(2015) 12 SHI CK 0017

In the High Court Of Himachal Pradesh

Case No : C.S. No. 47 of 2003

The Himachal Pradesh State Industrial Development Corporation Ltd.	APPELLANT
Vs	
Himachal Filament (P) Ltd. and Others	RESPONDENT

Date of Decision : 28-12-2015

Acts Referred:
Contract Act, 1872 — Section 74
State Financial Corporations Act, 1951 — Section 29, 30

Citation : (2015) 12 SHI CK 0017

Hon'ble Judges : Tarlok Singh Chauhan, J.

Bench : Single Bench

Advocate : Ajay Kumar, Senior Advocate, Sumit Sood and Dheeraj K. Vashisht, Advocates, for the Appellant

Judgement

Tarlok Singh Chauhan, J.—The plaintiff has filed the present suit for recovery of Rs. 2,49,06,814.00 with future interest on the grounds that:

"(a) It is a Company incorporated under the Companies Act, 1956 and having its registered office at New Himrus Building, Cart Road, Shimla, H.P. Sh. Pawan Kumar Bali is the Manager Project (Legal) of the Corporation and is duly authorized by the Managing Director of the plaintiff Corporation in terms of Resolution No. 12 dated 18.06.1997 passed by the Board of Directors of plaintiff Corporation, to sign, verify plaints, institute suits on behalf of the plaintiff Corporation and to engage advocates, for prosecuting suits etc. One of the various functions of the plaintiff is to provide financial assistance in the form of term loans, equity and soft loans (under various scheme of IDBI/SIDBI) for the growth and development of industrial units in the State of Himachal Pradesh.

(b) Defendant No. 1 Company, M/s. Himachal Filaments (P) Ltd., applied to the plaintiff for sanction of term loan of Rs. 150.00 lacs for the construction of building, purchase of land, plant and machinery and other assets for setting up an industrial unit for manufacture of Filament Yarn at Kala Amb, District Sirmaur in the State of Himachal Pradesh. The financial assistance of Rs. 150.00 lacs to the defendant No. 1 Company was sanctioned on 4.4.1998. The interest agreed to be paid by defendant No. 1 on loan amount was 17.5% per annum on term loan of Rs. 150.00 lacs with half yearly rests. Additional interest 4% per annum was also payable on the defaulted amount for the defaulted period. Against the sanctioned term loan, Rs. 149.34 lacs was disbursed to the defendant No. 1 Company between 24.7.1998 to 17.8.1999.

(c) For securing the repayment of the said loan and interest thereon, the defendant No. 1 through its directors defendants No. 2 and 3 executed loan agreement on 17.7.1998 with respect to the term loan of Rs. 150.00 lacs and hypothecation agreement regarding land, building, plant, machinery and other assets was also executed on 17.7.1998. Apart from this, equitable mortgage by deposit of title deeds of the properties of the industrial concern of defendant No. 1 in favour of plaintiff was also made. Defendants No. 2 and 3 stood guarantee with respect to the loan advanced to defendant No. 1 Company and consequently executed deed of guarantee on 17.7.1998 guaranteeing repayment of aforesaid loan amount and interest thereon and they being guarantors are liable to pay the entire outstanding loan amounts alongwith interest to the plaintiff. The liability of defendants No. 2 and 3 is joint and several with defendant No. 1 and it is a continuing guarantee provided by defendants No. 2 and 3 in favour of the plaintiff Corporation in respect of the loan advanced by the plaintiff Corporation to defendant No. 1 Company. The liability of defendants No. 2 and 3 is co-extensive with defendant No. 1. The particulars of agreements and hypothecation deed are as under:

(d) As per the loan documents executed by the defendants in favour of the plaintiff referred to in para supra, the loan together with agreed interest was to be paid in half yearly instalments commencing from 10.7.2000 and the last instalment was payable on or before 10.1.2006 for term loan of Rs. 150.00 lacs. The defendants failed to comply with the terms and conditions of loan documents mentioned above and also failed to pay the instalments of principal and interest on due dates in accordance with the repayment schedule entered in the loan documents referred above, the defendants, however, continued to remit part payments in instalments upto 5.6.2002. The money advanced by the plaintiff to the defendants was secured by hypothecation, mortgage/charge on the immovable property and other assets of the defendants.

