

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2020

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.533 of 2014

1. Malathi
2. S.Suresh
3. Aravind

..Appellants

(Cause title accepted vide order
dated 28.04.2014 in MP.No.1 & 2/2014
in SA.Sr.36177/2014)

Vs.

1. M.Chandran
2. R.Munirathinam

.. Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the III Additional District Judge, Vellore at Thiruppathur, Vellore District dated 21.11.2013 in A.S.No.13 of 2013, reversing the judgment and decree of the Subordinate Judge, Vaniyambadi, Vellore District dated 21.09.2012 in O.S.No.100 of 2009.

For Appellants : Mr.P.Dinesh Kumar

For Respondents : Mr.M.V.Krishnan (for R1)
No appearance (for R2)

J U D G M E N T

The defendants 1 to 3 in O.S.No.100 of 2009 on the file of Subordinate Court, Vaniyambadi, Vellore District who suffered a personal decree for payment of money, upon its affirmation by the appellate Court in A.S.No.13 of 2013 have come up with this second appeal.

2. The suit was laid by the plaintiff seeking recovery of a sum of Rs.1,05,250/- allegedly due on Promissory Note, executed by one Shankar, husband of the 1st defendant and father of defendants 2 and 3 along with the 4th defendant on 15.02.2006, after having borrowed a sum of Rs.1,00,000/, agreeing to repay the amount along with interest at 24% per annum.

3. The suit was resisted by the defendants raising various grounds including denial of the very borrowal. It was stated

that Shankar had borrowed only a sum of Rs.30,000/- from the plaintiff and the same was repaid on 19.02.2006 as evidenced by a discharge receipt issued by the plaintiff. It was also contended that the defendants are not in possession of any estate of Shankar and therefore there cannot be any decree against them personally or against the estate of Shankar in their hands. The 4th defendant remained exparte.

4. At trial, the plaintiff was examined as PW1 and one of the attesor of the Promissory Note viz., Ramasamy was examined as PW2. Exs.A1 to A5 were marked. On the side of the defendants, the 1st defendant Malathi was examined as DW1 and the receipt dated 19.02.2006 was marked as Ex.B1.

5. The trial Court upon a consideration of the evidence on record, concluded that the plaintiff has not proved his case with sufficient evidence, he cannot be favoured with a decree and hence, dismissed the suit.

6. Aggrieved the plaintiff preferred an appeal. The appellate Court on a reappreciation of the evidence on record concluded that after having admitted the signature of the deceased Shankar in the Promissory Note, the defendants 1 to 3 will have to prove the lack of consideration. The evidence of PW2, the attesor, was accepted and it was found that the defendants have not let in enough evidence to prove lack of consideration to dislodge the presumption that is created under Section 118 of Negotiable Instruments Act. Upon such conclusions, the appellate Court decreed the suit.

7. Aggrieved the defendants 1 to 3 are on appeal.

8. Upon hearing the counsel sometime, the following questions of law were framed at the time of admission:

1. Though it is contended by the 1st respondent herein that Ex.B1 discharge receipt is not related to the present loan for which the suit is filed, when the pleadings of the 1st respondent is silent about the said aspects, is still the Appellate Court right in decreeing the suit?
2. When there are wide discrepancies in the case of the 1st respondent herein that the 1st respondent herein had pleaded that both 1st appellant's deceased husband Shankar and 2nd respondent herein jointly taken the loan for which the suit promissory note was executed and as against the said pleadings, the 1st respondent herein had

deposed that the 2nd respondent herein signed Ex.A1 suit promissory note in his capacity as Guarantor, is still the Appellate Court is right in decreeing the suit?

3. When adverse inference could be drawn against the 1st respondent herein that his case loan Rs.30,000/- is different from the loan for which suit promissory note was executed is only an afterthought one, as his said case is neither pleaded nor deposed in chief examination but deposed for the first time during his cross examination, is still the Appellate Court is right in decreeing the suit?

9. After hearing the counsel some time on 13.11.2019, I have framed the following additional question of law :

"Whether the suit as framed against defendants 1 and 3 in their personal capacity is maintainable?

10. The case was adjourned to hear the counsel on the additional question of law framed.

11. I have heard Mr.P.Dinesh kumar, learned counsel for the appellants and Mr.M.V.Krishnan, learned counsel for the respondents.

12. Mr.P.Dinesh kumar would contend that the suit framed against the defendants 1 and 3 in their personal capacity is not maintainable. The borrower has not left any estate and that there is nothing to show that the defendants 1 and 3 are in possession of the estate belonging to Shankar, and they cannot be personally liable for the suit debt. He would also rely upon the Judgment of this Court in the case of Govindammal and another Vs. Bhuvaneswari Financing Corporation reported in AIR 2002 Mad 296 wherein this Court has considered the question of liability of the legal representatives who had not inherited anything from the borrower to satisfy the debt. While doing so, this Court has observed as follows:

"8. Though the appellants/defendants have defended the suit on many grounds, in law and as per the pleadings, unless basically it is proved that these appellants / defendants, though related to the late Ethirajulu Naidu, have inherited the estate of the Ethirajulu Naidu so as to become liable to repay the debts, the respondent/plaintiff cannot maintain the suit as against the appellants/defendants. Unless this vital legal question is determined, the Court

cannot go into the next step whether such borrowing by Ethirajulu Naidu is true, so as to claim the same on proof of such evidence from the defendants."

