P L D 2002 Supreme Court 500

Present: Sh. Riaz Ahmad, Mian Muhammad Ajmal and Tanvir Ahmed Khan, JJ

Messrs DADABHOY CEMENT INDUSTRIES LTD. and 6 others---Petitioners

Versus

NATIONAL DEVELOPMENT FINANCE CORPORATION, KARACHI---Respondent

Civil Petitions for Leave to Appeals Nos.2720 to 2723 of 2001, decided on 2nd October, 2001.

(On appeal from the judgment of the High Court of Sindh, Karachi dated 19-9-2001 passed in Special High Court Appeals Nos. 159 to 162 of 2001).

(a) Civil Procedure Code (V of 1908)---

----S. 12(2) read with O.XXIII, R.3---Contract Act (IX of 1872), S.19-- Corporate and Industrial Restructuring Corporation Ordinance (L of 2000), Ss.2(L). 10, 20 & Sched.---Constitution of Pakistan (1973), Art.185(3)-- Suits tiled by petitioner for redemption of mortgaged property and that filed by respondent for recovery of loan amount were disposed of in terms of Memorandum of Understanding executed between the parties, whereby petitioner agreed to pay the loan amount in quarterly instalments subject to the condition that in event of default of any instalment, the entire principal amount and interest accrued thereon then remaining unpaid would become immediately payable by petitioner and respondent would be entitled to file execution application for recovery thereof---Petitioner, after paying four (4) instalments stopped further payments and filed applications under S.12(2). C.P.C. which were dismissed by Trial Court---Appellate Court also dismissed the petitioner's appeals---Contention of petitioner was that Memorandum of Understanding was obtained through misrepresentation, coercion and fraud; disposal of such applications without inquiry was against law, though Trial Court had omitted penal interest, but respondent was still charging the same; and that respondent could refer a question of bona fide dispute relising to liability etc. of the obligor to Governor State Bank of Pakistan for verification and correct determination/calculation by Verification Committee---Validity---Petitioner had been failed to substantiate the allegations of fraud, misrepresentation and coercion as no particulars thereof had been given in application under S.12(2), C.P.C.---Mere allegation not supported by any material would not invariably warrant inquiry or investigation in each case---Petitioners had agreed to pay interest/mark-up on rescheduled outstanding amount, as such they being the privy to rescheduling of loan could not turn around to say that interest/mark up had been fraudulently charged---Parties with their free-will and consent had entered into compromise, whereupon signatures of the parties and their counsel had been verified by Trial Court, which had decreed 'the suit in terms thereof---Petitioners had acted upon the consent decree by paying four (4) quarterly instalments---Had petitioners been aggrieved of consent decree, they would have challenged the same in appeal---No appeal had been filed against consent decree, which had attained finality---Consent decree did not suffer from fraud, misrepresentation or want of jurisdiction, thus, the same was not amenable to challenge under S.12(2), C.P.C.--'Corporate and Industrial Restructuring Corporation Ordinance, 2000, came into force on 22-9-2000, whereas consent decree was passed on 18-2-1998, thus, the date on which consent decree was passed, Corporate and Industrial Restructuring Corporation Ordinance, 2000 was not in force---Said Ordinance came into force during pendency of applications under S.12(2), C.P.C. but its provisions could not be pressed into service as the applications had been

found to be incompetent and consent decree had been found to have been lawfully and validly passed---Judgment passed by Appellate Court was well-founded not warranting any interference-- Supreme Court refused to grant leave to appeal and dismissed the petitions in circumstances.

(b) Civil Procedure Code (V of 1908)---

----S. 12(2)---Fraud, misrepresentation, allegations of---Decision of such application without inquiry---Validity---Mere allegations of fraud, misrepresentation and coercion not supported by any material would not invariably warrant inquiry or investigation in each case.

(c) Civil Procedure Code (V of 1908)---

----S. 12(2)---Framing of issues---Trial Court is not bound to frame issues in each and every case, but it depends upon the facts and circumstances of each case---Where Court finds that further inquiry is required, it would frame issues and, record evidence of the parties, but if it is of the opinion that no inquiry is required, then it can dispense with the same and proceed to decide the application.

