IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.02.2018

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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.1014 of 2007

Indian Bank,
rep. by its Zonal Manager,
G.T.Branch,
Madras. ..Plaintiff

..Vs..

1.Sri Ram Engineering Contractors

2.N.Rajagopalan

3.B.K.Ranganatha Naidu

4.S.Krishnamurthy

5.R.Kasi

6.Chaluvadi Sampoorna Rao

7.R.Santhanam ... Defendants

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Plaint filed under Order VII Rule 1 of Original Side Rules and Order XXXIV Rule 1, of Civil Procedure Code praying to pass a judgment and decree:

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a) for a sum of Rs.7,15,280.75 against the defendants limiting the liability of the 5th defendant to the extent of Rs.3,38,081.45 with further interest at the rate of 18.5% with quarterly rests on the aggregate sum (Principal, cost and interest) that may be fixed till date of redemption from the date of suit till realisation;

b) directing the defendants other than fifth defendant to pay the aforesaid sum mentioned in the prayer (i) before a date fixed by this Hon'ble Court failing which directing the sale of immovable property mortgaged to the plaintiff as described in Schedule 'A' and 'B' of the Plaint and credit the sale proceeds towards payment of the principal interest and costs;

c) directing that if the sale proceeds are insufficient for the amount due to the plaintiff for a personal decree against the defendants; and

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d) for the cost of the suit.

For Plaintiff : Mrs.Hemalatha Suresh
For Defendants : M.Chitra Gomathy for D-6

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J U D G M E N T

The suit is one for recovery of money based on mortgage by deposit of title deeds dated 06.05.1985 and 18.05.1985.

The plaint averments in brief are as follows:

2.The plaintiff is a Nationalised Bank, carrying on business in banking having one of its branches at George Town, Chennai. The 1st defendant is a Partnership Firm engaged in Engineering Consultancy and Contract Business. The 1st defendant represented by its Managing partner had approached the plaintiff for financial assistance. Initially, an overdraft facility of Rs.2,00,000/- was sanctioned on 02.05.1985, and the defendants 1 to 4 and 7 had executed a Demand Promissory Note for a sum of Rs.2,00,000/- in favour of the plaintiff's Bank agreeing to repay the same with interest at 6.5% over and above the official rate of the Reserve Bank of India with a minimum of 16.5% p.a. with quarterly rests. A letter of continuity was also executed by the defendants 2, 3, 4, and 7 on the same date. The defendants had also executed a stamped agreement dated 02.05.1985, confirming the names of the partners of the firm. The 5th defendant has guaranteed the repayment of the loan borrowed by the 1st defendant. As evidence of such guarantee, he had executed a deed of guarantee on 02.05.1985. The

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3rd defendant, on 06.05.1985, deposited with the plaintiff Bank the title deeds relating to some of his properties with an intention to create an equitable mortgage as additional security for the facilities availed by the 1st defendant firm. A memorandum of deposit of title deeds was also executed by the 3rd defendant on 11.05.1985, confirming that the deposit of title deeds was made with an intention to create a equitable mortgage. It is also claimed that over draft facility was subsequently enhanced to Rs.4,00,000/- from Rs.2,00,000/- at the request of the 1st defendant firm. The defendants executed a fresh set of documents which are as follows:-

1.Letter of renewal dated 17.05.1985 executed by the 2nd defendant as Managing partner of the 1st defendant firm along with the defendants 2 and 3.

2.Demand promissory note dated 17.05.1985 for Rs.4,00,000/- executed by the defendants 1 to 4.

3.Letter of continuity dated 17.05.1985 executed by the defendants 1 to 4.

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3.The 6th defendant as guarantor for repayment of the loan availed by the 1st defendant on 17.05.1985, and executed a deed of guarantee on the same date. On 18.05.1985, the 6th defendant had deposited title deeds relating to the properties set out in schedule 'B' with an intention to create a Equitable Mortgage over the said property as additional security. A memorandum of deposit of title deeds was also executed by the 6th defendant on 25.05.1985. The defendants 1 to 4 failed and neglect to pay the liability despite repeated reminders. Therefore, the plaintiff Bank was forced to issue a legal notice on 20.11.1986 calling upon the defendants to pay the money due under the mortgage. The 3rd defendant by a letter dated 15.12.1986 acknowledges his liability and promised to repay the same within a month from 15.12.1986. But, he failed to keep up the promise. The 6th defendant issued a reply through his counsel questioning the creation of Equitable Mortgage. It is also stated that the 5th defendant being the guarantor is liable to an extent of Rs.3,38,081.45 being the amount due with interest on Rs.2,00,000/-.

