(1995) 09 AP CK 0035

In the Andhra Pradesh High Court

Case No : A.S. No''s. 1737 of 1988 and 687 of 1995

Savoy Solvent Oil Extraction Ltd. APPELLANT

Vs

Indian Overseas Bank and Others RESPONDENT

Date of Decision : 14-09-1995

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Companies Act, 1956 — Section 132

Citation : (1996) 2 ALT 1005

Hon'ble Judges : S. Parvatha Rao, J;Neelam Sanjiva Reddy, J

Bench : Division Bench

Advocate : B. Veerabhadra Rao and C. Lakshminarayana, for the Appellant; S. Kondal Rao, M.V. Durga Prasad, V. Venkata Reddy and C. Poornaiah, for the Respondent

Final Decision : Dismissed

Judgement

Neelam Sanjiva Reddy, J

1. These two appeals arise from the judgment and decree dated 30th April, 1988 passed in O.S.No. 27 of 1981 by the learned Subordinate Judge, Nizamabad.

2. The facts necessary for disposal of these appeals are that the plaintiff-Indian Overseas Bank represented by its agent and General Power of Attorney-holder and Branch Manager, Nizamabad, filed the suit against the first defendant M/s Savoy Solvent Oil Extraction Limited represented by its Managing Director, the second defendant B. Pramodkumar Reddy, the third defendant B. Ganga Reddy and the fourth defendant, M/s Sherif and Sons, Kakinada. The first defendant is a company with its registered office and factory at Nizamabad, carrying on business of manufacture and sale of bran-oil, deoiled bran cakes etc. Defendants 2 and 3 are Managing Director and Chairman, respectively of the first defendant company. The fourth defendant is a firm with its head office at Madras and branch office at Kakinada, with transit warehouse facilities, doing forwarding and clearing business at Kakinada and Madras ports.

3. Defendants 1 to 3 availed themselves of credit facilities from the plaintiff-bank under key cash credit against pledge of rice-bran, deoiled bran and bran-oil etc., open cash credit against hypothecation of rice-bran, deoiled bran etc., bills purchase account against hypothecation of goods covered by the bills, and loans against export incentives. The key cash credit availed against pledge of rice-bran, deoiled bran etc., was Rs. 1,500,000/- by executing a demand promissory note and other relevant documents on 15-4-1978. To secure the repayment of the amount due under this account, bran, deoiled bran and oil etc were pledge to the plaintiff. Defendants 2 and 3 guaranteed and undertook to pay all moneys due under this account. At the request of the first defendant, the plaintiff guaranteed for payment of Rs. 1,000,000/- payable by the first defendant to the Andhra Pradesh Industrial Development Corporation (''APIDC'' for short) and executed a letter of guarantee in favour of APIDC on 29-5-1979. The first defendant executed a counter-guarantee for the said sum of Rs. 1,000,000/- and also a letter of hypthecation hyptothecating hexane, gunny bags, rice-bran etc., in favour of the plaintiff. On account of failure of the first defendant to repay the loan, and on invocation of bank guarantee by APIDC, the plaintiff was constrained to pay Rs. 1,000,000/- to APIDC on 28-5-1980 on behalf of the first defendant and the said amount was debited to the key cash credit of the first defendant after due intimation to them. The first defendant admitting its liability executed a letter of revival on 19-8-1980. The third defendant also executed a letter of guarantee on the same day to pay the amount due under this account. A total sum of Rs. 1,473, 641.47 ps was due by the defendants 1 to 3 by the date of the suit on this account.

4. The open cash credit facility availed against hypothecation of rice-bran, deoiled bran etc., was Rs. 1,500,000/- by executing demand promissory note, letter of hypothecation and other relevant documents on 7-8-1978 in favour of the plaintiff. Defendants 2 and 3 guaranteed and undertook to pay the said amount and executed relevant documents. The total amount due from defendants 1 to 3 on this account as on the date of the suit was Rs. 1,932,670.35 ps.

