IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.09.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.636 of 2008
and
CMP.No.2505 of 2017

Selvaraj ...Appellant/Defendant

vs.

M/s.Cocos Benefit Fund Ltd.,
represented by its Executive Director,
Ramani,
Plot No.1225, Anna Nagar Westend Colony,
Padi (Post), Chennai - 600 050.

(Respondent substituted vide order dated 13.02.2017 made in CMP.No. 2352 of 2017 in AS.No.636 of 2008)
... Respondent/Plaintiff

Appeal suit is filed under Order 41 Rule 1 of Code of Civil Procedure to set aside the judgment and decree dated 22.01.2008 in OS.No.141 of 2004 on the file of the Additional District Judge/ Fast Track Court IV, Poonamallee. The CMP.No.2505 of 2017 is filed to receive documents.

For Appellant : Mr.T.Sri Krishna Bhagavat
for Mr.P.Subba Reddy

For Respondent : Mrs.G.Devi

J U D G M E N T

The defendant in OS.No.141 of 2004 is the appellant. The said suit was filed by the respondent seeking preliminary decree on a mortgage directing the defendant to pay into Court a sum of Rs.8,37,000/- together with interest on the balance principle sum of Rs.4,50,000/- at the rate of 24% p.a. from the date of suit till the date fixed for payment. There was also a prayer for final decree for sale of the suit Schedule property, in the event of failure, to make payment, by the defendant.

The case of the plaintiff is as follows:

2. The defendant made an application for grant of loan, on the security of his property, to the tune of Rs.6,00,000/- on 01.08.1996. On 07.08.1996, the plaintiff sanctioned a loan of Rs.2,00,000/-. As security for the said borrowing, the defendant had executed a promissory note and also had deposited the sale deed dated 06.05.1992 with an intention to create an equitable mortgage over the suit schedule property. A registered Mortgage deed was also executed on 07.08.1996 for a sum of Rs.1,00,000/-.

3. The plaintiff further claims that it had advanced further sums of Rs.1,00,000/- on 14.08.1996; Rs.1,00,000/- on 24.08.1996; Rs.1,00,000/- on 09.09.1996 and Rs.1,00,000/- on 25.09.1996. Thus, according to the plaintiff, the total amount advanced was Rs.6,00,000/-. At the time of each borrowing, namely 14.08.1996, 24.08.1996, 09.09.1996 and 25.09.1996, the defendant had executed promissory notes and letters of continuity stating that the mortgage created by depositing the sale deed on 07.08.1996, will continue to operate as security for the subsequent borrowings also.

4. The plaintiff being Finance Company claims that the loans were advanced on 5 different loan accounts namely PL Nos.007, 008, 009, 010 and 011. The plaintiff would further plead that the defendant had paid a sum of Rs.1,50,000/- on 04.09.1998 and that amount was adjusted towards the loan dated 24.08.1996, the balance of Rs.50,000/- was adjusted towards the loan dated 09.09.1996. Since the defendant had failed and neglected to pay either interest or balance amount due under the transactions, the plaintiff had issued a legal notice on 29.01.2000. The same was returned with an endorsement that there is no such person. On receipt of the said notice, it appears that the defendant filed a suit in OS.No.179 of 2000 on the file of the District Munsif cum Judicial Magistrate Court, Ambattur seeking permanent injunction restraining the plaintiff herein from dealing with the suit property in any manner against the interest of the defendant herein, direction to the plaintiff to return the original title deeds and the parental documents of the suit schedule property to the defendant.

5. In the said suit, the present plaintiff, who was the first defendant, filed a counter claim and the said counter claim was returned by the learned District Munsif on the ground that it would exceed the pecuniary jurisdiction of the trial Court. It is, thereafter, the plaintiff had come forward with the present suit.

