

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

**AS(MD).No.202 of 2022 and
CMP(MD).No.8993 of 2022**

S.Sengamalam

... Appellant/ defendant

Vs.

G. Krishnan

.. Respondent / plaintiff

PRAYER: This Appeal Suit filed under Order 41 Rule 10 CPC against the Judgment and Decree passed in O.S.No.9 of 2018 on the file of the District Judge, Karur District, dated 17.11.2021.

For Appellant : Mr. C.M. Arumugam

For Respondent : Mr.K. Devaraj

JUDGMENT

Aggrieved over the decree and Judgment of the trial Court decreeing the suit for a sum of Rs.8,50,000/-, the present appeal came to

be filed.

2. For the sake of convenience, the parties are referred herein as per their ranking before the trial Court.

3. The brief facts of the case of the plaintiff is as follows:

The defendant borrowed a sum of Rs.8,50,000/- on 06.10.2016 for urgent family expenses from the plaintiff and executed a pronote on the same day agreeing to pay interest at the rate of 0.05 paise per hundred rupee per day. Despite repeated demands and requests made by the plaintiff, the defendant failed to repay the amount and hence, he sent a legal notice, dated 25.01.2018. However, the defendant sent a reply with false allegations. Hence the suit.

4. It is the contention of the defendant that he neither executed a pronote nor received any consideration on 06.10.2016. The plaintiff is not the man of means to advance such huge amount. He is a benami and agent of one Muthumanickam. The said Muthumanickam is a financier. The plaintiff was working under him as a collection agent.

Besides, he is also having the power of attorney of said Muthumanickam. Now, under the instigation of said Muthumanickam, in order to enrich by illegal gains, in collusion with one Selvaraj, the present suit has been filed. It is the further case of the defendant that there is a dispute between Muthumanickam and the defendant in respect of ancestral properties. In respect of which, suits in O.S.No.75 of 2017 and O.S.No.183 of 2016 are pending before the District Munsif Court, Kulthalai and Sub Court, Kulithalai respectively.

5. The plaintiff as a power of attorney of one Selvaraj, has filed a suit in O.S.No.75 of 2017 against the defendant and others. The brother of the defendant filed a suit in O.S.No.183 of 2016 before the Sub-Court, Kulithalai, for partition. The further case of the defendant is that in the year 2016, the defendant was in need of money, therefore, he approached the plaintiff, who is known to the defendant, who arrange for finance. The plaintiff has introduced the said Muthumanickam and accordingly, a sum of Rs.2,00,000/- was borrowed by the defendant. For the said loan amount, the said Muthumanicakm obtained signature in blank papers and in promissory note. Besides, he has also obtained a sale deed as a security for the said loan amount in respect of the land in

S.F.No.501/2 measuring an extent of 2.47 Acres. The said Muthumanickam obtained the sale deed as a security and hence, there is no necessity to borrow a sum of Rs.8,50,000/- when he sold the property on 26.09.2016 for a sum of Rs.4,07,000/- within 10 days from 06.10.2016. Hence, disputed the suit claim.

6. On the basis of the above pleadings, the trial Court has framed the following issues:

1. Whether the suit promissory note is true and valid?
2. Whether the plaintiff is entitled for the suit claim?
3. To what other relief?

7. On the side of the plaintiff, he himself examined as PW.1 and PW.2 attesting witness to the promissory note was also examined, besides, the Bank Manager was examined as PW.3 and Exs.A1 to A4 were marked. On the side of the defendant, the defendant examined himself as DW.1 and marked 7 documents as Exs. D1 to D7.

8. The trial Court, after considering the entire evidence

disbelieving the case of the defendant, decreed the suit. Challenging the same, the present appeal came to be filed.

9. The main contention of the learned counsel appearing for the appellant / defendant before this Court is that the suit pronote has not been proved in the manner known to law. The execution of the pronote has not been established. Besides passing of consideration has also not been established. The evidence of PW.2 – attesting witness itself clearly shows that the execution of the pronote is improper. Therefore, the contention of the defendant that the amount has been advanced at the higher rate of interest 0.05 paise per Rs.100/- is improper. The documents filed on the side of the defendant clearly show that at the relevant point of time, sale deed was executed in favour of one Muthumanickam and this fact clearly establishes that there was no privity of the contract between the plaintiff and the defendant. He further submits that though the plaintiff was examined, PW.3 evidence clearly shows that he has not withdrawn any amount from the Bank in order to pay the amount to the defendant. This evidence runs contrary to the pleadings and evidence of PW.1. Hence, his contention that when the plaintiff has not discharged the initial burden of proving the execution of the pronote, the Trial Court ought not to have

decreed the suit on the basis of the document. He further submits that the evidence of PW.2 - attesting witness shows that the defendant has not signed the entire document after reading out and understanding the contents. Hence, the execution itself is not established. Therefore, prays for allowing the appeal.

