

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08 - 07 - 2015

Coram

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 286 of 2009

and

M.P. No. 1 of 2009

Marimuthu

.. Appellant/Defendant

vs.

Anjalai Ammal

.. Respondent/Plaintiff

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 24.11.2008 in A.S. No. 17 of 2008 on the file of the Subordinate Judge, Panruti, reversing the judgment and decree dated 27.3.2008 made in O.S. No. 726 of 2004 on the file of the District Munsif, Panruti.

For Appellant : Mrs. R. Meenal

For Respondent : Mr. S. Kingston Jerold

JUDGMENT

The present appeal is preferred by the Defendant in the suit against the judgment and decree dated 24.11.2008 passed by the learned Subordinate Judge, Panruti, in A.S. No. 17 of 2008 reversing the judgment and decree dated 27.3.2008 passed by the learned District Munsif, Panruti, in O.S. No. 726 of 2004 filed for recovery of a sum of Rs.50,000/- with future interest based on a promissory note.

2. The case of the plaintiff is that the defendant had borrowed a sum of Rs.50,000/- from the plaintiff on 01.12.2001 repayable at the rate of 18% interest per annum and executed the suit promissory note. As there was no voluntary repayment by the defendant, after causing a legal notice, the suit has been filed for recovery of Rs.63,500/-.

3. The suit was contested by the defendant resisting all the allegations in the plaint besides denying the signature in the suit promissory note. According to the defendant, the suit promissory note was fabricated for the purpose of the suit as there was no

necessity for the defendant to borrow the money and that the plaintiff also did not have the wherewithal to lend money. Hence, prayed for dismissal of the suit.

4. Before the trial Court, the plaintiff had marked Exs. A.1 to A.3 and examined herself as P.W. 1 besides examining one Velmurugan as P.W.2. To nullify the case of the plaintiff, the defendant examined himself as D.W.1 and marked Exs. B.1 and B.2 were marked. Ex. C.1 specimen signature of P.W.2 Velmurugan was marked as Court document.

5. The trial Court, on evaluation of the evidence available, dismissed the suit holding that the Ex.A.1 promissory note is not true and genuine but forged one. However, on appeal by the plaintiff, the Lower Appellate Court after appreciating the facts, found the suit promissory note to be valid and allowed the appeal thereby decreeing the suit. Feeling aggrieved, the defendant has preferred the present Second Appeal.

6. When the matter was listed for admission, only notice was ordered. The following points arise for determination in this Second Appeal:-

- (i) Whether in law the Lower Appellate Court was right in failing to see that non-replying to the plaintiff's notice would not constitute admissions of his contents as per Section 58 of the Indian Evidence Act vide 2008 3 MLJ 862.
- (ii) Whether in law the Lower Appellate Court was not wrong in omitting to see that the respondent / plaintiff had not proved passing of consideration as required in Section 43 of the Negotiable Instruments Act?
- (iii) Whether in law the Lower Appellate Court was right in failing to note that the pronote was not proved to satisfy Section 67 of the Indian Evidence Act and that the lower appellate Court ought to have at least compared the signatures under Section 73 of the Act.

7. Heard Mrs. R. Meenal, learned counsel appearing for the appellant / defendant as well as Mr. S. Kingston Jerold, learned counsel appearing for the respondent / plaintiff and perused the records.

8. The plaintiff had contended that the suit promissory note was executed by the defendant in the presence of scribe and witnesses. It is also contended that the witness of the suit promissory note as well as the scribe, viz., the plaintiff's husband, are dead. However, the defendant had contended that there was no necessity for him to borrow money from the plaintiff and that merely because the defendant had not responded to Ex. A.2 legal notice, it would not amount to admission of the debt.

9. Learned counsel for the plaintiff contended that the signature on Ex. A.1 promissory note was admitted by the defendant and if that is compared with Ex. A.3, which is the postal acknowledgment on which the defendant's signature is found, the defendant's signature can be confirmed.

10. In the evidence, D.W.1 had stated that the admission of the signature on the suit promissory note was elucidated by the plaintiff by showing the specific portion of the promissory note in which his signature is alleged to be found. This was clarified by the defendant in the re-examination that the signatures shown to him were similar to his own signature. Therefore, he had originally admitted in the cross-examination that it was his signature. The admission of the signature by the defendant was not on the stamp affixed on the promissory note but it was written below the stamp that was affixed on the promissory note. Therefore, in the strict sense, there is no admission by the defendant of his signature. As stated earlier, the scribe and the attester of the promissory note are said to be dead. Merely because the defendant had not replied to Ex. A.2 notice, it cannot be deemed that he had admitted the signature. Unless and until the execution is proved by the plaintiff, as the initial burden is on her to prove the execution of the document, the onus does not shift on the defendant to prove the passing of consideration.

