

(2013) 09 MAD CK 0221

In the Madras High Court

Case No : S.A. No. 1261 of 2012 and M.P. No. 1 of 2012

The Purasawakkam Permanent Benefit Fund Ltd.

APPELLANT

Vs

P. Shanmugam, S. Kesavan, S. Gokulakrishnan and Sri
Murugan Auctioneers Company (P) Ltd.

RESPONDENT

Date of Decision : 17-09-2013

Acts Referred:

Citation : (2013) 5 CTC 856 : (2013) 5 LW 268 : (2014) 1 MLJ 325 : (2014) 1 RCR(Civil) 526

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : G. Arul Prasad, for the Respondent

Final Decision : Allowed

Judgement

P.R. Shivakumar, J

1. The first defendant in the Original Suit is the appellant in the second appeal. Plaintiffs 1 to 3 in the original suit are the respondents in the second appeal. The appellant Purasawakkam Permanent Benefit Fund Ltd. is the mortgagor, with whom the suit property was mortgaged by the respondents 1 to 3/plaintiffs 1 to 3. Since mortgage debt was not discharged fully, the appellant/first defendant took steps for bringing the property by public auction engaging the 4th respondent/second defendant as auctioneer. Pursuant to the same, the respondents 1 to 3 herein/plaintiffs filed the suit O.S. No. 2182/2003 for redemption of mortgage and for a permanent injunction restraining the appellant and the 4th respondent/second defendant from bringing the mortgaged property for auction. The suit was resisted by the defendants based on the averments in the written statement filed by the appellant/first defendant, which was adopted by the 4th respondent/second defendant. At the conclusion of trial, the learned trial judge (XVIII Assistant Judge, City Civil Court, Chennai) dismissed the suit with cost by judgment and decree dated 09.03.2005. As against the same, the respondents 1 to 3 herein/plaintiffs 1 to 3 filed an appeal in A.S. No. 334/2005

on the file of the City Civil Court. The same was heard and disposed of by the learned Additional District and Sessions Judge (FTC No. 4), Chennai by a judgment and decree dated 18.12.2008. The learned appellate judge allowed the appeal, set aside the decree dated 09.03.2005 passed by the trial judge in O.S. No. 2182/2003 and decreed the suit for redemption of mortgage by passing a preliminary decree for redemption directing the respondents 1 to 3 herein/plaintiffs to pay Rs. 4,00,000/- towards principal and Rs. 1,38,844/- towards interest with proportionate cost and further interest on the above said principal amount from the date of decree of the lower appellate court (18.12.2008) till realisation at the rate of 6% per annum. It was also provided therein that in case of default of payment of the said amount within six months from the date of the impugned decree passed by the lower appellate court, the property would be directed to be sold. As against the same, the appellant/first defendant has filed the second appeal.

2. For the sake of convenience, the parties are referred to in accordance with their ranks in the suit and at appropriate places their ranks in the second appeal will also be indicated.

3. Admittedly the first plaintiff Shanmugam availed a loan of Rs. 4,00,000/- from the Purasawakkam Permanent Benefit Fund Ltd./first defendant, creating a mortgage in respect of the property described in the plaint schedule, namely the land measuring 3,000 sq. ft. comprised in T.S. No. 71 and the building thereon bearing door No. 55, Vinayagar Koil Street, Venkatapuram, Velachery Road, Saidapet. The mortgage was created by all the three plaintiffs on 06.12.1995. The loan amount availed by mortgaging the suit property, was agreed to be repaid in 92 equated monthly instalments of Rs. 8,800/-. It was averred in the plaint that the first plaintiff and his wife had paid a sum of Rs. 2,30,000/- on different dates towards the mortgage debt; that through one Doss employed in the first defendant Fund, the first plaintiff's wife had paid over Rs. 3,60,000/- besides a sum of Rs. 60,000/- paid to the said Doss and another worker of the first defendant by name Chandrasekaran towards official charges and commission; that the balance amount payable as on the date of the plaint was only Rs. 1,50,000/-; that the first defendant issued a notice dated 03.03.2003 informing the plaintiffs that the balance amount as on 31.03.2003 was Rs. 11,21,311.69P without giving copies of the accounts statement; that the plaintiffs were not agreeable for the amount demanded in the notice; that taking advantage of the helpless situation, which led to the default in redemption of the mortgage, the first defendant was taking steps to bring the property which was worth more than Rs. 25,00,000/- for sale through auctioneer, namely the second defendant, without submitting the proper account, and that in view of the same, the plaintiffs had to file the suit for redemption of the mortgage and for injunction.

