HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No.1157 of 1999

JUDGMENT:

This appeal is filed by the plaintiff against the judgment and decree dated 16.02.1999 passed in Original Suit No.591 of 1991 by the II Additional Senior Civil Judge, Ranga Reddy District.

2. For the sake of convenience and as this is a first appeal, the parties are referred to as in the suit viz., as 'plaintiff' and 'defendants' only.

3. The plaintiff is the State Bank of India, Old Malakpet Branch, Hyderabad. As per the plaint, the first defendant is a firm called 'Pallavi Enterprises', which is a registered partnership firm, the defendants 2 and 3 are the partners of the said firm and the 4th defendant is a guarantor and mortgagor of the suit schedule property. The plaintiff-bank advanced a cash credit loan and medium term loan to the first defendant-firm. According to the plaintiff-bank, the loans are secured by guarantees; mortgages etc. The fourth defendant is shown as guarantor. In addition, it is mentioned that plaint B and C schedule properties are mortgaged with the plaintiff-bank. Claiming that the defendants have defaulted in payment of the loan, the suit was filed for

recovery of a sum of Rs.2,42,074.30 paise by sale. A preliminary decree on the mortgaged property is sought for, in addition to a decree for the sale of hypothecata and a personal decree etc.

4. The defendants 1 to 4 filed a detailed written statement alleging that they did not execute most of the documents which are filed, that no consideration was passed under the demand promissory notes; that the demand promissory notes are invalid and unenforceable under Section 23 of the Contract Act; that there is no valid mortgage under the unregistered documents. The fourth defendant filed an additional written statement denying the mortgage and also the guarantee alleged. He also urged that no money is due to the plaintiff-bank.

5. Based on the pleadings, the lower Court initially framed the following five issues and later framed thirteen additional issues:

i) Whether the plaintiff is entitled to interest as claimed in the plaint?
ii) Whether the plaintiff is entitled to preliminary decree in respect of plaint schedule properties?
iii) Whether the claim is barred by limitation?
iv) Whether the plaintiff is not entitled to the suit claim for the various reasons stated in the written statement?
v) To what relief?

Additional issues:

i) Whether the suit is property signed, filed and presented by the bank manager of the plaintiff banks and if not whether the suit is liable to be rejected?

ii) Whether the suit demand promissory notes demand promissory delivery notes and suit agreement are true valid and binding on defendants?

iii) Whether the demand promissory note dated 12.10.1988 and 18.11.1988 and demand promissory delivery note constitute a valid transaction supported by consideration operating as a collateral security in favour of bank.

iv) Whether any charge/right is validly created for the suit amount on the suit properties belonging to D4 and D2?

v) Whether letter dated 18.11.1988 executed by D4 is not true and vitiated by material alteration regarding the date and contents?

vi) Whether the statement of account filed in the court is authentic?

vii) Whether the suit is vitiated as opposed to order 34 Rules 2 and 11 of CPC is that the principal and interest have not been segregated and pleaded and if so the suit is validly constituted?

viii) Whether the plaintiff is entitled to claim 4% above the State Bank of India rate of interest from the date of unit going sick on 1.7.1989 and during the pendency of the suit.

ix) Whether the plaintiff bank is entitled for claiming interest due to prove negligence and latches negative approach indulging in material alterations, not following the principles of legitimate expectancy. If so, whether the plaintiff is disentitled to claim interest?

x) Whether the plaintiff bank has followed the reserve bank guidelines/circulars/directions in respect of sick units, timely rehabilitations as opposed to the principles of promissory estoppel and if so, whether the suit claim is liable to be rejected?

xi) Whether the provisions of the agreement and RBI guidelines/circular are contrary to charging /debiting various amounts like insurance, credit guarantee scheme insurance, inspection charges, quarterly rests etc., during the pendency of sickness and pendency of the suit. If so such illegal claims are to be pruned from the suit amount?

xii) Whether the suit claim is liable to be pruned down applying the principles of 'Dandaput'?

xiii) Whether the rate of interest is exorbitant and liable to be struck down?

6. Based on these pleadings and issues, the parties went to trial. For the plaintiff-bank, PWs.1 and 2 were examined and Exs.A.1 to A.27 were marked. For the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.27 were marked. After the trial, the lower Court passed the impugned judgment dismissing the entire suit filed by the plaintiff-bank. It is this judgment that is now challenged in the appeal.

7. This Court has heard Sri K.B. Ramanna Dora, learned counsel for the appellant/plaintiff-bank. There was no representation for the respondents/defendants in the appeal. Hence, the matter was reserved for judgment

after giving opportunities to the respondents on 25.06.2018, 27.06.2018, 04.07.2018 and on 09.07.2018.

