



A.S. No.654 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.11.2022

Pronounced on : 24.11.2022

CORAM

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY, J.

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1.M/s.Srinivasa Construction Corporation,
Having its office at No.53-A, 6th Street,
Jothi Nagar Extension, Muduchur Road,
West Tambaram, Chennai-45.
Chingleput Dist.

2.R.Srinivasan

3.P.Kalavathi

...Appellants/ Defendants 1,2,4

Vs.

1.Canara Bank,
Nanganallur Branch,
Rep. by its Senior Manager,
Having Office at Nanganallur,
Chennai-61.

2.M.Ezhilmaran

...Respondent/ Plaintiff/ 3rd Defendant

PRAYER: First Appeal filed under Section 96 of Civil Procedure Code to set aside the judgment and decree made in O.S.No.23 of 2005 dated 31.10.2006 on the file of the Additional District and Sessions Judge (Fast Track Court-II, Ranipet), Vellore District.



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For Appellants : Ms.D.Malarvizhi

For Respondents : No Appearance
1 and 2

JUDGMENT

This Appeal Suit is filed by the defendants 1, 2 and 4 aggrieved by the judgment and decree dated 31.10.2006 in O.S.No.23 of 2005 (originally O.S.No.9 of 2005) passed by the Additional District and Sessions Judge (Fast Track Court-II, Ranipet), Vellore District in and by which the Suit for recovery of money filed by the plaintiff bank was decreed by the Trial Court by passing a preliminary decree directing the defendants to deposit a sum of Rs.18,12,933.99/- with further interest at the rate of 6% per annum till the date of realisation. In this judgment, the parties are referred to in the same ranking as before the Trial Court.

2. The case of the plaintiff/Bank is that the first defendant is a partnership firm and the defendants 2 to 4 are its partners. The firm availed a loan of Rs.50,000/- on 07.06.1989 agreeing to repay the debt with interest at the rate of 16.5% per annum compounded quarterly for the value received. A promissory note duly signed by the second defendant on behalf

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of the first defendant firm in the capacity of Managing Partner was executed.

The debt was followed by two letters of Acknowledgement of Debts dated 02.07.1991 and 20.03.1993. The balance outstanding on account of the said loan was Rs.31,608/- with further interest inclusive of penal interest upto 15.11.1994.

3. The first defendant also availed overdraft facilities to the tune of Rs.2,00,000/- and two promissory notes were executed by the first defendant firm on the same terms and conditions. The two promissory notes are dated 07.06.1989 for Rs.1,00,000/- and another for Rs.2,00,000/- on 20.10.1990. The first defendant firm also executed a Deed of Hypothecation. The loan was also acknowledged by letter on 01.02.1992 and the balance outstanding on the said account as on 31.12.1991 was Rs.3,35,376/-. Thereafter, on 17.02.1993, in respect of the total liability arising out of both the transactions, the second defendant deposited the title deeds in respect of the Suit Schedule Property by duly executing a Memorandum of Deposit of title deeds and created a mortgage of making the suit property as security in respect of the entire loan amount. The defendants defaulted in repayment and therefore as on the date of filing of the Suit, the total outstanding



amount was Rs.5,10,773/- along with future interest at the rate of 21.25% and hence the Suit.

4. The first defendant filed a written statement whereunder both the loan transactions were admitted. It is submitted on behalf of the first defendant that when two promissory notes were executed in respect of the second loan transaction, the entire loan transaction was only for a sum of Rs.2,00,000/- and upon execution of the second promissory note for a sum of Rs.2,00,000/-, the first promissory note stood superseded. It is the case of the defendants that a sum of Rs.50,000/- was lying as a deposit with the Bank and therefore during the period from 1989 when the amount was lying as a deposit, no interest was chargeable for a sum of Rs.50,000/- which was promised to be kept in the account for grant of Bank Guarantee. But, however, since the overdraft facility was sanctioned, there was no need for a Bank Guarantee and the interest of the said sum of Rs.50,000/- was never paid. Therefore, counter interest has to be calculated and adjusted towards the balance amount due.

