



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.02.2021

PRONOUNCED ON : 02.03.2021

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CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

A.S.No.1125 of 2007

N.Shanmugavelu,
S/o.N.Natarajan,
Door No.7-A, III Street,
Lakshmi Nagar Extension,
Tirupur Taluk,
Coimbatore District.

...Appellant/1st Defendant

/versus/

1. S.Gnanasudhakar,
Son of S.Shanmugam,
No.149, Kumaran Street,
Tirupur.

...1st Respondent/Plaintiff

Natarajan (died)

2. Deivathal,
Wife of Late Natarajan,
Kizhaku Thottam,
Umaiychettipalayam,
Rakkiapalayam Post,
Avinashi.

...2nd Respondent/3rd Defendant

Prayer: First Appeal is filed under Section 96 of the Code of Civil Procedure against the judgment and decree of the Additional District Judge's (FTC No.IV) Court, Coimbatore at Tirupur, dated 14.02.2007 in O.S.No.437 of 2004.

For Appellant : Mr.S.Mukunth,
for M/s.Sarvabhauman Associates

For R1 : Mr.T.Murugamanikam, Senior Counsel
for M/s.Zeenath Begum

For R2 : No appearance



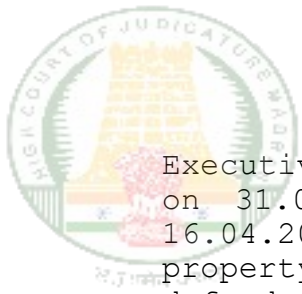
J U D G M E N T

This Appeal arising out of judgment and decree passed by the trial Court in the suit filed for recovery of money based on promissory note. The 1st defendant in the suit is the Appellant herein.

2. The brief facts of the case is that, the 1st defendant/ Shanmugavelu and his father form joint hindu family. The properties were purchased in the name of the father, who is the 2nd defendant. Due to old age of the father, the 1st defendant was appointed as Karta and he was looking after the joint family properties. To improve the joint family properties and to met out the family expenses, the defendants borrowed a sum of Rs.7,60,000/- from the plaintiff on 13.05.2000. A Promissory note was executed by the 1st defendant for the said amount. He agreed to pay interest at Rs.2 per month per Rs.100/- to the plaintiff. In spite of repeated demands, the defendants not paid the interest or principal amount. Legal notice to the defendants was issued on 20.03.2003 calling upon them to repay the amount. The defendants received the notice. The 1st defendant chosen not to reply the notice. The 2nd defendant replied on 31.03.2003 denying the borrowing and execution of pro-note.

3. The suit was filed for recovery of the said principal amount with interest restricting to 9%. Pending suit, the 2nd defendant died and therefore, his wife the 3rd defendant was impleaded on the premise that, the loan was borrowed for improvement of joint family properties and therefore, right to sue survives on the death of 2nd defendant.

4. In the written statement filed by the 1st defendant, the entire allegations made in the plaint were denied as false, frivolous and vexatious. According to the first defendant, he is not appointed by the 2nd defendant as the Manager of the joint family property. He separated from his father and residing at T.B.Road, Kottayam, Kerala, since 1999. The alleged pro-note was not executed by him and he never borrowed any money from the plaintiff. In fact, the plaintiff and the 1st defendant along with few others started a partnership firm in the name and style of M/s.Trico Tex at Tiruppur. At that time, signed cheque leaf of the partnership firm and given it in possession of the plaintiff. The cheque leaf of M/s.N.S Agencies, a proprietorship firm owned by the 1st defendant was also given to the plaintiff on trust for obtaining financial aid to run M/s.Trico Tex. In the year 1998, he closed his proprietorship concern M/s.N.S Agencies and also closed the bank accounts. The pre-suit notice sent to his Tiruppur address was re-directed to his Kerala address, where he is residing and working as a Marketing



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Executive in S.S.Syndicate. On receipt of the frivolous notice on 31.03.2003 at Kerala, he replied through his Counsel on 16.04.2003. The properties which are mentioned as joint family property are in fact, the self acquired property of the 2nd defendant, who is the absolute owner of the property, in which, the 1st defendant have no right, title and interest.

