Madappillil Brothers Vs Ullattil Agencies

Court: High Court Of Kerala

Date of Decision: July 13, 2006

Acts Referred: Evidence Act, 1872 â€" Section 101, 114
Limitation Act, 1963 â€" Article 1, 2, 3, 4, 5
Money Lenders Act, 1958 â€" Section 7, 7(3), 9
Money Lenders Rules â€" Rule 11, 7, 8
Negotiable Instruments Act, 1881 (NI) â€" Section 118
Partnership Act, 1932 â€" Section 22
Registration Act, 1908 â€" Section 17

Citation: (2007) 1 CivCC 760 : (2006) 3 ILR (Ker) 404 : (2006) 4 KLT 196 : (2007) 5 RCR(Civil) 201

Hon'ble Judges: R. Bhaskaran, J; K.T. Sankaran, J

Bench: Division Bench

Advocate: Tomy Sebastian, K.P. Thankachan and C.C. Padmakumar, for the Appellant; R. Ramdas and T. Krishnanunni, for the Respondent

Final Decision: Dismissed

Judgement

R. Bhaskaran, J.
Defendants in O.S. No. 961 of 1994 on the file of the Principal Sub Court, Kottayam, are the appellants in the appeal.

The suit was for realisation of money allegedly due from the defendants to the plaintiff. The plaintiff is a partnership firm engaged in money-lending

business. The amounts are claimed from different defendants on different accounts and a single suit is filed in respect of all the accounts.

Defendants 1 to 3 are partnership firms of which defendants 4 to 6 are partners. 7th defendant is also a partner of the 3rd defendant firm and he is

not a partner of other partnership firms. The trial court has granted a decree almost in terms of the prayer in the plaint.

2. The case of the plaintiff is as follows. At the request of defendants 1, 4, 5 and 6 for credit facility to carry on their business under the name and

style ""M/s Madappillil Brothers"", the plaintiff sanctioned a loan of Rs. 3,00,000 on 26-5-1986, another loan of Rs. 1,00,000 on 21-11-1986 and

yet another loan of Rs. 1,08,333.33 on 9-5-1987 in the account of the 1st defendant. Defendants 1,4, 5 and 6 executed demand promissory note

for Rs. 3,00,000 on 26-5-1986, another promissory note for Rs. 1,00,000 on 21-11-1986 agreeing to repay the amounts with interest thereon at

the rate of 24.5% per annum with quarterly rest and another promissory note for Rs. 1,08,333.33 on 9-5-1987 agreeing to repay the amount with

interest thereon at the rate of 18.5% per annum with quarterly rest. At the request of defendants 2, 4, 5 and 6 for credit facility to carry on their

business under the name and style ""M/s. Madappillil Agencies"", the plaintiff sanctioned a loan of Rs. 1,50,000 on 26-6-1986. Defendants 2, 4, 5

and 6 executed demand promissory note for Rs. 1,50,000 on 26-6-1986 agreeing to repay the amount with interest thereon at the rate of 24.5%

per annum with quarterly rest. At the request of defendants 4, 5 and 6 for credit facility to carry on their business in their individual capacities apart

from their status as partners of defendants 1 to 3 firms, the plaintiff sanctioned a loan of Rs. 2,00,000 on 10-11-1986 and on their further request

sanctioned a further loan of Rs. 2,00,000 on 21-11-1986. To secure the aforesaid two loans, defendants 4, 5 and 6 executed a demand

promissory note for Rs. 2,00,000 on 10-11-1986 and another demand promissory note on 21-11-1986 in favour of the plaintiff agreeing to repay

the amount with interest thereon at the rate of 24.5% per annum with quarterly rest. At the request of defendants 3, 4, 5, 6 and 7 for credit facility

to carry on their business under the name and style ""M/s. L.P.R. Brothers"", the plaintiff sanctioned a loan of Rs. 1,50,000 on 26-6-1986 in the

account of the 3rd defendant. To secure the above said loan, defendants 3, 4, 5 and 6 executed a demand promissory note for Rs. 1,50,000 on

26-6-1986 in favour of the plaintiff agreeing to repay the amount with interest thereon at the rate of 24.5% per annum with quarterly rest. As

collateral security for the above said various loans availed by defendants 4, 5 and 6, they deposited their title deeds relating to their property

described in the schedule to the plaint at the office of the plaintiff situated in Kottayam on 11-5-1987 with intent to create equitable mortgage by

way of security for the amounts due to the plaintiff from the defendants and executed a letter in favour of the plaintiff acknowledging the deposit of

title deeds. After availing the loans, the defendants made payments which have been credited in their accounts. Since substantial amounts were

due, a lawyer notice was sent on 26-9-1994 demanding the entire balance amount. The transactions between the parties are commercial

transactions and the plaintiff is entitled to collect interest at the rate of 24.5% per annum with quarterly rest from the date of suit till realisation

except for a loan of Rs. 1,08,333.33 for which 18.5% was the interest agreed upon. It is also stated in paragraph 17 of the plaint that as per the

ledger maintained by the plaintiff in the name of the defendants, the balance amount outstanding due from the defendants under different accounts

as on 7-12-1994 were as follows:

(a) Under D.P.N. Loan of Rs. 3,00,000 dated 26-5-1986

in the account of M/s Madappillil Brothers - Rs. 6,12,376.14

(b) Under D.P.N. Loan of Rs. 1,00,000 dated 21-11-86 in the

account of M/s Madappillil Brothers - Rs. 5,67,734.32

(c) Under D.P.N. Loan of Rs. l,08,333,33 dated 9-5-1987

in the account of M/s Madappillil Brothers - Rs. 4,08,232.23

(d) Under D.P.N. Loan of Rs. 1,50,000 dated 26-6-1986

in the account of M/s Madappillil Brothers - Rs. 8,31,840.85

(e) Under D.P.N. Loan of Rs. 2,00,000 dated 10-11-1986

in the account of Mr. Lakshmana Hegden and 2 others - Rs. 5,83,540.83

(f) Under D.P.N. Loan of Rs. 2,00,000 dated 21-11-1986

in the account of Mr. Lakshmana Hegden and 2 others - Rs. 11,35,468.65

(g) Under D.P.N. Loan of Rs. 1,50,000 dated 26-6-1986

in the account of M/s L. P. R. Brothers - Rs. 8,31,840.85

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TOTAL - Rs. 49,71,033.87

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3. M/s. Madappillil Brothers is the 1st defendant and M/s Madappillil Agencies is the 2nd defendant and M/s L.P.R. Brothers, Ettumanoor is the

third defendant. The cause of action for the suit is said to have arisen on the dates of the execution of the demand promissory notes on 26-5-1986,

21-11-1986, 9-5-1987, 26-6-1986, 10-11-1986 and on 26-9-1994 which is the date of the lawyer notice and subsequently. The plaintiff prayed

for a decree against defendants 1 to 6 for a sum of Rs. 49,71,033.87 as per statement of accounts A, B, D, E, F and evaluation given in the plaint

together with interest at the rate of 24.5% per annum compounded quarterly from the date of suit till realisation. The plaintiff also prayed for a

decree against defendants 1 to 7 to pay to the plaintiff an amount of Rs. 4,08,232.23 as per statement of C valuation together with interest thereon

at the rate of 18.5% per annum compounded quarterly from the date of suit till realisation. The plaintiff further prayed for a decree to recover the

amount by sale of the plaint schedule property and if it is not sufficient to realise the balance amount due from the defendants personally and from

their assets. However, C valuation shown in the statement of accounts will show that the amounts were claimed against defendants 1 to 6 only and

not against the 7th defendant. Defendants 4 to 7 are the partners of the 3rd defendant firm.

