

(1990) 11 KAR CK 0067

In the Karnataka High Court

Case No : Regular First Appeal No. 191 of 1982

Syndicate Bank

APPELLANT

Vs

Sudhir Surgicals and Allied Industries and Others

RESPONDENT

Date of Decision : 28-11-1990

Acts Referred:

Citation : (1991) 72 CompCas 555 : (1991) ILR (Kar) 3173

Hon'ble Judges : N.D.V. Bhat, J;K.A. Swami, J

Bench : Division Bench

Advocate : C.N. Kamath, for the Appellant; V.P. Deenadayalu Naidu, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Swami, J.—This appeal is preferred against the judgment and decree dated February 26, 1982, passed by the learned First Additional City Civil Judge, Civil Station, Bangalore, in O. S. No. 2023 of 1980 (old No. O. S. 204 of 1977). The appellant is the plaintiff and respondents Nos. 1 to 4 are defendants Nos. 1 to 4 before the trial court. In this judgment, the appellant will be referred to as the plaintiff and the respondents as defendants.

2. The appellant filed the aforesaid suit for recovery of the following sums :

(i) Rs. 81,897 with interest at 16 per cent. per annum ;

(ii) Rs. 69,714.13 with interest at 16 per cent per annum ; and

(iii) Rs. 18,579.55 with interest at 18.5 per cent. per annum from the date of suit till decree and future interest at contract rate from the date of decree till realisation with full court costs.

3. The plaintiff also prayed for the sale of hypothecated goods described in schedules A and B for the realisation of the decretal dues and in the event the sale proceeds of the hypothecated goods are found insufficient, to satisfy, the decretal dues, the plaintiff sought for a personal decree against the defendants

jointly and severally.

4. The case of the plaintiff was that defendant No. 1 was a partnership firm ; defendants Nos. 2 and 3 were the partners and defendant No. 4 was the purchaser of the first defendant-partnership of all its assets including the goodwill. The further case of the plaintiff was that defendants Nos. 2 and 3, as partners of the first defendant-firm, availed of three facilities from the plaintiff-bank :

(1) A sum of Rs. 50,000 (OSL No. 58 of 1974) by hypothecating the properties as mentioned in the hypothecation deed dated November 23, 1974 ;

(2) Overdraft facility to the extent of Rs. 20,000 under SOD No. 25 on November 23, 1974, by executing a pronote for Rs. 20,000 on November 23, 1974 ;

(3) A sum of Rs. 18,579.55 was also due under temporary overdraft facility availed from October 19, 1974.

Thus, the sums due under all these heads were claimed which were to the tune of Rs. 8,897, Rs. 69,714.13 and 18,579.55 respectively.

5. Defendants Nos. 1 and 2 remained ex parte. Defendant No. 3 filed his written statement. Defendant No. 4, though appeared through a counsel, did not file any written statement.

6. In his written statement, the third defendant contended that defendants Nos. 2 and 3 were the partners of the first defendant-firm. They sold the first defendant-firm to the fourth defendant on March 10, 1975, with all the rights and liabilities with the consent of the plaintiff in the presence of the then manager, Mr. Albert Kotuyan, who was instrumental in bringing about the sale ; that, on March 10, 1975, all the transactions of the second and the third defendants as partners of the first defendant-firm were cancelled and terminated and the plaintiff could not have any cause of action or right to proceed against defendants Nos. 1 to 3 ; that the fourth defendant undertook to discharge all the liabilities of the first defendant firm to the plaintiff and the plaintiff gave up all the claims against the third defendant on March 10, 1975 ; that the fourth defendant was liable for the suit-claim. Without prejudice to the aforesaid contentions, the third defendant also submitted that he borrowed a sum of Rs, 50,000 from the plaintiff for the first defendant and agreed to repay the same with interest at 4.5 per cent. per annum. However, he denied that he agreed to pay a minimum of 13.5 per cent. per annum compounded quarterly and contended that he was liable to pay interest only at 4.5 per cent. per annum ; that the interest claimed over and above the aforesaid rate was illegal, excessive and liable to be rejected. He also further admitted that, on November 27, 1974, the first defendant availed of the overdraft facility to the extent of Rs. 20,000 and agreed to repay the same with interest at 4.5 per cent. per annum. He had not agreed to pay interest at 13.5 per cent. per annum compounded quarterly. The third defendant further denied that he had overdrawn on his current account

from October 19, 1974, to the extent of Rs. 18,579. He contended that he had not over drawn from the plaintiff.