5. The 2nd defendant in his written statement while denying the averments made in the plaint had reiterated that the defendant Nos.1 & 2 do not form Joint Hindu Family and 1st defendant was not appointed as Manager of the family. The 2nd defendant never borrowed money for the improvement of his land or for digging borewell in his land. In fact, the borewell in his land was dug in the year 1989 itself. There was no necessity for him to borrow a sum of Rs.7,80,000/- from the plaintiff for improvement of his land. In the year 1999 itself, the 1st defendant, who is the son of the 2nd defendant separated from the family and not in talking terms with the 1st defendant. On receipt of the notice dated 20.03.2003 from the plaintiff, suitable reply was sent to the plaintiff's counsel and same was received by him. The properties were purchased by him out of his own efforts and earning in the year 1977. Deep borewell was dug in the year 1989, electricity extension of supply to compressor was obtained on 05.03.1990. The water from the deep borewell is utilised for agricultural purposes using 7.5HP compressor. Later, the 2nd defendant obtained H.P service connection for industrial purpose in the year 1994. Water service connection was obtained to the property in the year 1995. Construction was made in the suit property from out of his own earning in the year 1992 itself. Therefore, the suit filed by the plaintiff against him is not maintainable since, he is not the borrower nor the borrowing was for the improvement of his land.

6. Based on the pleadings, the Trial Court framed following issues:-

(i). Whether the 1st defendant borrowed Rs.7,80,000/- from the plaintiff and executed pro-note?

(ii). Whether the other defendants are liable to discharge the alleged loan obtained by the 1st defendant?

(iii). Whether the plaintiff is entitled for recovery of Rs.9,85,335/- with interest from out of the estate of the deceased 2nd defendant?

(iv). What are the reliefs?

7. Before the Trial Court, the plaintiff examined three witnesses and marked 32 Exhibits. On behalf of the defendant, 1



witness and 5 exhibits were marked.

8. The Trial Court decreed the suit holding the 1st defendant liable to pay the suit claim of Rs.9,85,355/- with 9% interest from the date of decree on the principal amount of Rs.7,80,000/- and from the date of decree till date of realisation with 6% interest on the principle amount with costs.

9. The said judgment and decree is assailed by the 1st defendant on the ground that, the trial Court erred in concluding that the suit pro-note Ex.A.1 was executed by the appellant overlooking the suspicious circumstances shroud for the execution of Ex.A.1. The reason given for the borrowal in Ex.A.1 was for purpose of family expenses and improvement of joint family property. Same was denied and proved to be false through the documentary evidence placed by the deceased 2nd defendant. The pro-note Ex.A.1 is a printed document with blank filled in writing. The scribe, who written the pro-note was not examined and other two witnesses are not independent witnesses but interested witnesses. Once the execution of the document is denied, the plaintiff has to prove its execution. In the instant case, the Trial Court has shifted the burden of proving the execution upon the defendants. Solely relying upon the evidence of P.W.2 (S.S.Karthikeyan) and P.W.3 (A.Siva), the Trial Court has concluded that the Ex.A.11 pro-note is a genuine document. P.W.2 is the brother of plaintiff and P.W.3 is an employee under P.W.2. Therefore, their evidence ought to have been eschewed.

10. The contradictions regarding the manner of execution elicited through examining P.W.2 and P.W.3 were overlooked. The Trial Court erred in overlooking the admission of P.W.2 that after 1998 there was no cordial relationship between the plaintiff's family and the defendant's family which falsifies the plaintiff's case that the 1st defendant borrowed a sum of Rs.7,80,000/- on 13.05.2000. The admissions made by the plaintiff regarding his income clearly prove that the plaintiff did not possess wherewithal to lend a huge sum of Rs.7,80,000/-.

11. The Learned Counsel appearing for the appellant would submitted that the case of plaintiff regarding the borrowing and necessity to borrow clearly demolished through evidence by the defendants particularly the fact that there was no joint family property managed by 1st defendant on behalf of the 2nd defendant. There was no necessity for borrowing money to improve the land held by the 2nd defendant in the year 1999 since it was already well improved and yielding good income. The borewell was dugged in the year 1989 itself and electricity service connection was obtained much before the date of suit pro-note. The signature found in the suit pro-note (Ex.A.1) denied by the 1st defendant.



The onus to prove the signature is on the plaintiff, who had not taken any measure to prove the same.

12. The plaintiff, in the cross examination had admitted that, he have no reasonable income during the relevant point of time. P.W.1 has admitted that, his salary from 1993 to 1999 was only Rs.1,200/- and from 1999 to 2006 was Rs.8,000/- Thereafter, in the year 2006, it was increased to Rs.20,000/-. The plaintiff has not produced any proof to show on the date of pro-note, he had money to lend Rs.7,80,000/-. There is no evidence to show that the plaintiff had paid the income tax or shown the lending in his account. The presumption of liability has been discharged by the defendant by all means, whereas, the plaintiff had not proved the execution nor proved the borrowing of Rs.7,80,000/- on the date of pro-note (Ex.A.1). The evidence of P.W.2 & P.W.3 are not worth considering in view of their proximity with the plaintiff and in view of contradictions.

