

(1978) 08 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 43 of 1975

Punjab National Bank Ltd.		APPELLANT
	Vs	
Udyog Silpa Pvt. Ltd. and Others		RESPONDENT

Date of Decision : 10-08-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, 35

Citation : AIR 1979 Ori 30 : (1978) 46 CLT 377

Hon'ble Judges : S.K. Ray, C.J.; J.K. Mohanty, J

Bench : Division Bench

Advocate : S.C. Sinha, for the Appellant; R.C. Patniak, P.K. Misra and R. Natia, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Mohanty, J.—The successful plaintiff has filed this appeal being aggrieved by the order of the trial court refusing to grant pendente lite and future interest at the contractual rate and to award costs at contested scale. The only point for determination, therefore, is as to whether either as matter of law or on account of equitable consideration, the plaintiff is entitled to pendente lite and future interest at the contractual rate and also entitled to costs at contested scale,

2. Plaintiff-Punjab National Bank (Nationalised) instituted Title Mortgage Suit No. 37 of 1971 in the court of the Subordinate Judge, Cuttack against the defendants-respondents for a preliminary decree for Rs. 2,34,797.25 p. with interest at the rate of 10 1/2 per cent per annum, which is the contractual rate of interest, and, on failure to pay the decretal amount within the time stipulated by the Court, for a decree for sale of the properties as per Schedules "A" and "B" of the plaint.

3. Defendants 1, 2 and 4 to 10 filed their written statement denying the plaintiff's case by taking various pleas. But at the time of hearing, they practically conceded the claim for Rs. 2,34,797.25 p. It may be mentioned here that by order of this Court in Civil (Revision No. 185 of 1972 the stock of Pig Iron

and the C. I. Pipes pledged with the Bank were sold and the amount was deposited in April, 1974. The total amount of deposit was Rs. 2,71,791.36 p. as per Ext. A. The learned Subordinate Judge decreed the suit preliminarily on contest for Rs. 2,34,797.25 p. with costs and consolidated Pleadings Fee of Rs. 500/-. It was further ordered that the decretal amount was to be adjusted from the deposited amount as shown in Ext. A within three months and the pendente lite and future interest, if any, shall run at the rate of 3% per annum till the date of disposal of the suit. The defendants were directed to pay the decretal dues within the stipulated period given by the court. On failure to pay, the plaintiff Bank was at liberty to apply for final decree for sale of properties.

4. Mr. S.C. Sinha, learned counsel for the appellant, contends relying on Order 34, Rule 11, C.P.C. that the Court is bound to allow pendente lite and future interest at the rate agreed to between the parties. Secondly, he contends that as the plaintiff has been deprived of the opportunity of rolling the huge amount of money as decreed in any business for a period of three years and more from 1971, when the suit was filed, till the end of 1974, when judgment was passed, the plaintiff should have been granted pendente lite and future interest at the contractual rate as a matter of justice and equity.

5. The first contention is based on the hypothesis that provisions of Order 34, Rule 11 are mandatory in nature. This provision is extracted hereinbelow.

"Order 34, Rule 11. Payment of interest--In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely :--

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage-

(i) on the principal amount found or declared due on the mortgage,-- at the rate payable on the principal, or where no rate is fixed, as such rate as the Court deems reasonable, xxx xx, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money, at the rate agreed between the parties, or, failing such rate, as such rate not exceeding six per cent per annum as the Court deems reasonable; and

(b) subsequent interest up to the date of realisation or actual payment on the aggregate of the principal sums specified in Clause (a) as calculated in accordance with that clause at such rate as the Court deems reasonable."

6. It is argued that since the rate of interest has been agreed to between the parties, the plaintiff Bank is entitled to interest at the contract rate. In support of the above contention Mr. Sinha relies on a decision reported in Konakalla Venkata Satyanarayana (Died) and Others Vs. State Bank of India and Others, and drew

our attention to para. 12 of the judgment which is quoted below :--

"The fifth point raised by the learned counsel, that the lower Court should not have awarded interest at the rate of 10 per cent per annum from the date of suit till date of decree, is devoid of any merit. Under Order 34, Rule 11, Civil P. C. interest can be awarded at the contract rate till the period of redemption expires. The provisions of S, 34, Civil P.C. are not applicable to cases of mortgages, and the award of interest is governed by the provision of Order 34, Rule 11, Civil P.C. This position is well-settled and Shri P.L.N. Sarma, has frankly submitted that this legal position cannot be controverted."

