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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2020

CORAM :

THE HONOURABLE MR. JUSTICE N.KIRUBAKARAN

and

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

O.S.A.No.232 of 2013

and

M.P.No.1 of 2013

Park Town Benefit Fund Ltd.,
Rep. by its Managing Director,
having their registered office at
No.73-74, Arcot Road,
Kodambakkam, Chennai - 600 024. .. Appellant/1st Defendant

Vs.

1. Saroja Ramanathan
2. Harshed R.Patel
3.C.S.Krishnan .. Respondents/Plaintiff &
Defendant 2 & 3

PRAYER : Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent, against the Judgment and Decree dated 17.09.2012, made in C.S.No.909 of 2002 on the file of this Court filed under Order IV R 1 of Original Side Rules R/w Sec 26 and order VII Rule 1 of CPC 1908 (1) to pass preliminary decree for redemption of mortgage dated 14.11.1995 (ii) to pass a trial decree directing the 1st defendant to execute a deed of cancellations for mortgage dated 14.11.1995 (iii) to direct the 1st defendant to furnish and correct accounts for various amount paid to award the loan transaction (iv) to award cost of the proceedings.

For Appellant : Mr.Om Prakash, Senior Advocate
Asst. by Mr.P.Ilayaraja
for M/s.Ramalingam & Associates

For Respondent 1 : Mr.V.Raghavachari

R.2 & 3 : Exparte

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J U D G M E N T

(Judgment of the Court was made by P.VELMURUGAN, J.)

The appellant is the first defendant in the suit in C.S.No.909 of 2002 on the file of this Court. The first respondent herein is the plaintiff in the suit. She filed the



suit for passing of preliminary decree for redemption of mortgage dated 14.11.1995 and to pass a final decree directing the appellant/first defendant to execute a deed of cancellation for mortgage dated 14.11.1995 and to direct the appellant/first defendant to furnish and correct accounts for the various amount paid towards the said loan transaction.

2. After trial, by decree and judgment dated 17.09.2012, the learned Single Judge decreed the suit in part and passed a preliminary decree for redemption of mortgage dated 14.11.1995, in respect of the suit schedule property for rendition of accounts against the appellant/first defendant and that an account be taken of what was due to the appellant/first defendant on the date of decree towards (i) principal and interest on the mortgage, (ii) the cost of the suit, (iii) other cost charges and expenses properly incurred by him upto the date of decree in respect of the mortgage security, together with the interest thereon. Further, the first respondent/plaintiff shall also be at liberty to apply for appointment of a Commissioner for ascertaining the outstanding sum towards suit mortgage, if any, within three months from the date of receipt of a copy of the said order. The learned Single Judge also further held that the unmarked letter dated 25.05.1997, written by Mr.K.S.C.Iyer, shall be kept along with Court records, and the same shall be produced during the rendition of accounts before the Commissioner to be appointed and if the first respondent/plaintiff fails to do so, the Court shall suo motu appoint a Commissioner for the aforesaid purpose and would proceed further. The costs of the suit was also awarded to the first respondent/plaintiff.

3. Challenging the said decree and judgment dated 17.09.2012 passed by the learned Single Judge, the appellant/first defendant has filed the present appeal before this Court.

4. The brief facts of the case which are averred by the first respondent/plaintiff in the plaint are as follows:

(i) The first respondent/plaintiff availed a loan of Rs.50,00,000/- from the appellant/first defendant on 14.11.1995. While availing the loan, the first respondent/plaintiff was called upon to execute a deed of simple mortgage. Apart from that, the signature of the first respondent/plaintiff was taken in several filled and unfilled forms and blank papers. Though the loan documents speak of a sum of Rs.50,00,000/- towards consideration, the appellant/first defendant had not paid a sum of Rs.11,09,180/- and the reason for such deduction had not been disclosed then. It is stated that a sum of Rs.5,25,000/- was paid to SIC vide cheque bearing No.326423 and another sum of Rs.3,00,000/- was credited to account No.1612. The first respondent/plaintiff has no connection whatsoever with both accounts. The document stipulates that a sum of Rs.50,000/- shall be paid each month for 60 months in a recurring deposit bearing account No. 689



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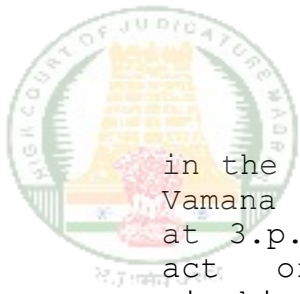
and this shall be utilized in addition to the interest on the loan amount. At the time of borrowal, the appellant/first defendant had charged interest @ 22.2% p.a and in default of payment of interest or the recurring deposit, interest shall be chargeable @ 24% p.a.

(ii) The first respondent/plaintiff was issued with a notice of demand on 03.04.1996 by the appellant/first defendant to pay Rs.5,55,000/- allegedly being the interest default for 6 months and default interest at Rs.27,750/- and interest tax at 3% amounting to Rs.17,482/-.

(iii) The father of the third respondent / third defendant Mr.K.S.C.Iyer, who had also availed a loan from the appellant / first defendant had directed his purchaser the second respondent / second defendant to pay a sum of Rs.1 crore to the appellant / first defendant and take possession of the title deeds and the keys from the appellant / first defendant. The appellant/first defendant was specifically called upon on 23.7.1997, to receive the sum of Rs.1 crore towards the loan of Mr.K.S.C.Iyer and the first respondent/plaintiff in A/c. No.1343. On the date of payment by the second respondent/ second defendant it appears that a sum of Rs.64,72,074/- is alleged to be due and payable by Mr.K.S.C.Iyer to the appellant/first defendant. Without disclosing the accounts, a notice was issued on 10.12.1997 as if a sum of Rs.37,13,712/- is due towards interest and Rs.50,00,000/- towards principal. There is no whisper about the payment of Rs.1 crore by the second respondent / second defendant to the appellant/first defendant. Without disclosing the true accounts, the appellant/first defendant had issued notices to the first respondent/plaintiff threatening to bring the property to sale and in order to avoid the sale of the property, the suit was filed in O.S.No.5173 of 1999 on the file of the learned XVII Assistant Judge, City Civil Court, Chennai and the said suit was also decreed exparte on 18.06.2002.

