
(2009) 04 DEL CK 0067

In the Delhi High Court

Case No : IA No's. 8826, 9209 of 2002 and CS (OS) No. 390 of 2002

National Horticulture Board

APPELLANT

Vs

M.R. Mashrooms and Agro Forms Pvt. Ltd and Others

RESPONDENT

Date of Decision : 06-04-2009

Acts Referred:

Citation : (2009) 158 DLT 673 : (2010) 7 RCR(Civil) 2733

Hon'ble Judges : S.N. Aggarwal, J

Bench : Single Bench

Advocate : Sanjiv Singh, for the Appellant; R.M. Aggarwal, for the Respondent

Judgement

S.N. Aggarwal, J.—The plaintiff has filed this suit against the defendants for recovery of Rs. 39,28,426/- under Order XXXVII, CPC.

2. Briefly stated, the facts of the case are that the plaintiff, National Horticulture Board, is a society registered under the Societies Registration Act, 1860 formed by the Government of India, Ministry of Agriculture, inter alia for the purpose of promoting, developing and supporting Horticulture activities by rendering financial assistance to various institutions engaged in horticulture activities including processing of Fruits, Vegetables and Floriculture.

3. Defendant No. 1 is a company incorporated under the provisions of the Companies Act, 1956. The defendant No. 1 has its registered office at 10/20, Holambi Kalan, Alipur, Narela Road, Delhi. Defendant Nos. 2 to 4 were the Directors of defendant No. 1 company at the time of alleged transaction of loan between the plaintiff and defendant No. 1.

4. It is stated that the defendant No. 1 has made an application dated 21.03.1994 to the plaintiff for financial assistance for its Integrated Mushroom Project for cultivation of button mushroom situated on a plot of land measuring one acre at 10/21, Holambi Kalan, Alipur, Narela Road, Delhi. It is pleaded that relying upon the representation made by the defendants and the documents submitted by them, the plaintiff vide its letter of intent/sanction dated

01.03.1995 agreed to lend and advance to the defendant No. 1 as and by way of term loan of a sum of Rs. 21 lakhs in aggregate to finance defendant No. 1's project. The said loan of Rs. 21 lakhs was sanctioned upon and subject to the terms and conditions contained in the letter of intent/sanction dated 01.03.1995 and in the loan agreement dated 20.03.1995 entered into between the plaintiff and defendant No. 1.

5. It is averred that the sanctioned loan amount of Rs. 21 lakhs was disbursed to defendant No. 1 by the plaintiff vide cheque No. 243656 dated 28.03.1995 drawn on Indian Overseas Bank, NHB Extension Counter, Gurgaon.

6. As per the loan agreement dated 20.03.1995, defendant No. 1 had agreed to repay the principal sum of the soft loan in five equal yearly installments of Rs. 4,20,000/- each commencing on or before 31.03.1997. The entire repayment of the whole of the principal sum of the loan was agreed to be paid by defendant No. 1 latest by 31.03.2001. The defendants also agreed to pay to the plaintiff service charges on the principal amount of the outstanding loan at 4% per annum.

7. The loan taken by defendant No. 1 from the plaintiff was secured by way of hypothecation created in favour of the plaintiff on 20.03.1995 on all their movable properties including movable machinery, machinery spares, tools and accessories present and future laying or stored in the defendant No. 1 company's project situated on a plot of land measuring one acre at 10/21, Holambi Kalan, Alipur, Narela Road, Delhi and wherever else the same may be or held by defendant No. 1. In order to further secure the soft loan advanced by the plaintiff to defendant No. 1, an irrevocable and unconditional personal guarantee dated 20.03.1995 was executed by defendant Nos. 2 to 4 in favour of the plaintiff for the due repayment of the loan and service charges and all other charges accrued in terms of the loan agreement.

8. It is further stated that the defendants had executed the following loan documents in consideration of their having received a loan of Rs. 21 lakhs from the plaintiff:

a) Defendant No. 1, executed a Demand Promissory Note dated 20.03.1995 in favour of the plaintiff acknowledging thereby its liability to pay on demand to the plaintiff an amount of Rs. 21,00,000/- (Rupees Twenty One Lac only) along with service charges @ 4% per annum.

b) Defendant Nos. 2 to 4 executed an Undertaking dated 20.03.1995 undertaking that they shall not transfer, dispose of or in any way encumber their existing or future share holdings in the Defendant company in favour of any person or company.

