IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.02.2019

PRONOUNCED ON : 15.03.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1284 of 2005

Chandramohan ...Appellant/Plaintiff

Vs.

Balasubramania Udayar ...Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.02.2005 made in A.S.No.69 of 2004 on the file of the District Court, Nagapattinam confirming the judgment and decree dated 09.08.2004 made in O.S.No.164/2003 on the file of the Principal Sub Court, Nagapattinam.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.C.Sivakumar

JUDGMENT

In this second appeal, Challenge is made to the judgment and decree dated 21.02.2005 passed in A.S.No.69 of 2004 on the file of the District Court, Nagapattinam confirming the judgment and decree dated 09.08.2004 passed in O.S.No.164/2003 on the file of the Principal Subordinate Court, Nagapattinam.

2. The Parties are referred to as per their rankings in the trial Court for the sake of convenience.

3. Suit for recovery of money.

4. The case of the plaintiff in brief is that the defendant borrowed a sum of Rs.2,00,000/- from him on 27.02.1998 by way of a cheque for meeting the family expenses and discharge of sundry debts and on 30.10.2000 repaid a sum of Rs.64,000/- towards interest and for the remaining principal sum of Rs.2,00,000/-, he has executed a hand chit and undertaken to repay the said sum in favour of the plaintiff with interest @ 12% per annum, however, failed to repay the said sum to the plaintiff despite

several demands and the plaintiff had issued legal notice on 19.11.2002 calling upon the defendant to pay the abovesaid sum as promised and undertaken and to the same, the defendant sent a reply on 17.12.2002 containing false allegations and thereafter, the defendant met the plaintiff at his residence on 13.01.2003 and expressing his regret for the reply sent by him, paid a sum of Rs.1,50,000/- to the plaintiff and assured to repay the balance sum and settle the account to the plaintiff, but, failed to pay the balance sum as promised and hence according to the plaintiff he has been necessitated to lay the suit for the recovery of amount due to him.

5. The defendant has resisted the plaintiff's case contending that the suit laid by the plaintiff is not maintainable either in law or on facts and the defendant did not borrow any amount from the plaintiff by way of a cheque as alleged in the plaint and also repaid a sum of Rs.64,000/- to the plaintiff on 30.10.2000 as alleged in the plaint and also not executed any hand chit on 30.10.2000 with reference to the borrowal as put forth in the plaint and according to the defendant, he does not know the plaintiff and he has never met the plaintiff and also denied the case of the plaintiff that after the issuance of reply notice, he met the plaintiff and paid a sum of Rs.1,50,000/- after regretting the issuance of reply notice and assured the plaintiff that he would pay the balance amount immediately. The defendant is entitled to the benefit of Debt Relief Acts and according to the defendant, he had approached one Haridas for obtaining a debt of Rs.2,00,000 to meet the marriage expenses of his daughter through Chandrahasan and Swaminathan and Haridas had obtained the signatures of the defendant, Swaminathan and Chandrasan in blank papers and also in revenue stamp papers and thereby paid the amount and though the interest was fixed at 12% per annum, more amount had been paid towards the interest and Haridas is working as a Village Administrative Officer and out of the borrowed sum, the defendant had paid a sum of Rs.30,000/- on 03.06.1998 through Swaminathan and Narayana Samy and paid a sum of Rs.1,50,000/-to Haridas directly on 12.09.1999 and a sum of Rs.40,000/- on 07.02.1999 through Swaminathan and paid a sum of Rs.40,000/- on 30.12.2000 directly in the presence of certain persons and discharged the debt and at the time of discharging the abovesaid debt, when the defendant demanded the return of the documents in which his signatures and the signatures of others had been obtained, Haridas had assured to return the same later and on the other hand, Haridas had instigated the plaintiff and come forward with the present suit as if the defendant had borrowed the suit sum from the plaintiff and hence the plaintiff's suit is not maintainable in law. The letter dated 30.10.2000 is relaibaly learnt to have been filled up by Haridas and the same had been filed in the Court and hence

prayed for the dismissal of the plaintiff's suit.

