

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No.143 of 1998

JUDGMENT:

This appeal is filed by the plaintiff against the judgment and decree dated 28.07.1997 passed in O.S.No.44 of 1990 by the Subordinate Judge, Kadiri, Anantapur District.

2. For the sake of convenience, the parties are referred to as plaintiff and defendants only.

3. The suit is filed by one Bhupalam Balasubbarayudu against the defendants for recovery of money based on a registered mortgage. The case of the plaintiff is that the first defendant in the suit borrowed a sum of Rs.50,000/- on 04.12.1978 and agreed to repay the same with interest at 18% per annum at the end of every month and in default to pay interest on interest. Evidencing this agreement and as security, the first defendant mortgaged the schedule mentioned property in favour of the first defendant and executed a registered simple mortgage deed on 14.12.1978. It is the case of the plaintiff that defendants 2 to 10 and one Annam Narasimhaiah purchased the mortgaged property under a sale deed dated 17.09.1979 and also agreed to repay the mortgaged debt to the plaintiff. The plaintiff also pleads that the new purchasers paid interest to him in discharge of the mortgage debt.

4. Since defendants 2 to 10 purchased the property, they were added as parties to the suit. As the first defendant

was adjudged an insolvent in I.P.No.54 of 1980, the official receiver was added as the 16th defendant. As one of the purchasers Annam Narasimhaiah died prior to the suit, his legal representatives were added as defendants 11 to 15 in the suit. After the death of second defendant, his legal representatives were added as defendants 17 to 21. Therefore, the suit is filed for recovery of money due by sale of the mortgaged property against all the defendants. The 3rd defendant filed a written statement which has been adopted by defendants 2, 4, 11, 12, 14 and 15. The 16th defendant filed a memo stating that he has not filed a separate written statement. The written statement of 3rd defendant is to the effect that Rs.50,000/- was not borrowed and only Rs.25,000/- was borrowed. It is his case that the suit mortgage deed is devoid of consideration for the balance of Rs.25,000/-. He stated that without his knowledge the stipulation for payment of interest on interest has been incorporated in the deed. He also states that the defendant is an agriculturist and that the interest at 18% per annum is usurious.

5. Based on the above pleadings, the lower Court framed three issues for trial:

- i) Whether the mortgage deed is not supported by consideration to the extent of Rs.25,000/-?
- ii) Whether the interest claimed by the plaintiff is usurious?
- iii) To what relief?

6. For the plaintiff, he was examined as PW.1 and Exs.A.1 to A.3 were marked. For the defendants, one witness was examined as DW.1 and no documents were marked.

7. After considering the oral and documentary evidence, the lower Court came to the conclusion that the plaintiff is not entitled to interest on interest or penal interest. The Court passed a preliminary decree for Rs.1,35,597.90 paise along with future interest at 18% per annum, till the date of redemption and thereafter, at 6% per annum from the date of redemption till realization with proportionate costs. It is this judgment by which the interest is scaled down that is challenged in the present appeal.

8. This Court has heard Sri T.S. Anand, learned counsel for the appellant/plaintiff and Sri M. Prasada Rao and O. Manohar Reddy, learned counsel for the respondents/defendants respectively.

9. The essential grounds that are urged by the learned counsel appearing on behalf of the appellant/plaintiff is that the lower Court committed a grave error in scaling down the interest and reducing the rate of interest. It is the vehement submission of the learned counsel that the respondents are experienced businessmen and they have availed a loan for their business and that therefore, the interest should be awarded at the contractual rate both as per the terms and conditions of the agreement and also as per the Order XXXIV Rule 11 CPC. He argued that there is no

evidence to hold that the interest claimed is usurious. On the other hand, it is the contention of the learned for the respondents/defendants that the interest is *per se* visible to the usurious in this case and that therefore, the lower Court did not commit any error whatsoever in scaling down the interest.

10. All the learned counsel concentrated on the issue of interest alone and therefore, this Court is also deciding the issue of interest alone. Nothing else was actually argued.

