

**(2012) 01 MAD CK 0133**

**In the Madras High Court**

**Case No : Appeal Suit No. 1059 of 2007**

|                                                          |            |
|----------------------------------------------------------|------------|
| Sumanlatha Mehta, L. Udhay Mehta and M/s. S.B.A. Traders | APPELLANT  |
| Vs                                                       |            |
| Dr. N.V. Sundaram                                        | RESPONDENT |

**Date of Decision : 09-01-2012**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 34

**Citation : (2012) 01 MAD CK 0133**

**Hon'ble Judges : S. Vimala, J;R. Banumathi, J**

**Bench : Division Bench**

**Advocate : C. Uma Shankar, for the Appellant; W.M. Abdul Majeed, for the Respondent**

## **Judgement**

R. Banumathi, J.—Challenge in this appeal is the judgment and decree in O.S. No. 4134 of 2000 whereby the VI Additional Judge, City

Civil Court, Chennai has decreed the suit holding that Defendants 1 to 3 are jointly and severally liable to pay a sum of Rs. 6,72,500/- together

with subsequent interest at the contracted rate of 36% per annum from the date of suit till the date of realization. Unsuccessful Defendants are the

Appellants.

2. Case of Plaintiff is as follows:

1st Defendant is the Proprietrix of the Company M/s. S.B.A. Traders dealing with the trading of shares. At the invitation of Defendants, Plaintiff

invested a sum of Rs. 5,00,000/- in 3rd Defendant's Company for which Ex.A1-agreement [30.06.1996] was entered into. As per Ex.A1-

agreement, Defendants agreed to repay the said amount by investing the same for a period of 90 days, subject to a maximum period of 120 days

which shall carry an interest of 36% per annum. In order to discharge the said

liability of the Defendants, 1st Defendant issued Ex.A2-cheque

[30.05.1997] for Rs. 6,60,000/-. When Ex.A2-cheque was presented into the State Bank of India, Salem Branch on 02.06.1997, the said

cheque was dishonored for ""insufficient funds"". Plaintiff issued Ex.A13-legal notice [19.06.1997] under Negotiable Instruments Act. Thereafter,

the 2nd Defendant approached the Plaintiff and paid Rs. 1,25,000/- and agreed to pay the balance amount in seven installments, six of which at

Rs. 90,000/- each and the last one at Rs. 22,000/- as final installment. On that basis, 2nd Defendant issued seven cheques [Exs.A3 to A9] which

also when presented were dishonored by the Defendants' bankers. Plaintiff informed the Defendants about the dishonor of cheques and called

upon them to make payment. Defendants have totally paid a sum of Rs. 3,80,000/- on various dates towards principal and interest. According to

Plaintiff, still there was an outstanding of Rs. 7,77,745/- due as on October 1999 and Ex.A15-notice was issued on 16.11.1999 calling upon the

Defendants to pay a sum of Rs. 7,77,745/-. The agreed rate of interest was at 36% per annum. Restricting the claim to Rs. 6,72,500/-, Plaintiff

has filed the suit for recovery of a sum of Rs. 6,72,500/- payable at the contracted rate of interest at 36% per annum from the date of suit till the

date of realization.

3. Denying the plaint averments, Defendants 1 to 3 have filed the written statement contending as follows:-

Plaintiff invested Rs. 5,00,000/- and obtained 50,000 shares from the Company viz., M/s. Chandra Prabhu Housing Limited worth Rs. 5,00,000/-

as security. Unfortunately, the shares could not be sold in the market due to Court order as the result of which, they were dead stocks lying at their

end and therefore, final payment could not be arrived at. Plaintiff returned only 5000 shares to 1st Defendant and retained the remaining 45,000

shares with him. According to Defendants, they have paid a sum of Rs. 4,73,500/- to the Plaintiff; but the Plaintiff has unjustly withheld 45,000

shares with him worth Rs. 4,50,000/-. Plaintiff has to return the balance shares held by him numbering 45,000 shares. Plaintiff has conveniently

struck out Mrs. Vanaja Sekar's name in the agreement [Ex.A1] and filed the suit on such agreement. According to Defendants, after the shares

are returned, they have to be sold in the market and the loss or profit amount

will be arrived at and thereafter, the profit or loss thereof has to be equally shared by the Plaintiff and the 1st Defendant respectively. Since the Defendants have already paid a sum of Rs. 4,73,500/-, Defendants are not liable to pay any amount to the Plaintiff and the suit is a frivolous one and prayed for dismissal of the suit.

