BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.07.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

A.S.(MD)No.56 of 2019 and
C.M.P.(MD)No.3065 of 2019

1. Sri Vinayaga Hardware & Electricals,
   Backside of Murugan Theatre,
   Andipatti Town Panchayat,
   Andipatti Taluk, Theni District.
   Rep. by its Managing Partner,
   Chandrasekar.

2. Chandrasekar
3. Packiyalakshmi ... Appellants/Defendants 1 to 3

Vs.

Pandi @ Karuppasami
(Amended vide Order dated 24.06.2021)
... Respondent/Plaintiff

Prayer: Appeal suit filed under Section 96 of C.P.C., to set aside the Judgment and Decree dated 11.01.2019 made in O.S.No.32 of 2017 on the file of the learned Additional District and Sessions Court(Fast Track), Theni by allowing this appeal.

For Appellants : Mr.R.Aravindan
For Respondent : Mr.M.S.Balasubramania Iyer

J U D G M E N T

The defendants in O.S.No.32 of 2017 on the file of the Additional District and Sessions(FTC) Court, Theni, are the appellants in this appeal.

2. The respondent herein, namely, Pandi @ Karuppasamy filed the said suit for recovering a sum of Rs.12,00,000/- from the first appellant, namely, Sri Vinayaga Hardware & Electricals, represented by its Managing Partner Chandrasekar. The first appellant represented by the second appellant filed written statement pointing out that the partners have not been impleaded as the defendants and that therefore, the suit is bad for non-joinder. Therefore, the plaintiff filed I.A.No.107 of 2018 for impleading appellants 2 and 3 also as defendants 2 and 3 in the suit. The application was allowed on 26.10.2018 and thereafter, the third defendant filed written statement contending that she is an unnecessary party to the suit.

3. The case of the plaintiff was that the partners of the defendant firm are personally known to him. There was an understanding between them that the plaintiff's son could be inducted as a working partner in the defendant firm. When the talks were going on between the parties in this regard, on 10.01.2016, defendants 2 and 3 met the plaintiff at his residence and told him that on 17.07.2012 they had mortgaged their property with the Indian Bank, Theni Branch and since they could not repay the loan, the property was likely to be auctioned. They also stated that they were planning to perform marriage of their daughter and that therefore, they were in urgent need of a sum of Rs.15,00,000/-. Since the plaintiff was having a sum of Rs.12,00,000/- with him, he agreed to give them an interest-free loan of Rs.12,00,000/- to the second defendant. Thereafter on 04.03.2016, the plaintiff remitted a sum of Rs.12,00,000/- in the bank account of the defendant firm. Utilising the said amount, the defendants were able to liquidate their liability with the Indian Bank. According to the plaintiff, the defendants had agreed to return the said amount within a period of three months. Since they did not do so, the plaintiff gave a police complaint against them on 10.04.2017. The second defendant appeared before the police for enquiry and agreed to sell 17 cents of his land. Since the second defendant did not honour the said undertaking given before the police, on 12.05.2017 the plaintiff issued notice demanding return of the said amount. However, defendants 2 and 3 sent reply notice controverting the notice averments. Since the defendants had declined to comply with the demand set out in the notice, the aforesaid suit came to be instituted.

4. The defendants filed their written statement controverting the plaint averments. The specific stand of the defendants is that the plaintiff had received materials from the defendant firm on credit basis on various dates. The supplies were made right from 04.09.2015 and on various dates. In order to liquidate the said liability, the plaintiff had made the remittance in question in a single lump sum. According to the defendants, an amount of Rs.12,00,000/- was remitted by the plaintiff to the bank account of the first defendant firm to discharge his liability incurred towards purchase of materials from the defendant firm.

5. Based on the divergent pleadings, the trial Court framed the necessary issues. The plaintiff examined himself as P.W.1 and three other witnesses were examined on his side. Ex.A.1 to Ex.A.11 were marked and the second defendant examined himself as D.W.1 and Ex.B.1 to Ex.B.8 were marked. Court exhibits 1 and 2 were also marked through P.W.4. After considering the evidence on record, the learned trial Judge by the impugned judgment and decree dated 11.01.2019 decreed the suit as prayed for and directed the defendants to pay the plaintiff the suit amount of Rs.12,00,000/-.

Cost was also awarded. Questioning the same, the defendants have filed this appeal.

6. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds.