10. The learned counsel appearing for the respondent / plaintiff submits that the execution of pronote has not been denied. The only contention of the defendant is that he has borrowed the amount from Muthumanickam. However, the said Muthumanickam has not been examined. Besides other contention of the plaintiff is that the defendant is not in need of funds will also not hold any water. The evidence of PW.2 clearly show that the plaintiff had sufficient means to pay the amount and has withdrawn the amount from the bank and paid amount. Besides DW.1 in his evidence has also admitted that at the relevant period, he was in dire need of fund and also requested the plaintiff for loan. Hence, his contention is that not only the execution of pronote, but also passing of consideration also established on the side of the plaintiff. Therefore, the legal presumption attracted to suit pronote, the same has not been rebutted by way of any probabilities. Hence, prayed for dismissal of the appeal.

11. In the light of the above submissions now, the points that arose for consideration in this appeal are as follows:

- 1) Whether the plaintiff has discharged the initial onus proving the execution of pronote?*
- 2) Whether the defendant has rebutted the legal presumption attached to the suit pronote?*
- 3) If so, whether the plaintiff has discharged the burden of proving, passing of consideration?*

12. The specific case of the plaintiff that the defendant has borrowed a sum of Rs.8,50,000/- and executed a suit pronote Ex.A1, dated 06.10.2016. It is well settled that initial burden is always on the plaintiff to prove the execution of the document by the defendant. Once the plaintiff has discharged his burden proving the execution, then statutory presumption available to the Negotiable Instrument get attracted as per Section 118 Negotiable Instruments Act. Now, the question is whether the plaintiff has proved the execution of pronote. The plaintiff himself examined as PW.1 and in his Chief Examination he stated that he has advanced a sum of Rs.8,50,000/- on pronote on 06.10.2016 and that the

defendant has executed a pronote after a receipt of consideration of Rs.8,50,000/-. PW.2 one of the attesting witness in the pronote was examined to prove the execution. In his evidence, he has stated that the defendant had received the consideration in the presence of one Ilavarasan, who has written the pronote. After receiving the consideration, the defendant put the signature on the pronote and the same has been done in the presence of PW.2. The evidence of PW.2 show the factum of signing the document by the defendant, not even a suggestion put to the effect that the document was never signed in the presence of PW.2. If the evidence tendered in chief examination, at execution and signing of the document are not denied in the cross examination same is deemed admission on the part of the defendant. Be that as it may, signature in the pronote has not been disputed by the defendant. His only contention is that the pronote has been executed in favour of one Muthumanickam only in the year 2016 at the time of borrowal of Rs.2,00,000/-. It is relevant to note that in the written statement the defendant had admitted that he was in dire need of funds, had approached the plaintiff in the year 2016 and plaintiff only introduced the said Muthumanickam and he borrowed a sum of Rs.4,00,000/- and executed the pronote. The said execution of document and the signature is not disputed by defendant. Be that as it may plaintiff

has proved the execution not only by his evidence but also through the evidence of PW.2. In the absence of any contrary evidence to disprove the fact the Court has to necessary hold that suit pronote is properly proved in the manner known to law. The word execution implies reading out, understanding the contents and signing the documents. The evidence of PW.2 and the chief examination of PW.1 clearly proved all the three aspects, which has not even disputed. Except cross examining PW.2 to the effect that there was no summons issued to him and he has signed in the document written by one Ilavarasan and except that evidence in chief examination is not denied seriously. Be that as it may, much emphasis has been made on the evidence of PW.2 that defendant's husband name is mentioned in the affidavit. It is to be noted that the defendant is male, in the chief examination in one line it is referred as if he enquired about the husband name of the defendant. Merely such mistake crept in while typing the evidence that cannot be ground to disbelieve the entire evidence of PW.2. Particularly, there was no circumstances brought in the cross examination to disbelieve him.

13. The further contention of the defendant in the written statement that in the year 2016 he approached the plaintiff for the loan.

