
(1999) 04 MAD CK 0098
In the Madras High Court
Case No : O.S.A. No. 35 of 1993

B.R. Shamala and B.R. Shyamala Devi and Another APPELLANT
Vs
Kundan S. Bhayani and Others RESPONDENT

Date of Decision : 30-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11
Registration Act, 1908 — Section 17

Citation : AIR 1999 Mad 441 : (1999) 3 LW 67 : (1999) 3 MLJ 74

Hon'ble Judges : V. Kanagaraj, J; S.S. Subramani, J

Bench : Division Bench

Advocate : R. Krishnaswamy, for the Appellant; S.C. Shah, for the Respondent

Judgement

1. Defendants 1 and 2 in C.S. No. 551 of 1983 on the file of this Court are the appellants herein.
2. The suit filed by respondents was one for recovery of money by sale of mortgage properties.
3. It is the case of plaintiffs that as per Exs. P3 to P15 Promissory notes, defendants borrowed a sum of Rs. 2,55,000/- agreeing to pay the same with 21 % interest. As collateral security, properties belonging to first defendant was also mortgaged by deposit of title deeds. It is their further case that even though defendants agreed to discharge the entire debt within a period of 180 days, they could not settle the transaction. A reply was sent as per Ex. P2 wherein they disputed the allegation that there is deposit of title deeds with an intention to create mortgage and it is also contended that P. W. 1 Shantilal Bhayani obtained signatures only in blank papers, blank stamp papers etc. and it is further contended that with the plaintiffs they have no money transaction.
4. The suit was therefore allowed for realisation of Rs. 8,97,160/- with future interest and costs by sale of mortgaged properties and in case the proceeds are insufficient to satisfy the claim, a personal decree against defendants.

5. In the Written Statement filed by the appellants they pleaded that in the year 1969, second defendant produced a Hindi movie by name Subash Gangaram and on 1 -5-1971, P. W. 1, who is the husband of first plaintiff entered into an agreement with the second defendant to take on lease the distribution rights over the territory of east Punjab. It is said that this is the only transaction which defendants have entered with PW 1 "and they have no other transaction. The allegation in the plaint that Plaintiffs 1 to 4 are acting as agents of Plaintiffs 5 to 12 is also denied.

6. On the above pleadings, learned Judge raised seven issues. On issue No. 2, learned Judge found that the defendants have executed Exs. P3 to PI 5 Promissory notes and the same are subject to consideration. On issue Nos. 4 and 5, learned Judge further found that defendants have deposited the title deeds to plaintiffs and valid executable mortgage has been created. The contention that Ex. P 16 i.e., Memorandum of deposit of title deeds require registration was also found against.

7. Learned Judge also found that plaintiffs 1 to 4 have only agreed to make arrangements to raise a loan of Rs. 2,55,000/- and therefore they were acting as agents of Plaintiffs 5 to 12. An equitable mortgage was also taken by Plaintiffs 1 to 4 for themselves and on behalf of Plaintiffs 5 to 12. Learned Judge also found that plaintiffs are entitled to claim 21% interest. The contention that plaintiffs 5 to 12 are entitled only to money claimed and are not entitled to bring the property for sale was also repelled. Consequently, the suit was decreed as prayed for with costs. Two months time was given to defendants to discharge the entire debt.

8. In this appeal, learned counsel for appellants put forward the following submissions. Firstly, there is no dealing with any of the plaintiffs and the learned Judge should have dismissed the suit. An alternate argument has been taken by the learned counsel that in case it is found that there is money transaction, on the basis of Ex. P 16, decree should not have been granted for sale of the properties. The argument of the counsel was Ex. P. 16 requires registration and therefore inadmissible in evidence. A further contention is also taken by the learned counsel that at any rate even if Ex. P. 16 is admissible, it is addressed to Plaintiffs 1 to 4 and they alone can bring the properties for sale for the amounts due to them. As against plaintiffs 5 to 12, suit is hopelessly barred by limitation. Finally, further contention is also taken that interest of 21 % is excessive and the learned Judge should have exercised his discretion in awarding lesser rate of interest at least from the date of suit.

9. As against the said contention raised by the learned counsel for appellants, respondents" counsel submitted that the fact that defendants borrowed a sum of Rs. 2,55,000/- is proved in this case. The contention that signatures were obtained in blank papers and blank stamrxpapers is without any bona fide. Regarding Ex. P. 16 also it is argued that the same is only a memorandum evidencing a past transaction and therefore does not require registration.