(d) Fraud---

---- Allegation of---Where allegation of fraud is levelled, the same must be specified and details thereof should be given.

Abdul Hafeez Pirzada, Senior Advocate Supreme Court, M. Afzal Siddiqui. Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioners.

Khalid Anwar, Senior Advocate Supreme Court and M.A. Zaidi Advocate-on-Record for Respondent.

Date of hearing: 2nd October, 2001.

JUDGMENT

MIAN MUHAMMAD AJMAL, J.--By this common judgment we propose to dispose of Civil Petitions for Leave to Appeal Nos.2720 to 2723 of 2001 as they have arisen out Of the common judgment and involve identical questions of law and facts.

2. Facts are that in 1982, the respondent-National Development Finance Corporation (hereinafter to be called N.D.F.C.) allowed several loan facilities to Messrs Dadabhoy Cement Industries Limited (hereinafter to be called D.C.I.L.) to the tune of Rs.584,065,920 and the petitioners were; to repay Rs.1,013,066,026. The petitioner mortgaged its properties as a security of the loan. D.C.I.L. after allegedly making payment of the due amount tiled Suit No.416 of 1996 against the respondent for redemption of mortgaged properties. The respondent also filed Suit No.1430 of 1997 against the petitioner for the recovery of the allegedly outstanding amount. In Suit No.416 of 1996 filed by the petitioners, the parties filed an application under Order XXIII, rule 3, C.P. C. for its disposal in terms of the compromise; which reads under:-

"It is submitted on behalf of the parties in the above suit that pursuant to a Memorandum of Understanding dated 19-12-1997 (Annexure 'A') executed between Dadabhoy Cement Industries Limited ("D.C.I.L.") the plaintiff No.1 herein and NDFC the defendant a settlement has been arrived at including the dispute in the present suit encompassing all the disputes in relation to the accounting of various facilities provided by NDFC to DCIL and rescheduling/restructuring of their loans/facilities

including the dispute in the present suit. The dispute involved in the present suit has been resolved on the following terms and conditions:

1. That it has been agreed between the parties that the interest-based loan facilities and mark-up-based finance facilities specified in Annexure 'B' offered by NDFC to DCIL shall be treated as withdrawn and cancelled in all respect as if the said facilities as to each and every one of them was never offered by NDFC to DCIL.

2. That it has been agreed between the parties that out of the amounts from time to time paid by or for the account of DCIL to NDFC and received by NDFC up to 1-9-1997 on account of various interest based term loan facilities as well as mark-up based term finance facilities, an aggregate amount of Rs.948.10 million (Rs. Nine hundred forty eight million one hundred thousand only) received from DCIL (in cash, through adjustment of certain loan amounts disbursements, amounts reimbursed by the local banks and Rs.10.36 million received from Aslan Development Bank) shall be deemed to have been received and appropriated by NDFC in part payments of amounts owing from DCIL on account of the interest based term loan facilities and in payment of the mark-up-based term finance facilities provided to D.C.I.L.

3. That on the basis of the appropriation as stated in para. 2 thereof, the account of interest-based term loan facilities shall be deemed to be re-stated, resulting in an aggregate amount of Rs.717,000,000 (Rupees seven hundred seventeen million only) owing and payable in respect of the aforesaid facilities which shall be paid by DCIL to NDFC in the manner stated hereafter.

4. That it is further agreed between the parties that the mark-up-based term finance facilities (with the exception of working capital facilities which is subject-matter in Suit No-1430 of 1997 and for which a separate compromise application has been moved) shall be deemed to have been settled and finally closed for all intents and purposes.

5. That as a result of the settlement so arrived at between the parties DCIL is liable to pay to NDFC an aggregate amount of Rs.717,000,000 as on the effective date i.e. 1-9-1997 which DCIL has agreed to pay to NDFC in the following manner.

