

Present:
Mr. Justice Farid Ahmed
-And-
Mr. Justice Md. Shawkat Hossain

First Appeal No. 149 of 2000.

United Commercial Bank Limited, 59-60
Motijheel Commercial Area, Dhaka,
having branch office at Khatunganj, P.S.
Kotwali, Chittagong.

...Plaintiff- Appellant.

-Versus-

M/S Panam Banaspati Limited, 9 Bandel
Road, P.S. Kotwali, Chittagong and 2429
Amir Ali Chowdhury Road, New Pak
Building, Khatunganj, P.S. Kotwali,
Chittagong and others.

... Defendant-Respondents.

Mr. Mahmudul Islam with

Mr. Probir Neogi, Advocates.

....For the Plaintiff- Appellant.

No one appears.

...For the Defendant-respondents.

sHeard on: 26.10.2010, 03.11.2010.
11.11.2010, 02.12.2010

And

Judgment on:08.12.2010.

Md. Shawkat Hossain, J:

The instant appeal by the plaintiff is directed against the judgment and decree dated 12.01.2000 (decree signed on 18.01.2000) passed by the Judge, 1st Artha Rin Adalat, Chittagong in Mortgage Suit No. 43 of 1997 decreeing the suit, in part.

Plaintiff's case, in short, is that the plaintiff is a schedule commercial bank established and registered under

Companies Act, 1913 having its Head Office at 59-60, Motijheel Coimmercial Area, Dhaka. That the defendant No. 1 is a Private Limited Company established and registered under Companies Act, 1913 and defendant Nos. 2-4 are members of Board of Directors of defendant No. 1. That the defendant No. 1 opened a C.C. Account No. 2533 in the Agrabad Branch of plaintiff-Bank. That on the application of the defendant No. 1, the plaintiff-Bank provided various kinds of loan facilities. That the plaintiff-Bank sanctioned project loan of Tk. 2,13,00,000/- on 26.05.1989 for Unit No. 1 and project loan of Tk. 1,56,00,000/- on 15.11.1989 and on 18.02.1990 for Unit No. 2 and also sanctioned cash credit (Hypo) of Tk. 50,00,000/- and I.P. Loan LIM/.C.C. (pledge) facility of Tk. 3,75,00,000/-. Besides, Agrabad Branch of Plaintiff issued a guarantee of Tk. 2,91,320/- on 06.04.1989 in favour of the defendant-Company. That the defendant No. 1 used to make banking transaction by opening a current Account No. 4297 in Khatungonj Branch and on the prayer of the defendant-Company loan account of the defendant-Company was transferred from Agrabad Branch to Khatunganj Branch of the Plaintiff-Bank. That the loans were enhanced and renewed form time to time and by sanction letter dated 01.01.1991 various types of loans amounting to Tk. 16,00,00,000/- up to 30.12.1991 was sanctioned. That cash credit (Hypo) loan of Tk. 1 crore, cash credit

(pledge/Lim) loan of Tk. 4 crores; L.C./I.p. loan of Taka 4 crore for Unit No. 1 and cash credit (Hypo) loan of Tk. 2 crores, cash credit (pledge/Lim) loan of Tk. 4 crores, L.C./I.P. loan of Tk. 4 crores for Unit No. 2 were sanctioned for the period up to 31.12.1993. That a guarantee of Tk. 20,74,930/- was issued in favour of the collector of Customs, Chittagong. Charge documents were executed by Company's authorized person. That on behalf of defendant No. 1 its authorized person executed D.P. Note, loan disbursement letter, letter of continuity, hypothecation deed on various dates as securities for the loans. That defendant No. 2 executing guarantee on 18.04.1990, 18.06.1990, 15.07.1991 and 02.03.1993 and defendant Nos. 3-4 by executing guarantee on 16.10.1993 became guarantors for the loans. All the assets of defendant No. 1 including plants, machineries, fittings and fixtures, raw materials, finished goods and the schedule land were mortgaged to the plaintiff-Bank by executing mortgage deed, Power of Attorney and also equitable mortgage was created by deposit of title deeds. That both the project loans were realized from defendant No.1 to facilitate the loans C.C. Accounts No. 99 and 115 were opened in the name of defendant No. 1 and the defendant-Company enjoyed the facilities of the aforesaid C.C. Accounts and the outstanding stood Tk. 1,87,57,954/- in C.C. (Hypo) account No. 99 and Tk. 3,74,05,381/- in C.C. (Hypo) Account

