

(1924) 04 MAD CK 0073
In the Madras High Court

Ramaswami Naicker and Another

APPELLANT

Vs

Narayanaswami Naicker

RESPONDENT

Date of Decision : 09-04-1924

Acts Referred:

Citation : AIR 1925 Mad 762 : 90 Ind. Cas. 906

Hon'ble Judges : Madhvan Nair, J;Madhavan Nair, J

Bench : Division Bench

Judgement

Madhvan Nair, J.—The facts so far as they are necessary for the purposes of this second appeal may be thus shortly stated : Defendants 1 and 2 are members of a joint family carrying on money lending business sometimes taking documents in the name of one and sometimes in that of the other and one or the other, collecting money and giving discharges on the documents. The plaintiff borrowed a sum of Rs. 1,250 and executed to the 2nd defendant a promissory note Ext. R. in Ananda Chitrai (29-4-1914). To discharge this promissory note the plaintiff sent money to the 1st defendant and, in so sending it, the promissory note for discharging which the money was sent was by mistake referred to as executed to the 1st defendant in Ananda Vaikasi (See Exhibit D). This was on account of forgetfulness as the plaintiff had kept no copies or memoranda of the various promissory notes. Availing himself of this mistake in the dates, the 1st defendant allotted this money for the discharge of promissory note of Ananda Vaikasi which, as a matter of fact, did not exist. Later on, the promissory note executed to the second defendant for which really the money was intended by the plaintiff when he sent it, was endorsed to another person and he instituted a But against the plaintiff for the recovery of that amount. It was decreed against him since the institution of this suit. I may here mention that, in a preliminary order passed in the suit instituted by the endorsee, the District Munsiff overruling the plea of payment urged by the present plaintiff who was defendant therein said that "the defendant may no doubt have his remedy to claim back the amount paid by mistaken under standing of the real claimant to the money." The suit out of which this second appeal arises has been instituted by the plaintiff for the

recovery of the amount declared due from him to the first defendant in the circumstances which I have narrated. Both the lower Court, holding that the money was paid by the plaintiff under a mistake of fact, have given a decree in his favour and the defendants have preferred this second appeal against that decree.

2. The learned Subordinate Judge has found "that there was no second promissory note for Rs. 1,250, that the plaintiff executed only one promissory note for Rs. 1,250 Exhibit R, dated 29-4-1914, that the reference in Exhibit D to a promissory note for Rs. 1,250 in Ananda Vaikasi was made owing to forgetfulness, and that the defendants are not entitled to appropriate it towards that fictitious promissory note but are bound to refund it." At the very outset I may point out that the arguments of the learned Counsel for the appellants at the bar were not directed to show that there is any equity upon which the appellants could retain this money. It is conceded that the defendants have committed a deliberate fraud, but it is argued that since the plaintiff intended to send the money to the 1st defendant, the finding of the Subordinate Judge based upon a mistake of fact cannot stand. It appears to me that, when once it is conceded that the money that was sent was intended for quite a different promissory note and not for the fictitious promissory note, though it was sent to the 1st defendant it was money which he had no right to retain and which he had from the date of its receipt been holding for the plaintiff. The circumstances of the case show that the money was sent by the plaintiff to the 1st defendant under a bona fide forgetfulness of fact which disentitles the first defendant to receive it. I think, therefore, the plaintiff is entitled to recover the money which he has paid to the first defendant on the ground of mistake.

3. It was argued that the suit is premature inasmuch as it was instituted before the decree in the suit brought by the endorsee was actually passed. I do not think that there is any substance in this argument. I have already pointed out that in the preliminary order the District Munsiff had indicated that the plaintiff had no defence to the endorsee's suit. The defect indicated can certainly be cured by an amendment. Further it cannot be said as a general rule that Courts have no power to grant a decree where the cause of action arose subsequent to the suit : See Subbaraya Chetty v. Nachiar Ammal (1918) 7 L.W. 403. In the special circumstances of this case I overrule this plea. I may also mention that this argument does not appear to have been put forward in the lower appellate Court.

4. I dismiss the second appeal with costs.