

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.02.2017

PRONOUNCED ON : 27.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.846 OF 2011

and

M.P.No.1 of 2011

S.Karthikeyan ... Appellant/Plaintiff

Vs.

M.P.Selvakumar ... Respondent/Defendant

Second Appeal is filed under Section 100 of Civil Procedure Code, against the decree and judgment passed in A.S.No.65 of 2008 on the file of the Subordinate Judge at Kancheepuram dated 08.10.2010 reversing the decree and judgment passed in O.S.No.99 of 2006 on the file of the Principal District Munsif Court, Kancheepuram dated 28.09.2007.

For Appellant : Mr.K.Chandu Suranjan

For Respondent : Mr.K.M.Balaji

JUDGMENT

In this second appeal, the plaintiff has impugned the judgment and decree dated 08.10.2010 passed in A.S.No.65 of 2008 on the file of the Sub Court, Kancheepuram, reversing the judgment and decree dated 28.09.2007 passed in O.S.No.99 of 2006 on the file of the Principal District Munsif Court, Kancheepuram.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:-

"Whether the Lower Appellate Court is correct in holding that the appellant has not rebutted the presumption of passing of the consideration?"

3. The suit has been laid by the plaintiff for recovery of money.

4. According to the plaintiff, the defendant borrowed a sum of Rs.58,750/- from him, for his business and family expenses on 31.12.2004 and issued a cheque, on the same date, in favour of the plaintiff and on the plaintiff presenting the said cheque in his bank for encashment, the same had been returned for the reason of "insufficient fund" and thereupon, the plaintiff issued a notice to the defendant on 06.04.2005 and thereon, the defendant approached the plaintiff and promised to settle the borrowed sum and inasmuch as the defendant did not keep up his promise, the plaintiff again issued another notice on 18.01.2006 and even thereafter, despite repeated demands, as the defendant failed and neglected to repay the borrowed sum, the plaintiff has been necessitated to lay the suit.

5. The defendant has pleaded that he had not borrowed the suit amount of Rs.58,750/- from the plaintiff on 31.12.2004 and issued the cheque in favour of the plaintiff as pleaded in the plaint. It is the case of the defendant that he had been having zari dealings with one S.Kumar, who was a tenant under him and as per the custom prevailing between them, as regards the purchase of goods, blank cheque used to be issued for security purpose and accordingly, the defendant, at the time of purchasing zari from S.Kumar, issued blank cheque and in the year 2004, the defendant stopped having dealings with S.Kumar and also, after discharging the amount due under the business dealings, he had insisted S.Kumar to return back the blank cheque. However, S.Kumar evaded to comply with the request of the defendant and in order to enrich himself, S.Kumar in collusion with the plaintiff had laid the false case by filling up the date, amount, and payee's name in the blank cheque issued by the defendant and hence, the defendant is not liable to pay any amount to the plaintiff and it is also stated that the suit filed against the defendant in his individual capacity is not maintainable without impleading partnership concern and hence, the suit, sans any cause of action, is liable to be dismissed.

6. Considering the pleas made by the respective parties and the evidence adduced in the matter, it is found that the case of the defendant is that in connection with the zari business dealings, he had with one S.Kumar, who has been examined as PW2, as per the custom prevailing, used to issue signed blank cheque to S.Kumar and thereafter, according to the defendant, he has stopped business dealings with S.Kumar and after the discharge of the amount due under the business dealings, he had insisted S.Kumar to hand over the blank cheque given by him, despite insistence, S.Kumar had evaded to return the same and colluded with the plaintiff and filled up blank cheque and also laid the false suit in the name of the plaintiff to enrich himself.

7. In the light of the above defence set out by the defendant, it could be seen that the defendant has admitted his signature in the cheque involved in this suit marked as Ex.A1. A perusal of Ex.A1 as also seen from the evidence of the plaintiff, examined as PW1, it could be seen that the defendant had issued the cheque in favour of the plaintiff on 31.12.2004 for a sum of Rs.58,750/- and in such view of the matter, it could be seen that as rightly put forth by the plaintiff, inasmuch as the defendant has borrowed the suit amount from the plaintiff, accordingly, he had chosen to issue the cheque in favour of the plaintiff in acknowledgment of the debt.

