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Indian Overseas Bank Vs Jaiguru Tyre Sales and Others

Court: Jharkhand High Court

Date of Decision: Aug. 20, 2004

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 34

Citation: (2005) 1 BC 438 : (2005) 1 JCR 82

Hon'ble Judges: Vikramaditya Prasad, J

Bench: Single Bench

Advocate: Rajendra Prasad and Naveen Kumar Ganjhu, for the Appellant; None, for the Respondent

Judgement

Vikramaditya Prasad, J.
This Money Appeal has been preferred against the judgment and decree dated 16th day of October, 1993

(decree signed and sealed on 25.11.1993) passed by Sri Sharangdhar Singh, Subordinate Judge, Seraikela in Title (Mortgage) Suit No. 7 of

1988, whereby and whereunder he has pleased to decree the suit in part with 6% simple interest directing the respondents/defendants to make

payment the dues in thirty six installments and also without cost of the suit.

2. The Indian Overseas Bank on an application of the defendants sanctioned a loan of Rs. 9.01 Lacs on 17.9.1979. The defendant respondent

No: 2 Lily Purkayastha wife of Col. P.C. Purkayastha (Retd.) defendant respondent No. 3 had applied for loan as they had a business functioning

as M/s. Jaiguru Tyre Sales, a Sole Proprietorship concern having its office and factory at C-14 Phase VI, Adityapur, P.S. Adityapur, District

Singhbhum (East). The advances were made in following manner :-

(i) Term loan-I for construction of boundary wall etc. for Rs. 1.05 Lacs at the margin interest of 40% 2% OBR minimum 11% P.A. with quarterly

rest.

(ii) Term loan-II for purchase of machinery for Rs. 2.21 Lacs margin interest 25%, 2% OBR minimum 11% P.A. with quarterly rest.

(iii) Cash credit for Rs. 50,000/- 5% OBR minimum 14% quarterly rest.

The plaintiff Bank advanced the aforesaid term loan to the tune of Rs. 1,05,000/to defendant Nos. 1 and 2 on 19.9.1979. Defendant No. 1 and 2

executed and delivered some documents to secure due repayment of the loan amount with all agreed terms of interest, costs, charges etc. on the

same day i.e., 19.9.1979.

Thereafter the defendant did not pay the installment as agreed in that deed. Thereafter the deed executed in favour of the plaintiff by the defendants

were renewed as they had acknowledged the liability secured in those deed on 1.9.1982 and 4.3.1985, 3.5.1980. They also acknowledged the

dues on 23.10.1982 and 4.3.1985 making them liable for the repayment of the outstanding loan with respect to the promissory Note dated

3.5.1980 and thereby they agreed to acknowledge an amount of rupees one lac seventy five thousand two hundered 58 paise seventeen. Rs.

3,69,305.15 paise and Rs. 1,42,600.60 paise respectively including interest calculated upto 30.12.1984. Thereafter on several occasions they

acknowledged the aforesaid dues but failed to pay the amount or the interest. Then the Bank gave final notice on 16.8.1985 recalling the facilities

granted and to repay the bank''s dues which on that day stood at Rs. 7,42,171.42 paise but in respect of that no payment was made and the last

payment that was made by the defendant was of Rs. 2000/- on 28.2.1983. As per the books of account maintained by the plaintiff bank some of

Rs. 2,53,913.80 was due in the loan account No. 1 and a sum of Rs. 5,33,839.00 stood due against term loan account No. 2 and a sum of Rs.

2,32,798/- stood due against cash credit account including the interest calculated upto 25.2.1988 and all the defendants according"" to plaintiff are

jointly and severally liable to pay the amount. By the date of filing of the suit i.e., on 21.3.1988 the total amount of Rs. 10,20,550.8 has become

due. The further case of the plaintiff that the hypothecated articles the seized and put on auction sale for realization of the loan and also for a

mortgage decree with respect of the immovable property by selling the same and to adjust the net sale proceeds towards satisfaction of the debt.

And if it is not sufficient to liquidate the amount then personal decree against the defendants be passed making them jointly and severally liable. The

cause of action for the suit arose on various dates and on 3.10.1982 and 4.3.1985 the dates of various transactions made between the parties

relating to the aforesaid loan. The prayer was made for a decree of Rs. 10,20,550.80 paise together with further interest @ 11.85% on the term

loan account and at the rate of 15% on Cash Credit Account per annum with quarterly rest penden-tilite and future interest until actual payment.

