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Calcutta High Court

Case No: APO/T. No. 178 of 2000, G.A. No. 889 of 2000 and Suit No. 117 of 1995

Swaika Vanaspati Products Ltd.		APPELLANT
	Vs	
Canbank Financial Services Ltd.		RESPONDENT

Date of Decision: June 14, 2000

Acts Referred:

- Bengal Money Lenders Act, 1940 - Section 13

Citation: 104 CWN 1130

Hon'ble Judges: Vinod Kumar Gupta, J; Arunabha Barua, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Arunabha Barua, J.

This appeal is directed against a judgment and order dated 15th February 2000 passed by the learned Single Judge of this court in execution proceedings whereby the objection raised by the appellant with regard to the legality of the decree sought to be executed has been overruled by the learned Single Judge and the learned Single Judge has passed an order in furtherance of the execution of the proceedings or to facilitate the execution of the decree in question. Undoubtedly, the appellant before us is a judgment debtor in the aforesaid execution proceedings. A suit was filed by the respondent Canbank Financial Services Limited against the appellant for recovery of money. That suit was decreed the learned Trial Judge on the basis of an agreement entered into between the parties in the suit. Actually, the terms of agreement were reduced into writing through a settlement which formed part of the decree. In the terms of settlement, the parties had agreed that the appellant/ defendant shall pay an amount of Rs. 25 lacs in full and final settlement of the respondent/plaintiffs claim. The mode and manner of such payment, including the interest liability contingent upon the payment as per the agreed terms and/or the default was also included in the terms and/or the default was also included in the terms of settlement Since the appellant/defendant neglected to pay the amount

except a sum of Rs. 14 lacs, as agreed to by it, the respondent/plaintiff had no option but to put the decree into execution. When the appellant/defendant faced the execution proceedings arising out of the aforesaid decree before the learned Executing Court, it raised an objection to the legality of the decree on the basis that the court below had no jurisdiction to pass the decree in question in view of Section 13 of the Bengal Money Lenders'' Act, 1940. As noticed at the very beginning, the learned Single Judge did not agree with the aforesaid contention of the appellant and while rejecting the same, passed orders for execution of the decree in question.

2. Mr. P. K. Ray, learned Counsel appearing for the appellant has urged before us that the suit was not maintainable and that the court below had no jurisdiction to pass the decree in question because of clear bar contained in Section 13 (supra) and that despite the agreement of the parties, the suit being hit by Section 13, the decree was illegal and not liable to be enforced by execution, the same being nullity in the eyes of law. In support of his contention Mr. Ray relied on a Single Bench judgment of this court in the case of Shib Kumar Todi vs. Amal Chand Champalal reported in 1994(1) CHN 49. Section 13 of the Bengal Money Lenders Act, 1940 reads thus:

Section 13. Stay of suit when money-lender does not hold licence:

(1) No court shall pass a decree or order in favour of a moneylender in any suit instituted by a money-lender for the recovery of a loan advanced after the date notified u/s 8, or in any suit instituted by a money-lender for the enforcement of an agreement entered into or security taken, or for the recovery of any security given, in respect of such loan, unless the court is satisfied that, at the lime or times when the loan or any part thereof was advanced, the money-lender held an effective licence.

(2) If during the trial of a suit to which Sub-section (1) applies, the court finds that the money-lender did not hold such licence, the court shall, before proceeding with the suit, require the money-lender to pay in the prescribed manner and within the period to be fixed by the court such penalty as the court thinks fit. not exceeding three times the amount of the licencee fee specified in Section 10.

(3) If the money-lender fails to pay the penalty within period fixed under Sub-section (2) or within such further time as the court may allow, the court shall dismiss the suit : if the money-lender pays the penalty within such period, the court shall proceed with the suit.

(4) The provisions of this section shall apply to a claim for a setoff by or on behalf of a money-lender.

(5) In this section, the expression "money-lender" includes an assignee of a money-lender if the court is satisfied that the assignment was made for the purpose of avoiding the payment of licencee fee and penalty which may be ordered to be

paid under this section.

