IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

RFA.No. 462 of 2003 (E)

AGAINST THE JUDGMENT IN OS 240/1999 of PRINCIPAL SUB COURT,ERNAKULAM
DATED 29-03-2003

APPELLANT/PLAINTIFF:

P.K.CHANDRASEKHARAN NAIR, AGED 62 YEARS,
PENSIONER, S/O ACHUTHAN NAIR, RESIDING AT SIVA SAILAM,
PADIVATTOM, EDAPPALY SOUTH VILLAGE,
KANAYANNUR TALUK.

BY ADVS.SRI.T.KURIAKOSE PETER
SRI.ABRAHAM P.GEORGE

RESPONDENT/PLAINTIFF:

K.K.SUNILKUMAR, AGED 32,
S/O P.K.KUMARAN, PUTHANMARAVEETTIKAL HOUSE,
1/114A, THIRUVANKULAM PANCHAYATIRUMPANAM VILLAGE,
KANAYANNUR TALUK DOING BUSINESS IN THE NAME AND STYLE AS
GENERAL ELECTRICAL INDUSTRIES,
KALAMASSERY DEVELOPMENT PLOT,
VI/77, KALAMASERY MUNICIPALITY PO, SOUTH KALAMASERY.,

BY ADV. SRI.K.S.BABU
BY ADV. SMT.N.SUDHA

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 25-02-2015, ALONG WITH RFA. 507/2004, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

R.F.A.Nos.462 OF 2003 & 507 OF 2004

DATED THIS THE 25th DAY OF FEBRUARY, 2015

JUDGMENT

P.N.RAVINDRAN, J.

These appeals arise from the decree and judgment passed by the Court of the Subordinate Judge of Ernakulam in O.S.No.240 of 1999. The appellant in R.F.A.No.462 of 2003 is the plaintiff and appellant in R.F.A.No.507 of 2004 is the defendant therein. The suit instituted by the appellant in R.F.A.No.462 of 2003 for realisation of the sum of ₹4,63,328/- together with future interest at 24% per annum on the principal sum of ₹3,28,000/- and costs of the suit was decreed after trial and he was allowed to realise from the defendant and the property covered by Ext.A2 sale deed the sum of ₹2,78,000/-with interest and costs. The plaintiff and the defendant have aggrieved thereby filed these appeals. The brief facts of the case are as follows:

2. The appellant in R.F.A.No.462 of 2003 had in the plaint averred that the defendant is doing business along with his father at Padivattom, that they are known to each other for the past

several years, that the defendant approached him in the year 1997 and requested him to advance a loan for his business purpose, that on 18.2.1997 the defendant borrowed the sum of ₹78,000/-, that he had on 7.11.1997 borrowed a further sum of ₹2,50,000/- and that on the aforesaid dates, the defendant had written, signed and handed over to the plaintiff two promissory notes marked as Exts.A8 and A9 respectively promising to repay on demand the aforesaid amounts with interest at 24% per annum. The plaint proceeds to state that though on several occasions the plaintiff personally approached the defendant and requested him to repay the loan, he dodged the plaintiff and therefore he was constrained to issue Ext.A10 notice on 1.5.1999 calling upon the defendant to repay the amount covered by the promissory notes with interest, that the notices were sent to the residential as well as the business address of the defendant, that the notice sent to the business address of the defendant was accepted by him on 6.5.1999 and the other one was returned unclaimed and that even after receipt of the notice, the defendant has not issued any reply or repaid the amount.

3. Upon receipt of summons, the defendant entered appearance and filed a written statement resisting the suit. In paragraph 3 thereof he admitted that he had received the sum of ₹2,00,000 on 7.11.1997 from the plaintiff by Ext.B1 cheque drawn on Canara bank, Palarivattom branch. He further contended that at the time of disbursement of the sum of ₹2,00,000/-, the plaintiff had apart from obtaining Ext.A9 promissory note for ₹2,50,000/-, insisted that the defendant should deposit the title deed in respect of the property having an extent of 12 cents owned by his father, that the plaintiff had also obtained Ext.A1 promissory note executed by his father and that utilising that promissory note, the plaintiff has instituted O.S.No.646 of 1998 in the Court of the Subordinate Judge of Ernakulam. He contended that his father had not received any amount on 7.11.1997 from the plaintiff and that his father has filed a written statement raising the said contention in that suit. The defendant also contended that Ext.A8 promissory note dated 18.2.1997 for ₹78,000/- and Ext.A9 promissory note dated 7.11.1997 for ₹2,50,000/- are not supported by consideration.

