
(1995) 10 MAD CK 0058
In the Madras High Court

Kanikapathi Vishnusagar and Others

APPELLANT

Vs

M. Ganeshpathi represented by his father and natural guardian S. Mahalingam

RESPONDENT

Date of Decision : 28-10-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2

Citation : (1996) 1 MLJ 256

Hon'ble Judges : Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—This revision is directed against the order passed in I.A. No. 1910 of 1989 in O.S. No. 9172 of 1988. Defendants 2 to 5 in O.S. No. 9172 of 1988 are the petitioners herein. The plaintiff is the respondent. The plaintiff filed the above suit to recover a sum of Rs. 41,511 due on a promissory note dated 1.8.1985. According to the defendants, the brothers and sisters of the plaintiff also borrowed amounts from the plaintiff and executed promissory notes for Rs. 30,000. Originally notice was given to the defendants on 2.6.1987 and again on 2.9.1987. Another notice was also issued stating that the original payee was one S. Mahalingam, but the suit was filed by a different person. A reply has been given to the said notice on 18.7.1987. According to the defendants, in respect of the total borrowings of Rs. 90,000, a sum of Rs. 10,000 was paid by cash with the period ending December, 1986, another sum of Rs. 5,000 on 23.4.1987, a sum of Rs. 13,167 was paid by cheque and another sum of Rs. 1,183 by cash in respect of timber account. All these amounts were not given credit to in the suit. After correspondence, the second defendant has paid a sum of Rs. 30,000 in cash to the plaintiff and another sum of Rs. 11,000 was paid for the redemption of the jewels pledged by S. Mahalingam and those jewels belonged to the second defendant. The plaintiff's father S. Mahalingam took gold bangles and utilised the amounts got therefrom for his personal use, but he did not redeem the jewels and the interest thereupon was accumulated. The second defendant redeemed the jewels by paying Rs. 11,000 and that amount of Rs. 11,000 has to be given

credit towards the borrowings, as admitted by the plaintiff. All these amounts were paid towards the amount due under the promissory notes. The plaintiff has not stated all these facts in the plaint. There is ample evidence to show that the defendants have paid interest upto 25.9.1987 towards total borrowings of Rs. 90,000, which either the plaintiff or his father cannot deny. There is triable issue in the suit, which has got to be enquired in detail. Therefore, it was prayed that the defendants may be given unconditional leave to defend the suit.

2. On the other hand, the plaintiff submitted that the defendants borrowed a sum of Rs. 30,000 from him on 1.8.1985 and on the same day executed a promissory note, promising to repay the amount with interest at 18% per annum. After a notice has been issued by the plaintiff and after repeated demands, the defendants have paid only a sum of Rs. 4,689 towards the arrears of interest. Thus the defendants have failed and neglected to pay the principal and interest due on the amount borrowed under the suit promissory note. The suit summons was served on the defendants and they have entered appearance through their counsel on 22.1.1989, after serving a copy on the plaintiff's counsel. It is not correct to state that the plaintiff failed to give credit to the amounts paid by the defendants. There is no valid defence for the defendants in this promissory note suit. Therefore, it - was prayed that a decree may be passed in favour of the plaintiff without granting any unconditional leave to defend the suit.

3. The trial court, on considering the facts arising in this case, dismissed the petition filed by the defendants for leave to defend the suit. Against that order, the present revision has been preferred by the defendants.

4. I have heard the learned Counsel appearing on behalf of the petitioners as well as the respondent herein.

5. The point for consideration is whether the defendants are entitled for leave to defend the suit. The suit was filed on the basis of a promissory note. According to the plaintiff, except Rs. 4,689 paid towards the interest, the defendants have not paid any other amount due on the promissory note. The plaintiff has sent a notice and also demand the repayment of the loan. Reliance was placed upon a decision reported in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , wherein the Supreme Court held as under:

If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

6. In the affidavit filed by the defendants, though it was stated that they have

paid several amounts on various dates, no prima facie proof was brought to the notice of the trial court. It also remains to be seen that the brothers and sisters, who are the defendants, used to borrow amounts from the plaintiff. In AIR 1990 2218 (SC) , while considering the provisions of Order 37, Rule 2 of Code of Civil Procedure, the Supreme Court held as hereunder:

Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

7. Similarly, this Court had an occasion to consider the provisions of Order 37, Rule 3 of CPC in the case of *Baba Industries and Another Vs. The Mehta Traders*, , wherein a Division Bench of this Court held as hereunder:

As the case law is abundant, and is also equally clear, we refer to the citation in the Tamil Nadu Law Notes Journal, to with, *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, , wherein the Supreme Court accepted the basic principles which would guide the court in the matter of grant of such leave to defend. One such principle contained in the ratio of the above decision is that if the court is satisfied that the defence of the defendant is acceptable, though prima facie, and also if the defence raises a triable issue, thereby indicating that the defendant has a fair or bona fide or reasonable chance of success, or if the state of affairs are such that the court is reasonably led to the conclusion that the trial of the action only can establish the truth, bona fides or otherwise of the defence raised, then, in such circumstances, the court ought not to impose a condition in the matter of the payment of the plaint amount sought for by the plaintiff, into court, as security, before the grant of such leave. This is deprecated by the Supreme Court by the observation that "the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security" (*italics is ours*). The accent, therefore, is on the imposition of condition regarding the time within which the original suit laid by the plaintiff has to be disposed of or the manner or the method of such a trial. But the Supreme Court

is emphatic that no condition as to payment into court of any portion of the amount claimed, or furnishing of security, would arise in a case where a triable issue is found and a prima facie defence is disclosed. Following this decision, we accept the contention of learned Counsel for the appellants that the imposition of the condition by the learned Judge in the last paragraph of his judgment has to be removed.

8. One important factor that has got to be seen in this case, according to the averments made in the affidavit filed by the defendants, is that the plaintiff's father also used to take the jewels from the defendants towards the amount due to him. Further, the suit is filed by a minor represented by his father and guardian. Therefore, there is a prima facie case in favour of the defendants to defend the suit.

9. Considering the facts arising in this case in the light of the judicial pronouncements cited supra, I am of the opinion that leave to defend can be granted in favour of the defendants, the petitioners herein, provided they are ready and willing to deposit half of the suit amount to the credit of the suit. Accordingly, leave to defend is granted in favour of the petitioners herein, provided they deposit half of the suit claim, namely, Rs. 20,756 in court to the credit of the above said suit O.S. No. 9172 of 1988 within six weeks from the date of this order, failing which the leave granted shall stand vacated and the order passed by the trial court will stand to operate. Accordingly, this revision is allowed to the abovesaid extent. No costs.