

(2001) 02 GAU CK 0024

Gauhati High Court (Agartala Bench)

Case No: First Appeal No. 1 of 1995

Anil Chandra Debnath

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision: Feb. 6, 2001**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 11, Order 34 Rule 11, 151, 34, 34(1)

Citation: AIR 2001 Guw 119 : (2001) 1 GLT 381**Hon'ble Judges:** B.B. Deb, J; A.H. Saikia, J**Bench:** Division Bench**Advocate:** Mr. A.C. Bhowmik, for the Appellant; Mr. S. Deb and Mr. S.D. Banerjee, for the Respondent**Final Decision:** Partly Allowed

Judgement

B.B. Deb, J.

This appeal is directed against the judgment and decree dated 27.7.1993 passed by the learned Asstt. District Judge, West Tripura, Agartala in Title Suit No. 16 of 1991.

2. We have heard Mr. A.C. Bhowmik, learned counsel for the appellant. Also heard Mr. S. Deb, learned sr. counsel assisted by Mr. S.N. Bannerjee, learned counsel for the respondent-Bank.

3. The aforesaid title suit was filed by the State Bank of India, Agartala Branch against the appellant. The appellant borrowed a sum of Rs. 1,45,000 on 15.7.1981 for purchasing a TATA chassis for transport business. But the respondent-Bank having granted loan asked the appellant to enter into an agreement creating equitable mortgage of immovable property and accordingly the appellant entered into an agreement creating equitable mortgage over his landed property. The loan money having been disbursed, the appellant purchased a Lorry bearing No.TRL-2881 and the said Lorry was also remained hypothecated against the loan. Since the appellant in default in repaying the loan amount with interest at agreed

rate, the respondent-Bank having served notice filed the suit. The learned trial Court having recorded the evidence decreed the suit for an amount of Rs. 2,18,902.81 p. and also decreed for a payment of interest (c) 12.5% p.a. over the decretal amount till realisation of the same. It was also directed by the learned trial Court that in the event of failure of the appellant to repay the decretal amount within a period of six months, the hypothecated Lorry bearing No. 2881 and the mortgaged property as shown in Schedule-B of the plaint be sold for satisfaction of the decretal amount.

4. During argument both the parties confined their stand as to what would be the rate of interest during the pendency of the suit and during the period intervening between passing of decree and realisation of the decretal amount. The learned counsel for the appellant referring section 34 of CPC submits that it is upto the discretion of the Court to determine the percentage of interest to be imposed upon the borrower (appellant herein) and as such the learned trial Court having failed to exercise the discretion imposed 12.5% interest in a mechanical manner.

5. Sub-Section (1) of Section 34 of CPC prescribes that the rate of interest to be paid on the principal sum adjudged from the date of filing of the suit to the date of decree is to be imposed by the trial Court as it deems reasonable and it is also further prescribed that the rate of interest should not exceed 6% p.a. as the Court deems reasonable on the principal sum from the date of decree to the date of payment, or to such earlier date as the Court thinks fit. But by Amendment Act of 1976 CPC, the following proviso has been incorporated u/s 34 CPC :-

"Provided that where the liability of 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 transaction."

6. The learned counsel for the respondent-Bank having referred to Order 34 Rule 11 submits that in a case for foreclosure based on a transaction of mortgage of immovable property the provision of section 34 CPC has no manner of application so far calculation of interest is concerned, but the provision of Order 34 Rule 11 would govern the field relating to rate of interest to be added to the decretal amount so adjudged by the learned trial Court. For convenience's sake, the provision of Order 34 Rule 11 is reproduced below:-

"R. 11 Payment of interest:- In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:-

(a) interest upto the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage -

(i) On the principal amount found or declared due on the mortgager at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) *****

(iii) on the amount adjudged due to the mortgage for costs, charges and expenses properly incurred by the mortgage in respect of the mortgage-security upto the date of the preliminary decree and added to the mortgage-money, at the rate agreed between the parties, or, failing such rate, at such rate not exceeding six per cent per annum as the Court deems reasonable;

(b) subsequent interest upto the date of realisation or actual payment on the aggregate of the principal sums specified in clause (a) as calculated in accordance with that clause at such rate as the Court deems reasonable."

