



WEB COPY



C.S.No.670 of 1997

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.03.2024

Pronounced on : 22.04.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

C.S.No.670 of 1997

GIC Housing Finance Limited,
Rep. By its Senior Vice President,
No.1 & 2 Mayor Ramanathan Road,
Chetpet, Chennai – 31.

... Plaintiff

Vs.

1.Crescent Housing (P) Ltd.,
Rep. By its Director
Sharath Kakumanu,
No.89, Raja Annamalaipuram,
Chennai – 28.

2.Sharath Kakumanu

3.N.Bhagwandas

... Defendants

Prayer: Complaint filed under Order IV Rule 1 of the Original Side Rules and Order VII Rule 1 and Order XXXIV of the C.P.C., praying;

(a) for a preliminary decree for a sum of Rs.4,47,94,037/- with future interest thereon at 22% per annum with quarterly rests with penal interest at 2% from 31.07.1997 till the date of realization making the defendants 2 and 3 jointly and severally liable along with the first defendant and calling upon the defendants to pay a sum of



C.S.No.670 of 1997

Rs.4,47,94,037/- within a date to be fixed by this Court, failing which, order sale of the mortgaged property, morefully, described in schedule A & B hereunder and to appropriate the sale proceeds after defraying the expenses thereof and in the event of shortfall in the satisfaction of the decretal dues, to permit the plaintiff to proceed against the defendants personally also; and

b) to direct the defendants to pay the costs of the suit.

For Plaintiff : Mr.P.L.Narayanan, Senior Counsel
for Mr.E.Hariharan & V.Praveenkumar

For Defendants : Mr.P.R.Raman, Senior Counsel,
for Ms.Abitha Banu

JUDGMENT

This suit has a chequered history. It ought to have been a simple mortgage claim, but, by the conduct of both the parties, both prior to the filing of the suit and after filing of the suit, the simple mortgage claim has got complicated and ultimately, it has delayed the resolution dispute. The suit filed in the year 1997 is witnessing final adjudication only now and the major reason for the same is the conduct of both the parties to the dispute.

2. The plaintiff is a financial institution, which lent money to the



C.S.No.670 of 1997

first defendant, who is a builder, and the defendants 2 and 3 are the guarantors to the said loan. The first defendant, though admits creation of mortgage in favour of the plaintiff as security for the loan, claims that in view of the delay in disbursement of the loan by the plaintiff, they had suffered losses and were unable to proceed with the construction on account of shortage of funds. They also claim that even though only a portion of the larger extent of the land owned by them was mortgaged with the plaintiff and only 25 flats were the subject matter of the mortgage, the plaintiff had issued a public notice stating that the entire land together with 88 flats were mortgaged with them, due to which, the first defendant claims that they were unable to sell the flats, which were not the subject matter of the mortgage, and this has resulted in them incurring huge losses and hardship. The suit claim seeks for mortgage relief and recovery of money from the defendants for the alleged non-repayment of the mortgage loan by the defendants. The defendants have also made a counter-claim against the plaintiff on the ground that they have suffered huge losses on account of the delay in disbursement of loan amount on time as well as on account of the public notice given by the plaintiff for all the 88 flats, though the mortgage was created only for 25 flats. By way of introduction and for easy understanding of the nature of



C.S.No.670 of 1997

the dispute between the parties, the aforesaid brief facts have been narrated.

3. Let us now in detail go to the contentions of the plaintiff and the defendants as found in their respective pleadings.

4. The plaintiff sanctioned the mortgage loan for a sum of Rs.4 crores and they also issued a sanction letter dated 27.09.1995 and thereafter, based on the sanction letter, short term loan agreement dated 30.10.1995 was entered into between the plaintiff and the defendants. The plaintiff is the lender, the first defendant is the borrower and the defendants 2 and 3 are the guarantors. The plaintiff disbursed the loan of Rs.4 crores to the first defendant. The first defendant has also issued a letter to the plaintiff identifying 25 flats to be mortgaged to the plaintiff as per the loan agreement. According to the plaintiff, the first defendant had mortgaged 60000/200000 sq.ft. of Un-Divided Share (UDS) of land together with 25 flats earmarked in Blocks 4 and 5 of the building project as security for the due repayment of the loan. According to them, eventhough during the pendency of the suit, they had claimed mortgage interest over 88 flats together with 60000/200000 sq.ft. of UDS land, they



C.S.No.670 of 1997

are now not claiming mortgage interest over 88 flats, but, claiming mortgage interest only in respect of 25 flats and 60000/200000 sq.ft. of undivided share of land.

5. According to the plaintiff, the defendants have made staggered payments during the pendency of the suit towards the repayment of the loan. According to them, the payments made by the defendants have been duly given credit to on the respective dates of payment. The plaintiff also claims that as per the short term loan agreement, the defendants are also liable to pay at quarterly rests penal interest at 2% per month for the delay in the repayment of the loan by way of liquidated damages over and above the interest at 22% per annum payable for the loan. The plaintiff has claimed that a sum of Rs.4,47,94,037/- is due and payable by the defendants as on 31.07.1997 and the defendants are liable to pay future interest at 22% per annum with quarterly rests with penal interest at 2% from 31.07.1997 till the date of realization.