5. In respect of bills purchase account, on the request of defendants 1 to3, the plaintiff agreed to purchase the bills drawn by the first defendant on buyers against the hypothecation of goods covered by the bills. The first defendant had executed a letter of hypothecation on 15-4-1978 in favour of the plaintiff. The first defendant used to draw clean bills on M/s R. Shantilal and Company, Bombay, and present them to the plaintiff for being purchased and discounted representing that the goods covered by the bills were sold and sent to the drawee and that the drawee would pay the amount of the bills on presentation by the plaintiff. Acting on these representations, the plaintiff purchased clean bills for a total sum of Rs. 713,968.25 ps drawn by the first defendant on M/s R. Shantilal and Company, Bombay. M/s R. Shantilal and Company, Bombay, refused to honour the bills on presentation and also declined to give reasons for their dishonour of bills. The first defendant had either not supplied the goods or

surreptiously collected the amount covered by the bills from the drawee. Defendants 1 to 3 were liable to pay Rs. 741,708.53 ps on this account by the date of the suit.

6. The first defendant was granted Rs. 725,000/- under loan against export incentives. The first defendant availed of this facility from time to time against execution of demand promissory notes. After giving credit to all the amounts received by the plaintiff on this account, a sum of Rs. 18,222.51 ps was found due to the plaintiff by the date of the suit.

7. A total sum of Rs. 4,166,242.86 ps was due to the plaintiff from the first defendant on different accounts as detailed earlier and charges created in favour of the plaintiff for the amounts advanced on various credit facilities availed by the first defendant were registered in the books of Registrar of Companies as per Section 132 of the Companies Act.

8. On 14-10-1977, title deeds relating to the land and rice mill building situated at Banswada were deposited with the plaintiff by the second defendant to secure the repayment of all moneys advanced to the first defendant by creating and equitable mortgage in favour of the plaintiff. The second defendant executed a letter on 15-10-1977 confirming the deposit of title deeds.

9. With the permission of the plaintiff, the first defendant transported the pledged/hypothecated stocks to the fourth defendant at Kakinada for the purpose of export to foreign countries. The fourth defendant held the goods as detailed below:

S.No. No. of the Date Quantity and warehouse receipt contents

1. WH/49/78 17-8-78 8794 bags of Indian deoiled rice-bran 2. WH/53/78 21-9-78 9519 -do- 3. WH/54/78 3-10-78 9642 -do- 4. WH/4/79 1-2-79 7039 -do- 5. WH/10/79 24-4-79 6160 -do- 6. WH/16/79 24-8-79 33126 Bags of Indianrice- bran extraction 7. WH/11/80 31-5-80 1381 -do-

The total quantity covered by the above warehouse receipts was 4539.42 metric tonnes of deoiled rice-bran valued at Rs. 2,400,000/-. The fourth defendant in collusion with defendants 1 to 3 failed to deliver the stocks or pay the value thereof to the plaintiff.

10. As the defendants 1 to 3 failed to repay the loans and the fourth defendant to discharge his contractual obligations, the plaintiff sued them for recovery of Rs. 4,166,242.86 ps together with subsequent interest and costs, by sale of suit hypothecated assets of the first defendant and personally from the assets of the second and third defendants and for a direction to the fourth defendant to deliver the deoiled rice-bran of 4539.42 metric tonnes to the plaintiff or pay Rs. 2,400.000/- with interest at 12% per annum.

11. Defendants 1 to 4 resisted the suit by filing separate written statements though their pleas are common and not adverse to each other. Defendants 1 to 3 pleaded inter alia that while availing the credit facilities detailed in the plaint, the relevant goods or stocks were hypothecated or pledged to the plaintiff to secure the repayment of loans advaned and the value of the hypothecated or pledged goods was much higher than the amounts advanced. It was plaintiff''s main responsibility to safeguard the security in the interest of all concerned. Even without the knowledge of the defendants, the plaintiff insured stocks with M/s Oriental Fire and General Insurance Company Limited. The stocks hypothecated/ pledged were destroyed in the fire accident that occurred in the first defendant''s premises. The plaintiff was bound to claim compensation from the insurer and adjust the said amount towards the loans advanced. The value of the loss or damage caused to the hypothecated /pledged goods due to the acts of omission or commission by the plaintiff, had to be adjusted towards the loans. The plaintiff was liable to account for the goods pledged to the plaintiff and under their control.

