

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 19.06.2018

PRONOUNCED ON: 20.07.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1432 of 2001

K.M.Thangamuthu ...Appellant/defendant

Vs

Velliangiri Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C, against the judgment and decree dated 30.06.2000 and made in A.S.No.257 of 1998 on the file of the learned I Additional District Judge - cum - Chief Judicial Magistrate, Erode, reversing the Judgment and Decree dated 30.06.1997 and made in O.S.No.288 of 1993 on the file of Sub-Court, Dharapuram.

For Appellant : Mr.N.A.Nissar Ahamed
for Mr.R.Kottravel

For Respondent : Set ex parte

JUDGMENT

This Second Appeal has been filed by the defendant against the judgment and decree passed by the First Additional District Judge - cum - Chief Judicial Magistrate, Erode, in A.S.No.257 of 1998 dated 30.06.2000, reversing the judgment and decree passed by the Sub-Judge, Dharapuram in O.S.No.288 of 1993 dated 30.06.1997.

2. The respondent herein has filed a suit in O.S.No.288 of 1993 on the file of the Sub-Judge, Dharapuram for recovery of Rs.40,800/- and further interest based on the Promissory Note said to have been executed by the appellant herein. The learned Sub-Judge, Dharapuram, by the judgment dated 30.06.1997 has dismissed the said suit with cost. Aggrieved by the same, the respondent herein has filed an appeal in A.S.No.257 of 1998 on the file of the First Additional District Judge - cum - Chief Judicial Magistrate, Erode. The learned First Additional District Judge - cum - Chief Judicial Magistrate by the judgment dated 30.06.2000 has allowed the said appeal and set-aside the judgment and decree passed by the trial Court and decreed the suit directing the defendant to pay the suit amount of Rs.40,800/- with interest for the principal amount of Rs.30,000/- at the rate of 9% per annum from the date of suit till the date of decree and thereafter

at the rate of 6% per annum till the date of realization and also directed the defendant to pay the cost. Feeling aggrieved, the defendant has filed the present Second Appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3.The averments made in the plaint are, in brief, as follows:

On 17.08.1990, the defendant borrowed a sum of Rs.30,000/- from the plaintiff and executed a Promissory Note agreeing to repay the said amount on demand with interest at the rate of 5 paise for Rs.100/- per day. Though in the Promissory Note the defendant has agreed to pay interest at the rate of 18% per annum, the plaintiff is restricting interest at the rate of 12% per annum. In spite of the repeated demands made by the plaintiff, the defendant did not re-pay the said amount. Hence, the plaintiff was constrained to file the suit for recovery of the amount.

4.The averments made in the written statement are, in brief, as follows:

It is false to state that on 17.08.1990, the defendant borrowed a sum of Rs.30,000/- from the plaintiff and executed the suit Promissory Note. The defendant has not executed any Promissory Note on 17.08.1990. The signature and the thumb impression found in the suit Promissory Note are forged. On 15.02.1989, the defendant borrowed a sum of Rs.30,000/- from the plaintiff and executed a Promissory Note. Subsequently, the defendant has sold his property to one Devi, W/o. Govindasamy for Rs.1,75,000/- and in the said sale deed the debt which is liable to be paid by the defendant to the plaintiff based on the Promissory Note dated 15.02.1989 has been mentioned. The purchaser Devi has paid the principal amount to the plaintiff and the defendant has paid interest on 22.10.1991 and the said purchaser Devi has received the said Promissory Note. Apart from the aforesaid debt, the defendant has not borrowed any amount from the plaintiff and he has not executed any promissory note also. So, the suit Promissory Note dated 17.08.1990 is a forged one. Further, there was no necessity for the defendant to borrow any loan on 17.08.1990. Therefore, the defendant prayed to dismiss the suit.

5. Based on the aforesaid pleadings, the learned Sub-Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and also examined two more witnesses as P.W.2 and P.W.3. He has marked Ex.A1 to Ex.A5 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and he has examined three more witnesses as D.W.2 to D.W.4. He has marked Ex.B1 to Ex.B10 as exhibits.