8. The first and foremost point that is urged by the learned counsel for the appellant/plaintiff-bank is that the judgment and decree of the lower Court is totally contrary to law. The learned counsel argued that the lower Court overlooked the fact that the sanction of loan or the disbursement of the loan is not denied. He points out that at various places in the pleadings and in the evidence, the defendants agreed that the loan was in fact sanctioned. He also points out that in para-11 of the written statement filed, the sanction of both the loans is admitted. The learned counsel also points out that in the written statement, the defendants admitted the medium term loan due as on 30.06.1989 and the term loan on 10.10.1991. He also points out that there are admissions about the rate of interest initially charged and subsequently charged. He also argued that the plaintiff-bank has filed the account copy; the demand promissory note and other documents, which would show that the loan was in fact disbursed and enjoyed by the defendants. Therefore, he urged that the lower Court committed a fundamental mistake in dismissing the suit. According to the learned counsel, the suit should have

been decreed in its totality and should not have been dismissed.

9. This Court on an examination of the pleadings and the documents notices that the defendants while agreeing about the sanction of loans also point out that the calculation of interest is not correct. They also pointed out that the rate of interest is being charged at 21.29% per annum against the sanctioned interest rate of 13.5%. Similarly, in para-21, they also state that the rate of interest is 17.93% against 14.00% as sanctioned. Therefore, the admission that the learned counsel relied upon is an explanation by the defendants to show how the outstanding was arrived incorrectly at and is not a 'pure and simple' admission of the outstanding. A reading of the entire written statement shows that the defendants did not admit the liability as projected by the learned counsel.

10. Apart from this, as the suit is filed for recovery of loan, the burden was on the plaintiff-bank to prove the case. The disbursement of the loan; the security created; the default committed and the sum due must be proved by the plaintiff-bank. As noticed earlier, the first witness for the plaintiff-bank is the Branch Manager of the bank. Other than merely marking the documents, he did not

speak anything about the contents of the documents. Exs.A.1 to A.23 were marked by him, but no oral evidence was given about the contents of the documents. On the contrary, PW.1 has made the following admissions in his cross-examination on 15.10.1998:

i) It is true Exs.A.1, A.2, A.5, A.7 and A.8 are relating to term loan and Exs.A.3, A.4, A.6, A.9, A.11, A.13 and A.14 are pertaining to cash credit account i.e., for working capital requirement.

ii) In Exs.A.5 and A.8, the executant's name is shown as Vijay Datt G, so also in the preamble of Ex.A.5 and A.8.

iii) It is true first defendant is a partnership firm. In Ex.A.5 and A.8 Pallavi Enterprises (D1) is described as proprietary concern. The other description of D2 and D3 are not given in Ex.A.5 and A.8. A copy of the application is not annexed to Ex.A.8 though it is referred in unnumbered para-3 in page-2. The date of the application is also left blank.

iv) It is true the blanks in clause 7 and 28 of Ex.A.8 are not filled up. It is true the ink used for writing the preamble in Ex.A.5 and A.8 are different from the writing underneath contents of those documents. The blanks in clause Nos.5 and 8 and an unnumbered para are not filled in Ex.A.5.

v) Though there is an annexure providing for description of pledge documents but the schedule is unfilled. It is true in schedule-B also there is no clear information in regard to the description of the articles date of purchase, manufacture and supplier and identification marks of the items pledge annexed to Ex.A.5.

vi) The machines installed are not mentioned in Ex.A.7 (Pledge letter).

vii) There is no signature of D4 in Exs.A.1 and A.3 (Demand Promissory Notes).

viii) He has no evidence to show that consideration was passed to D4 under Ex.A.1 by D1 to D3. The total descriptive particulars of the executant are not mentioned in Ex.A.2 and Ex.A.4 (Demand Promissory Notes).

ix) The executants name is mentioned as G. Vijaya Dat in favour of G. Dattatreya.

x) The other descriptive particulars of the articles are not mentioned. It is not possible to identify the articles without the descriptive particulars.

xi) The suit is based on the statement of accounts. Supporting documents for entries in the statement of account are available in the bank.

xii) There is a prescribed pro-forma for obtaining mortgage by deposit of title deeds. It is true the documents filed in the court in regard to mortgage are not in that pro-forma.

11. PW.2 is a witness, who examined essentially to prove the entry in Ex.A.20 relating to a sum of Rs.38,581/-.

12. Therefore, this Court notices that the plaintiff-bank, which had the duty to prove its case, did not really discharge the burden of proving its case. The plaintiff is a nationalized bank. The loan is supposedly secured by equitable mortgage and by personal guarantees. The guarantees are not filed as exhibits. PW.1 clearly admits the same. The names of the defendants are not properly mentioned. The first defendant is described as a 'partnership' and also a 'proprietary' firm. The articles hypothecated are not mentioned in the documents.

Ex.A.5 does not contain a list of pledged machines in schedule-A is blank. Schedule-B which deals with machinery "to be" pledged is filled up. The document proving the deposit of title deeds is also not filed into the Court. The witness clearly admits that the bank has a pro-forma for obtaining a mortgage by deposit of title deeds which is not filed. The two affidavits which are marked as ExA.24 and A.25 do not talk of a creation of mortgage, but merely state that the deponents have agreed to create a mortgage by deposit of title deeds. The date on which the mortgage is created is not spelt out in the plaint. The plaint does not describe the mortgage as required under Form Nos.45 of Appendix-A of C.P.C. and the required details of the mortgage are not given. The letter dated 18.11.1988 (Ex.A.4) is stated to be materially altered/forged etc. The written statements filed pointed out many errors in the documentation. The creation of a mortgage is also denied.

