
(1986) 04 CAL CK 0052

In the Calcutta High Court

Case No : Appeal from Original Order No. 124 of 1985 and Suit No. 277 of 1982

The Bank of Rajasthan Ltd.

APPELLANT

Vs

S.K. Trading Co. and Others

RESPONDENT

Date of Decision : 02-04-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, 107(2), 34

Citation : (1990) 1 CALLT 139

Hon'ble Judges : Sachikanta Hazari, J; Bimal Chandra Basak, J

Bench : Division Bench

Judgement

Bimal Chandra Basak, J.—This appeal arises out of a Judgment and order passed by the learned Trial Court on 19th June 1984 in application made by the defendant respondents herein. The facts of this case are very simple.

2. There was an usual agreement between the appellant-plaintiff bank and the defendant-respondents whereby the plaintiff bank agreed to lend and advance to defendant No. 1 of which the defendants Nos. 2, 3, 4, 5 and 6 were the partners and wherein the defendant No. 7 subsequently became a partner, originally, the transaction was in the Cash Credit Account and the bill discount account at its branch at 25, Strand Road, Calcutta. Thereafter, with effect from 31st March 1978 by agreement between the parties the said Cash Credit account of the defendant No. 1 was transferred from the Strand Road Branch of the plaintiff to the plaintiff's branch at 31, Chowringhee Road, Calcutta and the agreements with the plaintiff continued.

3. We are concerned with the Cash Credit account with the said transferred Branch only. The arrangement was to advance money in the said account at the said branch upto a limit of Rs. 900,000 on the following terms and conditions :

"(a) The interest payable in the said account would be at the rate of 6% per annum above the Reserve Bank of India rate subject to a minimum of 15% per annum with quarterly rests in respect of the advance as made against

hypothecation of goods upto a limit of Rs. 4,00,000 ;

(b) Interest would be paid at the rate of 6% per annum over the Reserve Bank of India rate with a minimum of 15% per annum with quarterly rests against advances made against hypothecation of book debts upto a limit of Rs. 5,00,000."

4. This suit has been filed for a decree for Rs. 11,88,706.91 further interest from 26th March 1982, interim interest and interest on judgment at the agreed rate of 19.50% per annum. So far as the interest is concerned, averments were made in paragraph 28 of the plaint to the effect that interest in the said accounts was duly altered by agreement between the parties as follows :

(a) From 13.11.76 till 28.2.78 .. 16.5.% (b) From 1.3.78 till 12.9.79 .. 15% (c) From 13.7.79 till 30.6.80 .. 18% (d) From 1.7.80 till 1.3.81 .. 19.40% (e) From 2.3.81 (continuing) .. 19.50%

5. A statement of account duly certified under the Banker's Book Evidence Act is annexed to the plaint which shows that from time to time withdrawals and deposits were made and that in accordance with the agreement at the end of each quarter the interest for the period was included in the principal amount lent and advanced. On such basis from the statement of account it appears that on the 26th March 1982 a sum of Rs. 11,88,706.91P. was due which included interest under the aforesaid clause and which was included in the principal amount. After the institution of the suit the plaintiff made an interlocutory application wherein certain orders were passed.

6. Thereafter the plaintiff made an application for final judgment and upon hearing of which a decree was passed in favour of the plaintiff appellant on 31st January 1983 which we set out hereinbelow :

There will be a final judgment and decree against the defendant Nos. 1 to 4 and 7 for Rs. 11,13,706.05P. with further interest from March 26, 1982 at the rate of 12 per cent per annum and costs. The decree passed will not however, be executed if the defendants pay the said amount decree instalments of a sum of Rs. 20,000 beginning from the 15th day of February 1983 and pay the same each and every month until the end of 1983. The defendants will thereafter from the 15th of January 1984 pay a sum of Rs. 25,000 a month until the entire decretal dues are wiped off. The defendants, after payment of all the instalments directed to be paid will as the last instalment pay the entire interest due and owing at the time within Six months of the payment of the last instalment paid.