4. A common written statement was filed by all the defendants. The principal contentions raised in the written statement are as follows. The plaintiff

is not a registered firm and the plaintiff has no license under the Money Lenders Act. The suit is barred by limitation. The plaintiff has not

sanctioned or defendants 1, 4, 5 and 6 have not availed any loan of Rs. 3,00,000 on 26-5-1986 as alleged in the plaint. The alleged loan of Rs.

1,08,333.33 on 9-5-1987 to the 1st defendant is also false and is denied. The loan of Rs. 1,00,000 on 21-11-1986 to Madappillil Brothers is

admitted. Defendants 1, 4, 5 and 6 availed a loan of Rs. 1,00,000 only on 9-5-1987 and not Rs. 1,08,333.33 as alleged in paragraph 3 of the

plaint. Defendants 1, 4, 5 and 6 have not executed any demand promissory note for Rs. 3,00,000 on 26-5-1986. They have not received the

alleged Rs. 3,00,000 or any other amount in the promissory note and it was devoid of consideration. The promissory note has been fabricated by

the plaintiff without authority. Defendants 1, 4, 5 and 6 admitted the of Rs. 1,00,000 on 21-11-1986. The amount was received as per demand

draft. There was no agreement to pay interest at the rate of 24.5% with quarterly rest. The agreement was to repay the said loan on daily payment

basis @ Rs. 1,000 per day and the interest agreed was at 12% per annum. The amounts were to be repaid within 4 months and the defendants

started repaying the said amount on 22-11-1986 onwards. An amount of Rs. 1,04,500 had been repaid as on 20-4-1987 towards principal

amount, interest and service charges. The loan was discharged. No amount is due to the plaintiff under the loan transaction for Rs. 1,00,000. There

is material alteration in the promissory note. There was no agreement to pay 24.5% interest. Defendants 1, 4, 5 and 6 did not execute a

promissory note for Rs. 1,08,333.33 on 9-5-1987. The said promissory note is fabricated and created by the plaintiff without authority. Instead,

defendants 1, 4, 5 and 6 availed a loan of Rs. 1,00,000 on 9-5-1987 and received the amount as per cheque No. 625229 of the Catholic Syrian

Bank. 12% interest was agreed upon and the amount was to be paid within four months. An amount of Rs. 1,04,500 was paid as on 20-9-1987

at the rate of Rs. 1,000 per day and the loan was fully satisfied. The 3rd promissory note and cash debit slips produced and mentioned in

paragraph 4 of the plaint, are fabricated documents and their execution are denied. Defendants 4, 5 and 6 did not execute promissory note on 26-

6-1986 nor the cash debit slip on the same date. They are fabricated documents. There was no agreement to pay interest at 24.5% with quarterly

rest. The document is materially altered and is unenforceable. They have not received Rs. 1,50,000 in cash on 26-6-1986. They availed a loan of

Rs. 1,50,000 and received the amount on 27-6-1986 in the name of L.P.R. Brothers by cheque No. 5146693 of the Corporation Bank. The

interest agreed was 18% at the rate of Rs. 2,250 per month. An amount of Rs. 27,000 was paid till July, 1987 being the interest for July, 1986 to

June, 1987. Defendants 4, 5, 6 and 7 and their relatives had chitties in their individual names with M/s Ullattil Chitty Funds, a sister concern of the

plaintiff-firm. The written statement gives the details of the chitty transaction and the amounts paid which read as follows:

Name Chitty LF and class Chitty Sala Amounts paid

and No. 1 chitty

(Rs.) (Rs.)

(a) M.C. Ratnakumar Hegden 31 1,00,000 72,800

A class x 1 (2500x29)

(b) M.L. Vinodkumar 32 1,00,000 72,500

A class x 1 (2500x29)

(c) M.P. Gopakumar 33

A class x 1 1,00,000 72,500

(2500x29)

(d) M.R. Nandakumar 34

A class x 1 1,00,000 72,500

(2500x29)

(e) M.U. Jayakumar 35

A class x 1 1,00,000 72,500

(2500x29)

(f) G. Lakshmana Hegden 71 50,000 36,250

B class x 1 (1250x29)

(g) M.G. Purushothama Hegden 72 50,000 36,250

B class x 1 (1250x29)

(h) M.G. Radhakrishna Hegden 73 1,00,000 72,500

B class x 2 (50,000x2) (2500x29)

(i) M.L.Gopalakrishna Hegden 74 1,00,000 72,500

B class x 2 (2500x2)

(j) M.P. Mohana Hegden 75 1,00,000 72,500

B class x 2 (2500x2)

(k) M.R. Premkumar Hegden 110 1,00,000 72,500

C class x 4 25000x4) (2500x29)

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10,00,000 7,25,000

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In the above chitty transactions, defendants 4, 5, 6 and 7 and their relatives had joined for a total amount of Rs. 10,00,000 and they had made

payments of Rs. 7,25,000 inclusive of ""veetha palisha"". They had paid only up to 29th instalment in each chit which came to a total payment of Rs.

7,25,000. It was agreed that this amount would be credited towards the amount due from defendants 4, 5, 6 and 7 under the loan transaction of

Madappally Agencies dated 27-6-1986 for Rs. 1,50,000 and the loan transaction of M/s L.P.R. Brothers dated 27-6-1986 for Rs. 1,50,000.

Instead of doing the same, the plaintiff gave credit of the amounts due to the defendants under the chitty transaction in other alleged transactions

which were non-existing. The loan transaction dated 26-5-1986 for Rs. 3,00,000 in the name of defendants 1, 4, 5 and 6 is non-existent and false.

The loan transaction dated 10-11-1986 for Rs. 2,00,000 in the name of defendants 4, 5 and 6 is non-existent and false and the loan transaction

dated 21-11-1986 for Rs. 2,00,000 in the name of defendants 4, 5 and 6 is non-existent and false. There is an excess of Rs. 8,333.33 in the loan

transaction dated 9-5-1987 in the name of defendants 1, 4, 5 and 6 and to that extent, it is false. The amounts paid by the defendants on the

various chitties were credited towards non-existing liabilities instead of the existing liabilities. Defendants 4, 5 and 6 have never borrowed any

amounts from the plaintiff in their individual capacity as alleged in the plaint. The amount of Rs. 2,00,000 alleged to have been borrowed on 10-

11-1986 and Rs. 2,00,000 on 21-11-1986 by defendants 4, 5 and 6 is also denied. They have not executed promissory notes for those amounts.

