

(2005) 09 DEL CK 0089

In the Delhi High Court

Case No : CS (OS) No's. 864 and 369 of 1994 and 113 of 1995

LIC Housing Finance Ltd.

APPELLANT

Vs

Pearl Developers (P) Ltd. and Others
 Pearl Developers
(P) Ltd. Vs LIC Housing Finance Ltd.

RESPONDENT

Date of Decision : 29-09-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 4, Order 34 Rule 6

Citation : (2006) 4 BC 152

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : A.K. Singl, for the Appellant; Santosh Paul, for the Respondent

Final Decision : Disposed Off

Judgement

Swatanter Kumar, J.—The plaintiff is a company registered under the Companies Act, 1956 having its Registered office at Yogakshema, Jeewan Bima Marg, Bombay with its area office at Lakshmi Insurance Building, Asaf Ali Road, New Delhi. The shares of the plaintiff are held by LIC, UTI, ICICI and IFCI and the company is engaged in the business of advancing loans for the construction/purchase of house/flat or extension thereof as well as providing short term construction finance to builders. Sh. B.P. Trikha is the Area Manager of the plaintiff company at New Delhi who has been duly authorised to sign and verify the plaint and institute the present suit on behalf of the plaintiff and to do all other necessary acts in that regard. The power of attorney has been executed by the Managing Director of the company in pursuance to resolution of Board of Directors of the company dated 27.10.1992.

2. Defendant No.1 is a private Limited Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Flat No. FF-2, Jumbo Complex, Phase-III, New Delhi and defendant Nos. 2 and 3 are stated to be directors of defendant No. 1 and are related to each other as husband and wife while defendant No. 4 is their son. Defendant Nos. 2 and 3 had

executed the guarantee deeds in favor of the plaintiff for securing the payment of the loan advanced to defendant No. 1. Defendant Nos. 3 and 4 have by way of collateral security for the loan mortgaged their properties in favor of the plaintiff. Defendant No. 5, is a cooperative group housing society having its registered office at Airlines House, 113, Gurudwara Rakabganj Road, New Delhi and defendant No. 6 is a partnership concern which carries on business as builders and promoters at New Delhi. Defendant No. 7 is the partner of defendant No. 6.

3. Defendant No. 1 applied to the plaintiff for a loan of Rs. 100 lacs as construction finance to proceed with the construction of the buildings in a project called "Kaveri Kunj" on a plot of land measuring about 3200 sq. yds. or thereabout in Khasra No. 136, Village Devli, Devli, Khanpur Road, New Delhi. At the time the plaintiff was informed by the defendant No. 1 that defendant No. 5 had purchased the said plot of land on 15.12.1978 and was intending to develop a residential colony thereon. On 4.6.1985, defendant No. 5 entered into a collaboration agreement with defendant No. 6 through its partner defendant No. 7 for the construction of the buildings for the aforesaid residential colony on the said plot of land. According to the condition of the collaboration agreement, it was stipulated that the buildings shall be got completed by defendant No. 6 at their own cost and defendant No. 6 shall appoint architects, engineers and consultants in their absolute discretion. In furtherance to the collaboration agreement, defendant No. 5 handed over possession of the aforesaid plot of land to defendant No. 6. On 24.4.1987, defendant No. 6 in furtherance to the said collaboration agreement entered into an agreement for development with defendant No. 1 for construction of the buildings for the aforesaid residential colony. Under the agreement, the development was undertaken by defendant No. 1 at their own cost on the stipulation that 65% of the built up area shall belong to defendant No. 1 and 35% to defendant No. 6 which included the share of the owner i.e. Defendant No. 5. In furtherance to the said agreement defendant No. 6 handed over possession of the land to defendant No. 1 and defendant No. 1 started constructing buildings thereon. At the time of institution of the suit, the building was yet to be completed. Vide confirmation dated 8.5.91, defendant Nos. 1 and 6 allocated and divided the area which provided area of the parties in each block. Defendant No. 1 then approached the plaintiff in the year 1991 for a loan of Rs. 100 lakhs as construction finance for the construction of the buildings and residential complex known as Kaveri Kunj. The application was made under the scheme of the plaintiff for granting construction finance to builders and developers. Finally, the plaintiff agreed to offer a loan of Rs. 75 lacs vide its letter dated 14.1.92. The terms and conditions stated in the said letter of offer was accepted and in token thereof the plaintiff gave the duplicate copy of the offer letter with the following endorsement signed by defendant No. 1.

We pearl Developers Pvt. Ltd. do hereby unequivocally agree to avail of the loan of Rs. 75 lakhs (Rupees Seventy Five Lakhs only) on terms and conditions mentioned in the letter. Dated at New Delhi this 16th day of January, 1992.

Sd/- Pearl Developers (P) Ltd.

4. Defendant No. 1 then paid the service charges for the loan by a cheque dated 16.1.1992. The loan of Rs. 75 lacs was to be advanced and as per terms V (a) & V (b) it was to be disbursed and properties to be mortgaged as under-

V(a) The loan will be secured by the first mortgage of the land over which the building is proposed to be constructed Along with super structure and any other freehold land with or without structure thereon of adequate value as may be deemed necessary and the personal guarantee of Sh. S.C. Bhargava and Smt. Sadhana Bhargava or any other security acceptable to the vendor.

(b) The borrower shall also execute a loan agreement and or such other documents as may be determined by the lender. The repayment schedule to the letter of offer is as follows:-

At the end of 6 months of the date of first disbursement Rs 3,00,000.00 At the end of 12 months of the date of first disbursement Rs 24,00,000.00 At the end of 18 months of the date of first disbursement Rs 24,00,000.00 At the end of 24 months of the date of first disbursement Rs 24,00,000.00 _____
Rs.75,00,000.00 _____

5. The loan agreement also contained inter alias the rate of interest, additional interest in case of default, term of repayment, covenants and warranties of the borrower, remedies of lender, miscellaneous and other provisions relating to grant and repayment of loan. On 18.3.1992, defendant No. 1 and 6 entered into a tripartite agreement with the plaintiff wherein the important conditions of the loan such as its mode of disbursement, repayment period, rate of interest, additional interest in case of default, securities for the loan, personal guarantee of the directors of defendant No. 1 are incorporated. The tripartite agreement inter alias stipulated that the loan shall be secured by mortgage by deposit of title deeds relating to land and building under construction at the said plot to the extent to which it falls to the exclusive share of defendant No. 1 and by mortgage of the property situated at 2526, Ward No. 8, Gali Lajpat Rai, Bazar Sita Ram, Delhi and by deposit of title deeds relating to first and second floor of the said property. Defendant No. 1 asked for disbursement of the first installment of the loan vide letter dated 15.5.1992. In that letter they stated that they would obtain and submit a clearance letter from defendant No. 5 to the effect that they (the defendant No. 5) have no objection to the defendant No. 1 mortgaging the property in favor of the plaintiff. Thereafter it was informed to the plaintiff by the said defendant that they were negotiating for acquiring the remaining interest of defendant No. 5 in the project. The defendant No. 6 thereafter paid an amount of Rs. 5 lacs to defendant No. 5 by cheque dated 18.7.92. Copy of the receipt was submitted to the plaintiff and it was also brought to the notice of the plaintiff by defendant No. 1 that the defendant No. 5 had passed a resolution dated 17.7.92 authorising Sh. Sen President and Sh. V.S. Khilnani, Secretary of defendant No. 5 to execute a special power of attorney in favor of the defendant No. 7, partner of

defendant No. 6 giving him power to execute sale deed. Vide letter dated 18.3.1992, defendant No. 1 submitted a declaration to the plaintiff stating that as security for the loan defendant No. 1 has agreed to mortgage the following blocks of buildings and the land apurtenant thereto falling to the share of defendant No. 1 at Kaveri Kunj under agreement dated 8.5.91 by and between defendant No. 1 and 6 and assented to by defendant No. 5:-

