(2017) 12 GAU CK 0009

In the Gauhati High Court

Case No : 15 of 2014

M/s Green Valley Industriy and anothe — APPELLANT

Vs

State of Assam and others — RESPONDENT

Date of Decision : 04-12-2017

Acts Referred:

Code of Civil Procedure, 1908, Section 11, Section 80, Order 2Rule 2(2) - Res Judicata - Notice
<a href=1909>Interest on Delayed Payments to Small Scale and

Citation : (2017) 12 GAU CK 0009

Hon'ble Judges : Kalyan Rai Surana

Bench : SINGLE BENCH

Advocate : U. Chakraborty, K. Rajbongshi, RPN Singh, A. Talumdar, SP Choudhury

Judgement

1. Heard Mrs. U. Chakraborty, the learned counsel for the appellants as well as Mr. SP Choudhury, the learned Govt. Advocate appearing for the respondents.

2. This appeal u/s 96 r/w Order XLI Rule 1 & 2 is filed against the judgment and decree dated 26.08.2011 passed by the learned Civil Judge No.1, Kamrup, Guwahati, in Money Suit No.77/2008.

3. The facts in the suit is brief. The appellant is the plaintiff in the suit. The appellant is a partnership firm carrying on business as small scale industry. The said industry is registered under No.02/03/01250/DNT SSI having its office at main road at Tezpur. The respondent No.2 i.e. the Chief Engineer, PWD (Roads), Guwahati entered into a contract with the plaintiff on 29.02.1996 for supply of RCC pipes, Class NP-2 & NP-3 for construction of road at Kokrajhar. The plaintiff agreed to the terms and condition of proposal dated 11.03.1996. Thereafter, the respondent No.2 issued a formal work order on 02.08.1996 for supply of materials at the work site. In this regard pursuant to a tender process, a Contract Agreement bearing No.341CE (Roads) 1995-96 was executed by and

between the respondent No.2 and the plaintiff. For the billed amount against the supply, the respondent No.2 paid a sum of Rs.6,79,000/- to the plaintiff and there remained an outstanding balance of Rs.7,70,233/- as the principal sum due. As no payment was forthcoming, the petitioner filed W.P.(C)No.5670/2000 before this Court for realizing their dues with statutory interest upto 31.03.2000 and thereafter as per the Act.

4. This Court disposed of the said writ petition by order dated 01.07.2004 by directing the respondents to examine the claim of the petitioner with further direction that if upon such examination, it is found that the petitioner was really entitled to the sum of Rs.7,70,233/-, the same shall be paid to him. The direction was issued that the entire exercise shall be carried out within a period of 6 months from the date of furnishing the certified copy of the said order along with copy of the writ petition and its annexures.

5. As the principal outstanding was only paid on 24.03.2007 without any interest in accordance with the provisions of the Interest on Delayed Payments to Small Scale Industries under the Small Scale and Ancillary Industrial Undertakings Act, 1993 (for short, ''1993 Act''), the appellant herein issued a notice u/s 80 CPC on 10.11.2007 demanding a sum of Rs.46,57,784/- towards interest under the provisions of the said 1993 Act. As the claim of the appellant was not paid, the appellant had filed the money suit being Money Suit No.77/2008 for recovery of the said amount.

6. The respondents herein, who are the defendants in the suit contested the suit by filing their written statement. Amongst others, plea was taken as the respondents had made payment of the entire amount pursuant to the order of this Court and hence, a civil suit for interest would not lie as the plaintiff had waived his right to claim any interest under the said 1993 Act. On the basis of pleadings, the following issues were framed by the learned trial court: "1.Whether the suit is maintainable in its present form?

2.Whether there is any cause of action for the suit?

3. Whether the suit is barred by limitation?

4. Whether the plaintiff is entitled for realization of interest as prayed for, from the defendants as per the provisions of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertaking Act, 1993?

5. Whether the defendants are liable to pay to the plaintiff interest on the principal amount as prayed for by the plaintiff in accordance to the provision of Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertaking Act, 1993?

6. Whether the plaintiff is entitled to be declared as the primary member of the defendant No.1?

7. To what relief/reliefs the parties are entitled?"

7. In support of their respective stand, both sides have examined one witness each. The plaintiff''s side had proved the following documents: Ext. 1- Partnership Deed dated 01.04.1996

Ext.2- General Power of Attorney dated 03.05.2008

Ext.3- Chart showing calculation of interest

The respondents had exhibited the following documents:

Ext.A- Statement showing liability against the plaintiff and full payment vouchers

Ext.B- The order dated 01.07.2004 passed by this Court in WP(C) No.5670/2000

Ext.C- Authority Letter.