6. That on execution of the aforesaid Memorandum of Understanding dated 19-12-1997 DCIL has paid to NDFC the sum of Rs. Two (1) millions and the balance of Rs.7,15,000,000 (Rupees seven hundred fifteen million only) payable on account of interest-based term loan facilities shall, from the effective date i.e. 1-9-1997, hear interest @15% per annum on daily balance and on the basis of a 360 days year with quarterly rest until full payment of principal and interest is made to NDFC. The aforesaid sum of Rs.715,000,000 shall be payable by DCIL to NDFC within 15 years from the effective date i.e. 1-9-1997 in 60 (sixty) equal quarterly instalments payable on or before 1st January, 1st April, 1st July and 1st December in each calendar year together with interest accrued at the rate aforesaid up to the date of payment of each such instalment as detailed in Annexure 'C" with the first such instalment shall be payable on or before 1-4-1998.

7. That in the event of default in payment of any instalment, as agreed Upon the entire principal and interest accrued thereon then remaining unpaid, shall become immediately due and payable by DCIL to NDFC without any notice. In such an event DCIL shall be liable to pay to NDFC an additional interest @ 4% per annum with semi annual rest on the entire amount of overdue principal, and interest in addition to the 15% interest per annum on daily balances, as stated in para. 6 hereof.

That it is agreed that the following shall constitute an event of default.
(i) If DCIL shall default in making any payment due to NDFC or shall be in breach of any provision of the said MOU dated 19-12-1997 or of any agreement, as modified by

the said MOU, governing any interest-based term loan facility or of any compromise decree of Hon'ble Court or of any document creating or evidencing security in favour of NDFC whether alone or together with others for money owing from DCIL to NDFC.

(ii) If DCIL shall suffer any petition for its winding up to be filed or any resolution for its winding up to be passed or any decree for money to be passed or any receiver or administrator or manager to be appointed in respect of the business of DCIL or any of its assets on income in or over which NDFC has a security interest.

(iii) If in the opinion of NDFC any security held by it for the indebtedness of DCIL is adversely affected, whether on account of actions taken or threatened by one or more creditors against the assets of DCIL in or over which NDFC has a security interest for money owing from DCIL.

(iv) If DCIL fails to fulfil any one or more of its obligations including the disposal of the various cases filed by DCIL and NDFC against each other pending in this Honourable Court in pursuance of the settlement arrived at through the aforesaid memorandum of understanding.

(9) That it is clarified and fully understood by the parties that notwithstanding the execution of the aforesaid MOU, all the credit agreements and security documents executed by DCIL in favour of NDFC and personal guarantees given by the plaintiffs Nos.2 to 7 shall remain valid binding and enforceable. However, the terms and conditions of the credit agreements, security documents including persona: guarantees shall be deemed to have been modified pursuant to the execution of the aforesaid MOU.

It is, therefore, prayed that this Honourable Court may be pleased to dispose of the above suit in terms of compromise as stated hereinabove with no order as to costs."

The above compromise was allowed by a learned Single Judge of the High Court of Sindh, Karachi with the exception of para. 7 which was modified by the Court, vide its order dated 18-2-1998 and the suit was decreed, said order reads as under:-

"The parties have jointly filed application under Order XXIII, rule 3, C.P.C., seeking disposal of the suit in terms of the compromise recorded therein. The application is signed by all the plaintiffs and their learned counsel, On behalf of the defendants one Talat Behzad and the learned counsel for the defendants have signed the application. The signatures are duly verified by the learned counsel who admits execution of the application by their respective clients. I have examined the terms of the compromise which appear to be lawful and within the scope of the suit with the exception that in para.7 of- the application, the plaintiff have burdened with liability to pay to the defendant additional interest at the rate of 4% per annum with bi-annual rests on the entire amount of over-due principal and the interest. The last mentioned term amounts to imposition to penal interest which cannot be allowed. In the circumstances, such term is modified and it is ordered that para.7 of the application shall be incorporated in the decree as follows:--

7. That in the event of default in payment of any instalment, as agreed upon, the entire principal and interest accrued thereon then remaining unpaid, shall become immediately due and payable by DCIL to NDFC without further notice. In such an event, NDFC shall be entitled to tile execution application seeking payment of the entire amount as above from the plaintiffs.

