IN THE HIGH COURT OF JUDICATURE AT MADRAS

| Reserved on: 13.07.2017 | Delivered on: 21.07.2017 |
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CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

Second Appeal No.1169 of 2013

M/s.Sree Gokulam Chits and Finance
Company(P) Limited
Rep. By its Authorised Agent
Mr.Sivabala Subramania Venkatesan
S/o.Late V.Ramalingam
Ramani Shopping Complex II Floor
Opp.New Bus Stand,
Omalur Main Road, Salem-4 .. Appellant/1st respondent/
Plaintiff

Vs.

1.M/s.Guru Jewellers
Rep. By its Partner
R.Annapoorani
No.18/E, Ramalinga Sowdeswari
Madam Street, Gugai, Salem.

2.R.Saravanan
3.R.Anna Poorani .. Respondents 1 to 3/
Appellants 1 to 3/
Defendants 1 to 3.

4.S.Saravanan
5.Sangameswaran
6.R.Rajamanickam
R-6 died, Given up vide memo dated 13.07.2017
7.P.Manickam .. Respondents 4 to 7/
Respondents 2 to 5/
/Defendants 4 to 7

Prayer : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree passed by the II Additional Subordinate Judge, Salem, in A.S.No.69 of 2012 dated 26.02.2013, reversing the judgment and decree passed by the Principal District Munsif Court, Salem, in O.S.No.881 of 2008 dated 16.11.2011.

For Appellants : Mr.L.Rajasekar
For Respondents: Mr.I.C.Vasudevan, Senior Counsel
for Mr.M.Jayachandran
for respondents 1 to 3
R-6 Given up.
R4, R5 and R7 Served.

J U D G M E N T

Challenge in the Second Appeal is made by the plaintiff against the judgment and decree dated 26.02.2013 passed in A.S.No.69 of 2012 on the file of II Additional Subordinate Judge, Salem, reversing the judgment and decree dated 16.11.2011 passed in O.S.No.881 of 2008 on the file of Principal District Munsif, Salem, which decreed the suit as prayed for by the plaintiff.

2. At the time of admission of the second appeal, this court issued notice to respondents 1, 4 to 7. Respondents 2 and 3 filed Caveat Petition through their counsel Mr.M.Jayachandran. The following are the substantial questions of law raised by the appellant herein:-

"(a) The findings of the Appellate Court that "when there are much remedy available for the appellant/plaintiff to recover the due amount, the appellant adopted the back door method by filing a suit for bare injunction" is not correct and there is no legal bar for the appellant/plaintiff to file a suit for bare injunction in light of the facts involved in this case.

(b) The observation of the Appellate Court that the relief of injunction should have been treated as the consequential relief and main relief should have been recovery of the due amount is not correct.

(c) The Appellate Court out to have seen that the Exhibit A.27 Mortgage Deed is not challenged by the respondents/defendants.

(d) The suit is not hit by Section 64(3) of the Chit Funds Act.

(e) The observation of the Appellate Court that mere filing of a suit for injunction will not fullfil the remedy of the appellant/plaintiff is not correct.

(f) The Appellate Court ought to have seen that there is a separate cause of action for the suit and the same has been pleaded and proved by the oral and documentary evidence.

(g) The Appellate Court could not point out any illegality or the perversity in the findings of the Trial Court.

(h) The Appellate Court's observation that the documents filed by the Plaintiff after the date of the filing of the suit would not be looked into by the Court while adjudicating the matter is illegal. "

