

(2007) 03 AP CK 0008

Andhra Pradesh High Court

Case No: AS No. 439 of 1992

Life Insurance Corporation of
India

APPELLANT

Vs

K. Vilasa Rao

RESPONDENT

Date of Decision: March 5, 2007

Citation: (2007) 6 ALD 379

Hon'ble Judges: G.V. Seethapathy, J

Bench: Single Bench

Advocate: M.V.S. Suresh Kumar, for the Appellant; B. Sitaramaiah, for the Respondent

Final Decision: Dismissed

Judgement

G.V. Seethapathy, J.

This appeal is directed against the judgment and decree dated 30.7.1991 in O.S. No. 114 of 1983 on the file of the Court of the Subordinate Judge, Khammam, wherein the suit filed by the appellant for recovery of a sum of Rs. 21,367.70, was dismissed.

2. The appellant-plaintiff filed the suit with the following averments:

The respondent-defendant being a businessman, running hotel complex, approached the appellant -plaintiff for a loan of Rs. 40,000/- for construction of a building and the loan was sanctioned. The respondent-defendant executed a registered mortgage deed, hypothecating the plaint schedule property on 12.1.1973 and also pledging the insurance policy bearing No. 37940760 assured for Rs. 10,000/-. The defendant availed loan in a sum of Rs. 36,000/- in two installments and agreed to pay interest and principal in half yearly installments due by first April and first October of every year. The defendant was also required to keep the Life Insurance Policy in force by payment of premium. The mortgage deed provides inter alia that in case of default in payment of any half yearly installments or mortgagor commits any breach of conditions, the mortgagee may demand payment of the whole of the mortgage debt then remaining due. The defendant committed default

in payment of the installments since three years prior to filing of the suit. In spite of demands and issuing notices including legal notice dated 7.6.1976 the defendant did not repay the debt. The defendant gave a reply requesting for time to clear the arrears by his letter dated 15.12.1976. As the defendant did not keep up the promise, another notice dated 4.1.1977 was issued for which the defendant gave a reply on 20.1.1977 agreeing to clear the balance by 1.4.1977. The plaintiff got issued another legal notice through Advocate on 6.8.1977. As the defendant persisted in committing default, the plaintiff got issued another notice dated 12.11.1981 for which the defendant gave a reply on 5.1.1982. The defendant was due in a sum of Rs. 38,852.10 and after deducting the amount kept in the suspense account, a sum of Rs. 21,367.70 was due as on 31.7.1983 and the suit is filed for recovery of the same.

3. The respondent-defendant filed written statement contending inter alia that he availed loan of Rs. 36,000/- and the interest payable is only 10% per annum and till the date of filing of the suit, he made a total payment of Rs. 58,451.14. The plaintiff did not however give credit to all the payments made by the defendant. The plaintiff did not furnish the details of the account in the plaint. The plaintiff calculated interest on the sanctioned amount of Rs. 40,000/- but not on the availed amount of Rs. 36,000/-. The plaintiff is not entitled to collect penal interest or the additional interest or time over due interest on interest. The plaintiff is not entitled to keep the amount in suspense account for years while claiming penal interest. The defendant is entitled for counter interest on the amount kept in suspense account. The interest claimed is usurious. The plaintiff ought to have furnished the details of the accounts along with the plaint. But they deliberately failed to furnish the copy of the account to cover up the latches. The suit is liable to be dismissed for want of proper particulars.

4. On the strength of the above pleadings, the trial Court framed the following issues for trial.

1. Whether the suit claim is true and correct ?
2. Whether the plaintiff is entitled for additional interest and time over due interest on interest ?
3. Whether the defendant is entitled to interest on the amounts kept in the suspense account ?
4. Whether the plaintiff is estopped from claiming the additional interest and interest on interest etc. ?
5. Whether the interest claimed is usurious ?
6. Whether the suit is properly framed ?

7. Whether the suit is liable to be dismissed for non-furnishing of the account with the plaintiff ?

8. Whether the plaintiff is entitled for the reliefs as claimed ?

9. Whether the plaintiff has properly accounted for the payments made by the defendant ?

5. PWs.1 and 2 were examined and Exs.A.1 to A.7 were marked on behalf of the plaintiff. The defendant examined himself as DW.1 and Exs.B1 to B.1 11 were marked on his behalf.

