HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

AND

HON'BLE SRI JUSTICE TARLADA RAJASEKHAR RAO

A.S.No.783 of 2019

JUDGMENT: (*Per Hon'ble Sri Justice U. Durga Prasad Rao)*

Challenging the decree and judgment dated 18.09.2019 in O.S.No.182/2011 passed by learned IV Additional District Judge, Tirupathi decreeing the plaintiff's suit for a sum of Rs.42,96,648/- with interest @ 12% p.a. from the date of suit till the date of decree and thereafter @ 6% p.a. till realization on the principal amount of Rs.25,00,000/-, the defendant filed the instant appeal.

2. The factual matrix of the case in nutshell is thus:

(a) The plaintiff's case is that the plaintiff and defendant are relations and they are businessmen. For his business purpose, the defendant borrowed Rs.25,00,000/- from the plaintiff and executed suit promissory note on 01.09.2008 agreed to repay the amount with interest @24% p.a. However the defendant did not pay the pronote debt on one or other excuse. Hence the suit.

3. The defendant opposed the suit by filing written statement contending thus:

(a) The plaintiff and defendant are relatives and defendant is a businessman. The plaintiff used to work under the defendant as an

employee and his only source of income was his employment and except that he had no other source of income. The plaintiff thus has no capacity to lend such a huge amount and the defendant had no necessity to borrow the amount from the plaintiff and in fact, he never borrowed any amount from the plaintiff and suit pronote is rank forgery. While the plaintiff was working under defendant, he swallowed amounts by committing misappropriation and hence the defendant lodged a report against the plaintiff before Hallyalla Police Station in Karnataka State and police registered the case in Crime No.178/2008 U/s 408, 420 IPC against the plaintiff. However after the intervention of their elders and well-wishers, the said report was withdrawn by the defendant. Thereafter he removed the plaintiff from the employment. The plaintiff bore grudge against the defendant and filed suit with fabricated pronote as he was familiar with the signature of the defendant. The scribe and attestors are relations of the plaintiff who assisted him in such fabrication. The defendant never executed any pronote and received consideration as alleged in the plaint. The defendant thus sought to dismiss the suit.

(b) During trial, plaintiff was examined as PW1 and the two attestors were examined as PW2 and PW3. Scribe S. Nagaraju Naidu said to be died on 19.05.2017. The suit pronote was marked as Ex.A1. On behalf of defendant, his chief affidavit was filed but he failed to turn up to the Court for cross-examination and so the trial Court eschewed his evidence from record. It appears the defendant filed I.A.No.478 of 2017 U/s 45 of Indian Evidence Act to refer the suit pronote to handwriting

expert, however, since he did not prosecute the said petition, the same was dismissed for default.

(c) The trial Court, having regard to the evidence placed on record by the plaintiff held that the plaintiff could establish his case but the defendant failed to rebut the case of plaintiff and also the presumption U/s 118(a) of NI Act and accordingly decreed the suit in favour of the plaintiff. Hence the appeal.

4. The parties in this appeal are referred as they stood before the trial Court.

5. Heard argument of learned counsel for appellant Sri G.V.R Choudary and learned counsel for respondent Ms S. Pranathi.

6. Toeing the line of defence in his written statement, learned counsel for the appellant Sri G.V.R Choudary would argue that the plaintiff and defendant are close relatives and plaintiff while working under defendant embezzled funds and therefore the defendant filed report before Hallyalla Police Station in Karnataka State, basing on which, Crime No.178/2008 was registered against him and later at the intervention of elders and well-wishers, the defendant had withdrawn the complaint and removed him from the employment. In that backdrop, bearing grudge, the plaintiff who is well acquainted with the signature of the defendant, forged the suit pronote with the assistance of scribe and attestors who are his nearest kith and kin. Learned counsel would argue that the defendant has elaborately explained all these facts in his written statement and gave a tough fight

before the trial Court. He also filed I.A.No.478/2017 U/s 45 of Indian Evidence Act to refer the said suit prontoe to a handwriting expert. However due to his misfortune when the matter was coming for defence evidence, the defendant could not attend the Court as he seriously fell ill and could not move out to prosecute his case and give instructions to his advocate. He filed IA.No.535/2017 to record his evidence through an advocate commissioner but the said petition was dismissed by the trial Court. In those circumstances the suit was decreed *ex-parte* against him.

(a) Learned counsel would submit that though the trial Court rendered an elaborate judgment giving its finding on all the issues, still the said judgment can be treated only as an *ex-parte* judgment in terms of order 17 Rule 2 of CPC for the reason that the evidence of defendant was not adduced for whatever reason by then. Therefore the decree and judgment assume the character of *ex-parte* but not on merits. To buttress his argument he placed reliance on the judgment of Apex Court in **Prakash Chander Manchanda v. Janki Manchanda**[1]**.** Learned counsel would further submit that if the decree and judgment under appeal are held to be '*ex-parte',* in nature, this Court can consider the request of the appellant and afford an opportunity to adduce the evidence by setting aside such *ex-parte* decree and judgment on some conditions which the appellant would honour and oblige. Incidentally, he brought to our knowledge that this Court by its order dated 28.11.2019 in I.A.No.2 of 2019 granted interim stay of execution of the decree on the condition of

[1] AIR1987SC42 = MANU/SC/0011/1986

appellant depositing 50% of the decretal amount along with proportionate costs and the petitioner complied with the said order. He thus prayed to allow the appeal.

