

IN THE HIGH COURT OF KERALAAT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

FRIDAY, THE 27TH DAY OF FEBRUARY 2015/8TH PHALGUNA, 1936

RFA.No. 415 of 2014 (B)

AGAINST THE JUDGMENT IN OS 236/2010 of SUB COURT, NEDUMANGAD
DATED 29-11-2013

APPELLANT/DEFENDANT:

K.VIJAYAKUMARN NAIR @ VIJAYAN.
AGED 59 YEARS, S/O KRISHNA PILLAI, PROPRIETOR,
SREEBHADRA FUELS, VELLANAD PO,
NEDUMANGAD, THIRUVANANTHAPURAM,
RESIDING AT SREE SAILOM, MELAMCODE,
VALIYARA, VELLANADU P.O., NEDUMANGADU,
THIRUVANANTHAPURAM.

BY ADV. SRI.C.P.PEETHAMBARAN

RESPONDENT:

AJIKUMAR, AGED 45 YEARS,
S/O LATE PADMANABHA PILLAI,
PANIKKAM VILLA HOUSE, PERUKAVU P.O.,
THIRUVANANTHAPURAM – 695 005.

BY ADV. SRI.S.V.RAJAN
BY ADV. SRI.R.SUDHISH
BY ADV. SMT.M.MANJU
BY ADV. SRI.R.SANTHOSH (VARKALA)

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON
8.1.2015, THE COURT ON 27-02-2015, DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

R.F.A.No.415 of 2014

Dated this the 27th day of February, 2015

JUDGMENT

Anil K.Narendra, J.

The appellant is the defendant in O.S.No.236 of 2010 on the file of the Subordinate Judge's Court, Nedumangad. The respondent-plaintiff filed the said suit for realisation of money. The court below by the judgment and decree dated 29.11.2013 decreed the suit allowing the plaintiff to realise an amount of ₹11,36,000/- together with interest at the rate of 6% per annum on the principal amount of ₹8,00,000/- from the date of suit till realisation. It is aggrieved by the said judgment and decree of the court below, the appellant is before us in this appeal.

2. We heard the arguments of the learned counsel for the appellant/defendant and perused the judgment and decree of the court below. We have also perused the records of the case made available by the learned counsel for the appellant.

3. The plaint averments, in brief, are as follows; The defendant had borrowed an amount of ₹8,00,000/- from the plaintiff on 29.5.2008 agreeing to repay the said amount with interest @18% per annum and executed a promissory note dated 29.5.2008 in his own handwriting in favour of the plaintiff. In spite of repeated demands, the defendant did not repay the said amount. On 8.9.2010 the plaintiff caused a lawyer's notice to be issued calling upon the defendant to return the aforesaid amount. As the defendant failed to repay, the plaintiff filed the suit for realisation of an amount of ₹11,36,000/- together with future interest at the rate of 18% per annum from the date of suit till the date of realisation, from the defendant and his assets, both movable and immovable.

4. The defendant filed a written statement admitting that, he had borrowed an amount of ₹8,00,000/- from the plaintiff, through one Sunil Kumar, who is the brother-in-law of the plaintiff. The defendant further admitted the execution of a promissory note for ₹8,00,000/- in favour of the plaintiff, which was given to the plaintiff through the said Sunil Kumar. Later, the defendant repaid the said amount of ₹8,00,000/- together with interest to the plaintiff, through Sunil Kumar, who had agreed to return the promissory note

obtained by the plaintiff. After one week, when the defendant approached Sunil Kumar for return of the promissory note, he was informed that it was lost from the hands of the plaintiff. The defendant demanded a written receipt from the plaintiff for repayment of the amount already made. Accordingly, the plaintiff has issued a receipt in favour of the defendant for the amount already received towards principal amount and interest due under the promissory note. Subsequently, the relationship between the defendant and Sunil Kumar got strained and it is at his instigation, the plaintiff filed the suit for realisation of money, misusing the aforesaid promissory note.

5. The plaintiff was examined as PW.1 and Exts.A1 to A4 were marked on his side. On the side of the defendants Dws.1 and 2 were examined and Exts.B1 to B3 were marked. On an appreciation of the facts of the case and the evidence on record, the court below decreed the suit allowing the plaintiff to realise an amount of ₹11,36,000/- together with interest @6% per annum on the principal amount of ₹8,00,000/- from the date of suit till realisation.