Block No.	No. of Storeys	Covered Area (in sq. feet)
2	8	12360
3	8	12360
4	5	5500
5	5	5500
6	5	5500
7	5	5500

6. Defendant Nos. 3 and 4 also made similar declarations in respect of their flats on the first and second floors respectively of the House No. 2526, Ward No. 8, Gali Lajpat Rai, Bazar Sita Ram, New Delhi and agreed to mortgage the said property as additional security for the loan to be advanced to defendant No. 1 by the plaintiff. Defendant Nos. 2 and 3 executed on 18.3.92 separate deeds of guarantee for the due payment of the loan with interest and observance of the terms and conditions of the loan agreement by defendant No. 1. The said deeds of guarantee contain inter alias stipulations with regard to interest, repayment of loan and to enforce the guarantee without taking recourse to the properties mortgaged to the plaintiff. On 20.7.1992 defendant No. 1 mortgaged all the buildings and lands falling to their share at Kaveri Kunj in favor of the plaintiff by depositing the documents of title and other related documents with the plaintiff. Thereafter defendant No. 1 also executed a memorandum dated 20.7.92 in respect of the mortgage by deposit of title deeds giving necessary details. The details of the properties which were mortgaged by defendant No. 1 to the plaintiff have been summed up in paragraph No. 13 and 14 are as under:-

13. That on 20.7.92 the defendant No.1 mortgaged all the buildings and lands falling to their share at Kaveri Kunj in favor of the plaintiff by depositing the documents of title and other related documents with the plaintiff. Thereafter the defendant No.1 also executed a memorandum dated 20.7.92 in respect of the mortgage by deposit of title deeds giving particulars of the documents deposited and also a promissory note for a sum of Rs.25 lakhs (Rupees Twenty Five Lakhs) being the amount of first installment of the loan which was paid to the defendant on 20.7.92.

The details of the mortgage created by defendant No.1 and in respect whereof a memorandum in respect of deposit of title deeds was executed thereafter are as under:

Details of Mortgage Created by Defendant No.1

a.	b.	c.	d.	e.	f.
Date 20.7.1992	Name of Mortgagor Pearl Developers (P) Ltd.	Name of Mortgagee LIC Housing Finance Ltd.	Sum Secured Seventy Five lakhs	Rate of interest 21.5% per annum payable monthly. 6% additional interest in case of default.	Property subject to mortg- Buildings and lands appurtenant age thereto falling to the share of the morgagor in Kaveri Kunj, situate in Khasra No.136, Devli Village, Khanpur-Devli Road, New Delhi as under: Block No. No. of Covered storeys feet Area in

sq. 2 8 12360 3 8 12360 4 5 5500 6 5 5500 7 5 5500 Total covered area 41220
g. Amount now due (as on 4.4.94) Towards principal Rs.49,00,000.00 Towards
interest Rs.10,11,638.38 Total Rs.59,11,638.38

14. That as collateral security for the loan the defendant No.3 mortgaged in favor of the plaintiff the property being first floor of house No.2526, War No.8, Gali Lajpat Rai, Bazar Sita Ram, Delhi as its beneficial owner. After effecting the aforesaid mortgages the defendant Nos.3 and 4 executed separate memorandum of deposit of title deeds dated 20.7.92 in respect of the above mortgages.

The details of the mortgage created by defendant Nos. 3 and 4 by way of collateral security by deposit of title deed in respect whereof separate memorandum of mortgage by deposit of title deed executed on 20.7.92 are as under:

Details of Property Mortgaged by Defendant No.3 a. Date 20.7.92 b. Name of Mortgagor Sadhana Bhargava c. Name of Mortgagee LIC Housing Finance Ltd. d. Sum Secured Rs.75 lakhs e. Rate of interest 21.5% per annum. 6% additional interest in case of default. f. Property subject to mort- 1st Floor, House No.2526, Ward No.8, Gali Lajpat Rai Bazar Sita Ram, New Delhi g. Amount due as on 4.4.94 Rs.59,11,638.38 np. Details of Property Mortgaged by Defendant No.4

a. Date 20.7.1992 b. Name of Mortgagor Shashank Bhargava c. Name of Mortgagee LIC Housing Finance Ltd. d. Sum Secured Rs.75 lakhs (Rupees Seventy Five lakhs) e. Rate of interest 21.5% per annum. 6% additional interest in case of default. f. Property subject to mort- 2nd Floor, House No.2526, Ward No.8, Gali Lajpat Rai Bazar Sita Ram, New Delhi g. Amount due Rs.59,11,638.38 np."

7. That on the basis of the aforesaid accepted loan offer dated 14.1.1992, loan agreement dated 18.3.1992 and on the security of the mortgage of the properties belonging to defendant Nos. 1,3 and 4, the personal guarantees furnished by the defendants 2 and 3, the tripartite agreement dated 18.3.1992 between the plaintiff and defendant Nos. 1 and 6 and the letter dated 20.7.92, receipt and resolution dated 17.7.92 of defendant No. 5, declarations dated 18.3.92 of defendants 1,3 and 4, the plaintiff advanced to defendant No. 1 an amount of Rs. 25 lacs on 20.7.92. As per the terms and conditions of the loan offer letter dated 14.1.92 accepted by defendant No. 1 and the loan agreement was executed by them on 18.3.92, defendant No. 1 had to pay interest at the rate of 21.5 per cent p.a. payable monthly on the amount disbursed. The first installment of the interest fell due on 1.8.92 but they did not pay the said installment of interest. They also did not pay the installments of interest which fell due on 1.9.92, 1.10.92 and 1.11.92. On 15.10.92, plaintiff wrote to defendant No. 1 and demanded payment of the outstanding installments of interest together with additional interest at the rate of 6 % p.a. on the unpaid installments. However, the said amount was not paid. The plaintiff paid Rs. 24 lacs to defendant No. 1 on 27.11.92 as second installment of the loan. The

