

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2010

CORAM :

THE HONOURABLE Mrs.JUSTICE R.BANUMATHI
and
THE HONOURABLE Mr.JUSTICE B.RAJENDRAN

A.S.No.544 of 1997

UCO Bank, Bazaar Branch,
Pondicherry, rep. by its
Branch Manager. ... Appellant/Plaintiff

vs.

- 1.M/s.Lucky and Company,
a Partnership firm having its place
of business at G.F.23, Nehru street,
Pondicherry.
- 2.R.Perumal @ Kaliaperumal
- 3.R.Shanmugam
- 4.Apparsamy
- 5.The Central Bank of India,
Pondicherry, rep. by its
Branch Manager. Respondents/Defendants

Prayer: Appeal filed under Section 96 C.P.C. against the Decree and Judgment made in O.S.No.217 of 1988 dated 29.02.1996 on the file of Principal Subordinate Judge, Pondicherry.

For Appellant : Mr.Srinath Sridevan

For Respondents : Mr.T.R.Rajagopalan - R2
Senior Counsel for
Mr.T.R.Rajaraman
No Appearance - R1,R3,R4,R5

JUDGMENT

R.BANUMATHI, J

Being aggrieved by decreeing of the suit in part and declining the prayer of preliminary decree for mortgage in respect of 'B' and 'C' schedule properties and dismissal of the suit against Defendants 4 and 5, Appellant-UCO Bank has preferred this Appeal.

2. Brief facts which led to the filing of suit is as follows:-

Defendants 2 and 3 [Perumal @ Kaliaperumal and Shanmugam] are the partners of 1st Respondent-M/s.Lucky and Company. On 31.05.1972, Defendants 2 and 3 approached the Plaintiff Bank and availed loan of Rs.5000/- by hypothecating the 'A' schedule properties. Defendants 2 and 3 have also agreed to repay the same with interest at the rate of 6% p.a. over the RBI rate subject to a minimum of 15% p.a. On 19.3.1973 at the request of Defendants 2 and 3, the said limit was enhanced to Rs.20,000/- and to that effect Defendants 2 and 3 have executed documents by way of securities. Subsequently, Defendants 2 and 3 have requested for further increase in the limit. One Sundarambal executed guarantee deed infavour of Plaintiff Bank on 16.5.1973 and also deposited her title deeds in respect of 'B' schedule property belonging to her with an intention to create an equitable mortgage over the same for the liability of 1st Defendant not only for the existing limits, but also for the future increase in limits.

3. Case of Plaintiff is that at the request of Defendants 1 to 3, Plaintiff Bank sanctioned limit of Rs.40,000/- on 06.11.1973; Rs.50,000/- on 26.11.1975; Rs.2,00,000/- on 07.06.1978 and Rs.5,50,000/- on 01.03.1980 besides an *ad hoc* limit of Rs.1,00,000/- on 13.1.1981 for which Defendants 1 to 3 have executed the documents. Plaintiff Bank issued lawyer's notice on 15.11.1984 for which Defendants have sent reply on 11.12.1984 disputing the correctness of outstanding balance. Guarantor Sundarambal died in July, 1987 intestate leaving Defendants 2 and 3 to inherit her properties. Since, Defendants 2 and 3 are legal heirs of deceased Sundarambal, they are liable to pay the suit claim. It is averred that there are other suits in O.S.No.512/1984, 349/85, 484/84 and 348/84 filed before the Sub-Court, Pondicherry in which 'C' schedule theatre has been subjected to a charge. Since, 5th Defendant-Central Bank of India is a puisne mortgagee, 5th Defendant is impleaded as Defendant in the suit. Hence, Plaintiff Bank filed the suit for recovery of Rs.22,94,072.29 together with future interest at 17.5% p.a.

4. Denying the correctness of description of 'B' and 'C' schedule properties, 3rd Defendant filed written statement contending that he never mortgaged the 'C' schedule property in favour of Plaintiff and moreover 4th Defendant does not own the 'C' schedule property, so as to mortgage the same. It is averred that, Plaintiff has not disclosed in their plaint as to what is the principal amount and what is the interest due. According to 3rd Defendant, he never acknowledged any sum of Rs.16,00,000/- under acknowledgement of debt. Contending that there is no indication of rate of interest in the documents, 3rd Defendant averred that Plaintiff Bank claimed interest of Rs.10,00,000/- for the principal amount of Rs.5,50,000/-

and interest claimed is more than the principal amount and prayed for dismissal of the suit.

5. Contending that 5th Defendant-Central Bank of India is unnecessary party to the suit, 4th Defendant filed written statement which was adopted by 1st Defendant contending that and the suit is hit by mis-joinder of parties. Case of 4th Defendant is that there is no cause for the suit, since he had not extended the alleged mortgage of 'C' schedule property infavour of Plaintiff Bank and extension of any mortgage is one unknown to law. According to 4th Defendant, there was no enhancement of claim to the tune of Rs.5.50 lakhs as alleged, besides the *ad hoc* limit of Rs.1 lakh, because, at every stage, the outstanding balance would be adjusted towards the part of the quantum payable and the actual amount of advance availed would only be less than Rs.4 lakhs. Further case of 4th Defendant is that Sundarambal was only a guarantor and she never offered her 'B' schedule property as mortgage. Likewise, 4th Defendant has also never extended any mortgage in respect of 'C' schedule property and he does not own the same. Since, Pondicherry Municipality demolished the business place of 1st Defendant, 1st Defendant Firm suffered heavy loss and prayed for dismissal of the suit.