3. The suit has been laid by the plaintiff/appellant for permanent injunction restraining the defendants 2 to 6 from alienating or encumbering the suit property in favour of the 7th defendant or to any other 3rd party. The plaintiff is a reputed financial institution engaged in chit business. The first defendant/respondent is a partnership firm carrying on business in jewellery and the respondents/defendants 2 to 5 are partners of the first defendant firm. The 2nd defendant is the son of the 3rd defendant while the 4th defendant is son-in-law of the 3rd defendant and the 5th defendant is the close associate of defendants 2 to 5 and all of them are the partners of first defendant firm. The 6th defendant is the Power of Attorney holder of the 2nd defendant and he has entered into sale agreement to sell the schedule mentioned property to the 7th defendant. According to the plaintiff, in the chit group run by them, the 2nd defendant/respondent enrolled himself as subscriber on behalf of the 1st defendant firm with the consent of defendants 3 to 5. According to the plaintiff, the 3rd defendant stood as surety for the chit transaction of 2nd defendant and they also executed necessary documents and Promissory Note in respect of the said chit transaction. The defendants 2 and 3 settled the chit group No.626/0545/KDM/20 which commenced from 20.06.2005 spread over 20 months and the monthly ticket amount was Rs.15,000/-. According to the plaintiff, the 2nd defendant was declared as Prize Subscriber during the 5th month auction and received Rs.2,25,000/- as a chit amount. After the said chit group was settled by defendants 2 and 3, the 2nd defendant became subscriber of 2 more chit groups of the plaintiff with the consent and knowledge of defendants 3 and 4. Both the chit groups commenced from 05.12.2005 spreading over 25 months for a ticket amount of Rs.12,000/- per month. According to the plaintiff, out of the said two groups, in the first group, No.636/0160/KDM/11, the 2nd defendant was declared as Prize Subscriber on the 6th month of auction and received a sum of Rs.2,25,000/- with the knowledge and consent of defendants 3 and 4. In respect of the same, defendants 2 to 4 on behalf of 1st defendant executed necessary documents while defendants 3 and 4

stood as guarantors for prompt payment of monthly installments. Likewise, in the other chit group number 636/0160/KDM/12, the 2nd defendant was declared as Prize Subscriber in the 12th month auction and received a sum of Rs.2,40,000/- as prize amount with the knowledge and consent of defendants 3 and 5. The defendants 2, 3 and 5 executed necessary documents in respect of the said transactions and D-3 and D-5 stood as guarantors for prompt payment of monthly installments. It is further stated by the plaintiff that the 2nd defendant became a subscriber on behalf of the 1st defendant in two other chit groups which commenced from 24.11.2006 for a monthly ticket of Rs.25,000/-. In the said chits also, the 2nd defendant was declared as Prize subscriber on 24.01.2007 in Chit Group No.J2H/0625/JMM/05 and again on 24.01.2007 in Chit Group No.J2H/0624/JMM/06 and received the prize amount of the chit viz., Rs.3,75,000/- in each Chit Group. The 3rd defendant stood as Guarantor of the 2nd defendant and assured prompt payments of monthly installments.

4. Subsequently, the Plaintiff contends that the 4th defendant became subscriber on behalf of 1st defendant with the consent and knowledge of Defendants Nos.2, 3 and 5 in Chit Group No.62F/0063/TRY/03 commencing from 14.02.2007 spreading over 20 months for a ticket of Rs.10,000/- per month. D-4 was declared as "Prize Subscriber" on 2nd month Auction held on 14.03.2007 and the prize amount of Rs.1,50,000/- was paid to D-4. Again the 2nd defendant became subscriber on behalf of 1st defendant with the consent and knowledge of Defendant Nos.3 to 5 in Chit Group No.J2H/0704/JMM/07, commencing from 28.02.2007 spreading over 20 months for a ticket of Rs.25,000/- per month. Later on the 2nd defendant was declared as "Prize Subscriber" on 4th month auctin held on 28.05.2007 and the prize amount of Rs.3,75,000/- was paid. The 3rd defendant stood as surety for this chit group transaction. The defendants 2 and 3 executed necessary documents and Promissory Note for the said transactions. The 2nd defendant also offered additional collateral security by way of Mortgage by deposit of title deeds. According to the plaintiff, thereafter, the defendants failed to pay the monthly installments due to the above said chit transaction and in that regard, a sum of Rs.13,10,566/- is still due with subsequent interest from the 2nd defendant to the plaintiff.

5. Thus according to the Plaintiff, the defendants became chronic defaulters and failed to pay the monthly installments promptly and to discharge their liability. While so, the defendants 1 to 5 subsequently approached the plaintiff staff and agreed to settle the amount due and paid a sum of Rs.23,100/- on 29.06.2007 and the same was acknowledged by the plaintiff by issuing a receipt. However, the defendants inspite of their promise to settle the entire amount failed to do so. Subsequently, on 07.07.2008, defendants 2 to 5 once again met the staff of the plaintiff and agreed to settle the outstanding

