
ICICI Bank Limited Vs Mustufabag Ahemadbag Miraza And Ors.

Original Application No. 49 Of 2017

Court: Debts Recovery Tribunal-I Ahmedabad

Date of Decision: Oct. 12, 2020

Acts Referred:

Recovery of Debts Due to Banks and Financial Institution Act, 1993 " Section 19, 19(22) Code Of Civil Procedure, 1976 " Section Order I Rule 10(2)

Hon'ble Judges: Vinay Goel, J

Bench: Single Bench

Advocate: Mihir Parekh

Final Decision: Allowed

Judgement

1. The hearing was conducted through virtual mode amid COVID-19 restrictions upon request for ex-parte hearing. Mr.Mihir Parekh, Ld. Counsel

appeared for Applicant Bank.

Heard the Ld. Counsel for the bank and also gone through records with his assistance. The defendants are ex-parte.

2. This Original Application has been filed by the Applicant Bank under Section 19 of The Recovery of Debts Due to Banks and Financial Institutions

Act, 1993, now amended as The Recovery of Debts and Bankruptcy Act, 1993, against the defendant No.1 for recovery of Rs.10,81,849.32 (Rupees

Ten Lacs Eighty One Thousand Eight Hundred Forty Nine & Thirty Two Paise only) together with interest at contractual rate, further interest rate at

12.5% per annum and penal charges at 8% over ICICI Benchmark Advance Rate from 28.3.2007 till the date of realization along with cost and other

relief as stated.

The Applicant Bank has not claimed any relief of recovery against defendants No.2 & 3 but has sought some interim relief regarding stocks and

goods were housed with defendant No.3 pledged with Applicant by defendant No.I.

3. The case of the applicant bank is that the defendant No.1 is the Borrower and defendant No.2 is the Management and Collection Agent appointed

by the Applicant. The Applicant and Defendant No.2 has entered into Management and Collection Agency Agreement dated 09.03.2005. The

relationship between the Applicant and Defendant No.2 is on principal to principal basis and the same is not to be construed as joint venture. Further,

the Applicant and Defendant No.2 has entered into a Supplemental and Amendatory Agreement on 10.04.2006. Such Agreement was made pursuant

to the request made by the Defendant No.2 to make available a further facility to enable the Defendant No.2 to reach out to further village level

Aggregators/Farmers. By virtue of such Agreement, the limit granted to the Defendant No.2 was upwardly revised by the Applicant. The applicant

submitted that the Amendatory Agreement clearly provides that it shall be deemed to be part of the Principal Management and Collection Agency

Agreement and all other terms and conditions contained in the Principal Management and Collection Agreement shall be applicable to the additional

loan. Defendant No.1 had made application for Warehouse Receipt Based Financing on 01.08.2006 and pursuant to the recommendations of

Defendant No.2, the Applicant has sanctioned Warehouse Receipt Based Finance Facility of Rs.10,00,000/- (Rupees Ten Lacs Only). The Defendant

No.3 is a Body Corporate constituted as well as governed by the provisions of Bombay Warehouse Corporation Act, 1959. In consideration thereof

and in order to avail the above sanctioned Credit Facility, the defendant No.1 executed following documents on 10.4.2006 in favour of the applicant

bank.

1. Facility Agreement

2. Pledge Agreement

3. Demand Promissory Note

4. The Applicant submitted that the local officer of the Defendant No.3 was acting in collusion and connivance with the Defendants No.1 & 2 and

parted with some of the goods/ commodity pledged to the Applicant. The defendants No.1 to 3 acting in collusion and connivance with each other

fabricated and concocted warehouse receipts in the names of third parties as well as purported to cancel the warehouse receipts issued in the name of

the Applicant with a view to defeating the legitimate claim of the Applicant and to deprive the Applicant of its valuable security.

5. They came to suspect discrepancies in actual stocks and shown in the book and took up the matter with defendants and found that approximately

80% of stocks has been released without written instructions of applicant.