6. The suit was resisted by the defendant contending that the claim that the defendant borrowed a sum of Rs.6,00,000/- is not true. According to the defendant the borrowal was only of a sum of Rs.4,00,000/- consisting of borrowing of Rs.2,00,000/- on mortgage and further sum of Rs.2,00,000/- on

chit transaction. He has also pleaded discharge of the said sum of Rs.4,00,000/-. He would also further contend that the subsequent loan transactions namely transaction between 14.08.1996 and 25.09.1996 are not secured by the mortgage and therefore the suit based on these transactions, filed on 22.10.2002 was clearly would be barred by limitation.

7. On the above pleadings the learned trial Judge framed the following issues:

> i) Whether the plaintiff proved the loan transaction and the balance due?
>
> ii) Whether the suit is barred by limitation?
>
> Iii) Whether the defendant has proved that the entire loan amount is paid?
>
> iv) Whether the suit is to be decreed?
>
> v) To what reliefs the plaintiff is entitled to?

8. On the side of the plaintiff, the Executive Director of the plaintiff's Company was examined as PW1 and Exs.A1 to A23 were marked. Exs.B1 to B21 were marked in the cross examination of PW1. The defendant did not chose to get into the box and let in any oral evidence.

9. It should be pointed out at this juncture that the suit filed by the defendant in OS.No.179 of 2000 on the file of the District Munsif cum Judicial Magistrate, Ambattur was decreed exparte on 05.12.2003.

10. Upon consideration of the oral and documentary evidence, the learned trial Judge concluded that the borrowings have been established by the plaintiff and in the absence of any evidence on the side of the defendant to prove his claim that there was no borrowing, the learned trial Judge decreed the suit as prayed for. As against the said decree, the defendant has come forward with this appeal.

11. I have heard Mr.T.Sri Krishna Bhagavat, learned counsel for Mr.P.Subba Reddy appearing for the appellant and Mrs.G.Devi, learned counsel appearing for the respondent.

CMP.No.2505 of 2017:

12. Pending this appeal, the appellant has come forward with an application under Order 41 Rule 27 of Code of Civil Procedure, seeking to produce certain documents as additional evidence. The documents sought to be produced are receipts issued by the plaintiff Finance Company. There are several receipts that have been filed, some of them relate to Savings

Bank Account operated by the son of the defendant namely S.Loganathan. It is seen that the defendant, apart from his loan account, had certain Recurring Deposit account with the plaintiff. The receipts issued for deposit of money in the Recurring Deposit Account as well as certain receipts issued evidencing payment of interest on the loan accounts have been filed.

13. Total number of 163 receipts have been filed by the appellant along with this application for receiving additional evidence. According to the appellant, these receipts were misplaced at the time of trial and they were traced out only later. Therefore, these documents should be received as additional evidence on the side of the defendant.

14. A counter affidavit has been filed by the respondent/ plaintiff contending that the receipts of the total number of 163 receipts which have been filed, most of the receipts relate to the payment made in the Savings Bank Account operated by the son of the appellant as well as the Recurring Deposit Account that was operated by the appellant and only a few of them relate to re-payment of the loan transactions.

15. I, therefore, directed the learned counsel for the appellant to give a statement containing breakup of these receipts. Such a statement has been filed by the learned counsel for the appellant. From the said statement, it is seen that 13 receipts relating to the loan accounts were not produced before the trial Court. The other receipts relating to the loan accounts have already been filed before the trial Court and the trial Court found that the monies paid were duly given credit to in the loan accounts of the defendant.

16. The details of the 13 receipts are as follows :

Loan/ Account	Receipt No.	Receipt Date	Amount Rs.	Name
PL 011	4865	31.05.1998	2000	Selvaraj
PL 011	6272	18.10.1998	2000	Selvaraj
PL 007	585	30.10.1996	4000	Selvaraj
PL 011	2535	28.09.1997	2000	Selvaraj
PL 009	3043	30.11.1997	2000	Selvaraj
PL 010	2778	31.10.1997	2000	Selvaraj
PL 009	2777	31.10.1997	2000	Selvaraj
PL 007	2775	31.10.1997	4000	Selvaraj
PL 008	5192	30.06.1998	2000	Selvaraj
PL 007	5191	30.06.1998	4000	Selvaraj
PL 011	5195	30.06.1998	2000	Selvaraj
PL 010	5194	30.06.1998	2000	Selvaraj

