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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 15.03.2021

JUDGMENT PRONOUNCED ON : 26.03.2021

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1821 of 2003

N.Krishnan

... Appellant/Plaintiff

...Versus...

1.V.Jayalakshmi

2.Senthil

3.V.Suba

... 2nd & 3rd Respondents/Defendants

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.14 of 2003 dated 17.03.2003 on the file of the Court of II Additional District Court at Coimbatore, reversing the judgment and decree made in O.S.No.732 of 1996 dated 28.03.2002 on the file of the I Additional Subordinate Judge, Coimbatore.

For Appellant : Mr.V.Manohar

For R1&R2 : Mr.M.Baskar

For R3 : No appearance

J U D G M E N T

The plaintiff is the appellant herein.

2. For the sake of convenience, the parties are referred to as in the same rank as they were arrayed before the trial Court.



3. The appellant/plaintiff is the lender and the respondents/defendants are the LRs of the deceased borrower being the wife, son and daughter of the deceased.

4. The plaintiff/appellant filed a suit in O.S.No.732 of 1996, based on pro-note for recovery of money for a sum of Rs.1,25,000/- with 12% interest.

5. The learned Sub-Judge, Coimbatore has rendered a finding that since the execution of Exhibit A1 / suit pro-note is admitted and in the absence of any evidence to propablize the case of the defendant, decreed the suit as prayed for. The defeated defendants filed the appeal and appeal was allowed and hence the Second Appeal.

6. The above Second Appeal was admitted on 11.12.2003 on the following Substantial Question of Law:-

"In the absence of a counter claim by the defendants, assuming they have an enforceable counter claim, has not the lower appellate Court committed an error of law in taking into account the claim not brought to the notice of the Court for dismissing the suit laid on a promissory note, holding that as the plaintiff is owing money to the defendants, he is not entitled to a decree on the promissory note?"

7. Mr.V.Manohar, learned counsel for the appellant/plaintiff would contend that the execution of the suit pronote Ex.A1 is admitted by the D.W.1 and in the absence of any other evidence to discharge the burden, the first Appellate Court has committed an error in setting aside the well considered judgment of the trial Court. The purpose of the borrowing is established from the own admission of the respondents and the finding of the lower Appellate Court that non issuance of pre-suit notice is fatal to the case of the plaintiff and hence prayed for allowing the second appeal.

8. Heard the learned counsel for the respondents/defendants.

9. In the written statement, the execution of the pro-note is admitted. However, it was projected that both the plaintiff and the deceased husband of the first defendant, Velusamy were working as LIC Agents and in the chit transaction conducted by the plaintiff Krishnan, the deceased husband had taken two chits for which some amounts were pending and based on



the same, the suit pro-note was executed for the security purpose of bid amount and the same was misused to file the suit.

10. Before the trial Court, the plaintiff examined himself as P.W.1 and defendant was examined as D.W.1 and marked Exs.A1 and A2. On the side of the defendants Exs.B1 to B3 were marked.

11. The case of the plaintiff/appellant is that in order to purchase the piece of land, the husband of the first defendant has borrowed the suit amount of Rs.1,25,000/- and executed Ex.A1/ suit pro-note on 28.12.1995.

12. In the cross-examination P.W.1 has admitted that he has not obtained the signature of his father or brother as a witness to the said transaction since both the plaintiff and the husband of the first defendant are very close friends known to each other and worked in L.I.C as an agent for many years.

13. The first defendant - widow of the deceased borrower and the second defendant is the son of the said person and third defendant Selvi suba against whom the suit was mistakenly dismissed as no such daughter is available for the deceased person. However, the trial Court has rightly come to the conclusion based upon the answer elicited in the cross-examination that the name of her daughter is suba alias Vijayalakshmi and she was called as Suba in at home assumes significance.

14. In the written statement as well as in the cross-examination of the D.W.1, the first defendant / widow of the deceased borrower O.S. Velusamy has admitted that the signature is that of her husband. However in the later part of the cross-examination, she could say that she is not sure or doubtful.

15. It remains to be stated that in the pleadings as well as the evidence of P.W.1 is that for the purpose of purchasing the house site, the money was borrowed by the said Velusamy. In the cross-examination of R.W.1 on behalf of the plaintiff it is successfully elicited that in respect to purchase "one Kuzhi Thottam" her husband has entered into an agreement with a person by name Vellingiri Gounder and one Lokesh of "Otthakal Mandapam" and he has admitted that her husband has entered into an agreement of sale to purchase a piece of land belongs to the said person at the relevant point of time and hence the trial Court has rightly come to the conclusion that the purpose for which the alleged money transaction has taken place and also the execution of the Ex.A1 suit pro-note being admitted by the defendant both in the evidence as well as in the cross-



examination, accordingly, held that there arises a presumption in favour of the plaintiff as to the passing of consideration.

