

(2014) 07 CAL CK 0083
In the Calcutta High Court
Case No : C.S. 158 of 2008

Indian Chain Private Limited

APPELLANT

Vs

Ajit Nain

RESPONDENT

Date of Decision : 28-07-2014

Acts Referred:

Companies Act, 1956 — Section 209(3)(b)
Evidence Act, 1872 — Section 34, 91
Income Tax Act, 1961 — Section 10(2)(xi), 145, 269SS, 36, 36(1)(vii)
Limitation Act, 1963 — Section 19
Registration Act, 1908 — Section 17(1)(b)
Transfer of Property Act, 1882 — Section 58(f), 59

Citation : (2014) 07 CAL CK 0083

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Pradip Kumar Jewrajka, Advocate for the Appellant; Jaydeb Ghorai, Advocate for the Respondent

Judgement

Soumen Sen, J.—The plaintiff has instituted this suit for recovery of money lent and advanced and for enforcement of mortgage.

2. The case made out by the plaintiff in the plaint is summarized below.

3. On or about 26th September, 1994, the plaintiff had lent and advanced a sum of Rs. 20 lacs to Ajit Nain, defendant no. 1, on terms of an agreement that the said sum would be repaid by him in five monthly installments of Rs. 4 lacs each commencing from January 1995 to May 1995. The agreement provided that the said loan would carry an interest at the rate of 18% per annum to be paid on monthly basis by the defendant commencing from 25th October, 1994 on reducing balance. In the event of default of payment or either the principal or the interest, the defendant no. 1 would pay penal interest of 1% per month. In consideration of the plaintiff agreeing to grant such accommodation loan to the defendant No. 1 and as security thereof, the defendant No. 2 would mortgage a flat owned by Ashok Nain at "Monalisa Co-operative Housing Society", being Flat

No. 6D, 17, Camac Street, Kolkata, in favour of the plaintiff. The defendant No. 2 is the brother of the defendant No. 1. On the basis of such agreement the plaintiff by a cheque bearing No. 47613 dated September 26, 1994 drawn on Indian Bank, Ganesh Chandra Avenue, Kolkata, lent and advanced a sum of Rs. 20,00,000/- to the defendant No. 1. The defendant No. 1, thereafter encashed the said cheque and appropriated the proceeds thereof for his own benefit. The terms and conditions of the said loan agreement were recorded in a letter written by the defendant no. 1 dated 26th September, 1994.

4. The defendant No. 1 in acknowledgement of such loan also executed a demand Promissory Note.

5. In consideration of the plaintiff granting such loan of Rs. 20,00,000/- (Rupees twenty lakhs) only to the defendant no. 1 as aforesaid and as further security, therefore, the defendant no. 2 deposited with the plaintiff at Calcutta the original Title Deed in respect of his said flat being Flat No. 6-D on the 6th floor of Monalisa Building at Premises No. 17, Camac Street, Kolkata - 700 017 situated within the jurisdiction of this Hon'ble Court together with all furniture and fixtures, sanitary fittings, equipments and garage No. 22 in the said Premises and thereafter recorded the same in a writing dated 27th September, 1994. The original Title Deeds deposited by the defendant no. 2 to the plaintiff are as follows:-

(i) Original share script bearing no. 17 of Monalisa Co-operative Housing Society Limited.

(ii) Purchase Agreement dated 6th May, 1980 between Ms. Fatima Raza and the defendant no. 2.

6. Out of the principal amount of Rs. 20 lacs lent and advanced, only a sum of Rs. 13 lacs have been repaid by the defendants till May, 1999, leaving a balance of Rs. 7 lacs as outstanding on account of principal. Interest, however, was paid till 25th October, 1996.

7. The defendants thereafter in acknowledgement of their liability paid a sum of Rs. 2 lacs by two several cheques bearing No. 540739 dated 2nd November, 2006 for Rs. 1 lac and Cheque No. 540740 dated 7th November, 2006 for Rs. 1 lac respectively. The defendants, thereafter, on repeated demands for payment of the balance amount, proposed to make partial payment of the amount due and, accordingly, had issued five post dated cheques of Rs. 3 lacs each payable between 31st March, 2008 and 30 October, 2008. The defendants, however, wrongfully, illegally and mischievously with the intention of avoiding payment of the amounts covered by the said cheques by letter dated 11th March, 2008 demanded return of the said cheques on allegation that the said defendant No. 1 did not receive the alleged value against the said cheques.

8. In the premises, the plaintiff filed a suit against the defendants claiming a money decree for a sum of Rs. 1,53,34,792.09 on account of balance principal

amount and interest as well as for foreclosure and sale of the mortgaged flat.

9. The defendants contested the suit and filed a written statement.

10. The defendant in the written statement has stated that there is no valid creation of an equitable mortgage as alleged by the plaintiff. The Memorandum of Understanding was executed prior to disbursement of the loan. Mr. Ashok Nain was not present at the time of disbursement of the loan on 26th September, 1994. The letter of declaration dated 27th September, 1994 was issued by the defendant No. 2 one day after the loan was given. There is no agreement for payment of penal interest in the Memorandum of Understanding or in the declaration of Ashok Nain. The present suit is a counter blast to the criminal proceeding instituted by the defendant No. 1. The purported letter dated August 23, 1999 was never issued by the defendant No. 1 or his manager Mr. Ramachandran. A bare perusal of the purported letter would show that the signature made therein is not that of Mr. Ramachandran and differs from the original signature of Mr. Ramachandran appearing on the Memorandum of Understanding dated 26th September, 1994. The interest all along has been paid in cash as directed by Mr. N.K. Chitlangia, which are shown in the books and Income Tax return of the defendant No. 1. No money is due or payable to the plaintiff company as the balance sheet of the plaintiff company dated 31st March, 2007, would show that no amount is due or payable to the plaintiff company. The five post dated cheques of Rs. 3 lacs each was issued on the basis of an assurance and promise given by Mr. Chitlangia that the plaintiffs should give defendant No. 2 a further loan for a sum of Rs. 15 lacs and on the basis of such promise and relying on such representation, the defendants in or about January, 2008, have issued five post dated cheques. Since the said plaintiff company did not give the said loan of Rs. 15 lacs, the defendant No. 1 by a letter dated 11th March, 2008 demanded, inter alia, return of the said post dated cheques. When such cheques were not returned, the defendant No. 1 had to stop payment of those cheques for Rs. 3 lacs each.

11. On the basis of the pleadings, the following issues were settled for trial:-

- i) Is the plaintiff entitled to a decree for Rs. 1,53,34,792.09 along with interest @ 18%?
- ii) Whether the plaintiff is entitled to other reliefs and any part thereof as claimed in the suit?

12. Mr. Shyamsundar Sarkar, the learned Counsel appearing on behalf of the plaintiff submits that in the written statement, apart from bare assertions that nothing is due and payable to the plaintiff, no averments have been made to show the manner in which the said outstanding principal amount of Rs. 7 lacs has been repaid. Although, in Paragraph 11 of the written statement, it has been alleged that "Interest all along has been paid in cash as directed by N.K. Chitlangia, a director of the plaintiff company, and the same has been shown in the defendant's books and income tax return" and that such payment was made

through one Vijay Kumar Agarwal, an alleged authorized officer of the defendant no. 1, the defendants did not produce their books and Income Tax return in proof of such payments.

13. Mr. Sarkar is critical about the written statement and more particularly paragraphs 11 to 14 of the said written statement. It is submitted that the written statement is silent as to how the loan has been repaid, both in regard to timing and the manner of payment. It contains a clear assertion that interest all along had been paid in cash and the same would appear from the Income Tax Returns of the defendants, which significantly has not been disclosed.

14. Mr. Sarkar submits that the defendants have miserably failed to demonstrate and establish in any plausible manner repayment of Rs. 20 lacs with interest beyond the fact that a sum of Rs. 13 lacs has been paid towards principal.

15. The Agreement between the parties with regard to the loan of Rs. 20 lacs were made in course of discussions and the terms were fully recorded in the letter dated 26th September, 1994 (Exh. 1A).

16. The aforesaid letter dated 26th September, 1994 refers to three things, namely, (i) confirmation of the Agreement arrived at an earlier point of time (ii) interest at the rate of 18% would be paid on monthly basis (iii) Share certificate, title deed of the flat at "Monalisa" had already been delivered prior to the said letter.

