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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.01.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(MD)No.17 of 2017 (PD)
and
C.M.P(MD)No.46 of 2017

V.Mohamed Khadar ..Petitioner/ Petitioner/ Defendant

Vs.

T.Venugopal .. Respondent/Respondent/Plaintiff

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India, to set aside the Fair and Decreetal Order passed in I.A.No.225 of 2016 in O.S.No.46 of 2016 on the file of the I Additional District Court, Madurai, dated 02.11.2016 by allowing this civil revision petition.

For Petitioner : Mr. M.Mohamed Rafi
For Respondent : Mr. R.Suriyanarayanan

ORDER

The petitioner has filed this Civil Revision Petition to set aside the Fair and Decreetal Order passed in I.A.No.225 of 2016 in O.S.No.46 of 2016 on the file of the I Additional District Court, Madurai, dated 02.11.2016.

2.The petitioner is the defendant. The respondent is the plaintiff. The respondent filed suit in O.S.No.46 of 2016 for recovery of money. The petitioner filed I.A.No.225 of 2016 under Order 7 Rule 11(d) of Code of Civil Procedure to reject the plaint. According to the petitioner, he borrowed only a sum of Rs.2,50,000/- from the respondent in the month of September and October, 2009 and he was paying Rs.25,000/- per month as interest from 24.11.2009 to 24.11.2014. The respondent threatened the petitioner and took acknowledgment and post dated cheque. Subsequently, the petitioner paid a sum of Rs.2,50,000/- and settled entire account. The petitioner gave acknowledgement in a white paper. The respondent did not return the cheque. Petitioner gave complaint to the police. The respondent also initiated Criminal proceedings based on returned cheque.

3.The respondent filed counter affidavit and denied all the averments made in the affidavit. According to the respondent, the petitioner borrowed a sum of Rs.9,00,000/- for his brick-kiln business and subsequently, he did not repay the loan. On 24.09.2014

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account was taken and a sum of Rs.17,55,676/- was found due. The petitioner acknowledged his liability and issued cheque, dated 01.11.2014 for a sum of Rs.17,55,676/- for repayment of amount found due on that date. On presentation, the said cheque was returned for want of funds. Again, the petitioner issued another cheque, dated 20.03.2015. The said cheque also was returned on presentation for want of sufficient funds and hence, respondent filed suit. According to the respondent, the petitioner acknowledged his liability and issued cheque dated 01.11.2014 for Rs.17,55,675/- for repayment of the amounts due. Therefore, the respondent filed suit within three years of acknowledgment and within three years from the date of cheque.

4.The learned Judge considering the averments made in affidavit and counter affidavit, judgment relied on by the counsel for the petitioner and arguments of learned counsel for parties, dismissed the application holding that only averments made in the plaint are necessary while considering the application under Order 7 Rule 11 of CPC and respondent has stated that the petitioner has acknowledged his liability and issued cheque, which were denied by the petitioner. The respondent has stated that suit was filed within three years from the date of acknowledgment and return of cheque. Whether suit is barred by limitation or not is a mixed question of law and facts, which can be decided only after trial while considering the evidence let in by parties.

5.Against the said order of dismissal, the petitioner has filed the Present Civil Revision Petition.

6.The learned counsel for the petitioner reiterated the grounds and submitted that the suit is clearly barred by limitation as respondent has not filed suit within three years of borrowing. In support of his case, the learned counsel for the petitioner relied on the following judgment:-

(ii)AIR 1985 GUJARAT 21 (Bhavnagar Salt & Industrial Works Pvt. Ltd., Bhavnagar, v. Union of India and another)

> *"........Article 24 is a provision which specifically deals with the refund of money payable by a defendant to the plaintff for money received by the defendant for the plaintiff's use. In this Article which will govern the case in hand because the amount was paid to the Company for the petitioner's use I.e. for the allotment of shares in his name. According to this Article, the period of limitation of three years will run from the date when the money is received. It is common case of the parties that money was received in the year 1982 and the present petition was filed in 1993. The recovery of the amount, on the face of it, had become barred by time......."*

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7.Per contra, the learned counsel for the respondent/Caveator submitted that after borrowing the amount, the petitioner acknowledged his liability on 24.09.2014 and issued a cheque on 01.10.2014 for amounts found due. On the date of presentation, the said cheque was returned and the petitioner issued another cheque, dated 20.03.2015 for the said amount. The said cheque was also returned. The respondent filed suit within three years from the date of the acknowledgment and receipt of cheques. In support of his case, the learned counsel for the respondent relied on the following judgment:-

(i)AIR 2008 SC 363 C.Natarajan vs. Ashim Bai and another)

11. However, we may notice that another Divisional Bench of this Court, in Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and Ors. (2006) 5 SCC 658, stated the law thus:

After hearing counsel for the parties, going through the plaint, application under Order VII Rule 11(D) CPC and the judgements of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order VII Rule 11(d) of the Code of Civil Procedure.

25. When the averments in the plaint are considered in the background of the principles set out in Sopan Sukhedo case the inevitable conclusion is that the Division Bench was not right in holding that Order VII Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence to be adduced. It is not a case where the suit from statement in the plaint beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order VII Rule 11. This is not so in the present case."

(ii)(2015) 4 CTC 747 (Sarala Vasu and others vas. Belair Corporation Private Limited and others)

10. A perusal of the above decision of the Supreme Court shows that a reading of the plaint must ex-facie show that the suit is barred by time/limitation, otherwise, the plaint cannot be rejected under Order 7 Rule 11 CPC. In other words, if the conclusion regarding the plea of limitation is possible and could be arrived at only upon

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consideration of pleadings, supported by evidence by allowing the parties to go on for trial, such an issue raised, undoubtedly, a mixed question of fact and law, cannot be considered as a ground to reject the plaint. In fact, by following the above decision of the Apex Court reported in 2006(5) SSC 658 (Balasaria Construction (P) Ltd. v. Hanuman Seva Trust), I myself, held, in the case of V.P.Narayanasamy Vs. Gurusamy, that the issue regarding limitation requires a trial, and therefore, the same cannot be made as a ground to reject the plaint.

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8.It is well settled that while considering the application under Order 7 Rule 11 of CPC, the averments made in the plaint only are necessary to decide the issues. The averments mentioned in the written statement or affidavit filed in support of the petition to reject the plaint cannot be considered. In the present case, the petitioner claims that the suit is barred by limitation as respondent has not filed suit within three years from the date of borrowing. On the other hand, a reading of the plaint reveals that the respondent has stated that the petitioner acknowledged his liability and issued cheques. The learned counsel for the respondent submitted that the suit is filed within three years from the date of acknowledgment and date of receipt of the cheque. Whether acknowledgment given by the petitioner is valid or not has to be considered only after conclusion of trial based on the evidence let in by the parties. The learned Judge considered the said preposition and rightly dismissed the application by giving cogent and valid reason and there is no illegality or irregularity warranting interference by this Court. The judgment relied on by the counsel for the respondent is squarely applicable to the facts of the case. In the circumstances, the judgments relied on by the counsel for the petitioner is not applicable to the facts of the present case and does not advance the case of the petitioner.

9. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

To

The I Additional District Judge, Madurai,

+ 1 CC TO Mr.R.SURYA NARAYANAN, ADVOCATE IN SR No. 1649
AM
TE/MR-VB : 07/02/2017 : 4P/3C

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