



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **17.04.2021**

CORAM:

THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

S.A. (MD) .No.985 of 2008

WEB COPY

Sounder ...Appellant/Respondent/Defendant
Vs.

Sreekandan Nair ...Respondent/Appellant/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 05.10.2007 passed in A.S.No.83 of 2005 on the file of the Subordinate Court, Padmanabhapuram, reversing the judgment and decree dated 23.02.2005 passed in O.S.No.182 of 2004 on the file of the Additional District Munsif Court, Padmanabhapuram.

For Appellant : Mr.K.N.Thampi
For Respondent : Mr.V.M.Balamohan Thampi

JUDGMENT

The defendant in O.S.No.182 of 2004 on the file of the Additional District Munsif Court, Padmanabhapuram, is the appellant in this second appeal.

2.The respondent herein namely, Sreekandan Nair filed the said suit for recovering a sum of Rs.56,800/- from the appellant herein with interest.

3.The case of the plaintiff was that the defendant/appellant herein borrowed a sum of Rs.40,000/- from the plaintiff on 25.02.2001. On the same day, the defendant handed over a signed post dated cheque Ex.A1 dated 21.08.2001 and agreed to repay the amount with interest within six months. The plaintiff was given liberty to present the cheque for encashment in the event of failure on the part of the defendant. Since the defendant did not repay, as agreed, Ex.A1 was presented on 21.08.2001. The cheque was returned on 31.08.2001. When the plaintiff informed the defendant about the dishonour of the cheque, the defendant requested the plaintiff to once again present the same in the 1st week of February, 2002. Believing his words, the plaintiff waited and presented the cheque for the second time on 07.02.2002. Once again the cheque was returned with endorsement "insufficient funds". Thereafter, the plaintiff issued Ex.A6 notice dated 22.02.2002. The defendant sent a reply Ex.A7 dated 05.03.2002, denying the allegations made in Ex.A6 notice. Since the demand of the plaintiff was not complied with, the said suit came to be instituted.



4.The defendant denied the case of the plaintiff. According to him, he did not borrow any amount from the plaintiff on 25.02.2001. The defendant claims that there was transaction between the defendant's wife and the plaintiff. The defendant's wife is said to have approached the plaintiff for a loan of Rs.20,000/- on 05.06.1997. On the said date, the plaintiff advanced only a sum of Rs.18,000/- and the balance amount of Rs.2,000/- was retained by him towards interest. The defendant's wife was to repay the loan on daily instalment basis. The defendant would further claim that his cheque was obtained as a security. Even though the loan was settled, the plaintiff did not return the suit cheque. Thus, the defendant contended that he was not liable to make any payment to the plaintiff.

5.The trial Court framed an issue as to whether the plaintiff was entitled to claim the suit amount from the defendant.

6.The plaintiff examined himself as P.W1 and marked Exs.A1 to A7. The defendant examined himself as D.W1 and marked Ex.D1 being receipt issued by the plaintiff in favour of the defendant's wife.

7.After consideration of the evidence on record, the trial Court dismissed the suit, by judgment dated 23.02.2005. Aggrieved by the same, the plaintiff filed A.S.No.83 of 2005 before the Sub Court, Padmanabhapuram. The appellate Court, by judgment dated 05.10.2007, reversed the decision of the trial Court and allowed the appeal. Questioning the same, this second appeal came to be filed.

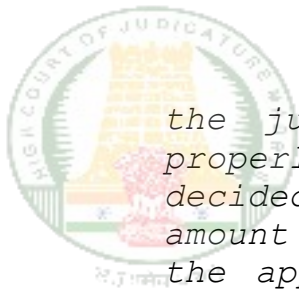
8.The second appeal was admitted on the following substantial question of law.

"Whether the judgment and decree of the lower appellate Court are correct and sustainable on account of its failure to formulate and decide proper points for decision in the appeal before it, as mandated in order 41, rule 31 of C.P.C.?"

9.Notice was issued to the respondent and the respondent entered appearance through counsel.

10.Heard the learned counsel on either side.

11.It may straight away be noted that the judgment of the first appellate Court is a reversing decision. Upto paragraph No.4, the case of the plaintiff has been set out. Paragraph No.4 contains the averments set out in the written statement. Paragraph No.5 contains the memorandum of grounds. In paragraph No.6, the point for determination has been framed in the following terms:-



the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions.

22.In B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy, while dealing with the issue, this Court held as under:

"4.The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put- forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings."

16.The ratio laid down above would squarely apply to the case on hand. When the 1st appellate Court thought it fit to reverse the decision of the trial Court, it was obliged to deal with all the legal and factual contentions arising in the matter. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts, because the 1st appellate Court is the last Court of fact. In the case on hand, the aforesaid statutory mandate has been totally lost sight of by the 1st appellate Court. I therefore have no hesitation to set aside the



impugned judgment passed by the 1st appellate Court. The second appeal is allowed and the matter is remanded to the file of the 1st appellate Court to hear both the parties and dispose of the matter by bearing in mind the statutory mandate set out in Order XLI Rule 31 of CPC. Since the suit itself is of the year 2002, the 1st appellate Court is requested to dispose of the matter on merits and in accordance with law, within a period of two months after the receipt of the records from the Registry. Registry to expedite the dispatch of the records.

17.The Second appeal is allowed on these terms. No costs.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Subordinate Judge,
Padmanabhapuram.

2.The Additional District Munsif,
Padmanabhapuram.

Copy to
The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.(2 copies)

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NS (CO)
TR(21.05.2021) 5P 5C