The Applicant filed Special Civil Suit No.57 of 2006 on 28.12.2006 against the defendants No.1 to 3 and other borrowers, namely, Mr. Hasmukh

Ratanlal Patel, Mr. Mustafabag Ahmedbag Miraza, Mr. Deepak K Shah, Mr. Rohit Balkrishna Desai, Mr. Bhavin K. Panchal trading as Shree

Traders and Mr. Manish Soni trading as Shree Laxmi Cattle Food Industries. The Hon'ble Civil Judge (S.D.), Nadiad appointed a Commissioner for

the purpose of inventory. In the report of the Commissioner noted that Defendant No.3 claimed that all the goods/commodity lying in the Warehouse

Nos.1 to 3 were not pledged with the Applicant and some of the goods/commodity belonged to other parties.

6. Further, the Applicant filed Special Civil Application No.685 of 2007 before the Hon'ble High Court of Gujarat due to non-filing of reply by

defendants. The Hon'ble High Court of Gujarat has granted ad interim injunction restraining Respondent No.1 to 9 therein either singly or jointly from

removing or parting with the possession of the goods/ commodities lying in warehouse Nos.1 to 3 at Kapadwanj belonging to Respondent No.9 therein.

7. The applicant decided to approach the Civil Court initially in view of the bonafide uncertainty about the jurisdiction of the Hon'ble Debt Recovery

Tribunal over the Defendant No.3. Since the Defendant No.3 is not a debtor of the Applicant, there was uncertainty about the availability of the

jurisdiction of this Hon'ble Tribunal over Defendant No.3. However, the Defendant No.3 has specifically submitted to the jurisdiction of this Hon'ble

Tribunal by raising a contention about the lack of jurisdiction of the Civil Court in its affidavit in reply before the Hon'ble High Court as well as in the

reply filed before the learned Civil Judge (S.D) at Nadiad.

8. The defendant No.2 has also contested the claim of the Applicant by filing the Affidavit in reply in Special Civil Application No.685 of 2007.

Defendant No.2 has contended, inter-alia, that clause 39 of Management & Collection Agent Agreement provides for arbitration and that no Civil Suit

is maintainable against Defendant No.2. The applicant is filing the present proceedings against the Defendant No.1 to 3 in order to seek the recovery

of the debts from the defendant No.1 only and the Defendant No.2 has been impleaded as a necessary and proper party, in view of his involvement

and the fraud sought to be perpetrated upon the applicant. However, the Applicant reserves the right to seek appropriate financial redress from the

Defendant No.2 through the mechanism of arbitration provided in Management & Collection Agent Agreement.

9. The defendant No.1 availed the facility but it failed to repay the dues of the Bank as per agreed terms, it failed to adhere to the financial discipline of

the applicant bank, and the account of the defendant No.1 became irregular and sticky. The applicant bank requested to defendant No.1 from time to

time to regularize the said account but defendant No.1 did not pay any heed to the said request letters. Despite repeated demands the defendant No.1

failed to regularize the account. All these acts and conduct on the part of the defendant No. 1 was contrary to the terms and conditions of the

documents signed and executed by it. Accordingly the Applicant Bank has moved this Original Application to recover public money.

10. On the date of filing of Original Application applicant bank claimed Rs.10,81,849.32 (Rupees Ten Lacs Eighty One Thousand Eight Hundred Forty

Nine & Thirty Two Paise only) together with interest at contractual rate, further interest rate at 12.5% per annum and penal charges at 8% over

ICICI Benchmark Advance Rate from 28.3.2007 till entire payment of dues.

11. Soon after the registration of the case the defendants were summoned through registered post with A/D. The defendant nos.1 & 3 appeared

through their respective counsels, whereas the defendant No.2 despite service of notice failed to contest the case. But ultimately all the defendants

opted not to appear in this matter. Thus, this Tribunal proceeded the case ex parte against all the defendants.