7. As already pointed out, the fourth defendant had not filed any written statement. There was a compromise petition filed. It was signed by the plaintiff and the fourth defendant and it was filed under Order 23, rule 3 of the Civil Procedure Code. However, it was not recorded. The learned trial judge has elaborately referred to this aspect of the matter and he has also noticed that even though there is a mention about it in the order sheet, no such compromise is forthcoming in the records. However, it is certain that the compromise was not entered into.

8. In the light of this, the learned trial judge framed the following issues :

"1. Whether the plaintiff proves that defendants Nos. 2 and 3 as partners of the first defendant-firm availed of the temporary over draft facility in their current account No. 210 to the extent of Rs. 18,579.55 from October 19, 1974, on the understanding that they would reimburse the same ?

2. Whether the plaintiff is entitled to the amount of Rs. 81,897 ; Rs. 69,714.13 and Rs. 18,579.55 ; from the defendants and that the defendants are jointly and severally liable to pay the same ?

3. Whether the plaintiff is entitled to the interest claimed ?

4. Whether defendants Nos. 2 and 3 prove that they are not liable to pay the amount claimed and whether they further proved that it was the fourth defendant that has undertaken to discharge all the liabilities and that the plaintiff gave up all the claims against them on March 10, 1975, with the consent of the then manager of the plaintiff-firm ?

5. To what amount is the plaintiff entitled and from what all defendants. ?

6. What decree and what order ?

9. The plaintiff examined two witnesses as PWs 1 and 2 on its behalf and marked 24 documents as exhibits P-1 to P-24, The third defendant examined himself as PW-1 and closed his case. No documentary evidence was adduced.

10. On the basis of the evidence on record, the learned trial judge has answered issues 1 to 5 as follows :

1. Partly yes ; the said defendants availed of overdraw facilities to the extent of Rs. 9,000 ;

2. Yes ; the plaintiff is entitled to the decretal amount but from the fourth defendant only.

3. Yes ; at 16 per cent. on Rs. 81,897 and Rs. 69,714.13 and 16.5 percent, on Rs. 9,000.

4. Yes.

5. The plaintiff is entitled to claim the decretal amount from defendant No. 4 only.

11. Accordingly, he passed a decree against the fourth defendant in the following terms ;

"The suit of the plaintiff against the fourth defendant is decreed in part with proportionate costs of defendant No. 3. The fourth defendant shall pay to the plaintiff a sum of Rs. 81,897 with interest at the rate of 16 per cent. per annum and Rs. 69,714.13 with interest at the rate of 16 per cent. per annum and Rs. 9,000 with interest from October 19, 1974, till the date of the suit at the rate of 16.5 per cent. per annum and future interest at the rates from the date of the decree till realisation of the above amounts."

12. In this appeal, Sri C. N. Kamath, learned counsel appearing for the plaintiff, urged the following points for consideration.

"1. That, as the plaintiff-bank was not a party to the transfer of assets and liabilities of the first defendant-firm under the sale deed dated March 10, 1975, the liability of defendants Nos. 1 to 3 to pay the amount to the plaintiff-bank was not extinguished. Therefore, the trial court was not right in refusing to pass a decree against defendants Nos. 1 to 3.

2. That, under the temporary overdraft facility availed of by defendants Nos. 1 to 3, the plaintiff was entitled to claim interest at the rate of 18.5 per cent. per annum. Therefore, the trial court is not justified in refusing to grant interest at 18.5 per cent. per annum ;

3. That, as the loan was for commercial purposes, the plaintiff was entitled to claim interest at quarterly rests. Therefore, the trial court was not justified in not allowing interest at quarterly rests."

13. We shall now proceed to determine the correctness of these contentions points.

14. We shall first take up points Nos. 2 and 3 which are covered by issue No. 3 framed by the trial court.

Points Nos. 2 and 3.--The learned trial judge has, on the basis of the evidence of PW-1, held that the plaintiff-bank was entitled to claim interest on Rs. 9,000 at the rate of 16.5 per cent. The court below has also held that there is no written agreement for payment of interest on the overdrawn amount. A book called "Instructions of Syndicate Bank" was produced before the trial court. It was pointed out that the rate of interest charged on the overdrawn advance, as per item No. 18 was 16.5 per cent. and not 18.5 per cent. per annum. Accordingly, the learned trial judge has held that the plaintiff-bank was entitled to claim interest at 16.5 per cent. per annum and not 18.5 per cent. per annum.

