

(2005) 08 AP CK 0054
In the Andhra Pradesh High Court
Case No : AS No. 999 of 1997

Dara Namassivaya and Others APPELLANT
Vs
Veturi Ratnalamma RESPONDENT

Date of Decision : 01-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, Order 34 Rule 4, Order 34 Rule 7
Contract Act, 1872 — Section 16
Limitation Act, 1963 — Article 113, 63, 3
Transfer of Property Act, 1882 — Section 68(1)
Usurious Loans Act, 1918 — Section 3(1)

Citation : (2005) 5 ALD 633 : (2005) 6 ALT 118

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : K.V. Satyanarayana, for Bhaskara Laxmi, for the Appellant; V.V.L.N. Sarma, for the Respondent

Judgement

P.S. Narayana, J.—Heard Sri K.V. Satyanarayana, the learned Senior Counsel representing Smt. Bhaskara Laxmi, the Counsel for the appellants-defendants and Sri V. V.L.N. Sarma, the Counsel representing the respondent-plaintiff.

2. Sri Satyanarayana, the learned Senior Counsel had taken this Court through the recitals of Ex.A.1 and would contend that the said document does not specify carrying of any interest. The learned Counsel also would maintain that Ex.A.2, being an un-registered agreement, is inadmissible and even otherwise, the same was not acted upon. The learned Counsel also would contend that this cannot be treated as contemporaneous agreement. In the case of breach regarding possession, the mortgagee may have to file a suit u/s 68(1)(d) of the Transfer of Property Act, 1882 (hereinafter, in short, referred to as "the Act" for the purpose of convenience). The learned Counsel also would submit that the suit for recovery of money is barred by time and had referred to Articles 63 and 113 of the Limitation Act, 1963. The learned Counsel also would contend that the Court

has no power to grant interest prior to the suit. The learned Counsel also would contend that the question of interest in relation to a mortgage transaction would be governed by Order 34 Rule 11 C.P.C., (hereinafter referred to as "Code" for the purpose of convenience). The learned Counsel also would contend that even on comparison of signatures in Ex.B.1 and the Vakalath definitely it cannot be said that Ex.B.1 is a brought-up document and hence, the findings recorded by the Trial Court cannot be sustained in this regard. The learned Counsel also would maintain that the interest at 30% in the facts and circumstances is usurious in nature and normally interest beyond 12% may have to be presumed to be usurious and hence, just and reasonable interest may have to be fixed exercising the discretion in proper perspective. The learned Counsel also placed reliance on certain decisions to substantiate his contentions.

3. Per contra, Sri V.V.L.N. Sarma, the learned Counsel representing respondent-plaintiff had taken this Court through the recitals of Ex.A.1 and would submit that Ex.A.1 to be read along with Ex.A.2. The learned Counsel also would submit that there is no denial in relation to Ex.A.2 and hence, the question of admissibility or inadmissibility of the same may not be of any serious concern. The learned Counsel also pointed out that D.W.1-the son was examined and the father was not examined. The learned Counsel also made elaborate submissions in relation to Ex.B.1 and had taken this Court through the findings recorded by the learned Judge in relation to the discharge and would comment that since the reasons recorded are just and proper, the said findings are to be confirmed. The learned Counsel also pointed out that the conduct of the appellant-defendants also may have to be taken into consideration. Ex.B.1 was not filed along with written statement and at a belated stage, an attempt was made to take the document to an expert and these aspects would go to show that Ex.B.1 cannot be believed. The learned Counsel also commented that the plea that the interest is of usurious nature had not been taken and no evidence was let-in in this regard and hence, the same need not be considered by this Appellate Court in the light of the findings recorded by the Trial Court in this regard.

4. Heard the Counsel.

5. On the strength of the respective pleadings of the parties, the evidence available on record and the findings recorded by the Trial Court, the following points arise for consideration in this appeal:

- (1) Whether the findings recorded by the Trial Court relating to the recovery of amount due to respondent-plaintiff from appellants-defendants to be confirmed or to be disturbed in any way?
- (2) Whether the interest granted by the Trial Court can be said to be just and reasonable and not usurious in the facts and circumstances of the case?
- (3) If so, to what relief the parties are entitled to?