12. The fourth-defendant, while denying the pleas of the plaintiff, specifically pleaded that there was no privity of contract between the fourth defendant and the plaintiff. The goods of the defendants 1 to 3 were received by the fourth defendant, clearing and forwarding agent, for the purpose of shipment only. The goods were stored in their warehouse at Kakinada in their transit shed until they were actually shipped. The fourth defendant was bound under the contract to ship the goods of the defendants 1 to 3 as soon as the ship reached the port and no prior information to and permission of the plaintiff were necessary. In fact, the fourth defendant dealt and arranged for negotiation of export documents with the plaintiff-bank for the stocks of defendants 1 to 3 during the course of business. The business of the fourth defendant was not to keep the cargo or store the goods of the parties permanently in their warehouse. On the other hand, the goods had to be stored in their transit shed until they were actually shipped. The stock position detailed in the warehouse receipt changed from time to time as an when the stocks were shipped to foreign countries when ships called at the port for loading purposes. The stocks were already shipped to various foreign countries on behalf of the defendants 1 to 3 and negotiation of the export documents was arranged with the plaintiff. The plaintiff cannot ask for redelivery of the stocks alleged to have been noted in the warehouse receipts. The plaintiff was bound to account for the proceeds of the documents negotiated for export. The fourth defendant neither suppressed any information nor colluded with the defendants 1 to 3.

13. Mainly on the basis of the above pleadings, the defendants 1 to 4 resisted the suit to avoid their liability.

14. The parties went to trial on appropriate issues. PW.1 V. Babu Rao, who worked as Branch Manager of the Nizamabad Branch of plaintiff-bank from December, 1980 to April, 1982, P.W.2 R.V.S. Satyanarayana Murthy, who worked

as Branch Manager of the Nizamabad Branch of plaintiff-bank from 1973 to 1976, P.W. 3 S. Balakrishna, who worked as manager of the plaintiff''s branch at Nizamabad from May, 1977 to May, 1978 and P.W.4 B.R. Vithal Rao, who worked as Manager of Nizambad branch of plaintiff-bank from May, 1978 to March, 1981, were examined and Ex. A-1 to A-67 were marked for the plaintiff. D.W.1 B. Pramodkumar Reddy - the second defendant and Managing director of the first defendant company and D.W.2 S. Dorai Raj, Officer-in-Charge of Kakinada Branch of the fourth defendant firm were examined and Exs. B-1 to B-10 were marked on behalf of the defendants.

15. The findings of the trial court are that the plaintiff is entitled to claim the suit sum and it is not dependent on the decree that may be passed in O.S.No. 84 of 1980 filed in the same court against the insurer for compensation for the loss caused in the fire accident and that the plaintiff is not estopped from laying this claim. Ex. A-17 title deed was deposited by the second defendant to create equitable mortage in favour of the plaintiff in respect of the property mentioned therein to secure repayment of loans availed of by the defendants 1 to 3 under different credit facilities. The defendants 1 to 3 are liable to pay the sum of Rs. 741,708.53 ps under bills purchase account. The letters of guarantee executed by the defendants 2 and 3 are valid and the second defendant executed the guarantee letter in support of key cash credit and it was not discharged. The guarantee letters executed by the second and third defendant in respect of Rs. 1,000,000/- payable of APIDC is valid, and the letter of guarantee executed by the second defendant on 29-5-1979 is valid. The first defendant is liable for the amount paid by the plaintiff-bank to APIDC. The amount of loan of Rs. 18,222.51 ps outstanding as against the export incentive was discharged on account of amounts received by the plaintiff during the pendency of the suit. There is no privity of contract between the plaintiff and the fourth defendant is not bound to inform the plaintiff before the goods are shipped. The fourth defendant is not a trustee for the plaintiff and is not liable to deliver 539.42 metric tonnes of deoiled rice-bran or its value of Rs. 2,400,000/-. The rate of interest charged by the bank is not usurious. The suit is not bad for misjoinder of causes of action. The suit claim is preferred to the extent the defendants availed themselves of loan facilities sanctioned. Consequent to the above findings, suit was decreed against defendants 1 to 3 for the suit amount less the amount of Rs. 18,222.51 ps received during the pendency of the suit with future interest at the contractual rate of 161 /2 % per annum from the date of the suit and a preliminary decree was passed for sale of hypothecated/pledged assets for relisation of the amount after redemption time. The suit against the fourth defendant was dismissed. Aggrieved by the said judgment and decree, the plaintiff filed A.S.N0. 687 of 1995 against the fourth defendant, and the first defendant filed A.S.No. 1737 of 1988 against the plaintiff adding other parties to the suit as formal respondents. The parties would be referred to as arrayed in the trial court for the sake of convenience.