6. On the above pleadings, trial Court framed seven Issues and four additional Issues. Before the trial Court, one S.K.Natesan, who was then working as Manager of Plaintiff Bank was examined as PW1. Exs.A1 to A32 were marked. 4th Defendant-Apparsamy was examined as DW1 and 3rd Defendant-Shanmugam was examined as DW2. No documents were marked on the side of Defendants.

7. Upon consideration of oral and documentary evidence, trial Court held that 5th Defendant-Central Bank of India is unnecessary party to the suit and accordingly answered Issue No.2. Holding that Plaintiff bank has not produced any document to prove that *ad hoc* limit of Rs.1,00,000/- was sanctioned, trial Court held that Plaintiff would be entitled to Rs.14,97,833.14 [Rs.15,97,833.14 less Rs.1,00,000/-] and not Rs.22,94,072.29. While holding so, trial Court reduced the 'pre-suit interest' to 12% p.a. In so far as 'principal sum adjudged', placing reliance upon AIR 1992 Bombay 482 (FB) [Central Bank of India v. Ravindra], trial Court held that Plaintiff bank would be entitled to claim interest only on the amount i.e. Rs.5,50,000/- advanced as loan to Defendants 1 and 2 and not the entire amount. Pointing out that Sundarambal died in July 1987 and plaint was filed in April. 1987, Sundarambal was not impleaded in the suit, trial Court held that Plaintiff bank had managed to obtain the signatures of Sundarambal and the intention of Sundarambal to create equitable mortgage has not been established. Likewise, in respect of the mortgage claim against the 4th Defendant, trial Court held that intention to create mortgage on 'C' schedule property was not established by the Plaintiff bank. On the above

findings, trial Court passed personal decree only for recovery of sum of Rs.14,97,833.14. Trial Court ordered payment of interest at the rate of 12% per annum from 12.6.1985 till the date of filing of the suit and thereafter at 6% p.a. on the principal sum of Rs.5,50,000/- till the date of realisation.

8. Mr.Srinath Sridevan, learned counsel for Plaintiff bank contended that under contract, Plaintiff bank is entitled to compute interest with quarterly rests and that the amount ought to have been treated as "principal sum" and deduction of Rs.1,00,000/- is perverse. Learned counsel would further contend that when Defendants 1 and 2 have executed promissory notes agreeing to repay the amount with interest at the rate of 7.5% over and above the RBI rate of interest subject to a minimum of 17.5% payable with quarterly rests, trial Court was not justified in decreeing the suit only for Rs.14,97,833.14. Pointing out that suit transaction was a commercial transaction, learned counsel for Appellant would further contend that even though the interest *pendente lite* and subsequent interest are within the discretion of the Court that discretion has not been properly exercised and the trial Court erred in awarding *pendente lite* interest at the rate of 12% p.a. and future interest at the nominal rate of 6% p.a. In so far as negating the mortgage decree, learned counsel would contend that merely because Sundarambal was not impleaded as party at the time when suit was presented that cannot be the ground for disallowing the mortgage relief.

9. Mr.T.R.Rajagopalan, learned Senior Counsel for Respondents contended that intention to create mortgage has not been established and mere deposit of title deeds is not sufficient. Learned Senior Counsel mainly contended that Sundarambal should have been impleaded as party and merely saying that she was a guarantor was not sufficient. It was further contended that in the absence of documentary evidence, trial Court rightly granted personal decree and the same cannot be faulted. Supporting the decree for Rs.14,97,833.14, learned Senior Counsel would further contend that the rate of interest claimed by the Plaintiff being usurious, trial Court rightly interfered with the pre-suit interest at 12% p.a. and in exercise of discretion under Sec.34 of CPC reduced the future interest to 6% p.a.

10. The following points arise for consideration in this Appeal:-

1. Whether the trial Court was right in holding that Defendants 1 to 3 are liable to pay only Rs.14,97,833.14 with subsequent interest at 12% p.a?
2. Whether the trial Court was right in interfering with

pre-suit interest to 12% per annum and reducing the suit claim from Rs.22,94,072.29 to Rs.14,97,833.14?

3. Whether the trial Court was right in taking the "principal sum adjudged as Rs.5,50,000/- which was the "principal sum advanced"?
4. Whether the discretion of the trial Court in awarding *pendente lite* interest at 12% p.a. and subsequent interest at 6% p.a. warrants interference?
5. Whether the trial Court was right in decreeing the suit only for personal decree against Defendants 1 to 3?
6. To what relief, the Plaintiff bank is entitled to?