12. From the perusal of the records, it is evident that defendants were provided with fair opportunity to contest the claim of the bank.

13. Although the defendants are ex parte but written statement of defendant no.3 is on record. So, keeping in view the principles of natural, I feel fair

to adjudicate the written statement so filed. The defendant No.3 in its written statement pleaded that there is no privity of contract between the

applicant and defendant no.3 and is neither a borrower nor a guarantor. Moreover, no relief is claimed against defendant No.3 and the relief sought by

the applicant is only against defendant No.1 and the defendant No.3 is not involved in the transactions that had taken place between the applicant and

the defendant No.1 Thus defendant No.3 is neither a necessary nor a proper party and therefore, the name of the defendant No.3 be struck out from

the plaint under Order-I, Rule 10(2) of C.P.C.

The defendant No.3 further pleaded that the applicant has suppressed true and material facts.

It is further pleaded that the general course of business of the Warehousing Corporation is to issue a Negotiable Warehouse Receipt in respect of

each consignment. In the case on hand, all warehouse receipts issued are found to be negotiable. It is a settled law that in case of Negotiable

Warehouse Receipts, by endorsing in the holder of the warehouse receipt can transfer the property in the goods to which it relates and by parting with

it the holder parts not only with the property in the goods but also with their possession. The receipt is a proof of possession and control of goods

therein referred to or authorizing the holder to receive a transfer of the goods. In view of Contract, T.P. Act and the sale of Goods Act and Bombay

Ware House Act (now Gujarat Warehouse Act), such warehouse receipts are documents of title thus, transfer of the said documents effect a

constructive delivery of goods and the Warehouse Corporation is under obligation to deliver goods to the holder of such Negotiable Warehouse

Receipts. Therefore, the allegations made against defendant No.3 are false and devoid of merits and the allegations made by the bank appears to

cover their own negligence. It is further pleaded that the defendant No.3 is not aware of the transactions and execution of documents between

defendants No.1 & 2 with the applicant bank.

14. In support of Original Application, Applicant has filed affidavit in support of Suit Claim at Exh.A/27, which is sworn by Shri Anal Patel, Officer of

the Applicant Bank. Applicant has also filed evidence on affidavit and proved on record copies of documents and proved the documents as secondary

evidence and produced on record documents Exh. AWI /2 to Exh. AWI/13.

15. The applicant bank in support of oral arguments submitted written arguments as Exh.A/ 30 and thereafter filed additional affidavit as Exh.A/ 31,

which is reproduced as under:

WRITTEN ARGUMENTS

The Advocate of the Applicant most respectfully submits as under: -

1. The Applicant has filed the captioned Original Application against the Defendants, on the facts stated therein and for the relief prayed

for therein. The facts of the case are stated in detail in the memo of the captioned Original Application and the same are not repeated

herein for sake of brevity and the same may be treated as part of this additional written arguments. The Applicant has also filed written

arguments dated February 5, 2019, which may also be treated as part of this additional written arguments.

2. The Defendant No.1 is Borrower of the Applicant, who has taken financial assistance from the Applicant. The Defendant No.2 is Management and Collection Agent of the Applicant. The Defendant No.3 is body corporate constituted and governed by the provisions of the

Bombay Warehouse Corporation Act, 1959 and having one of its warehouses at Kapadwanj, where the goods/commodity of the Defendant

No.1 were deposited. Hence, the Defendants No.2 and 3 are joined as formal parties to the captioned Original Application. No relief has

been claimed against the Defendants No.2 and 3 in paragraph 6 of the captioned Original Application. The Hon'ble Tribunal has already

proceeded ex-parte against the Defendants.

3. The Defendant No. 1 has not filed its reply to the captioned Original Application. Therefore, facts stated by the Applicant in the captioned

Original Application remain uncontroverted.