(e) Inspite of various opportunities afforded to the defendants, they failed to remit payment even in easy instalment. On their failure to remit payments, the plaintiff recalled the loan on 19.1.2002 but the defendants filed a civil writ petition in the High Court and obtained stay orders. The High Court dismissed the writ petition No. 674 of 2002 on 23.9.2002. The possession of hypothecated/ mortgaged assets was taken over on 10.10.2002. After verifying the assets financed by the plaintiff, it was found that machinery worth Rs. 44.42 lacs have been misappropriated by the defendants and an FIR No. 257 of 2002 dated

19.10.2002 was lodged with the police station, Nahan for criminal breach of trust against defendants No. 2 and 3. The outstanding amount of the plaintiff against defendants as on 10.7.2003 stood at Rs. 2,49,06,814/- as per details give hereunder:

(f) The defendants committed breach of loan documents and defaulted in repayment of loan, the entire loan amount was recalled and subsequently a demand notice was issued to the defendants on 19.7.2003 asking them to pay amount of Rs. 2,49,06,814/-. Although, the said period has expired, but they have not cared to pay the same. Besides this, the defendants are also liable to pay interest at the agreed rate of 17.5% per annum on outstanding term loan of Rs. 2,49,06,814/- with half yearly rests and other miscellaneous expenses from 10.7.2003 till realisation of the entire amount.

(g) The transaction between the plaintiff and defendants is of commercial nature and, therefore, the plaintiff is entitled to pendente lite and future interest at the contractual rate of interest as per the loan agreements and the liability of the defendants is joint and several. It is also pleaded that the cause of action with respect to the suit amount firstly arose on 19.01.2002 when the loan was recalled and then on 18.10.2002 when assets were taken over and then on 19.7.2003 when demand notice was issued to the defendants and then on each day thereafter."

2. The defendants despite service did not choose to appear and proceed ex parte on 13.12.2005 and, therefore, the ex parte evidence was recorded on behalf of the plaintiff, who examined two witnesses and closed their evidence on 30.11.2006 and the case was listed for arguments. In the meanwhile, the defendant No. 3 filed an application being OMP No. 447 of 2008 for recalling the ex parte order, which application was allowed on 15.7.2009 and the ex-parte proceedings against defendant No. 3 were recalled.

3.(a) Defendant No. 3 thereafter filed his written statement wherein he raised preliminary objections regarding maintainability of the suit, suit having not been filed by the duly authorized person, suit being time barred, suit being bad for non-joinder and misjoinder of necessary parties etc.

(b) On merits, it was averred that the delay in setting up of the unit had occurred only on account of the inaction on the part of the plaintiff. The defendants were the subsequent purchaser of the unit which earlier belonged to M/s. Ogli Paper Mills and was indebted to the plaintiff corporation and had been taken over by the plaintiff under Section 29 of the State Financial Corporations Act. Despite the defendants having raised funds from the financial institutions, friends, family and personal accounts of Rs. 140.00 lacs and even a loan of Rs. 150.00 lacs, the entire investment of Rs. 3 crores was of no use since the defendants could not start production till the unit was registered in their name. Despite the repeated requests and reminders, the plaintiff failed to get the sale deed registered within time. After the registration of the land and building in the name of the defendants, the defendants started work in earnest and trial production commenced in October, 1999 and immediately thereafter commercial production began in January, 2000.

(c) Though the Reserve Bank of India had revised the rate of interest for export oriented units and the maximum rate of interest could be charged from such unit was 8% per annum, yet the plaintiff was charging interest at highly excessive rate of 17.5% per annum and in case of default penal interest @ 4% was being charged, which means a total interest of 21.5%. The plaintiff issued a take over notice on 1.5.2002 under Section 29 /30 of the State Financial Corporations Act threatening to take over the industrial concern of the defendants on 1.6.2002. On receipt of the said notice, the defendants sent a representation dated 13.5.2002 requesting that the time may be extended which request however was not accepted by the plaintiff and another letter dated 15.5.2002 conveying its decision to take over the unit on 1.6.2002 was issued.