6. The plaintiff has sought for a preliminary decree for the aforesaid sum against the defendants jointly and severally and, failure to pay the said sum by the defendants, the plaintiff has sought for sale of the mortgaged property morefully described in the Schedule A and B of the



C.S.No.670 of 1997

plaint and appropriate the sale proceeds after defraying the expenses thereof and, in the event of shortfall in the satisfaction of the decretal dues, permit the plaintiff to proceed against the defendants personally.

7. However, the defendants contend as follows:-

(a) The plaintiff did not disburse the loan amount on time resulting in heavy losses to the first defendant. According to the defendants, the plaintiff ought to have disbursed the total loan of Rs.4 crores by March, 1996, and due to the delay in disbursement of the loan by the plaintiff, the first defendant has suffered huge losses.

(b) During the pendency of the suit, the plaintiff had given One Time Settlement (OTS) offer on 09.06.2005, which was accepted by the defendants. As per the said OTS offer, the plaintiff agreed for a one time penalty of Rs.2 lakhs as against the penal interest of 2% per month and to receive a sum of Rs.7.80 crores by computing interest at the rate of 10% from 01.02.1997. According to the defendants, there was a clear understanding between the plaintiff and the defendants that as and when part payments were made by the defendants, the proportionate undivided share of land mortgaged with the plaintiff will be released by the plaintiff on pro-rata basis. According to the defendants, contrary to the



C.S.No.670 of 1997

understanding, the plaintiff had failed to release the charge on pro-rata basis in spite of receipt of Rs.2.80 crores from the defendants on different dates.

(c) According to the defendants, since the proportionate undivided share of land was not released by the plaintiff on pro-rata basis, the defendants could not register undivided share of land to the purchasers of the apartments, who had obtained bank loan. According to the defendants, only due to non-release of the proportionate undivided share of land from mortgage on pro-rata basis by the plaintiff, they could not pay the balance payment of Rs.5 crores to the plaintiff as per the settlement letter dated 09.06.2007 given by the first defendant.

(d) According to the defendants, the plaintiff insisted the defendants to give cheques for Rs.5 crores. The defendants also gave 5 post-dated cheques, each for Rs.1 crore, to the plaintiff, along with their letter dated 09.06.2007, intimating the plaintiff not to present cheques without obtaining the consent of the defendants believing that the plaintiff would release the proportionate 21000 sq.ft. of UDS land to the defendants.

(e) According to the defendants, contrary to the understanding, the plaintiff presented cheques without informing the defendants and without



C.S.No.670 of 1997

releasing the proportionate 21000 sq.ft. of UDS land from mortgage.

According to the defendants, the plaintiff had also issued a notice dated 13.07.2007 under Section 138 of the Negotiable Instruments Act, 1881, against the defendants in respect of the dishonoured cheques.

(f) According to the defendants, in the year 2008, they had filed an application in O.A.No.374 of 2008 seeking for injunction restraining the plaintiff from dealing with 63 flats which were not mortgaged to the plaintiff. This Court, by order dated 30.06.2008 and 30.09.2008, directed the plaintiff and the defendants to take a decision on the settlement afresh with regard to the receipt of the balance sum of Rs.5 crores. According to the defendants, when the applications were pending, the plaintiff initiated proceedings under the SARFAESI Act by issuing a demand notice on 08.02.2008 and possession notice on 18.09.2008 for the entire block Nos.4 and 5, and also issued a paper publication of possession notice on 24.10.2009 for the entire property at No.33, Nelson Manickam Road, and for Block Nos.4 and 5 consisting of 88 flats.

(g) The plaintiff has also filed a petition under Section 14 of the SARFAESI Act, 2002, before the Chief Metropolitan Magistrate Court in Criminal M.P.No.1912 of 2009 for taking physical possession of entire Block Nos.4 and 5 and the said application was allowed on 26.08.2009.



C.S.No.670 of 1997

This Court, vide its order dated 02.12.2009, restrained the plaintiff from proceeding against 63 flats out of the total 88 flats. Aggrieved by the same, an appeal was also filed by the plaintiff and the Division Bench of this Court, by its order dated 15.02.2010, passed in O.S.A.No.14 of 2010, dismissed the said appeal.

8. Based on the pleadings of the respective parties, this Court framed the following issues:-

1. Whether the plaintiff proves any legal, valid enforceable mortgage as claimed in the suit?

2. Whether the plaintiff is entitled to a preliminary decree for a sum of Rs.4,47,94,037/- with future interest thereon at 22% per annum with quarterly rests with penal interest at 2% from 31.07.1997 till the date of realization against the defendants?

3. Whether the defendants are entitled for the relief of compensation of a sum of Rs.2 crores @ 24% per annum from 04.01.1999 till the date of realization?

4. Whether the plaintiff proves that the plaintiff is entitled to anything more than Rs.5 crores due to the settlement arrived at pending suit?

5. Whether the defendants prove that they have



WEB COPY



C.S.No.670 of 1997

incurred damages due to the various omission and commission of the plaintiff?