15. In the light of the evidence of PW-1 who is no other than the manager of the

plaintiff-bank and, in the absence of any agreement regarding payment of interest on the overdrawn advance, the learned trial judge was justified in relying on item No. 18 of "Instructions of Syndicate Bank." PW-1 has admitted in his evidence that overdrawn amount was Rs. 9,000. Therefore, the trial court was justified in holding that the plaintiff-bank was entitled to claim interest on the overdrawn amount of Rs. 9,000 at 16.5 per cent. per annum. We are of the view that the decision of the learned trial judge on this point in the light of the evidence on record is correct and that it does not call for interference.

16. Regarding quarterly rests, on Rs. 9,000 availed of under the temporary overdraft facility by defendants Nos. 1 to 3, there does not appear to have been" any contention urged before the trial court. Therefore, we are of the view that this contention appears to have been given up, as there is no reference to it under issue No. 3. No doubt, in the appeal, a ground has been specifically raised that compound interest at 18.5 per cent. ought to have been allowed with quarterly rests. It appears that the same has not been urged before the court below. Therefore, we do not consider it necessary to go into that question. Accordingly, points Nos. 2 and 3 are answered as follows ;

"Under the temporary overdraft facility, the amount due as on the date of suit was Rs. 9,000. The interest payable on the said amount was at 16.5 per cent. and not 18.5 per cent. per annum. The claim for quarterly rests had not been made before the trial court inasmuch as the matter was covered under item No. 18 of "Instructions of Syndicate Bank" as there was no separate written agreement evidencing payment of interest on the overdrawn advance with quarterly rest."

Point No. 1--It is true that the second defendant has not filed any written statement. It is only the third defendant who has filed the written statement. The third defendant has not disputed that a loan of Rs. 50,000 was obtained under an agreement dated November 23, 1974, exhibit P-15 hypothecating the properties of the first defendant as mentioned in schedule 3 and annexure 1 to exhibit P-15. This loan of Rs. 50,000 was obtained under OSL No. 58 of 1974. Similarly, it is also not disputed by the third defendant that a pronote was executed on November 23, 1974, for a sum of Rs. 20,000 as per exhibit P-16 by way of security obtained under SOD 25. The third defendant has also not disputed the fact that, on executing the letter of delivery by hypothecating the stock-in-trade, a temporary overdraft facility was availed of from October 19, 1974, to the tune of Rs. 9,000. But the case of the third defendant is that the properties of the first defendant were sold along with the liabilities to the fourth defendant at the instance of the manager of the plaintiff-bank on his assurance that their liability will be discharged and that the same will stand transferred to the fourth defendant. Therefore, it is the case of the third defendant that, as the second and the third defendants have transferred the property of the first defendant along with the goodwill, it is not now open to the plaintiff to fall back and make a claim against defendants Nos. 1 to 3, as it is open to the plaintiff to

recover the amount from the fourth defendant. Therefore, the submission made on behalf of the third defendant is that the bank is not entitled to make any claim against defendants Nos. 1 to 3 ; that it can only make the claim against the fourth defendant; that there is also a decree passed against the fourth defendant ; that the fourth defendant did not even contest the suit and has not even challenged the decree passed against him. It is submitted on behalf of the third defendant that this circumstance also would go to show that it was understood by the parties that the liability of defendants Nos. 1 to 3 should be transferred to the fourth defendant only. It is further submitted that no record is produced by the plaintiff to show that the head office had refused to accept the transfer of liability ; that no action was taken for recovery of the amount for over a period of two years ; that the notice issued by the plaintiff as per exhibit P-20 to the defendants would also go to show that the liability of defendants Nos. 1 to 3 was taken over by the fourth defendant and it was accepted by the plaintiff-bank. Therefore, it is contended that it is not permissible to the plaintiff to claim the amount from defendants Nos. 1 to 3.

17. On the contrary, it is strenuously contended by Sri Kamath, learned counsel for the plaintiff-bank that the liability incurred by the second and third defendants as partners of the first defendant by executing exhibits P-15, P-16 and P-17 and the amount drawn by them has not been disputed and, therefore, the liability is not wiped out by sale of the assets with liabilities of the first defendant to the fourth defendant even if it is held that the same had been done at the instance of the manager of the plaintiff-bank because it was beyond the capacity of the manager of the plaintiff-bank to discharge the second and third defendants from their liabilities as such power was vested only in the head office ; that the loan in question was also sanctioned by the head office ; that the manager of the plaintiff-bank had no power either to sanction the loan or to discharge the liability of defendants Nos. 1 to 3.

