

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 08.03.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.190/2017 & CMP.No.4145/2017

1.Santhi
2.Vignesh
3.Saneha

..Appellants/Defendants/
Respondents

Versus

Sigamani

..Respondent/Plaintiff/
Appellant

Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed in AS.NO.1/2015 on the file of the learned III Additional District and Sessions Judge, Cuddalore at Vridhachalam dated 06.10.2016, reversing the Judgment and decree passed in OS.NO.149/2012 on the file of the Subordinate Judge, Neyveli dated 20.10.2014 with costs.

For Appellants : Mr.R.Venkatachalapathy

JUDGMENT

It is a case of money decree due and payable on Promissory Note. The Defendants who were successful before the Trial Court and lost before the Lower Appellate Court are the appellants herein.

2 The respondent / plaintiff filed OA.No.149/2012 on the file of the Court of Subordinate Judge, Neyveli against the appellants / defendants praying for judgment and decree to recover a sum of Rs.4,79,600/- with interest and cost on a Promissory Note dated 05.10.2010 executed by [late] Sivashanmugam-husband of the 1st Defendant for a sum of Rs.4,00,000/-.

3 The plaintiff would aver among other things that the husband of 1st defendant and father of the defendants 2 and 3, viz., Sivashanmugam, on 05.10.2010, has borrowed a sum of Rs.4 lakhs to meet out the family expenses and also in respect of the contract work by way of loan and on the date, executed a Promissory Note dated 05.10.2010 for a sum of Rs.4 lakhs,

undertaking to pay the principle and also interest at the rate of Re.1/- per Rs.100/- per month. The plaintiff would further aver that in spite of very many demands made to repay the said amount, Sivashanmugam did not pay the same and he died on 16.02.2012. According to the plaintiff, the defendants had succeeded to the estate of [late] Sivashanmugam and as such, they are liable to repay the loan amount under the above said Promissory Note. The plaintiff through his Lawyer, has sent a legal notice dated 18.09.2012, for which, on behalf of the defendants, a reply notice was sent through their Lawyer dated 01.10.2012, containing false allegations. Since the defendants did not come forward to repay the amount borrowed by [late] Sivashanmugam, under the above the said Promissory Note, they instituted the above said suit.

4 The 1st defendant has filed the written statement, denying the averments made in the plaint and she would further aver that there is no need on the part of her husband, viz., Sivashanmugam, to borrow any amount and that there is no family expenses to meet and he has no contract work also. The 1st Defendant also took a stand that the plaintiff has not means to advance such a huge amount and he is also a total stranger to the defendants as well as to the deceased Sivashanmugam. The 1st defendant denied the allegation that the defendants has succeeded to the movable and immovable properties of the [late] Sivashanmugam and further that, no such properties exist also. The 1st defendant would further aver that the defendants and Sivashanmugam are agriculturists and as such, the interest demanded on the alleged principle sum is highly exorbitant. The 1st defendant also took a stand that [late] Sivashanmugam is in the habit of signing blank Promissory Notes to enable the defendants to take money in the event of any emergency or contingency and it seems that the plaintiff might have caught hold of one such document based on which, filed the suit and therefore, prayed for dismissal of the suit.

5 The Trial Court, based on pleadings, has framed the following issues:-

[a] Whether the husband of the 1st defendant and father of defendants 2 and 3, viz., [late] Sivashanmugam, has borrowed a sum of Rs.4 lakhs on 05.10.2010 and executed a Promissory Note and also undertook to repay the principle amount with interest at the rate of Re.1/- per Rs.100/-per month.

[b] Whether the plaintiff is entitled to judgment and decree as prayed for? ; and

[c] To what other relief the plaintiff is entitled to?

6 The Trial Court, after taking evidence and upon perusal of the documents, has recasted the issues, which are as follows:-

[a] Whether the suit Promissory Note was executed at 10.00 a.m. or 6.00 p.m.?

[b] Whether the plaintiff is having means to advance the amount?

[c] Whether the [late] Sivashanmugam is having need to borrow the amount?

[d] Whether the suit Promissory Note is a fabricated one?

[e] Whether the plaintiff is entitled to judgment and decree as prayed for? And

[f] To what other relief, the plaintiff is entitled to?

7 During the course of trial, the plaintiff examined himself as P.W.1 and examined the Attestors as P.Ws.2 and 3 and the Scribe as P.W.4 and on behalf of the plaintiff, Exs.A1 to A6 were marked. The 1st defendant examined herself as D.W.1 and marked Exs.B1 and B2.

