IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 07.03.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.359 of 2008 &
M.P.No.1 of 2008

K.Kuppusamy ...Appellant/Plaintiff

Vs

1. M/s.P.Chennimalai Gounder & Sons
   Rep. by its Partner
   Mr.C.Somasundaram

2. C.Somasundaram
3. C.Ramasamy (deceased)
4. Pappathi
5. Maheswari @ Nithya

(Respondents 4 and 5 brought on record as LRs of the deceased third respondent vide Order of Court dated 15.02.2019 made in CMP No.3944 of 2019)

... Respondents/Defendants /LRS of Defendants

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree passed in A.S.No.12 of 2007 dated 06.12.2007 on the file of the Additional District Court cum Fast Track Court, No.I, Erode confirming the judgment and decree passed in O.S.No.898 of 2001 dated 11.08.2004 on the file of the I Additional Sub Court, Erode.

For Appellant : Mrs.Chitra Sampath Senior Counsel for Mr.S.Saravanan

For Respondents: Mr.A.K.Kumarsamy, Senior Counsel for Mr.Kaithamalai Kumaran - R2, R4 & R5

No appearance - R1

JUDGMENT

Aggrieved over the concurrent finding of the Courts below, this Second Appeal has been filed.

The suit has been filed for recovery of a sum of Rs.4,36,614/- on the basis of a loan of a sum of Rs.4,20,000/- said to have been advanced to the defendants 2 and 3 on 01.10.2001 and for the said loan, they had issued a cheque dated 02.11.2001. When the above cheque was presented for encashment, the same was dishonoured with an endorsement that cheque amount has not been deposited in the bank. Therefore, legal notice was issued. Hence, the suit.

The defendants have taken a specific stand that they never borrowed any amount on 02.11.2001. The first defendant partnership firm has become defunct in the year 1992. The cheque in question was issued in the year 1991. It is the further contention of the learned counsel for the defendants that they borrowed money from one Mani in the year 1991 and issued a blank cheque for the said borrowal. The amount due to the said Mani has already been settled as early as in the year 1992. Ever since 1994, no transaction or borrowal has been made in the accounts of the defendants. The plaintiff, who is a close friend of the said Mani, by misusing the blank cheque, has filed the present suit.

The trial Court has dismissed the suit and the first appellate Court also confirmed the judgment of the trial Court.

It is relevant to note that in the first appellate Court, the appellant has filed an application under Order 41 Rule 27 in I.A.No.367 of 2007 for filing additional documents, namely State Bank of India pass book of the plaintiff to show that the amount has been withdrawn from the bank and also bank details of the defendants and to show that the accounts are operative till the year 2002. The first appellate Court has dismissed the above application as unnecessary and dismissed the appeal. As against which, the present Second Appeal has been filed.

The following substantial questions of law have been raised by the appellant :

1. Whether the Courts below are right in law in not decreeing the suit when the

defendant/respondent has failed to rebut the presumption with acceptable evidence

as contemplated under Section 118 of the Negotiable Instruments Act?

2. Whether the Courts below are right in not drawing any adverse inference against the defendant/respondent when they has withheld necessary documents namely the statement of account or pass book fro being produced into the Court, which are in their exclusive custody, get a wrongful gain over the plaintiff and not dismissing the caw of the respondent/defendant?

3. Whether the lower appellate Court is right in law in following the mandatory provisions of Order 41 Rule 31 of C.P.C.?

4. Whether the lower appellate Court is right in law in dismissing the I.A.No.574 and 575 of 2004 filed under Order 41 Rule 27 of C.P.C. Without assigning any reasons as to why the additional documents cannot be accepted?

5. Whether the Courts below are right in law in casting the burden of the plaintiff when Section 18 of the Negotiable Instruments Act creates a presumption against the defendant/respondent as to the passing the consideration and the burden lies on the defendant/respondent to discharge the presumption?