5. An additional written statement was also filed on behalf of the first



defendant denying the execution of the letter of acknowledgment of debts and raising a plea of limitation and also claiming that the Bank had no right to adjust the sum of Rs.50,000/- which was lying in deposit. The third defendant separately filed a written statement whereunder it was contended that except for the debts incurred in the year 1999, when the third defendant was a partner, the subsequent debts will not bind the third defendant. The third defendant was not an existing partner on the date of the second borrowal of Rs.2,00,000/-. The Suit is bad for non-joinder of the then existing partners of the first defendant firm. The fourth defendant filed a written statement whereunder the calculation particulars are denied as incorrect. The fourth defendant's case is that he stood as guarantor only for a sum of Rs.50,000/- and prayed for the dismissal of the Suit.

6. On the strength of the said pleadings, the Trial Court framed the following issues:

“i) Whether the promissory note dated 07.06.1989 has to be cancelled as contended by the defendant?

ii) Whether the interest claimed is correct?

iii) Whether the claim of Rs.2,31,608/- is



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correct?

iv) Whether the Suit is to be decreed as prayed for with costs?

v) To what reliefs is plaintiff entitled?

The following additional issues were also framed:

i) Whether the Suit is barred by Section 69(2) of the Indian Partnership Act?

ii) Whether the plaintiff has complied with the provisions laid down under Order XXIX Rule 1 and Order XXX Rule 2 of Civil Procedure Code?

iii) Whether the Suit claims made by the plaintiff on the pro-note dated 07.06.1989 and 20.10.1990 for Rs.50,000/-, Rs.1,00,000/- and for Rs.2,00,000/- respectively or on the deposit of title deeds creating equitable mortgage or by depositing the title deeds by the first defendant?"

7.On the said issues, the parties let in evidence. On behalf of the plaintiffs, one *A.Manimaran* was examined as P.W.1 and ***Exs.A-1 to A-20*** were marked. On behalf of the defendants, the second defendant *V.R.Srinivasan* was examined as D.W.1 and ***Exs.B-1 to B-5*** were marked. Thereafter, the Trial Court proceeded to consider the case of the parties and



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by Judgment dated 31.10.2006 found that when the loan transactions are admitted, the plaintiff/Bank by producing **Exs.A-1 to A-20** has proved their claim and that the defendants have to repay the suit claim to the plaintiff/Bank. Regarding the change of constitution of partnership even though **Exs.B-1 to B-3** were marked, since the defendants never intimated such change/reconstitution, the defendants have no right to question. As far as the limitation is concerned, relying upon Articles 55 and 113 of the Limitation Act, 1963, the Trial Court found that the liability of guarantors arises only when the demand is made and even then the suit is filed within limitation. The Trial Court further found that when the plaintiff Bank has proved the passing of consideration, the Suit has to be decreed. Therefore, the Court passed a preliminary decree with costs. Aggrieved by which, the present Appeal Suit is laid before this Court.

8. Heard *Ms.Malarvizhi*, learned counsel appearing on behalf of the appellant. Even though notices were served on the respondent Bank there is no appearance. The learned counsel firstly pointing out to the decree would submit that when further interest is ordered, it ought to have been ordered only on the principal outstanding amount and not the entire sum due. The



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learned counsel would submit that as far as the guarantors are concerned, the Suit is hopelessly barred by limitation and the Trial Court erroneously decreed the Suit in respect of the guarantors. The learned counsel would submit that the partnership firm is nothing but the partners and the firm is represented by the defendants in the suit only in respect of the first loan transaction and when the partners have retired and new partners have come into the firm, then the Trial Court ought not to have decreed the Suit. The new partners are not impleaded as parties in the Suit. Therefore, the Suit is also defective of non-joinder of necessary parties. The liability of the borrowal by the subsequent partners cannot be fastened on the erstwhile partners. The learned counsel would submit that only a sum of Rs.3,55,000/- was shown to be outstanding. Only 16.5% was the contracted rate of interest. Erroneously, the Trial Court accepted the claim even for the penal interest in all totalling 21.25% and therefore the calculation as made in the decree requires interference.

9. I have considered the said submissions and perused the material records of the case.



10. The Following points arise for consideration:

“i) Whether or not the defendants 2 to 4 are liable for borrowal of the first defendant firm in view of re-constitution of the firm?

ii) Whether the Suit is barred by limitation in respect of the fourth defendant guarantor?

iii) Whether the plaintiff/Bank has properly calculated the interest and whether any discount has to be given for the period in which the amounts were lying in deposit with the Bank?

iv) Whether the Trial Court has calculated the amounts rightly and decreed the Suit and to what relief?”

