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S.A.No.152 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.08.2024

CORAM:

THE HON'BLE MRS.JUSTICE.N.MALA

S.A.No.152 of 2021
and CMP.No.3279 of 2021

L.Karthikeyan

... Appellant
Vs.

S.S.Vadivel Achari

... Respondents

PRAYER:-- This Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the Judgment and Decree dated 07.03.2020, made in AS.No.52 of 2017, on the file of the Additional District Court (FTC), Arani, Tiruvannamalai District, confirming the Judgment and Decree dated 10.08.2016 made in OS.No.14 of 2014 on the file of the Sub-Court, Cheyyaru.

For Appellant : Mr.A.E.Ravichandran

For Respondent : Mr.V.Prakashbabu

* * * * *

J U D G M E N T

This Second Appeal is filed to set aside the Judgment and Decree dated 07.03.2020, made in AS.No.52 of 2017, on the file of the Additional District Court (FTC), Arani, Tiruvannamalai District, confirming the Judgment and Decree dated 10.08.2016 made in OS.No.14 of 2014 on the file of the Sub-Court, Cheyyaru.



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2.The unsuccessful defendant is the appellant in the second appeal.

3.The brief facts leading to the second appeal are as follows:

The plaintiff filed the suit in O.S.No.14 of 2014 on the file of the Sub Court, Cheyyaru against the defendant for recovery of Rs.1,46,200/- along with subsequent interest at 24% per annum on Rs.85,000/- from the date of the suit till the date of realisation and for cost on the basis of the promissory note dated 02.08.2010 executed by the defendant in favour of the plaintiff for a sum of Rs.85,000/-.

4.The defendant contested the suit by filing written statement, wherein he pleaded that he had actually borrowed Rs.10,000/- from the plaintiff on 02.08.2010 at 3% interest per month and signed a blank paper. The defendant further stated that he had paid Rs.3,000/- and when he approached the plaintiff on 01.09.2012, along with one Arunachalam to repay the principal amount of Rs.10,000/- the plaintiff demanded 4% interest. The defendant thereafter paid Rs.14,000/- to the plaintiff and requested for the return of the pro-note. The defendant further stated that though the plaintiff promised to return the pronote within a week, he failed to do so and instead issued a legal notice on 12.09.2012 for recovery of money with interest. Thereafter the plaintiff



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filed the suit in O.S.No.14 of 2014 on the file of the Sub Court, Cheyyaru for the aforesaid reliefs.

5.Before the trial Court, the plaintiff examined himself as PW1 and marked Ex.A1 to Ex.A3. On the side of the defendant, the defendant examined himself as DW1 and marked Ex.B1 to Ex.B7. The trial Court on an appreciation of the entire evidence on record both oral and documentary, decreed the suit by the Judgment and Decree dated 10.08.2016, by directing the defendant to pay a sum of Rs.1,46,200/- along with interest at 9% per annum on the principal amount of Rs.85,000/- from the date of the date of plaint till the date of the decree and from the date of the decree till date of realisation. Aggrieved by the Judgment and Decree of the trial Court the defendant preferred an appeal in A.S.No.21 of 2017 before the Additional District Court, Arani, which was renumbered as A.S.No.52 of 2017. The lower Appellate Court on consideration of the entire materials confirmed the Judgment and Decree of the trial Court vide its Judgment and Decree dated 07.03.2020. Aggrieved by the concurrent Judgments of the Courts below the defendant filed the above second appeal.

6.The second appeal was not admitted. Notice was ordered on 25.02.2021. On



notice the respondent appeared through counsel. With the consent of both the learned counsels the main second appeal is taken up for final hearing. The substantial questions of law that arise for consideration in the second appeal are as follows:

i) Whether the suit ought to have been dismissed although the limitation has not been set up as a defence, as per Section 3 of the Limitation Act?

ii) Whether the suit is not barred by limitation, when the plaintiff has not paid the proper Court fee and re-presented the suit after the period of limitation and the extension of time to pay deficit Court Fee has been granted without notice to the defendant and without affording an opportunity of hearing, as held by the Hon'ble Supreme Court in A.Nawab John and Others Vs. V.N.Subramaniam and another, reported in 2012 7 SCC 738.

7.The learned counsel for the appellant submitted that the plea of limitation was not raised before the trial Court, because, the defendant came to know that the suit was filed beyond the period of limitation only after receiving the copy of the Judgment of the trial Court. The learned counsel submitted that though the issue of limitation was raised before the lower Appellate Court, the same was not considered by the



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Courts below having concurrently found in favour of the plaintiff this Court, under Section 100 CPC should be loath to interfere with the concurrent Judgments of the Courts below.

9.I have heard both the learned Counsels and I have perused the materials placed on record.

10.1st Substantial Question of Law:

The learned counsel for the respondent submitted that the issue of limitation ought to have raised in the first instance before the trial Court. The suit was numbered and the Judgments were also passed by the Courts below by entertaining the suit and so, this Court should not interfere with the Judgments on the ground of limitation at the second appellate stage. The said submission of the learned counsel is directly answered by the Hon'ble Supreme Court in it's latest Judgment in S.Shivraj Reddy (Died) through his Legal heirs and Another Vs. S.Raghuraj Reddy and Others reported in 2024 SCC Online SC 963. The Hon'ble Supreme Court while answering the question whether the suit could be dismissed on the ground of limitation even without a plea of limitation raised by the defendant held as follows:

“15.... Law in this regard has been settled by this Court



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through a catena of decisions. We may refer to the judgment in the case of *V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao and Another*³, wherein this Court held as follows:

“20. The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation.

