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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.377 OF 2011

Dnyandeo Dada Dighe,
Age : 58 years, Occupation : Agriculturist,
R/o Loni Khurd, Near Church,
Taluka Rahata, District Ahmednagar

..APPELLANT
(Orig. Defendant)

VERSUS

Bharatkumar Chandrahans Satav,
Age : 68 years, Occupation : Advocate,
R/o Kopargaon, Tal. Kopargaon,
District Ahmednagar

..RESPONDENT
(Orig. Plaintiff)

Mr P.B. Shirsath, Advocate for appellant;
Mr Mukul S. Kulkarni, Advocate for respondent

CORAM : NITIN W. SAMBRE, J.

(Date of reserving the order : 26.09.2017)

Date of pronouncing the order :09.11.2017)

ORDER:

This appeal is by original defendant, questioning money decree passed against him by learned District Judge-1, Kopargaon, on 6th December, 2010, in Regular Civil Appeal No.42 of 2003, reversing the decree of dismissal of the suit for recovery, passed by Civil Judge Senior Division, Kopargaon on 12th March, 2003, in Special Civil Suit No.19 of 2000.

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2. Facts necessary for deciding the appeal are as under :-

It is the case of the respondent-plaintiff, who is a practicing Advocate, that the appellant-defendant sold his tractor and trolley for consideration of Rs.2 Lacs, with a condition that the appellant shall repay the bank loan, to which the appellant-defendant committed default. As a consequence thereof, the tractor and trolley were returned with relevant papers and on 18th May, 1997, a receipt to that effect was executed. It is claimed that by a post dated cheque (dated 24th May, 1997), for an amount of Rs.2 Lacs, appellant-defendant agreed to pay Rs.2 Lacs.

3. Since the aforesaid cheque was dishonoured, the suit was brought into action with recovery of interest at the rate of 24% per annum.

4. The claim of the appellant is that, it is a money lending transaction and the cheque was given towards security. According to him, though money was borrowed, the same was repaid with interest. In view of the aforesaid rival claims of the respective parties, the Trial Court framed issues at Exh.25 on 24th April, 2002, which are reproduced as under :-

Sr. No.	ISSUES	FINDINGS
1.	Do plaintiff proves that he sold tractor to defendant on credit ?	In the Negative
2.	Do plaintiff proves suit claim ?	In the Negative
3.	Whether suit is maintainable under Order – 37 of Civil Procedure Code ?	Does not survive
4.	Whether suit is in limitation ?	In the Affirmative

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5.	Whether defendant is entitled for penal costs?	In the Negative
6.	What is due to plaintiff ?	As per final order

5. The Trial Court has recorded that the alleged transaction between the parties was not proved and as such, made the observation that the suit claim was not established and thereby dismissed the suit.

6. In appeal, the lower appellate court framed following points for determination :-

Sr. No.	POINTS FOR DETERMINATION	FINDINGS
1.	Whether the Impugned Judgment and Decree is vitiated as the suit is tried as a Special Civil Suit ?	No
2.	What is the impact of wrong framing of Issue No.1 by the Trial Court ?	Being a clerical mistake, no impact whatsoever
3.	Whether the issues are wrongly framed and if yes, what is its impact ?	Yes, but no impact as both parties have led the evidence
4.	Whether defendant proved non existence of the consideration of Rupees Two Lakhs, either by direct, indirect or inferential evidence ?	No.
5.	Whether defendant proved that his signatures were obtained on the blank paper and cheque ?	No.
6.	Is plaintiff entitled to a Decree for recovery of Rupees Two Lakhs ?	Yes.
7.	If yes, is he entitled to interest ?	Yes, @ 6% p.a. From the date of the suit till realization of the entire amount.

7. The appellate court, in point no.4 has noticed that the burden was on the defendant to prove non-existence of consideration of Rs.2 Lacs,

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either by direct, indirect or inferential evidence. The burden was also shifted on the appellant-defendant to prove that his signature was taken on blank paper and cheque. Answering said issues against present appellant-defendant as not proved, the appellate court allowed the appeal.

