

IN THE JUDICATE OF MADRAS HIGH COURT

RESERVED ON : 30.08.2017

DELIVERED ON : 21.09.2017

CORUM

THE HON'BLE MR.JUSTICE R.SUBBIAH

and

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

A.S.No.1026 of 2012

and

C.M.P.No.1071 of 2016

1.M/s.Creative Homes Pvt. Ltd.,
rep. By its Managing Director,
Paul Ponmany.

2.Paul Ponmany,
S/o.Thathrathil Devasay Porinchu
T-52 B, Elliots Beach Road,
6th Avenue, Besant Nagar,
Chennai-600 090. ... Appellants/Defendants

Vs.

Thathrathil Porinchu Devassy @ Dev.T.Devasay,
S/o.Thathrathil Devasay Porinchu
rep. by his Power of Attorney
G.Nirmala
D/o.Gajendran,
No.33, Nellikaran Street,
Thiruvottriyur,
Chennai-600 019. ... Respondent/Plaintiff

Appeal has been filed under Section 96 of CPC of CPC,
against the judgment and decree dated 20.07.2011 in O.S.No.7214
of 2010 passed by the learned V Additional Judge, City Civil
Court, Chennai.

For Appellants : Mr.S.V.Jayaraman, Senior Counsel
for Mr.P.Arivudainambi

For Respondents: Mr.O.Padma Prakash

* * * * *

JUDGMENT

R.SUBBIAH, J.,

This appeal has been filed by the defendants as against the judgment and decree dated 20.07.2011 in O.S.No.7214 of 2010 passed by the learned V Additional Judge, City Civil Court, Chennai, in and by which the suit filed by the respondent herein/plaintiff for directing the appellants herein/defendants to pay a sum of Rs.15,12,000/- being the principle and interest till the date of plaint, was decreed.

2.For easy reference, the parties will be hereinafter referred to as per their rankings in the suit viz., the plaintiff and the defendants.

3.The brief facts of the case of the plaintiff, inter alia, are as follows_

3-1.The 1st defendant is a private limited company registered under the Indian Companies Act, 1956, having its office at No.5, New Avadi Road, Kilpauk, Chennai-10. The 2nd defendant is the Director of the 1st defendant-company, whose age and father's name are not known to the plaintiff. The 2nd defendant is residing at No.5, New Avaid Road, Kilpauk, Chennai-10, wherein the 1st defendant-company is being run by the 2nd defendant.

3-2.In the course of their business, the 1st defendant represented by the 2nd defendant requested the plaintiff to lend the 1st defendant a sum of Rs.12 lakhs and as per the said request so made by the 2nd defendant, a sum of Rs.12 lakhs was lent by the plaintiff to the 1st defendant on 03.01.1995, for which the 2nd defendant stood as a guarantor to repay the same on or before 04.01.1996 with interest @ 24% per annum, as evidenced by the Promissory Note duly executed by the defendants. According to the plaintiff, the defendants did not pay the principle and interest as agreed in the said Promissory Note, but only paid the interest from January, 1996 to January 1997 and from January 1997 to January 1998 and thereafter, failed and neglected to repay any further amount either towards the principal or any amount in the form of the admitted interest thereof. The plaintiff had been repeatedly contacting the defendants and had been requesting the defendants to make good the borrowed sum with the contractual rate of interest. But, the 2nd defendant had been evading the plaintiff and when the plaintiff approached the defendants through friends and relations, the defendants used to behave in a very nonchalant manner. Hence, through his counsel, the plaintiff issued legal notice to the defendants, to repay the amount borrowed with accrued interest. Inspite of the receipt of the legal notice

on 25.1.1999, the defendants have not come forward to repay the amount. Hence, the plaintiff has filed the suit. According to the plaintiff, the suit is not barred by limitation inasmuch as the defendants have paid the interest on the principal amount borrowed under the above said Promissory Note till January, 1998. The amount due and payable by the defendants is Rs.12 lakhs as principal and Rs.3,12,000/- as interest from January 1998, totally to a sum of Rs.15,12,000/-. Hence, the plaintiff filed the suit praying to direct the defendants to pay a sum of Rs.15,12,000/- being the principal and interest till the date of the plaint and to pay the interest @ 24% per annum on the principal amount of Rs.12 lakhs from the date of the plaint till the date of payment.

