
(1998) 10 MAD CK 0154
In the Madras High Court
Case No : S.A. No. 866 of 1986

Bhoovaraha Kounder

APPELLANT

Vs

Bhoovarahamurthy Rao and Others

RESPONDENT

Date of Decision : 14-10-1998

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 30, 35, 36, 91, 92

Citation : (2000) 100 CompCas 250

Hon'ble Judges : S.M. Sidickk, J

Bench : Single Bench

Advocate : Parthasarathy, for Hema Sampath, for the Appellant; M. Maninarayanan, for K. Balachandran, for the Respondent

Final Decision : Allowed

Judgement

S.M. Sidickk, J.—The appellant is the first defendant and the first respondent is the plaintiff before the courts below.

2. Respondents Nos. 2 and 3 in this second appeal are defendants Nos. 2 and 3 before the trial court and they have been given up in this second appeal.

3. The first respondent/plaintiff filed the suit in O. S. No. 313 of 1981 on the file of the Principal District Munsif's Court at Villupuram for recovery of a sum of Rs. 5,551.50 on the following grounds : The appellant/first defendant advanced a sum of Rs. 5,000 on a promissory note dated August 25, 1969, to one Ranganatha Iyengar and a sum of Rs. 1,000 was paid and endorsed on the suit pronote on May 7, 1970. Then the appellant/first defendant assigned the suit pronote on August 1, 1970, for valid consideration in favour of the first respondent/plaintiff herein. The first respondent/plaintiff herein on the basis of the assigned pronote filed a suit in O. S. No. 721 of 1979, against the said Ranganatha Iyengar and obtained a decree against him on June 27, 1971. The first respondent/ plaintiff was able to realise only a sum of Rs. 1,846.93 by means of rateable distribution. Thereafter the first respondent/plaintiff filed

another execution petition for attachment of a house at Poiyapakkam as though belonging to the said Ranganatha Iyengar. One Krishnaswamy Iyengar claimed the said house at Poiyapakkam village as his own property by filing a claim petition in E. A. No. 1754 of 1974 on the file of District Munsif's Court at Villupuram and the said claim petition was allowed. Then the first respondent/plaintiff herein filed a claim suit in O. S. No. 299 of 1975 to set aside the claim order passed in E. A. No. 1754 of 1974 and the said suit in O. S. No. 299 of 1975 was dismissed. Thereupon the first respondent/plaintiff preferred an appeal in A. S. No. 19 of 1978 and the same was also dismissed on September 14, 1979. Thereafter the first respondent/ plaintiff issued a notice calling upon the appellant/first defendant herein to pay the balance amount due to him. The appellant/defendant issued a reply denying his liability. Hence the present suit was filed.

4. The appellant/first defendant filed a written statement as well as an additional written statement admitting the execution of the pronote dated August 25, 1969, by Ranganatha Iyengar in his favour and also the assignment of the suit pronote in favour of the first respondent/plaintiff but the appellant/first defendant pleaded that he has no knowledge about the execution proceedings taken by the plaintiff against Ranganatha Iyengar, and the assignment consideration was paid to him by defendants Nos. 2 and 3 by virtue of a sale deed executed by the first respondent/plaintiff in favour of defendants Nos. 2 and 3 herein, and the first respondent/plaintiff has no right to file the suit against the appellant/first defendant and the suit claim is barred by limitation, and so the suit must be dismissed with costs.

5. Defendants Nos. 2 and 3, who are respondents Nos. 2 and 3 in this second appeal and later given up, filed a written statement contending that they purchased the property from the first respondent/plaintiff for a sum of Rs. 13,000 and it is true that one of the considerations for the sale deed was the consideration for the assignment of the pronote dated August 25, 1969, executed by Ranganatha Iyengar in favour of the appellant/first defendant, and thereby the plaintiff's liability to the first defendant for the assignment was discharged as per the said sale deed, and defendants Nos. 2 and 3 have no connection thereafter, and there is no cause of action against them, and hence the suit must be dismissed with costs.

6. On the above pleading and after considering the oral and documentary evidence placed before her, the learned Principal District Munsif of Villupuram came to the conclusion that notice of dishonour should have been given within reasonable time, but in the present case the first respondent/plaintiff gave the notice of dishonour after realising a portion of the amount due under the assigned pronote and after a lapse of 11 years, and in those circumstances the appellant/first defendant is not liable to pay any amount to the first respondent/plaintiff, and there is no connection between defendants Nos. 2 and 3 and the assigned pronote, and, therefore, defendants Nos. 1 to 3 are not liable to pay the

suit claim, and the suit claim is not barred by limitation, and consequently she dismissed the suit with costs.