13. For fastening the personal liability on to the fourth defendant, the duly executed deed of guarantee should be filed. No such deed of guarantee is filed. A joint decree is sought for against the fourth defendant, but there is absolutely no evidence to show that the

fourth defendant is a 'guarantor'. Ex.A.27 is neither filled up nor signed.

14. A preliminary decree is also sought for on the mortgage in respect of plaint B and C properties. No documentary evidence is filed to show the actual creation of a mortgage. A mortgage by deposit of title deeds is a recognized form of creating a mortgage. Since there is no document evidencing deposit of title deeds, evidence should be let in to show that with an 'intention' to create a mortgage, title deeds were deposited. In this case, there is absolutely no proof to show that the documents of title deeds were in fact deposited let alone with the intention to create a mortgage. For the sale of hypothecated equipment also, there is no documentary proof filed to show that equipment was in fact hypothecated.

15. Last but not the least, the account copy, which is filed as Ex.A.21, is not certified at all. The plaintiff-bank has the privilege of a presumption in its favour if the account copy is certified as required under the Banker's Books Evidence Act, 1891. In the case on hand, in Ex.A.20 and Ex.A.21, all the entries are made by hand. The witness in his cross- examination clearly admitted that there are supporting documents for all the

entries in this copy. The balances in Ex.A.22/A.23 do not match the entries in Ex.A.20/A.25. The defendants have strongly denied their liability and also the quantum. Despite this, the plaintiff-bank has made no effort to prove the handwritten entries in the account copy. The judgment of the Hon'ble Supreme Court of India reported in ***Chandrakantaben v. Vadilal Bapalal Modi***[1] is very relevant herein and an account copy cannot be relied upon unless supporting documents are filed. Section 34 of the Indian Evidence Act also says that the entries in the account copy alone are not enough to fasten any liability. Therefore, in the absence of certification under the Banker's Books Evidence Act and in the absence of proof of entries, the amount claimed is also not proved as required under law. In ***Chandradhar Goswami v. the Gauhati Bank Ltd.***[2] the Hon'ble Supreme Court of India held that mere entries in banker's books are not enough to fasten liability and there is a need for further evidence also. Therefore, this Court holds that the appellant/ plaintiff-bank failed to prove the amount due to it.

16. The haphazard manner in which the documents were executed was clearly noted by the lower

[1] AIR 1989 SC 1269
[2] AIR 1967 SC 1058

Court. The witnesses who were examined did not speak about the contents of the documents marked. No one actually deposed about the documents to hold that these documents are validly proved. As held by the Hon'ble Supreme Court in ***H. Siddiqui (Dead) by LRs v. A. Ramalingam***[3], mere marking of documents is not proof of the contents. As mentioned earlier, the witness did not speak of the contents at all and merely marked the documents. Hence, for all these reasons, this Court is of the opinion that the plaintiff-bank cannot seek any judgment from this Court. The judgment passed by the lower Court is correct.

17. In this Court the two essential issues that arise for consideration are additional issues (ii), (iii), (iv) and (v) and issue No.(ii). The lower Court has correctly concluded that additional issues (ii) and (iii), which are framed, have to be held against the plaintiffs. The lack of consideration, which is deposed by the witnesses, was noted by the Court. Similarly, additional issues (iv) and (v) and issue No.(ii) pertaining to the deposit of title is also correctly decided by the lower Court. No valid charge or right is created in favour of the plaintiff-bank. Even the last two issues i.e., additional issues (vi) and (iv) were

[3] 2011 (4) SCC 240

rightly decided by the lower Court. The Court notices that PW.2 could not also prove the discrepancy in the account copy. The double entries in the statement of accounts are not validly explained or backed up by documentary proof. The lower Court relied upon a decision of the Hon'ble Punjab and Haryana High Court reported in (1996) B.C. Page 282 to show that bank must produce supporting evidence for the entries in the account copy. The judgment of the Hon'ble Supreme Court in ***Chandradhar Goswami***'s ('2' supra) is also on the same point. The lower Court rightly held that the plaintiff-bank has failed to prove the entries in the statement of accounts. This Court concurs with the said conclusions.

18. For all these reasons, this Court concurs with the findings and also with the conclusions in paragraphs 21 and 22 of the impugned judgment. Therefore, this Court holds that there are no merits in the appeal.

19. Accordingly, the appeal is dismissed. The judgment and decree dated 16.02.1999 passed in O.S.No.591 of 1991 by the II Additional Senior Civil Judge, Ranga Reddy District is confirmed. In the circumstances of the case, there shall be no order as to costs.

20. Miscellaneous petitions, if any, pending in this appeal shall also stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 17.08.2018
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