4. On the above pleadings, four Issues were framed by the trial Court. On the side of Plaintiff, Plaintiff-Dr. N.V. Sundaram examined himself as

PW1 and Exs.A1 to A18 were marked. On the side of Defendants, 2nd Defendant-L. Udhay Mehta was examined as DW1 and Exs.B1 and B2 were marked.

5. Upon consideration of oral and documentary evidence, trial Court held that it was not disputed that the amount was invested by the Plaintiff with

the 3rd Defendant Company. Pointing out the return of the cheques and referring to the recitals in Ex.A1- agreement, trial Court held that as per

Ex.A1-agreement, 1st Defendant has agreed to repay the amount with interest at the rate of 36% per annum and hence, he cannot evade payment

of suit amount to the Plaintiff. Pointing out that the payments made by the 1st Defendant has been deducted, trial Court decreed the suit as prayed

for. Challenging the impugned judgment, Defendants have preferred this appeal.

6. Mr. C. Uma Shankar, learned counsel appearing for the Appellants has contended that Defendants have already paid a sum of Rs. 4,30,000/-

and that amount has not been properly credited. It was further submitted that as security 50,000 shares have been handed over to the Plaintiff, out

of which, Plaintiff has returned only 5,000 shares and retained 45,000 shares and when the Plaintiff has retained 45,000 shares, the suit claim is

unsustainable. Taking us through the written statement, learned counsel for Appellants has contended that 1st Defendant has denied his signature in

Ex.A1-agreement [30.6.1996] and while so, the trial Court erred in saying that Ex.A1-agreement was not disputed. It was further submitted that in

the light of the denial of 1st Defendant's signature in Ex.A1-agreement, the trial Court ought to have framed relevant Issues as to the genuineness

of Ex.A1-agreement and the impugned judgment granting the relief as prayed for is liable to be set aside.

7. Taking us through the evidence and the judgment of the trial Court, Mr. W.M. Abdul Majeed, learned counsel for Respondent has submitted

that denial of 1st Defendant's signature in Ex.A1-agreement is very vague. Learned counsel would further submit that Defendants have not chosen

to send any reply to Exs.A13 and A15-notices denying their liability and considering the dishonor of cheques [Exs.A2 to A9], trial Court has

rightly decreed the suit for Rs. 6,72,500/- payable with interest at the rate of 36% per annum.

8. Upon consideration of the impugned judgment, evidence, rival contentions and materials on record, the following points arise for determination:-

(1)Whether the Plaintiff is entitled to claim Rs. 6,72,500/-?

(2)Whether the contention of Appellants/Defendants that they have already made payments and also by way of shares is acceptable?

(3)Whether the Plaintiff is entitled to interest at the rate of 36% per annum?

(4)To what relief, the parties are entitled to?

9. Point Nos. 1 and 2:-

Admittedly, Plaintiff has invested a sum of Rs. 5,00,000/- in 3rd Defendant's company. Evidencing the investment and also stating the mode of

repayment, parties have entered into Ex.A1-agreement [30.06.1996]. As per the recitals of Ex.A1-agreement, the investment was made for a

minimum period of 90 days and a maximum period of 120 days. It was further agreed that the principal amount of Rs. 5,00,000/- was to be

returned with interest at the rate of 36% per annum and the relevant clause in Ex.A1-agreement reads as under:-

Dr. N.V. Sundaram is making an investment of Rs. 5.00 lakhs (Rupees Five lakhs only) in the above referred company, M/s. S.B.A. TRADERS

for investment and trading in shares. The understanding arrived between the above referred two parties are as follows:

1. The investment made is for a minimum period of 90 days and maximum period of 120 days.

2. At the time of returning the amount an interest of 36% p.a. to be calculated till the day of making payment and to be paid along with the principle

amount of Rs. 5.00 lakhs.

