
(2018) 05 CAL CK 0050
In the Calcutta High Court
Case No : Writ PetitionNo. 1040 of 2016

Sppl Hotels Pvt. Limited & Anr.

APPELLANT

Vs

Allahabad Bank & Ors.

RESPONDENT

Date of Decision : 01-05-2018

Acts Referred:

Contract Act, 1872 — Section 8, 74

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2018) 05 CAL CK 0050

Hon'ble Judges : DEBANGSU BASAK, J

Bench : Single Bench

Advocate : Jayanta Mitra, Abhrajit Mitra, Prithwiraj Sinha, Soumen Ghosh, Snehashis Sen, Om Narayan Rai

Final Decision : Dismissed

Judgement

DEBANGSU BASAK, J.

The petitioners have assailed the imposition of prepayment charges upon the first petitioner prepaying the credit facilities. Learned Senior Advocate

appearing for the petitioners has submitted that, the first petitioner had enjoyed term loan facilities from the first respondent. Such credit facilities were

governed by the terms and conditions of a sanction letter dated January 11, 2013. He has referred to the terms and conditions of such sanction letter,

particularly, the clause relating to prepayment charges. He has submitted that, before the expiry of the time for reset of the interest, a second sanction

letter was issued by the first respondent dated March 3, 2013. He has referred to the terms and conditions of the second sanction letter also. He has

submitted that, on a true and proper construction of the terms and conditions of the two sanction letters, the first petitioner had repaid the credit

facilities without prepayment charges being attracted.

He has referred to the various correspondence exchanged between the parties in this regard, including the letters dated June 5, 2015, July 27, 2015

and August 14, 2015 of the first petitioner, and the response dated September 14, 2015 issued on behalf of the first respondent. He has submitted

referring to 2015 Volume 4 Supreme Court Cases page 136 (Kailash Nath Associates v. Delhi Development Authority & Anr.) that, the first

respondent has to suffer some loss to invoke the prepayment clause. He has submitted that, the first respondent did not suffer any loss. Even the

affidavit-in-opposition of the first respondent, does not speak of any loss being suffered by the first respondent, at the behest of or by the conduct of

the first petitioner. The first petitioner had substantial amount to its credit in the bank account with the first respondent. The first respondent had acted

unilaterally, and without the support of law, in adjusting the prepayment charges from the credit balance, available in the bank account of the first

petitioner, maintained with the first respondent. The claim of the first respondent not being quantified, and adjudicated by an appropriate authority, the

first respondent was not entitled to adjust, any claim from out of the proceeds, of the bank account of the first petitioner, maintained with the first

respondent. Therefore, he submits that, the first respondent be directed to reverse the amount deducted on account of prepayment charges.

Learned Advocate appearing for the respondents has submitted that, the writ petition is not maintainable in view of the fact that, the first petitioner had

approached the Ombudsman on the selfsame subject matter. The Ombudsman upon hearing the parties had rejected the claim of the petitioners by its

order dated June 13, 2016. Such order of the Ombudsman is not under challenge. In view of the issue raised by the petitioners being decided by the

Ombudsman, the petitioners are not entitled to any relief in the present writ petition. In support of his contention, he has relied upon 1996 Volume 1

Supreme Court Cases page 435 (State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil & Ors.).

Referring to the merits to the claim of the petitioners, learned Advocate for the respondents has submitted that, the first petitioner did not fulfil the

requisite conditions of prepaying the loan, without the penal charges for prepayment being attracted. He has submitted that, both the sanction letters

