

D. Lohiah Chetty Vs. the M.P.H.J.S. Nidhi or the Permanent General Benefit Fund Ltd.

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Court : Chennai

Decided On : Aug-05-1971

Reported in : AIR1972Mad407

Judge : Ramanujam, J.

Acts : Negotiable Instruments Act - Sections 4, 79 and 80; Evidence Act - Sections 92; Stamp Act - Sections 2(22); Indian Contract Act - Sections 29

Appeal No. : Second Appeal No. 1539 of 1970

Appellant : D. Lohiah Chetty

Respondent : The M.P.H.J.S. Nidhi or the Permanent General Benefit Fund Ltd.

Judgement :

1. The appellant herein borrowed a sum of Rs. 2,510 on various occasions from the respondent Nidhi on pledge of certain jewels, after executing promissory notes. Exs. B-1 to B. 6 are six of the promissory notes executed by him. On the first two loans borrowed in the year 1954 and 1955 the rate of interest mentioned was 6 1/4 per cent per annum and on the rest 6 3/4 per cent per annum. However, under the promissory notes executed by the appellant for the various borrowings, he had agreed to pay interest at the rate mentioned therein 'or such other rate as may, from time to time, be fixed by the directors of the said Nidhi and notified by

them at the office of the said Nidhi.' Relying on this clause, the respondent Nidhi demanded interest at the rate of 10 1/2 per cent per annum as and from 1-7-1966 but the appellant refused to pay interest at the enhanced rate. In view of the appellant's attitude the respondent brought the pledged jewels to sale on 10-3-1968. With a view to avert that sale, the appellant filed O. S. 800 of 1968 on the file of the City Civil Court, Madras, out of which this second appeal arises, for a declaration that he is liable to pay interest only at the rate of 6 1/4 per cent per annum on the first two loans and at 6 3/4 per cent per annum on the remaining loans, and for an injunction restraining the defendant Nidhi from bringing the pledged jewels to sale.

2. The respondent resisted the suit contending that the appellant is a share-holder of the Nidhi, that the loans were advanced by the Nidhi as per the Articles of Association which are binding on the appellant, that the Articles of Association of the Nidhi empowered the Board of directors to fix the rate of interest from time to time on the loans advanced by the Nidhi, that the appellant having expressly agreed to pay interest on the said loans at such rate as may from directors of the Nidhi, he is bound by the fixation of the rate of interest by the Board of Directors with effect from 1st July 1966, and that the Nidhi is entitled to bring the pledged jewels to sale in enforcement of its right as pledgee.

3. The trial court as well as the lower appellate court upheld the right of the respondent Nidhi to collect interest at 10 1/2 per cent, per annum on the basis of the resolution of the Board of directors and the appellant is aggrieved against the said decision of the courts below.

4. Thus, the only question that has to be considered in this second appeal is whether the enhancement of the rate of interest by the respondent on the borrowings made by the appellant on the pledge of the jewels from 1st July 1966 is valid and enforceable.

5. All the borrowings are covered by promissory notes and six of the promissory notes have been filed into court. They are in printed forms. As the question involved has to be decided with reference to the recitals in the promissory notes, it is better to extract one of them. Ex. B-1 promissory note is as follows:--

'S. L. No. M. 2839 Madras 11-6-1969 Rs. 75/-. On demand I promise to pay the Madras Pursawalkam Hindu Janopakara Saswatha Nidhi or the Permanent General Benefit Fund Ltd. or order for value received, the sum of Rs. seventy five only together with interest thereon at 6 3/4 per cent per annum or such other rate as may, from time to time be fixed by the directors of the said Nidhi and notified by them at the office of the said Nidhi.'

The appellant contends that his liability is to pay interest only at 6 3/4 per cent per annum under the above promissory note, while the respondent contends that it is, entitled to charge interest at a higher rate in view of the alternative provision empowering the directors to fix a higher rate of interest. The learned counsel for, the appellant submits that, notwithstanding the alternative provision for enhanced rate of interest, the respondent cannot unilaterally fix an enhanced rate of interest, and that the alternative provision will have to be taken as invalid as there is neither consensus ad idem between the two contracting parties, nor mutuality as one contracting party has been given the right to unilaterally fix an enhanced rate of interest. The learned counsel also contends that if the alternative provision is allowed to operate, the document Ex. B-2 will cease to be a promissory note as defined in Section 4 of the Negotiable Instruments Act which refers to an unconditional undertaking to pay a certain sum of money. According to the learned counsel if the alternative provision is to operate the liability on the promissory note will not be certain and that, therefore, it cannot be enforced as a promissory note.

