

Asim Industries Pvt Ltd vs Neptune Developers on 4 February, 2020

Author: N. J. Jamadar

Bench: N. J. Jamadar

3-SJ35-19INS705-19.DOC

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 35 OF 2019
IN
COMM SUMMARY SUIT NO. 705 OF 2019

Asim Industries Private Ltd.	...Applicant
In the matter between	
Asim Industries Private Ltd.	...Plaintiff
Versus	
Neptune Developers	...Defendant

Mr. Sourasubha Ghosh, a/w Mr. Arjun Savant, i/b M/s.
Hariani & Co., for the Plaintiff.
Mr. Akshay Patil, i/b Mayur Thorat, for the Defendant.

CORAM: N. J. JAMADAR, J.

DATED : 4th FEBRUARY, 2020 Oral Order :-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.16,30,91,405.60, alongwith interest at the rate of 24% p.a. from 1st January, 2019, till realisation.

2. The material averments in the plaint can be stated in brief as under:

(a) The plaintiff is a company registered under the provisions of the Companies Act, 1956. It deals in the business of real estate. The defendant is a partnership firm registered under the Indian Partnership Act, 1932. The defendant also deals in the business of development of real estate. In the 3-SJ35-19INS705-19.DOC month of January 2012, the defendant had approached the plaintiff to advance loan of Rs.7 Crore. The plaintiff had agreed to advance the loan in the ordinary course of business. A loan agreement came to be executed on 9 th February, 2012. It provided for creation of security in favour of the plaintiff by the defendant by way of mortgage of a

premises situated on the 9 th floor of Neptune Element South Woing, at Woagale Industrial Estate MIDC, Thane. The terms of loan were incorporated. It was, inter alia, agreed that the duration of the loan would be 24 months. It will carry interest at the rate 24% p.a. at monthly rest. The defendant had also agreed to pay interest at the enhanced rate in the event of default. In accordance with the terms of the agreement, the defendant executed a Deed of Mortgage dated 9th February, 2012, in favour of the plaintiff. A Demand Promissory Note was also executed on 27 th March, 2012, on which day the amount of loan came to be disbursed.

(b) It is the claim of the plaintiff that the defendant did pay interest, as agreed, for the period of first 24 months. However, the defendant could not repay the amount of loan after the expiry of the duration of loan. Hence, the first supplemental agreement came to be executed between the parties on 1 st March, 2014 and the repayment period came to be extended 3-SJ35-19INS705-19.DOC upto 30th September, 2014. The second supplemental agreement came to be executed on 1st October, 2014, and the period came to be further extended upto 31st March, 2015. The defendant committed default in payment of interest, which fell due from the month of December 2014.

(c) The defendant had drawn three cheques payable on 30th June 2016 (Cheque No.093852), 30th July, 2016 (Cheque No.093853) and 30th August, 2016 (Cheque No.093855), towards the repayment of loan amount and the interest accrued thereon. However, the cheques were dishonored on presentment. Ultimately, a third supplemental agreement came to be executed in the month of September, 2017 and the repayment period was extended upto 31st January, 2018.

(d) In the meanwhile, the defendant had acknowledged the liability to pay the loan amount along with interest accrued thereon, at agreed rate, on 19 th September, 2017 and 10th January, 2019. However, the defendant could not discharge the liability. Hence, the plaintiff was constrained to make a demand for payment and, upon failure of the defendant, institute the suit for recovery of the said amount, due as on 31 st December, 2018, with further interest at the rate of 24% p.a. from 1 st January, 2019.

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3. The writ of summons was served on the defendant. The defendant entered appearance. Thereupon the plaintiff has taken out this summons for judgment.

