THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

A.S.No.1127 of 2004

JUDGMENT:

The appellant filed this appeal against the judgment dated 14.10.2003, in O.S.No.277 of 2000, on the file of the II Additional Senior Civil Judge, Warangal, by and under which, the learned Senior Civil Judge decreed the suit of the respondent filed for recovery of money.

2. For convenience, the parties are referred to as ‘plaintiff’ and ‘defendant’.

3. The brief facts of the case are as under:

The defendant is Landlord of a shop, situated at RNT Road, Warangal, having 1/3rd share in it, in which, the husband of the plaintiff was doing business as a tenant. On the request of the defendant and with the consent of her husband, the plaintiff gave Rs.2,25,000/- to the defendant on 20.10.1997, for which, as a collateral security, the defendant executed Ex.A1 promissory note in her favour agreeing to repay the same with interest @24% per annum. When the plaintiff and her husband demanded security for the said amount, the defendant executed Ex.A3 agreement, mortgaging his 1/3rd share in House No.8-11-34, RNT road, Warangal in favour of the plaintiff, stating that he will repay the amount within 30 months, and in the event of failure, the plaintiff may take over his 1/3rd share in the said property. The defendant committed default in payment of the loan amount. The plaintiff got issued Ex.A4 legal notice on 03.10.2000, but the defendant did not give any reply, having received the same. Hence the plaintiff filed the suit for recovery of the suit amount of Rs.3,87,000/- with agreed interest.

The defendant filed written statement denying the averments of the plaint and further contended that he did not take any amount from the plaintiff and did not execute any agreement in favour of the plaintiff. The defendant stated that the husband of the plaintiff is a tenant of one mulgi, and he is entitled to 1/3rd share in rental amounts. Since 23 years the husband of the plaintiff was not paying rents and the rent of the mulgi is Rs.3,500/- per month. The rent is being enhanced from time to time. As per calculations, the husband of the plaintiff is due for Rs.5,13,500/- towards rents for the mulgi, out of which, the defendant is entitled to 1/3rd share, amounting to Rs.1,71,166/-. The defendant further stated that in one transaction, the husband of the plaintiff obtained his signatures on blank two promotes, two cheques, white papers and two stamped papers and the same were not returned in spite of several requests, and the same were misused by the plaintiff and filed the present suit.

4. On the basis of pleadings of both sides, the Court below framed following issues.

1. Whether the plaintiff had obtained blank pronote and cheques from the defendant?
2. Whether the plaintiff is entitled to the suit amount?
3. To what relief?

5. On behalf of plaintiff, the husband of the plaintiff was examined as PW 1 and examined PWs 2 & 3 on her behalf and marked Exs.A1 to A6. On behalf of defendant, no oral or documentary evidence was adduced.

6. After considering the oral and documentary evidence let in on behalf of the plaintiff, the Court below decreed the suit, observing that the plaintiff established her claim by examining her husband and scribe of the

documents, and though the defendant raised several contentions, he did not enter into the witness box to prove his contentions.

7. Learned Counsel appearing for the appellant/defendant submitted that the trial Court has erred in not framing the issue as to whether the plaintiff is a moneylender as defined in sub-section (7) of Section 2 and whether he has complied with the provision of Section 3 and Clause 5 (a) and (b) of sub-Section (1) of Section 5 and sub-Sections (1) and (2) of Section 6 of A.P. (Telangana Area) Money Lenders Act. It is further submitted that the Court below has erred in appreciating the evidence on record in the manner in which it did, that the plaintiff who filed the suit has not been examined and instead her husband is examined as PW.1, that he did not participate in the suit during trial due to the fact that he was not informed about the progress of the suit by his Advocate and that therefore the Judgment and Decree is liable to be set aside. It is also submitted that the husband of the plaintiff is a tenant in the mulgi which belongs to the defendant and for several years the rents are not being paid and there are arrears more than Rs.2 lakhs due as on the date when the suit was filed and in order to avoid the same, the present suit is filed with the help of the blank promissory notes which the husband of the plaintiff obtained from the defendant in connection with some other transaction.

8. Learned Counsel appearing for the respondent/plaintiff submits that the Court below has properly appreciated the evidence on record, that neither in the pleadings nor in the evidence it is brought out that the plaintiff is a moneylender so as to require an issue on that aspect being framed and therefore there is no substance in the objection of the learned

Counsel appearing for the appellant/defendant that the suit is bad for non-framing of the issue. With regard to the evidence, it is submitted that the very case of the plaintiff is that she has lent the amount to the defendant with the permission of her husband and that since he was in knowledge of the entire dealings, he gave evidence and no capital can be made out of the non-examination of the plaintiff herself.

