

(1980) 07 MAD CK 0011
In the Madras High Court

K. Appa Rao

APPELLANT

Vs

V.L. Varadaraj (since deceased) and Others

RESPONDENT

Date of Decision : 30-07-1980

Acts Referred:

Citation : AIR 1981 Mad 94 : (1980) 93 LW 769 : (1981) 1 MLJ 57

Hon'ble Judges : Nainar Sundaram, J

Bench : Division Bench

Judgement

Nainar Sundaram, J.—The defendant in C.S. No. 81 of 1968 on the original side of this Court is the appellant in this appeal. The

respondents are the legal representatives of the deceased plaintiff, who died pending the suit. The deceased plaintiff laid the suit for the recovery of

the amounts due on a promissory note, marked in this case as Exhibit P-1, dated 27th March, 1967, executed by the defendant for a sum of Rs.

49,671 with interest thereon at 10 1/2 per cent. per annum. The defendant contended in the main that he had several money dealings with; the

deceased plaintiff from the year 1945 that the deceased plaintiff had been a professional money lender; that he had been charging interest on

arrears of interest due on each loan advanced by him under a promissory note and taking renewal promissory notes for the total amount including

compound interest every two or three years; that for the suit promissory note, the actual amount borrowed by him was only Rs. 17,300 under four

promissory notes, viz., Rs. 4,000 on 4th April, 1955, Rs. 10,000 on 18th November, 1955, Rs. 1,700 on 1st April, 1958 and RS. 1,600 on 7th

August, 1961; that these promissory notes were renewed by three promissory notes with added interest on 10th March, 1958 for Rs. 18,085, on

27th March, 1961 for Rs. 26,779 and on 12th March, 1963 for Rs. 35,341 and that eventually the single promissory note for the consolidated sum of Rs. 49,671 including further interest and interest on interest due up to 27th March, 1967, was taken from him. The defendant wanted to be relieved and protected against such untenable, usurious, unfair and unconscionable claim of Rs. 32,371 and he sought relief"s under the provisions of the Usurious Loans Act and the Madras Money Lenders Act by re-opening all the aforesaid transactions prior to the suit promissory note and ascertaining the reasonable amount payable for interest. According to the defendant, upon such calculation, the interest lawfully payable on the principal debt of Rs. 17,300 will be less than Rs. 10,000. The defendant also refers to the prior litigation between him and the plaintiff in respect of the mortgage dated 9th May, 1949, executed by him in favour of the plaintiff for Rs. 3,15,000 and the pendency of the Civil Appeal No. 2175 of 1972 before the Supreme Court of India. According to him, the final decision of the Supreme Court will enable this Court to determine as to whether the suit promissory note also will get discharged or not upon re-opening all the money dealings between him and the deceased plaintiff. The defendant would also challenge the competency of plaintiffs 2 and 3 to come on record as the joint executors of the codicil purported to have been left by the deceased plaintiff. On the above pleadings, the following issues were framed for consideration;

1. Whether the suit pronote is a renewal of prior pronotes with added interest and interest on arrears of interest?
2. In the event of any excess payment being found in C.A. No. 2175 of 1972, then is the defendant entitled to have the same adjusted in law or in equity in discharge of the admitted claim of the suit pronote?
3. Whether the defendant is entitled to relief under the Usurious Loans Act and the Madras Money Leaders Act; and if so, to what extent?
4. Is the defendant entitled to have the decree, if passed in this suit, stayed till the disposal of civil appeal on the file of the Supreme Court of India?
5. Are the plaintiffs 2 and 3 entitled to the suit claim, as legal representatives of the deceased first plaintiff?
6. To what relief, if any, are the plaintiffs entitled?

Suryamurthy, J., who tried and disposed of the suit found all the issues against

the defendant and the suit was decreed with costs as prayed for, less a sum of Rs. 34,000 paid after suit. However, the learned Judge granted interest at the rate of 6 per cent per annum from the date of suit. As against the judgment and decree of the learned Judge, the present appeal has been preferred by the defendant.

2. The respondents herein have filed the memorandum of cross-objections against the allowance of interest, only at the rate of 6 per cent per annum from the date of suit, instead of allowing interest at the rate of 10½ per cent per annum from the date of suit till the date of decree.

