

(2010) 06 MAD CK 0161

In the Madras High Court

Case No : A.S. No. 276 of 2005 and C.M.P. No"s. 79 and 1469 of 2009

Mangayarkarasi Ammal, M. Velayudham, V. Mahendran and V. Elango APPELLANT

Vs

Suresh Bafna Proprietor of Madras Mercantile Agency RESPONDENT

Date of Decision : 07-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Criminal Procedure Code, 1973 (CrPC) — Section 156(3)
Evidence Act, 1872 — Section 63
Limitation Act, 1963 — Section 18
Negotiable Instruments Act, 1881 (NI) — Section 20

Citation : (2010) 4 BC 27 : (2010) 4 CTC 339 : (2011) 1 MLJ 265

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; V. Bhiman, for Sampathkumar Associates, for the Respondent

Judgement

G. Rajasuria, J.—This appeal by the defendants is focussed as against the judgment and decree dated 21.09.2004 passed by the learned Additional District and Sessions Judge, Fast Track Court No. IV, Chennai in O.S. No. 5989 of 1997 which was filed by the plaintiff for recovery of money. For convenience sake, the parties are referred to here under according to their litigative status before the trial Court.

2. Heard both sides.

3. A summation and summarisation of the relevant facts absolutely necessary and germane for the disposal of this appeal as well as the miscellaneous petitions would run thus:

a) The plaintiff filed the suit seeking the following relief:

- to direct the defendants to pay jointly and severally a sum of Rs. 5,69,700/- together with interest at 24% p.a on Rs. 2,04,000/- from the date of plaint till

the date of payment in full (under Section 34 of CPC) and for costs.

b) The case of the plaintiff is that the plaintiff lent money to the defendants on different dates as under:

322.06.1988 - Rs. 51,000/- 22.06.1988 - Rs. 51,000/- 06.01.1988 - Rs. 51,000/- 22.06.1988 - Rs. 51,000/- Total - Rs. 2,04,000/-

and in consideration of the same, the defendants executed the suit promissory notes undertaking to repay the same with 24% interest per annum. Subsequently, they committed default in repaying the debts.

4. Whereupon the defendants filed the written statement by way of challenging and impugning, denying and refuting the averments/allegations in the plaint contending as under:

- The suit was barred by limitation.
- There was no lending and borrowal as alleged in the plaint.
- The statement of accounts furnished by the plaintiff does not tally with the suit promissory notes, which were not supported by consideration.
- The plaintiff invented a fictitious payment of interest of Rs. 4,080/- on 18.07.1992 to sustain his claim. Signatures were forcibly obtained from the defendants 1 and 2 with the help of the plaintiff's henchmen one Mr. Ashok Sharma in non-judicial stamp paper and other papers on 16.06.1992, in connection with the plaintiff's previous attempt to purchase the defendants' property. The suit promissory notes are incomplete documents.

5. The trial court framed the relevant issues. During trial, on the side of the plaintiffs, PW1 was examined and Exs.A1 to A6 were marked. On the side of the defendants D.W.1 was examined and Exs.B1 to B7 were marked. Ultimately, the trial Court decreed the suit.

6. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the defendants have filed this appeal on various grounds, the gist and kernel of them would run thus:

- The trial court failed to take into consideration that the statement of accounts filed by the plaintiff is antithetical to the other documents filed by the plaintiff.
- Ex.A2 pro-note is inadmissible in evidence and it does not contain the signature of defendants 2 to 4. Ex.A5 does not contain the name of the promisee. Ex.A6 refers to Canara Bank and Ex. A2 refers to Tamil Nadu Mercantile Bank. Those contradictions have not been explained by the plaintiff at all. Ex.A6 is inadmissible in law because it was not maintained in the regular course of business. The books of accounts have not been produced by the plaintiff. As per Section 63 of the Indian Evidence Act, Ex.A6 is inadmissible in evidence. No cause of action would arise based on Exs.A2 to A5 counting the period of limitation from those documents, it should be held that the suit is barred by

limitation. Section 18 of the Limitation Act would not enure to the benefit of the plaintiff as there was no acknowledgment of debt in writing. The trial court was wrong in holding that the entries in the account book would constitute acknowledgment of debt, made by the defendants. The defendants happened to be the lessees of a Dhall Mill and there was no debtor and creditor relationship between the defendant and the plaintiff. Ignoring the admissions made by PW1, the trial court decided the matter. No presumption would arise based on Exs.A2 to A5 and accordingly Section 118 of the Negotiable Instruments Act also cannot be pressed into service in favour of the plaintiffs. The court below did not take into consideration Section 43 of the Negotiable Instruments Act. As such, ignoring the law and without making a legal proper approach, the trial court discarded the pleas of the defendants in toto and decreed the suit, warranting setting aside of the judgment and decree of the trial court by this Court.