11. *Point Nos. 1 to 3:-* Defendants 1 to 3 have initially availed a loan to the limit of Rs.5000/- on 31.5.1972. Subsequently, at the request of Defendants 1 to 3, the limit was enhanced to Rs.5,50,000/- as on 01.3.1980 and besides, an *ad hoc* limit of Rs.1,00,000/- was also availed by Defendants 1 to 3 on 13.01.1981. By way of securing the said limit, Defendants 1 to 3 have executed Ex.A1 to A21 documents. Plaintiff bank opened cash credit facility to the limit of Rs.5,50,000/- which is not in dispute. On behalf of 1st Defendant, Defendants 2 and 3 have secured the borrowal limit at Rs.5,50,000/- by executing Ex.A6-promissory note [06.03.1980] infavour of Plaintiff bank and Ex.A10 [06.03.1980] is the deed of hypothecation executed by the 1st Defendant. Sundarambal offered 'B' schedule property and 4th Defendant offered 'C' schedule property as security and deposited their title deeds [letter of confirmation - Exs.A26 & A22 respectively] with an intention to create equitable mortgage. Defendants 1 to 3 have acknowledged their liability as per Ex.A9-letter [12.06.1985] and they have also executed Ex.A16-promissory note [12.06.1985] for Rs.15,97,833.14. Since, Defendants failed to repay the loan availed by them, the interest accrued and Defendants are liable to pay the suit claim of Rs.22,94,072.29. According to Plaintiff bank, as per the documents executed by the Defendants, they are liable to pay the contractual rate of interest with quarterly rests.

12. On 26.02.1983, Defendants 1 to 3 have acknowledged a sum of Rs.5,50,000/- by execution of revival letter Ex.A14. Defendants 2 and 3 have also acknowledged their liability towards Plaintiff bank to the tune of Rs.15,97,833.14 and they have secured the said sum by executing Ex.A16-promissory note and Ex.A20-hypothecation deed. Besides, Exs.A16 and A20, Defendants have also executed other letters Exs.A17 and A19 viz., letter of waive presentment and undertaking by Defendants 2 and 3; covering letter for Ex.A16-promissory note; and letter of confirmation of balance by Defendants 2 and 3.

13. Defendants 2 and 3 have clearly acknowledged their liability towards Plaintiff bank to the tune of Rs.15,97,833.14 by executing

Exs.A16 to A21 [12.06.1985] documents. Even though, Defendants 2 and 3 have acknowledged their liability to the tune of Rs.15,97,833.14, trial Court held that Plaintiff bank has failed to prove the *ad hoc* limit of Rs.1,00,000/- sanctioned to the Defendants on 13.03.1981. Even though, Defendants 1 to 3 have acknowledged their liability to the tune of Rs.15,97,833.14 finding that Plaintiff bank has not produced any documents to show sanction of *ad hoc* limit of Rs.1,00,000/-, trial Court deducted Rs.1,00,000/- and held that Defendants 1 to 3 are liable to pay Rs.14,97,833.14.

14. Approach of the trial Court deducting Rs.1,00,000/- towards sanction of *ad hoc* limit is perverse. As pointed out earlier, Defendants 2 and 3 have executed Ex.A16-promissory note for a sum of Rs.15,97,833.14. Ex.A17 [12.06.1985] is the waive presentment of demand promissory note executed by the Defendants 2 and 3 undertaking to pay the due on the said promissory note. Ex.A18 is the letter of confirmation by Defendants 2 and 3 for the execution of Ex.A16-promissory note for a sum of Rs.15,97,833.14. Exs.A19 is the hypothecation deed executed by Defendants 2 and 3 hypothecating their stock in trade at No.15-17, Paikadai Lane, No.GF23, Municipal Shopping Complex, J.N. street, Pondicherry. Ex.A20 is the deed of hypothecation executed by 1st Defendant Firm hypothecating the premises as well as stock in trade in No.15-17, Paikadai Lane, No.GF23, Municipal Shopping Complex, J.N. street, Pondicherry.

15. Under Exs.A16 to A20, the Defendants 1 to 3 have clearly acknowledged their liability for a sum of Rs.15,97,833.14 and have also executed deed of hypothecation, trial Court was not justified in deducting Rs.1,00,000/- sanctioned as *ad hoc* limit. Observation of the trial Court that Plaintiff bank has not produced any document showing sanction of *ad hoc* limited of Rs.1,00,000/- is untenable. In fact, in his evidence, 3rd Defendant-Perumal [DW2] has not specifically denied about the sanction of Rs.1,00,000/- nor he denied execution of Exs.A16 to A20 documents. In his evidence, PW1 has clearly stated about the execution of Exs.A16 to A20 documents. While so, trial Court was not justified in deducting Rs.1,00,000/- and ordering payment of Rs.14,97,833.14 and the said finding of the trial Court is liable to be set aside.