11. The learned counsel for the appellant/plaintiff relied upon the following judgments and argued their case:

- i) ***K.V. Satyanarayana v. State Bank***¹
- ii) ***P. Sambamurthy & Sons v. M. Krishna Rao***²
- iii) ***Nandimandalam Abdul Azeez v. Jainab Begum***³

i) The decision of ***K.V. Satyanarayana*** is a decision of a Division Bench of this Court wherein it was laid down in para-41 as follows:

"41. It is unnecessary to refer to the entire case law on the point as the section has been recently construed in a recent judgment dated 5-8-1970 of this court in ***Godugula Lakshmi Narasimha Murty v. Muthukumalli Venkata Subba Rao***, (L. P. A. No. 69/ 1968 (Andh Pra)). After considering the relevant case law on the point, the position was summarised as follows :--

"(1) The Court can reopen the transaction and give appropriate relief in the matter of interest when the transaction is substantially unfair;

(2) If the interest is excessive, the court shall presume that the transaction is substantially unfair, but this is a rebuttable presumption;

¹ AIR 1975 AP 113 (DB)

² AIR 1981 AP 77

³ 2002 (1) An.W.R. 754 (AP)

(3) No hard and fast rule can be laid down as to what is a reasonable or excessive rate without reference to the several circumstances enumerated in Clauses (a), (b) and (c) of Sub-section (2) of Section 3 of the Act.

(4) In determining whether the rate is reasonable or not, the court has to take into consideration the following circumstances.

- (a) The value of the security offered;
- (b) The financial condition of the debtor including the result of any prior transaction;
- (c) The known or probable risks in getting repayment;
- (d) If compound interest was provided for the frequency of the period of calculation of the interest; and
- (e) The advantage which the debtor reasonably expected to derive from the transaction."

The Division Bench held that bearing these principles in mind, the Court will have to judge whether in a particular case the interest is usurious or not. The Division Bench in fact concluded by saying as follows in para-55:

"55. The aforesaid rulings clearly establish that there can be no presumption that the charging of compound rate of interest is per se excessive, that the burden of establishing that the interest is excessive lies on the debtor setting up a plea that the interest charged is usurious and that it is only when that is established the presumption under Explanation (1) to Section 3(1) of the Usurious Loans Act, as amended by the Madras Amendment Act, arises. In the instant case, the defendants have not established that the interest charged is excessive. There is neither pleading nor evidence on record to support such a plea and the defendants have failed to discharge the burden which clearly lay on them. The mere fact that interest was charged at 8 1/2 per cent per annum with monthly rests by the plaintiff-bank, it cannot be presumed that the interest is excessive and that the transaction was substantially unfair on the date on which the loan was advanced by the bank to the defendants firm."

ii) The next judgment relied upon by the learned counsel for the appellant is **P. Sambamurthy & Sons's** case, wherein his Lordship Justice Sri Jeevan Reddy held that it cannot be laid down as a rule of law that interest above a

particular rate is penal and excessive. His Lordship has also held that whether interest is penal and excessive, is always a question of fact, to be decided in the facts and circumstances of a given case.

iii) Similarly, another learned single Judge in **Nandimandalam Abdul Azeez**'s case has held in para-7 that the burden to establish that the interest is excessive lies on the person setting up a plea that the interest charged is usurious and that it is only when that is established the presumption under Explanation (1) to Section 3 (1) of the Usurious Loans Act, 1918 would be attracted.

12. In reply, the learned counsel for the respondents/defendants relied upon i) a decision of the Division Bench of this Court reported in **M.R. Reddy v. S.R. Naidu**⁴ wherein their Lordships held that the question whether interest at 18% per annum with annual rests is usurious or not is a fact to be decided in each case. In para-25, it is held that charging of interest at 18% per annum compound with annual rests is usurious in the facts and circumstances of the case.

ii) The next judgment relied upon by the learned counsel for the respondents is **Sethmal & Company v. Sri Laxmi Paradise**⁵ wherein a learned single Judge of this Court summarized the entire case law on the subject and also noted the amendment to the Usurious Loans Act, 1918 which was

⁴ 1989 (1) ALT 265

⁵ 1999 (5) ALD 642

brought about by the State of Madras under Act 8 of 1937. This amendment was made applicable to the State of Andhra Pradesh under Act 24 of 1961. An explanation was added to this section, which is to the following effect:

“Explanation:- Interest may of itself be sufficient evidence that the transaction was substantially unfair.”

The learned single Judge held that interest by itself can be presumed to be unfair and that the creditor can prove the special circumstances to justify the rate of interest. The learned single Judge also held that there is no hard and fast rule with reference to which rate of interest can be said to be excessive and ultimately concluded that it is a matter of fact to be decided in each case.

