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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.01.2021

PRONOUNCED ON : 19.01.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.967 of 2008

1. Sundaram (Died),
S/o, Maruthamuthu,
Door No.61-D East Street,
Kumarasamypatty,
Salem Town.

... 1st Appellant/Plaintiff

2. S.Pugalendi,
S/o, Late Sundaram
3. S.Murugan,
S/o, Late Sundaram

Appellants 2 and 3 are residing at
75/61/D, East Street,
Komarasamypatti,
Salem.

Appellants 2 and 3 brought on record
as LRs of the deceased sole appellant
viz Sundaram vide order of the Court
dated 11.11.2019 in CMP.No.24067,
24069 and 24071 of 2019 in
S.A.No.967/2008.

... Appellants 2 & 3

Vs.

L.Gowri Shankar,
S/o, Lakshmanan,
Madam street,
Salem-1.
Now residing at
Door No.Q-24/1
Thermal Quarters,
Anal Min Nagar,
Thottilpatty,
Mettur Dam -6.

...Respondent/Defendant



Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 17.04.2007 passed in A.S.No.132 of 2006 on the file of the Additional Subordinate Court, Salem, allowing the appeal reversing the judgment and decree dated 10.04.2006 passed in O.S.No.1590 of 2004 on the file of the I Additional District Munsif Court, Salem.

For Appellants : Mr.P.Jagadeesan

For Respondent : Mr.V.Ayyadurai, SC
for M/s.V.B.Perumal Raj

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 17.04.2007 passed in A.S.No.132 of 2006 on the file of the Additional Subordinate Court, Salem, reversing the judgment and decree dated 10.04.2006 passed in O.S.No.1590 of 2004 on the file of the I Additional District Munsif Court, Salem.

2. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

3. The plaintiff in O.S.No.1590 of 2004 is the appellant.

4. Suit for recovery of money.

5. Briefly stated according to the plaintiff's case, the defendant and one Vijayakumar borrowed a sum of Rs.50,000/- on 10.06.2001 from the plaintiff towards their business and family expenses and in evidence thereof, executed a promissory note on the same date, agreeing to repay the borrowed sum with interest at 24% per annum. Subsequent thereto, Vijayakumar paid a sum of Rs.1,000/- on 09.07.2001 and a further sum of Rs.1,000/- on 08.08.2001 and thereafter, no payment has been made to the plaintiff towards the borrowed sum either by the defendant or by Vijayakumar. Hence, according to the plaintiff, he issued a legal notice on 24.05.2004 to both the defendant and Vijayakumar calling upon them to repay the borrowed sum as promised. Though the legal notice has been received by the defendant and Vijayakumar, no response had been received from them qua the legal notice and they have also failed to comply with the demand made by the plaintiff in the legal notice. The liability of the defendant and Vijayakumar under the promissory note is joint and several and accordingly the plaintiff has levied the suit only against the defendant and hence prayed that the suit may be disposed of in favour of the plaintiff.



6. The defendant resisted the plaintiff's case contending that he is no way connected with the plaintiff and the plaintiff is a stranger to the defendant and the defendant never borrowed any amount from the plaintiff along with Vijayakumar as alleged in the plaint and executed a promissory note in favour of the plaintiff towards the borrowed sum along with Vijayakumar as averred in the plaint. Though the defendant had received the legal notice sent by the plaintiff dated 24.05.2004, inasmuch as, the defendant has no nexus with the plaintiff in any manner with reference to any monetary transaction, the defendant did not respond to the legal notice. Further according to the defendant, the suit has been laid by the plaintiff at the behest of Murugesan @ Murugan. The defendant had been harassed by the said Murugesan @ Murugan along with Vijayakumar and in that connection, the defendant sent a legal notice to them and at the instance of Vijayakumar, the defendant had been called to the Police Station and according to the defendant, in respect of the chit transaction conducted by Murugesan @ Murugan, Vijayakumar was a subscriber in the said chit and Vijayakumar bid in the chit and shared the bid amount with the defendant and for that purpose, obtained the signatures of the defendant in blank promissory note and therefore according to the defendant, Vijayakumar had handed over the blank promissory note to Murugesan @ Murugan and at the instance of Murugesan @ Murugan, the suit has been falsely foisted against the defendant in the name of the plaintiff. Further on the police complaint given by Vijayakumar, Karumalikoodal Police has called both the defendant and Vijayakumar and it had been agreed that Vijayakumar should return the blank promissory note and the stamp papers to the defendant and the defendant should discharge the amount due to Vijayakumar within a particular point of time. On the other hand, the suit has come to be laid in the name of the plaintiff at the instance of Murugesan @ Murugan by making use of the blank promissory note given by the defendant to Vijayakumar, who in turn had handed over the same to Murugesan @ Murugan. The defendant is not liable to pay any amount to the plaintiff. Vijayakumar is a necessary party to the suit proceedings and without impleading him, the present suit cannot be maintained and accordingly prayed for the dismissal of the plaintiff's suit.

7. In support of the plaintiff's case, P.Ws.1 and 2 were examined. Exs.A1 to A4 were marked. On the side of the defendant, D.Ws.1 to 3 examined. No document has been marked. Exs.X1 and X2 were also marked.

