

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.599 of 2018

B.A.Duraiswamy

...Appellant/Defendant

vs.

A.S.Kandaswamy

...Respondent/Plaintiff

Appeal filed under Section 96 & Order 41 Rule 1 of the Civil Procedure Code, against the judgment and decree dated 29.06.2018 made in O.S.No.32 of 2011 on the file of II Additional District Court, Erode and prays to set aside the same.

For Appellant : Mr.S.Kaithamalai Kumaran

For Respondent : Mr.N.Manokaran

J U D G M E N T

The judgment and decree passed in O.S.No.32 of 2011 dated 29.06.2018 is under challenge in the appeal suit on hand.

2.The facts set out in the plaint in nutshell are that the defendant on 12.03.2008 at Chennimalai, borrowed a sum of Rs.10,00,000/- from the plaintiff for the urgent purpose of his family and business expenses and executed a promissory note in favour of the plaintiff. On the same date, the defendant agreed to repay the said amount with interest at the rate of Rs.1.00 per hundred per month either on the demand of the plaintiff or his order. The defendant owns considerable movable and immovable properties and also doing business profitably. Thus, the defendant is not entitled to claim any debt relief enactment of Tamil Nadu. The plaintiff is entitled to claim interest at the contractual rate i.e., 12% per annum. The plaintiff states that in spite of repeated demands made by the plaintiff to the defendant for payment of the principal and interest, the defendant failed and neglected to pay the same and thereafter, the plaintiff filed an application in I.P.No.2 of 2010 on the file of Sub-Court, Perundurai against the defendant and the

purchaser and the said insolvency proceeding is pending for adjudication. Consequently, he filed the suit for recovery.

3. The defendant filed the written statements, denying the averments in the plaint and has stated that allegation of rivalry of Rs.10,00,000/- (Rupees Ten Lakhs only) at Chennimalai on 12.03.2008 and the execution of promissory note agreeing to repay the said amount with interest at the rate of 12% per annum is false and denied. The plaintiff filed I.P.No.2 of 2010 on the file of Sub Court, Perundurai and the same is pending. The suit promissory note dated 12.03.2008 is a forged one and the defendant never borrowed Rs.10,00,000/- from the plaintiff on 12.03.2008 and never executed the suit promissory note. The defendant had no necessity to borrow such a huge amount of Rs.10,00,000/- on 12.03.2008 and the plaintiff has no means to advance the said amount in cash. The plaintiff is a retired teacher and doing yarn and cloth business in the name and style of India Tex and Himalaya Fabrics and the defendant is having a power loom factory at Kavundapady. The defendant was having business dealing with the plaintiff for purchase of yarn. Due to supply of interior quality of yarn, the defendant stopped his business dealings with the plaintiff and since then the plaintiff is not in cordial terms with the defendant. The plaintiff demanded the defendant to sell his Chennimalai properties for Rs.9,00,000/-, but the defendant refused and on 12.05.2008, the defendant sold his properties under two sale deed for Rs.10,72,100/-. By saying all these facts, the defendant claimed that the suit is to be dismissed.

4. The trial Court framed the issues as to Whether the suit promissory note dated 12.03.2008 is valid and genuine; Whether the plaintiff has the capacity to lend the sum of Rs.10 Lakhs on 12.03.2008 is true; To what relief the plaintiff is entitled to?

5. The plaintiff examined himself as PW1 and produced Ex.A1 and A2 and Ex.B1, Ex.B7 to B8 were also marked through him in his cross examination. The plaintiff also examined Tr.Swaminathan as PW2 and K.C.Palanisamy as PW3. PW3 admitted Ex.B2 in his cross examination. The defendant examined himself as DW1 and has produced Ex.B3 to B6 and admitted Ex.A3 to A7 in his cross examination. The defendant did not examine any other witness on his side.

6. With reference to Ex.A1, the trial Court considered two specific pleas raised in his defense by the defendant namely, 1) the promissory note is a forged one and 2) the financial capacity of the plaintiff to lend to said amount of Rs.10 lakhs. The promissory note was marked as Ex.A1.

7. The contention of the defendant was that the plaintiff was unsuccessful in purchasing a property of the defendant and out of the said vengeance, he fabricated the suit promissory note.

