

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Ravi Krishan Kapur

APD/4/2015

in

CS/223/2008

IA NO: GA/4/2021

AI CHAMPDANY INDUSTRIES LTD.

VS

DUNCAN INTERNATIONAL (INDIA) LIMITED

APD/5/2015

in

CS/220/2008

AI CHAMPDANY INDUSTRIES LIMITED.

VS

ARINDAM INVESTMENT PVT. LIMITED

APD/6/2015

in

CS/221/2008

AI CHAMPDANY INDUSTRIES LIMITED.

VS

COSMOPOLITAN INVESTMENTS LIMITED

APD/7/2015

in

CS/222/2008

AI CHAMPDANY INDUSTRIES LIMITED.

VS

DISCIPLINED INVESTMENTS LIMITED

APD/8/2015

in

CS/224/2008

AI CHAMPDANY INDUSTRIES LIMITED.

VS

HALDIA INVESTMENT CO. LTD

APD/10/2015
in
CS/225/2008
AI CHAMPDANY INDUSTRIES LIMITED.
VS
NEW INDIA INVESTMENT CORPORATION LIMITED

For the appellant : Mr. Sabyasachi Chowdhury, Advocate,
Ms. Abhijit Guha, Advocate,
Mr. Syed E. Huda, Advocate,
Mr. Shounak Mukhopadhyay, Advocate,

For the respondent : Mr. Ranjan Deb, Senior Advocate,
Mr. Manju Bhuteria, Advocate,
Mr. Rajarshi Dutta, Advocate,
Mr. V.V.V. Sastry, Advocate,
Mr. Debargha Basu, Advocate,

Reserved on : 30.03.2023

Judgment on : 23.08.2023

Ravi Krishan Kapur, J.

Facts

1. These appeals arise out of a common judgment and decree dated 9 October 2015 subsequently modified by an order dated 14 October 2015 passed in six different suits instituted for recovery of money lent and advanced whereby the plaintiffs have been granted the principal amount including simple interest @ 10% per annum from 10 October, 2008 till the date of payment.
2. Briefly, the defendant/appellant was earlier known as Anglo India Jute Mills Co. Ltd. (AIJM). The plaintiffs in all the suits are associate companies of the JP Goenka Group of Companies. Till about 1994, both the plaintiff and the defendant were group companies under the common management and control of the JP Goenka Group of Companies. In or about 1987, the

defendant was declared to be a sick industrial undertaking within the meaning of the Sick Industrial Companies (Special Provisions) Act, 1985 (the Act) and a proceeding (BIFR Case No.117 of 1987) was registered with the Board for Industrial and Financial Reconstruction (BIFR).

3. Initially, a scheme for rehabilitation of the defendant was sanctioned on 28 March, 1989. By the 1989 scheme, the promoters were required to infuse unsecured loans to the extent of Rs.225 lakhs with a portion of such loans being interest free and the balance yielding 10% per annum. The scheme of 1989 also contemplated that the promoters would bring in another Rs.200 lakhs from their group concerns on a year to year basis for the period 1989-90 to 1997-98. The 1989 scheme eventually failed. Subsequently, a fresh scheme of rehabilitation was sanctioned on 4 February, 1994 in favour of Champdany Industries Limited which took over the management of the defendant company and changed its present name to AI Champdany Industries Limited. Thereafter, the defendant revived and ultimately came out of the purview of BIFR.
4. All these suits have been filed by the plaintiff and its associates companies for recovery of unsecured loans advanced under the scheme of 1989. Paragraphs 4 and 5 of the amended plaint read as follows:

“4. In or about 1987 the defendant had become a sick industrial company within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as ‘SICA’) and a reference relating to the defendant was made in accordance with the provisions of SICA. A Scheme had been sanctioned by an order dated March 28, 1989 by the Board for Industrial and Financial Reconstruction (hereinafter referred to as BIFR) for rehabilitation of the defendant. In terms of the said Scheme and/or otherwise as recognized by scheme

the plaintiff and other associate companies of the plaintiff had advanced various sums of monies as unsecured loans to the defendant by cheque(s)."

