

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :12.10.2018
PRONOUNCED ON:25.10.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.555 of 2015
and
M.P.No.1 of 2015

R.Kaliappa Gounder

... Appellant/Respondent/Defendent

Vs.

C.Shanmuga Sundaram

... Respondent/ Appellant/Plaintiff

Prayer:Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 21.03.2013 made in A.S.No.33 of 2009 on the file of the III Additional District and Sessions Court, Coimbatore reversing the judgment and decree dated 29.07.2008 made in O.S.No.75 of 2007 on the file of the Subordinate Court, Pollachi.

For Appellant : Mr.G.T.Subramanian

For Respondent : Mrs.V.Srimathi

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 21.03.2013 passed in A.S.No.33 of 2009 on the file of the III Additional District and Sessions Court, Coimbatore, reversing the judgment and decree dated 29.07.2008 passed in O.S.No.75 of 2007 on the file of the Subordinate Court, Pollachi.

2. The parties are referred to as per the ranking in the trial court.

3. Suit for recovery of money.

4. The case of the plaintiff in brief is that the

defendant borrowed a sum of Rs.1,00,000/- from him to meet the family expenses on 19.01.2005 and in evidence thereof, executed a promissory note in his favour promising to repay the borrowed sum with interest at 12% per annum on demand and however, the defendant had failed to repay the borrowed sum with interest as promised, despite several requests made by the plaintiff and accordingly it is stated that the plaintiff has been necessitated to lay the suit for recovery of money from the defendant.

5. The case of the defendant in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. The defendant has not borrowed any amount from the plaintiff on 19.01.2005 as claimed and averred in the plaint and not executed any promissory note in favour of the plaintiff promising to pay the alleged borrowed sum with interest as averred in the plaint. The suit promissory note is a forged document and created by the plaintiff with an intention to get unlawful gain from the defendant and one month prior to the filing of the suit, a dispute arose between the defendant's son and the plaintiff in respect of parking of two wheelers on the way in front of the defendant's house and due to the abovesaid misunderstanding, the plaintiff has come forward with the false case and the plaintiff has not even issued any pre-suit notice claiming the amount from the defendant and therefore the plaintiff has no cause of action to institute the suit and the suit is thus liable to be dismissed.

6. In support of the plaintiff's case, P.Ws.1 to 3 were examined. Ex.A1 was marked. On the side of the defendant, D.W.1 was examined. Ex.B1 was marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit. On Appeal, the first appellate court, on an appreciation of the materials placed on record, was pleased to set aside the judgment and decree of the trial court and by way of allowing the Appeal preferred by the plaintiff, decreed the suit as prayed for. Impugning the same, the present Second Appeal has been preferred.

8. At the time of admission of the Second Appeal, the following substantial questions of law were formulated for consideration.

(1) Whether the Appellate Court is justified in shifting the onus of the case on the defendant, while the plaintiff is liable to prove his case especially when he failed to prove the case?

(2) Whether the Appellate Court right in not considering the material evidence and record before it and mistakenly giving a finding in favour of the plaintiff?

9. The suit has been laid by the plaintiff for recovery of money based on the promissory note. Now, according to the plaintiff, the defendant borrowed a sum of Rs.1,00,000/- from him on 19.01.2005 and in evidence thereof, executed the suit promissory note in his favour promising to repay the borrowed sum with interest at 12% per annum as and when demanded and the suit promissory note has been marked as Ex.A1. The defendant has taken the plea in his written statement that the suit promissory note is a forged document and that he had not borrowed any sum as alleged in the plaint from the plaintiff and contended that as the dispute arose between the plaintiff and the defendant's son qua the parking of the two wheelers in front of the defendant's house, it is stated that the plaintiff has come forward with the suit fabricating the promissory note and hence the suit is liable to be dismissed.

