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S.A.No.195 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.11.2024

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.195 of 2018 and
C.M.P.No.5032 of 2018

Mr.T.V.Kumarasamy

... Appellant

Vs.

1. UOI Represented by General Manager,
Heavy vehicles Factory, A Unit of AVNL,
Avadi, Chennai.

(R1 is amended as per the order of this Court
made in CMP no.5289/2024, dated 05.03.2024)

2. C.G.Sivalingam

... Respondents

Prayer : Second Appeal filed under Section 100 r/w. Order 41 of CPC, 1908 against the decree and judgment dated 21.02.2017 passed in A.S.No.110/2015, on the file of the XVIII Additional Judge, City Civil Court, Chennai, upholding the decree and judgment dated 19.02.2013 passed in O.S.No.8817/2008, on the file of the VIII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.N.Nagu Sah

For R1 : Mr.A.Murugan,

Additional Central Government

Standing Counsel



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JUDGMENT

The appellant is the second defendant in O.S.No.8817/2008 on the file of the VIII Assistant Judge, City Civil Court, Chennai. The first respondent, the Union of India, represented by the General Manager, Heavy Vehicles Factory, Avadi filed the above suit for recovery of a sum of Rs.1,00,000/- from the defendants 1 and 2 together with interest at the rate of 18% per annum.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.

3. The case of the plaintiff in a nutshell is as follows :

The first defendant was appointed as Chargeman Grade II (OP/Tech/Mech) in the plaintiff's Heavy Vehicles Factory, Avadi, during 2004-2005. As per the procedure and practice, he was sent to Ordnance Factory Institute of learning, Nagpur to undergo training for ten months with effect from 28.03.2005. A Bond, dated 24.03.2005 was executed by



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the first defendant in favour of the plaintiff to the effect that the first defendant would serve the Government of India for a period of five years after the expiry of two year probation period. As per the Bond, in the event of refusal or failure to serve the organization for the mandatory period, the first defendant or his surety would be jointly and severally liable to refund a sum of Rs.1,00,000/- or the amount paid to him towards pay and allowances during the period of training, whichever is less. The first defendant after undergoing ten months training at Nagpur, did not join duty as per the proceedings No.02317/HVFTS/2005-06/OFILAMJ, dated 09.01.2006. However, he sent a fax message on 18.01.2006, stating that he was suffering from kidney ailment and has to undergo an operation. Since he did not join duty thereafter also the plaintiff was constrained to initiate proceedings against the first defendant under Rule 14 of CCS (CC & A) Rules, 1965 on 07.05.2007. It also came to the knowledge of the plaintiff that during the training period the first defendant was issued with an advice note for his misbehavior vide letter number OFILAJ/9017/DISC/05-06, dated 30.09.2005 by the Training Institute Director, Ambajhari, Nagpur. As per the terms of the Bond



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agreement, dated 24.03.2005 the first and second defendants are jointly and severally liable to pay a sum of Rs.1,00,000/- to the plaintiff and hence the suit.

4. Since the plaintiff did not take any steps to serve summons on the first defendant, the suit was dismissed as against the first defendant.

5. The suit was resisted by the second defendant on the following grounds:

- i. The suit is not maintainable.
- ii. The second defendant did not execute any Bond as alleged by the plaintiff.
- iii. The second defendant did not commit any breach of contract and therefore he is not liable to pay a sum of Rs.1,00,000/-.

6. On the basis of the above pleadings, the trial Court framed the following issues:

- i. *Whether the plaintiff is entitled to get the suit amount?*



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ii. *To what relief the plaintiff is entitled?*

7. In the trial Court, one witness was examined on the side of the plaintiff and Ex.A1 to Ex.A8 were marked. No oral or documentary evidence was adduced on the side of the defendants.

8. After full contest, the learned VIII Assistant Judge, City Civil Court, Chennai, vide his decree and judgment dated 19.02.2013, decreed the suit filed by the plaintiff on the following grounds:- :

- i. It is clear from the Bond dated 24.03.2005 that the defendants have agreed to refund a sum of Rs.1,00,000/- or total amount paid towards pay and allowances during the training period to the first defendant, in the event of the first defendant leaving the service.
- ii. The liability of the first and second defendant is joint and several and therefore they are liable to pay the said amount to the plaintiff.
- iii. The plaintiff has also issued a letter to the first defendant (Ex.A3) during the period of training about his un-authorized absence and had in fact requested him to join duty immediately.
- iv. The first defendant had sent his reply dated 18.01.2006 (Ex.A4)



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stating that due to kidney ailment, he could not report to duty.