Regarding interest, it is argued that Section 34 of CPC will not apply and plaintiffs are entitled to enforce the mortgage by demanding entire amount borrowed with contract rate of interest under O. 34, R. 11 of Code of Civil Procedure. It is argued that film business is a risky business and financiers are taking great risk in advancing loans to such persons and therefore interest awarded is only proper. Counsel prayed for dismissal of the appeal.

10. After hearing counsel on both sides, following points arise for consideration :

1. Whether Exs. P. 3 to P. 15 are executed by defendants and whether the same are binding on them?

2. Whether Ex. P. 16 is inadmissible in evidence for want of registration?

3. Whether the interest claimed by plaintiffs is excessive?

4. Whether the Preliminary Decree and Judgment of the learned Judge call for interference in this appeal?

11. Before dealing with the evidence in this case, it is only proper to take into consideration the pleadings of either parties.

12. In paragraph 3 of the Plaint it is said that plaintiffs have been acquainted with second defendant who is none other than the husband of first defendant, a Film Producer and it is also alleged that they have no dealings with them years before the suit transaction. In paragraph 4 of the plaint it is said that plaintiffs 1 to 4 are members of the same family and at the request of defendants, they agreed to arrange a total loan of Rs. 2,55,000A by advancing the same themselves as well as by obtaining loans from their principals and associates viz., plaintiffs 5 to 12 for whom plaintiffs 1 to 4 are acting as agents. On the basis of the arrangement, plaintiffs advanced a sum of Rs. 2,55,000/- as per Promissory notes Exs. P3 to P15 all dated 31-8-1971. It is also alleged that properties detailed in the Plaint have been given as mortgage to plaintiffs and therefore they are entitled for recovery of the amount with contractual rate of interest of 21% per annum.

13. In the written statement of the appellants in paragraph 5 it is alleged that second defendant produced a Hindi film and PW 1 offered to take on lease the distribution right of the film for exhibition and exploitation, in the east Punjab area. It is said that there is no transaction on 31-7-1971 and therefore the question of borrowing or lending of any amount on that date is false. It is also said that defendants' signatures were obtained in blank papers, non-judicial stamp papers and PW 1 fabricated the documents for the purpose of this case. According to them, there is no proper contract and plaintiffs did not arrange Rs. 2,55,000/-. They have also specifically denied about the deposit of title deeds. Ex. P. 16 also requires registration. Execution of Ex. P. 16 is also denied. It prayed for dismissal of the suit.

14. While narrating facts we have said while denying execution of the Promissory

notes, defendants have also contended that their signatures were taken in the blank papers, stamp papers etc. and the same have been utilised for filing the suit. When such a contention is taken, burden of proof regarding execution of Promissory notes lies on the plaintiffs. At the same time, it cannot be said that defendants are without any burden. They are also entitled to prove the circumstances under which they have signed the blank stamp papers, blank papers, etc. and if those explanations are found to be true, that will also be taken into consideration while considering the case of the plaintiffs.

15. Evidence in this case consists of the evidence of PW 1, Husband of first plaintiff and oral evidence of DWs. 1 and 2 who are the defendants in the suit. The capacity of PW 1 to prove Exs. P3 to P15 is not disputed. Even according to defendants, it is with whom they have entrusted the alleged blank promissory notes.

16. We have to take into consideration certain circumstances while considering the question how far plaintiffs are successful in proving the documents Exs. P3 to P15. Evidence of DW1 itself is an answer for this.

17. Ex. P38A is an admitted document. The same is executed by second defendant in favour of Plaintiffs 1 to 4. That is dated 31-8-1971. According to plaintiffs, though second defendant executed such a deed, they were not satisfied nor approved the agreement and the same was returned with them after getting legal advice. It is their case that title deeds were also given as Ex. P16 and the agreement Ex. P38A was also entrusted to their counsel. Counsel did not approve the agreement and a draft of Ex. P 16 was prepared. Subsequently defendants 1 and 2 themselves got Ex. P. 16 typed, corrected and signed and handed over the same to plaintiffs.

