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**(1997) 09 BOM CK 0048**  
**In the Bombay High Court**  
**Case No : L.P.A. No. 15 of 1997**

State Bank of India

APPELLANT

Vs

Neela Ashok Naik and another

RESPONDENT

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**Date of Decision :** 10-09-1997

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 34  
Constitution of India, 1950 — Article 141  
Contract Act, 1872 — Section 126, 148, 172, 176, 34  
Sales of Goods Act, 1930 — Section 2(7)

**Citation :** (1997) 09 BOM CK 0048

**Hon'ble Judges :** Y.K. Sabharwal, C.J.; R.M.S. Khandeparkar, J

**Bench :** Division Bench

**Advocate :** V.B. Nadkarni, with Y.V. Nadkarni, for the Appellant; V.P. Thaly, for the Respondent

**Final Decision :** Allowed

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## Judgement

Y.K. Sabharwal, C.J.—The appellant had instituted a suit for recovery of Rs. 1,42,395.00 against the respondents. The facts in brief as pleaded in the plaint are as follows.

2. The plaintiffs at the request of defendant No. 1 granted to her loan facility in the form of Medium Term Loan for Rs. 95,000/-, for purchase of Maruti Omni Bus. Defendant No. 2 stood as guarantor for the said loan amount. In order to secure the repayment of the loan, the defendants executed certain documents dated 16th May, 1991 including Guarantee Document executed by defendant No. 2 for a sum of Rs. 95,000/- and form of Agreement furnishing security executed by defendants Nos. 1 and 2. The defendants agreed to repay the loan in installments with interest at the rate of 18.5% per annum compounded quarterly. Initially defendant No. 1 was regular in payment of installments, but later she committed default, whereupon legal notices were sent to the defendants.

3. Defendants Nos. 1 and 2 who are respondents Nos. 1 and 2 in the present appeal are wife and husband respectively. One of the pleas taken in defence is that on 10th June, 1994, the defendants had requested the plaintiff Bank to adjust the amount due to the Bank from the Fixed Deposit Receipts which were lying with the Bank as security. According to the defendants the Bank should have encashed the Fixed Deposit Receipts for adjustment of the dues on default of payment of installments. The claim of interest is also disputed.

4. The rate of interest stipulated to be paid is as per document (Exh. A) in this appeal. There is no dispute about the execution or validity of this document. According to it, the interest on the advance is chargeable at the rate of 1% above the State Bank of India advance Rate at Minimum 17.5% per annum with quarterly rests and enhanced rate of 2% with quarterly rests in terms stated in para 7 of this document.

5. To appreciate the controversy raised in this appeal, it would be useful to reproduce Clause 6 of the Form of Agreement dated 16th May, 1991 (Exh. B):

"6. In the event of any money hereby secured remaining unpaid after becoming payable or the value of the said securities/shares at anytime being insufficient in your opinion I/we authorise you through your agents and nominees without notice to me/us to sell and realise the said securities/shares or any part thereof at such times and prices and generally in such manner as you in your absolute discretion shall think fit without being liable for any loss I/we undertaking to accept your accounts of sales as conclusive evidence of the matters therein."

The Schedule of this Document mentions the Fixed Receipts deposited with the Bank. Once again there is no dispute about the execution and validity of this document, but the dispute is regarding the interpretation of Clause 6, object thereof and the applicability or otherwise of section 176 of the Indian Contract Act, 1872.

6. The Trial Court, by judgment and decree dated 27th December, 1995, decreed the suit jointly against both the defendants in the sum of Rs. 1,42,395/- with interest at the rate of 19.75% per annum compounded quarterly from 21st December, 1993 i.e. date of the suit, till date of final payment with costs, etc.

7. In First Appeal filed by the defendants, their total liability quantified by learned Single Judge till date of the impugned judgment is Rs. 24,768/-. From this amount Rs. 15,000/- deposited in the Court by them was directed to be deducted and the costs granted by the Trial Court and of the appeal was quantified at Rs. 5,000/-, thus working out a sum of Rs. 14,768/- being payable by the defendants which they were directed to pay within a week, failing which the defendants were directed to pay interest at the contractual rate of 19.75% per annum.

