

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :16.06.2015

CORAM

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 500 of 2009

K. Sivakumar

... Appellant/Plaintiff

vs.

N. Kadhar Ali

... Respondent/Defendant

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 06.11.2007 in A.S. No. 109 of 2007 on the file of the Court of Principal Subordinate Judge, Salem, reversing the judgment and decree dated 12.02.2007 made in O.S. No. 615 of 2006 on the file of the Principal District Munsif, Salem.

For Appellant : Mr. T.M. Hariharan  
For Respondent : Mr. D. Shivakumaran

JUDGMENT

This second appeal is filed by the plaintiff inveighing the judgement and decree dated 06.11.2007 passed by the Principal Subordinate Judge, Salem, in A.S. No. 109 of 2007 wherein and by which the judgment and decree dated 12.02.2007 recorded in a suit for recovery in O.S. No. 615 of 2006 on the file of the Principal District Munsif, Salem, were reversed allowing the First Appeal at the instance of the defendant.

2. The case of the plaintiff is that the defendant borrowed a sum of Rs.20,000/- for the purpose of his family and business requirement and executed a promissory note on 08.10.2004 agreeing to repay the same with interest at 24% per annum. As the defendant did not repay the loan, the plaintiff caused a legal notice on 14.7.2005 for which a reply was sent by the defendant alleging untenable reasons. Hence, the suit has been filed.

3. The case of the respondent / defendant was that it was the father of the plaintiff who had been carrying on business in money lending in the name and style of P.S.K. Finance. The defendant denied the borrowal of Rs.20,000/- as loan from the plaintiff and

also denied the execution of the promissory note on 08.10.2004. The defendant further denied the statement of the plaintiff that his father was his power of attorney. It was his further contention that the defendant signs only in English language and hence, the signature in pronote in Tamil is a forged one. On these grounds, he sought for dismissal of the suit.

4. Before the trial Court, the plaintiff examined himself as P.W.1 besides examining one Venkatachalam, the scribe of the pronote as P.W.2 and marked Exs. A.1 to A.7. To nullify the case of the plaintiff, the defendant examined himself as D.W.1 and marked Ex. B.1.

5. The trial Court / learned Principal District Munsif, Salem, on consideration of the evidence adduced and the materials available thereon, decreed the suit as prayed for. Challenging the same, the defendant preferred appeal in A.S. No. 109 of 2007. The Lower Appellate Court, after appreciating the facts, finding that the plaintiff has not impleaded the legal heirs of the deceased, reversed the finding of the trial Court and dismissed the suit. Feeling aggrieved by the dismissal of the suit, the plaintiff has come up with this Appeal.

6. At the time of admission of this appeal, this Court formulated the following substantial questions of law for consideration:-

- (i) Whether the plaintiff principal is not competent to file the suit in his own name to recover the monies advanced by his agent to the defendant especially when the agent is dead?
- (ii) When Ex. A.1 is established by the evidence of P.W.2 scribe and when the borrowings are recorded in the accounts, Exs. A.5 and A.6 duly maintained and when the rebuttal evidence is on the face of it false and contrary to the pleadings, has not the appellate court misdirected itself in reversing the findings of the trial court that Ex. A.1 is proved in accordance with law?

7. Heard Mr. T.M. Hariharan, learned counsel appearing for the appellant / plaintiff and Mr. D. Shivakumaran, learned counsel for the respondent / defendant and perused the records.

8. From the materials available on record, it is seen that the suit promissory note marked as Ex. A.1 was executed in favour of T.K.Kuppusamy as power of attorney holder of K.Sivakumar who is the plaintiff in the suit. Subsequently, since the power of attorney

died, the suit was filed in the name of the plaintiff who is the principal. Though the suit promissory note was executed in favour of the power of attorney, the plaintiff had not established whether the money was paid by the power of attorney or by himself. The specific case of the defendant is that he used to sign only in English and his signature found in the promissory note is in Tamil which itself would go to show that Ex. A.1 suit promissory note was created for the purpose of the suit. But the plaintiff who was examined as P.W.1, had specifically deposed that the defendant had borrowed money from the plaintiff's father as power of attorney and the said power of attorney died on 27.10.2004.