With the above modification, the application is granted and the suit is decreed accordingly with no order as to costs.
(Sd)

Judge. "

Suit No. 1430 of 1997 filed by the respondent was also disposed of in terms of the above compromise.

3. In pursuance of the compromise and the consent decrees, the petitioners paid four quarterly instalments to the respondent and thereafter, they defaulted in payment of quarterly instalments and filed applications J.M. 30 of 1999 in Suit No.416 of 1996 and J.M. 29 of 1999 in Suit No. 1430 of 1997, under section 12(2), C.P.C. whereas the respondent filed Execution Applications Nos.110 of 2000 and 137 of 2000 for execution of the consent decrees. All the above four applications were disposed by a learned Judge of the High Court of Sindh vide his common order dated 18-6-2001, whereby- he refused to recall his order dated 18-2-1998, and dismissed the applications filed by the petitioners. Peeling aggrieved, the petitioners filed Special High Court. Appeals Nos. 159 to 162 of 2001, which have been dismissed in limine by a learned Division Bench of the High Court vide its common judgment dated 19-9-2001, impugned herein.

4. Learned counsel for the petitioners contended that Memorandum of Understanding (MOU) dated 19-12-1997 was got executed by the respondent under coercion and duress in order to extort excess amount by charging additional interest, penal, interest and mark-up over mark-up in violation of Banking Control Departments Circular Nos. 13 and 32, which amounted to commission of fraud as contemplated by section 12(2), C.P.C. He referred to the Schedule of Corporate and Industrial Restructuring Corporation Ordinance, 2000 to contend that the provisions of this Ordinance apply to the respondent and corporation could refer a question of bona fide dispute relating to the liability of the obliger in respect of non-perforating assets or cases related thereto including the cases of fraud, misrepresentation, breach of law, rules, regulations and circulars of the State Bank of Pakistan regarding the calculation, existence and payment of a financial obligation or outstanding loan, mark-up or interest claimed against an obliger, to the Governor State Bank for verification and correct determination and calculation by the Verification Committee. He submitted that in the year 1996 the petitioners had re-paid the entire loan alongwith interest/mark-up, both short and long term, and there was nothing outstanding against them. The respondent through illegal methods charged further interest/mark-up on the amount on which mark-up had already been paid, therefore, the additional charge. of interest/mark-up was against law. He submitted that since the MOU was obtained through misrepresentation, coercion and fraud, therefore, the petitioners challenged the decrees passed in pursuance of the said MOU and the Court under the law was bound to enquire arid investigate into the allegations made in the applications under section 12(2), C.P.C. He contended drat the disposal of the said applications without inquiry was against law. He further submitted that despite the fact that the trial Court substituted para. 7 of the MOU by omitting the penal interest, the respondent is charging the same.

5. On the other hand, learned counsel for the respondent argued that the MOU was entered into between the parties with their free-will and consent and no pressure, coercion or duress, whatsoever, was exerted on the petitioners. He submitted that the MOU was entered into between the parties with their conscious application of mind and with legal assistance of their counsel, therefore, no question of fraud and misrepresentation could arise, as such, the applications under section 12(2), C.P.C. of the petitioner were not maintainable. He submitted that the respondent has not charged any alleged extra-interest mark-up from the petitioners which has been admitted by them in para.5 (xii) of their Suit No.416 of 1996 stating that pursuant to the rescheduling of the agreement the respondent had added compound interest; additional interest and other charges in determining the principal amount due and payable by the petitioner. In such a situation, the allegation that extra interest/mark-up has been charged is without any foundation. He urged that the compromise decree was passed in pursuance of the MOU which was duly acted upon by the petitioners and in

consequence whereof the petitioners paid. 4 quarterly instalments as enunciated in the compromise and thereafter they stopped payment of further quarterly instalments as agreed upon and instead tiled application under section 12(2), C.P.C. He submitted that the applications under section 12(2), C.P.C. of the petitioners were designedly filed with mala fide intention in order to delay the payment of the outstanding agreed amount area thus deserved to be dismissed with costs.

