



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on
21.12.2021

Judgment Pronounced on
12.01.2022

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CORAM:

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

S.A.No.1139 of 2019
and
CMP.No.24839 of 2019

Minakshi Ganesh ... Appellant/2nd Defendant
..vs..

1. Ganesh Subramanian ... 1st Respondent/Plaintiff
2. State Bank of India
represented by its
Assistant General Manager
Personal Banking Branch
Bazullah Road, T.Nagar
Chennai-600 017. ... 2nd Respondent/1st Defendant

This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 16.08.2019 made in A.S.No.348 of 2018 on the file of the learned II Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 24.07.2018 made in O.S.No.1245 of 2013 on the file of the learned II Assistant Judge, City Civil Court, Chennai.

For Appellant : M/s.B.Deepak Narayanan
For Respondent-1 : Mr.C.Manishankar
Senior Counsel
for M/s.S.Kanmani Annamalai
For Respondent-2 : Mr.S.Kanniah

JUDGMENT

This Second Appeal is filed challenging the judgment and decree dated 16.08.2019 in A.S.No.348 of 2018 of learned II Additional City Civil Court, Chennai, confirming the judgment and decree dated 24.07.2018 in O.S.No.1245 of 2013 on the file of learned II Assistant Judge, City Civil Court, Chennai.



2. First respondent filed the suit in O.S.No.1245 of 2013 seeking the following reliefs:-

a) Declaring that the foreclosure and transfer of Fixed Deposit Receipt bearing No.30002531786 dated 09.02.2005 issued in favour of the plaintiff being deposited in FDR No.30037266160 dated 16.02.2006 in favour of the second defendant performed by the first defendant bank as null and void;

b) for mandatory injunction directing the first defendant Bank to retransfer the said deposit available in FDR 30037266160 dated 16.02.2006 by restoring the original deposit made in FDR No.30002531786 in favour of the plaintiff;

c) for permanent injunction restraining the first defendant Bank from disbursing or transferring or in any way alienating the funds available in FDR No.30037266160 to and in favour of the second defendant or any of her nominee or any person claiming through the second defendant; and

d) to pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

3. The case of the first respondent/plaintiff, in brief, is as follows:-

First respondent was working in Abu Dhabi as Manager in M/s.Parsons International. He had deposited a sum of Rs.10,000/- US\$ with the second respondent bank on 01.12.2005. He has his NRI Account in this bank. He was issued necessary Fixed Deposit Receipt bearing No.30002531786 dated 08.02.2005. The period of deposit was from 01.02.2005 to 01.02.2007. He handed over the deposit receipt to his wife/appellant/second defendant and instructed her to renew the Fixed Deposit Receipt on the date of maturity. To facilitate the renewal, he put up his signature on the reverse side of the Fixed Deposit Receipt. Appellant, instead of renewing the Fixed Deposit Receipt on the date of maturity, approached the second respondent bank for foreclosure of the Fixed Deposit Receipt and got it transferred and endorsed in her favour, without the knowledge and consent of the first respondent. She got the deposit amount transferred in her name under FD Receipt bearing No.30037266160 dated 16.02.2006. First respondent returned to India after quitting his job at abroad and shocked to know that the appellant left



