THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

And

THE HON'BLE SRI JUSTICE S.RAVI KUMAR

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APPEAL SUIT No.358 of 2002

JUDGMENT: (per Hon'ble Sri Justice S.Ravi Kumar)

This appeal is preferred against judgment dated 21.07.2001 in O.S.No.9 of 1997 on the file of the III Additional District Judge, Vijayawada whereunder suit filed by plaintiff-bank on the basis of equitable mortgage is decreed and a preliminary decree was passed against the defendants. Aggrieved by the same first defendant preferred the present appeal. Brief facts leading to this appeal are as follows:

First defendant opened current account in his trade name on 17.05.1985 with the plaintiff-bank at Vijayawada and operated the said account till 16.08.1985 and a credit balance of Rs.43,478.02 ps was found due by defendants under the said current account of the first defendant. On the request of first defendant several facilities were granted to him under separate accounts in pursuance of the terms and conditions of the sanction order for which defendants 2 and 3 stood as guarantors and separately executed two letters of guarantee on 12.08.1985 agreeing to stand as guarantors for the amounts payable to first defendant by the plaintiff-bank and delivered those letters. Under the letters of guarantee defendants 2 and 3 took the liability of first defendant to pay Rs.13,00,000/- with interest at 17.5% p.a. to plaintiff-bank with quarterly rests. First defendant executed a promissory note for Rs.2,00,000/- on the same day i.e. 12.08.1985 in favour of plaintiff-bank undertaking to repay the amount at the contract rate of interest of 17.5% p.a. with quarterly rests and executed a letter hypothecating stock in trade in favour of plaintiff-bank. First defendant also executed another promissory note for Rs.4,00,000/- on the same day in favour of plaintiff-bank undertaking to repay the amount with interest at 7.5% over the Reserve Bank of India rate with a minimum of 17.5% p.a. with quarterly rests either to plaintiff or its order on demand and first defendant in his trade name used to draw bills against his customers through the plaintiff-bank and used to withdraw the amounts by discounting the said bills and crediting the proceeds in his open cash account. First defendant, with an intention to create security for payment of amounts payable to plaintiff-bank, created equitable mortgage along with D2 and D2 on 24.07.1985 and on 16.08.1985 by delivering their respective title deeds relating to their respective properties situated in Vijayawada to plaintiff-bank. All the defendants separately executed letters in token of deposit of title deeds and delivered them on 24.07.1985 and 17.08.1985 to plaintiff-bank. Defendants requested the plaintiff-bank to release one of the properties of second defendant and also property of the third defendant from mortgage on the ground that a sum of Rs.2,45,000/- will be credited as part-payment in the open credit cash account of first defendant and accordingly plaintiff-bank returned title deed to the second defendant under voucher on 19.12.1987. The title deeds relating to property of the third defendant deposited with plaintiff-bank were returned to third defendant on 21.12.1987 but title deeds of defendants 1 and 2 relating to 'B' and 'C' schedules are still with the bank and the suit is filed basing on mortgage created on 'B' and 'C' schedule properties as the bank has got charge on these properties.

Appellant herein resisted the claim of plaintiff-bank denying all plaint allegations and contended that he never created any equitable mortgage in favour of plaintiff-bank and those title deeds are furnished to the bank to show his solvency in respect of suit schedule properties and the alleged mortgage on 24.06.1985 and 16.08.1985 is not true and correct. Appellant also disputed execution of letters dated 24.06.1985 and 16.08.1985 for delivering the title deeds in respect of 'B' and 'C' schedule properties in favour of plaintiff-bank. It is further contended that plaintiff-bank obtained signatures on blank printed forms and those documents must have been used for the purpose of suit and those documents are not binding the defendants.

On these pleadings trial Court framed the following issues:

1. Whether the account copy filed along with the plaint is true and

valid?

2. Whether the agreement dated 12.08.1985 is not true nor valid nor binding on first defendant?

3. Whether the first defendant never agreed to pay interest at 17.5% p.a. with quarterly rests?

4. Whether the interest claimed in the suit is excessive, usurious, penal and unenforceable?

5. Whether the calculation of interest as claimed in the plaint is correct?

6. Whether the first defendant is not liable to pay Rs.9,09,423.45 ps under open cash credit account and bill discount account to plaintiff?

