

(2008) 06 MAD CK 0148

Madras High Court

Case No: A.S. No. 885 of 1993

S. Somasundaram

APPELLANT

Vs

The Tamil Nadu Theatre
Corporation Limited

RESPONDENT

Date of Decision: June 23, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 4(2), 34, 35A

Hon'ble Judges: V. Dhanapalan, J

Bench: Single Bench

Advocate: Patty B. Jaganathan, for the Appellant; R. Shanmugham, for M/s. V. Karthikeyan, for the Respondent

Judgement

V. Dhanapalan, J.

Aggrieved by the judgment and decree of the Lower Court dated 19.02.1993 in O.S. No. 42 of 1991 on the file of the Sub Court, Ranipet, the defendant has preferred this appeal. The plaintiff, which is a Corporation incorporated under the Indian Companies Act, 1956 with the main object to provide financial assistance to private individuals, firms, companies, etc., to enable them to construct semi-permanent theatres in Tamil Nadu sanctions loan, taking into account the various factors like the location of the proposed theatre, the financial repaying capacity of the applicant etc. It is the case of the plaintiff that the defendant by an application dated 31.10.1972 requested their Corporation to provide funds to the tune of Rs. 1,00,000/- in order to complete the construction of the semi-permanent theatre in his plot of land situate in Nemili Village and after scrutinising the application of the defendant, they had sanctioned a sum of Rs. 1,00,000/- to the defendant in their Proceedings in Loan Sanction Order No. 2/2/NA/TTC/74 dated 01.02.1973, subject to the terms and conditions of their Corporation.

1(i). The defendant has also agreed to abide by the rules and regulations of the plaintiff Corporation in the grant of loan by executing an agreement dated

12.12.1973. Thereafter, the defendant had executed a registered Mortgage Deed dated 12.12.1973 in favour of the plaintiff, mortgaging the piece and parcel of the land measuring 0.60 cents situate in S. No. 39/3-A, 4, 5 in Nemili Village, more fully described in the schedule. Besides, the defendant had also executed hypothecation deed dated 26.03.1974 in favour of the plaintiff as further security for the repayment of the loan. On request of additional loan amount of Rs. 20,000/- by the defendant, the plaintiff sanctioned the same as per Loan Sanction Order No. 11/2/NA/TTC dated 11.06.1974, for which the defendant has also executed a registered simple mortgage deed in favour of the plaintiff on 01.08.1974, mortgaging the lands and buildings described in the schedule. The defendant received the entire consideration of Rs. 1,20,000/- from the plaintiff agreeing to repay the same in 60 monthly instalments with interest agreed upon.

1(ii). It is the further case of the plaintiff, that after obtaining the necessary bonds and deeds, they disbursed a sum of Rs. 25,000/- to their satisfaction on 12.12.1973 as first instalment towards the loan sanctioned to the defendant in the construction of the theatre; the 2nd, 3rd, 4th, 5th and 6th instalments of Rs. 7,958.72, Rs. 25,000/-, Rs. 30,000/-, Rs. 11,000/- and Rs. 20,000/- were disbursed to the defendant on 14.12.1973, 05.03.1974, 26.03.1974, 17.04.1974, 01.08.1974, respectively, thereby the entire amount of Rs. 1,20,000/- sanctioned to the defendant was paid by their Corporation.

1(iii). The plaintiff has further stated that the defendant inaugurated the theatre on 22.08.1974 and started exhibiting the movies, whereby he had the benefit and full utilisation of the amounts borrowed from their Corporation. It is the contention of the plaintiff that the defendant has committed wilful default in payment of the loan amount and he has not paid the arrears of monthly instalments promptly and has thereby violated the terms and conditions of their Corporation under which the loan was paid to him.

1(iv). According to the plaintiff, the total liability on the defendant is Rs. 92,082.98 as per the statement of accounts and even after repeated requests and reminders, the defendant has failed to pay the arrears of monthly instalments. Therefore, the plaintiff had caused an Advocate's notice dated 22.07.1982 to the defendant demanding the repayment of the entire loan amount together with interest thereon and the same was acknowledged by the defendant on 27.07.1982. Since the defendant had not chosen to comply with the demands of the plaintiff Corporation, a suit in O.S. No. 42 of 1991 was filed by the plaintiff for (i) a direction to the defendant to pay them the sum of Rs. 92,082.98 with subsequent interest at 23% per annum from 25.09.1982 till the date of payment by fixing a date for such payment with the cost of the suit, (ii) in default of such payment, direct the sale of the mortgaged, hypothecated items in the schedule for a sufficient portion thereof for the due satisfaction of the amount (iii) granting a personal decree against the defendant for payment of the balance due if any, in the event of hypothecated items

being found insufficient to the satisfaction of the decree.

