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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 05.10.2021

Judgment Pronounced on: 22.11.2021

CORAM

THE HON'BLE MRS.JUSTICE S.KANNAMMAL

Second Appeal No.1096 of 2019

1.M/s.Iridium NDT Suppliers

Rep. by its Partners

1.J.Robert Charles

2.Omana

2.J.Robert Charles

3.Omana

... Appellants / Defendants

Vs.

Corporation Bank

Ashok Nagar Branch

Rep. by its Chief Manager

V.Vasudevan, No.58, 1st Avenue,

100 ft Road, Ashok Nagar,

Chennai-600 083.

...Respondents / Plaintiff

PRAYER: This Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree dated 08.02.2019 made in A.S.No.28 of 2018 on the file of the XVII Additional City Civil Court, Chennai, confirming the judgment and decree passed in O.S.No.1661 of 2011 dated 17.04.2017 on the file of the VII Assistant City Civil Judge, Chennai.

For Appellant : No appearance

For Respondent : Mr.A.Arunbabu

JUDGMENT

This Second Appeal has been preferred by the defendants against the Judgment and Decree dated 08.02.2019 made in A.S.No.28 of 2018 on the file of the XVII Additional City Civil Court, Chennai, confirming the judgment and decree passed in



O.S.No.1661 of 2011 dated 17.04.2017 by the VII Assistant City Civil Judge, Chennai.

2.The brief facts leading to the filing of this Second Appeal are as follows:

The suit is one for recovery of money. The plaintiff is a bank. The defendant is dealing in Iridium supply. One Salamath Nisha had drawn a cheque in favour of the defendants for a sum of Rs.2,50,000/-. The defendants have deposited the same on 08.02.2012 drawn on Bank of Baroda with the plaintiff bank. However, it was returned by the plaintiff branch for the reason "funds insufficient" on 19.04.2012. But, due to some technical problems following introduction of cheque truncated system in clearing and due to inadvertence, the cheque got credited to the account of the defendants. The return of the instrument due to insufficient funds came to light during the reconciliation only. In the meanwhile, the defendants have withdrawn the said amount and had utilized the same, which resulted in overdrawing of the account. The plaintiff submitted that, immediately on coming to know about the same, they had requested the defendants to repay the amount at the earliest. However, on repeated requests, the defendants have not come forward to repay the same. It is the case of the plaintiff before the trial Court that the defendants in their letter dated 28.06.2012 had acknowledged the utilization of the said amount and assured to settle the matter shortly. Since the said amount was not repaid, the plaintiff has issued a notice dated 19.11.2012 demanding the said amount. Even after receipt of the said notice, the defendants have not come forward to pay the same. Hence, the plaintiff has filed the suit.

2.1. Before the trial Court, the case of the defendants is that the drawee bank is the Bank of Baroda and for not impleading the said bank as one of the party, the suit is bad for non joinder of necessary party and prayed for dismissal of the suit. Before the trial Court, they have also denied the letter dated 28.06.2012 acknowledging the utilization of the money and assured the plaintiff bank to settle the matter shortly. The case of the defendants is that the plaintiff bank has adjusted an amount of Rs.8,922/-, which lies in the account of the defendant and hence, they made a counter claim for a sum of Rs.11,420/-, which include interest.



2.2. A reply statement has also been filed by the plaintiff bank for the counter claim made by the defendants denying the averments made.

3. After considering submissions made on the side of the plaintiff and defendants, the trial Court framed the following substantial questions of law:

(1). Whether the plaintiff is entitled to recover the suit amount as prayed for?

(2) Whether the defendants is entitled to recover the counter claim as prayed for?

(3) To what other relief is the plaintiff entitled to?

(4) To what other relief is the defendants entitled to?

4. After considering the oral and documentary evidence, the trial Court decreed the suit in favour of the plaintiff and has given a finding that the plaintiff is entitled to Rs.2,41,078/- together with interest at the rate of 6% per annum till the realization of the amount with costs.

5. Before the trial Court, the plaintiff examined one Bharatesh, as P.W-1 and marked Ex.A-1 to Ex.A13. On the side of the defendants, one J.Robert Charles/2nd defendant, was examined as D.W.-1 and Ex.B1 to Ex.B3 have been marked.

6. As against the judgment and decree of the trial Court, the defendants have preferred an appeal before the first appellate Court.

7. The first appellate Court has framed the following substantial questions of law:

1. Is the plaintiff entitled to recover any amount from the defendant under the provisions of Section 72 of the Indian Contract Act, 1872, if so, to what amount is the plaintiff entitled and on what basis?

2. Whether the doctrine of estoppels operate against the plaintiff bank?

3. Whether the judgment and decree of the trial Court in O.S.No.1661/2014 dated 17.04.2017 is liable to be set aside on the grounds raised by the appellant?