6. Point No. 1: Respondent-plaintiff filed the suit O.S. No. 23/90 on the file of

Subordinate Judge, Vizianagaram for recovery of Rs. 71,250/- due on a mortgage bond, dated 17-7-1984, in relation to the house property and the shop room in Vizianagaram by permitting the realization of the amount by way of sale of the schedule mentioned property with subsequent interest and costs of the suit. The learned Judge on appreciation of the evidence available on record, decreed the suit with costs granting a preliminary decree and three months time had been granted for redemption. Aggrieved by the same, the present appeal was preferred.

7. The respective pleadings of the parties are as hereunder. Hereinafter for the purpose of convenience the parties would be referred to as plaintiff and defendants as arrayed in the original suit in O.S. No. 23/90, which was re-numbered as O.S. No. 81/96 on the file of District Judge, Vizianagaram. The plaintiff pleaded as hereunder:

The defendants on 17-7-1984 borrowed a sum of Rs. 30,000/- from the plaintiff and hypothecated the schedule mentioned building situated in Vizianagaram, which is more fully described in the schedule annexed to the plaint and the plaintiff prays that the schedule may be read as part of the plaint. The defendants hypothecated the said building and attorned the tenants of the said building viz., she mart and the defendants paid to the plaintiff at the rate of Rs. 750/- per month representing the same as the monthly rent payable to him on the said building are about 10 times and obtained receipts from the plaintiff. Subsequently, the defendants did not choose to pay the amount payable as rent on the said building and therefore the husband of the plaintiff approached the defendants, but the defendants used to postpone the same on one or other pretext. Having been disappointed, the husband of the plaintiff also approached the tenants viz., Vijayawada Shoe Mart People, but they also did not pay the same stating that the 1st defendant has already collected the amounts from the.

The defendant having hypothecated the schedule mentioned building by attorning the tenants, they are bound to make necessary arrangements for due payment of the rents by the Vijayawada Shoe Mart. The plaintiff having waited all these years, but the defendants have not discharged the mortgage amount due on the mortgage deed in spite of the demands made by the plaintiff. Hence, this suit is filed for recovery of the amount due on mortgage bond dated 17-7-1984. The period of resumption is 2 years and therefore the plaintiff is also entitled for recovery of the entire amount due on the mortgage bond together with interest at the rate stated supra. Hence, this suit is filed for the recovery of amount due on the mortgage bond dated 17-7-1984 together with interest and costs.

8. The 1st defendant filed written statement pleading as hereunder:

"It is true that all the defendants borrowed the sum of Rs. 30,000/- from the plaintiff and all the defendants have executed a registered deed of possessory mortgage dated 17-7-1984 in respect of the plaint schedule building in favour of the plaintiff. It is also true that there is a contemporaneous unregistered

agreement dated 17-7-1984 between the plaintiff and the defendants where under, among other terms, the plaintiff agreed to collect the rent every month from the tenant i.e., M/s. Vijayawada Shoe Mart in a sum of Rs. 1,175/- as M/s. Vijayawada Shoe Mart is the tenant of the 2nd defendant in respect of the plaint schedule shop room and retain a sum of Rs. 750/- with the plaintiff towards the monthly interest payable on the aforesaid mortgage deed and to pay the balance of amount of rent of Rs. 425/- every month to the defendants by the plaintiff under a receipt. It is also true that it was agreed to be redeemed after two years and before three years from the date of the mortgage deed. As it is a possessory mortgage the tenant was also attorned to the plaintiff and while attorning the tenant to the plaintiff the contemporaneous unregistered agreement came into existence as the interest agreed to be paid every month is far less than the rent.

The unregistered contemporaneous agreement was drawn into two separate copies and one copy was kept with the plaintiff and the other copy was kept with the defendants.