2(i). The defendant, in his written statement has denied the suit claim as unsustainable in law. According to the defendant, he had already invested more than Rs. 2 lakhs in constructing the theatre and sought the loan only to complete the same. At the time of sanction of loan, the plaintiff had fixed the interest only at the rate of 12% p.a., but the plaintiff by and by had increased the interest abnormally and unconscionably without any regard to the possibilities of avenues of un-estimable income from a theatre in a rural area. The main contention of the defendant is that the alleged agreement referred to in the plaint was taken in blank even without date; so too, the rate of interest was left blank and later filled up behind his back, which is the same position with regard to the hypothecation deed when the date was not there at the time of the defendant's signature in the blank printed form. The defendant expressly denies the due execution and valid attestation of the two alleged mortgages and they cannot be taken to be of any enforceable validity.

2(ii). According to him, the entire sum of Rs. 1,20,000/- was not given to him as alleged, but the plaintiff withheld certain inadmissible items for which interest cannot be claimed and that he had no control over the plaintiff's borrowing rate with its Bankers" and the claim for recovery of interest at 17% p.a. and the penal interest at 6% p.a. is absolutely untenable and illegal. The defendant has further stated that he has not committed any default in payment and the statement showing the liability of Rs. 92,082.98 is inflated illegally and unilaterally by adding up penal interest which alone amounts to Rs. 42,354.73 and it has to be disallowed and struck down.

2(iii). The defendant has further stated that when a rival applicant sought to start a camp cinema within the prohibited limits, the plaintiff to safeguard its interests, to ensure that the defendant's source of incomes does not get depleted ought to have prevented such installation; but quite unintelligibly, the plaintiff remained quiescent when a later attempt by a rival exhibitor started a camp cinema and allowed it to operate, with the result that the collection in the defendant's theatre fell down considerably to the knowledge of the plaintiff. The defendant vehemently contended that the plaintiff has filed the suit only with an intention to make profits by burdening him with usurious interest and illegal penal interest. The plaintiff has deliberately omitted to mention any of the improvements made in the theatre, converting it to a permanent one with many alterations and improvements, thereby enhancing the value of the property by over 15 times the value arrived at by the plaintiff. On the whole, the defendant prayed for dismissal of the suit on the ground that it is entirely vexatious and untenable not only on the taxed scale, but also under the provisions of Section 35A C.P.C.

3. The Trial Court, on consideration of the facts and circumstances of the case and on going through the available materials on record decreed the suit in favour of the

plaintiff Corporation. Aggrieved by the same, the defendant in the suit has preferred the present appeal.

4. Heard Mr. Patty B. Jagannathan, learned counsel for the appellant and Mr. R. Shanmugham, learned Senior Counsel for the respondent.

5. Learned counsel for the appellant has contended that the Lower Court has exercised its jurisdiction illegally and deliberately violated the principles of natural justice by failing to state the points for consideration, whether the appellant is liable to pay compound interest or simple interest, which is the main dispute in the suit. He further contended that the Lower Court had directed the appellant/defendant's counsel on 18.12.1992 to present his arguments in the suit without hearing the arguments of the respondent/plaintiff's counsel and the appellant/defendant's counsel argued in the suit in the absence of the respondent/plaintiff's counsel and pointed out various irregularities and illegalities in the suit.

5a. Learned counsel for the appellant has strenuously contended that the Lower Court has passed a preliminary decree and judgment under Order 34 C.P.C, which is not invokable for the sale of the hypothecated movable items. It was his further contention that the learned Judge has failed to note the last payment of the loan amount in order to calculate the period of limitation and he had also failed to adjudicate the genuineness of Ex.P24 and Ex.D2, in order to adjudicate the exact due amount in the suit. According to the learned counsel, the respondent/plaintiff had very clearly evaded from mentioning the date in the cause of action. In view of the above, he prayed to set aside the judgment and decree of the Court below.

5b. Learned counsel for the appellant, in support of his contentions has relied on the following judgments:

(i) This Court, [Swaminathan Ambalam Vs. P.K. Nagaraja Pillai](#), has held as under:

"7. In S.A.1323 of 1969 arising out of another judgment of the same learned Subordinate Judge which also did not state the points arising for determination or discuss the evidence, I hold that the judgment of the learned Judge cannot be said to be a judgment and that it is vitiated by its failure to comply with the requirements of Order 20, Rule 4(2) Civil P.C. For the same reasons, I consider that the judgment in the present case is also vitiated in its failure to state the points arising for the determination and discuss the evidence on matters in controversy."

