

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 20.10.2016

Judgment pronounced on : 24.10.2016

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.450 of 2008

Kalyanasundaram

.. Appellant /Respondent/Plaintiff

Versus

M.Kumaravel

.. Respondent /Appellant/Defendant

Prayer: Petition filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree as made in A.S.No.59 of 2006 dated 27.11.2007 on the file of the Principal District Judge, Coimbatore reversing the judgment and decree made in O.S.No.12 of 2001 dated 07.04.2006 on the file of the Subordinate Judge, Tiruppur.

For Petitioner : Mr.A.K.Kumaraswamy
For Respondent : Mr.V.P.Sengottuvel

J U D G M E N T

The plaintiff is the appellant before this court. The suit filed by the appellant herein for recovery of money based on the pro-note executed by the respondent herein was allowed by the trial court, whereas reversed by the Appellate Court disbelieving the endorsement made on the said pro-note for partial payment and saving of limitation. Aggrieved by that, this appeal has been preferred on the ground that when the signature found on the endorsement marked as Ex.A2 is admitted by the respondent-defendant, the first appellate Court ought not to have disbelieved the said endorsement to de-suit the plaintiff. Further, it is contended by the appellant that the first appellate Court has given a finding on the genuineness and validity of exhibit A2 endorsement without any pleadings and issue framed in this regard.

2. To understand the lis before this court, the facts of the case is extracted below:

The case of the appellant is that, the respondent herein borrowed a sum of Rs.1,00,000/- from one Preemier Investment Corporation, Tirupur on 09.11.1995 and executed a pro-note which is marked as Ex.A1. On 18.11.1997, the defendant paid a sum of

Rs.3,000/- towards interest and made endorsement on the back of the pro-note which is marked as Ex.A.2. Later, the promisee-Preemier Investment Corporation, Tiruppur assigned the said promissory note in favour of the appellant-plaintiff for proper and valid consideration and the said made over recorded on the back of the pro-note Ex.A.1, which is marked as Ex.A.3.

3. After getting made over of the pro-note, the appellant-plaintiff has demanded repayment of the money borrowed, but the respondent-defendant neglected to pay. Hence, a notice dated 08.01.2000 was served on the defendant, which was duly replied by the defendants through his counsel on 22.01.2000, which led to causing a re-joinder dated 26.01.2000 by the plaintiff. These three documents are marked as Ex.A.4 to Ex.A.6 respectively. Since, the respondent has not repaid the money as per the pro-note, suit has been laid for recovery of the principle and interest accrued upon the money borrowed against the pro-note. The said suit was contested by the defendant-respondent on the ground that he borrowed Rs.1,00,000/- from Preemier Investment Corporation, Tiruppur, a partnership firm consisting of P.K.Periyasamy, A.K.C.Thiyagarajan and K.Velmurugan as his partner and executed a pro-note for the same. He never made an endorsement on 18.11.1997 as alleged in the plaint. Contrarily, on 01.05.1998, P.K.Periyasamy, one of the partner of the financial company viz., Preemier Investment Corporation, informed him that the income tax authorities raided the Corporation premises and seized all the pro-notes and other documents from the premises and therefore, he was not in a position to return the original pro-note but demanded the repayment of the loan amount borrowed by the defendant against the said pro-note. Accordingly, he repaid the entire due borrowed against the pro-note based on the promise made by P.K.Periyasamy that he would return back the original pro-note once he get back from the income tax department. As a surety, the said Periyasamy executed a pro-note of Rs.1,00,000/- Ex.B.1 in favour of the defendant on 01.05.1998.

4. While fact being so, the said P.K.Periyasamy filed an Insolvency Petition No.24 of 1998 before the Subordinate Judge, Erode in connivance with other partners of the firm, so as to defraud the creditors. Later, he also did not pursue the Insolvency Petition and allowed to get dismissed for default on 25.01.1999. On receipt of the pre suit notice, he came to know that the discharged pro-note has been misused by the partners of Preemier Investment Corporation, more particularly, P.K.Periyasamy by making an ante-dated endorsement on the pro-note and assigned in favour of plaintiff-appellant. When notice was issued by the plaintiff-appellant, the same was suitably replied. Despite the reply, the plaintiff has chosen to send a re-joinder and filed a suit.