(iv) The appellant/first defendant filed an application to set aside the ex parte decree in I.A.No.1358 of 2002 and the same is pending disposal. The property was sought to be auctioned through Vaman auctioneers and a notice to that effect was also issued to the first respondent/plaintiff on 16.11.2002. The first respondent/plaintiff was shocked on receipt of the said notice, since the entire proceedings had been done in violation of the decree of the Court. A telegraphic notice was issued on 24.11.2002, by the learned counsel for the first respondent/plaintiff.

(v) In the meantime, the Deputy Superintendent of Police, EOW, had called upon the first respondent/plaintiff to appear before her in connection with the criminal proceedings launched against the Directors of the company under Sections 409 and 410 of IPC. On 02.05.2000, an attempt was made and the first respondent/plaintiff had launched a criminal complaint



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in the R4 Police Station. An undated notice was issued through Vamana auctioneers, fixing the date of auction on 26.12.2002 at 3.p.m. According to the first respondent/plaintiff, the act of the appellant/first defendant is fraudulent, mischievous, contemptuous and sheer abuse or process of law.

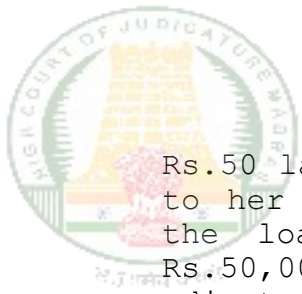
(vi) The first respondent/plaintiff further states that if the amounts paid by the second respondent / second defendant are taken into account, the entire loan would almost stand discharged. The first respondent/plaintiff states that the appellant/first defendant had deducted nearly 10% of the loan amount towards registration charges and service charges but it was stated 5% was deductible towards registration charges and another 5% towards service charges. The first respondent/plaintiff came to know about the deductions only when the counter was filed in I.A.No.13181 of 1999 in O.S.No.5173 of 1999. The amount of 5% charged towards registration is on the higher side and the appellant/first defendant cannot take advantage of its illegalities and attempt to stake a claim under various heads, when the same had not been disclosed when the loan was disbursed.

(vii) The first respondent/plaintiff was under the bona fide impression that the amount of Rs.50 lakhs would be paid and therefore she had signed the documents. The documents pertaining to her property are available with the appellant/first defendant and they are bound to return the same. The appellant/first defendant has to account for the various amounts received from her and from Mr.K.S.C.Iyer and also prays for accounting. The second respondent/second defendant is impleaded as a party, since he was called upon by Mr.K.S.C.Iyer to pay a sum of Rs.1 crore to the appellant/first defendant and hence he is a necessary party to the proceedings. As Mr.K.S.C.Iyer is not alive, the third respondent/third defendant is impleaded as his legal representative to speak the relevant facts.

(viii) When the appellant/first defendant filed the said application in I.A.No.13181 of 1999 in O.S.No.5173 of 1999 for injunction, though the said application was pending at the time of filing of the suit, subsequently, the same was dismissed. Therefore, the first respondent/plaintiff filed the present suit for preliminary decree as stated supra.

5. The appellant/first defendant filed a written statement inter alia contending as follows:-

(i) The appellant/first defendant admitted that the first respondent/plaintiff availed the loan of Rs.50 lakhs from the appellant/first defendant on 14.11.1995 and executed a mortgage but denied that the first respondent/plaintiff signed on blank papers and unfilled forms and that the contents of the documents were not explained to her. The appellant/first defendant further denied that the first respondent/plaintiff has not paid a sum of Rs.11,09,180/- from the loan amount of



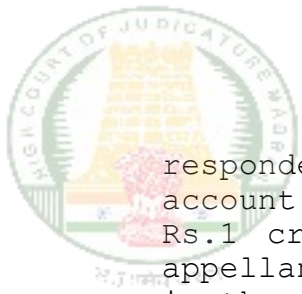
Rs.50 lakhs and the reason for the deduction was not disclosed to her then. As the first respondent/plaintiff had availed the loan of Rs.50 lakhs, she had been directed to pay Rs.50,000/- for 80 months in a recurring deposit for adjustment of the principle of the loan amount at the end of 80 months. The interest charged on the loan is the contractual rate prevalent at that time and hence the first respondent/plaintiff cannot wriggle out of her liability to repay the interest. The penal interest will be charged only when the first respondent/plaintiff defaults in payment of interest on the due date and if the first respondent/plaintiff had ensured due repayment there would have been no penal interest charged on her account.

(ii) The appellant/first defendant admitted that the notice of demand on 03.04.1996 was issued by them calling on the first respondent/plaintiff to pay the amount as stated therein. The appellant/first defendant admitted that Mr.K.S.C.Iyer wrote a letter to the appellant/first defendant on 25.5.1997 stating that he sold his property in No.9, Rajarathnam Street, for Rs.1 Crore and had asked for crediting the sale proceeds towards the dues to his and the first respondent/plaintiff's loan account. Though Mr.K.S.C.Iyer stated that the property had been sold for Rs.1 crore, only a sum of Rs.80,50,802/- was realised from the sale and the appellant/first defendant had to waive the interest due on the loan availed by the Mr.K.S.C.Iyer to close his account.

(iii) The allegation that the appellant/first defendant was called upon on 23.07.1997 to receive Rs.1 crore towards the loan of Mr.K.S.C.Iyer and the first respondent/plaintiff is obviously made to substantiate her false claim. The second respondent/second defendant had been informed by the appellant/first defendant on 07.07.1997 that the dues from Mr.K.S.C.Iyer and his associates was Rs.83,36,759/- and that interest was waived to settle the account. Therefore, the appellant/first defendant denies that there was a surplus of Rs.35,26,826/-.