6. We has a heard the learned counsel for the parties and have gone through the material available on record. Obviously, the parties at their own free-will and consent, entered into .a compromise vide MOU dated. 19-12-1997 which was signed by the parties and their counsel and both the Suits No.416 of 1996 and 1430 of 1997 were disposed of in terms of the said compromise except para. 7 thereof, which was substituted by the Court. The Court after verifying the signatures of the parties and their counsel, who admitted the execution of the compromise, examined the terms of compromise and. found para.7 thereof to be unreasonable, as such, it was substituted and on its satisfaction that the compromise was voluntary and genuine, accepted the same with substituted para.7 and decreed the suit in terms thereof, which attained finality as it was not challenged in appeal. In pursuance of the compromise decree, the petitioners paid 4 quarterly instalments but thereafter stopped payment and filed two applications under section 12(2), C.P.C and on the other hand, the respondent filed two applications for the execution of the said decree.

7. As far the allegations that the compromise, decree was obtained by fraud, coercion and misrepresentation, the petitioners failed to substantiate the same as no particulars or details thereof had been given in their application under section 12(2), C.P.C. and mere allegation not supported by any material, would not invariably warrant inquiry or investigation in each case. It is for the trial Court to see whether the facts and circumstances of the case require further probe into the allegations or not. Where the Court finds that further inquiry is required, it would frame issues and record evidence of the parties and if it is of the opinion that no inquiry is required, it can dispense with the same and proceed to decide the application. So, it is not incumbent on the trial Court to frame issues in each and every case but it depends upon the facts and circumstances of each case. The argument that the respondent by adding further interest/mark-up on the amount on which interest/mark-up had already been paid, played fraud, has no substance, for, this fact was already in the knowledge of the petitioners as they had agreed to pay the same on rescheduling of the outstanding amount, which has been admitted by the petitioners in their Suit No.416 of 1996, as such, they being the privy to the rescheduling of the loan, cannot turn around to say that further mark-up was fraudulently charged. It is settled law that where allegation of fraud is levelled, it must be specified and details thereof should be given. The contents of MOU were mutually agreed upon between the parties and there is nothing to suggest that the same as executed by fraud, I misrepresentation or under duress or coercion.

8. As far the question of maintainability of the applications under section 12(2), C.P.C. is concerned, it may be noted that consent decree was passed in pursuance of the compromise arrived at between the parties. The compromise decree was acted upon by the petitioners as they deposited four quarterly instalments as agreed upon in the compromise and thereafter they defaulted in payment of further instalments. Had the petitioners been aggrieved of consent decree, they would have challenged the same in appeal. I Since, no appeal was tiled against the consent decree, hence, it attained finality. It appears that the petitioners, in order to avoid payment of remaining instalments tiled afterthought applications with mala tide intentions. The consent decree did not suffer from fraud, misrepresentation or want of jurisdiction, therefore, the same was not amenable to challenge under section 12(2), C.P.C. Thus the applications were not maintainable as none of the ingredients for challenging the validity of decree as contemplated in section 12(2), C.P.C. was available to the petitioners.

9. So far application of the provisions of Corporate and Industrial Restructuring Corporation Ordinance, 2000 (Ordinance L of 2000) to the present case is concerned, it may be noted that this law came into force on 22-9-2000 whereas the consent decree in pursuance of the compromise, had been passed on 18-2-1998, as such, the date on which decree was passed, the Ordinance was non-existent. Although, the said Ordinance had come into force during the pendency of the application under section 12(2), C.P.C., yet its provisions could not be pressed into service as the applications under section 12(2), C.P.C. were found to be incompetent and thus, not maintainable and the consent decree was held to have been lawfully and validly passed.

10. For the foregoing reasons, we are of the view that the learned. Division Bench of the High Court has exhaustively dealt with each and every point alleged before it and we see no ground to interfere with the well-founded judgment. Consequently, finding no merit in these petitions, the same are dismissed and leave is refused.

S.A.K:/D-24/S Petitions dismissed.

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