7. Whether the letter of hypothecation executed by D1 is not true and correct?

8. Whether the suit is bad for mis-joinder of parties?

9. Whether the equitable mortgage created by defendants by depositing their title deeds is not true and valid?

10. Whether the title deeds deposited with the plaintiff-bank were made under the circumstances narrated in para 9 of the written statement of D1?

11. Whether D3 is not a surety of D1 having executed a letter of guarantee dated 12.08.1985?

12. Whether the understanding pleaded in para 12 of written statement of D1 is true, legal and valid?

13. Whether D2 and D3 signed the letters of guarantee in blank forms?

14. Whether plaintiff is not entitled to the suit claim?

15. To what relief?

On behalf of the plaintiff, three witness were examined and 38 documents were marked and on behalf of the defendants one witness was examined and three documents were marked and, on an overall consideration of oral and documentary evidence, trial Court disbelieved the version of defendants and decreed the suit for Rs.9,09,423.45 ps with interest at 17.5% p.a. with quarterly rests on

Rs.6,93,607.35 ps from the date of the suit till the date of redemption and thereafter at 6% p.a. till the date of realization. Trial Court granted six months' time for redemption.

Learned counsel for the appellant submitted that when the bank released mortgage in respect of 'B' schedule property it cannot use the same property as mortgage in this suit unless there is a separate document from the defendants agreeing to continue 'B' schedule property as a mortgage for recovery of the suit amount and further contended that the rate of interest at 17.5% granted by the trial Court is usurious and the same is to be reduced. To support his argument he relied on two decisions of the Supreme Court in **Punjab and Sind Bank v. Allied Beverage Company Private Limited and others Kedarnath Lal (dead) by his legal representatives and another v. Sheonarain and others.**

Now from the submissions and material the points that would arise for our consideration in this appeal are:

1. Whether the mortgage created by appellant in favour of plaintiff-bank is true and correct and binding on the appellant?
2. Whether the rate of interest granted by the trial Court at 17.5% p.a. is usurious as contended by the appellant?
3. Whether the trial Court committed any error in appreciating the evidence on record?

Point No.1: As already referred above, it is the specific contention of the appellant that the title deeds are not deposited with the plaintiff-bank with an intention to create equitable mortgage, but they are deposited only to show solvency. This contention was raised before the trial Court also, and learned trial Judge, on considering the evidence on record, particularly evidence of D.W.1 and P.W.2, disagreed with the contention of the defendants that the title deeds are deposited with plaintiff-bank to prove their solvency. The Accountant in the plaintiff-bank at the time of transaction was examined as P.W.2 and he categorically deposed that D2 and D3 stood as guarantors for the loan sanctioned in favour of D1 and besides personal guarantee they also deposited title deeds of their properties with the plaintiff-bank. He also deposed that D1 also deposited his title deeds with an intention to create equitable mortgage towards facilities extended to him by the plaintiff-bank. Though the appellant cross-examined P.W.2 at length, except making suggestions, nothing could be elicited from him to support his plea that he has not created any mortgage in favour of the bank over the plaint 'B' and 'C' schedule properties. Appellant herein, who is examined as D.W.1, deposed in his evidence that he gave a letter dated 25.06.1985 showing the list of documents that are deposited with the bank which are in respect of 'B' schedule property and the said letter is marked as Ex.A25. He also deposed that Exs.A.26 to A.30 are certified copies of sale deeds. It is clear from the material on record that plaintiff-bank filed a separate suit against the appellant herein before Debt Recovery Tribunal, Bangalore and all the original documents i.e. original title deeds are filed in the proceedings before the Debt Recovery Tribunal, Bangalore and certified copies of those documents are marked before the trial Court in this suit. An objection was raised before the trial Court with regard to marking of copies of documents but the objection was overruled on the ground that they are certified copies and originals are with the DRDA, Bangalore which fact is not disputed. Along with those title deeds defendants also produced Encumbrance Certificate dated 16.08.1985 and the corresponding link documents i.e. Will dated 12.06.1983 which are marked as Exs.A.31 to A.37. From the evidence of D.W.1 it is clear that he deposited all these documents before the bank only with an intention to create equitable mortgage and admittedly these documents were not returned to the appellant unlike the documents that were returned to guarantors–D2 and D3.