6. On a consideration of the evidence on record, the trial Court held on issue Nos. 2, 4 and 5 that the plaintiff is entitled to calculate interest as claimed by them and the same is not usurious; on Issue Nos. 1, 6, 7 and 9, the trial Court held that the plaintiff has not properly accounted for the payments made by the defendant and they failed to furnish the accounts either in the plaint or subsequently inspite of the orders of the Court and the plaintiff has not come forward with the correct amount due and the suit as framed is not proper. On issue No. 3, the trial Court held that the defendant is entitled for the interest on the payments made by him and on the amount kept in the suspense account at 10% per annum. In view of the findings on issue Nos. 1, 6, 7 and 9, the trial Court held that the plaintiff is not entitled to recover the suit amount, and accordingly dismissed the suit without costs.

7. Aggrieved by the said judgment and decree, the plaintiff preferred the present appeal.

8. Arguments of the learned Counsel for the appellant and respondent are heard. Records are perused.

9. Learned Counsel for the appellant contended that the defendant having admitted the loan transaction and having failed to repay the balance amount due inspite of repeated notices has come forward with the frivolous defence of non-furnishing of the copy of the account only to evade the payments. Learned Counsel for the respondent on the other hand contended that the plaintiff has ignored the fact that the defendant made payment of total amount of Rs. 58,451/- as against the availed loan of Rs. 36,000/- and failed to account for all the payments made by the defendant and inspite of repeated requests made by the defendant, the plaintiff failed to furnish the copy of the account and filed the suit charging penal interest, additional interest and time over due interest while keeping the payments made by the defendant in suspense account and therefore, the suit is not maintainable.

10. In view of the rival contentions of the parties, the short question, which arises for consideration in this appeal, is whether the plaintiff established their right to recover the suit amount ?

11. It is not disputed that the defendant availed loan of Rs. 36,000/- from the plaintiff and mortgaged the plaint schedule property in favour of the plaintiff and also hypothecated the Life Insurance Policy. It is also not disputed that the defendant made total payments of Rs. 54,451.14 under bunch of receipts Exs.B2 to B.91, Exs.B96 to B.104 and the bunch of counterfoils for payment made through Andhra Bank by way of demand drafts under Exs.B.105 to B.108 and similar counterfoils for payments made through Canara Bank under Exs.B.109 to B.111, supports the claim of the defendant that he made payments worth more than Rs. 58,000/-. It is also not disputed that some of the payments made by the defendant were not given credit to against loan account and were kept in suspense account by the plaintiff on the ground that the payments were made beyond due date. Whether the plaintiff gave credit to the payments against the loan account or kept them in a separate suspense account, the fact remains that the defendant did in fact make several payments. The contention of the defendant was all along been that inspite of repeated requests, the plaintiff has not furnished him the copy of the account. Admittedly the plaintiff never furnished a copy of the account to the defendant. The plaintiff issued notices under Ex.A.2 dated 6.8.1977 and Ex.A.3 dated 12.11.1981. In Ex.A.2 the plaintiff demanded payment of balance of Rs. 31,737.97 which is said to be due after deducting a sum of Rs. 22,743.34 in deposit against the alleged outstanding amount of Rs. 54,481.31. In Ex.A.3 a sum of Rs. 28,395.60 is shown to be due. Exs.A2 and A.3 both indicate that the defendant has been making payments and some of them were given credit and some of them were kept in suspense account. In Exs.A.4 to A.6 reply notices, the defendant has been questioning the correctness of the outstanding amount claimed by the plaintiff. He has also furnished details of the payments made by him in his reply notices and sought further time for payment of the balance, which according to him is due. In Ex.A.6, which is reply given by the defendant to the plaintiffs notice Ex.A3, the defendant has stated that in view of the payments already made, the details of which are furnished in the reply, he had to pay balance of only Rs. 13,910/- as on 1.10.1981. The plaintiff has been contending that the defendant having sought extension of time for payment of balance in his reply notice, has put forth with a frivolous defence to evade payment. It is to be noted that in the reply notices Exs.A.4 to A.6, the defendant nowhere admitted the liability for the amount as claimed by the plaintiff in their notices. He has been questioning the correctness of the said amount and contending that all the payments made by him have not been duly credited to and he was due for a lesser amount for payment of which, of course, he sought extension of time. It cannot therefore be said that the defendant has admitted his liability for payment of the amount as claimed by the plaintiff. Inspite of the defendant repeatedly questioning the correctness of the amounts demanded by the plaintiff in their notices, the plaintiff has not chosen to furnish the details of the account in the plaint or filed copy of the account along with it. In Para 7 of the plaint, it is stated that a sum of Rs. 20,635/- towards principal and Rs. 9,973.60 towards interest; Rs. 2,493.40 towards additional interest and Rs. 5750.10 towards

time over due interest on interest due, making up a total amount of Rs. 38,852.10 was due on 31.7.1983 and after giving credit to the net amount in a sum of Rs. 17,484.40 kept in suspense account, the amount of Rs. 21,367.70 was due as on 31.7.1983. It is however, not stated in the plaint or by way of furnishing a copy of the account as to how the said amount was arrived at. It is not known whether all the payments made by the defendant were given credit or not.