(d) The defendants were running an export oriented economically viable unit wherein number of persons were also employed. The defendants would have paid the entire dues of the plaintiff within a reasonable period of time in case the plaintiff would have given them the benefit of the period during which the project was delayed because of the non-registration.

(e) Despite having taken over of the defendants unit in the year 2002, no steps were taken by it for over six years to have the unit sold which was ultimately sold in August, 2008. Even at the time when the unit of the defendants was proposed to be sold, the defendant No. 3 had conveyed the plaintiff vide letter dated 1.9.2008 that he was having a better buyer who was ready to pay a sum of Rs. 350 lacs i.e. Rs. 200 lacs for the assets of the defendant No. 1 Company and Rs. 150 lacs on account of sales tax dues. But despite this, the plaintiff sold the unit in utter violation of the condition No. 12 of the terms and conditions for sale of the units which is provided for a notice of 15 days before finalizing the terms of the sale so as to enable the promoters/guarantors of the Company (defendants) whose assets are being sold to bring a better buyer.

4. The plaintiff filed replication wherein the averments contained in the plaint were reiterated and reaffirmed while the averments contrary to the claim set up by the plaintiff in the written statement were denied. It was averred that after taking over of the unit it was found that the machinery worth Rs. 44.42 lacs had already been misappropriated by the defendants and FIR No. 257 of 2002 was lodged with the police station, Nahan for criminal breach of trust against defendants No. 2 and 3. It was further averred that during the pendency of the suit the mortgaged assets were sold for Rs. 320 lacs after providing due opportunity to the defendants to bring better buyer. The sale proceeds realised by way of sale had been appropriated and shared between the plaintiff and Excise and Taxation Department in the following manner:

"HPSIDC = Rs. 2,11,78,606/-

Excise & Taxation Deptt. = Rs. 97,21,394/-."

It was further mentioned that the total outstanding of the Excise and Taxation Department was Rs. 158.93 lacs.

5. On the basis of the pleadings of the parties, this Court on 7.12.2010 framed the following issues:

"1. Whether the plaintiff is entitled for decree of the suit amount or any other amount as alleged? OPP

2. Whether the suit has been filed, signed and verified by the duly authorized representative of the plaintiff? OPP

3. Whether the suit is barred by limitation? OPP

4. Whether the suit is bad for misjoinder of necessary parties? OPD

5. Whether the plaintiff is estopped from filing the present suit in view of the submissions made in preliminary objection No. 5? OPD

6. Whether the plaintiff is guilty of suppressio vary and suggestio falsi? OPD

7. Whether the suit has been properly valued for the purpose of Court fee and jurisdiction? OPD

8. Whether the stipulation to charge penal interest/additional interest in the agreement is void under Section 74 of the Contract Act? OPD

9. Relief."

I have heard learned counsel for the parties and have gone through the records of the case carefully.

Issue No. 2:

6. The plaintiff has specifically averred in para 1 that Pawan Kumar Bali, is the Manager Project (Legal) of the Corporation and is duly authorized by the Managing Director of the plaintiff-Corporation vide resolution No. 12 dated 18.6.1997 passed by the Board of Directors of the plaintiff-Corporation to sign, verify plaints, institute suits on behalf of the plaintiff Corporation and to engage advocates etc. for prosecuting the suits etc. He appeared in the witness box as PW-2 and has proved the original minutes Ex. PW-2/B to Ex. PW-2/D whereby he had been duly authorized by the Managing Director of the plaintiff-Company to institute the suit. He has also proved on record the original noting of the Managing Director Ex. PW-2/E whereby he was authorized to file the suit. The defendant has not chosen to cross-examine this witness on this aspect of the matter and, therefore, the issue is answered in favour of the plaintiff.

Issue No. 3:

7. This issue appears to have been wrongly framed and therefore is corrected

and be read as "whether the suit is within the prescribed period of limitation? OPP". This issue is no longer res integra in view of the law laid down by the Hon''ble Supreme Court in Civil Appeal No. 1971 of 1998, titled H.P. Financial Corporation v. Smt. Pawana and others, decided on 18.12.2003 and also in view of the subsequent judgment of the Hon''ble Supreme Court in Deepak Bhandari Vs. Himachal Pradesh State Industrial Development Corporation Limited, wherein it was held that when the Corporation takes steps for recovery of the amount by resorting to the provisions of Section 29 of the Act, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern. As it would be then that the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realised after the sale of the mortgage hypothecated assets.