8. The contention of the plaintiff is that one week prior to 12.03.2008, the defendant approached the plaintiff and sought a loan of Rs.10,00,000/- which the plaintiff could not immediately lend and agreed to lend it in one week and on 12.03.2008, in the presence of the PW2 and PW3, the money of Rs.10,00,000/- in cash was lent by the plaintiff to the defendant, for which Ex.A1 promissory note was executed by the defendant, which was attested by PW2 and PW3. The evidence of PW1 to PW3 established that on 12.03.2008, the defendant borrowed a sum of Rs.10,00,000/- from the plaintiff and executed the suit promissory note, Ex.A1 in the presence of PW2 and 3, who attested, the said document and the same was written by the scribe. Though the defendant filed I.A.No.872 of 2011, to send the suit promissory note Ex.A1 for comparison by the handwriting expert. The defendant failed to produce documents for his admitted signature, the same was dismissed by the trial Court. On a revision before the Hon'ble High Court, the defendant filed a memo, referring to two sale deeds executed by him and prayed for a direction to take the signature in the said sale deeds to be his admitted signature, and also obtained an order to that effect. But the said documents were not produced by him, and in spite of the best efforts by this Court, the defendant did not secure the said documents and therefore, I.A.No.872/2011 was closed by the trial Court with an observation to reopen the same only after securing the original sale deeds executed by the defendant, in terms of the order of the Hon'ble High Court of Madras. An application to reopen I.A.No.872/2011 was filed by the defendant, but the same was dismissed by the trial Court. However, the net result is that the defendant has not produced or secured any document of the contemporaneous period of Ex.A1 suit promissory note, with the admitted signature of the defendant to send them for comparison by the Handwriting expert.

9. In spite of the orders of the High Court, the defendant has not produced any such sale deeds with the admitted signature for the purpose of sending the same for Handwriting expert. Therefore, the defendant could not able to establish that the Ex.A1 Promissory note is a forged one. Thus, the trial Court arrived a conclusion that the suit promissory note is a valid document and genuine. As far as Issue No.2 is concerned, the trial Court proceeded on the ground that the motive contended by the defendant is also irrelevant as far as the lending of loan by the defendant and therefore, such contention raised by the

defendant cannot be taken for the purpose of considering the suit for recovery of money. The plaintiff has produced positive evidence to the effect of passing of consideration. Though the defendant has contended that the plaintiff does not have the financial capacity to lend the huge amount of Rs.10 lakhs as loan to the defendant, the defendant has not produced any evidence to controvert the evidence of PW1 as regards Ex.A2 statement of accounts. It is not the case of the defendant that the plaintiff does not possess any money or not having any financial background to lend the such amount as loan. As such, the trial Court considered the documents and evidences and arrived a conclusion that the plaintiff had positively proved that he was in possession of sufficient money, so as to lend Rs.10,00,000/- to the defendant on 12.03.2008.

10. In view of the said findings with reference to the issues 1 to 3, the trial Court decreed the suit as prayed for with costs and directed the defendant to pay the plaintiff the suit amount of Rs.13,55,000/- with interest on the principal amount of Rs.10,00,000/- at the rate of 6% p.a from the date of the suit till the date of decree and thereafter, at the rate of 6% per annum till the date of realisation of the amount along with the cost of the suit.

11. The learned counsel appearing on behalf of the appellant mainly contended that when the defendant placed certain materials to establish that the promissory note Ex.A1 is a forged document, the trial Court ought to have considered the same. The High Court also in the order said that the signatures are to be sent for comparison by the Handwriting expert. When the High Court passed an order in C.R.P.(PD).No.558/2015 dated 24.02.2015, the trial Court ought not to have disposed of the suit without completing the process of comparison by the Handwriting expert. This apart, it is contended that there was a business rivalry between the plaintiff and the defendant, which resulted in creation of a forged promissory note.

12. This Court is of the considered opinion that in a suit for recovery of money, the genuinity of the promissory note is to be examined by the trial Court. In the present case, the trial Court did examined the genuinity of the promissory note Ex.A1. As far as the comparison by the Handwriting expert is concerned, though the defendant has filed an Interlocutory Application before the trial Court and thereafter, a revision before the High Court, the defendant has miserably failed to produce any original document with admitted signature, enabling the trial Court to send the same for comparison by the Handwriting expert. A person, who approached the Court for referring a particular document for comparison by the Handwriting expert, then he must produce the document with

