Kerala High Court
Gopinathan vs Viswanathan on 22 January, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

AS.No. 467 of 1995()

1. GOPINATHAN
... Petitioner

Vs

1. VISWANATHAN
... Respondent

For Petitioner :SRI.P.R.VENKITESH

For Respondent :SRI.N.P.SAMUEL

The Hon'ble MR. Justice P.N.RAVINDRAN

Dated :22/01/2009

O R D E R

P.N.Ravindran, J.

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A.S. No.467 of 1995

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Dated this the 22nd day of January, 2009.

JUDGMENT

The plaintiff in O.S.No.954 of 1990 on the file of the Court of the Subordinate Judge of Thrissur is the appellant in this appeal. The respondent is the sole defendant therein. The suit instituted by the appellant for realisation of the sum of Rs.34,050/- together with interest thereon and costs of the suit was dismissed by the trial court. Hence, this appeal.

2. The case set out by the plaintiff is that the defendant had requested him to advance a sum of Rs.25,000/- as loan and had assured him that he would repay the loan amount with 12% interest on demand, that he thereupon issued a cheque dated 18.12.1987 for Rs.25,000/- drawn in favour of the defendant on the Syndicate Bank, Thrissur branch, that the cheque was encashed by the defendant on 18.12.1987 itself, that in spite of repeated requests, the defendant did not repay the loan, that the

defendant had sent Ext.A1 letter dated 14.8.1990 stating that he would repay the amount without delay, that when the defendant did not repay the loan as promised in Ext.A1, he caused Ext.A2 lawyer notice dated 31.10.1990 to be issued and that though the defendant received the said notice, he did not send a reply or repay the loan.

3. The defendant entered appearance and resisted the suit. He denied the averment in the plaint that he had availed a loan of Rs.25,000/- from the plaintiff. He contended that the cheque referred to in the plaint was issued by the plaintiff towards repayment of money lent by him to the plaintiff on various occasions. He also denied having sent Ext.A1 letter agreeing to repay the loan availed by him from the plaintiff. He also contended that on receipt of Ext.A2 lawyer notice, he met the plaintiff in person, that the plaintiff thereupon stated that the notice was sent by mistake, that he would not proceed further in the matter and that believing the plaintiff, he did not send a reply to Ext.A2 notice.

4. In the trial court, the plaintiff examined himself as PW1 and a witness to the transaction as PW2. Exts.A1 to A3 were produced and marked on his side. The defendant examined himself as DW1 and produced Ext.B1, stated to be an account book maintained by him. The trial court on an analysis of the evidence oral and documentary available in the case held that the plaintiff has not proved that the cheque dated 18.12.1987 was issued by him to the defendant as loan, as contended by him in the plaint. The trial court also held that no reliance can be placed on the testimony tendered by PW2 for the reason that the presence of a witness at the time of the alleged lending is not referred to either in the plaint or in Ext.A2 notice. The court below held that Ext.A1 cannot be relied on in view of the vast difference in the signature purporting to be that of the defendant appearing therein and the admitted signature of the defendant in the written statement and in Ext.A3 postal acknowledgment card. The suit was accordingly dismissed.

5. Sri.T.R.Rajan, the learned counsel appearing for the appellant contended that as the defendant has not denied the issuance of the cheque and he has not proved that the cheque was issued in repayment of the loan availed by the plaintiff from him, the finding of the court below cannot be sustained. The learned counsel further contended that there is no dissimilarity between the signatures in Exts.A1 and A3 and that the inference drawn by the court below that Ext.A1 does not bear the signature of the defendant cannot be sustained. The learned counsel also contended that failure of the appellant to refer to the presence of PW2 at the time of the lending in Ext.A2 lawyer notice and in the plaint, is not of much importance in the facts and circumstances of the case. The learned counsel appearing for the appellant also submitted that the plaintiff may be given an opportunity to prove that the signature in Ext.A1 is similar to the signature of the defendant in Ext.A3 and in the written statement filed by him and that the suit may be remitted to the lower court for fresh disposal after affording the appellant an opportunity to get the signature in Ext.A1 examined by an expert. Per contra, Sri.N.P.Samuel the learned counsel appearing for the respondent contended that the plaintiff has not proved that the amount covered by the cheque was given as loan to the defendant, that there is a presumption that a cheque is always issued in repayment of a loan and that in the absence of any cogent evidence to prove the alleged lending, the finding of the court below cannot be upset. The learned counsel appearing for the respondent also referred to the vast difference in the admitted signatures of the defendant in Ext.A3 and in the written statement with