For a further order and decree for sale of hypothecated goods and for a preliminary mortgage decree in accordance with order XXXTV, Rule 4

of the CPC. Besides prayer for appointment of Receiver and attachment before judgment. The land on which factory deed exist was shown in the

schedule of the plaint.

3. The defendants appeared and contested the suit. They denied the claim of the plaintiff and a plea was taken that the suit was against order VII,

Rule 2 and 11 as well as Order VII, Rule XVII of the CPC and the suit is liable to be disposed of under Order XV of the CPC. The further case

of the defendant was that in the year 1979 the loan of Rs. 3.26 lacs and Rs. 50,000/- Cash credit facility sanctioned by the plaintiff and the factory

started working manufacturing electric re-soled tyre. The defendants also refunded about three lacks of rupees to the plaintiff bank till the end of

1982 against aforesaid loan. In the year 1981 the Industries of Adidtyapur were hit by sever power load shedding and as such the 100 HP

Transformer got burnt and was beyond repair. Later on the same was replaced after few months. Meanwhile the quality of work of the defendants

was badly affected causing return of defective re-soled tyres to be put for re-solling at the cost of the defendant. All such facts were reported to

the plaintiff time to time. In the year 1982 the defendant was given an order by the D.G.S. for re-treading of Government''s Defence tyre at the rate

of 400 tyres per month but the plaintiff has stopped the working capital of cash credit limit without any intimation thus the golden chance of start

making profit was lost to the defendant. The defendants requested the plaintiff Bank for rehabilitation so that the aforesaid orders could have been

complied with but the plaintiff bank did not help and the fresh move of the defendants to switch over to the slow but sure boiler system in want of

adequate power was totally sabotaged in spite of repeated demand. The last letter in this connection was letter No. 4001 dated 26.11.1983 but in

vain and the defendants has to withdraw from aforesaid contract to supply tyres to D.G.S. and causing heavy financial loss. In the year 1984 the

defendant requested the plaintiff to sanction the sale of the out-dated Electric Machineries to get the ""Boiler machinery"" in its place but no response

came till 1985. But suddenly in the year 1985 a. surprise inspection was made by the Officials of the plaintiff Head Quarter who agreed to help the

defendant and on Techno Economic Feasibility report on conversion to the boiler system which was done in April, 1985. Thereafter the Managing

Director Adityapur Industrial Development Authority also had inspected the factory and recommended to rehabilitate the defendants for which he

wrote to the Head Office, Madras for remission of interest also vide his letter dated 12.6.1986. On 16.8.1986 the plaintiff rejected their proposal

which resulted a loss of Rs. 22 lack. The defendant again requested the plaintiff for permission to sale the machineries in order to start repaying the

loan besides also requested for remission of interest but no reply was given by the plaintiff. The defendant No. 3 being a retired Army Col.

maintained his livelihood on the army pension. The industry became seek, the Managing Director, Adityapur Industrial Development Authority

recommended to rehabilitate and therefore the plaintiffs were bound to remit the interest due on cash credit and term loan. In terms of Circular No.

LECD. No. IRD. BC. 132/SIU-A-85 dated 5.11.1985 issued by the Reserve Bank of India to all the Commercial Banks advising parameters for

provision of feliefs/concessions by Banks under Rehabilitation Packages evolved for sick industrial unit, in spite of repeated requests of the

defendants the plaintiff had denied. The letter delivered by the defendants of continuing guarantee dated 19.9.1979 were claimed to be not true

and it was also pleaded that their signatures were taken on plain paper, it was also pleaded that the case is barred under the limitation act.

4. The learned trial Court framed as many as nine issues :-

1. Is the suit maintainable in its present form?

2. Has the plaintiff got any legal and valid cause of action for the suit?

3. Is the suit bared under the principles of estoppel, waiver, and acquiescence as well as under the Law of limitation?

4. Is the suit bared under the provisions of Bihar Money Lenders Act?

5. Whether the suit has been filed by an authorized person?

6. Whether the documents exhibited on behalf of the plaintiff bank were properly executed and are genuine documents under the established

principles of rule of law to make the defendants liable for the claim made by the plaintiff bank?

7. How far the alleged sick industry of the defendant and non-rehabilitation by the plaintiff bank to the defendants, entitles the defendants to any

relief on the point of quantum of interest if the industry of the defendants sick and not rehabilitated by the plaintiff bank?

8. Is the plaintiff entitled to realize and recover the amount claimed in the plaint with pendente lite and future interest from the defendants jointly and

severally?

