IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.10.2016

Coram:

The Hon'ble Mr.Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.171 of 2016

S.Mukanchand Bothra .. Appellant

Vs.

1. N.M.Abdul Haleem,
   mandate holder
   M/s.Zahira Stores

2. J.Ummul Fazna
   Partner
   M/s.Zahira Stores

3. A.Zahira Begum
   Partner
   M/s.Zahira Stores .. Respondents

This Appeal is preferred under Order XXXVI Rule 11 of O.S.Rules r/w Clause 15 of the Letters Patent Act against the judgment and decree of this Court dated 19.9.2014 in C.S.No.432 of 2007.

For Appellant : Mr.S.V.Jayaraman
Senior Counsel for
Mr.T.Dhanasekaran

For Respondents : Mr.P.Davoodu for R2 and R3
No appearance for R1

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED
BY **A.SELVAM, J.**)

This Original Side Appeal is directed against the judgment and decree dated 19.9.2014 passed in C.S.No.432 of 2007 by the learned Single Judge of this Court.

2. The appellant herein, as plaintiff, has instituted O.S.No.432 of 2007 on the file of this Court praying to pass a money decree by virtue of a Pronote dated 18.4.2004, wherein the present respondents have been shown as defendants.

3. The material averments made in the plaint are that the first defendant by name Abdul Haleem is the husband of the third defendant and son-in-law of the second defendant. The first defendant has been appointed as power of attorney of the defendants 2 and 3. The first defendant, as a mandate holder, has used to act for the defendants 2

and 3. Under the said capacity, the first defendant has executed a suit Pronote dated 18.4.2004 in favour of the plaintiff and thereby received a sum of Rs.20 Lakhs by way of debt for the benefit of Zahira Stores in which the defendants 2 and 3 are partners and on 8.6.2004, a cheque has also been issued in favour of the plaintiff. Since the defendants have failed to repay the loan with interest, the plaintiff has issued a legal notice dated 6.7.2004, to the defendants. After receipt of the same, the defendants have issued a reply notice dated 18.8.2004, wherein, the defendants have alleged that there is no privity of contract between the plaintiff and first defendant and the first defendant has not received the money mentioned in the suit Pronote from the plaintiff. Under the said circumstances, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the first defendant, it is averred that the present suit is barred by limitation. The first defendant has had some transactions with the plaintiff and even prior to 1990, he has issued a blank cheque and Pronote in favour

of the plaintiff and the same have been misused for instituting the present suit and there is no merit in the suit and the same deserves to be dismissed.

5. In the written statement filed on the side of the defendants 2 and 3, it is averred that the defendants 2 and 3 have not granted power of attorney in favour of the first defendant and they never authorized him to borrow money either for them or for the firm, viz., Zahira Stores. There is no existing liability on the part of the defendants 2 and 3. The plaintiff has filed a complaint under section 138 of the Negotiable Instruments Act and the same has been taken on file in Calendar Case No.8624 of 2004 and subsequently, the plaintiff has failed to proceed the same. The plaintiff is a professional money lender and there is no merit in the suit and the same deserves to be dismissed.

6. On the basis of the divergent pleadings raised on either side, the learned Single Judge of this Court has framed necessary issues and after analyzing both the oral and documentary evidence, has dismissed the suit. Against the judgment and decree passed by the learned Single

Judge of this Court, the present Original Side Appeal has been preferred at the instance of the plaintiff, as appellant.

7. The sum and substance of the case of the plaintiff is that the first defendant is the power of attorney of the defendants 2 and 3. The second defendant is the mother-in-law of the first defendant and the third defendant is his wife. On 18.4.2004, the first defendant, as a mandate holder and also for the benefit of Zahira Stores, in which the defendants 2 and 3 are partners, has received a sum of Rs.20 Lakhs from the plaintiff and to that extent, he has executed the suit Pronote and subsequently, on 8.6.2004, he has given a cheque in favour of the plaintiff. Despite repeated demands made by the plaintiff, the defendants have failed to discharge the liability. Therefore, the plaintiff has issued a legal notice dated 6.7.2004 and even after receipt of the notice, the defendants have failed to discharge their liability, but they have given a false reply notice. Under the said circumstances, the present suit has been instituted for the relief sought therein.