the disputed signature in Ext.A1 and contended that even without the assistance of an expert, it can be seen that the signatures in Exts.A1 and A3 are not similar. The learned counsel for the respondent also contended that apart from the testimony tendered by PW2 which was rightly rejected by the court below, the plaintiff has not adduced any evidence to show that he had lent and advanced the sum of Rs.25,000/- to the defendant as claimed by him, on 18.12.1987.

6. I have considered the submissions made at the Bar by the learned counsel appearing on either side. The short question that arises in this appeal is whether the appellant has proved that the amount covered by the cheque dated 18.12.1987 issued by him to the defendant was lent and advanced to him by the defendant as loan. The plaintiff relies on the testimony tendered by PW2 and the recitals in Ext.A1 letter alleged to have been sent by the defendant in support of his contention. A Division Bench of this Court has in Ramachandran v. Velayudhan

-1986 KLT 647, held as follows:

> "4. The burden of proving that the sum advanced to the 1st defendant was towards loan is on the plaintiff. Merely because 1st defendant admitted that he received the cheques it would not follow that he obtained a loan of the said amount. No legal presumption arises when a sum is admitted to have been received, that it was meant to be repaid because the same may have been paid for various reasons. It is for the plaintiff to substantiate his case that the amount covered by the cheques was really given to the 1st defendant as a loan.
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> 5. All payments by cheques are prima facie indicative of the fact that they are issued to extinguish an existing debt and not to create a new one. A cheque issued to a person by itself is not indicative of the fact that money was lent to him. On the other hand, it is prima facie evidence of the repayment of money owed by the drawer to the payee. Of course, it is always open to the plaintiff to establish that the payment of the amount by cheque was in fact a loan to the 1st defendant. In this context, it is apposite to refer to Sangappa Basappa Gogi v. Chidananda Baswantraya Aski (I.L.R. (1980) 2 Karnataka 1133) wherein it is held as follows:
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> "A cheque drawn, presented and paid is by itself no evidence of any money lent or advanced by the drawer to the payee. It may be a prima facie evidence to extinguish an existing debt, however, not to create a new one. However, it is open to the drawer to show by other evidence that the cheque was in fact loaned to the payee. A mere issue of a cheque in favour of the payee, by itself will not be evidence of a loan even if the cheque is encashed by the payee. That it was loaned to the payee must be proved by the drawer by other evidence. The burden is upon the person who sets up a case of loan based on the issuance of a cheque to establish by other evidence that it was a loan to the payee."
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> 6. The burden of proving that the sum paid as per the cheque was towards a loan is always on the plaintiff. In Bihari Lal v. Lala Chandu Lal (A.I.R. 1939 Lahore 386) it

has been held as follows:

> "When a sum is admitted to have been received, there is no legal presumption that it was meant to be repaid. The payment may have been made for various reasons and it is for the person who comes to Court and sues for recovery of the sum of money to prove that it was meant to be repaid."
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> Merely because 1st defendant admitted receipt of the cheques it would not follow that he received the amount as a loan. As the burden is always on the plaintiff in a suit where he claims amounts due to him from the defendant to substantiate his case, in the absence of evidence to prove the alleged loan given to the 1st defendant, mere issuance of cheques will not raise any presumption in his favour."

