(1984) 10 OHC CK 0002

In the Orissa High Court

Case No : First Appeal No. 22 of 1977

State Bank of India APPELLANT

Vs

Rashmi Small Industries and Another RESPONDENT

Date of Decision : 22-10-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, 34
Orissa Money Lenders Act, 1939 — Section 9

Citation : AIR 1985 Ori 163 : (1984) 58 CLT 540

Hon'ble Judges : P.C. Misra, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : S.N. Sinha, for the Appellant;

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—State Bank of India is the appellant against the judgment and decree of the Subordinate Judge, Cuttack, Though the suit has been decreed, the Subordinate Judge has refused to grant costs and pendente lite interest and this appeal is, therefore, directed against the said order of refusal of interest and costs.

2. The Bank fiied the suit for realisation of the amount due on defendant No. 1 on the basis of a cash credit loan granted in his favour by the State Bank of India. The suit was for the principal sum of Rs. 10,462.25 together with interest pendente lite and future at the agreed rate and with costs of litigation. Defendant No. 1 was the principal loanee and defendant No. 2 was the guarantor. Defendant No. 1 in his written statement admitted his liability but defendant No. 2 contested the suit by alleging that he was not liable for the said claim.

3. The Subordinate Judge relying on Exts. 1 and 3 came to hold that defendant No. 2 also was liable for the suit claim along with defendant No. 1 jointly and severally. In view of the admission of defendant No. 1 in the written statement, the Subordinate Judge decreed the plaintiff''s suit so far as the principal sum was

concerned, but he held that since defendant No. 1 had admitted the claim, it would not be appropriate to grant pendente lite interest in the case. So far as the future interest is concerned, the Subordinate Judge came to hold that by operation of Section 9 of the Orissa Money Lenders Act read with Order 34, Rule 11, C.P.C. the plaintiff could not claim more than six per cent towards interest and, therefore, he granted future interest at the rate of six per cent per annum. So far as the costs of the suit is concerned, he found that the bona fides and fairness exhibited by defendant No". 1 warranted that the defendant should not be saddled with costs of the suit and accordingly he decreed the suit without any costs. Defendant No. 1 had made a prayer for payment of the decretal dues on monthly instalments but the said prayer was also rejected by the Subordinate Judge.

4. Mr. Sinha appearing for the Bank-appellant contends that the Subordinate Judge has committed serious error of law while deciding the question of interest. He also submits that though grant of costs in a suit is a matter of discretion of the Court, but the said discretion must be a judicial discretion and costs cannot be refused arbitrarily or whimsically. According to Mr. Sinha, the Subordinate Judge proceeded on a wrong premise while refusing to grant costs and, therefore, the said order is liable to be interfered with in appeal. There is no appearance for the respondents in this case.

5. So far as the question of interest is concerned, the Subordinate Judge has found that the parties agree to pay interest at a higher rate, but he granted six per cent on a finding that u/s 9 of the Orissa Money Lenders Act read with Order 34, Rule 11, C.P.C., plaintiff is not entitled to claim more than six per cent per annum towards interest. Admittedly, the provisions of the Orissa Money Lenders Act have no application to the plaintiff-appellant. The State Bank of India, since the Bank is exempted from the operation, of the said Act. We fail to understand how Order 34 Rule 11, C.P.C. disentitles the plaintiff to get interest at the agreed rate. In fact, under Rule 11 of Order 34, plaintiff is entitled to interest at the rate agreed to between the parties till the period of redemption expires and the provisions of Section 34 of the C.P.C. are not applicable to cases of mortgages. See, AIR 1927 1 (Privy Council) and Konakalla Venkata Satyanarayana (Died) and Others Vs. State Bank of India and Others, . In the case of Mst. Banabai Vithoba v. Doma Butanji AIR 1953 Nag 258, Mudholkar, J., observed : --

"The next contention is that the lower Court has wrongly awarded interest at 4 p.c. p.a. from the date of suit till the date of redemption instead of at the contract rate. In my opinion 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."

We do not find any justifying circumstances to reduce the rate of interest agreed to between the parties nor is there any justification to refuse the plaintiff pendente lite interest. In our view, therefore, the discretion of the Subordinate Judge on the question of interest must be set aside and the plaintiff-appellant is entitled to get interest at the agreed rate which is 9 1/2% as submitted by Mr. Sinha, both pendente lite and future.

6. The next question relates to grant costs. The award of costs is entirely within the judicial discretion of the Court and if the trial Court exercises that discretion, the appellate Court would be loath to interfere with the same. If, however, the discretion has been exercised on a misapprehension of fact or law or the Court below has not exercised any real discretion in making the direction or the discretion can be said to be not judicial, that is, not based on sound and well-established legal principle, then, the appellate Court may interfere with the direction of the trial Court with regard to grant of costs. The reasons which weighed with the trial Court in refusing to grant costs are that the plaintiff could have realised the suit dues by sale of hypothecated goods and that defendant No. 1 showed her bona fides in making payment of more than two-thirds of the principal amount within a period of one year. So far as the second ground is concerned, we find that it is an error of record and in fact, defendant No. 1 did not make any payment to prove her bona fides. As it appears, under Ext. 6, defendant No. 1 promised to make some payment by March, 1975, but since no payment was made, the plaintiff issued notice (Ext. 7) and even thereafter as no payment was made, the plaintiff was compelled to file the suit. In this view of the matter, the finding of the Subordinate Judge that there was no lack of bona fides on the part of defendant No. 1 is liable to be reversed. That apart, the reasoning of the Subordinate Judge that the plaintiff could have avoided the suit by selling the hypothecated goods, to us, does not appear to be germane while considering the question of grant of costs. Having gone through the ''evidence on record, we are of the opinion that the Subordinate Judge has not exercised any real discretion and much less any judicial discretion in refusing to award costs in the present case. Sub-section (2) of Section 35 of C.P.C indicates that the costs shall follow the event and where the Court directs that costs shall not follow then the Court shall state its reasons in writing. In this view of the matter, we are of the opinion that the Subordinate Judge committed an error in not awarding costs in the present case and in our view, the plaintiff is entitled to the costs of the suit.

7. In the ultimate result, therefore, both the contentions of Mr. Sinha must be upheld and the first appeal is allowed, but since the respondents have not entered appearance in this appeal, there would be no order for costs of this appeal.

P.C. Misra, J.

8. I agree.