"5. The loans brought in by the plaintiff and their associate companies were shown in the balance sheet of the defendant. The Scheme which had been sanctioned by the BIFR by the order dated March 28, 1989 had failed and thereafter BIFR initiated steps for preparation of a fresh scheme for rehabilitation of the defendant. The defendant was under an obligation to repay the sums which were given as loan to the defendant by the plaintiff pursuant to the Scheme and/or otherwise as recognized by scheme which had been sanctioned by the BIFR in 1989."

5. The crux of the case of the plaintiff is that the scheme of 1994 provided for freezing of loans amounting to Rs.386 lakhs which were claimed to have been brought in by the erstwhile promoters under the scheme of 1989 and advanced to the defendant by cheques as unsecured loans. This was also recognized contemporaneously in the balance sheets of both the plaintiffs and the defendant company. In all these six suits, the plaintiffs claim their respective portions of Rs.386 lakhs reflected in the sanctioned scheme on account of principal.
6. Prior to the filing of these suits, the plaintiffs had filed six separate winding up petitions against the defendant to enforce their claims under the scheme. By an order dated 18 January 2006, all the six petitions were dismissed and the parties were relegated to their ordinary remedies permissible under law. Hence, these suits.
7. In an application for summary judgment, under Chapter XIII A of the Original Side Rules of this Court, the defendant was directed to secure the claim of the plaintiffs and the matter was remanded to trial.

8. At the trial, four issues were framed by Court:

- i. *Did the plaintiffs and the other associate companies of the plaintiffs advance various sums of monies as unsecured loans to the appellants/defendants by cheque(s) in terms of the scheme sanctioned by the BIFR and/or otherwise as recognized by the scheme as pleaded in paragraph 4 of the plaint?*
- ii. *Are the respondents/plaintiffs entitled to claim the amount as claimed in the plaint or any part or portion thereof?*
- iii. *Are the claims of the respondents/plaintiffs barred by the laws of limitation?*
- iv. *To what relief/reliefs the respondents/plaintiffs are entitled?*

9. There was only one witness adduced on behalf of the plaintiffs. In cross-examination, the witness had admitted that Anglo India Jute Mills Co. Ltd. was part of the JP Goenka Group of Companies. The witness also admitted that there were no records to prove that loans had been given and the cheques referred to in the plaint had been encashed. The only evidence which the witness could rely on was a hand written statement prepared in the year 1994-95 and typed thereafter. There were no other records of any of the six plaintiff companies. The witness relied on the records of the proceedings before the BIFR and the AAIFR as admissions of the fact that moneys had been advanced to the defendant. The defendant chose not to adduce evidence on the ground that the plaintiffs were unable to prove their case and discharge the burden of proof.

10. By the impugned judgment, the Learned Judge held that the plaintiffs had been able to adduce sufficient evidence to show that the sums have been lent and advanced to the defendant. The Learned Judge relied on the balance sheets of the defendant company at the time when both the defendant and the plaintiffs were under the common control of the JP

Goenka Group of Companies. The Learned Judge also gave weightage to the fact that the orders of the BIFR and the AAIFR had attained finality and there were admissions in such proceedings that moneys had been advanced to the defendant. In this context, the relevant finding by the Trial Court is as follows:

“It is true that the plaintiffs have not been able to produce any documents to support the transaction. But what has been produced by the plaintiffs have to be evaluated along with the oral evidence of Mr. Chandak. The plaintiffs have been able to prove from the records of proceedings before the BIFR and AAIFR, its orders, the balance sheet, the statements of accounts and so on that monies were lent and advanced by them to Anglo India Jute. These loans were not repaid by them. The Board and AAIFR declared this loan to be outstanding and payable by them. This is enough to fix the defendant with liability. It does not matter whether Mr. Chandak has been able to produce any document or not. There is strong preponderance of evidence to suggest the grant of loans and advances by the plaintiffs to the defendants as claimed in the respective complaints.”