7. During the pendency of the appeal two petitions, viz., C.M.P. No. 79 of 2009 and C.M.P. No. 1469 of 2009 were filed under Order 41 Rule 27, 29 and 33 r/w Section 151 of CPC and Order 47 Rule 27 of CPC respectively. The following are the documents which are sought to be filed additionally.

C.M.P. No. 79 of 2009:

- xerox copy of cheque No. 007330 dated 03.06.1992 for Rs. 5,200/- issued by 1st respondent towards payment of interest.
- xerox copy of cheque No. 007332 dated 18.06.1992 for Rs. 5,200/- issued by 1st respondent towards payment of interest and
- original notice dated 10.08.1992 sent by appellants' Counsel.

C.M.P. No. 1469 of 2009:

- letter dated 18.07.1992 given by the 4th respondent/appellant to this petitioner/respondent and
- xerox copies of the entries made in the ledger maintained by the petitioner/respondent in respect of Mangayarkarasi Ammal's account as additional evidence.

8. Counters have been filed by the respondents/appellants. Explanatory memo also has been filed by the appellants.

9. The points for consideration are as to:

1. Whether the trial court improperly entertained the evidence ignoring the provisions of the Indian Evidence Act and the pleas as put forth by the defendants?
2. Whether there are contradictions between the statement of accounts as contained in Ex.A6 and the other documents filed by the plaintiff and Whether the law relating to burden of proof was misapplied by the lower court?
3. Whether the plaintiff was not in a position to file additional documents, which

he now seeks to file at the appellate stage?

4. Whether the judgment and decree of the lower court are not in accordance with law and

5. To what relief?

Point Nos. 1 to 3:

10. These three points are taken together for discussion as they are inter-linked and interwoven with one another.

11. The learned Counsel for the appellants/defendants "hereinafter referred to as defendants" would put forth and set forth his arguments by inviting the attention of this Court to the fact that there are material contradictions between the statement of accounts Ex.A6 and the other documents.

12. A mere perusal of Ex.A6 the statement of accounts and other documents would demonstrate and display that there are contradictions among them. The entries in Ex.A6 is extracted here under for ready reference.

STATEMENT OF ACCOUNT

----- FROM
TO MADRAS MERCANTILES AGENCY M/S. V. Mangayarkarasiammal 3, STOTTEN
MUTHU MUDALI ST., MADRAS MADRAS 600079.

----- I/We
have the following balance in your name in my/our book/as on ...[A/Y....]
Please return the original & Duplicate Copies duly signed in confirmation of the
same. -----

Date	Particulars	Amount	Date	Particulars	Amount	Rs.	P.	Rs.	P.
------	-------------	--------	------	-------------	--------	-----	----	-----	----

31.3.89 By received 39329 00 11.1.88 To CB 327328 51000 00 instalments

31.3.90 By received 22000 00 29.06.88 To TNMB 51000 00 instalments 973853

To TNMB 51000 00 973854

To TNMB 51000 00 973855

31.3.91 By received 56000 00 31.3.89 To Insts 39329 00 instalments 31.3.90
To Insts. 22000 00

31.3.92 By received 41600 00 31.3.91 To Insts. 56000 00 instalments 31.3.92
To Insts. 41600 00

Total Rs. 158929 00 Total Rs. 362929 00

204000 00

I/We confirm the above statement Yours faithfully Signature of the Party G.I.R.

No. I.T. No. Circle

STATEMENT OF ACCOUNT
----- FROM
TO

MADRAS MERCANTILES AGENCY M/S. V. Mangayarkarasiammal 3, STROTTEN
MUTHU MUDALI ST., MADRAS MADRAS 600079.

----- I/We
have the following balance in your name in my/our book/as on ...[A/Y....].
Please return the original & Duplicate Copies duly signed in confirmation of the
same.

----- Date
Particulars Amount Date Particulars Amount Rs. P. Rs. P.