defendant executed a promissory note dated 27.11.92 for Rs. 49 lacs being the total amount of loan disbursed to the plaintiff. Thus the defendant No. 1 paid installments of interest and also additional interest amounting to Rs. 7,73,220/-. As per conditions of loan, first installment of Rs. 3 lacs fell due for payment on 20.1.1993. Defendant No. 1 did not pay the said amount despite repeated requests. Thereafter defendant No. 1 vide their letter dated 31.3.93 asked for a copy of the loan agreement and correspondence kept on exchanging between the parties. However, the installment of the principal amount was not paid. The plaintiff also wrote to the defendant No. 1 on 2.12.93 and 31.12.93 asking them to repay the overdue repayment installments with interest and additional interest. Defendant No. 1 then sent a reply dated 4.1.1994 enclosing the copy of a letter dated 22.12.93 which was a reply to the letter of the plaintiff dated 2.12.93. It was stated that they had negotiated with the State Bank of Bikaner and Jaipur and that the bank might purchase the flats towards the end of January, 1994 and they also stated that they were in the process of tying up with NBCC for sale of flats to institutional buyers like Central Board of Technical Education. The defendant No. 1 assured that they had no intention to withhold the repayment of the loan. The plaintiff failed to receive any payment from the defendant and as such it issued a legal notice dated 20.1.94 recalling the entire loan as per the terms and conditions of the agreement and claiming a sum of Rs. 57 lacs from defendant No. 1 and the legal notice was also sent to defendant Nos. 2,3 and 4. Instead of paying the dues of the plaintiff, the defendant No. 1 filed a suit in the High Court of Delhi. According to the plaintiff wherein defendant No. 1 had made baseless and false allegations against the plaintiff and the said suit was registered as CS(OS) 369/94. The said suit is being contested by the plaintiff. Having left with no alternative and having failed to receive its repayment of the loan, the present suit was filed by the plaintiff on the basis of the claim of mortgage in terms of the provisions of Order 34 Rule 4 of the CPC. The cause of action according to the plaintiff arose in favor of the defendants when the loan was advanced, then when the defendants failed to make repayment of the interest and the principal amount and lastly when after service of legal notice they failed to pay the amount. The plaintiff prays for passing of a decree for a sum of Rs. 59, 11,638/- with interest and costs and it is further prayed that all the properties mortgaged to the plaintiff as afore-noticed should be sold in furtherance to the decree of the court and if the amounts are found to be insufficient, the plaintiff be granted liberty to apply for recovery of the balance amount in accordance with the provisions of Rule 6 of Order 34 of the CPC. The relief of injunction is also prayed.

8. Vide order dated 21.04.1994, the court had passed ad interim ex parte injunction against the defendants restraining them from alienating, transferring or parting with the possession of the property buildings at Kaveri Kunj as well as the first and second floor of property No. 2526, Ward No. 8, Gali Lajpat Rai Bazar Sita Ram, Delhi. This order of injunction has continued though the application for injunction has not been finally disposed of as yet.

9. The defendants vehemently contested the claim of the plaintiff by filing two different written statements, one on behalf of defendant Nos. 1 and 2 and the other on behalf of defendant Nos. 3 and 4. The defendants have taken various preliminary objections with regard to maintainability of the suit, the suit having not been instituted by a duly authorised person and the suit being bad for mis-joinder of parties. On merits, the averments that they had applied for loan and loan was sanctioned and the properties had been mortgaged has not been disputed. The thrust of the defendants' case is that the application for loan by the defendant company stated the project cost as Rs. 449.15 lacs and the plaintiff was informed that the defendants have already invested Rs. 47 lakhs in the project. It is denied that any discussion had taken place in regard to disbursement of the loan, repayment schedule, rate of interest and security for loan guarantors as alleged. According to the defendants, the plaintiff ought to have disbursed the entire loan of Rs. 75 lacs immediately after sanction and non-disbursement of this loan has caused tremendous loss to the defendants. It is further stated that from first and second installments of the loan which were disbursed, unnecessary deductions were made and the disbursement of Rs. 25 lacs as first installment was contrary to the terms agreed between the parties and the entire action of the plaintiff is arbitrary and contrary to the agreed terms. The defendants have suffered tremendous loss because of inaction or arbitrary action on the part of the plaintiff and in order to protect their rights they had filed the suit against the plaintiff being suit No. 369/94 and thereafter they also filed another suit being suit no. 113/95 for recovery of Rs. 45 lakhs on account of damages and mesne profits. The present suit of the plaintiff (CS(OS) 864/1994) is stated to be a counter blast to the suit filed by the defendants.

10. It is further averred that the defendant company did not submit declaration dated 18.3.1992 as claimed. In fact, the plaintiff obtained several signatures of the answering defendants prior and after issuance of letter of offer and the documents referred and relied upon by the plaintiff are otherwise inadmissible. There was no stipulation between the parties even on the basis of the alleged documents to state for interest to be due on 1.8.1992. According to the defendants, plaintiff has no cause of action to recover any installment or interest as the installment of any kind could be recovered only after disbursement of the entire loan. No installment of interest, thus, according to the defendants fell due on 1.9.92, 1.10.92 or 1.11.92. This claim was raised by the defendants in their correspondence to the plaintiff. It is also specifically denied that the first installment of loan fell due for the payment on 20th January, 1993. According to plaintiff, there was rest period of two years and the loan would have become recoverable only after the plaintiff had disbursed the entire loan of Rs. 75 lacs to the defendant. It is denied that the defendant company accepted the loan offer dated 14.1.92 or executed the loan agreement dated 18.3.1992 or mortgaged the properties by way of security as claimed by the plaintiff or furnished personal guarantee or signed tripartite agreement dated 18.3.1992 as alleged. It is stated that none of the claim documents/records are admissible in law. These

documents are not enforceable (which in fact is the main relief claim in Suit No. 369/94). Defendant Nos. 3 and 4 have denied that they are guarantors to the loan of the plaintiff and the suit in any case is not maintainable against them. However, the factum of applying for the loan and its sanction is even admitted by these defendants. It is also the case of the defendants that there is no agreement between the parties to pay interest of 21.5 per cent per annum or of 6 per cent per annum as alleged. The defendants have denied their liability to pay any amounts because of the breach on the part of the plaintiff.

11. On the above premise, the defendants pray that the suit of the plaintiff be dismissed while their suit Nos. 113/95 and 369/94 be decreed.

12. All these three suits were listed before the court and vide order dated 4.12.1995 they were ordered to be consolidated and issues in all the three suits were commonly framed. Order dated 4.12.95 reads as under:-

The plaintiff has filed this suit for the recovery of Rs. 59,11,638.38 paise against the defendants by sale of the mortgaged properties and other properties of the defendants and for permanent injunction.

The case, as set up in the plaintiff, is that that the plaintiff company had granted some loan to the defendant No.1, of which defendant Nos2 to 4 had given guarantee and on account of defendants having failed to repay the said amount ,they are liable to suffer a decree.

The defendant No.1 has also filed a suit being suit No.369/94 for a declaration that the covenants of agreement which had been entered into between it and the plaintiff are not enforceable as the same had been arrived at on account of mutual mistake between the parties. Still another suit had been filed by defendant No.1 being suit No.113/95 for recovery of Rs.45 lakhs by way of damages and mense profits on account of plaintiff's having not fulfilled its obligations under the agreement.

In my opinion, the issues in all the three suits are common and they can be tried together. I, Therefore, consolidate suit Nos.369/94 and 113/95 with suit No.864/94.