16. First, we would like to proceed with the question raised about the liability of

the fourth defendant for the goods entrusted to it. The relief sought by the plaintiff in this regard is a direction to the fourth defendant to deliver deoiled rice-bran of 4,539.42 metric tonnes pledged to the plaintiff or pay Rs. 2,400,000/- being the value of the goods together with interest at 12% per annum. A total of 75,657 bags of deoiled rice-bran covered by Exs. A-43 to A-49 corresponding to warehouse receipts WH/49/78 dated 7-8-1978, WH/53/78 dated 21-9-1978, WH/54/78 dated 3-10-1978, WH/10/79 dated 24-4-1979/WH/16/79 dated 24-8-1979, WH/11/80 dated 31-5-1980 and WH/4/79 dated 1-2-1979 respectively were pledged or hypothecated by the first defendant to the plaintiff-bank while availing of credit facilities on different accounts detailed earlier. The first defendant with the permission of the plaintiff was exporting the deoiled rice-bran to foreign countries through the fourth defendant''s branch at Kakinada. The stocks covered by Exs. A-43 to A-49 were sent to the fourth defendant at Kakinada for exporting them to foreign countries. The fourth defendant was keeping the stocks in their godowns at Kakinada and was shipping the goods by the earliest ship going to European countries and sending the bills of lading etc to the plaintiff-bank for negotiation and collection of sale proceeds. This general practice is clear from the pleadings and evidence adduced by the parties. There was no specific written contract between the parties in this regard. The conduct of the parties and the documents that came into existence during the transactions between the parties clearly indicate that there was an implied contract between the parties for exporting the stocks of the first defendant, hypothecated / pledged to the plaintiff, to foreign countries through the fourth defendant''s branch at Kakinada and the relevant papers like bills of lading etc., after shipment were being sent to the plaintiff for negotiation with the foreign bank and to collect the sale proceeds from the foreign buyer. It is specifically mentioned in Exs. A-43 to A-49 that the goods were stored in their godowns at Kakinada and they were to be shipped by the first available vessel from Kakinada to UK and continental ports. Carbon copies of the said receipts were sent to the first defendant. It is seen from them that the fourth defendant is a shipping, clearing and forwarding agent. In the said receipts, the fourth defendant formed the plaintiff that the original documents would be delivered to them on completion of shipment. These are undisputed facts.

17. For the first time the plaintiff addressed Ex.A-62 letter on 10-6-1980 to the fourth defendant requesting them to await their further instructions regarding disposal of the goods covered by warehouse receipt No. 11 /80 dated 31-5-1980 i.e. Ex.A-48. The said letter read thus:

" We acknowledge receipt of your warehouse receipt No. WH/11/80 dated 31-5-1980 sent through our Kakinada branch covering 1381 bags of deoiled bran held by you on our behalf. We request you to note to await our further instructions regarding disposal of said goods."

Apparently, this is the first communication addressed to the fourth defendant by the plaintiff not to proceed with the shipment of goods as usual as seen from the conduct of the parties. From Ex.A-62, it is clear that the plaintiff was aware that all the goods transported earlier to the fourth defendant were already shipped to foreign countries and that the plaintiff received relevant original bills of lading etc as usual for negotiating with the foreign buyers through the concerned bank for realising the sale proceeds. If anything contrary had happend affecting the interests of the plaintiff-bank, they would have atleast mentioned about it in Ex.A-62 letter. Otherwise, they would have stopped shipment of the goods covered by other warehouse receipt also. It shows that the differences between the plaintiff and defendants 1 to 3 arose around 10th June, 1980.