18. Why we are relying on Ex. P. 38A is that is an admitted document by defendants wherein plaintiffs 1 to 4 will advance a loan of Rs. 2,55,000/-, is mentioned. 21% interest for the amount advanced is also agreed to be paid. In Clause 12 of their agreement also provides that second defendant will obtain the consent from his wife i.e., first defendant to offer the scheduled properties as security for the financial arrangement. Ex. P.38A can be relied on for one purpose i.e., that there was an understanding between Plaintiffs 1 to 4 and second defendant for the loan of Rs.2,55,000/-agreeing to return the same with 21% interest.

19. In the written statement, the definite case is that PW 1 offered to take on lease of distribution right of the Hindi film produced by second defendant and it is their case that there is no other arrangement. That is belied by Ex. P38A.

20. Ex. P38A was not accepted by Plaintiffs and it is thereafter Ex. P16 came into existence. Defendants denied the contents in Ex. P. 16, but not the signature. It could be seen from Ex. P. 16 that the same is also corrected and initialled by first defendant. Therefore, the allegation that they executed Ex. PI 6 and signed in blank stamp papers is without merit.

21. If Ex. P. 16 is executed by defendants 1 and 2, it refers to the borrowing of Rs. 2,55,000/- on execution of promissory notes.

22. Apart from the above circumstances, it is seen that for some of the amounts covered by Promissory notes, cheques were issued by plaintiffs. When DW1 was examined there is change of stand from what he pleaded, as he has said that except for distribution right there is no other arrangement. As rightly contended by learned counsel for respondents, there is no necessity to sign blank stamp papers or blank papers for the purpose of entering into distribution rights. In fact, there cannot be any liability incurred by the defendants in such cases. In view of the weakness in the case, probably he shifted the stand while he was examined. In the chief examination dated 5-8-1991, he was asked in what connection you know Shantilal Bhayani. His answer was, in 1969, he produced a Hindi film and he intended to take on lease distribution rights and PW1 agreed to finance the same. He was further asked, "whether PW1 made any payment?" He said that he paid Rs. 2,50,000/- and the lending started from 31-8-1971. 31-8-1971 is the date of various promissory notes. He was further asked, "Whether he has given any document evidencing the said borrowing?" The Answer was, "PW1 got number of promotes and stamp papers signed by him and also signed by his wife".

23. In the Chief Examination dated 6-8-1991, a question was put to him thus,

"You have stated that Mr. Shantilal Bhayani had lent a sum of Rs. 2,55,000/- for your picture. Now you say that you do not owe him any money. Can you assign reason for that?"

The answer is, "The reason is when picture is completed my liability automatically ceases. He should have released the picture and got it released at Bombay and got the money back."

From this question, it is clear that defendants 1 and 2 have borrowed a sum of Rs. 2,55,000/- and it is at the time of those transactions, the alleged signature was also obtained in the alleged blank promissory notes. At this juncture, it is worthwhile to take into consideration the question in chief examination that,

"It is further stated by Mr. Shantilal Bhayani that you and your wife both together handed over the documents to Shantilal Bhayani. Is that statement correct,?"

The answer is,

"Yes. It is correct."

What was the necessity of handing over documents if the arrangement was only distribution right? On the same date Exs. P25 to P37 were also given by second defendant. They are various cheques in the name of plaintiffs 1 to 12. All these Exs. P25, P26, P27 and P28 are admittedly written and signed by second defendant himself. The last question in the chief examination on 6-8-1991 read thus,

"Apart from this loan of Rs. 2,55,000/- have you borrowed any amount from either Shantilal Bhayani or through him?"

The answer is,

The very statement amounts to admission about the borrowings. Then, what is the purpose of executing promissory notes is also answered by DW1 when he was examined on 12-8-1991, which read thus,

"I only gave a blank signature on the demand note for filling up amount of Rs. 2,55,000/- and have been filled up and not by me."

24. In this connection it may also be noted that even before 31-8-1971, there was earlier financial transaction between plaintiffs and second defendant. That is evident from Ex. P42. It could be seen that a sum of Rs. 50,000/- was borrowed in May, 1971 agreeing to return the same by three months. The said amount could not be returned and inclusive of that amount of Rs. 50,000/- a sum of Rs. 2,55,000/- was borrowed. We do not find any transaction after 31-8-1971 as contended by appellants. Apart from the admission. in Ex. P16, P. 38A and also issuance of cheques, it is clear that the case put forward by plaintiffs is true. Apart from the same, when he was examined on 16-8-1991, he was asked whether the cheques Exs. P25 to P29 relate to repayment of cash borrowings or cheque borrowings? He admitted that there are two or three cheque borrowings. He was further asked that, with regard to cheque borrowings, why PW1 is giving cheques drawn by his family members? There is no specific answer given by DW1.