(ii) In AIR 1974 Andhra Pradesh 1 in the case of Aziz Ahmed Khan vs. I.A. Patel, a Full Bench of the Andhra Pradesh High Court has held as under:

"8. The irregularities committed by the trial court do not stop at that. The judgment that it has given does not conform to the provisions of Rule 4(2) of Order XX. C.P.C, at all. Whereas a judgment shall contain a concise statement of the case, the points for determination and the decision thereon. We search in vain for any of these essentials in the impugned judgment. It is no judgment at all. The provisions of Rule

4(2) have a set purpose. The form is designed to ensure that while pronouncing the orders or judgments, the Courts do not act mechanically. They should apply their minds to the facts of the case and the points at issue and give a reasoned judgment thereon so that not only their own conscience may be satisfied but also the litigants should have satisfaction that all their evidence has been evaluated and their contentions and arguments duly considered. This is of vital importance inasmuch as the whole edifice of confidence of the litigants in Courts is built upon the quality of judgments. The Courts, therefore, have to necessarily take care that their judgments conform to the provisions of law and are products of sound reasoning. In the instant case, the judgment of the trial Court which we have extracted above is no judgment at all. The appeal must be allowed on that basis also.

"20. The result of the above discussion is that having regard to the facts and circumstances of the present case, the trial court was not justified in passing a decree in favour of the plaintiff. Firstly when the ground under the Money Lenders Act was raised, unless it be proved that the said Act had no application or if applicable the plaintiff had complied with the requisite provision, the Court could not go into the merits to pass a decree in favour of the plaintiff. Secondly, even otherwise when the plaintiff had not brought on record material which is legal and admissible evidence, no decree could be passed in his favour. Certainly the testimony of the plaintiff recorded at an earlier stage when the proceedings were ex parte was not legal evidence after the ex parte proceedings or decree was set aside. Lastly, the judgment given by the Cohort was no judgment in the eye of law. For all these reasons, the appeal must be allowed, the ex-parte decree should be set aside and the court should be directed to proceed with the case from the stage the proceedings were set ex parte against the defendant and dispose of the suit in accordance with law...."

(iii) This Court, in yet another decision reported in 1998 (II) CTC 146 = 1998-2-L.W.439 in the case of Arunachalam Pillai vs. Ramu Mudaliar (died) and three others has held as follows:

"14. It is clear from the above decisions, that the jurisdiction of the Court to grant a relief must be based on pleadings or at least the opposite party must have admitted the right of the plaintiff in respect of the portion of the same. In this case, both the plaintiff and 1st defendant claimed exclusive title. There is no alternative case for either of the parties. The 1st defendant has also not filed any counter claim and he has filed only written statement denying the right of the plaintiff. He claims exclusive right only as a defence to the plaintiff's claim and what he prayed for is only the dismissal of the suit. The question whether the plaintiff and defendant are entitled to equal right over the suit lane was not a matter in issue nor evidence let in that regard. Only because the suit lane lies in between the properties of the plaintiff and the 1st defendant, the Lower Appellate Court though that it has been commonly enjoyed by both of them. When the parties are not at issue and the relief granted by

the Lower Appellate Court is neither incidental to the main relief, following the decisions cited supra, I think that the relief granted was in excess of its jurisdiction. The relief does not flow either from the plaint claim or on the basis of any admission of the defendants. In such cases, the Court cannot grant a relief, as has been granted by the Lower Appellate Court. Consequently, the first substantial question of law raised in the Second Appeal has to be found in favour of the appellant. The Lower Appellate Court has no jurisdiction to grant a declaration that the plaint lane is a common lane. On question No. 2, it has to be held that when there is a finding that the plaintiff has failed to establish his case, it can only dismiss the suit and cannot grant a decree as has been done in this case. On question No. 3, I hold that such question does not arise for consideration, since the suit has only to be dismissed."

(iv) In 2002 (2) CTC 354 = 2002-1-L.W.683 in the case of Central Bank of India vs. Ravindra and others, a Constitutional Bench of the Supreme Court has held as under:

"38. However, "penal interest" has to be distinguished from "interest". Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrong-doer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Thus, while liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. Penal interest can be charged only once for one period of default and therefore cannot be permitted to be capitalised.