- v. The plaintiff had thereafter sent a notice to the defendants 1 and 2 to pay a sum of Rs.1,00,000/- or total amount paid towards pay and allowances during the training period to the plaintiff.
- vi. Despite receipt of the said notice by the defendants, they did not come forward to pay the amount. As per the terms of the Bond dated 24.03.2005, both the defendants 1 and 2 are jointly and severally liable to pay a sum of Rs.1,00,000/- together with interest at 9% per annum.

9. Aggrieved over the decree and judgment passed by the trial court, the second defendant filed an appeal in A.S.No.110/2015, before the XVIII Additional Judge, City Civil Court, Chennai. The learned XVIII Additional Judge after analysing the oral and documentary evidence adduced on both sides, upheld the findings recorded by the trial court vide his decree and judgment dated 21.02.2017, as against which the present second appeal is filed.

10. The second appeal is admitted by this Court on 19.03.2018



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on the following substantial questions of law:

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- i. *Whether the Appellate Court was right in law in dismissing the first appeal on merits while it records the absence of the appellant and his counsel on the hearing date of the Appeal suit without notice eventhough there is an express bar provided under the explanation to Sub Rule 1 to Rule 17 of Order 41 of C.P.C.?*
- ii. *Whether the Courts below were right in law in decreeing the suit against the appellant / Guarantor while it had dismissed the suit as against the 1st defendant / Principal Debtor?*
- iii. *Whether the Courts below were right in law in holding the validity of Ex.A2-Agreement in the absence of any evidence by the plaintiff for proving the execution of Ex.A2 while the appellant had seriously disputed the execution of Ex.A2-Agreement by him?*

11. Heard Mr.N.Nagu Sah, learned counsel for the appellant and Mr.A.Murugan, learned Additional Central Government Standing



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Counsel for the respondents 1 and 2.

12. Mr.N.Nagu Sah, learned counsel for the appellant contended that the first Appellate Court ought not to have disposed of the case without hearing the appellant's arguments. He relied on the decision of the Hon'ble Supreme Court in ***Ghanshyam Dass Gupta Vs. Makhanlal*** reported in ***(2012) 8 SC 745*** and contended that as per Rule 17 (1) of Order 41 of the code of civil procedure, if the appellant does not appear when the case was called for hearing, the Court has to dismiss the appeal. In the instant case, the first Appellate Court has dismissed the appeal merely based on the arguments advanced by the respondent/plaintiff. He therefore prayed for remitting the case back to the Appellate Court for fresh consideration. He would also contend that when the Bond clearly speaks that a sum of Rs.1,00,000/- or the amount spent towards pay and allowances to the first defendant which ever is less, has to be paid, the plaintiff has not adduced sufficient documentary evidence to show the actual amount spent on the first defendant.

13. Per contra, Mr.A.Murugan, learned Additional Central



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Government Standing Counsel contended that the Bond is very clear in respect of payment of Rs.1,00,000/- payable by the first defendant to the plaintiff and both the Courts below concluded that the defendants 1 and 2 are jointly and severally liable to pay the said amount.

14. A perusal of the Judgement of the first Appellate Court shows that the first Appellate Court even without hearing the arguments of the appellant dismissed the appeal based on the arguments advanced on the side of the respondent/plaintiff. In the decision in ***Ghanshyam Dass Gupta Vs. Makhan lal*** (cited *supra*), it has been held thus:

"6. We are, in this case, called upon to consider whether the High Court was justified in deciding the appeal on merits in the absence of any representation on behalf of the appellant, in view of the Explanation to Order 41 Rule 17(1) C.P.C. The said provision is given below for easy reference:

"17. Dismissal of appeal for appellant's default:- (1) Where on the day fixed, or on any



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other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may take an order that the appeal be dismissed.

Explanation :- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

7. Rule 17 (1) of Order 41 deals with the dismissal of appeal for appellant's default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing the Court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if nobody had appeared for the appellant."



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15. In the circumstances, the case is remitted back to the first Appellate Court viz., XVIII Additional Judge, City Civil Court, Chennai to hear the appeal afresh. The first Appellate Court shall give sufficient opportunity to the appellant to put forth his contention.

16. In the result,

- i. The Second Appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.
- ii. The decree and judgment dated 21.02.2017 passed in A.S. No.110/2015, on the file of the XVIII Additional Judge, City Civil Court, Chennai is set aside.
- iii. The counsels for the appellant and the respondents shall appear before the first Appellate Court on 11.12.2024 and advance their arguments without fail.
- iv. The first Appellate Court viz., XVIII Additional Judge, City Civil Court, Chennai is directed to dispose of the appeal within a period of three months thereafter.

11.11.2024



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Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
vum

R. HEMALATHA, J.

vum

To

1. The XVIII Additional Judge, City Civil Court, Chennai.
2. The VIII Assistant Judge, City Civil Court, Chennai.
3. The Section Officer, VR Section,
Madras High Court, Chennai.

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