

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.09.2017
DELIVERED ON : 13.11.2017

Coram

The Honourable Mr. Justice RAJIV SHAKDHER
and
The Honourable Mr. Justice ABDUL QUDDHOSE

Original Side Appeal No.160 of 2014
and M.P.No.1 and 2 of 2014

1. Krishna Ponnuswamy
2. Nirmal Kumar ... Appellants/Plaintiff

Vs.

1. Dr.Punitha Anand
2. K.Thandael Vedamani
3. K.Snethamizh Samraj
4. K.David Anna Durai
5. Grace Roasline Vijay
6. Manohari Kalimuthu
7. Manikanda Pandian
8. Amutha Prasanna
9. Arul Mozhi Thevan
10. Kayal Vizhi ... Respondents/Defendants

Prayer : Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent, against the Judgement and Decree dated 28.04.2014 in C.S.No.336 of 2007 on the file of this Court.

C.S. No 336/2007:

Suit filed under order IV Rule 1 of Original Side Rules read with order VII Rule 1 of Civil Procedure Code praying for Judgment and decree against the defendants a) for payment of Rs.27,35,000/- with further interest at the rate of 12 % per annum from the date of plaint till date of realisation and b) for costs of the suit.

For Appellants : Ms.Hema Sampath,
Senior Counsel
for Mr.R.Subramanian

For Respondents : Ms.P.T.Asha for Ms.Sarvabhuman
Associates for R6 to R10
R1 to R5 Given up.

J U D G E M E N T

RAJIV SHAKDHER, J.

Prefatory Facts

1. This is an appeal directed against the judgement and decree dated 28.04.2014, passed by the learned Single Judge.

2. The appellants before this Court are the original plaintiffs in the suit. The suit i.e., C.S.No.336 of 2007, was instituted against ten (10) defendants. Since the parties in the appeal has been arrayed in the same manner as in the suit, they would be referred to as appellants and respondents.

2.1. The suit, as instituted in the first instance, sought recovery of a sum of Rs.27,35,000/-, with further interest at the rate of 12% p.a., from the date of the suit, till the date of realization. Thus, out of the total amount of Rs.27,35,000/-, the principal amount was pegged at Rs.25,00,000/-, while the balance sum of Rs.2,35,000/-, comprised of interest calculated at the rate of 12% p.a., albeit, in two parts.

2.2. The first part of the interest component was calculated at the aforementioned rate, for the period spanning between 29.05.2006 and 29.03.2007, albeit, on a portion of the principal amount, that is, Rs.20,00,000/-. The interest qua this part was quantified at Rs.2,00,000/-. The second part of the interest component was also calculated at the same rate, i.e., 12% p.a., though, for the period 20.08.2006 to 20.03.2007, albeit, on the remaining portion of the principal amount, that is, Rs.5,00,000/-.

3. The case set up by the appellants was that the said sum of Rs.25,00,000/- was paid to, one, Mr.K.Kalimuthu, the erstwhile Speaker of the Tamil Nadu Legislative Assembly, though, into two tranches. The first tranche comprised of Rs.20,00,000/-, which was paid via three demand drafts, out of which, two demand drafts were of a value of Rs.9,00,000/- each, while the third demand draft bore a value of Rs.2,00,000/- (Exs.P.1 to P.3). As per the averment made in the plaint, the funds for the said purpose were furnished by appellant No.2.

3.1. Apparently, appellant No.2 had transmitted the said sum of Rs.20,00,000/- from USA to appellant No.1's bank account. Appellant No.1 is the mother of appellant No.2. According to the appellants, on receipt of the sum of Rs.20,00,000/-, Mr.Kalimuthu, executed a demand promissory note dated 29.05.2006 (Ex.P.5). This loan was taken by Mr.Kalimuthu, according to the appellants, to get over the financial difficulties he had encountered in running a petrol bunk at Madurai, which was in the name of his son, i.e., respondent No.4.

3.2. In so far as the sum of Rs.5,00,000/- is concerned,

according to the appellants, the said sum was paid to Mr.Kalimuthu as he had approached appellant No.2, once again, for grant of financial assistance to perform the marriage of his daughter, i.e., respondent No.8. It is claimed, accordingly, appellant No.2, mobilised resources and paid a sum of Rs.5,00,000/- to Mr.Kalimuthu, albeit, in cash.