Loan/ Account	Receipt No.	Receipt Date	Amount Rs.	Name
PL 009	5193	30.06.1998	2000	Selvaraj
		Total	Rs.32,000	

17. As could be seen from the above table it is the claim of the defendant that a sum of Rs.32,000/- paid by the defendant on various dates towards interest has not been duly accounted for by the plaintiff. Though it is contended by Mrs.G.Devi, learned counsel for the respondent that the reasons assigned for non-production of these receipts before the trial Court do not amount to sufficient cause to allow the appellant to produce these documents in this appeal. I am of the considered opinion that since the payments that were received under these receipts have not been denied by the respondent, it would be appropriate in the interest of justice to receive these documents in the evidence. Therefore, the above mentioned 13 receipts alone are received in evidence in this appeal as additional documents and they are marked as Exs.B22 to B34.

18. Accordingly, the application in CMP.No.2505 of 2017 is allowed to the extent indicated above and the above mentioned 13 receipts are received in the evidence.

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19. As far as the main appeal is concerned Mr.T.Sri Krishna Bhagavat, learned counsel for the appellant would contend that the appellant had borrowed only a sum of Rs.4,00,000/- from the plaintiff and as such the claim of total borrowing of Rs.6,00,000/- pleaded by the plaintiff cannot be accepted. He would also contend that adjustment of the proceeds of the Recurring Deposit to the tune of Rs.1,50,000/- is in respect of the loan advanced on 24.08.1996 and the portion of loan advanced on 09.09.1996 is without authorization. Therefore, the same cannot be accepted.

20. Taking me through the evidence, particularly the promissory notes and letters of continuity, the learned counsel would contend that It is evident from the very nature of the documents that these documents have been prepared on pre-signed blank papers.

21. The learned counsel would also further contend that the subsequent loans namely those advanced on 14.08.1996, 24.08.1996, 09.09.1996 and 25.09.1996 were not secured by mortgage and hence the suit filed in the year 2002 is barred by limitation. It is also the contention of the learned counsel that the present suit is barred by res-judicata in

view of the earlier decree granted in OS.No.179 of 2000 filed by the appellant.

22. Per contra Mrs.G.Devi, learned counsel for the respondent would contend that all the loans were availed by the defendant and the respondent being Finance Company has disbursed the amounts through cheques. Therefore, it will be futile for the defendant/ appellant to contend that the promissory notes and letters of continuity for disbursing the loan amount dated 14.08.1996, 09.09.1996, 25.09.1996 have been prepared using the pre-signed blank papers.

23. According to the learned counsel for the respondent, the details of the disbursement of the loan have been given and all the loans have been disbursed by way of cheques in favour of the defendant. The learned counsel would further contend that the decree in OS.No.179 of 2000 relates only to the first borrowing of Rs.2,00,000/- on 07.08.1996 and the same cannot prevent the plaintiff from seeking recovery of the loan amounts advanced under the other borrowings. Even in respect of the first borrowing, the learned counsel would contend that the decree is only an injunction decree restraining the plaintiff from invoking the powers under Section 69 of the Transfer of property Act conferred on it under the registered simple mortgage. Therefore, according to the learned counsel, the decree in OS.No.179 of 2000 cannot bar the present suit.

24. On the above rival submissions, the following points arise for determination:

> 1.Whether the defendant has established that the promissory notes dated 14.08.1996, 09.09.1996 and 25.09.1996 are supported by consideration?
>
> 2.Whether the defendant had established that the letters of continuity dated 14.08.1996, 09.09.1996 and 25.09.1996 were prepared on pre-signed blank papers as contended by him?
>
> 3.Whether the suit is barred by limitation?
>
> 4.Whether the decree in OS.No.179 of 2000 would be a bar for the present suit?