According to the contemporaneous agreement it is the duty and obligation of the plaintiff to collect rent from the tenant every month and after collection, retain Rs. 750/- being the monthly interest payable on the suit subject mortgage deed and pay the balance to the defendants under a receipt. But unfortunately the plaintiff, perhaps, to harass the defendants, did not fulfill the terms of the agreement to collect the rent from the tenant, though attorned, and also did not pay the balance of rent to the defendants. The second defendant is therefore, obliged to collect the rent from the tenant and pay the interest every month payable on the mortgage deed to the plaintiff and the plaintiff was collecting the said interest every month by herself and as and when she was collecting the interest every month she was making endorsements of payments on the back of the aforesaid contemporaneous agreement kept with the defendants, every month, and after completion of the page on the back of the contemporaneous agreement a full sheet white paper was also annexed to the said agreement copy kept with the defendants to note further payments, if any.

On 20th November, 1988, the plaintiff collected a sum of Rs. 750/- from the defendant being the monthly interest payable on the suit subject mortgage bond for the month of October, 1988 to November, 1988 and made endorsement of payment of interest, on the back of the white paper annexed to the contemporaneous agreement of the defendants. Every month the plaintiff has been collecting the interest payable on the mortgage bond, from the defendants and making endorsements of payment of interest, every month, on the back of the contemporaneous agreement kept with the defendants. Thus she received payment of interest and made endorsements of payments on the back of the said agreement up to 20-11-1988. On 20-11-1988 the plaintiff stated that they did not make any note of the payments in any book of account or on the back of the copy of the contemporaneous agreement kept with the plaintiff and therefore, requested the defendants to give their copy of the contemporaneous agreement

with the endorsement thereon so as to enable the plaintiff to note the details of payment and thereafter return the same to the defendants. But till this date the said contemporaneous agreement copy of the defendants with endorsements is not returned by the plaintiff to the defendants, despite demands of the defendants.

On 14-12-1988 the plaintiff for herself approached the defendants, as usual, and requested the defendants for the payment of not only the interest for the month of November, 1988 to December, 1988 and also for payment of the principal amount as she was in need of funds for the building construction in Visakhapatnam as the same was in half progress, when the defendants insisted for the return of the contemporaneous agreement copy with endorsements taken by the plaintiff, she promised to return the same few days thereafter, as the same was with her husband who was not readily available at home, and that he left for Vizag. At the same time, she requested the defendants to pay the interest for that month and also the principal amount if possible, as she was in need of money for the construction of their building at Gajuwaka, Vizag. Thereupon the defendants stated that they have no objection to pay the interest for that month and also pay a major portion of the mortgage amount as the defendants have sold another property of theirs few days prior to that date. Then she said that she would gladly receive the same and pass a receipt. Accordingly, the plaintiff collected from the defendants on 14-12-1988 a sum of Rs. 750/- being the interest for the month of November, 1988 to December, 1988 and also a sum of Rs. 28,000/- in discharge of the principal amount and passed a receipt of even date in favour of this defendant for the aforesaid amounts. Thus on 14-12-1988 the plaintiff collected a sum of Rs. 28,750/- from the defendants under a receipt signed by her and passed in favour of the first defendant. This amount would not have been paid to her but for her promise to return the contemporaneous agreement copy of the defendants with endorsement of payments thereon after the return of her husband from Vizag inasmuch as she was in dire need of the amount as the construction of building by the plaintiff in Visakhapatnam was in half progress.

After the payment of those amounts on 14-12-1988 there would be only a balance of Rs. 2,000/- towards principal and interest thereon amount to Rs. 50/- per month from 17-12-1988. Therefore, it is incorrect to state that the plaintiff received only a sum of Rs. 7,500/- from the defendants and that the balance of amount is payable on the mortgage bond by defendants. The defendants have paid the entire interest every month upto the end of 16-12-1988 and also a sum of Rs. 28,000/- in discharge of the principal amount on 14-12-1988. The plaintiff is, therefore, put to strict proof of the same.