(iv) The appellant/first defendant states that in June 1997 a letter was issued to Mr.K.S.C.Iyer that only after full and final settlement, the keys and documents would be handed over and on the request of Mr.Harshad R. Patel the appellant/first defendant gave a letter on 07.07.1997, stating that total dues from Mr.K.S.C.Iyer and thereafter on 16.09.1997, requested the appellant/first defendant to hand over the original documents to Mr.Bharatkumar R.Patel and for discharge of mortgage. There is no tripartite agreement between the first respondent/plaintiff, Mr.K.S.C.Iyer and the appellant/first defendant and the fact that a cheque for Rs.1 lakh was issued on behalf of the first respondent/plaintiff on 15.5.1999.

(v) The appellant/first defendant states that the notice dated 16.12.1997, was therefore issued to the first



respondent/plaintiff calling on her to repay the due on her account. The allegation that there is no whisper of payment of Rs.1 crore by the second respondent/second defendant to the appellant/first defendant and true accounts were not disclosed in the said notice is without any justification. The fact that the first respondent/plaintiff admits filing of O.S.No.5173 of 1999, before the City Civil Court for bare injunction to restrain conduct of auction on 24.08.1999 and her conduct in filing the present suit later will reveal the lack of bona fides in the case of the first respondent/plaintiff. It is pertinent to note that O.S.No.5173 of 1999 has been subsequently dismissed.

(vi) The appellant/first defendant reiterates that they have taken steps available to them under law and if the first respondent/plaintiff had repaid the amount due from her, the appellant/first defendant would not have taken those steps. The appellant/first defendant being a benefit society, receives deposits from the public and is bound to repay to the public and is constrained to realize the amounts from the securities on default by the debtors of the society. The appellant/first defendant denies that it is under an obligation to disclose the accounts of Mr.K.S.C.Iyer to the first respondent/plaintiff and in any event as stated supra there was no surplus from the amounts made available by Mr.K.S.C.Iyer to credit to the first respondent/plaintiff's account. The appellant/first defendant also denied that the amounts paid by the second respondent/second defendant has discharged the entire loan of the first respondent/plaintiff also. The interest and service charges charged is the contractual rate and hence the first respondent/plaintiff cannot question the same.

(vii) The appellant/first defendant denied the allegation that the first respondent/plaintiff was not aware about the service and registration charges while availing the loan and was under the bona fide impression that the entire Rs.50,00,000/- would be paid to her. The first respondent/plaintiff is bound to prove the same in the light of the contents of the documents she signed willingly. The appellant/first defendant denied that they are liable to return the documents of title to the first respondent/plaintiff. The appellant/first defendant states that suit is bad for misjoinder of parties as the 3rd defendant was not a party to any of these proceedings and after the sale of the property, he is not a legal representative of Mr.K.S.C.Iyer with respect to these proceedings.

(viii) The present suit is barred by res judicata and also hit by Order II Rule 2 of C.P.C. and also barred by limitation. As per the mortgage deed, the appellant/first defendant is entitled to claim and the first respondent/plaintiff is liable to pay the said amount.



Therefore, according to the appellant/first defendant,, the suit is liable to be dismissed.

6. The second and the third defendants remained ex parte and they have not filed any written statement.

7. Based on the above said pleadings, the learned Single Judge framed the following issues in the suit viz.,

"1. Whether the plaintiff is entitled to a preliminary decree for redemption of mortgage dated 14.11.1995 in respect of the suit property ?

2. Whether the plaintiff is entitled to a final decree directing the defendants 1 to 3 execute the deed of cancellation of mortgage dated 14.11.1995 as prayed for ?

3. Whether the plaintiff is entitled to a preliminary decree for rendition of accounts against the first defendant as prayed for ?

4. Whether the interest claimed by the plaintiff is usurious and illegal ?

5. Whether the suit in O.S.No.5173 of 1999 would operate as res-judicata forbearing the first defendant for enforcing the mortgage ?

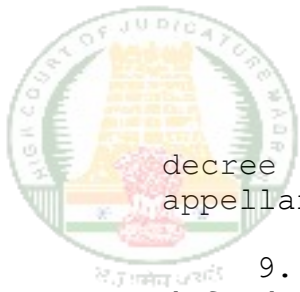
6. Is not the payment made by the plaintiff after the sale of property of K.S.C.Iyer an admission of her liability to repay the loan availed from the first defendant ?

7. Whether the plaint is barred under the provision of Order 2 Rule 2 of C.P.C. ?

8. Whether the suit is bad for mis-joinder of parties ?

9. To what relief, the parties are entitled to ?"

8. After issues were framed, during trial, in order to prove the case, on the side of first respondent/plaintiff she examined herself as P.W.1 and marked as many as 23 documents as Exs.P1 to P23. On the side of the defendants, the appellant/first defendant examined their Joint Managing Director as D.W.1 and marked as many as 8 documents as Exs.D1 to D8. After hearing of the arguments, the learned Single Judge decided the suit in part and also passed a preliminary



decree as stated above. Challenging the same, the appellant/first defendant is before this Court.

9. The learned counsel appearing for the appellant/first defendant would raise the following points for consideration:

(i) The plaintiff, being the mortgagor having filed the suit for redemption of mortgage, has she discharged her burden in proving that the mortgage debt is discharged.

(ii) In absence of the burden of proof being not discharged by the mortgagor can any adverse inference drawn against the mortgagee and seek for rendition of accounts by a preliminary decree.

(iii) The defendants 2 and 3 are strangers to the loan transaction of the plaintiff with 1st defendant and are not necessary and proper parties. The suit is bad for misjoinder of parties.

(iv) The plaintiff having already filed an earlier suit in O.S.No.5173 of 1999 on the same mortgage debt and enforcement, is barred under Order II Rule 2 of CPC to institute a further suit on the same cause, which was available while the earlier suit was filed. The decision in O.S.No.5173 of 1999 will also operate as res judicata and bar the present suit.