39. ...If there is a stipulation for the rate of interest, the Court must allow the rate up to the date of the suit subject to three exceptions; (i) any provision of law applicable to money lending transactions, or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; (ii) if the rate is penal, the Court must award at such rate as it deems reasonable; (iii) even if the rate is not penal the Court must reduce it if the interest is excessive and the transaction was substantially unfair. If there is no express stipulation for payment of interest the plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest, or an implied agreement. Interest from the date of suit to date of decree is in the discretion of the Court. Interest from the date of the decree to the date of payment or any other earlier date appointed by the Court is again in the discretion of the Court...."

6. In response, learned Senior Counsel for the respondent Theatre Corporation submitted that the total liability on the appellant is Rs. 92,082.98 as per the statement of accounts and even after repeated requests and reminders, the appellant failed to pay the arrears of monthly instalments as agreed upon. He contended that the interest on the total liability is calculated based on the statement

of accounts and the penal interest levied thereon is also as per the terms of agreement. It is his further contention that the appellant had executed a mortgage deed dated 12.12.1973 and a deed of hypothecation dated 26.03.1974 in favour of the respondent Theatre Corporation as a security for the repayment of loan. He further submitted that the interest charged is at the rate of 17% per annum and the penal interest is only at the rate of 6% per annum and there is no exorbitant claim in the rates of interest. According to the learned Senior Counsel for the respondent Corporation, the findings of the Trial Court in respect of the interest or compound interest and the liability calculated thereon cannot be found fault with and the Court below has passed a very considered judgment and the same may be confirmed.

7. I have heard the rival contentions made by the learned counsel on either side and given careful consideration to the oral and documentary evidence on record.

8. A cursory reading of the case would reveal that the unsuccessful defendant in the suit has come on appeal before this court. It is seen that the respondent Theatre Corporation incorporated under the Indian Companies Act, 1956 provides financial assistance to private individuals, firms, companies, etc. to enable them to construct semi-permanent theatres in Tamil Nadu, based on which the appellant approached the respondent by an application dated 31.10.1972, requesting them to provide funds to the tune of Rs. 1,00,000/- in order to complete the construction of the semi-permanent theatre in his plot of land situated at Nemili Village; after scrutinising the application of the appellant, the respondent had sanctioned a sum of Rs. 1,00,000/- to the appellant on 01.02.1973, subject to the terms and conditions of their Corporation and in that regard, the appellant had executed an agreement dated 12.12.1973; moreover, the appellant had executed a registered Mortgage Deed dated 12.12.1973 and a deed of hypothecation dated 26.03.1974 in favour of the respondent Corporation as further security towards the payment of loan. It is also seen that an additional loan of Rs. 20,000/- as requested by the appellant has been sanctioned to him by the respondent Corporation on 11.06.1974, for which the appellant has also executed a registered simple mortgage deed in favour of the respondent on 01.08.1974, mortgaging the lands and buildings described in the suit schedule.

8a. It is further seen from the records that the respondent Corporation had disbursed a sum of Rs. 25,000/- on 12.12.1973 as first instalment and thereafter disbursed sums of Rs. 7,958.72, Rs. 25,000/-, Rs. 30,000/-, Rs. 11,000/- and Rs. 20,000/- to the appellant on 14.12.1973, 05.03.1974, 26.03.1974, 17.04.1974 and 01.08.1974, respectively. It is revealed that after the completion of construction of theatre, it was inaugurated on 22.08.1974 and the appellant started exhibiting the movies. It appears that the appellant has paid some amount towards the instalment dues and thereafter, he has committed default in the payment of loan and the arrears of monthly instalments, thereby violating the terms and conditions of the agreement; the total liability on the part of the appellant as per the statement of

accounts is shown as Rs. 92,082.98. It is further revealed that the respondent Corporation had caused a legal notice to the appellant on 22.07.1982 demanding repayment of the entire loan amount together with interest and the same was acknowledged by the appellant on 27.07.1982; since there was no response from the appellant, the respondent Corporation filed a suit in O.S. No. 42 of 1991 for a direction to the appellant to pay them the sum of Rs. 92,082.98 with subsequent interest at 23% per annum from 25.09.1982 till the date of payment by fixing a date for such payment with the cost of the suit, in default of such payment, direct the sale of the hypothecated items in the schedule for a sufficient portion thereof for the due satisfaction of the amount and grant a personal decree against the appellant for payment of the balance due, if any, in the event of the hypothecated items being found insufficient to the satisfaction of the decree.

9. An analytical view of the case would reveal that originally the appellant had invested some amount in building a theatre in his land and thereafter obtained loan for a sum of Rs. 1,20,000/- from the respondent Corporation with interest at the rate of 12% per annum and failed to repay the same after paying few instalments. It was argued by the appellant that the agreement referred to in the plaint was taken in blank papers without any mentioning of the date and even the rate of interest column was left blank and later it was filled up by the respondent. It was also his contention that he had executed an unfilled hypothecation deed in favour of the respondent.