contemplate and impose a condition that, prepayment is possible without payment of additional interest being attracted, should such prepayment is made, in accordance with the terms of the sanction letters. Both the sanction letters allow the first petitioner, a window of opportunity, in prepaying the loan amount without the imposition of prepayment charges. He has referred to clause 17 of the sanction letter dated January 11, 2013 and has submitted that 90 days advance notice, from the date of prepayment has not been given by the first petitioner in terms of clause 17 of the sanction letter dated January 11, 2013. Clause 17 of the sanction letter dated January 11, 2013 requires a 90 days advance notice, from the date of prepayment and not from the date of reset. He has submitted that, the interpretation of the sanction letter dated January 11, 2013 given by the petitioners cannot be accepted. He has referred to the various correspondence exchanged between the parties and has submitted that, none of the letters issued by any of the parties can be construed to mean that, there was a 90 days advance notice for prepayment given by the petitioners, and the acceptance thereof by the bank. Consequently, it cannot be said that, the first petitioner had acted in terms of clause 17 of the first sanction letter allowing it to repay without prepayment charges. He has referred to the pleadings of the writ petitioners and has submitted that, the petitioners have contended that, they did not receive the second sanction letter dated March 3, 2015. He has submitted that, such a contention is misplaced. Moreover, the first petitioner, in view of such stand in the writ petition, cannot avail of the benefits of the terms and conditions of the second sanction letter dated March 3, 2015. The petitioners cannot claim any right flowing out of the second sanction letter dated March 3, 2015.

Referring to the correspondence exchanged between the parties, learned Advocate for the respondents has submitted that, the first petitioner was aware that, the request for reduction of the rate of interest, was not favourably considered by the bank. Notwithstanding such position, the first petitioner asked for the approximate amount due with the breakup of the details thereof to pay off the liability. The bank by the letter dated August 21, 2015 informed the first petitioner that, in the event the first petitioner wants to foreclose the account, prepayment charges at the rate of 2.05% of the outstanding loan amount would be realized. According to him, the first petitioner never contradicted this letter dated August 21, 2015 of the bank. He

refers to paragraph 14 of the writ petition and has submitted that, the writ petitioners admit receipt of this letter on September 8, 2015. He has drawn the attention of the Court to the letter dated September 2, 2015 of the first petitioner and has submitted that, the same cannot be construed to be an answer to the letter dated August 21, 2015 of the bank as the same was received by the first petitioner on September 8, 2015. He has referred to the letters dated September 21, 2015 and September 22, 2015 of the first petitioner which deals with the prepayment and are silent about the prepayment charges. In these letters, the first petitioner never raised any objection with regard to the imposition of prepayment charges.

Referring to the fact that, the petitioners did not file any affidavit in reply, despite opportunity being given for such purpose, it should be held that, the

petitioners have deemed to have admitted the allegations made in the affidavit-in-opposition. On the doctrine of non-traverse, he has relied upon 1993

Supp. Volume 4 Supreme Court Cases page 46 (Naseem Bano (Smt.) v. State of U.P. & Ors.). He has submitted that, the petitioners accepted the

imposition of prepayment charges at the rate of 2.05% by not objecting to the contents of the letter dated August 21, 2015. He has relied upon 2007

Volume 9 Supreme Court Cases page 531 (Food Corporation of India & Anr. v. Ram Kesh Yadav & Anr.) and 2006 Volume 5 Supreme Court

Cases page 311 (Bhagwati Prasad Pawan Kumar v. Union of India). He has contended that, the loan contract was discharged by accord and

satisfaction. In support of such contention, he has relied upon 2009 Volume 1 Supreme Court Cases page 267 (National Insurance Company Limited

v. Boghara Polyfab Private Limited).

Referring to Kailash Nath Associates (supra) learned Advocate for the respondents has submitted that, prepayment interest is not an imposition of

penalty. Rather it is a portion of the agreed bargain which the petitioner must adhere to. He has relied upon 1988 Volume 2 Supreme Court Cases

page 134 (Smt. Sova Ray & Anr. v. Gostha Gopal Dey & Ors.) in support of his contention.

Learned Advocate for the respondent has submitted that, the bank did suffer loss due to the prepayment. He has relied upon a sheet showing the

quantum of loss that the bank suffered. He has relied upon an unreported decision of the Division Bench rendered in G.A. No. 461 of 2017 A.P.O.

No. 29 of 2017 (MBL Infrastructures Limited v. IRCON International Limited) dated March 1, 2017 for the proposition that, loss in its exactitude

need not be proved. He has therefore submitted that, the writ petition should be dismissed.

Whether the action of the bank in debiting prepayment charges is justified, is the issue which has fallen for consideration in the present writ petition.

