THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1022 of 2017

06.11.2017

Between:

Nalluri Satyanarayana, S/o.Sarvaiah

… Appellant/
Appellant/Defendant

And

Tumma Appi Reddy, S/o.Kodanda Rami Reddy

… Respondent/
Respondent/Plaintiff

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1022 of 2017

JUDGMENT:

This appeal is filed by the defendant challenging the decree and judgment dated 08.6.2017 in A.S.No.28 of 2014 on the file of Court of VII Additional District Judge, Khammam, confirming the decree and judgment dated 27.9.2013 in O.S.No.122 of 2010 on the file of the Court of Senior Civil Judge, Khammam, decreeing the suit filed for recovery of money.

2. For the sake of convenience, the parties hereinafter will be referred to as they were arrayed in the suit.

3. The case of the plaintiff is that on 10.2.2008 the defendant had taken hand-loan of Rs.1,30,000/- from him agreeing to repay the same within a period of one month. On 23.3.2008, the defendant, expressing his financial constraints, executed a letter of even date (Ex.A1) acknowledging the hand-loan. For one reason or the other, the defendant did not choose to pay the amount within the stipulated time; therefore, the plaintiff issued legal notice dated 30.1.2009 (Ex.A2) directing the defendant to pay the amount. On 09.2.2009, the defendant issued reply notice (Ex.A3) and on 20.3.2009 the defendant issued rejoinder (Ex.A4). Having no other alternative, the plaintiff was constrained to file the suit for recovery of Rs.1,30,000/- with interest and costs.

4. The case of the defendant is that he does not know the plaintiff. One Are Venkata Reddy, by suppressing the factum of his employment in Singareni Collieries, worked under him. Taking advantage of his employment under the plaintiff, he committed

theft of letter pads of the defendant and created Ex.A1 letter dated 23.3.2008 in collusion with the plaintiff. The defendant totally denied the execution of Ex.A1 letter dated 23.3.2008.

4. Basing on the above pleadings, the trial Court framed the following issues for trial:

> (1) Whether the hand-letter executed by the defendant is true, valid and binding on the defendant?
>
> (2) Whether the plaintiff is entitled to recover the suit amount?
>
> (3) To what relief?
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> <u>Additional Issue:</u>
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> Whether prior transaction dated 10.2.2008 relating to the borrowal of Rs.1,30,000/- by the defendant from the plaintiff is true, valid and binding on the defendant?

5. To substantiate the case, plaintiff examined himself as P.W.1 besides examining P.Ws.2 to 4 on his behalf and got marked Exs.A1 to A4. To demolish the case of the plaintiff, the defendant examined himself as D.W.1 but no document was marked on his behalf.

6. Basing on the oral and documentary evidence available on record, the trial court decreed the suit with costs for a sum of Rs.1,30,000/- with interest thereon (a) at the rate of 24% per annum from 30.1.2009 (the date of legal notice) till the date of filing of the suit, (b) thereafter at the rate of 12% per annum till the date of decree, and (c) thereafter at the rate of 6% per annum till realization. Feeling aggrieved by the decree and judgment dated 27.9.2013, the defendant preferred A.S.No.28 of 2014 on the file of the Court of VII Additional District Judge, Khammam, and the same was dismissed by decree and judgment dated 08.6.2017. Hence the defendant preferred the present second appeal.

7. Sri M.M.M.Srinivasa Rao, learned Advocate, representing Sri Kowturu Pavan Kumar, learned counsel for the appellant, strenuously submitted that the Courts below have not properly considered the factual and legal aspects.

8. The following two points have been raised by the learned counsel for the appellant as the substantial questions of law:

> (1) Whether both the Courts justified in decreeing the suit for money without there being any pro-note or authenticated document only on the basis of Ex.A1, a letter of alleged acknowledgement even which is not in accordance with law?
>
> (2) Whether both the Courts justified in decreeing the suit on the basis of alleged letter dated 23.3.2008 which is on the face of it not admissible in evidence and also grant of interest without there being any recital to that extent?