6. The learned Sub-Judge after considering the materials placed before her, came to the conclusion that the signature found in the suit Promissory Note is not that of the defendant

and hence that the suit Promissory Note is not a genuine one. Accordingly, she dismissed the suit with cost. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.257 of 1998 on the file of the first Additional District Judge-cum-Chief Judicial Magistrate, Erode. The learned first Additional District Judge-cum-Chief Judicial Magistrate, has allowed the said appeal and set-aside the judgment and decree passed by the trial Court and decreed the suit as aforesaid. As against the same, the defendant has filed the present Second Appeal.

7. At the time of admitting the Second Appeal, this Court has formulated the following substantial questions of law:-

"1) Whether the Lower Appellate Court is right in shifting the burden of proof on the appellant?

2) Whether the Lower Appellate Court is right in holding that the suit pro-note had been executed by the appellant?

3) Whether the Lower appellate Court is right in not following the mandatory provisions of Order 41 Rule 31 CPC and in not assigning reasons for differing with the conclusion arrived by the trial Court?'"

8. When this Second Appeal was posted for hearing on 19.06.2018, there was no representation for the respondent. Hence, the respondent was called absent and set ex-parte. After hearing arguments of Mr.N.A.Nissar Ahmed, learned counsel for the appellant and on perusing the records, Judgment is being passed in this Second Appeal.

9.Question Nos. 1 to 3:

The learned counsel for the appellant has submitted that the First Appellate Court erred in reversing the well considered judgment of the trial Court. He further submitted that the First Appellate Court failed to consider that the defendant borrowed a sum of Rs.30,000/- only on 15.02.1989 and executed Ex.B2 Promissory Note in favour of the plaintiff and this fact has been mentioned in the Ex.B1 sale deed itself. He further submitted that if really the defendant had borrowed any amount based on the suit Promissory Note dated 17.08.1990, he would have mentioned this fact also in Ex.B1 sale deed. He further submitted that Ex.B2 would show that the purchaser namely Devi has paid the principal amount of Rs.30,000/- and the defendant has paid the interest and thereafter the said Devi has obtained the said Promissory Note from the plaintiff. He further submitted that without assigning any valid reason, the first Appellate Court has reversed the findings of the trial Court and hence he prayed to allow this Second Appeal and set-aside the judgment and decree passed by the first

Appellate Court and restore the judgment and decree passed by the trial court and dismiss the suit.

10. According to the plaintiff, on 17.08.1990, the defendant borrowed a sum of Rs.30,000/- from him and executed the suit Promissory Note. The case of the defendant is that he has not received any amount on 17.08.1990 and executed the suit Promissory Note. According to him, he borrowed a sum of Rs.30,000/- only on 15.02.1989 and for that he executed a Promissory Note on 15.02.1989 itself and subsequently on 21.10.1991, he has sold his property to one Devi W/o.Govindasamy and in the said sale deed, the debt which was borrowed by him from the plaintiff on 15.02.1989 has been mentioned and the purchaser undertook to discharge the said debt and accordingly on the next date, i.e. On 22.10.1991, the said purchaser has paid the principal amount of Rs.30,000/- to the plaintiff and he has paid the interest and the purchaser has got back the said Promissory Note.

11. The defendant has produced a copy of the aforesaid sale deed dated 21.10.1991 and marked as Ex.B1. He has also produced the Promissory Note dated 15.02.1989 said to have been executed by him in favour of the plaintiff and marked as Ex.B2. Before the trial Court, the plaintiff has examined himself as P.W.1 and marked the Promissory Note dated 17.08.1990 said to have been executed by the defendant as Ex.A1. He has examined the scribe of the said Promissory Note as P.W.2. He also examined hand writing and finger print expert as P.W.3. The report submitted by the P.W.3 and the photographs taken by him have been marked as Ex.A2 to Ex.A5. Likewise the defendant examined himself as D.W.1. He has examined the scribe of the Ex.B2 Promissory Note as D.W.2. He also examined hand writing and finger print expert as D.W.3. He has examined purchaser of his property as D.W.4. He has marked certified copy of the fair and decreetal order passed in I.P.No.3 of 1994 on the file of the Sub-Judge, Dharapuram and marked as Ex.B3 and Ex.B4. He also marked the hand writing and finger print expert's report and photographs taken by the said expert as Ex.B5 to Ex.B10.