13. This Court also notices that a Constitution Bench of the Hon’ble Supreme Court of India in the case of **Central bank of India v. Ravindra and others**⁶ also decided a case of interest charged by nationalized banks but however some of the passages are relevant to this case also. At para-35, the Hon’ble Supreme Court of India concluded as follows:

“35. The English decisions and the decisions of this Court and almost all the High courts of the country have noticed and approved long established banking practice of charging interest at reasonable rates on periodical rests and capitalising the same on remaining unpaid. Such a practice is prevalent and also recognised in non-banking money lending transactions. Legislature has stepped in from time to time to relieve the debtors from hardship whenever it has found the practice of charging compound interest and its capitalization to be oppressive and hence needing to be curbed. The practice is permissible, legal and judicially upheld excepting when superseded by legislation. There is nothing wrong in the parties voluntarily entering into transaction, evidenced by deeds incorporating covenant or stipulation for payment of compound interest at reasonable rates, and authorising the creditor to capitalise the interest on remaining unpaid so as to enable interest being charged at the

⁶ AIR 2001 SC 3095

agreed rate on the interest component of the capitalised sum for the succeeding period. Interest once capitalised, sheds its colour of being interest and becomes a part of principal so as to bind the debtor/borrower.”

Again in para-55, it is observed that if any dispute is raised about the interest debited, the onus would be on borrower to show why the sum cannot be claimed.

14. Therefore, on a review of all the cases on this subject, which are cited across the bar, the conclusions that emerge are a) there is no hard and fast rule to state whether a particular rate of interest is excessive or not; b) the sanctity of an agreement is also an important factor and c) the mere fact that there is an agreement does not prevent this Court from examining the nature of the interest being charged. The heading of Section 3 of the Usurious Loans Act clearly starts with the non-obstante clause ‘notwithstanding anything’. Therefore, the mere fact that there is an agreement will not preclude this Court from examining whether the terms and conditions impact the interest claim excessive or not.

15. The learned counsel for the appellant argued that the parties are experienced businessmen who have entered into the contract when their eyes wide upon. Therefore, he argues that under the guise of Usurious Loans Act, this Court cannot change the terms of written agreement. His submission is that the primacy of the contract should be preserved. Hence, he prays for award of interest as agreed upon with the rests as prescribed. The learned counsel for the respondents argued that the rate is *per se* excessive and

high and therefore, it should be scaled down. The learned counsel relied upon the explanation added by the State of Andhra Pradesh and argued that the 'interest' by itself is sufficient evidence and that the interest is usurious.

16. In the light of above judgments and submissions across the bar, this Court examined the terms and conditions of Ex.A.1, the conduct of parties and the evidence on record to decide if the interest is usurious in this case.

17. Ex.A.1 is a registered mortgage deed under which the amount was advanced. The said document was registered as document No.3877 in the office of the Sub-Registrar, Kadiri. Along with this deed, another mortgage deed was registered in the name of the plaintiff in another suit O.S.No.50 of 1990 for another loan. The admitted facts are that the persons who borrowed money and the person, who gave money, were both sufficiently experienced businessmen. They were aware of the transaction. There is also no allegation that this registered mortgage deed was in any way created or that any of the terms were included without consent. In fact, the concerned persons who were actually a part of the transaction were not even examined as witnesses by the defendants. On behalf of the defendants, the only one witness was examined as DW.1-Annam Venkatesh Kumar, who is the son of Annam Narasimiah. He was neither a party to Ex.A.1 nor to the subsequent sale deed. The defendants 2 to 10 are the purchasers of the property. They purchased the

property subject to the mortgage and agreed to clear the mortgage. The property in question is an urban immovable property situated within the limits of Kadri Town.

18. PW.1 was examined and he deposed clearly that the first defendant borrowed the money on 04.12.1978 and was regular in repayment of interest up to September, 1979. The defendants 2 to 10 and Annam Narasimhaiah purchased the property on 17.09.1979 subject to the mortgage. He also deposed that the 3rd defendant representing himself and other purchasers made payment of Rs.1,750/- on 16.10.1979. Later, he deposed that the 2nd defendant made certain payments. He also filed Ex.A.2 calculation sheet showing all the payments made and claiming the balance. In the cross-examination on behalf of defendants 2 to 5, he admits that the 1st defendant who was facing financial crisis mortgaged the property in favour of the plaintiff and his son. He, however, denies the suggestion that only Rs.25,000/- was advanced and not Rs.50,000/-.