3.3. It is the case of the appellants that on receipt of the said amount, Mr.Kalimuthu, issued a cheque bearing No.174376, dated 20.08.2006, for a sum of Rs.5,00,000/-, with a request that the same should be presented for encashment only after a period of two (2) months had elapsed.

3.4. The record shows that Mr.Kalimuthu expired on 08.11.2006. Consequently, the appellants approached respondent No.1, the daughter of Late Mr.Kalimuthu, born from his relationship with Ms.Manohari Kalimuthu for repayment of the aforementioned amounts loaned to him. Since, appellants were unable to persuade respondent No.1, to repay the loan, a suit for recovery was filed against the respondents. As indicated above, respondent No.1 is the daughter of Late.Mr.Kalimuthu, while respondent No.2 and 3 are the children of Late Mr.Kalimuthu. Respondent No.4, as indicated above, is the son of Late Mr.Kalimuthu. The relationship of respondent No.5 is not set out in the plaint. However, in so far as respondent No.6 is concerned, it is averred in the plaint that she is the other partner of Late Mr.Kalimuthu.

3.5. What is emerged from the record is that, Late Mr.Kalimuthu had children from two partners i.e., Ms.Nirmala Kalimuthu and Ms.Manohari Kalimuthu. Insofar as respondent No.1 to 5 are concerned, they are the children of Late Mr.Kalimuthu from Ms.Nirmala Kalimuthu. While respondent No.7 to 10 are the children of Mr.Kalimuthu from his other partner/Ms.Manohari Kalimuthu i.e. respondent No.6.

3.6. The record also shows, in respect of which there is no dispute, that prior to the institution of the suit, the appellants had sent a legal notice, dated 02.02.2007 (Ex.P.7), to which, a reply dated 12.03.2007 (Ex.P.9), was filed by respondent No.1 to 5, though no reply was filed to the legal notice by respondent No.6 to 10.

3.7. The record would further shows, qua which, once again, there is no dispute, is that, the appellants had filed an application bearing No.3523 of 2007, for attachment of the following properties :

"Schedule of Immovable Property :

Property belonging to the fourth defendant.

All that piece and parcel of land situated at Ayan Pappakudi Village, Madurai South Taluk, comprised in Survey No.166/4A, admeasuring an extent of 0.92 cents and bounded on the -

North by - lands comprised in Survey No.98

South by - land comprised in Survey No.166/4

East by - Aruppukottai Road (R.S.164)
West by - Kanmoi poramboke

All that piece and parcel of land and building bearing door No.16/249N Kurinchi Aruppukottai Main Road, Villupuram, Madurai, and bounded on the -
North by - Door No.15/249
South by - Door No.249/1
East by - Aruppukottai Main Road

All that piece and parcel of land and building Door No.31/35, Pillaiyar Koil Street, S.S.Colony, Madurai, and bounded on the -
North by - Door No.33/35B
South by - Door No.29/35C

All that piece and parcel of land and building bearing door No. , Ponmeni Narayanan Street, Madurai, and bounded on the -
North by - Door No.29/35C
South by - Door No.33/35
East by - Pillaiyarkoil Street
West by - Ponmeni Narayanan Street

All that piece and parcel of land and building situated at Door No.1/310-1, Kanna Nenthall Village, Tagore Street, Sri Nagar, Naganangulam Municipality, Madurai -14, comprised in Old Survey No.374/2A 3C, UDR Survey No.2/2A 3C, patta No.141 and bounded on the -
North by - Tagore Street
East by - Door No.1/309
West by - Door No.1/313-1

All that piece and parcel of land situated at Thoppur Village, Madurai South, comprised in Survey No.71/8A1, 0.2305 hectare."

3.8. The said application was allowed by the Court vide order dated 11.08.2009. Against this order, respondent No.4, filed an appeal, which was numbered as: O.S.A.No.352 of 2009. This appeal was later dismissed as withdrawn, vide order dated 02.11.2009.