3. In the appeal before us, Mr. M. Sharma Das, learned Counsel appearing for the appellant, would urge the following points in support of the

case of the appellant. The first submission of the learned Counsel is that the learned trial Judge ought to have accepted the plea of the appellant that

the suit promissory note is a renewal of earlier promissory notes with added interest and interest on arrears of interest. Secondly, the learned

Counsel would submit, relying on two pronouncements of this Court, that if the plea of the appellant on the first point is accepted, this Court has to

draw the pre sumption that the interest charged was excessive and consequently, the transaction was substantially unfair and this would entitle the

appellant to have the provisions of Section 3 of the Usurious Loans Act 1918 applied to the transaction in question. Learned Counsel would also

urge that the provisions of the Tamil Nadu Money Lenders Act (XXVI of 1957) ought to have been applied by the learned trial Judge to two of

the borrowings on the earlier promissory notes for Rs. 1,700, Exhibit D-3, dated 1st April, 1958 and for Rs. 1,600 Exhibit D-4, dated 7th August,

1961, No other point was argued before us by the learned Counsel for the appellant.

4. On the first submission, learned Counsel for the appellant, wants to rely on Exs. D-1 to D-5, which, according to him, are the copies of the

earlier promissory notes which preceded the suit promissory note. Earlier, in the course of the argument, the learned Counsel was under the

impression that the said copies have been marked without any objection as to admissibility. But this stand of the learned Counsel is found to be not

correct, because the documents, Exs. D-1 to D-5 have, in fact, been marked subject to admissibility. As rightly pointed out by the learned trial

Judge, the earlier promissory notes, treated as discharged on the execution of the subsequent promissory notes by the appellant, ought to have

been returned to the appellant only. The appellant has no convincing explanation as to why he has not taken back the original discharged

promissory notes. Learned Counsel for the appellant made much out of the fact that the appellant, in the course of his evidence as D.W.1, has

stated that he has given notice to produce the prior promissory notes; and on the basis of the statement of D.W.1 learned Counsel for the appellant

contended that the earlier discharged promissory notes were only with the deceased plaintiff. We are unable to accept this argument. In the first

place, by the time the suit was taken up for trial the original plaintiff was dead and, therefore, there was none to admit or deny this statement of

D.W.1. Secondly, the appellant has not produced any copy of the notice which he claimed to have given for the production of the prior promissory

notes. In view of this, we are unable to hold that the discharged promissory notes, if any, were only with the deceased plaintiff. Exs. D-1 to D-5

are merely typed copies. There is no authentication as a true copy in any of these documents. The appellant has not stated that these copies,

Exhibits D-1 to D-5 were made from or compared with the originals. Hence no reliance can be placed on these documents to uphold the

contention of the appellant that the evidence the transactions that are said to have preceded the suit promissory note. However, as the learned trial

Judge points out, Exhibit P-1 itself recites that it was in renewal of a promissory note executed by the appellant in favour of the deceased plaintiff

for Rs. 44,775 on 12th March, 1966. Apart from accepting this position, it is not possible to look into these documents to uphold the case of the

appellant with regard to the earlier transactions.

5. Then the question that comes up for consideration is as to whether, when the accrued interest on an earlier promissory note is capitalised and

added on to the principal and a fresh promissory note is taken for the composite amount, the transaction should be characterised as usurious, so as

to attract the provisions of the Usurious Loans, Act, 1918. We are clearly of the opinion that there is no warrant to apply the provisions of the

Usurious Loans Act, 1918 to the instant case on the ground that the transaction between the parties was substantially unfair in the sense, the

interest charged was excessive. Section 3 of the Usurious Loans Act, 1918 relating to reopening of transactions, as it stands amended by Madras

Act VIII of 1937, reads as follows:

3(1) Notwithstanding anything in the Usury Laws Repeal Act, 1855(XXVIII of 1855), where in any suit to which this Act applies, whether heard

ex parte or otherwise, the Court has reason believe that the transaction was, as between the parties, thereto, substantially unfair, the court shall

exercise one or more of the following powers namely;

(i) reopen the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken

between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in

respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan and if the creditor has parted

with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just;

Provided that, in the exercise of these powers, the Court shall not...

(i) reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any

persons from whom they claim at a date more than twelve years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation I--If the interest is excessive the Court shall presume that the transaction was substantially unfair; but such presumption may be

rebutted by proof of special circumstances justifying the rate of interest.

Explanation II--In the case of a suit brought on a series of transactions the expression "the transaction" means, for the purpose of proviso (i) the

first of such transactions.

(2) (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it

appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in

money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods

at which it is calculated and the total advantage which may reasonably be taken to have been expected from the transaction:

Provided that in the case of loans to agriculturists, if compound interest is charged, the Court shall presume that the interest is excessive.

(c) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations

of the parties at the time of the loan or tending to show that the transaction was unfair including the necessities or supposed necessities of the

debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

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

(3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of

any agreement or security in respect of a loan or for the redemption of any such security.

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was bona fide, and that he

had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section.