4. The defendant has fled an affidavit-in-reply and sought an unconditional leave to defend the suit. The leave is sought on two grounds. One, the loan agreement dated 9 th February, 2012, being insufficiently stand, cannot be admitted in evidence or acted upon under the provisions of the Maharashtra Stamps Act, 1958, until the deficit stamp-duty is paid. Thus, the summons for judgment cannot be entertained. Two, the defendant asserts that the transaction is required to be reopened under the provisions of Usurious Loans Act, 1918 ('the Act, 1918') as the plaintiff has charged interest at an exorbitant rate of 24% p.a., with monthly rest. The defendant contends that the plaintiff has obtained an undue advantage of the circumstances in which the defendant found himself while availing of the loan from the plaintiff on account of a dire necessity. It is submitted

that the defendant has admittedly paid a sum of Rs.4,48,00,000/- till date towards the loan of Rs.7 Crore and from the claim of the plaintiff it becomes evident that in a span of six years and eight months, the loan of Rs.7 Crore has ballooned out to the liability of Rs.20,76,91,405/-.

3-SJ35-19INS705-19.DOC The interest thus charged being highly excessive, inequitable and unjust, the transaction is required to be reopened in exercise of the power conferred on the Court under Section 3 of the Act, 1918.

5. The plaintiff has filed an affidavit-in-rejoinder and resisted the prayer for an unconditional leave to defend the suit.

6. I have heard Mr. Ghosh, the learned Counsel for the plaintiff and Mr. Patil, the learned Counsel for the defendant, at some length.

7. To begin with, it may be apposite to note that so far as the transaction of loan there is no controversy as such. The fact that the plaintiff had advanced a sum of Rs.7 Crore to the defendant under the loan agreement dated 9 th February, 2012, is not in contest. The execution of a Deed of Mortgage for creating security in favour of the plaintiff is also not in dispute. Nor the fact that the defendant had executed the Demand Promissory Note dated 21st March, 2012. There is not much controversy over the execution of the supplemental agreements whereunder the period of repayment came to be extended from time to time; the last extension being up to 31st January, 2018. The question which thus warrants determination is, whether in the face of 3-SJ35-19INS705-19.DOC the aforesaid admitted transaction of loan the defendant is entitled to leave to defend the suit?

8. The learned Counsel for the defendant urged that in view of the provisions contained in Article 5(h)(A)(iv) of Schedule I of the Maharashtra Stamps Act, the loan agreement is required stamped with duty computed at the rate of 0.2% of the loan amount plus interest. Since the agreement in question is written on a stamp-paper of the denomination of Rs.300/-, the agreement is inadmissible in evidence and cannot be acted upon, even at the stage of summons for judgment.

9. The learned Counsel for the plaintiff submitted that the aforesaid objection to the admissibility of the loan agreement is misconceived. Banking upon the provisions contained in Section 4 of the Act, which provides for the levy of duty where several instruments are executed in respect of a single transaction, it was submitted that as the Deed of Mortgage has been executed and the requisite stamp-duty is paid thereon, the loan agreement is not required to be charged with duty other than that of Rs.100/-.

10. Section 4 of the Act reads as under:

"4. Several Instruments used in single transaction of [development agreement] sale, [lease] mortgage or settlement (1) Where, in the case of any [development agreement] sale, [lease,] mortgage or settlement, several instruments are
3-SJ35-19INS705-19.DOC employed for completing the transaction, the principal

instrument only shall be chargeable with the duty prescribed in Schedule-I for the conveyance, [development agreement] [lease,] mortgage or settlement, and each of the other instruments shall be chargeable with a duty of [one hundred rupees] instead of the duty (if any) prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-

section (1), be deemed to be the principal instrument. [(3) If the parties fail to determine the principal instrument between themselves, then the officer before whom the instrument is produced may, for the purposes of this section, determine the principal instrument:] Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed."

11. A faint attempt was made on behalf of the defendant to draw home the point that the Deed of Mortgage and the Loan Agreement represent distinct transactions and, therefore, the case is not governed by the provisions of Section 4 extracted above. I find it rather difficult to accede this submission. The parties had agreed that the defendant should provide security for the loan. The mortgage and the loan agreement were evidently part of the one and the same bargain. It is trite that the underlying transaction in a mortgage is of a debt. The submission that the loan agreement was required to be charged with duty as prescribed in Article 5(h)(A)(iv) of Schedule-I does not merit acceptance.

