IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 5TH DAY OF JUNE 2015/15TH JYAISHTA, 1937

RFA.No. 135 of 2003 ( )

AGAINST THE JUDGMENT IN OS 90/1998 of SUB COURT, ATTINGAL DATED 31-07-2002

APPELLANT/PLAINTIFF:

SAJI KUMAR, S/O SHANMUGHAM,
AGED 28, CHARUVILA VEEDU,
MENAPPARA, NAVAIKULAM DESOM AND VILLAGE,
THIRUVANANTHAPURAM DISTRICT,
REPRESENTED BY POWER OF ATTORNEY HOLDER,
PRADEEP, S/O SHANMUGHAM, AGED 33,
CARUVILA VEEDU, MENAPPARA, NAVAIKULAM DESOM AND VILLAGE,
THIRUVANANTHAPURAM DISTRICT.

BY ADVS.SRI.NAGARAJ NARAYANAN
SRI.NAIR AJAY KRISHNAN
SRIRAJAN VELLOTH
SRI.SAIJO HASSAN

RESPONDENT/DEFENDANT:

MOHAMMED BASHEER, S/O KASIM KOYA,
AGED 46 YEARS, SHEEBA BHAVAN,
RALOORKAVU, CHEMARATHUMUKKU DESOM,
NAGAROOR VILLAGE,THIRUVANANTHAPURAM DISTRICT,
REPRESENTED BY POWER OF ATTORNEY HOLDER
LAILA BEEVI, D/O.ABDUL KAHADAR,
AGED 42, SHEEBA BHAVAN,
RALOORKAVU, CHEMMARATHUMUKKU DESOM,
NAGAROOR VILLAGE, THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.K.RAJENDRAN (VENNICODE)

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 1.4.2015, THE COURT ON 05-06-2015, DELIVERED THE FOLLOWING:

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

R.F.A.No.135 Of 2003

DATED THIS THE 5th DAY OF JUNE, 2015

JUDGMENT

Anil K.Narendran, J.

The appellant is the plaintiff in O.S.No.90 of 1998 on the file of the Court of the Subordinate Judge of Attingal. He filed the said suit for realisation of ₹2,84,000/- together with interest and costs from the respondent who is the defendant in that suit. The court below by judgment delivered on 31.7.2002 decreed the suit in part and allowed the plaintiff to recover the sum of ₹44,430/- from the defendant together with interest at the rate of 12% per annum from the date of suit till realisation and proportionate costs. Aggrieved by the judgment and decree of the court below to the extent it disallows the plaint claim, the plaintiff is before this Court in this appeal.

2. We heard the arguments of the learned counsel for the appellant/plaintiff.

3. Going by the plaint averments, the plaintiff and the defendant are close friends and are working abroad. The defendant

used to borrow money from the plaintiff and in discharge of the amount due to the plaintiff, the defendant issued Ext.A2 cheque dated 9.10.1998 for ₹2,84,000/-. The plaintiff presented the cheque for collection on the same day itself. But it was returned unpaid stating that the amount in words and figures differs. The plaintiff informed the matter to the defendant through telephone on the very same day and demanded the amount covered by the cheque. Due to the failure on the part of the defendant in paying the sum of ₹2,84,000/- covered by Ext.A2 cheque, the plaintiff filed the suit before the court below.

4. The defendant filed a written statement through his power of attorney disputing the claim made by the plaintiff. According to the defendant, in February, 1998, when both the plaintiff and the defendant were in Saudi Arabia, the defendant owed 27266 Saudi Riyals to the plaintiff towards the prize amount of a chitty conducted by the defendant at Saudi Arabia. On 15.4.1998, the defendant handed over a cheque to the plaintiff as security for the aforesaid amount on the specific understanding that the cheque would not be presented for collection and it would be returned to the defendant on payment of the aforesaid amount. No date was

entered in the cheque. Subsequently, the plaintiff obtained the signature of the defendant in an Indian stamp paper worth ₹50/- as additional security. On 25.8.1998, the defendant paid 23000 Saudi Riyals to the plaintiff and the balance amount to be paid was only 4266 Saudi Riyals. But, with a dishonest intention, the plaintiff presented the cheque. According to the defendant, he had not borrowed any amount from the plaintiff as alleged and he is not liable to pay the amount demanded by the plaintiff. The defendant contended that the balance amount due to the plaintiff is only ₹44,430/-. Therefore, the defendant contended that the suit is liable to be dismissed.

5. On the side of the plaintiff, his power of attorney was examined as PW1 and Exts.A1 to A3 were marked. On the side of the defendant, his power of attorney was examined as DW1 and Exts.B1 and B2 were marked.

6. On the pleadings and evidence on record, the court below came to the conclusion that Ext.A2 cheque was not offered as security for any amount due to the plaintiff from the defendant. The court below held further that in the light of Ext.B2 receipt dated 25.8.1998, the plaintiff is not entitled for the entire amount shown in

Ext.A2 cheque and that he is entitled only for the sum of ₹44,430/-. In the result, the suit was decreed in part allowing the plaintiff to recover the sum of ₹44,430/- from the defendant together with interest at the rate of 12% per annum on the said amount from the date of suit till realisation and proportionate costs.