6. In support of the plaintiff's case P.Ws.1 and 2 wer examined and Exs.A1 to A4 were marked. On the side of the defendant D.Ws.1 and 2 were examined and Ex.B1 was marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the plaintiff's suit. In the first appellate court, two documents, on the side of the plaintiff, have come to be marked as Exs.A5 and A6.The first appellate court on an appreciation of the materials placed on record and the submissions made, was also pleased to concur with the judgment and decree of the trial court and also dismissed the plaintiff's suit. Challenging the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

> "1. Whether the Lower appellate court, as a final court of facts, erred in not adverting to the evidence of D.W.2 and genuineness of Ex.A1 as mandated by order 41 Rule 31 of C.P.C.?
>
> 2. Whether the Judgment of Lower appellate court is liable to be set aside as perverse in its failure to consider material evidence on record?

9. The plaintiff has laid the suit against the defendant for the recovery of money on the footing that the defendant borrowed a sum of Rs.2,00,000/- by way of a cheque dated 27.02.1998 and thereafter, on 30.10.2000 repaid a sum of Rs.64,000/- towards interest and assured to pay the balance principal sum of Rs.2,00,000/- to the plaintiff with interest and in connection with the same, according to the plaintiff, the defendant has executed a hand chit in favour of the plaintiff and as the defendant failed to repay the borrowed sum as above pointed out despite several demands and issuance of notice and on the other hand, sent a reply containing false allegations and thereafter, met the plaintiff on 13.01.2003 and paid a sum of Rs.1,50,000/- promising to repay the balance amount and as the defendant failed to honour his promise, according to the plaintiff, he has been necessitated to institute the suit against the defendant for the recovery of amount due to him.

10. The defendant, in toto, disputed the abovesaid case of the plaintiff, both the borrowal of the principal sum of Rs.2,00,000/- as alleged by the plaintiff, repayment of Rs.64,000/- towards interest as alleged by the plaintiff on

30.10.2000 and the execution of the hand chit on the said date promising to repay the balance principal sum with interest in favour of the plaintiff and according to the defendant he has never met the plaintiff at any point of time and there is no monetary transaction between him and the plaintiff and therefore, he is not liable to pay any sum to the plaintiff as claimed. According to the defendant, he had approached one Haridas for a debt of Rs.2,00,000/- through one Chandrahasun and Swaminathan and at the time of lending the amount, Haridas had obtained the signatures of the defendant, Chandrahasan and Swaminathan in blank papers and revenue stamp papers and the defendant paid more amount towards interest than agreed to and further according to the defendant, thereafter, he he had discharged the said debt on various dates as detailed in the written statement and though he had demanded Haridas to return the documents in which his signature and others' signatures had been obtained, Haridas had assured to hand over the same later but only after the institution of the present suit, according to the defendant, he has come to learnt that Haridas had laid the suit utilising the said documents in the name of the plaintiff and come forward with the false suit through the plaintiff and hence the suit is liable to be dismissed.

11. In the light of the abovesaid factual matrix, particularly, in toto, the defendant having disputed the case projected by the plaintiff and also disputing the borrowal of the suit sum from the plaintiff by way of the cheque, execution of the hand chit, repayment of interest of a sum of Rs.64,000/- on 30.10.2000, etc., it is for the plaintiff to establish his abovesaid case through acceptable and reliable evidence. When the abovesaid case of the plaintiff has been totally repudiated by the defendant, at the foremost, the plaintiff should have first established that the defendant had, indeed, borrowed a sum of Rs.2,00,000/- from him on 27.02.1998 and the said fact could have been easily established by the plaintiff by producing the said cheque in the court by way of summoning the same from the concerned bank and also establishing that the same had been encashed by the plaintiff by showing the debit entry in his bank account by summoning the concerned records from the bank. However, for the reasons best known to the plaintiff, he has not evinced interest to produce the said documents in the court and on the other hand, had placed only the hand chit said to have been executed by the defendant on 30.10.2000. According to the plaintiff, the defendant paid a sum of Rs.64,000/- towards interest on 30.10.2000 and executed a hand chit in his favour promising to repay the balance principal sum of Rs.2,00,000/- to him with interest and the said hand chit has come to be marked as Ex.A1. The defendant has taken the specific plea that the abovesaid hand chit is written by Haridas. As above seen, according to the defendant he has not borrowed any amount from