the matrimonial home at Chennai. He was not able to locate her whereabouts. He approached the second respondent bank to update his savings and about the deposits and came to know the transfer of FDR in the name of appellant. Immediately, he sent an objection letter dated 29.09.2006. There was no response from the second respondent bank. After several visits and reminders and the second respondent bank sent the e-mail dated 24.12.2006 acknowledging the objection raised by first respondent and he was informed that anything with regard to Fixed Deposit Receipt will be done only on further instructions from the first respondent and appellant. First respondent located the whereabouts of appellant and requested her to join him to visit the bank to sort out the issue. Appellant, instead of sorting out the problem, insisted the second respondent bank to re-transfer the matured value of the amount to her HDFC bank account at Secundrabad. Appellant sent a complaint to Ombudsman and that was rejected. She filed complaint before the District Consumer Disputes Redressal Forum, Chennai in C.C.No.520 of 2007. That complaint was dismissed on 07.06.2010. Then she preferred appeal before State Consumer Disputes Redressal Commission, Chennai in F.A.No.650 of 2010. State Commission took the contra view and held that the first respondent has to approach the civil forum to seek redressal and allowed the appeal. Only during the appeal, first respondent came to know about the filing of Consumer Case and he filed a petition to implead him as respondent in CMP No.578 of 2011 in F.A.No.650 of 2010. That was dismissed on 08.11.2011. Second respondent bank has no right to transfer the hard earned money of the first respondent in favour of the appellant. Fixed Deposit Receipt is not a negotiable instrument. First respondent waiting for the second respondent to rectify the mistake and re-transfer the amount to him. The deposited amount comes under the provisions of Foreign Exchange Regulation Act and its Rules and Regulations. First respondent made deposit for two years from 01.02.2005 to 01.02.2007. Even before the expiry of this period, appellant foreclosed the Fixed Deposit and transfer the amount to her name and got fresh Fixed Deposit Receipt on 16.02.2006. Therefore, this suit is filed for the aforesaid reliefs.

4. The case of the second respondent/first defendant, in brief, is as follows:-

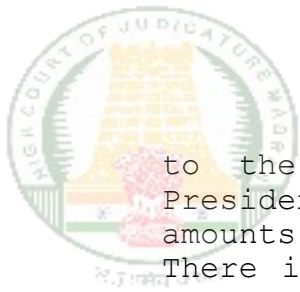
It is admitted that the appellant and first respondent are the customers of second respondent bank. When the first respondent was in foreign countries, appellant was handling his financial matters in India. In February 2006, appellant requested the bank for the foreclosure of amount of US\$10,000/-. She handed over the original Fixed Deposit Receipt with the signature of the first respondent on the back side. Over and



above the signature, there was a written request to foreclose the Fixed Deposit Receipt and open a new Fixed Deposit Receipt in her account for one year. Second respondent believed her words and foreclosed the FDR and opened the deposit of USD10303.27. The amount was deposited by the first respondent. Appellant attempted to encash the amount by depositing the Fixed Deposit Receipt. Meanwhile her husband/first respondent gave a complaint. Appellant approached the banking ombudsman and gave a complaint against the bank. Complaint was dismissed on 04.04.2007. Then she filed complaint before District Consumer Disputes Redressal Forum, Chennai, against the bank without impleading her husband/first respondent as a party to the suit. That complaint was dismissed on 07.06.2010 in C.C.No.520 of 2007. She preferred an appeal in F.A.No.650 of 2010 before the State Consumer Disputes Redressal Commission and that was allowed. Bank issued Fixed Deposit Receipt in favour of appellant relying on the specific endorsement made in the Fixed Deposit Receipt in the name of first respondent. First respondent was aware of various proceedings against the bank, but he was a silent spectator for all these days and filed the suit belatedly. Bank has bonafidely transferred the Fixed Deposit Receipt in the name of appellant. There is no merit in the case.

5. The case of the appellant/second defendant, in brief, is as follows:-

Appellant and first respondent lived in Sultanate of Oman and United Arab Emirates, where appellant worked for a considerable time. Her savings were spread over in several fixed deposits and savings bank accounts. Most of the Fixed Deposits are in the name of appellant and first respondent. First respondent filed a suit in C.S.No.737 of 2006 seeking the relief of recovery of amount, due to him. No relief was sought in that suit in respect of FDR Nos.30002531786 dated 09.02.2005 and 30037266160 dated 16.02.2006. The petition filed by the first respondent for impleading in the proceedings before the State Consumer Disputes Redressal Commission was dismissed. The Fixed Deposit in FDR No.30037266160 was created by the appellant on 16.02.2006 for the period from 01.02.2006 to 01.02.2007. Cause of action in this suit and the suit in C.S.No.737 of 2006 are almost identical. However, the first respondent has not sought for any relief in respect of the FD receipts concerned in this case in C.S.No.737 of 2006. Therefore, the suit is explicitly barred by limitation and also the principles of constructive res-judicata and under Order 2 Rule 2 CPC. First respondent has not taken any steps for more than seven years to challenge the FD receipt issued in the name of appellant. Therefore, the suit is barred by acquiescence and estoppel. Respondents 1 and 2 are colluding and avoiding payment of money