11. On the above points, a reading of the plaint documents and **Exs.B-1 to B-4**, it is clear that from the records in respect of the firm, it can be seen that the second defendant *Srinivasan* was the partner of the firm from the beginning and continues to be so. The third defendant/ *Ezhilmaran* ceased to be a partner from 01.04.1990 and in his place, one *Padmavathy* has come in as partner from 01.04.1990. However, the said fact of the second defendant, retiring from partnership was never intimated to the plaintiff/Bank and the said third defendant namely, *Ezhilmaran* has not

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preferred any appeal even though a decree has been passed. Therefore, the said contention of the learned counsel that the Suit was not maintainable in respect of retired partners is unsustainable. In the absence of any intimation or knowledge to the plaintiff/ Bank, the Suit will not be bad merely because *Padmavathy*, the newly added partner was not added as defendant in the Suit. Even in the written statement, her name and particulars were not clearly pleaded and therefore no exception can be taken to the findings of the Trial Court in this regard. This apart, the fourth defendant was only a guarantor, who has duly executed the Deed of Guarantee in ***Ex.B-10***, undertaking to be the guarantor in respect of the loans of the first defendant firm. When a mortgage has been created by the second defendant, who is the partner, there was no necessity for invocation of a Deed of Guarantee and as per Articles 55 and 113 of the Limitation Act, 1963, the period of limitation starts only from the date of demand and accordingly the Suit is also well within the period of limitation as far as the fourth defendant is concerned. Otherwise, the mortgage and the Memorandum of Deposit of title deeds are duly proved and therefore the Suit is well within the period of limitation. As far as the waiver of interest for the sum of Rs.50,000/- which is lying as deposit is concerned, there was no contractual obligation except for the

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pleadings that there was oral understanding from the Branch Manager.

Therefore, the defendant cannot claim any exclusion of interest, as a matter of right.

12. As far as the calculation by the Trial Court is concerned even as per the plaint, it can be seen that the balance outstanding was Rs.5,10,773/- and the interest rate which was calculated was as per the rate of interest prescribed by the Reserve Bank of India and therefore upto the date of plaint i.e.,06.01.1995, the said rate of 21.25% is applicable. However, while passing the decree, the Trial Court calculated the further interest on the amount at the rate of 21.25% from the date of plaint till 31.01.2007 and arrived at a sum of Rs.18,12,933.99/-, the future interest is ordered to be payable on the total sum instead of the principal sum outstanding which was Rs.3,00,000/-. Therefore, the decree of the Trial Court is to be modified that the defendants be made to pay a sum of Rs.18,12,933.99/- with further interest at the rate of 6% per annum on the principal outstanding of Rs.3,00,000/-. Except for the above modification, the rest of the decree shall stand and to that extent, the Appeal stands partially allowed.



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13. In view of my above findings, the findings of the Trial Court in respect of all the issues are upheld except to the limited extent of the error committed by the Trial Court while drafting the preliminary decree.

14. In the result, the Appeal Suit in A.S.No.654 of 2008 is partially allowed:

i) The Judgment and Decree dated 31.10.2006 in O.S.No.23 of 2005 is confirmed in all aspects except for Clause II point (i) as "That the defendants do pay into the Court on or before 31st day of January 2007 or any later date up to payment time may be extended by the Court. The said sum of Rs.18,12,933.99/- and thereafter, further interest at the rate of 6% per annum shall be paid on the principal amount of Rs.3,00,000/-".

ii) There shall be no order as to costs as far as the Appeal Suit is concerned; and

iii) Consequently, connected miscellaneous petitions, if any, are closed.

24.11.2022

Speaking (or) Non Speaking Order

Index : Yes/ No

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To:

1.The Additional District and Sessions Judge
Fast Track Court-II, Ranipet,
Vellore District.

2.The Senior Manager,
Canara Bank,
Nanganallur Branch,
Having Office at Nanganallur,
Chennai-61.



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D. BHARATHA CHAKRAVARTHY, J.

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Pre-Delivery Judgment in
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