

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.11.2019

DELIVERED ON : 19.11.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.531 of 2007

1.M.Mariappan
2.M.Indirani
3.Minor M.Manikandan Appellants/ Defendant
(Represented by his mother 2nd Appellant)

Vs

1.S.Arumugam1st Respondent/ Plaintiff
2.A.M.ElangovanRespondent/ Defendant

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 02.03.2006 made in A.S.No.94 of 2005 on the file of Principal District Judge, Salem insofar as partly allowing the appeal against the Judgment and decree dated 15.10.2003 made in O.S.No.641 of 2001 on the file of the Principal District Munsif, Salem.

For Appellants : Ms.K. Janani for
Mr.N.S.Sivakumar

For Respondents : No appearance

JUDGMENT

This Second Appeal has been filed challenging the judgment and decree dated 02.03.2006 passed by the Principal District Judge, Salem in A.S.No.94 of 2005 partly allowing the appeal filed against the Judgment and decree dated 15.10.2003 passed by the Principal District Munsif Court, Salem in O.S.No.641 of 2001.

Brief facts leading to the filing of this Appeal:

2. The Appellants are the defendants 1 to 3 in the suit O.S.No.641 of 2001 on the file of the Principal District Munsif Court, Salem. The first respondent is the plaintiff and the second respondent is the fourth defendant in the said suit.

3. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

4. The plaintiff filed the suit O.S.No.641 of 2001 on the file of the Principal District Munsif, Salem against the defendants seeking the following reliefs: (a) to direct the defendants 1 and 2 to repay the suit amount of Rs.12,000/- along with subsequent interest thereon at 24% per annum till the date of realisation or in the alternative direct the fourth defendant to pay the entire suit claim instead of the defendants 1 and 2 to the plaintiff; (b) restraining the defendants 1 to 3 from in any way either alienating or encumbering the suit property either to the 4th defendant or his order in pursuance of the registered sale agreement 3/2000 till the realisation of the entire suit claim along with the subsequent interest thereon till date of realisation; and (c) also to award the costs of the suit.

5. It is the case of the plaintiff that the defendants 1 and 2 borrowed a sum of Rs.12,000/- on 19.07.1999 from the plaintiff for their urgent business needs. According to the plaintiff, on 19.07.1999, the defendants 1 and 2 have executed a Promissory Note in favour of the plaintiff for a sum of Rs.12,000/- and agreed to repay the loan amount of Rs.12,000/- along with interest at the rate of 24% per annum. According to the plaintiff, the defendants 1 and 2 failed to repay the loan amount inspite of repeated demands and requests. It is also his case that the defendants 1 to 3 with ulterior motive have entered into an agreement of sale with A.Elangovan who is the fourth defendant in the suit to sell their property to deprive the plaintiff as a security to recover his dues. According to the Plaintiff, they came to know about the sale, when the plaintiff obtained an encumbrance certificate from the office of Joint Sub-Registrar No.1, Salem East Registration District, Salem. According to the plaintiff, the defendants 1 and 2 have entered into a sale agreement with the fourth defendant only with the unlawfull intention of defrauding the plaintiff. With these averments, the suit was filed for the reliefs sought for in the plaint.

6. The second defendant filed a written statement which was adopted by the first and third defendants. According to the defendants 1 to 3, the defendants 1 and 2 did not borrow a sum of Rs.12,000/- from the plaintiff on 19.07.1999 and they also did not execute any Promissory Note in favour of the Plaintiff. According to the defendants 1 to 3, the plainitff has no capacity to advance a sum of Rs.12,000/- to the defendants 1 and 2 on 19.07.1999. According to the defendants 1 to 3, the signatures of the defendants have been forged by the plaintiff

in the Promissory Note and the Promissory Note is a fabricated document. According to the defendants 1 to 3, they are not liable to pay any amount to the plaintiff as they have not borrowed any money from the plaintiff. They have also denied in the written statement, the allegations of the plaintiff that only with the unlawful intention of defrauding the plaintiff, the defendants 1 to 3 have entered into an agreement of sale with the fourth defendant.

7. The Trial Court after framing issues and after trial, dismissed the suit filed by the plaintiff by its Judgment and decree dated 15.10.2003 passed in O.S.No.641 of 2001. Aggrieved by the dismissal of the suit, the plaintiff preferred an appeal before the Principal District Court, Salem in A.S.No.94 of 2005. By Judgement and Decree dated 02.03.2006 passed in A.S.No.94 of 2005, the lower appellate court partly allowed the appeal filed by the plaintiff by directing the defendants 1 and 2 to pay the plaintiff the suit amount with subsequent interest at the rate of 9 % per annum from the date of suit till the date of realisation with costs. However, the lower appellate court rejected the second prayer sought for in the plaint to restrain the defendants 1 to 3 from alienating or encumbering the suit property either to the 4th defendant or his order in pursuance of the registered sale agreement 3/2000 till the realisation of the entire suit claim along with the subsequent interest thereon till date of realisation. Aggrieved by the Judgment and decree dated 02.03.2006 passed by the learned Principal District Judge, Salem in A.S.No.94 of 2005, this second appeal has been filed by the defendants 1 to 3 in the suit.

8. Heard Mr.N.S.Sivakumar, learned counsel for the Appellants. Despite service of notice on the respondents and their names having been printed in the cause list today, no one has entered appearance on the side of the respondents.