to the appellant. First respondent is an associate Vice President of Tata Consultancy Services and invested substantial amounts in various banks. He is not maintaining the appellant. There is no violation of Foreign Exchange Management Act (FEMA) or Foreign Exchange Regulation Act (FERA). First respondent has not made out a case and therefore, the suit is liable to be dismissed.

6. On the basis of the above pleadings, the trial court framed the following issues and additional issues:-

Issues:-

1. Whether the plaintiff is entitled for declaration as prayed ?
2. Whether the plaintiff is entitled for mandatory injunction ?
3. Whether the plaintiff is entitled for permanent injunction against D1 ?
4. To what relief :-

Additional issues:-

1. Whether the suit is barred by limitation?
2. Whether the suit is barred under Order 2 Rule 2 of CPC ?
3. Whether the plaintiff had acquiesced to the fact that the monies covered under FDR No.30037266160 dated 16.02.2006 belonged to second defendant and whether the plaintiff is estopped from challenging the same ?

7. During the trial before the trial Court, PW.1 was examined and Exs.A1 to A9 were marked on the side of first respondent/plaintiff. DW.1 was examined and Exs.B1 to B14 were marked on the side of appellant/second defendant. Apart from that two FD receipts dated 09.02.2005 and 16.02.2005 were marked as Ex.C1.

8. On considering the oral and documentary evidence, learned trial Judge found that Ex.A2-Fixed Deposit Receipt is not a negotiable instrument and the appellant had manipulated the Fixed Deposit Receipt handed over by first respondent for renewal with his signature by adding the following sentences:- "Please foreclose and open an FDR as on date for one year period in the individual name of MRS.MINAKSHI GANESH ONLY". She has not established the fact that Fixed Deposit Receipt was issued by the bank to her. It is also found that the amount for issuance of Ex.A2-FD receipt was deposited by the first respondent through US\$ and therefore, the amount due under Ex.A2-FDR is due to him. There is no question of the suit being barred by limitation, principles of constructive res-judicata and under Order 2 Rule 2 CPC and this in view of the matter, the trial Court decreed the suit. Aggrieved against the



same, appellant filed A.S.No.348 of 2018. Learned first appellate Judge has also found no reason to differ from the view taken by learned trial Judge and dismissed the appeal. Therefore, the appellant/second defendant filed this second appeal.

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9. At the time of admission of the second appeal, the following substantial questions of law were framed:-

a) Whether the suit was barred by limitation, as per Article 59 of the Limitation Act, 1963, since the first respondent showed knowledge of the existence of the instrument by way of letter dated 20.09.2006 to the second respondent and had subsequently, filed the suit belatedly after well beyond the limitation period of three years in 2013 ?

b) Whether the suit filed by the plaintiff in O.S.No.1245 of 2013 is hit by the principle of constructive res-judicata as the cause of action and relief sought in the said suit is similar to the cause of action and relief sought in C.S.No.737 of 2006 filed by the plaintiff ?