6. The learned counsel for the appellant would contend that, in the absence of an undertaking to pay a certain sum, which is

an essential feature of a promissory note under section 4 of the Negotiable Instruments Act, 1881, Exhibit A1 promissory note is unenforceable. It is well settled that, the question as to whether an instrument is a promissory note or not has to be ascertained by reading the instrument as a whole, regardless of its form or nomenclature. Therefore, mere writing of the words 'Promissory Note' on the top of Exhibit A1 will not make it a promissory note. The real character of Exhibit A1 has to be determined by reading it as a whole. Section 4 of the Negotiable Instruments Act, 1881, reads thus;

"4. 'Promissory Note': A 'promissory note' is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Therefore, if there is an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument, it will be a promissory note.

7. In the case on hand, the recitals in Exhibit A1 is to the effect that, on demand the appellant undertakes to pay a sum of

₹8,00,000/- to the respondent with interest at the rate of 18% per annum, for value received. In **Validation of document v. State (AIR 1955 Madras 652)** a Full Bench of the Madras High Court held that, "the mere omission of the expression 'to the order of' would not render a document any the less a promissory note, if otherwise it fulfilled the definition of the term 'promissory note'. Actually a promissory note need not contain this expression. It is sufficient if there is an unconditional undertaking to pay a certain sum of money to a certain person." Following the said judgment and also the judgment of the High Court of Gujarat in **Shah Chhabildas Mangaldas v. Luhar Mohan Arjan (AIR 1967 Gujarat 7)** and the judgment of the High Court of Andhra Pradesh in **Bahadurrinisa Begum v. Vasudev Naick (AIR 1967 AP 123)**, a learned Single Judge of this Court in **Hameed Haji v. Appukutty (1968 KLT 869)** has reiterated that, "the absence of the expression 'or to the order of' will not make the document any the less a promissory note." Therefore, Exhibit A1, which contains an express unconditional promise made by the appellant to pay on demand a certain sum of money to the respondent for value received, is an instrument having

the essential features of a promissory note and the contention to the contra raised by the learned counsel for the appellant can only be rejected.

8. The learned counsel for the appellant would contend that, the appellant had already discharged ₹8,00,000/- borrowed from the respondent through DW2 Sunil Kumar, as evidenced by Exhibit B1 receipt dated 16.12.2009. It is contended that the court below ought not to have ignored Exhibit B1 receipt on technicalities, since the written statement contained a specific plea of discharge. The learned counsel has also contended that, the appellant was denied a fair opportunity before the the court below to prove Exhibit B1 receipt through an expert.

9. In the plaint, the definite case of the respondent was that, on 29-5-2008 the appellant had borrowed an amount of ₹8,00,000/- from him, agreeing to repay the said amount with interest @18% per annum and executed a promissory note dated 29.5.2008 in the own handwriting of appellant in favour of respondent. In the written statement the appellant had admitted the transaction mentioned in the plaint and also the execution of a promissory note in favour of respondent. His only contention was

that he has discharged the entire liability. According to the appellant, he had borrowed the money and returned it through DW2 Sunil Kumar, brother-in-law of the respondent. When the appellant has admitted the transaction and raised a plea of discharge, the burden is upon him to prove the alleged discharge of the liability.

10. The suit was filed on 13.9.2010. The appellant, who was examined as DW1, has admitted that, on receipt of summons he entered appearance on 13.10.2010 by filing vakalath. Thereafter, the written statement was filed only on 22.10.2011, in which the appellant had raised a contention that, he had repaid an amount of ₹8,00,000/- together with interest to the respondent, through DW2 Sunil Kumar, who had agreed to return Exhibit A1 promissory note obtained by the respondent. According to the appellant, after one week, when he approached DW2 Sunil Kumar for return of the promissory note, he was informed that it was lost from the hands of the respondent. The appellant demanded a written receipt from the respondent for repayment of the amount already made. Accordingly, the respondent issued a receipt in favour of the appellant for the amount already received towards principal amount and interest due under the promissory note. Though the appellant has raised a

contention in the written statement that the respondent had issued a receipt for repayment of amount covered by Exhibit A1 promissory note, he has not produced the said receipt along with the written statement.

11. The respondent, who was examined as PW1, has categorically stated that, the appellant has not repaid the amount through Sunil Kumar and that, he had never issued any receipt to the appellant, as averred in the written statement. On 11.11.2013, at the time of cross-examination of PW1, the appellant produced Exhibit B1 receipt dated 16.12.2009, which was marked subject to the objection of the respondent. PW1 has categorically denied the execution of Exhibit B1 receipt. He has also deposed that, Exhibit B1 receipt is a fabricated one, which is not in his handwriting and the signature on the said receipt is also not his.