One of the contentions of the learned counsel for the appellant is that while releasing the mortgage plaintiff-bank has to obtain separate letter or document from the defendants for continuation of mortgage in respect of this debt also and without obtaining such document the plaintiff cannot enforce the mortgage against the appellant. To substantiate his submission learned counsel for the appellant relied on **Kedarnath Lal**'s case (2nd cited)**.** In that case while releasing the mortgage it was clearly recorded in the mortgage deed that the properties were released and they cannot be made liable for any other debt of the Society and in those circumstances the Honourable Supreme Court held that when such specific recital is there the same mortgage cannot be used by the Society for the subsequent debt. In our case there is no such mortgage deed nor any letter to the effect that the title deeds were given back to D2 and D3 with condition that plaintiff-bank cannot proceed, in respect of other debts due to the bank. Therefore the decision (2nd cited) relied on by the learned counsel for the appellant is no way applicable to the facts of this case. Further this plea was taken for the first time here in the appeal and no such plea was taken before the trial Court. This contention is purely a factual aspect and appellant cannot take a new plea at appellate stage in respect of factual aspect. Therefore contention of appellant is not tenable and the point is held against appellant.

Point No.2: Next contention of the appellant is that trial Court granted interest at 17.5% p.a. and the same is usurious and it is to be reduced. Learned counsel relied on judgment in **Punjab and Sind Bank** (1st cited). He has drawn our attention to paragraph No.19 of the said decision wherein principles formulated in **Canara Bank of India v. Ravindra** (2002 (10) SCC 367) were extracted. The principles are as follows:

> "(1) Though interest can be capitalized 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 capitalized. 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 capitalized. It will be opposed to public policy.
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> (2) Novation, that is, a debtor entering into a fresh agreement with a 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 the 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 legitimatizes 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 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the 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 the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. The 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 the 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.
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> (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.
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> (8) Award of interest *pendente lite* and post-decree is discretionary with the court as it is essentially governed by Section 34 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."

From the above referred principles it is clear that the Court has discretion under Section 34 of the Code of Civil Procedure to *de hors* the contract rate of interest but such discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner. Here, admittedly, the contract rate of interest is 17.5% p.a. with quarterly rests. This rate of interest is not specifically disputed by the appellant in the written statement except pleading that the rate of interest is usurious. Having pleaded that the rate of interest is usurious, it is for the defendant to show as to how it is usurious or contrary to the existing market rate. Admittedly the amount was borrowed for commercial purpose and the plaintiff-bank is governed by the Reserve Bank of India regulations for collecting rate of interest. Though the Court has got discretion to reduce the contract rate of interest but such discretion cannot be exercised without any material evidence. In this case the defendant, except contending that the interest charged by the bank is usurious, failed to substantiate the same with any acceptable and convincing evidence. Even D.W.1 did not whisper anything in his evidence as to the usurious nature of the interest. Therefore the contention of the appellant, with regard to rate of interest, cannot be accepted. The appellant even urged this point before the trial Court and the trial Court, on considering the decision of the Supreme Court reported in **N.M.Veerappa v. Canara Bank** (AIR 1988 SC 1101), negatived the objection of the appellant with regard to the rate of interest. We do not find any illegality in the judgment of the trial Court and the learned trial Judge has rightly accepted the contract rate of interest and granted the same only from the date of the suit till the date of redemption and subsequent interest was granted only at the rate of 6%. Therefore this point is also held against appellant.

Point No.3: The learned trial Judge has elaborately discussed both oral and documentary evidence and came to a right conclusion. We do not find any wrong appreciation of evidence or wrong application of law by the trial Court on any of the material aspects. Every issue is dealt with by considering the evidence of both parties and trial Court rightly decreed the suit. For these reasons, we are of the considered view that there are absolutely no grounds to interfere with the findings or the decree passed by the trial Court in favour of the appellant.

In the result Appeal Suit is dismissed with costs. As a sequel to the disposal of this Appeal Suit, Miscellaneous Petitions, if any, pending, shall stand dismissed.

RAMESH RANGANATHAN, J

S.RAVI KUMAR, J

06th October, 2015.

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