BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.06.2021
CORAM:
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
S.A.(MD)No.687 of 2013
and
M.P.(MD)No.1 of 2013

1.T.R.Vivekanandan

2.T.V.Rajalakshmi ... Appellants/Appellants/Defendants

-Vs-

R.R.Mekala ... Respondent/Respondent /Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 17.12.2012 made in A.S.No.46 of 2012 on the file of the IV Additional District Judge, Madurai, confirming the Judgment and Decree dated 10.10.2011 made in O.S.No.521 of 2007 on the file of the First Additional Subordinate Judge, Madurai.

For Appellants : Mr.A.R.M.Ramesh
For Respondent : Mr.D.Nallathambi

JUDGMENT

The defendants in O.S.No.521 of 2007 on the file of the I Additional Subordinate Judge, Madurai, are the appellants in this second appeal. The said suit was instituted by R.R.Mekala respondent herein. According to the plaintiff, the defendants were carrying on business in the name and style of M/s.Rajalakshmi Mills. They are husband and wife. On 22.10.1996, they borrowed a sum of Rs.1,22,800/- from the plaintiff agreeing to repay the same with interest at the rate of 18% per annum. The defendants were paying the monthly interest till 21.07.2003.From 25.06.2003 till 24.07.2004, the defendants were making payments towards principal and interest. According to the plaintiff, the defendants owed to pay a further sum of Rs.99,628/- as on 22.10.2007. Even though the plaintiff issued suit notice dated 23.10.2007, the defendants did not choose to respond.

2.The stand of the defendants was that their business ended in loss and it was wound up on 31.03.2002 itself. Thereafter, there was a meeting between the parties and the plaintiff agreed to receive the principal amount in installments. According to the defendants, with the payment of Rs.7,000/- on 29.10.2004, the entire liability was cleared and, there was nothing further to be paid.

3.The husband of the plaintiff Thiru.Ramadoss examined himself as P.W.1. Ex.A1 to Ex.A19 were marked. On the side of the defendants, Ex.B1 to Ex.B3 were marked. The defendants did not enter the witness box. The learned trial Judge by Judgment and decree dated 10.10.2011 decreed the suit as prayed for. Aggrieved by the same, the defendants filed A.S.No.46 of 2012 before the fourth Additional District Munsif Judge, Madurai. By Judgment and decree dated 17.12.2012, the appeal was dismissed. Challenging the same, the second appeal came to be filed.

4.The second appeal was admitted on the following substantial questions of law:-

(a) Whether the Courts below have misconstrued Ex.A.13 since a proper consideration of the said document in the light of the attendant circumstances would lead to the inference that the suit account had been settled.

(b) When the plaint clearly admits that the first defendant was only the authorised signatory or agent of the second defendant, in its short cause title and long cause title and reaffirms it in the body of the plaint, can there be a decree for recovery of money as against the admitted agent of the alleged borrower?

(c) Is not admission the best form of evidence and when the defense case is founded on the admission of P.W.1, can non-examination of the defendants be fatal to it?

5.The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellants and set aside the impugned Judgment and decree and allow this appeal.

6.Per contra, the learned counsel appearing for the respondent submitted that the impugned Judgment does not call for any interference. The learned counsel placed heavy reliance on the decision reported in ***(1999) 3 SCC 80 (Industrial Credit & Development Syndicate Vs. Smithaben H.Patel)***. His core contention is that it has been authoritatively laid down that when the defendant had taken a loan and interest had accrued on the principal amount and when payments are made, appropriation will first be towards interest. In the case on hand, the money that was paid by the defendants was appropriated only towards interest. Whatever balance amount available was appropriated towards the principal.

7.The learned counsel would point out that the factum of borrowal and the rate of interest at 18% per annum is not in dispute. Even a simple application of arithmetic would show that the suit claim had been clearly and accurately calculated. He would also point out that when the defendants fall back on subsequent oral agreement, the burden was clearly on them to establish the same. In the case on hand, the defendants for the reasons best known, avoided entering the witness box. He called upon this Court to draw adverse inference against such a conduct. He also would remind the Court that when exercising jurisdiction under Section 100 of C.P.C., in as much as the courts below have correctly appreciated the factual aspects and also applied the correct principles of law, no interference is called for. He prayed for dismissal of the second appeal.

