BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 19.07.2021
CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
AS(MD)No.97 of 2016
and
CMP(MD)No.6355 of 2016

S.V.Ramasamy ... Appellant /Plaintiff

Vs.

1.Vaibhogh Homes Pvt Ltd.,
Through its Managing Director,
R.Jawahar

2.R.Jawahar ... Respondents / Defendants

Prayer : Appeal Suit filed under Order 41 Rule 1 & 2 of CPC r/w. Section 96 of CPC against the judgment and decree dated 30.03.2015 passed in O.S No.111 of 2011 on the file of the V Additional District Judge, Madurai.

For Appellant : Mr.M.Saravanan
for R.Subramanian
For Respondents : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

JUDGEMENT

The plaintiff in O.S No.111 of 2011 on the file of the Vth Additional District Judge, Madurai is the appellant herein. The appellant filed the said suit for recovering a sum of Rs.11,10,273.90 with interest from the respondents herein. According to the appellant, he supplied building materials to the first defendant company over a period of two years from 2006. The last date of supply was 26.06.2008. According to the appellant/plaintiff, the second defendant who is none other than the Managing Director of the first defendant company had admitted in writing that the plaintiff has to be paid a sum of Rs.7,21,660/-. The plaintiff issued notice dated 08.06.2009 calling upon the defendants to pay the same. The defendants issued reply notice dated 26.06.2009 followed by rejoinder on 10.07.2009. The suit itself came to be filed literally at the last moment before the expiry of the limitation period. The defendants filed their written statement controverting the plaint averments. Several defences were taken. One such defense was that if at all the liability had only to be fastened on the company and no personal liability can be fastened on the Managing Director of the company. Based on the divergent pleadings, the trial court framed the necessary issues.

The plaintiff examined himself as PW.1 and marked Exs.A1 to A44. The second defendant examined himself as DW.1 and two other witnesses were also examined on the side of the defendants. Exs.B1 to B58 were marked. Exs.X1 to X30 were also marked. After considering the evidences adduced on either side, the trial court by the impugned judgment and decree dated 30.03.2015 dismissed the suit. Questioning the same, this first appeal came to be filed.

2.The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum grounds. He pointed out that the court below had totally ignored Exs.A9 and A10 in which the defendants' liability had been clearly acknowledged. He also would contend that the defendants virtually pleaded discharge as defence. Therefore, the burden lay only on the defendants. When the defendants marked Exs.B49 to B58 in support of their plea of discharge, the plaintiff challenged their genuineness. They were marked subject to objections. According to the defendants, the plaintiff had affixed his signature in the said vouchers. According to the appellant's counsel, when the plaintiff disputed his signature found in those vouchers (Exs.Ex.49 to Ex.B58), duty was cast on the defendants to have the same referred for the opinion of the handwriting expert. That was not done. The court below could have exercised its jurisdiction under Section 73 of the Indian Evidence Act. That was also not done. Therefore, the learned counsel for the appellant would contend that since the plea of discharge was not established, the suit ought to have been decreed as prayed for.

3.Per contra, the learned counsel appearing for the respondents contended that the present suit was one based on a running transaction. In such a case, the plaintiff ought to show that he had maintained the books of accounts in the regular course of business and that the final claim is a true reflection of the statement of accounts. The defendants have convincingly demonstrated that the plaintiff did not maintain proper statement of accounts. The learned counsel for the respondents drew my attention to the answers given by the plaintiff during the course of his cross examination. Since the requirement set out in Section 34 of the Indian Evidence Act has not been fulfilled, the suit has to necessarily fail. In this regard, the learned counsel placed reliance on the decisions of the Madras High Court reported in ***1992 1 L.W 262 Deluxe (Deluxe Road Lines vs. P.K. Palani Chetty)*** and ***2015 (1) MWN (Civil) 278 (Madras Cements Ltd., vs. T.M.T.Kannammal Educational Trust).*** The learned counsel for the respondents also pointed out that the plaintiff has been in the habit of receiving payments through open cheques. Therefore, he cannot now be heard to contend that Exs.B50 and Exs.B51 do not pertain to the said transaction. He also pointed out that Ex.A10 corresponds to Ex.B59 and that in Ex.A10 there have been interpolations made by the plaintiff. The pointed contention of the respondents is that the accounts maintained by the plaintiff are most unreliable and that therefore the impugned judgment does not call for any interference.

