

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.02.2021

PRONOUNCED ON:18.02.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.828 of 2008
and
M.P.Nos.1 & 2 of 2011

1. State Bank of India,
Taylors Road Branch,
Rep by its Manager,
Kilpauk,
Chennai - 600 010.
2. State Bank of India,
Kasdamkumwa Branch,
Represented by its Manager,
Shashi Palace,
Nala Road,
Patna 800 004. ..Appellants/1 & 2 Respondents/Defendants

Vs.

1. M/s.Gocoola Doss Jamuna Doss & Co (Textiles),
Rep by its Partner Govindoss.P,
No.2, Gowdon Street,
Chennai - 600 001. ..1st Respondent/Appellant/Plaintiff
2. M/s.Santhosh Vasthralaya,
Thakur Bai Road,
Patna, 800 003.
3. M/s.Kalpaka Transport Co. Ltd.,
Sikandhar Manzil,
Library road,
Patna. ..2 & 3 Respondents/3 & 4 Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 18.08.2006 made in A.S.No.3 of 2005 on the file of the IV Additional City Civil Court, Chennai, reversing the judgment and decree in O.S.No.4402 of 2000 dated 23.01.2004 on the file of the XIV Assistant City Civil Court, Chennai.

For Appellants : Mr.M.Devendran
For R1 : Mr.K.Mani

For R2 & R3 : No appearance
Set exparte

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 18.08.2006 passed in A.S.No.3 of 2005 on the file of the IV Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 23.01.2004 passed in O.S.No.4402 of 2000 on the file of the XIV Assistant Judge, City Civil Court, Chennai.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The first defendant in O.S.No.4402 of 2000 is the appellant in the second appeal.

4. Suit for recovery of money.

5. The case of the plaintiff in brief is that on the basis of the orders received from the third defendant, the plaintiff despatched the textile goods under the Bill Nos.27302 and 27303 dated 06.01.1998 for Rs.27,103/- through the fourth defendant under the Way Bill No.80528603 dated 07.01.1998 and endorsed the bill in favour of the first defendant with the request in writing on 07.01.1998 to collect the amount of Rs.27,103/ from the third defendant and handover the original documents to them for the clearance of the textile goods from the fourth defendant. The first defendant has to collect the amount after the delivery and credit the same in the plaintiff's account lying with the first defendant. Even though the first defendant had accepted the bills and sent it to the second defendant, the plaintiff has not received the said amount. The plaintiff on 28.02.1998 and 18.04.1998 made a request to return the documents if the bills were not cleared and received a letter on 08.05.1998 stating that the second defendant had not received the documents sent by the first defendant. The plaintiff also contacted the fourth defendant and the fourth defendant informed that the goods were delivered to the third defendant after obtaining the original documents on 29.01.1998. Thus, it is clear that the second defendant had colluded with the third defendant and handed over the original documents without receiving the amount and thereby enabled the third defendant to take the delivery of the goods from the fourth defendant. The plaintiff also received a letter from the General Manager, State

Bank of India (D&PB) stating that the claim of the plaintiff is under investigation. The plaintiff received a letter dated 16.09.1998 from the first defendant requesting to furnish the duplicate copy of the bill and also the way bill, by letter dated 26.10.1999. the first defendant informed that they have already sent a telegram to the second defendant on 03.03.1998 to know the fate of the bill. The second defendant apprised the non-receipt of the bill by telegram dated 04.03.1998. The first defendant also admitted that they had lodged a complaint to the post master, Kilpauk Post Office on 04.03.1998. The postal authorities replied that they could not confirm the delivery of the registered letter through which the bills had been sent to the second defendant. The plaintiff furnished and forwarded the duplicate copies vide letter dated 11.11.1999 and on 14.02.2000, the plaintiff received a letter from the first defendant returning all the Photostat copies of the bills stating that the payments are not forthcoming. The defendants 1 and 2 had breached the contract and made the plaintiff to incur the loss of the value of the goods. The defendants 1 and 2 are liable to make good the loss of the value of the goods along with interest. The plaintiff sent a legal notice on 22.02.2000, to the first and second defendant, calling upon them to pay the amount with interest. The second defendant sent an evasive reply on 29.02.2000 rejecting the claim of the plaintiff. Hence according to the plaintiff, it has been necessitated to lay the suit against the defendants.