8. The main defence taken on the side of the first defendant is that the present suit is barred by limitation and even prior to 1990, some transactions have become emerged between the plaintiff and first defendant and at that time, he has given a blank cheque and a Pronote in favour of the plaintiff and the same have been misused for filing the present suit.

9. The defence taken on the side of the defendants 2 and 3 is that they have not appointed the first defendant as their power of attorney and never authorized him to receive money either for them or for the benefit of Zahira Stores and therefore, the present suit deserves to be dismissed.

10. The learned Single Judge, after considering the available evidence on record, has dismissed the suit by way of giving a reason to the effect that since the first defendant has taken a defence to the effect that he has given a blank pronote and cheque in favour of the plaintff, the entire burden lies upon the plaintiff to prove that the

pronote in question has been given by the first defendant after receipt of Rs.20 Lakhs.

11. The learned senior counsel appearing for the appellant/plaintiff has strenuously contended that in the instant case, the suit Pronote has been marked as Ex.P.1 and the cheque dated 8.6.2004 has been marked as Ex.P.2. The legal notice dated 6.7.2004 issued by the plaintiff has been marked as Ex.P.4. The reply notice given by the first defendant has been marked as Ex.P.5 and the reply notice given by the defendants 2 and 3 has been marked as Ex.P.6. Even in Ex.P.5 and Ex.P.6, no specific denial has been made with regard to execution of Ex.P.1 by the first defendant and further even in Ex.P.6, the defendants 2 and 3 have clearly admitted to the effect that till 1992, the first defendant has acted as their power of attorney. But, the learned Single Judge, without considering the documents filed on the side of the plaintiff and also without considering the presumption available under section 118 of Negotiable Instruments Act, 1881 has erroneously fixed the burden upon the plaintiff and therefore, the reasoning given by the learned Single Judge for dismissing the suit is not

legally tenable. Under the said circumstances, the judgment and decree passed by the learned Single Judge are liable to be interfered with.

12. Per contra, the learned counsel appearing for the respondents 2 and 3 has also equally contended that in the instant case, the plaintiff has not positively established the alleged fact that the first defendant has acted as power of attorney of the defendants 2 and 3 and further as per the Income Tax Act, a loan transaction above the amount of Rs.20,000/- must be routed through cheque and therefore, the present suit is not legally maintainable.

13. On the basis of the divergent submissions made on either side, the Court has to look into as to whether Ex.P.1, the suit Pronote has been executed by the first defendant on behalf of the defendants 2 and 3 and also supported by consideration.

14. In Ex.P.1, it has been clearly mentioned that the first defendant has received a sum of Rs.20 Lakhs for the benefit of Zahira Stores. The consistent case put forth on the side of the

appellant/plaintiff is that the defendants 2 and 3 are the partners of the said Zahira Stores.

15. The first contention put forth on the side of the defendants 2 and 3 is that the first defendant is not the power of attorney and even in the written statement, the said aspect has been mentioned.

16. At this juncture, it would be apropos to look into the reply notice dated 18.8.2004 given by the defendants 2 and 3 and the same has been marked as Ex.P.6. In ExP.6, it has been clinchingly stated to the effect that till 1992, the first defendant has acted as power of attorney of the defendants 2 and 3. Therefore, from the clear admission made in Ex.P.6, the Court can unflinchingly come to a conclusion that the first defendant has acted as power of attorney of the defendants 2 and 3. At this juncture, an abortive attempt has been made on the side of the defendants 2 and 3 to the effect that the power alleged to have been given by the defendants 2 and 3 in favour of the first defendant has been subsequently cancelled, but to prove the same, no document

has been filed on the side of the defendants 2 and 3. Under the said circumstances, the defence taken on the side of the defendants 2 and 3 with regard to their power of attorney, viz., the first defendant cannot be accepted.

