

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 11.12.2018

PRONOUNCED ON: 20 .02.2019

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.712 of 2007

K.M.Nachimuthu

... Appellant/plaintiff

Vs.

1.K.R.Balan(died)

2.Kavitha

3.Thenmozhi

4.Annadurai

5.Gayathiri

6.Vigneshwaran

7.Vishnavi

... Respondents/defendants

(RR2 to 7 brought on record as
Lrs of the deceased sole respondent
vide order of this court dated 24.08.2015
made in MP.No. 1 to 3 of 2015 in S.A.No.712 of 2007).

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 05.12.2006 passed in A.S.No.38 of 2006 on the file of the Principle District Judge, Erode reversing the judgment and decree dated 19.11.2004 passed in O.S.No.440 of 2002 on the file of the learned II Additional Subordinate Judge, Erode.

For Appellant : Mr.V.S.Kesavan

For RR1 : Died

For RR2 to R7 :No appearance

J U D G M E N T

This Second Appeal has been filed by the appellant/plaintiff against the judgment and decree passed by the Principle District Judge, Erode in A.S.No.38 of 2006 dated 05.12.2006. The appellant herein has filed a suit in O.S.No.440 of 2002 on the file of the learned II Additional Subordinate Judge, Erode for the relief of claiming the suit amount. The learned II Additional Subordinate Judge, Erode by the judgment

and decree dated 19.11.2004, has allowed the said suit with cost. Aggrieved by the same, the first respondent herein has filed an appeal in A.S.No.38 of 2006 on the file of the Principle District Judge, Erode. The Principle District Judge, Erode by the judgment and decree dated 05.12.2006 has allowed the said appeal and modified the judgment and decree passed by the trial Court with cost. Feeling aggrieved, the appellant/plaintiff has filed the present Second Appeal.

2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

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

On 03.01.2000, the defendant had borrowed a sum of Rs.70,000/- from the plaintiff, for which, he executed a promissory note in favour of the plaintiff promising to repay the same with interest @ 24% per annum. Similarly, on 22.01.2000, the defendant again borrowed an another sum of Rs.70,000/- from the plaintiff for the urgent expenses of his son and also executed a promissory note in favour of the plaintiff, promising to repay the same with interest @ 24% per annum. Exs.A1 & 2 were the respective pro-notes. After some time from the date of borrowing, the plaintiff orally demanded the defendant to repay the entire loan amount with interest. Finally, on 18.11.2000, the plaintiff issued a legal notice to the defendant, in which, he demanded the defendant to repay the entire loan amount due to him. After receiving a notice issued by the plaintiff, the defendant on 30.11.2000 sent a reply with false averments. So also without any alternative, the plaintiff had filed a suit.

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

It is denied that the defendant borrowed the suit amount after executing two pro-notes as mentioned in the plaint. The defendant had a son by name Arivazhagan. The said Arivazhagan was running a Finance Firm in the name and style of 'Winning Auto Finance'. In the said business, the said Arivazhagan, had entangled himself into a huge loss and on 15.12.1999, he left the home without informing to any one and subsequently, his whereabouts were not known to anybody till date. Thereafter, several creditors of the said Arivazhagan compelled the defendant to repay the loan amount availed by his son. In the meanwhile, since the plaintiff was a close relative of the defendant, compelled the defendant to furnish a security for the loan availed by the said Arivazhagan. On 26.01.2000, the defendant went over to the residence of the plaintiff and abused him by means of using filthy language. Further, he demanded the defendant to repay the loan availed by the said Arivazhagan or

to execute a surety. Without any alternative, the defendant had signed in the two pro- notes, in which, the defendant had signed and written a date as 26.01.2000 and 03.01.2000. The defendant managed to sign in the witness columns of the pro-notes. Accordingly, the alleged promissory notes executed by the plaintiff were not supported by any consideration and hence, there was no cause of action to file a suit.