6.The first defendant resisted the plaintiff's suit contending that on 07.01.1998, the plaintiff entrusted with the first defendant, bill Nos.27303 dated 06.01.1998 along with L.R. which was sent for collection on 12.01.1998 by registered post to the second defendant with instructions to collect the money from the consignee, the third defendant by a letter dated 28.02.1998. The plaintiff demanded the first defendant to recall the documents since they have not realized the money. The first defendant sent a telegram on 03.03.1998 to the second defendant, enquiring about the fate of the bills. The second defendant intimated by way of a telegram that the bills have not been received and there upon the first defendant sent a letter to the postal department enquiring about the fate of the registered post and was informed by them that the matter is under investigation. Despite several reminders to the postal department, there was no reply. Meanwhile, the plaintiff had written a letter dated 02.09.1999 demanding the first defendant to recall and hand over the documents or credit the bill amount to its account. Even thereafter, the first defendant wrote a letter to the postal department inquiring about the fate of the delivery of the letters sent to the second defendant. The postal department finally replied that the despatch of the registered letter could not be found and the abovesaid two bills

were lost in transit by the postal authorities. The first defendant took all the efforts to trace out the bills. But the same ended in vain. The plaintiff was silent for nearly one year three months and sent a letter dated 04.09.1999 demanding the bill amount. Later the first defendant came to know from the plaintiff that the goods were delivered to the third defendant by the fourth defendant on the production of the original documents. It is false to state that the second defendant colluded with the third defendant and handed over the documents enabling the third defendant to take the delivery of the goods. The second defendant had not received the bills and the same had also been communicated to the plaintiff. The plaintiff should have laid the suit only against his consignee who fraudulently possessed the original bills and Lorry receipt which had been lost in transit and the fourth defendant who delivered the consignment to the third defendant. The defendants 1 and 2 are not liable to pay any amount to the plaintiff. The delay aspect of the plaintiff in not making the demand immediately and not taking any action against the third defendant would go to show that the plaintiff is not bonafidely prosecuting the suit and laid the suit in collusion with the defendants 3 and 4. The legal notice has been sent only to the defendants 1 and 2 and not to the defendants 3 and 4. The first defendant had taken all the efforts to trace the bills through the postal authorities. Hence the first defendant prays for the dismissal of the plaintiff's suit.

7. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A18 were marked. On the side of the defendants, D.W.1 was examined. Exs.B1 to B14 were marked.

8. On an appreciation of the materials placed on record both oral and documentary and the submissions putforth by the respective parties, the trial court was pleased to dismiss the plaintiff's suit. On appeal by the plaintiff, the first appellate court, on an appreciation of the materials available on record, both oral and documentary and the submissions projected by the respective parties, was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the plaintiff, decreed the suit in favour of the plaintiff with costs. Impugning the judgment and decree of the first appellate court, the defendants 1 and 2 have preferred the second appeal.

9. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

i. Whether the Appellate Court is right in shifting the burden on the Appellants to prove that under which provision of

the bank rules they are not bound to pay in case the lorry receipts are lost in transit. Failing the note that the case of the plaintiff is that the defendants 2 and 3 colluded and taken delivery of the goods?

ii. Whether the Lower Appellate Court misread and misapplied the evidence available on record?

10. From the materials placed on record, it is noted that the plaintiff based on the orders received from the third defendant, dispatched the goods under the bills dated 06.01.1998 for Rs.27,103/- through the fourth defendant under way bills dated 07.01.1998 and it is further noted that the plaintiff had endorsed the bills in favour of the first defendant with the request to collect the due amount from the third defendant and hand over the original documents to them for the clearance of the textile goods from the fourth defendant.

11. In the written statement, the first defendant has clearly admitted that on 07.01.1998, the plaintiff entrusted the bills dated 06.01.1998 along with the lorry receipt and it is also stated that the same had been sent for collection on 12.01.1998 by registered post to the second defendant with the instructions to collect the money from the consignee, the third defendant. In view of the above, as rightly concluded by the first appellate court, considering the materials placed on record, when the first defendant has not disputed the endorsement of the bills in question to it and the acceptance of the same by it, in such view of the matter, as per the contractual liability entered into between the plaintiff and the first defendant as well as the second defendant, it is seen that the first defendant should collect the amount after the delivery of the abovesaid bills from the third defendant and credit the same in the plaintiff's account lying with the first defendant. Now the grievance of the plaintiff is that he is not received the amount, however the goods had been delivered to the third defendant and the same had come to the knowledge of the plaintiff by way of the letter received from the fourth defendant dated 26.06.1998, where under the fourth defendant had informed that the goods were received on 21.01.1998 and delivered to the party on 29.01.1998.