10. Learned counsel for the appellant mainly argued on these substantial questions of law that the suit is barred by limitation and the principles of constructive res-judicata. It is his submission that the change of Fixed Deposit Receipt from the name of first respondent to the name of appellant was made on 16.02.2006. First respondent sent an objection letter on 20.09.2006. Second respondent replied through e-mail, to this objection letter, on 24.12.2006. The suit ought to have been filed within a period of three years from the date of change of Fixed Deposit Receipt on 16.02.2006 or atleast from the date when the objection was given on 20.09.2006. However, the suit was filed only in 2013. Therefore, the suit is clearly barred by limitation. Merely because there is certain observations by the District Consumer Disputes Redressal Forum and then, by the State Consumer Disputes Redressal Commission, first respondent cannot claim that these forums had given free hand to the first respondent to file a suit, after the period of limitation. There is no specific observation made by the State Consumer Dispute Redressal Commission giving liberty to the first respondent to file a suit. A similar letter dated 20.09.2006 was sent to other banks, where Fixed Deposits were made and the suit in C.S.No.737 of 2006 was filed. The cause of action for this suit had arisen when the suit in C.S.No.737 of 2006 was filed. However, no relief was asked with reference to the Fixed Deposits concerned in this suit, in C.S.No.737 of



2006. Therefore, the suit is barred under Order 2 Rule 2 CPC and principles of constructive res-judicata.

11. In support of his submission, learned counsel for the appellant relied on the following judgments:-

(i) Dahiben ..vs.. Arvindbhai Kalyaniji Banusali (MANU/SC/0508/2020). Relevant portion reads as follows:-

14. The Limitation Act, 1963 prescribes a time-limit for the institution of all suits, appeals, and applications. Section 2(j) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suits, appeals or applications. Section 3 lays down that every suit instituted after the prescribed period, shall be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article. Articles 58 and 59 of the Schedule to the 1963 Act, prescribe the period of limitation for filing a suit where a declaration is sought, or cancellation of an instrument, or rescission of a contract, which reads as under :

Description of suit	Period of limitation	Time from which period begins to run
58. To obtain any other declaration.	Three years	When the right to sue first accrues.
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

The period of limitation prescribed under Articles 58 and 59 of the 1963 Act is three years, which commences from the date when the right to sue first accrues.



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In *Khatari Hotels Pvt. Ltd. & Anr. v. Union of India & Anr.*,¹² this Court held that the use of the word 'first' between the words 'sue' and 'accrued', would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. That is, if there are successive violations of the right, it would not give rise to a fresh cause of action, and the suit will be liable to be dismissed, if it is beyond the period of limitation counted from the date when the right to sue first accrued.

A three-Judge Bench of this Court in *State of Punjab v. Gurdev Singh*,¹³ held that the Court must examine the plaint and determine when the right to sue first accrued to the plaintiff, and whether on the assumed facts, the plaint is within time. The words "right to sue" means the right to seek relief by means of legal proceedings. The right to sue accrues only when the cause of action arises. The suit must be instituted when the right asserted in the suit is infringed, or when there is a clear and unequivocal threat to infringe such right by the defendant against whom the suit is instituted.

Order VII Rule 11(d) provides that where a suit appears from the averments in the plaint to be barred by any law, the plaint shall be rejected."

(ii) *Rameeza Beevi and others ..vs.. S.Mohammed Ibrahim* (MANU/TN/2428/2005); Relevant portion is extracted hereunder:-

"16. The relevant Article applicable to this prayer is 59, not in dispute. Therefore, as per the third column in Article 59 of the Act, time begins to run, from the date first known to the plaintiffs, namely the availability of the registered document, which is labelled, as one obtained by fraud or coercion, as the case may be. Here, the plaintiffs came to know, about the existence of a fraud sale deed, at least, on 10.4.1997, as per the cause of action given in paragraph 7, which cannot be denied. If that date is to be taken, as the time, from which the period of limitation begins to run, then the plaintiffs should have sought for the relief, to cancel or set aside the instrument within three



years from the said date onwards, i.e. on or before 10.04.2000. "

(iii) In Union of India and others ..vs.. M.K.Sarkar (MANU/SC/1874/2009), it is held as follows:-

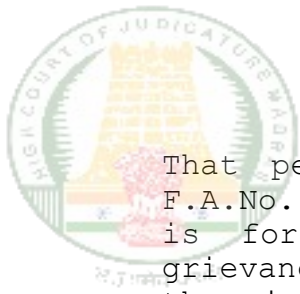
"9. A Court or Tribunal, before directing 'consideration' of a claim or representation should examine whether the claim or representation is with reference to a 'live' issue or whether it is with reference to a 'dead' or 'stale' issue. If it is with reference to a 'dead' or 'state' issue or dispute, the court/Tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or Tribunal deciding to direct 'consideration' without itself examining of the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect."