The promissory notes are fabricated and falsely created documents. These documents are materially altered and filled up without lawful authority.

The defendants have not received any amount in cash from the plaintiff firm under any transaction. All the amounts were received either by cheque

or demand draft. The defendants had only four loan transactions with the plaintiff firm and they are the loan transaction dated 27-6-1986 for Rs.

1,50,000 between the plaintiff and defendants 2, 4, 5 and 6, the loan transaction dated 27-6-1986 for Rs. 1,50,000 between the plaintiff and

defendants 3, 4, 5 and 6, the loan transaction dated 21-11-1986 between the plaintiff and 1st defendant for Rs. 1,00,000 and the loan transaction

dated 9-5-1987 for Rs. 1,00,000 between the plaintiff and defendants 1, 4, 5 and 6.

5. At the time of entering into each loan transaction the plaintiff used to insist for two or more stamped, undated blank promissory note forms to be

signed by defendants and given to the plaintiff and with the same a signed blank paper and blank undated debit slips were also to be given.

Accordingly while entering into the above four transactions on the aforesaid dates defendants 1, 4, 5 and 6 signed and gave four blank pronote

forms with seal and four blank debit slips with seal to the plaintiff. Similarly, defendants 2, 4, 5 and 6 have signed and given two blank undated

promissory note forms with seal and two blank undated debit slip forms with seal to the plaintiff. Defendants 3, 4, 5, 6 and 7 had given two signed

blank undated and sealed promissory note forms and two signed blank and sealed debit slips to the plaintiff. Defendants 4, 5 and 6 have given two

signed undated blank promissory note forms and two signed blank undated debit slips to the plaintiff. Thus a total of ten signed blank promissory

note forms and ten signed blank debit slips were given to the plaintiff. The following blank signed cheques of the State Bank of Travancore,

Ettumanoor, were also taken by the plaintiff from the defendants from 1982 to 1987. The cheque numbers are 522001, 474921, 846400, 17557,

846769, 846761, 848338, 848340, 848341, 848343, 475907, 848390 to 848400. Those cheque leaves have not been returned till date.

6. Defendants 4, 5 and 6 have not deposited their title deeds relating to their property at the office of the plaintiff on 11-5-1987 with the intention

of creating a collateral security for securing the amounts allegedly due from the defendants to the plaintiff. No letter was issued on 11-5-1987 as

alleged in the plaint. Title deed No. 878/79 was in the possession of the Managing Partner of the plaintiff-firm long before 11-5-1987 in his

capacity as the Manager of the Proprietary concern Ullattil Agencies and Bankers, Kottayam and the blank papers signed by the defendants had

been misused by the plaintiff without authority or consent. There was no intention on the part of defendants 4, 5 and 6 to create any equitable

mortgage. Since there was no creation of equitable mortgage, the suit was barred by limitation.

7. The accounts maintained by the plaintiff are not correct. The amounts paid by the defendants have not been given credit to. There was no

agreement to pay interest at the rate of 24.5% with quarterly rest. The ledger allegedly maintained by the plaintiff is a fabricated and manipulated

one. The balance due under (a) to (g) as stated in the plaint are absolutely false. The ledger is not maintained in the due course of business and it is

created for the purpose of the suit. No cause of action has arisen on 26-5-1986, 21-11-1986,9-5-1987, 26-6-1986, 10-11-1986, 26-9-1994 or

on any other date.

8. The plaintiff has filed a replication transversing the contentions in the written statement. The amounts paid by the defendants had been credited in

the record. The promissory notes are duly executed by the defendants. At the desire of the defendants and their relatives Ullattil Chitty Fund paid

an amount of Rs. 3,80,258.09 to the plaintiff to be credited in the account of the 1st defendant in respect of the loan of Rs. 3,00,000 dated 26-5-

1986 and the balance alone is shown in the plaint.

9. The trial court framed the following issues for trial:

1. Is the suit barred by limitation?

2. Is the suit maintainable?

3. Whether the plaintiff is a partnership registered under the Indian Partnership Act and signatory to the plaint is not a partner of the firm?

4. Whether the D.P.N. and cash debit slip dated 26-5-1986 had been validly executed by defendants 4, 5 and 6 on behalf of the 1st defendant? Is

not the D.P.N. supported by consideration?

5. Whether the Demand Promissory Note and Debit slip dated 21-1-1986 had been validly executed by defendants 4, 5 and 6 on behalf of the

1st defendant?

6. Whether the Demand Promissory Note and Debit slip dated 9-5-1987 had been validly executed by defendants 4, 5 and 6 on behalf of the 1st

defendant? What was the amount of loan availed of by defendants on 9-5-1987?

7. Whether the Demand Promissory Note dated 26-6-1986 for Rs. 1,50,000 had been validly executed by defendants 4, 5 and 6 on behalf of the

second defendant?

8. Whether the Demand Promissory Note and debit slip dated 10-1 l-1986 for Rs. 2,00,000 had been validly executed by defendants 4, 5 and 6?

Is it not supported by consideration?

9. Whether the Demand Promissory Note and debit slip dated 21-11-1986 had been validly executed by defendants 4, 5 and 6? Is it not

supported by consideration?

10. Whether the Demand Promissory Note and debit slip dated 26-6-1986 had been validly executed by defendants 4, 5, 6 and 7 on behalf of the

third defendant?

11. Has not the defendants deposited the title deed on 11-5-1987 with the plaintiff by way of equitable mortgage to secure all the above

advances?

12. Whether the statement of account is correct and what is the amount to which the plaintiff is entitled to realise from the defendants?

13. Whether the discharge pleaded by the defendants is true and correct?

14. Whether the interest claimed is excessive and if so what is the rate of interest allowable?

15. Reliefs and costs.

10. The trial court has granted a decree as prayed for. The trial court has not even looked into the question whether the plaintiff has claimed more

than the amount specified in the promissory notes. In one of the disputed promissory notes which is marked as Ext. A-10 dated 10-11-1986

alleged to have been executed by defendants 2 to 6 for Rs. 2 lakhs there is no stipulation to pay interest at quarterly rest. But the plaintiff has

claimed interest at 24.5 per cent per annum with quarterly rest till the date of realisation and the trial court has granted the same which can be seen

from the operative portion of the judgment.