12. Now the contention of the defendants 1 and 2 is that though the first defendant had accepted the bills forwarded by the plaintiff, according to the first defendant, the same had been sent for further action to the second defendant, however, the bills in question had been lost in transit and despite the efforts/endeavors to trace them through the postal authorities, the same ended in vain and therefore according to the defendants 1 and 2, they cannot be fastened with any liability to pay the amount sought for by the plaintiff and according to the

defendants 1 and 2, the remedy of the plaintiff is only against the defendants 3 and 4. No doubt, some correspondences have been filed on the part of the defendants 1 and 2 qua the complaint lodged by them with the postal authorities regarding the delivery of the registered letter containing the bills. But when admittedly, the first defendant had acknowledged the receipt of the bills from the plaintiff and also undertaken to credit the amount in the plaintiff's account, as concluded by the first appellate court, the defendants 1 and 2 cannot escape from the liability on the footing that the bills and the lorry receipt had been lost during the transit. That concrete steps had been taken by the defendants 1 and 2 to trace the bills and lorry receipt said to have been lost in transit, no acceptable and reliable evidence has been placed on the part of the defendants. Though the defendants 1 and 2 endeavored to adduce evidence with reference to the same through D.W.1, the fact remains that D.W.1 had not subjected himself to the cross examination of the plaintiff. It is thus found that as held by the first appellate court, the plaintiff had been deprived of the opportunities to cross examine D.W.1 as to the actual steps taken by them to retrieve the bills and lorry receipt sent by registered post to the second defendant. Now, according to the second defendant, it had not received the bills and lorry receipt from the first defendant and on the other hand, according to the first defendant, the same had been dispatched to the second defendant. The complaints lodged with the postal authorities did not evoke proper response and they had only informed that the bills could not be detected.

13. As rightly contended by the plaintiff's counsel as well as held by the first appellate court, when D.W.1 examined on behalf of the defendants 1 and 2 had not subjected himself to cross examination, his evidence in the chief examination cannot at all be considered as evidence in the eyes of law and it has to be totally rejected and for the abovesaid proposition of law, the plaintiff's counsel placed reliance upon the decision reported in 2000 MLJ Supplement 246[Sundaram, Partner, India Metal Trading Company, Madras] and in the abovesaid decision, it has been held that when the witness had been examined in chief, but is not available for cross examination, his evidence cannot be accepted and the acceptance of his evidence is perverse and the position of law has been outlined in the abovesaid decision as follows:

(A) Evidence Act (I of 1872), Sec.33 - Witness examined in chief but is not available for cross examination- Acceptance of his evidence is perverse. In the absence of cross-examination, there is no evidence at all and the evidence of P.W.2 ought to have been completely rejected. Acceptance of such evidence is perverse.

In the decision reported in 2003(1) MLJ Page 291, [Kaliappan and others Vs. Vijayalakshmi and another] it has been held that when a party to a case do not endeavor to come to the box to establish his plea raised in the written statement, an adverse inference is to be drawn against the defendant by virtue of the principle laid down by the Supreme Court in 1999 (3) MLJ 22 (Supreme Court) [Iswar Bhai C.Patel alias Bachi Bhai Patel Vs. Harihar Behera and another], and the position of law has been outlined in the abovesaid decision as follows:

Evidence Act (I of 1872), Sec.114-Presumption-When can be drawn-Plaintiff claiming right under a settlement deed - First defendant denying the same and contending that it is sham and nominal - Plaintiff establishing her case by entering the witness box - First defendant not entering the witness box to prove his plea in the written statement - Whether adverse inference can be drawn against him.

Once it is established that on the strength of Ex.A4, the possession was handed over to 'N', it is for the first defendant, who executed the settlement deed, to establish that the document was only a sham and nominal document and the same has not been acted upon. Even though such a stand was taken by the first defendant through his written statement, he did not choose to come to box to establish his plea raised in the written statement. As such, an adverse inference is to be drawn against the defendants by virtue of the principle laid down by the Supreme Court in 1999(3) M.L.J.22(S,C):2000(1) L.W.178.

17. Once it is established that on the strength of Ex.A-4, the possession was handed over to Nachayammal, it is for the first defendant, who executed the settlement deed, to establish that the document was only a sham and nominal document and the same has not been acted upon. Even though such a stand was taken by the first defendant through his written statement, he did not choose to come to box to establish his plea raised in the written statement. As such, an adverse inference is to be drawn against the defendants by virtue of the principle laid down by the Supreme Court in Iswar Bhai C.Patel Vs. Harihar Behera and another, 1999(3)M.L.J 22(S.C):2000(1)L.W.178. As a matter of fact, the trial Court's judgment would show that the first defendant, who is the main party to establish the defence, has remained exparte.