On the pleadings of the parties, the following issues are framed:

1. Whether the suit has been instituted, signed and verified by an authorised person on behalf of the plaintiff company
2. Whether the suit is bad for misguide of the parties?
3. Whether the plaintiff is not entitled to the recovery of the amount on account of its having no fulfilled its obligations under the agreement dated 18th March, 1992?
4. Whether the terms of the agreement dated 18th March, 1992 were different from the terms which had been agreed between the parties? If so, to what effect?

5. Whether the covenants of the agreement were entered into only by playing fraud upon the defendant No.1? If so, to what effect?
6. Whether the loan has not been released by the plaintiff in accordance with the terms agreed upon between the parties? If so, to what extent?
7. Whether the defendant is entitled to any concession in the interest? If so, to what extent and for what period?
8. Whether the action of the plaintiff in recalling the loan is not legal and valid?
9. Whether the plaintiff is entitled to interest? If so, at what rate and for what period?
10. Relief.

No other issue arises or pressed.

Additional documents and list of witnesses be filed within six weeks. Parties agree that, in the first instance, they will file affidavits of the witnesses and the other party should be given liberty to cross-examine the witnesses. They also agree that to avoid delay in the disposal of the case, they are prepared to have the statement of the witnesses before the local commissioner to be appointed by this Court.

In view of the fact that presently the dates of November, 1998 are being given for trial in Court, I think it will be proper to direct the parties to file affidavits, in the first instance, and appoint a local commissioner for recording their evidence. I, accordingly, appoint Shri Vijay Chaudhary, Advocate, Local Commissioner for recording the evidence of the witnesses.

plaintiff should file affidavits of the witnesses within six weeks. The defendants should file affidavits of its witnesses within four weeks thereafter.

The matter will be listed before the Local Commissioner thereafter for cross-examination of the said witnesses. The Local Commissioner shall be paid a fee of Rs.5,000/-, in the first instance, to be shared equally by the parties.

On the date when the evidence will be recorded by the Local Commissioner, he can requisition the file of the case which will be taken by the dealing assistant to the Local Commissioner shall be paid a fee of Rs.250/- for every visit that he has to make to the office of the Local Commissioner for recording the evidence.

List this case for further proceedings before the Joint Registrar on 15th May, 1996 and before the Court on 20th May, 1996.

IA No.7126/94

Put up on 23rd January, 1996 for arguments.

13. The number of issues framed by the court vide its order dated 4.12.95 give the complete factual matrix of the case as well as the stand taken by the parties.

However, the basic and pertinent question which would help in answering the issues arising in all the three cases is whether the letter of offer of loan dated 14.1.1992 Ex.DW1/4 read in conjunction with the reply of the defendants dated 17.1.1992 Ex.DW1/8 culminating into agreement of loan executed between the parties on 18.3.1992 being Ex.DW1/6. Was the plaintiff obliged to disburse the entire loan of Rs. 75 lacs in a lump sum and whether full disbursement of the loan was a condition precedent for creating a liability upon the defendants to repay the loan with interest (installments of principal and/or interest) only after two years of rest period was over from the date of such disbursement? This is the basic plea of the defendants and the real dispute between the parties. However, according to the plaintiff the sum of Rs. 75 lacs could be disbursed in lump sum or in installment at the discretion of the court and once the installment was disbursed, its repayment commenced on the expiry of 30 days from the date of disbursement of the installment and defendants having committed breach in repayment of interest and/or principal amount, they are liable to pay the entire dues claimed by the plaintiff. Reference in this regard was made to Ex.PW2/21 as reiterated in the letter dated 21.5.1993.

14. As is evident from the afore-narrated pleadings of the parties and the issues framed that the entire controversy in the present suits would revolve around the interpretation of the documents relating to offer, acceptance, sanction and disbursement of loan. There is no dispute to the fact that the defendants had submitted an application for loan dated 25.03.91 which after negotiations and fulfillment of the formalities was sanctioned and the letter of loan offer Ex.DW1/4 dated 14.1.92 was issued by the plaintiff. The relevant clauses of the said letter reads as under:-

2. The loan will carry interest at 21.5% p.a. payable monthly. Payment of interest will fall due on 1st of the following month from the date of disbursement & thereafter on 1st day of every month.

3. In the event of delay in payment of any Installment (Principal &/or interest) additional interest of 6% p.a. will be payable on the overdue Installments from the due date till the payment thereof in addition to normal rate of interest.

4. The loan will be disbursed in lumpsum or in suitable Installments and will be repayable as per the repayment schedule attached. The term of the loan will be for 24 months which may be extended by months at our sole discretion.

6. You shall insure the entire property against loss or damage by fire, riot, malicious damages and earthquake for full value above plinth level from the date of disbursement of the loan or Installments thereof in the joint names of the Company as Lender and yourself as the Borrower and to continue to keep the same so insured as aforesaid till the repayment of the outstanding loan together with interest thereon payable by you.

7. The prospective buyer of the House/flat to be constructed in your project may avail of loan from us, for which you shall authorise us to adjust the loan amount

sanctioned to such buyer towards the loan advanced to your way of construction finance.

8. You shall pay to us the amount of 0.75% of the sanctioned loan by way of service charges i.e. Rs. 56,250/-

10. All payments towards mortgage and other dues to be made in full without any deduction at our Area Office at the following address by way of Local cheque/ demand drafts. Outstation cheques will not be accepted.

15. Vide Ex.DW1/5, the said offer was accepted by the defendants unequivocally and subject to the terms and conditions stated in the said letter. Vide letter dated 17.01.92, the defendants had also agreed to the rate of interest and specifically to the condition "we agree to pay additional interest at the rate of 6% p.a., should there be any default on our behalf in payment of principal or interest. Resultant to this offer and acceptance, the parties entered into a loan agreement Ex.DW1/6. This agreement contained various covenants in regard to the loan transaction between the parties. Under Article 7 of Ex.DW1/6 remedies of the lender was specified and it was stated therein that if one or more of the events specified in this Article shall have happened then the lender by a written notice to the borrowers may declare the principal and all accrued interest on the loan that may be payable by the borrowers under or in terms of the agreement and all such other charges would become payable.

16. The first installment of Rs. 25 lacs was received by the defendants by executing the receipt Ex.P12 dated 20th July, 1992. Then the defendants vide Ex.P14 had stated that the work was in progress and the plaintiff should disburse the second installment and had made enquiries as to the time when the said installment would be disbursed. Second installment of Rs. 24 lacs was disbursed to the defendants vide Ex.P16.