No. 115 on 30.06.1997 and two Bank guarantees of Tk. 23,74,250/- i.e. total outstanding stood Tk. 5,85,63,335/- That the time for repayment of the loans having expired long before plaintiff demanded payment by letter dated 22.01.1994, 10.02.1994, 05.04.1994, 25.06.1994, 28.06.1994, 28.10.1994, 30.11.1994, 23.05.1995 and 10.06.1996 but without taking steps for adjustment of loan defendant No. 1 by letters dated 08.05.1994 and 07.01.1995 requested the plaintiff for enhancement and renewal of the loan and the plaintiff through their advocate served a demand notice upon the defendant on 23.10.1996. Defendant No. 1 instead of repaying the outstanding claim replied through its advocate on 05.12.1996 claiming the renewal of loan facilities. Under the above circumstances plaintiff constrained to file the above suit for preliminary decree for recovery of Tk. 5,61,63,335/- and in the case of the failure final decree for recovery of the decretal amount along with the interest and pendent-lite interest till realization along with the costs through auction sale of the mortgaged property.

Defendant No. 1 contested the suit by filing written statement contending inter alia that the defendant No. 1 duly adjusted project loan. The defendant-Company was falsely implicated in a criminal case in the Court of Chief Metropolitan Magistrate, Dhaka in 1993 and the properties of the defendant No. 1 was attached and all Bank Accounts of

defendant No. 1 were freezed by the order of Chief Metropolitan Magistrate, Dhaka and as a result the factory of defendant No. 1 became closed, raw materials of the factory were exhausted and the production of the defendant-factory became close down from December, 1993. Besides, plaintiff-Bank played non-co-operation and took various steps to harass the defendant-Company. That with a view to running the factory defendant No. 1 by its letters dated 08.05.1994, 07.01.1995, 17.06.1995 and 25.06.1995 requested the plaintiff-bank to renew the C.C. limits by enhancing the limit and to open letters of credit for importation of raw materials but the plaintiff illegally neither enhanced the C.C. limit, nor renewed them, nor took step for opening the letters of credit for importation of raw materials. That it was at the discordant behaviour of the plaintiff-Bank defendant No. 1 could not start the production of its factory till date for want of raw materials and working capitals. That due to closure of the factory, plants and machineries of the factory have become almost useless and thereby the defendants have undergone loss of crores of taka. That defendant No. 1 replied to the legal notice of plaintiff and requested to enhance and renew the C.C. limit and to open letters of credit for importation of raw materials. Plaintiff by its step-motherly treatment pushed the factory financially crippled and as such the plaintiff is not legally entitled to get Taka 2,61,63,355/- being the interest

during the closure period of the factory of defendant No. 1. That the plaintiff by its step-motherly treatment and behaviour made the defendant-factory a sick industry. The suit is liable to be dismissed.

Mr. Mahmudul Islam, the learned Counsel appearing on behalf of the plaintiff-appellant submits that the claim of interest prior to filing suit is governed by the agreement between the parties and it is not dependant on the discretion of the Court. He further submits that the plaintiff had no participation to the attachment and freezing of the account of the defendant-company and the plaintiff was in no way responsible for the same which was in operation for three months only. He also adds that the defendant-company remained in control of its business and operation of the factory all the while and it went on its production even in December, 1993 and that the freezing of the accounts of the defendant-company had no effect on its business. He submits that plaintiff extended full co-operation for proper functioning of the defendant-company and the plaintiff had no control to the business and functioning of the defendant-company. He further submits that the learned Judge, Artha Rin Adalat in exercising discretion arbitrarily exempted the interest from 01.07.1993 to till filing of the suit and pendent-lite interest referring the decision reported in 37 DLR (AD) 1 which has no manner of application to the facts and circumstances of the

present case since in no time the plaintiff had its control of the management and production of the defendant-company considering the circumstances on which the above decision was held. He further adds that in the reported case the business assets and property of the company was taken over by the Government and the company was not in control of its business for years over while in the present case the company had always been in control of its business and admittedly it continued production even in November, 1993 and the freezing of the account of the company had no effect on its business. He also adds that the decision in the reported case was held in the case filed prior to the promulgation of Artha Rin Adalat Ain, 1990 (hereinafter referred as 'Ain, 1990') but in the instant law such exemption of interest as it has been exempted by the court below was beyond its jurisdiction. He further adds that under the provision as section 50(i) of the Artha Rin Adalat Ain, 2003 (hereinafter referred as 'Ain, 2003') awarding interest from the date of granting loan till filing of the suit is not discretionary i.e. the court has no authority to exempt such interest. He submits that Court has exercised the power in exempting such interest and pendent-lite interest arbitrarily and without authority and as such the impugned order of the part decree exempting interest warrants necessary interference.

None appears on behalf of the defendant-respondents.

On pleadings of the parties trial court framed four issues:

Learned Judge, Artho Rin Adalat, on consideration of the pleadings of the parties, evidence on record and on discussion in the light of above issues decreed the suit in part by the impugned judgment and decree.