For the faults committed by the plaintiff in not fulfilling the terms of the contemporaneous agreement in the collecting of the rents from the tenant of the 2nd defendant, the plaintiff made the defendants a scapegoat. Therefore, the 2nd defendant is obliged to collect the rents from the tenant. But this defendant

never collected the rents from the tenant at any time. Hence, the plaintiff is put to strict proof of the same.

Suppressing these payments and without even disclosing as to when the sum of Rs. 7,500/- was collected by the plaintiff, though in fact she received interest payable upto 16-12-1988 and also the principal amount, the plaintiff filed the suit, according to the information of the defendants, at the instance of the other tenants in the other buildings of the defendants against whom Rent Control Proceedings are pending for eviction, one of whom having failed in all the Courts mooted the matter with the Supreme Court and against the said tenant the defendants are executing the orders of eviction against him (Mandavilli Ramachandra Rao) who failed to comply with the directions given by the Supreme Court. The said proceedings are now pending in the Principal district Munsiff-cum-Rent Control Court, Vizianagaram. Hence, it is clear that the plaintiff has not come to Court with clean hands and consequently the suit is liable to be dismissed in limini.

The plaintiff is not entitled to file the suit as if it is a simple mortgage suit though in fact it is a possessory mortgage and the plaintiff herself having failed to fulfill her obligations under the unregistered contemporaneous agreement."

9. The other defendants had adopted the written statement of the 1st defendant.

10. The learned Judge framed the following Issues:

- (1) Whether the discharge pleaded is true?
- (2) Whether the interest claimed is usurious?
- (3) To what relief ?

11. The evidence of P.Ws.1 and 2 and DW.1 had been recorded and Exs.A.1 to A.3 and B.1 to B.5 were marked. Ex.A.1 is the mortgage deed, dated 17-7-1984; Ex.A.2 is the Agreement, dated 17-7-1984; and Ex.A.3 is the Encumbrance Certificate, dated 18-6-1984. Ex.B.1 is the receipt, dated 14-12-1988, issued by V. Ratnalamma to D. Namassivaya. It is pertinent to note that Namassivaya, the 1st defendant, was not examined, but 4th defendant was examined as DW.1. Ex.B.2 is the Certificate issued by Dr. S.R. Ranganadhan; Ex.B.3 is the Diet Pass; Ex.B.4 is the Telegram, dated 16-6-1989; and Ex.B.5 is the Certified Copy of Sale Deed, dated 5-12-1988. Reasons in detail had been recorded by the Trial Court why Ex.B.1 cannot be believed. P.W.1 deposed in detail about Exs.A.1 and A.2 and also Ex.A.3 and specifically denied about the alleged receipt and had taken a stand that it is concocted one. P.W.1 also deposed that though a clause was incorporated in Ex.A.1 about delivery of possession, possession was with the tenant and the rent approved was agreed to be adjusted towards interest and this witness deposed about the details relating to Exs.A.1 and A.2 and she is specifically denied the suggestion that after adjustments, she would be entitled to only Rs. 2,000/-after deducting the alleged payments. This witness was cross-examined at length in relation to Exs.A.1 and A.2. P.W.2 is the husband of the