18. Exs. B-1 dated 26-6-1979, B-2 dated 28-8-1979, B-3 dated 14-2-1980, B-4 dated 23-2-1980, B-5 dated 7-2-1980, B-6 dated 4-2-1980, B-7 dated 6-10-1979, B-8 dated 29-9-1979 and B-9 dated 5-9-1979 show that a total of 3607.75 metric tonnes of deoiled rice-bran were shipped to foreign countries by different vessels and bills of lading and other relevant documents were sent by the fourth defendant to the plaintiff. It is the case of the fourth defendant that besides shipment of goods shown under Exs. B-1 to B-9, some more deoiled rice-bran weighing 11,496.30 metric tonnes were also shipped on behalf of the first defendant and relevant bills of lading and other original documents were sent to the plaintiff bank for negotiating with the bank of foreign buyers for realising the sale proceeds. Ex. B-10 notice was given by the counsel for the fourth defendant to the counsel for the plaintiff under Order 12 Rule 8 of CPC to produce documents is possession of the plaintiff, namely, bills of lading and their letters as per the chart enclosed, which were sent to the plaintiff. The chart enclosed to Ex.B-10 notice covers goods shipped from 25-11-1978 to 18-2-1980 on 22 occasions. The total weight of the said shipped goods was noted as 11,496.30 metric tonnes. Admittedly, the plaintiff neither produced the documents requested for nor gave any reply for non-productive of the said documents. Exs. B-1 to B-10 show that all goods, except goods covered by Ex. A-48, were shipped to foreign countries and all the relevant bills of lading and other connected original papers were sent to the plaintiff-bank for negotiating with the foreign bank for realisation of sale proceeds.

19. Admittedly, at the instance of the plaintiff, in I.A.No. 234 of 1981, a Receiver was appointed and he took possession of the goods covered by Ex. A-48 and sold them. The sale proceeds of the said goods were credited to the suit by the Receiver and latter on, withdrawn by the plaintiff towards adjustment of their claim. Thus, the fourth defendant had a accounted for the goods covered by Ex. A-48 also.

20. D.Ws 1 and 2 testified that the goods of the first defendant were shipped for export through the fourth defendant and the bills of lading and relevant original documents were sent to the plaintiff for negotiating with the bank of the foreign buyer to realise the sale proceeds. D.W.2 specifically deposed that all goods, except the stocks received by the Receiver, were exported and relevant bills of lading etc., were sent to the plaintiff, who negotiated with the bank of foreign

buyers and realised the sale proceeds. P.Ws 1 to 4 had admitted the above facts regarding the practice of realising the sale proceeds of goods of the first defendant exported through the fourth defendant. They had specifically admitted in their cross-examination the receipt of originals of Exs. B-1 to B-9. They were aware of Ex. B-10 notice, but they did not give any explanation for non-production of the documents required to be produced by Ex. B-10 notice. P.W.1 admitted that Ex.. B-10 information was available in the bank. It is also seen from their evidence that Reserve Bank of India paid the export incentives after the bank certification that the bills of lading were cleared. The plaintiff sanctioned credit facility on account of export incentives to an extent of Rs. 725,00/- and it was availed by the first defendant. This loan, except to the extent of Rs. 18,222-51 ps only, was cleared by the date of the plaint by crediting the export incentives. The balance of Rs. 18,222-51 ps was also discharged by adjustment of export incentives received subsequent to the filing of the suit. Clearing off this loan account by adjustment of receipt of export incentives was possible only when the plaintiff realised the sale proceeds of the exported goods on negotiation of bills of lading etc., sent by the fourth defendant. Here it may be pertinent to note the plea of the plaintiff in the rejoinder to the written statement of the fourth defendant to the effect that the fourth defendant did not inform that the documents negotiated through the plaintiff-bank were in respect of goods hypothecated to the plaintiff and the plaintiff was not aware of the same. From this plea of the plaintiff, it is quite apparent that the plaintiff-bank had negotiated the documents sent by the fourth defendant with the bank of foreign buyers and realised the sale proceeds, but did not adjust the same to the first defendant''s loan accounts. The plea that the plaintiff was not aware that the documents negotiated through plaintiff-bank were of the goods hypothecated to the plaintiff as they were not informed so by the fourth defendant cannot be accepted. Admittedly, the defendant had availed of credit facilities on different accounts, and they had to be discharge. The fourth defendant was sending the original documents like bills of lading etc to the plaintiff for negotiation and realisation of sale proceeds. The fourth defendant had been discharging its obligation as per the implied contract between the parties. It was the duty of the plaintiff to diligently manage its affairs. The negligence or lapses on the part of the plaintiff''s officials leading to the payment of sale proceeds to the first defendant without adjusting the same towards the different loan accounts, do not make the fourth defendant liable for the goods shipped for export.