18. The trial judge has given his reasons in paras 18 to 20 of the judgment for coming to the conclusion that the plaintiff-bank was not entitled to make a claim for recovery of the suit amount from defendants Nos. 1 to 3. It is not necessary for us to repeat those reasons since we are of the view that the ultimate conclusion reached by the learned trial judge is correct.

19. In this regard, it is relevant to notice the evidence of PW-1, who was the manager of the plaintiff-bank at the relevant point of time when defendants Nos. 2 and 3 sold the assets along with liabilities of the first defendant to the fourth defendant on March 10, 1975. In the examination in-chief, at para 5, he has stated thus:

"Defendant No. 4 has purchased the assets of defendant No. 1. Defendant No. 4 has also purchased the liability of defendant No. 1. Defendants Nos. 1 to 4 approached me to arrange for permission for transfer of the business of defendant No. 1 to defendant No. 4 along with the assets and liabilities of defendant No. 1. I prepared all the papers in this regard and sent them to my

head office, but the head office did not grant the permission. So long as I was in the plaintiff-bank branch at Ulsoor, Bangalore, I did not receive any communication from the head office either granting or refusing the permission."

20. In the cross-examination at paras 7 and 8, he has stated thus :

"I have brought along with me the file of the plaintiff-bank pertaining to the suit loan. The said file contains a copy of the sale deed between defendants Nos. 1 to 3 on the one hand and defendant No. 4 on the other. It is true to suggest that the copy of the sale deed is in the file of the plaintiff-bank since the date of the sale deed of defendant No. 1 by defendants Nos. 2 and 3 to defendant No. 4.

It is true that the assets of defendant No. 1 was sold by the second and the third to defendant No. 4 on March 10, 1975. The sale transaction took place in the office of defendant No. 4 in the presence of myself representing the plaintiff-bank. Revanna, the landlord of defendant No. 1, was also present at that time. Mr. Suvarna, the advocate, was the person who prepared the documents of sale at that time. It is not true to suggest that I absolved defendant No. 1 from all the liabilities and made a representation to that effect to defendant No. 3. I assured defendants Nos. 2 and 3 on the date of the sale that their liability would be discharged. Witness volunteers : I gave that assurance to defendants Nos. 2 and 3 subject to the approval of the head office of the plaintiff-bank. I was instrumental in bringing about the sale of defendant No. 1 to defendant No. 4. It is not true to suggest that, as the head of the branch, I have got powers to discharge the liability of parties. Defendant No. 1 came into existence after it purchased Sudhir and Willy firm. It is true that Sudhir and Willy firm was due in a sum of Rs. 36,000 to the plaintiff-bank on the date of its dissolution. It is true that the said liability was transferred to defendant No. 1 when it purchased the Sudhir and Willy firm. The liability of the Sudhir and Willy firm was discharged and transferred to defendant No. 1 only after the approval of our head office.

Question : Can you show me any document to evidence that the liability of Sudhir and Willy firm was discharged by you with the approval of your head office ?

(After going through the office file brought by him carefully, witness gives the following answer).

Answer : I have not got any such document now with me. It is not true to suggest that I can discharge the liability of a party without the approval of the head office and that informing the head office about the discharge is only a formality after the discharge of the party. The amount of Rs. 18,579 mentioned in para 6 of the plaint includes interest up to the date of the suit.

21. There is no document to show that the defendants agreed to pay interest on the said amount. It is not true to suggest that defendants were not ready to pay interest on the said amount. The outstanding due excluding interest on account of overdraw debit balance due from the defendants is Rs. 9,000. It is not true to

suggest that defendants Nos, 2 and 3 are not liable to pay the suit claim to the plaintiff.

23. Again, in further cross-examination after the re-examination, he has stated thus :

"It was my intention to discharge defendants Nos. 1 to 3 from their liability to the plaintiff by arranging for the purchase of defendant No. 1 by defendant No. 4 and I brought about the sale of defendant No. 1 with defendant No. 4 with the hope that our head office will approve it."

24. The evidence of PW-1, as reproduced above, clearly establishes that the assets of defendant No. 1 along with liabilities were sold to defendant No. 4 at the instance of PW-1. He was instrumental in effecting this sale. No doubt he has stated that he was not competent to discharge the liabilities of defendants Nos. 1 to 3 without the approval of the head office. He has also further stated in his evidence that the head office did not grant permission and he did not receive any communication from the head office either granting or refusing permission during his tenure at Ulsoor branch, Bangalore. It is not possible to believe the evidence of PW-1 when he says that the head office had not approved it because, if the head office had not approved it, there would have been a communication from the head office to the branch office as well as to defendants Nos. 1 to 3. No such record is produced before the court. The evidence on record also does not disclose that any action was taken for recovery of the amount from defendants Nos. 1 to 3 from March 10, 1975, till the issuance of the suit notice produced as per exhibit P-20. Thus, the plaintiff-bank has failed to produce the material evidence to show that the head office did not approve it.