Point No.1:

25. The appellant/ defendant has not chosen to deny the signatures either in the promissory notes or in the documents evidencing deposit of title deed dated 07.08.1996 and the letters of continuity dated 14.08.1996, 09.09.1996 and 25.09.1996. His claim is that when he borrowed the loan amount of Rs.2,00,000/- on 07.08.1996, signatures were obtained in number of papers and those documents were utilised for the purpose of preparing the promissory notes and the letters of continuity.

26. It is to be pointed out that the defendant had not entered the box before the trial Court and he has not chosen to let in evidence to establish his claim. He was satisfied with marking certain documents in the cross examination of PW1.

27. The plaintiff, on the other hand, has produced the loan application as well as the accounts statement for each and every loan account. It is also seen that the money lent under each loan account was disbursed by way of cheques. It is also seen from the receipts produced by the defendant himself, in cross examination of PW1 that the receipts relate to various loan accounts and the loan account numbers have been clearly written in each of the receipts. It is also seen that interest was paid every month on the same day and the receipts have been issued for different loan accounts on the same day. Therefore, the contention of the defendant that the borrowing was only one, cannot be accepted. The defendant has produced a bunch of receipts which were marked as Exs.B6 to B10.

28. The bunch of receipts marked as Ex.B6 relate to the loan account PL.No.007. Similarly the bunch of receipts marked as Ex.B7 relate to PL.No.008. A bunch of receipts in respect of PL.No.010 have been marked as Ex.B8 and another bunch of receipts in respect of PL.No.011 have been marked as Ex.B9. A perusal of the abovesaid exhibits would show that every month the defendant has paid the interest for each loan account separately and it is evidenced by separate receipts issued on the same day with continuous serial numbers. Therefore, the defendant cannot now claim that he had borrowed only Rs.4,00,000/- and not Rs.6,00,000/- as alleged by the plaintiff.

29. As far as the adjustment of Rs.1,50,000/- on 04.09.1998, the defendant has not chosen to raise his objection when the said adjustment was made and now he cannot turn around and contend that the said adjustment was without authority.

30. Infact, the plaintiff had adjusted a sum of Rs.1,50,000/- towards two loan accounts. The borrowing dated 24.08.1996 has been adjusted in full and borrowing dated 09.09.1996 has been adjusted partially to the tune of Rs.50,000/-. It is also seen from the very statement of accounts that the plaintiff has given credit to the said sum of Rs.50,000/- on 04.09.1998, while adjusting the same for the borrowing dated 09.09.1996. It is therefore, clear that the claim of the defendant that the promissory notes are not supported by consideration has not been established by letting in evidence, which will have the effect of rebutting the statutory presumption under Section 118 of Negotiable Instruments Act. Therefore, this point is answered against the appellant.

Point No.2:

31. Mr.T.Sri Krishna Bhagavat, learned counsel for the appellant would vehemently argue that the letters of continuity marked as Exs.A4, A7, A9 and A11 have been created by the plaintiff with the help of the pre-signed blank papers. The fact that the original title deed dated 06.05.1992 deposited with the plaintiff with an intention to create an equitable mortgage for the borrowing is admitted. As and when further amounts are borrowed from the plaintiff, the defendant has executed the letters of continuity which clearly state that the said mortgage created by deposit of title deed would operate as continuing the security for further amounts borrowed by the defendant.

32. The learned counsel for the appellant would contend that a perusal of these letters would show that these letters have been created subsequently. The defendant who has admitted his signatures in these letters has not chosen to get into the box and depose to show that those signatures were obtained in blank papers. A perusal of these letters would show that they have been obtained in ordinary course of business from the date and signature of the defendant. It could be seen from the very nature of the documents that the same could not have been obtained in pre-signed blank papers. It is the primary duty of the party who seeks to dispute the documents to let in evidence. Having failed to let in such evidence, the defendant cannot be allowed to raise the plea that his signatures were obtained in blank papers and they have been filled up subsequently. Therefore, the second point is also answered against the appellant.