4-1. Resisting the claim of the plaintiff, the defendants have filed a written statement, inter alia, denying the allegations made in the plaint. In the written statement, it is specifically stated by the defendants that the plaintiff has not come to the Court with clean hands and he deliberately and wantonly suppressed the facts for obvious reasons with malafide intention and for reasons best known to him. The plaintiff has deliberately suppressed and omitted to mention the relationship between himself and the 2nd defendant. The 2nd defendant is the younger brother of the plaintiff and both are Canadian Citizens and the 2nd defendant is residing outside India and is living in New York at 111-19, 66th Avenue, Forest Hills, New York 11375 for about 35 years. The plaintiff knows that the 2nd defendant is residing in foreign country and inspite of the same, his residence has been shown by the plaintiff as Avadi Road, Kilpauk, Chennai deliberately.

4-2. Further, according to the defendants, the 2nd defendant never requested the plaintiff to lend to the 1st defendant-company a sum of Rs.12 lakhs. The plaintiff had deposited the said amount only by way of deposit and not as a loan to the 1st defendant. As the entire transaction was only in the nature of the depositor and depositee and not as creditor and debtor, the suit as filed is not maintainable. In fact, the plaintiff wanted some security or evidence for the purpose of the aforesaid deposit and only in that context, the document was executed. Absolutely, there is no indication in the suit document as to whether the loan was given and even the document relied on by the plaintiff cannot be said to be a Promissory Note and it is only a document as and by way of security for the purpose of the deposit. Further, the communication between the parties did not take place in India on 3.1.1995 because the 2nd defendant was not in India on that date. The document was executed later on. When the 2nd defendant signed the document, the revenue stamps were not affixed. The revenue stamps have been affixed only by the plaintiff and the marking or scoring on the stamps was not done by the 2nd defendant. The stamps must

have been affixed later in point of time after the signature of the 2nd defendant and therefore, the document is inadmissible as the scoring thereon is not done by him or at his instance or by getting his consent and therefore, it is fabricated.

4-3. It is further stated by the defendants in the written statement that the interest was paid not under the Promissory Note, but towards the deposit as mentioned above. Even as per the letter written by the plaintiff, it is clear that the amount of Rs.12 lakhs was only a deposit and not a loan. Further, receipt of interest is also only towards deposit. The 2nd defendant is not admitting or accepting the letter dated 04.01.1998 ie., Doc.No.3 filed along with the plaint. The entire deposit amount has been paid by cash and on various occasions and as on date, deposit has also been discharged and no amount is due on that deposit and therefore, the defendants are not at all liable to pay any amount to the plaintiff. Thus, the defendants sought for dismissal of the suit.

5. On the above pleading, the trial Court has framed the following issues-

- 1) Whether the Trial Court is having jurisdiction to try the suit?
- 2) Whether the suit is barred by limitation?
- 3) Whether the suit Document No.1 (Ex.A.1 - Promissory Note) actually styled as Pro-note or document evidencing the security for deposit of amount deposited with the 1st defendant?
- 4) To what relief the plaintiff is entitled to?

Before the Trial Court, in order to prove his case, the plaintiff examined himself as P.W.1 and marked six documents as Ex.A.1 to Ex.A.6. On the side of the defendants, the 2nd defendant examined himself as D.W.1 and mark a document as Ex.B.1.

6. The Trial Court, after analysing the entire evidence both oral and documentary, has decreed the suit as prayed for. Aggrieved over the same, the defendants have come forward with the present appeal.