4.I carefully considered the rival contentions and went through the evidence on record. The points for consideration arising in this appeal are three fold. A) Whether the suit has to fail because the plaintiff failed to maintain the books of accounts in their regular course of business. B) Whether the second defendant can be fastened with any personal liability. C) Whether the defendants have proved Exs.B49 to B58. I must straightaway uphold the contention of the learned counsel for the respondents that the books of accounts have not been maintained in a proper manner. I find them to be intrinsically unreliable. But the question is whether the suit can be dismissed on that sole ground. If the plaintiff can otherwise establish the defendants' liability, then, failure to maintain proper books of accounts alone cannot result in non-suiting of the plaintiff. In the case on hand, the plaintiff had anchored his entire case more on the defendants' acknowledgement on Ex.A9 and A10 than on his books of account. Ex.A9 inspires my confidence. In Ex.A9 which was received by the defendants on 06.05.2008, the liability of the defendants had been quantified at Rs.6,30,760/-. It is not in dispute that Ex.B49 to B58 are subsequent to 06.05.2008. Ex.B49 is dated 08.05.2008 while Ex.B58 is dated 20.02.2009. A simple addition of the amounts covered under Exs.B49 and B58 comes to Rs.6,40,500/-. From this I am able to conclude that the plaintiff has proved the liability under Ex.A9. Thereafter, the onus clearly shifted to the defendants to show that through Exs.B49 to Ex.B58, this liability has been liquidated. In fact, that is precisely the stand of the defendant also. Since the plaintiff has been in the habit of receiving payment through open cheque, payment under Ex.B50 and Ex.B51 has been proved. The same cannot be revisited. That leaves us with the payments said to have been made vide vouchers Exs.B49, B52 to B58. The signatures appearing in those vouchers have been specifically denied by the plaintiff.

5.Therefore, as rightly pointed out by the learned counsel appearing for the appellant, the defendants ought to have got those documents referred for the opinion of the handwriting expert. Admitted signatures of the plaintiff are very much available on record. Such an exercise was not undertaken by the defendants. The court below also failed to invoke its jurisdiction under Section 73 of the Indian Evidence Act. In these circumstances, the counsel on either side submitted that if the matter is remitted to the file of the trial court, the parties may be given one more opportunity to test the genuineness of the aforesaid exhibits. In this view of the matter, the impugned judgment and decree of the court below is set aside. The appeal is allowed and the matter is remitted to the file of the trial court. The defendants shall file an application for referring the aforesaid exhibits for the opinion of the handwriting expert. The disputed signatures will be compared with the contemporaneous admitted signatures of the plaintiff. After getting the opinion of the expert, the court below shall dispose of the matter on merits and in accordance with law. The contention of the defendants as regards the second point for consideration is left open. The claim of the plaintiff under Ex.A10 is also left open. The evidence already adduced shall remain on record. Of course, the handwriting expert will have to be examined before the court below after his report is marked. Since the matter is being remitted to the trial court, the appellant will be entitled to refund of the court fees. Since the suit is of the year 2011, the court below shall endeavor to conclude the same within a period of nine months from the date of receipt of copy of this judgement. The first appeal is allowed on the above terms. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

skm

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.Vth Additional District Judge, Madurai.

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

+1 CC to M/s.D.NALLATHAMBI, Advocate(SR-23364[F] dated 20/07/2021)

+1 CC to M/s.R. SUBRAMANIAN, Advocate(SR-23248[F] dated 20/07/2021)

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KMK (CO)
LR (02.08.2021) 4P 6C