17. The contents of the said letter would establish and indicate that the said mortgage was not created by the letter dated 26th September, 1994 as was sought to be argued and contended by the defendant far less by a declaration dated 27th September, 1994. In view of the aforesaid, the question of registration of the said letter creating a mortgage could not and does not arise.

18. It is argued that it is surprising as well as significant that the defendant No. 1 who has affirmed the written statement did not offer himself for examination and cross-examination in this proceeding and a patently incompetent and unreliable witness by the name of Mr. Ramchandran has been produced by the defendant to support the averments made in the written statement. The written statement although was incidentally verified by the affidavit of the defendant No. 1 but the defendants have failed to disclose any reason or offer any explanation for not producing the said defendant No. 1. The said defendant No. 1 is conspicuous by his absence.

19. Mr. Sarkar has gone hammer and tong with the evidence of Ramchandran, the defendant's sole witness. He was described as a pathetic witness with a craving for giving false evidence. Discrepancy and clumsy evidence is the hallmark of a lying witness and Ramchandran according to Mr. Sarkar falls in that category. It is argued that there are glaring discrepancies disparity between the averments in the Written Statement and evidence of Ramchandran, the defendants' sole witness, is all too clear. The written statement is silent as to

how and in what way the liability was discharged save a bare statement in paragraph 11 that no money was due and payable to the plaintiff company and that interest all along had been paid in cash as directed by N.K. Chittangia, which are shown in defendant No. 1's books and Income Tax Return. The defendant could not give any credible evidence of such allegation at the trial for none of the defendants had gone to the witness box; nor did the defendants disclose their books of account or their I.T. Returns. Ramchandran is a patently incompetent & unreliable witness. His evidence is that not only the entire interest but a part of the Principal i.e. 1 lacs was also paid in cash. The evidence that entire loan and interest was repaid by the end of 2000 or a little thereafter is in flat contradiction to the averment made in Complaint Case No. 2713 of 2008, filed by Ajit Nain, the defendant No. 1, before the Chief Judicial Magistrate, Kolkata, wherein in paragraph 5 of the petition it was alleged that loan along with all interest had been cleared by the defendants in the year 2006.

20. The defendants' claim that interest had all along been paid in cash is also belied by the statement contained in the last sentence in the defendants' letter dated 18th March 2008, written in the context of 5 cheques for total sum of Rs. 15 lacs given in January 2008, to the effect that if money is due, on account of previous loan, fresh cheques would be issued.

21. The explanation offered by Mr. Ramchandran, the sole witness of the defendant is unworthy of acceptance inasmuch as there is a glaring discrepancy between the evidence adduced by him and the averments made in the written statement with regard to the repayment of loan and interest. The evidence of Mr. Ramchandran is that a part of principal and all interest was paid in cash and Rs. 15 lacs was paid by cheque towards principal, ignoring the fact that Rs. 2 lacs paid by cheque in 2006 were adjusted by the plaintiff towards interest. Even on the footing that Rs. 5 lacs was due he claimed only Rs. 4 lacs was paid and by way of explanation said that balance sum of Rs. 1 lac was never required to be paid because by reason of arrangement between the parties (which does not include him) it was foregone by the plaintiff. Significantly such arrangement was neither pleaded, nor was it subject matter of any correspondence. Ramchandran's evidence as to the method and manner of alleged repayment in cash is equally mixed up deserving little credence and in this regard reference was made to Q.130-Q.142, Q.151 to Q.162, Q.188-Q.201. Significantly, the witness admitted that statements relating claim of interest was supplied by the plaintiff and defendant paid accordingly. Further, while he does not know why defendants did not disclose their accounts he bases his case solely on Exhibit Z in support of contention that entire due have been paid. Ramchandran's evidence with regard to the episode of alleged fresh loan of Rs. 15 lacs in January 2008 for which 5 post-dated cheques of Rs. 3 lacs each were made over to the plaintiff by defendant no. 1 in advance, notwithstanding the fact that no consideration was received by him is taken to its absurd height, when he said that "title deeds of the flat were mortgaged to the plaintiff in respect of fresh loan".

22. With regard to the issuance of 5 several cheques of Rs. 3 lacs each for an aggregate sum of Rs. 15 lacs, Mr. Sarkar has referred to two letters of the defendants, being letters dated 11th March, 2008 (Exh. AA) and 18th March, 2008 (Exh. BB) and the plaintiff's letter in reply to the first one dated 28th March, 2008 (Exh. N) and submitted that such contention of the defendant is a clear after thought, absurd and raised with a view to avoid liability. This evidence is patently absurd and does not make any commercial sense nor accorded with common sense as the earlier loan granted to the defendant had remained unpaid and the plaintiff would not have burnt its fingers twice as the substantial portion of the loan had remained unpaid. The omission on the part of the said witness to deal with the letter dated 23rd August 1999 admitting the liability to pay Rs. 7 lacs which was signed by him but in the written statement it was alleged to be a forged one, according to the learned Counsel, smacks of defendants' scant regard for truth and serves as a measure of desperation of defence. The defendant according to Mr. Sarkar has virtually admitted payment of Rs. 13 lacs towards principal and a further sum of Rs. 2 lacs paid in 2006 towards interest. Mr. Sarkar contends that, however, one aspect of the matter needs to be emphasized with regard to the defendants allegation that the outstanding loan was paid in cash to or through Vijay Kumar alleged to be an employee or associate of the plaintiff-company. The learned Senior Counsel has referred to the evidence of Mr. Chitlangia, PW2 in answer to question Nos. 40, 43-46, 49 and 50 where Mr. Chitlangia had denied payment of such outstanding loan in cash or through Vijay Kumar. The defendants' sole witness has not been able to contradict or otherwise discredit the evidence given by the plaintiff's witness.

23. Ramachandran's evidence pertaining to Vijay Kumar Agarwal's common acquaintance of the parties in no way make any dent to the suggestion of the plaintiff's Counsel that Vijay Kumar Agarwalla had independent transactions with Ajit Kumar Nain, the defendant No. 1.

24. The most fatal flaw in the defence according to the learned senior counsel lies in the fact that despite their claim that entire loan amount and interest has been repaid, the defendants have made no claim for return of the title deed at any stage in these long years nor filed any suit or counter-claim for foreclosure of mortgage.

25. Taking in totality of evidence given on behalf of the defendants, both oral and documentary, it is submitted that it is abundantly clear that no cogent or coherent case has been made out, by the defendants as to how the loan with interest has been repaid. On the contrary, their defence is full of prevarication and inconsistencies.

26. In other words, the burden of proof to show repayment of loan and interest lies on the defendants and this onus has not been discharged by the defendants.

27. In addition to the patently absurd case run by the defendant it is argued that there are other established principles of law which make the defence untenable

in law and otherwise allows the Court to draw adverse inference.

28. First, the defence that interest has been paid in cash and further taking into account Ramchandran's evidence, a part of the principal has also been paid in cash is not tenable on principle of *pari delicto* and hence should not be countenanced by the Court. Section 269SS of Income Tax Act stipulates that any payment by way of loan or repayment exceeding a sum of Rs. 20,000/- is prohibited, making such payment illegal. Since it concerns payment of considerable amount far beyond Rs. 20,000/- such alleged payment in cash is illegal. The said illegality is inherent in the defence. In view thereof, the defendants are legally barred from taking such defence. In this regard reliance has been placed on *Sita Ram Vs. Radhabai and Others*, and [1962] 1 All ER 494 (*Chettiar Vs. Chettiar*).

