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(1956) 07 MP CK 0005

In the Madhya Pradesh High Court

Case No : C. Rev. No. 265 of 1955

Fatehlal APPELLANT

Vs

Yashwantrao RESPONDENT

Date of Decision : 27-07-1956

Acts Referred:

Citation : (1957) JLJ 39

Hon'ble Judges : V.R. Nevaskar, J;P.V. Dixit, J

Bench : Division Bench

Advocate : Agrawal, for the Appellant; Phadke, for the Respondent

Judgement

1. This revision-petition arises out of a suit brought by plaintiff Fateh lal against defendants Yeshwantrao and Sikandarkhan for the recovery of Rs. 194-7-9. The claim was based on the allegations that the defendant had obtained a loan of Rs. 150/- on 2nd August, 1951 agreeing to repay the same at interest of 1 per cent per month and had executed a pro-note on that date and the defendants had paid Rs. 10/- only towards the liability.

2. The defendants denied to have executed the pro-note or to have taken anything as a loan from the plaintiff. Competency of suit on the basis of pronote in question was challenged on the ground that the same is inadequately stamped.

3. The trial court framed issues covering the questions regarding (1) the execution of the pro-note by the defendant, (2) the plaintiff''s right to recover Rs. 150/- principal and Rs. 44/- interest and Rs. /7/9 as notice charges, (3) the existence of cause of action, (4) maintainability of suit on the ground that the document in suit is inadmissible in evidence (for inadequacy of stamps) and (5) interest.

4. Issue No. 4 regarding the maintainability of the suit was tried as preliminary issue.

5. The trial court held after hearing arguments that the document not being duly

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stamped was inadmissible in evidence. He then without giving further thought to the nature of the plaintiff''s claim or the other issue in the case at once dismissed the plaintiff''s suit.

6. On appeal the learned District Judge confirmed the finding of the trial court that the document sued upon was inadmissible in evidence and could not form the basis of the suit. He too was of the opinion that in the state of allegations in the plaint the suit was not maintainable.

7. The plaintiff at the stage of appeal submitted an application stating that he wanted to amend the plaint so as to base his suit on the ''original cause of action''. This application was submitted on 29th January, 1955. The appellate court was of the view that the claim was barred by time on the date of application for amendment. He, therefore, rejected the application for amendment and dismissed the suit.

8. The plaintiff has now filed this revision petition.

9. In my opinion both the courts below have acted with material irregularity in the exercise of their jurisdiction in not paying attention to what the plaintiff''s case really was. The plaintiff in the plaint had clearly alleged the making of the loan on 2nd August, 1951 and the execution of the pro-note. The cause of action too was mentioned to be the making of loan and execution of pro-note. Thus the plaintiff had filed his suit on the loan itself and also on the pro-note which the defendants were alleged to have executed on 2nd August, 1951. Even an issue bearing on the plaintiff''s right to recover Rs. 194-7-9 as principal and interest was framed. The courts below however thought that after a finding on issue No. 4 against the plaintiff there was nothing left in the case. This was clearly erroneous. The plaintiff, having already based his suit on the loan itself and alternatively on the pro-note, need not have applied for amendment in the appellate court. The appellate court too ought to have examined plaintiff''s allegations in the plaint instead of assuming that an amendment was necessary. The result of such an assumption was that it dismissed the application and dismissed the appeal.

10. Next question is--can the plaintiff who gives a sum of money on interest as a loan and obtains a pro-note is bound to sue on the note itself as the only cause of action surviving or could sue alternatively on the transaction of loan and that of pro-note ?

11. It appears from the remarks of their Lordships of the Privy Council in 46 Indian Appeal 33, Sadusuk vs. Maharaja Sir Kishan Pershad and another, that he can sue alternatively on both the transactions of loan and the pro-note and on the later being held inadmissible can recover on the loan itself. Their Lordships observed as follows:--

It would, of course, have been open to the plaintiffs, had they thought fit to have framed their case in an alternative form, and to have sued both on the hundies

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and alternatively upon the consideration.

12. In the above case before their Lordships the lending of money, Rs. 35,000 and execution of hundies to secure their repayment were simultaneous and yet their Lordships held that a case in the alternative form could have been set up.

13. In the present case the plaintiff had already set up a case in the alternative, there was no reason for the lower courts to shut their eyes towards it and to dismiss the plaintiff''s suit.

14. I may add that even in England competency of suit on the basis of original transaction of loan is recognised even where there is a promissory note given in consideration of the same. In this connection the observations in "Chitty on Contract" at page 652-53 and in Halsbury''s Laws of England, Vol. VII page 242 are material.

15. In "Chitty on Contracts" (6th edition) pp-652 and 653 it is stated:--

If the loan is secured by a covenant in a deed, the specialty merges the simple contract, and the lender can only sue on the specialty covenant; if there is a promissory note he will during the currency of the note be estopped from suing otherwise than in accordance with terms; but after it had become due, he can sue on the note, and add a claim for money lent, and the promissory note may be used as evidence in support of money lent.

16. In Halsburys Laws of England (Hailsham Edition) Vol. VII at page 242 it is stated:--

If a bill of exchange or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended till the maturity of the instruments in the hands of the creditor. If the security is paid when it becomes due, this is equivalent to payment of the original debt and if it is paid in part, the original debt is discharged pro tanto. If the instrument is dishonoured, payment of the original debt may be enforced as if no security had been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor''s remedy continued to be suspended.

17. In view of the aforesaid observations of their Lordships of the Privy Council and those in Chitty and Halsbury, it is clear to me that in the state of pleadings as they stood in the plaint the courts below were not justified in non-suiting the plaintiffs. The order of dismissal having been passed without caring to know the allegations in the plaint involved a material irregularity on the parts of the courts below in exercise of their jurisdiction.

18. The result is that the decisions of the lower courts are set aside and the case is sent back to the trial court for trial and disposal in accordance with law. The costs of this petition and those of the lower appellate court shall be paid by the

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opponent-defendants to the plaintiff-appellant.

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