3. The investment will be made on shares of M/s. CHANDRA PRABHU HOUSING LIMITED, Madras. The off loading of the shares

purchased will be after 90 days but within 120 days. At the time of off loading date the ruling price of the above referred share will be taken into

account for sharing the difference in bought and sold position.

10. The period of investment was subject to a minimum period of 90 days and a maximum period of 120 days. Thus the minimum period of three months expires on 30.09.1996 and the maximum period of four months expires on 30.10.1996. Even though it was agreed that the investment for a minimum period of 90 days is subject to a maximum period of 120 days, 1st Defendant has issued Ex.A2-cheque only on 30.05.1997 for a sum of Rs. 6,60,000/-. Ex.A2-cheque when presented for collection, the cheque was dishonored for want of "sufficient funds". Thereafter, Plaintiff had issued Ex.A13-notice [19.06.1997] calling upon the Defendants to pay a sum of Rs. 6,60,000/- being the amount of the dishonored cheque. In his evidence, PW1 has spoken about the investment and also Ex.A1-agreement and dishonor of Ex.A2-cheque and also issuance of Ex.A13-notice.

His evidence is supported by the recitals in Ex.A1-agreement.

11. Learned counsel for Appellants has submitted that 1st Defendant has denied his signature in Ex.A1-agreement and that factum has not been properly considered by the trial Court. Even though it was argued that 1st Defendant has denied his signature in Ex.A1-agreement, such denial seems to be for the first time set forth in the written statement. By perusal of the written statement, it is also seen that 1st Defendant has not specifically denied his signature in Ex.A1-agreement. In Paragraph (3) of the written statement, it is averred only as "... the first defendant states that as regards the agreement the terms thereof were not agreed to by the first defendant.....

12. It is pertinent to note that after the receipt of Ex.A13- notice, 1st Defendant has not chosen to send any reply denying his signature in Ex.A1-agreement. On the other hand, after the receipt of Ex.A13-notice, Defendants only seems to have made payments/issued Exs.A3 to A9-cheques.

If really 1st Defendant had not signed in Ex.A1-agreement, on receipt of Ex.A13-notice, Defendants would have chosen to send the reply. Non-issuance of any reply militates against the defense plea.

13. By perusal of Ex.A1-agreement, we also find that stamp paper was purchased in the name of "S.B.A. TRADERS". By comparison of 1st Defendant's signature in Ex.A1-agreement with that of his admitted signature in Ex.A2-cheque, both the signatures seem to be identical. We do

not find any material variation in both the signatures. Considering Ex.A1-agreement along with other evidence, in our considered view denial of 1st

Defendant's signature in Ex.A1-agreement is seemingly an after thought. If really, 1st Defendant had not signed in Ex.A1-agreement, immediately,

after the receipt of Ex.A13-notice, Defendants would have chosen to send the reply; but that was not done.

14. In his evidence, PW1 has stated that after the receipt of Ex.A13-notice, 2nd Defendant approached him and paid Rs. 1,25,000/- by cash and

promised to pay the balance in seven installments and on that basis Defendants issued seven cheques which again when presented for collection

were dishonored for "insufficient funds". Further case of Plaintiff is that on being informed about the dishonor of cheques, Defendants have paid Rs.

25,000/- on 07.08.1997; Rs. 41,000/- on 19.08.1997; Rs. 50,000/- on 31.12.1997; Rs. 39,000/- on 17.04.1998; Rs. 50,000/- on 04.05.1998;

Rs. 25,000/- on 26.06.1999; Rs. 25,000/- on 16.7.1999 totaling Rs. 3,80,000/-.