17. Vide Ex.PW2/18, the plaintiff informed the defendants on 15th October, 1992 that they were required to pay interest @ 21.5 % on the first of the following month from the date of disbursement i.e. 1.8.1992 and thereafter on first of every month in terms of the loan offer dated 14.1.92. The computation of the amounts due and claimed by the plaintiff was 1,40, 130.50/- as on 20th October, 1992. This amount appears to have been paid and/or deducted by the plaintiff at the time of payment of the installments with the consent of the defendants. A promissory note for a sum of Rs. 49 lacs was executed by the defendants on 27th November, 1992 which is Ex.PW2/20. The language of Ex.DW1/4 is specific and admits no ambiguity. It was in the discretion of the plaintiff to disburse the loan in lump sum or in suitable installments. This loan was to be repaid as per the schedule attached to this letter. The expression "disbursement", thus, would depend upon the option which may be exercised by the plaintiff keeping in view the various facts and circumstances of this case. The schedule of repayment was specifically agreed to between the parties and it again left no scope for ambiguity. The offer for loan Ex.DW1/4 was accepted by the defendants vide

their letter dated 17.1.92 Ex.DW1/8 and no reservation of any kind was stated by the defendants in this letter. The loan agreement Ex.DW1/6 was executed between the parties containing all the terms and conditions as well as the rights of the plaintiff in the event of default. The question which deserves further consideration is whether disbursement of loan in installments was an accepted mode between the parties or was it a matter of dispute at the relevant time? Prior even to the disbursement of the loan, the defendants had vide Ex.P3 submitted various documents including sale deed of the property in respect of plot No. 136, Deoli -Khanpur Road, New Delhi, collaboration agreement, agreement for development and all other documents including their income tax returns. After execution of the loan agreement, the plaintiff vide Ex.P8 gave an undertaking in regard to utilisation of the funds for the purposes of developing and building residential flat units with requisite infrastructure in terms of the project report. It was also requested that instead of interest @ 21.5 per cent per annum , interest of 18 per cent per annum be charged. It was further specifically agreed that additional interest @ 6 per cent per annum would be payable in the event there were any defaults. The defendants also submitted additional securities for protecting the repayment of the loan and para 4 of the said letter can be usefully be reproduced:-

4. Regarding the loan disbursement, it may pleased be done taking into account your guide lines in para 1 of your letter. We undertake to repay the loan after drawing the full loan amount as per the repayment schedule advised by you and confirmed by us.

18. In addition to the above clause, it was reiterated that the defendants have already given duplicate copy of the letter duly signed in token of their having accepted the loan offer made by the plaintiff. Vide Ex.P9, the defendants requested for disbursement of the first installment of the loan of Rs. 25 lacs. The said letter reads as under:-

"PDPL: 92: LIC:258 15th May, 1992. The Manager, LIC Housing Finance Ltd., Laxmi Insurance Building, Asaf Ali Road, New Delhi. Sub: Disbursement of First Installment of Loan for Rs.25,00,000/-(Rupees twenty five lacs only) Dear Sir, We have been sanctioned loan against our project "Kaveri Kunj" Devi, New Delhi by your organisation and the same is pending for disbursement. The only document required to be given by us was the clearance letter from Indian Airlines Co-operative Group Housing Society Limited regarding they have no objection in alienating, mortgaging the property on which the complex is being built. The same letter is scheduled to be received by us by 17th of May, 1992 and we shall handover the same to you either on 18th or 19th May, 1992 at the maximum after it is being received by us on 17th May, 1992.

We have to advise you that you may please mobilise the fund towards issue of the first Installment so that at the last moment no delay occur on this account.

We hope you will cooperate with us.

We remain, Yours faithfully, For PEARL DEVELOPERS LTD. Sd/- (Director)

19. The above letter is definite evidence that the decision of the plaintiff to disburse the loan in installments and subject to fulfillment of other conditions including collateral securities, was not only accepted by the defendants but they had pressed for early disbursement of the installment in furtherance to the agreed terms. Vide Ex.P13 on 5th October, 1992, the defendants requested the plaintiff to release the second installment of Rs. 25 lacs as the amount was required for construction activity. The valuation report even in regard to progress of the work was submitted by the defendants for expeditious disbursement of the said installment. Vide Ex.P12 and P16, the defendants had executed pro-notes for receipt and consequential repayment of the amount of Rs. 25 lacs and 24 lacs respectively, thus, making a total of Rs. 49 lacs.

20. Ex.PW2/4 is the loan agreement which has been signed by the parties. In terms of clause 1.1(d), the terms "repayment" means the repayment of the principal amount of loan, interest thereon and/or any other charges, premium, fees or other dues payable in terms of the agreement to the lender. In terms of clause 2.3 of the agreement, interest is to be calculated on monthly basis. Clause 2.4 deals with disbursement of loan and which clearly says that the loan could be disbursed in a lump sum or in suitable installments, as was the offer given by the plaintiff in its offer letter Ex.DW1/4. Under Clause 2.6, in any case, the lender has the right at any time to review and reschedule the repayment terms of the loan or demand the outstanding amounts in the manner as it may consider fit and proper. The lender also has the right in terms of Clause 2.8 to reschedule and alter the installments. The remedies available to the lender are dealt with under article 7 of this agreement. In the event of happening of any of the events specified in this article, the lender has a right to recall the entire loan and wherever a default has continued for more than 30 days after the notice to pay, the rights of the lender are much wider in their ramification. The effective date of the agreement in terms of clause 9.1 is the date when the agreement is executed between the parties. The agreement does not refer to a definite repayment schedule or period for which the defendants were entitled to enjoy any free period at all. This aspect of the matter is controlled in its entirety vide the letter of loan offer and its acceptance which are Ex.DW1/4 and DW1/8 dated 17.1.92 respectively. The relevant contents of Ex.DW1/4 have already been reproduced above. The basic question raised by either party to the present suit on the strength of these documents read in light with the loan agreement and correspondence exchanged between the parties, is with regard to liability to repay the loan. It may be noticed that to most of the documents filed by the plaintiff, the defendants have admitted their signatures but had denied the contents despite the fact that under those very documents they have received the sum of Rs. 49 lacs.

21. In terms of Clause 4 of Ex.DW1/4, the loan was to be disbursed in lump sum or in suitable installments and was repayable as per the repayment schedule

attached. The term of the loan was for 24 months which could be extended at the discretion of the lender. The repayment schedule annexed to Ex.DW1/4 imposes a liability upon the borrower to start repaying the principal amount at the end of six months from the date of first installment to the extent of Rs. 3 lacs. For subsequent installments of repayment, further time was provided but that would not be of much relevance as the very first installment was not paid by the defendants and there is no dispute to this fact.

22. The loan was extended to the defendants for a period of 24 months but was subject to the terms and conditions of disbursement of the loan in installments and repayment thereof as per schedule. This was unequivocally, without variation and protest was accepted by the defendants vide their letter dated 17.1.1992 vide agreement Ex.DW1/6 and even thereafter at the time of accepting the first and second installment of the loan. Once these terms were unconditionally accepted by the defendants, the defendants would be stopped from questioning the correctness of these terms of the contract to the prejudice of the plaintiff. There is no iota of evidence on record to show that the loan was given by the plaintiff to the defendants on the basis that the defendants would enjoy 24 months or two years as a free period or a moratorium period. The liability to pay interest in terms of the agreement commenced from the date of the execution and disbursement of the first installment which the defendants have admittedly failed to pay. Thus, the very basic contention raised on behalf of the defendants that the plaintiff has not acted in terms of the contract and the repayment schedule, would be applied only after the entire loan of Rs. 75 lacs was disbursed and is a contention which is not only mis-conceived but is contrary to the documents filed by the defendants themselves.