16. While initially availing the loan for Rs.2,00,000/-, in Ex.A1-promissory note [14.06.1978], Defendants 1 to 3 have agreed to pay interest at 6% per annum above the RBI rate subject to minimum rate of interest of 15% per annum with quarterly rests for value received. As pointed out earlier, Defendants 2 and 3 have executed fresh promissory note under Ex.A16[12.06.1985] agreeing to pay Rs.15,97,833.14 with interest at the rate of 7.5% per annum above the RBI rate, subject to minimum rate of interest of 17.5% per annum

with quarterly rests for value received. Likewise, in Exs.A19 and A20-deed of hypothecation, Defendants 1 to 3 have confirmed execution of promissory note and thereby confirming their payment of interest at 7.5% per annum above the RBI rate, subject to minimum rate of interest of 17.5% per annum with quarterly rests. As per the terms of the contract, bank computed interest with quarterly rests and after the quarter the interest was added to the last balance and that amount was treated as "principal sum" for computing the interest for the next quarter and so on and so forth. The amount arrived at the said method till the date of filing of the suit will be the "principal sum". The suit was filed on 30.04.1987. From 12.06.1985, Plaintiff bank calculated compound interest at the rate of 17.5% p.a. with quarterly rests on the amount of Rs.15,97,833.14 and claimed Rs.22,94,072.29. The suit claim of Rs.22,94,072.29 is well in accordance with the terms of the contract and Exs.A16 and A20 and other loan documents. Therefore, the trial Court was not right in saying that interest has to be paid at the simple rate at 12% p.a. By ordering simple interest at the rate of 12% p.a. from 12.06.1985 [i.e. pre-suit interest], trial Court brushed aside Exs.A16 and A20 documents. The approach of the trial Court is perverse and cannot be countenanced. Therefore, it is held that Plaintiff bank is entitled to the suit claim of Rs.22,94,072.29 and Point Nos.1 to 3 are answered accordingly.

17. Point Nos. 4 to 6:- Interest for the period prior to the institution of the suit is not governed by the provision of Section 34, but the award of interest from the date of the suit to the date of the decree and from the date of decree from the date of payment can only be on the "principal sum adjudged". Therefore, the Court while passing a decree in the suit has to adjudge, firstly, the principal sum and any interest on such principal sum prior to the date of the institution of the suit. The "principal sum adjudged", therefore, can only mean the amount which the Court determines after adjudicating upon the rights of the parties. In a money suit, Court would adjudge the 'principal sum' on the date of the suit. Court may also be called upon to adjudge interest due and payable by the Defendant to the Plaintiff for the pre-suit period which interest would obviously be other than such interest as has already stood capitalised and treated as "principal sum". As pointed out earlier, under contract, Bank compute interest with quarterly rests and after the quarter, the interest was added to the last balance and that the amount was treated as "principal sum" for computing the interest for the next quarter and so on. The amount finally arrived till the date of filing of the suit is the "principal sum".

18. Holding that "principal sum adjudged" would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties are established in banking practice has stood capitalised, in AIR 2001 SC 3095

[*Central Bank of India v. Ravindra and others*], a Five Judge Constitution Bench of Supreme Court has laid down the following guidelines:-

"(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy.

(2) Novation, that is, debtor entering into a fresh agreement with creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any contract express or implied and an express acknowledgement of accounts, are best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(3) The prevalence of banking practice legitimatises stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contracts voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to recovery and payment of interest.

(4) Capitalisation method is founded on the principle that the borrower failed to make payment though he could have made and thereby rendered himself a defaulter. To hold an amount debited to the account of the borrower capitalised it should appear that the borrower had an opportunity of making the payment on the date of entry or within a reasonable time or period of grace from the date of debit entry or the amount falling due and thereby avoiding capitalisation. Any debit entry in the account of the borrower and claimed to have been capitalised so as to form an amalgam of the principal sum may be excluded on being shown to the satisfaction of the Court that such debit entry was not brought to the notice of the borrower and/or he did not have the opportunity of making payment before capitalisation and thereby excluding its capitalisation.

(5) The power conferred by Sections 21 and 35A of the Banking Regulations Act, 1935 is coupled with duty to Act. Reserve Bank of India is prime banking institution

of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.

(6) Agricultural borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot be permitted in India except on annual or six monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

(7) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly.

(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner."

19. To hold that Defendants 1 to 3 are liable to pay simple interest at the rate of 12% p.a. from 12.06.1985 on Rs.14,97,833.14, trial Court placed reliance upon AIR 1992 Bombay 482 (FB) [Central

Bank of India v. Ravindra]. It is pertinent to note that the said decision in AIR 1992 Bombay 482 (FB) was overruled by the Judgment in AIR 2001 SC 3095 [Central Bank of India v. Ravindra and others]. Under Exs.A1, A16 and A19 and other loan documents when Defendants 1 to 3 have agreed to repay the loan with interest at the rate of 7.5% p.a. over and above the RBI rate of interest subject to a minimum of 17.5% p.a., Plaintiff bank is entitled to make the claim of calculating the compound interest and capitalising the same to the "principal sum".