the plaintiff, on the other hand, he has borrowed a sum of Rs.2,00,000/- only from Haridas and not from the plaintiff. When, primafacie, it is seen that as determined by the courts below, EX.A1 hand chit is found to be written by Haridas and also stated to be so written by Haridas in the document itself and on a reading of Ex.A1, there is nothing contained therein that the defendant had borrowed a sum of Rs.2,00,000/- from the plaintiff on 27.02.1998 by way of the cheque, on the other hand, it only recites that a sum of Rs.2,00,000/- had been borrowed by the defendant on 27.02.1998 and does not point out as to the mode by which the said debt had been borrowed whether in cash or by way of the cheque and when the abovesaid case of the plaintiff has been, in toto, denied by the defendant, in such view of the matter, by way of Ex.A1 hand chit alone, one cannot infer or hold that the defendant had borrowed a sum of Rs.2,00,000/- from the plaintiff on 27.02.1998 by way of the cheque as put forth in the plaint. If that be so, the recital to that effect would have been incorporated in Ex.A1 in clear terms. The same is conspicuously absent in Ex.A1. As above noted, even the repayment of Rs.64,000/- as written in Ex.A1 and as projected by the plaintiff as well as the execution of Ex.A1 itself has been disputed and challenged by the defendant. In such view of the matter, the plaintiff should also endeavour to establish the abovesaid facts to sustain his case. With reference to the same, the plaintiff has examined his brother R.Sridharan as P.W.2, who is said to have attested Ex.A1 document. According to the plaintiff, on 30.10.2000, the date of execution of Ex.A1 hand chit, the defendant paid a sum of Rs.64,000/- towards interest and assured to repay the balance principal sum of Rs.2,00,000/- with interest by way of Ex.A1 hand chit. P.W.2 during the course of evidence in chief Examination itself has admitted that on the date of Ex.A1, his sister's husband Haridas was present and also his borther's son Chandrahasun was present. Therefore, it is seen that Haridas is closely related to the plaintiff as well as P.W.2. Furthermore, P.W.2 has clearly admitted that it is only Haridas who had written Ex.A1 document. As above noted, according to the plaintiff, the defendant paid a sum of Rs.64,000/- towards interest on 30.10.2000 and promised to pay the balance principal sum of Rs.2,00,000/- with interest and only with reference to the same, he has executed Ex.A1 hand chit. Quite inconsistent to the abovesaid case projected by the plaintiff, P.W.2 after admitting that Ex.A1 had been written by Haridas and that he had attested the same, during the course of cross examination, has clearly admitted that no amount was disbursed in his presence on that date and according to him, it has been written in a document that the defendant had borrowed amount from his brother, the plaintiff, but he does not remember the contents of Ex.A1 document and therefore, from the abovesaid evidence of P.W.2, it is found that he has not witnessed the repayment of Rs.64,000/- by the defendant to the plaintiff on 30.10.2000 as put forth by the plaintiff. Therefore, the case of the plaintiff that the defendant paid a sum of Rs.64,000/- towards interest on 30.10.2000 and promised to repay the balance principal sum of Rs.2,00,000/- and only in connection with the same the hand chit Ex.A1 had been written cannot be held to have been established based on the abovesaid unreliable testimony of P.W.2, when he has clearly admitted that no amount had been disbursed in his presence on that date. Though P.W.2 would claim that it is only the defendant who had executed Ex.A1 chit admitting the contents thereof, though he would claim that he could identify the defendant and after denying the suggestion put to him that the defendant was not present in the suit village and not executed Ex.A1 hand chit, P.W.2 during the course of further cross examination, when asked to identify the defendant amongst the persons standing in the court, he has deposed that he is unable to identify the defendant due to lack of memory. The abovesaid evidence adduced by the P.W.2 would clinchingly go to establish that the testimony given by him that it is only the defendant who had executed Ex.A1 hand chit to the plaintiff after paying a sum of Rs.64,000/- towards interest as regards the alleged borrowal of Rs.2,00,000/- from the plaintiff on earlier occasion, cannot at all be believed in any manner and as above noted, when the plaintiff has failed to establish that the defendant had, indeed, borrowed a sum of Rs.2,00,000/- from him on 27.02.1998 by way of a cheque by producing the said cheque and other connected documents by summoning the same from the bank one way or the other, on the strength of Ex.A1 alone, it cannot be inferred or concluded that the defendant had borrowed a sum of Rs.2,00,000/- from the plaintiff by way of the cheque on 27.02.1998 and only towards the borrowal, he had repaid a sum of Rs.64,000/- towards interest on 30.10.2000 and executed the hand chit marked as Ex.A1. When the abovesaid case of the plaintiff is not supported by P.W.2 by way of his evidence and when P.W.2's evidence is found to be totally unreliable and also unacceptable as above pointed out and when he is unable to identify the defendant himself and also clearly admitted that no amount was disbursed in his presence on that date and unable to disclose anything about the contents of Ex.A1 in any manner, in such view of the matter, no reliance could be attached to his evidence for upholding the plaintiff's case.