9. The contention of the appellant/defendant is that the trial Court ought to have framed the issue as to whether the plaintiff is a moneylender as per the definition contained in sub-section (7) of Section 2 and whether he has complied with the provision of Section 3 and Clause 5 (a) and (b) of sub-Section (1) of Section 5 and sub-Sections (1) and (2) of Section 6 of A.P. (Telangana Area) Money Lenders Act and since that issue is not framed and adjudicated, the suit is liable to be dismissed.

10. Learned Counsel appearing for the appellant relies upon a decision of our High Court reported in THOTA VENKATA RAO v. SUNKARA RAJA KUMAR[1] in support of his contention. Learned Single Judge of our High Court in para 11 observed as under:-

> "The Judgments relied upon by the learned Counsel for the appellant speak that the burden is on the defendant to prove that the plaintiff-money lender has no licence and the suit itself is not maintainable. Whereas, the Judgments relied upon by the learned Counsel for the respondent would show that whether there is a pleding or no pleading, in a suit relating to a loan under the Act, it is the duty of the Court to frame issues, whether the plaintiff has money lending business licence and whether he has been maintaining accounts for the same as required under the Act. Thus, there is no conflict in the Judgments referred to by the learned Counsel on either side; one deals as to the burden of

[1] 2006 (3) ALT 729

the defendant to prove that the plaintiff has no money lending business licence when there is an issue framed and the other speaks that it is mandatory on the part of the trial Court, in view of Section 9 of the Act, to frame such issues and if such issues are not framed, the suit itself is liable to be dismissed. This is to give effective operation to the intendment of the Act. In view of the non-obstance clause with which Section 9 commences and the language of the provision itself, whether there is a pleading or not, the Court is bound to frame two issues. Under those circumstances, I am of the opinion that since the possession of Section 9 of the Act are mandatoryin its nature, as pointed out by the learned Counsel for the respondent, as held in *Agaiah's case (1972 (2) APLJ 17 (SN),* a duty is cast on the trial Court to frame such an issue and allow the parties to lead evidence. In this case there is no pleading in the plaint that the plaintiff is a money lender and he is maintaining accounts regularly as required under the law. The plaintiff also did not assert in his chief-examination that he is a money lender and he has got licence. In fact, it is in the cross-examination, the defendant elicited that the plaintiff is a money lender and the money lent to the defendant is from his agricultural income and not from the firm. However, the trial Court did not take note of this aspect. It is the appellate Court, which had pointed out that in the teeth of the provisions of Section 9 of the Act, without there being such an issue framed by the trial Court, the suit itself is not maintainable. But the appellate Court erred in not remanding the matter for the purpose of framing such issues and directing the trial Court to give opportunity to the parties to lead their respective evidence in this regard. Instead of that, for the mistake committed by the trial Court, the appellate Court has simply allowed the appeal and dismissed the suit, which, in my considered opinion, is not proper. The lower appellate Court ought to have remanded the matter to the trial Court for framing necessary issues ad allowing the parties to lead their evidence."

11. The facts of the case before the High Court are different from the facts of the case in hand. In the instant case, neither it is the case of the plaintiff that she is doing money lending business nor it is pleaded by the defendant that the plaintiff is a moneylender. Even in the evidence, nothing is elicited so as to warrant framing of an issue on that aspect. In the case before the High Court even though it was not pleaded in the pleadings but however the plaintiff in the cross-examination admitted that he is a moneylender but however the money lent to the defendant of that suit is from the agricultural income and not from the firm. In that view of the matter, the Court held that the suit is not maintainable and the issue was required to be framed. Accordingly, the High Court remanded the matter to the lower Court for framing an issue and allowed the parties to lead the evidence.

12. Learned Counsel appearing for the appellant also relied upon a Full Bench Judgment of our High Court reported in AZIZ AHMED KHAN v. I.A. PATEL[2] wherein it is laid down as under in para 7:-

> "We are not at all satisfied with the manner in which the case has been dealt with by the trial Court. One of the important functions of the trial Court is to settle all necessary issues, whether of fact or of law, arising out of the pleadings. If a question is raised that the suit is not maintainable under certain provisions of law, the Court cannot afford to lose sight of this material proposition which goes to the root of the matter.
>
> It has to necessarily frame an issue in that behalf. <u>It is surprising that the Court failed to notice that the plaint itself elicits that question and the written statement pointedly raises that issue and the Statute referred to enjoins that the Court shall frame and decide the issue</u>.