8. In the aforesaid background, while inviting attention of this Court to the provisions of Order XIV, Rules 1 and 2 of the Code of Civil Procedure, Mr Shirsath, learned Counsel appearing on behalf of the appellant-defendant would urge that the substantial questions of law that need consideration are, (a) whether an invalid negotiable instrument will carry same presumption as provided under Section 118 and 139 of the Negotiable Instruments Act, when the negotiable instrument was unable to be presented for encashment for expiry under the caption "presented beyond prescribed date" and (b) whether the lower appellate court, in absence of admission was right in shifting burden on the appellant-defendant to prove non-receipt of consideration of Rs.2 Lacs and the fact of obtaining his signature on blank paper and cheque.

9. Attention of this Court is also invited to the provisions of Order XLI, Rule 25 of the Code of Civil Procedure, so as to claim that if the lower appellate court wanted to frame issues which were not framed by the Trial Court, the same should have been referred to the Trial Court whose decree is appealed from. He would then invite attention of this Court to the provisions of Order XLI, Rule 24 of the Code to submit that the appellant was not given an opportunity to lead evidence, which was sufficient for the

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appellate court to determine the case finally.

10. Per contra, Mr Kulkarni, learned Counsel appearing on behalf of the respondent-plaintiff would rely upon Rule 24 of Order XLI to submit that once the appellate court having noticed that the evidence on its record was sufficient to enable it to decide the appeal by pronouncing the judgment after re-settling the issues, the appellate court was right in doing so and as such, no fault could be found with the decree of the appellate court. In addition, he would draw support from the judgment of the Apex Court, in the matter of **Nedunuri Kameswaramma vs. Sampati Subba Rao**, reported in **AIR 1963 Supreme Court 884**, so as to claim that the parties to the suit were within full knowledge of the rival claims made in the suit and so as to refute the same, have entered into the witness box. According to him, non framing of issue, as such, would not be fatal to the right of either of the parties. He would draw support from paragraph 6 of the said judgment, which reads thus :-

“On the first point, we do not see how the suit could be ordered to be dismissed, for, on the facts of the case, a remit was clearly indicated. The appellant had already pleaded that this was jeroyti land, in which a patta in favour of her predecessors existed, and had based the suit on a kadapa, which showed a sub-tenancy. It was the respondent who had pleaded that this was a Dharmila inam and not jeroyti land, and that he was in possession of the kudiwaram rights though his predecessors for over a hundred years, and had become an occupancy tenant. Though the appellant had not mentioned a Karnikam

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service inam, parties well understood that the two cases opposed to each other were of Dharmila Sarvadumbala inam as against a Karnikam service inam. The evidence which has been led in the case clearly showed that the respondent attempted to prove that this was a Dharmila inam and to refute that this was a Karnikam service inam. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate ; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We therefore, proceed to consider the central point in the case, to which we have amply referred already.”

11. In addition, Mr Kulkarni would submit that the object and the purpose of pleadings is required to be appreciated, particularly having regard to the procedural law viz. Order VI, Rule 1 of the Code of Civil Procedure. According to him, the pleadings are meant to give the intimation to each side as to the the case of each other to properly meet with and to determine what is really at the issue between the parties. He would then urge that the object of Order XIV, Rule 2 of framing of issues is to identify from the pleadings the question or points which are framed for

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decision of the Court, where the parties are able to lead evidence thereon. He would urge that all this procedural part was rightly followed by the Court. He would draw support from paragraphs 8, 9, 11 and 12 of the said judgment.

12. Considered rival submissions.

13. In the aforesaid factual background, what is required to be noted is, the claim of the respondent-plaintiff in the special civil suit is based on the cheque dated 24th May, 1997, drawn for an amount of Rs.2 Lacs by the present appellant-defendant in favour of the respondent-plaintiff. The cheque was presented for realization on 21st November, 1997. The said cheque was dishonoured on the ground that same was presented “beyond the date of validity of the cheque”.

14. Based on the aforesaid background, it is claimed that there is presumption under the Negotiable Instruments Act in favour of the respondent-plaintiff.

15. If the claim of the present appellant-defendant is appreciated in the aforesaid background of pleadings, there was a denial of the transaction in question including that of issuance of cheque. In the aforesaid background, issues which were framed by the Trial Court at Exh.25 (supra), are without going into the alleged issue of presumption under the Negotiable Instruments Act in favour of the respondent-plaintiff and preliminary issue

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casting the burden on the plaintiff should have been the same.

16. Based on the respective pleadings and issues framed, parties to the suit led their evidence, which was scrutinized and the suit came to be dismissed.