5. Considering the above rival pleadings, the trial court framed the following issues:

1. Whether, the plaintiff is entitled for recovery of Rs.1,48,800/- based on the pro-note ?
2. Whether there was any consideration passed in the said pro-note ?
3. What are the relief the plaintiff is entitled for?

6. After examining 3 witnesses on behalf of the plaintiff and 6 exhibits marked as Ex.A1 to A6 and 2 witnesses on behalf of the defendant and one exhibit B.1, the Trial Court has accepted the plea of the plaintiff and allowed the suit.

7. Aggrieved by the judgement and decree, the defendant-respondent herein preferred an appeal before the Principal District Court, Coimbatore. The first Appellate Court re-appreciating the evidences has held that on perusal of the endorsement Ex.A2 made on the back of the pro-note between the content and the signature of the defendant there is a huge gap and strangely above the signature of the borrower, the witnesses N.Samiappan and scribe R.Palanisamy had signed. So, taking note of this, the first appellate Court has accepted the plea of the defendant that there was no payment of Rs.3,000/- on 18.11.1997 as alleged by the plaintiff and the signature found on the back of the pro-note was obtained by the Finance Company on the day of executing the pro-note itself. Whiles, the suit is barred by limitation, since it is filed beyond three years from the date of its execution.

8. The first Appellate Court held that the defendant-respondent has executed the pro-note Ex.A.1 on 09.11.1995 but the endorsement dated 18.11.1997 for payment of Rs.3,000/- is not proved and therefore, the suit is barred by limitation. Hence, reversed Judgment of Trial Court.

9. Aggrieved by the reversal Judgment of the first Appellate Court, the plaintiff herein has filed this Second Appeal before this Court on the ground that the first Appellate Court has entertained the doubt regarding the endorsement marked as Ex.A.2 and a ground which not even pleaded the respondent. The first Appellate Judge has relied with ipsi dixit of D.W.1 regarding Ex.A.2 to disbelieve the genuineness of the said endorsement.

10. The respondent was served notice for hearing on admission of the Second Appeal and on receipt of the notice, respondents appeared before this court through his counsel and made his submissions. The point to consider is whether there is any substantial question of law to interfere the finding of the lower Appellate Court?

11. The execution of pro-note Ex.A.1 on 09.11.1995 is

admitted by the respondent. The specific case of the appellant is that the pro-note was assigned to him on 01.12.1997 and before the said assignment, the respondent has made a payment of Rs.3,000/- and endorsed on the back of the pro-note on 18.11.1997 which fact is disputed and invited contra findings by the Courts below.

12. Since execution of the pro-note is admitted, it is the duty of the court now to find out whether Ex.A.2 and A.3, which is propounded by the plaintiff are genuine and duly executed. So far as the endorsement Ex.A.2 is concern, it is the specific case of the defendant that he never paid Rs.3,000/- on 18.11.1997. Upon a blank signature obtained from him at the time of Ex.A.1, the holder of the pro-note has filled up the contents found in Ex.A.2.

13. In the written statement, the defendant has denied emphatically and pleaded that he made no endorsement of payment on 18.11.1997 as alleged in the plaint and also made an allegation that the partner of the Premier Finance Corporation has colluded together and made an ante-dated endorsement of the assignment on the discharged pro-note dating it as 01.12.1997 for the purpose of making a fraudulent claim on the defendant. While there is a denial and allegation in respect of the endorsement marked as Ex.A.2, no specific issue framed by the Trial Court regarding the genuineness of the endorsement Ex.A.2 or Ex.A.3, the alleged assignment.

14. However, the parties regardless of non framing of issue regarding Ex.A.2 and Ex.A.3 have let in evidence and cross examined the witnesses in support of the contentions. The trial Court while discussing about the genuineness of the assignment marked as Ex.A.3 has observed that the assignment is made by one of the partner of Premier Investment Corporation and one third party by name Geetha Rani. However, he has held that for the said reason, the assignment cannot be held invalid. In respect of the endorsement Ex.A.2, the trial Court is silent but observed that the burden of proving discharge of the debt is upon the defendant. Regarding Ex.B.1., the promissory note alleged to have been executed by P.K.Periyasamy, partner of Premier Investment Corporation, the trial Court has held that the pro-note marked as Ex.B.1 cannot be taken as a proof for discharge of the debt incurred upon the pro-note Ex.A.1.

