

GAHC010144452009



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/154/2009

HEMANTA DAS,
SON OF LATE NITTANANDA DAS RESIDENT OF BARPETA GANAKKUCHI
BUGULAMARI IN THE DISTRICT OF BARPETA, WITHIN THE STATE OF
ASSAM.

VERSUS

BIREN PATHAK,
SON OF LATE TARUN PATHAK, RESIDENT OF BARPETA METUAKUCHI
SANTINAGAR IN THE DISTRICT OF BARPETA, WITHIN THE STATE OF
ASSAM.

Advocate for the Petitioner : MR.D DAS

Advocate for the Respondent : MRI B KAKATI

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 12.10.2023

Heard Mr. K. Sarma, learned counsel for the appellant. None appears on call for the respondent.

2. This appeal under Section 100 CPC is by the appellant-defendant who is

aggrieved by the first appellate judgment and decree dated 13.05.2009 passed by the learned Civil Judge, Barpeta by which the suit of the respondent/plaintiff was decreed by allowing the appeal and setting aside the judgment and decree dated 19.08.2008 passed by the learned Munsif No. 1, Barpeta in Money Suit No. 22/2008.

3. In brief, the pleaded case of the respondent-plaintiff in the plaint is that the appellant being in need of money had taken a loan of Rs.40,000/- from the respondent by executing a hand note dated 06.01.2003 with a promise to repay the said amount on demand along with interest. As repay was asserted that the respondent was not a money lender and that as the appellant is failed to repay the loan even after demand, the respondent served an advocate's notice on the appellant on 08.07.2005, which was served on 13.07.2005 and thereafter, the suit was filed. The appellant contested the suit by filing written statement by claiming that the respondent was a money lender and the suit was barred by limitation as well as under the provisions of Assam Money Lenders' Act, 1934 as the respondent was a professional money lender doing business without valid registration. It was also claimed that the hand note was not sufficiently stamped and the execution of the hand note was also denied by claiming that the signatures were taken on a blank piece of paper containing revenue stamp which was signed on good faith.

4. The learned trial Court had framed the following issues for trial:

1. *Whether there is cause of action for the suit?*
2. *Whether the suit is maintainable?*
3. *Whether the suit is barred by limitation?*
4. *Whether the plaintiff is entitled to realize Rs.60,000/- from the*

defendant?

5. Whether the defendant took a loan on 06.01.2003 by executing a hand note from the plaintiff?

6. Whether the plaintiff is entitled for a decree as prayed for?

7. What other relief or relief's the parties are entitled to?

1(a). Whether the hand note is sufficiently stamped?

5. The respondent-plaintiff had examined three witnesses including himself as PW-1, Benudhar Das as PW-2 and Prabin Deuri as PW-3 and exhibited the hand note (Ext.1), advocate's notice (Ext.2) and postal receipt (Ext.3). The appellant had examined himself as DW-1 and did not exhibit any documentary evidence.

6. The issue nos. 1 to 3 regarding cause of action, maintainability of the suit and whether suit was barred by limitation were all decided in favour of the respondent-plaintiff. In respect of issue no. 5, the learned trial Court had referred to the evidence of the witnesses and found the evidence of PW-2 and PW-3 to be trustworthy and returned a finding that the appellant had taken a loan from the respondent on 06.01.2003 by executing a hand note and accordingly, the issue was decided in the affirmative and against the appellant. In respect of additional issue no. 1(a) , it was held that the hand note contained revenue stamp of Rs.80.00 paise whereas the appropriate revenue payable was Rs.1.00 and accordingly, it was held that the hand note was not sufficiently stamped. In view of the finding returned in respect of additional issue no. 1(a), in respect of issue no.4, it was held that the respondent was not entitled to recover money from the appellant. Accordingly, in respect of issue nos. 6 and 7, it was held that the respondent-plaintiff was not entitled to any relief and the

suit was dismissed.

7. The appeal was preferred against the judgment and decree passed by the learned trial Court.

8. The learned first appellate Court had formulated the points for decision as to whether the impugned judgment and decree had been passed erroneously without properly appreciating the evidence on record and is not legally sustainable.