29. Secondly, since burden of proof in establishing that loan has been repaid invariably rests on the borrower defendants, the Court can draw an adverse inference in view of reluctance and failure on the part of the defendants or any of them to come forward and give evidence and more so when the defendant no. 1 himself had verified and affirmed the written statement declaring that averments were true to his knowledge. In this regard reliance has been placed on *Vidhyadhar Vs. Manikrao and Another*, and *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*,

30. Thirdly, as a case was sought to be made out, both in their written statement and by their witness Ramchandran that all the cash payments were made to the plaintiff's employee or agent, one Vijay Kumar, it was for the defendants to prove that latter was acting in such capacity which they had clearly failed to prove. In this regard reliance has been placed on AIR 1926 34 (Privy Council)

31. Per contra, Mr. Abhrajit Mitra, the learned Counsel for the defendant submits that the plaintiff has failed to establish that any sum is due and payable by the defendant to the plaintiff. Mr. Mitra refers to the evidence of the witness of the plaintiff both oral and documentary and submitted that in the balance sheet disclosed in this proceeding, the plaintiff has stated that no loan has been granted against any security. The ledger for the year 2001 disclosed in this proceeding would show that the plaintiff has treated a sum of Rs. 7 lacs as bad debts as on March 31, 2001 transferred the said sum to the Bad Debt Account. If there are sufficient securities against the said debt as claimed by the plaintiff, Mr. Mitra wonders how the said amount could be written off and treated as bad debts in 2001. This itself would show and support the evidence of the defendant that by the year, 2001, the entire amount was paid off and no amount was due and payable by the defendant to the plaintiff.

32. Mr. Mitra submits that no amount is due and payable by the defendant No. 1 to the plaintiff after 31st March, 2001. It is submitted that the plaintiff made a desperate attempt to make out a case of running, current and continuous account between the parties in order to come out from the bar of limitation. The

so-called running, current and continuous account of the plaintiff is a figment of imagination of PW 1 and it is the so-called parallel account claimed to have been maintained by the parties being Exhibit Z. Mr. Mitra made a scathing remark about the evidence given by the PW 1 in this regard by referring to Question Nos. 135 to 146 of the Cross-examination of the said witness. It is submitted that the witness of the plaintiff referred to Exhibit Z as the statement of accounts being maintained by the plaintiff as a running, current and continuous account since October, 1996. The witness stated that the Exhibit Z would reflect the second running account and the said account is maintained separately to keep an account of total dealings of all the transactions in addition to the general normal books of accounts of the plaintiff company. This evidence, according to Mr. Mitra, completely negates and demolishes the claim made by the said witness in answer to Question Nos. 67 to 70 during Cross-examination in which the said witness deposed that the plaintiff maintains one set of accounts. Mr. Mitra submits that Exhibit Z is only of recent origin and not an account maintained over a period of 15 years between 1994-1995 till the date of filing of the suit in the year 2008. The document itself is captioned as "schedule". The first date in the statement is October 26, 1996 which is, however, not the date of commencement of the transaction. This is long after the advance was made by the plaintiff on 26th September, 1994. It is submitted that to qualify as an mutual running, current and continuous account within the meaning of Article 1 of the Limitation Act, 1963, it has to be a case of shifting balance and cannot apply to a case of mere advance of loan and repayment. It is submitted that the witnesses on behalf of the plaintiff all throughout maintained that the statements contained in Paragraph 5 of Exhibit N dated 28th March, 2008 are correct. Mr. Mitra draws my attention to Paragraph 5 of Exhibit N which reads as follows:-

5. The accounts for every financial year were always prepared showing the interest accrued on the said amount of loan and copies whereof have been forwarded to you on the expiry of every financial year. You have not raised any objection to the said accounts and thereby confirmed the correctness of the accounts.

33. In dealing with the said paragraph 5 of the said Exhibit N, P.W. 1 in his evidence has stated that the said letter dated 28th March, 2008 was issued by him under an authority from Mr. Narendra Chitlangia, one of the directors of the said company, the witness said that the financial year referred to in the said letter begins with September, 1995.

34. The evidence of the plaintiff is that it classified an advance/loan as sticky loan when either repayment of principal or payment of interest or both becomes irregular. Mr. Mitra has referred to Question Nos. 149, 198, 202, 240-242 and submitted that if the answers to the said questions are read with the answer given to Question No. 72, it would be evident that the plaintiff is unsure about the classification of the said loan account. While the said witness at an earlier stage stated that the defendant's account was classified as a sticky loan

sometimes in 1996-97 in the course of auditing, the auditors enquired about the details of the payments and when they did not find regular repayment in principal or interest thereon, later on it was stated later that the defendant's loan at no point time was classified by the Auditor as "sticky loan" and reported as such in the audited accounts and note to the accounts.

35. In summarizing the said evidence, Mr. Mitra submits that the some and substance of the evidence appears to be that had there been any irregularity in repayment of loan or payment of interest, the plaintiff's loan would have been classified as a sticky loan. In support of the contention that dealings within the parties included substantial unaccounted for cash transactions, Mr. Mitra placed reliance upon the audited accounts of the plaintiff and Exhibit Z to show that the loan to the defendant has been written off on 31st March, 2001. It is contended that it is the categorical evidence of P.W. 1 that if there is no amount due from a party and only when the party's account shows a Nil balance it is written off as it would appear from answer to question Nos. 249 and 250 of the said witness during cross-examination.

36. In the annexure to the auditor's report (being part of Exhibit "W" at page 53) in point No. 12 it has been stated by the auditor of the plaintiff as on 3rd September, 2007 that "according to the information and explanation given to us the company has not granted loans or advances on the basis of the security by way of pledge of shares, debentures, and other securities".

37. In view thereof it is submitted that as on 3rd September, 2007, the defendant (who was granted loan against security) was not a debtor of the plaintiff.

38. It would also appear from the evidence of the defendant's witness that the defendants in contemplation of getting future financial accommodation from the plaintiff on the basis of the security already lying with the plaintiff had approached the plaintiff for a further loan in January, 2008. The evidence of the defendant's witness in this regard are Q.169 to Q.176.

39. The first limb of attack is that there is no valid creation of mortgage. It is submitted that there are inconsistencies in the evidence with regard to the creation of mortgage. Mr. Mitra do not dispute that an equitable mortgage can be created by depositing the title deeds with an intention to create mortgage but he submits that the said procedure was not followed in the instant case and it would be evident from the evidence of the plaintiff both oral and documentary that the mortgage was created by a deed of declaration which unless registered cannot create a valid mortgage.

40. In any event, it is submitted that having regard to the fact that no amount was due and payable after November 2006, the claim in the suit is frivolous and required to be dismissed.

41. In dealing with the argument of Mr. Sarkar that the defendant had paid only

a sum of Rs. 2 lacs in November, 2006 and no other payment was received thereafter, it is submitted that such payment was made in full and final satisfaction of the entire outstanding amounts. The parties have agreed to waive interest if any payable in terms of the loan transaction. It is submitted that there is an accord and satisfaction of the debt by reason of payments of Rs. 2 lacs in November, 2006 and, thereafter, the plaintiff could not have claimed any amount at all.

42. The plaintiff, according to Mr. Mitra, has failed to establish that a mortgage by deposit of title deed has been created in favour of the plaintiff. In any event, the purported deed of declaration on which the plaintiff has placed reliance to establish that there is a creation of a valid mortgage has not been registered. It is submitted that the plaintiff claims that a mortgage has been created by instrument. The plaintiff has referred to a mortgage deed in the form of a declaration dated 27th September, 1994. This evidence of PW1 in which he has categorically stated that the mortgage was created by declaration dated 27th September, 1994. It is submitted that irrespective of the evidence of the said witness, a bare reading of the declaration dated 27th September, 1994 would establish it beyond doubt that the mortgage has been created by the instrument. The relevant extract from the declaration is set out below:-

The title deeds, i.e. shares certificate of the said Society and purchase agreement dt. 6th May 1980 in respect of the said flat are delivered to you which shall be treated as mortgage/security to you in lieu of the said loan of Rs. 20,00,000/- granted by you to M/s. Harvard House (Prop. Ajit Nain) until the same is re-paid along with accrued interest thereon by them.

43. The mortgage having been created by a mortgage deed (i.e. the Declaration dated 27.9.1994), it was compulsorily registrable u/s 17(1)(b) of the Registration Act, 1908. The declaration being unregistered is inadmissible in evidence and in this regard he has referred to a decision reported in AIR 1923 PC 52 at Pg. 53 (Subramanian Vs. Lutchman).

44. It is argued that the suit is also barred by limitation. The original loan transaction is one of September, 1994. The last repayment of principal was on 19th February, 1996. The last payment on account of interest as per the plaint case was till October, 1996. In evidence, the P.W. 1 said that interest lastly paid was upto October, 1996. Therefore, the claim became barred by limitation latest 3 (three) years after October, 1996, i.e. by October, 1999. Even if this Hon''ble Court considers the letter dated 23rd August, 1999 written by M.P. Ramachandran (D.W.) as acknowledgement of liability, then in that case the period of three years gets extended till 23rd August, 2002.