12. In the light of the above position, as rightly determined by the courts below, the other available witness to sustain the case of the plaintiff pleaded in the matter is only Haridas. When Haridas is found to have written Ex.A1 hand chit, the plaintiff solely relies only upon the said document for sustaining his claim, as rightly determined by the trial court as well as the first appellate court, the plaintiff should have

endeavoured to summon Haridas and examined him in the matter in support of his case. However, though Hairdas is found to be closely related to the plaintiff, for the reasons best known to the plaintiff, he had not been examined.

13. As above noted, it is the specific case of the defendant that he had borrowed a sum of Rs.2,00,000/- only from Haridas and not from the plaintiff and according to the defendant, he had repaid the sum borrowed from Haridas in piecemeal as detailed in the written statement. After the exchange of notice between the parties marked as Exs. A2 and A4, according to the plaintiff, the defendant came to his residence and repented for giving the false reply and paid a sum of Rs.1,50,000/- on 13.01.2003. The abovesaid case of the plaintiff appears to be very very artificial and unacceptable. When according to the defendant he has not even seen the plaintiff and not had any monetary transaction with the plaintiff at any point of time and, in toto, disputed the alleged borrowal of sum of Rs.2,00,000/- on 27.02.1998 and repayment of Rs.64,000/- towards interest on 30.10.2000 and the execution of Ex.A1 in favour of the plaintiff as claimed in the plaint and thereby, in entirety, disputed the case of the plaintiff in his reply notice marked as Ex.A4, the case projected by the plaintiff that thereafter, the defendant on his own came to his residence and paid a sum of Rs.1,50,000/- on 13.01.2003, as such, cannot be readily accepted. If that be so, as a prudent person, the defendant would have obtained a proper receipt from the plaintiff with reference to the same one way or the other evidencing the repayment of the abovesaid sum of Rs.1,50,000/- to the plaintiff. Even the plaintiff has not averred in the plaint as to whether any document has been written in connection with the repayment of Rs.1,50,000/- by the defendant on 13.01.2003. To say that the defendant had simply repaid a sum of Rs.1,50,000/- without securing any document whatsoever from the plaintiff, that too, after the exchange of notices between the parties and when the defendant in toto disputed the plaintiff's claim, as rightly determined by the courts below, the plaintiff is found to have failed to establish his abovesaid case in any manner and therefore, unable to establish the same by placing acceptable and reliable evidence. On the other hand, the defendant would come forward with the document marked as Ex.B1 stating that Haridas had acknowledged the receipt of Rs.1,50,000/- from him towards the borrowal received from Haridas and the abovesaid document marked as Ex.B1 is found to have been admitted to be written only by Haridas by P.W.2. However, for the reasons best known to the plaintiff, he had disputed that Ex.B1 document had been written by Haridas. The case of the defendant gets more probablised by way of Ex.B1 document that he had only borrowed the sum from Haridas and not from the plaintiff and accordingly towards the amount paid by him, it is seen that Haridas had