4. In so far as the instant suit is concerned, only respondent No.1 to 5 filed their written statement, in the first instance. The written statement was filed by respondent No.1 to 5 around December 2008. As a result of the same, respondent No.6 to 10 were set ex parte, and a decree dated 03.11.2010, came to be passed in the suit, against respondent No.6 to 10 for a sum of Rs.39,13,747.53, after adjusting a sum of Rs.20,00,000/-, which was paid by respondent No.1 to 5, in a compromise arrived

at, between the appellants and the respondent No.1 to 5. Furthermore, the decree dated 03.11.2010, provided for payment of interest at the rate of 12% p.a., on the sum of Rs.27,35,000/-, being the initial suit amount, from that date till the date of realization.

4.1. In addition thereto, the order of attachment dated 11.08.2009, passed in A.No.3523 of 2007, was raised, i.e., vacated, in respect of item No.1, as set out in the schedule appended to the said application. In so far as the other items in the schedule were concerned, the order of attachment was made absolute.

4.2. The record also shows that in and about February, 2012, respondent No.6 to 10 filed A.No.1141 of 2012, to set aside the ex-parte decree passed against them along with an application for condonation of delay of 480 days. This application was allowed by the Court vide order dated 19.06.2013.

5. It is, in this background, that the learned Single Judge was called upon to make a final determination in the suit.

5.1. The learned Single Judge, however, having regard to the fact that the sum of Rs.20,00,000/- was paid by respondent No.1 to 5, proceeded to adjudicate upon the suit on the premise that the appellants' claim was confined to respondent No.6 to 10, that too for recovery of the balance principal sum of Rs.5,00,000/- along with interest.

5.2. In the suit, in the first instance, the following two (2) issues were framed :

"(i) Whether the defendants 6 to 10 are left with any property of the deceased Kalimuthu for the plaintiffs to proceed against them?

(ii) Whether the defendants 6 to 10 are liable to answer the suit claim?"

5.3. The aforesaid was followed with the framing of an additional issue, which reads as follows :

"(iii) Whether the plaintiffs have given a hand loan of Rs.5 lakhs to the deceased Kalimuthu on 20 August 2006?"

5.4. The learned Single Judge answered all the three issues against the appellants and, thus, proceeded to dismiss the suit.

6. Being aggrieved, the instant appeal has been preferred.

6.1. In support of the appeal, arguments have been advanced on behalf of the appellants by Ms.Hema Sampath, Senior Advocate, instructed by Mr.R.Subramanian, while on behalf of respondent No.6 to 10, submissions have been made by Ms.P.T.Asha, Advocate. Submissions of Counsels

7. The submission of Ms.Hema Sampath, can, broadly, be paraphrased as follows :

(i) The learned Single Judge ought to have appreciated the fact that Late.Mr.Kalimuthu had borrowed a sum of Rs.25,00,000/- from the appellants and upon his death, the liability for repayment of the debt would pass on to the legal heirs, who had succeeded to his estate, and since, respondent No.6 to 10, apart from respondent No.1 to 5, had succeeded to the estate of Late.Mr.Kalimuthu, they were jointly and severally liable for the debt owed by Late Mr.Kalimuthu.

(ii) The learned Single Judge failed to appreciate that while, the legal notice dated 02.02.2007 (Ex.P.7), issued by the appellants for repayment of the debt, was responded to by respondent No.1 to 5, no reply was sent by respondent No.6 to 10, despite having received the same.

(iii) Respondent No.6 to 10, deliberately, kept themselves away from the suit proceedings, and, once, an ex parte decree was passed, they moved the Court for setting aside the decree.

(iv) The learned Single Judge failed to appreciate that in the action instituted, the appellants had claimed a sum of Rs.27,35,000/- from all respondents, and the fact that in a compromise arrived at, with respondent No.1 to 5, a sum of Rs.20,00,000/- was received, it would not absolve respondent No.6 to 10 from the liability of paying the balance amount with interest, as they had inherited the estate of the deceased.

