

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.03.2016

CORAM

THE HON'BLE Mr.SANJAY KISHAN KAUL, THE CHIEF JUSTICE
and
THE HON'BLE Mr.JUSTICE M.M.SUNDRESH

O.S.A.Nos.178 to 186 of 2013
& M.P.Nos.1 of 2013 (9 Nos.)

G.Baktavatchalam & Co.,
rep.by its Managing Partner,
D.Thirunarayanan,
No.17, Kaliamman Koil Street,
Tirupattur, Vellore District. ... Appellant in O.S.A.No.178
of 2013

D.Thirunarayanan & Co.,
rep.by its Managing Partner,
D.Thirunarayanan,
No.17, Kaliamman Koil Street,
Tirupattur, Vellore District. ... Appellant in O.S.A.No.179
of 2013

T.Manivannan & Co.,
rep.by its Managing Partner,
D.Thirunarayanan,
No.17, Kaliamman Koil Street,
Tirupattur, Vellore District. ... Appellant in O.S.A.No.180
of 2013

M.Kamalakaran & Co.,
rep.by its Managing Partner,
D.Thirunarayanan,
No.17, Kaliamman Koil Street,
Tirupattur, Vellore District. ... Appellant in O.S.A.No.181
of 2013

C.Kuppusamy Chettiar Sons,
rep.by its Managing Partner,
D.Thirunarayanan,
No.17, Kaliamman Koil Street,
Tirupattur, Vellore District. ... Appellant in O.S.A.Nos.182
& 185 of 2013

D.Muralidharan & Co.,
rep.by its Managing Partner,
D.Thirunarayanan,
No.17, Kaliamman Koil Street,
Tirupattur, Vellore District. ... Appellant in O.S.A.No.183
of 2013

G.Jagannathan & Co.,
rep.by its Managing Partner,
T.Manivannan,
No.22, Kalliamman Koil Street,
Tirupattur, Vellore District.

.. Appellant in O.S.A.No.184
of 2013

C.K.Govindasamy Chettiar & Co.,
rep.by its Managing Partner,
T.Manivannan,
No.21, Kalliamman Koil Street,
Tirupattur, Vellore District.

.. Appellant in O.S.A.No.186
of 2013

Vs.

1. C.Abdul Rahman & Co.,
rep.by its Partner,
C.Nadeem Ahamad,
No.10, V.V.Koil Street,
Perimet, Chennai-3,

2. C.Nadeem Ahamad,

3. B.Durre Nafees

.. Respondents in all appeals

Prayer: Original Side Appeals No.178 to 186 of 2013 are filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of Letters Patent against the Order and Decretal order dated 13.03.2013 made in Application Nos..4384 of 2012 in C.S.No.862 of 1998, 4383 of 2012 in C.S.No.863 of 1998, 4382 of 2012 in C.S.No.864 of 1998, 4381 of 2012 in C.S.No.865 of 1998, 4380 of 2012 in C.S.No.866 of 1998, 4379 of 2012 in C.S.No.867 of 1998, 4378 of 2012 in C.S.No.868 of 1998, 4377 of 2012 in C.S.No.869 of 1998 and 4376 of 2012 in C.S.No.870 of 1998 respectively on the file of this Court.

Application Nos.4384, 4383, 4382, 4381, 4380, 4379, 4378, 4377 & 4366 of 2012 in CS No.862 of 1998 to 870 of 1998. Applications praying to issue subpoena to Mr.A.Mahesh B.Com,DCA, Chartered Accountant to appear before this court to dispose in the above suit.

For Appellants :: Mr.R.Subramanian

For Respondents:: Mr.Jafarullah Khan

COMMON JUDGMENT

(Judgment of Court was made by M.M.Sundresh.J.,)

In view of the commonality of the issues involved in all these appeals, they are disposed of by way of a common judgment.

2. The appellants, being the plaintiffs, have filed suits in C.S.Nos.862 to 870 of 1998 seeking recovery of money based upon the dishonour of the cheques said to have been issued by the respondents.

