

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.02.2017

PRONOUNCED ON : 10.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.666 of 2011

and

M.P.No.1 of 2011

Cross Mary @ Mary ... Appellant/Appellate/Defendant

Vs.

Azhagudurai Padayachi ... Respondent/Respondent/Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 20.09.2010 in A.S.No.196 of 2008 on the file of the Additional District Judge/Fast Track Court, Ariyalur, confirming the judgment and decree dated 05.09.2005 in O.S.No.519 of 2004 on the file of the Principal District Munsif Court, Ariyalur.

For Appellant : Mr.K.S.Shankar Murali
For Respondent : Mr.M.V.Krishnan

JUDGMENT

In this second appeal, the defendant has impugned the judgment and decree dated 20.09.2010 made in A.S.No.196 of 2008 on the file of the Additional District Judge/Fast Track Court, Ariyalur, confirming the judgment and decree dated 05.09.2005 made in O.S.No.519 of 2004 on the file of the Principal District Munsif Court, Ariyalur.

2. The suit has been laid by the plaintiff for recovery of money on the basis of the promissory note.

3. According to the plaintiff, the defendant borrowed a sum of Rs.50,000/- from him on 06.03.2002 and in evidence thereof, executed a promissory note in his favour promising to repay the above said amount with interest on demand. It is stated by the plaintiff that despite several demands and also after the issuance of the legal notice calling upon the defendant to repay

the amount, the defendant neither responded to the notice nor cared to pay the amount. Hence, the suit.

4. The defendant has pleaded that she has not borrowed the suit amount from the plaintiff and executed the suit promissory note in favour of the plaintiff. Thus according to the defendant, the suit promissory note is a forged one and fabricated by the plaintiff for the purpose of this case. It is further stated that the name of the defendant is Cross Mary and she does not have any nick and alias name. The defendant has no acquaintance whatsoever with the plaintiff and therefore, is not liable to pay any amount to the plaintiff and the suit is liable to be dismissed.

5. The plaintiff has levied the suit against the defendant for recovery of money on the basis of the promissory note. The plea has been taken by the defendant that the suit promissory note is a fabricated one. In such view of the defence put forth by the defendant, it is evident that the burden of proving that the defendant had borrowed the amount from the plaintiff as pleaded and executed the suit promissory note in his favour squarely rests upon the plaintiff. With reference to the same, the plaintiff has examined himself as PW1 and further examined the scribe of the promissory note as PW2 and the promissory note has been marked as Ex.A1. Both PWs1 and 2 have consistently and clearly deposed about the borrowal of the amount by the defendant from the plaintiff and the execution of the suit promissory note by the defendant in favour of the plaintiff. The evidence of PWs1 and 2, with reference to the above aspect, as rightly found by the courts below, are found to be inspiring, convincing and also trustworthy. No material, as such, has been pointed out by the defendant to discredit their testimony. However, it is argued by the defendant's counsel that PW2 in his evidence has not deposed about the presence of the persons at the time of the execution of the promissory note as stated by PW1 and thus according to him, there are material contradictions in the evidence of PWs1 and 2. However, the above pointed contradiction in my opinion and as rightly held by the Courts below do not in any manner affect the plaintiff's case or undermine the testimony of PWs1 & 2. Barring the above point, the defendant has not projected anything to reject the evidence of PWs1 & 2. On the other hand, as rightly found by the Courts below, it is seen that PWs1 & 2 have clearly deposed about the factum of the borrowal of the defendant of the suit amount from the plaintiff and the execution of the promissory note, in evidence thereof, in favour of the plaintiff.

6. It is found that prior to the institution of the suit, the plaintiff has issued the legal notice calling upon the defendant to pay the suit amount. The receipt of the same has

not been disputed. The notice and the acknowledgment card have been marked as Exs.A2 and 3. If really, the defendant has no acquaintance with the plaintiff and not borrowed the suit amount from the plaintiff and not executed the promissory note in favour of the plaintiff, as a prudent person, it could be seen that the defendant would have responded to the legal notice sent by the plaintiff appropriately. However, the defendant has not sent any reply to the same. The reasons given by the defendant is that on the receipt of the legal notice, according to her, she had met the son-in-law of the plaintiff and inasmuch as the plaintiff's son-in-law informed that legal notice had been sent by mistake, she had not taken any further action but kept quiet. The defendant is found to be an employed person and a school teacher and she cannot claim herself to be a greenhorn and novice. There is no material in support of the defence version that she had met the son-in-law of the plaintiff, after the receipt of the legal notice. When according to the defendant, she has no connection whatsoever with the plaintiff, it does not stand to reason as to how come, she had met the son-in-law of the plaintiff and on the mere assertion of the son-in-law that the notice had been sent by mistake, she had kept mum thereafter. The above said version of the defendant, for not sending the reply to Ex.A2 seems to be artificial and unacceptable.