But this decision does not support his contention as it has not been decided that the Court is bound to pay interest at the contract rate. What has been said is that interest can be awarded at the contract rate. Unfortunately in the above decision, an earlier decision of a Division Bench of the same High Court reported in *Pentala Githavardhana Rao and Others Vs. The Andhra Bank Ltd. and Others*, which held a contrary view has not been noticed. Mr. Sinha also cited a case reported in AIR 1953 Nag 258 (*Mst. Bainabai v. Doma*) wherein it has been held that in a mortgage suit the ordinary rule is that interest from the date of suit to the date of redemption should be awarded at the contract rate and not at a different rate unless there are circumstances which justify doing so. So this decision also does not support Mr. Sinha. Again reliance is placed on a decision reported in *Sukhraj Rai and Others Vs. Ratinath Panjira and Others*, which says that in the matter of awarding pendente lite interest ordinarily the contractual rate ought to be allowed unless it appears to be penal or excessive. This decision also does not support the case of the plaintiff. The next decision cited by Mr. Sinha is *Patel Narharilal Kuberdas and Others Vs. Partners of the Firm of Pari Bhogilal Amratlal: (i) Manilal Bhogilal and Another*, . In this case the trial court did not grant any interest, but the appellate court granted interest at the rate of 3 per cent per annum from the date of the suit till the date of realisation (although 6% was the rate of interest mentioned in the charge). Before the High Court the granting of interest by the appellate court was challenged on the ground that it (appellate court) has erred in awarding interest when after exercise of discretion, the trial court declined to award interest. So it was held (at p. 254):--

"While u/s 34, the Court has a discretion to order interest at such rate as the Court deems reasonable to be paid on the principal sum from the date of the suit to the date of the decree, in the case of a suit for the sale of property mortgaged or charged, the Court must take an account of the principal and interest on the mortgage and the amount due to the plaintiff on the date of the decree. The Court has, therefore, no discretion in the matter of taking accounts of the mortgage but it is under an obligation to include interest.

There is no inconsistency between the provisions of Section 34 and Order 34. Section 34 gives a discretion to the Court in cases where the Court passes a pure money decree. Order 34 leaves no discretion to the Court where the Court is

dealing with suits under Order 34.

Under Order 34, Rule 11 the Court has a discretion whether or not to order interest for the subsequent period of six months from the date of the preliminary decree till the time of actual payment." As there was no cross-objection, the Court did not consider as to whether 6% interest should be granted or not. This decision has dissented from an earlier decision reported in Dawoodbhai Kassamji Matiwalla and Another Vs. Shaikhali Alibhoy, by Honourable Chief Justice Chagla.

7. Mr. Pathak, learned counsel appearing on behalf of the respondents cited a series of decisions of different High Courts. The first and most important case to which Mr. Patnaik invites our attention in this connection is a decision of the Federal Court reported in AIR 1940 20 (Federal Court) wherein it has been held :--

"By Act 21 of 1929, Order 34 was amended, and a new Rule 11 was inserted, which deals specially with interest, and provides that the Court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between Section 34 and Order 34, Rule 2 and 4, gives a certain amount of discretion to the Court, so far as interest pendente lite and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918."

In the decision reported in Nilmoni Sardar and Others Vs. Baidyanath Das Manna and Another, a Division Bench of the Calcutta High Court relying on the decision of the Federal Court referred to above held (at p. 141) :--

"In our view, the Court is bound to decree pendente lite interest, it being left to the discretion of the Court at what rate it is to be allowed. The circumstances of each particular case have to be taken into consideration."

Considering all circumstances of that case the Court held that the rate of interest from the date of the suit should be allowed at 4 per cent per annum.

8. The next case cited is Kishen Raj and Others Vs. Radhalal and Others, . In this case several earlier decisions of the different High Courts and of the Federal Court reported in AIR 1940 20 (Federal Court) were considered and the Court came to the following conclusion: --

"From a review of the decisions referred to above, the true principles for the award of interest, pending and future in a mortgage suit may be laid down somewhat as follows :--

(1) There can be no doubt or dispute that where the interest claimed as opposed to any law, or the rate of interest claimed is penal or extortionate or is contrary

to any law, such interest has to be disallowed or the rate claimed cannot be permitted and must be reduced as the case may be.