21. The first defendant filed O.S.No. 84 of 1980 on the file of the Sub-Court, Nizambad, against the Insurance Company for compensation of the goods and property damaged in the fire accident which occured on 5-5-1979 in their factory premises. The plaintiff-Indian Overseas Bank joined that suit as co-plaintiff. Subsequent to the filing of the said suit, the plaintiff-Indian Overseas Bank filed O.S.No. 27 of 1981 and the first defendant in its written statement pleaded thus:

"......this defendant filed a suit O.S.No. 84 of 1980 on the file of this Hon''ble Court against the Insurance Company. This defendant has no and cannot have any objection for the plaintiff to receive the entire proceeds of the decree that may be passed in O.S.No. 84 of 1980 in case this O.S. No. 27 of 1981 is decreed."

D.W.1 in his cross-examination admitted that he testified in O.S.No. 84 of 1980 admitting the present suit claim. Ex. A-29 gives the outstanding balances due by the first defendant on different loan accounts to the plaintiff-Indian Overseas bank. D.W.1 in his evidence stated that he could neither confirm nor contradict the correctness of Ex. A-29 entries. If really Ex. A29 does not rep resent the correct balances in different loan accounts, D.W.1 could have easily contradicted the said statement of account Ex. 29 by producing the accounts of the first defendant company which would naturally reflect the amounts received from and paid to the plaintiff-bank. D.W.1 had apparently received the sale proceeds realised on account of export of goods covered by Ex. A-43 to A-47 and A-49 and probably for that reason only, the accounts of the first defendant company were not filed to contradict Ex. A-29 statement of account. It is apparent that both the plaintiff-bank and the defendants 1 to 3 were not inclined to come forward with the true and correct facts as to how the sale proceeds realised in respect of goods covered by Exs. A-43 to A-47 and A-49 were applied. From the above evidence and conduct of the parties, we are constrained to draw an inference that the officials of the plaintiff-bank connived with the defendants 1 to 3 and paid the sale proceeds in respect of exported stocks covered by Exs. A-43 to A-47 and A-49 to the first defendant without adjusting the same towards the outstanding loan accounts.

22. The aforesaid discussion of evidence on record shows that there was an implied contract between the parties for exporting the stocks hypothecated/ pledged by the first defendant through the fourth defendant, shipping, forwarding and clearing agent, branch at Kakinada and accordingly, the goods delivered to the fourth defendant by the first defendant and covered by Ex. A-43 to A-47 and A-49 were shipped for export by immediately available ship and bills of lading and other export documents were delivered to the plaintiff-bank for all the said goods. The stocks covered by Ex. A-48 were handed over to the Receiver appointed by the Court, who sold them and credited the sale proceed into the Court and subsequently received by the plaintiff-bank towards adjustment of the suit claim and therefore, the relief claimed against the fourth defendant cannot be granted.

23. We further hold that the sale proceeds of the exported goods covered by Exs. A-43 to A-47 and A-49 were realised by the plaintiff-Indian Overseas Bank and paid to the first defendant, and the first defendant even availed of the incentives for exporting the said items from the Union Government and consequently, there is nothing to be adjusted towards the suit claim from the sale proceeds realised on exported stocks.

24. P.Ws 1 to 4 spoke about the availment of credit facilities on different accounts by the first defendant company and execution of promissory notes,

letters of guarantee/pledge/hypothecation and deposit of title deeds creating equitable mortgage for repayment of different loans by defendants 1 to 3. The above charges were registered with the Registrar of Companies. They also testified to the facts relating to the purchase of hundis and invoices under Exs. A-33 to A-42 and their dishonour by drawee and notice of the same to the defendants 1 to 3. The above evidence of P.Ws 1 to 4 regarding availment of loans on different accounts and execution of promissory notes, letters of guarantee/pledge/hypotecation and mortgage was not denied by D.W.1 and in fact, he had admitted this claim in the prior suit O.S.No. 84 of 1980 filed by the first defendant against the Insurance Company for recovery of compensation in respect of a fire accident occurred in their factory premises on 5-5-1979. Under these circumstances, no other finding of the trial court is assailed in these appeals.

25. In the result, both the appeals are dismissed with costs.