plaintiff who deposed about the entire transaction and he further deposed that the alleged receipt does not contain the signature of his wife. DW.1-4th defendant-the son of the 1st defendant deposed about the execution of the mortgage deed for a sum of Rs. 30,000/- and giving delivery of property on 17-7-1984 to the plaintiff and he also deposed about the mode of payment, adjustment and the interest payable towards the mortgage debt. This witness also deposed about the contemporary agreement given to the plaintiff to collect rent towards monthly interest and pay the balance to defendants under receipt. This witness also further deposed that the interest for every month was being endorsed on the back and another white sheet was also annexed to note the further payments. This witness also deposed that on 20-11-1988 plaintiff collected Rs. 750/- from them towards monthly interest. For the 10th and 11th months in the year 1988 payments were made and endorsements in relation thereto were made on white paper, annexed to the document. This witness also deposed that the plaintiff received payment of interest and made endorsements on 20-11-1988 and on 20-11-1988 the plaintiff stated that they did not make any entry in the back of the contemporary agreement and requested to give a copy to make endorsements. This witness also deposed about the details relating to the payments in 11th and 12th month of 1988. This witness also specifically deposed that an amount of Rs. 28,000/- towards principal amount and interest up to 14-12-1988 had been paid and the plaintiff had issued a receipt for the said amount, marked as Ex.B.1. In cross-examination, this witness deposed that this shown in the receipt now filed by him only Rs. 28,000/- had been paid and another amount of Rs. 750/- was paid towards interest. The plaintiff told that the document under which he borrowed, she will get endorsements duly as and when it is received by her. This witness denied the suggestion that the receipt-Ex.B.1 is a forged one and was brought into existence to escape the liability. This witness also deposed that his father paid the amount and receipt was obtained and hence, he cannot say whether anyone else was present when that payment was made under the receipt. He was not present when the receipt was issued and in the lengthy cross-examination, he denied several suggestions and also admitted that certain other creditors also filed suits for recovery of the amounts. This witness also deposed about the illness of his father and also Exs.B.2, B.3 and B.4 and further deposed about certified copy of the sale deed-Ex.B.5. The execution of both Exs.A.1 and A.2 is not in serious dispute. No doubt, Ex.A.2 is being attacked on the ground that since interest in immovable property would be affected by virtue of the terms, the document is inadmissible in evidence. On a careful scrutiny of the evidence available on record, DW.1 also deposed about the contemporaneous agreement entered into and the terms specified in the contemporaneous agreement. Strong reliance was placed on Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar Karve, , where the Apex Court observed that one part of the interest which a mortgagee has in mortgaged property is the right to receive interest at a certain rate when the document provides for interest and if that rate is varied, whether to his advantage or otherwise, then his "interest" in the property is affected and if the subsequent agreement substitutes a higher

rate, then to the extent of the difference it "creates" a fresh "interest" which was not there before and if the rate is lowered, then his original "interest" is limited. Following the said view, learned Judge of Bombay High Court at Nagpur in *Shankar Madhaorao Gampawar and Others Vs. Maltibai*, , held that the right to receive interest as provided in the mortgage deed amounts to an "interest" which the mortgagee has in the property and a change in the agreed rate of interest or a fresh claim for interest amounts for change in the mortgagee's interest in the property and cannot be effected without a registered deed where the immovable property involved is worth more than Rs. 100/-. It is no doubt true that Ex.A.2 is an un-registered document and certain conditions had been stipulated. It is pertinent to note that both Exs.A.1 and A.2 came into being on same day and it is just a contemporaneous agreement. Apart from this aspect of the matter, this question was not seriously urged before the learned Judge evidently in the light of the admissions made by DW.1 in relation to Ex.A.2. In view of the clear evidence of DW.1, the findings recorded by the Trial Court in this regard may have to be confirmed Ex.B.1, in fact, was disbelieved for several reasons. The learned Judge appreciated the evidence available on record in detail and also recorded reasons why Ex.B.1 cannot be believed and a belated attempt made to send Ex.B.1 to Expert also had been taken into consideration. The conduct of the parties, the payments under the endorsements made in this regard also had been appreciated at length. Hence, these findings recorded by the Trial Court, in the considered opinion of this Court, need not be disturbed in any way and accordingly, the same are hereby confirmed. In *Srinivasa Naicker and Others Vs. Govindasami Chettiar and Others*, , the learned Judge relying upon *Subramania Iyer v. Panchanada Odayar*, AIR 1932 Madras 175, held that when a mortgage purports to be one with possession, but, as a matter of fact the mortgagor does not deliver possession, the mortgagee-plaintiff is entitled to get interest just equated to damages notwithstanding the fact that he has not taken immediate steps to enforce possession of the property and where a mortgagor is guilty of the breach of the covenant to deliver possession, the mortgagee is entitled to fall back on the claim for interest whether it is described as interest or as damages for breach of the covenant to deliver possession. The learned Judge also placed reliance on the decision of the Privy Council in *Mathuradas v. Raja Narain Bahadur*, ILR All 39 (PC). Strong reliance was placed on the decision of the Full Bench of Allahabad High Court in *Nurul Hasan Vs. Mahbub Bux and Others*, wherein it was held that where in the case of a usufructuary mortgage possession of part of the property mortgaged is not delivered to the mortgagee, the mortgagee cannot claim by way of interest the profits of the property which had not been delivered to him. Strong reliance was placed on the decision of the Division Bench of Madras High Court in *Bysani Madhavachettiar Charity Fund v. G.B. Krishnaswamy Chetty*, AIR 1923 Mad. 71, wherein the Division Bench of the Madras High Court while dealing with the construction of mortgage and rents not in lieu of interest held that in a mortgage with possession there was a separate provision fixing the rate of interest and the method by which it was to be recovered, namely that the rents and profits were to be set off, as far as