6. Before dealing with the said contentions put forward by the learned counsel it is necessary to find out the powers of the Directors under the Articles of Association, Ex. B-7. It is seen that Art. 75 specifically empowers the directors to charge interest at such rate as may be determined by them from time to time on the special loans advanced by the Nidhi. The loans in question are admittedly special loans coming within the purview of Art. 75. This power of the directors to enhance interest on the said loans has also been recognised and agreed to by the appellant in the promissory notes executed by him. The appellant has specifically agreed to pay the rate of interest mentioned in the promissory note or such other interest as the Board of directors may from time to time fix and notify. In view of this the alternative provision under which the appellant has agreed to pay such rate of

interest as the directors may fix and notify, the appellant may not be right in saying that he is liable to pay interest only at the specific rate mentioned in the promissory note. The learned counsel refers to the decision in *Fathuma Bibi v. Hanumantha Rao*, (1907) 17 MLJ 296, in support of his contention that a particular rate of interest having been mentioned in the promissory notes it is only that rate that has to be charged and not any rate unilaterally fixed by the Board of directors and that where it is not possible to find out the rate of interest definitely, Section 80 of the Negotiable Instruments Act should come into play. In the above case *Benson and Wallis, JJ.* had expressed the view that where a promissory note is silent as to the rate of interest, oral evidence is not admissible in proof of a contemporaneous agreement to pay a certain rate of interest; but in such cases interest at the rate of 6 per cent should be awarded under Section 80 of the Negotiable Instruments Act. In *Gopal v. Achut Sadashiv*, AIR 1941 Nag 271, it was held that where a promissory note is silent as to interest evidence is not admissible to prove a contemporary oral agreement to pay a certain rate of interest under S. 92 of the Evidence Act and that if that is the case where the document is silent as to the rate of interest a fortiori evidence is not admissible in a case where the document mentions a rate of interest to prove that the rate was different from that mentioned in the document. In *Raghunath Prasad v. Mangilal*, the court had to consider whether a document which contains a promise to pay a sum of money with interest but does not specify the rate of interest is a promissory note within the meaning of Section 2(22) of the Stamp Act and it was held that it is not a promissory notes as the sum payable under it is not certain as required under S. 4 of the Negotiable Instruments Act and as there s vagueness in the document and extraneous evidence has to be imported for construing the document on the question of interest. I am not able to see how these decisions are of any assistance to the appellant. In all these cases the rate of interest was not mentioned and on the contemporaneous agreements oral evidence on the rate of interest was sought to be relied on, and the courts held that contemporaneous oral agreement as to the rate of interest is not admissible in evidence under S. 92 of the Evidence Act. In the last of the cases above referred to it was also held that as the rate of interest has not been specifically mentioned and the amount due under the promissory note being uncertain, the document will not fall under the definition of 'promissory

note'. I am of the view that neither Section 79 nor Section 80 of the Negotiable Instruments Act states that when interest at a specified rate is expressly made payable on a promissory note, interest shall be calculated at the rate specified, on the amount of the principal money and Section 80 provides that where no interest shall notwithstanding any agreement relating to interest between the parties to the instrument be calculated at the rate of 6 per cent per annum. In the case on hand not only a specified rate of interest is mentioned but the parties have provided for enhanced interest in certain circumstances. Therefore it is not possible to bring the case either under Section 79 or under Sec. 80 of the Negotiable Instruments Act. Even if the appellant's contention that in view of the indefiniteness as to the rate of interest payable on the promissory notes they cannot be enforced as promissory notes is accepted on the basis of the decision in *Raghunath Prasad v. Mangilal*, it will not help the appellant as the respondent can still enforce the same as an agreement and exercise its rights as a pledgee of the jewels. The respondent can always enforce the pledge and recover the amounts due under Exs. B-1 to B-6 treating them as agreements or bonds. Hence I am not in a position to agree with the appellant that the documents Exs. B-1 to B-6 have to be considered, ignoring the alternative provisions for enhancement of interest contained therein.

7. The learned counsel then contends that even if Exs. B-1 to B-6 are treated as agreements providing for an enhanced rate of interest in certain events, they should be held to be void for uncertainty under Section 29 of the Indian Contract Act. I am not inclined to agree with that contention. Sec. 29 states that agreements, the meaning of which is not certain or capable of being made certain are void. But in this case Exs. B-1 to B-6 are certain and there is no ambiguity about the rate of interest. If the directors of the respondent Nidhi did not exercise their power, the rate of interest payable is certain and definite having been mentioned in the instruments themselves. If and when the directors enhance the rate of interest as and from a particular date even then the rate of interest payable is certain. Hence there is no question of the terms of the instrument being uncertain. A term in the contract of loan which gives a party power to alter the rate of interest does not in my opinion, render the contract uncertain and void under Section 29 of the Contract Act. Both the parties agreed that the rate of interest will stand varied at the instance of the directors and such a clause in the contract cannot be attacked

on the basis that there was no consensus ad idem or that the whole agreement was void for uncertainty. It is true, if the parties have no consensus ad idem with reference to any essential term of the contract, there can be no binding contract at all. As both the parties had agreed to the alternative provisions for interest it cannot be said that there was no consensus ad idem. If the parties to a contract agree that the rate of interest shall ultimately be fixed by the Board of directors, such a contract is valid and binding on both the parties and can be enforced. Illustration (e) to Section 29 of the Contract Act throws considerable light on the question whether Exs. B-1 to B-6 are void for uncertainty. The said illustration shows that there can be a binding contract even if the price of the goods to be sold is not fixed under the contract but is regulated at a later stage to be fixed by a third party. In this case, the appellant having specifically agreed to pay interest at the rate to be fixed by the directors in future cannot resile from that agreement and say that he is bound to pay interest only at the rate mentioned in the earlier portion of the instrument without reference to the alternative provision. In any view of the matter it cannot be held that the decision of the courts below holding that the appellant is liable to pay interest at the rate fixed by the directors from 1st July 1966 is erroneous. The second appeal therefore fails and is dismissed with costs. No leave.

8. Appeal dismissed.