9. After availing the loan amount of Rs. 21 lakhs, defendant No. 1 failed to reach the milestones fixed by the plaintiff and failed to adhere to the financial discipline. The plaintiff in view of the failure of defendant No. 1 in repaying the

principal amount and service charges as per the schedule and unsatisfactory implementation of the project by defendant No. 1, recalled the entire loan along with service charges and the penal interest vide legal notice dated 21.12.2001 sent by their lawyers Sanjeev Singh & Associates, through registered post and UPC. It is further pleaded in the plaint that the defendant No. 1 had acknowledged its liability towards the plaintiff for payment of the amount due under the promissory note dated 20.03.1995 and the defendant No. 1 has further acknowledged its liability through revival letter dated 30.11.1997. The defendants are stated to have paid an amount of Rs. 10000/- as part payment of service charges vide cheque on 24.08.2000.

10. It is stated that as on date of filing of the suit, an amount of Rs. 39,28,426/- was due and outstanding to the plaintiff from the defendants. The liability of all the defendants to pay the suit amount is alleged to be joint and several. The break-up of the claim made by the plaintiff in the suit is given in para 26 of the plaint which is as follows:

Principal Rs. 21,00,000 Service Charges for 1994-95 Rs. 920 Service Charges for 1995-96 Rs. 84,000 Service Charges for 1996-97 Rs. 84,000 Service Charges for 1997-98 Rs. 84,000 Service Charges for 1998-99 Rs. 84,000 Service Charges for 1999-00 Rs. 84,000 Service Charges for 2000-01 Rs. 84,000 Penal Interest on Principal & Service Charges (Upto 31.12.2001) Rs. 1,33,506 Rs. 39,38,426 Less : Service Charge received Rs. 10,000 on 24.08.2000 Total amount outstanding on Rs. 39,28,426 24.08.2000

11. Since the defendants have failed to pay the above outstanding amount despite service of legal notice dated 21.12.2001, the plaintiff has filed the present suit against the defendants under Order XXXVII, CPC.

12. The summons of the suit were sent to the defendants in the prescribed proforma meant for suits under Order XXXVII, CPC. In response to the summons of the suit received by the defendants, they entered appearance in the matter through their counsel and in response to summons for judgment served on them, they have filed leave to defend applications seeking leave to contest the present suit. Two separate leave to defend applications have been filed, one by defendant Nos. 1 & 2 and the second by defendant Nos. 3 and 4.

13. Defendant No. 4 is reported to have expired during the pendency of the present suit and Mr. Sanjiv Singh, learned Counsel appearing on behalf of the plaintiff, says on instructions that the plaintiff does not want to proceed against defendant No. 4 who has died. The court is, therefore, not concerned with the leave to defend application filed on behalf of defendant No. 4.

14. Mr. R.M. Aggarwal has appeared on behalf of defendant Nos. 1, 2 and 3.

15. I have heard the arguments of counsel for both the parties on the leave to defend applications and have also gone through the case file and the documents available on record.

16. Mr. R.M. Aggarwal, counsel appearing on behalf of the defendants, has argued that the claim of the plaintiff for service charges and for penal interest does not fall within the ambit of Order XXXVII, CPC. He has referred and relied upon the statutory provisions contained in Order XXXVII Rule 1(2), CPC which reads as follows:

1. Courts and classes of suits to which the Order is to apply --

(1) XXXXX

(2) Subject to the provisions of Sub-rule (1), the CS(OS)No.390/2002 Page 6 of 14 Order applies to the following classes of suits, namely:

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising, -

(i) on a written contract, or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

Before dealing with the above argument advanced on behalf of the defendants, I would like to note that Mr. Sanjiv Singh, learned Counsel appearing on behalf of the plaintiff, on instructions has given up the claim of the plaintiff on account of penal interest and, therefore, this Court while considering leave to defend application of the defendants need not go into the question of maintainability of the suit in regard to penal interest claimed in the suit. The claim of the plaintiff on account of penal interest amounting to Rs. 13,33,506/- is, therefore, rejected as not pressed.

