(1991) 05 BOM CK 0011

In the Bombay High Court

Syndicate Bank and another — APPELLANT

Vs

Kailashchandra and another — RESPONDENT

Date of Decision : 03-05-1991

Acts Referred:

Banking Regulation Act, 1949 — Section 21A
Usurious Loans Act, 1918 — Section 3

Citation : (1993) 76 CompCas 392

Hon'ble Judges : M.M. Qazi, J;M.B. Ghodeswar, J

Bench : Division Bench

Advocate : M.G. Bhangde and V.G. Bhangde, for the Appellant; V. Deo, for the Respondent

Judgement

M.B. Ghodeswar J.

1. The appellants - original plaintiffs have preferred this appeal against the judgment and order dated September 29, 1982, passed by the Joint Civil Judge, Senior Division, Nagpur, in Special Civil Suit No. 4 of 1982.

2. The plaintiff - Syndicate Bank sued the defendants for recovery of Rs. 73,016.97. The plaintiff - bank had given two loan facilities to respondent No. 1 trader. On October 16, 1978, a loan of Rs. 10,000 was given for purchase of weighing scales to respondent No. 1 and on August 21, 1979, an overdraft facility of Rs. 20,000 was given. Respondent No. 2 stood surety. The rate of interest was at 3.5 per cent. above the rate fixed by the Reserve Bank of India subject to a minimum of 12.5 per cent. with quarterly rests. The amount was to be paid in monthly instalments and, in case of default, overdue interest of two per cent. more than the regular rate was agreed to. The interest was to be paid quarterly and if not, it was to be added to the principal amount. On the first loan, the amount due was Rs. 1,211.55 and on the second loan, the amount due was Rs. 71,805.42 - totalling Rs. 73,016.97. The respondents have not contested the suit on facts. They filed one pursis on September 20, 1982, stating that the plaintiff - bank charged excess interest and cannot charge interest more than the

rate mentioned in the Usurious Loans Act. The trial court framed issues. Issue No. 1 is as under : "Whether the defendants prove that the interest charged is excessive in view of the provisions made in the Usurious Loans Act. If yes, its effect", and answered the issue in the affirmative. The learned trial court held that the first proviso to section 3(2)(a) of the Usurious Loans Act, 1918, is applicable to advance of money by the bank and ordered that the accounts between the parties be reopened from the beginning.

3. The short question to be decided in this appeal is whether section 3 of the Usurious Loans Act or section 21A of the Banking Regulation Act, 1949 (for short "the Banking Act"), is applicable. Shri Bhangde, the learned advocate appearing for the appellants, submitted that, in view of the bringing of section 21A of the Banking Act on the statute book, the Usurious Loans Act is not applicable. Shri Deo, the learned advocate appearing for the respondents, supported the judgment and order passed by the learned trial court.

4. In order to appreciate the rival contentions, it is necessary to see the relevant provisions of the Banking Act and the Loans Act. Section 3 of the Usurious Loans Act reads as under :

"3. Reopening of transactions. - (1) Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies, whether heard ex parte or otherwise, the court has reason to believe -

(a) that the interest is excessive ; and

(b)that the transaction was, as between the parties thereto, substantially unfair, the court may exercise all or any of the following powers, namely, it may,- (i)reopen the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest ; (ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof ; (iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just :

Provided that, in the exercise of these powers, the court shall not - (i) reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction : (ii) do anything which affects any decree of a court.

Explanation. - In the case of a suit brought on a series of transactions the expression "the transaction" means, for the purposes of proviso (i), the first of such transactions.

(2) (a) In this section, "excessive" means in excess of that which the court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk of court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(d) In considering whether a transaction was substantially unfair, the court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Explanation. - Interest may of itself be sufficient evidence that the transaction was substantially unfair.

(3) This section shall apply to any suit, whatever is form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan or for the redemption of any such security in respect of a loan or for the redemption of any such security.

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the court that the transfer to him was bona fide, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section.

For the purposes of this sub - section, the word "notice" shall have the same meaning as is ascribed to it in section 4 of the Transfer of Property Act, 1882.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court."