45. Therefore, under any circumstance according to the learned counsel the claim became barred after 22nd August, 2002. The alleged repayment of Rs. 2 lac in the year 2006 will not revive the cause of action for recovery of loan which had long become barred by limitation. Part payment to save limitation has to

come within the scope of Section 19 of the Limitation Act, 1963, which, inter alia, deals with the effect of payment on account of debt and states that acknowledgment of debt with promise to pay extend limitation and mere part payment does not extend limitation. Accordingly, part payment made beyond the expiration of the prescribed period of limitation would not save limitation.

46. Mr. Mitra further submits that it has been admitted by the witnesses on behalf of the plaintiff that the account between the parties was maintained on accrual basis at least up to 2001 and that the interest was paid in cash. The balance sheet, auditor's report and books of account would show that interest on sticky loan is accounted for on cash basis. The plaintiff all throughout maintained that this loan transaction is not a sticky loan. Interest received in cash was never reflected in the books which squarely fits into the contention of the defendant that the plaintiff had received interest in cash. The instant loan was never classified as a sticky loan - a concept which finds place in the Income Tax Act. The annual accounts and the audited balance sheet also shows that the loan transaction was never classified as a sticky loan and the account was maintained on accrual basis. In the balance sheet under the heading "advances", there is an entry of accrued interest on loan, which does not show that any amount received on account of interest from the defendant is reflected therein. The ledger account of 2001 clearly shows that as on 1st April, 2001, no amount is due and payable as the evidence of Ashok Bagla would show that the balance principal amount was written off as bad debt in the previous year. The Books of account of the plaintiff if produced would not show any amount as outstanding on and from April 1, 2001. The said classification was made in view of the fact that the parties have squared off their accounts and since the interest was received by the plaintiff in cash and the account maintained was not on accrual basis. Mr. Mitra explained payment of Rs. 2 lakhs in November, 2006 as a payment made by the defendant on the basis of a request made by the plaintiff for the past concluded transaction. It is submitted that even in the balance sheet of 31st March, 2007, no interest was shown to have been due and payable by the defendant to the plaintiff. Mr. Mitra refers to Section 209(3)(b) of the Companies Act, 1956 to emphasize that the plaintiff Company is required to maintain the books on accrual basis. He further criticized the claim made by the plaintiff that the accounts maintained between the parties are mutual, open and current account and in this regard he referred to Paragraph 9 of the Plaint. He submitted that during cross-examination Mr. Chitlangia has categorically stated that the accounts between the parties was never maintained as mutual, open and current account and one set of account is maintained. In this regard, Mr. Chitlangia has differed in his defence from Mr. Bagla.

47. Mr. Mitra has submitted that audited accounts and annual report of the plaintiff for the year ending 31st March, 2007 Exhibit W, Note 12, of the auditor's report records:-

According to the information and explanation given to us, the company has not

granted loans or advances on the basis of security by way of pledge of shares, debentures, and other securities.

48. This is a categorical admission that the plaintiff's loan, if at all it was outstanding on 31.3.2007 is not secured meaning thereby there is no valid mortgage.

49. That the mortgage in this case was not created by way of deposit of title deeds but created by an unregistered Declaration of 27th September, 1994 is the evidence of PW1 as would be evident from his answer to question Nos. 251, 252, 275 of Cross-examination.

50. In the audited accounts and annual report of the plaintiff for the year ending 31st March, 2007 Exhibit W under the heading Investment, Loan and Advance, there is an entry [D] for Rs. 7,88,97,228.54 as on 31/3/2007 towards loan and advances and Rs. 7,03,80,420.83 as on 31/3/2006. The break up of such sum is given in Schedule "J". This total comprises of only loans that were unsecured. There is no secured loan advanced by the plaintiff. This is also an admission of fact that the loan in question is not backed by a valid mortgage.

51. In the audited accounts and annual report of the plaintiff for the year ending 31st March, 2007 (Exhibit W) - in Schedule "T" under the head "Notes to the Accounts", at paragraph 4 it is stated :- "interest on sticky loan" is being accounted for on cash basis amount unascertained.

52. In other words, in case of all loans advanced by the plaintiff apart from those classified as sticky loan interest is accounted for on "accrual basis". This would be further corroborated by Schedule "J" to the Account where there is a separate entry "accrued interest on loan", for the year ending 31/3/2006 is Rs. 3,01,188.30 and for the year ending 31/3/2007 is Rs. 2,66,430/-.

53. That the loan advanced by the plaintiff to the defendant No. 2 was never classified as sticky loan is the evidence of the director and person in control of the plaintiff, PW2, (Q.72).

54. There is no "interest accrued" as on 31/3/2001 in the audited account of the plaintiff pertaining to the defendant No. 1 maintained by the plaintiff.

55. The carried forward "accrued interest on loan" as per plaintiff's balance sheet as on 31/3/07 was only Rs. 2,66,430/- as per its audited accounts. This is the total accrued interest which would be covering all interests accrued (and not paid) on loans and advances given by the plaintiff to different concerns.

56. That the plaintiff did not maintain separate accounts parallel to its audited accounts, which is at page 77 of the Judge's brief is admitted by PW2 in answer to Question Nos. 67,68 and 69 which set out below: -

Q.67 Does the plaintiff maintain any accounts which is not audited ?/No.

Q.68 Does the plaintiff maintain two sets of accounts?/One set of accounts.

Q.69 So will your answer be the same with regard to the transaction which took place between the plaintiff and the defendants. - Was there one set of accounts or two sets of accounts ?/One set of accounts.

57. This according to the learned counsel negates the authenticity of the computerized statement at pages 75 and 76 of the Judge's Brief with the caption "Schedule". Even otherwise this "Schedule" is not the running current and continuous account which has been referred to by PW1 as the parallel account maintained by the plaintiff. Even otherwise PW1 in his evidence has categorically stated that this Schedule at pages 75 and 76 is only a statement prepared by him and not the running current and continuous account referred to at paragraphs 9 and 25 of the plaint.

58. It is the plaintiffs' case [paragraph 4(e) of the plaint] as also the plaintiffs' evidence [Question 9 of PW1) that the transaction in question between the parties was that of an accommodation loan. Accommodation loan is defined in both Black's Law Dictionary as also P Ramanatha Aiyar's THE MAJOR LAW LEXICON as follows:

Accommodation Loan - A loan for which the lender receives no consideration in return.

59. On the basis of such a case, the plaintiff cannot claim any interest, because interest is the only consideration that a lender can receive against grant of loan.

60. In dealing with the aforesaid submission, Mr. Sarkar submitted that the argument of defendants' counsel by referring to Declaration dated 27th September 1994 that by said Declaration equitable mortgage was created and since same was not registered, it was not valid or even admissible overlooked the fact that the title deeds were delivered earlier and the same was recorded in the defendants' letter dated 26th September, 1994.

61. The submission of learned Counsel on behalf of the defendant is remarkable in the sense that he did not even refer to any part of evidence of the defence witness being conscious of the vulnerable nature of his evidence and lack of his credibility as a witness.

62. The argument that such equitable mortgage was created by Declaration dated 27th September 1994 (Exhibit F) requiring registration and not being so registered is not admissible in evidence is misconceived and misleading. The letter dated 26th September 1994, written by the defendant no. 1 records that share certificates had already been delivered and was thus to be regarded as Memorandum of equitable mortgage. There is no requirement of registration in case of an equitable mortgage and in this regard reference has been made to the judgment reported in State of Haryana and Others Vs. Navir Singh and Another,

63. It is argued that against all the overwhelming consideration, outlined above which clearly show that the defendants have failed to discharge their burden of proof and make out any plausible defence to the plaintiffs admitted claim, refuge

has been sought to be taken as a last resort in the excerpts accounts and Balance Sheet disclosed by the plaintiff as evidence of admission by the latter that nothing was due and payable by the defendants.

64. Mr. Sarkar submitted that the argument advanced with regard to the entries and statements made in the account and their implications thereof the defendants first has to overcome the hurdle of proving repayment of loan. It is a fundamental principle of law that in order to found one's case or defence on admission a party must show that the admission is clear and unambiguous, and admits of, no, doubt and requires no explanation, whatsoever. There is no admission in the account in any sense whatsoever to the effect that the loan has been repaid or waived. The efforts made by the defendants' counsel by attempting to explain the esoteric of the accounting practice and income tax law simply could not make up for the failure of the defendant to prove that the loan was repaid.

