

R.Y. Narayanan Vs. Bank of Madurai Limited and anr.

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Court : Chennai

Decided On : Nov-19-1990

Reported in : (1991)2MLJ82

Appellant : R.Y. Narayanan

Respondent : Bank of Madurai Limited and anr.

Advocate for Pet/Ap. : Mr. G.M. Nathan

Judgement :

Bellie, J.

1. Second defendant is the appellant. The suit for a sum of Rs. 11,333.82 has been decreed against the two defendants.

2. First defendant Lakshmanan, on 11.12.1974, borrowed a sum of Rs. 10,000 from the plaintiff bank executing a promissory note Ex. A-4 agreeing to repay the same with interest at 6% per annum over the Reserve Bank of India rate. This amount was borrowed by the first defendant for the purpose of purchasing a Bajaj tempo vehicle. Out of the said sum of Rs. 10,000 borrowed, as a matter of arrangement, the first defendant made a Fixed Deposit of Rs. 4,000 in the same bank. The balance of Rs. 6,000 was utilised for the purchase of the vehicle. A deed was executed by the first defendant hypothecating the vehicle as a security for the payment of the said loan amount, and the said Fixed Deposit also was

intended to be a security. The second defendant also executed a guarantee letter in favour of the plaintiff for repayment of the loan amount. As per the hypothecation deed the first defendant shall discharge the loan amount in 33 instalments of Rs. 300 each together with interest at 15% per annum. The first defendant paid only two instalments and thereafter he failed. According to the plaintiff bank it issued notice to the defendants demanding payment of the amount due as per the ledger accounts but it was of no avail and therefore the plaintiff bank had to file the suit.

3. The first defendant remained exparte, and the second defendant alone resisted the suit. He contended that the accounts filed by the plaintiff is not correct and every entry is disputed. His further contention is that since the first defendant - principal debtor did not comply with the conditions of the hypothecation agreement this defendant got the hypothecated vehicle delivered to the plaintiff bank and he also got the fixed deposit receipt of the first defendant for Rs. 4,000 duly discharged and handed over to the plaintiff. He further submits that he then arranged for sale of the vehicle to one Mariappan with the acceptance of the plaintiff bank, and he also arranged for a loan from the plaintiff bank to the said Mariappan to enable him to purchase the vehicle on the hypothecation of it by Mariappan to the bank with a guarantor, and the said Mariappan has paid a sum of Rs. 1,000 as advance of the sale price, and inasmuch as Mariappan has purchased the vehicle and he has hypothecated it with the bank for a loan, the hypothecation agreement with the first defendant stands cancelled and the second defendant also is discharged of his liability. Therefore there is no cause of action against this defendant and therefore the suit has to be dismissed.

4. The learned trial Judge on consideration of the evidence in the case did not accept the contention of the second defendant that the vehicle was sold to Mariappan and on the same vehicle he executed a hypothecation deed in favour of the plaintiff bank. The learned Judge also rejected the second defendant's case that the accounts produced by the plaintiff is incorrect and it has to be rejected. On these findings the suit was decreed.

5. Mr. G.M. Nathan, learned Counsel for the appellant-second defendant first contends that it is not in dispute that the fixed deposit receipt for Rs. 4,000 duly endorsed has been transferred to the bank, and there is clear evidence that at the instance of the second defendant the vehicle had been handed over to the plaintiff bank and again at the instance of the second defendant the vehicle had been sold by the plaintiff bank to one Mariappan who has entered into a hypothecation agreement on the said vehicle for a loan from the bank for purchase of that vehicle, and therefore the hire purchase agreement with the first defendant stood cancelled and consequently this defendant's liability as surety also has been discharged. The plaintiff-bank does not admit that there was any such sale to Mariappan and there was a hire purchase agreement with him.