12. Order VIII of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'), deals with written statement, set-off and counter-claim. Going by sub-rule (1) of rule 1A of Order VIII of the Code, where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he

shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement. Sub-rule (2) of rule 1A mandates that, where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is. Sub-rule (3) of rule 1A states that, a document which ought to be produced in court by the defendant under rule 1A, but, is not so produced shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit. As per sub-rule (4) nothing in rule 1A shall apply to documents produced for the cross-examination of the plaintiff's witnesses, or handed over to a witness merely to refresh his memory.

13. In **Bhanumathi v. K. R. Sarvothaman and others (2010 (4) KLT 809)** a learned single Judge of this Court repelled the contention that, the Court has no power to receive in evidence at the time of hearing of the suit documents which ought to have been produced along with the plaint or written statement, holding that in view of the amendment brought about by the Amendment Act 22 of 2002, inserting sub-rule (3) in rule 14 of Order VII and sub-rule (3)

in rule 1A of Order VIII of the Code, and by using the expression 'shall not without the leave of the court be received in evidence on his behalf at the time of hearing of the suit', the court has the power to receive in evidence even at the time of hearing of the suit documents which ought to have been produced along with the plaint or the written statement though a party cannot claim a right to produce such documents at the time of hearing. The learned single Judge noticed that, in the affidavit filed in support of the application for leave it was stated that the applicants were not in custody of those documents at the time of filing of the written statement and having regard to the facts of the case the court below accepted the reason stated therein as sufficient to grant leave to introduce the documents in evidence. That discretion having been exercised in accordance with law and as it is not shown to be arbitrary or perverse, the learned single Judge refused to interfere with the same.

14. Going by sub-rule (1) of rule 1A of Order VIII of the Code, a document in the possession or power of the defendant on which he bases his defence or claim for set-off or counter-claim shall be produced at the time of presentation of the written statement. As

required under sub-rule (2) of rule 1A, if any such document is not in the possession or power of the defendant he shall, wherever possible, state in whose possession or power it is. If any document falling under sub-rule (1) of rule 1A is not produced at the time of presentation of the written statement, the defendant has no right as such to produce such a document in evidence at the time of hearing. However, in view of sub-rule (3) of rule 1A, the court has the power to grant leave to receive such documents in evidence even at the time of hearing. Since sub-rule (3) is an exception to the general rule contained in sub-rule (1) of Rule 1A, the court must exercise sound discretion while granting leave to receive such documents, on the defendant satisfying the court that, those documents could not be produced at the time of presentation of the written statement, for convincing reasons.

15. In the case on hand, the suit was filed on 8.9.2010. On receipt of summons, the appellant entered appearance through counsel, on 13.10.2010. Thereafter, on 22.10.2011, he filed a written statement raising a plea of discharge. However, no document in support of such a plea of discharge was either specifically mentioned in the written statement or produced in court at the time

of presentation of the written statement. Later, on 11.11.2013, at the time of cross-examination of the respondent as PW1, the appellant produced in court a receipt dated 16.12.2009 (marked as Exhibit B1 subject to the objection of the respondent), alleged to have been issued by the respondent. Instead of producing the said document in court along with an application under sub-rule (3) of rule 1A of Order VIII of the Code seeking leave of the court to produce such a document, the appellant attempted to mark the said document during the cross-examination of the respondent as PW1, contending that, it is a document intended to be handed over to PW1 merely to refresh his memory, the production of which would fall under clause (b) of Sub-rule (4) of Rule 1A. We are unable to accept the said contention raised by the learned counsel for the respondent. Exhibit B1 receipt is a document which should be the basis for the plea of discharge raised by the appellant in his written statement. It is a document, which the appellant ought to have produced in court at the time of presentation of the written statement, in view of the provisions contained in sub-rule (1) of rule 1A. Such a document cannot be termed as one intended to be handed over to PW1 merely to refresh his memory, falling under clause (b) of sub-rule (4) of rule

1A. Exhibit B1 is the basic document relied on by the appellant to prove his plea of discharge raised in the written statement. If the appellant could not produce the said document at the time of presentation of the written statement, for any convincing reasons, it is for him to produce the same in court along with an application under sub-rule (3) of rule 1A, seeking the leave of the court. Having failed to do so, it is not open for the appellant to contend that the court below erred in not receiving Exhibit B1 receipt into evidence.

