**IN THE HIGH COURT OF JUDICATURE AT MADRAS**
**RESERVED ON : 28.11.2016**
**PRONOUNCED ON : 30.11.2016**

Coram:

The Hon'ble Mr. **Justice M.SUNDAR**

**C.S.No.147 of 2007**

Sri.Suresh Bafna
Prop. M/s.Mansi Mercantile Co.,
No.228, Mulla Sahib Street,
Sowcarpet, Chennai - 600 079.
… Plaintiff

Vs.

1.R.Krishnaji Reddy
2.K.Kalpana Reddy … Defendants

Suit filed under Order VII Rule 1 of O.S.Rules r/w Order XXXVII Rule 1 of CPC.

For Plaintiff :: Mr.M.Aravind Subramanian

For Defendant :: No appearance

**JUDGMENT**

1. Suresh Bafna, carrying on business as sole proprietor in the name and style of 'Mansi Mercantile Co.', is the plaintiff. There are two defendants in the suit. Defendants are spouses. The defendants have borrowed a sum of Rs.7 Lakhs in all from the plaintiff, executing demand promissory notes and have defaulted in repayment is

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the case of the plaintiff in a nutshell. This suit has been filed by the plaintiff as a summary suit under the provisions of Order XXXVII of Code of Civil Procedure, 1908 (hereinafter referred as 'CPC' for brevity) and the relevant portions of the plaint averments read as follows:

> The first defendant borrowed a sum of Rs,7,00,000/- from the plaintiff on 01.04.1998 and 08.06.1998 and executed 4 promissory notes as details hereunder promising to repay the same with interest thereon at 2.5 per cent per mensem on demand.
>
> | | |
> |---|---|
> | 01.04.1998 | Rs.1,00,000/- |
> | 01.04.1998 | Rs.1,00,000/- |
> | 08.06.1998 | Rs.2,50,000/- |
> | 08.06.1998 | Rs.2,50,000/- |
>
> The 2nd defendant, who is the wife of the 1st defendant, has signed all the promissory notes and has also executed a letter of guarantee dated 10.06.1998 standing personal guarantee for the due repayment of the amount due under the said promissory notes.
>
> As on 07.08.2000, the amount due by the defendants became more than Rs.10 Lakhs with interest. The 1st defendant sold a property belonging to him at Nilangarai Village to the plaintiff to adjust the same

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against the amount due and payable. After adjusting the sum of Rs.2,00,000/-, a sum of Rs.8,66,296/- was due as on 19.08.2000 and the plaintiff demanded the same. The defendants have been promising to pay the balance by sale of the house property but they have been delaying the same. The 1st defendant acknowledged the liability on 08.08.2000, 31.03.2003 and 31.03.2004. At his request, the interest was reduced from 08.08.2000 to 2 per cent per annum.

A sum of Rs.33,30,384/- is due and payable by the defendants to the plaintiff as per Memo of Calculation filed herewith as on 31.07.2006.

2. On the above submissions, plaintiff has laid the suit with a prayer for a decree against the defendants jointly and severally for a sum of Rs.33,30,384/- together with interest at the rate of 36% per annum on Rs.7 Lakhs from the date of plaint till the date of realisation. There is also a prayer for costs of the suit.

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3. The defendants were duly served, but they did not enter appearance and contest the suit. Therefore, the defendants were set ex-parte on 25.06.2010. Thereafter,

ex-parte evidence was recorded, documents marked and ultimately the suit was decreed on 19.10.2010.

4. Thereafter, the defendants came to Court and filed an application vide Appl.No.5213 of 2010 with a prayer to set aside the above said ex-parte decree. Conditional order was passed on the said application, condition was complied with and therefore, the ex-parte decree was set aside by this Court vide order dated 21.03.2016.

