THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Appeal Suit No.1042 of 1999

JUDGMENT:

The unsuccessful defendant preferred this appeal suit, under Section 96 of the Code of Civil Procedure, 1908, assailing the decree and judgment, dated 21.12.1998, of the learned Principal Senior Civil Judge, Visakhapatnam, passed in OS.No.50 of 1991.

2. Be it noted that except copies of pleadings and the issues and a photostat copy of exhibit A1 receipt, no other material is available on record as the entire record of the trial Court including exhibits and depositions were already destroyed as per the information furnished by the trial Court to the Registry of this Court. However, learned counsel for both the sides requested that this appeal suit may be disposed of on merits with the available material, after hearing both sides.

3. I have heard the submissions of Sri C.V. Narasimham, learned counsel appearing for the appellant-defendant, and of Sri G. Rama Gopal, learned counsel appearing for the respondent-plaintiff. I have perused the material record.

4. The parties in this appeal suit shall hereinafter be referred to as the plaintiff and the defendant as arraigned in the original suit for convenience and clarity.

5. The case of the plaintiff may be stated, in brief, as follows: - 'The defendant is a private limited company engaged in travel agency business and other allied services. It arranges *inter alia* domestic and international air tickets.

It is one of the recognised agents of Indian Airlines, Air India International and other international Air lines. The plaintiff believes that the defendant being such a recognized agency of several Air lines has got fifteen days credit facility while buying tickets without readily paying money and that the defendant is entitled to pay the accumulated amounts payable to the airlines stated above at the end of every fortnight. The plaintiff also understands that in the matter of fortnightly payment, the obligation of the defendant is very strict and that the defendant is obliged to make payments religiously and that on failure to do so, the defendant faces the risk of termination of the agency and that in which event its main business would collapse. In that view of the matter, all the travel agencies, which are recognized by Indian Airlines, Air India International and other international Airlines, are always eager and vigilant in their own interest in paying their outstandings to those Airlines without any default. The defendant is no exception to the same. One, Y. Bhaskara Rao, who is the uncle of the plaintiff by courtesy, worked as Manager, Visakhapatnam Branch of the defendant till February, 1989. The defendant encourages its Managers to raise private loans to tide over financial stringency at times. The management of the defendant company, it appears, authorised the Manager of its Visakhapatnam branch to offer interest at simple rate of upto 36% per annum depending upon exigencies on such loans obviously in view of the fact that unless interest offered is reasonably attractive, private individuals cannot be motivated to lend money to a private company that too without any security/protection. At the instance of the defendant company, its said Manager along with the Managing Director, Venkateswara Prasad, approached the plaintiff and persuaded the plaintiff to lend Rs.90,000/-