12. The hand writing and finger print expert, who was examined as P.W.3 deposed that the signature and the thumb impression found in the Ex.A1 Promissory Note are that of the defendant. On the contrary, the hand writing and finger print expert, who was examined on the side of the defendant as D.W.3 gave evidence that the signature and the thumb impression found in Ex.A1 Promissory Note are not that of the defendant. In the said circumstances, the learned trial Court Judge has taken a task of comparing the disputed signature of the defendant found in Ex.A1 Promissory Note with the admitted signatures of the defendant found in vakalat, written statement, Ex.B1 sale deed and served summons and came to the conclusion that the admitted signatures of the defendant have not been called with the disputed signature found in the

Ex.A1 Promissory Note. But the learned trial Court Judge has not stated any reason as to how the admitted signatures of the defendant are differed from the disputed signature of the defendant found in the Ex.A1 Promissory Note.

13. According to the plaintiff, with a view to cheat him, the defendant has created the Ex.B1 sale deed by giving false date of the Promissory Note. So, on the date of execution of Ex.B1 sale deed itself, the defendant would have planned to put his signature in a different manner. Only thereafter, the vakalath, written statement, served summons came into existence. Those documents came into existence only after dispute arose. So, it would not be proper to compare the signatures found in those documents with the signature found in Ex.A1 Promissory Note.

14. Ex.A1 Promissory Note is dated 17.08.1990. Both the parties have not made any attempt to produce admitted signature of the defendant for the contemporary period. But on the other hand, they have obtained experts opinion with the documents which came into existence after arising dispute between the parties. The trial Court also not directed the parties to produce the admitted signature made by the defendant during the contemporary period of Ex.A1. As already pointed out that the trial Court has compared the signatures with the documents came into existence after dispute arose and therefore the said findings cannot be accepted.

15. Admittedly, the case of both parties is that there was only one transaction between them. The plaintiff is relying upon one Promissory Note and the defendant is relying upon another Promissory Note. The defendant has stated in his written statement that on 22.10.1991, his purchaser namely Devi has paid the principal amount of Rs.30,000/- and he has paid the interest. But he has not stated in his written statement that how much amount he has paid towards interest. Only in his evidence, he has stated that he has paid a sum of Rs.9,660/- as interest to the plaintiff. If really the defendant has paid interest and his purchaser has paid principal amount to the plaintiff, they would have obtained voucher from the plaintiff to that effect or at least they would have obtained endorsement to that effect from the plaintiff in the Ex.B2 Promissory Note itself. But they have not obtained either voucher or endorsement to show that they have paid amount to the plaintiff for the debt mentioned in Ex.B2.

16. The defendant while examining himself as D.W.1 has stated that on the date of execution of Ex.B1 sale deed, the plaintiff was present. If really the plaintiff was present on that date and also agreed to receive the amount from the defendant's purchaser (D.W.4), he would have signed as witness in Ex.B1 acknowledging the recitals found in EX.B1. But the plaintiff has not signed as witness in Ex.B1. Except the oral

evidence of the D.W.1 and D.W.4, there is no other evidence to show that the plaintiff was present at the time of executing Ex.B1 sale deed. In the absence of any documentary evidence, the oral evidence of the D.W.1 and D.W.4 that the plaintiff was also present at the time of execution of Ex.B1 sale deed cannot be accepted. Therefore, it is clear that the Exs.B1 and B2 were created by the defendant in collusion with the DW4 with a view to defraud the plaintiff.

17. It is also to be pointed out that in the written statement, the defendant has not stated any motive for filing false case against him by the plaintiff. If really the plaintiff has received the amount from the defendant, there was no necessity for him for filing any false suit against the defendant. Since admittedly there was only one transaction between the parties, if Ex.B2 goes, then it has to be presumed that Ex.A1 is a genuine Promissory Note. Further the evidence of PW2 who is the scribe of Ex.A1 would clearly establish that the defendant has executed Ex.A1.

