
(2002) 04 KL CK 0041
In the High Court Of Kerala
Case No : A.S.No. 301 of 1997

Thomas and Co.

APPELLANT

Vs

UCO Bank

RESPONDENT

Date of Decision : 01-04-2002

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 20, 31

Citation : (2002) 2 ILR (Ker) 348

Hon'ble Judges : S. Sankarasubban, J; R. Bhaskaran, J

Bench : Division Bench

Advocate : K.N. Narayana Pillai, S. Vidyasagar and T.K. Venugopalan, P.B. Krishnan, Amicus Curiae, for the Appellant; George Cherian (Thiruvalla), for the Respondent

Judgement

S. Sankarasubban, J.—This appeal is preferred against the judgment and decree in O.S. No. 565 of 1993 on the file of the Sub Court, Ernakulam. Plaintiff in the suit is the UCO Bank. Defendants are the appellants. First defendant is the Firm engaged in marine products. Defendants 2 and 3 are partners of the Firm and defendants 4 and 5 are guarantors of the loan. The loan was granted for the purpose of constructing two mechanised fishing boats. The loan was granted after executing the loan agreement, hypothecation deed, guarantee agreement and memorandum of title deeds evidencing creation of equitable mortgage of A schedule properties belonging to defendants 2 and 3 onwards. The boats and accessories described in the B schedule were also hypothecated to the plaintiff bank as collateral security. As per the loan agreement, defendants had agreed to repay the loan in 60 equal monthly instalments at the rate of Rs. 10,834/- for each boat commencing from February, 1991. Defendants further agreed to pay interest at the rate of 2.5% per annum over the RBI rate with minimum of 12.5% with quarterly rests at such rates as may be notified to borrower from time to time in the event of such default till payment and to pay 2% penal interest in case of default in the payment of any one instalment. The defendants

further agreed to pay guarantee fee calculated at the rate of 1.5% per annum on the outstanding amount every year. On the above terms, the defendants availed of the loan. The defendants committed default in remitting the monthly instalments. Despite the repeated requests, defendants did not-clear the liability. Hence, the suit was filed for the balance amount payable under the loan.

2. Defendants filed a joint written statement. The loan transaction was admitted. According to the defendants, the loan was applied under the refinance scheme of NABARD for agricultural loans. As against the loan application of Rs. 37.05 lakhs for the construction of 4 mechanised boats, the plaintiff sanctioned only Rs. 13 lakhs for two boats and out of the sanctioned loan amount of Rs. 13 lakhs, plaintiff disbursed only Rs. 6,43,196.98 for the first boat and Rs. 3,20,532/- for the second boat. Contrary to the agreement, the plaintiff delayed payment of loan amount for the construction of the second boat. The balance amount was not disbursed despite repeated requests, thereby defendants were considerably prejudiced. Several communications were sent to the plaintiff in this regard. But they did not respond. In the meanwhile, material and labour costs shot up considerably beyond the estimated limit. So, the defendants were constrained to raise funds from other sources by paying heavy interest and thus defendants suffered huge loss. It was further stated that the interest charged is high. The plaintiff is not entitled to charge penal interest. The defendant had repaid an amount of Rs. 44,300/-.

3. On the basis of the above pleadings, relevant issues were raised. So far as the loss suffered by the defendants on account of the nondisbursement of the entire amount, as stated by the defendants, the court below took the view that there was no evidence. Further, there was no counter claim and hence the court below answered the issue against the defendants. Regarding the grant of interest, it found that interest at the rate of 12.5% is reasonable. It also found that the defendants are liable to pay guarantee fee, as per the agreement. Thus, the suit was decreed for recovery of an amount of Rs. 14,85,692.63 with future interest at the rate of 12.5% per annum from the date of suit till realisation and cost of the suit by the sale of plaint AB schedule properties and from the defendants.

4. The suit was decreed on 12.4.1996. The present appeal was filed on 9.4.1997. Various contentions have been taken in the appeal, during the pendency of the appeal, the appellants filed CMP No. 668 of 2002. Along with the CMP Annexure AI letter was produced. It is dated 31.3.2001. Annexure AI was issued by the Manager of the UCO Bank/plaintiff. The letter states that the Bank accepts the proposal of the appellants to compromise the matter. The letter further states that the appellants have to remit Rs. 12,00,000/-as follows:

1. Rs. 3,00,000/- to be paid on or before 31.3.2001.
2. Rs. 9,00,000/- is to be paid in 3 equal monthly instalments on or before 30.6.2001 along with interest @ 12.5% p.a. with quarterly compounding.

In the event of default of any instalments, the Bank reserves the right to recover

the entire dues.

