IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.01.2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.804 of 2010
and
M.P.Nos.1 of 2010 & 1 of 2011

Dr.P.Sundara Rajan,
S/o.Perumal Goundar,
Neuro Surgeon,
A.G.Neuro Hospital,
Ramakrishna Hospital,
Alagapuram Village,
Salem-636 007. ..Appellant/Defendant

vs.

1.P.N.Ammachi Gounder
2.P.N.A.Govindan
3.A.Tamilarasan
4.A.Raja Rajan
5.A.Dhanam(Died)
6.A.Anbukkarasi
7.A.Ezhilmani
8.A.Kalaiarasi
9.A.Malliga
10.A.Senthil kumar ..Respondents

RR2 to 5 brought on record as legal heirs of the deceased R1 vide order dated 05/12/16 made in M.P.Nos.1 & 2/2011 in A.S.No.804 of 2010.
RR6 to 10 brought on record as legal heirs of the deceased R5 vide order dated 17/12/2019 made in C.M.P.Nos.6140,6143, 6144

Prayer : First Appeal filed against the Judgment & Decree dated 29.09.2009 passed in O.S.No.172 of 2005 on the file of the Additional District Judge, Salem, FTC No.2, Salem.

For Appellant : Mr.S.Ramanarayanan
for M/s.Sampathkumar Associates
For Respondents : Mr.T.Murugamanickam
Senior Counsel
for Mr.V.Rajesh for RR2 & 3
RR1 & 5-Died steps taken
Non-appearance for R4.

J U D G M E N T

The appeal suit on hand is directed against the judgment and decree dated 29.09.2009 passed in O.S.No.172 of 2005 on the file of the Additional District Judge, Salem.

2. The defendant is the appellant in the appeal suit and the respondent/plaintiff instituted a suit for recovery of money with interest and costs.

3. The facts in nutshell as narrated in the plaint are that the defendant borrowed a sum of Rs.17,00,000/- from the plaintiff and issued a cheque No.063931 dated 11.03.2003 drawn on Bank of India Shevapet Branch, Salem-2. The plaintiff presented the cheque before the Indian Bank, Fairlands Branch, Salem-16 for encashment. The said Indian Bank had returned the cheque with an endorsement "payment stopped" by the drawer and the fact was intimated to the plaintiff. The Bank had returned the cheque with a memo dated 15.03.2003. The 'stop payment' instructions given by the defendant to his banker amounts to an offence punishable under Section 138 of Negotiable Instruments Act. The plaintiff issued a notice to the defendant on 25.03.2003 informing the dishonour and liability for prosecution. The defendant sent a reply containing false particulars. It is false to say that the plaintiff asked for a loan from the defendant and the defendant has issued the cheque to accommodate the plaintiff. The cheque was issued only towards the repayment of the debt due by the defendant to the plaintiff. The plaintiff filed a private complaint before the learned Judicial Magistrate No.3, Salem against the defendant and the learned Judge acquitted him. In this regard, the plaintiff preferred an appeal and the same is pending. The plaintiff issued a notice on 03.10.2005 to the defendant calling upon him to pay the entire sum of Rs.17,00,000/- with interest. The defendant received the notice on 05.10.2005. But, he has not repaid the due amount. Thus, the plaintiff was constrained to institute a suit for recovery of money with interest and costs.

4. The appellant/defendant denied the contention set out in the plaint by stating that the suit is unsustainable. The defendant borrowed a sum of Rs.17,00,000/- from the plaintiff and in discharge of the loan amounts, the defendant has issued a cheque is false. The defendant is a Neuro Surgeon. The plaintiff and his sons were owning lands in Salem in Alagapuram Pudur Village in T.S.No.2/8 and the defendant as the Managing Director of "A.G.Neuro Hospital Private Limited" had purchased lands from the plaintiff and his three sons, and also purchased an item of