8. On considering the oral and documentary evidence adduced on both sides, the first appellate Court found that the plaintiff bank has established their case in view of Section 72 of the Indian Contract Act. Accordingly the first appellate Court dismissed the appeal.

9. As against the said dismissal of the appeal, the appellants/defendants are before this Court with the second appeal.

10. At the time of admission of the second appeal, this Court framed the following substantial question of law:-

"Whether the Courts below were right in granting a decree in favour of the plaintiff bank when it is shown that the returned cheque dated 06.02.2012 was not returned to the defendant by the plaintiff bank and it was retained by it and the suit itself is based on inter-office memo of return?"

11. The following contentions are raised by the learned counsel for the appellants / defendants:

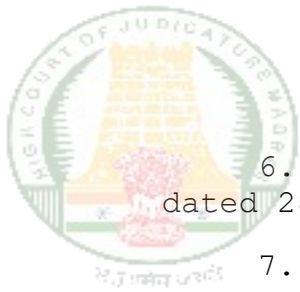
1. The Courts below failed to take into consideration the counter claim made by the appellant.

2. The Courts below failed to note that the bank of Baroda, K.K.Nagar Branch, Chennai, which is a drawee bank, is a proper and necessary party and the specific plea taken by the defendants to the effect that the suit is barred for non joinder of necessary party, was not taken into consideration by the Courts below.

3. The Courts below erred in decreeing the suit on the presumption that the alleged letter dated 28.06.2012 marked as Ex.A3 is a genuine one and held that the defendants are liable to pay the disputed amount along with interest.

4. The Courts below failed to take into consideration the contention raised on behalf of the appellants/defendants to the effect that the signature in Ex.A3 was forged and the defendants denied the signature contained in Ex.A-3.

5. The Courts below failed to note that as per Section 67 of the Indian Evidence Act, the signature of the person, who is alleged to have signed the document, must be proved by evidence that the signature purporting to that of the executant's handwriting.



6. The Courts below erroneously presumed that the letter dated 28.6.2012 Ex.A-3 was signed by the 3rd defendant.

7. The Courts below have not taken into consideration the reference letter dated 19.06.2012, which is found in Ex.A-3, which was not produced by the plaintiff Bank.

8. The Courts below have not taken into consideration the fact that the cheque has not been returned to the defendants.

For these reasons, the learned counsel for the appellants prays to set aside the judgment and decree of the Courts below.

12. The learned counsel for the respondent would submit that after considering the oral and documentary evidence, the trial Court decreed the suit in favour of the respondent. Further, it is submitted that on appeal by the appellants/defendants, the first appellate Court reappraised the oral and documentary evidence had rightly confirmed the judgment and decree of the trial Court and hence, contended that no interference is required.

13. This Court has considered the submissions made on either side and the materials available on record.

14. The admitted fact is that one Salamath Nisha had drawn a cheque in favour of the defendants for a sum of Rs.2,50,000/- and the defendants deposited the same on 08.02.2012 drawn on Bank of Baroda with the respondent Bank. But the same was returned on 19.04.2012 by the respondent/plaintiff service branch for the reasons "funds not sufficient". It is also an admitted fact that due to some technical problems, following introduction of cheque truncated system in clearing and due to inadvertence, the cheque got credited to the account of the defendants. It is also an admitted fact that the appellants herein had withdrawn the said amount and had utilized the said amount.

15. Though the appellants herein contended that they have not received any communication from the respondent Bank, Ex.A-5, A-6 and A-11, the acknowledgment cards would prove the fact that the appellant herein had the knowledge about the fact of insufficiency of funds. Further the admission made by R.W.-1 in his cross examination would prove about the knowledge of the communication by the respondent bank. Ex.A-3 dated 28.06.2012 originally the letter issued by the second appellant would go to prove that the appellants have knowledge about the funds insufficient. As per Ex.A-3, the appellants herein acknowledged the receipt of the respondent's letter dated 19.04.2012 with



regard to the return of cheque and the appellants herein had written that they shall settle the matter shortly. Though the appellants herein deny Ex.A-3 letter is a forged one, they have not preferred any complaint before any authorities. They have not even taken steps to prove that the second appellant's signature has been forged. It is for the appellants to take steps to prove that Ex.A-3 is a forged letter, since they deny the signature in Ex.A-3. It is pertinent to note that the third appellant Ms.Omana, who is the signatory of Ex.A-3, had not chosen to examine herself and subject herself for cross examination would prove the case of the respondent herein.

16. The Courts below have rightly considered the oral and documentary evidence and also considering Section 72 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Act') rightly decreed the suit.

17. Section 72 of the Act reads as follows:

"72.Liability of person to whom money is paid, or thing delivered by mistake or under coercion - A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

18. The first appellate Court has also observed that when the appellants have taken steps to produce the account of Salamath Nisha for the perusal of the trial Court, they have not explained whether they have demanded the said amount from Salamath Nisha. The first appellate Court has also observed that no amount was deducted from the account of Salamath Nisha. Further, the first appellate Court observed that the appellants are silent as to whether they have requested the said Salamath Nisha for the payment of Rs.2,50,000/- for which the cheque had been issued. The first appellate Court has also observed that the appellants have not taken any steps to represent the said cheque to the respondent Bank.