In default of payment of any two successive instalments and/or the last instalment, the plaintiff will be entitled to execute the decree after giving credit for the amounts received in pro tanto satisfaction of the decree and will also be entitled to interest at 15% per annum and costs.

7. The Court is not at all satisfied that there is a good defence enlightening the defendants to proceed with the trial. No facts have at all been disclosed which would entitle the respondents to defend save and except bare and vague

allegations made without particulars as a defence to the suit. The decision cited by learned Counsel for the petitioner inately, *Essavi India Match Mfg. Co. Vs. Essabhai and Another*, is on authority for the proposition that bare allegations not supported by a shade of evidence is not defence at all.

8. The contention of the learned Counsel for the respondent that no application lies under Chapter XIII A of the High Court Rules inasmuch as the suit contemplates a declaration of a hypothecation of goods mentioned in Annexure "C and "D" also a decree for sale has no substance and is rejected.

9. The Court is also unable to accept the submission of the learned Counsel for the respondent that order 34 of the CPC should be made applicable and a preliminary decree and thereafter a final decree required to be passed.

10. Subsequent thereto the defendant duly proceeded with payment of instalments in accordance with such decree. On the 18th April 1984 the defendant respondents made an application for the following prayers :

"(a) The said order dated 31st January 1983 be clarified and/or varied and/or modified in the manner following, viz :

(i) The direction for payment of further interest from March 26, 1982 @ 12% p.a. be on the principal amount of Rs. 9,00,000 and not on Rs. 11,13,706. 05P.

(ii) Leave to pay the interest due and owing at the time of payment of the last instalment of Rs. 25,000 also at the rate of Rs. 26,000 p.m. until the plaintiff's entire claim on account of interest is paid off and "not within six months" as directed by the said order;

(b) The aforesaid amendments to the said order dated 31st January 1983, be incorporated in the order dated 31st January 1983 to be finally drawn up, completed and filed and the said order do stand varied or modified accordingly".

11. After hearing the learned Advocates the learned Judge passed the following order on the 19th June 1984 against which this appeal has been preferred.

Having heard the respective submissions of the parties this Court is satisfied that no interest for the post suit period is required to be allowed the sum decreed in accordance with the provisions of Section 34 of the Code of Civil Procedure. As such the Court is not inclined to award any interest upon interest. Admittedly, the decree passed in favour of the plaintiff bank is for a sum of Rs. 11,88,706.91 and this was passed on the basis of the agreement between the parties which entitled the plaintiff bank to claim interest at the agreed rate as set out in paragraphs 27 and 28 of the plaint. On a fair construction of the pleading it is beyond doubt that the principal sum advanced by the plaintiff bank to the defendant company was a sum of Rs. 9,00,000 and after giving due credit over payments made by the defendant No. 1 a sum of Rs. 11,88,706.91 with interest calculated thereon upto the 26th March 1982 was due and owing at the time the final judgment was passed in favour of the plaintiff. As such there will be an

order clarifying the order dated 31st January 1983 in terms of prayer (a)(i) of the petition inasmuch as variation and modification of the said order is also prayed for. In so far as the interest due and payable at the time of the last payment of instalment is concerned inasmuch as such claim for interest is a sum of Rs. 2,40,000 in the interest of just prayer (a) (ii) should also be allowed. There will also be an order in terms of prayer (b) of the petition. The Court is, however, not inclined to discharge the Receiver appointed and the interlocutory order dated 16th September 1982 directing the defendants to keep stock of hypothecated goods under their control and for submitting monthly statement of accounts to the Receiver is required to be continued until the entire decretal amount including interest thereon is fully paid up.

The defendants will, however, pay the cost of this application assessed at 40 G.Ms, which will be paid within a fortnight, in default the application will stand dismissed with costs. The costs shall be paid to the plaintiff's Advocate-on-record M/s. Khaitan & Co.

Department and all parties will act on a signed copy of the minutes of this order".

12. The judgment of the learned Trial Judge proceeded on the basis of interpretation of Section 34 of the CPC which is set out herein below:

"Section 34(1) : Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefore shall not lie.