7. Aggrieved against the said findings of the trial court the first respondent/plaintiff preferred the first appeal in A. S. No. 69 of 1984 before the Subordinate Judge's Court at Villupuram, and the learned Subordinate Judge came to the conclusion that the notice given by the plaintiff to the first defendant on September 22, 1979, marked as exhibit A-4 is a notice of dishonour as required u/s 35 of the Negotiable Instruments Act, and as the appellant/first defendant was aware of the proceedings initiated by the first respondent/plaintiff and as the first respondent/plaintiff after taking all possible steps to recover the amount from the drawer of the assigned pronote and as the notice was issued under exhibit A-4 within reasonable time, the notice issued under exhibit A-4 is a notice of dishonour as required u/s 35 of the Negotiable Instruments Act, and the plaintiff's counsel did not press the claim of the plaintiff as against defendants Nos. 2 and 3, and the learned Subordinate Judge allowed the appeal partly and set aside the judgment and decree of the trial court in respect of the first defendant and the suit was decreed as prayed for as against the first defendant, and in other respects the judgment and decree of the trial court are confirmed, and the learned Subordinate Judge ordered no costs.

8. Not satisfied with the findings of the first appellate court the appellant/ first defendant has preferred this second appeal. While admitting the second appeal my learned predecessor his Lordship Justice Bhaskaran J. framed the following substantial questions of law that arise for consideration in this second appeal :

(1) Whether the suit claim is barred by limitation ?

(2) Whether the view of the courts below that no notice of dishonour was necessary, when even according to the plaintiff, he had filed a suit against the promisor as early as in 1970 and was not able to realise the full amount in spite of his obtaining the decree against the promisor ?

9. Point No. 2.--Section 35 of the Negotiable Instruments Act states as follows :

"Liability of indorser,--In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided. Every indorser after dishonour is liable as upon an instrument payable on demand."

10. Section 36 of the Negotiable Instruments Act states as follows :

"Liability of prior parties to holder in due course.-Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied."

11. Thus a reading of Section 35 of the Negotiable Instruments Act makes it clear that the liability of the indorser laid down in Section 35 cannot arise unless the person indorsing the pronote delivers the instruments to the transferee. In the present case the delivery is completed when the assignment was made by the appellant/first defendant in favour of the first respondent/plaintiff.

12. A further reading of Section 35 of the Negotiable Instruments Act would go to show that in order to charge the indorser, due notice of dishonour should be given to him by the holder in due course. The word "dishonour" in Section 30 of the Negotiable Instruments Act as well as in this Section 35 of the Negotiable Instruments Act has been used in its general and commercial sense and it is not confined to the limited definition in Sections 91 and 92 of the Negotiable Instruments Act. "Dishonour" as commercially understood involves a proper demand within reasonable time and for wrongful refusal. It was obligatory on the part of the first respondent/ plaintiff herein to allege such notice and no decree can be passed without proof thereof, even though the appellant/first defendant has not specifically raised this point. It is, therefore, clear that it is the duty of the holder in due course to present the instrument for payment and if dishonoured, give notice to the parties and unless this is done, the prior party is discharged and he may be left without any remedy.

13. A person, who pays for an assigned pronote, acts at his own risk, and wherever an innocent person must suffer by the acts of a third party, he must sustain it and the person who assigned the pronote cannot be held liable. At any rate the liability of the person, who assigned the pronote to the subsequent holder in due course, can arise only after a reasonable notice of dishonour was given. Applying these principles to the facts of the present case it can be seen that the first respondent/plaintiff filed the suit against Ranganatha Iyengar on the basis of the assigned pronote of the appellant/first defendant and realised a portion of the decree amount, i.e., a sum of Rs. 1,846.93 by means rateable in O. S. No. 721 of 1979, and thereafter a claim petition was filed in E. A. No. 1754 of 1974 by one Krishnaswamy Iyengar, and the same was allowed and the subject-matter of the claim petition went up to the appeal in A. S. No. 19 of 1978 which appeal was also dismissed on September 14, 1979. But the first respondent/plaintiff did not notify the appellant/first defendant about the rateable distribution or immediately thereafter when the claim application in E. A. No. 1754 of 1974 was allowed by the executing court in the year 1974. Instead the first respondent/plaintiff has chosen to issue a notice on September 22, 1979, under exhibit A-4, i.e., after a lapse of five years from the date of allowing the claim petition in E. A. No. 1754 of 1974. In those circumstances, I am of the view that there is no reasonable notice of dishonour of the assigned pronote or the failure to realise the balance amount due on the basis of the assigned pronote to the first respondent/plaintiff, and in those circumstances the first respondent/plaintiff is not entitled to claim the suit amount from the appellant/first defendant on the basis that he was not able to realise the full amount due under the assigned pronote in spite of obtaining a decree against the said

Ranganatha Iyengar. Therefore, I hold that the view of the courts below that no notice of dishonour was necessary are not correct in law and a reasonable notice of dishonour is necessary in view of sections 35 and 36 of the Negotiable Instruments Act when the first respondent/plaintiff was able to realise only a portion of the decree amount in O. S. No. 721 of 1979 by way of rateable distribution and when the claim application filed by a third party by name Krishna-swamy Iyengar in E. A. No. 1754 of 1974 was allowed in the year 1974, and consequently, I answer this point in favour of the appellant/first defendant and as against the first respondent/plaintiff.

