

(2000) 10 DEL CK 0021
In the Delhi High Court
Case No : Suit No. 725 of 1978

The Bank of Rajasthan Ltd.	Vs	APPELLANT
Sh. Pala Ram Gupta and Another		RESPONDENT

Date of Decision : 17-10-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2, Order 8 Rule 6(2)
Contract Act, 1872 — Section 23
Court Fees Act, 1870 — Article 1
Delhi Development Act, 1957 — Section 14, 29(2)
Transfer of Property Act, 1882 — Section 58

Citation : AIR 2001 Delhi 58 : (2001) 2 CivCC 209 : (2000) 57 DRJ 863 :
(2002) 1 RCR(Civil) 102

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Anil Aggarwala and Jagdeep Anand, for the Appellant; J.P. Sengh,
N.A. Khan and Arun Kumar Sharma, for the Respondent

Judgement

K.S. Gupta, J.—plaintiff filed this suit, inter alia, alleging that it is a banking company having its registered office at Clock Tower, Udaipur (Rajasthan) and a branch office at 82, Janpath, New Delhi. Plaintiff has been signed, verified and suit instituted by L. N. Sapra (Manager of the said branch) who is the principal officer and also holds power of attorney in his favour. Defendants who are the owners of plot No. G-39, Green Park, New Delhi, wanted to construct a building thereon. They approached the said branch of plaintiff-bank for grant of loan being short of funds. Bank agreed to advance loan of Rs. 75,000/- to them on the terms and conditions set out in the letter dated 25th August, 1975, salient features of this letter have been given in sub-paras (a) to (i) of para 4 of the plaint. It is further alleged that defendants on 3rd September, 1975 created equitable mortgage of the property to be constructed on said plot G-39, Green Park by depositing title deeds with the said branch of the bank. Total amount of loan of Rs. 75,000/- was received by the defendants from plaintiff by 11th December, 1975. It is stated that a registered lease deed between the parties was executed on 9-12-1975 and

the bank agreed to take on rent the entire first floor and mezzanine floor of said property for running a branch therein. Salient features of the said lease deed are incorporated in para 9 of the plaint.

2. It is further pleaded that defendants failed to complete the construction and deliver possession of first and mezzanine floors to the plaintiff-bank by the stipulated date which was 30th December, 1975. In the meantime, plaintiff also came to know that said portions of property agreed to be let out, could be used only for residential purpose and its use for commercial purpose was an offence under the Delhi Development Act, 1957. Accordingly, said L. N. Sapra approached the defendants and asked them to approach DDA to obtain permission for use of the said floors for commercial purpose. Instead of obtaining permission for commercial use, the defendants sent a letter which was received by the plaintiff-bank on 10th June, 1976, informing that construction was completed by the date stipulated in said lease deed and the plaintiff-bank was called upon to take possession within 10 days failing which said portions would be considered as having been taken on rent by the bank. It is claimed that the averments made in the said letter were false to the knowledge of defendants as they never informed the bank prior to issue of that letter that construction had been completed. Thus, the plaintiff through its counsel sent a reply dated 22nd June, 1976 denying the averments made in the said letter. Defendants were further informed that after receipt of the said letter, L. N. Sapra along with Vinod Verma of M/s. Riviera Traders (P) Ltd. visited the said building on 22nd June, 1976 and it was found that no internal electric wires had been laid nor electric connection provided. Grills too were not provided and mezzanine floor was incomplete. Said two floors thus were not capable of occupation. The defendants were further informed that on enquiries made by plaintiff-bank it had transpired that said two floors could not be acquired for commercial purpose and the assurance given by defendants about commercial use thereof was untrue to their knowledge. Defendants were, Therefore, asked to approach the concerned authorities and obtain certificate that said two floors could be used for commercial purpose. It is stated that defendant No. 1 refused to take delivery of the said letter and same was received back with the report "Avoid to take". Said letter sent to defendant No. 2 was initially received by him and he also signed AD in token of having received it but on second thought he scored off his signature on AD and refused to take delivery thereof. Thereafter defendants never intimated the plaintiff-bank that said two floors had been completed in every respect and they had obtained certificate from the concerned authorities. plaintiff-bank thus could not enter into possession of the said two floors. It is further alleged that plaintiff-bank served notice dated 13th October, 1976 through its counsel to the defendants requiring them to repay the loan amount of Rs. 75,000/- along with interest at the agreed rate of 13 1/2% per annum with monthly rest amounting to Rs. 84,666.92. The defendants vide their reply dated 8th November 1976 falsely stated that said amount of Rs. 75,000/- had been given as advance and it was not to carry any interest. It was further stated that