23. In fact, the letter dated 21.5.1993 Ex.PW2/21 clearly dispense all such arguments on behalf of the defendants as it specifically provided the due dates for repayment of the principal amount of loan effective from 20.1.1993 ending up to 20.7.94. The amount of Rs. 3 lacs being the first installment of the principal sum fell due on 20th January, 1993. The contents of EX.PW2/21 were never disputed by the defendants but on the contrary vide their letter dated 31st May, 1993 Ex.P23 they had admitted their liability to pay interest and had sent a cheque on that account for a sum of Rs. 87,791.70/- to the plaintiff. The disbursement by means of installments was offered by the plaintiff and accepted by the defendants. Thus, the liability to repay the loan in terms of Ex.DW1/4 and PW2/4 arose when it was demanded by the plaintiff. It is also a case where despite notice, the defendants failed to repay the loan interest accrued thereupon and in fact admitted their inability to pay the loan.

24. The voluminous documentary evidence which was even supported by oral evidence of the plaintiff clearly demonstrates the fact that the defendants have failed to establish that their liability to repay the loan with agreed rate of interest was only upon expiry of two years from the date of disbursement of the loan and that the plaintiff was under contractual obligation to disburse the loan of Rs. 75

lacs in a lump sum. On the contrary, it is clear that the liability to repay the loan (or interest accrued thereupon) in terms of the contract between the parties, had become due and after the plaintiff had served a notice calling upon the defendants to discharge their liability within a period of 30 days of such notice, the plaintiff was justified in recalling the loan and demanding the entire payment.

FINDING ON ISSUES

25. Having discussed the principle in issue in all three suits as the suits had been consolidated and common issues were framed in them, now I would proceed to discuss the findings on the respective issues:-

ISSUE No 1- Whether the suit has been instituted, signed and verified by an authorised person on behalf of the plaintiff company and ISSUE NO. 2.-Whether the suit is bad for misguide of the parties?

26. Both these issues were not seriously argued by the learned counsel for the parties. Thus, it would not be necessary for the court to deal with these issues in a greater detail. Suffice it to notice that the plaintiff is a registered company and Sh. B.P. Trikha is the area manager of the plaintiff company. He has been duly authorised to sign and verify the plaint and institute the present suit on behalf of the company. The power of attorney in his favor had been executed by Sh. J.S. Salunkhe, Managing Director in furtherance to the resolution of the Board of Directors dated 27.10.1992. Affidavit of Mr. Trikha by way of evidence was filed in this court wherein he has referred to these averments. Nothing substantial had come in the cross-examination of this witness in this regard. The certificate of incorporation of the company along with its articles of association and memorandum has been proved on record as Ex.PW2/32 and Ex.PW2/31 respectively. The minutes of the meeting of the Board of Directors dated 27.10.1992 have been proved on record as Ex.PW2/33 and the General power of attorney executed is PW2/34. The plaint has been signed and verified by Sh. Trikha who was examined in court. As noticed and in face of his evidence, there is no substance in the objection taken by the defendants in this regard.

27. Defendant No. 1 is a private company. Defendant Nos. 2 and 3 are its Directors and defendant No. 4 is their son. Besides others, defendants No. 2 and 3 had stood guarantors for repayment of the loan advanced to defendant No. 1 while defendants No. 3 and 4 had given collateral securities and mortgaged their properties in favor of the plaintiff for disbursement of the loan. Defendant No. 5 is a cooperative group housing society and defendant No. 6 is a builder and defendant no. 7 is its partners. They had entered into various agreements at the relevant time for completion of the project for which the plaintiff had advanced loan to defendant No. 1. The properties, individual as well as the project properties, had been mortgaged to the plaintiff and there is even dispute with regard to the share in terms of tripartite agreement. Thus all the defendants are necessary or proper parties to the suit. As such, the objection taken in regard to mis-joinder of parties is also without any merit.

28. Consequently, both these issues are answered against the defendants and in favor of the plaintiff.

ISSUE NO. 5-Whether the covenants of the agreement were entered into only by playing fraud upon the defendant No.1? If so, to what effect?

29. Onus of this issue was obviously upon the defendants. In the written statement of either of the defendants, no details much less definite particulars of the alleged frauds played by the plaintiff upon them have been stated. There is no evidence on record as to what acts or representations of the plaintiff are tinted with fraud or an actual act of fraud. To establish a plea of fraud, the person who raises such pleading must specifically plead and prove the allegations in regard to fraud. The fraud cannot be inferred but must be established as a matter of fact. In the present case, the defendants had examined DW1 Sh. S.C. Bhargava as a witness. His detailed affidavit was filed on record and in the entire examination-in-chief even the word fraud has not been referred to less any details with any definite averments stated therein. The plea of fraud taken by the defendants is void of any specific pleading and any cogent evidence in support thereof. On the contrary, the affidavit of this witness largely even admits the case of the plaintiff in regard to sanction and disbursement of loan. Various documents have been produced and proved by the plaintiff and even by their documents (defendants' documents) which are subsequent to the letter of offer of loan by the lender its acceptance by the borrower as well as after the execution of the loan agreement not even a whisper is made in all those letters including Ex.P7 to Ex.P14, P27 and P28 when further properties by way of collateral securities were mortgaged to the plaintiff and Ex.DW1/4 to DW1/7 are the documents which clearly indicate the plea of fraud now sought to be taken by the defendants is a mere after thought and is without any substance.

30. In the absence of any cogent material on record, this issue necessarily has to be answered against the defendants.

ISSUE NO. 7.-Whether the defendant is entitled to any concession in the interest? If so, to what extent and for what period?

31. Again the onus to establish the fact that defendants were entitled to the benefit prayed for was on the defendants. What are the circumstances on the basis of which the defendants can claim variation of a written contract between the parties, is a matter which the defendants ought to establish before the court. The rate of interest was spelled out in the letter relating to loan offer and then even in the agreement of loan. The rate of interest was fixed and was not open to any change is established by own letter of the defendants. Vide Ex.P8 they had accepted the terms of loan with a specific stipulation that they would pay additional interest @ 6 per cent per annum in the event of default. In this letter they had also made a request to the plaintiff to consider their request for charging 18 per cent interest per annum instead of 21.5 per cent p.a. This was not accepted and no variation was made in the loan agreement. The defendants

thereafter unequivocally without protest signed the loan agreement, letter of confirmation and thereafter accepted the installments subject to the same terms and conditions. They even furnished collateral securities and entered into a tripartite agreement and furnished all requisite documents to the bank but no whisper was made in regard to any of the factors including deduction in rate of interest. The plaintiff had in fact calculated the interest payable by the defendants from time to time and had sent the demands to the defendants. Vide their letter dated 4.11.1992 Ex.P15 the defendants stated that "payment of this amount was inadvertently omitted since we had the feeling that the interest has to be paid along with the first installment of loan repayment falling due in January, 1993. We have now understood about monthly payment of interest and shall be regular on account. You are requested that the disbursement of 2nd installment may please be made since it is nearing a month and we have not been disbursed with the installment effecting our financial commitments related with project.