9. Since the trial Court and the Lower Appellate Court have expressed divergent opinions, this Court has to consider whether the findings of the Courts below are based on evidence and whether such evidence is based on pleadings.

10. The contention of the defendant / respondent is that once the power of attorney is dead, the legal heirs of the said power of attorney should have been added as parties. The said contention was rightly rejected by the Lower Appellate Court. The further contention that the suit as filed by the plaintiff is not maintainable as the same should have been filed only by the power of attorney, also did not find favour with the defendant. The only thing that remains to be seen is whether the plaintiff on whom the burden of proof lies for establishing the execution of the promissory note, has discharged the same.

11. In this regard, it is seen that the plaintiff had examined the scribe of the promissory note as P.W.2. He has specifically deposed that the defendant had executed a promissory note on 08.10.2004 after receiving Rs.20,000/-. Though the evidence of P.W.2 was assailed by the defendant contending that the scribe's evidence may not be as valid as the evidence of an attester, curiously, in Ex. A.1, there was no attester and only the scribe has put a signature. Excepting the fact that P.W.2 is the scribe, there is no other document to discredit his evidence. Hence, this Court holds that the execution of the promissory note is proved.

12. The next contention of the defendant / respondent is that he signs only in English and that the promissory note contains his signature in Tamil and the same was denied by him. To substantiate his contention, he had also produced Ex. B.1, Driving Licence in which he has signed only in English. Persuaded by the said evidence, the Lower Appellate Court held that the signature of the defendant in Ex. A.1 in Tamil, is not proved by the plaintiff.

13. Per contra, the plaintiff / appellant had produced Ex. A.3 dated 19.7.2005, acknowledgment card received by him from the defendant for having received the suit notice. Since the Lower Appellate Court had found that the defendant had signed only in English in the acknowledgment card, this Court perused the same. In the said acknowledgment card, the defendant has signed in English first and then at the bottom of the same, his signature in Tamil is also found. From a plain look at Ex. A.3, it is seen that the defendant, at the first instance, has put his signature in Tamil above the phrase "Signature of the addressee", and it appears that on a second thought, he has affixed his signature in English also on top of it. Though the defendant has put his signature twice both in English and Tamil, there is no overlapping and it appears to be an insertion.

14. It was contended by the learned counsel for the respondent / defendant that the said acknowledgment card was produced by the plaintiff / appellant and hence, there was a chance of the plaintiff putting the signature in Tamil on the same.

15. Normally, a person would sign on the column provided for the signature whereas in this case, there is no reason as to why the person who signs in English, had left enough space in between the signature and the printed phrase "Signature of addressee". This leads to the doubt that the defendant / respondent could have signed it in Tamil as per his normal practice and on a second thought, would have fixed his English signature on top of the same. No other circumstance has been pleaded to invalidate the case of the plaintiff. Therefore, Ex. A.3 also gains importance along with Ex. A.1. Hence, this Court feels that the defendant / respondent, only to defeat the rights of the plaintiff / appellant, had deliberately denied the signature on the promissory note. Once the burden of execution of the promissory note is discharged by the plaintiff, the onus automatically shifts on the defendant to disprove the same as the presumption is that consideration would have passed.

16. Insofar as passing of consideration, the plaintiff / appellant has proved by examining P.W.2 scribe of the pronote Ex.A.1. Merely because P.W.2 happened to be the scribe, his evidence cannot be discredited in the absence of any rebuttal.

17. In the written statement, the defendant had stated that the plaintiff's father T.K. Kuppusamy was doing business in the name and style of P.S.K. Finance in Salem, whereas in his cross-examination as D.W.1, he has deposed that he did not know P.S.K. Finance or any of its group company.

18. From the above pleading and deposition of the defendant, this Court comes to the definite conclusion that the defendant / respondent is not speaking the truth and has set up the defence only to defeat the rights of the plaintiff / appellant. From the above, it is clear that the defendant / respondent has deposed contrary to his pleadings. The plaintiff / appellant has established the execution of the promissory note as well as passing of consideration on the same. It is also not established that P.W.2 scribe of Ex. A.1 had any enmity with the defendant / respondent and that he had deposed against him.