4. In pursuance to the request made by the Defendant No.1 and in pursuance to the recommendation of the Defendant No.2, the Applicant

had granted Warehouse Receipt Based Finance Facility of Rs.10,00,000/- (Rupees Ten Lakhs only) (hereinafter referred to as "the

Facility") to the Defendant No.1, on the terms and conditions contained in the Commodity Based Finance Credit Facility Application Form

dated August 1, 2006 (Annexure D-Page 58 of OA) and as well as Standard Terms and Conditions for Commodity Based Finance (Annexure E-Page 64), executed by the Defendant No.1. The tenure of the Facility was 3 years and applicable rate of interest was 12.5%

per annum. The Facility is secured by the pledge of agricultural produce, as stated in the memo of the captioned Original Application. The

Applicant has filed copy of Take Delivery Letter (Page-73 of OA) issued by the Defendant No.1 in favour of the Applicant Bank. In terms of

the aforesaid Take Delivery Letter, the Defendant No.1 has confirmed having deposited with and bailed to the Bank the produce/goods

belonging to the Defendant No.1 described in Annexure thereto by depositing the Additional Goods at the warehouse/godown of the Bank/its

Agent as specified in the Annexure thereto/by depositing the warehouse receipt(s) in respect of the Additional Goods duly endorsed in favor

of the Bank.

5. This Hon'ble Tribunal has territorial jurisdiction to try, entertain, hear and decide the captioned Original Application in view of what is

stated in memo of the captioned Original Application, more particularly, in view of the facts that, (i) the Defendants carry on business or

work for gain at Kapadwanj, District Kheda, in the State of Gujarat; (ii) cause of action has arisen within the territorial jurisdiction of this

Hon'ble Tribunal, as the Applicant had sanctioned financial assistance to the Defendant No.1 from its Ahmedabad Office, for which various

Agreements/Documents came to be executed at Kapadwanj, District Kheda, in the State of Gujarat and the properties pledged by the

Defendant No.1 in favour of the Applicant were situated at Ahmedabad, at the time when the captioned Original Application was filed. This

Hon'ble Tribunal has pecuniary jurisdiction in view of the fact that the amount sought to be recovered by way of the captioned Original

Application exceeds of Rs.10.00 Lakhs.

6. The Applicant had granted financial assistance in the form of Warehouse Receipt Based Finance Facility to the Defendant No.1, for

which the Defendant No.1 had executed various documents in the year 2006, as stated in the memo of the captioned Original Application.

The above facilities were secured by the pledge of the agriculture produce of the Defendant No.1, which are described in Schedule-I of the

captioned Original Application. Therefore, the captioned Original Application is within the limitation period.

7. The Advocate of the Defendant No.1 had served upon the Advocate of the Applicant, an application dated January 17, 2008, wherein, it

has been stated that the Defendant No.1 had requested the Applicant to dispose of the goods lying in various godowns.

Relevant part of the aforesaid application is abstracted hereunder: -

... As early as on 1st April 2007, a proposal for settlement, without prejudice, was sent to M/s Singhi & Co., learned advocate for the

ICICI Bank, to which there is no reply. In the said proposal, the Defendants have requested the ICICI Bank to dispose of the goods lying in

various godowns and to credit the amount in the accounts of the defendants by adjusting the prices of the goods and then to give instalments

at the rate of interest as suggested in the said proposal ...

8. The Applicant was under the impression that the Defendant No.1 had placed on record, the aforesaid application dated January 11,

2008, before the Hon'ble Tribunal. However, upon taking inspection of the record of the captioned Original Application, on December 29,

2018, the Advocate of the Applicant did not find the aforesaid application on record of the captioned Original Application. It appears that

the Advocate of the Defendant No.1 though served copy to the Advocate of the Applicant, at the relevant point of time, but not filed the said

application on record. Copy of the aforesaid application was annexed with the written arguments of the Applicant dated February 5, 2019

as Annexure A. Copy of the aforesaid application is again annexed herewith and marked as Annexure A for ease of reference.