32. Vide Ex.P18, the calculated interest demanded by the plaintiff was accepted by the defendants and they had sent the payment of Rs. 87,791.70/- towards the interest payable on the loan advanced. All these documents clear show that the plaintiff at no point of time raised any protest with regard to the rate of interest nor it justified any circumstances under which the plaintiff had agreed to charge a concessional rate which in any case is not part of the loan agreement or any other loan documents placed on record by the parties.

33. Once the contract between the parties particularly in relation to a mortgage property provides for a rate of interest, the court has no jurisdiction to alter or vary the said rate of interest even pendente lite and future. Reference in this regard can be made to the judgment of the Supreme Court in State Bank of India Vs. Yasangi Venkateswara Rao, where the Supreme Court held as under:-

8. We also find it difficult to agree with the observation of the High Court that normally when a security is offered in the case of mortgage of property, charging of compound interest would be regarded as excessive. Entering into a mortgage is a matter of contract between the parties. If the parties agree that in respect of the amount advanced against a mortgage compound interest will be paid, we fail to understand as to how the court can possibly interfere and reduce the amount of interest agreed to be paid on the loan so taken. The mortgaging of a property is with a view to secure the loan and has no relation whatsoever with the quantum of interest to be charged.

34. The present suit is a suit for recovery of money by sale of mortgaged properties and would be strictly controlled by the terms and conditions of the agreement between the parties. Even otherwise, there are no compelling circumstances referred by the defendants in their pleadings or evidence which could persuade the court to take any other view which would hardly be permissible in view of the settled principles of law.

35. Resultantly, this issue is also answered against the defendants.

Issue Nos. 3, 4, 6 & 8

3. Whether the plaintiff is not entitled to the recovery of the amount on account of its having not fulfilled its obligations under the agreement dated 18th March, 1992?

4. Whether the terms of the agreement dated 18th March, 1992 were different from the terms which had been agreed between the parties? If so, to what effect?

6. Whether the loan has not been released by the plaintiff in accordance with the terms agreed upon between the parties? If so, to what extent?

8. Whether the action of the plaintiff in recalling the loan is not legal and valid?

36. These issues can conveniently be discussed commonly in as much as they all are inter-dependent. The findings on these issues would depend upon the fact as to which party has committed breach of the terms of the agreement and what are the consequences thereof. Therefore, it will be useful that if, to avoid repetition, the findings on all these issues are recorded in the same discussion.

37. Before recording issuewise findings, the Court has deliberated upon the substantial controversy between the parties. In continuation of the said discussion, it can safely be recorded that offer of the defendants for sanctioning of loan was accepted by the plaintiffs, who in turn had issued letter offering the loan subject to the terms and conditions contained therein Ex.PW 2/3 (DW.1/4). Execution of the loan agreement was one of the terms of this letter. This letter was accepted by the defendants unequivocally, without any reservation or exception vide Ex.DW.1/5. After having confirmed the said agreement, the defendants had not only entered into and executed the loan agreement DW.1/5, but had also written a letter dated 17th January, 1992 DW.1/7. Thus these documents concluded the contract between the parties. It is hardly possible for any of the parties to question the correctness or validity of these agreements and the documents under which they have availed the benefits for all this period and the loan was disbursed in terms thereof. The contention of the defendant that the loan was repayable only after the lapse of a period of two years is in complete contradiction to the written contract between the parties. No interpretation of the relevant terms of Ex.DW.1/4 and the loan agreement can be interpreted in support of the defendants, particularly when the repayment schedule was a part of the offer for loan given by the plaintiffs to the defendants. This issue has already been discussed by the Court at great length and the finding has been recorded against the defendants. In face of that, the plaintiffs were entitled to repayment of interest after 30 days of the expiry of disbursement of the first installment of loan to the defendants. Thereafter the defendants were liable to pay the first installment of Rs.3 lacs in January, 1993. The defendants having failed to discharge their liability, the plaintiffs have rightly demanded the sum by means of letters. These letters of demand were correctly understood by the

defendants themselves as is clear from the very language of Ex.P-15; where the defendants agreed that non-payment by them was result of some misunderstanding and inadvertent omission on their part and the first installment of the loan falling due in January, 1993 was agreed to be paid Along with interest and the defendants have also assured the plaintiff that there would be no default in that regard. Ex.P-15, in fact, is the complete answer to the defense sought to be raised by the defendants now before this Court. The terms of loan, repayment schedule and rate of interest and disbursement of the loan timely or otherwise, in installment of lumpsum were the questions which the defendants could have raised prior to the execution of the agreement or even immediately thereafter. Much less that, the defendants raised such issues, they have conceded all these issues orally and have, in fact, even paid the amount as demanded by the plaintiffs from time to time. Acceptance of the loan in two different installments i.e. of Rs.25 lacs and Rs.24 lacs respectively vide Ex.P-16 as late as on 27th November, 1992 and that very day accepting the calculation, rate of interest and correctness of the amounts of loan having been disbursed to the defendants, the defendants even wrote on 30th November, 1992 vide Ex.P-17 and paid the sum of Rs.50,446/- on account of interest. Vide Ex.P-20 when the plaintiff had demanded the principal amount, all that was said on behalf of the defendants was that they did not have the copy of the agreement and as far as interest was concerned, they were making up-to-date payments. This thin issue was also given up subsequently and vide Ex.P-22, letter dated 30th April, 1993, the defendants paid even the subsequent installment of Rs.87,791.70p on account of interest on the loan taken from the plaintiffs.

38. Ex.P-9 to P-14 are the other documents placed on record by the plaintiff which clearly show that parties were ad idem and had completely understood the terms and conditions of the loan. The defendants mortgaged their properties and requested for disbursement of the first installment of loan vide Ex.P-9. If the loan was to be disbursed in lump sum, there was no occasion for the defendants to write Ex.P-9 as at that time there were no stake of the parties, loan had not been disbursed and the defendants were well within their rights to decline the loan if the terms and conditions of the loan were not acceptable to them. Nothing of this kind was done by the defendants. On the contrary, vide Ex.P-10, request for disbursement of the first installment was repeated and it was stated that there has again to be a joint venture undertaking being given from Universal Land & Finance Company as well as by the defendants in relation to the project in question. The plaintiffs had demanded from the defendants that the Society, which was going to get into joint venture with the defendant, have also signed the letter. Vide Ex.P-11, the defendants agreed to and submitted the demand. This continued and the first installment was disbursed and a request for disbursement of the second loan installment was made by the defendant to the plaintiff vide Ex.P-13. In order to substantiate their demand, they have stated in their letter of demand that the disbursement of second installment is required for the building construction of the project and also satisfied the plaintiffs that the

funds so received were being used for the purposes in furtherance of the project and construction is being carried out. Ex.P-14 which is the valuation report, was submitted in relation to the work progress at site.