8. In respect of issue No.2, the learned trial court had held that there was a cause of action for the suit and the issue was answered in the affirmative. Issues No.4 & 5 were taken up together. In this regard, it was held that the principal amount had been paid by the defendant and no outstanding is lying due for recovery and that the plaintiffs had received the said amount from the defendants without interest. It was further held that as per their own contract and admission, the plaintiff had waived their right to claim interest under the 1993 Act and accordingly, it was held that neither the plaintiff was entitled to recover any interest from the plaintiff nor the defendants are liable to pay the said interest and the said issues were answered in the negative.

9. In respect of issue No.3, it was held that in view of the plaintiff''s claim for realization of principal outstanding dues without interest in W.P.(C)No.5670/2000, as per the provisions of Order II Rule 2(2) CPC, the suit of the plaintiff was barred by limitation since the suit was filed on 02.07.2008 beyond the period of limitation and the said issue was decided in affirmative.

10. As regard issue No.1, in view of the discussion and decision on issues No.3 & 4, it was held that the suit was not maintainable as it was hit by Order II Rule 2 CPC read with Section 56 of the 1993 Act and the issue was decided in negative.

11. The issue No.6 was also decided against the plaintiff and in respect of issue No.7, it was held that the plaintiff is not entitled to any decree as prayed for. As a result, the suit was dismissed on contest.

12. Mrs. U. Chakraborty, the learned counsel for the appellant submits that in the light of the various judgments passed by this Court as well as by the Hon''ble Supreme Court, it is no longer res-integra that the suit on the interest was not maintainable. Strong reliance is placed on the Full Bench decision of this Court in the case of Assam State Electricity Board and others Vs. M/s Shanti Construction (P) Ltd. and another, 2002 (1) GLT 547, and the case of Modern Industries Vs. M/s Tea Authority of India Ltd, (2010) 5 SCC 44. It is submitted that right of interest under the 1993 Act was a statutory right vested on the SSI Unit to claim interest under the said 1993 Act, if the principal amount was not paid within the

time permitted under the said 1993 Act. It is submitted that as the right to interest is a statutory right under the 1993 Act, the said right having not been waived or relinquished, it cannot be said to have extinguished. Accordingly, the dismissal of the suit was bad in law and the appellant prays for a decree for interest as claimed in the suit. It is further submitted that as the right to interest is a statutory right, the said right is not extinguished either under the provisions of Order II Rule 2 CPC or under the provisions of Explanation-iv to Section 11 CPC. It is submitted that the suit for interest was maintainable and merely because this Court vide order dated 01.07.2004 passed in WP(C) No.5670/2000 directed the respondents to release sum of Rs.7,70,233/-, it cannot be construed as a clog on the right of the petitioner to claim interest.

13. Per contra, Mr. SP Choudhury, the learned Govt. Advocate for the respondents submits that the appellants had approached this Court by filing WP (C) No.5670/2000, by which the petitioner had claimed the payment of a sum of Rs.7,70,233/- with interest under the Act and this Court had allowed the prayer of the appellant by the order dated 01.07.2004, by directing that the State respondents shall carry out exercise of examining the claim of the appellant within a period of 6 months and if the appellant is found to be entitled, the same shall be paid to him. It is further submitted that as this Court had not allowed any interest to be paid on the said amount. Therefore, the subsequent suit i.e Money Suit No.77/2008 claiming only interest was barred as per Explanation-iv of Section 11 read with the provisions of Order II Rule 2 CPC. It is submitted that as this Court did not allow interest on the principal sum of Rs.7,70,233/- by the order dated 01.07.2004, the Money Suit No.77/2008 which was filed on 02.07.2008 was barred by limitation. In support of his contention, the learned Govt. Advocate has placed reliance on the judgment of this Court in the case of Basant Surana Vs. State of Assam and others passed in R.F.A.No.20/2009 disposed of by the judgment and order dated 09.06.2015.

14. The facts in the said case is somewhat similar. In the said case, the appellant therein had preferred WP(C) No.7227/2001 before this Court, but while disposing the said writ petition, the prayer for interest was not considered by this Court. Therefore, on the basis of provisions of Order II Rule 2 CPC and Explanation-iv of Section 11 CPC, the civil suit for claiming interest as filed by the petitioner therein was held to be barred by limitation. It was further held that the plaintiff cannot institute a fresh proceeding on the basis of the same fact and that too before the trial court when he had opted for extra- ordinary jurisdiction of the High Court for getting relief with regard to the same work order as cause of action and accordingly, the appeal was dismissed.