9. The Applicant has filed its affidavit in support of suit claim vide Exhibit A/21 in the year 2015. Thereafter, the Applicant had filed an

Interlocutory Application No.857 of 2018 in the captioned Original Application seeking permission of this Hon'ble Tribunal to lead secondary evidence, which was allowed by this Hon'ble Tribunal vide order dated August 1, 2018. Since the affidavit in support of suit claim

filed by the Applicant was preceded by the aforesaid Interlocutory Application filed by the Applicant and the order dated August 1, 2018,

passed by this Hon'ble Tribunal below the aforesaid Interlocutory Application, the Applicant had submitted the additional affidavit in support of suit claim, on September 25, 2020. Also, the Applicant tendered copy of the documents for inspection of the Hon'ble Tribunal, on

September 25, 2020. During the virtual hearing held on September 28, 2020, the Hon'ble Tribunal took on record, the additional affidavit in

support of suit claim of the Applicant along with photocopy of the documents as Exh.AW/2 to AW/13.

10.The Applicant had filed separate Original Applications being (i) Original Application No.12 of 2007 against Shree Chirag Traders and

others, (ii) Original Application No.13 of 2007 against Shree Traders and others (iii) Original Application No.28 of 2007 against Shree

Laxmi Cattle Food Industries and others before this Hon'ble Tribunal. This Hon'ble Tribunal had, vide separate Judgment, all dated December 04, 2019, allowed the aforesaid Original Applications.

In the premises, the Applicant submits that it has proved its case. The Applicant humbly prays that the Hon'ble Tribunal may be pleased to

allow this Original Application and be pleased to grant the relief prayed for by the Applicant in the captioned Original Application.

16. I have heard the Ld. Counsel for the applicant bank and also gone through the records. The only question before this Tribunal is whether applicant

bank is entitled to the relief claimed on the basis of documents placed on record in the light of defence taken by defendant No.3.

17. I have considered the defence regarding maintainability of Original Application in view of earlier Civil Suit. The Civil Suit filed by the applicant

bank before the Civil Court was for the relief of injunction, whereas this application has been filed for recovery under Section 19 of RDDBFI Act

1993. So, the Civil Suit filed earlier would not have any bearings on the merits of this application filed for recovery.

18. The Original Application is not maintainable as the defendant No.2 is the agent of applicant and defendant No.3 is the Warehousing Corporation

and has denied loan and liability. The Bank has claimed relief in recovery against defendant No.1 only and case has been filed against defendants No.2

& 3 as to the opinion of the bank same are necessary parties. A suit or Original Application cannot be dismissed for the want of mis-joinder of parties

and certainly same can be dismissed for non-joinder of necessary parties. So, if at all bank has pleaded defendants No.2 & 3 as defendants in a

recovery proceedings filed against defendant No.1, I find no illegality in the Original Application so filed.

19. I have considered the defence so taken. The Bank has produced photocopies of documents after obtaining permission to lead secondary evidence.

It is a case where bank gave their permission for commodity loan to defendant No.1 against warehouse receipts on execution of relevant documents.

The bank has specifically mentioned quantum of loan/credit facility granted to defendant No.1 from time to time and there is no denial about the same

from the defendant No.1. This Original Application is pending since the year 2007 and till date nobody has turned up with any objection claim of its

rights over said pledged goods. The warehouse receipts produced by the bank and disbursement of loan to defendant No.1 clearly reveals that

defendant No.1 obtained loan/credit facility from applicant bank on production and execution of said documents. Once there is no denial of availment

of credit facility, onus shifted upon defendant No.1 to prove under what circumstances defendant No.1 executed loan and security documents. The

documentary evidence produced by the bank remains unrebutted and I find no legal impediments to grant the relief as claimed in the Original

Application.