17. After rejection of the claim of the plaintiff on account of penal interest of Rs. 13,33,506/-, we are left with only two claims of the plaintiff, one on account of principal amount of Rs. 21 lakhs and the second on account of service charges at 4% on the principal outstanding amount for the years 1994-95 to 2000-01. The total claim on account of service charges claimed in para 26 of the plaint comes to Rs. 5,04,920/-. The objection of the defendants is that the claim of the plaintiff for service charges amounting to Rs. 5,04,920/- does not fall within the ambit of Order XXXVII Rule 1(2) of CPC, 1908. It may be noted that the defendants have not disputed the loan agreement dated 20.03.1995 executed between the parties. The defendants have also not disputed that they have received loan of Rs. 21 lakhs from the plaintiff. It is also not the case of the defendants that after taking loan of Rs. 21 lakhs by them from the plaintiff, they had returned any amount to the plaintiff, except paying an amount of Rs. 10000/- on 24.08.2000 towards part service charges. A perusal of the loan agreement between the parties dated 20.03.1995 reveals that the defendants

with eyes wide open had entered into a contract with the plaintiff to pay service charges at 4% per annum on the outstanding loan amount. Reference for the same may be made to para 5 of the loan agreement. I am of the view that the claim of service charges at 4% made by the plaintiff against the defendants is clearly within the terms of the written contract between the parties and, therefore, the claim on this account squarely falls within the four corners of Order XXXVII Rule 1(2) referred above. The claim on account of service charges made by the plaintiff is a claim for liquidated demand in terms of written contract between the parties and, therefore, by no stretch of imagination, it can be said that the said claim does not fall within the purview of Order XXXVII, CPC. Therefore, the plea taken by the defendants that the case needs a trial for proving that the service charges are not a part of the contract or that the said claim does not fall within the purview of Order XXXVII does not raise any triable issue.

18. Mr. Aggarwal, counsel appearing on behalf of the defendants, has further argued that in terms of the loan agreement dated 20.03.1995, the loan granted by the plaintiff to defendant No. 1 was a soft loan and, therefore, according to him, this soft loan could not carry any liability for payment of interest. I need not go into this argument of the counsel for the defendants because the plaintiff has not claimed any interest on the principal amount. What it has claimed is service charges at 4% per annum on the outstanding loan amount. Service charges cannot be equated with interest. The service charges have been claimed by the plaintiff in terms of the loan agreement between the parties dated 20.03.1995. Therefore, even if we assume that the soft loan granted by the plaintiff to defendant No. 1 was not to carry any interest still it does not make any difference to the right of the plaintiff to recover this loan amount or the liability of the defendants to repay it in terms of the loan agreement. This plea of the defendants that the loan was a soft loan also does not raise any triable issue.

19. Mr. Aggarwal, learned Counsel appearing on behalf of the defendants, has also contended that the total outstanding amount of Rs. 39,28,426/- claimed by the plaintiff in para 26 of the plaint appears to be incorrect as per its own break-up of claims given by the plaintiff in the said para. In response to this contention of the defendant's counsel, Mr. Sanjiv Singh appearing on behalf of the plaintiff, has submitted that there is a typographical error in mentioning the amount of penal interest as according to him, the penal interest claimed in the legal notice dated 21.12.2001 was to the tune of Rs. 13,33,506/- and due to a typographical error, the said figure has been wrongly got typed in para 26 at page 8 of the plaint as Rs. 1,33,506/- instead of Rs. 13,33,506/-.

20. Learned Counsel appearing for the plaintiff has made a statement at Bar that this claim of Rs. 13,33,506/- made on account of penal interest on principal and service charges be excluded from the claim of Rs. 39,28,426/- made by the plaintiff in the present suit. On this concession being given by counsel for the plaintiff, the recoverable amount on account of principal and service charges

comes to Rs. 26,04,920/- and this claim is on account of principal loan amount and service charges at 4% up to the date of filing of the suit. Hence, the objection raised on behalf of the defendants regarding mistake in the outstanding amount that occurred in para 26 of the plaint, does not call for any adjudication or raises any triable issue. This is so because the defendants have admitted that they have taken a loan of Rs. 21 lakhs from the plaintiff and have not paid any amount except Rs. 10000/- on 24.08.2000. As such, the defendants were liable to return the principal loan amount of Rs. 21 lakhs on the date of filing of this suit and they were also liable to pay service charge of Rs. 5,04,920/- up to the date of the suit in terms of the loan agreement dated 20.03.1995.