20. In so far as, Plaintiff bank's claim for compound interest with quarterly rests, trial Court strangely invoked the 'doctrine of damdupat' and held that the claim of interest has exceeded the "principal amount" and therefore, as per the "doctrine of damdupat" [A rule of the Hindu Law of debts by which the interest recoverable at any one time cannot exceed the principal - (Advanced Law Lexicon - Page 1190 - P.Ramanatha Aiyar - 3rd Edition, 2005)], claim of interest is liable to be restricted to the extent of "principal amount" only. Referring to AIR 1988 SC 1200 [Mhadagonda Ramgonda Patil and others v. Shripal Balwant Rainade and others], trial Court held that rule of "damdupat" is an equitable rule debarring the creditor to recover the amount of interest which is in excess of the 'principal amount' and the same is applicable in the transaction of the mortgage also. Invoking the said "doctrine of damdupat", trial Court observed as under:-

" The plaintiff has not given any opportunity to the defendants to know about the balance outstanding after 12.06.1985. The plaintiffs have not filed a single scrap of paper before this court to show that they have appraised the defendants about the huge arrears and calling upon them to pay the same. Under such circumstances, though this court finds that the defendants are liable to pay Rs.14,97,833.14 I am of the opinion that the defendants are liable to pay future interest only on the principal sum of Rs.5,50,000/-."

21. As held by the Supreme Court in AIR 2001 SC 3095 [Central Bank of India v. Ravindra and others], the "principal sum adjudged" would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties or the established banking practice has stood capitalised. The prevalence of banking practice stipulates the interest on periodical rests and their capitalisation being incorporated in contracts between the parties in Exs.A1, A16, A19 and A20 and while so, trial Court was not right in invoking the "doctrine of damdupat" and saying that Defendants 1 to 3 are liable to pay simple interest at

the rate of 12% p.a. on Rs.14,97,833.14 from 12.06.1985.

22. In so far as "principal sum adjudged", placing reliance upon AIR 1992 Bombay 482 (FB), trial Court adopted erroneous approach. Trial Court ordered future interest at 6% p.a. on Rs.5,50,000/- which was the original amount advanced. Trial Court was totally under the misconception between the "principal sum adjudged" and the "original amount advanced".

23. As per the contract between the parties, interest is also to be treated as "principal" and the amount so adjudged is to be taken as "principal" for granting future interest. The expression "principal sum adjudged" is to be distinguished from the "principal sum advanced". The "principal sum adjudged" means the amount which the court determines after adjudicating upon the rights of the parties. The interest accrues on this amount and not on the original amount advanced. Where interest was payable at monthly rests, when default was once made by the defendant on the occasion of the first rest, the interest will sunk into principal and the aggregate amount (principal and interest) was to be treated as a principal for the next month and so on and so forth.

24. In our considered view, trial Court erred in taking the amount of Rs.5,50,000/- which was the amount advanced as 'principal amount adjudged'. As pointed out earlier, as per the contract bank compute interest with quarterly rests. After the quarter that interest was added to the last balance and that amount was treated as "principal sum" for computing the interest for the next quarter and so on. While so, computing interest with quarterly rest interest *pendente lite* and the subsequent interest ought to have been awarded on the amount of Rs.22,94,072.29 and not on the amount advanced i.e. Rs.5,50,000/-.

25. Trial Court awarded interest *pendente lite* at the rate of 12% p.a. and subsequent interest at the rate of 6% p.a. Award of interest *pendente lite* as well as future interest is perverse and unsustainable. Trial Court was not at all justified in awarding future interest at 6% p.a. on Rs.5,50,000/-.

26. Under Section 34 of C.P.C., award of interest from the date of suit to the date of decree is entirely discretionary. So far as interest *pendente lite*, it should be at the rate agreed unless there are compelling and inescapable reasons to the contrary. Sec.34 C.P.C. reads as under:-

"S.34. Interest - (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree,

order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, (with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum) from the date of the decree to the date of payment, or to such earlier date as the court thinks fit:

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I - In this sub-section "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970

Explanation II - For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest (on such principal sum) from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

Section 34 of CPC leaves it to the discretion of the Court as to what interest is to be decreed by way of *pendente lite* interest. So far as future interest or further interest is concerned, that too is also left entirely to the discretion of the Court, but subject to a limit of 6%. However, the added proviso would remove the limit to the future interest arising out of a commercial transaction. But, the proviso does not take away the discretion left to the Court, nor does it limit the scope of exercise of such discretion. Grant of interest upto the limit of contractual rate is in discretion of the Court. Court cannot grant higher rate of interest than what was contracted between the parties even *pendente lite*. Even though interest *pendente lite* is a discretion of the Court, discretion has to be judiciously exercised. Exercise of discretion depends on many facts including the fact that the amount decreed was in respect of the liability arising out of the commercial transaction. In commercial transactions by public financial institutions, the contractual rate of interest should be the rule and departure a rare exception. In a suit for recovery of money from industry or

commercial concern, it will not to be inequitable to award interest at the agreed rate. In respect of commercial transaction, Plaintiff bank is entitled to *pendente lite* interest at the agreed rate.

