THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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APPEAL SUIT No.838 of 1997

and

CROSS OBJECTIONS (S.R.) No.3128 of 1998

COMMON JUDGMENT:

The plaintiff in O.S.No.80 of 1989 on the file of the Additional Subordinate Judge Court, Ongole, preferred this appeal challenging the judgment and decree dated 20.03.1997, whereunder the defendant was made liable to pay Rs.2,69,231.75 ps. together with costs.

2. For convenience of reference, the ranks given to the parties in O.S.No.80 of 1989 on the file of the Additional Subordinate Judge Court, Ongole, will be adopted throughout the judgment.

3. The plaintiff is a Proprietary Firm carrying on tobacco business, under the name and style of "Sri Venkata Krishna Tobacco Traders". The defendant is also a Proprietary Firm carrying on business in tobacco, under the name and style of "M/s. Aruna Enterprises". The defendant became indebted to the plaintiff individually to a tune of Rs.2,69,231.75 ps., as on 31.12.1988.

4. The defendant issued a cheque bearing No.CA/38 962938, dated 31.12.1988 drawn on Andhra Bank, Ongole Branch, in favour of the plaintiff for a sum of Rs.2,69,231.75 ps. in discharge of the debt amount due to it.

5. On instructions, the plaintiff presented the cheque for collection through its collecting bank i.e., State Bank of India, Ongole Branch, on 04.02.1989, but the cheque was returned by the payee bank i.e., Andhra Bank, Ongole Branch, on 04.02.1989, with an endorsement "***it exceeds arrangement***". Again as per the direction of the defendant, the plaintiff presented the said cheque for collection and the same was returned with an endorsement "***payment was stopped by the***

drawer". When the said fact was brought to the notice of the defendant, the defendant expressing its regrets, addressed a letter dated 24.02.1989 to the plaintiff with an undertaking to deposit sufficient amount to the credit of its bank account and directed the plaintiff to present the cheque again for collection on 05.06.1989. In pursuance of the said direction, on 05.06.1989, the plaintiff presented the cheque for collection and again it was returned with an endorsement "***payment was stopped by the drawer***". After due enquiry, the plaintiff came to know that the bankers have no further instructions in the matter.

6. As the plaintiff came to conclusion that the defendant intentionally avoided to pay the amount, got issued a notice dated 05.06.1989, demanding payment of the amount due. The defendant acknowledged receipt of the notice and got issued a reply with false allegations particularly contending that it repaid Rs.2,30,000/- in cash after deducting an amount of Rs.40,000/- towards godown rent. Thus, the defendant discharged total amount due under the cheque.

7. As the defendant failed to discharge the debt due under the cheque, the plaintiff filed the suit for recovery of suit amount together with interest.

8. The defendant filed written statement contending that father of sole proprietor of the plaintiff Firm i.e.,
Sri Ch.Venkateswarlu developed close connections with the sole proprietor of the defendant's Firm i.e., Pydi Amaraiah. The said Ch.Venkateswarlu is a scheming intellect and he was looking after the business of the plaintiff - Firm for all practical purposes. The defendant admitted about business and personal dealings between the plaintiff and the defendant and also issuance of a cheque dated 31.12.1988 with an undertaking that Cherukuri Krishna Rao should pay the godown rent etc., to the defendant after due verification and settlement of the same even before encashing the cheque.

9. It is further contended that the plaintiff's Firm took the godown belonging to Guduru Kotaiah and Co., in which the sole proprietor of the defendant is one of the partners, on lease and the rent due is the subject matter of the specific understanding between the plaintiff and the defendant on the date when the cheque was issued. Ch.Krishna Rao was not present, but his father, who is considered to be his duly authorized agent, was instrumental for receiving the cheque dated 31.12.1988 with the above understanding. Subsequently, Venkateswarlu gave a