9. The plaintiff's authorized representative Mr.S.R.Ravi, who is their area manager, was examined as a witness (PW1) on the side of the plaintiff. He has filed a proof affidavit reiterating the contents of the plaint and the subsequent developments during the pendency of the suit. Through PW1, the following documents were marked as exhibits on the side of the plaintiff:-

Date	Nature of documents	Exhibits
27.11.2012	General power of attorney executed by the plaintiff's company in favour of S.R.Ravi	Ex.P1
30.10.1995	The original short term loan agreement	Ex.P2
27.09.1995	The original sanction letter	Ex.P3
30.10.1995	The original promissory note executed by the first defendant in favour of the plaintiff	Ex.P4
30.09.1995	Letter of guarantee	Ex.P5
30.10.1995	The original letter evidencing deposit of title deeds executed by the first defendant in favour of the plaintiff	Ex.P6
11.11.1995	The letter issued by the first defendant to the plaintiff	Ex.P7
14.02.1996	The original letter addressed by the first defendant to the plaintiff	Ex.P8
16.10.1996	Letter addressed to the first defendant by the plaintiff	Ex.P9



C.S.No.670 of 1997

Date	Nature of documents	Exhibits
16.11.1996	Letter sent by the first defendant to the plaintiff	Ex.P10
07.02.1997	Letter sent by the plaintiff to the first defendant	Ex.P11
26.02.1997	Letter issued by the first defendant to the plaintiff	Ex.P12
10.03.1997	Letter sent by the plaintiff to the Bank of America	Ex.P13
13.03.1997	Notice issued by the plaintiff's counsel to the defendants	Ex.P14
19.09.1997	Encumbrance certificate for the period of 01.08.1984 to 29.08.1997	Ex.P15
24.03.1995	Sale deed (document no.3439 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P16
24.03.1995	Sale deed (document no.3444 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P17
31.03.1995	Sale deed (document no.3956 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P18
31.03.1995	Sale deed (document no.3455 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P19
31.03.1995	Sale deed (document no.3957 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P20
31.03.1995	Sale deed (document no.3972 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P21
31.03.1995	Sale deed (document no.3967 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P22
31.03.1995	Sale deed (document no.3966 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P23
24.05.1995	Sale deed (document no.3968 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P24



C.S.No.670 of 1997

Date	Nature of documents	Exhibits
10.05.1995	Sale deed (document no.3976 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P25
30.10.1995	Letter from the first defendant to the plaintiff	Ex.P26
09.06.2007	Series of letters	Ex.P27
30.06.2007	Cheque Nos.3339 to 3343	Ex.P28
24.05.2007	Letter written by the first defendant to the plaintiff	Ex.P29

The plaintiff's witness (PW1) was also cross-examined by the defendants' counsel.

10. The first defendant's authorized representative Mr.Sarath Kakumanu, who is the director of the first defendant, was examined as a witness (DW1) on the side of the defendants. He has filed a proof affidavit reiterating the contents of the written statement and the additional written statement filed by the defendants in the suit. Through DW1, the following documents were marked as exhibits on the side of the defendants.

Date	Nature of documents	Exhibits
31.10.1995	Letter acknowledgment by the area Manager of the plaintiff	Ex.D1



C.S.No.670 of 1997

Date	Nature of documents	Exhibits
26.11.1996	Letter written by the plaintiff to the defendant	Ex.D2
09.05.1996	Letter sent by the defendant to the Area Manager	Ex.D3
23.07.1996	Letter sent by the defendant to the plaintiff	Ex.D4
28.12.1996	Letter sent by the defendant	Ex.D5
01.04.2005 to 31.08.2023	Ledger Account	Ex.D6

DW1 was also cross-examined by the plaintiff's counsel.

11. Heard Mr.PL.Narayanan, learned Senior counsel for the plaintiff; and Mr.P.R.Raman, learned Senior counsel for the defendants.

12. The learned Senior counsel for the plaintiff reiterated the contents of the plaint and also drew the attention of this Court to the exhibits and would submit as follows:-

a) The defendants are defaulters under the short term loan agreement dated 30.10.1995 (Ex.P2) in the repayment of the loan to the plaintiff.

b) As per the short term loan agreement dated 30.10.1995 (Ex.P2), the defendants will have to repay the loan together with interest at 22%



C.S.No.670 of 1997

per annum and failure to repay the loan on the part of the defendants will entitle the plaintiff to claim penal interest at 2% per month in addition to the 22% simple interest.

c) During the pendency of the suit, the first defendant, by letter dated 09.06.2007 (Ex.P27), had given an offer of settlement by way of full and final settlement to the plaintiff agreeing to pay the remaining sum of Rs.5 crores in 5 postdated cheques, as they had already paid Rs.2.8 crores earlier during the pendency of the suit. Postdated cheques were also enclosed by the first defendant along with their letter dated 09.06.2007 (Ex.P27)

d) There is no delay in disbursement of the loan by the plaintiff, as they had agreed to disburse the loan only based on the progress of the construction under the short term loan agreement dated 30.10.1995 (Ex.P2).

e) As per the short term loan agreement dated 30.10.1995 (Ex.P2), the plaintiff had made a demand for the repayment of loan from the defendants through legal notice dated 13.03.1997 (Ex.P14).

f) Even the postdated cheques issued by the defendants got dishonoured and in respect of which, proceedings under Section 138 of the Negotiable Instrument Act were initiated by the plaintiff.