immovable property from the plaintiff on 30.08.1995. The defendant was having very great respect towards the plaintiff and therefore, he had named the company as "A.G.Neuro Hospital Private Limited" in which AG was standing for "Ammachi Gounder". The plaintiff, during last week of February 2003, was requesting the defendant for a loan of Rs.17 lakhs which may be paid by 10th or 11th March 2003. The defendant agreed to advance a loan of Rs.17 lakhs to the plaintiff and asked the plaintiff along with his sons, to execute a promissory note and also asked the plaintiff to deposit the title deeds of his properties as security. The defendant used to go over to NIMHANS Hospital, Bangalore and Chennai frequently for his professional and other works. Hence, the plaintiff wanted the defendant to give him a post dated cheque dated 11.03.2003 so that he will be collecting the money on that date for his requirements. The plaintiff, after receiving the cheque, did not give the promissory note and did not also deposit the title deeds. So, the defendant sent a letter on 03.03.2003 to the plaintiff reminding him about the non-execution of promissory note. In that letter itself, the defendant has stated that he had sent a letter to the Bank with 'stop payment' instruction and even after service of the letter dated 03.03.2003, the plaintiff did not execute the promissory note and did not deposit the title deed. Hence, the defendant did not make sufficient provisions in the account and therefore, the cheque, when presented for collection, was returned without payment. The defendant also issued a notice to the plaintiff on 09.04.2003, calling him to prove the lending of Rs.17 lakhs in a Civil Court. But the plaintiff did not choose to file a civil suit but filed a complaint under Section 138 of Negotiable Instruments Act in C.C.No.180 of 2003 on the file of learned Judicial Magistrate No.3, Salem against the defendant and the same is dismissed.

5. The contention of the defendant was that there was no necessity to borrow money from the plaintiff. The defendant is an income tax payer and thereby, the income tax was paid for A.G. Neuro Hospital Private Limited by his individual capacity. The plaintiff has not produced any document to prove the lending of such huge amount as alleged in the plaint. Thus, the suit is to be rejected.

6. With reference to dispute, the Trial Court framed the issues as to whether the plaintiff is entitled to decree as prayed for? To what relief?

7. Additional issue was framed, whether the suit cheque was issued by the defendant in discharge of debt?

8. With reference to the additional issue, whether the suit cheque was issued by the defendant in discharge of debt, the Trial Court examined the documents as well as evidences produced by the respective parties. The contention of the defendant, with reference to the said issues, was that there was no specific pleading in the plaint that Ex.A1 cheque was obtained in discharge of promissory note. Though there is no specific pleadings with regard to the date of borrowal and the execution of promissory note made by the defendant, the plaintiff has made a reference about the promissory note debts in Ex.B1. He has deposed that the defendant borrowed a total sum of Rs.16 lakhs and executed three promissory notes on three different occasions. The plaintiff has pleaded in the plaint that the defendant had borrowed Rs.17 lakhs from him and for the due payment of the above lawful debt, the defendant issued Ex.A1 cheque. In this regard, the Trial Court formed an opinion that though there is no specific pleadings about the date of borrowal and the execution of promissory note, the plaintiff is entitled to take the advantage of presumption as envisaged in the aforesaid authorities, that Ex.A1 cheque was issued by the defendant in the discharge of promissory note debt.

9. The fact remains that the private complaint instituted by the plaintiff under Section 138 of Negotiable Instruments Act against the defendant before J.M.No.5, Salem ended in an order of acquittal. The main contention of the defendant was that the plaintiff and the defendant were having long standing relationship and therefore, he issued a post dated cheque as requested by the plaintiff and the said cheque was misused without complying his part. The post dated cheque was issued on account of the fact that the defendant would not be available in the month of March, and as directed by the plaintiff, he filled up the post dated cheque on 11.03.2003 and since the plaintiff failed to execute promissory note in favour of the defendant along with his sons and deposit of title deeds as promised, the defendant was constrained to send Ex.B5 notice on 03.03.2003 to the plaintiff and the plaintiff had admitted the receipt of the same in his evidence.