8. Aggrieved by the judgment of the learned Single Judge, the plaintiff Bank is in appeal before us.

9. Before we consider the respective contentions of learned counsel for the parties, it deserves to be noticed that during the pendency of the suit, collateral security in the form of FDR's along with interest to the tune of Rs. 1.20.340/-, was adjusted by the Bank on 11th November, 1994. One of the questions considered by learned Single Judge is as to when the adjustment by the Bank was required to be made from the Fixed Deposit Receipts deposited with it as security. The learned Single Judge has held that in view of clause 6 as aforesaid the Bank was required to adjust the installment of Rs. 2,755/- which was due every month to it from the collateral security in the shape of FDR's. The learned Single Judge goes on to hold that the absolute discretion vested in the Bank under clause 6 has to be exercised judiciously and not arbitrarily or at the sweet will of the Bank and in this regard reference has also been made to an earlier adjustment having been made by the Bank on 21st November, 1991 appropriating a sum of Rs. 9,500/- from the Fixed Deposit Receipts being the amount due on that date. It has been held that there was no impediment whatsoever in the Bank to adjust the installments when the same became due in future as well from the collateral security, but the Bank did not follow the same procedure which it earlier followed while appropriating Rs. 9.500/-. In these circumstances, counsel for the Bank was asked to prepare a chart of every installment from the collateral security, namely, the fixed deposits, to workout that if adjustments were made every month out of fixed deposit receipts, what would be the balance amount payable by the defendants to the plaintiff. On this calculation, the amount found due to the appellant as on 16th October, 1994 was Rs. 19,696/- which was adjudged as principal amount plus Rs. 3,889.96 as interest at the rate of 19.75% on that amount thus arriving at the figure of Rs. 23,586/-. To that amount post decree interest at 6% per annum on the principal sum adjudged at Rs. 19.699/- was worked out to approximately Rs. 1182/- to arrive at the total liability of defendants as Rs. 24,768/- as aforesaid.

10. The contentions urged by learned counsel for the appellant are :- (i) Section 176 of the Contract Act vests absolute discretion in the Bank to retain the security and sue for the amount due or to adjust the security at the point of time at its discretion and sue the debtor for the balance amount and (ii) The interest awarded u/s 34 of the CPC on the principal sum adjudged can be inclusive of the principal sum advanced and interest added thereto which as per the agreement between the parties may become principal sum.

11. Learned counsel contends that on both the aforesaid counts the opinion of the learned Single Judge is not sustainable. The contention is that no fault can be found with the adjustment made on 11th November, 1994 and that the Bank is also entitled to interest u/s 34 not on the amount found by learned Single Judge, but on the principal sum adjudged namely about Rs. 1,42,000/- till adjustment and thereafter on the balance sum as mentioned in the Statement of Account.

12. We may notice that in the present appeal there are no disputes on facts. The contentions are purely legal. Now we would consider the first contention

regarding applicability of section 176 of the Contract Act. Section 176 provides for pawnee's right where pawnor makes default. It inter alia stipulates that on pawnor making default in payment of the debt, at the stipulated time, in respect of which the goods are pledged, the pawnee may bring a suit against the pawnor on the debt and retain the goods pledged as a collateral security; or he may sell the goods pledged, on giving the pawnor reasonable notice of the sale and if the sale proceeds are deficient the pawnor would be liable to pay the balance and if more, the surplus amount shall be paid to the pawnor. The contention of Mr. Nadkarni is that the only effect of aforementioned Clause 6 is that the Bank can dispose of the security without giving any notice to the respondents. It is only a waiver of the stipulation of right of the respondents to a reasonable notice before the Bank decides to appropriate the security. Learned counsel relies upon a decision of the Delhi High Court in Bank of Maharashtra vs. M/s Racmann Auto (P) Ltd, AIR 1991 Del 278. In the said decision, the question which came up for consideration was whether there was any legal duty cast on the plaintiff Bank to take early steps for disposing of the pledged goods. Construing section 176, it was held that the very wording of the section makes it clear that it is the discretion of the pawnee to sell the goods in case the pawnor makes default but if the pawnee does not exercise that discretion no blame can be put on the pawnee and pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security. Doubt was also expressed whether a defendant as pawnor could force the pawnee to dispose of the pledged goods without defendant clearing the debt. However, on the facts of the present case, we need not go into this latter aspect on which doubt has been expressed. It has been categorically held in the cited decision that it is the discretion of the plaintiff Bank to have filed the suit for recovery of the debt and retain the pledged goods as collateral security or in the alternative it could resort to selling the pledged goods after giving reasonable notice of sale to the defendants. In that case the plaintiff Bank had in its wisdom exercised the first option of filing the suit and retaining the collateral security.