11. The suit is based on 7 promissory notes out of which six are allegedly executed in 1986 and one in 1987. The suit is filed in 1994. The total

amount allegedly advanced is Rs. 12,08,333.33 and the suit is filed after giving credit to various payments including adjustment of chit amount of

Rs. 3,80,258.09 for Rs. 49,71,033.87. Defendants 1 and 2 are partnership firms of which defendants 4 to 6 are the partners. The third defendant

is also a partnership firm in which apart from defendants 4 to 6 the 7th defendant is also a partner. The execution of 4 promissory notes are

admitted except for the fact that in one promissory note (Ext. A-6), the amount borrowed was only Rs. 1 lakh instead of Rs. 1,08,333.33 as

contended by the plaintiff. With respect to these admitted promissory notes the contention of the defendants is that they have discharged the loans

completely by daily payments as well as by payments for the chitty conducted by a sister concern of the plaintiff and as per the understanding

between the parties those chit amounts were to be adjusted for the loan and it was so adjusted. The execution of 3 promissory notes is totally

denied. The case of the defendants is that since they were in dire need of money and they approached the plaintiff, the Managing Partner insisted

for handing over signed papers and debit notes without filling the same and some signed papers after affixing revenue stamps and with the seal of

the defendants firms and some blank papers with mere signatures of defendants 4 to 6 and blank debit slips forms were also obtained. The

disputed promissory notes in this case are those containing the mere signatures of defendants 4 to 6 as well as the note evidencing the mortgage by

deposit of title deeds. The case of the defendants is that these blank signed papers were made use of for creating the mortgage as well as the

promissory notes.

12. Learned Counsel for the appellants and respondent had advanced elaborate arguments in this appeal. We refer to the points and discuss the

same under each head.

13. The main points argued in the appeal are:

(i) Whether the suit is based on promissory notes and equitable mortgage or on accounts?

(ii) Whether the disputed promissory notes and letter evidencing mortgage by deposit of title deed were executed by the defendants and on whom

is the burden to prove the same?

(iii) Whether there is material alteration in Exts. A-2 to A-15?

(iv) Whether Ext. A-16 letter evidencing deposit of title deed required registration and whether it is proved to have been executed by defendants 4

to 6?

(v) Even assuming that Ext. A-16 is executed by defendants 4 to 6 and it did not require registration whether it can be used against defendants 1 to

3, partnership firms when Ext. A-16 is not executed in the name of the firm or on behalf of the firm?

(vi) Whether the plaintiff is entitled to realise interest against the provisions contained in the Money Lenders Act and whether the interest awarded

by the trial court can be sustained?

(vii) Whether the defendants have succeeded in proving the discharge of the loans admittedly taken from the plaintiff?

(viii) Whether the suit is barred by limitation?

Point 1:

Whether the suit is based on promissory notes and equitable mortgage or on accounts?

14. The learned Counsel for the appellants vehemently contended that a mere reading of the plaint will show that the suit is based on accounts as

what is prayed for is for a decree for Rs. 49,71,033.87 as per statement of accounts ABDEF and G valuation. It is also pointed out that para 17

of the plaint specifically refers to the ledger maintained by the plaintiff in the name of the defendants, and the balance amount outstanding due from

the defendants under different accounts as on 7-12-1994. The further contention is that the plaintiff has produced Ext. A-18 ledger containing

entries of all the alleged transactions between the plaintiff and defendants and therefore unless the entries are proved to be correct, the plaintiff is

not entitled for a decree as prayed for.

15. Learned Counsel appearing for the respondent on the other hand contended that the suit is based on promissory notes and equitable mortgage

and the statement of account in the plaint referred to the ledger only for calculation of the amounts and not for the purpose of finding out the

payments made by the plaintiff or return of the amounts borrowed by the defendants. Counsel also pointed out that instead of producing the ledger

the plaintiff could have produced along with the plaint statement of accounts and since the ledger was produced along with the plaint, it could be

treated as part of the plaint. The question therefore arises as to what exactly is meant by a suit on accounts. Whether a suit for realisation of

amounts covered by promissory notes and equitable mortgage can be treated as suit on account merely because the plaintiff has produced a ledger

showing the entries containing payments by the plaintiff and by the defendant to the plaintiff. Counsel on both sides have not pointed out any

specific provision of law dealing with mere suit on accounts. Part I of Schedule of the Limitation Act consisting of Articles 1 to 5 provides for the

period of limitation for suits relating to accounts. Article 1 refers to suits for balance due on a mutual open and current account. It is only in cases

where Article 1 of the Limitation Act is applicable that it can be said that the suit is based on accounts. The Bombay High Court in Kanhayalal

Supdubhai Vs. Hiralal Deoram, , has held that if the moneys were given by way of loan and the suit is for realisation of the same, it is not a suit on

accounts. It will be suit on accounts if the moneys have been paid to and accepted by the defendants as deposits to be held in trust for the plaintiff.

Learned Counsel for the appellants on the other hand heavily relied on the decision of this Court in Rosy George v. State Bank of India 1993 (1)

KLT 151 and brought our attention to para 12 of the Judgment which reads as follows:

Now we may examine the nature and scope of the suit. That has to be judged on the basis of the allegations and recitals in the plaint. A reading of

paragraph 1 to 3 of the plaint would show that, the loans were advanced on the basis of equitable mortgage, that as and when amounts were

advanced promissory notes were got executed, that plaintiff used to keep separate accounts for the advances, that later it was consolidated into

one account and that the balance outstanding was admitted by late P.L. George in Ext. A-11 and by the appellant in Ext. A-19. The very valuation

in the plaint states: "the amount due as per the account as on 31 -3-1985". The allegations and recitals in the plaint clearly brings out that the suit is

based on account secured by an equitable mortgage. Thus the character of the suit being so Ext. A-5 series pronotes could only be col lateral in

nature and their invalidity on account of material alteration cannot affect the maintainability of the suit. The contention regarding limitation can be

conveniently dealt with after adverting to the contention of the defendants that no equitable mortgage as alleged was created.

16. Learned Counsel for the respondent on the other hand pointed out that this Court in Rosy George"s case treated the suit as a suit on account

for the reason that there were reciprocal obligations for the plaintiff and defendant in that suit. The defendant had obtained loan from the bank and

the plaintiff had taken the building of the defendant on lease arrangement. Thus the defendant was liable to pay back the loan amount with interest

and the plaintiff was liable to pay rent. Therefore it is a case where the suit could be treated as a suit on accounts. Learned Counsel for the

appellants does not contend for the position that the suit is based on account in order to argue that the suit is barred by limitation but only for the

purpose of showing that if the suit was based on account the account book produced is thoroughly unreliable for various reasons and in the

absence of proper proof of accounts the suit cannot be decreed.

17. The Bombay High Court has in Zenna Sorabji and Others Vs. Mirabelle Hotel Co. (Pvt.) Ltd. and Others, has held that in order that a

document could be relied up on as a book of account, it must have the characteristic of being fool-proof. A ledger by itself cannot be a book of

account of the character contemplated by Section 34. In so far as there is no reciprocity of obligations between the parties and there is no

occasion for the defendants to be creditors of the plaintiff and there is no prayer in the plaint for accounting it cannot be said that suit is one on

accounts and we overrule the first contention of the learned Counsel for the appellants.

18. We however make it clear that in case the suit is to be treated as one on accounts, we have no hesitation in holding that the plaintiff has failed

to produce the necessary evidence in support of the claim. Ext. A-18 produced by the plaintiff is thoroughly undependable. It suffers from various

defects. In fact some of the pages in Ext. A-18 are missing. There are erasers to page numbers. The index of the book assigns certain pages to

certain individuals and firms. But those pages are relating to some other persons and firms. The book is not maintained chronologically and it is

unnecessary to elaborate on these aspects as the learned Counsel for the plaintiff never attempted to argue that Ext. A-18 is properly maintained

nor did he contend that the various allegations of the learned Counsel for the appellants made against Ext. A-18 are unfounded. Hence we do not

attempt to elaborate on the mistakes and non-reliability of Ext. A-18 as a book of account.