8. The negotiation of the sale of the assets was held on 6.8.2008. On 6.8.2008 the letter of sale was issued and thereafter letter of possession was handed over to the successful buyer on 19.8.2008 and whereas the suit was already filed on 25.9.2003 and, therefore, is within the limitation. The issue is accordingly answered in favour of the plaintiff.

Issues No. 4, 6 and 7:

9. The defendants have led no evidence on these issues and, therefore, the same are answered against the defendants.

Issues No. 1.

10. PW-2 is a star witness, who states that the defendants had applied for a loan vide application Ex. PW-2/F dated 3.3.1998 for a sum of Rs. 150 lacs (One Crore Fifty Lacs). The application for the same is Ex. PW-2/G. The defendant-Company had passed a resolution seeking loan vide Ex. PW-2/H dated 25.2.1998. Ex. PW-2/I, is the project report while Ex. PW-2/J is the sanction letter dated 4.4.1998. Ex. PW-2/K is the acceptance letter and Ex. PW-2/L is the copy of resolution dated 27.6.1998 passed by defendant No. 1 Company to authorise Rahul Arora and Vikram Puri to execute the loan agreements with the plaintiff-Company on behalf of the defendant-Company. Promissory note Ex. PW-2/M was executed by the defendant on 17.7.1998. They also executed the loan agreement Ex. PW-2/N and hypothecation agreement Ex. PW-2/O. Both Rahul Arora and Vikram Puri stood guarantors for the aforesaid loan and executed guarantee deed Ex. PW-2/P. The original trust letter executed by the defendant is Ex. PW-2/G. The entire loan amount was disbursed in favour of the defendant-Company on 24.7.1998 and the last instalment was released in their favour on 17.8.1999. The total disbursement made in their favour was Rs. 149.34 lacs, which would bear interest at the rate of 17.5% with half yearly rests. The first instalment was to be paid by the defendant-Company on 10.7.2000 and the last instalment on or before 10.1.2006. The defendant had also created an equitable mortgage with regard to the land over which the Oriental Bank of Commerce had

also the second charge, the copy whereof is Ex. PW-2/R. The defendant did not stick to the re-payment schedule, constraining the plaintiff to issue a recall notice on 19.1.2002 vide Ex. PW-2/S. The defendant-Company was also served with a taking over notice by the plaintiff-Company vide Ex. PW-2/T. On receipt thereof, the defendants obtained stay orders from this Court which was ultimately vacated on 23.9.2002. Ultimately, the assets of the defendant-Company were taken over. However, there were shortages in the machinery which led to the filing of the FIR at Police Station, Nahan vide Ex. PW-2/V. The final demand was raised by the plaintiff on 19.7.2003 vide Ex. PW-2/W. At that time, there was a Government charge with regard to the non-payment of the sales tax. After sale of the assets of the defendant-Company, the sale proceeds were shared in the ratio of principal loan amount of plaintiff-Company and principal core amount of sales tax. The plaintiff -Company retained a sum of Rs. 2,11,78,606/- while rest of the amount of Rs. 97,21,394/- was paid to the State Government. The assets of the defendant-Company had been put to auction after due publication in the newspaper by inviting tenders in which M/s. Rubicon Manufacturing Company was the highest bidder. The defendant-Company was duly informed about the tenders, but did not respond.

11. The originals of the correspondence entered into between the defendant and the plaintiff were marked as Ex. PW-2/X-1 to Ex. PW-2/X-10. The entire record of the sale proceeds was marked as Ex. PW-2/Z-1 to Ex. PW-2/Z-31. PW-2 further deposed that the suit property had been sold during the pendency of the suit and that the defendant still owes a sum of Rs. 550 lacs including interest accrued during the pendency of the suit after adjustment of Rs. 2,11,78,606/- only.