4. The suit was resisted by the appellant and the 4th respondent herein/defendants on the basis of the averments made by the appellant/first defendant

in its written statement, which are in brief, as follows:

A sum of Rs. 4,00,000/- was borrowed from the first defendant by executing a mortgage deed mortgaging the property described in the plaint schedule on 28.11.1995. The said amount of Rs. 4,00,000/- was availed by the plaintiffs for the purpose of discharging a pro-note debt amounting to Rs. 1,40,000/- payable to one Nagappa Mudaliar. As instructed by the plaintiffs, a cheque for Rs. 1,40,000/- was issued in favour of Nagappa Mudaliar out of the loan amount. Further deducting a sum of Rs. 8,800/- towards the first instalment and Rs. 250/- towards process charges, balance amount of Rs. 2,50,950/- was paid by issuing a cheque dated 06.12.1995 bearing No. 324284 drawn on Canara Bank, Chennai. Thus actually a sum of Rs. 4,00,000/- was paid as loan. The plaint allegation that Doss and Chandrasekaran, who were employed with the first defendant had taken a sum of Rs. 60,000/- towards official charges are false. Those two persons were not employees of the first defendant and they had nothing to do with the suit mortgage loan. The claim of the plaintiffs that the wife of the first plaintiff paid Rs. 3,60,000/- through Doss is also a cock and bull story. The agreed interest was 21% per annum and on that basis alone, the monthly instalment was fixed at Rs. 8,800/-. Though the mortgage debt was not discharged and the mortgagors committed default in payment of the monthly instalments, the plaintiffs filed an earlier suit O.S. No. 4699/1999 on the file of XIV Assistant Judge, City Civil Court, Chennai for a permanent injunction restraining the first defendant from bringing the property for sale. In the said suit the plaintiffs filed an application in I.A. No. 11934/1999 and in the said application, the learned judge directed the plaintiffs to pay the entire defaulted instalments on or before 15.11.1999. Since the said direction was not complied with, the said interlocutory application was finally dismissed for default on 10.07.2002 and thereafter the suit was also dismissed for default on 10.07.2002. Without taking any steps to restore the said suit which was dismissed for default, as an abuse of process of court, the plaintiffs have come forward with the suit without furnishing any statement of account and without producing the pass-book furnished to the plaintiffs at the time of disbursing the loan. Hence the suit is liable to be dismissed.

5. The defendants contended further that the plaintiffs had paid a total sum of Rs. 3,04,600/-, out of which Rs. 75,000/- was the amount paid by the plaintiffs on 29.04.2003 as per the orders passed by the court in I.A. No. 8377/2003; that out of the said amount, a sum of Rs. 2,35,399.40 was appropriated towards interest on unpaid instalments and a sum of Rs. 69,200/- was appropriated towards arrears of instalments and that as on 31.05.2003, a total sum of Rs. 10,77,330.65 was due towards interest and arrears of instalments. It was also contended that unless the plaintiffs would pay the said sum together with interest from 31.05.2003 they were not entitled for redemption of the mortgage.

6. Based on the above said averments, the learned trial judge framed three issues, which are as follows:

- 1) Whether the plaintiffs are entitled to redeem the mortgaged property?
- 2) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for?
- 3) To what other reliefs?

7. In the trial, one witness was examined as P.W. 1 and two documents were marked as Exs. A1 and A2 on the side of the plaintiffs. One witness was examined as DW. 1 and five documents were marked as Exs. B1 to B5 on the side of the defendants.