Provided that where the liability in relation to the sum so adjudged . had arisen out of a commercial transaction the rate of such further interest may exceed six per cent per annum but shall not exceed the contractual rate of interest or where there is no contractual rate the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I : In this sub-section "Nationalised Bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and. Transfer of Undertakings) Act 1970 (5 of 1970).

Explanation II : For the purposes of this section, : a transaction is a commercial transaction, if it is connected with the industry trade or business of the party incurring the liability.

13. The learned Judge proceeded on the basis that the principal sum within the meaning of Section 34 was Rs. 9,00,000 and not Rs. 11,88,706.91P.

14. The question before us is as to whether u/s 34 of the CPC interim interest and interest on judgment would be granted only on the said sum of Rs. 9,00,000 or on the said sum of Rs. 11,88,706.91P. which included interest calculated upto 26th March 1982. The next point in appeal is regarding grant of instalment regarding payment of interest. The learned Judge made certain changes. However, we need not go into the same in the present appeal as Mr. Sarkar appearing for the appellant has not made any grievance so far as that aspect of the matter is concerned.

15. The contention of Mr. Sarkar with regard to Section 34 of C.P.C. is that in view of the agreement between the parties the interest with quarterly rests becomes part of the principal and therefore, this Rs. 11,88,00ft and odd which includes interest will be the principal amount within the meaning of Section 34 of the C.P.C. In support of his contention he has relied on the following decisions :

The Commissioner of Inland Revenue v. Sir H. C. Holder BT. and Anr. reported in (1931) 2 K.B.D. 81 . Halsgury's Laws of England, Fourth Edition Vol. 3, Article 160 at Page 118 and Paget's Banking Law, 9th Edition Page 117,

16. On behalf of the respondents-defendants Mr. Das has contended that in view of the amendment made in Section 34 at present such interest u/s 34 can be granted only on the principal sum which in the present case is Rs. 9,00,000 and not on the sum of Rs. 11,88,000 and odd which included interest. Mr. Das has submitted that the decision of the Commissioner of Inland Revenue v. Sir H. C. Holder is no longer a good law as it has been held by the House of Lords in Paton (Fenton's Trustee) v. Inland Revenue Commissioners reported in (1938) 1 All ELR 786.

17. There cannot be any doubt that the interest u/s 34 after amendment can be granted on the principal sum only, but what is the principal sum depends on the facts and circumstances of each case. It may be that in the case of an ordinary loan which provides for interest the principal amount would be the amount lent and there cannot be an interest on interest in the sense that the amount claimed an interest upto the date of the suit can be decreed, but while granting interest u/s 34 no further interest on such interest can be granted. This is generally the law after the amendment of Section 34. There cannot be any dispute. So far as that principle is concerned but the whole question is what is a principal amount in the facts and circumstances of this case. We have referred to the clauses mentioned above. These clauses make it clear that the interest which would accrue on the outstanding amount for the quarter concerned becomes a part of the principal "quarterly rests" means that this is being capitalised. It means that the interest calculated upto the end of a particular quarter is thereafter added to the principal amount and since then it becomes part of the principal amount. This practice is well-known and it has been so recognised in the case of Commissioner of Inland

Revenue v. Sir H. C. Holder (1931) 2 K.B.D. 81 where it has been held by the Court of Appeal that this recognised the system of Bankers in turning interest into capital was usual and binding on the parties who had acquiesced in it. It was further pointed therein that the plan of capitalizing interest at the end of each half-year was adopted by Bankers in order to enable them in effect to secure what is usually termed compound interest which could not have otherwise been claimed on the basis of the usury laws which were subsequently repealed. It was further pointed out that there seems no reason to ascribe a different effect in law to a system under which before the Act repealing the usury laws was passed, an unpaid interest was turned into capital even though the reason or necessity for it has passed away or changed. It was pointed out that the terms of the contract remain whether it is expressed or implied. The case before the Court of appeal was in the form of a case stated under the Finance Act, 1925 on the point as to whether such interest which, is added to the principal sum can be treated as a claim made for repayment of Income Tax upon sums paid to bank in respect of interest out of tax profits Without deduction of tax. It was pointed out that the system adopted was that at each half-year the charges for interest were added to the capital sum advanced and total sum carried forward into the next half-year as one undivided advance. It was pointed out that the interest was thus capitalized and became in integral part of the advance to the company.

