HC-KAR

NC: 2026:KHC:14616-DB
RFA No. 1728 of 2016

R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF MARCH, 2026

PRESENT

THE HON'BLE MR. JUSTICE D K SINGH

AND

THE HON'BLE MR. JUSTICE T.M.NADAF

REGULAR FIRST APPEAL NO. 1728 OF 2016 (MON)

BETWEEN:

K.F.NOOR BASHA,
S/O K.FARID SAHEB,
AGED MAJOR,
R/AT NO.64, LALBHADUR NAGAR,
5TH MAIN, OMBR LAYOUT,
BANASWADI,
BANGALORE - 560 043

...APPELLANT

(BY SRI. SRINIVAS V., ADVOCATE)

AND:

1. MR.S.MOINUDEEN,
S/O ABDUL SUBHAN,
AGED ABOUT 51 YEARS,
R/AT NO.254, 10TH MAIN,
12TH CROSS, WILSON GARDEN,
BANGALORE - 560 027.

2. JUNEED PASHA KHADER
AGED MAJOR,
R/AT NO.966, 3RD "A" CROSS,
8TH MAIN, OPP PART KALYANAGAR,
HRBR LAYOUT,
BANGALORE - 560 043

...RESPONDENTS

(BY SRI. NAVEEN KUMAR.L, ADVOCATE FOR R1
SRI.M.S.CHANDRASHEKAR, ADVOCATE FOR R2)

THIS RFA IS FILED UNDER SEC.96 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED 26.09.2016 PASSED IN OS.NO. 734/2013 ON THE FILE OF XLI ADDL. CITY CIVIL JUDGE, BENGALURU, DECREEING THE SUIT FOR RECOVERY OF MONEY.

THIS APPEAL, COMING ON FOR ADMISSION, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR. JUSTICE D K SINGH
and
HON'BLE MR. JUSTICE T.M.NADAF

ORAL JUDGMENT

(PER: HON'BLE MR. JUSTICE T.M.NADAF)

Defendant No.2 is in this appeal before us under Section 96 of Code of Civil Procedure, calling in question the Judgment and Decree dated 26.09.2016 passed in O.S.No.734/2013 by XLI Additional City Civil Judge, at Bengaluru (CCH.No.42) ('trial Court' for short) only to the extent of making defendant No.2 jointly and severally liable to pay amount of Rs.25,00,000/- to the plaintiff along with 18% interest from the date of suit till realisation.

2. The parties are referred to as per their rankings before the trial Court.

3. The brief factual matrix leading to filing of the present appeal are as under:

4. The plaintiff/respondent No.1 herein filed a suit for the following reliefs:

> *"a) Pay a sum of Rs.25,00,000 (Rupees Twenty Five Lakhs only) along with interest at the rate of 24% per month from the date of suit until realization of the amount along with the suit with court costs.*
>
> *b) Pass such other orders or reliefs as this Hon'ble Court deems fit in the facts and circumstances of the suit, in the interest of justice."*

<u>AS PER THE PLAINTIFF:</u>

5. The plaintiff is a well established Timber Merchant and the defendants are his close friends maintaining good relationship and having cordial acquaintance. In the first week of May and June, 2009, the defendants approached the plaintiff for monetary help of Rs.25,00,000/- for domestic and personal legal

necessities. The plaintiff agreed to pay the amount and accordingly he has arranged the amount and called the defendants to his residence. He paid a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) on 25.05.2009 by way of Cheque bearing No.187288 drawn on ING Vysya Bank Limited, Bangalore Stock Exchange Branch in favour of defendant No.1. Again he paid a sum of Rs.5,00,000/- (Rupees Five Lakhs only) by cash. On 29.06.2009, he paid another sum of Rs.10,00,000/- (Rupees Ten Lakhs only) by way of cheque bearing No.187289 drawn on ING Vysya Bank Limited, Bangalore Stock Exchange Branch in favour of defendant No.1. Totally a sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) was paid to defendant No.1. The defendants acknowledged the receipt and defendant No.2 stood as guarantor to the hand loan paid to the defendant No.1.