21. This Court in *Manindra Land & Building Corpn. Ltd. v. Bhutnath Banerjee* [(1964) 3 SCR 495 : AIR 1964 SC 1336] held (AIR para 9):

“Section 3 of the Limitation Act enjoins a court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate court comes to an erroneous decision, it is open to the court in revision to interfere with that conclusion as that conclusion led the court to assume or not to assume the jurisdiction to proceed with the



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determination of that matter.”

16.Thus, it is a settled law that even if the plea of limitation is not set up as a defence, the Court has to dismiss the suit if it is barred by limitation.”

11. Therefore, it is clear that under Section 3 of the Limitation Act the Court is enjoined to dismiss the suit even if the plea of limitation was not raised. Hence the submission of the learned counsel for the respondent is rejected and the first substantial question of law is answered in favour of the appellant.

12.2nd Substantial Question of Law:

On a perusal of the plaint in O.S.No.14 of 2014, it is seen that the plaint was presented on 01.08.2013 with deficit court fee and hence the plaint was returned on 12.08.2013. The plaint was represented on 14.09.2013 and again returned on 14.09.2013 for payment of deficit court fee. It was again returned on 28.10.2013 for payment of deficit court fee and represented on 05.11.2013 with an endorsement that the deficit Court fee was paid on 29.10.2013. From the above it is clear that at the time of presentation of the plaint, the full Court fee was not paid and that the deficit Court fee was paid beyond the limitation period. Applications were filed under Section 151 CPC to condone the delay in representation. But it appears from the record that no application was filed to condone the delay in paying the deficit Court fee under Section 149 CPC. Section 149 of CPC reads as follows:



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“Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance”.

13. Section 149 CPC empowers the Court to permit a person to pay the deficit Court fee belatedly. The power to make up the deficit court fee vested in the court is a discretionary power. Once the Court exercises its power in favour of the person liable to pay the deficit Court fee, the same takes effect as if, such fee was paid in the first instance.

14. The contention of the learned counsel for the plaintiff is that the application under Section 151 CPC would encompass the delay in paying the deficit court fee and therefore no separate application under Section 149 CPC was necessary. In the case of ***S.V.Arjunaraj Vs. P.Vasantha*** reported in ***2005 (5) CTC 401***, this Court following



the Judgment of the Division Bench in ***Pamidimukkala Sitharamayya and Ors. Vs.***

Ivaturi Ramayya and Anr., reported in ***1938 (1) MLJ 514***, held that the suit was liable to be rejected when deficit Court fee was paid beyond the limitation period and without an application and order under Section 149 CPC granting extension of time to pay the deficit Court fee. The aforesaid Judgments were followed by a learned Judge of this Court in the case of V.N.Subramaniam Vs. A.Nawab Johb and Others reported in 2007 (2) Law Weekly 363. The relevant paragraphs are as follows:

“6.However, the Learned counsel for the revision petitioner contended that on two occasions I.A.'s, were filed only under Sections 148 and 151 CPC to condone the delay of representation alone and there was no separate application or prayer for condoning the delay of payment of deficit court fee and thus there is no prior permission obtained to pay the deficit court fee.

7. A perusal of the impugned orders and the typed set of papers would clearly show that the delay condonation applications have not been field under Section 149 CPC or a separate prayer has been included to pay the deficit court fee with such delay. In fact the said applications have been filed under Sections 148 and 151 CPC to condone the delay of representation alone. The decisions in Padmidikkala Sitharamayya and others Vs. Ivaturi Ramayya and another (1938 MLJ 515 DB) and S.V.Arjunaraja Vs. P.Vasanth (2005 (5) CTC 401, this court held that in the absence of specific application invoking Section 149



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CPC and in the absence of any order passed by the court granting time for payment or enlargement, the plaintiff is not protected and the suit is liable to be rejected. It is also held that mechanical return of the plaint, which cannot be said that an order has been passed, extending the time for payment of court fees, would save the limitation, if the court fees is paid, after the period of limitation prescribed is lapsed.

14.As regards invocation of Section 151 CPC instead of 149 CPC, it is to be held that only in the absence of any specific provision, the inherent provision of Section 151 can be invoked as has been held in Muthulingam Vs. Gangai Ammal reported in 2001 (2) L.W. 347. Thus, in the present case the plaintiffs could have invoked Sec.149 CPC as well to condone the delay in in paying the deficit court fee while representing the Plaint.”

15.It is pertinent to note that the above Judgment was affirmed by the Hon'ble Supreme Court in the case of ***A.Nawab John and Others Vs. V.N.Subramaniam*** reported in ***2012 7 SCC 738***. From the above Judgments it is clear that the contention of the learned counsel for the respondent that the application made and the order passed under Section 151 CPC would encompass the delay in paying the deficit Court fee cannot be sustained. In the present case, the plaintiff while presenting the plaint did not pay the entire Court fee. The deficit Court fee was paid beyond the



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period of limitation and that too without an application and order under Section 149

CPC. Therefore, in my view, the above Judgments of this Court, as rightly pointed out by the learned counsel for the appellant squarely apply to the facts of the case and hence the second substantial question of law is also answered in favour of the appellant.

16.In fine, the Judgment and Decree dated 07.03.2020, made in AS.No.52 of 2017, on the file of the Additional District Court (FTC), Arani, Tiruvannamalai District, confirming the Judgment and Decree dated 10.08.2016 made in OS.No.14 of 2014 on the file of the Sub-Court, Cheyyaru are set aside and the second appeal is accordingly allowed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

02.08.2024

NCC : Yes

Index : Yes

Speaking Order / Non-speaking order

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To

- 1.The Additional District Court (FTC),
Arani,
Tiruvannamalai District.
- 2.The Sub-Court,
Cheyyaru.
- 3.The Section Officer,
Vernacular Records,
High Court,
Madras.



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N.MALA, J.
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