

**(2009) 05 KL CK 0109****High Court Of Kerala****Case No:** AS. No. 595 of 1999 (A)

Kajiramkulam Prasanna Chitty

APPELLANT

Vs

Krishna Nadar

RESPONDENT

**Date of Decision:** May 23, 2009**Hon'ble Judges:** P.S. Gopinathan, J; A.K. Basheer, J**Bench:** Division Bench**Advocate:** R.T. Pradeep, for the Appellant; G.S. Reghunath, for the Respondent**Final Decision:** Dismissed

### **Judgement**

A.K. Basheer, J.

Appellant is the defendant in a suit for recovery of money. The trial court, after considering the oral and documentary evidence, dismissed the suit holding that the appellant/plaintiff had not succeeded in establishing her case.

2. The plaintiff claimed that she had been conducting chitty business in the name and style of "Prasanna Chit Fund" for the last several years. The defendant, a close relative of the plaintiff, had been working in the establishment as a clerk. But he was put in charge of the entire business. The plaintiff alleged that the defendant had fabricated several chitty bonds in the name of subscribers and misappropriated huge sums of money shown in the bonds. The subscribers were not paid amounts shown in those bonds. When the plaintiff got the accounts of the business audited, the above defalcation came to light. According to the plaintiff, a total sum of Rs. 1,50,500/- covered under Ext.A3 series of chitty bonds, totalling to 24 in number, was misappropriated by the defendant. The said amount was sought to be recovered from him in the suit.

3. The suit was resisted by the defendant contenting inter alia that he was not in charge of the business in the firm as alleged by the plaintiff. He had been discharging the duties of clerk as per instructions of the plaintiff who had been in overall control and charge of the chitty business. He further denied the allegation

that he had anything to do with Ext.A3 series of bonds. All transactions in the firm were being under direct supervision of the plaintiff herself and all accounts were being maintained by her. In short, the defendant contended that all the allegations made against him in the plaint were totally baseless and incorrect and he had not misappropriated any money as alleged. He, therefore, prayed for dismissal of the suit.

4. Appropriate issues were framed by the court below on the basis of the pleadings of the parties. Plaintiff got herself examined as PW1. Her witnesses were examined as PWs 2 to 17 and Exts.A1 to A7 were also marked on her side. The defendant got himself examined as DW1. Exts.B1 to B8 were marked on his side. Exts.X1 and X2 were also marked in the case.

5. The court below found that the plaintiff had totally failed to establish her case. It was noticed by the learned Judge that some of the witnesses examined on the side of the plaintiff had stated that the plaintiff herself had been conducting the chitty business and the defendant was only an employee under her.

6. Learned Counsel for the appellant has taken us through the evidence available on record. It is pertinent to note that the specific case of the appellant/plaintiff was that the defendant had fabricated or created Ext.A3 series chitty bonds (24 in number) in the name of various subscribers. Though it was mentioned in the bonds that the executants (subscribers) had received the sums shown in them, according to the plaintiff, none of the subscribers shown had been paid any money. However, the amounts shown in those bonds were misappropriated by the defendant.

7. It is significant to note that the plaintiff had not produced her books of accounts to show that the defendant had defalcated the funds of the firm. In other words, there was no corresponding evidence with reference to the bonds in question (A3 series) to show that the amounts indicated therein were debited in the accounts of the firm.

8. The plaintiff wanted the court to assume that Ext.A3 (series) bonds were created or fabricated by the defendant in the names of various subscribers. Curiously, many of the executants of the bonds, who were examined as PWs2 to 16, stated before the court that it was the plaintiff who had been conducting the chitty business and that the defendant was only an employee in that establishment. None of them did have a case that the defendant had fabricated these documents. Some of the witnesses pretended total ignorance about these documents. It is true that some of the witnesses denied their signature in the bonds. But that did not mean that it was the defendant who had created these bonds or that he had misappropriated the amounts shown in them. Unless and until cogent evidence was adduced by the plaintiff to show that funds of the firm had been misappropriated by the defendant, the plaintiff could not have succeeded in the suit.

9. The court below had adverted to all the materials available on record. We have carefully perused the oral and documentary evidence adduced by the parties. In our view, the court below was justified in repelling the contention raised by the appellant/plaintiff. In this context, we may also notice that the plaintiff had not produced the audited statement of accounts though it was alleged that a Chartered Accountant had conducted audit. According to the plaintiff, defalcation had come to light when the Chartered Accountant had conducted audit. But the audited statement of accounts had never seen the light of the day. It was one of the various reasons which persuaded the court below to dismiss the suit. In short, no evidence was adduced by the plaintiff to show that the defendant had, on the strength of anyone of the bonds, misappropriated the funds of the firm. The plaintiff ought to have established this with the aid of her books of accounts.

10. Having considered the entire materials available on record, we do not find any reason to interfere with the decree and judgment passed by the court below. The appeal fails and it is accordingly dismissed.

In the peculiar facts and circumstances of the case, we are satisfied that the cost imposed by the court below on the appellant will meet the ends of justice. Therefore, no further orders as to cost in this appeal.