defendants never created any equitable mortgage by deposit of title deeds with the plaintiff-bank in respect of the said property and title deeds were given to the bank only for the purpose of verification of title of defendants to the said property and said amount was to be adjusted towards rent. The plaintiff through its counsel sent reply dated 6th December, 1976 to the communication dated 8th November, 1976 denying the allegations made therein. It is further alleged that defendants through their counsel sent to the plaintiff a notice dated 15th November, 1977 stating that they had spent Rs. 20,000/- in constructing a strong room and Rs. 15,000/- on certain other facilities exclusively meant for bank purposes. It further stated that the plaintiff had not paid rent since January, 1976 onwards and approximately Rs. 42,000/- had become due by way of rent from the bank and said amounts are liable to be adjusted towards advance amount of Rs. 75,000/-. plaintiff-bank got a reply sent through its counsel to the said notice. It was prayed that a preliminary decree for Rs. 1,06,705.06 be passed in favor of the plaintiff-bank and against defendants. In default of payment of the amount due under the preliminary decree a final decree for sale of said property with costs and interest pendente lite and future @ 13 1/2% be passed against the defendants. Personal decree is also sought to be made against the defendants for such amount which may remain due after sale of the mortgaged property.

3. Both the defendants have contested the suit by filing joint written statement. By way of preliminary objections it is pleaded that the suit as framed is not maintainable. On merits, it is denied that L. N. Sapra is competent to sign and verify the plaint and institute suit on behalf of the bank. It is admitted that defendants are the owners of plot No. G-39, Green Park. However, it is denied that they approached the plaintiff-bank for grant of loan for raising construction on the said plot as alleged. It is asserted that it was the plaintiff-bank who was keen to open its branch in the said locality and, Therefore, had approached the defendants for leasing out the property to be constructed on said plot. It is denied that amount of Rs. 75,000/- was given by way of loan to the defendants on the terms and conditions as set out in alleged letter dated 25th August, 1975. It is "claimed that said amount was given as advance rent to the defendants for finalising construction on the said plot. It is denied that the said amount was to carry interest @ 13 1/2% per annum as alleged. Sale deeds of the said plot were taken to the plaintiff-bank for verification of title of the defendants to the said plot. It is denied that sale deeds of the plot were deposited with plaintiff-bank for creation of equitable mortgage as alleged. It is pleaded that defendants are illiterate persons. Defendant No. 1 does not know English while defendant No. 2 can sign in English but cannot read or write English. The lease deed was got drafted by the plaintiff-bank and signatures of defendants were obtained thereon without explaining the contents thereof to them. Defendants at no point of time were told about the clauses of the said lease deed as mentioned in para 9 of the plaint. It is alleged that building was constructed much before 30th December, 1975 and defendants had been thereafter constantly requesting the plaintiff to

occupy the two floors. It is denied that plaintiff-bank came to know that the two floors could not be used for commercial purpose under Delhi Development Act as stated by it. There was no false assurance given by the defendants that property could be used for commercial purpose. At that time several banks were functioning in nearby areas even on first floor and there was absolutely no prohibition from the side of DDA with regard to lease of property for banking purpose. It is denied that L. N. Sapra or any other person told the defendants that the property could be used only for residential purpose or that the plaintiff-bank ever asked the defendants to approach the concerned authorities for permission to use the two floors for commercial purposes. It is denied that no internal electric wires had been laid or electric connections not obtained till 30th December, 1975 as alleged. It is further denied that mezzanine floor was incomplete. It is asserted that the property was complete in all respects by 30th December, 1975 and the plaintiff-bank was repeatedly asked to occupy it. Receipt of the plaintiff's notice dated 30th October, 1976 is not denied. Reply of the plaintiff dated 6th December, 1976 to the answering defendants' communication dated 8th November, 1976 is further not denied. Liability to pay the suit amount is emphatically denied.

4. In the replication the plaintiff has controverted the averments made in written statement besides reaffirming those made in the plaint.