For the purposes of this sub-section, the word "notice" shall have the same meaning as is ascribed to it in Section 4 of the Transfer of Property

Act, 1852.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

6. Learned Counsel for the appellant places strong reliance on the judgment of Patanjali Sastri, J., in *K. Venkanna Chettiar and Sons by Managing*

Partner, K.V. Muthukrishna Chettiar Vs. K.K. Shaik Muhammad Rowther and Another, as well as the judgment of a division Bench, consisting of

P.V. Rajamannar, C.J., and Krishnaswami Nayudu, J., in SV. L. SV. Sevugan Chettiar Vs. Chinnasami Reddiar and Another, wherein the Bench

approved the dictum of Patanjali Sastri, J., in the earlier case. In our view, these two decisions have no relevance to the facts of the present case.

Patanjali Sastri, J., as well as the learned Judges of the Division Bench, in the above two cases, were concerned with debtors who were

agriculturists, so as to attract the proviso added on to Sub-section (2) (b) of Section 3 of the Usurious Loans Act, 1918 by the Madras Act VIII

of 1947 which proviso has laid down that if compound interest is charged, the Court shall presume that the interest is excessive. In the present

case, the appellant is not admittedly an agriculturist, so as to attract the said proviso. Patanjali Sastri, J., pointed out that though there was no

stipulation in advance to pay compound interest with rests, where accrued interest was capitalised and added to the principal at each settlement of

account and it was agreed that the composite sum should bear interest at the same rate, it amounted to charging compound interest. The Division

Bench, in SV. L. SV. Sevugan Chettiar Vs. Chinnasami Reddiar and Another, also found that the defendants in that case though were not

agriculturists within the meaning of the Madras Agriculturists Relief Act. they were agriculturists within the meaning of the Usurious Loans Act, and

it was only in that context, the Division Bench approved the dictum of Patanjali Sastri, J., in the earlier case with regard to charging of compound

interest.

7. If this position is made clear, then the question is, whether in the instant case the interest charged could be characterised as excessive, so as to

say that the transaction was substantially unfair, attracting Section 3 of the Usurious Loans Act. Sub-section (2) of Section 3 itself delineates the

test to be applied by the Court to find out as to whether the interest charged was excessive and as to whether a particular transaction was

substantially unfair. In Lala Ballammal v. Ahad Shah (1918) 48 IC 1 : 35 MLJ 614 : AIR 1918 PC 249 the Privy Council recognised the

justification for adding on the accumulated interest under an earlier transaction in the fresh transaction and the following observation of the Privy

Council brings out the position succinctly:

A borrower who obtains a loan secured by a promissory note on quite reasonable

terms, by neglecting to pay the note at maturity, further neglecting to pay the accruing interest for the several years following, and then giving a renewal note for the original debt plus the capitalised interest, could produce a result which might, at first sight appear oppressive, and yet there would be nothing harsh or unconscionable in the creditor's demand, since the added interest only accumulated while he fore bore to enforce the payment of the sums from time to time due to him.

8. In AIR 1940 60 (Privy Council) the Privy Council opined that where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt, this is not in principle open to any sound objection. However, on the facts of that case which involved transactions of loan and charge, the interest charged being 24 per cent per annum, and such interest charged at that rate was, on each transaction, capitalised and made payable by monthly instalments, the charging of 24 per cent interest per annum was presumed to be unfair and was reduced to 15 per cent compound interest.

9. It must be pointed out that the charging of compound interest by itself is not per se usurious except in the case of an agriculturist and that too, by virtue of the proviso added to Clause (b) of Sub-section (2) of Section 3 of the Usurious Loans Act, 1918 by the Madras Act VIII of 1937. The

factors that should weigh with the Court to find out as to whether the interest charged is usurious or not are those found in Clauses (a) to (d) of

Sub-section (2) of Section 3. In Gopala Menon and Another Vs. Srinivasa Varadachariar and Others, P.V. Rajamannar, CJ., and Ganapathia

Pillai, J., pointed out as follows:

We are clearly of opinion that to lay down an absolute maximum rate of interest beyond which interest would be excessive within the meaning of

the Usurious Loans Act would be in direct contravention of what is laid down in the Act itself. Section 3(2) (a) (b) and (c) of one Usurious Loans

Act which continue to be applicable notwithstanding the Madras amendment makes it abundantly clear that in deciding whether the interest

charged is excessive, several factors have to be taken into consideration. One important fact will be the risk incurred as it appeared or must be

taken to have appeared, to the creditor at; the date of the loan. In considering

the question of risk, Section 3(2)(c) enacts that it will be material to take into account the presence or absence of security and the value thereof, and the financial condition of the debtor and the result of any previous loan transactions known to the creditor. If compound interest is charged, the periods at which it is calculated and the total advantage which may be reasonably expected to have accrued from the transaction are important factors. As to the justification for consolidating the principal and interest due under the earlier promissory note as recited in Exhibit P.1 and making the consolidated amount the consideration for Exhibit P.1, the learned trial Judge has set out the relevant factors in the course of his judgment in the following terms:

The defendant herein had instigated his son K. Satyendra Kumar to institute C.S. No. 39 of 1957 on the file of this Court, impugning the mortgage executed by him in favour of the deceased plaintiff. Subsequently, the defendant instituted O.S. No. 140 of 1967 on the file of this Court for a declaration inter alia that the mortgage deed dated 9th May, 1949, executed by him in favour of the deceased plaintiff for Rs. 3,15,000 stands completely discharged and that the two promissory notes dated 21st March, 1967 for Rs. 49,671 and Rs. 13,429 also stand completely discharged. He further prayed for a decree against the deceased plaintiff for a sum of Rs. 10,000 or any other sum that may be found due and owing on taking of accounts. He also prayed for a permanent injunction restraining the deceased plaintiff from taking any action in respect of the aforesaid two promissory notes. In lending money to a person of this character, the deceased plaintiff was certainly taking a great risk.

No exception could be taken to the above view of the learned trial Judge and we are clearly of the opinion that the considerations that weighed with the learned trial Judge are relevant and they fit in with the provisions of Sub-section (2) of Section 3 of the Usurious Loans Act, 1918. That apart, we may also point out that even according to the appellant, as far as the present suit is concerned, the first transaction commenced on 4th April, 1955. But even earlier, on 9th May, 1949, the appellant had borrowed a sum of Rs. 3,15,000 under a mortgage. Thus, when the deceased plaintiff advanced loans subsequently, he was doing so without any security and therefore, was running a great risk in lending the money. This

factor has also to be taken into account for the purpose of finding out as to whether the rate of interest is excessive or usurious, or not. In this context, we may also refer to the judgment of the Supreme Court in Srinivasavardachariar and Others Vs. Gopala Menon and Others, where the Supreme Court upheld the award of 10 per cent. compound interest with yearly rests as meeting the justice of the case, That was a case of a mortgage and the security was found to be not adequate and there was also threatened litigation. In Navis Ammal Fernando and Another Vs. S. Subbiah Iyer, one of us, Ismail, J., as he then was, speaking for the Bench, clearly pointed out that no hard and fast rule can be laid down either with reference to the percentage of interest or with reference to the nature of interest, whether simple or compound, for the purpose of determining whether the rate of interest charged in a particular case was excessive or not. In that case, the rate of interest originally stipulated was only 12 per cent, simple interest per annum and only in default of payment of interest every month, the document provided that it must be added on to the principal and the interest thereafter would be at 13 1/2 per cent per annum, and consequently the Division Bench held that the above rate of interest per se cannot be said to be excessive. in view of the above position, we do not find any substance in the second plea of the learned Counsel for the appellant that the interest charged was excessive and consequently, the transaction was substantially unfair, so as to attract the provisions of the Usurious Loans Act, 1918.

10. Coming to the last submission of the learned Counsel for the appellant; that at least in respect of Exhibit D-3 and D-4 the learned trial Judge ought to have applied the provisions of the Tamil Nadu Money Lenders Act (XXVI of 1957), we have already held that Exhibit D-3 and D-4 cannot be looked into to spell out any earlier transaction as alleged by the appellant, They are totally inadmissible and hence, there is no question of applying the provisions of the Tamil Nadu Money Lenders Act (XXVI of 1957) with regard to any such transaction, regarding which there is no acceptable material before us.

11. In our view, the appeal by the defendant-appellant lacks merits and the same will stand dismissed with costs of the respondents.

12. Coming to the cross-objections preferred by the respondents in the appeal,

who are the plaintiffs brought on record in the suit on the demise of the original plaintiff, we are of the opinion that the learned trial Judge is not right in denying interest to the plaintiffs at the contract rate from the date of suit till the date of decree. The learned trial Judge has not given any reasons for awarding interest for the said period only at the rate of 6 per cent per annum instead of at the contract rate, viz. 10 1/2 per cent per annum. It is not as if the appellant put forth any factor or circumstance justifying such a denial. The general rule is that the rate of interest pendente lite should be at the contract rate unless there are circumstances which would disentitle the plaintiff to have the same. The burden is on the appellant to show such circumstances. Nothing has been spelled out before us, so as to decline the award of interest at the contract rate from the date of suit till the date of decree. Hence, we feel obliged to interfere with this part of the judgment and decree of the learned trial Judge and the memorandum of cross-objections filed by the respondents in the appeal is allowed and the decree in the suit will stand modified, awarding interest at the rate of 10 1/2 per cent. per annum from the date of suit till the date of decree. The respondents will be entitled to their costs in the memorandum of cross-objections.