(v) The learned Single Judge failed to appreciate that the order of attachment dated 11.08.2009, was passed after contestation; while respondent No.1 to 5 had filed a counter affidavit, no counter affidavit was filed by respondent No.6 to 10. Furthermore, the learned Single Judge had failed to appreciate that respondent No.6 to 10 were represented by counsel. Once, the order dated 11.08.2009, was passed, while, respondent No.4 preferred an appeal, respondent No.6 to 10 did not file any appeal and consequently, are deemed to have accepted the order of attachment. Thus, having regard to the same, the conclusion reached by the learned Single Judge that the property in issue was not owned by Late Mr.Kalimuthu was flawed.

(vi) The learned Single Judge committed a serious error in concluding that the appellants had failed to show that the property in issue was purchased by Late Mr.Kalimuthu in the name of his other partner, i.e., respondent No.6.

(vii) The learned Single Judge was required to, principally, ascertain, as to whether or not, the appellants were entitled to a decree for the sum claimed along with interest. Since, compromise was arrived at with respondent No.1 to 5, all that the learned Single Judge was required to do, after determining the total debt due by Late Mr.Kalimuthu, was to adjust the amount of Rs.20,00,000/- received by the appellants from respondent No.1 to 5. In other words, the aspect pertaining to whether or not respondent No.6 to 10 had inherited a part of the estate of Late Mr.Kalimuthu, was an enquiry, which, necessarily, would have to be conducted in the course of execution

proceedings, in consonance with the provisions of Order 21, Rule 58 of the Code of Civil Procedure, 1908 (in short, "CPC").

(viii) The conclusions reached by the learned Single Judge that the appellants had failed to prove that they had paid a sum of Rs.5,00,000/- to Late Mr.Kalimuthu, was erroneous. The appellant No.2 had, admittedly, been issued a cheque in the sum of Rs.5,00,000/- drawn by Late Mr.Kalimuthu, and therefore, in consonance with provisions of Section 118 of the Negotiable Instruments Act, 1881 (in short, "NI Act"), a statutory presumption had got created that consideration had passed qua the said cheque. The execution of the cheque, having been admitted, both in the written statement as well as by respondent No.1, in his deposition, the learned Single Judge could not have come to the conclusion that the appellants had failed to establish that they had paid cash in the sum of Rs.5,00,000/- to Late Mr.Kalimuthu. The burden of proof was, in fact, on respondent No.6 to 10, as they were in possession of the bank statement of Late Mr.Kalimuthu, and therefore, they should have rebutted the presumption created in law by producing the bank statement, to demonstrate whether or not the said cheque had been encashed.

(ix) The undisputed fact, is that, the cheque in issue had not been encashed. The photocopy of the cheque was marked without any objection. This Court has powers under Order 41, Rule 27 CPC to receive the original cheque, which has been filed along with M.P.No.2 of 2014, as an additional document in the instant appeal. Since, the original cheque is available for scrutiny by this Court, discrepancy, if any, in the oral evidence of the appellants cannot be held to be material.

(x) Even, if, this Court were to come to the conclusion that the appellants had not been able to prove that the sum of Rs.5,00,000/-, as claimed, was paid in cash to Late.Mr.Kalimuthu, they would, still, be entitled to interest at the rate of 12% p.a. on the sum of Rs.20,00,000/-, which was, admittedly, received by Late.Mr.Kalimuthu. There is no bar in law, in a Court passing two separate decrees in one action vis-a-vis two different set of respondents. The fact that based on a compromise, the first decree was passed on 03.11.2010, could not have disabled the Court from passing a second decree. In support of this proposition, reliance was placed on the judgement of the Supreme Court rendered in Bai Chanchal and others V. Syed Jalaluddin and others, 1970 (3) SCC 124.

(xi) The appellants, being creditors their debt could not have been apportioned by the learned Single Judge. The respondents, being legal heirs, who had benefited from the estate of the deceased Kalimuthu, are liable to discharge the debts of the deceased as well, albeit, to the extent of the benefit received. In support of this submission, reliance was placed on the judgement of the Supreme Court rendered in : Venkatesh Dhonddev Deshpande V. Sou.Kusum Dattatraya Kulkarni and others, (1979) 1 SCC 98.