balance. They opted for pre-closure of the chit amount, since they are in need of the title deed deposited with the plaintiff. Following the mutual understanding between them, the 2nd defendant issued a cheque dated 08.07.2008 for Rs.13,10,566/- to discharge the liability, but the same was returned with the endorsement "funds insufficient" on 10.07.2008. Thereafter, the plaintiff issued legal notice to the defendants and the same is produced as Ex.P.29. Even though the plaintiff requested the defendants to pay the entire sum of Rs.13,10,566/- with interest, they were evading the payment and in order to defraud the plaintiff, attempting to sell the entire property to the 7th defendant herein. According to the plaintiff, the 6th defendant as a Power Agent of 2nd defendant entered into the sale agreement with the 7th defendant on 08.04.2008. A copy of which is produced as Ex.A.6. The Plaintiff pleads that the title deeds and other documents relating to the property belonging to the 2nd defendant is deposited with the plaintiff. Mortgage deed was executed in this regard and the same is produced as Ex.A.27 and the title documents, encumbrance certificate and other kist receipts given by the defendants to the plaintiff is produced as Ex.A.1 to Ex.A.5, Ex.A.7 to Ex.A.24. Thus the plaintiff contends that the defendants committed default in payment of chit amount and with the intention to cheat the plaintiff, they are now trying to alienate the property. Hence, the plaintiff seeks permanent injunction restraining the defendants 2 and 6, from alienating or encumbering the suit property.

6. On the other hand, opposing the suit, the defendants contended that the suit is not maintainable and the 1st defendant is not a partnership firm. According to them, the 2nd defendant is the sole proprietor of the 1st defendant M/s.Guru Jewellers and the other defendants are not partners of the said establishment. It is further stated that the 2nd defendant became a subscriber in the chit group run by the Plaintiff and the other defendants became guarantors. The defendants state that no amount is due to the plaintiff and the entire amount due under the chit transaction has been paid and their liability is discharged and they have got every right to execute power of attorney deed to alienate their property. Hence, the defendants seek for dismissal of the suit.



7. On the basis of oral and documentary evidence placed before it, the trial court concluded that the plaintiff is entitled for the relief sought for and decreed the suit as prayed for.

8. Aggrieved over the same, the defendants 1 to 3 preferred A.S.No.69 of 2012 before the First Appellate Court and the said court, after considering the materials placed before it, allowed the appeal and reversed the judgment and decree of the trial court in toto and dismissed the suit in O.S.No.881 of 2008 and

thus aggrieved over the said conclusion of the First Appellate Court, the plaintiff has come forward with this Second Appeal before this court.

9. According to the appellant/plaintiff, the finding of the First Appellate Court is not proper and it failed to take into consideration the admission of D.W.1 and D.W.2 about their liability properly and also failed to take into consideration the material placed by the plaintiff in support of the suit claim in appropriate manner. Hence, the learned counsel for the plaintiff seeks to allow this Second Appeal and to reverse the finding of the First Appellate Court and to decree the suit O.S.No.881 of 2008 as prayed for by them.

10. The fact that the plaintiff was running a chit group, wherein, the 2nd defendant became a Subscriber is admitted. According to the plaintiff, in respect of the said chit subscription, a sum of Rs.13,10,566/- is due from the 2nd defendant herein. Even though the plaintiff mentions about the chit groups, wherein, the 2nd defendant became a subscriber, no document is placed before the court regarding the said chit transactions. The plaintiff produced Ex.P.27 Memorandum of deposit of title deeds and the same is said to have been executed as collateral security for prompt payment of future subscription amount due to the chit transaction by the 2nd defendant.

11. The trial court on the basis of the evidence placed before it, concluded that the amount is due to the plaintiff chit as claimed in the suit and defendants are not entitled to alienate the property after having deposited the title deeds to the plaintiff and without settling the amount due to the Plaintiff as claimed in the suit.

12. In the case on hand, it is claimed by the appellant/plaintiff that the subscription amount to the chit groups is due from the defendants. Even though the plaintiff has produced 29 documents, there is nothing on record to show what is the actual amount due to them. The learned counsel for the defendants, relying upon additional typed set of papers filed before this court, contended that in the arbitration O.P., A.O.P.No.1588/2008 and in the Execution Petition REP.No.212 of 2012, filed by the plaintiff against defendants 2 to 4 herein, as per orders dated 01.03.2011, the defendants 1 to 3 were held to be liable to pay a sum of Rs.1,11,573/- only and the plaintiff was unable to prove before this court that a sum of Rs.13,10,566/- was liable to be paid by the Defendants as claimed in the suit.