20. From the documents produced by the applicant bank, it clearly reveals that the defendant No.1 has availed the Credit facility against Warehouse

receipts from the applicant bank from time to time and it is clear from the statement of accounts produced by the applicant on record, that the

defendant No.1 has failed to repay the outstanding dues of the applicant bank as per the agreement and defendant No.1 has failed to dispute any

specific debit or credit entry so reflected in account statement and therefore, the defendant No.1 is liable to repay the dues of the applicant bank as

claimed.

21. Further, while adjudicating this Original Application, this Tribunal has restricted itself to the civil liability of defendant No.1 qua recovery of amount

claimed in this Original Application and has not decided allegations of fraud, conclusions, misappropriation and criminal breach of trust alleged by the

applicant. The said allegations are required to be adjudicated by the court having competent jurisdiction on such matters and allegation and adjudication

of such allegations are not within domain of this Tribunal constituted under Act 1993. The warehouse receipts if are negotiable, the holder of receipt

become entitled to the possession of goods and whereas house keeper cannot ask that holder about further detail. Further, it was the duty of the

borrower to maintain the financial discipline of the loan and to keep the pledged goods in order as per terms on which loan had been sanctioned by

creditor on the goods pledged with it.

22. The evidence produced by the bank remains un rebutted as already discussed supra. There is no reason to disbelieve the same. I have considered

the claim of the bank, the claim of the applicant bank is within time in view of execution of loan documents and operation of account. As per the

statement of accounts on the date of filing of Original Application, the defendants were liable to pay Rs.10,81,849.32 (Rupees Ten Lacs Eighty One

Thousand Eight Hundred Forty Nine & Thirty Two Paise only) together with interest at contractual rate, further interest rate at 12.5% per annum and

penal charges at 8% over ICICI Benchmark Advance Rate from 28.3.2007 till realization, but keeping in view of loan documents, I feel judicious to

grant interest @12% per annum for pendent lite and future period and claim for penal interest is declined.

23. As a result, the Original Application is allowed ex parte with cost against defendant no.1. The Bank has proved the loan transactions, pledge, default

and liability of the defendant No.1. The liability of the defendant No.1 will be absolute and the hypothecated assets along with other personal movable

and immovable properties of the defendant can also be sold for recovery of amount due. The Original Application is disposed of against defendant

no.2 & 3, as no relief has been claimed against them.

24. All pending Interim Applications, if any, filed by the defendants, during the pendency of this Original Application stands dismissed being not

pressed at the time of final hearing.

It is, therefore ordered:-

(i) That the Original Application No.49 of 2007 initiated by the Applicant Bank for issuance of Recovery Certificate to the tune of Rs.10,81,849.32

(Rupees Ten Lacs Eighty One Thousand Eight Hundred Forty Nine & Thirty Two Paise only) together with interest and costs hereby succeeds and is

allowed against the defendant No.1. The defendant No.1 is directed to pay the dues within a period of two months from the date of judgment, failing

which the Applicant Bank will be entitled to sell the hypothecated assets, personal movables and immovable properties of the defendant No.1. The

Applicant Bank is further entitled to pendent lite and future interest on the amount due @12% per annum simple from the date of filing of O.A. till the

full recovery is made from the defendant No.1.

(ii) Let a Recovery Certificate be issued with memo of cost immediately u/s 19(22) of The Recovery of Debts and Bankruptcy Act, 1993 together

with the details of the properties, if any, by fixing 15.12.2020 before Learned R.O., DRT -1, Ahmedabad.

(iii) The defendant No.1 is hereby restrained by means of injunction from depleting, transferring, encumbering, alienating or in any way dealing with its

properties/assets without first paying the claim of the Applicant Bank.

(iv) The Original Application is disposed of against defendants No.2 & 3.

Given under my hand and the seal of this Tribunal on this

date: 12.10.2020.

Dictated on 12.10.2020

Corrected and signed by me on 12.10.2020.