18.7.92 By received 4080 00 01.4.92 To B/F 204000 00 instalments

31.3.93 To Insts. 74460 00 31.3.94 To Insts. 101640 00

31.3.95 To Insts. 138700 00 15.7.95 To Insts. 54980 00

Total Rs. 4080 00 Total Rs. 573780 00

15.7.95 DUE 569700 00

----- I/We
confirm the above statement Yours faithfully Signature of the Party G.I.R. No. I.T.
No. Circle

The debts of promissory notes Ex.A2, A3, A4 and A5 are also set out here under:

Ex.A2 pro-note

V. Mangayarkarasi Madras M. Velayudham 6.1.1988 V. Elango and V. Mahendran
On demand _____ I _____ promise to pay to we jointly and severally
Mr. Madras Mercantile Agency or order the sum of Rupees Fifty one thousand
only together with interest at the rate of 24 per cent per annum for value
received in cash/goods.

Rs. 51,000/- TMB 327328 sd. V. Mangayarkarasi Ex.A3 pro-note V.
Mangayarkarasi Madras M. Velayudham 22.6.1988 V. Elango and V.Mahendran On
demand _____ I _____ promise to pay to we jointly and severally

Mr. Madras Mercantile Agency or order the sum of Rupees Fifty one thousand
only together with interest at the rate of 24 per cent per annum for value
received in cash/cheque.

Rs. 51,000/- TMB 973853 sd. by all the four defendants

Ex.A4 pro-note

V. Mangayarkarasi Madras M. Velayudham 22.6.1988 V. Elango and V. Mahendran

On demand _____ I _____ promise to pay to we jointly and severally Mr. Madras Mercantile Agency or order the sum of Rupees Fifty one thousand only together with interest at the rate of 24 per cent per annum for value received in cash/cheque.

Rs. 51,000/- TMB 973855 sd. by all the four defendants

Ex.A5 pro-note

V. Mangayarkarasi Madras M. Velayudham 22.6.1988 V. Elango and V. Mahendran
On demand _____ I _____ promise to pay to we jointly and severally Mr. Madras Mercantile Agency or order the sum of Rupees Fifty one thousand only together with interest at the rate of 24 per cent per annum for value received in cash/cheque.

Rs. 51,000/- TMB 973854 sd. by all the four defendants

(extracted as such)

A mere look at those details extracted supra would demonstrate and display that in Ex.A6 in the statement of accounts, the first promissory note is found specified as one dated 11.1.1988 whereas Ex.A2 the first promissory note is found dated 6.1.1988. In Ex.A6, the second pro note is projected as dated 29.6.1988 whereas Ex.A3 the pro-note is found dated 22.6.1988. The third and fourth entries would refer to cheque numbers and not the dates of pro notes. However, both Ex.A4 and A5 would refer to the date 22.6.1988 as that of Ex.A3. As such there is no plausible explanation at all relating to such discrepancies and it appears that the trial court also did not take into account, these material contradictions seriously.

13. The learned Counsel for the defendants would submit that in the pro-note Ex.A2 even though the pronoun "I" i.e., first person singular, the name of the defendants, Mangayarkarasi, Velayutham, V. Mahendran and V. Elango are found interpolated at the tope of the pronote and it was signed only by Mangayarkarasi and not by others. The trial court ignored in a casual manner the said defect by making untenable observation as though it was a minor defect. With respect to the observation made by the trial Judge in para No. 9 of the judgment, the learned Counsel for the appellants would submit that the defendants did not admit the execution of the promissory notes so as to attract the presumption u/s 118 of the Negotiable Instruments Act. The signatures alone were admitted and according to him those signatures came to be put in those Exs.A2, A3, A4 and A5 under various other circumstances, which are found exemplified in the written statement, but, they were not taken into consideration by the trial court at all. He would also point out that at the appellate stage, for the first time, by way of filling up the lacuna, the plaintiff should not be allowed to file additional documents.

14. Whereas the learned Counsel for the respondent/plaintiff, would submit that the defendant cannot pick holes in the consistent case of the plaintiff and try to

achieve success in the litigative process; the income tax authorities issued prohibitory order dated 28.03.2003 prohibiting the plaintiff from taking from his own cupboard the account books and the documents and that alone incapacitated and handicapped the plaintiff to produce all these additional documents earlier. As such, according to him, due opportunity has to be given to the plaintiff to further buttress his claim by producing those clinching additional documents. As per him, it is a trite proposition that when relevant evidence are available, the party concerned should not be throttled from producing the same even at the appellate stage.