19. If the suit is not to be treated as a suit on accounts and when the plaintiff relies on the promissory notes executed by the defendants as well as

the equitable mortgage, there is nothing wrong if the trial court has proceeded to decide the suit on that basis and therefore the first point framed

for decision in this appeal is found in favour of the plaintiff/respondent.

Point 2:

Whether the disputed promissory notes and letter evidencing mortgage by deposit of title deed were executed by the defendants and on whom is

the burden to prove the same?

20. There are 7 promissory notes produced by the plaintiff. Ext. A-2 dated 26-5-1986 for Rs. 3 lakhs Ext. A-4 dated 21-11-1986 for Rs. 1 lakh,

Ext. A-6 dated 9-5-1987 for Rs. 1,08,333.33 are executed by defendants 4 to 6 on behalf of the first defendant firm. Ext. A-8 is another,

promissory note allegedly executed by defendants 4 to 6 on behalf of the second defendant firm for Rs. 1,50,000. Ext. A-10 dated 10-11-1986

and Ext. A-12 dated 21-11-1986 are promissory notes for Rs. 2 lakh each allegedly executed by defendants 4 to 6 in their individual capacity and

Ext. A-14 dated 26-6-1986 is said to be executed by defendants 4 to 7 who are the partners of the 3rd defendant firm for Rs. 1,50,000. Out of

the 7 promissory notes, defendants 4 to 6 admit the signatures in 4 promissory notes and they are Exts. A-4, A-6, A-8 and A-14. The only

contention with regard to Ext. A-6 is that the amount for which the promissory note was executed was only Rs. 1 lakh whereas the promissory

note showed Rs. 1,08,333.33. Therefore the question to be considered on this point is whether the disputed promissory notes are executed by the

defendants. The contention of the defendants in paragraphs 16 and 17 of the written statement is as follows:

At the time of entering into each loan transaction the plaintiff used to insist that for every loan transaction two or more stamped, undated blank

promissory note forms of the plaintiff firm had to be signed by the defendants and given to the plaintiff and with the same a signed blank paper and

blank undated debt slips had also to be given. Accordingly while entering into the above four loan transaction on the aforesaid dates, defendants 1,

4, 5 and 6 signed and gave four blank pronote form with seal and four blank debit slips with seal to the plaintiff. Similarly defendants 2, 4, 5 and 6

have signed and given two blank undated promissory note forms with seal and two blank undated debit slip forms with seal to the plaintiff.

Defendants 3, 4, 5, 6 and 7 had given two signed blank undated and sealed pronote forms and two signed blank and sealed debit slips to the

plaintiff. Defendants 4, 5, and 6 have given two signed, undated blank pronote forms and 2 signed blank undated debit slips to the plaintiff. Thus a

total of 10 signed blank pronote forms and 10 singed blank debit slips were given to the plaintiff at the time of availing the aforesaid loans. The

following blank signed cheques of the S.B.T., Ettumanoor was also taken by the plaintiff from the defendants from 1982 to 1987, the cheque

number being 522001, 474921, 846400, 17557, 846769, 846761, 848338, 848340, 848341, 848343, 475907, 848390 to 848400. The said

cheques have not been returned till date.

17. Out of the above-mentioned 10 blank pronotes form and debit slips 7 pronote forms and debit slips have been without authority, illegally and

falsely filled up by the plaintiff showing excessive interest and non-existent amounts has been produced in this case. The said pronotes and debit

slips are materially altered and has not been duly executed by the defendants. They are devoid of consideration and unenforciable.

21. Para 18 of the written statement contains specific denial of creation of equitable mortgage and writing of letter, dated 11-5-1987

acknowledging deposit of title deed.

22. The question for consideration is whether the burden is on the plaintiff to prove that these promissory notes and letter acknowledging deposit

of title deed were executed by the defendants and whether the plaintiff has succeeded in establishing the same. The main argument of the learned

Counsel for the plaintiff/ respondent is that once the signatures are admitted, the onus shifts to the defendants to show the circumstances under

which they happened to put their signatures in blank papers and very little evidence is sufficient to discharge the burden of proof on the part of the

plaintiff to prove the execution of the promissory notes. The learned Counsel for the appellants relied on the Division Bench decision of this Court

reported in Velayudhan v. Velayudhan 2001 (1) KLT 392, in which a Division Bench of this Court has held that mere putting of signature does not

amount to admission of execution of the document. When a person admits that he has put the signature on blank paper it does not mean that he

had admitted the execution of the document. Person who signs the paper may not know the conditions which will be imposed by the other side

while filling up the same and hence a general proposition cannot be laid down that the burden shifts on the person who subscribed the signature to

a blank paper. But the evidence that has to be adduced by the plaintiff will be less onerous than in cases where there is complete denial of signature

and execution. Subsequently the Supreme Court in Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another, had occasion to consider the

question of burden of proof where the signatures on the back portion of 3 rent receipts were admitted and the documents having been admitted

and marked as exhibits. Those documents were produced by the defendant to substantiate his plea that he was a tenant of the building. The

Supreme Court noticed that even after the specific plea in the written statement of the defendant claiming status of a tenant on the basis of rent

receipts, the pleadings in the plaint were not amended by the plaintiff to explain how on the back of the printed rent receipts He happened to put

his signatures. No consequential amendment was made in the plaint taking a plea of fraud and forgery of rent receipts. In that case the rent receipts

were admitted in evidence without objection and the signatures on the rent receipts were also admitted. The Supreme Court held that the onus of

proof was on the plaintiff to explain as to how blank printed rent receipts came to be signed by him on their back portions.

23. In this case the 6th defendant is examined as D.W. 1. He is the Managing Partner of defendants 1, 2 and 3 firms. He has explained that the

defendants only signed the blank promissory notes and the particulars were not filled up at that time. He had deposed with regard to each of the

disputed promissory note and the fact that no amount was received as per the promissory notes. He has further stated that whenever loans were

asked for, defendants 4 to 6 had to sign all the forms the plaintiff wanted and then alone amounts would be disbursed. Since they were getting

amounts only by cheque and those cheques were encashed through the accounts of defendants they had no objection in signing the blank forms. In

this case we noticed that all the payments with respect to the promissory notes admitted by the defendants are made by cheque only. But the

payments alleged to have been made with respect to the disputed promissory notes are said to be in cash only. According to the learned Counsel

for the plaintiff, defendants are denying receipt of consideration and execution of promissory notes only because the amounts were paid in cash.

Whereas defendants contend that they are maintaining proper accounts with respect to all the transactions including the payments made by the

defendants and the cheque payments made by the plaintiff and the repayment of loan as well as the contributions to the chits started by the sister

concern of the plaintiff firm are all seen accurately noted in the account books produced by the defendants.