5. On the pleadings of the parties the following issues were framed :--

1. Whether the suit as framed is not maintainable? OPD
2. Whether the plaint has been signed and verified and suit instituted by a duly authorised person? OPP
3. Whether the defendants did not raise loan of Rs. 75,000/- from the plaintiff carrying interest at 13 1/2% p.a. with quarterly rests ? OPD
4. Whether the defendants equitably mortgaged plot No. G-39, Green Park, New Delhi including the construction standing thereon as security against the loan of Rs. 75,000/-and interest due thereon ? OPD
5. Whether the loan of Rs. 75,000/- was to be adjusted against the rent of the portion of property G-39, Green Park, New Delhi agreed to be let by the defendants to the plaintiff ? OPD
6. To what amount is the plaintiff entitled on account of principal and interest ?
7. Relief. Issue No. 2

6. Ex. P-1 is the copy resolution No. 12 passed in the meeting of Board of Directors of plaintiff-bank held on 23rd and 24th June, 1948 at Udaipur while Ex. P-2 is the attested copy of power of attorney dated 1st July, 1967. In terms of the said resolution Damodar Lal Ji Mansinghka was authorised by the Board of Directors to appoint any person to be the attorney of plaintiff-bank for such purposes and with such powers, authorities and discretions (not exceeding those

vested in or exercisable by the directors under the Articles of Association of the Bank) and for such period, if any, and subject to such conditions as he could from time to time think fit. By virtue of Ex. P-2 said Damodar Lal Ji Mansinghka had appointed L. N. Sapra to be the attorney of plaintiff, bank and granted him the powers and authorities enumerated therein. In terms of powers/authorities listed at 7(d) said L. N. Sapra was authorised to sign and verify the plaint and to institute suit on behalf of the plaintiff-bank. It is in the deposition of Gian Sunder Sareen, P. W. 2 that he joined the plaintiff-bank in the year 1949; that he had worked with L. N. Sapra and seen him writing and signing and the plaint bears the signatures of said L. N. Sapra as also power of attorney executed in favor of the counsel. This part of the statement of P. W. 2 has not been challenged by the defendants. Considering Ex. P-1, Ex. P-2 and also the deposition of P. W. 2 the plaint must be held to have been signed, verified and suit instituted by a duly authorised person on behalf of plaintiff-bank.

Issue No. 4

7. It is further in the deposition of Gian Sunder Sareen, P. W. 2 that the defendants in consideration of grant of facility of Rs. 75,000/- executed memorandum of deposit of title deeds dated 3rd September, 1975 relating to property No. G-39, Green Park, Ex. P3. They also deposited the original title deeds Exs. P-4 and P-5 with the plaintiffs bank. In cross-examination he emphatically denied the suggestion that defendants deposited the title deeds for the purpose of verification. Defendant No .1 examined himself as D. W. 1 while defendant No. 2 as D. W. 2. On the issue on hand the testimony of defendant No. 2 is silent. D. W. 1 in his examination-in-chief deposed that he had given the title deeds of property to the plaintiff-bank for verification. In cross-examination he admitted that Ex. P-3 bears his signature and also that of defendant No. 2. Omitting the immaterial portion, said Ex. P-3 runs as under :--

"We, Pala Ram Gupta and Ram Gopal Gupta, sons of Shri Chet Ram, A-176, defense Colony, New Delhi, hereby acknowledge that we have this day deposited with the Bank of Rajasthan Ltd., South Ext. Part II, New Delhi (hereinafter called the Bank) which expression shall include their successors and assigns) the documents specified in the schedule hereto with intent to create an equitable mortgage upon all our estate and interest in the said property to which such documents relate, for the purposes of securing the payment to the Bank on demand of all moneys now owing or which shall at any time hereafter be owing from us to the Bank whether on balance of account or by discount, or otherwise, in respect of bills of exchange, promissory notes, cheques and other negotiable instruments or in any manner whatsoever and including interest with quarterly rests, commission and other banking charges and any law costs incurred in connection with the accounts."

8. In the Schedule the nature of document deposited has been described as sale deed of property No. G-39, Green Park, New Delhi.