He contended that he has not received the sum of ₹78,000/- and ₹2,50,000/- as claimed in the plaint and that the promissory notes are not supported by any consideration. In paragraph 9 of the written statement it was stated that to Ext.A10 lawyer notice, Ext.A12 reply was sent by his counsel to the plaintiff's counsel, but for reasons best known to him, the plaintiff has not produced the reply notice along with the plaint.

4. O.S.No.240 of 1999 was tried and disposed of along with O.S.No.646 of 1998, a suit instituted by the very same plaintiff against the defendant's father. In the trial court, the plaintiff was examined as PW1 and Exts.A1 to A20 were produced and marked on his side. On the side of the defendant, the defendant in O.S.No.646 of 1998 was examined as DW1, the defendant in the instant suit was examined as DW2 and Exts.B1 to B24 were marked on his side. The court below on an analysis of the pleadings and the evidence, oral and documentary available in the case, held that Ext.A1 promissory note is not supported by consideration and that the plaintiff has not proved his case that he has advanced ₹2,50,000/- to the defendant

therein. O.S.No.646 of 1998 was accordingly dismissed. The said decree and judgment are under challenge in R.F.A.No.822 of 2011 which also stands posted for hearing before us today. O.S.No.240 of 1999 was decreed in part and the plaintiff was allowed to realise the sum of ₹2,78,000/- together with interest and costs from the defendant. Both sides have aggrieved thereby, filed this appeal.

5. We heard Sri Abraham P.George, learned counsel for the appellant in R.F.A.No.462 of 2003 and Smt.N.Sudha learned counsel for the appellant in R.F.A.No.507 of 2004. The learned counsel appearing for the plaintiff contended that the court below has disbelieved the case of the plaintiff that he had lend and advanced the sum of ₹2,50,000/- to the defendant on 7.11.1997 relying on the fact that a portion of the said amount namely, the sum of ₹2,00,000/- was paid by Ext.B1 cheque and that the plaintiff has not proved the payment of the balance sum of ₹50,000/- covered by Ext.A9 promissory note. The learned counsel contended that the court below has proceeded on the assumption that the plaintiff had during his cross examination

deposed in answer to a question as to why he had issued a cheque for ₹2,00,000/- instead of ₹2,50,000/-, stated that he issued a cheque for ₹2,00,000/- in the name of DW2 and gave an amount of ₹50,000/- as personal loan and that the said conduct is highly improbable. The learned counsel contended that the court below lost sight of the fact that besides executing Ext.A9 promissory note, the defendant had also issued Ext.B18 cheque for ₹2,50,000/-, that besides executing Ext.A8 promissory note, the defendant had also issued Ext.B12 cheque for ₹78,000/- and that in such circumstances, the court below erred in not applying the presumption available under 118 of the Negotiable Instruments Act. The learned counsel contended that all that the plaintiff had stated in his cross examination was that the sum of ₹2,50,000/- consisted of the sum of ₹2,00,000/- paid by Ext.B1 cheque and ₹50,000/- paid by cash and he had not deposed that he had advanced ₹50,000/- as a personal loan. The learned counsel contended that in such circumstances, the court below erred in decreeing the suit only in part.

6. Per contra, Smt.N.Sudha, learned counsel appearing

for the defendant contended that the defendant had admitted having received only the sum of ₹2,60,000/-, that the defendant had not admitted having received the sum of ₹2,78,000/- and therefore, as the evidence in the case establishes payment of only ₹2,60,000/-, the court below erred in passing a decree allowing the plaintiff to realise the sum of ₹2,78,000/- with interest and costs. The learned counsel contended that Ext.A8 promissory note is dated 18.2.1997 and Ext.A9 promissory note is dated 7.11.1997, but the court below awarded interest on the sum of ₹78,000/- covered by Ext.A8 promissory note with effect from 18.8.1996 instead of 18.2.1997 and therefore in any view of the matter that part of the decree is liable to be modified. The learned counsel also contended that the plaintiff had not in the plaint averred that the original of Ext.A2 sale deed was deposited by the defendant's father with an intention to create a mortgage as security for the amount of ₹2,50,000/- advanced by the plaintiff, that the plaintiff had also not prayed for a decree allowing him to realise the sum of ₹2,50,000/- charged on the said property and therefore the court below erred in passing a decree allowing the plaintiff to realise the sum of ₹2,78,000/- with interest and costs from the defendant and from the property covered by Ext.A2 sale deed. Referring to Order VII Rule 7 of the Code of Civil Procedure, the learned counsel contended that in the absence of such a relief being sought for, court below should not have passed a decree against the defendant.

7. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record including the depositions of the plaintiff examined as PW1 and defendant examined as DW2. The defendant has in paragraph 3 of his written statement admitted that he had borrowed the sum of ₹2,00,000/- from the plaintiff. However he had denied having received the sum of ₹78,000/-. He placed reliance on Ext.B1 cheque to contend for the position that sum of ₹2,00,000/- alone was paid to him on 7.11.1997. Exts.A8 and A9 promissory notes are admittedly in the handwriting of the defendant. In Exts.A8 and A9 promissory notes it is stated that the amounts were borrowed for the purpose of the defendant's business. The fact

that the defendant is running a business is not disputed. The fact that the defendant had issued Ext.B12 cheque dated 18.8.1998 for ₹78,000/- towards the amount covered by Ext.A8 promissory note and the fact that he had likewise issued Ext.B18 cheque dated 7.8.1998 for ₹2,50,000/- towards the amount covered by Ext.A9 promissory note are also not in dispute. The court below however, chose to hold that the consideration under Ext.A9 promissory note was only ₹2,00,000/- and not ₹2,50,000/-. Such a finding was entered on the erroneous assumption that the plaintiff had when cross examined deposed that the sum of ₹50,000/- was given as a personal loan in cash and the balance sum of ₹2,00,000/- was paid by cheque and the said contention is improbable. In that process the court below lost sight of the admitted fact that the sum of ₹78,000/- covered by Ext.A8 promissory note was admittedly paid in cash. Though the defendant attempted to raise a plea that the plaintiff did not possess the means to pay the sum of ₹2,50,000/- on 7.11.197, the documents on record more particularly Ext.A7 passbook, Ext.A14 certificate, Ext.A15 and A16 letters establish the fact that the plaintiff had with him the requisite funds and the plaintiff possessed the means to advance the sum of ₹2,50,000/- to the defendant. Ext.A14 certificate dated 11.12.1999 issued by the Life Insurance Corporation of India discloses that the Life Insurance Corporation of India had paid the sum of ₹58,209/- by cheque dated 15.7.1997 to the plaintiff. Ext.A15 certificate dated 2.6.2000 issued by the Accounts officer HMT Ltd., would show that the plaintiff is a former employee of HMT Ltd. and that on 6.5.1996 he was paid towards voluntary retirement benefits the sum of ₹2,13,902.75 and on 9.7.1996 he was paid a further sum of ₹1,00,000/- towards gratuity. Ext.A16 certificate 20.12.1999 discloses that the Administrative officer, HMT Ltd. had paid the sum of ₹1,81,986.59 on 31.5.1996 to the plaintiff in full and final settlement of his provident fund dues. These documents coupled with the fact that the sum of ₹2,00,000/- was admittedly paid by way of a cheque establish the fact that the plaintiff possessed the means to advance the sum of ₹2,50,000/- as loan to the defendant. This fact coupled with the fact that towards the amount covered by Ext.A9 promissory note, the defendant had admittedly issued Ext.B18 cheque and towards the amount covered by Ext.A8 promissory note, the defendant had issued Ext.B12 cheque establish the fact that the plaintiff has proved the fact that he had advanced the sum of ₹2,50,000/- covered by Ext.A9 promissory note and the sum of ₹78,000/- covered by Ext.A8 promissory note to the defendant. The finding entered by the court below that the plaintiff has not proved payment of the sum of ₹2,50,000/- covered by Ext.A9 promissory note to the defendant cannot in our opinion be sustained, having regard to the overwhelming documentary evidence on record. In this context, it is relevant to note that though the defendant had denied having received the sum of ₹78,000/- covered by Ext.A8 promissory note in the written statement filed by him, during evidence he admitted that he had received the sum of ₹60,000/-. The court below however proceeded to hold that he is liable to repay the sum of ₹78,000/- covered by Ext.A8 promissory note relying on Ext.A8 promissory note and Ext.B12 cheque. When it came to the question whether the defendant is liable to repay the sum of ₹78,000/- covered by Ext.A8 promissory note and Ext.B12 cheque, the court below took the stand that the oral evidence of DW2 is not sufficient to prove that he had received only a part of the consideration recited in Ext.A8 promissory note. On the short ground that the plaintiff has not proved payment of the sum of ₹50,000/- notwithstanding the presumption available to him under section 118 of the Negotiable Instruments Act, the court below held that the plaintiff has not proved having advanced the sum of ₹2,50,000/- covered by Ext.A9 promissory note as loan. On an overall view of the matter, we are of the considered opinion that the plaintiff is entitled to a decree allowing him to realise the sum of ₹2,50,000/- with interest and costs.