16. In the written statement, the appellant has admitted that he had borrowed an amount of ₹8,00,000/- from the respondent through DW1. He has also admitted the execution of Exhibit A1 promissory note in favour of the respondent. But, the appellant would contend that, later he repaid the said amount together with interest to respondent through DW1, who had agreed to return Exhibit A1 promissory note obtained by the respondent. After one week, when he approached DW1 for return of the promissory note, he was informed that it was lost from the hands of the respondent. Then he demanded a written receipt from the respondent for repayment of the amount already made. Accordingly, the respondent issued Exhibit B1 receipt in his favour for the amount already

received towards principal amount and interest due under the promissory note. Exhibit B1 receipt was marked subject to objection. The respondent has raised serious disputes regarding the genuineness of Exhibit B1 receipt and contended that it is a fabricated document. On a comparison of the signature of the respondent in the plaint with that in Exhibit B1 receipt, the court below found that there is considerable difference between the two signatures. Further, going by the averments in the written statement, it was one week after repayment, the appellant had approached DW1 for return of Exhibit A1 promissory note, then he was informed that it was lost from the hands of the respondent. Thereafter, as demanded by the appellant, the respondent issued Exhibit B1 receipt dated 16.12.2009. But, the defendant, while examined as DW1, has deposed that he got Exhibit B1 receipt on the date of repayment itself, i.e., on 16.12.2009. DW1 had no definite case regarding the date of repayment and the amount paid towards interest. Further, DW2, who was examined on the side of the appellant had denied his involvement in the transaction. On analysing the evidence of DW2, the court below came to the conclusion that he is a total stranger to the transaction and he is

unaware of anything mentioned in the plaint and the written statement. It was in the totality of these circumstances and the evidence on record, the court below came to the conclusion that, the appellant has not succeeded in proving the plea of discharge raised in the written statement. We find absolutely no grounds to interfere with the said finding of the court below.

17. The learned counsel for the appellant would contend that, the court below has not granted a fair opportunity to the appellant to prove Exhibit B1 through an expert. A reading of the impugned judgment would show that, though the appellant had applied for comparison of the signature in Exhibit B1 receipt with the admitted signature of the respondent in the plaint, he had not taken any steps to get an expert opinion on the signature in Exhibit B1. In such circumstances, having failed to take steps before the court below to get an expert opinion on the signature in Exhibit B1 receipt, the appellant cannot now contend that, no fair opportunity was afforded to him to prove Exhibit B1 through an expert.

18. The learned counsel for the appellant would further contend that, as the time fixed in Exhibit A2 lawyer notice for sending a reply was only 3 days the appellant could not send any

reply to that notice. As we have already noticed, the suit was filed on 13.9.2010 and the defendant entered appearance on 13.10.2010 by filing vakalath. Thereafter, the written statement was filed only on 22.10.2011. If the plea of discharge pleaded by the defendant was genuine, he could have send a proper reply to Exhibit A2 lawyer notice and nothing prevented him from sending such a reply, even after entering appearance in the suit. Therefore, the contention of the learned counsel in this regard can only be rejected.

19. Lastly, the learned counsel for the appellant would contend that, even if it is assumed that the respondent is entitled for the principal sum, the court below went wrong in awarding interest for the period subsequent to the deposit of the plaint claim in court. Going by the decree, the plaintiff is allowed to realise the plaint claim with interest at the rate of 6% per annum, on the principal amount of ₹8,00,000/- from the date of suit till realisation. Merely for the reason that, during the pendency of the suit, the appellant had deposited the plaint claim in court in order to avoid an order of attachment before judgment over his property, it cannot be contended that, once the suit is decreed the respondent is entitled for interest on the plaint claim only upto the date of such

deposit. Such a deposit by the defendant, during the pendency of the suit, can never be treated as a deposit of money, in terms of Rule 1 of Order 21 of the Code. We, therefore find absolutely no merit in the contention raised by the learned counsel for the appellant that, the court below ought not to have granted interest on the plaint claim from the date of such deposit made by the appellant.

We accordingly hold that no grounds have been made out to interfere with the findings of the court below in the impugned judgment. The appeal fails and it is dismissed in limine.

Sd/-

P.N.RAVINDRAN, JUDGE

Sd/-

ANIL K.NARENDRAN, JUDGE

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