offering interest thereon at 36% per annum. Accordingly, the plaintiff lent an amount of Rs.90,000/- to the defendant company by way of account payee cheque bearing no.620050, dated 09.09.1986, drawn on State Bank of India, Seethammadhara branch, Visakhapatnam, in favour of the defendant company. In token of receipt of the said cheque, the defendant issued receipt no.QR 1244. Subsequently, the cheque was duly encashed and the proceeds thereof were appropriated by the defendant. Thereafter, the defendant paid interest at 36% per annum and also a portion of the principal amount from time to time as per the details shown in the copy of the account filed with the plaint. The defendant deducted 10% of the interest towards 'tax deducted at source' pursuant to the requirement under the Income Tax Regulations. However, the defendant did not issue the specific certificate in that regard. If the same has been issued, the plaintiff would have submitted the said TDS certificate along with his income tax return and claimed the necessary adjustments or the refund as the case may be. All the payments made by the defendant either towards interest accrued or part payment of the principal amount were made by means of account payee cheques drawn in favour of the plaintiff; and, all such payments made to the plaintiff must have been duly incorporated in the defendant company's account supposed to be maintained in the company's normal course of business as required under the provisions of the Indian Companies Act and other regulations. The defendant repaid a sum of Rs.60,000/- by means of cheque, dated 12.05.1988, to the plaintiff towards part payment of principal amount of Rs.90,000/-. The defendant again, from time to time, borrowed a total further amount of Rs.55,000/-. The account, therefore, must be deemed to be a current and running account. The said plaintiff's uncle has since resigned from the defendant's company. As the defendant failed to repay the said outstanding debt together with interest accrued thereon, the plaintiff got issued a legal notice, dated 23.07.1989, demanding repayment. The defendant sent a reply, dated 31.07.1989, stating that the defendant is not at all aware of the transaction and denying the liability. Subsequently, the defendant sent an account payee cheque, dated 07.12.1989, in favour of the plaintiff for an amount of Rs.6,981.45 ps stating that as per defendant's book of account an amount of Rs.6,540/- was outstanding and found payable to the plaintiff. The defendant stated that no interest was payable nor had any interest been paid to the plaintiff and that no TDS had ever been deducted by the defendant. It is also stated that a sum of Rs.6,981.45 ps for which the above mentioned cheque was drawn was inclusive of the interest at the rate of 18% per annum from the date of receipt of the plaintiff's legal notice, till December, 1989. However, the plaintiff did not encash the cheque and met the Branch Manager of the defendant and raised a protest regarding the improper behaviour of the defendant. As a promise was made to settle the matter amicably, the plaintiff waited for some time. As nothing happened, he got issued another legal notice, dated 14.06.1990, demanding repayment. The defendant issued a belated reply notice, dated 01.08.1990, with all false allegations. The correspondence discloses that the denial of the fact of borrowal by the defendant is false. Since the defendant incurred the debt agreeing to repay the same with interest at 36% per annum and the defendant in fact paid the interest at the said rate for some time, the defendant is bound by the same. The payment of interest at the agreed rate for some time in respect of the suit debt would amount to acquiescence on the part of the defendant. Hence, the suit is laid for recovery of the suit amount of Rs.1,07,598/- inclusive of balance principal amount of Rs.90,000/- lent by the plaintiff to the defendant on one occasion, that is, 09.09.1986, and also another amount of Rs.55,000/- advanced from time to time as shown in the statement of account; [The total balance of both the loans being Rs.60,000/-] and Rs.47,598/- being interest thereon at 36% per annum; and for mandatory injunction to direct the defendant to issue a certificate certifying deductions while making payment to the plaintiff towards interest on the loan amount from time to time and for costs.

6. The defence of the defendant may be stated, in brief, as follows:

The material allegations in the plaint are false. The defendant company is not authorised to borrow any funds from private individuals as alleged in the plaint. Any such act would be *ultra vires* and beyond the scope of articles and memorandum of association. Therefore, any such act does not bind the defendant company. The allegations that for the reasons alleged in the plaint, the defendant encourages its managers to raise private loans to tide over financial stringency at times and that the management of the defendant company authorised its then manager of Visakhapatnam Branch to offer interest at the simple rate of 36% per annum depending upon exigencies and that unless interest offered is reasonably attractive, private individuals cannot be motivated to lend money to a private limited company that too without offering any security are all false. The defendant never authorised the said Bhaskara Rao or any Manager to borrow amounts on behalf of the defendant's company from any other source except Suryabhagh branch of Bank of Baroda. The registered power of attorney executed by the defendant company in favour of the said Bhaskara Rao, which clearly stated that he is authorised to borrow amounts from Suryabagh branch of bank of Baroda, clearly indicates that the said Bhaskara Rao is not authorised to borrow amounts from any other source. The defendant company has to only borrow funds from the said bank and from its shareholders in case of need. It never borrowed any money from any persons other than the Suryabagh branch of Bank of Baroda. The interest paid by the defendant company to the Bank of Baroda is according to RBI guidelines. The interest paid to the shareholders has always been 18% simple. The plaintiff deposited an amount of Rs.90,000/- as advance at Visakhapatnam office of the defendant for the purpose of foreign travel and the said deposit was made under the supervision of the uncle of the plaintiff who was the then Manager. The said amount was credited to the account concerned by the uncle of the plaintiff. If the amount was borrowed by the said Bhaskara Rao, as contended by the plaintiff, he would not have credited the said amount in the 'advances account'. Assuming for a moment that he borrowed the amount, such borrowal is totally an unauthorised act without the knowledge or consent of the Board of Directors; and, therefore, the same does not bind the defendant company. No interest is payable on the said amount as the amount is not taken by the defendant as a fixed deposit or a loan and the said amount is only a deposit towards future services. There was no agreement to pay interest and the company never pays interest on advances for future services. The receipt filed by the plaintiff, it appears, has been tampered subsequently by putting figure '36%'. Thus, it is a forged document. It has no evidentiary value. The further allegations in the plaint that in terms of understanding the defendant paid interest accrued on the said loan at the agreed rate of 36% per annum and that it also paid a portion of principal amount from time to time as per the details shown in the copy of the account filed with the plaint and that the defendant deducted 10% of the amount towards TDS pursuant to its requirement under the Income Tax Regulations and that the defendant did not issue certificates in that regard to enable the plaintiff to submit the said TDS certificates along with income tax return are all false and are denied. The plaintiff having made the advance deposit subsequently cancelled his programme and the said amount was repaid in instalments by means of various cheques signed by the said uncle of the plaintiff. There was no agreement either oral or written for payment of interest. The question of payment of interest does not arise. There is no current and running account between the plaintiff and the defendant. The amount of Rs.55,000/- is only towards travel advance for foreign travel and is not a loan amount. No interest is payable on the said amount. No assurance was given at any time to settle the matter amicably. There is no written agreement between the parties for the rate of interest as required under Section 3 of the Interest Act. Hence, the defendant is not liable to pay any interest. The statement of account filed by the plaintiff is incorrect. Hence, the suit is liable to be dismissed with costs.