5. Based on the above said pleadings, the trial Court has framed the necessary issues and tried the suit. During the trial, on the side of the plaintiff, the plaintiff examined himself as PW1. He has marked 4 documents as Exs.A1 to A4. On the side of the defendant, the defendant examined himself as DW1. One document was marked as Ex.B1, a letter dated 15.12.2000 on his behalf.

6. The learned II Additional Subordinate Judge, Erode after considering the materials placed before him has found that since the defendant admits the contents of the pro-notes i.e., Ex.A1 and A2 and also admit that the signature found in the pro-notes were belonging to him, the plaintiff was entitled to claim the suit amount from the defendant. The Principle District Judge, Erode by the judgement and decree dated 05.12.2006 had came to the conclusion that the trial Court did not look into the matter that the consideration was not proved and also due to the non examination of the witnesses, who were all signed in the pro-notes concluded that the defendant has not discharged his burden to disproof the presumption and finally, allowed the appeal. Aggrieved by the same, the plaintiff has preferred the present Second appeal.

7. During the pendency of the Second appeal, the first respondent herein, who was the defendant in the suit, died. Hence, the legal representatives of the defendant K.R.Balan, added as parties to the proceedings and ranked as R2 to R7.

8. This Court, at the time of admitting the second appeal has formulated the following substantial questions of law for consideration in this second appeal.-

- i. Whether the defendant discharged the burden of proof caste on him after he admitted the signature in the suit pro-notes?
- ii. Whether the First Appellate Court is right in framing the issue on consideration against the statutory presumptions when the defendant admitted his signatures in pro-notes?

9. Heard Mr. V.S.Kesavan, learned counsel for the petitioner. In respect to the respondents, despite repeated notices were sent, none appeared either in person or through

their respective counsel before this Court to argue their case.

10. The learned counsel for the appellant has submitted that the First Appellate Court had erred in reversing the well considered judgment of the trial Court. The learned counsel further submitted that the First Appellate Court had mainly relied upon the principle that after admitting the signature found in the pro-notes, the defendant has not discharged his burden to dis-prove the presumption i.e., though the pro-notes were not supported by consideration. According to him, the above approach of the I Appellate Court was unsustainable as per the law.

11. It is an admitted fact that the signature found in the promissory notes were belonging to the defendant. The defendant has approached this Court by saying, the signature found in the pro-notes were obtained by the plaintiff by fraud, coercion and undue influence. Now, on going through Order 6, Rule 4 of the Code of Civil Procedure, it was a bounden duty of the defendant that if a plea of fraud and undue influence has taken, he was duty bound to mention the date of occurrence in the written statement itself. In this case, admittedly it was mentioned by the defendant that on 26.01.2000, in the presence of his family members and others, the plaintiff verbally abused the defendant and his family members and demanded that either to pay money or execute some sort of document to acknowledge his son's debt. Further, the defendant has stated that the plaintiff and his people demanded that he should at least sign a promissory note, so as to enable them to provide their claim if and when the said Arivazhagan come back, so also after writing the words ' 'என் மூலம் என் மகன் அறிவழகனுக்கு கீழ்க்கண்ட பணத்தை வாங்கிக் கொடுக்கிறேன் ' '.

12. Accordingly, the above sentence written in both the pro-notes and the signature found over the stamp and the signature found in the column provided for signature of witnesses, were admitted by the defendant.

13. Apart from that in the pro-notes one Mr.Murthy was signed as a witness but the said Murthy was not examined either on the side of the plaintiff or on the side of the defendant. So also on culling out the entire case projected by the defendant, it is seen that he had taken a plea that the defendant's sign in the suit pro-notes were obtained by the plaintiff by using fraud, coercion and undue influence.

14. Now, it is useful and relevant to refer Section 103 of the Indian Evidence Act, which reads as follows:

'103. Burden of proof as to particular fact:

The burden of proof as to any particular fact lies on that person who wishes the Court

to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.''