15. I have considered the arguments advanced by both sides and also perused the LCR. On the basis of the arguments advanced by both sides, the following point of determination arises for consideration of this Court: "Whether the order dated 01.07.2004 passed by this Court in WP(C)No.5670/2000 whereby direction was issued for payment of sum of Rs.7,70,233/- to the appellant would

constitute a bar for the appellant to pursue the remedy for filing a suit for claiming interest under the provisions of 1993 Act and whether the reliefs prayed for in the Money Suit No.77/2008 was barred under the provisions of Order II Rule 2 CPC read with Explanation-iv of Section 11 CPC?"

16. In the evidence on affidavit filed by the PW.1, as already stated above, only 3 documents were exhibited being the partnership deed (Ext.1), general power of attorney (Ext.2) and the chart showing calculation of interest (Ext.3). Therefore, the appellant as plaintiff in the suit did not exhibited any document showing that the appellant/plaintiff was a SSI Unit. The contract agreement executed between the parties was also not exhibited. Similarly, the bills in dispute which were allegedly not paid by the respondents were also not proved. In this regard, the arguments advanced by the learned counsel for the appellant is that these facts were not disputed by the respondents, there was no requirement of the appellant to prove said facts.

17. In this case, as the claim is for payment of interest under the 1993 Act, the requirement of Section 4 of the said Act is that where any buyer fails to make payment of the amount to the supplier, as required under Section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day. Therefore, the agreement between the parties appears not to be relevant for the purpose of adjudicating the issue of interest due to the supplier as per the provisions of Section 4 of the 1993 Act. The statement in the plaint that the plaintiff/appellant was a SSI Unit was not disputed by the respondents in their written statement and therefore, no issue was framed as to whether the appellant was a SSI Unit or not.

18. In view of the matter, no infirmity is found for not exhibiting of the said documents produced by the plaintiffs/appellant. Therefore, the non-proving of the registration of the appellant as SSI Unit and non- exhibiting of the bills and payment vouchers is found to be not fatal.

19. The second relevant issue which were decided by the learned trial court is the issue of limitation which was taken up as issue No.3 by the learned trial court. It is not in dispute that on 01.07.2004 when the WP(C) No.5670/2000 was decided, a sum of Rs.7,70,233/- was found by this Court to be due and payable and the State authorities were directed to examine the said claim of the appellant. It is also not in dispute by the respondents herein that the said principal sum due was paid prior to 24.03.2007. Therefore, it is only on 24.03.2007 when interest was not paid by the respondents, the appellant perceived it to be the right moment to claim interest and pursuant to that, a notice under Section 80 CPC was issued on 10.11.2007, claiming a sum of Rs.46,56,784/-. Therefore, the issue No.3 appears to be incorrectly decided by the learned trial court as being barred by limitation.

20. While deciding issue No.3, the learned trial court had recorded that the suit

was filed within the period of one year from 24.03.2007 being the date of payment of last instalment. However, in view of the writ petition, by referring to the provisions of Order II Rule 2 CPC, the learned trial court held that plaintiff''s claim was barred by limitation. In the opinion of this Court, the provisions of Order II Rule 2(2) CPC relates to relinquishment of part of the claim. The said provision does not refer to any period of limitation. On a perusal of the prayers made, it is seen that the appellant had made a claim for payment of interest in the said writ petition. However, this Court by the order dated 01.07.2004 while disposing the said writ petition, did not make a mention of anything about interest. It is possible to infer that as the 1993 Act provided for payment of interest, the appellant had waited for the result of the outcome of the direction issued by this Court for payment of principal amount and only thereafter the suit was filed for interest within one month from the date of last payment received.

21. As the liability of buyer to pay compound interest is prescribed under Section 5 of the 1993 Act which prescribes for payment of monthly interest. Therefore, as the calculation of the interest on compound rate is a continuous process, it is to be held that a part of the claim of the interest could be said to be barred by limitation. However, the entire claim of interest specifically under the special law i.e. 1993 Act cannot be held to be barred by limitation because the liability of buyer to pay computed interest arises from the statute. A reference to the provisions of Section 4 of the said 1993 Act would show that where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be. Moreover as per Section 6 of the said 1993 Act, the amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force. Therefore, this provisions for interest under the 1993 Act is found to be an exception to the general law on interest, as such, this special law shall prevail over the general law.

22. Therefore, in the opinion of this Court, in this case, may be a part of the claim for interest may be held to be barred by limitation, but it cannot be held to be wiped out the entire claim for interest under the 1993 Act. Therefore, the findings recorded by the learned trial court on issue No.3 on the point of limitation is interfered with and the same is reversed by holding that the suit was filed within the period of limitation.