8.I carefully considered the rival contentions and went through the evidence on record. There is no dispute that the plaintiff had lent a sum of Rs.1,22,800/- on 22.10.1996. Even though in Ex.A1-receipt, it is mentioned that the loan amount was received by M/s.Rajalakshmi Mills and D1-T.R.Vivekanandam had signed in the capacity of authorised signatory, the specific stand of the plaintiff is that the borrowal was jointly made by the defendants who are husband and wife. If the borrowal was by the proprietary concern, liability will fall only on the proprietary concern or the proprietor. There is no distinction between the two. Merely because, the authorised signatory was corresponding with the creditor, that would not by itself cast any liability on the authorised signatory.

9.The learned counsel appearing for the respondent draws my attention to Order 1 Rule 7 of C.P.C., which states that where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties. Therefore, the plaintiff cannot be faulted for making both the defendants as parties to the suit. The question that arises for my consideration is on whom the liability should be fastened. The stand of the appellant is that the borrowal was by M/s.Rajalakshmi Mills and that it was the second defendant Raja Lakshmi who was the proprietrix of the said concern and that therefore, even assuming that the suit claim had been established, still it is only the proprietrix against whom the decree can be passed and that defendant No.1 cannot be fastened with any liability. Though as a proposition of law, this contention is acceptable, still in the facts and circumstances of the case, in as much as, the defendants have not entered the witness box to controvert the claim of the plaintiff, the defendants cannot hide behind technicalities.

10.The case of the plaintiff is not that M/s.Rajalakshmi Mills is the borrower. The case of the plaintiff is that the defendants are joint borrowers. Therefore, the second substantial question of law is answered in favour of the respondent and against the appellants, notwithstanding the description set out in the cause title. However, the outcome of this appeal does not depend on my answer to the aforesaid substantial question of law. It turns on the issue as to whether the defendants have cleared the liability in full or not. It depends on whether the payments made by the defendants could have been appropriated towards interest or not.

11.I do not find much substance in the contentions of the respondent's counsel that adverse inference should be drawn against the defendant for not entering the witness box. It is well settled that if the defendant can establish his defence by anchoring it on the plaintiff's evidence, then, failure to enter the witness box need not be put against him. In the case on hand, the defendants have specifically pleaded that following the loss suffered by their business, they had expressed their difficulties to the plaintiff and that the plaintiff also agreed to receive the subsequent payments towards the principal amount. The defendants have been clearing the liability in installments by way of cheque payments. The cheques were enclosed with the covering notes. Some of the covering notes have been marked by the plaintiff herself through P.W.1. I went through the exhibits A9 to A13. In fact, Exs.A2 to A8 are also documents evidencing payments made by the defendants. A comparison of the covering notes would indicate that while some payments were specifically towards interest, some exhibits clearly mention that the defendants were making the payments only towards the principal.

12.I sustain the contention of the learned counsel appearing for the respondents that the defendants cannot unilaterally make a claim that his payment should be appropriated only towards principal and not towards interest. But in the case on hand, there appears to be a clear pattern in the matter of making payment. The contents of Ex.A13 are of utmost relevance. It clearly states that the account had been settled. Balance is shown as “Nil”. If the plaintiff did not accept the statement made by the defendants, the plaintiff ought to have sent a notice then and there.

13.As rightly pointed out by the learned counsel appearing for the appellants, till 23.10.2007, the plaintiff did not send any communication to the defendants. The loan transaction dates back to 22.10.1996. The defendants have been periodically making the payments. 29.10.2004 is the late date of such payments. According to the defendants, with that payment, the loan account got settled. If according to the plaintiff, the loan was not settled, the plaintiff ought to have sent a notice. The fact that the plaintiff did not send any notice clearly probabilises the case of the defendants. The defendants have more than established their defence through Ex.A9 to Ex.A13 marked by the plaintiff herself through her husband P.W.1.

14.The Courts below have completely misdirected themselves in holding that whatever payment was made by the defendants can only be towards interest. The Courts below lost sight of the fact that it is always open to the parties to vary the terms of the contract. In the case on hand, the defendants have pleaded that since their business had suffered loss, they should be permitted to clear the liability by making payments towards principal. A mere look at the figures mentioned in the plaint would show that over a period of several months, payments were made. I hold that the defendants have established that the terms of agreement were subsequently varied by a oral understanding and that by 29.10.2004, the entire loan liability has been cleared. Therefore, the other substantial questions of law are answered in favour of the appellants. The impugned Judgment and decree are set aside and the suit is dismissed.

15.The second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

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Sub Assistant Registrar(CS)

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To

1.The IV Additional District Judge, Madurai,.
2.The First Additional Subordinate Judge, Madurai.
3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai(2 copies)

Judgment made in
S.A.(MD)No.687 of 2013
21.06.2021

KM(CO)
TR(05.08.2021) 5P 5C