
(2012) 09 KL CK 0050
In the High Court Of Kerala
Case No : Co. A. No. 13 of 2011

Vinod P.C.

APPELLANT

Vs

Mayuram Chitties and General Finance (P) Ltd.

RESPONDENT

Date of Decision : 07-09-2012

Acts Referred:

Citation : (2012) 4 KLJ 518

Hon'ble Judges : P.S. Gopinathan, J;K. Hema, J

Bench : Division Bench

Advocate : K.A. Salil Narayanan, for the Appellant; K. Moni, for the Respondent

Final Decision : Allowed

Judgement

P.S. Gopinathan, J.—These appeals are preferred against the common judgment in C.C. Nos. 615/2008 and 618/2008 in Company Petition Nos. 34/2002 and 53/2002, whereby the learned single Judge found that appellant is liable to pay a sum of Rs. 53,500/- in C.C. No. 615/2008 and a sum of Rs. 60,000/- in C.C. No. 618/2008 to the company under liquidation. The claim was for Rs. 60,000/- each. But, it was found that a sum of Rs. 6,500/- was due to the appellant from the company. That amount was deducted from the claim in C.C. No. 615/2008 and the balance Rs. 53,500/- was ordered to be realised from the appellant. The brief facts leading to the appeals are that in the liquidation proceedings initiated against the respondent company, it was brought to the notice of the Official Liquidator that the appellant was a subscriber of two kuries, namely, TK1/11 and TK1/12, run by the company, both kuries bid in auction and received the bid amount. As per the ledgers, which were marked as Exts.A1 And A4, it was noticed that up to December 2000 the appellant remitted only thirty five kuri instalments and fifteen instalments in both kuries were due from the appellant at the rate of Rs. 4,000/- per installment. It is on that basis the claim was lodged.

2. The appellant took up a contention that he had remitted the entire instalments in the above two kuries and at the time of receiving the prize amount he had

executed kuri security bonds in addition to hypothecation of the property and that after discharging the entire kuri instalments, the kuri security bonds and the hypothecation deeds were got back along with the title deeds. It was even alleged that the property hypothecated was subsequently sold by the appellant and that no amount was due in respect of the above two kuries. It was also contended that company was functioning up to 2002 and that the appellant was a subscriber of two other kuries also. In those kuries, the appellant had remitted instalments up to May 2002 and payments are recorded in Exts.D1 and D2, the passbooks and that the appellant is entitled to get back that amount. With these pleadings, the parties went for evidence.

3. On the side of the Official Liquidator, an employee of the company was examined as CW1 and Exts.A1 to A6 were marked. The appellant was examined as RW1 and Exts.D1 and D2 were also marked.

4. Learned Judge, on appreciation of evidence, arrived at a finding that both sides had not produced relevant documents. However, learned Judge further found that by Exts.A1 and A4 ledgers, it could be seen that appellant had remitted only thirty five instalments and the balance fifteen instalments at the rate of Rs. 4000/- are due from the appellant. Ext.D1 was found in respect of a kuri run by the company. As per Ext.D1, the appellant had remitted Rs. 500/- in that kuri. So, that amount was deducted towards the claim in C.C. No. 615/2008. Ext.D2 was found in respect of a kuri run by a partnership firm, of which some of the Directors of the company were partners and not by the company. Therefore, the claim of the appellant based on Ext.D2 was rejected. Now these appeals.

5. We have heard Sri. Salil Narayanan, the learned counsel appearing for the appellant and Sr. K. Moni, the learned counsel appearing for the Official Liquidator. Perused the impugned judgment as well as the evidence on record.

6. The evidence of the appellant as RW1 is in support of his plea that he had discharged the entire liability by making remittance and he got back all the documents including the title deed of the property which was hypothecated. As against that evidence, there is no contra evidence. Evidently, there is no document with the company to show that the kuri hypothecation bond and the title deed of the property were not released to the appellant but with the company. It is admitted in cross-examination of CW1 that at the time of release of prize money to the bidder, the company used to get the kuri security bond executed in addition to the hypothecation bond relating to the property which was offered as security. It is with that plea, the appellant filed a petition, for directing the respondent to produce the daily cash book as well as the Bond Registers. It is not in dispute that the mortgage register and bond register are primary documents to establish execution of the kuri security bond and hypothecation agreement. So also, the cash book is the primary document to prove the daily transaction. But the documents were not produced. The result is that primary documents are suppressed. The bond registers were sought to be produced with a contention that the return of bonds were recorded in the

registers.