7. The learned counsel for the appellant/plaintiff would contend that the court below ought not have limited the decree to ₹44,430/- relying on Ext.B2 receipt. When the respondent/ defendant had admitted the issuance of Ext.A2 cheque for the amount due to the appellant/plaintiff, the burden is upon him to prove part payment of the amount covered by the aforesaid cheque. According to the learned counsel, Ext.B2 receipt produced by the respondent/defendant is not at all sufficient to discharge the burden on him. Further, the court below failed to note that the admitted signature of the appellant/plaintiff in Ext.A1 power of attorney and on the obverse of Ext.A2 cheque are entirely different. Therefore, instead of comparing the signature by itself, the court below ought to have obtained expert opinion.

8. We have considered the arguments advanced by the learned counsel for the appellant/plaintiff.

9. The specific case of the appellant/plaintiff is that the respondent/defendant used to borrow money from him and in discharge of the debt, the respondent/defendant issued Ext.A2 cheque dated 9.10.1998. The respondent/defendant has admitted issuance of Ext.A2 cheque to the appellant/plaintiff. The respondent/defendant contended that he owed 27266 Saudi Riyals to the plaintiff toward the prize amount of a chitty and on 15.4.1993, he had handed over Ext.A2 cheque to the respondent/plaintiff only as security for the aforesaid amount, on the specific understanding that the cheque would not be presented for collection and it would be returned on payment of the aforesaid amount. As is evident from Ext.A3 memo, when Ext.A2 cheque was presented for collection, it was dishonoured on account of the difference in the amount shown in figures and words. A perusal of Annexure A2 would show that the amount shown in figures is ₹2,84,000/- whereas in words it is written as “two lakh and eighty four”.

10. The respondent/defendant contended that he had conducted a chitty business in Saudi Arabia and Ext.A2 cheque was handed over to the appellant/plaintiff only as security. According to

the learned counsel for the appellant, the respondent/defendant has not produced any document to prove that he has conducted a chitty business in Saudi Arabia. In the absence of any material to show that Ext.A2 was given to the appellant/plaintiff as security in respect of any monitory transactions with him, the only conclusion that can be drawn is that Ext.A2 cheque is supported by consideration and it is not one given as security for any amount due from the defendant. We therefore agree with the finding to that effect in the impugned judgment.

11. The respondent/defendant has raised a plea of discharge. According to him, after the issuance of Ext.A2 cheque, he had paid some amount to the appellant/plaintiff and obtained Ext.B2 receipt. Ext.B2 receipt would show that the respondent/defendant had paid 23000 Saudi Riyals to the appellant/plaintiff on 25.8.1998. The thumb impression and signature of the appellant/plaintiff are also seen therein. PW1, who is the brother and power of attorney holder of the appellant/plaintiff disputed the signature and thumb impression in Ext.B2 receipt. According to PW1, Ext.B2 receipt is a concocted document.

12. It has to be noticed that the respondent/defendant has

raised a specific plea of discharge in the written statement. PW1 has admitted that, the signature seen on the obverse of Ext.A2 cheque is that of the appellant/plaintiff and the court below has also noticed that, the admitted signature on the obverse of Ext.A2 cheque is similar to that in Ext.B2 receipt. But, the signature of the appellant/plaintiff in Ext.A1 power of attorney executed immediately after the filing of the suit is entirely different from his admitted signature seen on the obverse of Ext.A2 cheque. In such circumstances, the court below cannot be found fault with in concluding that when the appellant/plaintiff executed Ext.A1 power of attorney after the institution of the suit, he had purposefully changed his signature.

13. In **Ajit Savant Majagavi** v. **State of Karnataka (1997 (7) SCC 110**) the Apex Court held as follows:

> "As a matter of extreme caution and judicial sobriety, the court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under section 73 of the Evidence Act, 1872."

14. Therefore, when PW1 has admitted the signature of the appellant/plaintiff seen on the obverse of Ext.A2 cheque, the court below committed no error in comparing it with the signature in Ext.B2 receipt and in coming to the conclusion that the signature on the obverse of Ext.A2 cheque is similar to that in Ext.B2 receipt.

15. The plea of discharge pleaded by the respondent/ defendant was asserted by DW1 who is his wife and power of attorney holder. DW1 has categorically stated in chief examination itself that 23000 Saudi Riyals was paid by the respondent/defendant to the appellant/plaintiff on 25.8.1998, for which the appellant/plaintiff had issued Ext.B2 receipt. But the cross examination of DW1 was mainly on the chitty business said to have been conducted by the respondent/defendant and on Ext.B2 receipt. Ext.A2 cheque is also referred to in Ext.B2 receipt. It was in such circumstances that relying on the oral evidence of PW1 and DW1 and also the materials on record like Exts.A2 and B2, the court below came to the conclusion that, after the issuance of Ext.A2 cheque, the defendant had paid 23000 Saudi Riyals to the appellant/plaintiff and obtained Ext.B2 receipt.

16. Going by the specific stand taken by the respondent/

defendant, the balance amount payable to the appellant/plaintiff is only 4726 Saudi Riyals equal to ₹44,430/-. Since the exchange rate of Saudi Riyal at the time of the transaction was not disclosed by the appellant/plaintiff, the court below granted a decree for the amount admitted in the written statement on finding that in the light of Ext.B2, the plaintiff is not entitled for the entire amount shown in Ext.A2. The aforesaid finding of the court below is neither perverse nor patently illegal warranting interference in appeal.

In the result, the appeal fails and the same is dismissed.

Sd/-
P.N.RAVINDRAN, JUDGE

Sd/-
ANIL K.NARENDRAN, JUDGE

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