IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :18.10.2022

CORAM:

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

A.S.No.1034 of 2007

N.P. Kavunde Kounder ...Appellant

...Vs...

1. G. Krishnakumar

2. M/s. Arthi Chandru Investments,
Rep. by its Partner,
Kavunde Kaunder,
No.43, A-2, Sathi Road,
Ganapathy and No.9, Dharani
Lodge, 8th Street, Gandhipuram,
Coimbatore.

3. A. Kanagaraj ...Respondents

Prayer:- Appeal Suit has been filed under Order 41 Rule 1 read with Section 96 of CPC, against the judgement and decree, dated 03.10.2005, made in O.S.No.246 of 2004, by the Additional District Judge, F.T.C-I, Coimbatore.

For Appellant : M/s. Chitra Sampath

For Respondents : Mr. V.Anandha Murthy for R1
: Notice dispensed with for R2
Vide order dated 24.11.2021
: No Appearance for R3.

JUDGEMENT

This Appeal Suit has been filed against the Judgement and Decree, dated 03.10.2005, made in O.S.No.246 of 2004, passed by the Additional District Judge, F.T.C-I, Coimbatore.

2. The appellant is the 2nd defendant, 1st respondent is the plaintiff and respondents 2 and 3 are the defendants 1 and 3 before the trial court. For the sake of convenience, the parties are referred to as they are arrayed before the Trail Court.

3. The case of the plaintiff is that 1st defendant is the financing Company under the name and style of M/s. Arthi Chandru Investments, a registered Partnership firm, represented by its partners, viz., 2nd and 3rd defendants. The plaintiff had deposited a sum of Rs.3,00,000/- on 01.07.1996 in the aforesaid Firm and in evidence of the same, the 1st

defendant-Firm had issued fixed deposit receipt No.196 dated 01.07.1996, thereby, undertaking to repay the said amount of Rs.3,00,000/- with interest @ 24% p.a. after the period of two years viz., 01.07.1998. On maturity, the plaintiff demanded payment after 1.7.1998, the defendants did not pay any amount and they were giving evasive reply. On enquiry, the plaintiff came to know that the defendants 2 and 3 have clandestinely dissolved the 1st defendant firm in the year 1999 with a view to cheat and defraud the depositors those who had deposited the amount in the said Firm. The plaintiff came to know that the 2nd defendant who alone had owned some properties is hurriedly trying to dispose of his properties with a view to cheat the depositors. The defendants 2 and 3 are the partners of the 1st defendant-Firm, they are personally liable to repay the amount, which was deposited by the plaintiff and as they failed to repay the same, the plaintiff has filed the suit in O.S. No.246 of 2004 on the file of the Additional District Judge, FTC-I, Coimbatore, in which, the Trial Court passed the Judgment and Decree dated 03.10.2005 in favour of the plaintiff. Being aggrieved over the same, the 2nd defendant in the suit filed the present appeal to set aside the aforesaid Judgment and Decree passed by the Trial Court.

4. The learned counsel for the appellant would submit that despite

the defendants 2 and 3 were partners of the 1st defendant-firm when the firm was constituted, the 2nd defendant/appellant herein retired from the partnership firm as early as on 07.03.1987 owing to certain misunderstanding with the 3rd defendant. Thereafter, the 3rd defendant alone was doing business for several years. The 2nd defendant/appellant herein has nothing to do with the business of the 1st defendant. While the Partnership firm was dissolved on 07.03.1987, the plaintiff is said to have deposited a sum of Rs.3,00,000/- in the said Firm on 01.07.1996, is not sustainable. Hence, the receipt of the Fixed Deposit relied by the plaintiff must be a rank forgery having collusion with the 3rd defendant/3rd respondent. The 2nd defendant/appellant herein did not sign therein and issue any such receipt.

5. It has been further submitted by the learned counsel for the appellant that in terms of the Deed of Dissolution dated 07.03.1987, the Assets and liabilities of the 1st defendant - Firm was taken over by the 3rd defendant/3rd respondent herein. Hence, the 2nd defendant/appellant herein is not at all liable to pay the amount claimed by the plaintiff/1st respondent herein and in terms of the Deed of Dissolution dated 07.03.1987, the 3rd defendant/3rd respondent is alone responsible for the suit claim.

6. The learned counsel for the appellant would further submit that the

suit was a collusive one between the plaintiff/1st respondent herein and 3rd defendant/3rd respondent herein and hence the 3rd defendant/3rd respondent herein remained ex-parte before the Trial Court and further, he has not chosen to appear before this Court. The 3rd defendant/3rd respondent who was inimical towards the appellant, had created bogus document to cause loss to the 2nd defendant/appellant herein and had instigated the plaintiff/1st respondent herein to file the suit.

7. It has been further submitted by the learned counsel for the appellant that the suit in O.S. No.530 of 2004 on the file of the Additional District Sessions Judge, Coimbatore, has already been filed by the plaintiff/1st respondent herein in the name of his wife was also dismissed by its Judgment dated 31.03.2005 and as such, the suit filed by the plaintiff as against the defendants ought to have been dismissed. But, the learned Additional District Judge, on an erroneous appreciation of fact and law had decreed the suit.