6. In support of his contention the learned Counsel reads out Exs. A-15, A-17, A-18, A-16, A-13, and A-10. In Ex. A-15 letter dated 17.2.1976 the second defendant has written to the bank stating that he is enclosing the Fixed Deposit receipt for Rs. 4,000 duly discharged and it may be adjusted to the loan account, and requesting the bank to take delivery of the vehicle from the first defendant. In Ex. P-17 letter dated 12.5.1976 the second defendant has written to the bank that he has fixed the price for sale of the vehicle to Mariappan at Rs. 8,000 and Rs. 1,000 as advance also price is being remitted and another Rs. 500 will be remitted in a week's time and he, the second defendant, has also requested the bank to sanction a loan of Rs. 6,500 to Mariappan. In Ex. A-18 letter of the same date Mariappan has written to the bank that he was paying a sum of Rs. 1,000 as advance for the price of Rs. 8,000 fixed for the vehicle and he would pay Rs. 500 in a week's time and for the remaining balance amount of Rs. 6,500 Mariappan has requested the bank for granting a loan. Ex. P-16 which is also of the same date is a letter by one Raju to the plaintiff bank to the effect that he is agreeable to stand as-surety and guarantor for the repayment of the loan that would be sanctioned to Mariappan. Ex. A-13 letter dated 30.9.1976 is by Mariappan to the bank stating that he is handing over the tempo along with the R.C. Book to the bank since he was not in a position to run it. Ex. A-10 dated 16.5.1977 is a proceeding of the Regional Transport Officer which only shows that Lakshmanan-first defendant has surrendered the permit of the Tempo. At the most these documents can be said to show that there was a suggestion by the second

defendant to the bank for sale of the vehicle to some other third party and he has made some attempts for such a sale and the bank also might have thought that such an agreement would be helpful to the bank, but there is nothing whatsoever to show that the bank really agreed to such an arrangement, and there was no hypothecation agreement at all between the plaintiff bank and the said Mariappan. There is nothing whatever to indicate that the said Mariappan ever became the owner of the vehicle. Maybe he was in possession of the vehicle for some time, and the possession was given to Mariappan during negotiations of sale to him by the bank, but from this alone it cannot be said that there was any completed contract between the plaintiff bank and the said Mariappan. There is nothing to show in the plaintiffs accounts that Mariappan ever remitted a sum of Rs. 1,000 as alleged, nor is there anything to show that the plaintiff sanctioned any loan to Mariappan. No scrap of paper has been filed as any communicated from the plaintiff bank either to the second defendant or the said Mariappan in this regard. The plaintiff being an institution especially a bank there is no point in simply saying that the plaintiff agreed to this or that without any communication in writing from them.

7. As pointed out by the Court below, if really there was a sale of the vehicle to Mariappan, there would have been a document in that regard, and such a sale cannot be possible without the hypothecation agreement. A-6 between the first defendant and the bank cancelled. But this hypothecation agreement Ex. A-6 and also the promissory note executed by the first defendant Ex. A-4 and the guarantee letter executed by the second defendant Ex. A-1 all remain in tact. There is absolutely no explanation for this. The R.C. Book has not been transferred to the name of Mariappan. Therefore it is idle to contend that there was a sale of the vehicle to another person viz., Mariappan and therefore the second defendant's liability has been discharged.

8. Mr. G.M. Nathan next contends that since the security viz., the vehicle was in the possession of the creditor-bank, before filing of the suit it should have sold it and only then for the balance amount if any it should have filed that suit and that having not been done the guarantor's liability must be held to be discharged. In this connection the learned Counsel relies on a decision in M. Ramnarain (P) Ltd.

and Anr. v. The State Trading Corporation of India Limited A.I.R. 1938 Bom. 45 on a reading of this decision it appears to me that the principle laid down therein is that the creditor should keep alive the security so that in case the principal debtor fails to pay the amount borrowed and the amount is recovered from the surety the surety can proceed against the security and therefore if the creditor fails to preserve the security that will lead to the surety being discharged from the liability. On the facts of that case it was held that,

In case of bill of exchange after acceptance the primary liability is of the acceptor and the drawer is liable only as a surety. It is necessary for the creditor to preserve the security, whether it is an actionable claim or whether it is pledge-mortgage or a negotiable instrument. The advantage of security available to the creditor must be kept alive so as to enable the surety to proceed against such security in case the principal debtor fails to discharge the liability. The failure to preserve the security would lead to the surety being discharged from the liability.

The hypothecation agreement Ex. A-6 enables the creditor-bank to seize the vehicle in case of failure on the part of the principal debtor in payment of any instalment or any other breach. But there is nothing incumbent on the part of the creditor-bank to sell and realise the sale proceeds to adjust it towards the amount due. The creditor-bank can hold the security in order to preserve it. Thus I find no merit in this contention of the learned Counsel either.