The first petitioner obtained term loan facilities from the first respondent by virtue of a sanction letter dated January 11, 2013. The relevant clauses of

the sanction letter dated January 11, 2013 are as follows:-

4. Rate of Interest : BR+2% p.a. with 1st reset on COD and annually thereafter.

12. The account shall be reviewed within one year or earlier at the discretion of the Bank.

17. Prepayment charges shall be applicable as per circular. The Company shall have the option at the time of reset, on 90 days advance notice, to

prepay the lenders, in part or in full, the loan together with all interests and other charges and monies due and payable to the Lenders upto the date of

such prepayment, on nil prepayment penalty. The second sanction letter dated March 3, 2015 stipulates that, save and except the terms and

conditions modified, all other terms and conditions of the first sanction letter would be applicable. The relevant portions of the second sanction letter

are as follows:-

Rate of Interest : BR+2% p.a. wmr with reset on every review date.

Interest rate reset clause: Interest Reset, if any: On annual review.

Terms and Conditions :

1. The loan shall be repaid by the borrower in equal monthly installments over the tenure of the loan.

2. The interest on the loan shall be calculated on the basis of the outstanding principal amount.

3. The borrower shall be liable to pay prepayment charges as per the circular issued by the bank.

4. The borrower shall be liable to pay the loan together with all interests and other charges and monies due and payable to the Lenders upto the date of such prepayment, on nil prepayment penalty.

5. The second sanction letter dated March 3, 2015 stipulates that, save and except the terms and conditions modified, all other terms and conditions of the first sanction letter would be applicable.

6. All usual terms and conditions and other existing terms and conditions will be followed.â??

The first petitioner issued a letter dated September 15, 2014 placing on record that, commercial operation of the project commenced from September

1, 2014. By a letter dated March 3, 2015, the bank informed the petitioner that, the interest would be reset on annual review. On July 27, 2017, the first

petitioner, by its letter informed the bank that, the first petitioner intended to close the credit facilities. Justification for closure given was, high rate of

interest being charged by the bank. This letter was followed up by a letter dated August 14, 2015 issued by the first petitioner, requesting the bank, to

provide the approximate amount due with detailed breakup of the amount, for the petitioner to foreclose the account. The bank responded by a letter

dated August 21, 2015 informing that, prepayment will entail 2.05% interest. The first petitioner claims to have received this letter on September 8,

2015. By a letter dated September 2, 2015, the first petitioner informed the bank that, they would foreclose the account, without prepayment penalty.

Request was made for the details of the amount required to be paid for foreclosure. The bank by its letter dated September 10, 2015 informed the first petitioner that, there would be a reduction of the rate of interest.

Thereafter, by a letter dated September 21, 2015, the first petitioner exercised its option of foreclosure. By a letter dated September 22, 2015 the bank

acknowledged receipt of funds, towards satisfaction of its claim, on account of the term loan. By a letter dated September 22, 2015, the first petitioner

questioned the bank as to why prepayment amount was charged, when the prepayment penalty clause was not attracted. The bank responded thereto

by its letter dated September 23, 2015 intimating that, prepayment charges were deducted in terms of the sanction letter dated March 3, 2015. By its

letter dated September 28, 2015, the first petitioner requested for refund of the prepayment charges along with interest. The bank refused to do so

through its writing dated October 1, 2015. The first petitioner lodged a complaint with the Banking Ombudsman on December 9, 2015. Such complaint

was disposed of by the Order dated June 13, 2016 passed by the Banking Ombudsman rejecting the claim of the petitioner. The petitioner carried an

appeal which was dismissed by the Order dated August 10, 2016.

As noted above, the first petitioner approached the Banking Ombudsman and

carried an appeal from the order of rejection passed by the Banking Ombudsman. The Banking Ombudsman refused to look into the complaint made by the first petitioner on the ground of clause 13(a) of the Banking Ombudsman Scheme, 2006. An order passed by Banking Ombudsman under clause 13(a) of the Scheme of 2006 is not appealable. The appeal was consequently not entertained.