We have gone through the evidence, oral and documentary, findings and observation of the learned Judge, and considered the submissions of the learned counsels for the appellant appear before us.

Md. Afjal Ullah, officer of the plaintiff-Bank , as P.W 1 was testified in support of the plaint case. Besides, plaintiff in support of its case produced exhibit- 1 to exhibit- 18.

On the other hand, Mahiuddin Chaudhary Sr. Accounts officer of the defendant-company was testified as D.W. 1 on behalf of the defendant and produced exhibit-‘ka’ to exhibit-‘ga’.

On consideration of the pleadings and evidence on record it does not appear that there remains any dispute between the parties over the matter of sanctioning of loan facilities to the defendant-company for its Unit No. 1 of Tk. 2,13,00,000/- on 15.11.1989 and Tk. 1,56,00,000/- for Unit No. 2 on 18.02.1990, issuance of bank guarantee of Tk. 2,91,320/- by Agrabad Branch on 09.03.1989, sanctioning of cash credit (Hypo) of Tk. 50,00,000/- I,P loan/Lim/C.C

pledge facility of Tk. 3,75,00,000/-, transferring of loan Accounts from Agrabad Branch to Khatunganj Branch, renewal and enhancement of loan facilities of Tk. 16,00,00,000/- up to 30.12.1991, cash credit (Hypo) loan of Tk. 1,00,00,000/- cash credit (pledge/Lim) loan of Tk. 4,00,00,000/- L.C/I.P loan of Tk. 4,00,00,000/- for Unit No. 1 and cash credit (Hypo) loan of Tk. 2,00,00,000/- cash credit (pledge)/Lim) loan Tk. 4,00,00,000/- L.C/IP loan of Tk. 4,00,00,000/- for Unit No. 2 sanctioned up to 31.12.1993; a guarantee of Tk. 20,74,930/- in favour of collector of Customs, Chittagong, execution of required documents by the authorized person of the defendant-Company; adjustment of loans, confirmation of balance statement, service of demand notice etc. Plaintiff filed the case for recovery of Tk. 5,61,63,335/- along with penal interest @ 18% till realization of the amount.

Defendant did not challenge the claim of the plaintiff as interest of Tk. 2,61,63,335/- but challenged the rest amount of the claim on the plea that the Accounts of the defendant-company was freezed by the order of Chief Metropolitan Magistrate, Dhaka and for non-co-operation of the bank for enhancement and renewal of loan limit and opening of letters of credit for importation, the defendant-company could not restore its production and consequently the plants and

machineries of the defendant-company became useless and as such the defendant-company turned into a sick industry.

D.W. 1 as examined on behalf of the defendant-company did not challenge the claim of the plaintiff rather he submitted the grievance of the Company, on the above matter. For proper appreciation of the case of the defendant it is relevant to quote his statement-

“আমি ১নং বিবাদী কোম্পানির Senior Accounts Officer. ১নং বিবাদী পক্ষে জবানবন্দি দিচ্ছি। ১নং বিবাদী কোম্পানির সম্পত্তি ও ব্যাংক হিসাব ঢাকা সিএমএম আদালতের আদেশে স্বেচ্ছায় এগোক হয় এবং ব্যাংক হিসাব ফ্রিজ হয় ১৯৯৩ সালের মাঝামাঝি। ব্যাংক হিসাব ফ্রিজ করায় কারখানার উৎপাদন সম্পূর্ণ বন্ধ হয়ে যায়। ১নং বিবাদী কোম্পানি সম্পূর্ণরূপে imported raw materials এর উপর নির্ভরশীল। ডিসেম্বর’ ৯৩ এ raw materials completely শেষ হয়ে যায়। আমরা ঋণ সুবিধা নবায়ন সহ আরো ঋণের জন্য আবেদন করি বিভিন্ন তারিখে যথাক্রমে ৮/৫/৯৫, ৭/১/৯৫, ১৭/৫/৯৫ এবং ২৫/৬/৯৫ তারিখের চিঠি মূলে। উক্ত তারিখের চিঠি দাখিল করিলাম। প্রদঃ ১ সিরিজ। বাদী ব্যাংক ঋণ নবায়ন করে নাই। বিবাদী কোম্পানি liability adjust করার পরও সম্পূর্ণ অবৈধভাবে ঋণ নবায়ন ঋণ সুবিধা প্রদান করেন নাই। আমরা অন্য ব্যাংক হতে ঋণ নিতে চেয়েছিলাম তাহাও অনুমোদন করে নাই। ১নং বিবাদী কোম্পানীকে পণ্ড করার জন্য বাদী ব্যাংক সম্পূর্ণরূপে দায়ী। বাদী ব্যাংকের legal notice এর জবাব দেই ৫-১২-৯৬ তারিখে বিস্তারিত বিবরণ দিয়ে। উক্ত জবাব প্রদঃ ‘গ’ বাদীর দাবীকৃত ৫ কোটি ৬১ লাখ ৬৩ হাজার ৩৩৫ টাকার মধ্যে ২, ৬১,৬৩,৩৩৫/- টাকা বন্ধ সময়কালীন সুদ। তাই সুদের টাকা পাইতে হকদার নহে। আমরা charge documents সমূহ blank সহি করি। ৬-১-৯১ তারিখের চিঠি মূলে যে সুদ নির্ধারণ করেন তাহা সম্পূর্ণ বেআইনী।”