25. In the notice exhibit P-20, issued to defendants Nos. 1 to 4 through the legal advisor of the bank, it is specifically stated thus :"

"That, on March 10, 1975, the fourth of you purchased all the machineries, leasehold rights, goodwill and all assets and rights connected with the business of manufacture and sale of hospital equipments, steel furniture, light and heavy engineering equipments and coach buildings of the first of you, subject to the liabilities of the first of you due to my clients. Since the fourth of you purchased the business of the first of you, subject to the liabilities due to the bank, the fourth of you are also liable to pay the amounts due to. my clients by the first, second and third of you. Though the fourth of you promised to pay the amounts due to the bank within 90 days, the fourth of you have failed to do so."

26. The expression "the first of you, the second and the third of you and the fourth of you" used in the aforesaid para 4 are referable to defendants Nos. 1 to 4, respectively, because their names are stated in the beginning of the notice. The notice does not further state that the sale transaction and the transfer of the liability of defendants Nos. 1 to 3 to defendant No. 4 under the sale transaction was not approved by the head office. On the contrary, from para 4, it is clear that the plaintiff-bank had approved it and tried to recover the amount from the

fourth defendant who promised to pay the amount due to the bank within 90 days but, failed to do so. This being the evidence on record, the contention of Sri Kamath, learned counsel for the plaintiff, that the head office had not approved it and as long as the head office had not approved it, the liabilities of defendants Nos. 1 to 3 were not discharged and were continued, therefore, the decree as prayed for ought to have been passed against defendants Nos. 1 to 3, cannot at all be accepted. It is the branch manager who deals with the customers of the branch office of the bank, it is he who disburses the loans sanctioned. It is he who recovers the amount due under the loans from the debtors. In the course of recovery of the loan, if the branch manager takes part and represents to the parties that their liability by sale of the hypothecated properties can be transferred to the third party and by that they will be discharged from their liability, and he becomes instrumental for sale of the properties which are hypothecated to the bank for the loan advanced and the parties act upon such assurance given by the branch manager that they would be discharged of their liability and, accordingly, they proceed to execute the sale deed, and transfer the assets along with the liabilities to the third party, and the bank keeps quiet for a long period of two years and does not produce any record to show that the head office of the bank had not approved it; that, in addition to this, the conduct of the bank in issuing a legal notice as per exhibit P-20 to defendant No. 4 demanding the amount from the fourth defendant on the ground that the liability of defendants Nos. 1 to 3 to the plaintiff-bank has been transferred to him under the sale deed, it will not be open to the bank to turn round and claim that the liability of defendants Nos. 1 to 3 had not been discharged by the bank. The bank is estopped from making any claim against defendants Nos. 1 to 3. In the facts and circumstances of the case, if the contention of the bank is accepted, no debtor will be safe ; because the branch manager, in his anxiety to recover the amount, may adopt this modus operandi and arrange for the sale of the debtor's property to a third party by representing to the debtors that their liability can be transferred to the third party and that they will be discharged of their liability to the bank. The parties, bona fide believing it and acting upon the representation, effect sale in the presence of the branch manager who becomes instrumental for the sale and, thereafter, as contended by the plaintiff-bank, it would still be open to the manager to turn round and claim that the transfer of property had not the effect of discharging the liability of the vendors-debtors to the bank as the bank was not a party to the transaction even though the branch manager of the bank was instrumental for the sale of the hypothecated property. It would result in giving a free hand to the bank and its branch managers to act in detriment of the interest of the borrowers/debtors and to persuade the debtors, by using their dominating position being creditors, to act in detriment of their interest. It would be nothing but permitting the bank to play hide and seek and to blow hot and cold. Therefore, we are of the view that in the facts and circumstances established in the case, the liability of defendants Nos. 1 to 3 stood transferred to defendant No. 4. The plaintiff-bank is estopped from making any claim against defendants Nos. 1 to 3. Therefore, the plaintiff-bank has to proceed against

defendant No. 4 and the hypothecated properties of the first defendant which are put in the possession of the fourth defendant pursuant to the sale including the stock-in-trade. Point No. 1 is answered accordingly.

27. For the reasons stated above, the appeal fails and the same is dismissed.

28. In the facts and circumstances of the case, there will be no order as to costs in this appeal.