17. The appellate court, as noted herein above, recorded points for determination and specifically on points no.4 and 5 (supra) cast burden on the appellant-defendant to prove the same. Perhaps, the reason for doing so is the presumption available under the provisions of the Negotiable Instruments Act, particularly Sections 118 and 139 of the said Act.

18. If both these points for consideration as framed by the appellate court are considered in the backdrop of provisions of Order XLI, Rule 31 of the Code of Civil Procedure, it is the appellate court, which for the first time shifted burden on the appellant-defendant to prove non-existence of the consideration by presuming that the amount of Rs.2 Lacs was due and payable by the appellant. As observed herein before, for drawing such presumption, reliance is placed on the provisions of the Negotiable Instruments Act, as also Section 114 of the Evidence Act, whereunder court can presume certain facts.

19. The fact remains that if such point for consideration is compared with that of the issues framed by the Trial Court under Order XIV, Rule 2 of the Code of Civil Procedure, the appellant herein had no occasion to meet

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with the case, whereby the burden to prove non-existence of the alleged consideration and his signature on the blank paper and cheque was shifted on him.

20. When confronted, Mr Kulkarni was unable to satisfy me from the record that the defendant had an opportunity to meet with such case by shifting burden on the defendant to prove a negative fact.

21. While doing so, the appellate court also, based on an invalid cheque, has drawn a presumption under the Negotiable Instruments Act and Section 114 of the Evidence Act, without recording a finding, as to whether such invalid instrument could get an identity of a negotiable instrument under the said Act.

22. Once the appellant having been not given an opportunity to meet with such case before the Trial Court, in my opinion, in appeal, by shifting burden on the defendant for the first time and without taking recourse to the provisions of Order XLI, Rule 25 of the Code of Civil Procedure, by framing an issue as regards the same and referring the same to the Trial Court for recording its finding, the appellate court committed an error of law.

23. Though Mr Kulkarni was right in relying upon the judgment of this Court in the matter of Nedunuri Kameswaramma (*supra*), still when the appellate court intended to shift burden on the defendant, for the first time,

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which was not a case before the Trial Court, the law laid down by the Apex Court in the said judgment would hardly be of any assistance to the respondent. Apart therefrom, it is also required to be noted as rightly pointed out by Mr Kulkarni, in the matter of **Bachhaj Nahar vs. Nilima Mandal and ors.**, reported in **AIR 1009 Supreme Court 1103**, particularly paragraphs 9, 10 and 12, the Apex Court has considered the object and purpose of pleadings and issues and has recorded a finding explaining the object behind the framing of issues, which read thus :-

“9. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

10. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result

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the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in *Bhagwati Prasad and Ram Sarup Gupta* (supra) referred to above and several other decisions of this Court following the

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same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto.”

24. If the claim of the appellant is considered in the backdrop of observations made in paragraphs 9 and 10 of the said judgment, as are reproduced herein above, this Court has no hesitation in holding that the case that was answered against the appellant-defendant, was never put forth to be answered by the defendant before the Trial Court and it is the appellate court, without giving opportunity, shifted burden on the appellant-defendant and further went on answering the same against the appellant.

25. In the aforesaid background, in my opinion, a case for remand is made out. Though this Court has ascertained from respective parties as to whether they are agreeable with the evidence that is already led in the suit, still the learned Counsel appearing on behalf of the appellant was of the opinion that once the burden is shifted on the appellant by the lower appellate court, the appellate court should grant an opportunity to the appellant-defendant to discharge such burden on points no.4 and 5 (referred supra) in appellate court's judgment.

26. In the above referred background, in my opinion, a case for remand to the appellate court is made out.

27. Parties hereto agree that they shall appear before the appellate court on 20th November, 2017, if required for re-casting the points for determination.

28. If the lower appellate court is of the opinion that the burden *qua* points no.4 and 5 is on the appellant-defendant, the Court may take recourse to the provisions of Order XLI, Rule 25 of the Code of Civil Procedure.

29. Parties agree that they shall co-operate with the appellate court in expeditious disposal of the appeal.

30. It is made clear that the lower appellate court, while deciding the claim, shall consider the observations made herein above.

Second Appeal stands partly allowed in above terms.

(NITIN W. SAMBRE, J.)