[2] AIR 1974 A.P. 1

The suit, having regard to the averments contained in the plaint, was for recovery of loans advanced on interest at Secunderabad where the A.P. (Telangana Area) Money Lenders Act was in force. <u>Of course, in para 9 it has been averred that the Money Lenders Act is not applicable. But the Court is not absolved from the duty to frame an issue under the mandate of the Statute</u>. Indeed, the defendant in para 11 has averred that the Money Lenders Act does apply and the suit is liable to be dismissed. Section 9 of the A.P. (Telangana Area) Money Lenders Act (V of 1349 F.) contains the following mandatory provisions:-

"9. Notwithstanding anything contained in any law for the time being in force, in every suit relating to a loan:

(1) the Court shall frame and decide the issues whether the money-lender is a money-lender as defined in Sub-Section (7) of Section 2, and whether he has complied with the provisions of Section 3 and of clauses (a) and (b) of sub-Section (1) of Section 5 and Sub-Sections (1) and (2) of Section 6;

(2) If it is proved that the plaintiff is a money lender as defined in Sub-Section (7) of Section 2, but does not hold a licence granted under Section 3, the Court shall dismiss his suit;

(2-A) if it is proved that the money lender has not complied with the provisions of clause (a) of Sub-Section (1) of Section 5, or of Sub-Section (1) of Section 6 or of Section 8 and the plaintiff's claim is established in whole or in part, the Court may, in the circumstances of the case, disallow the whole or any portion of the interest due and may disallow the cost wholly or in part;

(3) If it is proved that the money lender has not furnished the debtor with a statement of account in accordance with the provisions of clause (b) of Sub-Section (1) of Section 5 or of Sub-Section (2) of Section 6, the Court shall, in computing the amount of interest, exclude the interest in respect of every period for which the money lender has not furnished the debtor with the statement of account.

Provided that if the money lender has, after the prescribed time, furnished the statement of account and the Court is satisfied that there was sufficient cause for not furnishing the statement earlier, the Court may, in spite of such default, include such period or periods for computing the interest.

Explanation ….. …. ….. …."

<u>It is clear from the above provision that framing of an issue and decision of the same was obligatory on the part of the Court. No such issue was settled nor was this aspect of the</u>

case considered. Indeed, if the plaintiff was a money lender and did not possess a licence at the time when he advanced the amounts, the Court has no other choice but to dismiss the suit. Merits of the case do not then come up for consideration at all. Even if the claim is otherwise proved, the suit has to be necessarily dismissed for want of licence. This position in law is not open to doubt or dispute. As observed in *Kaloji Talusarjpa V. Khyanagouda (AIR 1970 SC 1420)* if the plaintiff at the date of the transaction was carrying on business as money lender without a licence, the Court is bound to dismiss the suit for recovery of the amounts advanced as money lender. Notwithstanding such a provision, under the Money Lenders Act, the trial Court had failed to comply with this mandatory provision. The *ex parte* decree as passed without consideration of this basic material question must, therefore, be set aside. The appeal has to be allowed and the case remanded on this very basis."

13. Upon carefully going through the authority cited, I have no hesitation in holding that the same is not applicable to the facts of the present case for the reason that in the instant case, neither there is a pleading nor evidence warranting framing of an issue about the maintainability of the suit. In the case before the Full Bench, it is specifically observed that however a question is raised that the suit is not maintainable under certain provisions of law the Court cannot afford to loose sight of this material proposition which goes to the root of the matter. In the case before the Full Bench there is specific averment in the plaint that the loan was advanced on interest at Secunderabad where A.P. (Telangana Area) Money Lenders Act was in force and it was also pleaded that the A.P. (Telangana Area) Money Lenders Act is not applicable. The defendant in that suit took up a specific plea that the A.P. (Telangana

Area) Money Lenders Act applies to the suit and the same is liable to be dismissed. In the instant case, neither there is a pleading nor any evidence to the effect that the plaintiff is a moneylender as was the case before the Full Bench.

14. Order 14 Rule 1 of CPC reads as under:-

"Framing of issues:-

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
(2) Material proposition are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
(3) Each material proposition affirmed by one party and denied by the other shall form the subject or a distinct issue.
(4) Issues are of two kinds:-
    (a) issues of fact,
    (b) issues of law.
(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or not law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence."

15. It is evident from the above that an issue need to be framed and answered if there is a pleading to that effect by either of the parties.

The question of framing and adjudicating upon an issue will arise when one party pleads it and the other denies it. When neither plaintiff the parties are on an issue, there need not be a specific issue to be framed and answered. The assertion and denial thereof should be either on the question of fact or law. When it is neither the case of the plaintiff that she lent the money to the defendant as a moneylender nor it is the case of the defendant that the plaintiff is a money lender there need not be an issue on that aspect and consequential finding that the plaintiff is not having a licence under the provisions of the Act and the suit is liable to be dismissed on that score alone.