15. In his evidence, PW1 has stated that the above said amounts [ Rs. 3,80,000/-] were adjusted towards interest alone. According to

Defendants, they paid Rs. 4,30,000/- on various dates. By perusal of evidence of P.W.1, except the payment of Rs. 50,000/- allegedly paid by

the Defendants on 19.06.1997, all other payments [ Rs. 3,80,000/-] made by the Defendants tally which is said to have been adjusted towards the

interest.

16. Defense plea is that for payment of Rs. 5,00,000/-, 50,000 shares of M/s. Chandra Prabhu Housing Limited each of the face value of Rs. 10/-

aggregating to Rs. 5,00,000/- and Plaintiff returned only 5,000 shares and retained the remaining 45,000 shares with him. Further case of

Defendants is that though the Defendants have returned to the Plaintiff a sum of Rs. 4,73,500/-, Plaintiff is still holding 45,000 shares of M/s.

Chandra Prabhu Housing Limited which are worth Rs. 4,50,000/-. In his evidence, DW1 has stated that Plaintiff has to return the shares

numbering 45,000 of M/s. Chandra Prabhu Housing Limited to the 1st Defendant and that Plaintiff has not set forth the true facts.

17. For the first time in the written statement, Defendants have taken the defense plea that Plaintiff was given 50,000 shares. Out of which, Plaintiff

had retained 45,000 shares. Even though Plaintiff had issued two legal notices

[Exs.A13 and A15], Defendants have not chosen to send any reply nor stated about the handing over of 50,000 shares to the Plaintiff and retaining of 45,000 shares by the Plaintiff. Considering the evidence and materials on record, trial Court has rightly held that the defense plea is not sustainable. We do not find any reason to take a different view from the said finding recorded by the trial Court.

18. Since 1st Defendant had issued Ex.A2-cheque [30.05.1997] for a sum of Rs. 6,60,000/- and also Exs.A3 to A9-cheques which were dishonored for want of "sufficient funds", Defendants are liable to pay the suit amount to the Plaintiff. In appreciation of the oral and documentary evidence in proper perspective and rightly negated the defense plea of discharge and has rightly decreed the suit holding that the Defendants 1 to 3 are jointly and severally liable to pay the suit claim of Rs. 6,72,500/-and Point Nos. 1 and 2 are answered in favour of the Respondent.

19. Point No. 3:-

Plaintiff seeks for recovery of Rs. 6,72,500/- payable with interest at the rate of 36% per annum from the date of suit till the date of realization. As per Ex.A1-agreement, the amount invested by the Plaintiff has to be repaid with interest at the rate of 36% per annum. However by claiming only Rs. 6,72,500/-, the Plaintiff has restricted the pre-suit interest at the rate of 18% per annum. In plaint Paragraph (10), Plaintiff has clearly alleged that Plaintiff is claiming interest at the rate of 18% per annum from 10.08.1998 to 20.05.2000. Even though the Plaintiff has restricted the pre-suit interest at 18% per annum, the Plaintiff sought for interest at the rate of 36% per annum from the date of suit till the date of realization. The trial Court decreed the suit as prayed for holding that the Defendants are jointly and severally liable to pay the amount of Rs. 6,72,500/- together with interest at the rate of 36% per annum.

20. Learned counsel for Appellants contended that when the Plaintiff has restricted the pre-suit interest to 18% per annum, the Plaintiff is not justified in seeking interest at the rate of 36% per annum from the date of suit till the date of realization. It was further submitted that the interest claimed at the rate of 36% per annum is excessive and is hit by the Usurious Loans Act. Learned counsel would further submit that the trial Court ought to have taken note of various payments made by the Defendants and the

interest awarded at 36% per annum is excessive.