8. On the other hand, Ms.P.T.Asha, largely, relied upon the judgement of the learned Single Judge.

8.1. This apart, the learned counsel sought to highlight the fact that the case set up by the appellants that the sum of Rs.5,00,000/- was given as hand loan for performing the marriage of respondent No.8, was false. Our attention, in this behalf, was drawn to the written statement filed by respondent No.6, who as indicated above is said to be the other partner and mother of respondent No.8, to stress the fact that the expenditure for respondent No.8's marriage was met by her own brother-in-law and the brother of Late Mr.Kalimuthu, one, Mr.Veerapandian. The fact that respondent No.6 had given sufficient jewellery to respondent No.8 in marriage was also sought to be emphasized by referring to the averment made in this behalf in the written statement filed by respondent No.6. It was, in sum, contended by the learned counsel that, since, resources were available, there was no occasion for Late Mr.Kalimuthu to borrow money from appellant No.2 as alleged or at all in order to perform the marriage of his daughter, i.e., respondent No.8.

8.2. Furthermore, learned counsel submitted that as per the case set up by the appellants themselves the cheque for the sum of Rs.5,00,000/-, which was issued on 20.08.2006, was required to be encashed after two (2) months, that is, in and about 20.10.2006. According to the counsel, nothing had been stated in the plaint which would explain the reason as to why the cheque had not been encashed at the end of the two month moratorium.

8.3. Besides this, learned counsel highlighted the fact that after the death of Mr.Kalimuthu, which occurred on 08.11.2006, the appellants surreptitiously attempted to encash the cheque by presenting it for payment on 16.02.2007. The illegal attempt of the appellants, as per the counsel, got thwarted, only because the concerned Bank had received information of the fact that Mr.Kalimuthu had expired. Consequently, the cheque was returned to the appellants by their banker vide the return memo dated 17.02.2007.

8.4. The fact that the appellants were aware of the death of Mr.Kalimuthu is evident from the fact that they had caused a legal notice dated 02.02.2007 to be served on the respondents.

8.5. The learned counsel further submitted that P.W.1 and P.W.2, were not reliable witnesses. This aspect was sought to be demonstrated by relying upon the deposition of P.W.1 made on 15.07.2013, wherein, in answering the question, whether the cheque had been presented for collection, she had stated that : "The cheque was not at all presented for collection".

8.6. In this behalf, reliance was also placed on P.W.2's cross examination held on 30.07.2013, wherein, he had stated "The original of Ex.P.6 was not deposited for collection, I do not know where the original cheque is".

8.7. Furthermore, the contradiction in the answer of P.W.2 was sought to be highlighted, by Ms.Asha, by referring to the following part of the testimony of P.W.2 :

"Q:- I put it to you that you have encashed the cheque and that is why you have not produced the original cheque, but produced only a xerox copy of the cheque and marked as Ex.P6?

A:- I deny the suggestion. Witness adds:- I can produce the original cheque."

8.8. Furthermore, Ms.Asha submitted that since, respondents 6 to 10 are the legal heirs of deceased Kalimuthu, who cannot be attributed with knowledge about the issuance of the subject cheque. It was contended that statutory presumption under Section 118 of the NI Act, could be used as a tool against respondent No.6 to 10, the presumption, if any, arises against the person, who issue the cheque.

8.9. Learned counsel further contended that the efficacy of the order of attachment dated 11.08.2009, came to an end with the dismissal of the suit, and therefore, would not advance the cause of the appellants.

REASONS

9. We have heard the learned counsel for the parties and perused the record.

10. What emerges on perusing the pleadings and evidence on record, and qua which, there is no palpable dispute is as follows :

(i) The the appellants had filed a suit for a sum of Rs.27,35,000/-.

(ii) Both the principal amount and the interest had two components. The principal amount comprised of one sum of Rs.20,00,000/-, while the other, comprised of Rs.5,00,000/-. Likewise, interest of Rs.2,35,000/- was split into two parts, i.e., Rs.2,00,000/- and Rs.35,000/-. Rs.2,00,000/- was the interest calculated, for the period 29.05.2006 to 29.03.2007, albeit, on part of the principal amount, i.e., Rs.20,00,000/- while for the period 20.08.2006 to 20.03.2007, interest was quantified at Rs.35,000/-. This part of the interest was calculated on the remaining portion of the principal amount, i.e., Rs.5,00,000/-.