5. In the above said circumstances, the learned counsel for both the defendants filed a Memo dated 26.10.2016, reporting no instructions. The Memo reads as follows:

> The counsel for the defendant states that through his letter dated 27.04.2016 sent under registered post he had called upon both the defendants to take back the above case bundle along with the change of vakalat in the above suit as they are not co operating to conduct the case and he would be giving no instructions on their behalf in the above case. The above registered post sent to both the defendants were returned with an endorsement "Unclaimed". Subsequently also he had send the letter dated 11.08.2016 addressed to the counsel for plaintiff in the above suit requesting him to send the copy of the suit plaint directly to the

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defendants as he is reporting no instructions in the matter on behalf of the defendants. A copy of the said letter dated 11.08.2016 was also sent to both the defendants under registered post but they were also returned with an endorsement "Unclaimed".

The copies of the letters dated 27.04.2016 and 11.08.2016 and the returned registered post send to both the defendants are filed along with this memo for reference.

In view of the aforesaid facts and circumstances the counsel for defendants report no instruction in the above suit for both the defendants and this Hon'ble Court may be pleased to record this memo and pass suitable orders and thus render justice.

6. Based on the above said Memo filed by the counsel for defendants, this Court on 26.10.2016 gave directions to be set down the main suit for ex-parte evidence. Proceedings of this Court dated 26.10.2016 read as follows:

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1. Mr.Arvind Subramanaian, learned counsel represents that he has filed change of vakalath on behalf of the plaintiff, but his name is not reflected in the cause list today. Registry is directed to verify if the

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vakalath is in order and print his name.

2. Be that as it may, Mr.Nagu Sah, learned counsel for both defendants has filed a memo stating that there are no instructions from his client. To the Memo, he has also annexed the communications sent by Speed Post with acknowledgement due. The communications have been returned with the postal endorsement unclaimed. Therefore, it is to be construed that the noticees/addressees have refused to receive the envelope as they have not been chosen to claim the envelope. Under such circumstances, this Court is of the view that there is no need/necessity to send notice afresh to the defendants.

3. Based on by the above said memo, both the defendants are set ex-parte. The main suit is set down for ex-parte evidence. Post the matter before the learned Additional Master-IV for recording evidence on 10.11.2016.

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7. Pursuant to the above said proceedings of this Court dated 26.10.2016, ex-parte evidence was recorded before the learned Additional Master-IV on 10.11.2016. Plaintiff was examined as P.W.1 and Exs.P1 to P14 were marked. Ex-parte evidence of the plaintiff runs as follows:

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I am the plaintiff herein and as such I am well acquainted with the facts of the case. I have already filed my proof affidavit which was recorded on 24.06.2010 and the same proof affidavit was shown to me to verify the contents and I accept the contents mentioned in that proof affidavit and I have also gone through the documents which were marked earlier with the earlier proof affidavit and I rely upon the same documents which were marked earlier with the earlier proof affidavit and I rely upon the same documents for proving my case. The documents are remarked as below.

Ex.P1 is the original promissory note dated 01.04.1998 for a sum of Rs.1 Lakh executed by the first defendant in my favour.

Ex.P2 is the original promissory note dated 01.04.1998 for a sum of Rs.1 Lakh executed by the first defendant in my favour.

Ex.P3 is the original promissory note dated 08.06.1998 for a sum of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) executed by the first defendant in my favour.

Ex.P4 is the original promissory note dated 08.06.1998 for a sum of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) executed by the first defendant in my favour.

Ex.P5 is the original Guarantee letter dated 10/6/1998 given to me by the second defendant.

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Ex.P6 series (4 Nos.) is the original cheque dated 2/3/2000 issued by the second defendant in my favour for a sum of Rs.5 Lakhs which was dishonoured along with the dishonoured memo and the notice intimating the second defendant that the cheque has been dishonoured along with the acknowledgement card for the service of notice to the second defendant.