24. The Supreme Court in Kuridan Lal v. Custodian, Evacuee Property AIR 1961 SC 1316 has held as follows:

The phrase "burden of proof has two meanings - One, the burden of proof as a matter of law and pleading and the other the burden of establishing

a case, the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not

constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden

need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial

evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. u/s 101 of the

Evidence Act, "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts,

must prove that those facts exist". Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by

the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in Section 118 of the Negotiable

Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as

soon as the execution is proved, Section 118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour

that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of

establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by

consideration, and, if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. The defendant may also rely upon

circumstantial evidence and, if the circumstances so relied upon are compelling the burden may likewise shift again to the plaintiff.

Again it is held in the same judgment as follows:

A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and

that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a

particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be

expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, Section 114 enables the Court

to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a

court, can under certain circumstances rebut the presumption of law raised u/s 118 of the Negotiable Instruments Act. Briefly stated, the burden of

proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or

circumstantial evidence but also by presumptions of law or fact.

25. D.W. 1 has also given evidence in what circumstance the original title deed was handed over in 1982 to the Managing Partner. He also denied

defendants 4 to 6 taking of any individual loan from the plaintiff.

26. The plaintiff partnership firm is admittedly engaged in money lending business. The firm has got a licence under Money Lenders Act. Under the

Act, a money lender is bound to maintain certain registers. Rule 7 of the Money Lenders Rules provides that a money lender shall record, maintain

and keep a day book giving full particulars of the cash in hand, the cash received, cash spent on each day with particulars of the source of receipt

and particulars of the closing balance in hand. u/s 9 of the Money Lenders Act, every money lender shall regularly record and maintain or cause to

be recorded or maintained an account showing each debt separately. Under Rule 8 he has to maintain Form ""E"" Register which should contain the

securities furnished, amount of loan applied, amount repaid in instalments, balance outstanding etc. P.W.1 admitted that the plaintiff firm was

maintaining all the records as required under the Act and Rules. But what was produced before the court was only a ledger about which we have

already observed earlier and on which learned Counsel for the plaintiff did not want to place any reliance apart from stating that it evidences only a

calculation statement of the amount due from the defendants. The defendants on the other hand have produced all the account books, ledger, day

book etc. Whatever amounts are paid by the plaintiff and to the plaintiff are all entered in these account books. They are maintained in the usual

course of business and are verified and initialed by the statutory authorities like Sales Tax Department. The learned Counsel for the plaintiff

contended that they are not proved as required by law and no reliance can be placed on those account books. When relevant entries in the

account books were marked through D.W. 1 no objection was raised by the plaintiff. D.W. 1 is none other than the Managing Partner of

defendants 1 to 3 firms. He has also stated that Ext. B-16 was written in his hand writing. In Ext. B-17 his handwriting, his brother''s and son''s

handwriting are there. Since the defendants are not claiming for a decree on the basis of the accounts, the proof required may not be as that of a

plaintiff in a suit on accounts. But when the plaintiff admits that he is keeping all the accounts under the Money Lenders Act and when the payments

as per some of the promissory notes are disputed by the defendants, we are of opinion that it was necessary for the plaintiff to produce those

accounts as observed by the Supreme Court in the aforesaid decision. Therefore the finding of the trial court that on the admission of the

defendants of their signatures in the promissory notes and letter for creating mortgage by deposit of title deed, the plaintiff has discharged the

burden of proof is not correct and we set aside that finding. However for doing complete justice between the parties, we are inclined to give an

opportunity to the plaintiff to produce the account books maintained by the plaintiff under the Money Lenders Act which will show the amounts

paid to the defendants as well as the amounts received from the defendants. This will also be helpful for the court to find out whether the payments

alleged to have been made by the defendants in the chit account run by the sister concern of the plaintiff firm are already accounted in the accounts

of the plaintiff.

27. The learned Counsel for the defendants also vehemently argued that Ext. A-16 is not proved as required by law. It is said to have been written

by three persons in three portions. The non-examination of Suni Thomas who wrote the first portion is also commented upon. It is also argued that

as admitted by P.W. 2 encumbrance certificate and tax receipts also used to be entrusted at the time of taking loan and non-production of the

same by the plaintiff is said to be for the reason that it will probabilise the case of the defendants that the deposit of title deed was in 1982.

28. Learned Counsel for the plaintiff has brought to our notice that no reply was sent to the notice sent by the plaintiff claiming the amounts from

the defendants. It is an important circumstance in favour of the plaintiff. But D.W. 1 has explained that when notice was received, he had

approached the counsel to send reply and the counsel advised him to approach the plaintiff directly and to settle the matter. Therefore there is

some explanation for not sending the reply. Similarly the non-examination of the managing partner of the plaintiff firm is criticized by the learned

Counsel for the defendants and it is argued that an adverse inference must be drawn against the plaintiff. Since the managing partner of the plaintiff

happens to be the partner of the sister concern, he will have to answer the questions with regard to the adjustments of chit amounts and according

to the defendants he was not examined to avoid such situation. Learned Counsel for the plaintiff on the other hand contended that he was suffering

from various ailments and he could not attend the court for facing cross-examination on account of his illness. Therefore there are circumstance for

and against the plaintiff and defendants in considering the question whether they have discharged the onus of proof properly. It is in this

circumstances that we consider that production of books of accounts maintained by the plaintiff under the Money Lenders Act will be to a large

extent helpful to the court in deciding the question whether the disputed promissory notes were executed by the defendants and whether they were

supported by consideration. This point is therefore answered in favour of the appellants.

Point No. 3:

Whether there is material alteration in Exts. A-2 to A-15?

29. Material alteration according to the defendants is that the words ""with quarterly rest"" were printed subsequent to the obtaining of the signatures

of the defendants in blank promissory notes. Learned Counsel for the defendants pointed out that it is evident that these words were printed

subsequently since in the sentence ending with the word ''payment'' there is already a full stop. More over it is also argued that if the words ''with

quarterly rest'' were to be printed after the word ''payment'' it would have touched the revenue stamp already affixed and it is to avoid such

difficulty that the words were subsequently printed below the last line. It is also argued that in one of the promissory notes the words ""with

quarterly rest"" are not there. If the plaintiff was maintaining a uniform promissory note then those words would have been there in that promissory

note also. Another material alteration pointed out by the defendants is that the words ""Madappallil Brothers"" are changed in Ext. A-8 to

Madappallil Agencies"" as is seen from the over writing in Ext. A-8. Learned Counsel for the plaintiff contended that there is no material alteration

pleaded or proved. Apart from the vague suggestions and possibilities there is no sufficient evidence on the basis of which we can hold that there is

material alteration of the promissory notes. It can be material alteration only if it is made after the promissory notes are executed. There is no

clinching evidence to show that these alterations were made after the execution of the promissory notes. Therefore we find this point against the

appellants.

Point No. 4:

Whether Ext. A-16 letter evidencing deposit of title deed required registration and whether it is proved to have been executed by defendants 4 to

6?