15. Considering the pro et contra, it is ex facie and prima facie plain and pellucid that there are certain defects in the plaintiff's evidence as highlighted by the learned Counsel for the defendants, but the lower court had not addressed itself properly on those aspects. After narrating the facts and figures involved in the case, the lower court in para No. 9 of its judgment simply held as though the entire burden is on the defendants to prove their case and not for the plaintiff and that the plaintiff's case was proved by the available evidence, ignoring the aforesaid contradictions highlighted by the learned Counsel for the defendants.

16. The lower court skipped over the objections raised by the defendants, by pointing out that simply because Ex.A2, the pro-note was signed only by one of the defendants namely Mangayarkarasi, the case of the plaintiff could not be doubled and as such, skipping over similarly, all the objection raised by the defendants, the lower court decreed the suit.

17. Admitting the signatures, would not amount to admitting the execution of the pro-notes and this settled proposition of law has not been considered by the lower court.

18. I recollect the maxim Affirmanti non neganti incumbit probatio- The burden of proof lies upon him who asserts and not upon him who denies.

19. Here, it is the bounden duty of the plaintiff to prove the case convincingly as per law and that too in the wake of the defendants having challenged the genuineness of the very money transactions, which allegedly emerged between the plaintiff and the defendants.

20. The lower court in para No. 10 of its judgment held that Ex.B6 dated 25.08.1992 could be taken as an acknowledgement of the debt. Ex.B6 is the copy of the FIR registered on the direction of the Magistrate u/s 156(3) of Cr.P.C based on the complaint of Mangayarkarasi. No where in Ex.B6 it is found exemplified that she admitted the execution of the promissory notes.

21. The lower court in para No. 6 observed thus:

The defendants totally disputes the claim and also the execution of the suit promissory notes.

However, the same lower court ignoring its own observation of the defendants''

case held as though the defendants admitted the execution of the suit promissory notes. Certain transactions alone are found set out in Ex.B6 with the versions as though in blank papers signatures were obtained from Mangayarkarasi.

22. A mere perusal of the plaint would display and evince that it is as precise as precision could be. There is reference to the four suit promissory notes only and it is found alleged that under each of the promissory notes a sum of Rs. 51,000/- was paid by the plaintiff to the defendants. In fact, Ex.A3, A4 and A5 pro-notes are pertaining to one and the same date, viz., 22.06.1988, but, in Ex.A6, the statements of accounts the date is shown as 29.06.1988 for Ex.A3 and for Exs.A4 and A5 no dates are found specified therein. The suit was filed as a summary suit. There were no pleadings in support of the documents, which are now sought to be filed as additional documents also.

23. In Ex.A5, there is no reference to the promisee's name also and it was for the plaintiff to explain those pitfalls and draw backs in the case with adequate explanation. But it appears the lower court had not taken all these defects seriously. But the lower court simply held that all the documents are proper documents on the side of the plaintiff and simply passed the judgment. Even though the defendant contended that no payments towards interest were made under those promissory notes, the trial court appears to have not taken into consideration the said plea but relied on the plaintiff's version only.

24. In para No. 4 of the plaint, it is found averred as under:

In respect of the above loans, the defendants have made payments as detailed below:

Date Amount Rs.

31.03.1989 39,329/- 31.03.1990 22,000/- 31.03.1991 56,000/- 31.03.1992 41,600/- 18.07.1992 4,080/-

Ex.A6, the statement of accounts only was relied on to prove the aforesaid payments but D.W.1 denied such payments having been made towards interest under the suit pro-notes. In such a case, no separate document, is found exhibited bearing the signatures of the defendants evidencing such part payments.

25. The trial court in para No. 10 of its judgment, relies on Es.B6 the FIR to hold that the defendants acknowledged that they had to pay a sum of Rs. 2,04,000/- as on the date of lodging the complaint.

26. A mere perusal of Ex.B6 would not in any way connote or denote that under the suit promissory notes the dues yet to be paid was acknowledged by Mangayarkarasi as though she had yet to pay a sum of Rs. 2,04,000/-. The plaintiff should prove his case and it is the duty of the lower court to see that the case of the plaintiff as set out in the plaint has been proved or not. But in this

case, that was not done do and it is quite obvious and apparent, pellucid and palpable.

27. No sale transaction or any other transactions is found spelt out in the plaint. However, all that is found out in the plaint is only about the alleged four payments under the said four suit promissory notes, Exs.A2 to A5 and in such a case, it is not known how the lower court could render its judgment in the manner it rendered.