9. Insofar as the issue nos. 1 to 3 are concerned, the finding of the learned trial Court was affirmed. The remaining issues were taken up together for adjudication. In respect of the additional issue no.1(a), the learned first appellate Court had referred to the provisions of Section 36 of the Stamp Act, 1899 and it was held that the learned trial Court did not take into account the said provision of law. Accordingly, as the learned first appellate Court found that the Ext.1 was marked in evidence without raising issue on the maintainability and also appreciating the decision of the learned trial Court on issue no. 5 wherein the finding has returned that the appellant had taken a loan on 06.01.2003 by executing a hand note, held that the learned trial Court had committed grave error of law by ignoring the provision of Section 36 of the Indian Stamp Act and accordingly, the issues were decided against the appellant and in favour of the respondent-plaintiff by holding that once Ext.1 was admitted without any objection as to maintainability, could have been taken. In this regard, reliance was placed on the provisions of Order 13 Rule 3 CPC and it was held that the provisions of Order 13 Rule 3 CPC must yield to section 36 of the Stamp Act. Accordingly, the decision of the learned trial Court on issue nos. 1(a), issue nos. 4, 6 and 7 was reversed and the respondent-plaintiff was found entitled to decree as prayed for.

10. This appeal was admitted for hearing on the basis of following substantial questions of law as framed by this Court by order dated 02.12.2009:-

1. Whether the respondent/ plaintiff has to possess a valid registration certificate for carrying out the business of money lending as per Section 7(b) of the Assam Money Lenders' Act, 1934?

2. Whether the hand-note, on the basis of which the appellant/ defendant was sued, has been properly stamped, as per provision of Section 35 of the Indian Stamp Act?

11. In support of the appeal, the learned counsel for the appellant has submitted that the learned trial Court had committed grave error in proceeding the suit without framing any issue as to whether or not the respondent was a money lender. It is submitted that the provisions of Assam Money Lenders Act, 1934 barred adjudication of a suit unless the money lender had a valid registration under the said Act. It is also submitted that as the learned trial Court had arrived at a finding of fact that the hand note was not sufficiently stamped, the learned first appellate Court had committed grave error in accepting the said hand note and passing a decree against the appellant. Accordingly, it is submitted that this is a fit and appropriate case for remanding the matter back to the learned trial Court for a fresh adjudication on all the issues and to frame additional issues as the respondent is a money lender.

12. In support of his submission, it is also submitted that in the written statement, specific averments was made that the respondent-plaintiff was a money lender. It is also submitted that the plaintiff witnesses nos. 2 and 3 did not support the evidence of the respondent-plaintiff about loan being taken as they were not the witnesses to actual handing over of the money.

13. Considered the submissions of the learned counsel for the appellant as well as considered the materials available in the LCR.

14. In respect of the decision of the learned first appellate Court on additional issue no.1(a) and issue nos. 4, 6 and 7, it would be relevant to quote the provision of Section 35 and 36 of the Stamp Act, 1899.

“35. Instruments not duly stamped inadmissible in evidence, etc.

*No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
Provided that—*

(a) any such instrument shall, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of 2[the 3[Government]] or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

36. Admission of instrument where not to be questioned- Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped.”

15. While the provision of Section 35 of the Stamp Act made instruments not duly stamped inadmissible in evidence, but the provision of Section 36 thereof provides an exception to the provisions of Section 35 by providing that where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that instrument has not been duly stamped. Owing to the reference to Section 61 in the provision of Section 36 of the Stamp Act, 1899, it would also be appropriate to quote the provision of Section 61 of the said Act.

“61. Revision of certain decisions of Courts regarding the sufficiency of stamps.-

(1) When any Court in the exercise of its civil or revenue jurisdiction of any Criminal Court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898), makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under section 35, the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under section 42, or in section 43, prosecute any person for any offence against the Stamp-law which the Collector considers him to have committed in respect of such instrument:

Provided that-

(a) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such Court, was payable in respect of the instrument under section 35, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purposes of such prosecution, no declaration made under this section shall effect the validity of any order admitting any instrument in evidence, or of any certificate granted under section 42."