(v) The Court could not have granted a preliminary decree in reference to an unmarked document and account arising thereto namely letter dated 25.05.1997 of Mr.K.S.C. Iyer to the appellant/first defendant.

10. The learned senior counsel appearing for the appellant/first defendant would submit that the execution of mortgage was admitted by the first respondent/plaintiff for a sum of Rs.50,00,000/- on 14.11.1995, but disputed the passing of consideration to the tune of Rs.19,34,180 and it is for the first respondent/plaintiff to prove that those payments were not legal. The first respondent/plaintiff had categorically agreed to pay interest at 22.2% p.a. and also to deposit a sum of Rs.50,000/- p.m. on 80 installments towards payment of loan amount apart from interest payment. The first respondent / plaintiff was neither prompt in paying the recurring deposit at Rs.50,000/- per month nor the interest towards the suit debt. There was no tripartite agreement between the first



respondent/plaintiff and the appellant/first defendant and Mr.K.S.C.Iyer to adjust any amount payable to K.S.C.Iyer to be adjusted in the first respondent/plaintiff's loan account. Further, the letter sent to Mr.K.S.C.Iyer on 25.05.1997 by the appellant/first defendant with the signature of Mr.K.S.C.Iyer would go to show apart from the discharge of loan of Mr.K.S.C.Iyer in HL-A/c.No.19, in respect of Door No.9, Rajarathinam Street, Kilpauk, Chennai-10, the debts of four companies namely M/s.SIC Business Association for a sum of Rs.5 lakhs; M/s.SIC Financial Services for a sum of Rs.2,50,000/-; M/s.PB Financial Services for a sum of Rs.1,15,000/-; and M/s.PB Business Associates for a sum of Rs.3 lakhs and the interest accrued thereon shall be adjusted and therefore, there would not be any excess amount in the said sum of Rs.1 crore paid by the second respondent/second defendant on the directions of Mr.K.S.C.Iyer and therefore the first respondent/plaintiff alone is liable to discharge the her mortgage debt.

11. The learned senior counsel appearing for the appellant/first defendant would further submit that the appellant/first defendant has also produced the relevant mortgage deed of Mr.K.S.C.Iyer, the letter written by Mr.K.S.C.Iyer on 25.05.1997 and registration copy of the receipt of discharge of mortgage of Mr.K.S.C.Iyer into Court on 29.07.2009 and therefore, there could not be any adverse inference be taken against the appellant/first defendant. Further, the letter issued by Mr.K.S.C.Iyer on 16.09.1997, in Ex.D4 would show the discharge of the entire debt of Mr.K.S.C.Iyer and to hand over the keys to the purchaser of Mr.K.S.C.Iyer, the second respondent/second defendant and that there could not be any discharge of mortgage debt of the first respondent/plaintiff in respect of the suit property. The learned senior counsel further submitted that the first respondent/plaintiff has to pay contractual rate of interest at the rate of 22.2% per annum and it is not an usurious one. The learned senior counsel further submitted that the appellant/first defendant is a benefit fund and they are receiving fixed deposit from public and they have been issued interest at 15% to 18 % per annum on the said deposits and the interest rate during the relevant period from 1993 to 1997 was 18 % per annum, paid as interest on the deposits to the public and therefore, the appellant / first defendant has to necessarily lend loans at 22.2% per annum which includes the suit mortgage also.

12. The learned senior counsel appearing for the appellant/first defendant would further submit that the first respondent/plaintiff had categorically agreed to pay interest at 24% per annum in default of payment of installments of recurring deposit at Rs.50,000/- per month or to pay interest every month and therefore, the said interest cannot be considered as penalty. The first respondent/plaintiff has to necessarily to pay and discharge the suit mortgage and seek



for redemption of mortgage, but without paying the principal and interest she relied upon the consideration paid by Mr.K.S.C.Iyer, who had paid the money for discharging his mortgage and his debts which is not sustainable in law. The suit has been filed by the first respondent/plaintiff in order to skip the appellant/first defendant from taking action under Section 69 of the Transfer of Property Act and also delaying payment of the money towards the suit mortgage and to prolong the case as far as possible.

13. Further according to the learned senior counsel appearing for the appellant/first defendant, the learned Single Judge failed to consider the rights and duties of the appellant/first defendant and the first respondent/plaintiff and that the first respondent/plaintiff admitted the execution of the mortgage deed, borrowal of money and signature was also admitted. Therefore, it is for the first respondent/plaintiff to prove that the consideration has not been passed as stated by her. Once she admitted the mortgage deed and borrowal of money and signature, it is for her to prove the same in the manner known to law. Further the amount paid by Mr.K.S.C.Iyer is only to his loan on mortgage deed and the second respondent/second defendant paid only to the mortgage loan of Mr.K.S.C.Iyer and not for the first respondent/plaintiff loan. Further, the first respondent earlier filed a suit and though the said suit was decreed ex parte, the present suit would operate as res judicata and it is hit by Order II Rule 2 of C.P.C. and therefore the learned Single Judge failed to consider the scope of the redemption of the mortgage under the Transfer of Property Act and the Code of Civil Procedure and erroneously passed the preliminary decree, even though the first respondent/plaintiff has not paid the mortgage amount, which warrants interference of this Court.