65. Secondly, and more importantly, if one seeks support from Books of account, either his own or those of his adversaries, such entries though relevant are only corroborative evidence. This is expressly provided in Section 34 of Evidence Act itself. In this regard reliance has been placed on Gopeswar Sen and Others Vs. Burdwanadhipati Maharajadhiraj Bijoy Chand Mahatab Bahadur, and Central Bureau of Investigation Vs. v.C. Shukla and Others,

66. In dealing with Note 12 in the Auditors' Report dated 3rd September 2007 and the contention of the defendant that no loan was granted against any security that the Court should infer from statement made in the report that loan in question, a secured loan, must have been paid off. It is submitted that such statement, was made in the context of transaction taken place in 2007, not in respect of old loan of 1994. It is submitted that even on the footing, that the notes of accounts envisaged even earlier period, on a realistic view, it must have been an oversight. But in any view of the matter what looms large is the fact that the defendants have not claimed for return of the share certificates, deposited with the plaintiff by way of equitable mortgage as security against loan.

67. It is argued that the argument put forward by Mr. Mitra by referring to entries at page Nos. 62 and 65 of the Judges Brief that since 1998 nothing was shown in the accounts by way of accrued interest warranting the inference that no interest was payable since then having all been paid by them is unacceptable since it is an admitted position that Rs. 2 lacs was paid by cheques in 2006 and that same was duly adjusted by the plaintiff towards interest. This was also duly reflected in the account for the year ending 1998 and tax thereon was also paid. However, as no further interest was received since then there was no question of maintaining the account on accrual basis; otherwise the plaintiff would be burdened with uncalled for income tax liability.

68. The point made with regard to the loan being written off, it is submitted that it was consistent with commercial prudence and accounting practice. Writing off

loan does not amount to extinction of liability.

69. In the premises having regard to the imperatives of law referred to above and in absence of any credible defence in terms of evidence, this Hon"ble Court, it is respectfully submitted, should be pleased to hold that the defendants have failed to discharge their burden of proof and that a decree should be passed as prayed for.

70. Any apparent error or irregularity in the accounts of the plaintiff regarding the said loan cannot affect the rule with regard to onus of proof nor would relieve defendants of their burden of proof. A Civil case is to be decided on balance of probability. Thus, after taking into account conduct of the defendants over the years, blatantly false allegations made such as by denying the genuineness of their own letter dated 23rd August, 1999 and thoroughly discredited evidence of their sole witness, Ramachandran, this Hon"ble Court, it is submitted, should pass a decree in favour of the plaintiff as prayed for.

71. As to the amount claimed in the suit, it is submitted that in terms of the agreement, as recorded in the letter dated 26th September 1994, interest was agreed to be paid at 18% on monthly basis; otherwise penal interest at 1% per month would be paid. The said provisions in the agreement necessarily implies, having regard to settled law and practice in the commercial world, that unpaid interest would become part of the principal. In this regard reliance has been placed on Central Bank of India Vs. Ravindra and Others,

72. It is submitted that it would be borne out from the oral and documentary evidence that only a sum of Rs. 13 lacs has been repaid by the defendants in three different phases, namely, in the first phase the defendant No. 1 issued 5 post-dated cheques of Rs. 4 lacs each respectively dated 25th January, 1995, 25th February, 1995, 25th March, 1995, 25th April, 1995 and 25th May, 1995 at the time of the said agreement. Of these, only three cheques aggregating to a total sum of Rs. 12 lacs were encashed. Balance two cheques were not presented at the requests of the defendant No. 1. This would be evident from the deposition of Mr. Bagla, the first witness of the plaintiff, namely answer to Question Nos. 14 to 24 and 31 in Chief. In the second phase, a further cheque of Rs. 1 lac was given by the defendant No. 1 and the same was duly encashed in February, 1996. This would be corroborated from the answer given by Mr. Bagla to Question Nos. 33 and 34 in Chief.

73. Of the five cheques originally furnished to the plaintiff, in April 1996, the defendant No. 1 requested the plaintiff to return him two unencashed cheques promising to issue four fresh post-dated cheques instead for a total sum of Rs. 7 lacs, 3 cheques of Rs. 2 lacs and 1 cheque of Rs. 1 lac. However, none of these 4 post-dated cheques were presented for encashment again at the requests of the defendants. This would be evident from the deposition of Mr. Bagla to Question Nos. 35 and 36 and Question Nos. 42 & 43 in Chief. Thus, by August 1996 altogether a sum of Rs. 13 lacs was paid towards principal.

74. In the third phase, In November 2006, two further cheques of Rs. 1 lac each were furnished by the defendants and were duly encashed and credited and adjusted towards interest. This would be evident from the deposition of Mr. Bagla answer to Question No. 44.

75. The Plaintiff's case is that after giving due credit to all the amounts received by the plaintiff from and/or on account of the defendant No. 1 against all items of debit in order of time in the said running and current and continuous account maintained by the plaintiff, in the name of the defendant No. 1 as aforesaid, as on 31st July, 2008 an aggregate sum of Rs. 153,34,792.09 became and is due and payable by the defendant no. 1 to the plaintiff.

76. Mr. Sarkar submits that the statement of accounts of the plaintiff has been proved by Mr. Bagla and Mr. Chitlangia which would be evident from the answer given by Mr. Bagla to Question Nos. 61 to 70 and Mr. Chitlangia to Question Nos. 5 to 8, 12 to 22, 52 and 53 in Chief.

77. Mr. Sarkar submits that defendants have made a pointless and incredible digression in their evidence as well as written statement.

78. In January 2008, defendant No. 1 issued 5 fresh post-dated cheques of Rs. 3 lacs each which were made over to the plaintiff by the defendant No. 1 towards repayment of the outstanding dues of the plaintiff towards part principal amount and interest. Accordingly, the said 5 cheques were presented but dishonoured with a remark "Stopped payment by the Drawer".

79. By two letters respectively dated 11th March, 2008 and 18th March, 2008, the defendant no. 1 requested the plaintiff to return the said 5 post-dated cheques on the plea that he had not received the value of the said cheques. This would be evident from the deposition of Mr. Bagla answer to question Nos. 46 to 60, letter dated 11th March, 2008 being Exhibit "AA" and letter dated 18th March, 2008 being Exhibit "BB".

80. The contention of the defendants with regard to the issuance of the said 5 cheques, apart from being incredible, in no way provides any defence to the plaintiff's claim for outstanding principal amount and interest. While the onus of proving that loan has been repaid squarely rests on the debtor, the claim for an alleged agreement for fresh loan in no way helps such defence.

81. There are two fold challenges to the claim of the plaintiff. The first challenge is that the enforcement of mortgage is bad since there is no creation of mortgage in the first place.

82. The defendant does not dispute that on 26th September, 1994, the plaintiff had lent and advanced a sum of Rs. 20 lacs to the defendant No. 1 which sum was required to be repaid in five installments of Rs. 5 lacs each commencing from January, 1995 to May, 1995. On the very same date, namely, 26th September, 1994, a Memorandum of Understanding was also executed by and between the parties in which Ashoke Nain had agreed to mortgage his flat at

Monalisa Co-operative Housing Society, being Flat No. 6D, 17, Camac Street, Kolkata, in favour of the plaintiff as a security if the said loan granted to his brother, namely, the defendant No. 1. In fact, by a declaration dated 27th September, 1994, an equitable mortgage of the said flat was created by the defendant by deposit of title deed of the said flat (share certificate). The letter dated 26th September, 1994, written by the defendant regarded that share certificate had already been delivered and was, thus, be recorded as memorandum of equitable mortgage. There is no requirement of registration in case of equitable mortgage. An equitable mortgage can be created by deposit of title deed. However, such security shall be created with an intention to create mortgage. It does not require any such form. The declaration dated 27th September, 1994 clearly shows that the documents have already been delivered to the plaintiff with an intent to create a security in respect of the flat in question. The language of the declaration leaves no manner of doubt that the declaration was preceded by deposit of the title deeds under the share certificate. This would also be evident from the letter dated 26th September, 1994 which gives particulars of the loan amount and it records that in consideration of the said loan of Rs. 20 lacs, the defendants had delivered through Mr. Ashoke Nain one share certificate bearing No. 17 in respect of the Monalisa Co-operative Housing Society", being Flat No. 6D, 17, Camac Street, Kolkata, standing in the name of Ashoke Nain as a mortgage. The said letter records three things, namely:-

i) Confirmation of the loan agreement arrived at an earlier point of time and the mode and manner of repayment.

ii) Rate of interest.

iii) Share certificate maintained thereby the title deed to the property had already been delivered prior to the issuance of the said letter.