8. The learned trial judge disbelieved the case of the plaintiffs regarding the alleged payments made by the wife of the first plaintiff through one Doss and accepted the contentions of the defendants. In view of the finding that the plaintiffs committed default in payment of instalments and they had not paid the amount due under the mortgage deed and hence they were not entitled to the relief of redemption. Since a right had been conferred in the first defendant under mortgage deed for bringing the property for sale u/s 69 of the Transfer of Property Act, the learned trial judge held that the plaintiff was not entitled to the relief of permanent injunction also. Accordingly, the suit was dismissed with cost by the trial court. On appeal, the learned lower appellate judge held that the first defendant was entitled to a simple interest of 15% on the principal amount of Rs. 4,00,000/- alone and thus held that a total sum of Rs. 5,38,844/- as on 18.12.2008, which amount should be paid along with a subsequent interest on the principal sum of Rs. 4,00,000/- from 18.12.2008 till the date of realisation at the rate of 6% per annum, for the purpose of redemption of the mortgaged property. Thus the learned lower appellate judge has reversed the decree of the trial court declining the relief of redemption of mortgage and granting the relief of redemption on condition that the above said amount should be paid within six months from the date of decree of the lower appellate court with a further direction that on default, the first defendant might apply to the court for a final decree for sale of the property. The said decree passed by the lower appellate court is challenged in the second appeal on various grounds set out in the Memorandum of Second Appeal.

9. The arguments advanced on both sides were heard. The materials available on record were also perused.

10. The plaintiffs are the mortgagors and the first defendant is the mortgagee. The amount borrowed under the mortgage is Rs. 4,00,000/-. Though the plaintiffs might have taken conflicting pleas in an attempt to show that the entire loan amount was not paid to them, the fact remains that it is an admitted fact that a sum of Rs. 4,00,000/- was lent by the first defendant and the mortgage deed was executed for the said amount. Out of Rs. 4,00,000/-, Rs. 1,40,000/- was paid to Nagappa Mudaliar for the discharge of a pro-note debt by issuing a cheque in favour of the said Nagappa Mudaliar on the instructions of the plaintiff. Out of the balance amount of Rs. 2,60,000/-, a sum of Rs. 250/- was deducted

towards process fee and a sum of Rs. 8,800/- was deducted towards the first instalment. After deducting the said amounts, the balance amount of Rs. 2,50,950/- was paid by issuing a cheque dated 06.12.1995 bearing cheque No. 324284 drawn on Canara Bank, Chennai in favour of the first plaintiff. Thus the first defendant has accounted for payment of the entire amount of Rs. 4,00,000/- to the plaintiffs as loan.

11. The said facts have been admitted by the plaintiffs. They contended that a sum of Rs. 60,000/- was taken by two persons by names Doss and Chandrasekaran, who were allegedly working with the first defendant, towards official charges and commission and that a sum of Rs. 3,60,000/- was paid by the wife of the first plaintiff towards the principal and interest and that only a balance amount of Rs. 1,50,000/- was due. In this regard, the first defendant has stated in clear terms that a pass book had been given to the plaintiffs containing the entries made regarding the payments and the plaintiffs have failed to produce the same. The plaintiffs also have not produced any statement of accounts. On the other hand, the plaintiffs chose to produce the following two documents alone: 1) The statement of accounts sent by the first defendant to the plaintiffs on 03.03.2003 and 2) the auction sale notice dated 24.08.2003 sent by the second defendant to the plaintiffs. The mortgage deed and the statement of accounts furnished by the first defendant have been produced as Exs. B2 to B4. Both the courts below have concurrently held that the admitted amount borrowed by the plaintiffs was Rs. 4,00,000/- and the same was agreed to be repaid in 91 equated monthly instalments of Rs. 8,800/- and 92nd instalment being Rs. 4,207/-. Both the courts below have concurrently found that the alleged payment of Rs. 60,000/- as commission and official charges to Doss and Chandrasekaran was not true and that the plaintiffs failed to prove that either Doss or Chandrasekaran was an employee of the first defendant and they were authorized to receive the amount on behalf of the first defendant. The courts below have also given a concurrent finding negating the contention of the plaintiffs that the first plaintiff's wife paid a sum of Rs. 3,60,000/- through the above said person Doss.