receipt under his son's signature with the date of issue of the cheuqe and obtained the defendant's signature on the counter foil. The plaintiff, instead of abiding by the said understanding, tried to encash the cheque, issued by the defendant on 31.12.1988. Then, the defendant suspecting the *bona fides* of the plaintiff issued instructions '***stop payment***' by addressing a letter to the bankers on 20.02.1989. Then, the plaintiff came to the defendant with a request to pay the value of the said cheque in cash after deducting an amount of Rs.40,000/-, approximately due on account of godown rent, before its complete settlement. The elders, by name Pydi Kotaiah and Kamani Kotaiah were also present and are instrumental in prevailing over the defendant for paying the cheque amount in cash after deducting Rs.40,000/- from the cheque amount. In pursuance of the settlement, the defendant paid Rs.2,30,000/- in cash in installments after obtaining receipts, as per convenience. The plaintiff, who could not reconcile with the above situation and who was entertaining ill-feelings with *mala fide* intention, got issued a lawyer's notice dated 05.06.1989 and it was suitably replied.

10. It is further contended that the letter heads with the signatures of the defendant, stamps and some other papers etc., were missing in the office and taking advantage of the same, letter dated 24.02.1989 was created by the plaintiff. In fact, the defendant gave a complaint to the police about missing of those papers and stamps etc., and gave publication in Eenadu daily newspaper, but no purpose was served though the letter dated 24.02.1989 is a fabricated document and not binding on the plaintiff.

11. It is also contended that the plaintiff instead of settling the rent due for occupation of godown, made an unwholly claim for recovery of Rs.2,69,231.75 ps., though the plaintiff is not entitled to claim any amount due under the cheque and finally, prayed for dismissal of the suit.

12. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the suit is not maintainable on account of misjoinder of claims?
2. Whether the suit is bad for non-joinder of necessary parties?
3. Whether the plaintiff is entitled for recovery of the suit amount as prayed for?
4. To what relief?

13. During course of trial, on behalf of the plaintiff, PW.1 was examined and Exs.A.1

to A.19 were marked. On behalf of the defendant, DWs.1 to 5 were examined and Exs.B.1 to B.58, besides Exs.X.1 to X.4 were marked.

14. Upon hearing argument of both the counsel and considering oral and documentary evidence on record, the trial Court decreed the suit in favour of the plaintiff for the suit amount without interest.

15. Dissatisfied with the judgment and decree under challenge for not granting interest, the plaintiff preferred this appeal raising various contentions, more particularly, non consideration of the provisions of Sections 3 and 4 of the Interest Act, 1978 and Section 34 of C.P.C. that though the suit is filed based on Negotiable Instruments, the provisions of Interest Act alone are applicable and therefore, failure to grant interest is illegal and prayed to pass a decree granting interest at 12% per annum, as claimed.

16. The defendant preferred cross objections challenging the judgment and decree dated 20.03.1997 passed by the trial Court mainly contending that the trial Court did not make any efforts to compare the admitted signatures with the disputed signatures under Section 73 of the Indian Evidence Act, 1872 and the trial Court ought to have given credence to the testimony of the witnesses examined before the Court, more particularly, the documents marked as Exhibits. But the trial Court, on erroneous appreciation, did not consider the evidence on record in proper perspective. It is further contended that the conclusions arrived at by the trial Court are not based on any material and apart from that, the trial Court did not consider the circumstances as to why the plaintiff had to wait for filing the suit and that all the circumstances would clinchingly establish that the plaintiff received the entire amount due under the cheque, but without considering various contentions raised by the defendant in the written statement, the trial Court passed a decree in favour of the plaintiff for recovery of Rs.2,69,231.75 ps. and hence, prayed to set aside the judgment and decree of the trial Court.

17. During course of argument, Sri M.R.S.Srinivas, learned counsel for the plaintiff, contended that when a suit is filed for recovery of money, the Court ought to have granted interest both during *pendente lite* and prior to filing of the suit and in support of such contention, he placed reliance on a decision of the Hon’ble Apex Court in **Tahazhathe Purayil Sarabi and Others Vs. Union of India and another.**

18. *Per contra*, the learned counsel for the defendant-cross objector would contend that the trial Court did not make efforts to compare the disputed signatures with admitted signatures and also failed to take into consideration the probative value of the day books maintain in the regular course of business and the attending circumstances, which made the plaintiff to wait 2 ½ months for filing the suit after receipt of notice etc., and prayed to set aside the judgment and decree.