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12. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of *The Madras Refneries Ltd. Vs. The Chief Controlling Revenue Authority, Board of Revenue, Madras*¹, wherein the Supreme Court after adverting to the provisions of Section 4 of the Indian Stamps Act held that when the prescribed duty on the Deed of Trust and Mortgage was paid, no separate duty was required to be paid on the Guarantee Agreement, in respect of the same transaction.

13. This takes me to the principal ground of the defendant that the rate of interest charged by the plaintiff is excessive and inequitable. The learned Counsel for the defendant urged that the provisions of Section 3 of the Usurious Loans Act, 1918, are clearly attracted in the facts of the instant case. The learned Counsel would urge that the entire setting of the matter is required to be taken into account, especially, the circumstances, in which, the loan was availed of by the defendant, the security which was provided by the defendant, and the risk to which the plaintiff was exposed to while advancing the said amount. It was submitted that in view of the undisputed fact that the defendant had provided adequate security in respect of the loan by way of mortgage of immovable property, the value of which is far in 1 (1977) 2 Supreme Court Cases 308.

3-SJ35-19INS705-19.DOC excess of the loan amount, the charge of interest at the rate of 24% p.a. at monthly rest is excessive, unreasonable, unjust and unfair.

14. Section 3 of the Usurious Loans Act, 1918, reads as under:

"Section 3. Re-opening of transactions.

(1) Notwithstanding anything in the Usury Laws Repeal Act, 1855 (28 of 1855), where, in any suit to which this Act applies, whether heard ex parte or otherwise, the Court has reason to believe, --

(a) that the interest is excessive; and

(b) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the following powers, namely, --

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-

open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not--

(i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than 1[twelve] years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation.--In the case of a suit brought on a series of transactions the expression "the transaction"

means, for the purposes of proviso (i), the first of such transactions.

3-SJ35-19INS705-19.DOC (2) (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(d) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Explanation.--Interest may of itself be sufficient evidence that the transaction was substantially unfair. (3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan [or for the redemption of any such security]. (4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was bona fide, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section. For the purposes of this sub-section, the word "notice" shall have the same meaning as is ascribed to it in section 4 of the Transfer of Property Act, 1882 (4 of 1882).

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court."

15. The learned Counsel for the defendant laid emphasis on the considerations which ought to weigh with the Court in determining the excessiveness of the interest, as provided in 3-SJ35-19INS705-19.DOC sub-section (2), extracted above. It was submitted that if the provisions of sub-section (2) of Section 3 are applied to the facts of the case, the excessiveness of the interest warranting reopening of the transaction becomes writ large.

16. To bolster up the aforesaid submission, the learned Counsel for the defendant relied upon a judgment of the Supreme Court in the case of S. Vardachariar and others vs. Gopala Menon and others². In the said case, the Supreme Court construed the provisions of the Act, 1918, and explained the scope and ambit thereof in the following words.

"4. In effect the provisions of the section which are relevant for the purpose of this appeal are as follows:

(a) If the Court has reason to believe that the transaction was unfair it will exercise the powers given by sub-s(1);

(b) The Court shall presume the transaction to be substantially unfair if the interest is excessive, such presumption being a rebuttable one by three special circumstances of the case.

(c) In order to find out whether the interest is excessive the Court must examine the circumstances of the case in the light of the risk incurred or the risk as would be apparent to the creditor at the date of the loan, and then Judge whether compound interest at the rate prescribed and with the rests provided for was justifiable keeping also in view the security given by the mortgagor, the value of such security and the condition of the debtor including the result of any previous transaction.

(5) The net result of the above seems to be that the Court must go back to the date of the original transaction and form an opinion as to the rate of interest which would be reasonable after considering:-

- (a) the value of the security offered;
- (b) the financial condition of the debtor including the result of any prior transaction;

2 AIR 1967 Supreme Court 412.

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- (c) the known or probable risks in getting repayment;
- (d) whether compound interest was provided for and if so

the frequency of the period of calculation of interest for being added to the principal amount of the loan."