4.On the above contentions, the plaintiff sought for recovery the amount due, and the present suit was filed for recovery of

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Rs.7,15,280.75 limiting the liability of the 5th defendant to an extent of Rs.3,38,081.45 with further interest at the rate of 18.5% p.a. with quarterly. The liability of the 5th defendant was restricted to Rs.3,38,081.45 since he had executed guarantee only for Rs.2,00,000/- and the same was not renewed, when the over all limit was enhanced to Rs.4,00,000/- from Rs.2,00,000/-.

5.The 6th defendant alone contested the suit. The defendants 1 to 5 remained ex-parte. The 6th defendant in his written statement would contend as follows: The 6th defendant signed a letter of guarantee, at the request of the partners of the 1st defendant firm. It is stated that he only obliged the defendants 2 to 5 by giving a letter of Guarantee and depositing the title deeds as security. It is claimed that the guarantee could be enforced against the 6th defendant only to the extent of Rs.4,00,000/- as the liability of the 6th defendant was limited to that amount. It is also claimed that the liability of the 6th defendant cannot be enforced until the plaintiff has exhausted the remedies as against the defendants 1 to 4 as well as the 5th defendant. It is also claimed that, the interest claim is high and therefore, this Court in exercise of its powers under Section 34 of the Code of Civil Procedure

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to modify the rate of interest.

6.Upon the above said pleadings, the following issues were framed by this Court:

1.Whether the plaintiff is entitled to claim the contractual interest?

2.Whether the defendants are liable to pay the claim as prayed for in the plaint?

3.Whether the liability of the 6th defendant is restricted to Rs.4,00,000/- as alleged in the written statement?

4.Whether the plaintiff is entitled to claim the amount due from the 6th defendant only after exhausting the remedies available against the other defendants?

5.Whether the 6th defendant is liable to discharge the suit claim as a guarantor?

6.To what others reliefs, the parties are entitled to?

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7.Before dealing with the issues that are framed, I deem it fit to narrate the chequered history of this suit. The suit was originally filed in this Court as early as on 02.05.1988 along with an application for leave to sue as mortgaged property was situated outside the jurisdiction of the Court. Even before numbering, the suit was transferred to the City Civil Court in the year 1998, and it appears that the suit was returned by the City Civil Court on the question of jurisdiction since the property was situated outside the jurisdiction of the City Civil Court, thereafter, the suit had been re-transfered to this Court and numbered finally in the year 2007, nearly after 19 years, after the filing of the suit. During trial, the Manager of the plaintiff's Bank was examined as PW-1 and Exs.P-1 to P-21 were marked. On the side of the 6th defendant, she was examined as DW-1, and no documentary evidence was filed.

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Issue Nos. 2 & 3:

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8.The defendants 1 to 4 are the borrowers. The 5th and 6th defendants are the guarantors. The defendants 1 to 4 have not chosen to dispute the claim of the plaintiff. The 6th defendant who had filed a written statement has also not disputed the borrowings or creation of

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the mortgages. His contention is that he could be made liable to the extent of Rs.4,00,000/- and that, the plaintiff has to exhaust its remedies against the defendants 1 to 5, before seeking recovery from the 6th defendant. Both the above defences are not permissible in the eye of law. Admittedly, the 6th defendant had executed a deed of guarantee marked as Ex.P-9. Under the said document, the 6th defendant as guarantor had guaranteed repayment of the loan borrowed by the defendants 1 to 4. The said guarantee deed dated 17.05.1985, does not limit the liability of the 6th defendant to the principal sum borrowed. Clause 2 of the document clearly states that the guarantor guaranteed to pay the Bank, on demand, all principal interests, costs and expenses due to the Bank from the borrowers. Therefore, the claim of the 6th defendant is that he is liable only to the tune of Rs.4,00,000/- cannot be accepted. The memorandum of deposit of title deeds executed by the 6th defendant filed as Ex.P-21 shows that the 6th defendant had acknowledged that the deposit of title deeds on 18.05.1985 with the plaintiff Bank is with an intention to create a equitable mortgage as security for due payment of the overdraft facility of Rs.4,00,000/- extended to the 1st defendant. Therefore, the 6th defendant cannot now claim that he could be made

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liable only to the tune of Rs.4,00,000/-. Hence, issue nos.2 and 3 are answered in favour of the plaintiff to the effect that the defendants 1 to 6 are jointly and severally liable to pay the balance of the suit claim, the liability of the 5th defendant being restricted to a sum of Rs.3,38,081.45.