Discussion:

9. At the time of admission of this second appeal on 11.06.2007, the following substantial question of law was formulated by this Court:

"Whether the lower appellate court is correct in law in holding that since the defendants have not taken steps to get the expert opinion to prove the thumb impression and the signature in Ex.A1 Pronote, the execution is proved? "

10. The defendants 1 to 3 who are the Appellants herein have categorically disputed the availing of loan from the plaintiff and they have also disputed the execution of any promissory note in favour of the plaintiff as seen from their written statement as well as from their deposition. PW1 who is the plaintiff has deposed that he knew the defendants 1 to 3 only through PW3 who is the witness in the alleged Promissory Note (Ex.A1). PW1, the plaintiff has also deposed that he did not know who had written the Promissory Note and the signature of the witness in the promissory note. PW1 has also admitted that he did not know the date on which he advanced money to the first defendant and he has also admitted that the statement in the promissory note are written in four different inks.

11. The initial burden of proving that the defendants 1 to 3 availed loans and executed a promissory note is on the plaintiff. In the case on hand, the defendants 1 to 3 have categorically denied the execution of the promissory note both in their pleadings as well as in their deposition.

12. This Court also perused and examined the promissory note (Ex.A1). As seen from the promissory note (Ex.A1), the statements in the promissory note are written in four different inks. When the execution of promissory note is doubtful, the initial burden of proving the execution of the promissory note has not been discharged by the plaintiff. The plaintiff ought to have let in evidence as to why the statements in the promissory note have been written in four different inks. Only in cases where the signature of the borrower in the promissory note is proved, the initial burden of proof is discharged by the plaintiff and shifted to the defendants. But in the case on hand, the initial burden of the plaintiff to prove his case has not been discharged as the execution of the promissory note Ex.A1 is itself doubtful from the evidence available on record.

13. The Trial Court has duly considered the evidence available on record and only thereafter has come to the right conclusion that the plaintiff has not proved his case and consequently dismissed the suit. However, the lower appellate court in the absence of any material evidence has come to the erroneous conclusion that the plaintiff has discharged the initial burden of proof as to the execution of the suit promissory note and passing of consideration for the suit promissory note.

14. The lower appellate court failed to appreciate the vital material contradictions in the deposition of PW1 and PW3. PW2 deposed that the stamp papers were purchased and brought by PW1. PW2 also admitted that the promissory note was written in three inks but PW3 deposed that the stamp papers were purchased and brought by the first defendant. PW3 also deposed that the signature in the promissory note did not tally with the signature put below after that. The lower appellate court erred in concluding that the plaintiff has proved the execution of the promissory note (Ex.A1) on the ground that DW1 in his chief examination has conceded for a decree to be passed against him. The defendants 1 to 3 who have categorically denied the execution of any promissory note in favour of the plaintiff and have disputed their signature in the promissory note would have never submitted to a decree to be passed against him. It must have been an inadvertent error committed by either the stenographer who recorded the evidence or by the first defendant (DW1). It cannot be construed that DW1 has submitted to a decree being passed against him. The lower appellate court has erroneously relied upon the inadvertent error recorded in the deposition of DW1 and erroneously held that the defendants 1 to 3 are liable to pay the suit claim.

15. The lower appellate court also erred in holding that the defendants 1 to 3 could have taken steps to get an expert opinion to prove that the thumb impression and the signature found in the promissory note are not theirs. As the initial burden of proving the execution of the promissory note (Ex.A1) by the defendants 1 to 3 has not been discharged by the plaintiffs due to the reasons stated above, the lower appellate court ought not to have held that since the defendants 1 to 3 have not taken steps to get an expert opinion as regards thumb impression and signatures found in the promissory note, the claim of the plaintiff has to be accepted.

16. In the promissory note, Ex.A1, the name of the second defendant is mentioned as Indira but her correct name is Indirani as seen from the cause title to the plaint. The plaintiff also failed to prove that Indira and Indirani are one and the same. The lower appellate court has failed to take into consideration all these factors while reversing the findings of the Trial Court.

17. For the foregoing reasons, the plaintiff has not discharged his initial burden of proving that the defendants 1 to 3 have executed the promissory note for availing the loan of Rs.12,000/- from him. Therefore, the matter will have to be remitted back to the Trial Court for fresh consideration after giving opportunities to both the parties to let in additional

oral and documentary evidence to prove their respective contentions. Even though the power of remand should be sparingly used, the case on hand for the above mentioned reasons is a fit case for remand. The substantial question of law formulated by this Court is answered in favour of the Appellant by holding that the lower appellate court erred in holding that since the defendants 1 to 3 have not take steps to get the expert opinion to prove the thumb impression and signature from the promissory note (Ex.A1), the execution of Promissory Note is proved.

Conclusion:

18. In the result, both the judgments and decrees passe by the first Appellate court as well as the Trial court are hereby set aside and the appeal is allowed by remanding the matter back to the Trial Court namely Principal District Munsif, Salem in O.S.No.641 of 2001 for fresh consideration after giving sufficient opportunity to the parties to place additional oral and documentary evidence including granting permission to get expert opinion as regards the signature and thumb impression found in the promissory note (Ex.A1). No costs. The trial court is directed to dispose of the suit O.S.No.641 of 2001 within a period of six months from the date of receipt of a copy of this judgment.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge , Salem.
2. The Principal District Munsif, Salem.
3. The Section Officer
VR Section,
High Court, Madras

1 cc to M/s. N.S. Sivakumar, Advocate, Sr. 96273

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