19. Considering rival contentions and perusing oral and documentary evidence available on record, including the judgment and decree of the trial court, the points that arise for consideration in this appeal are as follows:

1. *Whether the plaintiff is entitled to claim interest at 12% per annum from the date of issue of cheque till the date of realization?*

2. *Whether the defendant is liable to pay the debt due under the cheque bearing No.CA/38 962938, dated 31.12.1988?*

POINT No.1:

20. The appeal is filed against the judgment and decree dated 20.03.1997 only on the ground that the trial Court failed to grant interest at the rate of 12% per annum, as claimed, from 31.12.1988 to 19.06.1989 and subsequent interest from the date of suit till the date of realization. As seen from the document sued upon i.e., cheque bearing No.CA/38 962938, dated 31.12.1988, there is no understanding between the plaintiff and the defendant for payment of interest. Even as per the pleadings, the plaintiff did not raise any specific plea with regard to the claim of interest either at the prevailing rate of interest or as per custom or usage. Though the sole proprietor of the plaintiff Firm himself was examined as PW.1, his evidence is totally silent as to the prevailing rate of interest or as per custom or usage for payment of interest at 12% per annum. In the absence of any agreement between the parties for payment of interest, the provisions of the Interest Act alone are applicable. According to Section 3 of the Interest Act, if the proceedings relate to a debt payable by virtue of a written instrument at a certain date, then, from the date when the debt is payable to the date of institution of the proceedings, the rate of interest agreed is to be paid and in the absence of any specific rate of interest, interest is to be paid from the date of notice at the current rate of interest. The current rate of interest is defined under Section 2(b) of the Interest Act, which reads as follows:

> ""current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949)."

21. Therefore, even to claim interest under Section 3 of the Interest Act, in the absence of any agreed rate of interest, the plaintiff has to plead and prove that it is entitled to the prevailing rate of interest from the date of filing of the suit.

22. Learned counsel for the plaintiff further contended that though there is no agreed rate of interest when a suit is filed for recovery of money, the Court is bound to grant interest both during *pendente lite* and prior to filing of the suit. Placing reliance on a judgment in **Tahazhathe Purayil Sarabi's** case (supra 1), where the Hon'ble Apex Court, while dealing with a claim before the Railway Claims Tribunal, discussed about the liability for payment of interest under Section 3 of the Interest Act and under Section 34 of C.P.C., held that in the absence of any statutory provision, Section 3 of the Interest Act and Section 34 of C.P.C. can be invoked. But, in the present case, the facts are totally different. Here, the plaintiff had neither pleaded nor proved its entitlement to claim interest at the current rate of interest as defined under Section 2(b) of the Interest Act. In the absence of any agreement or pleading and proof, it is difficult to sustain the contention of the counsel for the plaintiff for grant of interest prior to filing of the suit. So far as *pendente lite* interest is concerned, it is covered by Section 34 of C.P.C., and by applying the principle laid down in the above judgment, the Court can award interest during pendency of the suit from the date of suit till the date of realization. Hence, I hold that the plaintiff is entitled to claim interest at the rate of 12% per annum from the date of suit till the date of realization, since it is a commercial transaction.