10. The contention of the plaintiff in this regard is that the notice dated 03.03.2003 was acknowledged by the plaintiff, at no point of time. The said notice was not sent through Registered post or delivered in person. Contrarily, it was stated that it was sent by the certificate of posting. Even the receipt of certificate of posting has not been marked as document. When the notice has been allegedly sent by the defendant to the plaintiff, the same is to be proved beyond doubt. As far as the said notice dated 03.03.2003 sent by the

defendant to the plaintiff is concerned, the same had not been established either by producing receipt of certificate of posting or any acknowledgement card. In the absence of any such proof, the Trial Court has rightly disbelieved the notice dated 03.03.2003 for the purpose of accepting the contention raised by the defendant in this regard.

11. It is the specific stand of the plaintiff that the defendant did not send Ex.B5 to the plaintiff and the defendant has admitted in his cross-examination that he has not produced any document to show that the said letter reached the hands of the plaintiff and in the absence of any documentary evidence, the Trial Court arrived at a conclusion that the said letter cannot be taken as a valid evidence on the side of the defendant. The Trial Court categorically made a finding that the receipt/acknowledgement of the letter dated 03.03.2003 had not been established, neither any document to that effect has been filed. Thus, the statement in this regard and the letter have not been believed for the purpose of considering the case of the defendant. The Trial Court elaborately discussed the manner in which the letter dated 03.03.2003 was sent by the defendant to the plaintiff and analysed the deposition of the plaintiff as well as the defendant and arrived at a conclusion that the letter cannot be taken as a valid evidence.

12. The trial Court further substantiated the contention regarding the return of cheque with an endorsement "stop payment" by stating that even in case of giving such instructions by the person, there must be funds in the accounts of that person. In other words, 'stop payment' instructions can be issued only when sufficient funds are available in the accounts and not otherwise. Even as per the defence of the defendant, the defendant was having bank balance of about Rs.49,000/- and therefore, he was not having sufficient funds so as to make out cheque for Rs.17,00,000/-. The Trial Court, relying the judgment of the Supreme Court in this regard, arrived at a conclusion that a person who issued a cheque must have sufficient funds in his account so as to issue instructions of "stop payment". In the absence of sufficient funds, the instructions of "stop payment" cannot be issued and such an instruction is legally unacceptable.

13. The contention raised by the defendant, even before the Trial Court, is that he is an income tax assessee, paying huge amount to the income tax and there was no necessity to borrow a loan from the plaintiff. This apart, the plaintiff could not able to establish that he was possessing Rs.17 lakhs, during the relevant point of time, and in the absence of any proof to

establish that he was having sufficient funds to pay loan to the defendant, the suit is liable to be dismissed. The defendant has produced income tax documents and established that he is an assessee. He was paying huge amount of income tax and therefore, there was no necessity to borrow any loan amount from the plaintiff. However, the plaintiff has produced Exs.A2 to A5 to show that he and his sons were already partitioned and the said fact is known to the defendant, and the defendant had purchased the separate properties from the plaintiff and his sons, based on Ex.A2 partition deed. According to the plaintiff, the entire defence taken in the written statement is false and contradictory to the facts established before the Trial Court. Considering all these facts, the Trial Court arrived at a conclusion that the plaintiff could able to establish that Ex.A1 cheque was issued in favour of the plaintiff by the defendant in the discharge of the debt incurred by him and accordingly, answered the issue.

14. With reference to issue No.1, the Trial Court held that the plaintiff is entitled to claim interest at the rate of 6% from the date of suit till the date of decree and thereafter, at the rate of 6% till realisation on a sum of Rs.17 lakhs with proportionate costs and accordingly, the Trial Court decreed the suit in favour of the plaintiff.

15. The learned counsel appearing on behalf of the appellant also reiterated that the appellant/defendant, at no point of time, borrowed loan from the plaintiff. Long term relationship between the plaintiff and the defendant is admitted. However, it is contended that there was no necessity for borrowing such huge amount of Rs.17 lakhs from the plaintiff. It is further admitted that the defendant constructed a hospital and named the hospital in the name of the plaintiff "A.G.Neuro Hospital Private Limited" where A.G. stands for Ammachi Gounder. The long standing relationship and credibility are not disputed by either of the parties. However, the learned counsel appearing on behalf of the appellant reiterated that the defendant had not borrowed a loan amount from the plaintiff. Contrarily, the plaintiff is due to pay the said cheque amount and accordingly, contended that the suit itself is liable to be dismissed. The learned counsel reiterated the depositions which are all in favour of the defendant and contended that the Trial Court has committed an error in decreeing the suit. In order to substantiate the said contention, the learned counsel cited the judgment of the Supreme Court in the case of SETHU RAMDAYAL JAT vs. LAXMI PRASAD reported in 2009 AIR SCW 4587, wherein the acquittal in a criminal case cannot be a bar for institution of the suit. However, the deposition made by the parties before the Criminal