9. Let me consider whether the questions raised by the learned counsel for the appellant will fall within the ambit of Section 100 of CPC or not.

Point No.1:

10. Since the plaintiff filed the suit basing on Ex.A1 letter, the burden of proof lies on him as to its execution. Once the plaintiff discharges his burden, then the onus of proof shifts on to the defendant.

11. The plaintiff filed the suit for recovery of Rs.1,30,000/- basing on the letter dated 10.2.2008 (Ex.A1). The testimony of P.W.2 clearly reveals that he is one of the attestors of Ex.A1. As seen from the testimony of P.W.3, he is the elder in whose presence the defendant executed Ex.A1 letter. As seen from the testimony of P.W.4, he is the scribe of Ex.A1 letter. In the cross-examination of

these four witnesses, nothing is elicited to shake their testimony so far as its contents, execution and attestation are concerned.

12. The plaintiff got issued legal notice dated 30.1.2009 (Ex.A2) directing the defendant to pay the amount within one week thereafter. The defendant got issued reply notice dated 09.2.2009 (Ex.A3) and rejoinder dated 20.3.2009 (Ex.A4). Either in Ex.A3 or in Ex.A4, it is not mentioned that Ex.A1 does not bear the signature of the defendant. The burden of proof lies on the defendant, having admitted his signature on Ex.A1. The case of the defendant is that P.W.2, suppressing his employment in Singareni Collieries, worked under him at the time of his project work under ITDA, Sudimalla, and committed theft of his letter pads. It is the further case that P.W.2 had taken his letter pads and created Ex.A1 in collusion with the plaintiff. If really P.W.2 was an employee in Singareni Collieries, at the relevant point of time, what prevented the defendant to prove the same by adducing evidence. No evidence was let in by the defendant on that aspect. The defendant failed to establish that Ex.A1 was brought into existence by P.W.2 in collusion with P.W.1. I am fully agreeing with the finding recorded by the Courts below that Ex.A1 letter is valid and binding on the defendant.

13. The next contention of the learned counsel for the appellant is that Ex.A1 is a hand-letter and the same is not admissible in evidence. A perusal of the record reveals that the defendant did not raise any objection at the time of marking the hand-letter dated 10.2.2008 as Ex.A1. Having not taken any objection at the time of marking Ex.A1, the defendant is estopped from taking the

plea of admissibility at the stage of second appeal. In order to appreciate the contention of learned counsel for the appellant, this Court is placing reliance on the following decisions:

(1) **Lothamasu Sambasiva Rao v Thadwarthi Balakotiah**[1], wherein eight-Judges Bench of this Court held at paragraph Nos.174 and 175 as follows:

> 174. The Small Cause Suit was filed by the plaintiff on the foot of a promissory note dated 28th of April 1966 executed by the 1st defendant in her favour for Rs.375 /- and the suit was to recover Rs.437 /-. Defendants 2 and 3 are the sons of the first defendant; but defendants 1 and 3 remained ex-parte and only the second defendant contested the suit. It is true, that the promissory note was not sufficiently stamped. But no objection was taken by the office. The husband of the plaintiff went into the box as P.W.1. During his examination-in-chief, the promissory note was marked as an exhibit and received in evidence without any objection. It was duly endorsed by the presiding officer as required by the Civil Procedure Code. Thus, it became an exhibit and part of the record. It was only during the cross-examination of P. W. 1 that the insufficiency of the stamp on the promissory note was noticed and then objection was raised as to the maintainability of the suit on such promissory note. The lower Court found that the first defendant died, in fact, receive the amount of Rs.375 /- and also held that Section 35 was only a bar to the admissibility of an unstamped or insufficiently stamped document. But when it was admitted in evidence it cannot afterwards be withdrawn. Consequently, it decreed the suit. Therefore, the second defendant has brought this revision petition.
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> 175. Section 36 of the Stamp Act provides that:
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> > where an instrument has been admitted in evidence such admission shall not except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.
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> Therefore, in view of the undoubted fact that the promissory note had been admitted in evidence no objection could be raised at any stage in the suit that it was not duly stamped. Section 35 is only a bar to the admissibility of unstamped or insufficiently stamped documents. Since an unstamped document is inadmissible in evidence, the Full Bench in C.R.P. No. 255/65 and batch dated 3-10-1972 took the view that no suit can be laid on such admissible document. But, that principle has no application to the facts of the present case for the reason that the promissory note had already