6. The plaintiff after lapse of timeline fixed, that is, 25 months, in June 2011, made several requests and demands to the defendants to repay his amount. However,

the defendants on one or the other ground dragged the matter and were postponing the payment. Thereafter, in August 2011, on persistent demand by the plaintiff, defendant No.1 issued 3 cheques on the account standing in his name for Rs.5,00,000/-, Rs.10,00,000/- and Rs.10,00,000/- in cheque bearing Nos.821997, 647465 and 649285, respectively.

7. As per the instructions of defendant, the plaintiff presented the cheque through his banker. However, to his dismay, he received intimation on 23.08.2011 with the shara "Funds insufficient". The defendants neither paid the amount nor made arrangements for payment of cheque amount by maintaining sufficient fund in the account. However, the defendants started threatening the plaintiff of dire consequences if he comes near their residence seeking repayment of money. Defendant No.2 who stood as a guarantor, also failed to keep up his promise, deceived the plaintiff, and not responded to the plaintiff, the plaintiff

has suffered huge loss due to the act of the defendants. The defendants have gone to the extent of assaulting him and threatened to kill him on 15.10.2011. In that regard, a crime came to be registered with the jurisdictional Police for the offences punishable under Sections 323, 314, 505(B) and 420 r/w Section 34 of IPC.

8. The plaintiff thereafter issued a legal notice through his counsel, which is served on defendant No.2. The defendant No.2 submitted an untenable reply. As there was no repayment of the amount, the plaintiff filed the present suit for the reliefs stated supra.

9. In response to the notice issued, defendant No.1, though served remained absent and unrepresented. Accordingly, he was placed *ex-parte*.

10. Defendant No.2 appeared before the trial Court and filed his written statement. Defendant No.2 denied the entire plaint averments. He has contented that he was made as a scapegoat with respect to the unsuccessful

marital life between sister of plaintiff Rukia Begum and brother-in-law Madarsab. Plaintiff's elder sister's daughter by name Noor Kuteja was married with defendant No.1, wherein defendant No.2 had participated as an elder person for negotiation of marriage talks with defendant No.1. Except for this, he has no other connection with the transaction. He never stood as a guarantor as contended by the plaintiff to the alleged transaction between plaintiff and defendant No.1 and he has no personal knowledge or privity of contract with the plaintiff and the defendant No.1, and accordingly sought to dismiss the suit against him, as he is having no connection with the alleged transaction.

11. The trial Court upon completion of pleadings framed the following issues.

> *"1. Whether the plaintiff proves that defendant No.1 on furnishing defendant No.2 as the guarantor has taken the loan of Rs.25,00,000/- from him agreeing to repay the said amount within a short date and out*

of the said amount the plaintiff has paid two cheques for Rs.10,00,000/- each dated 25.5.2009 and 29.6.2009 bearing No.187288 and 187289 drawn on ING Vysya Bank Ltd., and paid Rs.5,00,000/- in cash?

2. *Whether the defendant No.2 proves that the documents produced by the plaintiff are all forged and created documents?*
3. *Whether the defendant No.2 proves that he has never stood as guarantor to any loan and as such the suit filed against him is not maintainable?*
4. *Whether the defendant No.2 is entitled to compensation of Rs.50,000/- as contended in the written statement without paying any court fee?*
5. *Whether the plaintiff is entitled to recover an amount of Rs.25,00,000/- with interest at 24% p.a. from the date of the suit till realization?*
6. *What Decree or Order?*

12. The plaintiff in order to prove his case, examined himself as PW.1 and marked 29 documents as Exs.P1 to P29. Defendant No.2 examined himself as DW.1, however no documents have been produced on his behalf.

13. The trial Court upon consideration of the materials placed on record before it, answered Issue Nos.1 and 5 in the affirmative and other issues, that is, Issue Nos.2 to 4 in the negative and decreed the suit stating that the defendants are jointly and severally liable to pay the amount of Rs.25,00,000/- with interest of the rate of 18% per annum from the date of suit till the date of realization.