6. Whether the Courts below have misread the pleadings, evidences placed before it and relied upon the documents created by the defendant which have remained unauthenticated either by independent body or bank for dismissing the suit of the plaintiff/appellant thereby resulting in miscarriage of justice and hence perverse?

The learned Senior Counsel appearing for the appellant would contend that the additional documents sought to be filed are relevant to prove the consideration on the said cheque and also to disprove the allegation of the defendants that they closed the account in the year 1992 itself. If those documents are properly received in evidence, the entire burden will shift on to the defendants to rebut the legal presumption available to the negotiable instrument. The first appellate Court has not even considered those documents and simply dismissed the application while disposing the Second Appeal. It is also contended by the learned Senior Counsel for the appellant that those documents are necessary to assess the entire suit to arrive at a finding in the appeal. Hence, prayed for allowing the application filed under Order 41 Rule 27 CPC and to remand back the suit to the first appellate Court.

The learned counsel for the respondent has contended that the appellant has already adduced evidence on his side and those documents are unnecessary and hence, submitted that the judgment of the first appellate Court does not require any interference.

Heard the learned Senior Counsel for the appellant and the learned counsel for the respondents and perused the entire materials available on record.

The suit has been laid for recovery of money on the basis of the cheque dated 02.11.2001. It is the specific contention of the plaintiff that the defendants had borrowed the amount and issued a cheque. Whereas, the defendants have taken a defence that they have not issued a cheque nor borrowed any amount. Their main contention is that in the year 1991, they issued a cheque to one Mani. Further their specific defence is that, the first defendant's bank account has been closed as early as 1992 and the accounts have not been operated.

Based on the above pleadings, the trial Court has dismissed the suit. However, in the first appellate Court, the appellant filed an application to show that the bank accounts of the defendants are in operation till 2003. Further, they have also sought to mark statements obtained from the State Bank of India through Court summons. Besides, they have also filed the bank pass book of the plaintiff to show that they had withdrawn a sum of Rs.four lakhs from the plaintiff bank to prove consideration.

In a suit based on the negotiable instrument, though initial burden always lies on the plaintiff to prove the execution, once, the execution is proved, the statutory presumption comes into operation. The defendants, of course, can rebut such legal presumption not only by direct evidence but also by various circumstances. In nutshell, the burden of proof in cases of this nature would not be constant, would keep on shifting to other side on producing relevant documents. Once, the defendant is able to rebut the presumption, then the burden shifts on to the plaintiff to prove consideration. Therefore, to assess the burden of proof between the parties, the documents sought to be filed in I.A.No.367 of 2007 by the appellant is very much relevant, considering the nature of suit filed by the appellant. Only, when those documents are brought on record, the Court can decide the issue fairly and to find out whether the burden of both sides have been properly discharged. If the documents are not brought on record, there will be finding merely on the basis of the available evidence.

It is to be noted that though for receipt of such documents due deligence should have been shown by the parties, the fact remains that the additional documents infact enables the Court to decide the issue effectively. It is further to be noted that those documents are very much relevant to decide the entire issue, the burden of proof and discharge and proof of consideration etc. all depend on those documents. Therefore, this Court is of the view that without discussing the above documents, the finding of the first appellate Court cannot stand.

Accordingly, this Second Appeal is allowed and the judgment of the first appellate Court is set aside and the appeal is remanded to the first appellate Court under Order 41 Rule 23 Code of Civil Procedure. The application filed in I.A.No.367 of 2007 is allowed and the finding of the first appellate Court in the application is set aside and the first appellate Court is directed to receive the documents filed along with the application and give an opportunity to both sides to adduce evidence on the documents and decide the entire appeal afresh. Such exercise shall be completed within 8 months from the date of receipt of a copy of this Order. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Judge,
   Fast Track Court No.I, Erode.

2. The I Additional Subordinate Judge,
Erode.

Copy to

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

+1cc to Mr.S.Saravanan, Advocate Sr.21367
+1cc to Mr.S.Kaithamalai Kumaran, Advocate Sr.21217

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ks[co]
srg 09/07/2019