25. When DW2 was examined, she gave an entirely different version. According to her, at the time when the affixed signature in Promissory notes, there is not even stamps. The evidence of PW1 shows that there was a borrowing on 31-8-1971 and defendants have executed promissory notes fully knowing that plaintiffs 1 to 4 are arranging payment of Rs. 2,50,000/- not only from their own funds but also from the funds of others. PW1 also categorically stated that even though in the promissory notes he has filled up the names, at the time when signatures were affixed, the name was already known to defendants. We do not find any ground to accept the case of appellants, that they did not execute the promissory notes.

26. It is along with this finding we have to take into consideration the explanation of affixing signature in blank promissory notes, stamp papers and blank papers. As rightly found by learned Judge, the explanation cannot stand scrutiny. It is an explanation for explanation sake. If there was only distribution arrangement, there was no necessity for taking such documents. When the explanation also fails and probabilities also in favour of Plaintiffs, we can only concur with the finding of the learned Judge regarding genuineness of Exs. P3 to P15. We hold that Exs. P3 to P15 were executed by defendants and the same is supported by consideration.

27. The next question that arises for consideration is whether Ex. P16 is inadmissible in evidence for want of registration. It will be proper to extract Ex. P16, which reads thus,

"To : Smt. Kundan S. Bhayani

Sri. Veerendra Kumar R. Bhayani,

Smt. Ranjan P. Bhayani

Smt. Manjula B. Bhayani

I, Shyamala Devi. wife of Sri. B. S. Ranga, aged about 38 years, residing at No. 53/9, Judge Jumbulinga Mudaly Road, Edward Elliots Road, Mylapore, Madras-4, to hereby acknowledge that on 31st August 1971, I handed over to you the documents as per list attached separately relating to my property at No. 53/9, Judge Jumbulinga Mudaly Road, Edward Elliots Road, Mylapore, Madras-4 with a view that you may keep the same as and by way of collateral security for the repayment of the amount of Rs. 2,55,000/- (Rupees Two Lakhs Fifty five thousand) only borrowed under Promissory notes under the joint signature of myself and my husband."

28. In AIR 1931 36 (Privy Council) it is held thus,

"That the memorandum was not other than a written record of the particulars of deeds the subject of an agreement constituted in fact by the act of deposit and the payment of the money, and that it neither purported nor operated to create or declare any right, title or interest in the property included in the deeds, with the result that it did not require registration. Even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document. It was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties and did not require registration."

29. In United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Others, , it is held thus, (Para 7)

"When the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies the contract between the parties to create a mortgage and no registered instrument is required under Sec. 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case

the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration and under Sec. 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either."

30. In *Deb Dutta Seal Vs. Ramanlal Phumra and Others*, , their Lordships had to consider the earlier decision of Calcutta High Court reported in (1873) 11 Beng. LR 405 (*Kedarnath Dutta v. Shamlal Khettry*). Considering the same,. their Lordships considered what are the essentials of deposit and how far the decision in *Kedarnath Dutta Case* is correct was considered. In paragraphs 9 to 12 of the Judgment, their Lordships held thus,

"9. It was said that if a transaction had already been entered into by the parties then Ex. 2 may not require registration, but if a transaction had not already been entered into it requires registration. Reliance was placed especially on *Kedarnath Duttv. Shamlal Khettry*, (1873) 11 Beng LR 405. The words in the memorandum in that case were :

"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the (sic) within note of hand, I hereby deposit with "the plaintiff, as a collateral security by way of equitable mortgage, title-deeds of my property,...." The Court held that the memorandum did not require registration on the ground that this was "not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred." Earlier the Court had observed:

"When we consider what the memorandum is we find it is not the contract for the mortgage, -not the agreement to give a mortgage for the Rs. 1,200/-, but, nothing more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission, by him that he had deposited the deeds upon the advance of the money for which the promissory note was given."

10. We are not concerned with the correct interpretation of that memorandum but if the decision lays down that even if a document on the face of it and properly interpreted in the light of the circumstances does not disclose the creation of a mortgage, or in the words of the Privy Council in AIR 1939 167 (Privy Council) , even if the document itself is not an operative instrument and is merely evidential, it requires registration, the decision cannot be approved.