12. In cross-examination, the witness did not deny that the defendant had purchased the unit which originally belonged to Ogli Papers which had been taken over by the plaintiff under Section 29 of the State Financial Corporation Act, 1951. He admitted that the defendant-Company had incurred an expenditure of Rs. 290 lacs for setting up of the unit, out of which Rs. 150 lacs was advanced by the plaintiff-Company, whereas the remaining amount of Rs. 140 lacs was raised from lenders. He denied the suggestion that the defendant could not come into commercial production in absence of the land and building being registered in their names by the revenue agency at Nahan. He also denied that a sum of Rs. 37 lacs had been paid by the defendant-Company to the plaintiff-Company before the commencement of commercial production. He volunteered to state that the defendant had paid approximately a sum of Rs. 15 lacs to the plaintiff on account of interest and the same was adjusted in the books of accounts. He admitted that the plaintiff had re-scheduled the re-payment of the loan vide letter dated 4.7.2001. The defendant had agreed to pay the default amount of interest i.e. Rs. 32.32 lacs in instalments. He feigned ignorance regarding the defendant-Company being export oriented unit. He denied the suggestion that as per the RBI guidelines the rate of interest which was required to be charged by the plaintiff was @ 8% per annum. He further denied the suggestion that the defendant had requested the plaintiff to reduce

the interest from 17.5% to 8% as per the RBI guidelines. He admitted that there were no legal proceedings pending against defendant No. 1 w.e.f. 23.9.2002 to 6.8.2008 i.e. date of sale. He volunteered to state that a complaint was lodged at Police Station, Nahan when the shortages were detected in the machinery. He further deposed that the plaintiff-Company had made efforts to sale the taken over assets w.e.f. 23.9.2002 to 6.8.2008 by entering into correspondence with the defendant-Company as well as by adopting the other methods admissible and permissible under the law. He further admitted that there were no documents on record that any notice was issued between 23.9.2002 to July, 2008. He admitted that the property remained in possession of the plaintiff w.e.f. 23.9.2002 to 5.8.2008 and that the defendant-Company had not taken any benefit of the unit during this period. He feigned ignorance regarding the fact that Vikram Puri one of the defendant had apprised the plaintiff-Company that he could produce a better buyer. He categorically stated that he is not aware of any communication having been received by the plaintiff either by way of fax or by way of courier. However, he did not deny the averments contained in paragraph 4 of the reply filed to OMP No. 446 of 2008 wherein the offer by way of fax had been admitted. The witness further deposed that the highest bid in the first negotiation was Rs. 150 lacs by M/s. Green View Apartments held on 5.8.2008 and it was only during the second negotiation that the amount was increased from Rs. 150 lacs to Rs. 307 lacs. He admitted that M/s. Green View Apartments had deposited a sum of Rs. 15 lacs towards earnest money. The witness was shown the terms and conditions incorporated in the advertisement, pursuant to which the tenders were called. He categorically stated that the plaintiff had followed the condition No. 12 incorporated therein. He further stated that the plaintiff had not entered into any correspondence with defendant No. 1-Company after 5.8.2008 with respect to the specific condition No. 12 of the advertisement. He admitted that negotiation had taken place on 5.8.2008 and the sale letter had been handed over to Rubicon Manufacturing Company on 6.8.2008. The possession was handed over on 19.8.2008. The entire process culminated within 14 days from the date of negotiation to handing over the property. The witness denied the suggestion that the Managing Director had any interest in the issuance of the letter and handing over of the possession to Rubicon Manufacturing Company. He denied the suggestion that in case the sale had taken place before 5.8.2008, the defendant could have got a better buyer. He further denied the suggestion that the defendant was not liable to pay any interest w.e.f. 23.9.2002 to 6.8.2008.

13. Defendants have examined DW-1 Kamal Kumar, Assistant Manger, SIDBI, who states that the re-finance rates applicable for SFCs/SIDCs, as per letter dated 15.6.2011 is marked as Ext. DW-1/A and the information of the re-financing was conveyed to the concerned parties.

14. DW-3 Mukul Attri, Clerk/Dealing Assistant, office of Excise & Taxation Officer, Nahan, has stated that the liability of defendant No. 1-Company for the year 1998-99 was assessed approximately at Rs. 94,00,000/-. He further stated that

the re-assessment has been done after the matter was remanded back by the Financial Commissioner on 30.7.2008 vide Ext. DW-3/B.