7. Having regard to the above pleadings, the trial Court framed the following issues for trial:

1. Whether the defendant borrowed any amount from the plaintiff?
2. Whether the acts of borrowing, if any, by Y. Bhaskara Rao, the then Manager, do not bind the defendant-company?
3. Whether the plaintiff is entitled to claim interest from the defendant?
4. Whether the interest claimed is excessive and usurious?
5. Whether the suit is barred by time?
6. To what relief?

[Reproduced verbatim]

8. It appears from the judgment of the trial Court that PWs1 to 4 were examined and exhibits A1 to A23 were marked on the side of the plaintiff and that DW1 was examined and exhibits B1 to B17 were marked on the side of the defendant. The details of the exhibits as could be gathered from the appendix of evidence are as follows:

Ex.A1: receipt, dated 09.09.1986 for Rs.90,000/-

Ex.A2: office copy of lawyer's notice, dated 23.07.1989

Ex.A3: reply lawyer's notice, dated 31.07.1989

Ex.A4: letter, dated 07.12.1989

Ex.A5: cheque, dated 07.12.1989 sent by the defendant

Ex.A6: office copy of lawyer's notice, dated 14.06.1990

Ex.A7: reply to exhibit A6

Ex.A8: statement of accounts

Ex.A9: covering letter

Ex.A10: office copy of letter from plaintiff to defendant

Ex.A11: letter from the defendant to the plaintiff

Ex.A12: office copy of letter, dated 06.03.1989

Ex.A13: office copy of letter, dated 15.061989

Ex.A14: telex message, dated 27.06.1989

Ex.A15 & A16: counter-foils

Ex.A17 to A19: bank pass books

Ex.A20: certified copy of decree & judgment

Ex.A21: certified copy of decree & judgment

Ex.A22: letter from Travel Express, Hyderabad.

Ex.A.23: telex message.

Ex.B.1: ledger book of the defendant for the years 1986-87

Ex.B2: relevant entry in Ex.B.1 at page no.91

Ex.B3: relevant entry in Ex.B.1 at page no.92

Ex.B4: relevant entry in Ex.B.1 at page no.98

Ex.B5: relevant entry in Ex.B.1 at page no.98

Ex.B6: ledger book

Ex.B7: relevant entry in Ex.B6 at page no.11

Ex.B8: relevant entry in Ex.B.6 at page no.11

Ex.B9: income tax returns for the year 1986-87

Ex.B10: income tax returns for the year 1989-90

Ex.B11: income tax returns for the year 1989-90

Ex.B12: order, dated 29.08.1993, of the income tax authority.