12. On appreciation of evidence, the trial court and on re-appreciation of evidence, the lower appellate court, accepted the particulars furnished by the first defendant regarding the details of payment made by the plaintiffs towards the discharge of the mortgage debt. The first defendant has admitted payment of a sum of Rs. 3,04,600/- as on 31.05.2003. The said amount consisted of a sum of Rs. 2,35,399.40 paid by the plaintiffs to the first defendant and a sum of Rs. 75,000/- paid by the plaintiffs on 29.04.2003 as per the orders of the trial court made in I.A. No. 8377/2003. In this regard, the learned counsel for the plaintiffs/respondents 1 to 3 in the appeal have also filed a statement showing the amount paid on various dates. As per the said statement, the following payments had been made.

S. No.

DATE

AMOUNT

1.

06.12.1995

Rs. 8,800/-

2.

18.01.1996

Rs. 8,800/-

3.

27.02.1996

Rs. 8,800/-

4.

30.03.1996

Rs. 8,800/-

5.

31.07.1996

Rs. 36,000/-

6.

17.10.1998

Rs. 17,600/-

7.

24.11.1998

Rs. 8,800/-

8.

24.06.1999

Rs. 20,000/-

9.

07.03.2000

Rs. 40,000/-

10

22.06.2000

Rs. 10,000/-

11

30.12.2000

Rs. 10,000/-

12.

18.01.2001

Rs. 12,000/-

13.

02.07.2002

Rs. 20,000/-

14.

23.12.2002

Rs. 20,000/-

15.

29.04.2003

Rs. 75,000/-

Total

Rs. 3,04,600/-

13. The learned counsel for the appellant has also filed a statement of accounts showing the instalments payable on various dates, the amounts paid on various dates and the interest calculated for the unpaid instalment amounts alone from the date of default at the rate of 21% per annum. The said calculation is in accordance with the terms of the contract embodied in the mortgage deed, a copy of which has been marked as Ex. B2. A comparative study of the statements furnished on both sides in this court will show that all the payments made, including the payment of Rs. 75,000/- paid on 29.04.2003 as per the orders of the court, have been noted in the statement of accounts produced by the counsel for the plaintiffs/respondents 1 to 3. It is obvious that only in July 1996, there was an excess payment of Rs. 800/-, which was also taken into account in reducing the interest for next instalment. Thereafter, there was no payment till October 1998. By the end of October 1998, a sum of Rs. 2,36,800/- was due towards previous unpaid instalments and Rs. 3,990/- was due towards interest on unpaid instalments alone. Only a sum of Rs. 17,600/- was paid, which was much below the figure representing the arrears of instalments and hence

from the said date for calculation of interest on the arrears of instalments, the balance amount of Rs. 2,19,200/- was taken as the principal. Similar credits were made as and when payments were made and it is obvious that small amounts like 20,000/-, 40,000/-, 10,000/-, 12,000/- were made and at last Rs. 75,000/- was paid as per the orders of the court in April 2003. All the payments were properly given credit to and the interest was also calculated only on the balance amount of defaulted instalments as on 31.07.2003. The total payments made by the plaintiffs accounted for Rs. 3,04,600/-. The total balance towards the arrears of instalments was Rs. 5,00,407/-. The total interest on the unpaid instalments calculated at the rate of 21% per annum simple interest amounts to Rs. 4,36,476/-. A total sum of Rs. 9,36,883/- was due as on 31.07.2003. The learned counsel appearing for the respondents 1 to 3 also conceded that the amount shown to be the balance as on 31.07.2003 in the statement of accounts is correct. However, in the calculation memo submitted by the learned counsel for the respondents/plaintiffs, a sum of Rs. 6/- was shown as interest on unpaid instalments in the month of July 1996, whereas there was an excess payment of Rs. 800/- on the previous month. Hence a deduction of Rs. 14/- from interest has been shown in the statement of accounts of the appellants. In fact in the statement of accounts submitted by the learned counsel for the plaintiffs/respondents 1 to 3, a total sum of Rs. 9,99,836/- has been shown as the amount due by the end of July 2003. But in the statement of accounts produced by the learned counsel for the first defendant/appellant, the amount shown to be due by the end of July 2003 is a little less than the said amount. As per the statement of account of the appellant/first defendant, Rs. 9,36,883/- which consists of Rs. 5,00,047/- towards defaulted instalments (to be taken as the principal) and Rs. 4,36,476/- towards interest on the unpaid instalments was due. Admittedly the agreed rate of interest as per the mortgage deed is 21% per annum. Since the amount was agreed to be repaid in 92 equated monthly instalments, the interest for the said 92 months was calculated according to the formula and the amount to be paid as monthly instalment was fixed. As such, the normal and usual procedure of prescribing a rate of interest to be levied on the unpaid instalments was prescribed in the mortgage deed and both the parties to the transaction agreed for such an interest. When the parties have fixed the contractual interest, there shall not be a justification for the court to interfere with the same and reduce. Such an interest should be either proved to be more than any ceiling prescribed by the statute or statutory regulations or it should have been proved to be usurious or exorbitant shaking the conscience of the court, to justify interference.