14. The trial Court while answering Issue Nos.1 to 4 given much importance on the examination in chief of PW.1 and the denial in the cross-examination by DW.1 and concluded that the plaintiff has proved his case that he has advanced a sum of Rs.25,00,000/- to defendant No.1, to which defendant No.2 stood as a guarantor and that the defendant No.1 received cash of Rs.5,00,000/- and two cheques of Rs.10,00,000/- each bearing No.187288 and 187289 drawn on ING Vysya Bank in favour of defendant No.1, and held that, whereas defendant No.2 failed to prove that the documents produced by plaintiff are forged

and created documents and he never stood as a guarantor to the transaction between plaintiff and defendant No.1 and the suit is not maintainable against him.

15. In view of answering issue Nos.1 to 4, the trial Court answered issue No.5 in favour of plaintiff, directing both the defendants to pay a sum of Rs.25,00,000/- with interest at the rate of 18% per annum jointly and severally and decreed the suit as sought for. It is this judgment and decree passed by the trial Court is called in question in the present appeal.

16. Heard Sri.Srinivas.V, learned counsel appearing for appellant, Sri Naveen Kumar.L, learned counsel for respondent No.1 and Sri.M.S.Chandrashekar, learned counsel appearing for respondent No.2/defendant No.1.

17. Sri.Srinivas, on a very short point submitted before us that in the cross-examination of PW-1, there is a categorical admission by the plaintiff recorded on 16.02.2015 that he has no document to show that

defendant No.2 stood as a guarantor for the amount taken by defendant No.1 and there is no document available to show that he has paid the amount to defendant No.1 in the presence of defendant No.2 and he has also admitted that there are no documents to show that there was a transaction between plaintiff and defendant No.2. The admissions given by the plaintiff in his cross-examination are extracted as under:

> *"xxx*
> *There is no document to show that defendant No.2 is guarantor for the amount taken by defendant No.1. There is no document to show that I have paid the amount to defendant No.1 in the presence of defendant No.2, it is true that there are no documents to show that there was a transaction between me and defendant No.2.*
> *xxx"*
>
> *(emphasis supplied)*

18. Further he has submitted that, the trial Court has framed two negative issues against defendant No.2. Though the burden is on the plaintiff to prove, but the same was shouldered on the defendant. He further

submits that as per the provisions of Indian Evidence Act, the person who approaches the Court has to prove and discharge his initial burden, it is only thereafter, such burden would shift on the other party to disprove the same. In the absence of this specific aspect of the matter, only on the basis of certain denial, the trial Court has formed an opinion that defendant No.2 has failed to prove the issue casted upon him. A perusal of issue Nos.2 and 3 clearly shows that these are the negative issues framed against the defendant No.2.

19. A reading of the issues clearly shows that it is for the plaintiff to prove them in terms of his pleadings in the plaint. No such effort has been made by the plaintiff to discharge the initial burden casted upon him in terms of provisions of the Indian Evidence Act. Though at paragraph No.16, the trial Court has stated that the police ought not to have taken the signature of the witness on the statement recorded under Section 161 of Cr.P.C, in that circumstance, the statement recorded by the Police

produced at Ex.P1, in view of denial of signature by the defendant No.2 on the said statement, the Investigation Officer ought to have been examined, however, the trial Court in the absence of any evidence, morefully substantive evidence by the plaintiff, proceeded to hold that the plaintiff has proved his case that he has paid hand loan of Rs.25,00,000/- by way of two cheques for Rs.10,00,000/- each and by cash of Rs.5,00,000/-, to which defendant No.2 stood as a guarantor and the defendant No.2 has failed to prove that he never stood as a guarantor and the documents produced by the plaintiff are false documents and answered Issue Nos.1 to 4 in favour of the plaintiff and against the defendant No.2. As such, the entire judgment suffers from serious errors and perversity and sought to allow the appeal and dismiss the suit against the defendant No.2.

20. Respondent No.2/defendant No.1 was placed *ex-parte* before the trial Court. However, he has appeared in this appeal and submits that he has filed a

Miscellaneous Petition seeking for recalling of the *ex-parte* decree passed against him. However, he is not in appeal before us.

21. Be that as it may, he could choose his remedy as provided under law, which he has already chosen by filing a Miscellaneous Petition for recalling the order passed *ex-parte*.

