HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

Second Appeal No.1048 of 2007

JUDGMENT:

The present Second Appeal is preferred by the defendant having been unsuccessful throughout under Section 100 of the Civil Procedure Code, 1908 (for short, 'C.P.C.').

2. The respondent herein laid the suit for recovery of Rs.1,39,748/- with interest and costs in O.S. No.28 of 2000 on the file of Senior Civil Judge, Miryalaguda, Nalgonda District. The said suit was decreed by judgment and decree, dated 31.10.2006, for the said sum, with future interest at 12% per annum from the date of suit till the date of passing of decree on the principal amount of Rs.65,000/- and post-decree interest at the rate of 6% per annum till realization.

3. Aggrieved over the said judgment and decree, the defendant preferred Appeal Suit No.4 of 2007 on the file of V-Additional District & Sessions Judge (III-Fast Track Court), Nalgonda at Miryalaguda, under Section 96 of C.P.C. There also, he did not succeed to get the judgement and decree of the trial court set aside. Thus, the judgment and decree passed by the trial Court was confirmed by the lower Appellate Court on 26.3.2007. Further aggrieved by the aforesaid judgment and decree of the lower Appellate Court, the present Second Appeal is preferred formulating the following substantial questions of law in paragraph-6 of the grounds of appeal:

"(i) Whether the Courts below violated the mandatory provisions of Section 3 of the Limitation Act in not dismissing the suit of the plaintiff which is barred by limitation and whether the judgment of the Trial Court is liable to be set aside?

(ii) Whether both the courts committed illegality in decreeing the suit by ignoring the conduct of the plaintiff who has redelivered back the bounced cheque Ex.B1 to the defendant without taking any coercive steps in view of receipt of loan amount in cash from the defendant, therefore, whether the suit is liable to be dismissed?

(iii) Whether the judgments of the courts below are result of misappreciation of the evidence on record and evidence of both the courts are liable to be set aside being perverse and being contrary to record?

(iv) Whether the judgments of the courts below are liable to be set aside as the plaintiff failed to discharge his burden to prove his case with regard to liability of the suit claim against the defendant, as required under Section 101 of the Indian Evidence Act and whether the courts below committed illegality in not drawing adverse inference against the plaintiff?

(v) Whether awarding exorbitant costs by the courts below is violative of section 35 of the CPC and amounts to failure of exercise of power of discretion vested in the courts and whether the decrees vitiated in law?"

4. However, while admitting the Second Appeal, thisCourt formulated the following two substantial questions of law"

(i) Whether the suit is barred by limitation?

(ii) Whether there is perversity in the judgments of the Courts below?

5. Heard Sri L. Prabhakar Reddy, learned counsel for the appellant, and Sri P. Prabhakar Rao, learned counsel for the respondents.

6. The submission of Sri L. Prabhakar Reddy, learned counsel for the appellant so far as the first substantial question of law is concerned that since the promissory notes Ex.A-1 relate to the date

18.7.1996 and since the suit was instituted on 12.6.2000, the claim was clearly barred by limitation and the Courts below did not properly appreciate the evidence, but just based on part payment of Rs.15,000/- which amount was paid towards interest. The learned counsel would submit that Rs.1,05,000/- paid by the appellant to the respondent was not evidenced by any receipt since the respondent-plaintiff failed to pass any receipt and the very fact that cheque for Rs.1,05,000/- issued by the appellant was returned to the appellant by the respondent is sufficient to prove that the amount of Rs.1,05,000/- was paid by the appellant and this aspect was not properly appreciated by the Courts below and thereby rendered perverse finding observing that the cheque of Rs.1,05,000/- was returned by the respondent-plaintiff on the asking of the appellant, and, therefore, the Second Appeal has to be allowed by setting aside the judgment and decree.

7. These submissions have been countered by the learned counsel for the respondent-plaintiff, Sri P. Prabhakar Rao, contending that the payment of Rs.15,000/- is not disputed by the appellant in his evidence nor in the pleadings, though, claimed to have been paid towards interest is sufficient to bring the suit claim within time and even the circumstance that cheque for Rs.1,05,000/- was issued by the appellant on 20.08.1997, though, it was returned at the request of the appellant cannot be side-lined and thus, it renews liability and has to be construed as an acknowledgment of liability under Ex.A1 and, therefore, the Courts did not commit any error nor the findings

recorded by the Courts below can be viewed as tainted with illegality warranting interference.

8. A perusal of the material available on record i.e., pleadings and evidence of P.W.1 and D.Ws.1 to 3 would clearly reflect that the amount of Rs.15,000/- paid by the defendant to the plaintiff amounts to part payment and issue of cheque by the defendant for Rs.1,05,000/-, as could be gathered from the pleadings as well as the evidence of defendant as D.W.1 as he did not dispute issue of cheque though, he has taken a different stand, still, amounts to acknowledgment of liability, and, therefore, it cannot be said that the claim was barred by limitation and the Courts below did not properly appreciate it and did not advert to the bar of limitation. Thus, there is no merit so far as this submission is concerned, which constitutes first substantial question of law.

9. Turning to the aspect, whether there is any perversity in the findings recorded by the Courts below warranting interference. The Courts below did not go wrong in thrusting the entire burden on the defendant, who put forth the plea of discharge, based on return of promissory note marked as Ex.B3 and the Cheque Ex.B2 for Rs.80,000/-, dated 20.08.1997, by the defendant to the plaintiff. The Courts below concurrently recorded finding that the evidence of D.Ws.1 to 3 is not worthy of acceptance, and, in fact, D.W.3 was set up by the defendant as there was already dispute between the plaintiff and D.W.3 with regard to passage of drainage, which dispute was

existing for the past 10 years prior to examination of D.W.3 as a witness and even the Courts found that D.W.3 was not at all present at the time of settlement of accounts between the parties and thereby the lower Appellate Court recorded that the evidence of D.W.3 is untrustworthy and not helpful to the defendant to prove the plea of discharge.

10. From a perusal of the evidence of D.Ws.1 to 3 and P.W.1, it is to be held that the lower Appellate Court did not deviate in appreciating the evidence in accordance with evidentiary rule and discarding the evidence of D.W.3 cannot be faulted.

11. Thus, the plea of discharge put forth by the defendant was not substantiated by the defendant, more particularly, when the circumstances from which an inescapable inference has to be invariably drawn, they being, that passing receipt for alleged payment of Rs.1,05,000/- covered by Ex.B-2 was not insisted upon by the defendant and no reasons were assigned to explain it away by the defendant.

12. Thus, the submission of the learned counsel for the appellant-defendant that the findings recorded by the Courts below in appreciating Exs.B-2 and B-3 are patently perverse is without any merit.

13. Hence, there is no merit in the present Second Appeal, and, accordingly, the same is dismissed. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions if any pending in the present Second Appeal shall stand closed.

A.SHANKAR NARAYANA

Dt. 14.2.2018
MD / gbs