11. It seems to us that the document must contain all the essentials of the transaction and one essential is that the

1. Date

2. Date of repayment

3. Sum secured

4. Nature of mortgage

5. Subject-matter of mortgage.

The two defendants in the suit were the appellant and one Deb Dutta Films Ltd. who was not a party to the mortgage. The facts about which there can be no dispute are as follows. A sum of Rupees 80,000/- has been advanced on three hundies to which the defendants were parties on December, 17, 1951 repayable within 60 days after date without grace. The hundies were silent as to interest. The money was advanced at the creditor's place in the morning and in the afternoon Deb Dutta Seal, the appellant, went there with the title deeds of the above mentioned property which were examined by Giridharilal Pumra, the original plaintiff (now represented by the respondents). They were approved and deeds must be deposited by virtue of the instrument or acknowledge an earlier deposit of title deeds and say further, as was said in the case of AIR 1939 167 (Privy Council) that the title deeds shall be held as security on the said mortgage.

12. Stress was also laid on the time element. Assuming that we are wrong in the interpretation that the deeds mentioned in the letter, after being shown to the father and approved, were handed back together, even then we are of the view that the document does not require registration because it is not an "operative instrument." It does not contain all the essentials of the transaction. What is reeistrable under the Indian Registration Act is a document and not a transaction."

31. In the decision reported in (1994) 2 Mad LW 305 (Canara Bank Through its Kovilpatti Branch Manager, Etc. v. R. Rengaswami, a Division Bench of this Court consisting of Justice M. Srinivasan (As he then was) and Justice Thangamani, in paragraph 6 of the Judgment held thus,

"6. The ruling will apply to the present case. It is argued by the learned counsel for the respondent that in this case, the two letters Exs. A. 26 and A.27 refer to the maximum liability of Rs. 2 lakhs and he submits that they contain the terms of the contract and therefore the documents require registration. We are unable to accept this contention. We have already extracted the terms of the document. Nothing has been said about the rate of interest or the amount actually borrowed and to be borrowed. Nor is there any reference to the method of repayment or times for repayment. None of the terms of the contract find a place in the documents. Just because the maximum liability is mentioned, it does not mean that it is one of the terms of the contract and that all the terms of contract find a place in the documents. Hence, there is no substance in the contention that the documents require registration. Moreover, the documents clearly refer to the fact that the title deeds were deposited on 16-10-1975 with an intention to create an equitable mortgage. That clearly shows that the mortgage was created even on 16-10-1975 and the transaction of mortgage was completed by them. It is also seen from the evidence that the parties executed a promissory note on

18-10-1975. It is marked as Ex. A-I, Thus, by no stretch of imagination, it can be contended that Exs. A-26 and A-27 contain all the terms of the transaction and therefore they require registration."

32. From these decisions it is clear unless and until the memorandum is the basis of the transaction and that is the bargain, registration is not required. We have already extracted Ex. P16. It shows that it only records a past transaction. It does not say about the rate of interest, date of payment or method of payment. Ex. P16 also shows that the documents have already been handed over. So long as Ex. P16 is not bargain but only evidences the intention to create a mortgage, it will not require registration. Learned counsel for the appellants also relied on other decisions reported in,

1. Indersain Vs. Mohammed Raza Gowher and Another,
2. (1972) 2 Mad U 319 (Modern Housing Construction v. Alagappa Textiles)
3. L.A.N.N. Alagappan Vs. P.S. Kalayanasundaram Iyer (Died) and Others,
4. H.G. Nanjappa Vs. M.F.C. Industries (P) Ltd.,

We do not find necessary to consider those decisions in this case, since those decisions also do not go against the decisions, which we have extracted already.