19. In such circumstance, this Court is of the opinion that the Lower Appellate Court was wrong in accepting the evidence of the defendant / respondent. The Lower Appellate Court, being the final Court of facts, ought to have considered the evidence as a whole to see any element of improbability arising from proved circumstances. In the light of the above discussion, this Court comes to an inevitable conclusion that the Lower Appellate Court, being a final Court of fact, dismissed the suit without considering the reasons given by the trial Court regarding the failure on the part of the defendant to establish his case thereby leading to perverse finding.

20. Though under Section 100 CPC, this Court cannot re-appreciate the evidence, in view of the facts and circumstances of the case, this Court is inclined to hold that the preponderance of probabilities are in favour of the plaintiff and the questions of law raised are answered materially and substantially in favour of the plaintiff / appellant. As such, the rejection of the suit by the Lower Appellate Court, is to be held as not based on correct reasoning.

In the light of the foregoing discussion, the Second Appeal succeeds and stands allowed and the judgment and decree of the trial Court dated 12.02.2007 passed in O.S. No. 615 of 2006 are restored decreeing the suit in favour of the plaintiff. Consequently, the judgment and decree passed by the Lower Appellate Court are set aside. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Deputy Registrar

//True Copy//

Sub Assistant Registrar

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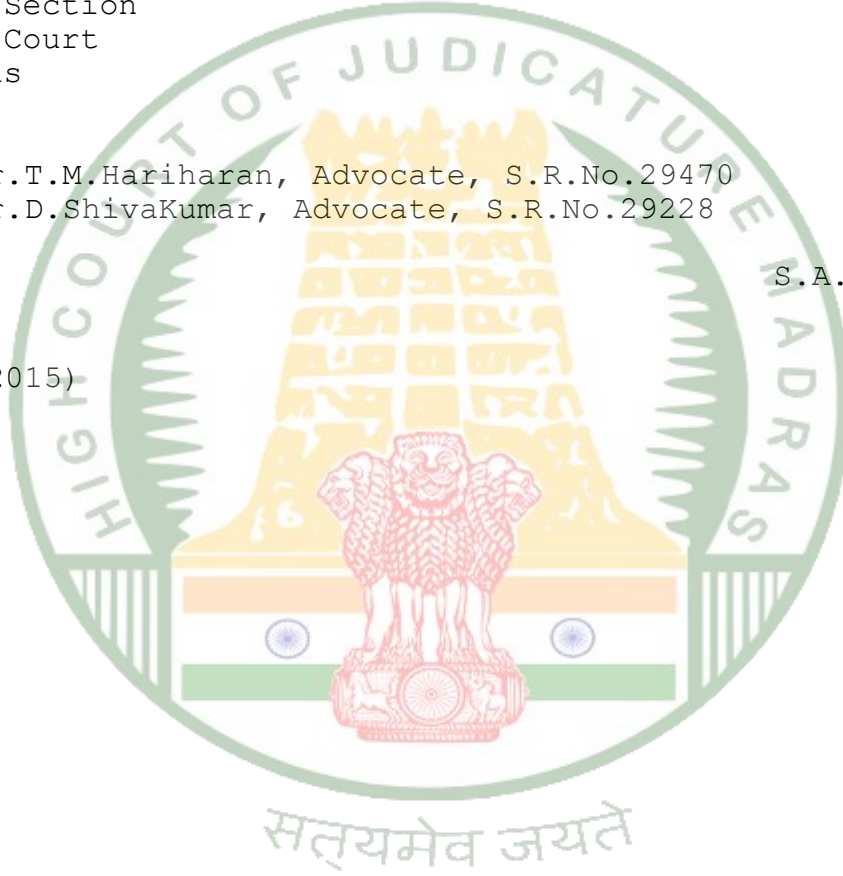
To

1. The Principal Subordinate Judge  
Salem
2. The Principal District Munsif  
Salem
3. The Section Officer  
V.R. Section  
High Court  
Madras

+1cc to Mr.T.M.Hariharan, Advocate, S.R.No.29470  
+1cc to Mr.D.ShivaKumar, Advocate, S.R.No.29228

S.A. No. 500 of 2009

KU (CO)  
CA (26/06/2015)



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