7. The learned counsel appearing for the appellants also filed written arguments. After taking me through the pleadings and evidence on record, the learned counsel appearing for the appellants pointed out that the pre-suit notice, namely, Ex.A.7 dated 12.05.2017 was addressed only to defendants 2 and 3 and that it was not issued to the defendant firm. His primary contention was that in the reply dated 18.05.2017(Ex.A.10), it had been specifically stated that the amount in question was remitted by the plaintiff only towards sale price for the goods supplied and that it was not a loan at all advanced by the plaintiff. Even though such a specific stand was taken in the reply notice, the plaintiff did not send any rejoinder. He also did not make any averment in this regard in the plaint also. Though in the written statement the very same stand was repeated, the plaintiff failed to file any reply statement. He also pointed out that it is inherently improbable that a huge amount of Rs.12,00,000/- would have been given without any interest. He also faulted the Court below for giving findings not based on documentary evidence. He pointed out that the Court below had given a finding that following the lodging of police complaint, the second defendant Chandrasekar appeared before the police and had agreed to convey 17 cents of land in favour of the plaintiff. He pointed out that no sale agreement was produced before the Court below for rendering such a finding. He also submitted that the Court below had not at all dealt with the stand of the third defendant that she was an unnecessary party to the suit proceedings. According to him, by marking Ex.B.2 bills and Ex.B.3 ledger account, the defendants have clearly shifted the onus to the plaintiff. The plaintiff had failed to discharge the onus that was cast on him. He also vehemently contended that going by the pleadings, one can notice that the entire case of the plaintiff was the transaction between him and defendants 2 and 3 was in their individual capacities. Therefore, the Court below could not have passed any decree against the defendant firm. He also submitted that even without framing any issue regarding the legal liability of defendants 1 to 3, an adverse decree had been passed against them. In his testimony, the plaintiff had admitted that he had purchased materials from the defendant firm. But his claim was that he had cleared the liability. According to the appellants' counsel, one must construe the nature of remittances in the light of this admission in the testimony of the plaintiff. He also submitted that it is improbable that a huge amount of Rs.12,00,000/- would have been given without taking any security. He also drew my

attention to the earlier decisions of this Court which deprecated holding of panchayats in the police stations. In this case, the Court below has chosen to attach significance to the testimony of the head constable, namely, P.W.4 through whom the court exhibits were marked.

8. The learned counsel appearing for the appellants placed reliance on the following decisions:-

i) 1997 (1) CTC 559 (K.M.M. Kadar Hussain Vs. O.M.R. Selvaraj and two others)

ii) 2002 (7) SCC 559 (Sampath Kumar Vs. Ayyakannu And Another)

iii) 2009 (17) SCC 796 (Fiza Developers & Inter-Trade ... Vs. Amci (I) P.Ltd.& Anr)

iv) 2011 (8) SCC 249 (Ramrameshwari Devi & Ors. Vs. Nirmala Devi & Ors)

v) AIR 1953 ASSAM 193 (Chandra Mohan Saha And Anr. Vs. Union Of India (Uoi) And Anr.)

vi) 2012 (8) SCC 148 (Union Of India vs Ibrahim Uddin & Anr.)

vii) AIR 1967 SC 58 (Chandradhar Goswami & Ors. Vs. The Gauhati Bank Ltd.)

viii) Biraji @ Brijraji & Anr. Vs. Surya Pratap & Ors. (Civil Appeal Nos.4883-4884 of 2017, dated 03.11.2020).

ix) AIR 1987 SC 1242 (Ram Sarup Gupta (Dead) By Lrs. Vs. Bishun Narain Inter College & Ors.)

x) AIR 2006 SC 2832 (Baldev Singh & Ors. Etc. Vs. Manohar Singh & Anr. Etc)

xi) AIR 2009 SC 1103 (Bachhaj Nahar Vs. Nilima Mandal & Ors.)

xii) AIR 1968 SC 538 (Seetharam Vs. Radhabai).

9. Per contra, the learned counsel appearing for the respondent submitted that the impugned judgment and decree do not warrant any interference.

10. The learned counsel appearing for the respondent further added that since this appeal is only a continuation of the original proceedings, this Court ought to invoke its jurisdiction under Order 41 Rule 33 of C.P.C. and award interest in favour of the plaintiff. Since the defendants did not repay the amount in question within the stipulated time, the respondent did not forego interest for the pre-suit period. However, the Court below ought to have awarded interest in terms of Section 34 of C.P.C. while passing the decree. Since the Court failed to do so, he wanted this Court to invoke jurisdiction under Order 41 Rule 33 of C.P.C. and award interest in favour of the respondent.