18. It is also to be pointed out that in the written statement, the defendant has stated that there was no necessity for him to borrow a sum of Rs.30,000/- from the plaintiff on 17.08.1990. The recitals found in Ex.B1 would falsify the aforesaid defence. In Ex.B1, the defendant has admitted that he borrowed a sum of Rs.35,000/- from one S.Thangaraj S/o.Samyappa Gounder on 15.09.1990. The suit Promissory Note is dated 17.08.1990. So, even as per Ex.B1, the defendant was in need of money in the month of September 1990 and that being so, he cannot take a plea that in the month of August 1990, he was not in need of money. Therefore, the contention of the defendant that there was no necessity for him to borrow a sum of Rs.30,000/- from the plaintiff on 17.08.1990 is false. The first Appellate Court has rightly come to the conclusion that the defendant has executed the suit Promissory Note and the said Promissory Note was supported by the consideration. It cannot be said that the findings of the first Appellate Court are perverse and therefore, this Second Appeal has to be dismissed. Accordingly these substantial questions of law are answered against the appellant / defendant.

19. In the result, the Second Appeal is dismissed. Since, the respondent / plaintiff has not contested this Second Appeal, he is directed to bear his own cost in this Second Appeal.

Sd/-
Assistant Registrar(CS-VIII)

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Sub Assistant Registrar

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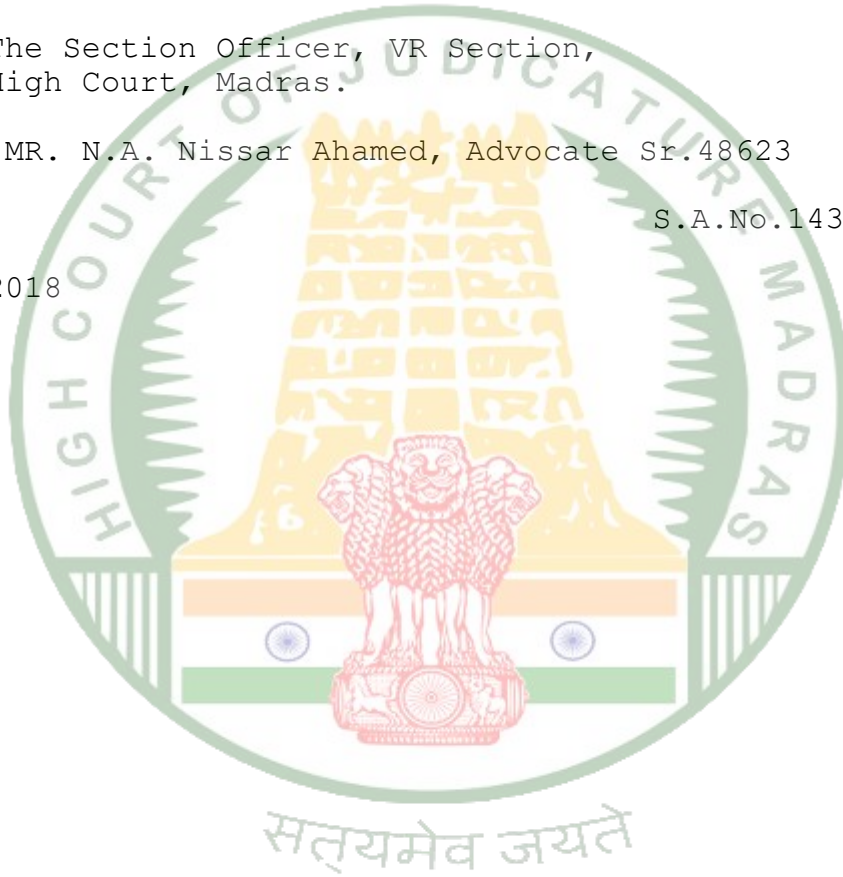
1. The I Additional District Judge - cum -
Chief Judicial Magistrate,
Erode.
2. The Sub-Court,
Dharapuram.

Copy to: The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to MR. N.A. Nissar Ahamed, Advocate Sr.48623

S.A.No.1432 of 2001

RJI(CO)
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