23. Accordingly, point No.1 is held in favour of the plaintiff and against the defendant.

<u>POINT No.2:</u>

24. Aggrieved by the judgment and decree directing the defendant to pay Rs.2,69,231.75 ps., the defendant-cross objector preferred cross objections on

various grounds and during the course of argument, the learned counsel for the defendant-cross objector would contend that the defendant discharged its liability covered by cheque and produced Exs.B.1 to B.24, evidencing discharge of the entire debt due to the plaintiff, besides appropriating Rs.40,000/- towards arrears of godown rent. The trial Court, though examined the documents, did not exercise its power under Section 73 of the Indian Evidence Act to compare the admitted signatures with the disputed signatures to come to a definite conclusion. It is further argued that when necessary entries were made corresponding to Exs.B.1 to B.24 in the day books, they are relevant and sufficient to establish the factum of discharge of debt due under the cheque. Apart from that, the abnormal waiting period of 2 ½ months after due notice by the plaintiff itself indicates that the plaintiff received amount covered by Exs.B.1 to B.24 and that too, it is impossible for anybody to forge the signatures of both the executant and mediators, who were present, on 24 receipts, and it is totally improbable to the natural circumstances. Therefore, the trial Court ought to have believed Exs.B.1 to B.24 and dismissed the suit and finally, requested to compare the admitted signatures with the disputed signatures by exercising power under Section 73 of the Indian Evidence Act and allow the cross objections by setting aside the judgment and decree of the trial Court.

25. No doubt, when the defendant pleaded discharge of debt due under the Negotiable Instruments Act, the burden heavily lies on it to prove the same. From the beginning, the plaintiff’s claim is that the debt due under the cheque was not discharged. In such a case, the defendant has to prove discharge pleaded by it by producing cogent and satisfactory evidence, then only, the onus of proof will shift on to the plaintiff to prove contra.

26. To substantiate the contention of the defendant, the proprietor of the defendant Firm himself was examined as DW.1. As usual, in his examination in chief, he supported the plea raised by him in the written statement, whereas in the cross-examination, several suggestions were put to him that the godown was leased out on an annual rent of Rs.10,000/-, but not on Rs.40,000/-, were got denied. Moreover, he admitted that prior to lease agreement for an annual rent of Rs.10,000/-, there was an oral agreement with regard to other godowns. The said oral agreement was entered two, three months prior to the written agreement. Under the oral agreement, rent was Rs.30,000/-. But, it is not substantiated by any material. So far as payments are concerned, the defendant did not produce any satisfactory evidence to discharge

initial onus of proof, which rests on it. On the other hand, the defendant examined DW.4, who worked as clerk in the Firm of the defendant from 1987 to 1991, who in the cross-examination, at first para, admitted that the account books now produced were written as per the transactions in day book, but he does not know whether those day books are available in the defendant's Firm as of now. He further deposed that there were no entries regarding the receipts in the ledger and they are contained in the day book, and all the entries containing in the day book will be entered in the ledger and unless the day book is referred, one cannot say how the amount came into the ledger and for what transaction. He further deposed that according to him, cash book means day book.

27. This portion of the evidence of DW.4 extracted above is sufficient to prove that no entries were made in the relevant ledgers corresponding to the entries in the day books covered by Exs.B.1 to B.24. No doubt, under Section 34 of the Indian Evidence Act, the entries in the books maintained in the regular course of business are relevant, if they are kept in the course of business.

28. Admittedly, the defendant, which is following double accounting system, is bound to maintain day book and corresponding ledger for the transactions, but strangely or unfortunately the ledgers were not produced, only day books were produced. Exs.B.26 to B.58 are the relevant entries in the day books, which include day books for the year 1989-1990 (Ex.B.33) and 1988-1989 (Ex.B.55) and entries contained therein. The day books are only relevant, but they are not conclusive proof of the transactions covered by those entries. Unless a ledger is maintained corresponding to day book, no evidentiary value can be attached to the entries in the day book. Apart from that, the admission in the evidence of DW.4 evidently proved that there was no ledger maintained corresponding to the entries in day book. In the absence of making entries in the ledger, no probative value can be attached to those entries in day book. Even in the judgment in **Ishwar Dass Jain (dead) through L.Rs. v. Sohan Lal (dead) by L.Rs.**, the Hon'ble Apex Court had an occasion to decide a similar question and held that the extracts from accounts are not "account books" falling within Section 34 of the Indian Evidence Act and are inadmissible. Sanctity is attached in the law of evidence to books of account if the books are indeed "account books" i.e. in original and if they show, on their face, that they are kept in the "regular course of business". Such sanctity cannot be attached to private extracts of alleged account books, where the original accounts are not filed into