C.S.No.670 of 1997

WEB COPY

13. On the other hand, the learned Senior counsel for the defendants, after drawing the attention of this Court to the various exhibits as well as the pleadings, would submit as follows:-

a) The entire loan of Rs.4 crores ought to have been disbursed to the defendants by the plaintiff by March, 1996. But, the loan was disbursed only in September, 1996, which resulted in the defendants not having sufficient funds to make progress in the construction. Due to the same, the defendants had to suffer losses and could not keep up their commitments with the buyers of the flats.

b) The mortgage was created by the defendants in favour of the plaintiff only in respect of 60000/200000 undivided share of land together with 25 flats. But, the defendants had claimed that the entire 88 flats together with the entire land were mortgaged with them and they had also given a public notice on 24.10.2009 cautioning the general public that the entire property including 88 flats has been mortgaged, thereby causing irreparable loss and hardship to the defendants. In view of public notice given by the plaintiff, the defendants were unable to sell the remaining 63 flats, which were not the subject matter of any mortgage.

c) The plaintiff, at the time of filing of the suit, had pleaded that the



C.S.No.670 of 1997

mortgage created by the defendants in their favour was only in respect of 25 flats, but, subsequently, the plaintiff had amended the plaint in the year 2012 taking a new plea that the entire property together with 88 flats were mortgaged in their favour by the defendants.

d) Eventhough the learned Senior counsel for the plaintiff, during the course of his submissions, on instructions, would submit that the mortgage is restricted only to 25 flats, the plea taken by the plaintiff as seen from the amended plaint that the mortgage covers the entire property including 88 flats has caused irreparable loss and hardship to the defendants, as they have been unable to sell the remaining extent of undivided shares of land as well as the remaining 63 flats proposed to be constructed in the remaining area, which are not the subject matter of the mortgage.

e) The plaintiff had also agreed to release on pro-rata basis the land proportionate to the payments made by the defendants as per the OTS proposal approved by the plaintiff's board dated 09.06.2005.

f) The plaintiff has also not released the land on pro-rata basis despite the defendants having made a payment of Rs.2.80 crores to the plaintiff. The defendants were unable to sell the flats only due to non-release of land from mortgage on pro-rata basis as per the OTS proposal



C.S.No.670 of 1997

approved by the plaintiff's board dated 09.06.2005.

WEB COPY

g) The Division Bench of this Court, by its order dated 15.02.2010 passed in O.S.A.No.14 of 2010, had also confirmed the order passed by the learned Single Judge on 02.12.2009, by dismissing the appeal filed by the plaintiff, under which, the plaintiff was enjoined from issuing public notice in respect of remaining 63 flats, which is not the subject matter of the mortgage.

h) On account of losses suffered by the defendants, the defendants have also made a counter-claim of Rs.2 crores in this suit. Though they have suffered more losses, they have restricted their counter-claim only to Rs.2 crores on account of their inability to pay court fees.

DISCUSSION:-

14. The following are the undisputed facts:-

a) The mortgage was created by the first defendant in favour of the plaintiff only in respect of 60000/200000 undivided share of land together with the specified 25 flats earmarked in Block Nos.4 and 5.

b) At the first instance, the mortgage suit was filed by the plaintiff seeking for recovery of a sum of Rs.4,47,94,037/- together with future interest at 22% per annum with quarterly rests with penal interest at 2%



C.S.No.670 of 1997

from 31.07.1997 till the date of realization.

WEB COPY

c) Under the short term loan agreement dated 30.10.1995 (Ex.P2), the plaintiff lent a sum of Rs.4 crores to the first defendant. As per Ex.P2, the loan amount will have to be repaid on or before 30.04.1997 to the plaintiff and it carries interest at 22% per annum and failure to repay the loan amount on time by the defendants will entitle the plaintiff to claim penal interest at 2% per month till the date of payment by way of liquidated damages.

d) During the pendency of the suit, the plaintiff's board, vide its letter dated 09.06.2005, approved the One Time Settlement proposal submitted by the first defendant with the following terms:-

1) The entire loan outstanding including interest should be repaid within 24 months from the date of acceptance of this proposal.

2) Rate of interest will be charged at 10% from 1st February, 1997 (date of default) and the same will be continued to be charged till the date of full repayment of loan.

3) As against normal penal interest of 2% p.m. for the days of default, nominal penal interest amounting to Rs.2,00,000/- towards full and final settlement of penal interest to be paid immediately.

4) A down payment of Rs.50,00,000/- to be paid



C.S.No.670 of 1997

immediately and the balance outstanding together with interest at the applicable rate shall be payable in monthly installments and postdated cheques to that effect to be submitted.

5) We will release the mortgage on the security on pro-rata basis subject to repayment.

6) If the loan together with applicable interest is not paid on or before the date mentioned above, the concessions mentioned in the previous paragraphs will stand withdrawn and the terms and conditions mentioned in the Original Agreement will be restored.

e) Since the repayment has not been done as per the OTS proposal approved by the plaintiff's board dated 09.06.2005 for a sum of Rs.7.8 crores, the first defendant vide its letter dated 09.06.2007 (Ex.P27) has come up with a request for one more settlement offer agreeing to repay the entire outstanding amount of Rs.5 crores. It is further stated in Ex.P27 that since the amount of Rs.2.8 crores has already been paid, for the remaining amount of Rs.5 crores, the first defendant has also issued 5 postdated cheques and thereby requested to release from mortgage 25% of undivided share for the amount already paid i.e., Rs.2.8 crores.

f) It is also admitted by the defendants as seen from their deposition that eventhough 5 postdated cheques were issued by the



C.S.No.670 of 1997

defendants to the plaintiff along with their letter dated 09.06.2007(Ex.P27), the defendants have intimated the plaintiff that without their consent postdated cheques should not be presented by the plaintiff for clearance. Infact, the first postdated cheque issued by the first defendant for a sum of Rs.1 crore to the plaintiff was returned dishonoured for insufficient funds, for which, the plaintiff had also initiated proceedings against the defendants under Section 138 of the Negotiable Instruments Act.