[1] AIR 1973 AP 342 (FB)

> become part of the record as one of the exhibits. Therefore, the principle laid down by the Full Bench has no application. The lower Court is, therefore, right in decreeing the suit when it came to the conclusion that the promissory note was supported by consideration. For this reason the revision petition must be found as having no merits. It is accordingly dismissed with costs.

(2) **Puvvada Sivaji v Alamuri Mallikharjuna Rao** [2], wherein this Court held at paragraph No.3 as follows:

> 3. It is a well-settled principle that once a document is marked, the appellate authority cannot go into the admissibility of the document. It is a fact that the petitioners have taken objection in their written statement, but when no objection was taken at the time of marking the document and when once the document is marked, this itself amounts to application of judicial mind of the officer with regard to the admissibility of the document.

The same principle was reiterated by a Division Bench of this Court in **K.M.Surya v L.Jaya Rama Reddy**[3].

14. A perusal of the record reveals that the plaintiff paid penalty before marking of Ex.A1 document. Once the Court marks the document after payment of necessary penalty, the opposite party is not entitled to take an objection with regard to admissibility of such document. Therefore, I am of considered view that point No.1 raised by the learned counsel for the appellant is not a substantial question of law, as contemplated under Section 100 of Cr.P.C.

<u>Point No.2</u>:

15. The next question that falls for consideration is whether the Courts below are justified in granting interest in the absence of interest clause in Ex.A1. As rightly pointed out by the learned counsel for the appellant, there is no interest clause in Ex.A1. It is needless to say that in civil proceedings, the litigation starts from the date of issuance of legal notice. It is an admitted fact that the

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[2] 1994 (2) ALT 589
[3] MANU/AP/1053/2010

plaintiff got issued legal notice dated 30.1.2009 (Ex.A2) directing the defendant to pay the amount covered under Ex.A1 within one week, failing which the plaintiff is entitled to interest on such amount at the rate of 24% per annum. The relevant portion is as follows:

> Hence, I hereby call upon you to repay the Rs.1,30,000/- with interest @24% per annum accrued there upon within 7 days from the date of receipt of this notice, otherwise my client is constrained to take appropriate legal action against you, for which you alone will be held responsible for costs and consequences thereon.

16. A perusal of the above clearly demonstrates that if the defendant failed to pay the amount within 7 days, the plaintiff claims interest at the rate of 24% per annum. The defendant got issued Ex.A3 reply notice and Ex.A4 rejoinder. Either in Ex.A3 or in Ex.A4, the defendant has not taken a specific plea that the plaintiff is not entitled to claim interest. Even in the written statement also, the defendant has not taken such a plea. If the plaintiff pleads a particular fact, it is the duty of the defendant either to admit or deny the said fact specifically. If the defendant did not specifically deny the fact in the written statement, it amounts to admission of such a fact, though not directly, by necessary implication. The defendant, having not taken a plea that the plaintiff is not entitled to claim interest at the earliest point of time i.e., either in Ex.A3, A4 or in the written statement, is not entitled to take such a plea at the stage of second appeal.

17. Whether the plaintiff is entitled to interest or not is purely a question of fact. The first appellate court is the final fact finding authority. To substantiate the argument, learned counsel for the appellant has drawn the attention of this Court to the following decisions:

(i) **Syndicate Bank v N.C.Kalyani Raghavan**[4], wherein the Madras High Court held at paragraph No.3 (of Manupatra) as follows:

> 3. … … This court holds that the case of the plaintiff had been established beyond all reasonable doubt and what is more it is only with respect to the rate of interest as there is only a blank space exhibiting in the column intended for the same in Ex.P.1, and that there has not been documentary evidence emanating from PW.1, regarding the rate of interest at 18 per cent per annum this court allows the interest at 6 per cent per annum from the date of the institution of the suit. The court specifically holds that inasmuch as the rate of interest is blank in Ex.P.1 till the date of the institution of the suit. It is only from the date of the institution of the suit to the date of decree at the rate of 6 per cent per annum will be actually are which will be governing the rate of interest. The decree passed accordingly.