8. In this connection, the plaintiff, examining himself as PW1, has tendered clear evidence that the defendant had borrowed the suit amount of a sum of Rs.58,750/- from him and also issued Ex.A1 Cheque in his favour in acknowledgment of the amount received. Nothing has been elucidated during the cross examination of PW1 to discredit his evidence in any manner. No doubt, in the notice and the evidence, the plaintiff has stated that the suit amount has been paid to the defendant in two installments i.e. Rs.50,000/- at the first instance and Rs.8,750 at the second instance. However, in the plaint, it has been averred that the suit amount of Rs.58,750/- has been lent by the plaintiff to the defendant on 31.12.2004. But, the fact remains that it is the specific case of the plaintiff that the defendant borrowed a sum of Rs.58,750/- from him and only in connection with the said borrowal, he had issued the cheque Ex.A1 in his favour. Therefore, the reasonings of the first appellate Court that the plaintiff has put forth inconsistent pleas, as regards the plaintiff's lending of the amount to the defendant i.e in installments, in the reply notice and in the course of evidence and in the plaint as regards lending the amount in lumpsum on 31.12.2004, as rightly put forth by the plaintiff's counsel, the question that has to be decided is as to whether the amount had been received by the defendant from the plaintiff as pleaded. In that context, when the case of the plaintiff is assessed vis-a-vis evidence, it could be seen that there is no inconsistency in the case of the plaintiff as regards the lending of the sum of Rs.58,750/- to the defendant. That apart, it is also found that the cheque, in question, viz., Ex.A1 has been, admittedly, issued by the defendant in favour of the plaintiff, as seen from the evidence of the plaintiff examined as PW1.

9. However, according to the defendant, the signed blank cheque issued by him to S.Kumar, examined as PW2, had been misused by S.Kumar, in collusion with the plaintiff and the same had been filled up in the name of the plaintiff with the suit amount. PW2 in his evidence has completely denied that he is doing any zari business. No material, as such, has been placed to show that PW2 was engaged in zari business at any point of

time. Equally, there is no material placed to show that the defendant had zari business with PW2 at any point of time. In such view of the matter, the case of the defendant that in connection with zari business, he had with PW2, he used to issue signed blank cheque and the same seems to have been used by PW2 in collusion with the plaintiff, as such, cannot be accepted.

10. It is the further case of the defendant that in the year 2004, he had ceased to have business with PW2 and thereafter, insisted PW2 to return the signed blank cheque given by him and further, it is pleaded that PW2 had evaded to hand over the same. If the above defence of the defendant has any element of truth, as rightly put forth by the plaintiff's counsel, as a prudent person, the defendant would have taken further steps in the manner known to law to retrieve the signed blank cheque alleged to have been handed over to PW2 by him in the so-called zari business. However, till date, no effort has been made by the defendant to get back the alleged signed blank cheque said to have been given by him to PW2. This conduct of the defendant would only go to show that he has taken a false plea that he handed over signed blank cheque to PW2 in connection with the zari business done by PW2.

11. It is also found that the plaintiff has presented the cheque in question and as the cheque had been dishonored for want of fund, it is seen that the plaintiff had issued a notice to the defendant with reference to the same. This has been marked as Ex.A2. Subsequently, it is also found that another notice marked as Ex.A3 has been issued by the plaintiff calling upon the defendant to repay the borrowed sum. The plaintiff has averred about the above said notices in the plaint. The defendant has neither disputed the issuance of the above said notice by the plaintiff nor denied the receipt of the same by him. It is therefore found that Exs.A2 & 3 notices have been received by the defendant. If really, Ex.A1 cheque had not been issued by the defendant in favour of the plaintiff for the borrowal of the suit amount, as rightly put forth, the defendant would have endeavored to suitably respond to the notices issued by the plaintiff. However, the defendant had not moved a little finger to deny the case of the plaintiff in the notices marked as Exs.A2 & 3. This would only go to show that the defence set out is a false one and unable to resist the claim of the plaintiff under Exs.A2 & 3, he has not chosen to respond to the same.