3. Even though a plain reading of Sub-section (1) of Section 13 clearly suggests that no court can pass a decree or order in favour of a moneylender in any suit instituted by such a money lender for recovery of a loan unless the court is satisfied that at the time when the loan was advanced, the money-lender held an effective licence. There is thus a dear embargo upon the court passing a decree or order in a suit in favour of a money-lender/plaintiff who al the time the loan was advanced did not hold an effective licence. What is worthy is that the embargo that related to the passing of the decree has, in point of time, relation to the period when the loan is advanced. Sub-section (2) of Section 13 then creates an exception to the aforesaid embargo by providing that if during the trial of a suit to which Sub-section (1) applies, the court finds that the money lender plaintiff does not have a licence, the court shall, before proceeding with the suit, require the money-lender/plaintiff to pay penalty which may be three times the licence Tee as specified in Section 10 of the Act As per Sub-section (3) of Section 13, if the plaintiff-money lender thus pays the penalty, the court shall proceed with the suit. This is the plain meaning as we can cull out by a combined reading of Sub-sections (1) 2 and (3) of Section 13. In sum and substance, therefore, the position of law as emerges from a combined reading of these three provisions is that even though there is embargo or prohibition as such about the maintainability or the filing of a suit with respect to a loan by an unlicensed money lender the court in such a suit is precluded from passing a decree, or an order in favour of such a money-lender with respect to such a loan if the money-lender does not hold a valid licence as per the Act. If. however during the course of the trial the court finds that the money-lender does not have a licence, an obligation is cast upon the court to call upon the plaintiff-money lender to pay penalty which cannot be more than three times the licence fee. as prescribed in Section 10 of the Act. The expression "the court shall, before proceeding with the suit, require the money lender to pay" clearly suggests that the legislature intended that in every case where the suit has been instituted by an unlicensed money-lender, it shall be mandatory for the court to give an opportunity to the money-lender/plaintiff to pay the penalty and, as per the provisions contained in Sub-section (3) of the Act, if the moneylender avails of this opportunity and pays the penalty, the court shall proceed with the suit. Undoubtedly, however, if the money-lender fails to pay the penalty the court shall dismiss the suit. The Legislature, therefore, very clearly, unequivocally and distinctively provided that if the penalty is pot paid, the suit would be dismissed; if the penalty is paid, the Court shall proceed with the suit. The intention was very clear. The suit is maintainable and it can be filed even by an unlicensed moneylender but no decree can be passed by a court in such a suit and that the court is bound to afford an opportunity to the money lender to cure the defect which had arisen because of the non-licensing of the moneylender by paying the penalty which cannot be more than three times the amount of licence fee. In this back drop, therefore let us consider the observations, reasoning and ratio of the

learned Single Judge of this court in the case of Shib Kumar Todi vs. Amal Chand Champalal (supra).

4. In para 38 of the judgment in Shib Kumar Todi the learned Single Judge took the view that if a loan was given by a money-lender when the money-lender did not hold a licence, the loan was to never ripen into a decree in Bengal. This observation appears to be the foundation of the ratio that he ultimately laid down. To understand the basis of this ratio, the observations of the learned Single Judge in paras 39, 40. 41 and 42 of the judgment may also be quoted. These read :

39. The point then arises, as Jo what is the use of the plaintiff being permitted to pay penalty, within the meaning of Sub-8. (2) of Section 13, if the plaintiff can, upon payment of such penalty, only proceed with the suit, but has to stop short of having a decree passed in his favour?

40. The other point, of at least equal, and, in my opinion, of greater perplexity is, that it is difficult to follow, as to what the legislature was intending to achieve, by enacting a detailed Act. as to control of money lending business, if it nearly intended that, prior to obtaining a decree, the money lender will have to pay three times the licence fee which, according to the present rate, works out to only 75/-. No money lender granting any substantial loan would bother to obtain any licence if the only penalty were that he would have to pay seventy five rupees prior to obtaining a decree.

41. I am therefore faced with two unsavoury choices. I must either construe Sub-Sections (2) and (3) of Section 13 as being of practically no value to the plaintiff, or I must alternatively construe the entire Act to be of no value of the regulating (3) would enable the plaintiff to proceed, but proceed fruitlessly. In the other line of construction, the Government would be permitted to make rules and regulations, regarding money lending business, but only to be defeated, by any money lender who is prepared to pay a penalty of seventy five rupees, prior to obtaining a decree in any suit of his against a borrower.

42. To speak very plainly. I would rather make a nonsense of Subsection (2) and (3) of Section 13 than make a nonsense of the entire scheme of the Act.

