

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.1935 of 1999

P.V.S.Shanmugam

.. Appellant/Plaintiff

Vs.

1. P.Dhasarathan

2. V.Shanmugam

.. Respondents/1 & 2 Defendants

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 11.02.1999 in A.S.No.10 of 1998 on the file of the Subordinate Court, Thiruvallur, against the judgment and decree dated 27.02.1997 in O.S.No.14 of 1995 on the file of the District Munsif Court, Thiruvallur.

For appellant : Mr.P.Mohankumar for Mr.A.Palaniappan

For respondents: Mr.K.C.Santhanam for R-1

No appearance for R-2

JUDGMENT

The unsuccessful plaintiff before the first appellate Court, is the appellant herein.

2. The plaintiff has filed the suit for recovery of money from the defendants in a sum of Rs.5,200/- which the plaintiff has to shell out in E.P.No.171 of 1987, vide order dated 28.11.1991. According to the plaintiff, a sum of Rs.3,100/- had been borrowed by the first respondent/first defendant, for which from Mahalakshmi Finance Corporation, and the second respondent/second defendant and the appellant/plaintiff stood as surety/guarantor. Since the amount of loan had not been paid, the financier, namely Mahalakshmi Finance Company earlier filed O.S.No.278 of 1979, in which, the plaintiff herein was a party. In O.S.No.278 of 1979, the defendants agreed to pay back the amount and since the amount has not been paid, the plaintiff has filed the present suit. Since the plaintiff stood as surety/guarantor in the earlier proceedings, in the execution proceedings initiated in the earlier suit, order was passed on 28.11.1991 in E.P.No.171 of 1987. The plaintiff herein issued notice, dated 24.04.1992 calling upon the defendants to pay the amount due to the plaintiff and as there was no response and time was running out, the plaintiff has filed the present suit

on 28.11.1994.

3. The first defendant has filed written statement denying the averments made in the plaint. The first defendant denies the statement of the plaintiff that the first defendant had borrowed a sum of Rs.3,100/-, for which, the second defendant stood as surety/guarantor. The first defendant admitted the pre-suit notice sent by the plaintiff. It is his further averment that the plaintiff has no locus-standi to file the present suit, as the suit is barred by limitation. Only the second defendant has obtained loan from Mahalakshmi Finance Corporation, for which, the plaintiff and the first defendant stood as surety/guarantor. For recovering the loan amount, the said Mahalakshmi Finance Corporation filed the suit in O.S.No.278 of 1979, in which, a decree was passed, in execution of which, E.P.No.171 of 1987 was filed by the said finance company, in which, an order was passed on 28.11.1991, based on which, the plaintiff has paid the amount specified therein.

4. On a consideration of the above pleadings and the oral and documentary evidence, the trial Court decreed the suit by rejecting the contention of the first defendant including the contention of limitation and accepting the version of the plaintiff that the period of limitation would run excluding the date of the order passed in the said E.P. The present suit has been filed within time and there was no dispute that the plaintiff is one of the surety/guarantor and has parted with the sum of Rs.5,200/- in 1991 and the final payment was made out at Rs.5,200/- on 28.11.1991 and that the suit is filed well within time and the first respondent is liable to pay the amount.

5. Aggrieved by the judgment and decree of the trial Court, the first defendant has preferred appeal contending that the suit was filed beyond the period of limitation and that the plaintiff has not established his case by producing earlier judgment and decree in O.S.No.278 of 1979 and that the appellant/plaintiff has failed to produce the documentary evidence with regard to the payment of money as ordered in E.P.No.171 of 1987. The first appellate Court, accepting the contentions of the first defendant, allowed the appeal and dismissed the suit, against which, the present Second Appeal is filed by the plaintiff.

6. Heard the learned counsel for the appellant/plaintiff and the learned counsel for the first respondent/first defendant and though the name of the second respondent/second defendant is printed in the list, there is no appearance for him either in person or through counsel. This Court also perused the materials available on record.

7. This Court ordered "notice of motion" on 23.12.1999. Now, the Second Appeal is taken up for final disposal and is being

disposed of on the merits of the matter.

8. A cursory glance of the judgment and decree of the first appellate Court makes it clear that it is not in dispute that the appellant/plaintiff stood as surety/guarantor along with the second defendant for a sum of Rs.3,100/- together with interest. This fact has not been disputed by the first respondent/first defendant.