g) The plaintiff's witness, during the course of cross-examination, has also admitted that a sum of Rs.2.8 crores was received from the defendants pursuant to the OTS proposal approved by the plaintiff's board dated 09.06.2005. Even according to the defendants, a sum of Rs.5 crores is still due and payable to the plaintiff as per the settlement letter dated 09.06.2007 issued by the first defendant (Ex.P27).

h) As per the OTS proposal of the first defendant approved by the plaintiff's board dated 09.06.2005, the plaintiff had agreed to waive the penal interest of 2% per month as claimed in the short term loan agreement dated 30.10.1995 (Ex.P2), and instead, agreed to receive a lumpsum penal interest of Rs.2 lakhs as liquidated damages.



C.S.No.670 of 1997

15. As seen from the aforementioned undisputed facts, it is clear that the defendants are defaulters in the repayment of the loan to the plaintiff, as they themselves had agreed that a sum of Rs.5 crores is due and payable to the plaintiff vide their letter for settlement dated 09.06.2007 (Ex.P27). As per the short term loan agreement dated 30.10.1995 (Ex.P2), the defendants had agreed that the loan amount will carry simple interest of 22% per annum. Therefore, necessarily, simple interest as stipulated in the contract will have to be paid by the defendants along with the principal outstanding amount.

16. However, this Court will have to give due consideration to the developments subsequent to the filing of the suit, namely, (a) public notice given by the plaintiff on 24.10.2009 cautioning the general public at large not to deal with the entire property, which includes 88 flats, though only 25 flats in Block Nos.4 and 5 were mortgaged to the plaintiff. Issuance of public notice has also not been disputed by the learned Senior counsel for the plaintiff during the course of his submissions, though the same has not been marked as an exhibit. Certainly, the defendants would have suffered losses and hardship on account of the said public notice issued by the plaintiff, as any buyer for



C.S.No.670 of 1997

that matter will hesitate to buy any of the flats, eventhough the land in which the flat is being sold is not actually subject to mortgage. The defendants have also pleaded in their written statement that they were unable to sell the flats in the unencumbered area only due to the public notice issued by the plaintiff for the entire property including 63 flats, which was not the subject matter of the mortgage.

17. Pending the suit, the plaintiff had filed a petition under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate Court in CrI.M.P.No.1912 of 2002 seeking to take possession of the entire Block Nos.4 and 5 and the said petition was allowed on 26.08.2009. Thereafter, this Court, by its order dated 02.12.2009 passed in O.A.No.374 of 2008, granted interim injunction restraining the plaintiff from proceeding against 63 flats out of 88 flats, which were not the subject matter of the mortgage, but, in respect of the specified 25 flats and the corresponding land area, no injunction was granted. Aggrieved by the same, the plaintiff preferred an appeal before the Division Bench of this Court. The Division Bench, by its order dated 15.02.2010 passed in O.S.A.No.14 of 2010, upheld the order passed by the learned Single Judge.



C.S.No.670 of 1997

WEB COPY 18. In the year 2012, the plaintiff themselves have amended the
plaint after obtaining permission from this Court to include the entire
extent of the land as well as 88 flats, though only 25 assigned flats were
mortgaged in their favour by the first defendant. The learned Senior
counsel for the plaintiff during the course of his submissions, on
instructions, submitted that the plaintiff is restricting its mortgage claim
only in respect of the assigned 25 flats and 60000/200000 undivided
share of land, which were mortgaged by the first defendant in their
favour. The subsequent developments, including the One Time
Settlement offer given by the plaintiff during the pendency of this suit,
have not been incorporated in the plaint by filing an amendment
application.

19. As seen from the above facts, the conduct of the plaintiff would
have certainly caused loss and hardship to the defendants. The first
defendant is a promoter of flats and they were admittedly promoting the
flats for the entire extent of the land and the mortgage was created by
them in favour of the plaintiff only for 25 flats and there were remaining
63 flats to be promoted by the first defendant, which were not the subject



C.S.No.670 of 1997

matter of the mortgage. However, arbitrarily, the plaintiff, during the pendency of the suit, had claimed mortgage over the entire extent of the land, which includes the remaining 63 flats as well. Though the defendants have claimed Rupees 2 crores by way of counter-claim in this suit, they have not let in any oral and documentary evidence to prove that they had suffered such a huge loss. No doubt, they may have suffered loss on account of the arbitrary and irresponsible conduct of the plaintiff in claiming mortgage over the entire extent of the land as well as the entire 88 flats during the pendency of the suit, though the mortgage was created in respect of 25 flats alone. However, unless and until they prove through oral and documentary evidence that they had suffered a minimum loss of Rs.2 crores, the same cannot be granted by this Court. But, this Court considering the fact that the plaintiff has issued public notice in respect of the flats and the undivided share of land which are not the subject matter of mortgage, the plaintiff is liable to pay nominal damages to the defendants.

20. The request for permission to convert residential flats into service apartments by the defendants will not entitle the plaintiff to issue



C.S.No.670 of 1997

public notice for the entire extent of the land. The short term loan agreement dated 30.10.1995 (Ex.P2) does not also explicitly prohibit the defendants from converting residential apartments into service apartments. While that be so, the plaintiff ought not to have issued public notice on 24.10.2009 cautioning the general public that they shall not deal with the entire extent of land together with 88 flats owned by the defendants and they will be doing so at their own risk and costs.