13. Heard the Learned Counsel for the appellant and the Learned Counsel for the respondent. Records perused.

Point for determination:-

Whether the evidence for plaintiff sufficient to hold the defendants liable to pay the suit pro-note?

14. The suit is based on the pro-note marked as Ex.A.1. The said pro-note is dated 13.05.2000. The pro-note is in printed form with particulars filled by hand. The reason for borrowing of Rs.7,80,000/- as found in the pro-note Ex.A.1 are:-

- (i). To repay hand loan.
- (ii). To dug the borewell.
- (iii). Family expenses.

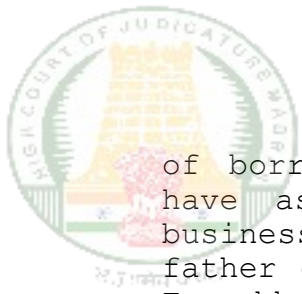
15. The pro-note is signed by the 1st defendant. It is witnessed by P.W.2/S.S.Karthikeyan and P.W.3/A.Siva. The scribe name is shown as Pannerselvam Son of Madurai. While, the 1st defendant alone is the signatory to the pro-note, the suit has been laid against the 1st defendant as well as his father the 2nd defendant alleging that the loan was availed to improve the joint family property. Pending suit, the 2nd defendant died, therefore, 2nd defendant's wife was arrayed as LR's of the 2nd defendant and was force to face the litigation.

16. On perusing the evidence of attesting witnesses namely P.W.2 S.S.Karthikeyan and P.W.3 A.Siva, we find that, P.W.2 admits that, he and plaintiff are living in joint family



property. He admits the address given in his proof affidavit is not correct and he has given false address in his proof affidavit. He admits that P.W.2/Siva is working under him as a mechanic and operator in his firm M/s.Rasi Offset Printers. He also admits that after 1999 when the plaintiff and 1st defendant dissolved the partnership firm M/s.Trico Tex and parted away, there is no contact between both the families. Now looking at his chief examination, he reiterate the averment found in the plaint that the money was borrowed for digging deep borewell in the joint family property to met out the family expenses and to repay the hand loan received. He had stated, in his proof affidavit that, on 13.05.2000 at about 10.30 a.m, he went to 1st Floor at No.149, Kumaran Road, Tiruppur and he found defendant Nos.1 and 2, scribe Paneerselvam. A sum of Rs.7,80,000/- cash was in hundred rupees domination kept on the table and after the arrival of P.W.3/Siva, the money was handover to 1st defendant. The 2nd defendant checked and informed to the 1st defendant that there is Rs.7,80,000/-. P.W.2/Siva, who is admittedly employee under P.W.2 in his proof affidavit has stated, on 13.05.2000 at about 10.15a.m, on the request of the 1st defendant, he went to Door No.149, 1st Floor, Kumaran Road, Trippur. When he went there, he saw 1st plaintiff, defendants 1 & 2. P.W.2/Karthikeyan, document writer Paneerselvam. Rs.100/- note bundles were kept on the table. He, along with the plaintiff, defendant Nos.1 & 2, P.W.2 Karthikeyan jointly counted the money and thereafter, the plaintiff handed over the money to the 1st defendant in their presence. The 2nd defendant confirmed that there is Rs.7,80,000/- in the bundle, after checking the same. In the proof affidavit, P.W.3 also had shown his residential address as No.149, Kumaran Road, Thiruppur. He admits that, for the past 10 years, he was working under P.W.2 and M/s.Rasi Offset Printer Company run by P.W.2 is functioning at No.149, Kumaran Road, Thiruppur. M/s.Rasi Offset Company is functioning as found from the cross examination of P.W.2. In the pro-note also both the witnesses have shown their address as No.149, Kumaran Road Thiruppur. The residence of the plaintiff also at No.149, Kumaran Road, Thiruppur. Therefore, from the address shown in the pro-note as well as in the proof affidavits, it could be easily seen that the plaintiff and two witnesses are all residing in the same premises and their relationship put their evidence under cloud.

17. This Court is unable to disbelieve the case of the plaintiff and due execution of the pro-note not only for the reason that the plaintiff and the 2nd witness were residing in the same place and given contradictory evidence for being present at the time of executing the pro-note but also for the reason that, if the money was borrowed for the development of the joint family property as pleaded in the plaint and if 2nd defendant the father of the 1st defendant was present at the time



of borrowing as deposed by P.W.2 & P.W.3. 2nd defendant would have asked to sign. No prudent person who is involved in business, will give loan without obtaining the signature of the father either as a co-borrower or as witness for the borrowing. To add, the witnesses admit the cordial relationship prevailing between the plaintiff's family and the defendant's family and the break-out of the cordiality after 1998. While so, there could be no reason for lending a huge sum of Rs.7,80,000/- on a pro-note to the estrange partner that too without binding the father who had assets and present when the alleged money given to the 1st defendant.