13. In fact a perusal of the Judgment of the Courts below would show that no issue was framed regarding the liability of the defendants 1 to 3 to discharge the debts of the deceased Shankar, though a specific plea was raised in the written statement by the defendants 1 to 3 to the effect that they did not inherit anything from Shankar. The question as to whether the defendants 1 to 3 had inherited any property or any estate from the deceased Shankar was not gone into. In the absence of such exercise, there cannot be a decree against the defendants 1 to 3 in their personal capacity for the borrowing of the deceased Shankar. In fact there is no pleading in the plaint to the effect that the defendants 1 to 3 are in possession of some property inherited by them from the deceased Shankar.

14. In view of the above, the appellate Court was not right in granting the personal decree against defendants 1 to 3 and there cannot be any decree against the estate of Shankar in the hands of the defendants 1 to 3 also in the absence of any proof to the effect that they are in possession of some assets by way of inheritance from deceased Shankar.

15. In view of the same, the additional question of law has to be necessarily answered in favour of the appellants. In view of the answer to the additional question of law, I do not see any reason to go into other questions of law.

16. Mr.M.V.Krishnan, learned counsel appearing for the respondents would contend that the decree against the 4th defendant will have to be sustained. I find much force in his contentions. The 4th defendant is a borrower, he has not chosen to defend the suit and therefore, the decree as against the 4th defendant has to be sustained.

17. In view of the above, the second appeal is partly allowed. The Judgement and Decree of the appellate Court is set aside and the suit in O.S.No.100 of 2009 will stand decreed only as against the 4th defendant for the suit sum of Rs.1,05,250/- with subsequent interest at 6% from the date of plaint till date of realisation. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The III Additional District Judge,
Thiruppathur,
Vellore District.

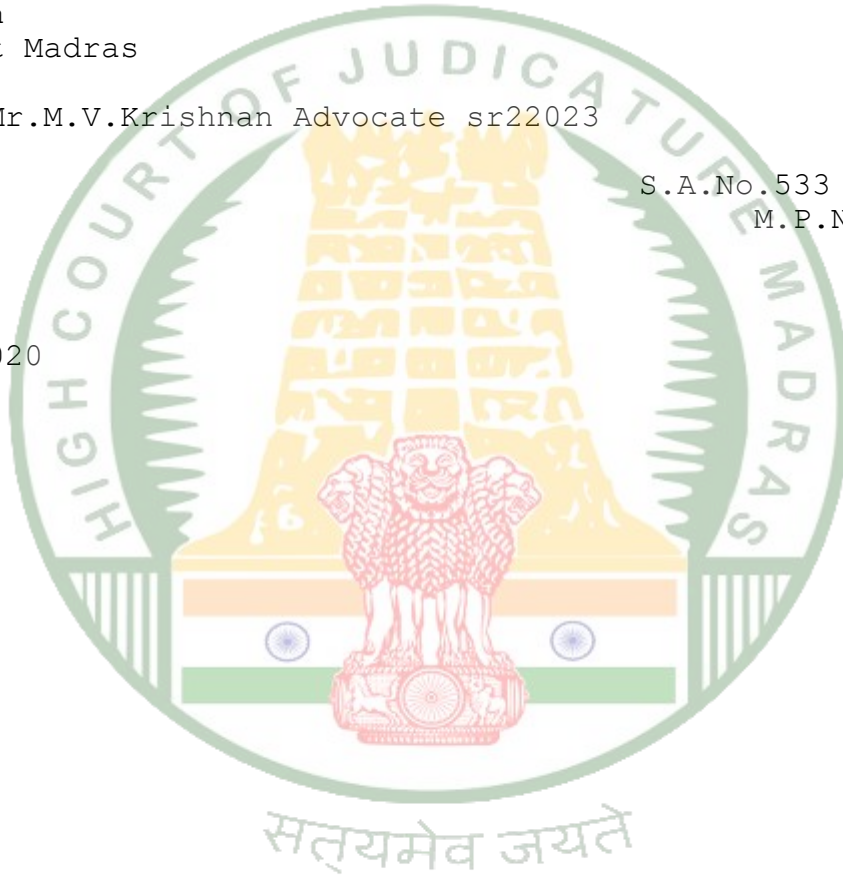
2. The Subordinate Judge,
Vaniyambadi,
Vellore District.

Copy to
The Section Officer
VR Section
High Court Madras

+1 cc to Mr.M.V.Krishnan Advocate sr22023

S.A.No.533 of 2014 and
M.P.No.1 of 2014

cnr(co)
aa08/12/2020



WEB COPY