15. DW-4 Ram Babu, Assistant in Noida Special Economic Zone (NSEZ), has stated that defendant No. 1 was registered with Noida Special Economic Zone, Noida as 100% Export Oriented Unit (EOU) on 20.6.2000. The certificate No. 4-478/2000-100% EOU dated 20.6.2000 was issued in favour of defendant No. 1. Some benefits were given to 100% EOU by the Government of India.

16. One S.K. Arora, who had initially made a bid of Rs. 150 lacs, was examined as DW-5. However, his statement is not of much avail, save and except that he acknowledges the defendant No. 3 Vikram Puri to be his son-in-law and Rahul Arora, one of the Directors of the defendant-Company, to be his son.

17. Vikram Puri, one of the Director''s of defendant No. 1, appeared as DW-6 and has stated that the unit in question had been purchased from M/s. Oriental Herbs and Remedies Ltd., which was earlier known as M/s. Ogli Paper Mills Ltd. The unit had been purchased by the sister concern of the defendant known as M/s. Calcutta Industrial Corporation in the auction held at the behest of the plaintiff. He claimed that the possession of the unit was delivered somewhere in January/ February, 1998 and came to be registered in defendant''s favour a year later. The intervening delay had occurred due to the reason that the Registering Authorities at Nahan, had initially refused to register the unit and addition thereto the plaintiff had to obtain the income tax clearance certificate from the concerned authorities which came to be obtained somewhere in January, 1999. On account of these defaults of the plaintiff, the unit could not be made functional and the defendant could not have been raised loans from the banks/markets due to non-registration of the unit. The trial production commenced in the month of October/ November, 1999, whereas the defendant came into final commercial production in the beginning of 2000. Since the production had been considerably delayed, the customers of the defendants shifted to other sources for their supply, resulting in huge losses to the defendants. Owing to these, the defendants requested the plaintiff to re-schedule the loan and extend the moratorium fixed for re-payment of the loan amount, but the same was not done despite repeated requests, reminders and meetings. The defendant No. 1 was registered as 100% export oriented unit (EOU) with the Ministry of Commerce and Industries and, therefore, entitled to the benefits such as reduced rate of interest as 8% instead of the rate of interest as charged by the plaintiff.

18. The first take over notice in respect of the unit was issued by the plaintiff somewhere in the month of October/November, 2002 against which the defendant filed writ petition which was later on dismissed on 23.9.2002. This witness claims to have left the country for Sudan in the end of 2002 to work there and claimed that in 2008, he was informed by his wife while he was at Sudan that the unit of the defendant was going to be sold through auction. He accordingly wrote a letter to the plaintiff and informed that he had a suitable buyer and the unit therefore may not be put to auction and instead the same

may be sold to such buyer through negotiations. He further claims to have informed the plaintiff through telephone and also sent a letter by courier, the photocopy of which is Ex. DW-6/A. This witness also claims to have rushed to India in September, 2008 where he again contacted the plaintiff. Even the party arranged by the defendant had also visited and contacted the defendant. The buyer according to this witness was M/s. Green View Apartments Company, who had offered a sum of Rs. 3.07 crore (Rupees three crore and seven lac only) for this unit and were even ready to enhance the offer and clear all statutory liabilities, such as sales tax, EPF, excise and custom duty etc. The buyer had deposited a sum of Rs. 15 lacs with the plaintiff towards the earnest money. However, even despite this, the unit was sold by the plaintiff illegally to M/s. Rubycon Industries Ltd. and in between the finalization of negotiations with M/s. Rubycon Industries Ltd. and confirmation of sale in their favour, the plaintiff had not sent any notice to the directors of the defendant for arranging a better buyer. This witness claims that since the unit had already been sold by the plaintiff through which it had realized a sum of Rs. 3.20 crore (Rupees three crore and twenty lac only) from M/s. Rubycon Industries Ltd., therefore, there was nothing due towards it from the directors of the Company including the defendants No. 2 and 3. This witness further claimed that before filing of the suit, the defendant had already paid a sum of Rs. 1.65 crore (Rupees One crore and sixty five lac) to the plaintiff as against the original loan of Rs. 1.50 crore (Rupees One crore and fifty lac only). It was further claimed that the buyer arranged by the defendant was even ready to pay a sum of Rs. 3.70 crore (Rupees three crore and seventy lac only) for this unit.