7. Learned counsel for the respondent fairly conceded that execution of the kuri security bond with sureties undertaking discharge of future instalments is a statutory requirement. Execution of hypothecation deed is optional. Non possession of the kuri security bond and hypothecation deed with the company, in fact probabalises the defence advanced by the appellant. The learned Judge also gave reliance to Ext.A2 pronote to come to a conclusion that entire instalments might not have been discharged. The reasoning is that in the event the entire liability was discharged, the promissory note would have been got back. It is pertinent to note that the consistent case of the appellant is that at the time when the entire liability was discharged all other documents were released and the promissory note in one kuri was not returned stating that it was not readily available. We find that the explanation is probable. The reason is that if the liability was not discharged and for that reason the promissory note in respect of one kuri is retained with the company, the promissory note in respect of the other kuri along with connected documents also must have been available with the company. So, possession of one promissory note in one kuri is not at all a good reason to conclude that the liability in respect of both kuries were not discharged. If the possession of Ext.A2 is taken as a reason to conclude that the, liability was not discharged, such a conclusion can be only in one case. In the other case, it is to be concluded that the liability was discharged. On the other hand, non-possession of the kuri security bond and the property hypothecation bond are good reasons to arrive at a conclusion in favour of the appellant that the liability was discharged in full. His explanation for having Ext. A2 in the possession of the company is more probable.

8. Having due regard to the nature of the dispute, we find that non production of the daily cash book as well as the registers relating to the security bond and hypothecation bond is much relevant. We also find that Exts.A1 and A4 ledgers are not primary documents. The primary document relating to daily transaction is the cash book in which entries are supposed to be made in the routine course of business. Ledgers are written at convenience after referring to the cash book. In the absence of cash book, it is not legitimate to rely upon the ledger alone to conclude that there was no discharge. The appellant was also found fault with by the learned single Judge for not producing the passbook or the receipts for payments of instalments. According to the appellant, since he got back the kuri security bond and the title deed of the property, he had not preserved the records in proof of discharge. We find that the explanation offered by the appellant is satisfactory because the transaction was over years back. The appellant is not expected to maintain the records relating to the kuri transaction which was closed years back. Moreover, when the kuri security bond and the hypothecation agreement were returned to the subscriber, there is no relevancy in retaining the passbook or receipts for payment of instalments. By Ext.D1, it can be seen that the company had been running kuries till May 2002. Therefore, the contention of the respondent that the company ceased to function after

November 2000 cannot be accepted. Probably, the functioning of the company might be out of gear and had not been maintaining the records regularly. Despite the fact that functioning of the company had been ailing from 2000, the company had been running kuries and had been obtaining money from the appellant and other subscribers as evidenced by Ext.D1. It appears that the Official Liquidator had received only some of the documents. The daily cash book is the most important document. Neither it was produced before the liquidator nor it was cared to be seized. In the above circumstances, we find that appellant cannot be held liable for the balance kuri amount basing upon Exts.A1 and A4 and for the sole reason that appellant had not kept the records relating to payments. In company claims, the burden of the official liquidator is nothing lesser than that of the plaintiff in a suit for realisation of money as if the company sues for recovery of money against its debtors. When the claim is based upon accounts, it should be established that the accounts are truly and correctly recorded. Failure of the claimant to prove that the accounts were truly and correctly recorded can go only in favour of the respondents and not in favour of the claimant. Since the daily cash book, which is the primary document relating to the account containing all money transactions in the order that take place provided it is duly maintained is not produced, it is not justified to fix liability basing on ledger entries which are made at a later time. Omission to make ledger entries up to date cannot be ruled out. Here, in this case, the very pleading of the claimant is that the company was functioning only up to 2000. Ext.D1 would show that the business was done up to 2002. It would indicate that there is suppression of transaction for two years from the Official Liquidator. Therefore, it cannot be said that all entries were truly and correctly made in Exts.A1 and A4. To ascertain the correctness of the entries in Exts.A1 and A4, we have to cross check the same with reference to the cash book. Since the cash book is not coming forward, cross checking is not possible. Looking through the ledger alone, it is rather impossible to conclude whether it was correctly and regularly maintained or not. There is also no supporting oral evidence adduced to show that Exts.A1 and A4 were regularly and correctly maintained. None acquainted with Exts.A1 and A4 was examined to bring on record that Exts.A1 and A4 were correctly and regularly maintained. CW1 is only a bill collector in another branch of the company. His evidence is not sufficient enough to conclude that Exts.A1 and A4 were regularly and correctly maintained. Therefore, we find that it is not appropriate to fasten the appellant with the liability on the basis of Exts.A1 and A4. We further find that non-production of daily cash book, the bond register and hypothecation agreement would go in favour of the appellant rather than against the appellant. In the above circumstances, we are inclined to arrive at a finding that the claim is not established. Judgment impugned requires interference in appeal.

In the result, both appeals are allowed. While setting aside the judgment impugned, C.C. Nos. 615/2008 and 618/2008 would stand dismissed. The finding of the learned single Judge that the appellant is entitled to get back a sum of Rs. 500/- on the basis of Ext.D1 is sustained. No order as to costs.