7. The learned senior counsel appearing for the appellants/defendants would submit that the plaintiff and the 2nd defendant are Canadian Citizens. The 1st defendant is the private limited company and the 2nd defendant is its Director, who is the younger brother of the plaintiff. But, in the plaint, the plaintiff has stated that the age & father's name of the 2nd defendant is not known to him, which would show that the

plaintiff has not come to the Court with clean hands. The plaintiff has filed the suit as if the 2nd defendant requested him to lend the 1st defendant-company a sum of Rs.12 lakhs and as per the said request so made, the plaintiff lent a sum of Rs.12 lakhs to the 1st defendant-company on 03.01.1995, for which the 2nd defendant stood as a guarantor for repaying the same with interest @ 24% per annum. But, according to the learned senior counsel for the appellants/defendants, there was no borrowal of loan; that absolutely there is no loan transaction between the plaintiff and the defendants; that if really the defendants had borrowed loan from the plaintiff, the plaintiff would have stated the place of borrowal in the plaintiff; but the plaint is silent with regard to the place of borrowal of the loan amount. According to the defendants, the plaintiff, knowing fully well that the 2nd defendant is not a resident of India, has deliberately given Chennai address as if he is a resident of Chennai, only for the purpose of bringing the jurisdiction to try the suit in the Court at Chennai. Further, learned senior counsel for the appellants/defendants, by inviting the attention of this Court to Ex.A.1 (alleged Promissory Note), submitted that Ex.A.1 was prepared in the Letter-Head of the 1st defendant-company, describing it as Promissory Note, but the contents of the said document (Ex.A.1) would show that it is not a Promissory Note. Ex.A.1, on the basis of which the suit has been initiated, clearly mentioned the words 'deposit premium' and 'full deposit amount'. Further, the learned senior counsel for the appellants/defendants, by inviting the attention of this Court to Ex.A.3, letter dated 04.01.1998 annexing a cheque for Rs.2,88,000/- towards interest, submitted that the contents of the said letter Ex.P.3, would show that 'interest on your deposit' for the period from January 1997 to January 1998. In fact, by letter dated 16.01.1996 (Ex.B.1) sent by the plaintiff to the 1st defendant, in more than one place it was mentioned as 'term deposit' and 'this deposit be returned'. Therefore, on the basis of the documents filed before the Trial Court, it is clear that the transaction between the plaintiff and the defendants is not as a creditor and debtor. Moreover, the document (Ex.A.1), which forms the basis and foundation for filing the suit cannot at any stretch of imagination be termed as a Promissory Note. If it is not a Promissory Note, the suit filed on the basis of that document treating it as a Promissory Note falls to the ground and no relief could be granted to the plaintiff on the basis of that document. Therefore, on the basis of the recitals in the documents, Ex.A.1 cannot be held to be a Promissory Note. Therefore, the suit filed claiming Ex.A.1 as Promissory Note is not maintainable.

8.The learned senior counsel for the appellants/defendants would also submit that there is no alternative case for the plaintiff, inspite of the written statement to the effect that

the transaction can be treated as deposit. In the absence of such a plea, according to the learned senior counsel for the appellants/defendants, the Court cannot, contrary to the pleading and evidence, treat the transaction as one of deposit and grant the relief. At least, after filing the written statement, the plaintiff would have taken steps to amend the plaint. Hence, in the absence of amendment of the plaint, relief cannot be granted, treating the suit transaction as one of deposit. Moreover, the plaintiff has to succeed or fail on the basis of his pleading and when plaintiff's specific case is that of Promissory Note, he cannot, in the absence of amendment of plaint, content that the transaction may be treated as deposit and relief can be granted on the plea, which was not raised and an issue was not framed.

9. In this regard, the learned senior counsel for the appellants/defendants has also invited the attention of this Court to the cause of action paragraph in the plaint and submitted that in the cause of action paragraph, the plaintiff had stated as if the 2nd defendant executed a Promissory Note for a sum of Rs.12 lakhs in favour of the plaintiff. If the plaintiff's case fails, he cannot seek relief on the basis of a different cause of action, especially when such alternative plea is not raised at any stage. Therefore, from the materials available on record, it could be seen that the transaction between the plaintiff and the defendants is only as a 'depositor and depositor' and not as 'lender and borrower' or as 'creditor and debtor'.