19. In cross-examination, DW-6 admitted that the defendant No. 1-Company had been wound up in the year 2003 after the hypothecated assets of defendant No. 1- Company had been taken over by the plaintiff. He acknowledged having received letters Ex. PW-2/Z-5 to Ex. PW-2/Z-8 and Ex. PW-2/Z-12 to Ex. PW-2/Z-17. He did not remember who had filed the writ petition in this Court and for what relief the same had been filed. He clearly acknowledged that Sh. S.K. Arora (DW-5) was his father-in-law and M/s. Green View Apartments Company was a partnership firm. He knew Mr. Ravinder Chaudhary, who was the partner of the firm, but did not know who the other partners were. He however stated that his father in law was not partner of this firm. He further stated that he was not present during negotiation between the plaintiff and M/s. Green View Apartments Company and was not aware as to who the other participants in those negotiations.

20. This witness admitted the execution of the loan document Ex. PW-2/M to Ex. PW-2/Q as having been executed by him and defendant No. 2 Sh. Rahul Arora. He did not remember that the instalment of the loan would commence from 10.7.2000 and the last instalment was due in January, 2006. He admitted that defendant No. 2 Rahul Arora was his brother-in-law. He further admitted that the letters Ex. PW-2/X.1 and Ex. PW-2/X.2 had been written by him, whereas letters Ex. PW-2/X.3 to Ex. PW-2/X.10 had been written by defendant No. 2. He feigned

ignorance regarding the assets of defendant No. 1 Company being taken over by the plaintiff on 10.10.2002. He feigned ignorance regarding the first recalling notice, registration of FIR and other documents on the pretext that he was not in India and had gone to Sudan. He even feigned ignorance regarding the father-in-law having appeared as a witness in this case. He denied the suggestion that his father-in-law was one of the partner in M/s. Green View Apartments Company and he further stated that he was not aware that his father-in- law had participated in the negotiations on behalf of M/s. Green View Apartments Company. He admitted having met Ravinder Chaudhary, the partner of M/s. Green View Apartments Company after having arrived in India but had not discussed the matter with regard to the negotiations held by M/s. Green View Apartments Company with the plaintiff. He further stated that the information that M/s. Green View Apartments Company was ready and willing to purchase the unit and had participated in the negotiations was forwarded to him by Sh. Ravinder Chaudhary, but clarified that he did not specifically enquire from him as to who had participated in the negotiations on behalf of M/s. Green View Apartments Company with the plaintiff at Shimla. He further stated that at the time of his examination he was not having any documentary evidence to show that defendant was 100% EOU. However, he volunteered to state that defendant No. 1 had deposited the certificate to this effect with the plaintiff and if called upon to do so, he could produce the requisite documents to this effect. Such certificate according to him had been issued by the Noida Special Economic Zone (NSEZ) which was under the Ministry of Commerce and Industries, Government of India. Though he had not brought any documents to show that the materials were exported by defendant No. 1 Company, but if given time, he could produce such documents. He further claimed that the production of the unit was delayed on account of the late registration of the sale deed in favour of the defendant and had written letters to this effect to the plaintiff, but then stated that he had not brought the copies of such letters.

This is the entire oral evidence led by the parties.