16. In the written statement and the chief-examination D.W.1 could state that in the chit conducted by the plaintiff (who is also L.I.C Agent as that of her husband) has taken two chits and also taken bid amount and was regularly paying the amount and after death some amount was pending repayment and when her husband has taken the bid in the chit transaction with the plaintiff as a collateral security for the bid amount taken the plaintiff had obtained signature of her husband in a blank sheet on the stamp paper and the same was misused and fabricated as a suit pro-note. In support thereof the defendant marked Exs.B1 and B2 that are chit passbook ticket No.10 and ticket No.126.

17. Based upon the evidence of D.W.1, it appears that the Lower Appellate Court has come to the conclusion that in respect of the chit transaction after taken the bid amount, suit pro-note he might have been executed on blank pro-note and might have been misused. Under the provisions of the Negotiable Instruments Act, there can be no presumption or assumption in the absence of any positive evidence.

18. It remains to be stated that though the defendant has taken a stand that some amount has been paid after the bid amount, drawn by her deceased husband, balance of the amount to be paid for the said amount and the Ex.A1 was executed only for the bid amount, no positive evidence nor any calculation as to the total bid amount how much amount has been paid by the defendant husband and what is the balance and such particulars regarding bid amount balance and are conspicuously absent and as rightly pointed out by the learned counsel for the appellant that in the absence of any positive evidence with regard to the alleged counter claim as stated by the defendant in the written statement and as stand taken by her in D.W.1, the Lower Appellate Court has committed an error in assuming that Ex.A1 suit pro-note was for bid amount. In the absence of any positive evidence no such finding could be rendered. In the absence of any counter claim by the defendant even assuming that the defendants have enforceable counter claim the Lower Appellate Court has committed an error in taking account to the claim not brought to the notice of the Court.

19. In the absence of any positive evidence to show there was a bid amount and the consideration for the total bid amount, how much amount has been paid on the alleged date and what is the balance of the amount to be paid by her deceased husband, the Lower Appellate Court has went on erroneous footing to dismiss the claim of the plaintiff.



20. At the risk of repetition however for the sake of clarification it is to be stated that

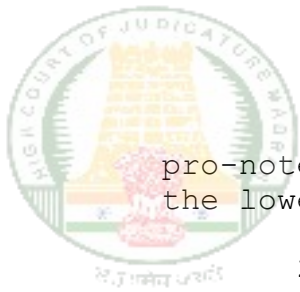
a) The borrowal of the amount has been necessitated for the purchase of piece of land. A sum of Rs.1,25,000/- is entered as a consideration for executing the pro-note. The date of the pro-note is 28.12.1995. The said Velusamy died on 28.01.1996. Suit is filed in the year 1996. Parties are known to each other even as per admitted the evidence of D.W.1.

b) The purpose for which the amount is borrowed from the plaintiff, as per the evidence of P.W.1 is clearly admitted by D.W.1 in the cross-examination.

c) The details of the land agreed to be purchased by the deceased is also elicited from the evidence of D.W.1 lends credence to the plaintiff's case.

d) When the execution of Ex.A1 suit pro-note is admitted the purpose for which the money was given is also elicited from the mouth of the D.W.1 on that score while the trial Court has rightly come to the conclusion that the burden of proof on the shoulder of the plaintiff is duly discharged the lower Appellate Court went on a wrong footing that the defendant is entitled for a counter claim based upon the un proved Exs.B1 and B2. In the absence of any supporting evidence to show there was a chit fund transaction in which the borrower O.S.Velusamy had taken a bid amount as stated supra no particulars regarding the bid and bid amount; amounts sofar paid; amount to be paid; the lower Appellate Court has committed an error in shifting the burden of the proof on the plaintiff especially one the plaintiff had successfully discharged the burden of the proof on a shoulder then it is for the defendant to rebut the same.

21. In the absence of any rebuttal evidence, the Lower Appellate Court has committed an error and hence this Court finds that the Substantial Question of Law is answered in affirmative in favour of the appellant/plaintiff against the defendant. The finding on the lower Appellate Court that the appellant/plaintiff had not issued the notice prior to the filing of the case on the suit pro-note does not found to be inconsonance with the provisions of the Negotiable Instruments Act. There can be any pre-condition to file a suit on pro-note. Non-examination of the two witnesses said to have been present at the time of the borrowal is not fatal to the case of the plaintiff since the execution of the pro-note himself is admitted by the D.W.1. Even to go by the part of the chief-examination of D.W.1, the deceased husband has executed a blank pro-note and the same has to be treated as inchoate document whereby the borrower has authorized the lender to fill up the



pro-note and hence viewing from any angle, the order passed by the lower Appellate Court is unsustainable in law.

22. In the result,

(i) This Second Appeal is allowed.

(ii) The judgments and decrees of the First Appellate Court rendered in A.S.No.14 of 2003 on the file of the Court of II Additional District Court, Coimbatore is hereby set aside.

(iii) The judgment and decree granted in O.S.No.732 of 1996 on the file of the learned I Additional Subordinate Judge, Coimbatore is hereby restored.

(iv) There shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The II Additional District Court
Coimbatore.
2. The II Additional District Munsif,
Coimbatore.

+1cc to M/s.V.Manohar, Advocate, S.R.No.19892

Judgment in
S.A.No.1821 of 2003

KJ(CO)
SU(28/10/2021)