18. It is true that from an appeal against the same on this point the House of Lords did not decide on this point but decided the case On a different point. It is also true that in a subsequent decision in the case of Paton (Fenton's Trustee) v. Inland Revenue Commissioners reported in (1938) 1 All ELR 786 the House of Lords did not follow the Court of Appeal's decision in the case of The Commissioner of Inland Revenue v. Sir H. C. Holder B.T. and Anr. But a close examination of the latter decision makes it clear. That so far as the relationship between the Banker and the customer is concerned and as to the question of capitalisation of interest the House of Lords did not differ with the Court of Appeal in the prior decision. The main point for decision in the House of Lords was whether the interest in such a case can be treated to have paid out of profits or gains already brought into charge within the meaning of Income Tax Act. On this point the House of Lords disagreed with the judgment in the case of The Commissioner of Inland Revenue v. Sir H.C. Holder (Supra). It was held therein that such interest cannot be treated as has been paid out of profits or gains brought into charge within the meaning of the Income Tax Act. The principle underlying the capitalisation of interest by the Bankers as observed by the Court of Appeal in the case of The Commissioner of Inland Revenue v. Sir H. C. Holder (Supra) has not been dissented from on the other hand, it appears that the House of Lords has recognised such practice as would appear from the judgment of Lord Macmillan at page 795 as follows :

"It may well be that as between a bank and its customer, this method of dealing may have the result that the accrued interest which the bank has with the customer's assent, added to the principal loan thereby ceases to be due or

recoverable as interest, but becomes merged in the principal loan. But has it been "paid" ?

19. Here, "Paid" means paid within the meaning of Section 36(1) of the Income Tax Act, 1918. Therefore, the House of Lords judgment only disagrees with the finding of the Court of Appeal in the earlier case on the ground as to whether such amount can be treated as amount paid within the meaning of the Act and not on the question of quarterly rests and capitalization of interest.

20. Similar is the observation made in Halsbury's Laws of England, Fourth Edition, Vol. 3 in Article 160 at Page 118 which is as follows :

"Interest" : By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts. An unusual rate of interest, interest with periodical rests, or compound interest can only be justified in the account being kept on that basis. Whether such acquiescence can be assumed from his failure to protest at an interest entry in his statement of account is doubtful.

21. Acquiescence in such charges only justified them so long as the relation of banker and customer exists with respect to the advance. If their relation is altered into that of mortgagee and mortgagor by the taking of a mortgage interest must be calculated according to the terms of the mortgage or according to the new relation.

22. The taking of a mortgage to secure a fluctuating balance of an overdrawn account is not, however, inconsistent with the relation of banker and customer. So as to displace a previously accrued right to charge compound interest.

23. It is the practice of bankers to debit the accrued interest to the borrower's current account at regular period (usually half-yearly) where the current account is overdrawn or becomes overdrawn as the result of the debit the effect is to add the interest to the principal, in which case it loses its quality of interest and becomes capital".

24. In this connection we may also refer to Paget's Banking Law 9th Edition Page 117, which is as follows :

The customer is liable for interest from the moment it accrues and probably whether the interest is in effect compound or not. The effect of the practice of Bankers in debiting interest to an overdrawn current account periodically and thereby increasing the capital sum was considered in *Yourell v. Aiberniam Bank Ltd.* in which Lord Atkinson said "The bank by taking the account with its half-yearly rests secure for itself the benefit of compound interest. This is usually and perfectly legitimate mode of dealing between Banker and customer", whether the overdraft fluctuates considerably it may well be that the interest debited one day is paid by the operation of the rule in *Clayton's case* as applied to the account.