9. It is true that the person who has filed a case, will have to establish his case beyond reasonable doubt. It is the subsequent cause of action after money has been recovered from the plaintiff for the amount borrowed by the first defendant and having enjoyed the benefit of the surety/guarantor of the appellant/plaintiff, the first defendant cannot try to stand on technicalities, more so, that there was no evidence at all.

10. It is also submitted that the first defendant has admitted in the cross examination that the entire amount has been paid to the full satisfaction of the execution petition and the amount was paid by the appellant/plaintiff for the money borrowed by the first defendant. When such being the admission by the first defendant, the first defendant cannot be allowed to go scot-free. From the records, it appears that the first defendant has not only tried to play fraud on the financial company, but also on the plaintiff/surety/guarantor.

11. The following substantial questions of law are framed for consideration:

(i) Whether for computing the limitation period, the first date, namely the date on which the order passed in E.P.No.171 of 1987 was passed, i.e. 28.11.1991, has got to be excluded or not ? and

(ii) Whether the appellant/plaintiff has to stand on his own plea or would bend on the pleadings of the respondents/defendant ?

12. In this regard, it is worthwhile to quote Section 12 of the Limitation Act and Sections 9 and 10 of the General Clauses Act, as follows:

"Section 12 of the Limitation Act: Exclusion of time in legal proceedings: (1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or

reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Explanation: In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be excluded."

"Sections 9 and 10 of the General Clauses Act:--

Section 9: Commencement and termination of time: (1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

(2) This section applies also to all Central Acts made after the third day of January 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Section 10: Computation of time: (1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877 applies.

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887."

13. A cursory glance of the above provisions of law makes it clear that the first day, namely the date on which the order has been passed, has got to be excluded for the purpose of

computing the period of limitation, in which case, the present suit has got to be filed within a period of three years excluding the date of the order passed in E.P.No.171 of 1987, dated 28.11.1991. Admittedly, the suit has been filed on 28.11.1994, which is well within the period of limitation.

14. Further, the appellant/plaintiff's case is also supported by a decision relied on by the learned counsel for the appellant/plaintiff, of the Apex Court reported in 1999 (1) CTC 631 (SC) (Saketh India Ltd. Vs. India Securities Ltd), wherein, in paragraphs 7 and 8, it has been observed as follows:

"7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word 'from' and for the purpose of including the last in a series of days or any other period of time, to use the word 'to'.

8. ... Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. ... "

15. Learned counsel for the appellant/plaintiff also relied on a decision of the Supreme Court reported in AIR 1972 SC 1293 (Haru Das Vs. State of W.B), wherein the Apex Court held that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded.

16. In view of the above discussion, the first question of law is answered in favour of the plaintiff, as the suit is filed well within time by the plaintiff. The first question of law is answered in favour of the plaintiff.

17. With regard to the question No.2, it is seen that it is the admission by the first defendant with regard to settlement of money borrowed from Mahalakshmi Finance Corporation after the judgment and decree in the earlier suit filed by the said Finance Corporation in O.S.No.278 of 1979, it is the plea of the appellant/plaintiff that the entire amount has been paid in full to the satisfaction of E.P.No.171 of 1987, dated 28.11.1991 and

this fact has been admitted by the first defendant in his cross-examination. It is true that the burden is on the plaintiff to establish his case and the same has been pleaded and that has been accepted in the cross-examination by the first defendant. In this case, the plaintiff has proved his case, which is clear from the pleadings as also from the oral and documentary evidence. The plaintiff has explicitly proved his case, more particularly in the light of the cross-examination of the first defendant. The second question of law is also answered in favour of the plaintiff.

18. As the impugned judgment and decree of the first appellate Court are perverse, the same is hereby interfered with. Accordingly, the Second Appeal is allowed with costs, setting aside the judgment and decree of the first appellate Court and confirming the judgment and decree of the trial Court decreeing the suit for the principal amount together with interest @ 9% per annum from the date of the present suit, i.e. 28.11.1994 till the amount is actually paid by the defendants. The fees of the learned counsel for the appellant/plaintiff is fixed at Rs.1,000/- (Rupees one thousand only).

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

cs

Copy to

1. The Subordinate Judge, Thiruvallur.
2. The District Munsif, Thiruvallur.
3. The Section Officer, V.R. Section, High Court, Madras.

+1 CC to Ms.A. Palaniappan, advocate sr 45531

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MP (CO)
SP (15/11/2017)