21. The relevant portions of the short term loan agreement dated 30.10.1995 (Ex.P2) are reproduced hereunder:-

“1) GIC-IIF agrees to lend to the borrower and the borrower agrees to borrow from GIC-IIF a short term loan of Rs.400 lakhs.

2) The short term loan shall be disbursed in one lumpsum or in suitable installments to be decided by GIC-IIF.

3) The borrower shall pay interest on the principal amount of the short term loan at the rate of 22% per annum on the last date of every month. Interest would be calculated on the basis of a year of 360 days.

4) If interest is not paid on the due dates specified in the foregoing paragraph, an additional



C.S.No.670 of 1997

interest @ 2% per month shall be payable as and by way of liquidated damages over and above the rate of interest aforementioned, computed from the respective due dates of such interest and all such interest and additional interest due under this agreement but not paid shall become payable upon the footing of compound interest with quarterly rests.

5) The short term loan shall be repayable before 30.04.1997 with the first installment payable on or before 31.01.1997. In case of default in repayment of loans on the dates specified herein, GIC-IIF shall, without prejudice to other rights and remedies that it may have, charge additional interest as per the provisions of paragraph 4 above.”

22. As seen from the terms and conditions of the short term loan agreement extracted supra, it is clear that the plaintiff shall disburse the loan in one lump-sum or in installments at its discretion. The plaintiff has pleaded that the entire loan amount was disbursed in installments based on the stage of construction. When the contract enables the plaintiff to exercise its discretion either to disburse the loan in one lump-sum or in installments, this Court is of the considered view when the entire loan



C.S.No.670 of 1997

was disbursed by the plaintiff in September, 1996 based on the stage of the construction, it cannot be held that there was delay on the part of the plaintiff in the disbursement of the loan.

23. All the parties to the dispute are bound by the terms and conditions of the short term loan agreement dated 30.10.1995 (Ex.P2), if the terms and conditions are conscionable and are not in violation of the provisions of the Indian Contracts Act, 1872. Insofar as 22% simple interest is concerned, as a financial institution, the defendants are bound by the terms of the contract. Clause 4 of the short term loan agreement dated 30.10.1995 (Ex.P2), extracted supra, also stipulates that by way of liquidated damages, additional interest at 2% per month with quarterly rests shall be payable by the defendants if the simple interest is not paid on the due dates by the defendants. In the sanction letter dated 27.09.1995 (Ex.P3), the plaintiff did not specify levy of penal interest, though, in the said letter, the plaintiff has disclosed to the defendants that the defendants will have to repay the loan together with simple interest at 22% per annum. In case, if the terms of the contract are unconscionable, this Court is having the power under Sections 16, 19A and 23 of the Indian Contract Act, 1872, to strike down unconscionable clauses in the



C.S.No.670 of 1997

contract. Infact, as seen from the 103rd report of the Law Commission and as seen from the RBI circular of the year 2003 placed on record by the learned Senior counsel for the defendants, the financial institutions should be prohibited from levying such kind of penal interest as stipulated in Clause 4 of the short term loan agreement dated 30.10.1995 (Ex.P2).

24. Unconscionable contracts are drafted in such a manner that they favour one party, and impose harsh, unfair and unjust conditions on the other party. An unconscionable contract is one that is so grossly unreasonable in the light of the business practices of the time and place that it should not be enforced. The doctrine of unconscionability allows the court to intervene into the contractual relations of parties and modify such agreements.

25. There are two types of unconscionability, namely, (a) procedural unconscionability; and (b) substantive unconscionability. Procedural unconscionability can be understood by examining how each term became a part of the contract and the actual bargaining process at the time of making the contract. This arises due to difference in the



C.S.No.670 of 1997

bargaining position of the parties, absence of meaningful choice, unfair surprise. Substantive unconscionability can be understood by referring to the contract or few unfair terms of the contract, such as, unfair price of the contract, the limitations of the remedies and disclaimers of warranties, which make the contract very harsh, oppressive, unworkable or one sided.

26. In the case on hand, though the loan disbursed by the plaintiff to the defendants was only Rs.4 crores, if the amount outstanding is calculated as per Clause 4 of the short term loan agreement dated 30.10.1995 (Ex.P2), which stipulates additional interest at 2% per month in addition to the simple interest at 22% per annum, the outstanding amount due and payable by the defendants will run to several crores of rupees, exceeding Rs.60 crores, which cannot be allowed as it shocks the conscience of the Court, as the penal interest alone will work out to more than Rs.50 crores.

27. Unconscionable is not defined anywhere in any Indian Law. There has been various debates on this issue and the Law Commission of India, in its 103rd and 199th report, recommended that there should be changes in the existing laws to protect the citizens of our country against



C.S.No.670 of 1997

unconscionable contracts.