9. The learned Counsel next argues that it is the contention of the second-defendant that the accounts on the basis of which the suit amount is claimed is incorrect one and every entry therein is disputed but the plaintiff has not adduced any evidence to show that the account is correct and therefore the plaintiffs claim must be rejected. As the trial Court did, I find no substance in this contention. When the plaintiff has filed the suit on the promissory note and filed the true extract of the ledger Ex. A-11 to show the correct amount due, it is not sufficient for the defendant to merely say that the accounts are not correct and every entry is disputed. If any entry is disputed, the defendants should state that that particular entry is disputed and the reasons therefor. That is not done, Further when the Manager of the plaintiff bank has been examined as P.W. 1 through whom Ex. A-

11 was marked and he has stated that as per the accounts the suit amount is due, no question has been put to him in the cross examination as to the correctness of the accounts. Even the second defendant while he was examined as D.W. 1 has not stated anything about the accounts. It must be remembered that the plaintiff is an institution - a scheduled bank and not an individual, and it is therefore difficult to believe that they would make false claims. True, they have made certain claims in the accounts like Insurance premium, Inspector fees and Lawyer's notice fees, but if three items are specifically disputed, possibly the plaintiff would have explained or at least if any question has been put to P.W. 1 he would have stated as to how these amounts are legitimately due from the defendants.

The learned Counsel in support of his contention has relied on *Sajjanraj Swarupchand v. Mehfa Commercial Co.* : AIR1973 Guj57 , wherein it has been held that,

Mere entries in one's own books of account would not be conclusive and binding on the other side even where such books of account are kept in the regular course of business.

But in our case, as stated above, the Manager of the plaintiff bank has been examined as P.W. 1 and he has stated that on the promissory note executed by the first defendant, as per the accounts maintained by the bank relating to the promissory note, the suit claim is due from the defendants. Therefore the ruling relied on by the learned Counsel is inapplicable to the facts of our case. Hence the third contention raised by the learned Counsel also has no merits. 10. With this we cannot conclude the matter in view of what has happened subsequent to the filing of the appeal. It is seen from the records that on 24.7.1981 in C.M.P. No. 6838 of 1981 this Court has ordered directing the plaintiff bank to dispose of the tempo vehicle in its custody and credit the proceeds of such sale towards the amount due by the defendants. The learned Counsel for the appellant-second defendant contends that inspite of this order the plaintiff has not sold the vehicle and it is still kept idle and it has now become a scrap and of value. The learned Counsel for the respondent plaintiff is not in a position to deny that the vehicle has not been sold inspite of the order. I think we can safely take it that the said order has not been

complied with by the respondent-plaintiff, and there is no doubt that the said order having been passed as early as on 24.7.1981 i.e., more than 9 years ago the Tempo which has been kept idle should have become absolutely worthless. In this position whatever may be the market value of the Tempo at the time of the order, to that extent it must be held that the defendants are not liable to pay.

11. Now, the second defendant as D.W. 1 has stated in his evidence that the value of the tempo was Rs. 4,000. This apart, in Ex. A-19 letter dated 10.6.1977 written by the second defendant to the Chairman of the plaintiff bank he has stated that 'There is a local driver who is prepared to buy the tempo for a price of Rs. 4,001.' These would show that even if the order dated 24.7.1981 in the said C.M.P. No. 6838 of 1981 it would have fetched at the most Rs. 4,000 only and not more than that. Mr. Nathan would however say that at the instance of the bank the appraiser - Engineer has given a certificate Ex. A-20 according to which the value was Rs. 7,500. But there is clear evidence both in the testimony and in the letter Ex. A-19 of the second defendant that the value of the vehicle would be Rs. 4,000. Ignoring this we cannot take the value of the appraiser - Engineer. Therefore the defendants would be entitled for a deduction of Rs. 4,000 from the decree amount.

12. In the result, therefore, there will be a decree for the balance amount after deducting Rs. 4,000 from the amount decreed by the trial court. To this extent the appeal is allowed, and in other respects the appeal will stand dismissed. In the circumstances there will be no order as to costs in this appeal.