Clause 13(a) of the Scheme of 2006 is as follows:-

13. REJECTION OF THE COMPLAINT

The Banking Ombudsman may reject a complaint at any stage if it appears to him that the complaint made is;

(a) not on the grounds of complaint referred to in clause 8 or otherwise not in accordance with sub clause (3) of clause 9;

The Banking Ombudsman found that, the grievances of the petitioner did not bring it within the ambit of clause 8 of the Scheme of 2006. Essentially

the Banking Ombudsman found that, the complaint was beyond its jurisdiction for a decision on merits. The Scheme of 2006 does not permit an appeal

when the complaint is rejected on such ground. Therefore, the issue raised before the Banking Ombudsman was not decided. It was not decided on

the ground of lack of jurisdiction. The principles of res judicata, therefore, would not stand attracted to deny the petitioners the right to avail of their

remedies, in respect of their grievances, if they are entitled thereto.

M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil & Ors. (supra) has held that, a decision even if rendered without jurisdiction subsists and

remains fully effective unless and until it is set aside by a Court of competent jurisdiction. In the facts of the present case, the Banking Ombudsman

did not render any decision on merits. Therefore, notwithstanding the order of the Banking Ombudsman being legal and valid, the issues raised by the

first petitioner require a decision by a competent forum, as such issues were not decided by the Banking Ombudsman, due to lack of jurisdiction. A

decision is legal and valid for the issues decided by it. In the present case, the Banking Ombudsman did not enter into the merits of the rival claims in

view of lack of jurisdiction to decide such issues. The decision of the Ombudsman is legal and valid, in the facts of the present case, to the extent of

the decision with regard to its jurisdiction and no further. The petitioners have not challenged the decision of the Ombudsman as to lack of jurisdiction.

This so called failure does not denude the petitioners of the right to raise the issues, sought to be raised herein, before a competent forum. The issues presently raised, have not been decided upon by the Ombudsman on merits. Rather, the Ombudsman considering the issues raised, found them to be beyond its jurisdiction for a decision on merits. The present petition is therefore, found not be barred by reason of the decision of the Ombudsman and the appellate authority exercising jurisdiction the Banking Ombudsman Scheme, 2006.

As noted above, the first petitioner enjoyed term loan facilities from the bank. There are two sanction letters dated January 11, 2013 and March 3, 2013. The petitioner claims not to have received the second sanction letter dated March 3, 2013. In the facts of the present case, a decision is not required on the point as to whether the first petitioner did receive the second sanction letter dated March 3, 2013 or not.

Clause 17 of the sanction letter dated January 11, 2013 deals with prepayment charges. The first petitioner in terms of the sanction letter dated

January 11, 2013 has two options of payment of the credit facilities. One option is to pay the credit facilities in accordance with the agreed schedule.

One should be mindful of the fact that, the credit facilities are terms loan facilities. The other option is to prepay the same. While exercising the option

of prepayment, the first petitioner will incur a liability of prepayment charges, if it does not adhere to the terms and conditions of waiver of prepayment

charges, contemplated under clause 17. Clause 17 of the sanction letter dated January 11, 2013 allows prepayment, without prepayment charges being

attracted, on the first petitioner issuing a 90 days advance notice to do so, and prepays the amount, at the time of reset of interest. To my

understanding, clause 17 contemplates a situation where, the first petitioner can prepay without any prepayment charges, if it evinces an intention to do

so 90 days in advance and prepays the entire amount at the time of reset of the interest. Clause 12 of the sanction letter dated January 11, 2013

stipulates that, the account would be reviewed within one year or earlier at the discretion of the bank. The sanction letter dated January 11, 2013

provides for the rate of interest as also the period of reset. It stipulates that, the first reset would be on commercial operation date and annually

thereafter. In the facts of the present case, the commercial operation date is September 1, 2014. The first reset would, therefore, be on September 1,

2014 and the subsequent reset of interest annually. However, in terms of clause 12, the bank at its discretion can make a reset prior to the expiry of

one year from the commercial operation date. On a meaningful construction of the rate of interest clause and clauses 12 and 17 of the sanction letter

dated January 11, 2013, it appears that, the first petitioner is entitled to repay the term loan facilities, without prepayment charges, should the first

petitioner issue a prior notice of 90 days from the date of reset, and prepays the amount on the date of the reset. There must be an advance notice of

at least 90 days prior to the date of reset.