22. Sri.Naveen Kumar., appearing for plaintiff/ respondent No.1 with all vehemence submits that there is statement recorded by the Police, wherein the defendant No.2 has admitted that he stood as a guarantor and he is the person who has taken the cheque issued by the plaintiff and handed it over to defendant No.1 and stated that he would settle the matter. This clearly shows that defendant No.2 stood as a guarantor. He further invited our attention to Ex.P16 - the reply notice issued by defendant No.2 to the notice issued by plaintiff, especially at paragraph No.4 and submits that the defendant No.2

had knowledge regarding passing of the amount in the account of defendant No.1 and as such he shall be deemed to be a guarantor.

23. We failed to understand that even if it is taken as it is, mere knowledge regarding the transaction a person become a deemed guarantor to the loan transaction in the absence of any document to that effect. Neither there is any such document produced, nor there is any oral evidence led independently supporting oral evidence led by the plaintiff to show that the defendant No.2 in fact stood as a guarantor.

24. Our view is supported on the Rule - '*Ei incumbit probatio qui dicit, non qui negat*' - the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; as negative is usually incapable of proof. This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the

greater practical difficulty which is involved in proving a negative than is proving an affirmative. "It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons". (Per Lord Maugham in ***CONSTANTINE LINE LTD., Vs. I S CORPN***. - **(1942) AC 154 : (1941) 2 ALL ER 165** [taken from SARKAR on Law of Evidence, 16th Edition. Volume 2 at page 1584].

(emphasis supplied)

25. As per Section 101 and 102 of the Indian Evidence Act, 1872, the initial burden is always on the person who approaches the Court and fails if no evidence at all was given on either side plaintiff and if he discharges that onus and makes out a line for the relief sought in the case, then the onus/ burden shifts on the defendant to prove those circumstances, if any to prove that the plaintiff is not entitled to the relief sought in the suit. In the case on hand, a bare perusal of Issues especially 2 to 4 pellucidly clear that they have casted reversal burden on

the defendant and they are not sustainable in law. The Trial Court failed to consider this aspect of the matter.

26. Our view is also supported with the law laid down by the Hon'ble Apex Court in the case of ***ANIL RISHI VS. GURBAKSH SINGH*** reported in ***(2006) 5 SCC 558,*** wherein the Hon'ble Apex Court at Paragraphs No.8, 9 and 19 held as under:

> "8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:
>
> "101. Burden of proof. ┬ Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."
>
> 9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.
>
> xxx
>
> xxx
>
> 19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the

> early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

27. In view of the categorical admission by the plaintiff in his cross-examination, which we have already extracted supra, nothing more is required to hold that no case is made out against the defendant No.2 and he is misconceivedly made as a party litigant to the suit. The trial Court has failed to consider this aspect of the matter which has resulted in an erroneous finding. The issues framed on the face of them have casted a reversal burden to prove them by defendant No.2, whereas the same are required to be proved by the plaintiff. It is trite that reversal burden cannot be on the defendant to prove the issues, which are required in law to be proved by the

plaintiff, as such the defendant is not obliged in law to prove the said issues.

28. In these circumstances, we are of the opinion in view of categorical admission by the plaintiff we have already extracted above, the Judgment and Decree passed by the trial Court against defendant No.2, making him jointly and severally liable to pay the amount in respect of alleged transaction, is erroneous and unsustainable in law. Accordingly, we set aside the judgment and decree so far as defendant No.2 is concerned.

29. Since Miscellaneous Petition is pending before the trial Court for recalling the order passed *ex-parte* against the defendant No.1, this judgment shall not be considered as a judgment rendered on the merits of the case of the defendant No.1 to hold that the judgment is not amenable for applying the 'Doctrine of Merger', since we have not expressed anything on the merits of the judgment nor uphold the same as against defendant No.1,

in view of the absence of evidence, either oral or documentary against the defendant No.2, we hold that the judgment so far as defendant No.2 is concerned is unsustainable and this cannot be construed as confirming the trial Court judgment since the Miscellaneous Petition is pending before the trial Court.

30. With these observations, the appeal is ***allowed*** with costs.

Sd/-
(D K SINGH)
JUDGE

Sd/-
(T.M.NADAF)
JUDGE

RR
List No.: 1 Sl No.: 33