19. The appellants herein contended that the Courts below have erred in decreeing the suit, after giving the finding that the plaintiff bank was negligent in crediting the cheque amount without considering the applicability of Section 77 of the Negotiable Instruments Act.

20. Section 77 of the Negotiable Instruments Act, 1981 reads as under:

"77. Liability of banker for negligently dealing with bill presented for payment.-When a bill of exchange, accepted payable at a specified bank, has been duly



presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss."

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21. A perusal of the above provision, it is clear that if a bill of exchange, accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss. However, on a careful analysis of the entire facts and circumstances case, it would explicit clear there was absolutely no negligence on the part of the respondent bank, which caused loss to the appellants. But in fact, the appellants have been unjustly enriched by inadvertent mistake committed by the respondent bank. The appellants had misconstrued that the respondent bank was negligent in crediting the cheque amount. This Court fails to understand as to how the act of the respondent bank in crediting the cheque amount in favour of the appellants, would amount to negligence.

22. "Negligence" has been explained by the Supreme Court in "Postgraduate Institute of Medical Education and Research, Chandigarh" reported in 2009 (7) SCC 330 as follows:-

"13. The term negligence is often used in the sense of careless conduct. Way back in 1866 in Grill vs. General Iron Screw Collier Co., Wills J. referred to negligence as:

" the absence of such care as it was the duty of the defendant to use."

Brown L.J. in Thomas v. Quatermaine stated: (QBD p. 694) "

..... idea of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody."

"14. In "Donoghue v. Stevenson, Lord Macmillan" with regard to negligence made the following classic statement: (AC pp. 618-19) ":

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such



in the said contention raised on behalf of the appellants. Admittedly, vide Ex.A3 Letter dated 28.06.2012, the appellants acknowledged the utilization of the money and assured that they would settle the matter shortly. It is pertinent to note that while giving such assurance, the appellants have not sought for return of the cheque from the respondent/bank. In fact, the appellants have not pleaded in their written statement before the trial Court that the respondent/bank has not returned the cheque to them and it was retained by it and thereby, the suit based on inter-office memo of return was bad. In the absence of specific plea in this regard, the trial Court has not framed the issue for trial. However, even during the first appeal also, the appellants have not raised this plea. Only in the present Second Appeal, the appellants have raised a ground that the respondent/bank has not returned the cheque Ex.A1 to the appellants. A perusal of Ex.A3 Letter dated 28.06.2012, it is revealed that the appellants have acknowledged the receipt of the money and utilization of the same and have categorically assured that they would settle the matter. In fact, the respondent bank has realized the mistake only on 19.04.2012 and thereafter, the respondent service Branch has returned the cheque. After noticing the said mistake, the respondent bank has approached the appellants, who in turn, acknowledged the receipt of the amount and admitted that they had utilized the same and in lieu of the same, they gave assurance by way of Ex.A2 Letter. Having tendered such assurance by the appellants, it is not fair enough on the part of the appellants to take U-turn and raise a plea that the respondent/bank never returned the cheque even by denying the Ex.A3 Letter dated 28.06.2012. Having received the assurance from the appellants vide Ex.A3 Letter, there might have been no occasion for the respondent/bank to return the cheque Ex.A1 to the appellants and even no such requirement would arise. Further, the appellants have also not sought for return of the cheque/Ex.A1 from the respondent/bank so as to either represent the same or to bring the same to the knowledge of one Salamath Nisha who issued cheque in favour of the appellants and to claim a fresh cheque or for payment of the amount due and payable by her to the appellants. In such circumstances, this Court does not find any merit in the contention raised on behalf of the appellants that the suit based on inter-office memo of return was bad. Accordingly, the substantial question of law arose in this appeal, is answered in favour of the respondent/bank and as against the appellants.

25. However, the appellants herein have simply denied the allegations made in the plaint and made a counter claim of Rs.11,420/- from the respondent Bank. The appellants have not



sought for any compensation from the respondent herein. Hence, the appellants' contention shall not be taken into consideration.

26. When the Courts below have rightly considered the oral and documentary evidence and rightly decreed the suit, this Court has no hesitation to hold that there is no illegality or infirmity in the findings rendered by the Courts below. Accordingly, no interference is warranted to the judgment and decree of the Courts below.

27. In the result, the second appeal is dismissed. No costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

RR

To

1. The XVII Additional Judge,
City Civil Court, Chennai.
2. The VII Assistant Judge,
City Civil Judge, Chennai.

Copy to

The Section Officer,
VR Section, Madras High Court,
Madras.

Second Appeal No.1096 of 2019

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srg 05/01/2022