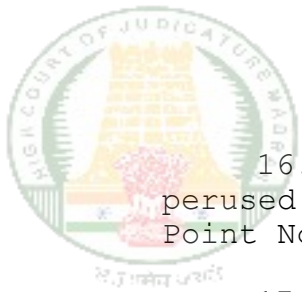
14. The learned counsel appearing for the first respondent/plaintiff would submit that though the first respondent/plaintiff has become the share holder of the appellant/first defendant company in the year 1995 and in order to apply for a loan of Rs.50,00,000/-. The appellant/first defendant agreed to grant the above said loan of Rs.50,00,000/- and obtained her signature on 14.11.1995 on various papers, all of which were blank papers. At that time, she was not aware of the fact that for what purpose, the appellant was obtaining her signatures in the blank papers and on the same date i.e. on 14.11.1995, the appellant issued one cheque bearing No.326425 for a sum of Rs.41,75,000/- retaining a sum of Rs.8,25,000/- on the ground that the same will be its commission for granting the loan and also they deducted even from the cheque and they have not paid the entire sum of Rs.41,75,000/-, they deducted for the registration fees and other deductions. Therefore, the mortgage deed was not fully supported by the consideration. Being a lady and in need of money, she affixed her signature in the blank papers. Taking advantage of the signatures obtained in blank papers



subsequently they have demanded money even though they have not filed any statement of accounts of the first respondent/plaintiff and also that of one Mr.K.S.C.Iyer who also borrowed from the appellant/first defendant.

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15. The learned counsel appearing for the first respondent/plaintiff further submitted that Mr.K.S.C.Iyer sold his property to the second respondent/second defendant and Mr.K.S.C.Iyer directed the second respondent/second defendant to pay Rs.1 crore to the appellant/first defendant and after deducting his loan account, the balance would be deducted in the loan account of the first respondent/plaintiff. Even the documents filed by the first respondent/plaintiff and the appellant/first defendant, a letter issued by Mr.K.S.C.Iyer to the second respondent/second defendant and the letter issued by the second respondent/second defendant to the appellant/first defendant would clearly shows that the second respondent/second defendant paid a sum of Rs.1 crore to the appellant/first and also the letter sent by Mr.K.S.C.Iyer, itself proves that after deducting the loan account of Mr.K.S.C.Iyer, the balance amount be credited in the first respondent/plaintiff account. The appellant has also not given credit to a sum of Rs.70,000/- paid on 11.02.1997 and further sum of Rs.30,000/- paid on 13.12.1997 by the first respondent/plaintiff. Subsequently, the first respondent/plaintiff also paid a sum of Rs.70,000/- on 31.03.1999 and Rs.1,00,000/- on 24.05.1999, for which payment only, the appellant/first defendant gave receipts. If the appellant produce the statement of account of Mr.K.S.C.Iyer and the first respondent/plaintiff that would reveal the balance amount to be paid by the first respondent/plaintiff. Further in the suit, the first respondent/plaintiff has also deposited a sum of Rs.15,00,000/- which amount has already been paid by the first respondent and the K.S.C.Iyer after deducting his account and the balance amount is credited in the account of the appellant and Rs.50,00,000/- also deposited. Therefore, definitely there would not be any balance amount to be paid to the appellant/first defendant and if the appellant/first defendant produced the correct accounts of the mortgage loan account of K.S.C.Iyer and the first respondent/plaintiff, certainly it would reveal that no amount is necessary to be paid by the first respondent/plaintiff. Even otherwise, if the accounts are filed, that would reveal what is the amount exactly the first respondent/plaintiff has to pay. Therefore, after deducting all the amount paid by the first respondent/plaintiff to the appellant/first defendant and if anything is there, she is ready to pay the said amount, for which necessarily the accounts has to be rendered. Thus, considering all the facts, the learned Single Judge has rightly decided the suit and passed the preliminary decree. Instead of filing the accounts, the appellant/first defendant has filed the present appeal, which is liable to be dismissed.



16. Heard the learned counsel on either side and also perused the records.
Point Nos. (i) & (ii)

17. The points for consideration (i) and (ii) are taken up together. Point No.(i) relates to whether the first respondent/plaintiff, being the mortgagor having filed the suit for redemption of mortgage, has she discharged her burden in proving that the mortgage debt is discharged. The Point No. (ii) relates to in the absence of the burden of proof being not discharged by the mortgagor can any adverse inference drawn against the mortgagee and seek for rendition of accounts by a preliminary decree.

18. In this regard, the case of the first respondent/plaintiff is that she availed a loan of Rs.50,00,000/- from the appellant/first defendant on 14.11.1995. While availing the loan, she was called upon to execute a deed of simple mortgage. Apart from that, her signature was taken in several blank papers. Further, though the loan documents speak of a sum of Rs.50,00,000/- towards consideration, the appellant/first defendant had not paid a sum of Rs.11,09,180/- and the reason for such deduction had not been disclosed to her. It is stated that a sum of Rs.5,25,000/- was paid to SIC vide cheque bearing No.326423 and another sum of Rs.3,00,000/- was credited to account No.1612. But the first respondent/plaintiff has no connection whatsoever with both accounts. The document stipulates that a sum of Rs.50,000/- shall be paid each month for 80 months in a recurring deposit bearing account No. 689 and this shall be utilized in addition to the interest on the loan amount. At the time of borrowal, the appellant/first defendant had charged interest @ 22.2% p.a and in default of payment of interest or the recurring deposit, interest shall be chargeable @ 24% p.a. The first respondent/plaintiff was issued with a notice of demand on 03.04.1996 by the appellant/first defendant to pay Rs.5,55,000/- allegedly being the interest for 6 months and default interest at Rs.27,750/- and interest tax at 3% amounting to Rs.17,482/-. The father of the third respondent / third defendant Mr.K.S.C.Iyer, who had also availed a loan from the appellant / first defendant had directed his purchaser the second respondent / second defendant to pay a sum of Rs.1 crore to the appellant / first defendant and take possession of the title deeds and the keys from the appellant / first defendant. The appellant/first defendant was specifically called upon on 23.7.1997, to receive the sum of Rs.1 crore towards the loan of Mr.K.S.C.Iyer and the first respondent/plaintiff in A/c. No.1343. On the date of payment by the second respondent/ second defendant it appears that a sum of Rs.64,72,074/- is alleged to be due and payable by Mr.K.S.C.Iyer to the appellant/first defendant. Without disclosing the accounts, a notice was issued on 10.12.1997 as if a sum of Rs.37,13,712/- is due towards interest and Rs.50,00,000/- towards principal.