17. Now the Court has to meticulously analyze Ex.P.1 and also the defence taken on the side of the defendants.

18. The consistent case of the plaintiff is that on 18.4.2004, the first defendant, as a mandate holder of the defendants 2 and 3, has received a sum of Rs.20 Lakhs from the plaintiff and to that effect, he has executed Ex.P.1, suit Pronote.

19. In the written statement filed on the side of the first defendant, it has been simply stated that prior to 1990, some transactions have become emerged between the plaintiff and first defendant and during that period, he has given a blank cheque and Pronote. In fact, this Court has perused the entire averments made in the written statement filed by the first defendant and there is no

specific denial with regard to execution of Ex.P.1.

20. In the written statement filed on the side of the defendants 2 and 3, no specific denial has been made with regard to execution of Ex.P.1 by the first defendant. In fact, the defendants 2 and 3 have simply stated in the written statement that they never authorized the first defendant to receive money either for them or for the benefit of Zahira Stores. Therefore, it goes without saying that there is no clear denial on the part of the defendants with regard to execution of Ex.P.1.

21. Now the Court has to analyze the oral evidence available on record. The first defendant has been examined as D.W.1. During the course of cross examination, he has candidly admitted to the effect that the signature found in Ex.P.1 is his signature. Therefore, it is very clear that the first defendant has accepted his signature found in Ex.P.1.

22. Considering the fact that the signature found in Ex.P.1 is the signature of the first defendant and also considering that in Ex.P.1, it has been clearly stated to the effect that the first defendant has acted

as mandate holder of the defendants 2 and 3, the Court has to further analyze with regard to execution as well as passing of consideration of Ex.P.1.

23. It is an everlasting principle of law that as per Section 118 of the Negotiable Instruments Act, 1881, a presumption can be drawn with regard to execution as well as consideration of Pronote. Of course it is true that the presumption available under section 118 of the said Act is nothing but rebuttable. But, in the instant case, except bald denial in the written statement filed on the side of the defendants, no specific denial has been made with regard to execution of Ex.P.1 and also the consideration mentioned therein.

24. As pointed out earlier, in the reply statement (Ex.P.6), the defendants 2 and 3 have clearly admitted to the effect that till l992, the first defendant has acted as their power of attorney. But, as taunted earlier, the defendants 2 and 3 have not filed any document for the purpose of proving the subsequent cancellation of power of attorney deed. Therefore, it is clear that the first defendant, as a power of

attorney of the defendants 2 and 3, has executed Ex.P.1, suit Pronote dated 18.4.2004 after receipt of Rs.20 Lakhs for the benefit of Stores mentioned therein.

25. Further, it has already been pointed out that as per Section 118 of the Negotiable Instruments Act, 1881, the Court can very well presume with regard to execution of Ex.P.1 and also passing of consideration.

26. The learned Single Judge, without considering the bald averments made in the written statements filed on the side of the defendants and also without considering the contents of Ex.P.5 and Ex.P.6, has erroneously shifted the burden upon the plaintiff. The reasoning given by the learned Single Judge for dismissing the suit is totally baseless.

27. In the light of the discussions made earlier, this Court is of the view that the plaintiff has established the fact that as per Ex.P.1, the first defendant on behalf of the defendants, has received a sum of Rs.20

Lakhs and executed the same. Therefore, viewing from any angle, the contentions put forth on the side of the defendants 2 and 3 cannot be accepted.

28. As stated earlier, an inert attempt has been made on the side of the defendants 2 and 3 that a loan transaction above Rs.20,000/- must be routed only through cheque. But, to prove the same, no clinching evidence is available on the side of the defendants 2 and 3. Under the said circumstances, the judgment and decree passed by the learned Single Judge are liable to be set aside and the suit is liable to be decreed as prayed for.

In fine, this **Original Side Appeal is allowed with cost**. The judgment and decree dated 19.9.2014 passed by the learned Single Judge in Civil Suit No.432 of 2007 are set aside and the suit filed in C.S.No.432 of 2006 is decreed as prayed for with cost.

(A.S.,J.) (P.K.,J)
24.10.2016

Index : Yes/No

ajr

A.SELVAM, J.
and
P.KALAIYARASAN , J.

ajr

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