Issue Nos.4 & and 5 :

9.The 6th defendant would contend that the plaintiff's Bank can proceed against him only after exhausting his remedies against the defendants 1 to 5. The execution of the guarantee deed is admitted and the creation of mortgage by deposit of title deeds is also admitted. The fundamental principle of law is that the liability of the guarantor is co-extensive with that of the principal debtors. It is for the creditor to choose as to whether, it should proceed against the principal debtors or against the guarantors. If at all, the guarantor is made liable to pay the suit claim, it is always open to him to recover the monies from the principal debtors by invoking *Section 140 of Indian Contract Act, 1872,* which provides a remedy to a guarantor to recover the monies paid by him in his capacity as guarantor in discharge of the debts of the principal debtors. Therefore, there is no merit in the contention of the

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6th defendant that the plaintiff should be directed to proceed against the defendants 1 to 5, at the first instance and only after exhausting its remedy against the defendants 1 to 5, the plaintiff Bank can proceed against the 6th defendant. Hence, issue no.4 is answered against the 6th defendant in favour of the plaintiff. Inasmuch as the execution of the guarantee deed is admitted, in view of the answer for the issue nos.4 and 5 is also against the 6h defendant holding that he is liable to the suit claim in his capacity as a guarantor.

Issue No.1:

10.This issue relates to the payment of contractual interest as guaranteed. The suit was presented in 1988, and has remained un-numbered till 2007 nearly for 19 years. Though the suit was transferred to the City Civil Court, finding that the suit properties are outside the jurisdiction of the City Civil Court it was again re-presented and numbered in the year 2007. Therefore, the plaint remained an un-numbered cause for nearly 19 years from the date of its filing. I find a total callous attitude on the part of the plaintiff, in not getting the suit numbered from 1988 to 2007. The suit remained un-numbered nearly a period of 19 years. The defendants cannot be

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blamed for such inaction and negligence on the part of the plaintiff. They cannot be saddled with the liability for payment of interest during the said period. The plaintiff has claimed interest at 18.5% with quarterly rests from the date of suit till date of realisation. Considering the above all facts and the negligence on the part of the plaintiff in getting the suit numbered, I am of the view that the defendants cannot be saddled with the liability to pay the interest for the period from 2.05.1988, namely, the date of presentation of the plaint, till 06.04.2005, the date on which the plaint was returned by the City Civil Court for representation before this Court.

11.The learned counsel for the 6th defendant would rely upon the judgment of the Supreme Court in ***C.K.Sasankan .Vs. The Dhanalakshmi Bank Ltd.,*** reported in ***2009 (2) CTC 381 and*** contend that even in case of suits filed by the Bank for recovery of money Section 34 of the Code of Civil Procedure would apply and the Court can exercise discretion for granting interest at a lesser rate. The Hon'ble Supreme Court in the said judgment reported in ***2009 (2) CTC 381*** has observed as follows:

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"8.The quantum and rate of interest which the appellant in the present case is entitled to would be in accordance with the provisions of Section 34 of the Code. According to the provisions of Section 34 of the Code interest is to be awarded at a reasonable rate and on the principal amount. It is needless to point out that although the amount of interest from the date of filing of the suit till the date of the decree and thereafter till realisation is in the discretion of the Court as is confirmed by the use of the word 'may' but such discretion has to be exercised by the Court property, reasonably and on sound legal principles and not arbitrarily and while doing so the Court is also to consider the parameter, scope and ambit of Section 34 of Code.

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9.The aforesaid scope and ambit of Section 34 of the Code has been the subject of discussion in many cases of this Court. We are inclined to refer to the decision in ***Clariant International***

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Ltd. v. Securities & Exchange Board of India, *2004 (8) SCC 524, where it was held by this Court that the interest can be awarded in terms of an agreement or statutory provisions and it can also be awarded by reason of usage or trade having the force of law or on equitable considerations but the same cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefore, for which a written demand is mandatory. It was further held that in absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate and such interest is payable upon establishment of totality of circumstances justifying exercise of such equitable jurisdiction. It was also held that in ascertaining the rate of interest the Courts of law can take judicial notice of both inflation as also fall in Bank rate of interest. The bank rate of interest both for commercial purposes and other purposes has been*