executed the document in favour of the defendant marked as Ex.B1. Atleast to dispute the case of the defendant projected by way of Ex.B1, the plaintiff should have endeavoured and chosen to examine Haridas and no explanation is forthcoming with reference to the same on the part of the plaintiff. As rightly determined by the court below, on coming to know that the defendant had paid the sum of Rs.1,50,000/- to Haridas towards the borrowal received by the defendant from Haridas, it is seen that the plaintiff had put forth the plea in the plaint that the defendant had repaid a sum of Rs.1,50,000/- subsequent to the exchange of notices on 13.01.2003 and however, unable to sustain his said claim by placing any acceptable materials. If really, as put forth by the plaintiff, the defendant had paid a sum of Rs.1,50,000/- to the plaintiff on 13.01.2003 towards the borrowal received from him by the defendant, as a prudent person, necessary endorsement to that effect would have been obtained by the plaintiff from the defendant in the hand chit marked as Ex.A1 or would have endeavoured to obtain other reliable document with reference to the same from the defendant and the case projected by the plaintiff that the defendant had simply approached him and paid a sum of Rs.1,50,000/- without obtaining any document from him even after the exchange of notices between the parties, is found to be far far from acceptability and reliability and in such view of the matter, the abovesaid inconsistencies found in the plaintiff's case, not having established by the plaintiff by placing acceptable and reliable evidence and Sridharan examined on the plaintiff's side as P.W.2 is found to be totally unreliable and not tendered evidence supporting the case of the plaintiff, in such view of the matter, when Ex.A1, cannot be construed as an instrument under the Negotiable Instrument Act, merely because the defendant has admitted his signature in the said document, that by itself, would not lead to the conclusion that it is only the defendant who had executed the said document accepting the liability to the plaintiff as put forth by the plaintiff and when the plaintiff has failed to establish the original borrowal, repayment of interest amounting to Rs.64,000/- and also the execution of Ex.A1 by the defendant, when nothing is contained therein with reference to the subsequent payment of Rs.1,50,000/- on 13.01.2003 and despite the availability of best evidence to throw some light on the said issue, being Haridas, for the reasons best known to the plaintiff, he having not chosen to examine Haridas despite his close relationship with Haridas, in all, as rightly determined by the courts below, the plaintiff has failed to establish his case in toto.

14. In the first appellate court, two documents have come to be projected by the plaintiff and those documents have been marked as Exs.A5 and A6. By way of Ex.A5, it is seen that the plaintiff has projected a new case not putforth in the plaint.