30. The question whether Ext. A-16 has been executed by defendants 4 to 6 is the question which has to be considered along with the question

whether the disputed promissory notes were executed by defendants 4 to 6 as the same defence is set up with regard to Ext. A-16 also. That

question will be considered by the trial court after allowing the parties to adduce further evidence. But the question whether Ext. A-16 requires

registration or not, if it is a genuine document, is a pure question of law which can be concluded by considering the relevant judicial

pronouncements on that aspect. Ext. A-16 states that defendants 4 to 6 have on various occasions received money from the plaintiff by executing

promissory notes and for additional security for such amounts they had agreed to give original title deed of their property and as per that the title

deed is handed over in the plaintiff''s office to the plaintiff and Ext. A-16 is written for that purpose. In Veeramachineni Gangadhara Rao Vs. The

Andhra Bank Ltd. and Others, the Supreme Court considered the question as to when a document evidencing deposit of title requires registration.

It was held as follows:

If the parties intended that it should embody the contract between them, it would have been necessary to register the same u/s 17 of the

Registration Act, 1908. As observed by this Court in Rachpal Mahraj Vs. Bhagwandas Daruka and Others, that when a debtor deposits with the

creditor title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage and no

registered instrument is required u/s 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is

excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form

integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the

charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction

with the deposit, it requires registration u/s 17 of the Indian Registration Act, 1908, as a non-testamentary instrument, creating an interest in

immovable property, where the value of such property is one hundred rupees and upwards''. Therefore, the crucial question is: Did the parties

intend to reduce their bargain regarding the deposit of the title deeds to the form of a document? If so, the document requires registration. If on the

other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there

being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and

the document being merely evidential does not require registration.

31. A reading of Ext. A-16 will show that the defendants had earlier agreed to handover the original of the title deed as security for the amounts

due from the plaintiff. The same was done and the note is given for that purpose. Ext. A-16 does not disclose the terms under which the loan

transactions took place and the promise to handover the title deed itself was given earlier and the money was also advanced earlier. Therefore it

cannot be said that the parties intended to reduce their bargain regarding deposit of title deed to the form of a document in which case alone the

document will require registration. Learned Counsel for the defendants have brought to our notice the decision of this Court in Hubert Peyoli v.

Santhavilasath Kesavan Sivadasan 1998 (2) KLT 125. In that case also it is only stated that in case a document was executed for creating

equitable mortgage then it required registration. A reading of Ext. A-16 will not show that it created an equitable mortgage. Similarly in the decision

reported in Joseph v. Michael 2000 (1) KLT 857, it is clearly stated that if the memorandum as such does not evidence creation of mortgage and

reveals only what happened earlier, it does not require registration. It is also held in that decision that the decisive question is the time factor and

not the date. Ext. A-16 shows that the document was already handed over on the same day and the note was executed to evidence the same. It

cannot be inferred that the same was done simultaneously. Ext. A-16 also does not disclose the terms with regard to the creation of mortgage by

deposit of title deeds. Hence we are of opinion that Ext. A-16 does not require registration and we answer the point in favour of the plaintiff.

Point No. 5:

Even assuming that Ext. A-16 is executed by defendants 4 to 6 and it did not require registration whether it can be used against defendants 1 to 3,

partnership firms when Ext. A-16 is not executed in the name of the firm or on behalf of the firm?

32. Learned Counsel for the appellants vehemently contended that even if Ext. A-16 is a genuine document and it did not require registration, it is

not binding on D-1 to 3 firms and their liabilities as it was not executed by defendants 4 to 6 in their capacity as partners or on behalf of the firms

and therefore such mortgage cannot be enforced as against the loan availed by defendants 1 to 3 partnership firms. He pointed out Section 22 of

the Indian Partnership Act which says that in order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of

the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. Since some of the

promissory notes contain the signature of defendants 4 to 6 with the seal showing them as partners of the firm it must be inferred that those

promissory notes are executed on behalf of the firm. But in Ext. A-16 there is no such seal and it is executed only in the individual capacity of

defendants 4 to 6. According to the learned Counsel for the appellants in view of the fact that Ext. A-16 is not executed by defendants 4 to 6 as

partners of the firm, the debt due from defendants 1 to 3 firms are not covered by the equitable mortgage and since the suit based on the

promissory notes by itself will be barred by limitation, no decree can be granted in respect of the amounts covered by those promissory notes. In

support of this contention the learned Counsel brought to our notice the decision of the Gujarat High Court in Porbandar Commercial Cooperative

Bank Ltd. Vs. Bhanji Lavji and Others, . That was a case where some of the partners executed surety bonds in their capacity as partners and the

High Court held that on that basis an award can be passed against the signatories of the surety bonds in their personal capacities as sureties. But it

was also held that other persons cannot be made liable. That decision will not in any way help the learned Counsel for the appellants. The only

other decision brought to our notice on this aspect by the learned Counsel for the appellants is the decision of the Supreme Court reported in Devji

@ Deviji Shivji Vs. Maganlal R. Athrana and Others, . That was also a case where one of the partners of a firm took a sublease of a colliery and

the contention was that all the partners of the firm are liable under the lease. It is in that context the Supreme Court relied on Section 22 of the

Indian Partnership Act and it was held that since the sub-lease was not executed in the name of the firm in obtaining the lease, he did not act on

behalf of the firm. There was no privity of contract between the firm and the main lessee. Learned Counsel for the plaintiff on the other hand argued

that defendants 4 to 6 are admittedly partners of defendants 1 to 3 firms and the partnership has got no legal entity and they are personally liable

for the amounts due from the partnership firms. Hence if a mortgage is created by them though not in their capacity as partners their property will

be liable to answer the claim against the firm also as they had executed the promissory notes making them jointly and severally liable. It is therefore

contended that the liability of the mortgaged property to answer the debts of the firm consisting of defendants 4 to 6 cannot be avoided merely for

the reason that Ext. A-16 is not executed as partners of the firm. In so far as the firm is not a legal entity and the defendants 4 to 6 are the partners

of defendants 1 to 3 their property is liable for the debts obtained by them in their capacity as partners. The learned Counsel for the

respondent/plaintiff made it clear that the property mortgaged will be liable for both the loans obtained by defendants 4 to 6 in their individual

capacity as well as partners of the defendants 1 to 3 firms. Therefore we find this point in favour of the plaintiff and we hold that in case Ext. A-16

is found to be a genuine document and there is creation of mortgage by deposit of title deed, the mortgaged property will be liable to be proceeded

against both for the amounts due from the defendants 1 to 3 partnership firms as well as for the amounts due from defendants 4 to 6 in their

personal capacity. The non registration of Ext. A-16 will not stand in the way of the plaintiff getting a decree on the basis of Ext. A-16 and this

point is found in favour of the plaintiff. Since the 7th defendant has not signed in Ext. A-16 and the suit based on the promissory notes alone against

the 3rd defendant is barred by limitation we hold that no decree can be passed against the 7th defendant in the suit.