available, towards the payment of interest and the contingency of an excess of rents and profits, over interest or vice versa was specifically contemplated, and for the case of deficit, where the whole of the interest was not met from rents and profits, it was provided that the mortgagee may recover from the mortgagors month after month and the sum to be repaid prior to redemption and for the purpose of redemption was merely the original principal sum and that the document meant that interest was to be a charge on the mortgaged property but was left to be recovered under the personal covenant of the mortgagors. This question relating to the controversy of the claim of interest to the effect that the same is not covered by the recitals of Ex.A.1 and the recitals in Ex.A.2 cannot be read along with Ex.A.1 need not detain this Court any longer in the peculiar facts of this case. The different provisions relating to mortgage transaction under the Act need not be adverted to in detail. There is clear evidence available on record relating to the terms and conditions agreed upon between the parties, the father, 1st defendant was not examined, whatever may be the reason, the son-4th defendant was examined as DW.1 and in the light of the admissions made by DW.1 in this regard, the claim of interest made by the respondent-plaintiff definitely is sustainable. It is one thing to say that the interest claimed is usurious or on higher side and it is yet another thing to say that interest is not payable at all. The contention that interest is not payable at all in view of the absence of the recitals in Ex.A.1 cannot find favour with this Court in the light of the evidence available on record and in view of the facts, this contention is not accepted. In the light of the same and in view of the detailed reasons recorded by the learned Judge, this Court is of the considered opinion that the relevant findings in this regard need not be disturbed in any way and the same are hereby confirmed.

12. Point No. 2: It is no doubt true that no attempt was made to lead evidence on the aspect of usurious nature of the transaction. Strong reliance was placed on the decision of the Division Bench of Madras High Court in Buragada Venkatarao and Another Vs. Godavarti Venkatratnam and Others, , wherein while dealing with the effect of Madras Act VIII of 1937 and Section 3(1) of Usurious Loans Act, 1918, it was held as hereunder:

"The effect of Madras Act VIII of 1937 by which Sub-section (1) of Section 3 of the Usurious Loans Act was amended and explanations and provisos were added is to make it obligatory upon the Court to find out whether there is excessive interest and when once that is done to presume that the transaction was unfair. Whatever might have been the rates prevailing prior to 1918, it should be deemed that the enactment of the Usurious Loans Act was intended to cover cases which could not ordinarily be governed by Section 16 of the Contract Act. The transaction may not be subject to the infirmities contemplated by the provisions of the Contract Act, such as undue influence or coercion. But still where the rate of interest is excessive after the amendment it is possible for the Court to presume that the transaction was unfair. Rs. 1-0-6 per cent per mensem compound interest with annual rests is excessive within the meaning of the

explanation inserted by Madras Act VIII of 1937 and that being so, the transaction is unfair between the parties and the debtors are entitled to the benefit of the Usurious Loans Act as amended by the Madras Act VIII of 1937. The mere fact that in earlier transactions Rs. 1-0-6 per cent per mensem compound interest was charged would not make that rate of interest reasonable. 12 per cent per annum simple interest is fair, reasonable and just."