and

(iv) Asgar and others ..vs.. Mohan Varma and others (MANU/SC/0136/2019). Relevant portion is extracted hereunder:-

"32. Constructive res judicata, in the same manner as the principles underlying res judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. "

12. In response, learned counsel for the first respondent submitted that only if the bank refused to entertain the objection raised by the first respondent, limitation will start to run. In the case before hand, on receiving the objection letter dated 20.09.2006 sent by first respondent, second respondent bank did not disburse the amount to appellant. On the other hand, it informed the first respondent to come with appellant to the bank to sort out the issue. First respondent was not able to locate the whereabouts of appellant. Only after sustained efforts, whereabouts of appellant was found out and he requested the appellant to accompany him to bank to sort out the issue. Instead of accompanying the first respondent, to bank to sort out the issue, appellant started making claims for the amount, by sending complaint to the Banking Ombudsman and filing complaint before the Consumer Forum. Only when the appeal was pending before the State Consumer Disputes Redressal Commission, first respondent came to know about the proceedings initiated by appellant and he filed a petition for impleading him as a party.



That petition was dismissed. There was an order passed in F.A.No.650 of 2010 that if the first respondent is aggrieved, it is for him to approach appropriate forum to redress his grievance, meaning thereby, the first respondent can approach the civil court. Accordingly, first respondent filed the suit. Therefore, it cannot be considered that the suit is barred by limitation. C.S.No.737 of 2006 concerned about the Fixed Deposits made in the joint names of first respondent and appellant. The banks are different and reliefs are different. This case concerns with the Fixed Deposit receipt in the exclusive name of first respondent. Cause of action in C.S.No.737 of 2006, parties to the suit, relief claimed in both the suits are different. The claim that the suit is barred by Order 2 Rule 2 CPC and constructive res-judicata cannot be accepted in law.

13. Learned counsel for the first respondent further submitted that the real fact is that believing his wife/appellant, first respondent signed and handed over Ex.A2-Fixed Deposit Receipt for renewing it at the time of its maturity. However, before the date of maturity, appellant in criminal breach of trust, fraudulently made endorsement to the effect of foreclosing the Fixed Deposit ad for issuing fresh Fixed Deposit Receipt in her name. It is nothing but criminal breach of trust, fabrication and cheating. It is clearly admitted by appellant that she had made this endorsement. The deposit made by Non-Resident Indian (NRI) cannot be transferred casually to a Resident Indian (RI) because certain provisions of FERA (Foreign Exchange Regulation Act) and FEMA (Foreign Exchange Management Act) were also involved in this matter. Moreover, the Fixed Deposit is not a negotiable instrument and it cannot be negotiated by an endorsement. Appellant cannot take advantage of fraudulent act committed by her. Therefore, the courts below have rightly found that first respondent is entitled for the relief prayed for and granted decree. He prayed for dismissal of the second appeal and cited the following judgments for the proposition as to what constitute res-judicata and bar under Order 2 Rule 2 CPC:-

(i) (1993) 3 Supreme Court Cases 123 (Inacio Martins (deceased through LRs.) ..vs.. Narayan Hari Naik and others). The relevant portion reads as under:-

"6. The next contention which found favour with the High Court was based on the language of Order 2 Rule 2(3) of the Code of Civil Procedure. The submission regarding constructive res judicata was also based on this very provision. Now Order 2 concerns the framing of a suit. Rule 2 thereof requires that the plaintiff shall include the whole of his claim in the framing of



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the suit. Sub-rule (1) of Rule 2, inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any court he will not be entitled to claim that relief in any subsequent suit. However, sub-rule (3) of Rule 2 provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted. It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court. But the Rule does not preclude a second suit based on a distinct cause of action. It may not be out of place to clarify that the doctrine of res judicata differs from the rule embodied in Order 2 Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action."

