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Thomas Alias Tomy Vs. K.C. Thomas

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Court : Kerala

Decided On : Oct-09-2003

Reported in : AIR2005Ker129

Judge : S. Sankarasubban and; A.K. Basheer, JJ.

Acts : Contract Act - Sections 25(3) and 138; Negotiable Instruments Act, 1981 - Sections 118; Evidence Act - Sections 114

Appeal No. : A.S. No. 375 of 2002

Appellant : Thomas Alias Tomy

Respondent : K.C. Thomas

Advocate for Def. : K. Jayakumar and; S.V. Balakrishna Iyer, Advs.

Advocate for Pet/Ap. : S.V. Balakrishna Iyer, Sr. Adv. and; V. Giri, Adv.

Judgement :

S. Sankarasubban, J.

1. This appeal is preferred by the defendant in O.S. No. 63 of 1999 of the Sub-Court. Thodupuzha. Respondent is the plaintiff. The suit was filed for recovery of an amount of Rs. 4,50,000/-with interest thereon. The case of the plaintiff is as follows :

2. The plaintiff is an Agriculturist. He is having rubber plantation. He sells the rubber to the defendant, who stores it and sells it at Kochi. The dealing has been going for a long time. The practice is that whenever the quantity of rubber is entrusted to the defendant, a slip will be given by the defendant showing the quantity as well as the price and later on, on producing the slip, the amount will be given. According to the plaintiff, the amount under two slips is due to the plaintiff. Those slips are produced as Exts. A1 and A2 and the value of those slips together comes to Rs. 1 lakh and odd and the rubber was sold in 1994. There is another case for the plaintiff that the defendant has borrowed an amount of Rs. 68,000/- personally in 1994. Even though many times the plaintiff demanded the amount from the defendant, he did not pay the same. Ultimately, at the instance of the mediators, a cheque for Rs. 4,50,000/- was issued by the defendant to the plaintiff taking into account the entire amount due to the plaintiff as well as the interest thereon. When the cheque was presented, it was dishonoured. Thus, the suit was filed for recovery of Rs. 4,50,000/- with interest thereon.

3. The defendant filed a written statement. In the written statement, the transaction with the plaintiff is denied. He also denied that he took a loan of Rs. 68,000/-. It is further stated that there was a practice on the part of the defendant of keeping signed cheques. The building in which the defendant's shop is housed was trespassed by one Thomas and took away the valuables from it. This included cheque leaves and those cheques would have been made use of by the plaintiff. At the time when the cheque was alleged to be executed, the claim had become barred by limitation and hence, even if the cheque is issued, it cannot be legally enforced.

4. On the basis of the above pleadings, necessary issues were raised by the Court below. Exts. A1 to A10 were marked on the side of the plaintiff and Exts. B1 to B6 were marked on the side of the defendant. On the side of the plaintiff, P.Ws. 1 and 2 were examined. P.W. 1 is the plaintiff and D.Ws. 1 and 2 were examined on the side of the defendant to show that the defendant owes money to the plaintiff. D.W. 1 is the defendant himself and D.W. 2 is one T. K. Lal, who was the Accountant of the defendant. The Court below found that the plea set up by the plaintiff is correct. Thus, a decree was passed for Rs. 4,50,000/- with interest thereon at 6%

per annum.

5. We heard learned Senior Counsel Sri S.V.S. Iyer for the appellant and learned counsel Sri. K. Jayakumar for the respondent.

6. Learned counsel for the appellant submitted that there is in evidence to show that the plaintiff had transaction with the defendant. The slips cannot be lawfully accepted as evidence for any transaction. Learned counsel submitted that amounts are due in 1994 and hence, the claim is barred by limitation. On the other hand, learned counsel for the respondent submitted that Section 25(3) of the Contract Act enables the plaintiff to show that if there is promise in writing, that is a good claim and the bar of limitation cannot be applied for the same.

7. We went through the records in the case. So far as the question of transaction is concerned, we find that Exts. A1 and A2 slips were issued. The execution of Ext. A1 is admitted by the defendant. So far as Exts. A2 is concerned, it is signed by D.W. 2. We agree with the lower Court in finding that Exts. A1 and A2 are issued by the defendant. So far as the issue of cheque is concerned, the case set up by the defendant is that he signed cheque leaves. There was a trespass in his building by the owner and took away the valuable records including the cheques and those cheques might have been misused by the plaintiff. We don't find any evidence for this. Even though, as already stated by the Court below, the records were taken away from the shop room, it did not include the cheque leaves. Hence, that part of evidence cannot be believed. Hence, we have to assume that the cheques were legally issued by the defendant.

8. The next question is whether the issuance of the cheque shows the liability on the part of the defendant. As we have already stated, Exts. A1 and A2 show the liability on the part of the defendant to pay the amount to the plaintiff. The amount stated in the cheque includes not only the value of the rubber, but also an amount of Rs. 68,000/-, which is said to be taken as loan from the plaintiff and further includes other amounts including interest. It goes without saying that if the execution of the negotiable instrument is admitted under Section 118(a) of the Negotiable Instruments Act, there is a presumption of passing of the consideration. There is no presumption regarding the exact amount that is shown in the

negotiable instrument.

9. In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316, it was held by the Supreme Court thus (para 5) :

'Section 118 lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a Court shall presume, inter alia, that, the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be'.

It is further stated in that judgment as follows (para 5) :

'A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration should produce the said account books; If such a relevant evidence is withheld by the plaintiff, Section 114, Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a Court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act'. A Division Bench of this Court in a case reported in Ramakrishnan v. Parthasaradhy (2003) 2 Ker LT 613:, held thus :'When a person issued a cheque, he acknowledges his liability to pay -- In the event of the cheque being dishonoured on account of insufficiency of funds, he will not be entitled to claim that the debt had become barred by limitation and that the liability was not thus enforceable.'

The judgment further says as follows :

'Thus, we are of the opinion that when a person writes, signs and delivers a cheque to another it is in acknowledgment of a legally enforceable liability. Thereafter, if the cheque is dishonoured on account of insufficiency of funds such a person shall not be entitled to plead that at the time of his writing the cheque the claim had become barred by limitation and thus, he is not liable to be punished

under Section 138. Under Section 25(3), a promise can be made even in a case where the limitation for recovery of the amount has already expired. Such a promise has to be in writing.'

In view of the above decisions, it cannot be said that the cheque is not enforceable. But this is a case where both sides adduced evidence. But there is nothing to show regarding the oral loan. The plaintiff when examined merely says that Rs. 68,000/- was given. This part of the consideration is not proved. So also, how the total amount of Rs. 4,50,000/- was arrived at is not seen. One of the mediators should have been examined to show how this amount was arrived at. Thus, the consideration is proved only for an amount of Rs. 1,73,011/- (1,35,953 + 37,058). The date of Ext. A3 is 26-4-1999. Out of this amount, it is admitted that Rs. 15,000/- has been paid to the defendant,

So the actual amount is only Rs. 1,58,011/-.

10. In the result, the judgment and decree of the Court below are modified and a decree is given to the plaintiff for an amount of Rs. 1,58,011/- with interest thereon at 12% per annum from 26-4-1999 till date of recovery.

Appeal is disposed of as above.

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