10. Further, the learned senior counsel for the appellants/defendants submitted that the suit could be filed only within a period of three years from the date of demand. But, in the instant case, no demand was made by the plaintiff. If it is taken as a Promissory Note as alleged by the plaintiff, then the suit ought to have been filed with a period of three years from the date of execution of the Promissory Note. Though the suit has been filed within a period of three years from the date of payment of interest towards the principal amount, in the instant case, since the payments of interest were made under Ex.A.2 & Ex.A.3 towards deposit, not under alleged Promissory Note, those payments also will not save the limitation and it cannot be treated as acknowledgement of liability. As such, the suit is also barred by limitation. But, the Trial Court, without considering all these aspects, decreed the suit, holding that Ex.A.1 is a Promissory Note and interest paid under Ex.A.2 & Ex.A.3 are only towards the loan transaction; thereby, the Trial Court has erroneously held that the suit is not barred by limitation. Thus, the learned senior counsel for the appellants/defendants submitted that by setting aside the judgment and decree of the trial Court, the appeal has to be allowed.

11. Countering the submissions made by the learned senior counsel for the appellants/defendants, it is replied by the learned counsel appearing for the respondent/plaintiff that it is incorrect to state that the transaction between the plaintiff and the defendants is only as depositor and depostee. As per the request made by the 2nd defendant, the plaintiff lent a sum of Rs.12 lakhs to the 1st defendant on 03.01.1995. The 1st defendant as the principal debtor and the 2nd defendant as the guarantor executed a Promissory Note dated 03.01.1995, which was marked as Ex.A.1. The person, who signed the Promissory Note for the 1st defendant, as Finance Director and the 2nd defendant, who is the guarantor, are one and the same person. As per Ex.A.1, the aforesaid amount should be repaid together with interest @ 18% per annum on or before 04.01.1996 and a deposit premium of 6% if the funds remain on deposit for the full time of the Note. In fact, the 1st defendant has repaid a sum of Rs.79,850/- towards part of the interest as per Ex.A.6, dated 18.02.1996, another sum of Rs.2,88,000/- towards interest from January 1996 to January 1997 as per Ex.A.2, and another sum of Rs.2,88,000/- towards interest from January 1997 to January 1998 as per Ex.A.3 dated 04.01.1996. Since the defendants were not properly repaying the sum borrowed, the plaintiff sent a letter dated 10.12.1997 marked as Ex.A.4 demanding repayment. The plaintiff has also caused a legal notice dated 25.01.1999 to the defendants demanding repayment (marked as Ex.A.5). Though in the written statement, the defendants admitted the fact that they received the said amount from the plaintiff, it is their stand that the said amount was given only as a deposit and not as a loan. In support of their contention, the defendants produced a letter dated 16.01.1996 (Ex.B.1), wherein the amount was mentioned as deposit. But, the defendants admitted in their written statement that the interest from January 1996 to January 1997 and January 1997 to January 1998 was paid by them; but, they contend that the interest was paid towards the deposit and not towards the Promissory Note. Further, in paragraph 8 of the written statement, the defendants mentioned that they repaid the entire amount. But, no document was adduced by the defendants to establish the said defence. In fact, the defendants failed to file any document/evidence either to disprove the case of the plaintiff or to prove their case. Therefore, the pleading in the plaint, the documentary evidence and oral evidence of P.W.1 could not in any way be assailed by the defendants. In fact, D.W.1 in his cross-examination admitted that Ex.A.1 bears the heading 'Promissory Note' and also describes it as a 'Promissory Note' at the end. Further, D.W.1 has also admitted in his cross-examination that the amount given by the plaintiff can be asked by the plaintiff to be returned on demand. This piece of evidence of D.W.1 would show that the said document-Ex.A.1 is only a Promissory Note and not deposit. Even in the letter-Ex.A.6 sent by the 1st defendant

to the plaintiff, Ex.A.1 has been described as Promissory Note. Therefore, the amount was received by the 1st defendant with a clear understanding that it has to be repaid to the plaintiff on demand. The interest amounts paid by the defendants under Ex.A.2, Ex.A.3 & Ex.A.6 are only towards the promissory note in respect of the loan amount. Therefore, the suit filed from the date of payment of the interest would save the limitation. Therefore, according to the learned counsel for the respondent/plaintiff, it is incorrect to state that the suit is hit by limitation.