The rival submissions

11. On behalf of the defendant it is contended that, the plaintiffs have been unable to prove that there were any loans advanced to the defendant by way of cheques or otherwise. The entries in the balance-sheets have not been proved. Significantly, ever since Champdany Industries Limited sought to participate before the BIFR they had disputed the contents of the balance sheets and in particular, the purported loans shown in the books of accounts of the defendant. In any event, AIJM was a subsidiary of the J.P. Goenka Group at the contemporaneous point of time. Thus, the entries of liabilities in the books of accounts of the defendant would

amount to self-serving admissions inadmissible under section 21 of the Indian Evidence Act 1872.

12. By letters dated 14 October, 1993 and 1 November, 1993 respectively, the defendant had disputed the liability to the plaintiffs. This fact had also been reflected in all the subsequent balance-sheets and the notes of accounts post Champdany Industries Limited assuming management and control of the defendant company. During the trial, the plaintiffs had attempted to make out a new case in evidence inasmuch as the loan payments were made prior to the scheme of 1989 and not pursuant thereto. The liabilities arising out of such payments made before the sanctioning of the scheme of 1989 would not bind the defendant since the said scheme only provided for freezing of loans brought in pursuant to the scheme of 1989. In support of their contentions, the defendant relied on the decisions in *CBI v. V.C. Shukla (1998) 3 SCC 410* and *Chandradhar Goswami v. Gauhati Bank Ltd.(1967) 1 SCR 898*.
13. On behalf of the plaintiffs, it is contended that section 18(8) read with Section 26 of the Act makes the scheme of 1994 and all provisions thereunder binding on the parties and had attained finality. The plaintiffs also submit that the entries in the balance sheets of the defendant are corroborated by the books of accounts of the plaintiffs. In support of their contentions, the plaintiffs relied on the decisions in *Modi Rubber Limited v. Continental Carbon India Ltd.2023 SCC OnLine SC 296* and *Director General of Income Tax v. Board for Industrial and Financial Reconstruction 2011 SCC OnLine Del 1484*.

Findings

14. A contract of loan for money is a contract whereby it can be shown that the plaintiff had ***paid*** money to the defendant and there is an obligation on the defendant to repay the same. Thus, in order to succeed in a claim for money lent and advanced, the burden of proof is on the plaintiff to satisfy the Court that the plaintiff had ***paid*** money to the defendant which has now become due and payable and the defendant has refused to repay the same.
15. Section 102 of the Evidence Act, 1882, embodies the test for ascertaining on which side the burden of proof lies. The general rule, in civil cases is that he who asserts must prove. Issues which are essential must be proved by that party which asserts such fact in order to succeed in such an action. It is true that the burden of proof as a matter of adducing evidence is always unstable and shifts constantly throughout the trial. However, in view of the averments in the plaint that moneys had been paid by the plaintiffs to the defendant by cheques as unsecured loans, the burden of proof was squarely on the plaintiffs to prove this fact whether pursuant to the scheme or otherwise.
16. In the course of trial, the plaintiff only examined one witness, who relied on a typed calculation sheet containing purported details of money alleged to have been disbursed by the plaintiff. The witness unequivocally admitted that there were no records to prove that any loans had been advanced by way of cheques. There was also no evidence to suggest that the cheques had been advanced from any of the accounts belonging to the plaintiffs. The plaintiffs were unable to provide the particulars of the cheques or the

bank accounts in which the cheques were deposited for encashment, the dates on which the cheques were encashed or the bank statements of either of the plaintiff companies or the defendant which would have been the primary evidence to prove such fact. It is no answer as contended by the plaintiffs, that the books of accounts of the plaintiffs were not available or that the records comprising of the cheque books and the bank statements had been misplaced. The plaintiffs were simply unable to prove that any amounts had been brought into the defendant company as unsecured loans whether pursuant to the scheme of 1989 or otherwise. In such circumstances, the entries in books of accounts *per se* are insufficient and inadmissible to affix liability on the defendant.