13. We are in respectful agreement with the legal proposition propounded in the aforesaid decision and thus there would be no question of judicious or arbitrary exercise of discretion by the Bank as to the time of appropriation of the amount from the collateral security given to it in the form of F.D.R/s.

14. In Gulamhusain Lalji Sajan vs. Clara D'Soyza, AIR 1929 Bom. 471 it was held that in cases of a pledge the creditor has two rights which are concurrent and the right to proceed against the property is not merely accessory to the right to proceed against the debtor personally and on the same lines. Reliance in the said decision was also placed on a Full Bench decisions of the Madras and Calcutta High Courts. The same principles were held to be applicable to the cases of hypothecation or mortgage of moveable property. Section 176 has been held to be mandatory in the Division Bench decision of this Court i The Official Assignee Vs. Madholal Sindhu, .

15. In view of aforesaid legal position, we are unable to accept the contention that the Bank was obliged to adjust the installments immediately on amount becoming due from the F.D.R.'s. Faced with this position, Mr. Thali, learned counsel for the respondents, contends that section 176 has no applicability since it applies only to goods and the Fixed Deposit Receipts cannot be construed as goods within the meaning of section 176 read with section 2(7) of the Sale of Goods Act. The contention of learned counsel is just stated to be rejected. Clause 6 has to be read in consonance with the interpretation of section 176 of the Act, which means that the respondents agreed to waive notice to them before appropriation of amount by the Bank. The provisions of sections 126, 148 and 172 of the Contract Act also do not, in any manner, help the respondents in support of their contention that there is a legal obligation on the appellant to adjust the amount due to it every month out of the Fixed Deposit Receipts. The acceptance of such contention may throw open various questions. We may just make mention of one of it. If adjustment from the amount of installment of Rs. 2,775/- was to be made in default being committed every month in payment thereof, what would happen to the remaining amount of F.D.R.? Would it be kept again in fixed deposit? Would it be kept in a saving account or would it be kept in a suspense account? All this clearly shows that the adjustment as made by learned Single Judge cannot be sustained in law.

16. Mr. Thali, learned counsel for the respondents, also contends that the appellant Bank had earlier appropriated Rs. 9,500/- from the Fixed Deposit Receipts and therefore it does not now lie in their mouth to plead or contend otherwise. We are unable to accept this contention of learned counsel as well. The fact of the said appropriation will not change the legal position that the Bank is not obliged to make appropriations month by month which is the effect of the impugned judgment. It may be noticed that Mr. Nadkarni explains that earlier appropriation of Rs. 9,500/- was made on the maturity of the Fixed Deposit Receipts.

17. Another aspect on question of appropriation from Fixed Deposit Receipts which deserves to be noticed is regarding the request made by respondent No. 1 in terms of her letter dated 10th June, 1994 sent to the appellant Bank. The said communication was sent by respondent No. 1 on receipt of summons from the Court of the suit which the Bank had filed. While expressing regrets for not making payment towards the loan, she explained that the installments could not be paid because of financial difficulties being faced by her husband in his business as also being faced by her in the shop run at her residence. In these circumstances, she stated that the Bank may adjust the amount due towards Medium Term Loan from out of the two Fixed Deposits and also praying for interest waiver to the maximum. As already noticed, the adjustment was made by the Bank on 11th November, 1994. Mr. Nadkarni states that it was done on maturity of the Fixed Deposit Receipts. According to learned counsel for the appellant, in fact a letter was written by the Bank to the borrower in acknowledgment of letter dated 10th June, 1994 requiring the borrower to