Without disclosing the true accounts, the appellant/first defendant had issued notices to the first respondent/plaintiff threatening to bring the property for sale and in order to avoid the sale of the property, the suit was filed in O.S.No.5173 of 1999 on the file of the learned XVII Assistant Judge, City Civil Court, Chennai and the said suit was also decreed exparte on 18.06.2002. The appellant/first defendant filed an application to set aside the ex parte decree in I.A.No.1358 of 2002 and the same is pending disposal. The property was sought to be auctioned through Vaman auctioneers and a notice to that effect was also issued to the first respondent/plaintiff on 16.11.2002. Further, an undated notice was issued through Vamana auctioneers, fixing the date of auction on 26.12.2002 at 3.p.m. The first respondent/plaintiff further states that if the amounts paid by the second respondent / second defendant are taken into account, the entire loan would almost stand discharged. The first respondent/plaintiff states that the appellant/first defendant had deducted nearly 10% of the loan amount towards registration charges and service charges. The first respondent/plaintiff came to know about the deductions only when the counter was filed in I.A.No.13181 of 1999 in O.S.No.5173 of 1999. The first respondent/plaintiff was under the bona fide impression that the amount of Rs.50 lakhs would be paid and therefore she had signed the documents. The documents pertaining to her property are available with the appellant/first defendant and they are bound to return the same. The appellant/first defendant has to account for the various amounts received from her and from Mr.K.S.C.Iyer and also prays for accounting. When the appellant/first defendant filed the said application in I.A.No.13181 of 1999 in O.S.No.5173 of 1999 for injunction, though the said application was pending at the time of filing of the suit, subsequently, the same was dismissed. Therefore, the first respondent/plaintiff filed the present suit for preliminary decree as stated supra.

19. The case of the appellant/first defendant is that the first respondent/plaintiff admitted the mortgage deed, payment of interest and the signature in the deed. Therefore, she has no right to challenge the same since she agreed to pay Rs.50,000/- in 80 installments but she failed to pay it. Therefore, she was issued with a notice and even after obtaining the notice she failed to pay, therefore Section 69 of the Transfer of Property Act was invoked and when the first respondent/plaintiff filed the suit, the sale proceedings were dropped. There was no tripartite agreement among the first respondent/plaintiff, the appellant/first defendant and Mr.K.S.C.Iyer to adjust any amount payable to K.S.C.Iyer to be adjusted in the first respondent/plaintiff's loan account. Further, the letter sent to Mr.K.S.C.Iyer on 25.05.1997 by the appellant/first defendant with the signature of Mr.K.S.C.Iyer would go to show apart from the discharge of loan of Mr.K.S.C.Iyer and the interest accrued thereon shall be adjusted and therefore, there would not be any excess amount



in the said sum of Rs.1 crore paid by the second respondent/second defendant on the directions of Mr.K.S.C.Iyer and therefore the first respondent/plaintiff alone is liable to discharge the suit mortgage debt. The first respondent/plaintiff has to pay contractual rate of interest at the rate of 22.2% per annum and it is not an usurious one. The first respondent/plaintiff had categorically agreed to pay interest at 24% per annum in default of payment of installments of recurring deposit at Rs.50,000/- per month or to pay interest every month and therefore, the said interest cannot be considered as penalty. The first respondent/plaintiff has to necessarily to pay and discharge the suit mortgage and seek for redemption of mortgage, but without paying the principal and interest she relied upon the consideration paid by Mr.K.S.C.Iyer, who had paid the money for discharging his mortgage and his debts. The suit has been filed by the first respondent/plaintiff in order to skip the appellant/first defendant from taking action under Section 69 of the Transfer of Property Act and also delaying payment of the money towards the suit mortgage and to prolong the case as far as possible. Further, the first respondent earlier filed a suit for permanent injunction and got a decree, hence the present suit is barred by res judicata and it is hit by Order II Rule 2 of C.P.C.

20. Since the first respondent/plaintiff has not repaid the mortgage amount as agreed by them i.e. Rs.50,00,000/- and interest, therefore the appellant/first defendant has taken steps under Section 69 of the Transfer of Property Act and the first respondent filed a suit and got injunction. Therefore the appellant/first defendant could not proceed further. It is for the first respondent/plaintiff to prove that Mr.K.S.C.Iyer has discharged the suit mortgage. Though the first respondent/plaintiff has admitted the execution of the mortgage deed and also borrowal but she has stated that she has received only a sum of Rs.38,90,820/- and not Rs.50,00,000/-. Further the interest claimed by the appellant/first defendant is very exorbitant. It is not in dispute that the appellant/first defendant is a financial company and the first respondent/plaintiff borrowed loan from the appellant/first defendant and executed the mortgage deed. The signature in the mortgage deed is also admitted. The only question is whether the first respondent/plaintiff discharged the mortgage debt or not.

21. Though the first respondent/plaintiff has stated that she received only a sum of Rs.38,90,820/- and subsequently she made payments and also stated that one Mr.K.S.C.Iyer directed the second respondent to pay a sum of Rs.1 crore to the appellant and after deducting the account of Mr.K.S.C.Iyer the balance amount would be credited in the account of the first respondent/plaintiff. For which, the appellant has admitted that Mr.K.S.C.Iyer has also mortgaged his property with their institution and the second respondent paid Rs.1 crore for and



on behalf of Mr.K.S.C.Iyer and though they have stated that apart from that, other loan accounts also in M/s.SIC Business Association; M/s.SIC Financial Services; M/s.PB Financial Services; and M/s.PB Business Associates have been deducted. Even assuming that the balance is not as stated by the first respondent to discharge the entire mortgage debt of the first respondent, at least some balance would be available with the appellant. Unless the statement of accounts of the first respondent and Mr.K.S.C.Iyer are produced, it is very difficult to say what was the balance amount to be paid on the suit mortgage as on date.