8 The Trial Court, on a consideration of pleadings and on appreciation of oral and documentary evidences, found that there is a discrepancy as to the time in which Ex.A1-Promissory Note came into existence and further found that the plaintiff did not adduce any evidence to show that he has got means to advance Rs.4 lakhs in favour of [late] Sivashanmugam. The Trial Court further found that as per the testimony of P.W.2, he himself has admitted that [late] Sivashanmugam was a contractor, doing contract work in Neyveli Lignite Corporation and he has got a means and therefore, he has no necessity to borrow the amount. The Trial Court also found that the wife of P.W.2 has also sent a legal notice and the same would prove that there was a transaction between the [late] Sivashanmugam and P.W.2 and P.W.2, by utilising the signed blank Promissory Note, has fabricated the document. The Trial Court has further found that there is a discrepancy with regard to the time on which the suit Promissory Note came into existence and that the plaintiff has no enough means to advance the amount and further that the plaintiff as well as the witnesses are closely related and all of them colluded and fabricated the suit Promissory Note and citing the said reasons, has dismissed the suit with cost, vide judgment and decree dated 20.10.2014.

9 The plaintiff, aggrieved by the dismissal of the suit, filed an appeal in AS.No.1/2015 on the file of the Court of II Additional District and Sessions Judge, Cuddalore at Vridhachalam

10 The Lower Appellate Court, on a perusal of the materials placed before it and on appreciation of the grounds of appeal, found that there is no specific denial on the part of the defendants as to the signature found in Ex.A1-Promissory Note and the plaintiff, in order to prove the execution of the Promissory Note, not only examined himself, but also examined two attestors and a scribe as P.Ws.2 to 4 respectively. The Lower Appellate Court has also noted inconsistency in the stand of the defendants while cross-examining P.W.1 and insofar as filing of the proof affidavit and as to the discrepancy in the time of execution of Promissory Note is concerned, the Lower Appellate Court found that admittedly the proof affidavit did not contain the signature of the party as well as the Advocate and therefore, no cognizance can be taken with regard to the said proof affidavit.

11 The Lower Appellate Court has also taken note of the admission on the part of D.W.1 even in the chief examination that P.Ws.1 and 2 came to her house on the date of demise of her husband and took away unfilled Promissory Note and also other documents and as such, the signature found in Ex.A1, has not been disputed at all. Insofar as recasting of the issues is concerned, the Lower Appellate Court found that the Trial Court framed only three issues initially and after the trial was over and case was posted for judgment, it recasted the issues without putting the parties on notice and ultimately held that the plaintiff is entitled to judgment and decree as prayed for and therefore, reversed the judgment and decree passed by the Trial Court and allowed the appeal, vide impugned judgment and decree dated 06.10.2016 and consequently, decreed the suit as prayed for with cost.

12 The defendants, aggrieved by the reversal of the judgment by the Lower Appellate Court and decreeing the suit, had filed the present Second Appeal.

13 In the Memorandum of Grounds of the Second Appeal, the following substantial questions of law are raised for consideration:-

[a] Whether the Lower Appellate Court is correct in reversing the judgment and decree of dismissal of the suit passed by the Trial Court?

[b] Is it not an error apparent in law in the finding of the Lower Appellate Court that the Trial Court had no power to recast/frame additional issues, based on the evidence adduced by the parties, for the appropriate determination of the LIS between the parties?

[c] Is it not an error apparent in law, when the Lower Appellate Court neglected to apply the correct principles of law on Burden of Proof/Presumption in money claims under the Negotiable Instruments Act, especially when ex.A1 is a fabricated document?

[d] Whether the Lower Appellate Court is correct in allowing the Appeal Suit when there is a reasonable suspicion, in terms of Ex.B2 as to the actual time of execution of the suit Pro-Note?

[e] Whether the Lower Appellate Court is correct in allowing the Appeal Suit, when the appellants herein had established their case by producing necessary oral and documentary evidence, before the Trial Court which impelled the Trial Court to dismiss the suit?

14 The learned counsel for the appellants / defendants would vehemently contend that the Lower Appellate Court without properly adverting to the pleading and oral and documentary evidences, had reversed the Trial Court judgment and would further submit that the plaintiff had failed to approach the Court with clean hands and by fabricating the suit Promissory Note, has filed the said suit. It is further submitted by the learned counsel that admittedly, the scribe and attestors are close relatives of the plaintiff and in fact, P.W.2 on behalf of his wife, has also sent a legal notice, demanding the said amount and utilising the unsigned blank Promissory Note, has instituted the suit with the help of his relative, viz., the plaintiff and the said material aspect has been completely overlooked by the Lower Appellate Court. It is further contended that initially, a proof affidavit in lieu of chief examination of the plaintiff was served on the learned counsel for the defendants and it contained the date and time of execution of the Promissory Note and whereas, the evidences let in are contrary to said proof affidavit and the said aspect has been rightly and correctly appreciated by the Trial Court and whereas, the Lower Appellate Court has brushed aside the same without passing any proper and sufficient reasons and therefore, prays for interference.