(iii) The sum of Rs.20,00,000/- was paid to Late Mr.Kalimuthu, via three demand drafts, out of which two (2) demand drafts carried a value of Rs.9,00,000/- each, while the third demand draft bore a value of Rs.2,00,000/-. In so far as Rs.5,00,000/- is concerned, the appellants case is that it was paid in cash against which, a cheque dated 20.08.2006 was issued by Late Mr.Kalimuthu.

(iv) Since, the amount claimed by the appellants, was not paid, they caused a legal notice 02.02.2007, (Ex.P.7), to be served on respondents. While, respondent No.1 to 5, responded to the same vide communication dated 12.03.2007 (Ex.P.9), in so far

as the respondent No.6 to 10 were concerned, the assertions made therein went unrebutted.

(v) Late Mr.Kalimuthu executed a demand promissory note dated 29.05.2006 (Ex.P.5), in which, he accepted the receipt of Rs.20,00,000/-, for the purposes of family expenses and promised to return the said amount with interest at the rate of Re.1 for every Rs.100/- per month, which, approximately, would equal a rate of interest of 12% per annum.

(vi) That, an order of attachment dated 11.08.2009, was passed in A.No.3523 of 2007, wherein, respondent No.6 to 10, were represented by a lawyer. Furthermore, respondent No.6 to 10, unlike respondent No.1 to 5, did not file a counter affidavit to the said application. By virtue of the said order, all the three items referred to in the schedule appended in the application were attached.

(vii) Since, respondent No.6 to 10 did not file a written statement, they were set ex-parte.

(viii) That a judgement and decree dated 03.11.2010, was passed for a sum of Rs.39,13,747.53 against respondent No.6 to 10, against which adjustment of Rs.20,00,000/- was required to be made in respect of the amount paid by respondent No.1 to 5 in a compromise reached with the appellants, with further interest at the rate of 12% p.a., albeit, on the suit amount, i.e., Rs.27,35,000/-, from the date of the decree, till the date of realization, a fact which is not in dispute.

(ix) That the judgement and decree dated 03.11.2010, was set aside, upon an in A.No.1141 of 2012, moved by respondent No.6 to 10, along with an application seeking condonation of delay of 480 days. This application was moved in and about February 2012. The application was allowed by the Court vide order dated 19.06.2013, whereby, the ex parte decree dated 03.11.2010, was set aside.

11. Given these admitted facts and circumstances, the following aspects come to fore :

(i) First, as to what was the principal amount loaned by the appellants to Late Mr.Kalimuthu. In other words, as to whether, Late Mr.Kalimuthu had been loaned a sum of Rs.20,00,000/- or Rs.25,00,000/-, as contended by the appellants.

(ii) Second, if, the appellants were to fail in establishing that Rs.5,00,000/- was paid in cash by them to Mr.Kalimuthu, whether the appellants would be entitled to interest on the sum of Rs.20,00,000/- from the date of the suit, till the date of realization.

(iii) Third, with the passing of the order dated 11.08.2009, could the learned Single Judge have come to the conclusion that respondent No.6 to 10 had not acquired any part of the estate of Late Mr.Kalimuthu, and thus, were not liable to pay the suit amount.

First aspect :

12. A perusal of the pleadings and the evidence on record

would show that the appellants did set up a case that, cash in the sum of Rs.5,00,000/- was paid to Late Mr.Kalimuthu, on 20.08.2006, as he had indicated that he had to perform the marriage of respondent No.8, on 10.09.2006. The appellants, specifically, aver that Late Mr.Kalimuthu had approached them for a "hand loan" of Rs.5,00,000/- for performing the marriage of respondent No.8, "just few days", before the marriage.

12.1. The appellants further aver that having regard to the request made by Late Mr.Kalimuthu, the appellant No.2 mobilised the resources and paid the amount to Late Mr.Kalimuthu. The appellants go on to say that, on receipt of the said amount, Late Mr.Kalimuthu issued a cheque in the sum of Rs.5,00,000/- on 20.08.2006 with a request that it should be encashed after two months. These assertions have been made in paragraph 8 of the plaint.