He has borrowed a sum of Rs.2,00,000/- from the said Muthumanickam and a pronote and a blank pronote was given. Besides sale deed has also executed in favour of Muthumanickam. It is to be noted that to prove the particular factum, no attempts whatever has been made by the defendant either to summon the said Muthumanicakm to substantiate his stand.

14. The specific case of the defendant that while borrowing a sum of Rs.2,00,000/- from Muthumanickam his signature was obtained in blank pronote. On a perusal of Ex.A1 his contention that he only put the signature in the blank paper is rather contrary to Ex.A1. On perusal of Ex.A1, apart from signature, thump impression has also affixed by the defendant. Therefore, once the execution has been proved statutory presumption is available under Section 118 of the Negotiable Instruments Act and will get attracted automatically as to the time of execution besides consideration etc., Though such legal presumption is also rebuttable, it is for the defendant to bring the probabilities, either by direct evidence or any admission or circumstances in the cross examination to rebut the legal presumption. Once such burden is discharged by the defendant to show that there was no consideration passed in the pronote, then onus again shift on the plaintiff to prove the passing of consideration. It I s relevant

to extract para No.5 of the Judgment of the Hon'ble Supreme Court reported in AIR 1961 SC 1316 (***Kundan Lal Rallaram Vs. The Custodian, Evacuee Property Bombay***):

“5. ... The phrase 'burden of proof' has two meanings — one the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence i.e., oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under Section 101 of the Evidence Act, "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". Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in Section 118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is proved, Section 118 of the Negotiable Instruments Act imposes a duty on the court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and, if he

adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. Under Section 114 of the Evidence Act, "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case". Illustration (g) to that section shows that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, Section 114 enables the court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

Applying the above ratio given in this case is considered, the plaintiff has established the execution and he has discharged the initial burden to prove the execution and in such view of the matter, it is for the defendant to rebut such presumption.

15. It is a specific contention of the defendant that he has only borrowed a sum of Rs.2,00,000/- from Muthumanickam. In the cross examination, he has admitted that he did not even note the full address of Muthumanickam. Therefore, merely on the basis of some transaction between Muthumanickam and the sale deed Ex.P1 filed, the Court cannot accept the stand taken by the defendant. Therefore, merely because some suits are filed in respect of other immovable properties. The contention of the defendant that the pronote was only executed in favour of Muthumanickam cannot be countenanced. Further, in the cross examination also, he has categorically admitted that in the year 2016 he approached the plaintiff for the loan. It is the case of the plaintiff that he has withdrawn the amount from the bank prior to the pronote and had advanced the same to the defendant. In the cross examination, the plaintiff has clearly given explanation that he has withdrawn the amount

from the Bank for the purpose of his building contracts and other works. However since there was no such work at the relevant point of time, he kept the money with him since the defendant asked loan he has paid the amount. To prove the fact that he has withdrawn the amount from the Bank PW.3 - Bank Manager was examined. PW.3 Bank Manager in his evidence clearly stated that on 23.09.2016 and 26.09.2016 the plaintiff has withdrawn the amount and he has also produced the Bank Statement of the plaintiff for the relevant period which is also filed as Ex.A5.

16. On a perusal of the above statement makes it very clear that plaintiff has withdrawn a sum of Rs.7,75,000/- on 23.09.2016 and on 26.09.2016 he has withdrawn another sum of Rs.1,75,000/- from his account. These facts also clearly established that prior to the pronote date the plaintiff had sufficient cash in hand and has withdrawn from the Bank. Such being the position, without any circumstances to rebut the legal presumption, particularly, when execution of pronote and passing of consideration is proceed. Defendant cannot succeed in proving his stand. The defendant has not discharged the burden by rebutting the statutory presumption attached to the pronote. Accordingly, the points are answered.

17. In the light of the above, the Appeal Suit stands dismissed by confirming the Judgment and Decree passed in O.S.No.9 of 2018 on the file of the District Judge, Karur District, dated 17.11.2021. No costs. Consequently, the connected Miscellaneous Petition is closed.

17.03.2023

Index : Yes/No
Internet : Yes/No
trp

To

1. The District Judge, Karur District.
2. The Record Keeper, Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

AS(MD),No.202 of 2022

N.SATHISH KUMAR, J.

trp

**Judgment made in
AS(MD).No.202 of 2022 and
CMP(MD).No.8993 of 2022**

17.03.2023