Applying such interpretation of the sanction letter dated January 11, 2013 to the facts of the present case, I do not find that, the first petitioner issued

an advance notice of 90 days evincing its intention to prepay the bank. The first letter of the first petitioner evincing any intention of prepayment is

dated July 12, 2015. The first petitioner repaid the credit facilities on September 22, 2015. A period of 90 days did not elapse from the date of first

intimation of prepayment for the first petitioner to contend that, the prepayment was made without attracting the prepayment interest. Kailash Nath

Associates (supra) has dealt with Section 74 of the Contract Act, 1872. It has held as follows:-

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as

reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the

Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be

awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can

be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant

reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in

Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non

for the applicability of the Section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove

actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated

amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and

conditions of a public auction before agreement is reached, Section 74 would have no application.”

Kailash Nath Associates (supra) has arisen out of a public auction conducted by the Delhi Development Authority (DDA) in respect of an immovable

property. In the facts of that case, it was found that DDA did not have the authority to conduct such auction, in first place, for it to be entitled to

forfeit any amount received by it under such auction process. In the present case, the parties are governed by the sanction letter dated January 11,

2013. It stipulates the rates of interest to be paid by the borrower, the happening of different events. Therefore, it can be said that, the parties have

agreed to different rates of interest on the happening of different events. The prepayment of the credit facilities is one of such events contemplated.

The parties have agreed that, prepayment is possible without additional interest being payable, upon the borrower complying with certain terms and

conditions. In the facts of the present case, the first petitioner did not comply with the terms and condition, allowing it to make the prepayment without

additional interest being paid. The facts of the present case, therefore, are distinguishable from that of Kailash Nath Associates (supra).

Ram Kesh Yadav & Anr. (supra) has held that, the parties should be held to their bargain. In the facts of that case, an employee had taken retirement

on the condition of appointment being given to his son. Although the scheme of compassionate appointment did not permit such appointment to be

given, the Supreme Court, in view of the facts of that case has held that, since the employee had offered to retire on medical grounds subject to the conditions that, his son was replaced in his place and the employer had accepted such condition in its entirety, the employer is required to give the compassionate appointment. Bhagwati Prasad Pawan Kumar (supra) has dealt with a situation where acceptance was deduced by conduct under Section 8 of the Contract Act, 1872. Naseem Bano (Smt.) (supra) has proceeded on the basis that, the respondents did not raise any dispute with regard to certain averments made in the writ petition through their affidavit contesting the contents of the writ petition. Boghara Polyfab Private Limited (supra) has dealt with Section 11 of the Arbitration and Conciliation Act, 1996 and whether an issue was live for reference to arbitration or not. In such context it has considered discharge of contract by accord and satisfaction. It has held as follows:-

27. While discharge of contract by performance refers to fulfillment of the contract by performance of all the obligations in terms of the original contract, discharge by accord and satisfaction refers to the contract being discharged by reason of performance of certain substituted obligations. The agreement by which the original obligation is discharged is the accord, and the discharge of the substituted obligation is the satisfaction. A contract can be discharged by the same process which created it, that is by mutual agreement. A contract may be discharged by the parties to the original contract either by entering into a new contract in substitution of the original contract; or by acceptance of performance of modified obligations in lieu of the obligations stipulated in the contract.

28. The classic definition of the term accord and satisfaction given by the Privy Council in Payana Reena Saminathan vs. Pana Lana

Palaniappa (reiterated in Kishorilal Gupta) is as under:

The receipt given by the appellants and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the receipt. It is a clear example of what used to be well known as common law pleading as accord and satisfaction by a substituted agreement. No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by

all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.â??

Smt. Sova Ray & Anr. (supra) has dealt with a compromise decree of partition. In the facts of such case, it has found that, the parties were bound by

the terms of the compromise decree and that, no clause in the compromise decree can be said to be penal in nature. In view of the discussions above,

it cannot be held that, the bank has acted illegally in debiting the prepayment charges. The writ petition, therefore, fails. W.P. No. 1040 of 2016 is

dismissed. No order as to costs.