9. Ex. P-4 is the sale deed dated 27th October, 1961 executed by Urban Improvement Housing and Construction Company, Pvt. Ltd., F-32, Connaught Place in favor of Ram Narain Srivastava in respect of plot No. G-39, Green Park. Ex. P-5 is the sale deed executed by said Ram Narain Srivastava in favor of defendants on 11th June, 1973 in respect of said property G-39 Green Park. Portion extracted above of the memorandum; Ex. P-3 clearly proves that the said sale deeds were deposited by the defendants with the plaintiff-bank for creating an equitable mortgage in its favor in respect of property No. G-39, Green Park for the sums to be advanced including interest and not for the purpose of verification of title of defendants to the said plot as alleged. Issue is answered in favor of the plaintiff.

Issue Nos. 1. 3. 5 and 6

10. These issues are interlinked and can be conveniently taken together for discussion.

11. It was contended by Sh. J. P. Sengh appearing for the defendants that Rupees 75,000/- were advanced by the plaintiff-bank for construction of building on plot No. G-39, Green Park and after completion of construction mezzanine and first floor portions thereof were to be taken on lease by the bank for commercial use. Such a use was prohibited and punishable under Sections 14 and 29(2) of Delhi Development Act. 1957, said plot being located in a residential area. Therefore, the alleged agreement contained in letter dated 25th August, 1975 as also the lease deed dated 9th October, 1975 were void u/s 23 of the Contract Act. As a part of the submission, it was further urged that defendants are entitled to set off under Order VIII Rule 6, C.P.C. of the amounts of Rs. 20,000/- spent on construction of a strong room, Rs. 15,000/- incurred for providing certain other facilities exclusively meant for bank purposes in addition to the rent with effect from 1st January 1976 onwards amounting to approximately Rs. 42,000/- out of the advanced amount of Rs. 75,000/-. According to the learned Counsel, though the defense in regard to set-off has not been pleaded specifically in the joint written statement but the same can be gathered from para No. 17 of the plaint which is admitted in the corresponding para of the written statement by the defendants. Said agreement and lease deed being void neither the plaintiff is entitled to recover the suit amount nor the defendants can claim the said amounts by way of set-off. Reliance was placed on the decisions in Malladi Seetharama Sastry Vs. Naganath Kawlwar and Sons, ; Universal Plast Limited Vs. Santosh Kumar Gupta, ; The Andhra Paper Mills Co., Ltd. Vs. Anand Bros., and Cofex Exports Ltd. Vs. Canara Bank, .

12. Before I proceed to examine the merit of said submission, reference to two documents is necessary. Letter dated 25th August, 1975 (at pages 169 to 173 on Part III file) on which both the defendants admitted their signatures in token of having accepted and confirmed the contents thereof and which also bears endorsement under the initial of counsel for defendants dated 4th May, 2000 that it be read in evidence was written by the plaintiff-bank with reference to the

defendants" letters dated 8th June, 1975 and 18th July, 1975 as also the verbal discussion. Contents of this letter which are material, are reproduced below :--

"With reference to your letters dated 8th June, 1975 and 18th July, 1975 and as per your verbal discussions, we agree to take on lease the entire 1st floor measuring app. 1200 sq. feet and its mezzanine floor measuring approximately 575 sq. ft of the building to be constructed by you on your plot No. G-39, Green Park, New Delhi, described in the schedule here below for purposes of opening of the Bank's branch on the following terms and conditions :--

1. That the bank will pay a monthly rent of Rs. 1320/- per month calculated @ Rs. 1.50/- per sq. ft for the first floor and Rs. 1.00 per sq. feet for the Mezzanine floor for the actual carpet area including w.c. and bath room inclusive of all Municipal and other taxes from the date of handing over the vacant possession of the building to us. That the bank shall have nothing to do with the increases/decreases of the taxes.

2. That on handing over of the physical possession of the building and after creating equitable mortgage of the said building in favor of the Bank to secure repayment, the Bank will advance you a loan of Rupees 75,000/- in installments @ 131/2% rate of interest per annum with quarterly rest for completing of the construction and the strong room, subject to the title deeds of your property having been found in order and free of any encumbrance. That a sum of Rs, 2,000/- per month out of the rent due shall be adjusted towards the loan amount after adjustment of the interest free advance rent as per clause No. 3 below, subject to the condition that the entire loan amount with interest is fully adjusted within a period of five years.