It is correct that in case a decree is passed in a suit for foreclosure, sale, or redemption where interest is legally recoverable, the Court may direct the mortgagor for payment in the manner prescribed in the aforesaid rule.

7. Under clause (a) of Rule 11 under Order 34 CPC, 3 stages are classified for imposition of interest. First stage is commencing from the date of preliminary decree declaring the amount to be paid by the mortgagor till the date fixed by the preliminary decree for making payment. Second stage commences from the date of mortgage till the date of preliminary decree regarding the expenses incurred by the mortgage in respect of the mortgage property and the third stage commences for the subsequent period till the realisation of the actual payment on the aggregate of the principal sum specified in clause (a).

8. So far the first stage is concerned, i.e. the period between the date of preliminary decree and the time allowed by the Court for satisfying the preliminary decree, the rate of interest would be the agreed rate between the parties and in absence of such agreed rate, at such rate not exceeding six per cent p.a. as the Court deems it reasonable. We are not concerned regarding the second stage as pointed out above because of the fact that the mortgages-Bank never claimed any charge or expenses incurred in respect of the mortgage-property. The third stage commences from the expiry of time allowed by the preliminary decree till realisation of the entire amount, the rate of interest would be such as the Court deems reasonable.

9. In the case in hand, the agreed rate of interest pursuant to the agreement is 12.5% p.a.

10. The suit has been filed by the plaintiff-Bank for realisation of Rs. 2,18,902.81 p., the amount as calculated as on the date of filing of the suit having regard to the rate of interest of 12.5% p.a. vide deed of agreement exbt.2 and the preliminary decree was passed for the aforesaid amount. The learned trial Court while passing the preliminary decree directed the payment to be made by the defendant-appellant

within a period of six months from the date of preliminary decree (27.7.1993). The learned trial Court imposed interest @ Rs.12.5% p.a. on the decretal amount till realisation of the same.

11. The learned trial Court committed an error in imposing the uninformed rate of interest (12.5% p.a.) on the decretal amount till realisation and in doing so, the learned trial Court failed to follow the provision embodied under Order 34 Rule 11 of CPC.

12. The learned trial Court ought to have imposed 12.5% interest p.a. on the adjudged amount i.e. decretal amount for the first six months from the date of preliminary decree and thereafter rate of interest ought to have been imposed as it would appear reasonable to the learned trial Court in view of Order 34 Rule 11(b) of CPC, but the learned trial Court imposed 12.5% interest p.a. from the date of preliminary decree till realisation.

13. Learned counsel for the respondent-Bank referred a decided case by the Apex Court in [N.M. Veerappa Vs. Canara Bank and Others](#), In the aforesaid case, the hon'ble supreme court held that section 34 of CPC applied to a simple money suit while provision of order 34 Rule 11 of CPC is applicable to a mortgage suit so far fixation of interest is concerned. There is no dispute on that score. The citation referred to above is in conformity with the provision of Order 34 Rule 11 of CPC. Hence, we are of the considered opinion that in a mortgage suit like one in hand, the provision of section 34 has no manner of application and it would be governed by the provision of Order 34 Rule 11 CPC.

14. Having applied to the aforesaid ratio coupled with the provision of Order 34 Rule 11 CPC, we are of the considered opinion that imposition of interest @ 12.5% p.a. from the date of preliminary decree till realisation as in the impugned Judgment, is bad in law and not tenable. The preliminary decree is required to be modified imposing interest @ 12.5% p.a. for the first six months on the adjudged/decretal amount and thereafter on expiry of the aforesaid six months from the date of preliminary decree, the rate of interest would be as the Court deems reasonable.