Point No. 6:

Whether the plaintiff is entitled to realise interest against the provisions contained in the Money-lenders Act and whether the interest awarded by

the trial court can be sustained?

33. In this case the plaintiff has claimed and the trial court has awarded interest at the rate of 24.5 per cent per annum with quarterly rest, for the

amount covered by the promissory notes less the amount received, from the date of the loan till realisation. Admittedly the plaintiff is a money-

lender having the licence under the Money Lenders Act. u/s 7 of the Act no money-lender shall charge interest on any loan at a rate exceeding two

per cent above the maximum rate of interest charged by commercial banks on loans granted by them. Sub-section (3) of Section 7 specifically

makes it clear that money-lender shall not demand or take from the debtor any interest in excess of that payable under Sub-section (1). Learned

Counsel for the defendants has made available the circular issued by the Reserve Bank of India as per which the lending rate in 1986-87 is 17.50

and for the year 1987-88 it is 16.50 per cent and the plaintiff can claim 2 per cent above that rate. Hence the claim for interest above the above

said rates is excessive. In view of the fact that the parties have agreed to treat interest as part of principal with quarterly rest, the plaintiff will be

entitled to claim interest at the above rate till the date of filing of the suit on the basis of the quarterly rest. Learned Counsel for the appellants has

relied on the decision of the learned Single Judge in Divisional Manager, L/C of India v. Bhagavathy Amma 1991 (2) KLT 522 and contended that

interest after suit cannot exceed 6%. The learned Counsel for the plaintiff/ respondent on the other hand relied on the Division Bench decision in

Bank of India v. Mary George 1991 (2) KLT 226 and argued that the same being a Division Bench decision it must prevail over the Single

Judge"s decision in L.I.C."s case. In the Division Bench decision, the trial court granted interest at 12% after suit and the plaintiff filed appeal

contending that the rate of interest was not sufficient. It was held that it was sufficient. That decision also held that the principal amount on which

interest must be calculated will take in interest added to principal with quarterly rest if the agreement provided for the same. We notice that Order

34 C.P.C. was subsequently amended in Kerala and substantial change is made to Rule 11 and the provision for rate of interest after suit is absent

in the amended C.P.C. But it is well-settled after the decision of the Federal Court in AIR 1940 20 (Federal Court) and the decision of the

Supreme Court in Soli Pestonji Majoo and Others Vs. Gangadhar Khomka, that the Court has discretion in awarding interest after the filing of the

suit. That principle was reiterated by the Supreme Court again in N.M. Veerappa Vs. Canara Bank and Others, . In Srinivasavardachariar and

Others Vs. Gopala Menon and Others, the Supreme Court noted that the creditor who lent the money in 1936 and 1938 waited till 1950 to file

the suit and would get interest exceeding the principal amount. Hence interest at 6% after the suit was found to be justified. In this case also we

notice that for Rs. 12,08,333 alleged to have been given, the suit is filed for realisation of Rs. 49,71,033-87 as on the date of the suit. So the total

amount comes to 4 times the amount alleged to have been given. In case the suit is to be decreed pendente lite interest can be calculated at 12% till

the date of decree and thereafter interest can be awarded at 6% till the date of realisation without quarterly rest.

Point No. 7:

Whether the defendants have succeeded in proving the discharge of the loans admittedly taken from the plaintiff?

34. Out of the 7 transactions the defendants have admitted 4 transactions with the difference that the amount of Rs. 8,333.33 in the loan dated 9-

5-1987 in excess of Rs. 1 lakh under Ext. A-6 promissory note is not admitted by the defendants. According to the defendants the loan under

Exts. A-4 and A-6 were to be repaid on daily repayment of Rs. 1,000 per day and Exts. B-9 and B-10 pass books issued by the plaintiff will

show that the amounts were repaid. Exts. B-9 and B-10 are the pass books issued for payment of such amounts per day and it is seen that there

are payments made under Exts. B-9 and B-10. The contention of the plaintiff is that the entries in Exts. B-9 and B-10 are created subsequently by

the defendants and there were no payments. These books are pass books issued by the plaintiff. The initials in Exts. B-9 and B-10 are that of the

managing partner and P.W.1. As already noticed the managing partner was not examined. Whether these entries are correct or not can be verified

when the connected account books are produced by the plaintiff and therefore we do not want to decide this issue finally. Similarly the plaintiff has

adjusted an amount of Rs. 3,80,258.09 being due from Ullattil Chit Funds to the defendants and the adjustment is made towards the amounts due

from the first defendant in the earliest loan account dated 26-5-1986. The case of the defendants is that there was no such loan existing and the

same was created by the plaintiff out of the signed stamp papers. The question whether the amount of Rs. 3,80,258.09 can be credited in that

account is to be considered by the trial court afresh in the light of the decision to be taken on point No. 2. Therefore this point is left open to be

considered afresh by the trial court as it is intrinsically connected with point No. 2. We make it clear that the burden to prove discharge is on the

defendants and the trial court will consider whether the defendants have succeeded in discharging that burden. The defendants will also be at liberty

to call for the records of the chit funds to see that the amounts in the chit were paid by the defendants and those amounts were adjusted towards

the amount due from the defendants. Learned Counsel for the plaintiff contended that the case of the defendants with regard to the creation of

equitable mortgage cannot be believed for the reason that if the title deed was handed over in 1982 for earlier loans, the defendants would have

got it back when those loans were repaid and that it was too much to think that the defendants allowed the title deed to remain with the plaintiff. It

is also argued that in case the loan obtained under admitted promissory notes are repaid the defendants would have insisted for return of

promissory notes or issue of sufficient receipts. The plaintiff can urge these aspects when the question of discharge is finally decided by the trial

court. This point is answered accordingly.

Point No. 8:

Whether the suit is barred by limitation?

35. There is no dispute that in case it was found that the suit was for sale of the property by enforcement of mortgage it is not barred by limitation.

Suit based on promissory notes alone will be barred by limitation. If there is proper deposit of title deed and the creation of equitable mortgage the

suit will be within time. The trial court has noted that the question of limitation was not seriously argued before the trial court by the counsel for the

defendants. In view of our finding that Ext. A-16 does not require registration and in case it is found that Ext. A-16 is executed by defendants 4 to

6 as evidence of creation of equitable mortgage the suit will not be barred by limitation.

In the light of the above discussion and our finding on points 2, 4, 6, 7 and 8 the appeal is allowed to the extent indicated therein and we set aside

the judgment and decree of the trial court and remand the suit to the trial court to try and decide afresh on those points. In case the plaintiff is not

able or willing to produce all the account books maintained under the Money-lenders Act, the trial court shall decide the suit in the light of the

observations contained in this judgment. The suit against the 7th defendant is dismissed as he has not executed any mortgage and the suit based on

promissory note is barred by limitation as against him. With regard to all other aspects we confirm the finding of the trial court. The parties shall

appear before the trial court on 14-8-2006. The court fees paid on the memorandum of appeal will be refunded to the counsel for the appellants.

The parties shall bear their costs in this appeal.