Court. This is because, from the extracts, it cannot be discovered, whether the accounts are kept in the regular course of business or if there are any interpolations or whether the interpolations are in a different ink or whether the accounts are in the form of a book with continuous page numbering. Hence, no evidentiary value can be attached. Though the facts in the above judgment almost are different to the case on hand, the Hon'ble Apex Court came to a conclusion that if the accounts are kept in regular course of business, they must maintain both day book and corresponding ledgers, otherwise it is difficult. Strangely ledger also produced, but the entries corresponding to the entries in day books are not found place. Therefore, no evidentiary value can be attached to the entries in day books. Hence, on the strength of Section 34 of the Indian Evidence Act, it is difficult to hold that the plaintiff discharged the debt due under the cheque.

29. The second contention of the defendant is that it is the duty of the Court invoking power under Section 73 of the Indian Evidence Act to compare the disputed signatures with admitted signatures. No doubt, the Court has conferred power to compare the admitted signatures with the disputed signatures to form an opinion, but such power has to be exercised sparingly. However, when the documents Exs.B.1 to B.24 were disputed by the plaintiff, it is for the defendant having pleaded discharge of the debt due, to establish that they were issued in discharge of the debt due under the cheque. The reason for disbelieving those receipts by the trial court is, though the entries were made in day books, no entries were found corresponding to those entries in the ledgers. Apart from that, in income tax returns marked as Exs.X.2 and X.3, those payments were not found place. If really, the discharge pleaded by the defendant is true and correct, certainly, those entries would have found place in the ledgers and in income tax returns marked as Exs.X.2 and X.3. Absence of entries furnishing details in the income tax returns- Exs.X.2 and X.3 is a strong circumstance to disbelieve the discharge pleaded by the defendant. Even an exercise under Section 73 of the Indian Evidence Act is taken up by the Court, when there is no satisfactory and cogent evidence in support of the discharge pleaded by the defendant, it is difficult to believe that the defendant has discharged the debt due. Merely because the trial Court did not invoke such power under Section 73 of the Indian Evidence Act, the judgment of the trial Court cannot be found fault and liable to be set aside. Therefore, on this ground, the judgment under challenge cannot be reversed.

30. The major contention urged before this Court during the course of hearing is that the attending circumstances of the case were not taken into consideration by the trial Court, more particularly, waiting for a period of 2 ½ months after notice. Even if those circumstances were taken into consideration that will not improve the case of the defendant to any extent and only for the reason of waiting for 2 ½ months by the plaintiff for filing the suit, the case of the defendant cannot be accepted in toto. Hence, I find no probable attending circumstances to believe the positive case set up by the defendant, particularly, to prove the discharge pleaded by it.

31. On the other hand, absence of entries in ledgers corresponding to Exs.B.1 to B.24 and the absence of details in Exs.X.2 and X.3 established that the discharge pleaded by the defendant is false on the face of the record. Hence, the trial Court rightly concluded that the discharge pleaded by the defendant under Exs.B.1 to B.24 is false and rightly decreed the suit.

32. Therefore, I find no illegality in the judgment and decree passed by the trial Court warranting interference of this Court. Consequently, the judgment and decree of the trial Court are hereby confirmed, holding this point against the defendant-cross objector and in favour of the plaintiff-appellant.

33**.** In view of my finding on point Nos. 1 and 2, the Appeal Suit is allowed in part. Accordingly, the judgment and decree, dated 20.03.1997 passed in O.S.No.80 of 1989 by the Additional Subordinate Judge, Ongole is modified granting interest at 12% per annum from the date of suit till the date of realization. The Cross Objections (S.R.) No.3128 of 1998 preferred by the defendant are dismissed, but without costs, in the circumstances of the case.

34. Consequently, Miscellaneous Petitions, if any, pending in this Appeal Suit and Cross Objections, shall stand closed.

M.SATYANARAYANA MURTHY, J

Dated: 14.09.2015

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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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