83. The letter dated 26th September, 1994 records a past transaction and the same is reiterated in the subsequent deed of declaration dated 27th September, 1994. In a fairly recent decision, the Hon"ble Supreme Court considered the manner and creation of an equitable mortgage. In State of Haryana (supra) the Hon"ble Supreme Court held that when the debtor deposits with the creditor title deeds of the property for the purpose of security, it becomes a mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required u/s 59 thereof as any other clauses on mortgage. The essence of a mortgage by deposit of title deeds handing over by a borrower to the creditor, the title deeds of the immovable property with the intention that those documents shall constitute a security, enabling the creditor to recover the money lent. After the deposit of title deeds, the creditor and borrower may record transaction in a memorandum but such a memorandum would not be an instrument of mortgage. In Subramanian (supra) cited by Mr. Mitra the issue was whether the document of July 15, 1908 constituted the bargain between the parties or was it merely record of an already computed transaction. In Paragraph

15 the evidence was scanned and, thereafter, Their Lordships arrived at a finding that without the production of the memorandum in question and having regard to the fact that the said memorandum was unregistered, it cannot be accepted. The relevant passages of the said report are stated below:-

10. It was not seriously contended before their Lordships that the Receiver had any authority under the order of April 5, 1910, to mortgage property of the firms, and on this point their Lordships are in agreement with the decree of the appellate Court. The plaintiffs' chief effort before this Board was directed to supporting the order of Mr. Justice Young, basing their claim upon the original sub-mortgage of July 15, 1908. The respondents' counsel, on the other hand, raised the objections which had also been made at the trial of the action (1) that the original sub-mortgage was void inasmuch as it was effected by an instrument in writing which was admittedly not registered and relied upon as 17 and 49 of the Indian Registration Act, 1908; and (2) that oral evidence was not admissible, as the memorandum of July 15, 1908, constituted the contract between the parties (Section 91, Indian Evidence Act I of 1872). The appellants, however, contended that though the terms of the deposit were embodied in a written document that document was a mere memorandum of and did not constitute the contract and therefore did not require to be registered, and that on the same ground oral evidence was admissible to prove and explain the deposit.

15. The only evidence upon this subject in their Lordships' opinion is conclusive that the memorandum of July 15, 1908, constituted the bargain between the parties. The plaintiffs' agent swore "The arrangement to deposit their title deeds was made in the presence of the eldest son of E. Solomon," and when we turn to Section Solomon's evidence, he says, "The document was drafted and typed in my office after they had come to an agreement. The document was drawn up at the time they came together"; and upon cross-examination he says: "The agreement was signed and handed over in my presence. Unless the title deeds had been handed over he would not have accepted Ex. I (the memorandum of July 15, 1908). The transaction was completed in my office at the same time." Turning to the document itself, one is led to the same conclusion. "We hand you herewith title deeds etc.... This please hold as security, etc.... Please also hold this as further security." Their Lordships have no doubt therefore that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.

84. In the instant case, the deposit of title deeds have preceded the grant of loan and it was on delivery of such title deeds creating security that the plaintiff lent and advanced a sum of Rs. 20 lacs to the defendant. The plaintiff's thus have been able to prove creation of valid mortgage.

85. In view of the aforesaid, the challenge thrown to the creation of mortgage fails.

86. The other ground of challenge appears to be that since the entire loan has been repaid, the plaintiff is not entitled to enforce the mortgage. This argument is based on the premise that since 1998 nothing was shown by the plaintiffs in their accounts by way of accrued interest warranting inference that no interest is payable as the same having all been paid by then. The contention of Mr. Mitra appears to be that the witness on behalf of the plaintiff had virtually admitted that the account between the parties was maintained on accrual basis at least upto 2001 and there is no dispute that interest was paid in cash.

87. The plaintiff appears to have transferred a sum of Rs. 7 lakhs to the Bad Debt Account on 31st March, 2001. In November 2006, the plaintiff had received a sum of Rs. 2 lakhs in aggregate paid by two several cheques of Rs. 1 lakh each on November 2, 2006 and November 7, 2006. It was only in March, 2008 the plaintiff shoots up a letter alleging non-payment of a part of the loan under the loan agreement. Both the plaintiff and the defendants were curiously reticent and averse to the production of the primary books of account. The plaintiff however exhibits a schedule being Exhibit "Z" as the statement of account reflecting the transaction. The witness on behalf of the plaintiff says that the amount of Rs. 7 Lacs was transferred to the bad debt account on the basis of auditor's advice since the plaintiff would be liable to pay tax on such balance loan amounts although in reality the plaintiff did not receive the said amount. Thereafter, the plaintiff did not file the suit until 2008 on the plea that the plaintiff wanted to avoid litigation since it could take inordinately long time to dispose of civil litigation. The plaintiff, however, does not dispute the receipt of a sum of Rs. 2 lakhs in 2006. The defendant thereafter issued five post dated cheques Rs. 3 lakhs each aggregating to Rs. 15 lakhs in consideration of a fresh loan which the plaintiff, however, disputes and contended that such cheques were issued towards part payment of the loan amount.

88. Mr. Mitra laid much stress on the balance sheet of 31st March, 2007 which shows that no loan has been given against security. This appears to be the trump card of the defendant's defence.

89. Mr. Mitra submitted that the evidence of Mr. Chitlangia and the balance sheet produced in this proceeding would show that the plaintiff company has treated interest on sticky loan on cash basis. The argument of Mr. Mitra that the interest has been paid in cash and in view thereof, the ledger account 2001 shows that a sum of Rs. 7 Lacs was due and payable on account of the loan transaction appears to be presumptuous and over simplification of the matter over looking and ignoring the fact the onus to prove that loan has been repaid lies with the defendant. The ledger account of 2001, shows that the plaintiff has written off a sum of Rs. 7 Lacs which was the opening balance as on 1st January, 2001, and the said loan was classified as a bad debt. Mr. Mitra submits that the classification of such account as bad debt was made in view of the fact that the parties have decided to square off their accounts since the interest was received by the plaintiff in cash and the account was not in accrual basis cannot be

accepted in view of the subsequent conduct of the defendants in as much as the onus is on the defendant to show that the loan has been repaid as the defendant never disputes its liability under the loan transaction. Moreover novation of contract has not been pleaded nor proved. Any evidence contrary to the pleading cannot be accepted.

90. All the elaborate submissions made by Mr. Mitra by referring to various provisions of the Income Tax Act and the method of accounting contemplated under the said Act in my view is irrelevant and inconsequential in deciding the dispute between the parties. It may be that the plaintiff has arranged his affairs in relation to the said loan transaction in a manner to get Income Tax Act benefit or may be on a deeper it could be found that the provisions of the Income Tax Act may not have been strictly allowed and not in conformity with the provisions of the said Act but, that by itself would not be a ground for denying the plaintiff its right to claim the balance amount of the loan if the plaintiff could prove and establish its claim in this proceeding. The onus is on the defendant to show that intent was paid in cash and the account was settled and squared off finally in 2001. The defendants in their written statement never pleaded such defence.

91. Section 145 of the Income Tax Act deals with method of accounting. The section states that income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

92. There are two systems of accounting that are being used and in vogue:

- (i) The mercantile system (also known as "the book profit system" or the "double entry system") and
- (ii) The cash system.