39. Coming to the properties mortgaged by the defendants to the plaintiff, defendant Nos.2 and 3 were the directors and guarantors of defendant No.1 for repayment of the loan disbursed in favor of the defendant No.1. Thereafter tripartite agreement Ex.PW.2/5 in furtherance to the agreement for development Ex.P-1 was also submitted by the defendants to the plaintiffs. The defendants had stood guarantors while other defendants had also submitted the original sale deeds in relation to purchase of property No.2526, Ward No.8, Gali Lajpat Rai, Bazar Sitaram and First Floor of the same property as well as first floor of property No.8 part of the same property and SF-10 again part of the same property. All these were mortgaged to the plaintiffs by deposit of original title documents Ex.P-27 to P-31. The above documents which primarily have been executed and/or written by the defendants themselves clearly tell the story of the loan advanced by the plaintiffs to the defendants. The terms and conditions of the agreement were clearly understood by the parties. The defendants by their conduct and by writing letters confirmed the said terms as they always paid the interest as calculated in terms of the offer of loan and repayment schedule which again was a part of the loan agreement. The loan agreement, in turn, had referred to the repayment schedule which was only annexed to the offer for loan, as was clearly mentioned in Ex.P-2/18 and P-2/21. In face of the documentary evidence duly supported by the statement of the witness PW-1 in whose cross-examination nothing worth noticing has come out and to whom no suggestion was made in specific words and unambiguous language, in regard to plea of fraud or, according to the defendants, terms of the contract; there is no reason for this Court to disbelieve the version put forward by the plaintiff in the present suit. What were the obligations which the plaintiffs have not fulfilled so as to disentitle the plaintiffs from the recovery of loan, have not been spelled out by the defendants anywhere. The only plea raised is that the entire loan of Rs.75.00 lacs ought to have been disbursed in a lump sum and interest could not have been charged @ 21.5% p.a. and additional interest @ 6% p.a. for the defaulted period on the defaulted amount. Both these contentions, for the reasons recorded in the earlier part of the judgment, are without any substance. The loan has been disbursed in installments but the defendants committed breach of the terms and conditions of the loan only at an early stage and after disbursement of the second installment itself, the defendants apparently failed to repay the demands within 30 days from the date when they were raised upon them. In addition to the above, the plaintiff had also served notices upon the defendants before recalling the entire loan. It was only when the default in repayment of the amount persisted that the entire loan was recalled by the plaintiffs and the defendants were required to pay the amount. Vide Ex.DW.1/27, the documents filed by the defendants themselves, the plaintiffs had called upon them to make the payment and that the plaintiffs had regretfully informed that no payment, in

terms of the agreement, had been received. Vide Ex.PW.2/19 on 31st October, 1992 itself, the plaintiffs reminded the defendants that they were in default and they should make the payment in time so as to enable the plaintiff to raise the second installment. Thereafter vide Ex.PW.2/21 on 21st May, 1993 the defaults were again noticed to the defendants and the repayment schedule, as agreed, were also informed to the defendants. Having failed to receive their money despite such notices, the plaintiff served notices Ex.PW.2/26 and PW.2/29 upon the defendants requiring them to pay the amount of Rs.57,02,591.20p after recalling the loan. On record, there is no reply to these notices. At no point of time, the defendants wrote to the plaintiffs that they are not aware of the terms and conditions of the loan and any fraud was played upon the defendants by the plaintiffs.

40. The discussion on the oral and documentary evidence led between the parties clearly shows that there was no substantive variation in the terms of the loan i.e. between Ex.DW 1/4 and the loan agreement. In fact they were complementary to each other and formed an integral part to the reschedule of payment which was the most material document and were accepted unconditionally, without protest by the defendant, was annexed as DW.1/4 and referred to under the definition of repayment in the agreement as well. As such, it cannot be stated that there was any incorporation in any of the terms and if it was so, the defendants could have declined to sign the agreement as no amounts had been disbursed to them by that time and they had incurred no liability towards the plaintiffs. The plaintiff has not committed any breach of the terms of the agreement between the parties which is primarily attributable to the defendants particularly when defendants No.2 & 3 were acting for and on behalf of defendant No.1 and were also responsible in their own right.

41. In view of my above discussion, all these issues are decided against the defendants and in favor of the plaintiffs.

ISSUE No.9.

9. Whether the plaintiff is entitled to interest? If so, at what rate and for what period?

42. The terms of the agreement between the parties clearly provided for charging of interest on the loan amount @ 21.5% per annum and also for additional interest @ 6% per annum on the defaulted amount. These terms were not subject to any change. They were stated in Ex.DW.1/4 and continued to be the same after execution of the loan agreement. It has not been shown as to why the plaintiffs would not be entitled to the contractual rate particularly in a mortgaged suit. It has already been referred in the earlier part of the judgment that in mortgaged suits where the rate of interest is agreed upon between the parties, the Court would hardly have jurisdiction to alter and/or vary the rate of interest. In view of this, the issue is answered in favor of the plaintiffs to the effect that plaintiffs would be entitled to contractual rate of interest in terms of

Ex.DW.1/4 read with loan agreement.

43. In view of the above detailed discussion, a decree in terms of Order 34 Rule 4 CPC is passed in favor of the plaintiffs and against the defendants 1,2, 3 and 4 for a sum of Rs.59,11,638/- with pendente lite and future interest @ 21.5% per annum by sale of mortgaged properties :-

2. The loan will carry interest at 21.5% p.a payable monthly payment of interest will fall due on 1st of the following month from the date of disbursement and thereafter on 1st day of every month.

3. In the event of delay in payment of any Installment (Principal &/or interest) additional interest of 6% p.a. will be payable on the overdue Installments from the due date till the payment thereof in addition to normal rate of interest.

4. The loan will be disbursed in lumpsum or in suitable Installments and will be repayable as per the repayment schedule attached. The term of the loan will be for 24 months which may be extended by 6 months at our sole discretion.

xxxx xxxx xxxx

6. You shall ensure the entire property against loss of damage by fire riot, malicious damages and earthquake for full value above plinth level from the date of disbursement of the loan or Installments thereof in the joint names of the Company as Lender and yourself as the borrower and to continue to keep the same so incurred as aforesaid till the repayment of the outstanding loan together with interest thereon payable by you.

7. The prospective buyer of the House/flat to be constructed in your project may avail of loan from us, for which you shall authorise us to adjust the loan amount sanctioned to such buyer towards the loan advanced to you by way of construction finance.

8. You shall pay to us the amount of 0.75% of the sanctioned loan by way of service charges i.e. Rs.56,250/-.

xxxx xxxx xxxx

If this offer is acceptable to you, kindly sign the duplicate copy thereof in token of your acceptance and return to us within 30 days from the date of this letter. Along with the 'Accepted Copy' you are also requested to send us a cheque for Rs.56,250/-payable at New Delhi on account of service charges, failing which this offer is liable to be withdrawn.

44. The sale proceeds so received shall be adjusted towards the amount due to the plaintiffs in terms of the above decree and still if the amounts are found to be due to the plaintiffs, liberty granted to them to recover the balance amount in terms of Rule 6 or Order 34 CPC. Further the suit of the plaintiffs is also decreed and a decree for permanent injunction is passed against the defendants 1 to 4 from transferring, alienating or in any manner dealing with or parting with

possession of the above mortgaged properties until dues paid to the plaintiffs are not cleared in terms of the decree. A further decree in favor of the plaintiffs against the defendants for permanent injunction is passed restraining defendants 5,6 and 7 from executing any sale deed, mortgaging, transferring or parting with possession in any manner whatsoever of the properties aforestated. The plaintiff would also be entitled to the costs of the suit.