

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 31ST DAY OF MAY 2017/10TH JYAISHTA, 1939

RSA.No. 518 of 2006 (C)

AGAINST THE JUDGMENT & DECREE DATED 31.10.2005 IN AS 194/2003 of III
ADDL.SUB COURT, KOZHIKODE

AGAINST THE JUDGMENT & DECREE DATED 27.11.2002 IN OS 436/2001 of
ADDITIONAL MUNSIFF COURT-I, KOZHIKODE

APPELLANT/APPELLANT/DEFENDANT.:

M.AHAMMEDKUTTY, S/O.ABDURAHIMAN,
MUPPATTA HOUSE, PALATH AMSOM,
IRUVALLUR DESOM OF KOZHIKODE TALUK.

BY ADVS. SRI.T.SETHUMADHAVAN
SRI.KODOTH PUSHPARAJAN
SRI.K.JAYESH MOHAN KUMAR

RESPONDENT/RESPONDENT/PLAINTIFF.:

K.P.GOVINDANKUTTY NAIR,
S/O.CHERIYOMANA NAIR, PUTHALATH HOUSE,
PALATH AMSOM, Iruvallur Desom, Iruvallur PO,
Kozhikode Taluk.

BY ADV. SRI.JACOB ABRAHAM

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
31-05-2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A. HARIPRASAD, J.

R.S.A.No.518 of 2006

Dated this the 31st day of May, 2017

JUDGMENT

Defendant in a suit for recovery of money, dissatisfied with the lower appellate court's judgment and decree, has come up in the second appeal.

2. Heard the learned counsel appearing for the appellant.

3. Relevant pleadings in the case are as follows:

It is the case of the respondent/plaintiff that on 27.11.2000, the appellant/defendant borrowed a sum of Rs.50,000/- and executed Ext.A1, agreeing to repay the amount within a period of six months. Since the appellant failed to repay the amount in the stipulated time, a lawyer notice was issued by the respondent for which no reply was sent. Hence, the suit for recovery of money was filed.

4. The appellant/defendant filed a written statement contending that he has not borrowed any amount on 27.11.2000 as claimed in the plaint and has not executed Ext.A1 document

agreeing to repay the said amount. According to him, in 1998, he had borrowed Rs.30,000/- from the respondent and the amount was returned with interest during 2000. The respondent was not satisfied with the quantum of interest and he obtained signature on a stamp paper and a blank paper from the appellant, which has been misused to create Ext.A1. The appellant is not liable to pay any amount to the respondent.

5. The trial court examined one witness on the plaintiff's side and two witnesses on the defendant's side. After considering the evidence, the court below decreed the suit as prayed for.

6. The appellant went in appeal before the Court of Subordinate Judge, Kozhikode with A.S.No.194 of 2003. Learned Subordinate Judge, after re-appreciating the evidence, found that Ext.A1 was not proved. However, the lower appellate court decreed the suit finding that the appellant himself has admitted that in 1998, he had borrowed Rs.30,000/- from the respondent and there was no evidence to show that the amount borrowed by the appellant was repaid. With this reasoning the lower appellate court modified the decree passed by the trial court and partly decreed the suit.

7. Learned counsel for the appellant submitted that the lower appellate court developed a case which is not borne out from the pleadings. In other words, nobody has a case that the amount outstanding to the respondent was Rs.30,000/-. The respondent's case is that the appellant borrowed Rs.50,000/- whereas the case put forward by the appellant is that he had borrowed Rs.30,000/- in 1998 from the respondent and it was repaid. It is therefore contended that the decision taken by the lower appellate court reflects nobody's case. It is pertinent to note that the plaintiff/respondent has not chosen to file any appeal or cross objection against the judgment and decree passed by the lower appellate court. Insofar as the respondent is concerned, the decree has become final.

8. It is true that the lower appellate court deviated from the pleadings and evidence of the parties. In fact in the absence of any valid challenge against Ext.A1 the course open to the lower appellate court was to accept it. Learned counsel for the appellant contended that the court below omitted to take note of one fact that Ext.A1 was not enforceable. Even though it is admitted in evidence as an agreement, going by the pleadings in

the plaint, it can only be considered as a bond as defined in Section 2(a) of the Kerala Stamp Act. It is her further contention that the document should not have been admitted in evidence and should have been impounded. It is therefore contended on behalf of the appellant that the entire suit should have failed.

I am afraid, I cannot accept that contention though it is attractive. Nowhere in the pleadings of the appellant such a contention has been taken. Not only that, the question of admissibility cannot be raked up for the first time in a second appeal. True, this could have been a sustainable contention had it been pleaded and taken up at the time of trial. In the absence of any such an attempt by the appellant, it cannot be done in this second appeal.

Having regard to the facts and circumstances of the case, I find no substantial question of law arising in this appeal. Hence, the appeal is dismissed.

SD/-
A. HARIPRASAD
JUDGE