Court can be taken by the Civil Court for the purpose of adjudicating the facts in a civil suit. Relying on the said judgment, the learned counsel for the appellant/defendant reiterated that the letter dated 03.03.2003 was admitted by the plaintiff and therefore, there is no reason for allowing the civil suit by the Trial Court. In yet another judgment by the Supreme Court in the case of KRISHNA JANARDHAN BHAT v. DATTATRAYA G.HEGDE reported in AIR 2008 SC 1325, the Supreme Court held that “merely raised persumption in favour of holder of cheque that same has been issued for discharge of any debt or other liability- Existence of legally recoverable debt- Is not a matter of presumption.”

16. In this regard, it is contended that the trial Court proceeded, based on the presumption, which is not in consonance with the legal principles. Merely the application of presumption, as contemplated under Section 139 of Negotiable Instruments Act, the same would lead to injustice and the said judgment was delivered by the Hon'ble Supreme Court, with reference to the Negotiable Instruments Act. The learned counsel for the appellant/defendant mainly pointed out that the plaintiff has not established that he had sufficient funds, during the relevant point of time, to lend money to the defendant to the tune of Rs.17 lakhs. Therefore, the suit is to be rejected.

17. The learned counsel appearing on behalf of the respondent disputed the contention by stating that the defendant borrowed a loan from the plaintiff and therefore, developed the hospital in the name of the plaintiff as “A.G.Neuro Hospital Private Limited”. Even thereafter, the defendant had purchased two more properties from the plaintiff and those properties were allotted in favour of the plaintiff in a family partition. Therefore, the very contention of the defendant that the plaintiff had no means to pay money by way of loan to the defendant is incorrect and false. After borrowing a loan, he had taken a different stand and issued cheque and subsequently, issued an instruction to the Bank for stop payment . After verification, the plaintiff came to understand that there was no sufficient funds in the account of the defendant. The very fact that the cheque was issued in favour of the plaintiff was admitted by the defendant is sufficient to consider the case of the plaintiff. The plaintiff could able to establish that the cheque was issued by the defendant in lieu of the repayment of the debt and therefore, there is no reason to disbelieve the transaction. The Trial Court also considered the document and evidence and arrived at a conclusion that such a defence is not acceptable, in view of the fact that the defendant could not

able to establish his case with documents and evidences.

18. This Court is of the considered opinion that the plaintiff has established the fact that the defendant has admitted that he has issued a cheque for Rs.17 lakhs. The cheque was presented by the plaintiff for encashment and was returned with an endorsement that the defendant has issued a 'stop payment' instruction. On verification, the plaintiff came to understand that sufficient funds were not available in the accounts of the defendant. This being the facts which are all admitted between the parties and in respect of other contention, there must be a proof to establish the same. In the absence of any clinching evidence, to disprove the said basic facts, the Trial Court has rightly proceeded with a finding that the plaintiff is entitled for the relief of recovery of money. On perusal of the entire findings, arrived by the Trial Court, which is in consonance with the document and evidence, this Court is of the opinion that there is no perversity or infirmity as such so as to interfere with the findings of the Trial Court. Accordingly, the judgment and decree passed in O.S.No.172 of 2005 dated 29.09.2009 is confirmed and the first appeal stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

ssb
To

The Additional District Judge, Salem,
FTC No.2, Salem.

+2cc to Mr.Sampath Kumar & Associates, Advocate SR.6581
+1cc to Mr.V.Rajesh, Advocate SR.6757

A.S.No.804 of 2010
M.P.Nos.1 of 2010 & 1 of 2011

SPD(CO)
CB(17/09/2020)