Ex.B13: order, dated 24.09.1993, of the income tax authority

Ex.B.14: Xerox copy of the assessment order, dated 25.08.1992

Ex.B15: income tax assessment order for the year 1988-89

Ex.B16: Income tax assessment order for the year 1989-90

Ex.B17: intimation given under the provisions of Income Tax Act.

9. As already noted, the trial Court decreed the suit of the plaintiff with costs for a sum Rs.1,07,598/-, which is the suit amount, however, with subsequent interest on the principal amount of Rs.60,000/- at 12% per annum from the date of the suit till date of decree and thereafter at 6% per annum from the date of the decree till date of realisation. Aggrieved thereof, the defendant is before this Court.

10. Learned counsel for the defendant while reiterating the pleaded defence of the defendant, which is already stated supra, *inter alia* contended as follows:

The trial Court ought to have seen that the defendant is a limited company and that any amounts which are borrowed from outsiders must have the sanction of the Board of Directors of the defendant company and that any act of borrowing without such sanction does not bind the defendant company. The trial Court ought to have seen that the specific case of the defendant is that no amounts were borrowed from any private individual and that the transaction of borrowal of funds by the defendant from the plaintiff is not true and that the same, even if true, is *ultra vires* and beyond the scope of the articles and memorandum of association of the defendant company. The trial Court failed to see that the registered power of attorney only authorised the then Manager to borrow funds from Suryabagh Branch, Bank of Baroda, and hence it ought not to have believed the case of the plaintiff as stated in the plaint and that on the other hand it ought to have believed the defence that the money is an advance and is deposited for future services. The trial Court ought to have seen that admittedly the then Branch Manager, Bhaskara Rao, is uncle of the plaintiff by courtesy and that the said person has no authority to borrow any amount from any private individual. The interest claimed at the rate of 36% per annum is usurious, penal and illegal. The defendant has borrowed money from its shareholders and repaid with interest at 18% per annum simple. The amount of Rs.90,000/- deposited by the plaintiff was for the purpose of foreign travel and the same was given to the uncle and was credited in the 'advance account'. If it were a loan amount, the same would not have been credited to the said account. The trial Court ought to have seen that a receipt like exhibit A1 is usually issued by the defendant company to its customers for the services rendered by it or for future services to be rendered by it to its customers. The trial Court ought to have seen that exhibit A1 is a tampered document as the figure '36%' was inserted at a place earmarked for the description of the party. The trial Court ought to have appreciated that the cheque for Rs.90,000/- issued by the plaintiff was received by the defendant, on 09.09.1986, and that the defendant has to make payment to the Indian Airlines on or before 9th by demand draft or bankers cheque and, therefore, under no circumstances it was possibile for the defendant to encash the cheque on the 9th itself and make payment to the Indian Airlines. The trial Court erred in appreciating the case with regard to alleged non furnishing of TDS certificate, which is a false case pleaded by the plaintiff; and it ought to have seen that the plaintiff is not entitled to any such certificates. The trial Court ought to have seen that there was no running account between the parties and that the transactions are independent of each other and the amount of Rs.55,000/- subsequently paid by the plaintiff was only towards advance for foreign travel and not towards any loan. The trial Court ought to have seen that the suit is filed with the active support and with the connivance of his uncle, Bhaskara Rao, who was formerly the Manager of the defendant company's branch at Visakhapatnam and that his uncle made up the records to suit the plaintiff's case and that he had surplus funds as well as drawing power with the bank on the dates when the alleged funds were said to have been borrowed and, therefore, there was no necessity for him to borrow the alleged amounts as alleged by the plaintiff that too on payment of interest at the rate of 36% per annum. The trial Court ought to have seen that plaintiff-PW1 and his uncle-PW2 who manipulated the records are not reliable witnesses. The trial Court ought to have seen that the defendant never paid interest at 36% per annum at any time earlier. The trial Court erroneously allowed interest at 36% per annum simple up to the date of the suit and further awarded *pendente lite* interest at 12% per annum contrary to settled legal principles.