3. That the bank will pay to you an amount equivalent to six months" rent calculated at the rate stipulated in clause No. 1 above in advance free of interest on the day of handing over of the possession of the premises and the advance rent will be adjusted by payment of Rs. 2,000/- per month out of the rent payable every month till the whole amount is adjusted.

4. That the possession of the building will be handed over to us latest by 30th December, 1975.

5. That the lease shall be for a initial period of five years with option of the bank to renew it for a further period of five years and thereafter for another period of five years as the bank may desire on the same terms and conditions. You will have no right to raise any objection against the extension of lease as provided herein whatsoever.

6. That the bank shall be at liberty to remove all furniture and fixture that may be installed by the bank from time to time for its use, at the time of vacating the premises.

7. That you will construct at your expense and cost a strong room of RCC construction as per specifications approved by the bank for which the strong

room door will be provided by the bank, which the bank shall have the liberty to remove, at the time of vacating the premises.

8. That you will provide the latrine and the bath room at the place suggested by the bank.

9. That you will provide separate water and Electric connections.

10. That you will carry out all major repairs, if any,

11. That you will provide us a separate stair case with four feet width.

12. That you will provide suitable glass panes, grills and shutters to doors of the portion leased out to the bank.

13. That you will allow the bank the peaceful possession of the premises and the fixtures and fittings.

14. That you will execute the lease deed in the approved form, containing the above conditions and other usual terms and will also execute necessary documents for the loan."

13. Clause 15 of the registered lease deed dated 9th October, 1975 admittedly executed between the parties thereafter which too is material, runs as under :--

"That the landlords have assured the tenant that the property hereby demised can be used for commercial purposes, that if any objection is raised by any authority including Delhi Municipal Corporation during the continuance of the lease, it will be the responsibility of the landlords to meet the said objection and to get the commercial use regularised. It is further agreed that the penalty and/or damages that may be levied by any such authority shall be paid by the landlords and in case the landlords fail to make payment of the same for any reasons whatsoever, the tenant will be at liberty to make payment of the same and recover the said amount from the amount of rent that may fall due."

14. It may be noticed that former limb of submission referred to above, proceeds on the assumption that concerned official(s) of plaintiff-bank since the inception of transaction were aware that the building to be constructed on said plot could be used only for residential purposes and despite that the bank agreed to take on lease said two floors thereof for running its branch there. Needless to say that in Para No. 10 of the written statement on merits also the defendants have alleged that the plaintiff fully knew the purpose for which the building could be used; that there was no false representation by the defendants that building could be used for commercial purposes; that there was no prohibition from DDA in regard to the use of building to be constructed for banking purposes. In support of this plea Pala Ram Gupta (DW-1) deposed that after the building was complete, bank raised objection that as the area falls within residential zone in the Master Plan it will not be in a position to take it on lease. plaintiff had not imposed any condition that defendants should obtain prior permission from DDA for functioning of its branch and many other branches of banks were operating in

the locality at that time. In cross-examination, he admitted that he did not obtain any permission from DDA for the purpose of giving the building on rent to a bank nor did he apply for grant of such a permission. Ram Gopal Gupta (DW-2) deposed that one of the branches of plaintiff-bank is functioning in Greater Kailash in the premises owned by Jagminder Dass. In cross-examination, he admitted that plot No. G-39, Green Park is a residential plot. Obviously, statements of both these defendants do not support the said plea/submission that concerned official(s) of plaintiff-bank knew since the inception of transaction that building to be constructed on said plot could be used only for residential purposes. Scope of Section 65 of Contract Act which has a bearing in this case, came to be considered by the Supreme Court in the decision in *Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd. and Others*, . While interpreting the provisions of said Section it was held :--

"The Section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the Section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and it, Therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the Section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, Therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, Therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply."