14. Point No. 1.--Even assuming and without admitting that a reasonable notice of dishonour was not necessary let us consider as to whether the suit claim is barred by limitation. The pronote executed by Ranganatha Iyengar in favour of the appellant/first defendant is dated August 25, 1969, and the same was assigned in favour of the first respondent/plaintiff by the appellant/first defendant on August 1, 1970. The first respondent/ plaintiff on the basis of the assigned pronote filed O.S. No. 721 of 1979 and obtained a decree on June 27, 1971. The first respondent/plaintiff was able to realise only a portion of the decree amount, viz., a sum of Rs. 1,846.93 by means of rateable distribution. The first respondent/plaintiff filed another execution petition for attachment of a house as though belonging to the borrower Ranganatha Iyengar and the same was resisted by Krishnaswamy Iyengar who claimed the house property as his own property by filing a claim petition in E. A. No. 1754 of 1974 and the said claim petition was allowed in the year 1974, and thereafter the claim suit was filed by the first respondent/plaintiff herein in O. S. No. 299 of 1975.

15. These are all admitted facts in this case and in this background let us consider as to whether the suit claim is barred by limitation.

16. It is well laid down in the decision in Jagannadha Reddiar Vs. Lakshmana Reddiar, that the liability of an endorser of a promissory note arises only on the date of endorsement. So if at all the appellant/first defendant is liable to pay any amount due on the assigned pronote because of the failure of the borrower to pay the entire amount, the liability of the appellant/first defendant would arise on August 1, 1970, when the pronote executed by Ranganatha Iyengar was assigned in favour of the first respondent/plaintiff on August 1, 1970. So the first respondent/ plaintiff ought to have filed the present suit on or before August 1, 1973, and he did not do so, and instead he filed the suit only on November 22, 1979, and the suit claim is barred by limitation.

17. Even assuming and without admitting that the date of the assigned pronote executed by Ranganatha Iyengar in favour of the first respondent/ plaintiff cannot be the date reckoned for the purpose of limitation, even then the first respondent/plaintiff was able to realise a portion of the decree amount on the basis of the assigned pronote, and thereafter the claim petition in E. A. No. 1754 of 1974 was allowed, and so the right to realise the balance amount due under the assigned pronote arose after the rateable distribution being given to the

plaintiff or at any rate after the claim petition was allowed in the year 1974. There is no specific article in the Limitation Act, 1963, which provides a specific period for a case of this nature. So the residuary article in the Limitation Act comes into play. Article 113 of the Limitation Act of 1963 states that any suit for which no period of limitation is provided elsewhere in the schedule, a suit should be filed within three years when the right to sue accrues. In the present case the right to sue accrues to the plaintiff against the first defendant on the date of allowing of the claim petition in E. A. No. 1754 of 1974. In other words the first respondent/plaintiff ought to have filed the suit within three years from the year 1974, i.e., within 1977. Per contra the first respondent/plaintiff filed the suit only in the year 1979. Therefore in my view the suit claimed is barred by Limitation Act. For the above reasons, I am to hold that the suit claim is barred by limitation, and consequently I answer this point in favour of the appellant/first defendant and against the first respondent/plaintiff.

18. In view of the findings recorded on the earlier points, I am to hold that this second appeal has to be allowed as prayed for with costs, and the judgment and decree of the Subordinate Judge's Court at Villupuram, dated October 16, 1985, in A. S. No. 69 of 1984 are to be set aside, and the judgment and decree of the Principal District Munsif's Court of Villupuram, in O. S. No. 313 of 1981, dated April 7, 1984, are to be restored, and the suit in O. S. No. 313 of 1981 has to be dismissed with costs as against all the defendants including the appellant/first defendant, and I answer this point in favour of the appellant/first defendant and as against the first respondent/plaintiff.

19. In the result the second appeal is allowed as prayed for with costs. The judgment and decree of the Subordinate Judge's Court at Villupuram, dated October 16, 1985, in A. S. No. 69 of 1984 are set aside, and the judgment and decree of the Principal District Munsif's Court at Villupuram, dated April 7, 1984, in O. S. No. 313 of 1981 are restored, and the suit in O. S. No. 313 of 1981 on the file of the Principal District Munsif's Court at Villupuram, shall stand dismissed as against all the defendants including the first defendant with costs throughout.