

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 04.01.2016

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1083 of 2015 and
M.P.No.1 of 2015

K.Jayaraman .. Appellant/Defendant

vs.

M.Govindarasu .. Respondent/Plaintiff

Prayer:- This Second Appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 24.11.2011 made in A.S.No.26 of 2011 on the file of the learned Subordinate Judge, Tiruvarur confirming the judgment and decree dated 25.02.2011 made in O.S.No.133 of 2009 on the file of the learned District Munsif, Tiruvarur.

For Appellant : Mr.Srinath Sridevan

For Respondent : Mr.B.Ramamoorthy

JUDGMENT

The defendant in O.S.No.133 of 2009 on the file of the learned District Munsif, Tiruvarur is the appellant and the plaintiff in the said suit is the respondent herein. The respondent herein filed the said suit for recovery of money to the tune of Rs.61,459/- with interest based on a dishonoured cheque. The trial Court decreed the suit as prayed for by decree and judgment dated 25.02.2011. As against the same, the appellant/defendant filed an appeal in A.S.No.26 of 2011 on the file of the learned Subordinate Judge, Tiruvarur. By decree and judgment dated 24.11.2011, the First Appellate Court dismissed the appeal thereby confirming the decree and judgment of the trial Court. Challenging the same, the appellant/defendant is before this Court with this second appeal.

2.The case of the plaintiff in brief is as follows:-

The defendant borrowed a sum of Rs.60,000/- from the plaintiff to meet out his family expenses. Thereafter, in discharge of the said loan, the defendant issued a cheque dated 02.09.2009 for a sum of Rs.60,000/-. The said cheque was presented for collection on 09.09.2009. But, the same was dishonoured on the ground that the account has been closed.

Thereafter, the plaintiff issued a notice to the defendant calling upon him to pay the amount due under the cheque. It was not so paid therefore, the plaintiff filed the present suit for recovery of amount with interest.

3.The defendant in his written statement disputed his liability. According to him, it is not true that he borrowed a sum of Rs.60,000/- from the plaintiff. As a matter of fact, according to him, he had borrowed only a sum of Rs.20,000/- from the plaintiff on 03.09.2009 and as a security for the said loan transaction, the cheque in question which was unfilled but signed by the defendant was obtained by the plaintiff. It is the further case of the defendant that at the same time, the plaintiff also obtained signature of the defendant in a blank promissory note form. Subsequently, the defendant demanded more interest. According to him, finally, the loan was discharged by him in full. Not satisfied with the same, the plaintiff made a complaint to the police against the defendant and in the Police Station, a compromise was reached between the parties, in which, the plaintiff admitted the payments made by the defendant and agreed to return the blank promissory note and the blank cheque but, he did not return the same to the defendant. Thus, According to the defendant, he is not liable to pay any amount to the plaintiff.

4.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff, three witnesses were examined and seven documents were exhibited. On the side of the defendant, he was examined as D.W.1 and two documents were exhibited.

5.Having considered all the above, the trial Court decreed the suit. The First Appellate Court dismissed the appeal filed by the appellant herein. That is how the appellant/defendant is before this Court with this second appeal.

6.This second Appeal has come up today for admission. I have heard the learned counsel for the appellant and the learned counsel for the respondent and I have also perused the records carefully.

7.The learned counsel for the appellant would submit that though, the very borrowal of Rs.60,000/- was disputed; though, the issuance of the cheque for Rs.60,000/- was disputed and though, the so-called liability of the defendant to pay the amount claimed in the plaint was disputed, the First Appellate Court did not give any finding on these disputed facts. The learned counsel would further submit that the First Appellate Court has gone into the single question, as to whether the suit is maintainable as according to the defendant, the remedy for the plaintiff is to work out under Section 138 of the Negotiable Instruments Act.

8. The learned counsel for the appellant would further

submit that arguments were advanced before the First Appellate Court canvassing all the above factual aspects but, the First Appellate Court had miserably failed to consider them all. The learned counsel would further submit that subsequent to the judgment of the First Appellate Court, Review Petition No.27 of 2012 in A.S.No.26 of 2011 was filed before the First Appellate Court urging the First Appellate Court to consider all the factual aspects which were omitted to be considered. However, the said Review Petition was dismissed by the First Appellate Court on 18.09.2014, stating that the remedy for the appellant/defendant is only to file a second appeal and the Review Petition is not maintainable. Thus, According to the learned counsel, the First Appellate Court has failed to consider the factual disputes raised and therefore, the judgment of the First Appellate Court is liable to be reversed.