The said document has come to be projected by the plaintiff on the footing that when the defendant borrowed a sum of Rs.2,00,000/- from him on 27.02.1998, he had executed a promissory note in his favour. The said promissory note is said to have been projected as Ex.A5. When the case, as put forth in the plaint by the plaintiff, does not speak anything about the execution of the promissory note in his favour by the defendant as regards the borrowal of Rs.2,00,000/- on 27.02.1998 and the plaintiff has only pleaded that the defendant has borrowed the said amount by way of a cheque, his new case in the Appellate court that the defendant had also executed the promissory note in his favour marked as Ex.A5 only goes to expose the inconsistency in the case of the plaintiff one way or the other and the abovesaid document only exposes the falsity of the plaintiff's case in toto. Furthermore, when according to the plaintiff, as avered in the plaint, the defendant had borrowed a sum of Rs.2,00,000/- from him on 27.02.1998 only by way of the cheque, the recital in Ex.A5 reads as if the defendant had borrowed a sum of Rs.2,00,000/- from the plaintiff on 27.02.1998 by way of cash, this itself, would be sufficient to expose the falsity on the plaintiff's case and accordingly the plaintiff is not sure as to by what mode he had tendered Rs.2,00,000/- in favour of the defendant, whether by way of cheque as pleaded in the plaint or whether by way of cash as recited in Ex.A5 document projected in the first appellate court. Furthermore, to sustain that Ex.A5 has been really executed by the defendant, neither the scribe of the same nor the attestor to the same has been examined or endeavoured to be examined by the plaintiff. Furthermore, on a perusal of Ex.A5 document, it is found to be torn against the revenue stamp affixed on the same. The same would only indicate that inasmuch as the amount borrowed by way of the abovesaid instrument has been discharged by the defendant , revenue stamp had been torn, as being done in the commercial transaction, and by way of Ex.A5 document, the only conclusion that can be inferred or made is that the alleged borrowal made by the defendant by way of the said instrument has been subsequently discharged by the defendant and accordingly the revenue stamp is found to have been torn as could be seen from the said document. Therefore no reliance, at all, could be fastened on the abovesaid document for upholding the plaintiff's case and the same had been rightly rejected by the first appellate court. The other document projected by the plaintiff in the first appellate court is Ex.A6, which is stated to be the communication sent to his lawyer by City Union Bank Limited that the cheque for Rs.2,00,000/- has been passed on 27.02.1998 favouring R.Balasubramanian. From the abovesaid document, it cannot be held that the cheque referred to therin has been issued only by the plaintiff from his account in favour of the defendant. The plaintiff's name is written as drawer in the abovesaid letter in ink and the same is not typed as similar to the other contents found in the said document. As to who had written the said entry in ink, there is no proper explanation on the part of the plaintiff. When the plaintiff has not endeavoured to produce the cheque in question and his bank accounts to show the debit entry of Rs.2,00,000/- by way of the cheque referred to in Ex.A6 letter and as to why the plaintiff has not endeavoured to produce the said letter in the trial court and let any evidence and when with reference to the same no explanation, at all, is forth coming on the part of the plaintiff and furthermore, when the abovesaid case of the plainitff that he has tendered the amount by way of a cheque to the defendant is found to be inconsistent to his case projected by way of Ex.A5, in such view of the matter, on the basis of Ex.A6, in isolation, when it has not been established that the abovesaid communication had been actually written by the bank official to the plaintiff's advocate as claimed in the said document, the first appellate court is found to be wholly justified in not placing reliance upon the said document and I do not find any valid reason to interfere with the abovesaid determination arrived at by the first appellate court.

15. No doubt, the defendant has not explained properly as to why he had not endeavoured to retrieve the documents in which the signature is claimed to have been obtained by Haridas at the time of lending the sum to him as put forth in the written statement. Furhermore, the defendant has also not established the repayment of the borrowed sum to Haridas through various persons as detailed in the written statement. In this connection, the evidence of D.W.2 examined on behalf of the defendant does not inspire confidence, but, the abovesaid failure of the defendant in establishing his defence would not automatically lead to the conclusion that the plaintiff's case is true. When the suit transaction is projected to be an independent transaction as claimed by the plaintiff and not related to the alleged transaction of the defendant with Haridas and when the defendant, in toto, has disputed the plaintiff's case, unless the plaintiff establish his case as projected , the plaintiff cannot be allowed to succeed based on the weakness of the defendant's case.

16. In the light of the abovesaid discussions,when the plaintiff has miserably failed to establish his case and on the other hand the plaint is found to be a bundle of inconsistencies and contradictions, totally militating against each other, in such view of the matter, no reliance, at all, could be placed upon the plaintiff's case based on the document projected by him and it is seen that the courts below had property appreciated the materials placed on record, both oral and documentary, adduced in the matter and by giving cogent and convincing reasons and conclusions as to how come they had rejected the

plaintiff's case and when the abovesaid reasonings and conclusions of the courts below are found to be rational and convincing in all aspects, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendant.

17. In conclusion, the second appeal is found be devoid of merits and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

bga
To

1. The District Judge
District Court, Nagapattinam

2.The Subordinate Judge
Principal Sub Court, Nagapattinam.

Copy to

The Section Officer,
V.R.Section,High Court, Madras.

+1 CC to Mr.S.Sounthar, Advocate sr 25831.
+1 CC to Mr.C.Sivakumar, Advocate sr 24494.

S.A.No.1284 of 2005

VGI(CO)
SP(24/06/2019)