8. That takes us to the question whether in the absence of a prayer for a decree charged on the property covered by Ext.A2, the impugned judgment and decree are liable to be set aside. Incidentally, the question whether the court below was in error in allowing the plaintiff to realise the sum of ₹78,000/- with interest at 12% per annum from 18.8.1996 instead of 18.2.1997 also arises for consideration. As regards that aspect of the matter, we are of the opinion that the defendant is liable to pay

interest on the sum of ₹78,000/- only from 18.2.1997, the date on which Ext.A8 promissory note was executed and the said sum of ₹78,000/- was paid by the plaintiff. The grievance of the defendant in that regard can therefore be redressed by modifying the decree and directing that the plaintiff will be entitled to interest on the sum of ₹78,000/- only with effect from 18.2.1997. As regards the former question as to whether in the absence of such a relief being prayed for, the court below was in error in allowing the plaintiff to realise the amount covered by the decree from the property covered by Ext.A2, we are of the opinion that Order VII Rule 7 does not stand in the way of the court below from granting a decree which the justice of the cause requires to be granted. There is yet another reason why the defendant cannot be said to be aggrieved by the decree to that extent. Ext.A2 stands in the name of the defendant in O.S.No.646 of 1998. The defendant in O.S.No.240 of 1999 is not the owner of the property. The defendant in O.S.No.646 of 1998 had in categorical terms admitted in the written statement filed by him in the suit that he had deposited Ext.A2 sale deed with the plaintiff with the intention to create a mortgage as security for the sum of ₹2,00,000/- borrowed by the defendant herein, his son. Even in that written statement, the defendant in O.S.No.646 of 1998 who is none other than the father of the defendant in the instant suit had admitted that his son, the defendant herein had received the sum of ₹2,00,000/- and had also executed a promissory note. In **William David @ Bijo** v. **Linu Mary George (2010(4) KHC 748)** a Division Bench of this Court after considering Order VII Rule 7 and provisions of Order XX Rule 10 of the Code of Civil Procedure held that the aforesaid provision gives power or discretion to court to issue appropriate directions regarding the alternative general relief that can be granted in cases where specific immovable property is not returned to the plaintiff notwithstanding the absence of a prayer in that regard. The Division bench has also held that interests of justice can never be forgotten by a court. We therefore find no merit in the challenge to the impugned judgment and decree.

For the reasons stated above, we allow R.F.A.No.462 of 2003 and modify the decree and judgment passed by the trial court and decree the suit by allowing the plaintiff to realise the sum of ₹2,50,000/- with interest at 12% per annum from 7.11.1997 till the date of the decree and the sum of ₹78,000/- with interest thereon @ 12 % per annum from 18.2.1997 till the date of the decree and at 6% thereafter, from the defendant personally and charged on the property covered by Ext.A2 sale deed. The appellant in R.F.A.No.462 of 2003 will also be entitled to proportionate costs in the court below and in this Court. R.F.A.No.507 of 2004 fails and is dismissed, but without costs.

Sd/-
P.N.RAVINDRAN,
JUDGE

Sd/-
ANIL K.NARENDRAN,
JUDGE

dsn

"If the discretion conferred on the court under Rule 11 of Order XXXIII of the Code of Civil Procedure has not been exercised in favour of the unsuccessful appellant while disposing of the appeal, the unsuccessful appellant who has been allowed to file the appeal as an indigent person will necessarily have to pay the court fee payable on the memorandum of appeal."

Vide common order dated 06/08/2015 in R.F.A.507/2004.

Sd/
Registrar (Judicial)