Ex.P7 Series (4 Nos.) is the original cheque dated 07/6/2000 issued by the first defendant along with the memo and the notice intimating the second defendant that the cheque has been dishonoured along with the acknowledgement card for the service of notice to the first defendant.

Ex.P8 is the original letter dated 05/07/2000 sent by the first defendant to me.

Ex.P9 is the original acknowledgement of debt by the first defendant after adjusting Rs.2 Lakhs towards the sale consideration for the land sold at Neelankarai.

Ex.P10 series (2 Nos.) is the original letter dated 19/8/2000 sent by me to the first defendant along with the postal receipt.

Ex.P11 series (3 Nos.) is the original cheque dated 31/10/2000 by the first defendant for a sum of Rs.9,34,000/- along with dishonoured memo and returned cover.

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Ex.P12 is the original acknowledgements of debt by the first defendant for a sum of Rs.16,17,356/- due to me as on 31/3/2003.

Ex.P13 is the Original acknowledgement of debt by the first defendant for a sum of Rs.20,05,521/- due to me as on 31/03/2004.

Ex.P14 series (3 nos.) is the original memo of calculation showing the amount due as on 31/03/2005, 31/03/2006 and 31/07/2006."

8. The deposition extracted supra, gives the details of each of the 14 exhibits that were marked.

9. When the suit was posted for arguments, learned counsel Mr.Arvind Subramaniam appeared on behalf of the plaintiff.

10. Pleadings, deposition and documents were perused. Learned counsel for plaintiff was heard.

11. Exhibits P1 to P4 are the four Promissory notes executed by the defendants for a total sum of Rs.7 Lakhs. Original Promissory Notes were marked. Ex.P5 is the Original Guarantee Letter. Cheques issued by the defendants for discharging their debts were dishonoured and the same have been marked as Ex.P6 series and Ex.P7 series. There is also an acknowledgement of debt by the defendants vide Ex.P9. All the other exhibits have also been perused.

12. The liability of the defendants has been

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proved by the plaintiff. However, with regard to the rate of interest which the plaintiff may be entitled to, it is necessary for this Court to go into the same. From the pleadings extracted supra, it will be clear that the plaintiff has admitted in the pleadings itself that the agreed interest which was 36% per annum on the date of borrowing was subsequently reduced to 2% per month with effect from 08.08.2000. In other words, the agreed rate of interest which was 36% per annum at the time of borrowing was admittedly reduced to 24% per annum with effect from 08.08.2000.

13. The prayer extracted supra would show that the plaintiff has claimed interest at the rate of 36% per annum on Rs.7 Lakhs from the date of plaint till the date of realisation. In the light of Section 34 of CPC, this Court is of the view that the plaintiff may not be entitled to interest at the rate of 36% per annum from the date of plaint till the date of realisation as claimed owing to the fact that there is nothing to show that this is a commercial transaction.

14. Section 34 of CPC may be usefully extracted hereunder and the same reads as follows:

> 34. Interest (1) Where and in so far as a decree is for the payment of money, the

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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 (5 of 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

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> decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.

15. Therefore, the suit is decreed in favour of the plaintiff holding that there shall be a decree against the defendants jointly and severally for a sum of Rs.33,30,384/- with interest at the rate of 36% per annum from the date of respective promissory notes to 07.08.2000. Thereafter, the interest will run at the rate of 24% per annum on Rs.7 Lakhs (all four demand promissory notes put together) from 08.08.2000, to the date of plaint which is 25.08.2006. From 25.08.2006 to the date of realisation the plaintiff will be entitled to interest on Rs.7 Lakhs at the rate of 6% per annum.

16. Considering the trajectory this litigation has taken namely, an ex-parte decree which was set aside and also considering the fact that ex-parte evidence was recorded twice over owing to the ex-parte decree being set aside, this Court holds that the plaintiff is entitled to costs of the suit.

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Suit decreed with costs on the above terms.

**Sd/M.S.J**

30.11.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/01.02.2017 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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