23. Thereafter, the issues No.4 & 5 as decided by the learned trial court is being taken up. Under the facts of the case, it is not in dispute that in order to recover the outstanding dues and interest thereon the appellant had filed WP (C) No.5670/2000 before this Court and this Court by the order dated 01.07.2004, issued a clear direction to the State authorities/respondents to consider the claim

of the appellant to make payment of Rs.7,70,233/-, if the same is found to be due. However, while direction was issued to make payment of the principal amount, this Court had not passed any order for release of interest thereon. Therefore, if a prayer made is not granted, it must be deemed to have been refused as the appellant is found to have filed a proceeding for recovery of the amount due, the said writ petition is squarely covered within the meaning of ''other proceeding'' as provided under Section 6 of the 1993 Act. Therefore, as the writ proceeding was initiated by the appellant, the only remedy which was available to the appellant for claiming interest was either applying for modification of the order or for preferring an appeal as provided for under the Gauhati High Court Rules. It was not open to the appellant to file a suit for recovery of interest which was not allowed by this Court in the said writ proceeding.

24. It is a well established principle of law that if a prayer is made in the writ petition under Article 226 of the Constitution of India is not granted, it amounts to refusal of such prayer. Therefore, when this Court had refused interest in a writ proceeding, it would not be available to the appellant to agitate their grievance for interest by filing a civil suit.

25. In the present case in hand, it is seen that by not applying for alteration/ modification of order dated 10.07.2004 passed by this Court in WP(C) No.5670/2000, or any appeal as provided for, the had forgone/waived his right to claim interest under the 1993 Act. Therefore, in the opinion of this Court, in this case, the provisions of Order II Rule 2 or Section 11 CPC is applicable, because the appellant is found to have instituted the present suit after his prayer for interest under the 1993 Act was not granted by this Court by the order dated 01.07.2004 passed in WP (C) No.5670/2000. If any authority is required on the same, one may refer to the case of Satyendra Kumar and others Vs. Raj Nath Dubey and others , (2016) 14 SCC 49, wherein it is held that previous proceedings would operate as res-judicata in respect of issues of fact. This Court is of the view that as the issue of interest was made in issue in the proceeding of WP(C) No.5670/2000, by not granting the said relief, the issue was laid to rest by this Court. Therefore, for the same issue of fact, a suit is held to be not maintainable as the said issue had attained finality within the meaning of Section 6 of the 1993 Act. Therefore, the appellant cannot be permitted to approach two courts under different jurisdiction for the same relief under Section 6 of the 1993 Act. This Court is constrained to hold that the appellant is found to waive their remedy to file a suit under the 1993 Act by filing a writ petition before this Court.

26. Therefore, although for different reasons, but this Court is inclined to uphold the decision of the learned trial court on issues No.4 & 5 by holding that it was correctly decided that the plaintiff was not entitled to recover interest under the 1993 Act from the defendants and nor the defendants are liable to pay interest to the plaintiff as claimed. In view of the findings on issues No.4 & 5, the appellant is not entitled to any relief.

27. As regards issue No.6 framed by the learned trial court, this Court is of the view that a reading of issue No.6 as to whether the plaintiff is entitled to be declared as the primary member of the defendant No.1 carries no plausible meaning. As per the cause-title, the defendant No.1/ State of Assam is represented by Secretary to the Govt. of Assam, PWD (Roads), Guwahati. Therefore, it is not known how the plaintiff which is a partnership firm can be declared as primary member of defendant No.1. There appears to be some defect framing of the said issue. Therefore, instead of interpreting the meaning of issue No.6 as framed by the learned trial court, this Court is of the opinion that the said issue requires to be struck off as the meaning and purport of the said issue cannot be deciphered.

28. In view of the following discussion, the point of determination framed by this Court is answered in negative by holding that under the facts of the present case, the suit for interest was not maintainable because the appellant is found to have approached this Court under Section 6 of the 1993 Act by filing WP(C) No.5670/2000 and while this Court allowed payment of principal amount, the relief for interest was not granted. In this regard, it would suffice to point out that this Court is in full agreement with ratio laid down by this Court on the maintainability of the suit for interest as held in the case of Assam State Electricity Board (supra) and M/s Modern Industries (supra). The facts of the present case are different from the facts indicated by the appellants in the said cases. Therefore, under the distinguishable facts of the present case with the facts of the cited cases of Assam State Electricity Board (supra) and M/s Modern Industries (supra), do not appear to help the appellant.

29. Therefore, this appeal fails in view of the ratio of the case of Basant Surana (supra), wherein this Court had held that the plaintiff cannot institute a fresh proceeding on the basis of same facts before the civil court after having opted for extra- ordinary jurisdiction of this Court for claiming principal and interest thereof.

30. Accordingly, the judgment and decree passed by the learned trial court is upheld.

31. This appeal stands dismissed without cost.

32. Let the decree be prepared accordingly.

33. LCR be returned forthwith.