15. Having regard to the financial condition of the appellant whose vehicle met with frequent accident as a result he could not earn any income for a considerable period and having regard to the fact that No Objection Certificate was withheld by the Bank on the ground of borrower being defaulted in making payment, we think imposition of interest @ 6% p.a. would meet the ends of justice. Hence, it is ordered that the rate of interest would be Rs 6% p.a. for the stage commencing from the date after expiry of six months from the date of preliminary decree till realisation.

16. The preliminary decree is modified accordingly in the following manner: -

Principal amount adjudged/decreed by the preliminary decree plus 12.5% interest p.a. for first six months from the date of preliminary decree and thereafter 6%

interest p.a till realisation of the entire amount under the decree.

17. Learned counsel for the appellant submits that the aforesaid amount under the decree may be allowed to be paid by easy monthly installments and according to the learned counsel for the appellant, the appellant is not in a position to repay the entire amount unless he is allowed to pay the same by equal monthly installments for 100 months. On the other hand, learned counsel for the respondent-Bank submits that in a mortgage suit while preliminary decree is passed, the Court has no power/jurisdiction to allow the payment by installment. In this respect, the learned counsel for the respondent-Bank invited our attention to a case in [Gujarat State Financial Corporation Vs. Jayshree Industries](#), In the aforesaid judgment, the Hon'ble Gujarat High Court dealt with the provision of section 30 of the State Financial Corporation Act and held that under the aforesaid Act, only mode of recovery of money was prescribed i.e. by way of attachment/sale of property hypothecated to the Bank and thus the Court has no jurisdiction to exercise inherent power allowing installment-wise payment. Hence, this has no application in the present case which has never been governed by the State Financial Corporation Act. Learned counsel for the respondent-Bank also invited our attention to a case in *United Bank of India v. The New Glencoe Tea Co. Ltd.* reported in AIR 1987 Calcutta 143 and continues to submit that in a mortgage suit, the Court has no jurisdiction to allow installments in exercise of power u/s 151 of CPC in view of Order 20 Rule 11 of CPC.

18. We have gone through the decisions cited above and the aforesaid provision of CPC and it appears to us that in those reported cases, the question of recovery of decretal amount arose out of a final decree in a mortgage suit, but in the present case, the appeal has been preferred against a preliminary decree and not against a final decree. Moreover, the provision of Order 20 Rule 11 of CPC dealt with a money suit simplicities allowing installment-wise payment, but the aforesaid provision never prevents any Court to exercise inherent power u/s 151 CPC.

19. The learned counsel for the appellant submits that during the pendency of the suit, the appellant made payment of huge amount and he submitted an amount sheet showing that during the period from 25.8.1992 upto 26.12.1995, the borrower-appellant made payment of Rs. 63,000 against the outstanding dues. This appears to be a bona fide attempt made by the appellant to repay the loan amount. The appellant suffered with accident as a result his vehicle could not earn any income for a considerable period of time. Having regard to the aforesaid peculiar situation, we are inclined to exercise our inherent power allowing the appellant to repay the outstanding dues installment-wise.

20. Since the final decree has not been drawn up and the appeal has been preferred against a preliminary decree, we are inclined to allow the appellant to repay the amount under the preliminary decree in the following manner :

The appellant must pay a lump sum amount of Rs. 50,000 within two months from today and thereafter the appellant must pay Rs. 10,000 per month till realisation of the entire amount. But a single default in paying any of the installments as indicated above will automatically deprive the appellant of benefit of payment by installment-wise and the decree holder/Bank is at liberty to pray for final decree and for execution thereafter in accordance with law.

The respondent-Bank shall have to issue "no objection" certificate on receipt of the lump sum amount of Rs. 50,000 enabling the appellant to get the road permit renewed.

21. With this modification, the appeal is partly allowed to the extent indicated above. No costs.