33. We hold that Ex. P16 does not require registration and it is admissible in evidence.

34. Further question that arises for consideration is whether Ex. P16 will enure to the benefit of Plaintiffs 5 to 12 also. It is true Ex. P16 is addressed to Plaintiffs 1 to 4. It is the definite case of PW1 that plaintiffs 1 to 4 have agreed to arrange to finance a sum of Rs. 2,55,000/- and the same was arranged by them. Once Ex. P16 is found to be written and signed by defendants, we have to hold that they have mortgaged the properties for a sum of Rs. 2,55,000/- and interest. Once we hold that the promissory notes executed by defendants are genuine and it is in pursuant to this promissory note, mortgage deed also executed, merely because the name of plaintiffs 5 to 12 are not mentioned in Ex. P16, they cannot deny their right, under the document. PW1 also speaks how they have acted as agents of Plaintiffs 5 to 12. Learned Judge also considered this question in detail and has come to the right conclusion that the benefit of Ex. P16 goes to all the plaintiffs. In paragraph 32 of the judgment, learned Judge has considered this aspect in detail and we only agree with the views expressed by learned Judge.

35. The only other question that requires consideration is whether the interest awarded is excessive. Learned Judge has held that Plaintiffs are entitled to 21 % interest i.e., contract rate and the same is not excessive. Learned Judge found that the borrowing under Promissory note was for the purpose of producing a motion picture and interest at 21 % in Cinema world cannot be said to be excessive in view of the risk involved. While considering the payment of interest in a suit of mortgage, Section 34 of CPC has no application.

36. In N.M. Veerappa Vs. Canara Bank and Others, their Lordships held that in regard to mortgage suits Order 34, Rule 11 of CPC alone will apply and not Section 34 of the Code. In that case their Lordships held advertent to Order 34, Rule 11 and also taking into consideration various amendments, in paragraph 18 (of SCC) : (Para 17 of AIR) of the Judgment, their Lordships held thus,

"18. From the aforesaid rulings the following principles can be summarised, (a) Before 1929, it was obligatory for the Court to direct the contract rate of interest to be paid by the mortgagor on the sum adjudged in the preliminary decree, from the date of suit till the date fixed for payment as per Order 34, Rule 2(c)(i) or Order 34 Rule 4(1) or Order 34, Rule 7(c)(i), respectively in suits for foreclosure, sale or redemption, (b) But after the 1929 Amendment, because of the words used in the main part of Order 34, Rule 11, namely that "the Court may order payment of interest" it is no longer obligatory on the part of the Court while passing preliminary decree to require payment at the contract rate of interest from date of suit till the date fixed in the preliminary decree for payment of the amount. It has been so held in AIR 1940 20 (Federal Court) by the Privy Council and by this Court in Soli Pestonji Majoo and Others Vs. Gangadhar Khomka, that the new provision gives a certain amount of discretion to the Court so far as pendente lite interest is concerned and subsequent interest is concerned, (c) It is no longer obligatory award the contractual rate after date of suit and up to the date fixed for redemption as above stated even though there was no question of the contractual rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act. 1918. (d) Even if the Court otherwise wants to award interest, the position after the 1929 and 1956 Amendments is that the Court has discretion to fix interest from date of suit under Order 34. Rule 11(a)(i) up to date fixed for payment in the preliminary decree, the same rate agreed in the contract, or, if no rate is so fixed, such rate as the Court deems reasonable -- on the principal amount found or declared due on the mortgager is concerned, (e) The Court has also power to award from the date of suit under Order 34. Rule 11(a)(iii) a rate of interest on costs, charges and expenses as per the contract rate or failing such rate at a rate not exceeding 6%. This is the position of the discretionary power of the Court from the date of suit up to the date fixed in the Preliminary decree as the date of payment, (f) Again, under Order 34, Rule 11(b) so far as the period after the date fixed for payment is concerned, the Court, even if it wants to exercise its discretion to award interest upto date of realisation or actual payment on the aggregate sums specified in Clause (a) of Order 34, Rule 11, could award interest at such rate as it deemed reasonable."

37. In this case, the amount borrowed is only Rs. 2,55,000/- and the suit claim is nearly Rs. 9,00,000/-. Taking into consideration the facts and circumstances, we feel that at least from the date of suit, defendants must be given some relief regarding interest. It is submitted at the time of hearing that the entire amount has been paid by the appellant to avoid payment of future interest. Taking into consideration the said conduct of defendants also, we feel some concession must

be given to them. We feel the interest of justice will be met in awarding 12% interest from the date of suit till date of payment. To that extent, Preliminary Decree will stand modified.

38. In the result, the Preliminary Decree and Judgment of learned single Judge is modified. We hold that the defendants are liable to pay interest only at the rate of 12% from the date of suit till date of realisation on the principal amount borrowed. Subject to this modification, all the other findings of learned single Judge are confirmed. Parties are directed to suffer their costs.