15. The first Appellate Court on re-appreciation of the evidence more particularly the manner in which Ex.A.2 is written on Ex.A.1 found suspicious over the genuineness of the endorsement. In this regard, the learned counsel for the respondent submitted that, the witnesses to the endorsement Ex.A.2 and Ex.A.3 Thiru. Samiyappan was examined as P.W.2 on behalf of the plaintiff. This witness admits that on the

endorsement Ex.A.2, he affixed his signature first and thereafter the scribe Palanisamy signed and only after that, the defendant affixed his signature. In the proof affidavit in lieu of chief examination, P.W.2 has sworn that the defendants signed in his presence and thereafter he signed as witness and subsequently Palanisamy P.W.3 signed. The self contradiction found in the deposition of P.W.2 gives rise to suspicion and doubt whether at all the endorsement Ex.A.2 was a genuine one.

16. Further the counsel for the respondent read out the depositions of P.W.3, Palanisamy, the scribe to the endorsement Ex.A.2 wherein P.W.3 admits that he is employed in the Preemier Investment Corporation since 1996 and for several years he has experience in writing pro-notes for the finance company and he is aware of the fact that in a pro-note, first the executor of the pro-note will sign and thereafter the witness and scribe will sign on the documents whereas he admits that in Ex.A.1 pro-note endorsement dated 18.11.1997 signature of the scribe is found on the left hand side followed by the signature of the defendant.

17. Similarly, in the cross examination, it is also elucidated from the scribe P.W.3 about the signature of one Geetha Rani found in the assignment endorsement marked as Ex.A.3. P.W.3 denied about the knowledge who the Geetha Rani and when she affixed signature in Ex.A.3. In the cross examination, it has been suggested to P.W.3 that the signature of defendant found in A.2 was obtained from him on the date of pro-note itself. It is further suggested to the witnesses that since the assignment endorsement Ex.A.3 was to be written on the back of pro-note, for want of space the witness and scribe has signed above the pre signed portion.

18. Though, the suggestions put in the cross examination denied, the reason for disbelieving the genuineness of the endorsement Ex.A.2 as explained by the lower appellate court cannot be neglected. It is the bounded duty of the plaintiff who has propounded the endorsement Ex.A.2 to prove the same. The specific case of the plaintiff is that on 18.11.1997, the defendant paid a sum of Rs.3,000/-. P.W.3 in his evidence says, on receipt of that said money, the Corporation gave a receipt and the same was also recorded in the ledger. While so, when there is a denial of payment by the defendant, the plaintiff ought to have produce the best evidence available to prove the same. This fact cannot be trivalized and given a go by because this endorsement alone saves the limitation for the cause of action.

19. Therefore, the first appellate Court has rightly held that even though the defendant has admittedly executed the pro-note and also failed to prove the discharge of the pro-note, the

plaintiff who carries the burden of proving genuineness of endorsement Ex.A.2 misreably failed and the manner in which it is written leads to suspicion. When there is no proof sufficient to held that a payment of Rs.3,000/- made to the plaintiff on 19.11.1997, the suit get hopelessly barred by limitation. This Court concurs with the above view expressed by the first Appellate Court regarding Ex.A.2.

20. The contention of the appellant as a substantial question of law is that without any pleadings and issue raised regarding genuineness and validity of Ex.A.2, the first Appellate Court ought not to have reversed the findings of the Trial Court. No doubt, there is no specific issue framed by the Court regarding genuineness of Ex.A.2. However, for the issue whether the plaintiff is entitled for the recovery of Rs.1,48,800/- based on the pro-note, the parties knowing fully well about the respective contention has let out evidence to substantiate their claim. The plaintiff has examined P.W.2 and P.W.3 to prove the execution of Ex.A.2 and Ex.A.3 found on the back of the pro-note Ex.A.1. Thus, it could be safely concluded that the parties have gone to the trial knowing fully well the genuineness of endorsement in A.2 is the question in issue between them and they adduced evidence to that effect. The cross examination done to the plaintiff witnesses 2 and 3 by the defendant also clearly fortifies the view that the parties have gone for trial knowing fully about the rival case and led all the evidence not only in support of the contentions, but no refutation of those of the other side. Therefore, it cannot be said that absence of a specific issue regarding Ex.A.2 will render the Judgment of the lower Appellate Court erroneous.