15 This Court paid its anxious consideration and best attention to the submissions made by the learned counsel for the appellants.

16 Chapter No.XIII of the Negotiable Instruments Act, 1881, deals with the Special Rules of Evidence. Section 118 of the Negotiable Instruments Act, 1881, speaks about the presumption as to the Negotiable Instruments. It is a well settled position of law that the initial burden lies on the plaintiff to prove execution and on such burden being

discharged, the Court shall raise presumption in favour of the plaintiff that the pronotes were for consideration and then, it is for the defendant to rebut the presumption. In the case on hand, the signature of [late] Sivashanmugam, in Ex.A1-Promissory Note is not in serious dispute and the defence taken by the 1st defendant in her written statement is that he had no family expenses to meet nor he had contract work and the plaintiff is a total stranger to her husband. However, while P.W.1 was in the box, a suggestion has been made to that effect that her husband for the purpose of doing contract work, used to sign blank Promissory Notes and it was utilised for the purpose of filing a false case. It was also further suggested to P.W.1 that [late] Sivashanmugam and other contractors used to keep unsigned and unfilled Promissory Notes for the purpose of business and that the suit Promissory Note has been fabricated. Thus, the plaintiff has established the fact that the signature found in the suit Promissory Note is that of the husband of the 1st defendant, viz., [late] Sivashanmugam. To prove execution, the plaintiff had examined two attestors, viz., P.Ws.2 and 3 and also the scribe of Ex.A1-Promissory Note as P.W.4.

17 In the light of the statutory provision, the burden shifts to the defendants to rebut the presumption and in the considered opinion of the Court, unfortunately, she has failed to do so.

18 A perusal of the cross-examination of P.W.1 would disclose that questions were put contrary to the pleadings and though it is open to the defendants to take a contra stand, it is also a settled position of law that admission made, cannot be resiled or taken back in lieu of the contrary stand.

19 Insofar as the plea raised by the learned counsel for the appellants that as per the proof affidavit, there is discrepancy with regard the time of the execution of Ex.A1, the Lower Appellate Court has taken into consideration the said aspect in paragraph No.20 of the impugned judgment and found that the proof affidavit did not contain either the signature of the plaintiff or the signature of the plaintiff's advocate and in Ex.B2, proof affidavit of the plaintiff, it has been mentioned as IA.No.380/2012 in OA.No.149/2012 and when P.W.1 was in the box, his attention was also not drawn to Ex.B1 and answers were elicited. In the considered opinion of the Court, the said findings rendered by the Lower Appellate Court are based upon proper appreciation of the evidence placed before it. It is also to be pointed out at this juncture that the Trial Court initially framed three issues and after arguments were over, it recasted the issues and without putting the counsels on notice, had chose to render findings and the said fact has also been deprecated by the Lower Appellate Court, for the reason

that in all fairness, the plaintiff ought to have been put on notice. In the considered opinion of the Court, once the arguments were over and the Trial Court had gone for recasting the issues, the proper course is to reopen the case and put the respective counsel on notice and after eliciting their response, ought to have reserved the judgment and pronounced the verdict. But, unfortunately, the Trial Court has failed to do so.

20 This Court, on an independent application of mind to the entire materials placed before it, is of the considered opinion that the respondent / plaintiff has proved the execution of Ex.A1 - Promissory Note strictly in accordance with law and the appellants / defendants had failed to rebut the presumption. The substantial questions of law raised by the appellants / defendants in the Memorandum of Grounds of Second Appeal have already been answered by the Lower Appellate Court by rendering a well considered findings and as such, no substantial questions of law arose for consideration in this Second Appeal.

21 In the result, the Second Appeal is dismissed at the admission stage itself. No costs. Consequently, the connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

AP
To

1.The III Additional District and Sessions Judge,
Cuddalore at Vridhachalam.

2.The Subordinate Judge,
Neyveli.

3. Thiru. Sigmani, S/o. Samikannu,
Chekkadi Street, NCV Home, Old,
Neyveli Pappannapattu Road, Neyveli-2.

Copy To:The Section Officer, VR Section, High Court
Madras.(2 Copies)

SA.No.190/2017

GMI (CO)
EU(03/02/2018)