15. By applying the above said principle to the case on hand, it is seen that the duty is caste upon the defendant to prove the circumstances in which, the pro-notes were executed as stated by him in his written statement.

16. It is the case of the plaintiff that on 03.01.2000 & 22.01.2000 after obtaining a loan of Rs.1,40,000/- (70000+70000) respectively, the defendant has executed two pro-notes in the presence of one Murthy. Admittedly, the said Murthy, has not been examined as a witness on the side of the plaintiff. Now, on going through the reply notice sent by the defendant for the demand notice issued by the plaintiff, it is seen that the defendant was entirely denied the execution of pro-notes. Particularly, in paragraph no.2 of the notice, he has been specifically stated that on 03.01.2000 & 22.01.2000, no amount was received as a loan from the plaintiff. Now, on proving the plea taken by the defendant, except himself, no witness has been examined on his side. In his evidence also he refuted the averment made in the written statement as only by coercion, fraud and undue influence, the pro-notes were signed by him. The defendant specifically stated in his written statement that the date mentioned in the said pro-notes will clearly establish the fact that the pro-notes were not executed as per the case of the plaintiff.

17. Now, on a fair perusal of Exs.A1 & A2, which were the pro-notes alleged to be executed by the defendant, it was mentioned in Ex.A1 as the said pro-note was executed on 03.01.2000 but it is seen that the defendant had put his signature on 26.01.2000 in the same pro-note. Apart from that in the column provided for the signature of the witnesses, the defendant has signed alongwith his address. Further, below the address, he mentioned the date as 26.01.2000. Further, the signature and address of the defendant and the words admitted by the defendant, which were written in the said pro notes as
'' என் மூலம் என் மகன் அறிவழகனுக்கு கீழ்க்கண்ட பணத்தை வாங்கிக் கொடுக்கிறேன் ''

18. The other wordings written in the pro-note were entirely different from the ink used by the defendant for putting his signature for writing his address for the above sentence. In the same way, on going through the contents of Ex.A2, it appears that the said pro-note was executed on 22.01.2000. But at the same time, as per the signature made by the defendant, it is seen that the said pro-note was executed on 03.01.2000. If really the said pro-note was executed on 03.01.2000, there was no necessity for the plaintiff to feel the

same as a loan was availed by the plaintiff on 22.01.2000. Further, in Ex.A2 also two inks were used for filling the contents of the pro-note. The difference of date and the difference of ink will in accordance with the evidence given by the defendant. So also for accepting the contention raised by the appellant/plaintiff, it is necessary for him to prove the execution of the pro-notes. But in the trial Court, one Mr. Murthy, who was singed as a witness in both the pro-notes has not been examined. The reason for the non examining the said witness was also not properly explained by the plaintiff. The I Appellate Court correctly appreciated the above situation and came to the conclusion that the suit pro-notes were not supported by consideration.

19. Even though, there is a statutory presumption under Section 118(a) of the Negotiable Instruments Act is in favour of the plaintiff, it is a specific case of the defendant that the pro-notes were obtained by means of compulsion. As already pointed out by the I Appellate Court that the dates and contents of the pro-notes were in support of the defendant, the stand taken by the I Appellate Court against the statutory presumption is a correct one. Even though, the signature found in the pro-notes were admitted by the defendant, we cannot come to the conclusion that the said signature was obtained after due consideration.

20. Accordingly, the substantial questions of law 1 & 2 are answered in favour of the respondents/defendants.

21. In fine, the second appeal is devoid of merits and accordingly, the same is dismissed. No costs.

Sd/-

Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

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To

- 1.The Principal District Judge, Erode
- 2.The II Additional Subordinate Judge, Erode

Copy To : The Section Officer, VR Section, High Court, Madras-104

S.A.No.712 of 2007

BS (CO)
GMY (20/06/2019)
GMY (01/07/2019)