(emphasis supplied)

17. In opposition to this, the learned Counsel for the plaintiff stoutly submitted that the defence of excessive and unjust interest had not seen the light of the day till the affidavit-in- reply came to be filed. It was urged that the defendant had never made any grievance of the interest being excessive and unreasonable. On the contrary, the defendant had specifically acknowledged the liability by confirmation of the due amount; principal plus interest thereon. Attention of the Court was invited to the letters dated 19th September, 2017 and 10th January, 2019, wherein the defendant had acknowledged the liability. In the letter dated 10th January, 2019, the defendant had acknowledged the liability to pay the principal amount of Rs.7 Crore along with interest of Rs.9,30,91,405.60 from 1 st December, 2014 to 31st December, 2018, with monthly rest, after adjustment/credit of the

ad-hoc payments made during the said period.

18. The situation which thus obtains is that there is no dispute about the loan transaction. The liability to pay the principal amount of Rs.7 Crore is undisputed, even if the case of 3-SJ35-19INS705-19.DOC the defendant is taken at par. At best, the ground of defence now sought to be urged is of excessiveness and unreasonableness of the interest, which may warrant, upon adjudication, reopening of the transaction, so far as the interest component.

19. In view of the fact that the defendant admits the transaction and the advancement of loan of Rs.7 Crore and also the liability to repay the said amount, there is no impediment to grant a decree to the extent of the principal amount of Rs.7 Crore. A profitable reference, in this context, can be made to a Full Bench Judgement of this Court in the case of SICOM Limited & others vs. Prashant S. Tanna & others, 3 wherein it was, inter alia, enunciated as under:

"28.

(3) At the hearing of the summons for judgment, it will be open to the Court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.

(4) At the hearing of the summons for judgment, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the defendant falling to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted."

20. As regards the defence of the interest being excessive, unfair and unjust if the transaction is looked at through the 3 AIR 2004 Bombay 186.

3-SJ35-19INS705-19.DOC prism of absolute numbers, i.e. the loan of Rs.7 Crore being trebled to a liability of Rs.20,78,91,405/- within a span of six years and eight months, the ground may seem worthy of consideration. In view of the provisions contained in Section 3 of the Act, for judging the excessiveness of interest the factors which may have a bearing are the circumstances of the transaction, the financial condition of the debtor, the risk of default associated with the debt, the nature and value of the security and acuteness of stringency in the money market at the given time.

21. In the case at hand, there is material to indicate that a valuable security was obtained from the defendant while advancing the loan amount. The security can be said to have adequately covered the risk of the lender. In this backdrop, if the Court comes to the conclusion that the interest was charged at an excessive rate, the Court may reopen the transaction and relieve the debtor of the liability in respect of the excessive interest. The fact that the defendant has paid an amount of Rs.4,48,00,000/-, which has been allegedly appropriated towards interest from 1st April, 2012 also

deserves to be taken into account. The defence thus sought to be raised by the defendant cannot be said to be moonshine or malafde. The 3-SJ35-19INS705-19.DOC defendant has succeeded in raising a triable issue about the justifiability of interest at the rate of 24% p.a.

22. In the totality of the circumstances, in my considered view the defendant can be granted a conditional leave to defend the suit so far as interest component. Having regard to the payment of Rs. 4,48,00,000/- till date, it would be in the fitness of things to grant the defendant leave to defend the claim for interest subject to deposit of a sum of Rs.2 Crore within six weeks from today. The summons for judgment, thus deserves to be made absolute to the extent of principal amount of Rs.7 Crore.

23. Hence, the following order.

(i) The Summons for Judgment stands partly allowed.

(ii) The defendant do pay a sum of Rs.7 Crore to the plaintiff towards the principal amount.

(iii) A decree be drawn and sealed for the aforesaid amount, expeditiously.

(iv) The defendant is entitled to defend the suit so far as the claim for interest on the said amount, subject to deposit of a sum of Rs.2 Crore, in Court, within six weeks from today.

(iv) If the defendant deposits the said amount of Rs.2 Crore, the defendant may file written statement within one 3-SJ35-19INS705-19.DOC month of the deposit. In the event of default on the part of the defendant to deposit the said amount of Rs.2 Crore, the plaintiff shall be entitled to move the Court for grant of decree in respect of the claim for interest as well.

24. The Summons for Judgment stands disposed of accordingly.

[N. J. JAMADAR, J.]