The Division Bench in *M.R. Reddy v. S.R. Naidu*, 1989 (1) ALT 265, while dealing with a mortgage bond executed in 1966 stipulating that the amount was payable on demand, that the interest was payable at 18% per annum in the month of July every year and that in case of default, the interest amount was also to carry interest at the same rate was held to be usurious in nature. In *Chilamkuri Gouri Sankar Rao and Another Vs. Bhurugumalla Venkatappayya Sons and Co. and Others*, , the Division Bench while dealing with Section 34 of the Code and Order XXXIV Rule 11 of the Code observed that it cannot be laid down as a rule of law that interest above a particular rate per se is penal or excessive and whether interest is penal or excessive is always a question of fact to be decided on the facts and circumstances of a given case and the language of Order XXXIV Rule 11 gave a certain amount of discretion to the Court so far as interest pendente lite and subsequent interest was concerned and it was no longer absolutely obligatory on the Courts to decree interest at the contractual rates up to the date of redemption in all circumstances even if there was no question of the rate being penal, excessive or substantively unfair within the meaning of the Usurious Loans Act, 1918. In *Nandimandalam Abdul Azeez v. Jainab Begum*, 2002 (1) ALD 513, it was held that where the mortgage deed providing for interest at 18% per annum with yearly rests, it is not per se usurious and when no complaint was made by defendant in his deposition in respect of usurious nature of interest, the Trial Court is justified in decreeing the suit with interest as stipulated in the mortgage deed.

13. It is no doubt true that the interest payable in a suit for foreclosure, sale or redemption of a mortgage would be governed by Order XXXIV Rule 11 of the Code dealing with Payment of Interest and the provision reads as hereunder:

In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely--

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage--

(i) on the principal amount found or declared due on the mortgage,-- at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) (omitted), and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,-- at the rate agreed between the parties, or, failing such rate, (at such rate not exceeding six per cent per annum as the Court deems reasonable) and

(b) subsequent interest up to the date of realisation or actual payment on the aggregate of the principal sums specified in Clause (a) as calculated in accordance with that clause at such rate as the Court deems reasonable.

Order XXXIV Rule 4 of the Code deals with Preliminary Decree in suit for sale and likewise, Order XXXIV Rule 7 of the Code deals with Preliminary Decree in redemption suit. The learned senior Counsel however pointed out that on facts, if this Court is satisfied that granting of interest at 30% is on higher side, just and reasonable interest can be fixed by this Court. It is needless to say that discretion can be exercised on reasonable grounds while modifying the interest. In the facts and circumstances of the case, taking the nature of the transaction into consideration, this Court is of the considered opinion that the interest of 24% per annum would be just and reasonable.

14. Point No. 3: An attempt was made to raise the question of limitation on the ground that the suit is barred by limitation inasmuch as Article 113 of the Limitation Act, 1963, would govern the case and the period of limitation is only 3 years and not 12 years, as specified by Article 63 of the Limitation Act, 1963. It is no doubt true that u/s 3 of the Limitation Act, 1963, whether the plea of limitation has been set up as a defence or not, the Court if satisfied that the suit is barred by limitation, relief cannot be granted. But on facts, this Court satisfied that the suit is within limitation, especially, in view of the nature of the relief prayed for and granted in the suit. In the light of the findings recorded above, the appeal, being devoid of merit, is bound to fail except the modification of the interest at 24% per annum. Accordingly, the appeal is partly allowed to the extent of modifying the interest to 24% per annum instead of 30% per annum which had been granted by the Trial Court. In view of the fact that there is modification of interest, the parties to bear their own costs.