WEB COPY

28. We will now look into the provisions of the Indian Contract Act to understand the doctrine of unconscionability and how it is used for avoiding any of the unconscionable terms of the contract. Section 16 of the Indian Contract Act states that a contract is said to be obtained by undue influence, if one party dominates the other party and uses his power to obtain unfair advantage over the other party. Section 16 of the Indian Contract Act is reproduced hereunder:-

16. “Undue influence” defined.-- (1) *A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*

(2) *In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another--*

(a) *where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or*



WEB COPY



C.S.No.670 of 1997

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

29. As per Section 19A of the Indian Contract Act, a contract falling within the purview of Section 16 of the Indian Contract Act is voidable at the option of the party whose consent was so obtained. Section 19A reads as follows:-

19A. Power to set aside contract induced by undue influence.— *When consent to an agreement is caused by undue influence, the*



C.S.No.670 of 1997

agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

30. Section 23 of the Indian Contract Act also makes it clear that if the object of an agreement is unlawful, fraudulent, immoral and opposed to public policy, the term of the contract, which fulfills the above referred criteria, is void. In the case on hand, levy of penal interest at 2% per month from the date of default by the defendants would amount to imposing harsh, unfair and unjust conditions on the defendants as it is a long period of more than twenty six years, and therefore, it is certainly opposed to public policy coming within the purview of Section 23 of the Indian Contract Act, which is reproduced hereunder:-

What considerations and objects are lawful, and what not.---

The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of



C.S.No.670 of 1997

any law; or
is fraudulent ; or
involves or implies, injury to the person or
property of another; or
the Court regards it as immoral, or opposed
to public policy.

In each of these cases, the consideration or
object of an agreement is said to be unlawful. Every
agreement of which the object or consideration is
unlawful is void.

31. For the foregoing reasons, this Court will have to necessarily partially strike down clause 4 of the short term loan agreement dated 30.10.1995 (Ex.P2) stipulating penal interest at the rate of 2% per month with quarterly rests payable by the defendants to the plaintiff. However, in view of the undisputed fact that the defendants have committed default in the repayment of the loan, which was disbursed as early as in the year 1996, the defendants are liable to pay a lumpsum amount to the plaintiff by way of nominal damages in addition to the simple interest amount calculated at 22% per annum. Accordingly, this Court quantifies the nominal damages suffered by the plaintiff on account of the delayed repayment by the defendants at Rs.50 lakhs, as the defendants themselves



C.S.No.670 of 1997

under the One Time Settlement offer given by the plaintiff in the year 2005 had agreed to pay a lumpsum amount of Rs.2 lakhs as penal interest in addition to the simple interest.

32. At the same time, the plaintiff is also liable to pay compensation to the defendants for their unlawful and improper conduct in giving public notice for the entire extent of the land together with 88 flats, though only 25 flats were the subject matter of the mortgage. Therefore, this Court quantifies the compensation payable to the defendants by the plaintiff for their unlawful and improper conduct at Rs.50 lakhs. Though the defendants have claimed a sum of Rs.2 crores by way of counter-claim from the plaintiff, this Court is not willing to award the said amount of compensation in view of the fact that the defendants had not let in oral and documentary evidence to prove that they had indeed suffered loss of Rs.2 crores on account of the unlawful and improper conduct of the plaintiff. But this Court after giving due consideration to the fact that the plaintiff had unlawfully and improperly claimed mortgage over all the 88 flats which claim was subsequently withdrawn, the defendants are entitled to nominal damages from the plaintiff which is quantified at Rs.50,00,000/-.



C.S.No.670 of 1997

WEB COPY

33. Since the plaintiff and the defendants are both liable to compensate each other amounting to Rs.50 lakhs each on account of their respective improper and unlawful conduct, the defendants are liable to repay the outstanding principal amount with simple interest at 22% per annum alone and they are not liable to pay any further sums of money by way of penal interest.

34. In the statement of account submitted by the plaintiff, the plaintiff has claimed that as of January, 2024, a sum of Rs.10,73,34,541/- is due and payable by the defendants jointly and severally towards principal and simple interest at 22% p.a. after giving credit to the payments received from the defendants. The relevant details of the statement of account submitted by the plaintiff pertaining to the outstanding amount due and payable by the defendants are reproduced hereunder:-

Total O/S as of January, 2024	
Principal O/S	Rs.1,20,00,000.00
Interest O/S	Rs.10,73,34,541.00
Penal O/S	Rs.51,04,66,398.00
Grand Total	Rs.62,98,00,939.00



C.S.No.670 of 1997

WEB COPY

35. Since the plaintiff is not entitled for any penal interest, this Court is disallowing the claim for penal interest amounting to Rs.51,04,66,398/- as claimed in the statement of account submitted by the plaintiff to this Court. The plaintiff is entitled to receive a sum of Rs.10,73,34,541.00 together with interest at the rate of 22% p.a. from the defendants on Rs.1,20,00,000.00 from 01.02.2024 till the date of payment.

36. The issues framed by this Court are answered in the following manner:-

Issue(1):-

The plaintiff has proved that there is a legal, valid and enforceable mortgage over the suit schedule property comprising of the earmarked 25 flats and 60000/200000 sq.ft. of UDS land.

Issue (2):-

The plaintiff is entitled to a preliminary decree against the defendants jointly and severally for a sum of



WEB COPY



C.S.No.670 of 1997

Rs.1,20,00,000/- being the principal amount outstanding and Rs.10,73,34,541/- towards interest (Rs.1,20,00,000/- towards principal outstanding + Rs.10,73,34,541/- towards interest outstanding as on 31.01.2024), together with future interest on Rs.1,20,00,000/- at 22% per annum from 01.02.2024 till the date of payment in full.