21. Pre-suit interest is generally regulated by contract and the Court ordinarily allows interest at the stipulated contract rate, unless the rate of

interest is excessive and unconscionable. The parties are governed by Ex.A1-agreement as per which the amount invested by the Plaintiff is to be

repaid with interest at the rate of 36% per annum. Even though as per Ex.A1-agreement, the amount is to be repaid to the Plaintiff with interest at

the rate of 36% per annum, the Plaintiff himself has restricted the interest to 18% per annum. In our considered view, the trial Court ought to have

kept in view such restriction of interest by the Plaintiff himself.

22. Section 34 C.P.C. deals with:- (i) interest on the principal sum adjudged from the date of suit to the date of decree i.e., interest pendent lite; (ii)

further interest on the principal sum at a rate not exceeding 6% per annum from the date of decree to the date of realization or other earlier date

fixed i.e., post decree. Section 34 C.P.C. leaves it to the discretion of the Court as to the rate of interest to be awarded by way of pendent lite

interest. So far as future interest or further interest is concerned, that too, is left to the discretion of the Court; but subject to the limit of 6% per

annum. However, the added proviso would remove the limit to the future interest arising out of a commercial transaction. As per Explanation-(ii) in

commercial transactions by public financial institutions, the contractual rate of interest should be the rule and departure is an exception.

23. As per the proviso to Section 34 C.P.C., in case of commercial transaction, rate of further interest may exceed 6% per annum, but shall not

exceed the contractual rate of interest. Refusal to award future interest at the contractual rate is only exception and not the rule.

24. Of course, Plaintiff's investment was for purchase of shares and a commercial transaction. In this case, even though the transaction is a

commercial transaction, there are more than one reason to make a departure from the normal rule of awarding contractual rate of interest in

commercial transactions. As pointed out earlier, Plaintiff himself has restricted the pre-suit interest at the rate of 18% per annum. Admittedly,

Defendants have made number of payments on various dates to the tune of Rs. 3,80,000/-. That apart, as per order in M.P. No. 3 of 2007 in

A.S. No. 1059 of 2007 dated 25.10.2007, Appellants-Defendants have also



deposited a sum of Rs. 6,72,500/- to the credit of the suit-O.S. No.

4134 of 2000 on the file of VI Additional Judge, City Civil Court, Chennai and that the said amount is simply lying to the credit of the suit for the

past four years without fetching any interest. In these circumstances, this Court is constrained to exercise the discretion u/s 34 C.P.C. to award

lesser interest than the contractual rate of interest claimed by the Plaintiff. Insofar as the rate of interest, the trial Court did not keep in view the

various facts and circumstances of the case and the award of interest at the rate of 36% per annum from the date of suit till the date of realization

by the trial Court is to be modified at 7.5% per annum and Point No. 3 is answered accordingly.

25. Point No. 4:-

In Point Nos. 1 and 2, we have held that Defendants 1 to 3 are jointly and severally liable to pay the suit claim of Rs. 6,72,500/-. In Point No. 3,

we have held that the rate of interest awarded by the trial Court is to be modified. Considering the facts and circumstances of the case, we hold

that the suit claim of Rs. 6,72,500/- is payable with interest at the rate of 12% per annum from the date of suit till the date of decree [22.09.2005]

and thereafter the said amount of Rs. 6,72,500/- is payable with interest at the rate of 7.5% per annum till realization and Point No. 4 is answered

accordingly.

26. In the result, the judgment and decree in O.S. No. 4134 of 2000 on the file of VI Additional Judge, City Civil Court, Chennai dated

22.09.2005 is modified and this appeal is partly allowed. Modifying the judgment and decree in O.S. No. 4134 of 2000, it is held that Defendants

1 to 3 are jointly and severally liable to pay the suit claim of Rs. 6,72,500/- payable with interest at the rate of 12% per annum from the date of suit

[28.06.2000] till the date of decree [22.09.2005] and thereafter at 7.5% per annum till realization. In the appeal, both parties are directed to bear

their respective costs.