14. In this case, a simple interest at the rate of 21% p.a. alone was prescribed and the plaintiffs agreed for making payment of interest on the unpaid instalments amount at the said rate. It is not the case of the plaintiffs that the first defendant was not entitled to levy interest at the rate of 21% as per the agreed clause. Nowhere in the plaint, the plaintiff had claimed that they were entitled to a reduction of interest, which shall be less than the contractual rate,

namely 21%. On the other hand, the plaintiffs had claimed that they had paid more amount through one Doss and one Chandrasekaran and that the said amount should have been deducted towards the loan amount. Clear and categorical plea had been taken by the first defendant that the said persons Doss and Chandrasekaran had nothing to do with the first defendant Fund and they were not employees of the first defendant Fund. When such a clear plea of defence was taken by defendants, plaintiffs ought to have either examined the said persons or produced documents evidencing such payment which was accepted by those persons on behalf of the first defendant. They should have also proved that those persons were authorised to receive the amount on behalf of the first defendant. Nothing was done by the plaintiffs. Hence the courts below have rightly held that the alleged payments made through those persons were not proved.

15. The plaintiffs had also taken a stand that all the amounts paid by them were appropriated towards interest and hence the principal amount remained intact and that the said method adopted by the first defendant was not correct. In this regard, the procedure adopted by the first defendant in appropriating the payments made by the plaintiff were perfectly in accordance with the procedure established by law. In case of payment made by the debtor, the following rules apply regarding appropriation of the same by the creditor. when payment is made by a debtor owing several distinct debts to the same person either with express intimation or under circumstances implying that that the payment is to be applied towards the discharge of a particular debt, if such payment is accepted, it should be applied according to such indication. Suppose a person owes two debts and he makes payment with specific indication that it must be appropriated towards the first debt or the second debt, in case of acceptance of the payment, it must be applied in discharge of the first debt or the second debt, as the case may be, in accordance with such indication made by the debtor. There may be circumstances implying that payment was made towards the discharge of one of such debts alone. Suppose the creditor issues a notice on one of the debts alone and payment is made with a reply in response to the said notice, it can be taken as a circumstance implying that the payment was made with implied indication to apply the same in discharge of that particular debt. Similarly, when a demand is made in respect of a particular debt alone and immediately the payment is made, we can also construe that there is an implied intimation for application of the said money towards such loan alone. In case the debtor is not prepared to accept the same for the discharge of the particular debt alone, he has to refuse to accept such payment for appropriation towards the particular debt alone. This has been stated so in section 59 of the Indian Contract Act.

16. Section 60 of the Indian Contract Act deals with a situation wherein the debtor has omitted to give express intimation regarding the debt in discharge of which the amount paid is to be applied and in the absence of any other circumstances indicating the debt to which the payment is to be applied. Then

the amount, if accepted, shall be entirely at the discretion of the creditor. The creditor can appropriate the same in discharge of any lawful debt actually due from the debtor irrespective of the fact whether the recovery of the same is or is not barred by the law of limitation relating to the filing of suit. Section 61 of the Indian Contract Act deals with a situation where the debtor does not indicate the debt in discharge of which the amount is to be applied and the creditor, who received the amount does not make appropriation of the same towards any particular debt. Then the amount thus paid and received shall be applied in discharge of debts in the order of time that had been incurred irrespective of the fact whether they are or not barred by the law of limitation relating to the filing of suit and if the debts are of equal standing, the payment shall be applied in discharge of each, but proportionately. The above said rules indicated in sections 59 to 61 of the Indian Contract Act do not specifically deal with the priority of appropriation in respect of principal and interest. But by analogy the following principles also emerge.