22. Though, in this case, the mortgage was admitted and Rs.1 crore received from Mr.K.S.C.Iyer was also admitted. Though the first respondent has specifically stated that she made certain payments and Mr.K.S.C.Iyer also gave a letter to the appellant that after deducting his loan account the balance would be credited to the account of the first respondent. The appellant has admitted the said transactions and the letters and in this case the appellant has not produced the statement of accounts of the first respondent as well as Mr.K.S.C.Iyer. If they filed the statement of accounts, certainly it would reveal what is the amount so far they have paid and what is the balance amount to be paid. Therefore, under these circumstances, the learned Single Judge drawn an adverse inference that the appellant has not produced the statement of accounts and proved that from the date of borrowal what was the credit made in the first respondent account and what are the debits regarding the interest and the penal interest and if any amount credited in the account of the first respondent based on the letter given by Mr.K.S.C.Iyer. If the accounts of the K.S.C.Iyer is also produced, then it will reveal what was the outstanding in his account at that time and what was the balance amount and whether the balance amount was credited in the account of the first respondent/plaintiff. Therefore, in the absence of statement of both the accounts of the first respondent and Mr.K.S.C.Iyer, it cannot be stated that what is the balance amount. Therefore, the first respondent has pleaded in his plaint very clearly and also during the evidence, that she made payments and also Mr.K.S.C.Iyer gave a letter. Even though the appellant has stated that there is no tripartite agreement but however the appellant admitted that they received a sum of Rs.1 crore from the second respondent on the instructions of Mr.K.S.C.Iyer. Therefore, it is the duty of the appellant to give the statement of accounts of the first respondent and Mr.K.S.C.Iyer. Therefore, the learned Single Judge has rightly passed the preliminary decree only for rendition of accounts.

Point No.(iii)

23. Point No.(iii) is as the defendants 2 and 3 are strangers to the loan transaction of the plaintiff with 1st



defendant and are not necessary and proper parties and therefore the suit is bad for misjoinder of parties.

24. Though the appellant has stated that the second and the third respondents are strangers to the loan transaction, they are unnecessary parties and the suit is bad for misjoinder of unnecessary parties. In this regard, though the first respondent/plaintiff has specifically pleaded in her plaint that during the pendency of the mortgage one Mr.K.S.C.Iyer gave a letter to the appellant and as K.S.C.Iyer is no more at the time of filing of the suit, by way of abundant caution, the third respondent who is the legal representative of K.S.C.Iyer was impleaded as a party in the suit because the averments in the plaint states that Mr.K.S.C.Iyer paid a sum of Rs.1 crore through the second respondent and after deducting his mortgage debt the balance would be deducted to the account of the first respondent/plaintiff.

25. Since the second respondent has purchased the property of Mr.K.S.C.Iyer, which was mortgaged with the appellant and in order to discharge that mortgage, Mr.K.S.C.Iyer instructed the appellant to receive Rs.1 crore from the second respondent and hand over all the mortgage documents, original title deeds to the second respondent. Accordingly, the appellant has also admitted the receipt of Rs.1 crore and he has also returned back all the documents to the second respondent as instructed by K.S.C.Iyer. Therefore, under these circumstances, the second and third respondents are necessary parties. Therefore, the suit is not bad for misjoinder of parties since Mr.K.S.C.Iyer is no more, in the absence of Mr.K.S.C.Iyer, his son, the third respondent, is a necessary party. Even otherwise the respondents 2 and 3 are proper parties to the suit. Therefore, merely showing the second and third respondents as parties in the suit, the same is not bad for misjoinder of parties.

Point No. (iv)

26. The point No.(iv) is as to whether the plaintiff having already filed an earlier suit in O.S.No.5173 of 1999 on the same mortgage debt and enforcement, is barred under Order II Rule 2 of CPC to institute a further suit on the same cause, which was available while the earlier suit was filed and whether the decision in O.S.No.5173 of 1999 will operate as res judicata and bar the present suit in O.S.No.909 of 2002.

27. So far as this point is concerned, as stated, during the pendency of the mortgage, the appellant issued sale notice with regard to the selling of the mortgaged property and therefore the first respondent filed a suit in O.S.No.5173 of 1999 on the file of the learned XVII Assistant Judge, City Civil Court, Chennai for declaring the public auction sale notice issued by M/s.Balaji & Co, the second defendant therein fixing the date of auction of the sale of mortgaged



property on 24.08.1999 as illegal, null and void and for consequential permanent injunction. Though in the said suit ex-parte decree was passed, the appellant filed petition to set aside the I.A.No.1358 of 2002 in O.S.No.5173 of 1999 and the same was subsequently dismissed. There is no other appeal/revision against that order, therefore, in the said suit issues were not finally decided between the parties. Therefore, though the suit was only decreed as exparte, even though issues were framed in the said suit no issue was tried and finally decided in that suit. Therefore, the present suit is not barred by res judicata. Section 11 of the C.P.C. is very clear. Section 11 of C.P.C. reads as follows:

"11. Res judicata: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the



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purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

In this case as admitted the suit in O.S.No.5173 of 1999 was decreed ex parte and the certified copy of the decree was marked as Ex.P20 in the suit in O.S.No.909 of 2002. Therefore, a careful perusal of the records in earlier suit, though issues were framed but only ex parte decree was passed no issues were tried and finally decided, whereas in the present suit the issues are finally tried and decided after trial and therefore the present suit is not barred by res judicata.