12.With regard to the objection made by the learned senior counsel for the appellants/defendants in respect of the jurisdiction of the Court at Chennai to try the suit, it is replied by the learned counsel for the respondent/plaintiff that first of all, the defendants have not raised any objection in their written statement with regard to the jurisdiction of the Court to try the suit and they submitted themselves to the jurisdiction of the trial Court and faced the trial. Moreover, address of the 1st defendant in the letters Ex.A.2 & Ex.A.3, along with the cheques for interest were annexed, has been mentioned as No.5, New Avadi Raod, Kilpauk, Chennai-10. Therefore, it is clearly established that the 1st defendant-company is carrying on business only at Chennai and the company is represented by the 2nd defendant, who is a Financial Director of the company and the 2nd defendant is having the permanent place of residence at Chennai.

13.With regard to the submission made by the learned senior counsel for the appellants/defendants that in Ex.A.1 stamps have been affixed at a later point of time after the signature of the 2nd defendant and further, the signature of the 2nd defendant was not on the stamps and the stamps were only scored, it is the reply of the learned counsel for the respondent/plaintiff that the defendants are admitting the receipt of a sum of Rs.12 lakhs under Ex.A.1 and hence, the plea regarding the affixture of stamps and defacing the revenue stamps are not relevant. The evidence on record would clearly show that Ex.A.1 is only a Promissory Note and interest paid under Ex.A.2, Ex.A.3 & Ex.A.6 are only towards the loan transaction and therefore, the suit is not hit by limitation. Considering all these aspects, the trial Court has correctly decreed the suit. Thus, the learned counsel for the respondent/plaintiff sought for dismissal of the appeal.

14.We have carefully heard the submissions made on either side and perused the materials available on record.

15. In view of the above submissions made on either side, the following points arose for consideration in this appeal_

1) Whether the Trial Court is having jurisdiction to try the suit?

2) Whether Ex.A.1 is a proof of deposit made by the plaintiff to the 1st defendant-company as alleged by the defendants or is it a Promissory Note as claimed by the plaintiff in respect of the loan transaction?

3) Whether the suit is hit by limitation?

Point No.1:-

16. It is the defence of the learned senior counsel for the appellants/defendants that the 2nd defendant is a Canadian Citizen; hence, the Courts in India do not have jurisdiction in respect of the subject matter of the suit. But, on a perusal of the written statement filed by the defendants, it is seen that no specific defence was taken by the defendants in the written statement with regard to the jurisdiction. Further more, in Ex.A.1 executed by the defendants, the address of the 1st defendant was mentioned as No.5, New Avadi Road, Kilpauk, Chennai-10. Similarly, even in Ex.A.2, Ex.A.3 & Ex.A.6, through which interest amounts were sent to the plaintiff by way of cheques, the address of the 1st defendant was mentioned as No.5, New Avadi Road, Kilpauk, Chennai-10. As per Ex.A.3, a cheque for Rs.2,88,000/- drawn on Catholic Syrian Bank, Kodambakkam Branch, Chennai, given by the 1st defendant to the plaintiff towards the interest for the period of January 1997 to January 1998. Therefore, the address given in Ex.A.2 & Ex.A.3, coupled with the fact that the 1st defendant has issued cheques to the plaintiff drawn on Catholic Syrian Bank, Kodambakkam Branch, Chennai, would show that the 1st defendant was carrying on business at Chennai and the company was represented by the 2nd defendant, who is having a permanent place of residence at Chennai. Hence, as per Section 20(b) of C.P.C, the Court in Chennai has jurisdiction over the subject matter of the suit, since the defendants are carrying on business at Chennai and the 2nd defendant is residing as well as carrying on business at Chennai. Therefore, the objection raised by the defendants with regard to the jurisdiction cannot be countenanced. The Trial Court, by considering this aspect properly, rendered a finding that the Court at Chennai will have the jurisdiction.