12. To cap it all, it is also found that though the defendant has taken various defences to stifle the plaintiff's suit, having admitted that the signature found in the cheque Ex.A1 has been put by him and when it is also found that the plaintiff has established his case beyond reasonable doubt through his evidence and through the evidence of PW2, S.Kumar,

one would have expected the defendant to repudiate the case of the plaintiff by subjecting himself to cross examination of the plaintiff with reference to his defence. But strangely in this case, the defendant has not chosen to examine himself. No document has also been marked on the side of the defendant in support of his defence. No reason, whatsoever, has also been given for the defendant, not entering the witness box. This would go to show that inasmuch as the defendant has no case to resist the plaintiff's claim, accordingly, he has chosen not to enter the witness box for subjecting himself to the cross examination of the plaintiff in the matter. Therefore, this aspect would also materially affect the defence projected by the defendant.

13. The first appellate Court has rejected the plaintiff's case on the footing that PW2, in his evidence, during the course of cross examination has stated that the defendant had not received the amount from the plaintiff. On that piece of evidence tendered by PW2 during the course of cross examination, the first appellate Court, disbelieved his evidence and also disbelieved the plaintiff's case in toto. It is not the case of the plaintiff that the defendant borrowed the suit amount from him in the presence of PW2 i.e. not pleaded in the plaint specifically. In such view of the matter, the evidence tendered by PW2 during the course of cross examination that the defendant did not borrow the amount from the plaintiff, by itself, would not lead to the conclusion that the plaintiff's case is false. On the other hand, if the evidence of PW2, adduced both during the chief examination and cross examination, is seen in its entirety, it is found that he had been called upon to tender evidence only with reference to the defence set out by the defendant and accordingly, he has clearly deposed about the falsity of the defence particularly that he had not been doing any zari business at any point of time and that, the suit cheque had not been issued to him by the defendant. No doubt, PW2, has stated that the defendant used to borrow amount from him and in connection with the same, he used to hand over cheque in his favour. On that ground, we cannot assume that Ex.A1 cheque has also been issued in blank form by the defendant to PW2 in connection with zari business. The fact of PW2 doing zari business has not been established by the defendant and the same has been specifically denied by PW2 and therefore, the foundation of the defence that the suit cheque had been issued in blank form to PW2 only in connection with zari business falls to the ground. Therefore, the further defence that PW2 had created the suit cheque in the name of the plaintiff to enrich himself also cannot be accepted in toto. It is found that the defendant has miserably failed to establish his defence version.

14. As regards the plaintiff's case, it has been established by the evidence of PWS1 & 2 as also the documents marked as Exs.A1 to 4. No evidence, whatsoever, has been placed by the defendant to disbelieve the plaintiff's case. Therefore, it could be seen that the first appellate court has erred in rejecting the plaintiff's case and therefore, as rightly put forth by the plaintiff's counsel, the first appellate court has misdirected itself against the evidence on record in the wrong perspective and based upon perverse findings has rejected the plaintiff's case. The plaintiff has established his case of borrowal of the suit amount by the defendant from him and also the issuance of Ex.A1 cheque in his favour in connection with the said borrowal. On the other hand, the defendant has failed to establish his defence version and in such view of the matter, it has to be held that the defendant has failed to discharge the burden resting upon him as per law.

15. In the light of the above reasons, I hold that the plaintiff has established his case that the defendant has borrowed the suit amount from him and issued Ex.A1 cheque in his favour in acknowledgment of the sum borrowed. The defendant has failed to establish the defence version. Accordingly, the substantial question of law formulated for consideration in this second appeal is answered in favour of the plaintiff and against the defendant.

In conclusion, the judgment and decree dated 08.10.2010 passed in A.S.No.65 of 2008 on the file of the Sub Court, Kancheepuram are set aside and the judgment and decree dated 28.09.2007 passed in O.S.No.99 of 2006 on the file of the Principal District Munsif Court, Kancheepuram, are confirmed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

sms

To

1. The Sub Judge, Kancheepuram.

2. The Principal District Munsif, Kancheepuram.

+2ccs to Mr.K.Chandusurajan,Advocate sr.12355

+1cc to Mr.K.M.Balaji,Advocate sr.13184

S. A.No.846 OF 2011
and M.P.No.1 of 2011

nm(co)

ss(10/4/2017)