

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1052 of 2002

C. Angamuthu ...Defendant/Appellant/ Appellant

Vs.

C. Senthamil Selvan ...Plaintiff/Respondent/ Respondent

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C. to set aside the Judgment and Decree dated 23.04.2002 passed by the Principal District Judge, Cuddalore, made in A.S.No.143/2001 confirming the Judgment and Decree of the Principal Sub Judge, Vridhachalam made in O.S.No.28 of 2000 dated 10.08.2001.

For Appellant : Mr.S.Ayyathurai

For Respondent : Mr.R. Venkatesulu
for Ms.Usha Raman

J U D G M E N T

The unsuccessful plaintiff, who lost the case before the lower court filed the present second appeal.

2. The sum and substance of the plaint are as follows:

The Plaintiff filed the suit for recovery of money for a sum of Rs.95,250/- being principal and interest due on promissory note dated 26.01.1997 executed by the defendant in favour of Senthilnathan for Rs.75,000/- payable with interest @ 12% p.a., The said Senthilnathan made over the promissory note in favour of the plaintiff on 05.12.1998. Thereafter, the plaintiff issued notice on 10.01.2000 to the defendant demanding the said amount due under the promissory note. Since the defendant did not discharge the liability, he filed the suit for recovery of the money.

3. The sum and substance of the written statement filed by the defendant is as follows:

The defendant's son-in-law/Mayavel had chit transaction with Ilangovan. In that process, Mayavel is liable to pay Rs.75,000/- to Ilangovan. Due to the threat made by Ilangovan

along with some other persons, on 26.01.1997 the defendant undertook to discharge the amount due by his son-in-law and thereby executed a promissory note as per the custom for double the amount in favour of Natarajan and another in favour of Senthilnathan on 26.01.1997. The defendant discharged the promissory note executed in favour of Natarajan. When the defendant demanded the other promissory note, he replied it was misplaced by him and he will return it later. The said Natarajan and Senthilnathan manipulated the suit promissory note and fabricated the promissory note. In order to wreck vengeance, he filed this vexatious suit.

4. After trial, the lower court decreed the suit in favour of the respondent/plaintiff. Aggrieved by the same, the appellant/defendant filed the appeal before the lower appellate court. The lower appellate court confirmed the Judgment and Decree granted in favour of the respondent/plaintiff. Aggrieved against which the present second appeal is filed.

5. At the time of admission, this court framed the following substantial questions of law:

1. Whether or not the Trial Court should order fresh notice of hearing to the party concerned when the court decides to proceed with the trial of the suit under Order 17 Rule 2.

2. Whether the Trial Court can ignore the interests of the party who remained absent when it decides the suit under Order 17 Rule 2 since statement of both the parties remain unchecked by cross-examination?

6. The learned counsel appearing the appellant would submit that the respondent/defendant admitted the execution of suit promissory note. So it is for the defendant to come forward to prove his case that there was no consideration for the suit promissory note. However, in order to prove the case, he himself examined as DW1. Accordingly, Exs.B2 and B3 were marked and the case was adjourned to 02.07.2001 for DW1 cross examination. On several dates, repeatedly the defendant was absent. Therefore, the lower court proceed the case in the absence of the defendant and closed his evidence based on the instruction given by the learned counsel appeared on behalf of the defendant. The reason for non-appearance before the lower court is that due to the unforeseen situations and after obtaining permission from his counsel, the defendant went to the pilgrimage centre, thereby he is not able to appear on the date fixed by the lower court. The act of lower court, without giving any opportunity to the defendant, proceeding the case under Order 17 Rule 2 and passing the decree in favour of the plaintiff, is not sustainable under law.

7. The learned counsel appearing for the respondent/plaintiff would submit that initially in order to prove the defendant's case, he examined himself and others and marked Exs.B1 to B3. After marking the said documents, the case was adjourned to 02.07.2001 for DW1 cross examination. On 02.07.2001, the concerned Judge was on Casual Leave and therefore, the case was adjourned to 05.7.2001 and again, at the instance of the defendant's counsel, it was adjourned to 17.07.2001. Thereafter, the matter was adjourned for cross examination of DW1 on 24.07.2001. Again, it was adjourned to 27.07.2001 and thereafter to 01.08.2001. On 01.08.2001, the defendant was called absent and again the matter was posted to 02.08.2001. On that day, the defendant's counsel reported 'no instruction' and the defendant was called absent. Therefore, the lower court has no other option except to proceed the case as per the procedure contemplated in CPC. Accordingly, the lower court proceed the case with the available materials and documents under Order 17 Rule 2 of CPC. Therefore, the lower court as well as the lower appellate court did not commit any error in granting decree in favour of the plaintiff. Even in factual aspects also, no document was produced by the defendant nor consideration was paid to the plaintiff.

8. On perusal of the lower court as well as the lower appellate court orders, it is seen that the defendant was repeatedly called absent on the aforesaid dates. Therefore, the court has no other option except to proceed the case under Order 17 Rule 2 CPC.

9. In the above said circumstances, I do not find any error in the manner in which the court passed the decree in favour of the plaintiff.

For ready reference, Order 17 Rule 2 is extracted as follows:

"2. Procedure if parties fail to appear on day fixed:

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit."

10. On perusal of the above provisions, if the parties failed to appear on the adjourned dates, the court may proceed to dispose the suit in one of the modes directing in that behalf and make such order as it thinks fit. Admittedly, the defendant himself examined as DW1 before the lower court and Exhibits Exs.B1 to B3 were marked. Thereafter, at the request of the defendant, the case was adjourned on condition that if the defendant fail to appear on the adjourned date, the court may proceed further as contemplated under Order 17 Rule 2.

11. In the present case, the lower court, in order to give opportunity to the defendant, granted nearly seven adjournments in favour of the defendant for his appearance. However, he did not appear before the lower court and even he has not given any instructions to the learned counsel appearing on behalf of him.

12. In view of the above, the act of the lower court in proceeding the case and passing the decree on merits in favour of the appellant/plaintiff need not be interfered with. Accordingly, the substantial questions of law are answered against the appellant.

In the result, the second appeal fails and accordingly, the same is dismissed. No costs.

Sd/-

Assistant Registrar(CS VIII)

//True copy//

Sub Assistant Registrar

gv

To

1. The Principal District Judge,
Cuddalore.
2. The Principal Sub Judge,
Vridhachalam
3. The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.S.Ayyathurai, Advocate SR.No.5687

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SKV(CO)
GN(06/03/2018)