7. Per contra, learned counsel for respondent Ms S. Pranathi while severely opposing the appeal would submit that the appellant/defendant never diligently prosecuted his case before the trial Court. Firstly he filed his chief affidavit as DW-1 but did not turn up to the Court to face the cross-examination. Further, though he filed I.A.No. I.A.No.478/2017 to send suit pronote to a handwriting expert, however did not pursue the said petition. Thus the conduct of the defendant would clearly show that his intention was only to procrastinate the decree to be passed eventually against him. He never showed any seriousness in the matter. Therefore, the trial Court rightly eschewed chief examination and having regard to the unimpeachable evidence placed in support of Ex.A1 pronote by the plaintiff, passed the decree in his favour. Therefore the decree and judgment shall be treated as on merits rather un-contested *ex-parte* decree.

(a) Learned counsel fairly admitted that the appellant/defendant deposited 50% of decretal amount and proportionate costs as directed by this Court. However he filed another application to modify the said order and to restrain the plaintiff from withdrawing the deposited amount. Learned counsel would further submit that the defendant did not place any record in proof of his averment that due to ill-health he could not prosecute his case before the trial Court. Hence there are no merits in the appeal and the same may be dismissed.

8. The point for consideration is whether there are merits in the appeal to allow?

9. **POINT:** We gave our anxious consideration to the above arguments of either side. The impugned judgment shows that after filing his chief affidavit, the defendant did not turn up to the Court and thereby his chief affidavit was eschewed and his evidence was closed. It appears that he filed IA.No.535/2017 to record his evidence by appointing an advocate commissioner but the trial Court dismissed the said application and ultimately passed the decree basing on the evidence available on record. The appellant's submission is that due to serious ill-health he could not move out to adduce evidence and give instructions to his counsel and though he filed IA.No.535/2017 to appoint an advocate commissioner, the said petition was also dismissed.

10. The above facts are not disputed by the respondent/plaintiff. We are of the view that unless the defendant was prevented by some unavoidable circumstances such as ill-health, in normal course he would not desist from attending Court for cross-examination and for adducing further evidence. Unfortunately I.A.No.535/2017 filed by him to appoint an advocate commissioner for recording his evidence was also dismissed. Thus at the outset there was no evidence on his behalf to effectively establish his defence case. Thus considering the totality of facts and circumstances i.e., both parties are relatives and that the suit amount is a high amount and that the defendant's staunch case is that the suit pronote is a rank forgery and also that to establish this fact once he filed expert

petition, we are of the view that interest of justice requires that a fair opportunity should be given to the defendant for adducing his evidence. As rightly stated by him, the impugned decree and judgment are only *ex-parte* in nature since the evidence of defendant was not adduced in this case and he failed to attend the Court. In **Prakash Chander Manchanda** (supra 1) case cited by the defendant, the facts are more or less similar. In that case when the suit was coming for defence evidence before the Sub Judge 1st Class, Delhi, he did not appear and hence the matter was ultimately posted to 30.10.1985 and on that date also the plaintiff was present but the defendant was absent. The Court closed the defendant's evidence and posted the matter for arguments on 08.11.1985 and heard the arguments of plaintiff and basing on the plaintiff's evidence available on record, decreed the suit in favour of the plaintiff. Subsequently the defendant therein filed an application under order 9 Rule 13 to set aside the *ex-parte* decree. However the trial Court observing that it has disposed of the suit in accordance with Order 17 Rule 3 of CPC but not under Order 17 Rule 2 of CPC and therefore the application under Order 9 Rule 13 was not maintainable, dismissed the petition. The matter went up to the Supreme Court, wherein, considering the provisions of Order 17 Rule 2 and Rule 3, the Apex Court held thus:

> 6. xxx. It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2, Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fail to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has

> led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined upto that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the CPC. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the CPC there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30th October 1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that upto the date i.e. 30th October, 1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under Order 9.
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> 7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the Court when proceeded to dispose of the suit on merits had committed an error. Unfortunately even on the review application, the learned trial Court went on in the controversy about Order 17 Rules 2 and 3 which existed before the amendment and rejected the review application and on appeal, the High Court also unfortunately dismissed the appeal in limine by one word.(emphasis supplied)"

11. Thus the Apex Court held that since the defendant's evidence was not adduced, the decree passed was only an *ex-parte* decree. The above case squarely applies to the case on hand. So there is no demure that in the instant case also the decree and judgment are *ex-parte* though the trial Court rendered an elaborate judgment. In that view also we think an opportunity should be given to the defendant to contest the suit by setting aside the impugned judgment and decree. However, such an opportunity can be given to the petitioner only by imposing suitable terms. Admittedly, the petitioner has deposited 50% of the decretal amount and proportionate costs. Hence additional terms are required to be imposed to establish his *bonafides.*

12. Accordingly, this appeal is allowed and the judgment and decree in O.S No.182/2011 on the file of IV Additional District Judge, Tirupathi are set aside with a direction that both parties shall appear before the trial Court on 01.08.2022 and thereupon the trial Court shall fix the date for defendant's evidence and give him an opportunity to attend the Court for his cross-examination and for adducing further evidence including filing a fresh application for sending the suit pronote to a handwriting expert and trial Court shall complete the trial expeditiously and pronounce the judgment within three (3) months from the date of receipt of copy of this judgment. To avail this opportunity, the petitioner shall deposit 15% of the decretal amount in addition to 50% of which he already deposited, within three (3) weeks from the date of this judgment, failing which this appeal shall deemed to be dismissed. No costs.

As a sequel, interlocutory applications pending, if any, shall stand closed.

U.DURGA PRASAD RAO, J

TARLADA RAJASEKHAR RAO, J

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Dt:12.07.2022

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

AND

HON'BLE SRI JUSTICE TARLADA RAJASEKHAR RAO

A.S.No.783 of 2019

12th July, 2022

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