9.The learned counsel for the respondent would stoutly oppose this second appeal. According to him, the only point urged before the First Appellate Court was in respect of the jurisdiction of the trial Court to entertain the suit. According to the learned counsel, as mentioned in paragraph No.10 of the judgment of the First Appellate Court, there was no argument advanced on the other factual aspects. Therefore, according to the learned counsel, the First Appellate Court was right in omitting to consider the factual disputes. At any rate, according to the learned counsel, the well considered judgment of the trial Court which was confirmed by the First Appellate Court does not require any interference at the hands of this Court.

10.From the submissions made by the learned counsel on either side and from the perusal of the facts, I find the following substantial questions of law involved in this second appeal.

“(i) Whether the First Appellate Court was right in holding that the suit is maintainable ?

(ii) Whether the First Appellate Court was right in omitting to consider the factual disputes between the parties without adjudicating upon the same ?”

11.So far as the maintainability of the suit is concerned, the learned counsel for the appellant concedes before this Court that the right of the plaintiff to work out his remedies under Section 138 of the Negotiable Instruments Act is not a bar for the Civil Court to maintain the present suit. In my considered view also, it is well settled that the criminal prosecution is not a bar for the party to work out his civil remedy. In such view of the matter, I answer the first substantial question of law against the appellant.

12. So far as the second question of law is concerned, a perusal of the entire judgment of the First Appellate Court would go to show that the First Appellate Court had not considered the factual disputes involved in the appeal. There is a dispute as to whether a sum of Rs.60,000/- was borrowed by the defendant as claimed by the plaintiff or only a sum of Rs.20,000/- was borrowed by the defendant as claimed by him. There is also a dispute as to whether the entire amount was repaid or not. There is yet another dispute as to whether the cheque was, in fact, issued in discharge of any legally enforceable liability to the tune of Rs.60,000/-, as it is claimed by the plaintiff. Evidence has been let in by both parties in respect of these factual issues. But unfortunately, the First Appellate Court has not considered these factual disputes at all. The First Appellate Court has recorded in paragraph No. 10 of the judgment that these factual disputes were not urged by the learned counsel for the appellant.

13. But, the learned counsel for the appellant would submit that the disputes were really raised by way of arguments but, they were not considered by the First Appellate Court. A copy of the Review Petition produced before this court in Review Petition No.27 of 2012 in A.S.No.26 of 2011 would go to show that the appellant had really urged these factual disputes before the First Appellate Court in fact, but, the same was not considered by the First Appellate Court.

14. The learned counsel on either side would submit that the Review Petition was dismissed on the ground that the Review Petition is not maintainable as the remedy for the appellant/defendant is only to file Second Appeal as against the decree and judgment of the First Appellate Court.

15. From these facts, it is clear that the First Appellate Court being the Court on facts, should have scrupulously gone into the disputed questions on facts and give an effective adjudication on the same. It is too well settled that even if the parties have remained exparte unless, there is sufficient evidence, the suit cannot be decreed as prayed for, because, there has to be an adjudication on the facts.

16. Here, in this case, unfortunately, the First Appellate Court has not adjudicated on the factual disputes. In such view of the matter, the judgment of the First Appellate Court cannot be sustained. The appellant/defendant cannot be deprived of an effective adjudication and proper consideration of the case of the rival parties on the above disputed facts. Failure to consider these factual disputes would amount to failure to follow the principles of natural justice which is one of the facets of law. In such view of the matter, I am inclined to answer the second substantial question of law in favour of the appellant/defendant and to set aside the decree and judgment of the First Appellate Court and also to remand the matter back to

the First Appellate Court for hearing the appeal afresh and to consider all the grounds raised and then, to dispose of the appeal in accordance with law.

17.In the result, the second appeal is allowed and the decree and judgment of the First Appellate Court in A.S.No.26 of 2011 dated 24.11.2011 is set aside and the appeal in A.S.No.26 of 2011 is remanded back to the file of the learned Subordinate Judge, Tiruvarur who shall hear the parties afresh, consider all the grounds/disputes raised and the points to be urged during arguments dispose of the appeal, on or before 29.02.2016. The parties are directed to make appearance before the First Appellate Court on 22.01.2016. There shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Subordinate Judge,
Tiruvarur.

2.The District Munsif,
Tiruvarur.

+1 cc to Mr.B.Ramamoorthy, Advocate, sr.488

sv co
kra 12.02.2016

S.A.No.1083 of 2015

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