27. Trial Court reduced the interest both *pendente lite* and future. In our considered view, there is no proper exercise of discretion by the trial Court under Section 34 of CPC. Loan was obtained by the Defendants 1 to 3 for their commercial transaction. Trial Court ignored the fact that it was commercial transaction. In our considered view, the exercise of discretion in awarding future interest at the rate of 6% p.a. on Rs.5,50,000/- is perverse and cannot be sustained. Where the relationship between the parties was not merely that of lender and borrower but there was an agreement similar to the cash credit arrangement with the Bank, the claim for interest was reduced from 18% to 12% p.a. which was the Bank rate of interest at that time [See AIR 1997 SC 1219 (Mahendra Singh Jaggi v. Dataram Jagannath)].

28. The present suit has been pending for quite some time. Applying the ratio of the above decision, interest *pendente lite* is reduced from 17.5% p.a. to 12% p.a. simple interest from the date of plaint [30.04.1987] till this date. The simple interest at 12% is payable on Rs.22,94,072.29 from the date of the suit [30.04.1987] till the disposal of the Appeal by the High Court and the future interest is payable on Rs.22,94,072.29 at the rate of 7.5% p.a. from this date till the date of realisation.

29. Case of Plaintiff is that as security for the loan, Sundarambal has created equitable mortgage of 'B' schedule property and 4th Defendant-Apparsamy created equitable mortgage over 'C' schedule property. For creating equitable mortgage, Sundarambal had executed Ex.A26-letter confirming deposit of title deeds infavour of Plaintiff bank. 4th Defendant executed Ex.A22-letter extending equitable mortgage created over 'C' schedule property [Balaji theatre, Pondicherry] infavour of Plaintiff bank. Trial Court dismissed the claim of preliminary decree of mortgage in respect of 'B' schedule property. 'C' schedule property is described in the plaint as Vacant site situate in Ozhugaria commune saram village R.S.No.97/14, Cadastre No.1552 Paimash No.1394, 1397 extent 1 Kany 40 Ku 8/16 with boundaries thereon. Case of 4th Defendant is that he never mortgaged 'C' schedule property infavour of Plaintiff bank in any other transaction or the suit transaction. According to 4th Defendant, Plaintiff bank has not produced any material to show that 4th Defendant has created mortgage over 'C' schedule property for the suit transaction. Further case of 4th Defendant is that the mortgage created in respect of one transaction cannot be extended in respect of another transaction.

30. 4th Defendant had already deposited his title deeds in respect of 'C' schedule property for another loan transaction. Under Exs.A22-letter [27.02.1984], 4th Defendant had extended the said equitable mortgage for the loan transaction of Defendants 1 to 3. Ex.A22 reads as under:-

"I have deposited with you on 6.12.78 the title deeds relating to my landed property and the building there upon, now known as Balaji Theatre, situated at Kamaraj Salai, Sithangudisai, Pondicherry with an intent to create equitable mortgage to secure the overdraft/cash credit/loan/co.acceptance of bills/guarantee facilities extended by you to M/s.Balaji Theatre to the extent of Rs.28.82 lacs.

I am aware that M/s.Lucky and Co., 17, Paikadai Lane, Pondicherry are enjoying a Cash Credit facility of Rs.5.50 lacs with you, for their retail trade in Eversilver goods. I hereby undertake to stand as a guarantor for the said Cash Credit facility extended by you to M/s.Lucky and Co., for which purpose I have executed the necessary document. I am also aware that the debits payable by M/s.Lucky and Co., to you is Rs.1258272.50 (Exclusive of interest from 26.12.83).

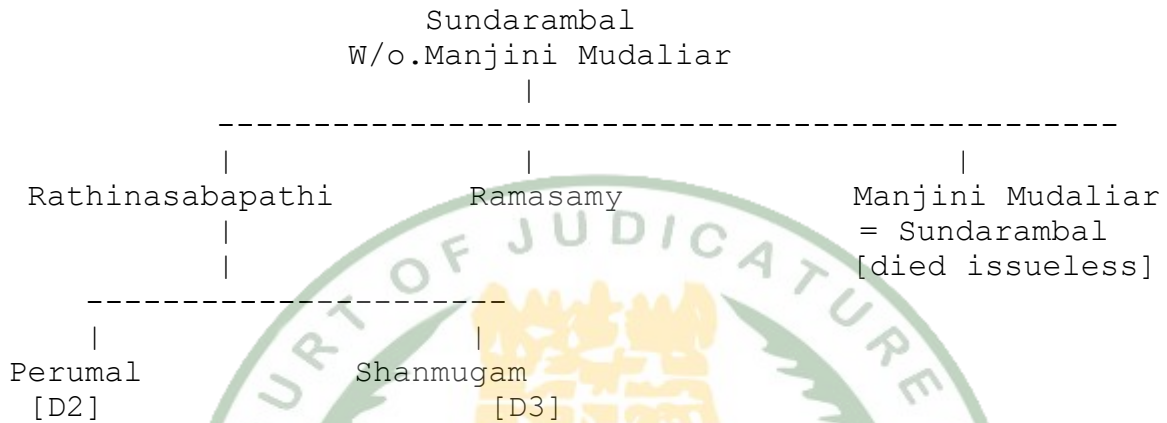
As already agreed with you, I confirm that the title deeds so deposited by me shall continue to be held by you also as security for the advance made by you to M/s.Lucky and Co., until the dues payable by them are liquidated in full." [Underlining added]

The contents in Ex.A22-letter clearly manifests the intention of 4th Defendant to create mortgage over 'C' schedule property for the loan transaction of Defendants 1 to 3. Trial Court totally ignored Ex.A22-letter. Ex.A22-letter of confirmation creating equitable mortgage over 'C' schedule is a banker's evidence which the trial Court was not justified in ignoring the same. Trial Court was not right in negating the Plaintiff bank's claim to pass preliminary mortgage decree on 'C' schedule property. Since, 4th Defendant extended the mortgage over 'C' schedule property by executing Ex.A22-letter, preliminary decree for mortgage is passed in respect of 'C' schedule property.