93. The book profit system denotes that the computation of profits based on entries of books and not actual receipts and double entry system is described as such because there are two entries in respect of each transaction, one of credit and the other of debit. Under the mercantile system, the entries are made in the account books on the dates when the monies fall due, and not on the dates when they are paid or received, for example, if goods are sold, the seller would credit himself with the sale proceeds in his books on the date of the sale, though he has received no money, making a corresponding debit entry immediately against the purchaser. If interest is payable by a merchant to his creditors on a certain date, the merchant would debit himself on that date in his accounts, though, in fact, he made no payment and would make a corresponding credit entry in his books in favour of the creditor the same day. That is to say, the assessee would credit himself with the monies as soon as he became entitled to demand payment, though, in fact, he has not received them, and similarly, he would debit himself with the monies as soon as he became liable to pay, though he has, in fact, made no payment then. In Keshav Mills Ltd. Vs. Commissioner of Income

Tax, Bombay, The Hon"ble Supreme Court explained the two systems of accounting in observing that the mercantile system of accounting or what is otherwise known as the double entry system is opposed to the cash system of book keeping under which a record is kept of actual cash receipts and actual cash payments, entries being made only when money is actually collected or disbursed whereas mercantile system brings into credit what is due, immediately it becomes legally due and before it is actually received and it brings into debit expenditure in respect of which a legal liability has been incurred before it is actually disbursed. The profits or gains of the business which are, thus, credited are not realized but having been earned are treated as received though, in fact, there is nothing more than an accrual or arising of the profits at that stage. They are book profits. The same position has been reiterated by the Hon"ble Supreme Court in *Morvi Industries Ltd. Vs. Commissioner of Income Tax (Central) Calcutta*, *Poona Electric Supply Co. Ltd. Vs. Commissioner of Income Tax, Bombay*, *Commissioner of Income Tax, M.P., Nagpur and Bhandara Vs. Swadeshi Cotton and Flour Mills (Private) Ltd., Indore* The Commissioner of Income Tax, Madras Vs. A. Krishnaswami Mudaliar and Others, The Commissioner of Income Tax, Madras Vs. A. Gajapathy Naidu, *Calcutta Company Ltd. Vs. The Commissioner of Income Tax, West Bengal*, and *Indermani Jatia Vs. Commissioner of Income Tax, Uttar Pradesh*,

94. In *Commissioner of Income Tax Vs. Syndicate Bank*, the Hon"ble Karnataka High Court has elaborately discussed the system of accounting of interest on sticky loans on cash basis and has endorsed such accounting even for tax purposes after review of a number of decisions on determination of income under mercantile system of accounting, enumerating various contingencies in which income is recognized under the mercantile or accrual system of accounting. The accrual system does not create income, it only recognizes accrued income. In view of the doubtful prospect of realization of the interest from sticky loans, the adoption of a system of accounting for such interest on actual realization as accrued income, does not necessarily mean that the assessee is following a hybrid system or is following the cash system for part of its accounts. The decision in *UCO Bank, Calcutta Vs. Commissioner of Income Tax, West Bengal*, cited by Mr. Mitra is a locus classicus on the subject for more than one reason. One of the principles restated by the Hon"ble Supreme Court in *UCO Bank* (supra) is that the mercantile system of accounting does not require credit of interest on doubtful debts to profit and loss account. In *UCO Bank* (supra) it is stated:-

In the present case, the circulars which have been in force are meant to ensure that while assessing the income accrued by way of interest on a "sticky" loan, the notional interest which is transferred to a suspense account pertaining to doubtful loans would not be included in the income of the assessee, if for three years such interest is not actually received. The very fact that the assessee, although generally using a mercantile system of accounting, keeps such interest amounts in a suspense account and does not bring these amounts to the profit

and loss account, goes to show that the assessee is following a mixed system of accounting by which such interest is included in its income only when it is actually received. Looking to the method of accounting so adopted by the assessee in such cases, the circulars which have been issued are consistent with the provisions of Section 145 and are meant to ensure that assessees of the kind specified who have to account for all such amounts of interest on doubtful loans are uniformly given the benefit under the circular and such interest amounts are not included in the income of the assessee until actually received if the conditions of the circular are satisfied. The circular of 9-10-1984 also serves another practical purpose of laying down a uniform test for the assessing authority to decide whether the interest income which is transferred to the suspense account is, in fact, arising in respect of a doubtful or "sticky" loan. This is done by providing that non-receipt of interest for the first three years will not be treated as interest on a doubtful loan. But if after three years the payment of interest is not received, from the fourth year onwards it will be treated as interest on a doubtful loan and will be added to the income only when it is actually received.

95. Mr. Mitra joins issue here to emphasize that in order to avail any such benefit the assessee would be required to establish that for three years the payment of interest is not received and only thereafter from the fourth year onwards, it would be treated as interest on doubtful loan and would be added to the income only when it is actually received. The transfer of Rs. 7 lacs on 31st January, 2001 clearly shows that all interests have been paid otherwise the amount could not have been Rs. 7 lacs. However, this cannot be a defence to deny the claim of the plaintiff. It is for the income tax authority to find out if there is any violation but failure to disclose receipt of such amount before the authority does not absolve the primary responsibility of the defendant to pay the balance amount unless it is shown to have been fully repaid or waived.

96. In cash system no item would figure in the account except cash receipts or cash disbursement.

97. Section 36 sub-section 2 deals with bad debt and provisions for bad debts. The loans in order to be deductible as bad debts must be granted in the ordinary course of banking and money lending operations.

98. Rowlatt, J. in a very early case, *Curtis v J & G Oldfield Ltd.* (1925) 9 TC 319, speaking of the rule for allowance of a bad debt observed:

When the rule speaks of a bad debt, it means a debt which is a debt that would have come into the balance-sheet as a trading debt in the trade that is in question and that it is bad. It does not really mean bad debt which, when it was a good debt, would not have come in to swell the profits.

99. The Supreme Court in *A. Vs. THOMAS AND CO. LTD. v. COMMISSIONER OF Income Tax.*, cited the observation of Rowlatt, J. quoted earlier with approval and said:

A debt in such cases is an outstanding which if recovered would have swelled the profits. It is not money handed over to some one for purchasing a thing which that person has failed to return even though no purchase was made. In the section a debt means something more than a mere advance. It means something which is related to business or results from it. To be claimable as a bad or doubtful debt it must first be shown as a proper debt. The observations of Rowlatt, J were applied by the Privy Council in AIR 1936 133 (Privy Council) where their Lordships observed as follows:

Their Lordships moreover can give no countenance to a suggestion that upon a dissolution of partnership a partner's share of the losses for several preceding years can be accumulated and thrown into the scale against the income of another partner for a particular year. No Principle or writing off a bad debt could justify such a course, whether in the year following the dissolution or, as logic would permit, in some subsequent year in which the partner's insolvency has crystalised. The "bad debt" would not, if good, have come in to swell the taxable profits of the other partner.

This court also approved the dictum of Rowlatt, J in Commissioner of Income Tax, Bombay Vs. Abdullahbhai Abdulkadar, and referred to the observation of Venkatarama Aiyar, J in Badridas Daga Vs. The Commissioner of Income Tax, where the learned judge speaking for this court said that a business debt "spring directly from the carrying on of the business and is incidental to it and not any loss sustained by the assessee, even if it has some connection with his business". Section 10(2)(xi) is in two parts. One part deals with an assessee who carries on the business of a banker or money-lender. Another part deals with business other than the aforesaid. Since this was not a loan by a banker or money-lender, the debt to be a debt proper had to be one which, if good, would have swelled the taxable profits.

100. The notion that the debt must have been taken into account in computing the income of an earlier year implies necessarily that the books of account of the business are maintained in accordance with the mercantile system of accounting and not the cash system. With reference to debts arising in business or profession when they become bad, allowance is permissible provided the accounts are kept on mercantile basis and not on cash basis except in the case of a banking or money-lending business. If the accounts are kept on cash basis, then, what is brought to tax are merely actual cash receipts, and there is thus no scope or justification for any allowance in respect of what has not been realized.

101. After amendment to section 36(1)(vii) allowing deduction in the year of write off, the manner in which such right off has to be carried out has assumed importance.

102. In another decision in Vithaldas H. Dhanjibhai Bardanwala Vs. Commissioner of Income Tax, Gujarat-V, , it was held that a debit entry to the profit and loss account, by itself, would constitute write off following the meaning

assigned to "write off" in E.L. Kohler's Dictionary for Accountants to mean: "To transfer the balance of an account previously regarded as an asset to an expense account or to profit and loss account". There has been an amendment to section 36(1)(vii) with effect from 1-4-1989 to allow deduction for "bad debt or any part thereof" substituting the words "which is established to have become a bad debt in the previous year" by the words "which is written off in the accounts of the assessee during the previous year".