9. Is the plaintiff entitled to get any other relief or reliefs?

The suit was decreed in part, which will be discussed in the next paragraph.

5. The operative portion of the impugned judgment is as follows :

In the light of the findings arrived at above under different heads of issue as the suit has already been found not maintainable in the present form and

also as the alleged cause of action to file the suit has already been found not to be so proper and genuine, but the contesting defendants himself has

requested to repay the justified and reasonable amount of loan this Court can have no option other than to pass a decree but with following

observations :

It is hereby ordered that the suit be and is decreed but in part. Part is so far as the amount to which the plaintiff was entitled to recover the

outstanding dues at the time of last offer for sale of the mortgaged property on auction on 24.10.1986 by the plaintiff bank and the rate of interest

to be counted should be at the rate of 6 per cent simple interest from the said period offer for auction sale till the realization of entire dues. The

defendants are directed to make payment of the aforesaid decretal amount in thirty-six equal monthly installments after expiry of ninety days of the

date of this order. In nutshell suit is decreed but in part on contest as observed above but there would be no order as to cost in the light of the

findings arrived at above.

6. No body appeared from the side of the appellant respondent when this appeal was taken up but the learned counsel for appellant had argued

that the learned trial Court ""decreed the suit of the plaintiff in part and held that the plaintiff was entitled to recover outstanding dues to the time of

last offer for sale of the mortgaged property on auction on 24.10.1986 and the rate counted at the rate of 6 per cent simple interest till the period

of its realization. Besides the defendants were directed to pay the decretal amount in thirty six equal monthly installments after ninety days of the

order"".

7. The learned counsel for the appellant argued that interest at the rate of 6% as granted by the Court below is highly illegal in view of the fact that

in terms of the agreement the parties are bound by the terms of the contract and consequently the rate of interest would be what that was agreed

upon and it will not be controlled by Section 34 of the CPC, and consequently the Courts should not have granted the repayment of the decretal

amount in installments. It was also argued that the Respondent No. 1 being an industry within the meaning of Industrial (Development and

Regulation) Act, 1951, so in declaring this unit sick under the provision of Sick Industrial Company (Special Provision) Act, 1985 certain orders

were required in absence of which the respondent No. 1 could not have been treated to be sick consequently it was not entitled to remission or

lower rate of interest than the agreed one.

8. The point for determination in this First Appeal are :-

(i) Whether the respondent''s industry was sick and consequently it was entitled to exemption from payment interest at contractual rate lower rate

of interest from the date when it sent notice to the appellant that the mortgage property be auction sold ?

(ii) Whether the directives of the Reserve Bank of India are applicable in the facts and circumstances of the case?

(iii) Whether the learned trial Court was justified in granting interest @ 6% from the date till the realization of the amount and also in fixing the

installment limit to pay the same as per the term of the contract?

9. Point Nos. I and II are taken together as they are related one. ExhibitE/4 which had been sent by the Adidtyapur Industrial Development

Authority shows that the M/s. Jaiguru Tyresoles, is a permanently registered small scale unit. Thus this industry being a small scale industry is

exempted from the mischief of the aforesaid two Acts and therefore the argument raised by the learned counsel for the appellant that the learned

Court below erred in not deciding the issue under the provision of the aforesaid Act is not available to him.

10. Before I proceed further it is relevant to examine the evidence adduced in the case by the plaintiff.

PW 6, Senior Manager of the Indian Overseas Bank in paragraph 5 says that he has got personal knowledge of this case. In paragraph 7 he

admits that the unit concerned was inspected by the Managing Director of Adityapur Industrial Area and they had recommended in the year 1985

to the bank for providing financial help to the unit but no consideration was given to that letter. He has also admitted that the defendants had

requested the Bank for realization of the due after selling the Industrial Unit. In Paragraph 10 he says that the Technical Officer of the Bank had

visited the factory in question and submitted report along with viability of the unit but at present I am not able to produce that report.

PW 8 is the Deputy Manager of the concerned Bank. He has proved the different deeds produced in this case. There was no much controversial

over it. He has also proved the fact and all the signatures, which was shown to him during his cross-examination. He has admitted that he could not

say that what was the system if the party requested for sale of the unit for satisfaction of the dues.