complete the formalities and both husband and wife were asked to sign the documents as stated in the Bank's reply dated 5th October, 1994. It is not clear whether the said document is proved in the suit or not though it is Exh. A9 in the first appeal filed by the respondents against the judgment and decree of the trial Court. We are not going into the question whether the Bank was obliged to adjust the loan amount immediately on receipt of the letter dated 10th June, 1994 and if so whether it was obliged to do so even before the maturity of the Fixed Deposit Receipts, because on account of adjustment having been made on 11th November, 1994, the dispute, if any, would be only of a very nominal amount as compared to adjustment if it had been made in June, 1994. We may just mention that if adjustment was to be made in June, the respondents may lose some amount of interest. After the adjustment on 11th November, 1994, as per the Statement of Account, the amount due and payable from the respondents remains Rs. 25,754.50. At this stage, another fact pointed out by Mr. Thali may be noticed namely the Bank having debited his clients of stamp charges and legal fees in the aforesaid Statement of Account and the trial Court having granted decree in favour of Bank with costs, which the learned counsel contends would mean that his clients would have to pay the costs twice-over. Mr. Nadkarni states that he would look into the matter and if it is a case of payment twice-over as pointed out by Mr. Thali, he would instruct the Bank to give necessary adjustment to the respondents.

18. Reverting now to the second contention as to the amount on which interest can be awarded u/s 34, there has been divergence of views of various High Courts. Section 34 deals with power to award interest at two stages, one during the pendency of the suit - *pendente lite* interest; and two, after the decree - future interest. We would notice some of the judgments relevant on the point in issue.

19. In *Syndicate Bank Vs. West Bengal Cements Ltd. and others*, considering the judgment of House of Lords in *Paton vs. Inland Revenue Commissioners*, (1938) AC 341, the Banking practice and the views of the Allahabad and Madras High Courts, one of us (Y. K. Sabharwal, J.) came to the conclusion that for determining the principal sum u/s 34 it is not possible to accept the general statement that amount of initial advance will always remain the principal sum and interest will always remain interest and the two can never emerge. It would depend on the contract between the parties. The definition of the word principal sum as given in various Dictionaries was held not to be relevant for the purpose of adjudging principal sum u/s 34.

20. A Division Bench of this Court in the case of *Bank of Baroda vs. M/s Jagannath Pigment and Chemicals and others* decided on 19th November, 1986 had reversed the trial court decision, wherein interest was claimed and awarded on the suit amount of over Rs. 1,66,000/- which was inclusive of the amount of interest upto the date of the suit added to the principal amount of Rs. 1,20,675/-. The Trial Court had awarded *pendente lite* interest on Rs. 1,66,000/-

The Division Bench modified the decree and awarded pendent lite interest only on the principal amount of Rs. 1,20,675/-. This decision was contrary to the view taken in an earlier decision of the Division Bench in Kaluram Bholaram Vs. Chimniram Motilal, - a decision before amendment of section 34. A full Bench of this Court in the case of Union Bank of India Vs. Dalpat Gaurishankar Upadhyay, on consideration of different views, expressed dissent with the views expressed by Delhi, Allahabad, Orissa and Madras High Courts and following the aforesaid decision in the case of Bank of Baroda vs. M/s Jagannath Pigment and Chemicals and others and distinguishing Kaluram's case, held that the term "principal sum adjudged" in section 34 does not include in it any interest and that there is no scope for doubt that the expression "principal sum adjudged" would mean only the principal sum, and will never include the interest whatever be the agreement between the parties. It was held that interest u/s 34 can be allowed only on principal sum and not on the principal sum plus interest accrued thereon till filing of the suit, meaning thereby that the interest could be awarded u/s 34 only on the amount lent without the addition thereto of any interest whatsoever and this will be the position notwithstanding any agreement between the parties or any prevailing banking or trade practice to the contrary. Dealing with Jagannath Pigment's case, it was observed that in the said decision, the interest was awarded evidently on the expression "principal sum adjudged" to mean "principal sum" only and not aggregate amount including the interest due and payable on the date of the suit.