103. Since the write off has been made a pre-condition for deduction, it may not be safe to rely upon the favourable decisions rendered with reference to pre-amendment law. Mere debit to the P&L A/c would be adequate evidence of write off in the light of earlier precedents because what was relevantly under the earlier law is not so much the write off, but evidence that the debt had gone bad during the accounting year, so that the provision in P&L A/c was only an evidence for the claim and not so much a pre-requisite for deduction. There is a reluctance in squaring up the accounts merely for purposes of claiming deduction, because it is felt that this may be construed as an abandonment of the claim or settlement waiving the right to the claim, so as to defeat the right to civil action for recovery. This apprehension is not justified in law, because waiver or settlement or abandonment should be a bilateral one or at least should have been intimated by the creditor to the debtor so as to justify the inference of abandonment or settlement and defeat the right of recovery. It would be safer to square up the accounts of the debtor to ensure claim for deduction, while continuing to take steps for recovery.

104. Though provision was considered enough to justify deduction in Commissioner of Income Tax Vs. Asea Ltd. (now known as Asea Brown Boveri Ltd.), following Vithaldas H. Dhanjibhai's case (supra), it was also pointed out that it could be so accepted because the provision requiring actual write off was inserted only with effect from 1-4-1989.

105. Mr. Mitra has referred to Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, at Paragraphs 44 and 46 in support of the submission that there are two methods of dealing with a debt which has been written off in the books of account. The said methods are indicated in Paragraphs 44 and 46 of the said report which clearly brings out a distinction between the provision for doubtful debts and the concept of write off. The said paragraphs 44 and 46 state:-

44. In Commissioner of Income Tax and Excess Profits Tax, Central, Bombay Vs. Jwala Prasad Tiwari, the Division Bench of the Bombay High Court speaking through Chagla, C.J. has held as follows:

5. "Writing off" is a technical term used by financiers and auditors. There are two methods of dealing with a debt which has been written off in the books of account, (1) by giving the corresponding credit to the debtor's account, and (2) by giving the corresponding credit to the bad and doubtful debts account. The

first method is only employed where it is desired to close the account of the debtor. The second method is employed where there are some chances of recovery, howsoever remote they may be.

When we talk of "writing off" we are not concerned with the credit to be given to an account. "Writing off" means the raising of a debit entry. This can only be to the debit of the profit and loss account. This is the only debit which can possibly be raised as a result of writing off a bad debt.

46. Applying the tests laid down in the aforesaid two judgments (Jwala Prasad and Metal Box) it is clear that the concept of "provision for doubtful debts" is different from the concept of "write-off". The effect of the two is quite different. Provisions made against anticipated losses are charges against profits and, therefore, to be taken into account against gross receipts in the P&L account and the balance sheet. "Provisions" are usually shown in the balance sheet by way of deduction from the assets whereas "reserves" are shown as part of the interest of the proprietor. In the present case, there is no dispute regarding the aforesaid concepts. However, according to the consultants for MSRDC though provision for doubtful debt is a non-cash expense it has to be treated as a cash expense because once a provision has been made, the write-offs cannot be routed through P&L account and, therefore, what is conceptually a non-cash expense is being treated as a cash expense. As stated above, this is begging the question. If the aforesaid argument is to be accepted it would obliterate the conceptual difference between "provision" and "write-off". The above reasoning shows that the only reason for excluding REL/HDEC is the future cash impact of the provision made in the accounts of HDEC for FY 2001. This aspect has been discussed by us in the following paragraphs.

106. Mr. Mitra has referred to Section 36(2) of the Income Tax Act, 1961, and submitted that there are several conditions to be fulfilled before any deduction can be claimed for a bad debt or a part thereof. However, as I have observed that non-fulfillment of any condition as may be required under the Income Tax Act, would not be much consequence and that could not give a justification to the defendant not to discharge its onus of proving and establishing that the loan has been repaid in cash.

107. The attempt on part of the defendant to show that upon payment of Rs. 2 Lacs in 2006 there has been a complete satisfaction of the debt is inconsistent and runs counter to with the case made by the defendant that the entire loan transaction was squared off in 2001. If the defendant was of the view that the entire loan has been paid off in 2001. Then there could not have been any occasion for the defendant to pay a sum of Rs. 2 Lacs in 2006. Once the defendants accept that they have borrowed money from the plaintiff it is for the defendants to show that the loan has been repaid. The defendants contend that there has been a novation of contract in the year 2006 and the plaintiff has received the said amount of Rs. 2 Lacs in full and final satisfaction of its claim which means that there has been an accord and satisfaction of the debt. The

defendant has not pleaded novation of contract nor accord and satisfaction. The onus lies on the defendants to show that the said sum of Rs. 2 Lacs was paid and received by the plaintiff in full and final satisfaction of its dues. Moreover, if the defendants were clear in their mind that by reason of payment of Rs. 2 Lacs, in the year 2006, the entire loan has been repaid, all that one would accept from a prudent businessman is to ask for return of the title deeds. On the contrary, the evidence of record would show that the defendants requested the plaintiff to give further loan on the basis of the existing security. The creation of mortgage as security for the loan of Rs. 20 Lacs stands admitted. The evidence of the defendants appears to be that they requested for further loan on the basis of the existing security. The allegation of the defendant that interest all along has been paid in cash as directed by N.K. Chitlangia and such payment has been made through one Vijay Kumar Agarwal an authorised officer of defendant no. 1 is also not proved. In AIR 1926 34 (Privy Council) it is stated that when a creditor sues a debtor for the payment of a debt, if the debtor pleads payment to an agent of the creditor, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had, the authority of the creditor to receive payment of the debt on behalf of the creditor. The defendants have failed to prove payment of interest in cash or such alleged authorization to Vijay Kumar Agarwal.

108. The other important aspect of the matter is the reluctance of the defendant nos. 1 and 2 to appear and depose in this proceeding. In *Vidhyadhar Vs. Manikrao and Another*, and in *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*, the Hon'ble Supreme Court has that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. The whole question about the creation of mortgage and repayment of the loan would depend upon the pleadings of the parties, the nature of the suit, the evidence led by the parties and other attending circumstances. It cannot be doubted that the defendant nos. 1 and 2 have direct knowledge about the transactions and this Court feels that the defendants have deliberately avoided to come to the witness box since they might have to face uncomfortable questions. Instead they have sent a person whose evidence is full of inconsistencies and does not appear to be credible.

109. Even if the plaintiff had not taken any steps for realisation of its debt between 2001 and 2008, the fact remains that the defendant has made payment of Rs. 2 Lacs in 2006, towards part payment of his liability. Although, the Court is not satisfied with the explanation offered on behalf of the plaintiff for not taking any steps between 2001 and 2006, but that by itself could not be a ground for not allowing the claim of the plaintiff. The plaintiff may not get the interest as claimed in the plaint for such conduct.

110. In 2001, according to the own showing of the plaintiff a sum of Rs. 7 Lacs is due and payable. The plaintiff claims that sum is due on account of principal.

However, in absence of any disclosure of any documents to show that the said Rs. 7 Lacs constitutes only principal and not interest, this Court on preponderance of probabilities and lack of evidence in that regard is inclined to give benefit to the defendants and accordingly hold that a sum of Rs. 7 Lacs is due and payable under the loan transaction as on 1st April 2001. Thereafter, no payment has been made by the defendants until November, 2006. Accordingly, the plaintiff would be entitled to interest on Rs. 7 Lacs, on and from 1st April 2001 till October, 2006 and thereafter, on the remaining balance till repayment. The rate of interest as claimed in the plaint appears to be exaggerated, unconscionable, inequitable and penal in nature. In view of the aforesaid this Court is not inclined to give interest at the rate claimed in the plaint. However the plaintiff shall be entitled to interest on the sum of Rs. 7 Lacs on and from 1st April, 2001, till October, 2006 at the rate of 12% per annum (simple) and thereafter, on the remaining balance at the rate of 10% per annum (simple) on and from December, 2006 till repayment. Considering the nature of the transaction this Court feels that the rate of interest awarded in favour of the plaintiff is just, proper and equitable.

111. The suit is decreed accordingly.

112. The department is directed to draw the decree as expeditiously as possible.