10. In the light of the above defence taken by the defendant denying the execution of the suit promissory note as well as the borrowal of the suit amount from the plaintiff as alleged in the plaint, the onus is upon the plaintiff is to establish that the defendant had borrowed the suit amount from him as stated in the plaint and in evidence thereof, he had executed Ex.A1 promissory note in his favour. To substantiate the abovesaid case of the plaintiff, the plaintiff has chosen to examine himself as P.W.1 and tendered evidence that the defendant had borrowed the suit amount from him on 19.01.2005 and executed the suit promissory note in his favour, promising to repay the borrowed sum on demand by the plaintiff. Despite cross examination, nothing has been culled out from P.W.1 to discredit his testimony with reference to the abovesaid case. The plaintiff in order to buttress his case, has also examined the scribe of the suit promissory note as P.W.2 and the attesor of the suit promissory note as P.W.3. The P.W.3 attesor has deposed in his evidence that he went to the plaintiff's house at 10.15 am on 19.01.2005 and found the plaintiff, the defendant and the scribe P.W.2 at the plaintiff's residence and accordingly deposed that the suit promissory note had been executed by the defendant in favour of the plaintiff for the amount borrowed by him from the plaintiff in a sum of Rs.1,00,000/- and that he had attested the suit promissory note. The scribe P.W.2 in his evidence has deposed that he had gone to the plaintiff's house at 10.30am and found the plaintiff, the defendant and the attesor and accordingly also testified that

he had prepared the said promissory note as per the instructions of the parties and that the defendant after borrowing the amount from the plaintiff, signed the suit promissory note in favour of the plaintiff and that the attesor P.W.3 had attested the document. The trial court on the basis of the contradiction as regards the evidence of P.Ws.2 and 3 with reference to the time at which they had reached the plaintiff's house, did not accept their evidence and thereby non suited the plaintiff's case. However, as rightly found by the first appellate court, the abovesaid discrepancy found in the evidence of P.Ws.2 and 3, the time at which they had reached the plaintiff's house on 19.01.2005, is found to be very trivial and inconsequential and by way of the same, it is seen that the plaintiff's case as such has not been undermined or defeated in any manner. When it is found from the evidence of P.Ws.2 and 3 that all were present at the relevant point of time on 19.01.2005 at the plaintiff's house and accordingly, all the three namely P.Ws.1 to 3 had 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 in evidence thereof, in such view of the matter, the discrepancy in the time gap of 15 minutes as spoken to by P.Ws.2 and 3, as rightly determined by the first appellate court, would not in any manner affect the plaintiff's case and on the other hand, on a reading of the evidence of P.Ws.2 and 3 in toto coupled with the plaintiff's evidence, it is seen that all the above three had clearly testified about the borrowal of the suit amount by the defendant from the plaintiff and the execution of the suit promissory note by the defendant in favour of the plaintiff with reference to the same. The defendant has not suggested any valid and acceptable motive on the part of P.Ws.2 and 3 to depose in favour of the plaintiff and against the defendant. Merely because, P.Ws.2 and 3 are related to the plaintiff that by itself would not in any manner be a factor to disbelieve their evidence, when their evidence is found to be otherwise inspiring, acceptable and trustworthy. As rightly put forth, normally the parties would be anxious and eager to take the assistance only from the persons who are known to them or related in the execution of the promissory note or other instruments which they rely upon for their transactions with the third parties and in such view of the matter, it is seen that the relationship of P.Ws.2 and 3 with the plaintiff, simplicitor would not be a ground to reject their testimony. That apart, the trial court has also disbelieved the plaintiff's case particularly, the plaintiff's evidence on the footing that the plaintiff has not averred about the fact that the defendant had approached the scribe at the first instance for the borrowal of the amount and only thereafter approached him as spoken to by the scribe P.W.2. As rightly determined by the first appellate court, there is no need on the part of the plaintiff to depose

about the abovesaid incident which had occurred between the scribe and the defendant as regards the borrowal and therefore the abovesaid reasoning projected by the trial court for disbelieving plaintiff's evidence and resultantly dismissing the plaintiff's case is found to be unacceptable and liable to be rejected. Similarly, the discrepancy pointed out by the trial court that as to who had accompanied the defendant to the plaintiff's residence also is found to be not material to disbelieve the plaintiff's case as such. The alleged contradictions pointed out by the trial court in the evidence of P.Ws.2 and 3 to non-suit the plaintiff's case are found to be not vital so as to disbelieve the plaintiff's case and in such view of the matter, as rightly put forth by the plaintiff's counsel, the plaintiff through his evidence as well as the evidence of the attesor and the scribe of the suit promissory note has clearly established the truth and genuineness of Ex.A1 promissory note and thereby clearly established the borrowal of the suit amount by the defendant from him on 19.01.2005 as averred in the plaint and the execution of the suit promissory note Ex.A1 by the defendant in evidence thereof.