11. Learned counsel for the defendant pointed out that the plaintiff had filed a similar suit against one Murugan for the alleged borrowal of Rs. 1 Lakh on 20.12.2001 in O.S. No. 110 of 2004 on the file of the Sub-Court, Panruti. Similarly, another suit was filed by the very same plaintiff in O.S. No. 102 of 2004 against one Gunasekaran for alleged borrowal of Rs. 1 Lakh. Yet another suit was filed by the plaintiff in O.S. No. 723 of 2004 against one Gandhi for recovery of money.

12. A perusal of all the above said suits reveals that the plaintiff is said to have lent a huge sum to various persons. In support of such contention, the defendant also filed Ex. B.2 deposition of P.W.2 in O.S. No. 110 of 2004. A reading of the above deposition indicates that the plaintiff did not have sufficient means for lending money to various persons in a short span of one month. The said witness was examined even in the present suit as P.W.2 and he was examined in the earlier suits also as P.W.2. The evidence of P.W.2 is not useful to support the case of the plaintiff. Therefore, as rightly held by the trial Court, the evidence of P.W.2 failed to establish the factum of execution of the promissory note by the defendant and also the passing of consideration under the same. The trial Court also had found that in all the four suits filed by the plaintiff herein, the plaintiff is depicted as the lender and P.W.2 as the witness. As uniformly the suits have been laid on identical pleadings supported by the evidence of P.W.2, the trial Court has disbelieved the case of the plaintiff. As stated earlier, the plaintiff has not brought in evidence to show that she had sufficient money for lending or that she has been doing this money lending business. The plaintiff has also not established that she has sufficient properties which are capable of raising income. In such circumstances, this Court comes to the conclusion that the plaintiff had failed to establish the execution of the promissory note, much less, the passing of consideration.

13. It is well settled principle that the initial burden of proof would be on the plaintiff. In terms of Section 101 of the Evidence Act, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it.

14. The trial Court had independently compared the signatures found on Ex. A.1. The trial Court, on comparing the signature of the defendant on the stamps affixed on Ex. A.1 and the signature below the stamp, has given a finding that despite the fact that both the signatures are alleged to be of the same persons, there are striking differences in both the signatures. In such circumstances, when the signature of the defendant is specifically denied, it is incumbent upon the plaintiff to send the signatures for the opinion of the expert. In this case, no doubt, the plaintiff, despite the denial by the defendant, had not cared to send the document to an expert and on which reason the trial Court dismissed the suit. The plaintiff having failed to do so, the trial Judge had compared the signatures on his own and came to the conclusion that the signature found on Ex. A.1 is not that of the defendant and hence, held that the execution is not proved and the plaintiff cannot take a decree for recovery of the sum as per Ex. A.1.

15. The Lower Appellate Court while reversing the judgment of the trial Court, ought to have independently considered the factual aspects. While reversing the well considered judgment of the trial Court, the Lower Appellate Court ought to have assigned reason and given a finding with an independent application of mind on the facts. The Lower Appellate Court, being the final Court of fact, failed to exercise its jurisdiction vested in it by not assessing the evidence available record. Hence, the judgment and decree of the Lower Appellate Court is liable to be set aside and based on the discussions above, the decree and judgment of the trial Court are to be restored dismissing the suit. The points are answered accordingly in favour of the appellant / defendant.

In view of the above, the Second Appeal is allowed and the judgment and decree dated 24.11.2008 passed by the Lower Appellate Court in A.S. No. 17 of 2008 decreeing the Suit in O.S. No. 726 of 2004 on the file of the District Munsif, Panruti, are set aside. The judgment and decree dated 27.3.2008 in O.S. No. 726 of 2004 passed by the trial Court are restored. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

gri
To

1. The Subordinate Judge
Panruti
2. The District Munsif
Panruti

+1 cc to Mr.S.K.Rakhunathan, Advocate, sr.34189
+1 cc to Ms.R.Meenal, Advocate, sr.34827.

S.A. No. 286 of 2009

tej(co), kra(07/08)