and

(ii) (1996) 1 Supreme Court Cases 735 (State of Maharashtra and another ..vs.. National Construction Company, Bombay and another), wherein it is held as follows:-

"5. On 28-7-1992, the learned Civil Judge dismissed the suit holding that as the cause of action was identical to the one in the former suit, it was barred by res judicata under Explanation IV to S.11 as also Order 2 Rule 2 of the Civil Procedure Code, 1908 (hereinafter called "the Code"). The appellants appealed against this order on the ground that the two suits were based on separate causes of action and the dismissal of the former on a technical ground could not act as a bar against the latter. On 9-



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7-1993, a Division Bench of the Bombay High Court by the decision impugned herein dismissed the appeal. Feeling aggrieved, the appellants have approached this Court by way of special leave.

6. We may first dispose of the plea based on Section 11, Explanation IV, of the Code. That section deals with the doctrine of res judicata and provides that any matter which might or ought to have been made a ground for defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Since the plea of res judicata can be disposed of on a narrow ground, it is not necessary to examine the ambit of Explanation IV. The main text of Section 11 reads thus :

"S. 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."

The important words are "has been heard and finally decided". The bar applies only if the matter directly and substantially in issue in the former suit has been heard and finally decided by a Court competent to try such suit. That clearly means that on the matter of issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicata.

"

14. Learned counsel for the second respondent bank submitted that first respondent and appellant are long-standing customers of second respondent bank. Believing the words of appellant, bank had foreclosed the Fixed Deposit Receipt in the name of first respondent and issued a fresh Fixed Deposit Receipt in the name of appellant. It is his further submission that the second respondent bank is willing to abide by the orders of this Court.



15. In reply, learned counsel for the appellant submitted that first respondent had signed on the back of Ex.A2-Fixed Deposit Receipt and handed it over to the appellant. It means that the appellant is given liberty to make endorsement. Endorsement was made only as per the instructions of first respondent. He cannot now turn around and say that he did not have any intention of foreclosure and issuance of Fixed Deposit Receipt in her name. He submitted that both the courts below have not addressed the issue of limitation and constructive res-judicata in the light of correct legal background and applied the law on facts and wrongly decreed the suit. Therefore, he prayed for setting aside the judgments of the courts below and for allowing this second appeal.

16. From the submissions made, it is clear that the amount for issuance of Ex.A2-Fixed Deposit Receipt was contributed by first respondent. Though a feeble attempt was made by appellant to claim that she was employed when she was living with her husband in abroad and contributed for the deposit of various amounts, she has not produced any evidence in support of her claim. Therefore, this claim was rightly rejected by the courts below. Thus, it is clear that Ex.A2- Fixed Deposit Receipt was issued on the basis of US\$10,000 deposited by first respondent.

17. The issue hotly contested here by the first respondent is that first respondent handed over Ex.A2 - Fixed Deposit Receipt to his wife, appellant herein, after putting his signature on the back of Fixed Deposit Receipt for renewal at the time of maturity. On the other hand, the claim of appellant is that no signature is required for renewal of FDR. In fact, there is no specific pleading in the written statement as to what purpose, her husband handed over Ex.A2 - Fixed Deposit Receipt with his signature to her. She claims that first respondent had paid the sum lying in Ex.A2-Fixed Deposit Receipt, in response to her request to return of money, representing her hard earned savings when she and first respondent were living in abroad. Thus, he signed in the reverse of Ex.A2-Fixed Deposit Receipt, to facilitate such transfer and gave it to her. Therefore, first respondent cannot made any objection to foreclosure and transfer of Ex.A2-Fixed Deposit Receipt and issuance of fresh Fixed Deposit Receipt to her. Thus, it is her case that first respondent gave consent for foreclosure and issuance of fresh Fixed Deposit Receipt to her. In the light of this dramatically opposite position taken by the parties with regard to Ex.A2-Fixed Deposit Receipt, we have to consider the issue.