9a. To answer the question regarding the genuineness of the agreement and the other deeds, it is seen from the deposition of the appellant that he had obtained a loan for a sum of Rs. 1,20,000/- and executed Ex.A3-Agreement dated 12.12.1973 and other mortgage deeds; he has also deposed that only in Ex.A3-Agreement, he had affixed his signature and the rate of interest column was left unfilled. While so, in his cross-examination, the appellant has stated that he had affixed his signature in Ex.A3 and the agreement was filled in at the time of execution; while it is the evidence of the appellant that one Vellaiyan has attested Ex.A3 as witness, the appellant has not brought the said Vellaiyan before the Court below for examining him and moreover, he has not given any explanation as to why he had affixed his signature in the agreement and deeds of mortgage and hypothecation, when they are unfilled. An analysis of the material records and the deposition of the witness would clearly reveal that the appellant has himself accepted that he had affixed his signature and executed the agreement as well the deeds of mortgage and hypothecation in favour of the respondent Corporation. Since the agreement and the deeds of mortgage and hypothecation are proved to be true, it is obligatory on his part to pay the liability of Rs. 92,082.98 along with interest to the respondent Corporation.

10. With regard to the contention raised by the learned Senior Counsel for the appellant that D.W.2, Auditor of the respondent Corporation in his

cross-examination has deposed that he had prepared the statement of accounts only as per the instructions of the Corporation, it is seen that the Trial Court has properly considered Ex.A4, Statement of Accounts.

11. A panoramic approach to the issue on hand reveals that the controversy centers around with the correctness of the calculation of interest and penal interest by the respondent Corporation. It is seen that the appellant had obtained loan from the respondent Corporation only for building a semi-theatre and as per the agreement, deeds of mortgage and hypothecation and the terms and conditions of the respondent Corporation, it is clearly stated that the rate of interest is subject to change; it is also stated that if the instalments are properly paid then the interest would be charged at the rate of 12% per annum and if otherwise, an additional 6% would be charged as penal interest, which is also subject to change by the respondent Corporation. As per the statement of accounts submitted by D.W.2, Chartered Accountant, the interest was charged only at the rate of 12% and the amounts paid by the appellant is adjusted only towards the principal. Since there is no evidence to prove the said calculation, the Trial Court came to the conclusion that the appellant is obliged to pay the interest as per the claim of the respondent Corporation. But, the question which arises now is whether the respondent Corporation has calculated the dues by charging simple interest or compound interest. The deposition of P.W.3 shows that it is compound interest; whereas, Ex.A4 shows that for the principal amount alone, penal interest has been calculated; however, in Ex.B3, letter written by the Company Secretary of the respondent Corporation to the appellant, dated 16.07.1986, it is stated that 17% simple interest has been calculated.

12. A clear reading of the judgment of the court below reveals that the findings of the court below in respect of the interest calculated on the principal amount and the penal interest imposed on the principal amount is not clear and the court below ought to have given proper consideration to the same. Learned counsel for the appellant has placed reliance on a judgment of a Constitutional Bench of the Supreme Court reported in 2002 (2) CTC 354 in the case of Central Bank of India vs. Ravindra and others to distinguish "interest" and "penal interest". Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrong-doer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Thus, while liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. Penal interest can be charged only once for one period of default and therefore cannot be permitted to be capitalised.

13. In the instant case, the entire dispute is as to how the liability has been arrived at, while calculating the interest and the penal interest. The findings rendered by the Trial Court regarding the calculation of interest cannot be accepted as no rational

method has been followed and the interest and penal interest have to be levied only as per the agreement; the court below ought to have come to a conclusion after thoroughly examining the witnesses and after analysing the material evidence on record. While upholding the findings of the court below in respect of the liability of the appellant in paying the dues, the manner and the method of fixation of liability cannot be sustained. Therefore, the findings of the Trial Court in not arriving at a proper conclusion in respect of interest and penal interest has to be looked into again and for that purpose, the matter has to be remitted to the court below for giving findings with regard to the total liability by giving proper calculation based on evidence. Accordingly, the judgment and decree of the court below are set aside and they are remitted to the court below to the extent indicated above. However, the Trial Court, taking note of the pendency of the suit is directed to dispose of the suit within a period of three months from the date of receipt of a copy of this order.

The appeal is allowed on the above terms. No costs.