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the subject-matter of statutory provisions as also the judge-made laws. In the said case reference was made to the decisions in ***Kaushnuma Begum v. New India Assurance Co.Ltd.,*** *2001 (3) CTC 170 (SC) : 2001 (2) SCC 9:* ***H.S.Ahammed Hussain v. Irfan Ahammed,*** *2002 (6) SCC 52; and* ***United India Insurance Co.Ltd. v. Patricia Jean Mahajan,*** *2002 (6) SCC 281, and it was observed that even in cases of victims of motor vehicle accidents, the Courts have upon taking note of the fall in the rate of interest held 9% interest to be reasonable. Direction to pay such rate of interest is also found to be reasonable and fair as the plaintiff was deprived to utilize and roll its money in commercial transaction and kept out of it due to wrongful withholding of the same by the defendant."*

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12.In view of the above decision of the Hon'ble Supreme Court as well as the conduct of the plaintiff, I am of the opinion that the plaintiff

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cannot be favoured with a decree with interest at 18.5% as with quarterly rests claimed by the plaintiff. The plaintiff will be entitled to simple interest at 12% from 06.04.2005, till the date of realisation on the principal amount of Rs.4,00,000/-.

13.In fine, the suit is decreed for a sum of Rs.7,15,280.75 with simple interest at 12% p.a. from 06.04.2005, till date of realisation on Rs.4,00,000/-. The liability of the 5th defendant is restricted to Rs.3,38,081.45. On the peculiar facts of this case, the suit is decreed for costs only against the defendants 1 to 5. The 6th defendant would not be liable for the payment of the costs of the suit.

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List of the witnesses examined on the side of the plaintiff:

PW1 - D.Vetrivel

List of Exhibits marked on the side of the plaintiff:

Sl. No.	***Exhibits***	***Description***
1.	Ex.P1	Authorisation Letter dated 02.03.2015 given by the Chief Manager, Indian Bank, Micro-ARM Branch.
2.	Ex.P2	Original demand promissory note dated 02.05.1985.
3.	Ex.P3	Original Letter of Continuity Joint and Several dated 02.05.1985.
4.	Ex.P4	Original Letter dated 02.05.1985 given by the defendants to the plaintiff.
5.	Ex.P5	Original Deed of Agreement of Guarantee dated 02.05.1985.
6.	Ex.P6	Original renewal letter dated 17.05.1985 given by the defendants to the plaintiff.
7.	Ex.P7	Original demand promissory note dated 17.05.1985.
8.	Ex.P8	Original Letter of Continuity Joint and Several dated 17.05.1985.
9.	Ex.P9	Original Deed of Agreement of Guarantee dated 17.05.1985.

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Sl. No.	***Exhibits***	***Description***
10.	Ex.P10	Original letter dated 11.05.1985 confirming creation of mortgage by the 3rd defendant to the plaintiff.
11.	Ex.P11	Photocopy of the legal notice dated 20.11.1986 sent by the plaintiff's counsel to the defendants.
12.	Ex.P12	Photocopy of the letter dated 15.12.1986 sent by the 3rd defendant to the plaintiff.
13.	Ex.P13	Original sale deed dated 06.07.1947 registered as Doc.No.2862/1947 at SRO, Tirupathur.
14.	Ex.P14	Photocopy of the Will dated 16.03.1996 written by B.Krishnaswami Naidu.
15.	Ex.P15	Photocopy of the extract of Register of deaths in Tirupathur Municipality relating to the death of B.Krishnaswami Naidu.
16.	Ex.P16	(Series – 3 nos) are the original encumbrance certificates dated 20.03.1992, 10.05.1985 & 17.12.1984.
17.	Ex.P17	Certified copy of sale certificate dated 09.12.1968.
18.	Ex.P18	Original Sale Deed dated 30.03.1973 which is in Telugu.

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Sl. No.	***Exhibits***	***Description***
19.	Ex.P19	Encumbrance Certificate dated 08.02.2005 which is in Telugu.
20.	Ex.P20	Copy of statement of accounts relating to the 1st defendant.
21.	Ex.P21	Original letter of deposit of title deeds dated 20.05.1985 sent by 6th defendant to the plaintiff.

List of the Defense witnesses examined on the side of the plaintiff:

DW1 - Chaluvadi Sampoorna

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Index : No

Internet : Yes

Speaking Order

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

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R.SUBRAMANIAN, J.

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