12.2. A careful perusal of the averments made in paragraph 8 shows that there are intrinsic inconsistencies in respect of this part of the case, and perhaps, a lack of candour in explaining certain aspects of the matter.

12.3. The inconsistency, according to us, is that, if, late Mr.Kalimuthu had approached appellant No.2 for a hand loan, just few days, before the marriage, which was fixed on 10.09.2006, why would a cheque be issued, which is dated 20.08.2006. Since, the assertion made, is that, after the request was made, appellant No.2 went about looking for sources to fund the loan.

12.4. Second, what is left unexplained, is that, if, late Mr.Kalimuthu had indicated that the cheque should be encashed after two months, then why did the appellants not present the cheque after the expiry of the moratorium period of two months, that is, in and about 20.10.2006. There is no explanation for this conduct by the appellants.

12.5. The appellants' version, as rightly pointed out by Ms.P.T.Asha, becomes muddled, as despite having possession of the original cheque, the same was not produced before the learned Single Judge. We must note here that there is an assertion in the grounds of appeal filed before us, that an attempt was made to produce the original cheque at the conclusion of the hearing; a request, which was turned down by the learned Single Judge.

12.6. According to us, there are no means available to us, to firstly, establish as to whether such a request was made, except the record of the case. The record does not advert to this at all. Secondly, if, the original cheque had to be presented, it ought to have been presented in the manner known to law, and not by a mere mentioning.

12.7. That being said, appellant No.1 (P.W.1) in her cross-examination held on 23.03.2010, stated that P.W.2 had not encashed the cheque (Ex.P.6). The appellant No.2 (P.W.2) in his cross examination, held on 30.07.2013, specifically stated that he could produce the original cheque. This answer was given by the appellant No.2 (P.W.2) in response to the suggestion made to

him that because he had encashed the cheque, he had not produced the original.

12.8. The appellants in their testimony, did not disclose the fact, which was in their exclusive knowledge, that they had attempted to encash the cheque, but had failed, since the concerned bank returned the cheque, as the bank had received information, in the meanwhile, regarding the demise of Mr.Kalimuthu.

12.9. The testimony of the appellants, thus, on this aspect of the matter is shaky and lacks credibility. Furthermore, this conclusion of ours is further supported by the fact that in paragraph 8 of the proof affidavit of P.W.2, contrary to what is stated in the plaint, the following assertion was made :

"..... 8. Subsequently on 20/8/2006 the deceased Kalimuthu asked me to lend another sum of Rs.5,00,000/- for the betrothal of his daughter. I mobilised the money and paid the same on 28/8/2006. On that day, he handed over a cheque for Rs.5,00,000/- drawn on Lakshmi Vilas Bank, Chennai, dated 20/8/2006 and requested me to encash the same after two months. The cheque was signed by him in my presence and it was also filed by him."

13. A perusal of the aforesaid would show that there are three inconsistencies. First, that the approximate date of meeting between late Mr.Kalimuthu and appellant No.2 was shifted to 20.08.2006, as against what was stated in the plaint, which is, few days prior to the date fixed for marriage i.e. 10.09.2006. Second, the purpose for asking for loan shifted from marriage to betrothal. Third, while the cheque issued by Late Mr.Kalimuthu, is dated 20.08.2006, in the aforementioned paragraph, it is stated that the money was paid by appellant No.2 to Late Mr.Kalimuthu on 28.08.2006.

13.1. Thus, as indicated above, this aspect of the matter does not inspire confidence. Therefore, the conclusion reached by the learned Single Judge cannot be faulted with.

Second aspect :

14. The question, however, remains as to whether sans the failure on the part of the appellants to establish that they had given a hand loan in the sum of Rs.5,00,000/- to late Mr.Kalimuthu, could they not press their claim for repayment of Rs.20,00,000/- along with interest. To our minds, there is no dispute, whatsoever, with regard to late Mr.Kalimuthu, having received the sum of Rs.20,00,000/-. This is evidenced by the demand promissory note dated 29.05.2006 (Ex.P.5). The said amount was received via three bank drafts of even date, i.e., 29.05.2006, (Exs.P.1 to P.3). The fact that the said sum of Rs.20,00,000/- had to be returned with interest at the rate of 12% p.a. is also borne out from the promissory note. Therefore,

quite clearly, the appellants were entitled in law to sue for return of Rs.20,00,000/- with interest, which, they have claimed for the period commencing from the date of the suit, till realization.