8. The learned counsel for the appellant would submit that the appellant is an indigent person and he did not have any movable and immovable property. Further, the 2nd defendant / appellant herein has no

knowledge of any thing about the deposit made by the plaintiff/1st respondent herein with the 1st defendant / 2nd respondent-Firm as he is no longer as the partner since 1987 in the 1st defendant /2nd respondent Firm. The receipt of Fixed Deposit No.196 was not given by the 2nd defendant/appellant herein and the signature found in the receipt is not of the 2nd defendant/appellant herein and it is said to have been signed by the 3rd defendant/3rd respondent herein.

9. It has been further submitted that the Court below erred in placing reliance only on Ex.A.1, the deposit receipt to decree the suit as against 2nd defendant/appellant herein while Ex.A1 did not contain the seal of the 1st defendant firm / 2nd respondent herein or the signature of 2nd defendant/appellant herein. Hence, the suit decreed by the Court below is not sustainable and liable to be set aside.

10. On the contrary, the learned counsel for the 1st respondent would submit that the 2nd defendant/appellant herein and 3rd defendant were the partners of the said Firm having carried out its Financing business. The

plaintiff/1st respondent herein had deposited a sum of Rs.3,00,000/- (Rupees Three Lakhs Only) on 01.07.1996 in the said firm and in evidence of the same, a receipt of Fixed Deposit No.196 dated 01.07.1996 was issued by the said Firm with the signature of the 3rd defendant mentioning the rate of interest @24% p.a. and maturity dated as 01.07.1998. While being so, when the plaintiff/1st respondent herein approached the defendants after maturity, the 2nd and 3rd defendants/the appellant and the 3rd respondent herein closed the said firm and failed to return the matured amount, as per the receipt of Fixed Deposit.

11. It has been further submitted that the 2nd defendant/appellant herein and 3rd defendant are attempting to dispose of the properties with the aim of defrauding the depositors. The 2nd defendant/appellant herein has not established before the Trail Court about his retirement from the said firm and the same was also disbelieved by the Trial Court. The plaintiff/1st respondent herein has deposited the amount taking into consideration his future interest for the welfare of the Family Members. Since the defendants had not been paid the matured amount from 1998 onwards, the plaintiff/1st respondent herein approached the Civil Court and obtained a decree. Further,

2nd defendant who was alone representing the 1st defendant Firm and the 3rd defendant had remained ex-parte to support the case of the plaintiff/1st respondent herein.

12. The learned counsel for the 1st respondent would further submit that the Ex.A1 is the evidence of the receipt of Rs.3,00,000/- from the plaintiff / 1st respondent herein wherein the 3rd defendant have put his signature on behalf of the Firm. During the payment of the amount, the 2nd and 3rd defendants were very much available in the Office and the payment was given in the presence of both the 2nd and 3rd defendants. Further, the 2nd defendant has not proved his retirement from the Firm by way of proper evidence before the Trial Court. Hence, the Court below having considered the oral and documentary evidence decreed the suit in favour of the plaintiff / 1st respondent herein. Hence, the appeal filed by the 2nd defendant is untenable and liable to be dismissed. The trial court upon hearing the submissions had framed the following issues for consideration:-

> *"1. Whether the plaintiff is entitled to suit claim as prayed for?*
>
> *2. To what reliefs?"*

13. Before the Trial Court, the plaintiff was examined as P.W.1 and the 2nd defendant was examined as D.W.1 and one Natarajan was examined as D.W.2. Ex.A1 was marked on behalf of the plaintiff and Ex.B1 to Ex.B15 were marked on behalf of the 2nd defendant.

14. Heard the learned counsel for the appellant and the learned counsel for the 1st respondent and perused the documents placed on record. The following points arise for consideration in this Appeal Suit:-

> *"1. Whether the court below was right in considering the evidence of D.W.1?*
>
> *2. Whether the court below has erred in considering the evidence, which is only a piece of evidence, viz., receipt and it is valid?"*

15. On a perusal of the records, it is seen that there was no representation on the side of the defendants 1 and 3 before the Trial Court, hence, they were set exparte. At the same time, in the present Appeal Suit also, there is no representation for the 2nd and 3rd respondents. The Suit claim was based on fixed deposit receipt No.196 dated 01.07.1996 for a sum of Rs.3,00,000/- (Rupees Three Lakhs Only) alleged to have been issued by

the 3rd defendant/3rd respondent in the name of the 1st defendant/2nd respondent herein-Partnership Firm. The plaintiff/1st respondent herein claimed the suit amount as against the appellant based on the only fact that the appellant was also a partner of the 1st defendant/2nd respondent herein. However, except the aforesaid receipt, the plaintiff/1st respondent does not have sufficient and satisfactory oral and documentary evidence to show the source of the amount of Rs.3,00,000/- which is said to have been deposited in the said Firm. While the plaintiff/`1st respondent is an Income Tax Assessee, since he is doing business of sale of Transformer, has to show in his accounts Books or Income Tax Return as an amount of Rs.3,00,000/- has been deposited in the said Firm. However, the plaintiff has neither shown any statement of Income Tax nor any other statement that the said amount has been deposited in the Firm. The address shown in the receipt is the residential address of the 3rd defendant and the partnership firm was functioning in a different address. That apart, D.W.2, viz., Natarajan, who has signed as a witness in the Dissolution deed dated 01.07.1996 [Ex.B.1], during his cross examination had deposed that **he went to the Auditor's office on 27.03.1987, during which, they had a conversation that the 2nd defendant would quit from the firm and the 3rd defendant, viz.,**

Kanagaraj would continue the partnership firm.