18. It is pertinent here to refer to Ex.A2 - Fixed Deposit



Receipt. Ex.A2- Fixed Deposit Receipt shows that it was issued for US\$10,000/- on 09.02.2005 repayable with interest on the expiry of deposit period. The period of deposit is from 01.02.2005 to 01.02.2007. Perusal of Ex.A2 - Fixed Deposit Receipt shows that it is not a negotiable document. It is specifically mentioned in this Ex.A2 - Fixed Deposit Receipt as "this is not 'negotiable instrument' ".

19. What is negotiable instrument ?

Section 13 of Negotiable Instruments Act defines what is Negotiable Instrument ? which reads as follows:-

Section 13 : "Negotiable Instrument"

(1) A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation 1 : A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation 2 : A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation 3 : Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

Only negotiable instrument can be negotiated by endorsement. Ex.A2 - Fixed Deposit Receipt, being not a negotiable instrument, certainly it cannot be negotiated by a mere endorsement like "Please foreclose and open an FDR as on date for one year period in the individual name of MRS.MINAKSHI GANESH ONLY".

20. The instruction given in Ex.A2-Fixed Deposit Receipt shows that it mainly focuses on disbursement of the principal amount of the deposit with interest due thereon, upon maturity



of the deposit. There is no instruction with regard to foreclosure or issuance of fresh FDR in the name of another person. For better understanding, the instructions are reproduced herein:-

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"1. Kindly furnish us with your instructions for renewal or disbursement of the principal amount of the deposit and interest due thereon upon maturity of the deposit. In the absence of your instructions, the Bank will automatically renew the deposit for a similar term at the interest rate prevailing at the time of renewal to safeguard you from any loss of interest.

2. The account number given in the term deposit advice only need to be quoted with your instructions to us for the disposal of the relative deposit. There is no need to physically send this term deposit advice.

3. Please inform us of any change in your Resident/Non-Resident status as and when such change takes place. The status declaration on the account opening form shall remain in force until such time as a change is advised to us.

4. After renewal and despatch of the TDA, instructions to repay the maturity proceeds, renders this TDA null and void.

5. Interest on this deposit is subject to TDS as per CBDT rules on Income Tax. "

The reading of these instructions clearly show that only the depositor can request for renewal or disbursement of principal with interest.

21. The endorsement made for foreclosure and issuance of Fixed Deposit Receipt in the name of appellant was written on either side of the signature of first respondent, meaning thereby, first respondent had already signed the Fixed Deposit Receipt and after he put up his signature, the endorsement was written. It was admitted by the appellant that she had alone written the endorsement. The signature of appellant was also found in this endorsement. If really, first respondent wanted the foreclosure of Fixed Deposit Receipt and issuance of fresh FDR in the name of the appellant, his signature alone is sufficient, if it is permitted under Banking Law and Practice, what is the necessity for appellant signing in this Fixed Deposit Receipt? The curious and strange way of endorsement made on either side of the signature of first respondent, and the appellant signing in Ex.A2-Fixed Deposit Receipt, strengthen the case of first respondent that Ex.A2-Fixed Deposit Receipt given to his wife with his signature, for being used at



the time of renewal, was misused by the appellant, with an intention to cheat the first respondent and dupe him of his money, by making endorsement found in Ex.A2-Fixed Deposit Receipt. It is nothing but an act of fraud and cheating. Fraud unsettled everything and it can be questioned at any stage. The Hon'ble Supreme Court in a judgment reported in (2007) 4 SCC 221 (A.V.Papayya Sastry and others ..vs.. Government of Andhrapradesh and others) observed as follows:-

21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;

"Fraud avoids all judicial acts, ecclesiastical or temporal".

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of Lazarus Estates Ltd. v. Beasley, Lord Denning observed:

"No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

24.

25. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be



utilized as an engine of oppression by dishonest and fraudulent litigants."