14.1. The decree dated 03.11.2010, would show that on that date, the amount payable was a sum of Rs.39,13,747.53. Since, the appellants had arrived at a compromise, that they had entered into, with respondent No.1 to 5, whereby, they had received a sum of Rs.20,00,000/-, that adjustment was necessitated. Since, this was an ex-parte judgement and decree, in so far as respondent No.6 to 10 are concerned, it was, as indicated above, set aside, by an order dated 19.06.2013. The fact remains that in so far as this leg of the transaction is concerned, the respondents were not able to dislodge the case of the appellants.

14.2. The question, which, then, arises is, should the learned Single Judge have decreed the suit for the principal amount of Rs.20,00,000/- with interest at the rate stipulated in the promissory note.

14.3. According to us, the claim is tenable and justifiable. The learned Single Judge overlooked this aspect of the matter and, erroneously, divided the principal amount claimed into two parts, one, settled and the other, which was outstanding. In our view, the approach was flawed. The principal amount, in effect, represented two different loan transactions. The appellants were able to establish the first loan transaction, whereby, Rs.20,00,000/- was paid to late Mr.Kalimuthu and, on the other hand, it failed to establish the second loan transaction, which was for a sum of Rs.5,00,000/-. According to us, there was no bar in the court passing a decree based on a compromise arrived at, with one set of respondents, followed by a separate decree vis-a-vis the other set of respondents, that is, those who chose to contest the suit. Since, the entire array of respondents are concededly the legal heirs of late Mr.Kalimuthu, they were jointly and severally liable in respect of the estate left behind by late Mr.Kalimuthu.

Third aspect :

15. With respect to the third aspect, we are of the view that, since, the order of attachment before judgement dated 11.08.2009, had been passed, qua which, no contest was made by respondent No.6 to 10, the onus, if at all, had shifted on to them to show that they had not acquired the estate of late Mr.Kalimuthu.

15.1. The fact that respondent No.1 to 5, entered into a compromise was an indicator that Late Mr.Kalimuthu had left behind assets. The failure on the part of the respondent No.6

to 10, to file a counter affidavit to the application preferred for attachment before judgement, would show that the appellants did discharge the initial burden that upon the death of late Mr.Kalimuthu, a part of his estate had come within their fold. The learned Single Judge, in our view, was right in coming to the conclusion that the order dated 11.08.2009, by itself could not have created any right, title and interest in favour of the appellants and that it would only disable the judgement-debtor in creating an encumbrance qua the property in issue.

15.2. Therefore, given this position in law, this aspect of the matter ought to have been left to be determined in the execution proceedings. The executing court under the provisions of Order 21, Rule 58 of CPC, has the power to carry out such an enquiry.

16. Having regard to the foregoing discussion, the appeal is partly allowed, to the extent that the appellants, would be entitled to claim interest on the sum of Rs.20,00,000/- at the rate of 12% p.a., from the date of the suit, till its realization. Upon the amount being calculated, an adjustment would be made in the sum of Rs.20,00,000/-, already received by appellants in the compromise arrived at with respondent No.1 to 5.

16.1. Insofar as M.P.No.1 of 2014 to furnish security is concerned, as the appeal has been finally disposed of, no order need to be passed.

16.2. Consequently, M.P.No.2 of 2014 to receive original cheque dated 20.08.2006, is dismissed.

17. The appeal and the connected applications are disposed of in the aforementioned terms.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

gg/kk

To

1. The Sub Assistant Registrar (Original Side),
High Court, Madras.

+2 Ccs to Ms.R. Subramanian, Advocate sr 80450.

+1 CC to Ms. Sarvabhuman Associates, sr 80261.

in O.S.A.No.No.160 of 2014
and M.P.No.1 and 2 of 2014

SP(27/12/2017)