31. Coming to 'B' schedule property, case of Plaintiff bank is that Sundarambal stood as a guarantor for the loan advanced to Defendants 1 to 3 and with an intention to create equitable mortgage over 'B' schedule property, Sundarambal had deposited her title deeds and also executed letter of confirmation [Ex.A26]. Trial Court negated Plaintiff bank's claim for passing the mortgage decree on 'B' schedule property on puerile grounds - (i) Plaintiff bank has not adduced cogent evidence and that there was no intention

on the part of Sundarambal to create any equitable mortgage in respect of 'B' schedule property; (ii) Sundarambal died in July 1987 and even though plaint was filed in April 1987, she was not impleaded as party.

32. Sundarambal is related to Defendants 2 and 3 as under:-



Exs.A23 to A25 are the original documents of title deposited by Sundarambal with an intention to create equitable mortgage over 'B' schedule property. Confirming the deposit of title deeds and manifesting her intention to create equitable mortgage, the said Sundarambal had also executed Ex.A26-letter of confirmation. By a reading of Ex.A26-letter of confirmation coupled with deposit of title deeds Exs.A23 to A25 [Ex.A23 is the Partition deed [06.1.1940] among Rathnasabapathy, Ramasamy and Manjini. Ex.A24 is the sale deed [22.11.1958] executed by Nadesa Mudaliar and others infavour of Sundarambal. Ex.A25 is the mortgage deed [05.04.1971] executed by Sundarambal infavour of Sulochana ammal], leads to inescapable conclusion that Sundarambal had deposited the title deeds with an intention to create mortgage over 'B' schedule property. The reasoning of the trial Court that there was no cogent evidence to show that Sundarambal had intention to create equitable mortgage ignores the cogent documentary evidence produced by the Plaintiff bank. Sundarambal died in July 1987. Plaint was filed on 30.04.1987 and the same was returned for rectification of certain defects on 23.6.1987. When the plaint was represented, the gap in the plaint averment was filled up stating that Sundarambal died in July 1987. Trial Court faulted the Plaintiff bank for filling up the plaint with a date later to April, 1987. Saying that Plaintiff bank has not come to the Court with clean hands and its claim over 'B' schedule property is misleading, trial Court observed as under:-

" ... When the plaintiff has filed the suit before this court as early as 30.4.1987 how could the plaintiff aver in the plaint that Sundarambal died in July 1987 subsequently after the return, it would be acceptable if the plaintiff

had filled up with a date prior to April 1987 or else, he should have mentioned Sundarambal as a defendant in the suit. Having omitted to implead Sundarambal as a defendant in the suit and having filed the suit before this Court as early as 30.4.1987 averring that Sundarambal died in July 1987, it only goes to conclude that the plaintiff has not come before this court with clean hands and the plaintiff's claim over the 'B' schedule property is only misleading. ..."

33. Admittedly, there is no dispute that plaint was presented on 30.04.1987 and returned on 23.6.1987 and Sundarambal died in July 1987. Ofcourse, Plaintiff had filled up the plaint averring in the plaint presented on 30.4.1987 that Sundarambal died in July 1987. Any such lapse is only a procedural and cannot be the reason for brushing aside Ex.A26 confirmation letter. In 1992-2-LW 110 [*M.Ranka v. Hon'ble Mr. Justice P.S.Mishra, High Court and another*], the Full Bench of this Court has observed that there are four stages: (1) Presentation, (2) Filing, (3) Admission, and (4) Final hearing. Whenever any proceeding is presented, the Registry/Office enters the same in the Stamp Register or General Diary. The serial number of the proceeding represents the number of the proceeding presented in the year. The plaint returned on 23.6.1987 and represented by filling up the gap was in the initial stage of presentation. It cannot be said that it was a serious lapse on the part of Plaintiff bank so as to criticise the Plaintiff bank that it has not come to the Court with clean hands. More so, to negative the Plaintiff's claim for mortgage decree in respect of 'B' schedule property.

34. As pointed out earlier, plaint was returned and represented. In other words, it was in the first stage of presentation when the same was returned for rectification of certain defects, certainly, the corrections could be made. Ofcourse, in the plaint averments it ought to have been made explicit that plaint was presented as early as 30.04.1987 and before representation in the interregnum period, Sundarambal died in July 1987. But the omission to make such averment cannot be the reason for disallowing the mortgage decree.