21. Now, what emerges from the oral and documentary evidence is that despite the plaintiff having taken over the possession of the defendants'' unit, it took no steps for the sale of the unit between 23.9.2002 to 6.8.2008. Though, PW-2 did try to improve the case of the plaintiff by stating that efforts to sale the taken over assets in between 23.9.2002 to 6.8.2008 by entering into correspondence with the defendant-Company as well as by adopting the other methods admissible and permissible under the law, but then candidly admitted that no documents to this effect were available on the record. He further admitted that not only did the property remain in possession of the plaintiff for the aforesaid period but even the defendant Company had not taken any benefit of the unit during this period. Thus, it is proved on record that not only the taken over assets were in possession of the plaintiff but thereafter no efforts were made to sell these assets for a period of nearly six years w.e.f. 23.9.2002 to 6.8.2008. Therefore, once this is the admitted position, then I am of the considered opinion

that the plaintiff cannot take advantage of its own lapses and claims interest for this intervening period. Therefore, the plaintiff cannot held entitled to the interest on the amount due w.e.f. 23.9.2002 to 6.8.2008, though it is entitled to the principal amount of Rs. 1,49,34,000/- alongwith interest at the rate of 17.5% from 17.8.1999 till its payment minus the period aforesaid and after setting off the amount received by way of sale of defendant No. 1 unit.

This issue is decided accordingly.

Issues No. 5 and 8:

22. Now, coming to the contention of the defendant that it is an Export Oriented Unit and was thus entitled to various benefits including the benefit of interest of 8% as per the RBI guidelines. I find that save and except for examining DW-4, there is no evidence worth the name led by the defendant. Though, DW-4 Ram Babu, categorically stated that defendant No. 1 was registered as EOU on 20.6.2000 with Noida Special Economic Zone, Noida vide certificate No. 4-478/2000. But then what were the actual benefits which had been conferred upon the EOUs, has not been stated. There is no evidence led by the defendants to show that 100% EOUs like the defendant No. 1 were entitled to reduced the rate of interest i.e. 8% as per the RBI guidelines. Having failed to lead any evidence, the defendant cannot claim any interest on the amount due only because the defendant No. 1 was registered as EOU.

23. Learned counsel for the defendant would also argue that it was on account of the default of the plaintiff that the defendant No. 1 could not commence production within the stipulated time. I am afraid that even if it is assumed that there may have been some lapses on the part of the plaintiff, it was for the defendant to agitate all these points at the initial stage and not after the instant suit has been filed.

24. Learned counsel for the defendants has thereafter vehemently argued that the plaintiff is not at all entitled to any amount whatsoever in view of the specific condition No. 12 of the advertisement which had been issued at the time of sale of the assets of the Company which reads thus:

"12. The Managing Director also reserves the right to issue a public notice/ advertisement after finalization of negotiations informing all concerned of the highest offer received including the promoters/guarantors of the Company whose assets are being sold and any other person interested in the assets of such units and advise them to bring a better offer/buyer by a specified date which may not extend beyond 15 days."

25. It would be evident from the aforesaid condition that notice of 15 days before finalizing the terms of the sale was required to be issued to the defendant so as to enable the promoters/guarantors of the Company to bring better buyers. But whether this condition would be attracted to the facts of the instant case is the moot question.

26. Now, in case the testimony of DW-5 S.K. Arora and DW-6 Vikram Puri are scrutinized minutely alongwith the minutes of the meeting wherein M/s. Green View Apartments Company had participated in the negotiations, it will be crystal clear that the defendants were well within the knowledge regarding the value of the assets fixed through these negotiations, but despite this, they did not choose to bring a better buyer. DW-5 is admittedly the father-in-law of DW-6, Vikram Puri, one of the Director''s of the Company, who has categorically stated that he was in touch with Ravinder Chaudhary, the partner of M/s. Green View Apartments Company after his arrival in India. Thus, in such circumstances, the defendant cannot be permitted to take advantage of condition No. 12. Once the defendants have led no evidence to show that the interest charged by the plaintiff is contrary to the agreed terms, it cannot be held to be void under Section 74 of the Contract Act. Accordingly, both these issues are decided against the defendants.

27. In view of my issue wise findings, the suit of the plaintiff is partly decreed. The plaintiff is held entitled to the principal amount of Rs. 1,49,34,000/- as on 17.8.1999 (when the entire loan was disbursed to the defendant) alongwith interest at the rate of 17.5% per annum upto 22.9.2002 and thereafter w.e.f. 7.8.2008 till the date of payment. The plaintiff is held not entitled to any interest w.e.f. 23.9.2002 to 6.8.2008. Needless to say that the amount of Rs. 2,11,78,606/- received by the plaintiff as sale proceeds shall be set off. The decree sheet be drawn accordingly.