16. Further, it is said that in the Ex.A1-Receipt of Fixed Deposit, the 3rd defendant has put his signature wherein no seal of the Firm is found and the plaintiff/1st respondent has also not taken any steps to summon the document from the defendants nor let in own documentary evidence to prove the signature of the 3rd defendant/3rd respondent herein, who was set ex-parte before the Trial Court and he has not chosen to appear before this Court also even though notice was served on him. Further, the registration number of the 2nd defendant firm has not been mentioned in the fixed deposit. While the 1st respondent/plaintiff has not chosen to take any steps to have the verifications of it, mere production of Ex.A1 is not sufficient to prove the case of the plaintiff/1st respondent herein that a sum of Rs.3,00,000/- was deposited with the 1st defendant on 01.07.1996 under Ex.A1 receipt.

17. It is no doubt true that the wife of the plaintiff, viz., K.Shanthikumari has filed a suit in O.S.No.530 of 2004 for recovery of Rs.3,28,000/- with interest at the rate of 24% per annum from the date of the suit till the date of realisation from the 1st defendant. The learned Additional

District and Sessions Judge, Coimbatore by Judgment and Decree dated 31.03.2005, upon considering the documents placed on record and on considering the evidence held that ***"the initial burden is always on the plaintiff to prove his claim, viz., deposit of the amount and the genuineness of Ex.A.1 and the plaintiff has also not taken any steps to summon evidence or issued any notice to the defendants to produce those documents",*** thereby dismissed the suit against the wife of the plaintiff.

18. That apart, it is represented before this Court that on the charge sheet lodged by the Inspector of Police, Economic Office Wing – 2, Coimbatore, against the defendants, the learned Special Judge, Special Court for Tamilnadu Protection of Interests of Depositors (in Financial Establishments) Act, 1997 vide, Year List Case No.47 of 2008 on 30.11.2009, upon hearing the submissions and on scrutinising the documents, acquitted the 2nd defendant on the ground that the 2nd defendant was not a partner in the 1st defendant – firm after 27.03.1987 and the receipts does not contain the signature of the 2nd defendant and awarded punishment against the 3rd defendant alone.

19. In the deposition of P.W.1, he had stated that the Receipt of the Deposit dated 01.07.1996 was issued in the presence of the 2nd defendant other than that he has no other document for paying the amount of Rs.3,00,000/- either Income Tax return or any financial statement received from the said Firm. That apart, the interest mentioned in the fixed deposit at the rate of 24% per annum is beyond the permissible rate of interest by the Reserve Bank of India. The plaintiff had not taken steps to produce the document relating to the partnership firm and particulars regarding mode of payment. As per Section 103 of the Indian Evidence Act, the burden of proof to any particular fact lies on that person, who wishes the court to believe in its existence. Hence in this case, the burden of proof lies on the plaintiff, who ought to have taken steps to substantiate his case. Even assuming that the 2nd defendant was available while receiving the deposit, the plaintiff has to produce evidence to prove the same and in the absence he has to proceed only against the person, who has signed the receipt. Except the averment in the plaint that the plaintiff and defendants were partners in the partnership firm, there is nothing on record to prove the same. In the absence of any cogent evidence / materials to prove that the 2nd respondent is involved in the case by affixing his signature in the receipt, only the person, who has signed

the said receipt is liable to pay the amount.

20. At this juncture, it would be necessary to consider the fact that a similar suit filed by the wife of the plaintiff for recovery of money from same respondents in O.S.No.530 of 2004 was dismissed on 31.03.2005 [as per Ex.B.7] on the ground that the plaintiff therein failed to prove the claim of the amount and the genuineness of Ex.A.1 by not taking steps to summon the documents from the defendant nor let in his own documentary evidence or issued any notice to the defendants to produce the documents. Considering the above said facts and circumstances and since the plaintiff has not produced any cogent materials to prove the case, this Court is of the view that the plaintiff/1st respondent has failed to prove his case against the appellant / 2nd defendant.

In view of the above, the Judgment and Decree dated 03.10.2005 in O.S. No.246 of 2004 passed by the Additional District Court, FTC-No.1, Coimbatore is set aside insofar as the appellant is concerned and the present Appeal Suit is liable to be allowed and the same is allowed. No costs.

18.10.2022

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking Order

Lbm / ssd

To:

1. The Additional District Judge, F.T.C-I, Coimbatore.

2. The Record Keeper, VR Section, Madras High Court

V.BHAVANI SUBBAROYAN., J.

lbm / ssd

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