7. In the instant case, the plaintiff contends that as the defendant admits having received the cheque, a presumption would arise that the amount covered by the cheque was given as loan. As held by the Division Bench of this Court in Ramachandran v. Velayudhan (supra), the mere admission by the defendant that he had received the cheque would not lead to the conclusion that he had received the amount covered by the cheque as loan and that the burden is always on the plaintiff to substantiate that the amount covered by the cheque was given as loan. The Division Bench also held that in the absence of evidence to prove that the amount covered by the cheque was given as loan to the payee, the issuance of the cheque will not raise any presumption in favour of the plaintiff.

8. The plaintiff relies on Ext.A1 to substantiate his contention that the defendant has admitted receipt of the amount of Rs.25,000/- as loan and had also agreed to repay the same at the earliest. The defendant has even in the written statement denied having sent Ext.A1 letter. Apart from the fact that there is no specific reference in Ext.A1 letter to the sum of Rs.25,000/-, as noticed by the court below the signature purporting to be that of the defendant in Ext.A1 bears no resemblance or similarity with his admitted signature in the written statement and in Ext.A3 postal acknowledgment card. The address of the sender is also not given in Ext.A1. Ext.A1 shows that one Sri. Viswanathan had sent a letter to Sri. T.B.Gopi, M/s. Thalikulam Engravers, South Bazaar, Thrissur. The name of the plaintiff as shown in the plaint is Gopinathan and the address given in the plaint is different from the address shown in Ext.A1. Apart from the ipse dixit of the plaintiff examined as PW1 there is no evidence to show that Ext.A1 letter was sent by the defendant to the plaintiff. The defendant has denied having sent Ext.A1 letter even in the written statement filed by him. The plaintiff has not either in the plaint or when examined as PW1 stated that he is running a business under the name and style "Thalikulam Engravers, South Bazaar, Thrissur. PW1 has deposed that he is doing business in gold and is also a goldsmith. Further, the signature in Ext.A1 purporting to be that of the defendant bears no similarity or resemblance to his admitted signature in Ext.A3 postal acknowledgment card and in the written statement. I therefore agree with the court below that no reliance can be placed on Ext.A1.

9. Apart from Ext.A1, the plaintiff also relies on the testimony tendered by PW2 in support of his contention that he had lent and advanced the sum of Rs.25,000/- to the defendant on 18.12.1987. PW2 is a broker by profession. His version is that the defendant had informed him that he is on the

look out for a parcel of land, that for that purpose he went over to the shop of the plaintiff, that in his presence, the defendant asked the plaintiff for a loan of Rs.25,000/- and that as the plaintiff did not have cash with him, he issued the cheque. The court below held that his testimony cannot be relied on for the reason that neither in Ext.A2 nor in the plaint there is any reference to the presence of any person especially PW2 at the time of the alleged lending. The court below held that in these circumstances, it would not be safe to rely on the testimony tendered by PW2. His version is that about 6 years back when he went over to the plaintiff's shop, the defendant was present there, that the defendant asked for a loan of Rs.25,000/- and that as the plaintiff did not have cash with him, he issued the cheque. PW2 was examined on 16.2.1994. Going by the version of Ext.PW2, the alleged lending would be some time in February/March, 1988. Further, going by the version of PW2 he went over to the shop of the plaintiff because the defendant had asked him to find out a parcel of land for him to purchase. The statement of PW2 that he went over to the shop of the plaintiff in order to speak to the defendant about the land transaction and that when he went to the shop of the plaintiff for that purpose, he happened to witness the loan transaction does not inspire confidence. Apart from Ext.A1 which cannot be relied on, the plaintiff has not adduced any evidence to show that the amount covered by the cheque dated 18.12.1987 was given to the defendant as loan. As held by the Division Bench of this Court in Ramachandran v. Velayudhan (supra) in the absence of any evidence to hold that the amount covered by the cheque was given by the plaintiff to the defendant as loan, merely because the defendant has admitted having received the cheque, it cannot be held that amount covered by the cheque was given as loan by the plaintiff to the defendant. As the plaintiff has not adduced any cogent evidence to prove the alleged lending, the court below was right in dismissing the suit.

For the reasons stated above, I hold that there is no merit in this appeal. The appeal fails and is accordingly dismissed. No costs.

P.N.Ravindran, Judge.

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