(i) If the debtor makes payment with specific request for appropriation towards the principal even though interest remained unpaid, the creditor, in case of acceptance of the payment, should appropriate it towards the principal and he cannot appropriate it towards the interest;

(ii) But the creditor will be justified in refusing to accept the payment towards principal without the liability towards interest being discharged at the first instance;

(iii) In case the amount is paid without indicating towards which part of the loan, whether principal or interest, the payment is to be appropriated, then the creditor shall have the discretion of applying the same first towards interest and then, if there is any surplus, towards the principal.

17. The Hon''ble Supreme Court in *Meghraj and Others Vs. Mst. Bayabai and Others*, came across a situation wherein, the mortgagors deposited money into court without indicating that the said deposit was made only towards the principal and not towards the interest. The Hon''ble Supreme Court held that unless the mortgagees were informed that the mortgagors had deposited the amount only towards the principal and not towards the interest and the mortgagees agreed unless the mortgagees were informed that the mortgagors had deposited only towards principal and not towards interest and the mortgagees had also agreed to withdraw the money from the court accepting the conditional deposit that the same should be appropriated towards the principal, the amount deposited in court should first be applied towards the satisfaction of the interest and cost and the remainder shall be applied thereafter towards the principal. The said principle was not a new principle of law enunciated in the judgment, but the same was the one holding the field for several years. Needless to say that the said principle has been followed and reiterated in a number of subsequent decisions and it shall be unnecessary to cite all those decisions.

18. In this case, though the first defendant is entitled to appropriate the amounts first towards interest on the unpaid equated monthly instalments, all the payments made by the plaintiffs were appropriated only towards the unpaid equated monthly instalments and the simple interest calculated on the unpaid monthly instalments have been left to be adjusted at the end. In fact such a procedure is beneficial to the plaintiffs. Had the first defendant chosen to appropriate the payments towards interest at the first instance and appropriate the balance alone towards the defaulted instalment, then the amount due from the plaintiffs would have been even more than what is claimed in the statement of the first defendant. Now, the first defendant/appellant has come with a fair claim that the amount due from the plaintiffs by the end of July 2003 was Rs. 9,36,883/-. The plaintiffs are not prepared to pay even this amount. They had been taking time in the guise of amicably settling the matter. At last it was informed by the learned counsel for the respondents/plaintiffs that the court could pronounce a judgment as it was not possible for the plaintiffs to settle. The plaintiffs had not claimed that they are entitled to a reduction of rate of interest from the one stipulated in the mortgage deed. In spite of it, the learned lower appellate judge has committed an error in law in simply reducing the rate of interest from 21% to 15%. The learned lower appellate judge has also failed to consider the fact that the agreement between the mortgagors and the mortgagee was that the loan amount would be paid in equated monthly instalments and that in case of default in payment of monthly instalments, the unpaid monthly instalments shall carry interest at the rate of 21% per annum. It is the normal contractual clause used to stipulate interest on the unpaid instalment money at a particular rate. Totally forgetting about the nature of the transaction, the learned lower appellate judge has chosen to hold that the first defendant was entitled to recover simple interest only @ 15%. The said procedure adopted by the learned lower appellate judge is totally erroneous and against law and the same is liable to be interfered with. Accordingly, the Substantial Questions of Law 1 and 2 are answered in favour of the appellant/first defendant.