16. In the instant case, it is not the case of the plaintiff that she is doing any money lending business and she has been lending money to people on interest as her avocation. When the transaction is purely personal loan in the shape of hand-loan or in between the close relatives or friends, it cannot be taken as a business activity under the A.P. (Telangana Area) Money Lenders Act warranting obtaining of a license and non-suing the person who lent the money on the ground that he has no moneylender's license. The facts of the case in hand are to the effect that the plaintiff and the defendant are in jural relationship and the husband of the plaintiff is doing business in a mulgi as a tenant of the defendant. According to the plaintiff, the defendant borrowed the amount as a loan. Therefore, in a case of this nature and in the absence of there being any evidence or pleading, it cannot be said that it was obligatory on the part of the trial Court to frame an issue as to whether the plaintiff is a moneylender and whether she has license to do the said business.

17. Not only there is a jural relationship between the plaintiff and the defendant, admittedly, the defendant is also said to be the uncle of the plaintiff. When there is a loan transaction in between realtives, whose

business is not to lend money, but a hand loan is given, it may not be necessary that there should be an issue irrespective of the fact as to whether there is any pleading or evidence to that effect or not.

18. What is now required to be seen is as to whether the plaintiff proved her case?

19. The case of the plaintiff as could be culled out from the averments is that her husband is a tenant of the defendant and the defendant borrowed a sum of Rs.2,25,000/- on 20.10.1997. It is further her case that she gave that amount to the defendant with the consent of her husband. The plea of the defendant is one of complete denial and it is contended that the husband of the plaintiff has withheld the rents for several years and only with an intention to avoid his liability, this transaction is created. From the contents of the written statement, what could be gathered is that he is not denying the execution of the promissory note as such. But according to the defendant, there was some other transaction in between them and in that connection, the husband of the defendant obtained his signatures on some blank promissory notes, cheques, bond papers and white papers. Out of those papers, the promissory note and one bond paper and one blank paper which contains the signature of defendant has been pressed into service. Ex.A1 is the promissory note whereas Ex.A3 is the agreement said to have been executed by the defendant on a stamp paper worth Rs.100/- stating that if that amount is not paid within thirty months, the plaintiff can take possession of the mulgi.

20. In support of the case of the plaintiff, her husband is examined as PW.1 and the brother of husband is examined as PW.2. No independent

witness has been examined. Though on behalf of the plaintiff, the chief affidavit of one Odela Sudhakar has been filed as PW.3 but however the plaintiff failed to produce the said witness for being cross-examined and the same fact has been noted on the docket of the Court on 21.07.2003. Therefore the evidence of PW.3 cannot be taken into consideration since he has not been produced for cross-examination. The husband in his evidence as PW.1 deposed that the amount has been lent by his wife after taking his permission.

21. Except for the testimony of the two brothers, no independent witness has been examined. The plaintiff herself did not enter the witness box. She has not authorized her husband to give evidence on her behalf. The transaction was money transaction and it is said to have been entered into in between the plaintiff herself and the defendant. The role of PW.1 in the said transaction is said to be only giving consent to the plaintiff to lend the amount to the defendant. Though PW.1 claims that he was present at the time of transaction, he did not put his signature in any of the papers even though several papers are said to have been signed at the time of transaction. Keeping in view the said aspects, the non-examination of the plaintiff will be detrimental to the case of the plaintiff since the defendant is denied of an opportunity to elicit from the plaintiff as to under what circumstances the transaction took place. Learned Counsel appearing for the appellant/defendant relied upon the Judgment of the Supreme Court reported in VIDHYADHAR v. MANKIKRAO AND ANOTHER[3] wherein it is held that where a party to the suit does not appear into the witness box and states his own case on

[3] AIR 1999 S.C., 1441

oath and does not offer himself to be cross-examined by the other side, the presumption would arise that the case set up by him is not correct. It is not as though that the non-examination of the plaintiff in every case will be taken as fatal but the totality of the material on record has to be taken into consideration. As already stated, in the instant case, it is a money transaction wherein the plaintiff is said to have lent money to the defendant which fact the defendant denied. Therefore, the non-examination of the plaintiff has to be taken as the case being set up by her as not correct.

22. Learned trial Judge did not consider this aspect in proper perspective and erroneously decreed the suit based on the evidence of the husband of the plaintiff and the brother of her husband. Therefore, the Judgment and decree cannot be sustained. The point is accordingly answered.

23. In the result, the appeal is allowed. Consequently, the Judgment and decree of the trial Court is set aside.

Pending Miscellaneous Petitions, if any, shall stand closed in consequence.

M.S.K.Jaiswal, J

Date: 22nd March, 2017

Dsr/smr