22. Appellant filed C.C.No.520 of 2007 against the bank before the District Consumer Disputes Redressal Forum, Chennai. It was observed in that order that "since the issue with regard to the rival claim has to be considered by elaborate oral evidence and the Consumer Forum cannot take this issue, it is open to the appellant/complainant to approach the civil court to sort out the dispute". Against this order, appellant preferred an appeal before the State Consumer Disputes Redressal Commission. The State Consumer Disputes Redressal Commission found in favour of the appellant and directed the bank to transfer the amount to the appellant. However, it also observed that "if the appellant's husband (first respondent) is aggrieved, it is for him to approach appropriate forum to redress his grievance". It is claimed by the first respondent that he came to know about the Consumer Court proceedings only when the matter was pending before the State Consumer Disputes Redressal Commission and not before that. His effort to implead himself and contest the claim of appellant was ended in failure. Therefore, he filed the suit. He is all along trying to sort out the issue between himself and appellant and the bank for the reason that the bank wanted him and the appellant to come to bank to sort out the issue. Bank had never denied his claim. On the other hand, it stopped disbursing the amount to the appellant. Therefore, it cannot be considered that the suit is barred by limitation. The moment the State Consumer Disputes Redressal Commission ordered the amount to be paid to the appellant, he approached the civil court and it is well within the time. As already stated fraud vitiates everything and the act of fraud can be challenged at any time, even in collateral proceedings. The act of appellant in making endorsement for foreclosure and for issuance of FDR in her name, even before the expiry of period of deposit, is nothing but an act of fraud and cheating. There is force in the submission of learned counsel for the first respondent that since the bank has not denied his claim, there is no starting point of limitation. When the State Consumer Disputes Redressal Commission ordered payment of money to the appellant, the first respondent approached the Court in time and therefore, this Court finds that the suit is not barred by limitation. Thus the first substantial questions of law is answered that the suit is not barred by limitation.

23. So far as the claim that the suit is barred by constructive res-judicata and Order 2 Rule 2 CPC, it is seen that except the first respondent and appellant, other parties to the suit in C.S.No.737 of 2006 and this suit are different,



claim involved in both the cases are different, cause of action for both the suits are different, except that the plaintiff issued a notice on 20.09.2006 in C.S.No.737 of 2006 and an objection letter in this case on the same date, all other things are different. The transactions concerned in C.S.No.737 of 2006 relate to joint deposits. On the other hand, the amount concerned in this suit is a deposit in the individual name of first respondent. Therefore, at any stretch of imagination, it cannot be said that the suit is barred under Order 2 Rule 2 CPC. It is also seen that C.S.No.737 of 2006 was dismissed as withdrawn. It is submitted by learned counsel for the first respondent that the issue relating to that suit was settled between the parties and therefore, the suit was withdrawn and therefore, dismissed as withdrawn. It is clear that C.S.No.737 of 2006 was not disposed on merits after recording the evidence of parties. Therefore, the judgment in C.S.No.737 of 2006 cannot be considered as a bar to file this suit under Order II Rule 2 or Section 11 of CPC. Thus, the second substantial questions of law is answered.

24. Both the courts below have concurrently found that first respondent is entitled for the reliefs claimed in the suit for the reasons set out in their judgments. This Court finds no reason to interfere with the said findings and confirms the findings.

25. Resultantly, the judgment and decree of first Appellate Court/II Additional Judge, City Civil Court, Chennai, in A.S.No.348 of 2018 dated 16.08.2019 confirming the judgment and decree of trial Court/II Assistant Judge, City Civil Court, Chennai, in O.S.No.1245 of 2013 dated 24.07.2018 is confirmed and this Second Appeal is dismissed with costs of the first respondent throughout. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-I)

//True Copy//

Sub Assistant Registrar

Mra

To

1. The II Additional Judge,
City Civil Court, Chennai.



2. The II Assistant Judge,
City Civil Court, Chennai.

Copy to:

The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to M/s.Kanmani, Advocate, S.R.No.2861

S.A.No.1139 of 2019
and CMP.No.24839 of 2019

MG(CO)
SU(29/03/2022)