3. In the suits filed in the year 1998, the appellants have filed number of documents including day book, ledger and balance sheet qua the relevant entries and they were heard in part. At that point of time, the respondents/defendants filed applications in A.Nos.4376 to 4384 in C.S.No.862 to 870 of 1998 seeking a direction from the Court to issue subpoena to Mr.A.Mahesh, B.Com., FCA., Chartered Accountant of the appellants to appear before the Court and depose. The said applications were filed on the premise that there are various discrepancies between the entries made and the deposition of the appellants/plaintiffs, apart from the very veracity of the audited balance sheets themselves are in doubt. Thus, it was stated that in order to bring out the truth, the Auditor, who had prepared the balance sheets, would have to be examined. It was opposed by the appellants stating that the suits, having been filed on the basis of cheque discounting form, dishonoured cheques and the acknowledgement of the debt issued by the respondents/defendants, there is no necessity to allow the applications. The day book, ledger and audited balance sheet were filed merely to support the claim of the appellants and therefore, they are not the foundation for the cases.

4. The learned single Judge, allowed the applications holding that the Auditor, having been not examined by the appellants, the respondents are at liberty to summon him qua the entries made in his report and other documents prepared by him. Reliance has been made on Order 16 Rule 21 of the Code of Civil Procedure in this regard. Accordingly, it was held that the evidence has to be let in by examining the Auditor of the appellants by both sides. A further observation has been made stating that in the event of the appellants not examining their Auditor, he could be examined as a witness on the side of the respondents or as a Court witness. Challenging the above said order passed, the present original side appeals have been filed.

5. The learned counsel appearing for the appellants submitted that the applications lack bona fides. They have been filed just to prevent the trial from proceeding further. The fulcrum of the appellants' case is based upon the cheques

issued by the respondents/defendants, which factum is supported through the cheque discounting form, dishonoured cheques and the acknowledgement of the debt. There is no necessity to call the appellants' Auditor. The respondents cannot collect evidence by seeking to summon the appellants' party. The Auditor has done his professional job. Order XVI Rule 21 of the Code of Civil Procedure does not provide for such a scenario. It is the appellants, who have to prove their case. Therefore, the appellants will have to be allowed.

6. The learned counsel appearing for the respondents submitted that there are discrepancies in the records produced by the appellants. The discrepancies are also between the statement made by the appellants and the documents filed by them. In order to find the truth, the applications have been filed. Order XVI Rule 12 of Civil Procedure Code read with Order XVI Rule 3 of the Original Side Rules provide for such a contingency. The order has been passed in order to find the truth. Therefore, no interference is required.

7. The suits have been filed by the appellants for recovery of money in pursuant to the cheques alleged to have been executed by the respondents having been dishonoured. The appellants filed documents in the respective suits in support of their case. The suits have also reached the stage of trial, which was going on. At that point of time, the respondents have filed the applications. The suits have been filed in the year 1998. The applications have been filed in the year 2012. Therefore, we are of the considered view that there is a distinct lack of bona fides in the applications filed.

8. Coming to the merits of the case, we do not know on what basis the applications have been filed by the respondents. Under Section 34 of the Indian Evidence Act, 1872, an entry made in the books of account regularly kept in the course of business is a relevant fact. But, however, they by themselves cannot create any liability being in the nature of the corroborative evidence. The respondents do not have a legal right to insist the examination of the Auditor of the appellants. The documents marked by the appellants will have to be proved by them. Through the applications filed, the respondents cannot seek to collect evidence to disprove the case of the appellants. The strength of the appellants' case is the dishonour of the cheques followed by the other documents, such as, cheque discounting form and acknowledgement of the debt issued by the respondents. We do not find any application of Order XVI Rule 2 of Code of Civil Procedure read with Order XVI Rule 3 of the Original Side Rules giving any right to the respondents to file the applications to seek such reliefs as they sought for in the applications filed for getting the decree and the appellants will have to prove their case. We

are also of the view that the respondents cannot seek the relief to examine the appellants' Auditor, on their behalf. The Report of the Auditor can at best to be a piece of evidence to be considered by the Court along with the other material produced, marked and relied on by the appellants. The proof and relevancy of the same is also on the appellant. Therefore, we are of the considered view that the learned single Judge totally misdirected himself in allowing the applications filed by the respondents.

9. Accordingly, the order passed in Application Nos.4376 to 4384 in C.S.No.862 to 870 of 1998 is set aside and the original side appeals are allowed. Taking note of the fact that suits are pending from the year 1998 and at the part heard stage, we request the learned single Judge to expedite the hearing. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Sub. Asst. Registrar,
Original Side, High Court,
Madras.

O.S.A.Nos.178 to 186 of 2013

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