PW 13, who was at that relevant time was bank manager at Jamshedpur, in paragraph 4, had admitted in cross-examination that he had gone to

the unit of the defendant many time and Adityapur Industrial Authority recommended for revival of the unit because the unit was sick. Thereafter

Technical Expert had come from Calcutta and he had submitted a viability report in respect of the unit which was on the point of sickness of the

unit, he is not aware whether that document has been filed from the side of the bank or not. Further he admits that the guideline of the Reserve

Bank of India are followed in case of sick units. He also admits that the defendants had sent proposal for auction of the unit. Other PWs are not

very important.

11. From the aforesaid evidence it is clear that there was

(i) Recommendation of the Managing Director to provide financial assistance, as the unit was sick, made to the Bank.

(ii) Technical Expert of the Bank had visited the site and prepare a viability report with regard to sickness.

(iii) That report has not been brought on record as has been withheld by the plaintiff appellant.

(iv) The defendant sent request for auction of the property in the year 1985 for satisfaction of the dues.

12. In view of these admission if the viability report of the Technical Expert was withheld by the plaintiff then it has to be adversely interpreted

against them. So the conclusion will be that the unit had become sick and defendants request for revival was not considered by the plaintiffs and

also its request for selling out the property was also not accepted, therefore if all these things were there then according to the own admission of

the plaintiff the Reserve Bank of India"s guideline will become applicable and these guidelines are enumerated in the plaint itself. Vide page 4, 5

and 6 of the plaint. These provisions have not been challenged by the appellant plaintiff.

13. As per these provisions if the industry is sick and it has been proved that it was sick the penal rates: of interest has to be waived from the

accounting year of the unit in which it started incurring cash losses continuously in respect of payment of loans and thereafter no interest should be

charged on funded interest for next three years. Unadjusted interest dues may also be funded in the aforesaid manner. The rate of term loans may

be reduced by not more than three per cent. The principal dues may be funded as working capital term loan with a repayment schedule not

exceeding 5 years interest may be charged on this funded loan at 10 per cent per annum. Need based working capital should be sanctioned to the

unit to enable it to carry on the operations, with interest at the minimum of the bank of the prescribed interest rates during the rehabilitation period.

Where the minimum of the bank exceeds 15% (as for instance in the case of working capital assistance in excess of Rs. 25 lakhs, where it is

16.5%, the rate may be fixed at 15%.

14. The circular of the Reserve Bank of India has not been challenged nor under the challenge is sickness of the industry because the plaintiff

witnesses themselves have admitted that on inspection the unit was found to be sick and adverse inference could be drawn also from the facts of

the report submitted by the technical expert of the bank which according to the respondent was a report regarding the sickness of the industry and

was with held. Term loan of the circular provides for the waiver of the penal rates from the accounting year the unit started incurring loses and

thereafter unpaid interest on term loan and cash credit has to be segregated from the total liability and funded. No interest may be charged on

funded interest and repayment of such funded interest should be made within a period not exceeding three year from the date of commencement of

implementation of the rehabilitation programme. This clause is applicable because the bank has never showed despite the request of the respondent

any rehabilitation programme came from the bank; If the rehabilitation programme did not come from the bank in spite of the own admission and

the report of the Managing Director of the Adityapur Industrial Development Authority then in that circumstances it will be difficult to find out from

which date the interest have to be segregated. Similarly the second clause will also be not applicable because of the aforesaid reasons and also the

next following clauses. So the Bank being the commercial bank which had to follow the directives of the Reserve Bank of India had not followed

the directives. To the contrary they kept harping on their pleadings that the contractual rate of interest should be paid along with the capital and

consequently judgment and decree of the Court below was not correct. 15. Thus I am of the considered view that as the unit became sick it was

the liability of the appellant to come with a rehabilitation package in terms of the direction of Reserve Bank of India but they did not do. Thus they

cannot be allowed to take advantage of their own fault; therefore their claim is not justified.

16. The learned trial Court has discussed the effect of Exhibits (A, A/1) which are the letters sent by the respondents to the bank and Exhibit-A/4

letter dated 4.6.1986 was also admitted by the PW 8 himself who was the Deputy Manager of the Bank. Thus the conclusion arrived at by the

Court below that in terms of letter dated 24.10.1986 (Ext-A/1) the respondent appellants were not entitled to realize interest even at the rate of

6%. This point is answered accordingly. The point No. III is answered accordingly but it is held that in the circumstances the trial Court rightly

applied Section 34 of the CPC.

17. This First Appeal is dismissed.

It is directed that even after auction if the decree is not satisfied then there will be a personal decree against respondent No. 1 and 3. It is further

directed that the dues should be calculated on the basis of the contractual rate till the date of offer for auction sell by the respondents thereafter @

6% P.A.