

Divakaran Vs. Gopalakrishnan

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Court : Kerala

Decided On : Jan-29-2013

Judge : Honourable Mr.Justice Harun-Ul-Rashid

Appellant : Divakaran

Respondent : Gopalakrishnan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE HARUN-UL-RASHID TUESDAY, THE 29TH DAY OF JANUARY 2013 9TH MAGHA 193 FAO.No. 156 of 2012 ----- AGAINST THE JUDGMENT IN AS.319/2008 of DISTRICT COURT, KOLLAM DATED 16 12-2011. (O.S.NO.231/2003 OF MUNSIFF COURT, KARUNAGAPPALLY) APPELLANT/RESPONDENT/PLAINTIFF: ----- DIVAKARAN S/O.PARAMU,'LAKSHMY NIVAS', MADATHILKARAZHMA MURI OCHIRA VILLAGE, OCHIRA BY ADV. SRI.K.P.SREEKUMAR RESPONDENT/APPELLANT/DEFENDANT: ----- GOPALAKRISHNAN, AGED ABOUT 6 YEARS, S/O.SEKHARAN, MEENATHERIL VEEDU, MADATHIKARAZHMA MURI OCHIRA VILLAGE, OCHIRA P.O. BY SRI.P.B.SURESH KUMAR, SENIOR ADVOCATE. BY ADV. SRI.LEO GEORGE THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 29-01-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: HARUN-UL-RASHID, J.

----- F.A.O.No.156 Of 2012 ----- Dated this the 29th day of January, 2013.

JUDGMENT

The plaintiff in O.S.No.231/2003 on the file of the Munsiff Court, Karunagappally, is the appellant. The appeal is directed against the judgment dated 16.12.2011 in A.S.No.319/2008 on the file of the District Court, Kollam. The lower appellate court remanded the case for fresh consideration. The parties hereinafter are referred to as arrayed in the suit.

2. The plaintiff filed the suit stating that the defendant borrowed ` 60,000/- on 5.6.2002 at his residence and executed Ext.A1 pro note undertaking to repay as and when demanded. The suit was resisted by the defendant contending inter alia that he did not borrow any money and did not execute any pro note as contended. It is averred in the written statement that he left India on 7.5.2002 and returned to India only on 2.10.2004. It is also contended that the plaintiff and defendant have conducted a jewellery shop in the name and style 'Chaithanya Jewelery', that the plaintiff happened to be in possession of the blank signed papers signed by the defendant and using one such signed blank paper, the plaintiff created Ext.A1 pro note. ::2:: F.A.O.No.156 O

3. The plaintiff was examined as PW1. PWs 2 & 3 are two witnesses examined on his side. Wife of the defendant, who is the power of attorney holder, was examined as DW1. DWs 2 & 3 were also examined on the side of the defendant. Exts.C1 & C2 were marked as court exhibits. Exts.A1 to A4 and Exts.B1 to B5 were marked.

4. The trial court examined the contention of the parties by evaluating the evidence on record. PWs 2 & 3 are the two witnesses to Ext.A1 document. They have supported the case advanced by PW1 in material particulars. The trial court also considered the contention of the defendant. The prior transactions between the plaintiff and defendant and the contention that the plaintiff kept with him the blank papers signed by the defendant, utilised one of the signed papers and created Ext.A1 pro note were also examined. The trial court observed that the defendant had admitted his signature in Ext.A1 document. The trial court also considered the contention of the defendant that on the date when the pro note was executed, the

defendant was not in station. The said contention was not considered because the defendant did not produce the original passport before the trial court. The trial court noticed the fact that the defendant has produced Ext.B5 copy of the ::3:: F.A.O.No.156 Of 2012 passport and observed that all along the plaintiff was requesting the defendant to produce the passport to prove the above said claim in order to prove that he was not in station at the time of execution of Ext.A1 pro note. The court also noticed the fact that the defendant was present in court on so many posting dates of the case and that his specific signature was taken for sending it to the handwriting expert for comparison. The trial court found that there is no justification for not producing the original passport in court. The trial court also noticed the fact that the defendant did not enter into the witness box to give evidence in support of his case. After evaluating the evidence on record, the trial court found that the plaintiff is entitled to a decree as prayed for. The trial court held that Ext.A1 is a genuine document supported by consideration and the plaintiff has every right to realise the plaint amount.

5. The defendant filed appeal as A.S.No.319/2008. The defendant produced the original of his passport along with I.A.No.1081/2011 to receive the passport in evidence. The lower appellate court noticed that the trial court did not rely on Ext.B5 copy of the passport attested by the Assistant Consular Officer, Embassy of India, Bahrain as the original passport was not produced. The lower appellate court observed that the original of ::4:: F.A.O.No.156 Of 2012 the passport has got bearing on the merits of the case. The lower appellate court observed that since the passport will have to be exhibited and proved the matter requires reconsideration and therefore, a remand is necessitated. The court also took the view that there are sufficient reasons for the appellant for not producing the passport in the court below on account of the fact that he was working abroad at that point of time. The lower appellate court also observed that if the passport is exhibited and considered there is a chance for the case having a different outcome. For the said reasons, the matter was remanded to the court below for fresh consideration.

6. It is noticed that the defendant produced the original of the passport along with I.A.No.1081/2011. The lower appellate court remitted the case to enable the

appellant defendant to prove his case. A direction was issued by the said court to take back the passport and produce the same before the trial court. The returned passport was produced again before the trial court.

7. I have examined the original passport produced before the trial court. The learned counsel for the appellant/plaintiff did not dispute the genuineness of the passport. The only reason stated for remanding the case is to enable the defendant to prove ::5:: F.A.O.No.156 Of 2012 the genuineness of the passport. Since the genuineness of the passport is not in dispute, all the contentions of the parties can be considered by the lower appellate court. The lower appellate court can mark the original passport as one of the exhibits of the defendant. The contention raised by the parties on the basis of oral and documentary evidence including the passport produced can be examined by the lower appellate court and can decide the matter in accordance with law. It is made clear that the parties are at liberty to raise all contentions available to them. In the result, the appeal is allowed. The judgment in A.S.No.319/2008 is set aside. There will be a direction to the lower appellate court to consider and dispose of the appeal afresh. Parties shall appear before the court below on 5.3.2013. The counsel shall inform the parties. The appeal shall be disposed of, as expeditiously as possible. HARUN-UL-RASHID, Judge. bkn/-

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