result of which the value of the security was substantially reduced. Neither the extent of reduction in the value of the security was quantified or specified nor any claim for set-off was put forward. It appears that at the time of framing of issues, this aspect was not pressed as a result of which no issue was framed on this aspect. It is pertinent to note that draft issues were filed by Advocate for defendants Nos. 2 and 4 himself in which no issue was pressed regarding deterioration/reduction in the value of security on account of fault of the plaintiff. Even after the framing of the issues, no application pressing this aspect was filed for the purpose of re-framing of issues on that count.

5. The plaintiff had examined only one witness and closed the case. The case was fixed for defence evidence and on that day, application was filed by defendants Nos. 2 and 4 for adjournment on the ground that defendant No. 2 was sick at Bombay. This application was rejected by the Civil Judge on 21-11-1989 and the defence evidence was closed. The Civil Judge vide impugned judgement dated 18th December 1989 decreed the suit except that in relation to the key loan of Rs. 70,600/- defendant No. 4 was not jointly or severally held responsible. These findings were arrived at after the trial Judge had answered Issue No. 1 in the affirmative and Issue No. 2 on the point of limitation which was raised by defendants Nos. 2 and 4, in the negative. This judgment is challenged in these appeals.

6. Learned Advocate Shri Lobo, appearing on behalf of the appellants, urged before us that the plaintiffs had not produced the so-called letter of acknowledgement of liability dated 14-4-1982 in the course of evidence and, as such, on the face of it the suit was barred by limitation. The earlier acknowledgements were, however, admittedly produced. In para 12 of the plaint

it was stated that defendant No. 1 on 14-4-1982 wrote a letter to plaintiffs acknowledging the liability of the payment of the said loan amounts and further agreed to clear the same as soon as possible. This fact was not disputed by defendants Nos. 2 and 4 in their written statement as can be seen from the said written statements where there is no reply to para 12 insofar as written statement of defendant No. 2 is concerned and in the written statement of defendant No. 4 it was submitted that the said defendant No. 4 had been advised not to plead to the said paragraphs. Thus, the plaintiff had made categorical averment in para 12 of the plaint regarding letter dated 14-4-1982 vide which the liability to pay the said loan amounts was acknowledged by defendant No. 1 and these facts were not disputed in the written statement. Issues are required to be framed only relating to disputed facts. Facts which are not disputed are not required to be proved by producing any documentary evidence or otherwise. Therefore, there is absolutely no merit in the submission of learned Advocate Shri Lobo and that there is no material on record to come to the conclusion that the suit in question was barred by limitation.

7. Learned Advocate Shri Lobo has strongly pleaded before us that the appellants are ready to deposit Rs. 75,000/- in this Court and the matter be remanded for giving opportunity to the defendants to lead evidence. This contention was raised on the basis that the defendants were not given sufficient opportunity to lead evidence and the defence case was closed. In this respect, it has been urged by learned advocate Shri Lobo that the adjournment was sought on the ground that defendant No. 2 was sick and there was no objection from the Advocate of the plaintiff for adjournment, but the Civil Judge declined to grant adjournment and closed the defence case. It may be mentioned here that the evidence in plaintiff's case was over on 16-9-1989 and sufficiently long date was given to the defendants to lead evidence on 21-11-1989. On that day, application in question was filed on ground of sickness but no medical certificate was filed along with the application though defendants Nos. 2 and 4 undertook to file the same. This application was rejected by the Civil Judge. Thereafter, the matter was taken up on 1-12-1989 on which date no one appeared for the defendants. Thereafter, the matter was adjourned and taken up on 5-12-1989 and on that day also no one appeared for the defendants, the matter was fixed for judgment on 18-12-1989 and on that day also no one appeared on behalf of the defendants. This clearly shows that the defendants were no longer interested in pursuing the matter. Otherwise they could have produced medical certificate prior to 18-12-1989. They could also file an application for setting aside of the order closing the defence evidence by producing medical certificate, but the defendants did not choose to do so. In our opinion, we do not find any justification for remanding the matter as urged by learned Advocate for the appellants.

8. Learned Advocate Shri Lobo also made submissions on the question that the plaintiff did not take any step to enforce security. We have already pointed out that no such issue was pressed before the Civil Judge and the appellants cannot,

at this stage, be allowed to urge this issue before us.

9. It was next urged by learned advocate for the appellants that the interest which is charged is much more than what is permissible in law. There is no dispute that the transactions in question would be covered by commercial transactions. Proviso to section 34 C.P.C. lays down:---

"....Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions."

In respect of banking transactions, especially of commercial nature, contractual rate of interest is rule and departure is an exception and this is now well settled. The debtor in case of a commercial transaction is required to pay the contractual rate not only pendente lite, but also from the date of the decree in addition to the interest prior to the suit. Award of interest prior to the suit is matter of substantive law and contractual liability and outside the realm of section 34. We, therefore, do not find any merit in the contentions of learned Advocate for the appellants. The interest awarded by the Civil Judge is as per contract between the parties.

10. For the aforesaid reasons, we do not find any merit in these appeals and the appeals are liable to be dismissed with costs. The amounts realised after the filing of the suit amounting to Rs. 52,980-50 shall stand adjusted against the key loan which has been decreed.

11. Appeal dismissed.