19. DW.1 is the 12th defendant-A. Venkatesh Kumar, son of A. Narahimhaiah Shetty (one of the purchasers of the property). He deposes that his father and other defendants purchased the suit schedule property subject to the mortgage. He admits that the 1st defendant mortgaged the suit schedule property for Rs.50,000/-. However, it is important to note that he does not depose at all in his entire evidence that the rate of interest stipulated in Ex.A.1-

mortgage deed is usurious or that it is unconscionable. No data or evidence is given of the contemporary interest rates on secured loans to prove that the present rate is high or usurious. In the cross-examination he also makes important admissions as follows:

a) that he was not present either at the time of execution of the mortgage deed or at the time of purchase of the property subject to the mortgage; b) that he is not aware of the reasons why the 1st defendant contracted the debt; and c) he is not aware of the payment of interest made by 1st defendant to PW.1.

20. DW.1 also admits that there is no document available to show that the payments were made by calculating simple interest at 15% per annum. He also admits that the details described by the plaintiff in the plaint are correct. He also admits that in the suit schedule property the business in the name of Annapurna Lodge was being carried.

21. In the light of this evidence, the Court is of the opinion that the case set up by the defendants cannot be said to be passing the tests laid down in the Division Bench judgment that was cited across the bar viz., **K. V. Satyanarayana's** case (1 supra) particularly in para-41 (4) (a) to (e). As was held in **Nandimandalam Abdul Azeez's** case (3 supra), the mortgage deed is not disputed. The decision in LPA No.69 of 1968 of this High Court has been considered in many of the subsequent decisions of this Court and so the

burden to establish the interest as excessive is upon the person alleging it. As held in earlier cases, it is noted that in the evidence of DW.1 this aspect of the 'usurious rate of interest' was not touched upon. Similarly, in the Division Bench judgment in **K.V. Satyanarayana's** case (1 supra), it is clearly held basing on the very same judgment in LPA No.69 of 1968 and other cases of the burden to prove that this rate is excessive lies upon the debtor setting up the plea. Even the decision of five-judges of the Hon'ble Supreme Court of India in **Ravindra's** case (6 supra) held that the onus would be on the plaintiff or borrower to show what is stated in the account is not correct.

22. In the light of the facts and circumstances of the case and the evidence introduced, this Court is of the opinion that the defendant did not discharge their burden. As experienced businessmen they have purchased the property which is subject to a mortgage. As it was a business risk they have been taken, this Court holds that they cannot raise an issue that the rate of interest is usurious or penal and seek a scaling down/alteration of the agreed terms. The person who had the benefit of availing the loan and the benefit of the borrowing has chosen not to appear before the court. He would have been the ideal person to explain his pecuniary difficulties or to plead that the interest claimed was usurious. Adverse inference has to be drawn against the 1st defendant for his failure in deposing. In addition, defendants 2 to 10,

who have purchased the property and who were admittedly parties to the business being run, have not chosen to appear before the Court and depose. They have purchased an encumbered property with their eyes wide upon and agreed to discharge the debt. The first defendant who had the benefit of availing the loan under Ex.A.1 has escaped the liability and the consequences because he has sold the property to defendants 2 to 10. The defendants 2 to 10 having unconditionally purchased the property from the 1st defendant cannot now claim benefits stating that the interest claim is *per se* usurious. This Court thus holds that the defendants have failed to discharge the burden cast upon them by law to establish that the interest claim is usurious or penal.

23. The exception enacted by the State of Andhra Pradesh which says that interest by itself is sufficient evidence that the rate is usurious is another aspect that has to be considered. This Court feels that 18% interest by itself is not usurious. Judicial notice cannot be taken of interest rates. As noticed earlier, no evidence of market rates is there on record. No evidence has been introduced to show the prevalent interest rates in that town at that period for this Court to conclude that the rate claimed is usurious. Interest rates are subject to prevalent market conditions; to supply-demand economics etc. This is the reason why the Courts have held that a hard and fast rule cannot be laid down to

say that interest above a particular rate is usurious. In the case on hand, admittedly, the rate of interest is only 18%. That by itself is not *per se* usurious to be struck down.

24. The other point that weighs with the Court is the delay in disposal of the case/appeal. The delay in disposal should not become a burden on one party or a bonanza for the other. Therefore, balancing the equities and ensuring that the justice is done to both the parties, this Court allows the appeal as follows:

25. The appeal is allowed and the judgment and decree dated 28.07.1997 passed in O.S.No.44 of 1990 by the Subordinate Judge, Kadiri, Anantapur District are set aside. The suit is decreed for a sum of Rs.2,81,269.70 with interest at 18% compounded annually from the date of the suit (i.e., 28.11.1990) till the date of the present decree, with further interest at 6% simple interest from the date of the decree, till the date of the payment/redemption with costs. Time for redemption is fixed at four months from today.

26. In the circumstances of the case, there shall be no order as to costs. As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 11.06.2018
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