It seems to me that this rule applies equally to interest up to the period of the suit as well as to pending and future interest.

(2) But even where interest is legally recoverable and the rate of interest is not penal or unconscionable or otherwise excessive according to any law, it is open to a court to vary the rate so far as the period between the date of suit and the date fixed for redemption in a preliminary decree is concerned, and high support for this view is to be found in several decisions of the Federal Court including AIR 1940 20 (Federal Court) already cited above.

The decisions which take a contrary view namely, that where interest is allowed, it must be allowed at the contractual rate and the rate cannot be varied, do not lay down the law correctly."

In the decision reported in Rama Vadhyar Guna Bhatt and Others Vs. The Trivandrum Permanent Bank Ltd., Trivandrum and Others, it was held (at p. 198) :--

"It is within the discretion of the Court to award such rate of interest from the date of the suit as the Court thinks reasonable in the circumstances of the case. The court is not bound to award interest at the contractual rate after the date of suit as the same can govern only for a period anterior to the date of the suit."

The next case to which reference was made is Pentala Githavardhana Rao and Others Vs. The Andhra Bank Ltd. and Others, in which it has been held :--

"In suit for redemption the Courts are under no obligation to award interest at the contractual rate after date of redemption, even though that rate is not penal or excessive. Award of interest for period subsequent to the date of the suit is discretionary with the Courts."

9. On a plain reading of Order 34, Rule 11, C.P.C. and on a review of the decisions referred to above the position of law that emerges is that Order 34, Rule 11 is not mandatory in character and that it is open to a Court to vary the rate of interest so far as the period between the date of suit and the date fixed for redemption in a preliminary decree is concerned, even in a case where interest is legally re-coverable and the rate of interest is not penal or unconscionable or otherwise excessive. The decisions which seem to take a contrary view that where interest is allowed it must be allowed at the contractual rate and that the rate cannot be varied do not lay down the law correctly. As for subsequent interest, i.e. from the date of redemption fixed in the preliminary decree up to the date of payment or realisation of the mortgage money, the matter rests clearly in the domain of judgment and the grant of rate of such interest is entirely in the discretion of the Court.

10. The other point that was canvassed on behalf of the appellant is that the

consolidated Pleader's Fee of Rs. 500 has to be re-assessed and the Court should have allowed Pleader's Fee at the contested scale. In support of this Mr. Sinha placed reliance on a case reported in 1974 (2) CWR 1135 (Smt. Patnala Urmila Devi v. Parankusam Jagannath Rao) where according to the facts and circumstances of that case, the Court allowed cost at the contested scale. Where no cost was allowed by the court below, this Court held that the plaintiff was entitled to full cost. But this decision does not say that the Court has no discretion in the matter in awarding cost according to the facts and circumstances of the case. Section 35 of the Civil P, C. provides that the costs of and incident to all suits shall be in the discretion of the Court and where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. This section gives discretion to the Court to award costs according to the facts and circumstances of the case,

11. Considering the contention of claim of interests at contractual rate on equitable ground, the same is not sustainable in view of the following facts. The plaintiff claimed in his plaint a sum of Rs. 2,34,797.25 p. which included interest at the rate of 10 1/2 per cent per annum from 1968 till 23-3-1971. An amount of Rs. 2,71,791.36 p. belonging to the defendants was lying in deposit with the plaintiff Bank since April, 1974, Thus, for 7 months from April till November, when the judgment in the suit was passed, a sum of Rs. 37,000 belonging to the defendants was with the plaintiff Bank and the latter must have invested the same in some business. Further the industry has been closed since 16-8-67 and since then the industry is being treated as a sick industry since it has lost its capital. Again two of its most active Directors Madanlal Jajodia and Harihar Mohapatra have expired in a Motor Car accident on 18-5-73. It is also pertinent to notice that defendants did not contest the plaintiff's claim, but admitted it as would appear from the evidence of D.W. 1. Considering all these circumstances, in our opinion, the Court exercised its discretion most equitably and judicially and allowed pendente lite and future interest at 3 per cent per annum and awarded costs of pleader's fee at consolidated rate of Rs. 500.

12. In the result, the appeal is dismissed. But in the circumstances of the case, parties are to bear their own costs of this Court.

S.K. Ray, C.J.

13. I agree,