Point Nos.2 & 3:-

17. It is the stand of the defendants that a sum of Rs.12 lakhs was given by the plaintiff to the 1st defendant only as a deposit and not as a loan. According to the learned senior counsel for the appellants/defendants that though Ex.A.1 described it as a Promissory Note in its heading, the contents of the said document would show that it is only a deposit,

because in Ex.A.1 it has been clearly mentioned as 'deposit premium' and full 'deposit amount'. As per Section 22 of the Limitation Act, the suit could be filed only within a period of three years from the date of demand. In the instant case, according to the learned senior counsel for the appellants/defendants, absolutely no demand was made by the plaintiff. There is no alternative case for the plaintiff, in spite of the written statement to the effect that the transaction can be treated as deposit. In the absence of such a plea, the Trial Court cannot, contrary to the pleading and evidence, treat the transaction as one of deposit and grant the relief.

18. But, from a perusal of the materials available on record, We find that as contended by the learned counsel appearing for the respondent/plaintiff that Ex.A.1 is only a Promissory Note, which was admitted by the 2nd defendant himself in Ex.A.6 (letter sent by the 1st defendant to the plaintiff dated 18.02.1996). Relevant portion in Ex.A.6 reads as follows_

"The total amount is Rs.79850.00 (Seventy-nine Thousand Eight Hundred Fifty). This amount has been debited to your interest account (of Promissory Note dated January 3, 1995). Please acknowledge the receipt of the payments."

Similarly, in Ex.A.2 it has been stated as follows_

"Please find the drafts totalling Rs.2,88,000/- (Two Hundred Eighty Eight Thousand) as interest payments, on the loan amount Rs.12,00,000 from 1996 Jan through Jan 1997. Please acknowledge the receipt of the funds"

From a perusal of Ex.A.2 & Ex.A.6, it could be seen that the transaction is only a loan transaction under Promissory Note and it is not a deposit. Therefore, the facts that the plaintiff paid the suit claim to the defendants and that the defendants received it with a clear understanding that it is repayable, have been established beyond any doubt. Further more, even the 2nd defendant himself in his evidence as D.W.1 has stated that it has been described in Ex.A.1 as Promissory Note in its heading. D.W.1 in his cross-examination admitted that the amount given by the plaintiff can be asked by the plaintiff to be returned on demand. The relevant portion in the evidence of D.W.1. reads as follows_

"The amount given by the plaintiff through Ex.A.1 can be asked by the plaintiff to be returned on demand....

.....The letter dated 18.2.92 is Ex.A6. In Ex.A6 letter I have referred Ex.A1 as promissory note."

Therefore, the above admission of the 2nd defendant (D.W.1) coupled with the fact that Ex.A.1 was headed as Promissory Note and letter sent by the 1st defendants viz., Ex.A.2, Ex.A.3 & Ex.A.6, described it as promissory note, would clearly show that the transaction is only a loan transaction. Therefore, We are of the opinion that the suit was filed within the limitation period by paying the interest time got extended. Therefore, the submission made by the learned senior counsel for the appellants/defendants that the suit is hit by limitation as per Article 22 of the Limitation Act has no force. Therefore, the suit is well within the time. Considering all these aspects, the Court below has rightly decreed the suit. Under such circumstances, We do not find any infirmity in the judgment and decree passed by the Trial Court and the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and stands dismissed, confirming the judgment and decree passed by the Trial Court. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To,
The V Additional Judge,
City Civil Court, Chennai.

copy to

The Section Officer
VR Section
High Court, Madras

+1 cc to M/s.P.Arivudainambi Advocate sr 69291
+1 cc to M/s.O.Padmaprakash Advocate sr 69374

A.S.No.1026 of 2012
and
C.M.P.No.1071 of 2016

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