5. After we have very carefully gone through the aforesaid observations of the learned Single Judge in Shib Kumar Todi, and on the basis of the abstract proposition of law laid down by him in para 38 of the judgment, we feel that the learned Single Judge perhaps based his observations by reading Sub-section (1) of Section 13 of the Act in total isolation and that he did not properly appreciate and take into account clear legislative intent as duly incorporated in Sub-sections (2) and (3). with the embargo as contained in Sub-section (1) According to us, the legislature by placing the embargo in Sub-section (1) about the court not being competent to pass a decree in a suit filed by an unlicensed money lender, at the same time expressed its clear intent that the embargo can be lifted and the unlicensed money

lender can be brought at per with a licensed money lender by providing that the court shall call upon such unlicensed moneylender plaintiff to pay the penalty and that if the penalty is paid, the suit shaft proceed. The language employed in Sub-section (3) is indeed crystal clear. It says that if the penalty is not paid the suit shall be dismissed. 11 also says that if the penalty is paid the court shall proceed with the suit. 11. in the suit (which Sub-section (3) says will proceed) the court ultimately cannot pass a decree in favour of the plaintiff, what is the idea of the court proceeding with the suit? Proceeding with the suit cannot be a mere ritual, an empty formality. Whenever the court proceeds with a suit, ultimately the result, the logical end has to be the passing of a decree. Therefore, when the legislature provides that if the penalty is paid, the court shall proceed with the suit, it is based on a clear intent that not only will the suit be maintainable it shall also proceed and that, ultimately depending upon its merits, the decree shall be passed. With utmost respect we say, hold and declare that the ratio laid down by the learned Single Judge of this court in Shib Kumar Todi vs. Arnal Chanel Champalal is not a good law and that it is required to be overruled. We. accordingly, declare that the ratio in Shib Kumar Todfs case as being contrary to the provisions of law as contained in Section 13 of the Act and overrule the aforesaid judgment.

6. The learned Counsel appearing for the respondent decree-holder has referred to a Division Bench judgment of this court in the case of Snehalata Cold Storage vs. State Bank of India reported in 1995(1) CHN 151 where in it has been observed that it is judicially well established that no party will ordinarily be allowed to resile from the consent order except when there is a serious miscarriage of justice, is a lack of good faith in the lawyer, or there is a specific instruction from the client to the contrary.

7. Being in respectful agreement with the aforesaid view, we find that we cannot permit the appellant/defendant-judgment-debtor to wriggle out and resile from the consent given by it which resulted in the passing of the decree based upon the agreement of the parties, especially when we find that the attempt to wriggle out is based totally on untenable, misconceived and inadequate grounds. When We are repelling the argument of the appellant that the court did not have the jurisdiction to pass the decree because of the embargo contained in Sub-section (1) of Section 13 of the act we are fully conscious of the fact that it was because of the act of the appellant itself that the learned Trial Court did not have any occasion to even consider the applicability of Section 13 of the Act because had the appellant raised any objection about the respondent-plaintiff not being entitled to a decree of the so-called disability suffering from out of Sub-section (1) of Section 13 of the Act, then and there, the Trial court would have given an opportunity to the respondent/plaintiff to cure this defect and remove the disability by ordering it to pay the penalty as per Sub-section (2) of Section 13 of the Act. Since the appellant at the very outset, at the very threshold, agreed to pay the suit amount and undertook that it shall be bound by such agreement, the court had no option but to pass a

decree on consent. In this background, therefore it shall be wholly against well established principles of equity and good conscience also to allow the appellant to wriggle out of the aforesaid agreement or to resile from the consent given by it which ultimately led to the passing of the aforesaid decree.

8. For the aforesaid reason, therefore, we uphold the judgment and order passed by the learned Single Judge and dismiss the appeal with cost assessed at Rs. 5000/-.

9. The application and the appeal, being treated the same as on day''s list, are disposed of accordingly. All undertakings in that behalf shall stand discharged.

10. After this judgment was dictated in court, the learned counsel for the appellant made an oral prayer for stay of the operation of the decree. On consideration the prayer is rejected. All parties concerned to act on a signed xerox copy of this dictated order on the usual undertaking.

Vinod Kumar Gupta, J.

I agree.