11. Per contra, learned counsel for the plaintiff while supporting the decree and judgment of the trial Court contended that the trial Court appreciated the facts correctly and the oral and documentary evidence in proper perspective and that the evidence in the form of exhibit B1 ledger of the defendant company with the relevant entries therein besides documents filed by the plaintiff in exhibit 'A' series sufficiently corroborated the version of the plaintiff and lent support to the oral and the other documentary evidence of the plaintiff and that therefore, the trial Court rightly held that the plaintiff established his case as required under law and that the defence of the defendant is false. He would next point out that the defendant failed to examine its cashier, who signed exhibit A1 receipt to establish its defence that it is a manipulated document. He would further contend that the trial Court framed specific issues on the liability of the defendant as well as the entitlement of the plaintiff to the suit claim with interest thereon and answered all the issues in favour of the plaintiff and that the trial Court while answering issue nos.3 & 4 supra recorded findings as to entitlement of the plaintiff to interest at 36% per annum up to the date of the suit after considering the admitted contention that the suit transaction is a commercial transaction and that therefore, the trial Court rightly decreed the suit of the plaintiff as prayed for and hence, the contentions of the defendant in the appeal suit are devoid of merit and that the appeal is liable for dismissal.

12. I have given earnest consideration to the facts and submissions.

13. The points that arise for determination in this appeal suit are –

1. **Whether the plaintiff is entitled for recovery of the suit amount or any part thereof?**

2. **Whether the plaintiff is entitled to interest at the rate of 36% per annum simple up to the date of the suit as claimed in the plaint and at the rate of 12% per annum on the principal amount during the pendency of the suit and at the rate of 6% per annum post lite?**

3. **Whether the decree and judgment of the trial Court are unsustainable under facts and in law in the circumstances stated by the defendant?**

4. **To what relief?**

14. <u>POINTS 1 & 2:</u>

14.1 In view of the handicap on account of the non availability of the material record including depositions and exhibits, this Court has to necessarily go by the content of the judgment of the trial Court.

14.2 The plaintiff's suit is based on exhibit A1 receipt for Rs.90,000/- and exhibit A8, copy of statement of account, besides other exhibits.

14.3 PW1 asserted his case and examined his uncle as PW2 who was admittedly the Branch Manager of the defendant's branch at Visakhapatnam during the relevant time. The Managing Director of the defendant company was examined as DW1. He asserted the defence. The reasoning in the judgment of the trial Court under issue no.1 would go to show that the ledger of Visakhapatnam Branch of the defendant company, exhibit B1, for the period from 01.07.1986 to 31.12.1986 was filed by DW1 and it contained an entry for Rs.90,000/- at page 91 with the date 09.09.1986 with the description 'hand loan from the plaintiff'. The said entry is obviously exhibited as exhibit B2. There is also an entry at page 92 of the said ledger with regard to transfer of the said amount to 'loan taken account' under exhibit B3, dated 31.12.1986. There is a later entry under exhibit B4 whereby the said amount was transferred from 'loans and advance accounts' to 'loans taken account' and it appears that there is also a further entry (exhibit B5) that the amount is repaid to the plaintiff. A further ledger of the defendant company of Visakhapatnam branch for the months September and October, 1988, was also exhibited as exhibit B6. In exhibit B6, there is an entry for Rs.25,000/- and credit entry, dated 10.10.1988, under exhibit B7 coupled with payment of the said sum on the same day to the plaintiff under exhibit B8 with description 'customers account'. Based on the evidence adduced by both sides, the trial Court believed the version of the plaintiff and disbelieved the defence of the defendant. The trial Court also noted in its judgment that DW1 categorically admitted in his cross examination that the money given by the plaintiff was utilised by the defendant for business of the defendant and that he further categorically deposed that it was written as 'hand loan from the plaintiff' and that the relevant entry is exhibit B2. In fact the trial Court extracted in its judgment the entry at page 91 of exhibit B1 as follows: - '09-9-1986 RV 1244 received towards hand loan from S. Nageswara Rao Rs.90,000/-.'