13. The defendants also stated that already the plaintiff has initiated execution proceedings in REP.No.212 of 2012 on the file of 1st Additional Sub Court, Salem, for attachment of property and also arrest of the defendants 1, 2 and 5 following the passing of Arbitration Award against them. Pointing it out, the learned counsel for the defendants contended that there is nothing on record to show that a sum of Rs.13,10,566/- is still due as claimed by the plaintiff. It is also contended that the relief sought for by the plaintiff is only permanent injunction and the same is discretionary relief to be exercised by the Court and in the absence of the plaintiff initiating steps to recover the alleged amount due, which should be the primary relief sought for and as the plaintiff has not taken any steps for seeking the primary relief, his plea in suit for the consequent relief of injunction cannot be entertained and the same is not maintainable.

14. Admittedly, the plaintiff is having mortgage by way of deposit of Title Deeds in its favour by the defendants and the same is enforceable. Assuming that the plaintiff is entitled for the amount due, as claimed by them, as rightly contended by the learned counsel for the defendants, it is for the plaintiff to take steps on the basis of mortgage in their favour or in any other manner known to law to recover the alleged amount due to them under the alleged chit transaction. In the absence of such steps being taken, the relief sought for by the plaintiff for permanent injunction only to restrain the defendants from alienating or encumbering with the property is unsustainable and the same is not in accordance with law.

15. It is also pointed out by the learned Senior counsel for the defendants that even assuming any new encumbrance is created as alleged by the plaintiff by way of sale of the property by the defendants, since mortgage is already created in favour of the plaintiff and title deeds are deposited with them, any subsequent encumbrance will be subject to the same and as such on that ground alone, the plea of the appellant/plaintiff has to fail.

16. The learned Senior counsel for the defendants also contended that even if the claim of the appellant/plaintiff about the amount due to them is true, the remedy for them is to file a suit on the basis of mortgage created in their favour by the defendants or to take up the issue for Arbitration before the competent authority. He also pointed out that the appellant/plaintiff has not produced material to show that any such steps were initiated by them for recovering loan amount due which is stated to be 13,10,566/-. The First Appellate Court has pointed out that in the absence of any steps being taken by the plaintiff to recover the alleged amount due, the relief

sought for by the plaintiff viz., permanent injunction alone cannot be entertained as the said relief is only a discretionary relief to be exercised diligently.

17. The learned counsel for the appellant/plaintiff contended that the suit schedule property belongs to the 2nd defendant/2nd respondent herein as per the Gift Settlement Deed Ex.A.4 dated 05.07.2002 executed by his father and it is pointed out that after the demise of 2nd defendant's father, the other legal representatives who are the 3rd and 5th defendants executed a Release Deed Ex.A.5 dated 02.01.2004, releasing their entire rights and thereby the 2nd defendant is the absolute owner of the suit schedule property as per Ex.A.4 Settlement Deed. The plaintiff also produced the title documents relating to suit property as Exs.A.1 to 5 and the Encumbrance Certificates under Ex.A.15 to Ex.A.20 and contended that the property which belongs to 2nd defendant is already mortgaged with them as per Ex.A.27 and as the defendants who claimed themselves to be the partners of the 1st defendant are liable to pay chit subscription due to the plaintiff had failed to do so, the plaintiff is entitled for the relief sought for by them restraining the defendants from alienating the property.

18. However, as stated above, even though the suit property belongs to the defendants, unless and until the plaintiff establishes the fact of actual amount due to them and takes necessary steps to recover the amount, as pointed out by the First Appellate Court, the discretionary relief of injunction alone cannot be entertained and in the light of the above said discussion, no infirmity found in the finding of the First Appellate Court and the plea of the appellant/plaintiff herein cannot be entertained.

19. In such circumstances, taking into consideration the fact that the plaintiff has not established with material the actual amount due to them from the defendants and also having not stated about any steps taken by the appellant/plaintiff to seek the primary relief of recovery of the amount, the relief sought for by them in this suit i.e., permanent injunction which is only consequential relief in nature, the same cannot be entertained and the finding of the First Appellate Court in that regard and the reasoning for the same given by it to dismiss the suit, is just and acceptable. No ground is made out by the appellant/plaintiff to entertain this appeal and the same has to fail.

20. In view of the above said discussion the judgment and decree of the First Appellate Court passed in A.S.No.69 of 2012 do not warrant any interference and the same is confirmed. The substantial questions of law raised by the appellant is answered

against the appellant herein.

21. In the result, the second appeal stands dismissed, confirming the judgment and the decree passed in A.S.No.69 of 2012 by II Additional Subordinate Judge, Salem. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

nvsri

To
1. The II Additional Subordinate Judge, Salem,
2. The Principal District Munsif Judge, Salem.

+1 cc to Mr.P.M.Jayachandran Advocat sr 51435

Second Appeal No.1169 of 2013

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