Learned Judge, Artha Rin Adalat considering the above facts of the case of the defendant as special circumstances exempted the interest amount ‘from 01.07.1993 till filing of the suit and from filing of the suit till decree and from the date of decree till realization’ and thus awarded part decree.

It appears from the admission of D.W.1 that the plaintiff had no role in attachment and freezing of the account of the defendant-company. D.W. 1 admits:

“আমাদের কোম্পানির হিসাব ফ্রিজ করার জন্য বাদী ব্যাংক কোন দরখাস্ত দেয় নাই। বিবাদীর কোম্পানির হিসাব আখতারুজ্জামান চৌধুরীর মামলার কারণে অন্যান্য কোম্পানির সহিত ফ্রিজ হয় কিনা জানিনা। বর্তমানে ফ্রিজ আদেশ নাই। ফ্রিজ আদেশ আদালত প্রত্যাহার করেছে ”।

From exhibit-Ka, the order sheet dated 14.06.1993 passed in G.R case No. 1651/93 of the court of C.M.M Dhaka, the account was freezed for the cause of Akhtaruzzaman Choudhury, the ejahar named accused to that case.

It is claimed by the plaintiff that such freezing of the accounts of the defendant-company it had no effect on its production and functioning and it went on production in December, 1993. No such evidence was adduced on behalf of the defendant that the defendant-company became completely inoperative for the cause of such attachment and freezing of the accounts of the defendant-company.

D.W. 1 further admits in cross-examination: -"ঋণের সময় সীমা 31-12-93 পর্যন্ত। 31-12-93 তারিখের মধ্যে টাকা পরিশোধ করিতে পারেন নাই। "

He further admits in his cross-examination: "ব্যাংক প্রতি ৩ মাস আয় সমূহের হিসাব করে ৩ মাসের ভিত্তির উপর compound interest যোগ করে।"

He also admits in the cross-examination: "আমাদের কোম্পানির নিজস্ব মূলধন আছে।"

Learned Counsel for the appellant submits that although suit was filed in Artha Rin Adalat, 1990 since the appeal is pending before the Court in pursuance of section 60 it shall be disposed of in accordance with the provisions of Ain, 2003 and as such section 50 of the said Ain shall govern in awarding interest in respect of interest from granting loan to institution of suit and pendent-lite interest i.e. from filing of the suit to recovery of decretal amount. He further submits that there is no authority of the court to exempt the interest from granting loan to institution of the suit and it is mandatory on the part of the court to award such interest on calculation of which the suit was filed. He further submits that learned Judge of Artha Rin Adalat being misconceived exempted interest from 01.07.1993 to institution of the suit. He further submits that under sub-section 2 of section 50 of Ain, 2003 the plaintiff-Bank shall also be entitled to pendent-lite interest.

We find substance to the submission of the Learned Counsel. The decision as held in 37 DLR (AD)1 has no manner of application to the facts and circumstances of the present case and the learned judge Artha Rin Adalat committed wrong in exempting the interest prior to filing of the suit on that basis.

It further appears that the instant appeal was filed at the instance of plaintiff-Bank. There is no doubt that under

provision of section 60 of Ain, 2003, it has its application to the appeals pending from the cases filed under Ain, 1990. In pursuance provision of sub-section 2 of section 50 of the Ain, 2003 the Plaintiff bank is entitled to penal interest i.e interest from the date of institution of the suit till decree at the rate of 08% simple interest.

The present appeal was filed in the year 2000 and it has been submitted by the Learned Counsel for the appellant that no sum of the decretal amount has yet been deposited by the defendant-Respondent.

In the facts and circumstances of the case, we find substance to the appeal.

In the result, the appeal is allowed with modification.

The suit is decreed for TK. 5,61,63,335/- along with interest at the simple rate of 08% from the date of institution of the suit till passing of the decree by the Court below.

Defendant is directed to pay the decretal amount passed by this court within 3 (three) months from the date of receipt of the record by the Trial Court failing which plaintiff shall be entitled to get interest till realization.

Lower Court record be send down at once.

Farid Ahmed, J:

I agree.