Point No.3:

33. On the question of limitation, the only contention of the learned counsel for the appellant is that except the borrowing dated 07.08.1996, the other three borrowings dated 14.08.1996, 09.09.1996 and 25.09.1996 are not supported by a mortgage. Therefore, the suit filed in the year 2002 is barred by limitation. I have while answering point No.2 said that the letters of continuity executed by the defendant are true and valid documents and they would operate to create mortgage over the suit schedule property in respect of six transactions covered by them also. Therefore the suit filed on 22.10.2002 is within the period of 12 years allowed for the plaintiff to enforce mortgage under Article 62 of the Limitation Act is within time. Hence, the plea raised regarding limitation also fails and the third point is also answered against the appellant.

Point No.4:

34. The last of the submissions of the learned counsel for the appellant is that the decree in OS.No.179 of 2000 either bars res-judicata or bar the present suit. It should

be pointed out that the plea of res-judicata was neither raised before the trial Court nor the trial Court framed the issue relating to the same.

35. Of course, for the plea of res-judicata, if it is strictly a legal plea can be allowed to be raised in appeal also. The perusal of the plaint as well as the written statement and decree in OS.No.179 of 2000 clearly show that OS.No.179 of 2000 was filed by the appellant seeking bare injunction to restrain the respondent herein from dealing with the property mortgaged with it, by invoking powers under Section 69 of the Transfer of Property Act.

36. The questions as to whether there was borrowing or not, whether the same was discharged or not were not the subject matter of issue in the said suit. Therefore, in my considered opinion, the decree in OS.No.179 of 2000 is not barred as res judicata so as to bar the present suit.

37. The learned counsel for the appellant has drawn my attention to certain other documents namely police complaint against Mr.G.Manivannan, the Director of the respondent Finance Company and also drawn my attention to Ex.B2, which is the letter that is said to be given by the said G.Manivannan to the defendant. Only the Xerox copy of the said letter has been produced. It is the letter addressed to the defendant. Hence, the original should be available with him, but the said original was not produced and no reasons were assigned as to why the original has not been produced. Even assuming that the said letter to be true, the same was given by Mr.G.Manivannan in his individual capacity to pay a sum of Rs.4,50,000/- and the same cannot operate against the plaintiff Company.

38. The 13 receipts, which have been produced to show that a sum of Rs.32,000/- over and above what has been given credit to in the statement of account. A comparison of the statement of account filed as Ex.A19 with the statement filed by the counsel for the appellant would show that all the payments made under these 13 receipts has also been given credit to by the plaintiff in the statement of accounts itself. Therefore, even though the receipts have been filed, the payments made therein have already been taken into account while arriving at the suit claim.

39. Therefore, I do not find any reason to interfere with the judgment and decree of the trial Court. The appeal is dismissed. However, in the circumstances of the case, there will be no order as to costs.

dsa

Documents marked in the Appeal:

Exhibit No. :	Acc. No. :	Receipt No. :	Date

Ex.B22	:	PL 011	:	4865	:	31.05.1998
Ex.B23	:	PL 011	:	6272	:	18.10.1998
Ex.B24	:	PL 007	:	585	:	30.10.1996
Ex.B25	:	PL 011	:	2535	:	28.09.1997
Ex.B26	:	PL 009	:	3043	:	30.11.1997
Ex.B27	:	PL 010	:	2778	:	31.10.1997
Ex.B28	:	PL 009	:	2777	:	31.10.1997
Ex.B29	:	PL 007	:	2775	:	31.10.1997
Ex.B30	:	PL 008	:	5192	:	30.06.1998
Ex.B31	:	PL 007	:	5191	:	30.06.1998
Ex.B32	:	PL 011	:	5195	:	30.06.1998
Ex.B33	:	PL 010	:	5194	:	30.06.1998
Ex.B34	:	PL 009	:	5193	:	30.06.1998

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

dsa

To

The Addition District Judge/
Fast Track Court IV,
Poonamallee.

+1cc to Mr.P.Subha Reddy, Advocate, S.R.No.69711
+1cc to Mr.G.Devi, Advocate SR.No.69646

A.S.No.636 of 2008
and
CMP.No.2505 of 2017

GP(CO)
GN(17/11/2017)