21. If the legal position had rested as propounded in the Full Bench decision, there would have been no difficulty in the matter of grant of interest u/s 34. However, there have been subsequent pronouncements taking different views than the one taken by the Full Bench because of decision of the Supreme Court.

22. The Apex Court in the case of Bank of Baroda Vs. Jagannath Pigment and Chem. and Others, has reversed the aforesaid decision of the Division Bench of this Court which was one of the judgments on the basis of which the Full Bench decision was rendered. The Apex Court, reversing the High Court decision has restored that of the trial Court and has thus upheld the grant of interest by the Trial Court on the sum of Rs. 1,66,759.29 and has not confined it to the sum borrowed viz. Rs. 1,20,675A. A learned Single Judge of this Court in Central Bank of India vs. Tar seems Compress Wood Manufacturing Company and others, 1997(2) ALLM.R. 15 relying upon this decision of the Apex Court in Corporation Bank Vs. D.S. Gowda and Another, , has held that in view of the Supreme Court decision particularly one in the case of Jagannath Pigment, the current rate had to be granted on the compounded principal claimed in the plaint and not on the principal sum.

23. We are conscious of the fact that some other decisions have been rendered by this Court after the Full Bench decision, but in the said decisions, the Supreme Court's decision reversing Jagannath Pigment's case has not been noticed, the same probably not having been cited.

24. We may also note that on the interpretation of the provisions of section 34 as to the principal sum adjudged in Central Bank of India Vs. Ravindra and Others, , the question has been referred to the Constitution Bench. The order directing reference notices the aforesaid two decisions in cases of Gowda and Jagannath Pigment. Till the matter is decided by the Constitution Bench, the legal position which holds the field would be as propounded in the decision of the Apex Court in Jagannath Pigment's case. For this view we also find support from the Division Bench decision of the Himachal Pradesh High Court in Punjab National Bank and etc. Vs. Vidya Hatchery, etc. etc., .

25. We may also notice a recent decision of the Apex Court in Oil and Natural Gas Commission vs. M/s M. C. Clelland Engineers S. A., 1999(3) BCR 537, where considering section 34 it has been held that the interest becomes part of the principal sum. In view of these pronouncement, we are unable to accept the contention of learned counsel for the respondents that no ratio decidendi is discernible from Jagannath Pigment's case and that it is not a precedent for the purpose of Article 141 of the Constitution of India and the law was not correctly laid down in Central Bank's case (supra). The judgment of the Apex Court in Jagannath Pigment's case shows that a specific mention has been made on the amount on which the interest was awarded by the Trial Court and in appeal noticing as to what is the amount of the principal sum.

26. Presently the legal proposition, in our view, clearly is that the principal sum adjudged can include in it interest as well depending upon the contract between the parties. In the present case, as already noticed, there was a contract for payment of interest with quarterly rests.

27. In the present appeal, another small point which still remains to be decided is about the award of future interest at the rate of 6% per annum. Learned counsel for the appellant contends that the future interest was rightly awarded at the contractual rate by the Trial Court. On due consideration of the evidence on record, the learned Single Judge came to the conclusion that only 6% future interest could be awarded as it was not a commercial transaction since that was the deposition of the Manager of the Bank. In this state of the evidence on record, we find no ground to upset the decision of the learned Single Judge on the aspect of grant of future interest at the rate of 6% per annum.

28. Except for the grant of future interest at 6% per annum, for the reasons as aforesaid, we set aside the impugned judgment and restore that of the trial Court. However, the respondents would be entitled to the benefit of the adjustment of Rs. 1,20,340/- as noticed hereinbefore and to that extent the judgment and decree of the Trial Court shall also stand modified since it grants the decree in favour of the appellant in the sum of Rs. 1,42,395.00. It is understood that whatever payments have been made by the respondents after the decree, due adjustment of the same would be granted to them.

29. The appeal is thus allowed in the above terms. In the facts and

circumstances of the case, the parties are however left to bear their own costs.