19. Admittedly there is a clause in the mortgage deed, by which the parties have agreed that the mortgagee shall have a right to sell the mortgaged property by public auction without the intervention of court for recovery of the mortgage debt u/s 69 of the Transfer of Property Act. The right u/s 69 of the Transfer of Property Act has been conferred on the mortgagee by the parties to the mortgage deed. When the mortgagee, namely the first defendant, exercised such a right on the default committed by the plaintiffs (mortgagors), they initially filed a suit O.S. No. 4699/1999 for a simple injunction, protracted the case without even complying with the direction for passing an interim order and at last left the said suit to be dismissed for default. Only thereafter they have chosen to file the present suit. Though the present suit has been filed for redemption of mortgage and also for an injunction against the defendants disabling the first defendant to exercise the right of sale conferred on it, the learned lower appellate judge has

committed an error in decreeing the suit for injunction also totally taking away the right of the first defendant to exercise the right of section 69 sale even in case of default in payment of the amount found to be due from the plaintiffs. Substantial Questions of Law 1 and 2 are answered in favour of the appellant holding that the lower appellate court committed an error in law reducing the contractual rate of interest from 21% to 15% per annum (simple interest) and by calculating simple interest on the principal amount without taking into account the contract between the parties that the amount was agreed to be repaid in equated monthly instalments and the unpaid monthly instalments would carry interest at the above said rate. During the course of discussion on the substantial questions of law, we have seen that the appellant/first defendant could have submitted a statement showing appropriation of the payment first towards the interest on the unpaid instalment amount, next towards unpaid instalments and then towards the future instalment and that had such a procedure been adopted by the first defendant/appellant, the amount due would have been even more than what is reflected in the statement of accounts produced on behalf of the first defendant/appellant on 29.01.2013. It has also been pointed out that the amount shown in the calculation memo submitted by the counsel for the plaintiffs exceeds by Rs. 62,953/-, in the amount shown in the statement of accounts produced by the counsel for the first defendant/appellant on 29.01.2013. We have also seen that the calculation shown by the first defendant/appellant shows only a lesser amount than what shall be actually due to the first defendant. Hence this court comes to the conclusion that the decree passed by the lower appellate court fixing the amount due under the mortgage for redemption shall be modified from 5,38,844/- to Rs. 9,36,883/-. It is also pointed that the total unpaid instalments shall be taken as the principal for the purpose of calculation of interest. Hence the decree deserves to be modified holding that a sum of Rs. 5,00,407/- was due towards principal and a sum of Rs. 4,36,476/- was due towards interest as on 31.07.2003. The plaintiffs shall also be liable to pay interest at the rate of 21% on Rs. 5,00,407/- from 01.08.2003 till the date fixed in the preliminary decree for payment of the amount and thereafter at the rate of 6% per annum till realisation or actual payment. Though the plaintiffs have not paid or deposited even the amount decreed by the lower appellate court, since this court has modified the decree declaring a higher amount as the amount due, the plaintiffs/respondents 1 to 3 shall be given three months time from today to make payment of the decretal amount and in case of default, the first defendant/appellant may apply for a final decree for the sale of the mortgaged property for the realisation of the amount due under the mortgage declared due under mortgage in this decree without prejudice to its right of sale u/s 69 of the Transfer of Property Act.

In the result, the second appeal is allowed with cost. The judgment and decree of the learned Additional District and Sessions Judge, Fast Track Court No. IV, Chennai dated 18.12.2008 made in A.S. No. 334 of 2005 are set aside. The decree passed by the lower appellate court fixing the amount due under the

mortgage for redemption is modified from 5,38,844/- to Rs. 9,36,883/-, which includes Rs. 5,00,407/- due towards principal and a sum of Rs. 4,36,476/- due towards interest as on 31.07.2003. The plaintiffs shall also be liable to pay interest at the rate of 21% on Rs. 5,00,407/- (principal sum) from 01.08.2003 till the date fixed in the preliminary decree for payment of the amount and thereafter at the rate of 6% per annum till realisation or actual payments. The plaintiffs/respondents 1 to 3 shall be given three months time from today to make payment of the decretal amount. The first defendant shall not bring the property for sale u/s 69 of the Transfer of Property Act till the time granted for payment expires. In case of payment or deposit of the amount decreed together with interest and cost within the stipulated time, the mortgage shall stand discharged and necessary discharge receipt shall be issued. In case of default, the first defendant/appellant may apply for a final decree for the sale of the mortgaged property for the realisation of the amount due under the mortgage declared in this decree, without prejudice to its right of sale u/s 69 of the Transfer of Property Act. The appellant shall also be entitled to costs throughout. Consequently, the connected miscellaneous petition is closed.