25. In *Holder v. I.R.C.* a taxation case the Court of Appeal approved the

statement of Lord Cowan in *Reddie v. Williamson* "That the periodical interest at the end of each year is a debt to be then paid and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants.

26. The case went to the House of Lords and the decision was confirmed but the above point was not touched on judgment being given on the construction of Section 36(1) of the Income Tax Act, 1918. However Lord Maugham in *Paton v. I.R.C.* said that, "Holder's case cannot be supported so far as it decided that the customer must be taken to have paid the interest on the advance due by him by means of further periodical advances made for that purpose".

27. Accordingly, we are of the opinion that in view of such clauses in the agreement between the parties which provides for quarterly rests, the interest calculated by the Bank was merged with the principal and for the purpose of Section 34 of the said Act principal sum would be Rs. 11,88,706.91P. for which decree was claimed and for which the decree was passed. However, it appears from the order dated 31.1.1983 passed by the Hon"ble Mrs. Justice Manjula Bose that the Learned Judge has passed a final judgment and decree against the defendant Nos. 1 to 4 and 7 for Rs. 11,13,706.05P. with further interest from 26.3.82 on the said sum @ 12% per annum and costs. Obviously, there is a mistake in the order appealed from as would appear from the order dated 31.1.83 itself. Accordingly, in our opinion, the interest would be calculated on Rs. 11,13,706.05P. and not on Rs. 9,00,000 as held by the Learned Judge by his seemed order appealed from. This in our opinion, having regard to. the contract between the parties is the principal amount within the meaning of Section 34 of the Code of Civil Procedure.

28. Mr. Das next submitted that he should reconsider the question of rate of interest as we have power to do so by virtue of provisions of Section 107(2) read with order 41 Rule 33 of the Code of Civil Procedure. Even if we assume such jurisdiction, the question is whether we should interfere with the same. The agreement provided for minimum 15% interest. This was increased later. The learned Judge has granted 12% interest though u/s 34 of the C.P.C. he would have granted interest at the rate of 15% or more. Further, the learned Judge has given some relief to the appellant-defendant so far as payment of interest by way of instalments is concerned. Originally by virtue of the decree passed on 31.1.83 as the last instalment the entire interest due and owing at the time was to be paid within 6 months of the payment of the last instalment paid. This was changed by the learned Judge by allowing similar instalments as she has allowed in respect of the principal amount.

29. We should remember that this is a banking institution. It is the business of the bank to lend money on payment of interest. The rate of interest has got a connection with the rate of interest provided by the Reserve Bank of India as we have already mentioned. It is the business of the bank to lend money and it is lent and advanced on certain terms and conditions. The Court must be very slow

to interfere with the same and particularly this Court, in a matter where once discretion in favour of the petitioner defendant has been allowed. No such contention was also raised before the Lower Court and accordingly we shall not interfere with the same.

30. Accordingly, we allow the appeal and set aside the order of the learned Trial Judge dated 19th June, 1984 only to the extent that it directs further interest to be paid from 26th March, 1982 @ 12% per annum on the sum of Rs. 9,00,000 and not on Rs. 11,13,706.05P. We hold that the principal amount was Rs. 11,13,706.05P. and the further interest to be paid from 26th March 1982 @ 12% p.a. would be on the said sum of Rs. 11,13,706.05P. and we order accordingly. The rest of the order of the learned Trial Judge including the default clause shall remain.

31. The appellant is entitled to the cost of this application. Parties are agreed that this Court may assess the cost of this appeal, the suit and all interlocutory proceedings and pass on order accordingly. Admittedly, a sum of Rs. 10,000 has been paid as Court fee for institution of the suit by the appellant-plaintiff. That they are in any event entitled to get as part of the costs over and above that we award cost which we assess at Rs. 5,000 that is totalling to a sum of Rs. 15,000. Such cost is to be paid as the last instalment after the payment of interest by instalments in the manner directed by the learned Judge is made. However, this would also attract the default clause.

The Appeal is disposed of accordingly.

Sachikanta Hazari, J.

32. I agree.