21. Learned Counsel appearing on behalf of the defendants has also argued that the loan documents are fabricated by the plaintiff after disbursement of the loan to defendant No. 1 on 20.03.1995. The contention of counsel for the defendants is that the blanks in the loan agreement were filled up by the plaintiff after execution of the loan agreement on 20.03.1995. This plea *ex facie* appears to be sham, vexatious and an after-thought. It may be noted that the defendants have not denied their signatures on the loan agreement and the related loan documents executed by them in favour of the plaintiff on 20.03.1995. They have also not denied that they had taken a loan of Rs. 21 lakhs from the plaintiff. Therefore, it cannot be said that the loan transaction in question was without consideration. In my opinion, the plea in this regard taken on behalf of the defendants does not raise any triable issue. The defendants are bound by the contract contained in the loan agreement dated 20.03.1995 as they admittedly have not repaid the loan amount, they are under a legal obligation to repay the principal amount together with the service charges in terms of the loan agreement.

22. The learned Counsel appearing on behalf of the defendants, has also argued that the defendant No. 3 in her leave to defend application has denied execution of personal guarantee by her and, therefore, this according to him, raises a triable issue. This objection, in my opinion, is false to the own knowledge of defendant No. 3. The defendant No. 3 at the time loan was disbursed by the plaintiff to defendant No. 1 was admittedly a Director in defendant No. 1 company. She has not denied her signatures on the deed of personal guarantee executed by her in favour of the plaintiff at the time of loan transaction in question. That being so, it does not lie in the mouth of defendant No. 3 to contend that she did not execute the personal guarantee and is, therefore, not liable to pay the amount claimed in the present suit. This plea also, in the peculiar facts and circumstances of the case, does not raise any triable issue.

23. Mr. Aggarwal, counsel appearing on behalf of the defendants, has further submitted that the defendants intend to file a counter claim of Rs. 50 lakhs against the plaintiff because of breach on the part of the plaintiff in providing technical knowhow due to which defendant No. 1 company has suffered huge losses. This plea raised on behalf of the defendants in my view appears to be

misconceived and is not tenable. In case, defendants have any claim against the plaintiff, then they can file a substantive suit for such claim but by no means, they can be permitted to take it as a ground for disputing their liability to repay the amount admittedly taken by them as loan in terms of loan agreement dated 20.03.1995.

24. It was further argued on behalf of the defendants that the suit is liable to be dismissed because of non-impleadment of Indian Overseas Bank as according to the defendants, the defendants had created pari passu charge in respect of the movable and immovable assets in favour of Indian Overseas Bank also. This argument made on behalf of the defendants is not tenable while considering the leave to defend application. The defendants cannot be permitted to take any advantage of any charge being created by them in respect of their assets in favour of Indian Overseas Bank. I am of the view that at best, the Indian Overseas Bank can come and object to the execution of the decree in favour of the plaintiff against the assets of the defendants in regard to which the said Bank also holds a charge along with the plaintiff. The question regarding competing claim of the plaintiff and that of the Indian Overseas Bank arising out of the charge over the assets of the defendants may be considered at the time if objection to the execution is raised by the Indian Overseas Bank.

25. No other argument was advanced by learned Counsel on behalf of the defendants in support of leave to defend applications.

26. Having regard to the above facts of the case and the submissions made by counsel for the parties, I do not find any merit in the leave to defend applications filed on behalf of the defendants. I am of the view that all the pleas raised by the defendants in their leave to defend applications and urged before the court at the time of hearing of these applications are vexatious pleas and do not raise any triable issue requiring a trial in the case.

27. Upon perusal of the plaint and the documents filed therewith, I am satisfied that the plaintiff has made out a case for grant of decree in its favour in the sum of Rs. 25,94,920/- together with service charge @ 4% per annum on the principal amount of Rs. 21 lakhs till the decretal amount is paid.

28. The liability of all the defendants (defendant Nos. 1, 2 and 3) is held to be joint and several.

29. At this stage, counsel appearing on behalf of the defendants, has submitted that the defendants have paid Rs. 2 lakhs to the plaintiff on different dates during the pendency of the present suit and this fact of payment of Rs. 2 lakhs by the defendants to the plaintiff is not denied by the learned Counsel appearing on behalf of the plaintiff. The defendants will, therefore, be entitled to adjust the said amount of Rs. 2 lakhs paid by them to the plaintiff during the pendency of the present suit.

30. In view of the above and having regard to the facts and circumstances of the

case, leave to defend applications filed by the defendants are dismissed and a decree of Rs. 25,94,920/- is hereby passed in favour of the plaintiff and against defendant Nos. 1, 2 and 3, with costs and service charges at 4% per annum on the principal amount of Rs. 21 lakhs till realisation. An adjustment of Rs. 2 lakhs paid by the defendants to the plaintiff during the pendency of the suit may be given to them while executing the decree.

31. Decree sheet be prepared.

32. This suit stands disposed of in terms referred above.