5. Section 21A of the Banking Act as amended reads as under :

"21A. Rate of interest charged by banking companies not to be subject to scrutiny by courts. - Notwithstanding anything contained in the Usurious Loans Act, 1918 (10 of 1918), or any other law relating to indebtedness in force in any

State, a transaction between a banking company and its debtor shall not be reopened by any court on the ground that the rate of interest charged by the banking company in respect of such transaction is excessive."

6. The amended section 21A is brought on the statute book on February 15, 1981. A mere perusal of this amended section 21A shows that the provisions of the Usurious Loans Act, 1918, are no more applicable and, therefore, the court cannot reopen the accounts.

7. The present appeal is admitted on October 14, 1983, and, during the pendency of this appeal, section 21A of the Banking Regulation Act, 1949, is brought on the statue book. Shri Bhangde, learned counsel for the appellants, has placed reliance on the decision in Amarjit Kaur Vs. Pritam Singh and Others, . In this reported case, during the pendency of an appeal in the High Court, the Punjab Pre - emption (Repeal) Act, 1973, received the assent of the Governor of Punjab on April 6, 1973. The High Court allowed the appeal and dismissed the suit, holding that the provisions of section 3 of the above Act should govern the decision. Section 3 of the Punjab Pre - emption (Repeal) Act, 1973, provides as under (at page 2069) :

"Bar to pass decree in suit for pre - emption. - n and from the date of commencement of the Punjab Pre - emption (Repeal) Act, 1973, no court shall pass a decree in any suit for pre - emption."

Their Lordship held that the hearing of the appeal is in the nature of a rehearing and that it is no the theory of an appeal being in the nature of a rehearing that the courts in this country have, in numerous cases, recognised that, in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against."

9. Their lordships have observed in para 5 as under :

"As an appeal is a rehearing, it would follow that if the High Court were to dismiss the appeal, it would be passing a decree in a suit for pre - emption. Therefore, the only course open to the High Court was to allow the appeal and that is what the High Court has done. In other words, if the High Court were to confirm the decree allowing the suit for pre - emption, it would be passing a decree in a suit for pre - emption, for, when the appellate court confirms a decree, it passes a decree of its own, and, therefore, the High Court was right in allowing the appeal."

10. Shri Bhangde has further relied on the single judge''s judgment in Second Appeal No. 77 of 1982, Gulabchand Laxmichand Bhutada v. Central Bank of India, which held that, in view of section 21A of the Banking Regulation Act, the court is prohibited from entertaining any plea to reopen any transaction which may deter a bank on the ground of excessive charging of interest under the provisions of the Usurious Loans Act, 1918.

11. Shri Deo, learned counsel for the respondents, has relied on the provisions of section 2 of the Banking Regulation Act, 1949, and submitted that the provisions of the Usurious Loans Act are not barred. Section 2 of the Banking Act can be usefully extracted as under :

"The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Companies Act, 1956, and any other law for the time being in force."

12. He has further submitted that, as per section 3 of the Usurious Loans Act, reopening of transactions can be ordered by the court on the ground that the interest is excessive and that the transaction was substantially unfair and, therefore, he laid much emphasis on the fact that the words "substantially unfair" remained untouched in the amended section 21A of the Banking Act.

13. It is true that section 21A of the Banking Act speaks only of the excessive interest and does not refer to section 3(1)(b) of the Usurious Loans Act. It is not the case of the respondents that the transaction between the parties was substantially unfair. Moreover, the element of fraud, misrepresentation, etc., is missing in such transactions. The transaction by a nationalised bank with a trader - respondent, by no stretch of imagination, can be called a substantially unfair transaction. The argument put forth by Shri Deo does not appeal to reason. We find much substance in this appeal and we hold that section 21A of the Banking Act is applicable in this case and, therefore, the learned trial court has committed an error in ordering reopening of the accounts from the beginning of the transaction. The trial court''s judgment and decree to this extent is, therefore, liable to be set aside.

14. In the result, the appeal is allowed. The decree of the trial court is modified and substituted as under :

(1) the defendants do pay Rs. 73,016.97 to the plaintiff - bank with future interest at the rate of 12.5 per cent. per annum from the date of the suit till realisation.

(2) the defendants are allowed to pay the decretal amount by monthly instalments of Rs. 1,500 each payable on the 15th of every month till realisation. On default in making the payment of any three consecutive instalments, the plaintiff - bank is entitled to execute the decree.

15. The defendants shall pay the costs of the plaintiff - bank and also bear their own costs.