16. In this case, the learned trial Court had admitted in evidence the Ext.1. Although Ext.1 was discarded by holding that the document was not sufficiently stamped, the first appellate Court had adjudged that the said document was admissible in evidence by taking recourse to Section 36 of the said Act. Therefore, in respect of the said finding, the provision of Section 61 of the Stamp Act provides for revision as a remedy and therefore, in respect of the said finding, a second appeal would not be maintainable in law. In view of the prescriptions contained in Section 61 of the Stamp Act, this Court would have no jurisdiction to reverse the finding of fact as the issues has not been taken up in the course of its own motion nor the question is being raised on an application made by the Collector.

17. In support of his contention, the learned counsel for the appellant has placed reliance on the case of *Ramdeo Ranglal (M/s.) Vs. Jain Hardware Stores and Ors., (2004) 2 GLT 298* that no suit for recovery of loan advanced by a money lender can be proceeded in a Civil Court. The said case is distinguishable on facts because from the said judgment, it appears that the statement made by the learned counsel for the petitioner therein in paragraphs 1 to 4 of the company petition clearly spelt out that the petitioner firm had been lending money for the respondent company regularly for the purpose of staff payment, labour payment etc. In this case, there is no such admission that the

respondent was habitually lending money to the appellant. In this context, it would be appropriate to refer to clause 1 of Section 2 of the Assam Money Lenders Act, which means a person who, in the regular course of business advances a loan as defined in the said Act. Therefore, a casual loan by an acquaintance to the other would not fall within the meaning of Section 2(1) of the Assam Money Lenders Act, 1934.

18. In view of above, both the substantial question of law is answered in the negative and against the appellant by holding that as the appellant could not show that the respondent was a habitual money lender and that the loan was granted in course of his regular business of providing loan. It could not be shown that for advancing a casual loan, there is any requirement to possess a registration certificate as a money lender. It may be mentioned that it is not disputed that at one point of time, the relationship between the respondent and the appellant was cordial. The respondent is stated to be a tea stall owner near the Court and the appellant was *Jarikarak* in the same Court.

19. In the plaint, the respondent-plaintiff has pleaded that he was not a money lender. The said contention of the respondent was denied by the appellant and in the written statement it was asserted that he was a money lender. In the considered opinion of this Court, the plaintiff-respondent had made a negative statement in the plaint, which cannot be proved. However, when the appellant has asserted in his written statement that the respondent was a money lender, both the burden as well as the onus shifted on the appellant to prove that the respondent was a money lender and only when such burden was discharged, the onus would shift to the respondent to disprove it. Therefore, as it was the plea of the appellant that the respondent was a money lender, the appellant having failed to prove the same, the decision of the

learned trial Court holding the respondent entitled to a decree as prayed for, is not found to be vitiated either in law or on facts.

20. In respect of the substantial question of law no.2, in view of the observations of this Court on substantial question of law no.1, the Court is inclined to hold that the provisions of Section 36 of the Stamp Act, 1899 would have the overriding effect over the prescription under Section 35 of the Stamp Act and accordingly, the decision of the learned first appellate Court, negating the rejection of admissibility of Ext.1 is found to be on a strong legal foundation and accordingly, the said finding is affirmed by holding that the Section 36 of the Stamp Act, 1899 would debar the Court from questioning the admissibility of the said Ext.1 in evidence. Moreover, Section 61 of the Stamp Act provides for remedy available in case of insufficiency of stamps, no substantial question of law would arise for determination as regard to the sufficiency or insufficiency of stamps on Ext.1.

21. Resultantly, the Court does not find any reason to interfere with the judgment and decree passed by the learned first appellate Court by which the suit was decreed. The finding of the learned first appellate Court stands affirmed. The dismissal of the suit by the learned trial Court is found to have been rightly interfered by the learned first appellate Court.

22. The appeal stands dismissed with cost.

23. Let the decree be prepared and LCR be returned.

JUDGE