35. In (1997) 9 SCC 688 [*Hanamanthappa and another v. Chandrashekharappa and others*], plaint was presented and returned for presentation to proper Court having territorial jurisdiction. After making certain amendments in the plaint, it was represented it in proper Court. In the facts and circumstances of the case, the Supreme Court held that it is not always necessary for the plaintiff to seek amendment of the plaint under Order VI, Rule 17 CPC. At best it can be treated to be a fresh plaint and the matter can be proceeded with according to law. Applying the ratio of the above

decision, we are of the view that trial Court was not justified in negating the Plaintiff's mortgage decree in respect of 'B' schedule property.

36. Sundarambal died issueless. Defendants 2 and 3 are the brother's sons who are the Clause-II legal heirs. Exs.A24 and A25 are the documents of title deposited by Sundarambal and Ex.A26 is the letter of confirmation for creating equitable mortgage over 'B' schedule property. Since, Sundarambal had deposited the title deeds with clear intention to create equitable mortgage over 'B' schedule property, preliminary decree for mortgage is passed in respect of 'B' schedule property also.

37. Upon analysis of materials on record, we are of the view that trial Court adopted erroneous approach in reducing the suit claim to Rs.14,97,833.14. Trial Court was also not right in awarding interest on the "principal sum adjudged". Trial Court fell in error in awarding future interest on the "principal sum advanced". Trial Court ignored the evidence and conduct of parties and erred in negating the decree for mortgage. Conclusion of the trial Court are to be modified and preliminary decree for mortgage is to be passed on 'B' and 'C' schedule properties and Point Nos.4 to 6 answered accordingly.

38. In the result, the decree and judgment of the trial Court is modified and the Appeal is allowed. Defendants 1 to 4 are held liable to pay Rs.22,94,072.29 together with interest at the rate of 12% p.a. on Rs.22,94,072.29 from the date of plaint [30.04.1987] till this date and thereafter at 7.5% p.a. on Rs.22,94,072.29 till the date of realisation. Defendants 1 to 4 are also held liable to pay suit costs as well as costs in the Appeal. Preliminary decree for mortgage is passed in respect of 'B' and 'C' schedule properties. Personal decree against Defendants 1 to 4 is also passed in the event of the proceeds of the suit 'B' and 'C' schedule properties not being sufficient to satisfy the decree fully. Time for payment three months.

Sd/

Asst.Registrar

/true copy/

Sub Asst.Registrar

bbr

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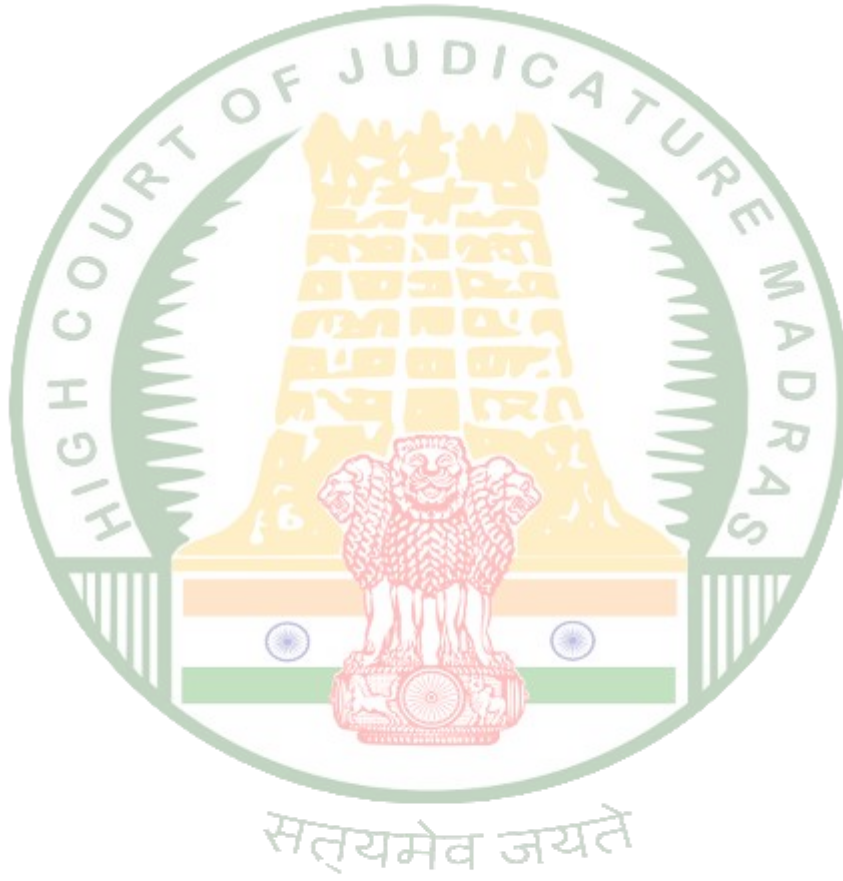
The Principal Subordinate Judge,
Pondicherry.

+1cc to M/s. Srinath Sridevan, Sr 56245

+1cc to Mr.T.R.Rajaraman, Sr 55840

MBS (CO)
km/27.9.

A.S.No.544/1997



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