18. Now looking on the point of capacity to lend PW.2 says his brother used to give money in a cover and he used to receive it and keep it in the safe and return back to him. Whether on the date of pro-note or soon before he gave any money to P.W.1 for lending the same to the 1st defendant is not spoken by PW.2.

19. The above statement of PW.2 in his deposition that plaintiff used to give money in a cover to him to keep it safely is only an afterthought to show that the plaintiff had enough wherewithal to lend Rs.7,80,000/-. Coming to the evidence of P.W.1 who claims, he has lend Rs.7,80,000/- to the 1st defendant. He, in the cross examination say that out of Rs.7,80,000/- which he gave to the defendant, a portion of money was with him and remaining was given by his brother P.W.2. But, he admits that from the year 1993, he is working as M/s.Tubeknit Fashion Limited and his current salary is Rs.20,000/-. During the year 1999-2000 his monthly salary was Rs.8,000/-, previously it was Rs.1,200/-. Though, he claims that, he is an Income Tax assessee, neither his income tax assessment nor accounts were placed before the Court to show is wherewithal. He admits that, he has two bank accounts but the statement of bank accounts also not produced.

20. In Basalingappa vs. Mudibasappa reported in (2019) 5 SCC 418, the Hon'ble Supreme Court has observed that,

"When financial capacity being questioned, it is incumbent on the complainant to explain his financial capacity. Court cannot insist on a person to lead negative evidence. The observation of the High Court that trial court's finding that the complainant failed to prove his financial capacity of lending money is perverse, cannot be supported. We fail to see that how the trial court's findings can be termed as perverse by the High Court when



it was based on consideration of the evidence, which was led on behalf of the defence."

21. No doubt, as far as negotiable instrument is concerned, if a pro-note is executed, passing of consideration is presumed. But when the execution itself is denied, the burden to prove the execution and also the capacity to pay the money are on the plaintiff. Several documents were relied by the plaintiff to impress the Court that the signature found in the pro-note is same as the admitted signature found in several other documents. The Trial Court has also compared the signature and accepted the due execution. This is not sufficient when the documents were available for comparing it with the aid of an expert.

22. The specific case of the 1st defendant is that after 1999, he left Thiruppur and residing at Kottayam, Kerala. When Ex.B.1 is the postal cover which carried the pre-suit notice was shown to the plaintiff. He admits that, the pre-suit notice though sent to the Thiruppur address, it was re-directed and received by the 1st defendant at Kottayam. Though, this may not be the proof that in the year 2000 when suit pro-note came into existence, the 1st defendant was not residing at Thiruppur. But the other circumstances, proves he was separated from his father and living at Kottayam and he had nothing to do with the property held by the 2nd defendant. This would go to show that there was no necessity for the 1st defendant to borrow money to dug borewell more so, when the 2nd defendant has proved that borewell was dug 10 years before the said borrowing.

23. The explanation given by the 1st defendant that he left blank signed cheques with the custody of the plaintiff, while they were running the partnership firm M/s.Tirco Tex and the signature were imitated in the pro-note and used to fabricate pro-note (Ex.A.1) is more plausible explanation in the circumstance of the present case, because when the plaintiff had all opportunities to send the disputed signature to be compared with the admitted signatures which he had in his possession and marked for the Court to compare, but deliberately avoided to compare it by an expert, which put the plaintiff's case regarding due execution of Ex.A.1 doubtful. The other factors regarding the discrepancy between the evidence given by the plaintiff's witness, the embellishments found in the plaint to rope in the 2nd defendant in the suit when he was no way connected with the borrowing and the interim order obtained to attach the property of the 2nd defendant to harass and extract the money based on Ex.A.1 leads to the conclusion that the suit pro-note is not genuine and suit based on fabricated pro-note is liable to be dismissed.



24. Accordingly, the judgment and decree passed in O.S.No.437 of 2004 is hereby set aside. Hence, the Appeal Suit is Allowed. No costs.

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Sd/-
Assistant Registrar (Audit)

//True Copy//

Sub Assistant Registrar

bsm

To,

1. The Additional District Judge,
FTC No.IV Court,
Coimbatore at Tiruppur.
2. The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to M/s.Zeenah Begum, Advocate, S.R.No.12693

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.12695

A.S.No.1125 of 2007

SSV(CO)
RGA(09/09/2021)