11. I carefully considered the rival contentions and went through the evidence on record.

12. As rightly pointed out by the learned counsel appearing for the respondent/plaintiff, the question that arises for

consideration is regarding the nature of remittance made by the plaintiff in the bank account of the defendant firm on 04.03.2016. It is not in dispute that the plaintiff had remitted the said amount in the bank account of the defendant firm. There is also no dispute that defendants 2 and 3 who are husband and wife are the partners of the first defendant firm. When the defendant firm filed written statement contending that the necessary parties, namely, defendants 2 and 3 have not been arrayed as defendants, the plaintiff in response thereto filed I.A. for arraying them as defendants. Thereafter, the third defendant was also arrayed as a defendant. She could not have filed written statement stating that she is not a necessary party. As rightly pointed out by the respondent, a partnership is not a legal entity. It is only a compendious mode of referring all the partners. The specific case of the plaintiff is that a sum of Rs.12,00,000/- was remitted by him in response to the request made by the partners. The remittance made by the plaintiff and its receipt by the defendants is not in dispute. It is the defendants who contend that this amount was paid by the plaintiff towards discharge of his liability for having purchased materials from the defendant firm. It is only the defendants who are having the burden to prove the same. Merely because the plaintiff did not issue any rejoinder notice or did not file any reply statement, no adverse inference can be drawn against the plaintiff. The learned counsel appearing for the respondent drew my attention to Order 8 Rule 9 of C.P.C. which clearly states that no pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claims shall be presented except by the leave of the Court and upon such terms as the Court thinks fit. In this case the defendants had not filed any counter claim. Therefore, the plaintiff was not really called upon the file any reply statement. As regards the stand taken in the reply, the plaintiff had specifically averred that the reply notice dated 18.05.2017 is full of evasion and false averments. Thus, the plaintiff had in fact specifically dealt with the contents of the reply notice in paragraph No.7 of his plaint.

13. The only question that arises for my consideration is whether the defendants had discharged their initial onus by marking Ex.B.2 and Ex.B.3. The learned counsel appearing for the respondent would point out that Ex.B.2 bills have been concocted for the purpose of the defence. He pointed out that Ex.B.2 series is a bunch of invoices from 04.09.2015 to 01.03.2016. Bill No.3 is dated 04.09.2015. Bill No.4 is dated 13.09.2015. The learned counsel appearing for the respondent pointed out that it would only mean that between 04.09.2015 to 13.09.2015, the defendant firm did not have any other transaction. Likewise, the bill No.32 is dated 25.02.2016 and bill No.33 is dated 28.02.2016. This would mean that between these two days, there were no sale transactions.

According to him, the bills have been especially prepared for the purpose of this defence. He would point out that the defendant firm had not produced its day book of accounts. Mere marking of the ledger account vide Ex.B.3 cannot fasten any liability on the plaintiff. The learned counsel appearing for the respondent placed reliance on Section 34 of the Indian Evidence Act 1872 which states that the entries in the books of account that are regularly kept in the course of business are relevant. From a mere look at Ex.B.2, one can come to the conclusion that they have not been maintained regularly.

14. I sustain the contentions advanced by the learned counsel appearing for the respondent/plaintiff. I must of course deal with the another contention of the learned counsel appearing for the appellants that the finding of the Court below as regards the existence of the sale agreement is perverse. It is true that no sale agreement was filed or marked before the Court below. But it is a fact that the plaintiff gave a complaint before Andipatti police station on 10.04.2017 and the second defendant was summoned and some sort of compromise was arrived at between the parties as evidenced by Court Ex.2. The said document was marked through P.W.4 Sathiya Bama, Head Constable working in Andipatti police station. A conjoint reading of the testimony of P.W.4, Ex.A.4 and Court Ex.2 would show that aggrieved by the non-repayment of a sum of Rs.12,00,000/-, the plaintiff had knocked the doors of the police. Of course in a case of a civil nature, the police complaint was clearly not maintainable.

15. This Court has to take judicial notice of the fact that in such matters, the aggrieved party goes to the police. The second defendant had not challenged the contents of Court Ex.2. The second defendant had agreed in writing that he would convey 17 cents of land in favour of the plaintiff. In fact the testimony of P.W.1 to P.W.4 are on the same lines. The learned counsel appearing for the respondent would point out that since the agreement was not stamped, it was not filed in the Court. But the plaintiff was ready to file the same in the Court. In the light of these circumstances, the learned trial Judge had given a finding that there was an understanding between the parties that the second defendant would convey 17 cents of land in favour of the plaintiff. Such a finding cannot be said to be perverse. I also find considerable merit in the stand of the learned counsel appearing for the respondent. If really the amount of Rs.12,00,000/- was remitted by the plaintiff to the defendant firm for payment towards sale price, the second defendant would not have undertaken before the police for selling 17 cents of land. Though the case of the plaintiff does not rest on Court Ex.2, still there is a considerable force in the claim of the plaintiff.

16. I must also note that in Ex.B.2, there is no acknowledgement from the plaintiff admitting his liability. It is true that the plaintiff had admitted that he purchased materials from the defendant firm. But that was for only a sum of Rs.40,000/-. Such an admission will not shift the onus from the defendants to the plaintiff.

17. Looked at from any angle, the judgment and decree impugned of the Court below do not call for any interference. Of course the learned counsel appearing for the plaintiff would request the Court to award interest in the favour of the plaintiff even while dismissing the appeal. I am not inclined to accept this request when the plaintiff has not filed any cross appeal.

18. The judgment and decree impugned passed by the trial Court are confirmed. This appeal suit is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PMU

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Additional District and Sessions Court(Fast Track Court), Theni.

Copy to

The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.R.ARAVINDAN, Advocate (SR-22219[F] dated 13/07/2021)

+1 CC to M/s.S.BALASUBRAMANIA IYER, Advocate (SR-22191[F] dated 12/07/2021)

A.S.(MD)No.56 of 2019
12.07.2021

RD(10/11/2021) 7P 6C