17. During the trial, the plaintiffs placed strong reliance on the books of accounts of the plaintiffs and the defendant to suggest that moneys had been advanced by the plaintiffs and duly acknowledged by the defendant. Manipulation of accounts or accounting fraud is a reality. How elementary it is to debit the receiver and credit the giver or debit what comes in and credit what goes out with the ultimate goal of attaining equality ought to be known to any first year student of accountancy. At times, this becomes all the more farcical, when both the receiver and the giver are under the aegis of the same management and control. In this context, section 34 of the Evidence Act, 1882 mandates as follows:

34. Entries in books of account when relevant.— Entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

18. In *Central Bureau of Investigation vs. V.C. Shukla* AIR 1998 SC 1406, it has been held as follows:

“18. From a plain reading of the section it is manifest that to make an entry relevant there under it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business. From the above section it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as relevant evidence, still, the statement made therein shall not alone be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the documents, with which we are concerned, fulfil the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed.”

37. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (Wigmore on Evidence § 1546). Since, however, an element of self interest and partisanship of the entrant to make a person - behind whose back and without whose knowledge the entry is made - liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words such statements shall not alone be sufficient to charge any person with liability.”

19. Hence, entries in the books of accounts are *per se* insufficient to charge any person with liability without independent evidence of their trustworthiness. Similarly, there is no evidentiary value which can be attached to the handwritten (subsequently typed) sheet relied on by the plaintiffs. The evidence relied on by the plaintiffs was neither cogent nor convincing [*State of Andhra Pradesh vs. Cheelampati Ganeshwar Rao* AIR 1963 SC 1850, *Chandradhar Goswami & Ors. vs. Gauhati Bank Ltd.* AIR 1967 SC 1058, *Ishwar Dass Jain vs. Sohan Lal* AIR 2000 SC 426].

20. There is also no merit in the argument on behalf of the plaintiffs that the defendant had admitted the figures in their balance-sheets. A balance sheet does not by itself prove the facts stated therein. Moreso, such admissions were at a point of time when both the plaintiffs and the defendant were under the same management and control of the JP Goenka Group. Both the BIFR and the AAIFR relied on the balance sheet of the defendant as on 31 March, 1991 when the same management was in control of both the companies. Significantly, the said O.P. Chandak had represented both the plaintiffs and the defendant at all relevant stages before the BIFR. Accordingly, such self-serving admissions cannot be treated as substantive evidence without any independent proof thereof. [See *Pattabhiram vs. M. Narayanamoorthy* AIR 1922 PC 102, *Smt. Krishnavati vs. Shir Hans Raj* AIR 1974 SC 280 and *Idandas vs. Anant Ramachandra* AIR 1982 SC 127].
21. Even on the basis of the amended plaint, the plaintiffs were bound to prove that moneys had been lent and advanced by cheques as unsecured loans from the plaintiffs to the defendant pursuant to the scheme. In such a situation, a Court is not to treat the recordings before the BIFR or the AAIFR as biblical or sacrosanct. Even the submission made by the Operating Agency (OA) before the BIFR on 8 September 1989 i.e. “Shri Ganguly, representative of IFCI added that the promoters brought Rs.225 lakhs and a further sum of Rs.50 lakhs pursuant to the scheme 1989” was not proved by any independent evidence during the trial of these suits. In such circumstances, the onus of proof could not be discharged on the basis of inferences, conjectures and assumptions.

22. There is no quarrel with the proposition laid down in the decisions in *Modi Rubber Limited v. Continental Carbon India Ltd.* 2023 SCC OnLine SC 296 and *Director General of Income Tax v. Board for Industrial and Financial Reconstruction 2011 SCC OnLine Del 1484* cited on behalf of the plaintiffs as to the binding nature of a scheme inter-alia under section 18 of the Act. It is also true that on a combined reading of sections 18(8), 19(3), 26 and 32 of the Act, schemes once formulated and having gone through the process of sections 17 and 18 of the Act would have the force of law. Both the aforesaid decisions are distinguishable and inapposite. In *Income Tax (Administration) vs BIFR (Supra)* the question raised in a writ petition was whether after discharge of the reference by BIFR and the company's net worth becoming positive, the Income Tax Department could withdraw the concessions which formed part of a sanctioned scheme. Similarly, in *Modi Rubber Limited vs. Continental Carbon India Ltd. (Supra)* in a writ petition, an unsecured creditor had challenged the scaled down value of its dues and sought to recover its debt with interest post rehabilitation. However, having filed these suits, the plaintiffs were obliged to prove that moneys had been advanced by cheques to the defendant as unsecured loans and had become repayable. This was the entire purpose behind filing of the suits and going to trial. The burden of proof was squarely on the plaintiffs and after a full-fledged trial the plaintiffs even post amendment were unable to discharge the same.
23. In the course of hearing of these appeals, the plaintiffs had also filed six applications under Order XLI Rule 27 of the Code of Civil Procedure, 1908. In such applications, the plaintiffs had sought leave to adduce additional