admitted signature, enabling the Courts to send the same for Handwriting expert. Contrarily, the defendant has not produced any such document. Thus, this Court has to draw a factual inference that the defendant himself was doubtful regarding the outcome of the report by the Handwriting expert in this regard. Thus, further such Interlocutory Application and Revision Petitions are filed in order to prolong and protract the civil proceedings and if the defendant really intended with comparison by the Handwriting expert, then he should have filed the original sale deed with the admitted signature, enabling the trial Court, to send the same for comparison for expert. Thus, the defendant had failed to comply the requirement as ordered by the trial Court as well as by the High Court and now, he cannot come before this Court in the appeal suit that his request for comparison by the Handwriting expert had not been complied with by the trial Court. It is not as if the factual inference alone can be drawn, the very conduct of the defendant in not producing the original sale deed with admitted signature itself is sufficient to arrive a conclusion that the plaintiff himself was not sure that the ground taken before the Trial Court and therefore, there is no error or perversity in respect of the findings arrived by the trial Court with reference to the grounds raised by the defendant. The trial Court had considered all the documents and evidences in the right perspective and there is no infirmity as such.

13. The learned counsel appearing on behalf of the respondent with reference to the facts established before the Trial Court as well as in respect of the factual inference drawn, cited a judgment of the Hon'ble Supreme Court of India in the case of Bharat Barrel & Drum Manufacturing Company vs. Amin Chand Payrelal [(1999) 3 SCC 35], wherein in paragraph-14, it has been held as under:-

"14. A perusal of the written statement of the defendant would clearly and unambiguously show that to disprove the consideration of the promissory note, he had brought certain circumstances to the notice of the Court which he wanted to probabilise by leading evidence. The evidence led by the defendant in that regard was not accepted by any of the Judges dealing with the case as noticed herein earlier. In the absence of disproving the existence of the consideration, the onus of proof of the legal presumption in favour of the plaintiff could not be shifted. It is true that the plaintiff had produced evidence in the case and that evidence was, in fact, the evidence in rebuttal of the evidence produced by the

defendant in the case. After holding Issue 1 to have not been proved, the High Court was not justified in holding that the defendant had discharged the onus of proof of Issue 2. In fact, both the issues were required to be decided together which was not done with the result that miscarriage of justice crept into the proceedings depriving the plaintiff of its rights on account of the pendency of this litigation in the courts for a period of about four decades now. The technicalities of law and procedural wrangles deprived the plaintiff of its due entitlement. The justice claimed by the plaintiff was buried under heaps of divergent legal pronouncements on the subject conveyed and communicated in sweetly-coated articulate language and the oratory of the persons which is shown to have been resorted to to present the rival claims. The approach adopted by the majority of the Judges in dealing with the case was contrary to the basic principles governing the law relating to negotiable instruments. Faith of the business community dealing in mercantile and trade cannot be permitted to be shaken by resort to technicalities of law and the procedural wrangles as appears to have been done in the instant case. Even though it is true that the plaintiff's evidence was not believed yet we are of the opinion that the same could not be made the basis for rejecting its claim because obligation upon the plaintiff to lead evidence for the purposes of "to prove his case", could not have been insisted upon because the defendant has prima facie or initially not discharged his onus of proof by showing directly or probablisising the non-existence of consideration."

14. The Hon'ble Supreme Court in unequivocal terms held that "Faith of the Business Community dealing in Mercantile and Trade cannot be permitted to be shaken by resort to technicalities of law and the procedural wrangles as appears to have been done in the instant case".

15. The said principle is to be considered as a guideline in order to draw such inferences which should be from

the conscience of the Court. Certain business transactions may not be established by either of the parties to the suit and in such circumstances, the over all evidences as well as the nature of transactions and the intention of the parties, all are to be considered and the Court must adopt an approach which should be formed on the basis of the conscience and accordingly, the decisions are to be arrived. Thus, in such circumstances, fairness, good conscience and the basis of evidences, all must lead for arriving a decision.

16. This being the factum, in the present case, the defendant, though filed an Interlocutory Application for the purpose of verifying the signature, he had miserably failed to initiate any steps to complete the said process and for which the plaintiff cannot be denied the relief of recovery of money. Contrarily, an inference is to be drawn that the defendant has impliedly accepted the signature and in spite of the opportunity, he had not availed the same. Thus, an inference must be drawn in favour of the plaintiff with reference to the conduct of the defendant in the matter of submitting himself for the verification of his signature by producing the original Sale Deeds as prayed by him.

17. Consequently, the judgment and decree dated 29.06.2018 passed in O.S.No.32 of 2011 is confirmed and A.S.No.599 of 2018 stands dismissed. No costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The II Additional District Court,
Erode.

2.The Section Officer,
VR Section, High Court, Chennai-104.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate SR.9347

+1cc to Mr.N.Manokaran, Advocate SR.9219

A.S.No.599 of 2018

pvs[co]
srg 21/09/2020