11. In the light of the abovesaid factors, when the plaintiff has discharged the onus of proof resting upon him as regards the case projected by him, as rightly determined by the first appellate court, the burden shifts upon the defendant to repudiate the same. However, it is seen that the defendant has not placed any acceptable and reliable material in support of his defence version. It is has not been explained by the defendant as to why he had not endeavored to send the suit promissory note for comparison by an expert of the signature found in the suit promissory note with his other admitted signatures. When the burden shifts upon the defendant to disprove the plaintiff's version and when it is noted that the defendant has not endeavored to adduce any material with reference to the same and also not taken any steps to subject the suit promissory note for expert's scrutiny, in all, it is found that the defendant has failed to establish the falsity of the plaintiff's case.

12.No doubt, the plaintiff has not sent any pre-suit notice calling upon the defendant to pay the borrowed sum, however as rightly determined by the Courts below, the failure of the plaintiff in sending the pre-suit notice would not by itself, in any manner, affect the plaintiff's case. It is not required in all cases to send the pre-suit notice for demanding the payment of the amount or put forth the plaintiff's case.

13. The defendant has attributed a motive on the part of the plaintiff to institute the case against him. However,

as found by the Courts below, there is absolutely no material placed on the part of the defendant to establish that there had been a dispute between the plaintiff and his son qua the parking of the two wheelers in front of the defendant's house and when with reference to the abovesaid plea projected by the defendant, there is no material at all forthcoming on his part, it is seen that the motive aspect projected by the defendant for the institution of the suit by the plaintiff falls to the ground.

14. In this Second Appeal, the argument has been put forth by the defendant's counsel that the first appellate court has erred in shifting the onus of proof on the defendant when the duty is cast only upon the plaintiff to prove his case, particularly, when the defendant has challenged the truth of the suit promissory note. However, as above discussed, when the plaintiff has established his case in all aspects through the evidence of P.Ws.1 to 3 and when nothing has been placed on record to disbelieve their evidence and when the alleged contradictions regarding the evidence of P.Ws.2 and 3 are found to be inconsequential and not vital and when the reasonings adduced by the trial court for disbelieving their evidence are found to be immaterial and unacceptable, in such view of the matter, it is seen that the first appellate court had rightly found that the defendant having failed to establish his defence version after the plaintiff had established his case in all aspects and resultantly accepting the plaintiff's case, thereby, the abovesaid approach do not call for any interference and therefore the argument that the first appellate court had shifted the burden upon the defendant instead of the plaintiff as such cannot be countenanced in the light of the abovesaid factors. It is thus found that the first appellate court had rightly appreciated the materials placed on record in the correct perceptive and on an analysis of the same both on factual matrix as well as on legal basis found acceptance with the plaintiff's case and in such view of the matter, no interference is called for in the judgment and decree of the first appellate court in accepting the plaintiff's case and rejecting the defence version. The substantial questions of law formulated in the Second Appeal are accordingly answered against the defendant and in favour of the plaintiff.

15. In support of her contentions, the plaintiff's counsel placed relied upon the decisions of this Court dated 30.10.2014 passed in S.A.No.228 of 2008 [P.Gnanambal Vs. S.Indiradevi] and dated 15.02.2006 passed in S.A.No.192 of 2011 [R.Senbagadevi and two others Vs. C.Sundaramani]. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

16.For the reasons aforestated, the Second Appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

- 1.The III Additional District and Sessions Judge,
Coimbatore.
- 2.The Subordinate Judge, Pollachi.

Copy to

The Section Officer,
VR Section,
High Court,
Chennai.

+1cc to Mr.G.T.Subramanian, Advocate, S.R.No.72954

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.72833

S.A.No.555 of 2015
and
M.P.No.1 of 2015

SSD(CO)
GSP(29/01/2019)

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