Issues (3) & (5):-

The defendants are entitled for a compensation of Rs.50 lakhs from the plaintiff and similarly, the plaintiff is also entitled by way of damages a sum of Rs.50 lakhs from the defendants, and if both the amounts are set-off against each other, the defendants are liable to pay only simple interest at 22% per annum, excluding the penal interest, on the principal outstanding amount as detailed in the statement of account submitted by the plaintiff to this Court.

Issue (4):-

The plaintiff has proved through oral and documentary evidence that they are entitled to recover a sum of Rs.1,20,00,000/- towards principal amount and



C.S.No.670 of 1997

WEB COPY

another sum of Rs.10,73,34,541/- towards interest as on 31.01.2024 together with future interest on Rs.1,20,00,000/- at 22% per annum from 01.02.2024 till the date of realization.

37. For the foregoing reasons, this suit is partly decreed by granting the following reliefs:

a) There shall be a preliminary decree passed in favour of the plaintiff against the defendants jointly and severally for a sum of Rs.11,93,34,541/- (Rs.1,20,00,000/- towards principal outstanding + Rs.10,73,34,541/- towards interest outstanding as on 31.01.2024), together with future interest at 22% per annum from 01.02.2024 on Rs.1,20,00,000/- till the date of realization, and the said sum shall be paid by the defendants jointly and severally within a period of one month from the date of receipt of a copy of this judgment, failing which, the suit schedule 'B' property together with the earmarked 25 flats in the schedule 'A' property shall be sold and the sale proceeds, after defraying the expenses of sale, shall be appropriated towards dues of the plaintiff and, in the event of any shortfall in the satisfaction of the decretal dues of the plaintiff, the plaintiff is permitted to proceed personally against the



C.S.No.670 of 1997

defendants jointly and severally.

WEB COPY

b) The defendants are directed to pay the costs of the suit to the plaintiff.

22.04.2024

Index: Yes/ No

Speaking order / Non speaking order

Neutral citation : Yes / No

rkm

Plaintiff's witness:

Mr.S.R.Ravi - PW1

Documents exhibited on the side of the plaintiff:-

Date	Nature of documents	Exhibits
27.11.2012	General power of attorney executed by the plaintiff's company in favour of S.R.Ravi	Ex.P1
30.10.1995	The original short term loan agreement	Ex.P2
27.09.1995	The original sanction letter	Ex.P3
30.10.1995	The original promissory note executed by the first defendant in favour of the plaintiff	Ex.P4
30.09.1995	Letter of guarantee	Ex.P5
30.10.1995	The original letter evidencing deposit of title deeds executed by the first defendant in favour of the plaintiff	Ex.P6
11.11.1995	The letter issued by the first defendant to the plaintiff	Ex.P7
14.02.1996	The original letter addressed by the first defendant to the plaintiff	Ex.P8
16.10.1996	Letter addressed to the first defendant by the	Ex.P9



C.S.No.670 of 1997

Date	Nature of documents	Exhibits
	plaintiff	
16.11.1996	Letter sent by the first defendant to the plaintiff	Ex.P10
07.02.1997	Letter sent by the plaintiff to the first defendant	Ex.P11
26.02.1997	Letter issued by the first defendant to the plaintiff	Ex.P12
10.03.1997	Letter sent by the plaintiff to the Bank of America	Ex.P13
13.03.1997	Notice issued by the plaintiff's counsel to the defendants	Ex.P14
19.09.1997	Encumbrance certificate for the period of 01.08.1984 to 29.08.1997	Ex.P15
24.03.1995	Sale deed (document no.3439 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P16
24.03.1995	Sale deed (document no.3444 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P17
31.03.1995	Sale deed (document no.3956 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P18
31.03.1995	Sale deed (document no.3455 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P19
31.03.1995	Sale deed (document no.3957 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P20
31.03.1995	Sale deed (document no.3972 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P21
31.03.1995	Sale deed (document no.3967 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P22
31.03.1995	Sale deed (document no.3966 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P23
24.05.1995	Sale deed (document no.3968 of 1995) executed by J.Saral Beevi and others in favour of the first	Ex.P24



C.S.No.670 of 1997

Date	Nature of documents	Exhibits
	defendant	
10.05.1995	Sale deed (document no.3976 of 1995) executed by J.Saral Beevi and others in favour of the first defendant	Ex.P25
30.10.1995	Letter from the first defendant to the plaintiff	Ex.P26
09.06.2007	Series of letters	Ex.P27
30.06.2007	Cheque Nos.3339 to 3343	Ex.P28
24.05.2007	Letter written by the first defendant to the plaintiff	Ex.P29

Defendant's witness:-

Mr.Sarath Kakumanu

- DW1

Documents exhibited on the side of the defendant:-

Date	Nature of documents	Exhibits
31.10.1995	Letter acknowledgment by the area Manager of the plaintiff	Ex.D1
26.11.1996	Letter written by the plaintiff to the defendant	Ex.D2
09.05.1996	Letter sent by the defendant to the Area Manager	Ex.D3
23.07.1996	Letter sent by the defendant to the plaintiff	Ex.D4
28.12.1996	Letter sent by the defendant	Ex.D5
01.04.2005 to 31.08.2023	Ledger Account	Ex.D6



WEB COPY



C.S.No.670 of 1997

22.04.2024

ABDUL QUDDHOSE, J.

rkm

Pre-Delivery Judgment in

C.S.No.670 of 1997



WEB COPY



C.S.No.670 of 1997

22.04.2024