12. It is not disputed that the defendant filed an application in LA. No. 820 of 1983 for a direction to the plaintiff to file loan account and the same was allowed. The plaintiff admittedly, did not produce the accounts nor furnished the copy of the same and thereby failed to comply with the orders of the Court passed in I.A. No. 820 of 1983. On the other hand, PW.1 Higher Grade Assistant in Plaintiffs branch at Warangal, admitted that he has not filed any document to show as to how the suit amount was arrived at. PW.2 Manager (Legal) for the plaintiff Corporation at Warangal, has for the first time come forward with an explanation in the cross-examination that the ledgers were torn and they were not filed into Court. He further stated that he can furnish the extract of the ledger if directed, but it was never furnished inspite of the orders passed by the Court in IA No. 820 of 1983. PW.1 however did not say that the ledgers were torn. It is unbecoming for an institution like plaintiff-Corporation to put forth a plea that the ledgers were torn and so they were unable to produce them inspite of the orders passed by the Court for their production in IA No. 820 of 1983. The defendant seriously disputes the correctness of the amount claimed by the plaintiff. The plaintiff has to necessarily establish the correctness of the claim made by him before he can seek to recover the same. The correctness or otherwise of the amount claimed can only be known on scrutiny of the account maintained by the plaintiff, inasmuch as the defendant has been persistently contending that all the payments made by him have not been given credit by the plaintiff. Without furnishing copy of the account inspite of the orders passed by the Court, the plaintiff seeks to recover the amount as demanded by them, which is totally untenable. The reply notice issued by the defendant do not reflect any admission of liability on his part for the amount demanded while assailing the correctness of the amount claimed by the plaintiff, the defendant sought time for payment of such balance amount as found due after ascertainment of the account and duly giving credit to all the payments made by him. In order to resolve the dispute regarding correctness of the claim made by the plaintiff, they ought to have filed the copy of the account along with the plaint or at least subsequently in compliance with the orders passed by the Court. Their failure to do so enables the Court to draw an adverse inference regarding the correctness of the claim made by them.

13. In [Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others](#), the Supreme Court held as follows:

The plaintiffs suit, as already indicated, was for a specific and ascertained sum of money on the basis of settled account. The Courts below have concurrently found that there was no settlement of account on April 4, 1949, as alleged by the plaintiff. After this finding, it was not open to them to make out a new case for the plaintiff which he never pleaded and go into the accounts and pass a decree for the amount which they considered was due from the defendants first set to the plaintiff. They should have, in the circumstances, either dismissed the suit or passed a preliminary decree for accounts directing that the books of account be examined item by item and an opportunity allowed to the defendants first set to impeach and falsify either wholly or in part the accounts on the ground of fraud, mistakes, inaccuracies or omissions for it is well settled that in case of fraud or mistake, the whole account is affected and in surcharging and falsifying the accounts, errors of law as well as errors of fact can be set right. By adopting the latter course indicated by us, the defendants first set would have got a fair and adequate opportunity of scrutinizing the accounts and showing whether they were tainted with fraud, mistake, inaccuracy or omission or of showing that any item claimed by the plaintiff was in fact not due to him.

14. In the present case also, the defendant was denied a fair and adequate opportunity of scrutinizing the accounts, inspite of his assertion that they are inaccurate and there has been large-scale omission to give credit to the payments made by him. The plaintiff filed the suit for a specific amount and sought the preliminary mortgage decree for the same. The plaintiff, however, failed to establish that the amount claimed by them in the suit is due. Inspite of specific direction by the Court to furnish accounts, they failed to do so. The defendant was therefore denied of an opportunity to substantiate his claim regarding the payments made but not given credit to. The failure of the plaintiff to furnish copy of the statement of accounts inspite of directions by the Court is totally unjustifiable. The trial Court has therefore rightly held that the plaintiff failed to establish their claim for the suit amount. The said finding of the trial Court does not call for any interference in this appeal.

15. In the circumstances and for the reasons stated above, the judgment and decree dated 30.7.1991 passed by the trial Court in OS No. 114 of 1983, dismissing the suit, are not held liable to be set aside.

16. In the result, the appeal is dismissed. In the circumstances, no order as to costs.