14.4 Coming to the aspect of the receipt, exhibit A1, issued by the defendant in token of receipt of a cheque bearing no.620050, dated 09.09.1986, drawn in favour of the defendant's company at Visakhapatnam for Rs.90,000/-, it is to be noted that it is evident from the reasoning of the judgment of the trial Court that DW1 admitted in his evidence that the plaintiff lent an amount of Rs.90,000/- to the defendant and that in token of the same the above receipt was issued. The trial Court's reasoning reflects that after coming to know of this disputed transaction, DW1, as per his admission, did not contact Bhaskara Rao (PW2), the then manager at Visakhapatnam branch of defendant company or issue any notice to him and that on the other hand, DW1 admitted that the amount given by the plaintiff was utilised for the business of the defendant. Hence, the trial Court concluded that the material brought on record categorically revealed that the defendant received the said sum of Rs.90,000/- from the plaintiff as hand loan and utilised the same for the business of the defendant. Accordingly, the trial Court answered issue nos.1 & 2 in favour of the plaintiff.

14.5. Coming to the rate of interest, considering the nature of the business and the admissions of DW1 as extracted in the judgment of the trial Court, it is discernable that the transaction is a commercial transaction. The transaction is a commercial transaction is fairly admitted before this Court. The evidence brought on record as extracted in the judgment of the trial Court reflects that earlier the defendant company is borrowing loans from third parties by agreeing to pay interest at the rate of 24% to 36% per annum on the principal amount and that a promise was made to the plaintiff that interest would be paid at 36% per annum. The judgment also reflects that the evidence brought on record does not support the contention of the defendant that after issuance of voucher, the plaintiff inserted the figure '36%' in red ink in exhibit A1 for the purpose of the suit. Be it noted that the cashier of the defendant company who signed exhibit A1 is not examined. Considering the nature of the transaction, the trial Court concluded that the claim of interest by the plaintiff at 36% per annum on the principal amount up to the date of the suit is valid and that in view of the contents of the statement of account filed with the plaint, the plaintiff is entitled to claim interest at the said rate up to the date of the suit. Accordingly, the trial Court allowed interest at 36% per annum only up to the date of the suit and awarded interest *pendente lite* at 12% per annum and *post lite* at 6% per annum.

15. Before parting, it is to be noted that the learned counsel for the defendant relied upon a decision of the High Court of Delhi in **Seo Pal v. Quality Rice Exports Pvt. Ltd., [**MANU/DE/4348/2017] wherein the High Court of Delhi having regard to the facts of that case considered claim of interest at 21.6% per annum as usurious and awarded pendente lite and future interest @ 9% per annum. In this case on hand, interest was not awarded at the rate of 36% per annum during the *pendente lite* and *post lite* periods as already noted. The instant suit transaction is an unsecured commercial transaction is undisputed. On commercial transactions, the creditors including banks, according to the submissions, are collecting interest at 18% or 24% per annum at quarterly rests and that in the case on hand the interest at 36% per annum is only a simple interest and, therefore, the said rate of interest, in the facts and circumstances of the case, cannot be termed as usurious or penal. Further, in the case on hand, though the transaction is a commercial transaction, the trial Court did not award subsequent and future interest at the contract rate on the principal amount and the trial Court while awarding interest only on the principal amount restricted the rates of interest to 12% & 6% respectively during the pendente and post lite periods. In-fact proviso to Section 34 of the Code ordains that where the liability in relation to the sum adjudged has arisen out of a commercial transaction, the rate of such further interest may exceed 6% per annum, but shall not exceed the contractual rate of interest. Further, as per the proviso, when there is no contractual rate of interest, the further interest can be awarded on such transaction at the rate at which monies are lent or advanced by nationalised banks in relation to commercial transactions. It is submitted by the learned counsel for the plaintiff that such banks are collecting interest at higher rates quarterly compounded on monies advanced in relation to commercial transaction. Hence, the decision of the High Court of Delhi does not advance the case of the defendant any further the payment of interest prior to the suit is a matter of contract and proof thereof; and, as the further interests from the date of the suit are awarded in this case at reduced interest rates, that too, on the principal sum only.

16. POINT No.3: -

As a sequel to the findings supra on points 1 & 2, it is to be held that the contention of the appellant-defendant that the decree and judgment of the trial Court are unsustainable under facts and in law is devoid of merit and is liable for rejection. The said contention is accordingly rejected holding that the trial Court is justified in decreeing the suit of the plaintiff.

17. **POINT No.4**:

In the result, the appeal suit is dismissed. No costs.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

05.03.2018
Vjl