5. When the matter came for hearing, learned counsel for the appellants submitted that the first condition in Annexure A1 has been complied with i.e., Rs. 3,00,000/- has been paid. So far as the balance amount is concerned, if some more time is given to the appellants, the amount can be given. Learned counsel for the respondent/Bank submitted that the appeal is not maintainable and hence, no relief can be granted in the appeal. According to the learned counsel for the respondent after the judgment was rendered, the Civil Courts and even the High Court had lost jurisdiction over the subject matter in view of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Act"). Section 17 of the Act states that a Tribunal shall be constituted from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act. The Appellate Tribunal was constituted on 12th July, 1994. Learned counsel further brought to our notice Section 18 of the Act, which says that on and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Article 226 and 227 of the Constitution) in relation to the matters specified in Section 17. Section 20 of the Act deals with the right of appeal to the Appellate Tribunal. u/s 31 of the Act, every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal. Learned counsel thus submits that as per Section 18 of the Act, the Civil Courts have no jurisdiction to entertain such suits. Learned counsel for the appellants objected by saying that the argument of the respondent is not correct. According to him, at the time when the judgment was delivered, the Appellate Tribunal was not constituted. The Appellate Tribunal was constituted only subsequently. The defendants are entitled to vested right of appeal to a forum as on the date of filing of the suit. That cannot be defeated unless it is expressly provided in the Act. Further, it was stated that an appeal lies to the Appellate Tribunal only from the orders of the Tribunal and orders which are deemed to be the orders of the Tribunal. Section 30 of the Act originally stated that notwithstanding anything contained in Section 29 an order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive), shall be deemed to have been made by the Tribunal and an appeal against such order shall lie to the Appellate Tribunal. Section 30 of the Act was amended by Act 1 of 2000 stating that any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order

is issued to him, prefer an appeal to the Tribunal. At the same time, Section 20 of the Act is not amended. Even now the Section says that an appeal lies from an order which is deemed to have been made by the Tribunal.

6. The question that arises is whether the present appeal is maintainable before this Court. Further, it is not an order passed by the Debt Recovery Tribunal or can it be said to be an order deemed to be passed by the Tribunal. The Tribunal was constituted only subsequently. In this context, it is pertinent to note that with regard to appeals which have been already filed against the judgments of the Civil Court, there is no provision for transferring of such appeals to the Appellate Tribunal similar to transfer of suits and proceedings stated in Section 31 of the Act. Thus, it is clear that the appeal lies only before this Court.

7. Sri. P. B. Krishnan appearing as amicus curiae brought to our notice various decisions of the Supreme Court and High Courts to submit that the right of appeal is a vested right. The decisions in Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, , State of Bombay Vs. Supreme General Films Exchange Ltd., and Kasibai v. Mahadu, AIR 1965 SC 703 were all cited to show that right of appeal is a vested right and that the party is entitled to the right to the same forum which was available at the time of filing of the suit. A Division Bench of this Court in Clara v. Augustine 1984 KLT 377 held that right of appeal is a substantive right and not a mere matter of procedure and the institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties till the rest of the career of the suit. This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment. This was followed by another Division Bench in Kunnappadi Kalliani v. Lekharaj 1996 (2) KLT 106 . The decision of the Supreme Court in Ramesh Singh and another Vs. Cinta Devi and others, , is also to the above effect. Thus, the above decisions will show that unless in the subsequent enactment something is found, which takes away the right of the appeal, that right is preserved.

8. Learned counsel for the respondent brought to our notice the decision in Kunju Beevi v. Syndicate Bank 1999 (2) KLT 245. That was a case where the suit was decreed ex pane before the Tribunal came into force. Subsequently, a petition to set aside the ex parte order was filed and that was pending. On the day on which the Tribunal was constituted, it was held that since it was a pending proceeding, the petition would be transferred to the Tribunal. The present case is different. We don't think, it is necessary to research on this question. The Act provides an appeal to the Appellate Tribunal. The present decree does not come under in any of those categories. Thus, the appeal is maintainable before this Court.

9. Hence, we reject the preliminary contention raised by the respondent. On merits of the case, we went through the records of the case, we don't find that any ground is made out by the appellant to reverse the findings of the trial court. The defendants were not able to prove that any loss was suffered by them on account of the disbursement of smaller amount or the disbursement of amount

later in time. Hence, we don't find anything wrong in the judgment and decree of the court below. Learned counsel for the appellants then brought to our notice Annexure A1 produced along with CMP No. 668 of 2002 and submitted that already the appellants had paid Rs. 3 lakhs and that since the Bank had agreed for settlement at Rs. 12 lakhs, they may be given an opportunity to comply with the terms in Annexure A1. Learned counsel for the Bank submitted that proposal was entered into on the understanding that the amount will be deposited within the time limit. Since that was not done, the proposal cannot continue. It appears that after the filing of the appeal, some amounts have been paid by the appellants.

10. Taking into all these matters, while confirming the judgment and decree of the court below, we hold that if the appellants pay the amount mentioned in Annexure A1, viz., 9 lakhs or balance as on today in six equal monthly instalments starting from 1.6.2002 along with interest at 12.5% per annum, the decree shall be deemed to be complied with. If payment of any two consecutive instalments is defaulted, the decree holder will be entitled to realise the entire amount. Annexure A1 shall be enclosed along with the decree.