15. Since the defendants have failed to establish that concerned official(s) of plaintiff-bank were aware since the inception of transaction that building to be constructed on said plot No. G-39 could be used only for residential purposes, taking note of the ratio in *Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd. and Others*, , the defendants can not legally resist repayment of aforesaid amount of Rs. 75,000/- with interest on the ground of agreement contained in aforesaid letter dated 25th August, 1975 as also lease deed dated 9th October, 1975 being void u/s 23 of the Contract Act. Further, as is manifest from aforementioned Clause 15 of lease deed, the plaintiff-bank had been assured by the defendants that said two floors could be used by it for commercial purposes and they even undertook to compensate the bank if any penalty was levied by any authority

whatsoever including Municipal Corporation of Delhi during the continuance of lease period. Thus the plea taken in said para 10 of the written statement that there was no false representation by the defendants that buildings could be used for commercial purposes deserves to be repelled being dishonest. Suffice it to say that defendants have not led any cogent evidence in support of yet another plea taken in said para of written statement about there being no prohibition from DDA regarding use of building for running a branch by bank. Running of some of the branches of banks in nearby localities cannot be taken as proof that there was no prohibition from DDA in regard to use of the defendants' building which admittedly is situated in a residential area for banking purposes. Universal Plast Limited Vs. Santosh Kumar Gupta, and Malladi Seetharama Sastry Vs. Naganath Kawlwar and Sons, were rendered on the facts having no similarity with the facts of present case and, Therefore, they are of no assistance on the issues on hand.

16. This brings me to aforementioned later limb of submission advanced on behalf of defendants concerning the plea of set-off under Order VIII, Rule 6. Rule 6 of Order VIII, CPC reads as under :--

"(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect of both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

17. Article 1 in Schedule I of Court-fees Act, 1870 provides for written statement pleading a set-off to be levied with court-fee. Since the written statement claiming set-off is to be treated as plaint in a cross-suit under said Sub-rule (2) of Rule 6 of Order VIII, CPC, the plea of set-off has to be raised specifically in written statement and the plaintiff is expected to file written statement thereto. Indisputably, neither the plea of set-off had been raised by the defendants in written statement nor have they paid court-fee thereon. Admissions made in para 17 of the written statement to averments made in para 17 of plaint cannot be treated as a claim for set-off made by the defendants as urged on their behalf. Having reached this conclusion, claim for the amounts allegedly incurred by the defendants on construction of a strong room and providing certain other

facilities exclusively meant for banking purposes as also the rent w.e.f. 1st January, 1976 onwards need not be examined in this case. Decisions in The Andhra Paper Mills Co., Ltd. Vs. Anand Bros., and Cofex Exports Ltd. Vs. Canara Bank, , which deal with the provisions of Rule 6, Order VIII, CPC, have no applicability to the facts of this case.

18. Receipt of amount of Rs. 75,000/-from plaintiff-bank is not disputed by the defendants. Defendants, however, claim that this amount was paid as advance and not to carry any interest while according to plaintiff it was given by way of loan. It is in the deposition of Gyan Sunder Sareen, PW-2 that defendants approached the plaintiff-bank for grant of loan of Rs. 75,000/- for construction of building and this amount was paid to them from time to time on their executing amongst others pro-notes Ex.P-7 to P-13. In these pro-notes accepting Ex.P-7, P-9 and P-13 rate of interest payable is noted as 13-1/2% p.a. with quarterly rest. These pro-notes are to be read in conjunction with aforesaid letter dated 25th August, 1975 which notices that loan of Rupees 75,000/- is to carry interest @ 13-1/2% p.a. with quarterly rest. In the face of this evidence said plea taken by the defendants which is supported in their statement deserves to be rejected being false. In the statement of account Ex.P-6 suit amount including interest up to 25th June, 1978 is shown to be due against the defendants on the date of institution of suit. It being a commercial transaction the plaintiff-bank is entitled to pendente lite and future interest at the agreed rate of 13-1/2% p.a. on the suit amount. Suit as framed does lie against the defendants. Issues are answered accordingly.

ISSUE NO. 7 (RELIEF)

19. In view of my findings on aforesaid issues, a preliminary decree for Rs. 1,06,705.06 with costs and interest pendente lite and future @ 13-1/2% p.a. on the said amount, is passed against the defendants. Defendants are, however, allowed six months time to pay the decretal amount failing which the plaintiff-bank will be entitled to move the Court for final decree for sale of said mortgaged property No. G-39, Green Park, New Delhi. In case the sale proceeds of mortgaged property are found to be insufficient to meet the decretal amount, the defendants will be personally liable to pay the balance amount.

20. Of course, the defendants will be entitled to adjustment against decretal amount of Rs. 1,06,705.06 deposited by them pursuant to the order dated 23rd September, 1999.