28. As far as Order II Rule 2 of C.P.C. is concerned, the earlier suit was filed because the appellant herein was taking effective steps to sell the mortgaged property by auction, therefore the first respondent/plaintiff filed the earlier suit for injunction. The said suit was decreed ex parte. The cause of action arises in the present suit is entirely different. Though the first respondent ought to have filed the suit for all the claims in that suit itself, but considering the fact that the date of auction sale of the property was fixed on 24.08.1999 and the appellant has also not produced the statement of accounts to the first respondent and therefore under those circumstances the earlier suit in O.S.No.5173 of 1999 was filed to declare the the auction sale dated 24.08.1999 as illegal, null and void and also for permanent injunction not to sell the property. Admittedly, the suit was decreed as ex parte and the same was final. Whereas, in the present suit the plaintiff has sought from the appellant for rendition of accounts. As already stated, the accounts were not produced by the appellant and therefore it is very difficult to ascertain as to what is the balance amount that the first respondent is liable to pay to discharge the mortgage. Therefore, under these circumstances, the present suit is not hit by Order II Rule 2 of C.P.C., as the



cause of action arises in the said suit is not one and the same and filing of the present suit at that time also is not possible due to the non availability of any account and urgency in stopping the auction sale. Therefore, the learned Single Judge has rightly held that the present suit is neither barred by res judicata nor hit by Order II Rule 2 of C.P.C. and therefore this point is answered accordingly.

Point No. (v)

29. The point No.(v) is whether the Court could not have granted a preliminary decree in reference to an unmarked document and account arising thereto namely letter dated 25.05.1997 of Mr.K.S.C.Iyer to the appellant/first defendant.

30. It is the specific case of the first respondent that during the pendency of the mortgage, one Mr.K.S.C.Iyer who is also a borrower of the appellant, in order to sell his mortgaged property to the second respondent and to settle the account with the appellant, he wrote a letter to the appellant and also gave instructions to the second respondent to pay a sum of Rs.1 crore to the appellant and to credit it towards his loan account and the balance amount be credited to the account of the first respondent. Though Mr.K.S.C.Iyer said to have written a letter directly to the appellant on 25.05.1997 itself. The appellant also admitted the transaction between the appellant and Mr.K.S.C.Iyer and Mr.K.S.C.Iyer with the second respondent and also admitted that the second respondent has paid Rs.1 crore under the instructions of Mr.K.S.C.Iyer to the appellant.

31. At that time, in the account of Mr.K.S.C.Iyer, the mortgage debt is not Rs.1 crore and when the appellant received Rs.1 crore from the second respondent for and on behalf of Mr.K.S.C.Iyer and when Mr.K.S.C.Iyer specifically written a letter to the appellant, the appellant also received the same, the balance amount would be deducted to the account of the first respondent. The appellant has not produced the accounts as to what was the amount outstanding in the account of Mr.K.S.C.Iyer and what was the balance amount if the balance amount is not deducted in the account of the first respondent, the same has to be returned back to Mr.K.S.C.Iyer. Unless the appellant shows the accounts of Mr.K.S.C.Iyer and the first respondent, it is not possible to find out the exact balance due on the account of the first respondent. Therefore, under these circumstances, though the suit was filed in the year 2002 and the trial had commenced in the year 2008, P.W.1 filed proof affidavit on 14.04.2008 and the cross examination of P.W.1 was completed on 15.04.2008 and the defendants evidence was completed on 31.07.2008. During the trial, they have not produced the letter of Mr.K.S.C.Iyer dated 25.05.1998 before the Court. The appellant produced the relevant mortgage deed of Mr.K.S.C.Iyer and the letter written by Mr.K.S.C.Iyer on 25.05.1997 and certificate copy of the receipt of discharge of mortgage of Mr.K.S.C.Iyer into Court



on 29.07.2009. Therefore, though the said letter was produced, the appellant has not marked the said document dated 25.05.1997. In fact the letter dated 25.05.1997, addressed to the appellant by Mr.K.S.C.Iyer would go to show that a sum of Rs.1 crore would be paid by the second respondent towards the outstanding sum in H.L.A/c.No.H-19 mortgage debt of K.S.C.Iyer and other debts of SIC and PB Group of Companies and at last the remaining amount was directed to be credited to the loan account of the first respondent/plaintiff namely Sarojini Ramanathan in respect of HL.A/c.No.1343. The said document is an important one and it ought to have been marked as exhibit while DW1 was in box but it was produced subsequently and it was not marked as documentary evidence. Therefore, once the said letter is produced before the Court, though the parties have not marked the said letter but they have admitted the transaction between Mr.K.S.C.Iyer and the appellant and also the letter written by the appellant, though the document is not marked and since admitted the transaction between the appellant and Mr.K.S.C.Iyer the amount received from the second respondent by the appellant and therefore merely because that document is not marked the Court cannot ignore the facts. Though the learned Single Judge could have reopened the case and marked the said document through the witness and given effect to the document but however without marking the document the learned Single Judge has considered the letter issued by Mr.K.S.C.Iyer to the appellant dated 25.05.1997 and directed that the copy of the letter dated 25.05.1997, shall form part of the records. Since the transaction is admitted even though the document is not marked, no prejudice would be caused to the appellant. Further, the decree passed by the learned Single Judge is only to render the accounts of the first respondent and K.S.C.Iyer. Therefore, once the appellant produces the account then if any explanation has to be given, he can make it but without submitting the account he has nothing to say.

32. Therefore, under these circumstances, on a careful reading of the entire pleading, the oral and documentary evidence produced by both the parties, the appellant is liable to render the accounts of the first respondent and Mr.K.S.C.Iyer. If both the accounts are produced, the exact amount to be paid by the first respondent/plaintiff, if any, would be arrived at and therefore under these circumstances, we do not find any reason to set aside the judgment and preliminary decree passed by the learned Single Judge. There is no merit in the appeal, the appeal is liable to be dismissed and accordingly the appeal is dismissed.



33. In the result, the appeal is dismissed. No costs.
Consequently, the connected miscellaneous petition is closed.

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Assistant Registrar (CS)

//True copy//

Sub Assistant Registrar

The Sub Assistant Registrar (Original Side),
High Court, Madras.

- 1 C.C. to M/S.V.RAGHAVACHARI, Advocate SR.NO.32375
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O.S.A.No.232 of 2013
and M.P.No.1 of 2013

SAI (CO)

RRI 21/12/2020