documents including bank statements reflecting encashment of cheques by the defendant. The parties were directed to exchange affidavits. After exchange of affidavits, the plaintiffs withdrew all such applications and the same stood dismissed as withdrawn. Significantly, the stand taken by the defendant was that, on the basis of the allegations made in these applications it was a mathematical impossibility that any money had been advanced by any of the plaintiffs to the defendant. In each of such applications, it was averred as follows:

12. In course of such enquiry and searches made, your petitioner got hold of some old records in connection with the transaction-in-question which was never disclosed as the same was not traceable in spite of all efforts were made by Sri O P Chandak who was in-charge of this litigation since its inception. In spite of his exercise of due diligence, such documents, which were old documents, could not be traced out and produced before this Hon'ble Court on an earlier occasion. In fact, upon being confronted, it had come out in evidence that since the documents were not handy at that moment, the same could not be produced. For the first time, your petitioner's representative on 20 April 2019 got hold of some old records in connection with the transaction-in-question.

17. The said documents have been discovered in course of the searches made by your petitioner's representative Sri Pranab Maity during the period March and April 2019. Even otherwise, since the documents referred to hereinabove would throw light on the genuineness of the transaction-in-question, in order to pronounce judgment in a more detailed manner and to do substantial justice, these documents may be permitted to be relied upon by your petitioner in support of its case of money lent and advanced by cheque. The documents, in any event, establishes beyond reasonable doubt the transaction of money lent and advanced by your petitioner to the appellant and the genuineness thereof.

24. If filing the above applications was a mistake, withdrawing the same was *hara-kiri*. It left more than a lurking doubt even on the balance of probabilities that the plaintiffs did not have the requisite evidence to prove

the case made in the plaint. As a Court of Record, the averments made in these applications cannot be brushed aside nor ignored. In *Mohd. Seraj vs. Adibar Rahaman Sheikh AIR 1968 Cal 550* it has been held as follows:

“In sum, suits may come and go, withdrawn with or without liberty to sue afresh, dismissed or decreed, - no matter which, - but statements made therein, - no matter where, in pleadings, petitions affidavits, or evidence – remain for ever and for all purposes too allowed by law such as to be proceeded with as admissions, when they are found to be such, so long as they are not rebutted, (section 17 et seq., Evidence Act), or to be confronted with under section 145 ibid. Otherwise the court, no less the party interested, will be deprived of very valuable evidence, nothing to say of a premium being put on reckless allegations with no apprehension of the makers thereof coming to grief in future for such glibness.”

25. For the foregoing reasons, the impugned judgment and decree is liable to be set aside. The plaintiffs have been unable to prove an essential aspect of the case i.e. any money had been lent and advanced by the plaintiffs to the defendant by cheques. In view of this fact not being proved, all other issues become irrelevant and unnecessary.
26. In passing the impugned judgment and decree, the Trial Judge with utmost respect, ignored a vital aspect of the matter i.e. that the claim in all the suits did not have any actual basis. The strong preponderance of evidence to suggest the grant of loans and advances remained unsubstantiated.
27. In view of the aforesaid, all these appeals are allowed. The impugned judgment and decree in all the six suits are set aside.
28. Liberty is granted to the defendant/appellant to forthwith withdraw the security furnished in terms of the orders of Court both in the form of bank guarantees and cash lying with the Registrar, Original Side, Calcutta. GA 4 of 2021 filed in APD 4 of 2015 also stands dismissed as infructuous. In

view of the aforesaid, APD/4/2015, APD/5/2015, APD/6/2015, APD/7/2015, APD/8/2015 and APD/10/2015 stand disposed of. However, there shall be no order as to costs.

I agree:

(Soumen Sen, J.)

(Ravi Krishan Kapur, J.)