21.The above said view is well fortified through the judgment of Hon'ble Supreme Court rendered in the case of Nedunuri Kameswaramma Vs. Sampati Subba Rao (AIR 1963 SC 884):-

(6)".....No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which

we have amply referred already."

22. As pointed out earlier, P.W.3 in his depositions admits that his Company is maintaining record for the transactions and the alleged payment of Rs.3,000/- by the respondent on 18.11.1997 is also recorded in the ledger and receipt was issued. If that is true, the plaintiff ought to have produced the same atleast after elucidating the said fact in the cross examination. Having failed to produce the same, the plaintiff-appellant cannot take advantage of the lapse of the Trial Court in not framing specific issue regarding Ex.A.2. As held by the Hon'ble Supreme Court, while the parties are aware of the dispute and let in evidence in support of the contention, mere omission to frame issue on the matter in controversy between the parties cannot be regarded as fatal. Unless, it is found that failure to frame the issue had resulted in miscarriage of justice and parties have gone to trial without knowing that the said question was in issue between them.

23. In the result, the appeal is dismissed confirming the judgment and decree of the first Appellate Court with costs throughout.

MEMORANDUM OF COSTS

STAMP FOR VAKALATNAMA	10.00
ADVOCATE'S FEE ON RUPPES	
FC NOT RECEIVED	NIL
TRANSLATION AND PRINTING/TYPING CHARGES	NIL

	10.00

सत्यमेव जयते
-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Principal District Judge, Coimbatore

2. The Subordinate Judge, Tiruppur

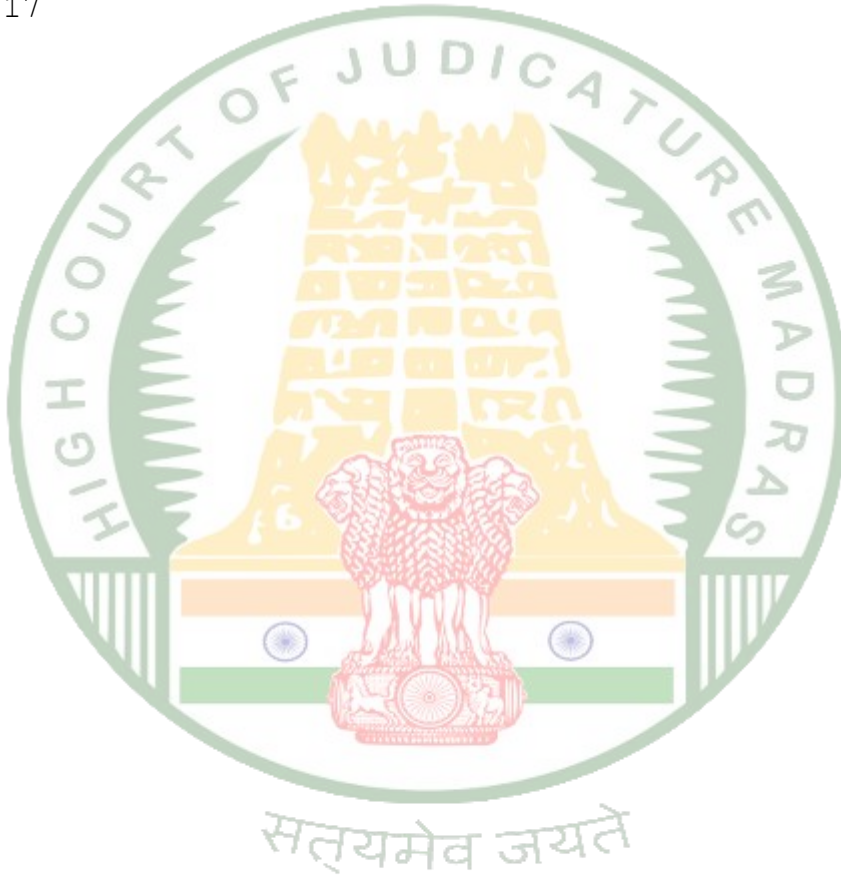
+1 cc to M/s.A.K.Kumarasamy Advocate sr 60485

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