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Court : Kerala

Decided On : May-26-2004

Reported in : AIR2005Ker1; II(2005)BC345; 2004(3)KLT71

Judge : R. Bhaskaran, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 8, Rule 5

Appeal No. : A.S. No. 67 of 1994

Appellant : Louiz

Respondent : Augustin

Advocate for Def. : P. Jacob Varghese and; P.K. Ravindran, Advs.

Advocate for Pet/Ap. : S. Sreekumar, Adv.

Judgement :

R. Bhaskaran, J.

1. This appeal is filed by the plaintiff in a suit for realisation of a sum of Rs. 47,550.39 with future interest and cost. Plaintiff and defendant were the partners of a firm 'Lions Knitting Industries'. The firm had availed a loan from Canara Bank and the Bank filed O.S. 185/1978 on the file of the Sub Court, Kochi and obtained a decree on 22.11.1980 against the firm. It is stated that the plaintiff had

mortgaged his property to the Bank and in execution of the decree the property was brought to sale and the plaintiff paid an amount of Rs. 71,154.40 on 14.2.1985. There were earlier two payments of Rs. 1000/- each and altogether the plaintiff paid Rs. 73,154.50. According to the plaintiff, the plaintiff is entitled to recover half of the amount paid by him from the defendant who was the other partner of the firm. Though the plaintiff demanded the amount as per lawyer notice dated 24.5.1986, the defendant did not reply to the notice nor paid the amount. Hence the suit was filed for the relief as stated above.

2. The defendant filed a written statement contending that the mutual obligations between the partners ceased on 4.12.1982 and alleged payments if at all true was voluntary and hence it cannot bind the defendant. The suit having been brought after three years is barred by limitation. It is also stated in paragraph 5 of the written statement that he did not participate in the execution proceedings and he was not aware of any payment having been made by the plaintiff. Therefore, he denied and put the plaintiff to strict proof thereof.

3. In the trial court the plaintiff produced Exts.A1 to A3 and the defendant produced Ext.B1. The plaintiff was examined as PW1 and the defendant did not get into the box. After the trial, the trial court has dismissed the suit finding that the plaintiff has not produced any evidence to show that he has made the payment to the bank. On the question of limitation, the trial court found that the suit was not barred by limitation.

4. In this appeal the learned counsel for the appellant submits that in the written statement there was no specific denial of the payment made by the plaintiff and even in the cross-examination of the plaintiff the question put was whether the payments were made voluntarily. He argued that when the averments with regard to payments were specifically in the plaint, the defendant was expected to make specific denial as otherwise necessary presumption will have to be drawn and there is no burden on the plaintiff to prove things which were not specifically denied.

5. Though the learned counsel for the respondent attempted to argue that the finding on limitation entered by the trial court is wrong, I am not satisfied that there

is any merit in that argument. The suit being essentially one for contribution by the defendant who was a judgment debtor in the earlier suit, the period of limitation would start when the plaintiff paid the entire amount for and on behalf of the other judgment debtor. Admittedly the suit is filed within three years of such payment. Therefore the finding of limitation by the trial Court cannot be assailed by the respondent.

6. The point for consideration in the appeal is whether the trial Court was correct in dismissing the suit for contribution on the ground that the plaintiff did not adduce any evidence for payment of decree amount to the Bank when the defendant did not specifically deny the payments made by the plaintiff in the written statement.

7. In the plaint the plaintiff has stated in paragraph 3 as follows:

'To discharge liability of the decree holder bank, plaintiff had no other go but to arrange the balance decree debt and that on 14.2.1985 plaintiff paid Rs. 71,154.40. The said amount was excluding 2 payments of Rs. 1,000/- each made earlier to the decree holder bank. Altogether plaintiff has paid Rs. 73,154.40 to the decree holder bank of which he was liable to pay only Rs. 36,577.20. Hence plaintiff is entitled to recover Rs. 36,577.20 from the defendant that being the half of total amount paid to the decree holder bank'.

In the written statement what is stated is as follows:

'It is true that for the dues of the firm, Canara Bank had instituted O.S. 185/78 before the Sub Court, Kochi and obtained decree dated 22.11.80. It is further admitted that the decree holder, Bank levied execution seeking sale of the plaintiff's property. This defendant has not participated in the execution matter and is therefore not aware of any payment having been made by the plaintiff towards satisfaction of the decree. This defendant therefore denies and puts the plaintiff to strict proof thereof.

8. The question is whether the above averments in the written statement will amount to specific denial as required under Order 8, Rule 5. A Division Bench of this Court in Abubacker v. Abdulrahiman Beary, 1960 KLT 348, has held as

follows:

'Order VIII of the Code of Civil Procedure requires denial of allegations in the plaint to be specific. Where a defendant simply 'puts the plaintiff to proof of the several allegations in the plaint, he will be deemed to have admitted the facts alleged in the plaint'.

The Supreme Court also in Jahuri Sah v. D.P. Jhunjhunwala, AIR 1967 SC 109, held as follows:

'The High Court has pointed out that the plaintiffs have clearly stated in para. 1 of the plaint that Shankarlal had been given in adoption to Sreelel. In neither of two written statements filed on behalf of the defendants has this assertion of fact by the plaintiff been specifically denied. Instead, what is stated in both these written statements is that the defendants have no knowledge of the allegations made in para. 1 of the plaint. Bearing in mind that Order VIII, Rule 5, CP.C. provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted, to say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial. No specific issue on the question of adoption was, therefore, raised. In the circumstances the High Court was right in saying that there was no occasion for the parties to lead any evidence on the point'.

9. In the light of the above decisions, I am of the opinion that there is no specific denial of the averments regarding the payments made by the plaintiff and there was no duty cast on the plaintiff to adduce evidence with respect to matters which were not specifically denied in the written statement. Apart from the above it is also seen that when plaintiff was examined, the questions put to him were whether the payments were made voluntarily. In that respect also there was an implied admission of the payments made by the plaintiff, Moreover the defendant did not get himself examined to controvert the oral evidence adduced by the plaintiff with regard to the payment made by him and in such cases the Court can draw adverse inference against the defendant. In Iswar Bhai C. Patel v. Harihar Behera, AIR 1999 SC 1341), the Apex Court held as follows:

'.....Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him'.

Therefore, for all these, reasons, the reasoning of the trial Court is absolutely incorrect and it is only to be set aside.

10. The appellant has produced a certificate from the bank showing the discharge of the entire decree debt as an additional evidence in this appeal. Since, even otherwise, I find that the plaintiff is entitled to succeed, it is not necessary to rely on the additional document produced in this Court.

In the result the judgment and decree of the trial Court are set aside and there will be a decree for Rs. 36,577.20 to be paid to the defendant with interest from 14.2.85 to 14.10.86 at 12% and thereafter at 6% till realisation. The appellant is also entitled for cost in this appeal.