BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.06.2016

Coram:

THE HONOURABLE MS.JUSTICE R.MALA

S.A(MD)No.504 of 2016

M/s Kongu Nanbar Finance,
represented by its Managing Partner,
K.P.Subbarayan. .. Appellant/Appellant/Plaintiff

vs.

K.P.Subramanian(died)
1.Maruthayee @ Pappayee
2.Kanagaraj
3.Palanisamy .. Respondents/Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgement and Decree dated 20.10.2011 made in A.S.No.77 of 2010 on the file of the Principal Subordinate Judge, Karur confirming the Judgment and Decree dated 28.10.2009 made in O.S.No.186 of 2005 on the file of the Additional District Munsif Court, Karur.

For Appellant : Mr.R.Devaraj
For Respondents : Mr.V.Balaji
for R.1 to R.3

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JUDGMENT

The plaintiff/Finance Institution who lost the legal battle in both the Courts, has come forward with the Second Appeal, challenging the Decree and Judgment passed in A.S.No.77 of 2010, dated 20.10.2011 by the Principal Subordinate Court, Karur, by confirming the Decree and Judgment made in O.S.No.186 of 2005, dated 28.10.2009 by the Additional District Munsif Court, Karur.

2. Heard the learned counsel for the appellant and perused the materials available on record.

3. The plaintiff/Finance Institution has filed a suit in O.S.No.186 of 2005 for recovery of money due to promissory note dated 07.03.2002 for a sum of Rs.25,000/-, stating that even though, the defendant/respondent borrowed a sum of Rs.25,000/- and

executed the promissory note, on the same day, for another sum of Rs.25,000/- he executed a simple mortgage deed and therefore, he reserves his right to file a suit for recovery of money due to simple mortgage deed. After issuance of notice, he filed a suit for recovery of money due to promissory note dated 07.03.2002 - Ex.A.2.

4. The defendant has raised a plea alleging that he borrowed Rs.10,000/- only on 07.03.2002 and executed the simple mortgage deed, but for interest, it was executed for Rs.25,000/-. He would further submit that he has never borrowed any amount on the basis of the promissory note and the promissory note is the forged one.

5. The trial Court, after considering the averments in plaint and written statement, framed necessary issues and also considering the oral evidence of P.W.1 and P.W.2 - who is one of the attestors and the documentary evidence viz., Exs.A.1 to A.5 and D.W.1 and Exs.B.1 and B.2, dismissed the suit stating that the plaintiff has not proved Ex.A.2-promissory note as true and genuine and the plaintiff has not filed any accounts to prove that the respondent has borrowed a sum of Rs.25,000/- and the trial Court also disbelieved the evidence of P.W.2 who is one of the attestors. Against which, first appeal has been preferred by the plaintiff, in which the first Appellate Court has confirmed the decree and judgment passed by the trial Court. Against which, the present Second Appeal has been preferred.

6. The learned Counsel appearing for the appellant would submit that he had substantial questions of law that since the appellant herein has disputed the signature in vakalat and written statement, both the Courts below ought to have accepted Ex.A.2-promissory note as it is true and genuine and on that basis, he wants to challenge the judgement and decree passed by both the Courts below.

7. But on a perusal of the entire records, it is clear that once execution of the document is denied, it is the duty of the plaintiff to prove that Ex.A.2 - promissory note is true and genuine and he could not take the advantage of the evidence of defence. Though P.W.2 is one of the attestors, he is none other than one of the partners of the plaintiff's firm from the date of inception. It is not the case that the plaintiff is an individual. It is the financial institution and therefore, it has to be maintained with accounts. Even though, the trial Court has specifically given a finding that to prove that on 07.03.2002, the defendant has borrowed a sum of Rs.25,000/- on a promissory note, no relevant document viz., Account book has been filed by the plaintiff and no document has been filed even before the first appellate Court.

8. The learned Counsel for the appellant/plaintiff would submit that the trial Court has failed to invoke the jurisdiction under Section 118 of Negotiable Instruments Act.

9. It is a well settled presumption that Section 118 of Negotiable Instruments Act has to be invoked when, the execution of the promissory note is admitted. But in the present case, the execution of the promissory note was not admitted by the defendant/respondent. In such circumstances, the burden of proof lies upon the plaintiff/appellant to prove that Ex.A.2 is true and genuine. But he has not done so. The question as to Whether Ex.A.2 - promissory note is true and genuine has been decided by both the Courts below. Once the genuinety of the document viz., promissory note is proved, then only, invoking the presumption under Section 118 of the Negotiable Instrument Act would arise. But, here, both the Courts below have held that Ex.A2 has not been proved as true and genuine. Hence, invoking the presumption of Section 118 of the Negotiable Instrument Act does not arise.

10. The learned Counsel appearing for the appellant/plaintiff relied upon a decision in *K.S.Satyanarayana V. V.R.Narayana Rao* reported in *AIR 1999 Supreme Court 2544,* in which the Honourable Supreme Court has held that in a suit for recovery of amount alleged to be paid by plaintiff to the two defendants as a sale consideration of property, the plaintiff claimed that there was a document signed by the defendant No.1 in favour of defendant No.2, authorising him to sell the property on his behalf and the defendant No.1 denied his signatures on the document and also on written statement and Vakalatnama, the trial Court could have decreed the suit at the stage of examination of witnesses instead of going into protracted trial and then dismissing the suit on the ground of absence of privity of contract between defendant No.1 and plaintiff and hence, the trial Court ought to have accepted the statement of the plaintiff and the suit has been decreed.

11. But the above citation is not applicable to the facts and circumstances of the present case. Because in that judgment, the letter of authorisation has been questioned. But here, the payment of amount and the execution of the document have been questioned. As already stated, the plaintiff is a financial institution and therefore, having accounts, they have failed to file the accounts to show that on 07.03.2002, the respondent/defendant borrowed a sum of Rs.25,000/- on the basis of the promissory note. Furthermore, in the above mentioned case, the provisions of Section 73 of the Evidence Act has also been invoked for comparing the signature. In such circumstances, this Court is of the view that the above mentioned judgment is not applicable to the facts of the present case.

12. Perusal of the records and considering the arguments made by the learned counsel for the appellant, I am of the view that

there is no substantial question of law arises for consideration in this second appeal and the second appeal is liable to be dismissed at the stage of admission.

13. Accordingly, this second appeal is dismissed in the admission stage itself. No costs.

Sd/-
Assistant Registrar(CSI)

/True Copy/

Sub-Assistant Registrar

To

1. The Principal Subordinate Judge, Karur.

2.The Additional District Munsif , Karur.

+One cc to Mr.V.Balaji, Advocate, SR.No.31035

+One cc to Mr.R.Devaraj, Advocate, SR.No.31222

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