Similarly, in the decision reported in 1999 MLJ Supreme Court 22 [Iswar Bhai C.Patel alias Bachi Bhai Patel Vs. Harihar Behera and another], it has been held that when a party to a lis do not present himself for cross examination, an adverse inference has to be drawn against him on the principles contained in illustration (g) of Section 114 of the Indian Evidence Act and the position of law has been outlined as follows:

(B) Evidence Act (I of 1872), Sec.114 - Presumption under - Held, appellant's failure to go into witness box and make a statement gives rise to adverse inference against him.

The appellant not having entered the witness box and not having presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of principles contained in Illustration (g) of Sec.114, Evidence Act.

An inference has to be drawn against the appellant that what he stated in the written statement was not correct. High Court was justified in decreeing the suit in its entirety and passing a decree against the appellant also.

14. Applying the abovesaid principles of law to the case at hand, though the defendants 1 and 2 would seek to get themselves absolved of the liability in not crediting the amount to the plaintiff's account by contending that the bills and lorry receipt had been lost in transit, they have failed to substantiate their case by placing acceptable and reliable evidence and as above noted, D.W.1 had not subjected himself to the cross examination, in such view of the matter, the defendants 1 and 2 cannot be allowed to take shelter on the pretext that they are not to be held responsible for the loss of the bills and lorry receipt in transit. When there is no correct/concrete materials available worth acceptance as to what further action, the defendants 1 and 2 had taken after the reply received from the postal authorities and in such view of the matter, and furthermore, as rightly concluded by the first appellate court, the defendants 1 and 2 having not established as to under what rules of the Bank, they would not be bound to pay the amount to the plaintiff, for the reason that the bills and lorry receipt had been lost during the transit and to substantiate the abovesaid facts, the defendants having failed to adduce reliable evidence and when the defendants 1 and 2 as the bankers are liable to honour their commitment to the plaintiff by accepting the bills from the plaintiff and they

having failed to fulfill their contractual obligations, as rightly concluded by the first appellate court, the plaintiff is entitled to recover the amount from the defendants 1 and 2.

15. Though the defendants 1 and 2 would contend that the plaintiff had levied the suit in collusion with the defendants 3 and 4 on the footing that the notice has not been sent to the third defendant, however, pointing to the defence version, there is no acceptable and reliable material forthcoming on the part of the defendants 1 and 2 and as correctly held by the first appellate court, no proof has been projected by the defendants 1 and 2 to show that the plaintiff had received the amount from the third defendant. In such view of the matter, merely because, the plaintiff had not sent the legal notice to the defendants 3 and 4, it cannot be held straight away that there is a collusion between the plaintiff and the defendants 3 and 4.

16. The trial court seems to have rejected the plaintiff's suit on the footing that the plaintiff had requested the defendants 1 and 2 with reference to the non-payment of the amount belatedly and on that footing upheld the defence version. However, when the liability is on the defendants 1 and 2 to secure the amount from the third defendant and thereafter hand over the bills and lorry receipt so as to enable the third defendant to take the delivery of the goods, however, when it is found that the goods had been delivered to the third defendant without any payment on the part of the third defendant, in all, it is found that the defendants 1 and 2 had failed to discharge their liability as agreed to, by accepting the bills and therefore they cannot escape from the consequences thereof, on the footing that the bills and lorry receipt had been lost during the transit.

17. Considering the abovesaid factors, in toto, it is found that the first appellate court, on an appreciation of the materials available on record, both oral and documentary in the right perspective, both on factual matrix as well as on the points of law, had rightly held that it is only the defendants 1 and 2 who are liable to pay the amount prayed for by the plaintiff in the suit and I do not find any valid reason to interfere with the same.

18. In the light of the abovesaid discussions, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeal are accordingly for the reasons aforesaid, answered in favour of the plaintiff and against the defendants 1 and 2.

19. In conclusion, the judgment and decree dated 18.08.2006 passed in A.S.No.3 of 2005 on the file of the IV Additional Judge, City Civil Court, Chennai reversing the judgment and decree dated 23.01.2004 passed in O.S.No.4402 of 2000 on the file of the XIV Assistant Judge, City Civil Court, Chennai are confirmed. Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1. The IV Additional Judge,
City Civil Court,
Chennai.
2. The XIV Assistant Judge,
City Civil Court,
Chennai.

Copy to

The Section Officer,
VR Section, High Court.

+1cc to Mr.K.Mani, Advocate SR.No.9483

+1cc to Mr.M.Devaraj, Advocate SR.No.9844

S.A.No.828 of 2008
and
M.P.Nos.1 & 2 of 2011

SSD(CO)
GMY(17/11/2021)