7. However, with reference to the above issue, the defendant's counsel contended that the failure of the defendant in not responding to the legal notice is not fatal to her defence. In this connection, he placed reliance upon the decision reported in 1999 - 3 -L.W.643 (Kamalammal Vs. Daniel). However, on a perusal of the above said decision, it does not state that irrespective of the facts and circumstances of all the cases, the Court should hold that the failure to send the reply is not fatal. Further, it is found that in that particular case, on account of the illness pleaded by the party, considering the same, the Court has held that failure to send the reply notice cannot be taken adverse to the concerned party. However, in so far as this case is concerned, when the defendant is found to be a literate person and also employed as school teacher and the reason adduced by her, for non sending the reply to the legal notice is also not supported by any material, it could be seen that as rightly argued by the plaintiff's counsel, inasmuch as the defendant had borrowed the suit amount and unable to resist the claim of the plaintiff, she had kept quiet without responding to the legal notice. Therefore, the above aspect of the case also should be held against the defendant as put forth by the plaintiff.

8. Now, according to the defendant, she used to sign only in English and also not sign as Mary and her name is Cross Mary and

therefore, the suit promissory note not had been executed by her. In such view of the defence, it is found that at the time of cross examination of the defendant, she had been requested to write her name as Mary. However, the defendant has refused to accede to the same. This attitude of the defendant would only go to show that if she had written her name or signed as Mary as the truth would be divulged she has not readily responded to write or sign her name as Mary as requested by the plaintiff's counsel. With reference to the same, according to the defendant's counsel, if the Court had directed her to write or sign her name as Mary, she would have responded positively and therefore, the above piece of evidence on the part of the defendant should not be held against her. However, the defendant being a party to the suit, should assist the Court to decide the issue involved in the matter. If really, the defendant had not executed the suit promissory note and she is always in the habit of only signing in English as Cross Mary and not as Mary either in English or Tamil, nothing prevented the defendant from writing or signing as Mary as and when she had been requested and she need not wait for the direction of the Court with reference to the same. That apart, nothing prevented the defendant from suo motu giving her specimen writing or signature as Mary so as to enable the Court or the plaintiff to send the dispute signature in the promissory note and the admitted signature /writing for comparison by an expert. It is found that inasmuch as there is no document available containing the signature/writing of the defendant as Mary and also further, the defendant has also not responded positively to the request of the plaintiff with reference to the same as discussed above, it could be seen that the plaintiff has been handicapped to subject the signature contained in the promissory note for expert's scrutiny, but the same cannot be held against the plaintiff. In the light of the above discussions, considering the conduct and attitude of the defendant, it is found that failure of the defendant, deliberately to respond positively to the request of the plaintiff to give her writing /signature as Mary, the courts below have rightly taken adverse inference against the defendant. Nothing is pointed out to warrant any interference with reference to the above aspect of the matter.

9. As seen above from the evidence, the plaintiff has established his case on the basis of the evidence of PWs 1 & 2 and also Exs. A1 to 3. Per contra, no material, as such, has been placed by the defendant to discredit or undermine the case of the plaintiff, other than the interested testimony of the defendant. The documentary evidence placed by the defendant are found not advancing her defence. Inasmuch as the plaintiff has established his case without any doubt, it is found that the Courts below have held that the defendant has failed to discharge the same by adducing any evidence as enjoined under

Section 118 of the Negotiable Instrument Act. The same is also not found to be erroneous or unacceptable.

10. In the light of the above discussion, it is found that the Courts below have rightly appreciated the evidence on record and giving proper reasons and findings held that the plaintiff has established his case. No infirmity is ascribed or found in the judgment and decree of the Courts below. In such view of the matter, the other decisions relied upon by the defendant's counsel reported in 1998 - 3- L.W.312 (Arumugam Vs. M.S.Narasaiah), 2015 - 2 -L.W. 381 (M.Rani Vs. A.Bala @ Palaniammal), and 2014-3-L.W.644 (Robinson Vs. Ramachandran), as rightly argued by the plaintiff's counsel, are found to be not applicable to this case.

In conclusion, no substantial question of law is found to be involved in the second appeal. Resultantly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sms

To

1. The Additional District Judge/
Fast Track Court, Ariyalur.
2. The Principal District Munsif Court,
Ariyalur.

+1cc to Mr.K.S. Shankar Murali, Advocate, S.R.No.8965
+1cc to Mr.M.V. Krishnan, Advocate, S.R.No.9193

GJII(CO)
md(03/03/2017)

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M.P.No.1 of 2011