28. Section 118(g) of the Negotiable Instruments Act is worthy of being reproduced here under:

118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:

a)....

b)....

c)....

d)....

e)....

f).....

g) that holder is a holder in due course - that the holder of a negotiable instrument is a holder in due course: Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Section 20 of the Negotiable Instruments Act - Inchoate stamped instruments.

- Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in (India) and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

(emphasis supplied)

A mere reading of the cited provisions of law would clearly convey and connote that if the contention of the defendant is that the defendant was coerced or under misconception etc forced to sign the blank stamp paper and he was made to part with it, then Section 20 of the Negotiable Instruments Act would not be attracted automatically. As such, these are all matters of evidence that the trial court should look for in the evidence adduced by the parties before holding about the application of Section 20 r/w Section 118 of the Negotiable Instruments Act. But in this case, no such effort has been taken by the lower court and the concept burden of proof also should be applied properly.

29. At this juncture, the learned Counsel for the plaintiff would submit that the additional documents, which the plaintiff seeks to get admitted in the litigative process would amply answer all the objections raised by the learned Counsel for the defendants.

30. At this stage, I do not want to give any decision on the probative value of the additional documents. But one thing is clear that even as per the plaintiff's contention the additional evidence is absolutely necessary to fortify and buttress the claim of the plaintiff and in such a case and that too in view of the objections raised by the learned Counsel for the appellants/defendants, the judgment and decree of the court below cannot be allowed to stand and it has to be set aside. However, considering the additional documents filed by the plaintiff, I am of the considered view that one more opportunity should be given to the plaintiff to prove his case convincingly.

31. The learned Counsel for the defendants/appellants would appropriately submit that once the additional documents are allowed to be filed, then there should be additional pleadings in that regard and the defendants should also have an opportunity to refute those documents by putting forth defence pleas.

32. I recollect the maxim "*Secundum allegata et probata*" - According to what is alleged and proved; according to the allegations and proofs). As such, once some additional documents are sought to be filed it is but natural for the parties to make their respective submissions by putting forth additional pleadings and accordingly, the lower court has to give opportunity to both the parties, to file their additional pleadings touching upon those additional documents.

33. No doubt, the learned Counsel for the defendants would pointedly point out that PW1 was examined as early as in January 2003; whereas the prohibitory order was issued by the Income Tax Authorities only in March 2003 and in such a case, this Court should not be carried away by the averments made by the plaintiff that the prohibitory order, which had been issued by the Income Tax authorities alone incapacitated or handicapped him from filing those documents earlier. I could see considerable force in the submission made by the learned Counsel for the defendants. Even then, taking a lenient view, those relevant documents should necessarily be allowed to be filed and the plaintiff should be given some more opportunity to buttress and fortify his case.

34. Hence, in this view of the matter, the matter has to be remitted back to the trial court after setting aside the judgment and decree of the trial court and both parties have to be allowed to file additional pleadings and adduce additional evidence also based on those additional documents.

Accordingly, the point Nos. 1 to 3 are decided.

Point Nos. 4 and 5:

35. In view of the ratiocination adhered to in deciding the aforesaid points, the first appeal and the miscellaneous petitions are ordered as under:

1. The judgment and decree of the lower court are set aside and the matter is remitted back to the trial court before it, the parties shall appear on 05.07.2010.
2. The trial court in addition to the existing pleadings and evidence shall give due opportunity to both the parties, viz., the plaintiff and the defendants, to recall their witnesses and examine fresh additional witnesses also.
3. By all means, the lower court shall see to it that the matter is disposed of on merits within three months from 05.07.2010. The trial court is at liberty to once again re-appreciate the entire evidence untrammelled and uninfluenced by any of the observations made by this Court in disposing of this appeal and the miscellaneous petitions.
4. The court fee paid in the appeal by the appellants is directed to be refunded as per law to the appellants.

36. At this juncture, the learned Counsel for the petitioner/plaintiff would submit that in the counter affidavit of V. Elango dated 17.11.2009 filed in C.M.P.1469 of 2009, the plaintiff was described as a "court bird", which is contemptuous and suo motu this Court can take action. Whereupon the learned Counsel for the respondents/defendants would submit that his client stick on to his stand in his counter. Wherefore, it is open for the petitioner/plaintiff to take suitable action, which he might choose to take in the way known to law and it is for the respondent/defendant to defend it.