In the case cited supra, the plaintiff did not issue legal notice prior to filing of the suit claiming interest from the defendant therein. In the instant case, the plaintiff got issued legal notice; therefore, the decision cited by the appellant is no way helpful to the appellant to substantiate his stand.

18. In order to appreciate the above contention, this Court is placing reliance on the judgment in **B.S.Rajput v M/s.The Cellar**[5], wherein the point that fell for consideration is whether the trial court is justified in law in not awarding interest on the suit amount for the period from 28.10.1984 to 08.10.1985. While answering the point, the Karnataka High Court held at paragraph Nos.7 and 8 (of Manupatra) as follows:

> 7. In the instant case, as per Ex. P.4, the plaintiff has issued notice demanding interest. Ex. P.4 was served upon the 2nd respondent on 28-10-1984. The suit was filed on 8-10-1985. Therefore, the plaintiff was entitled to interest for the period from 28-10-1984 to 8-10-1985.

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[4] AIR 1983 Mad 254

[5] AIR 1993 Kant 9

> 8. The next question for consideration is whether the plaintiff is entitled to interest at 18% per annum as claimed in Ext. P. 4. Under the Interest Act, the party is entitled to Interest at the "current rate of interest" which expression is defined in clause (b) of section 2 of the Interest Act, as meaning, the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of schedule banks in accordance with the direction given or issued to the banking companies generally by the Reserve Bank of India under the Banking Resolution Act, 1949. Therefore, taking into consideration the definition of the expression current rate of Interest" as contained in clause (b) of Section 2 of the Interest Act, we are of the view that the interest at the rate of 15% p.a. would be just and appropriate as that was the maximum rate of interest that was being paid on different classes of deposits during the period from 28-10-1984 to 8-10-1985. Accordingly we answer the point raised for determination as follows:
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> > The trial Court is not justified in refusing to award interest on the suit claim for the period from 28-10-1984 to 8-10-1985. It ought to have awarded interest on the suit claim for the aforesaid period at 15% per annum.

The facts of the case on hand are almost identical to the facts of the case in **B.S.Rajput**. The Hon'ble apex Court, while considering scope of Section 3 of the Interest Act in **State of Rajasthan v Ferro Concrete Construction Pvt. Ltd.**[6], held at paragraph Nos.34 and 35 (of Manupatra) as follows:

> 34. The position regarding award of interest after the Interest Act, 1978 came into force, can be stated thus:
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> (a) where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with the such contract.
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> (b) where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.
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> (c) where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of Interest Act will apply in regard to the pre-suit or pre- reference period and consequently interest will be payable:
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> > (i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

[6] (2009) 12 SCC 1

> (ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.
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> (d) payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of Interest Act, 1978 but by the provisions of Section 34 of Code of Civil Procedure 1908 or the provisions of the law governing Arbitration as the case may be.
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> 35. Therefore, even in regard to claims for damages, interest can be awarded for a prior to the date of ascertainment or quantification thereof if (a) the contract specifically provides for such payment from the date provided in the contract; or (b) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be due from the date when they became due.

19. Section 34 of CPC confers discretionary power on the Court to grant interest. If the suit is filed for recovery of money, the Court may grant 12% per annum or agreed rate of interest for the period from the date of filing of the suit till the date of decree. For the post-decree period i.e., from the date of decree till its realization, the Court may grant interest at the rate of 6% per annum. The Courts below exercised discretionary power judiciously keeping in mind the scope of Section 34 of CPC.

20. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the Courts below are justified in granting interest. Point No.2 urged by the learned counsel for the appellant will not fall within the ambit of Section 100 of CPC. There is question of law much less substantial question of law that arise for consideration in this second appeal.

21. In the result, the second appeal is dismissed at the admission stage. The miscellaneous petitions, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J

November 06, 2017.
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