8. On a consideration of the materials placed on record, both oral and documentary and the submissions putforth by the respective parties, the trial court was pleased to decree the

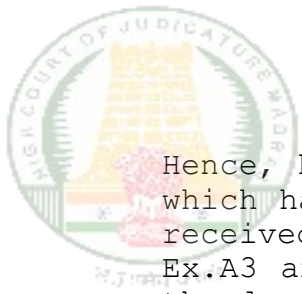


suit in favour of the plaintiff directing the defendant to pay a sum of Rs.61,174/- along with interest at the rate of 6% per annum from the date of the suit till the date of realization. Impugning the judgment and decree of the trial court, the defendant preferred the first appeal. The First Appellate Court, on an appreciation of the materials placed on record and the submissions putforth by the respective parties, was pleased to allow the appeal preferred by the defendant and consequently dismissed the suit laid by the plaintiff without costs. Challenging the judgment and decree of the First Appellate Court, the present Second Appeal has been preferred by the plaintiff.

9. 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 right in holding that the suit on a promissory note (Ex.A1) is not maintainable without impleading the joint promissor of Ex.A1, ignoring Section 43 of Indian Contract Act?
2. Whether the Lower Appellate Court right in relying on Exs.X1 and X2, the statement given before the police to uphold the case of the defendant, especially the said statement do not relate to the transaction of the suit promissory note Ex.A1?
3. Whether or not the defendant discharged his burden of proof that Ex.A1 is not supported by any consideration and came into existence as pleaded by him?

It is the specific case of the plaintiff that both the defendant and one Vijayakumar borrowed a sum of Rs.50,000/- from him on 10.06.2001 and executed the promissory note agreeing to repay the borrowed sum with interest as recited in the promissory note. The promissory note dated 10.06.2001 has been marked as Ex.A1. Further according to the plaintiff, towards the borrowed sum, Vijayakumar paid a sum of Rs.1,000/- on 09.07.2001 and another sum of Rs.1,000/- on 08.08.2001 and the endorsements had been obtained with reference to the same on the reverse side of the suit promissory note Ex.A1. The abovesaid endorsements had been marked as Ex.A1(A) and Ex.A1(B) respectively. Further according to the plaintiff, no subsequent payment had been made towards the borrowed sum either by defendant or by Vijayakumar.



Hence, he sent a legal notice to them on 24.05.2004, the copy of which has been marked as Ex.A2. The postal acknowledgment cards received from the defendant and Vijayakumar have been marked as Ex.A3 and Ex.A4. The defendant has not disputed the receipt of the legal notice issued by the plaintiff under Ex.A2. However, it is seen that the defendant has not responded to the legal notice sent by the plaintiff.

10. It is the main contention of the defendant that inasmuch as, the plaintiff has come forward with the case that both the defendant and Vijayakumar had borrowed the sum under the suit promissory note Ex.A1, according to the defendant, Vijayakumar should have been arrayed as a party to the proceedings and hence on the failure of the plaintiff to implead Vijayakumar as a party to the suit proceedings, on that ground alone, the suit is liable to be dismissed and is not maintainable under law. However, as rightly held by the trial court, the suit laid by the plaintiff against one of the joint promissors is maintainable as provided under section 43 of the Indian Contract Act. Section 43 of the Indian Contract Act reads as follows:

Section 43

Any one of joint promisors may be compelled to perform.-

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more] of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.-Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.- If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.- Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Therefore, on a reading of the provisions contained in Section 43 of the Indian Contract Act, it is evident that the plaintiff is entitled to maintain the suit against the present defendant



alone, one of the joint promissors and there is no need on the part of the plaintiff to implead the second promisor namely Vijayakumar. In such circumstances, it is open to the defendant to compel the other joint promisor namely Vijayakumar to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

11. Though it is contended that the suit is bad for non-joinder of Vijayakumar on the part of the defendant, in the decision reported in Indian Law Reports (Volume II) 466 [Bishunath Sahay Vs. Nanku Prasad Singh] with reference to the non-impleadment of one of the two joint promissors, it has been held that the suit on a hand note against one of the two joint promissors is not bad for non-joinder of the other joint promisor. For arriving at the said conclusion, reliance is placed upon Section 43 of the Indian Contract Act. In the light of the abovesaid factors, it is found that as rightly determined by the trial court, the plaintiff's suit is maintainable against the defendant, one of the joint promissors and the plaintiff's suit cannot be thrown out merely on the footing that the plaintiff has not impleaded the other joint promisor namely Vijayakumar as a party to the suit proceedings. Further more, even the First Appellate Court has held that under section 43 of the Indian Contract Act, the plaintiff is entitled to file a suit against one of the joint promissors, however, proceeded to hold that the plaintiff should give reasons as to why he has not impleaded the other joint promisor. However, when as above pointed out, for the non impleadment of the other joint promisor, the plaintiff's suit cannot be rejected on that score, it is evident that the plaintiff is entitled to maintain the suit against either of the joint promissors as per Section 43 of the Indian Contract Act, and the plaintiff is not necessitated to assign reasons from the same. In such view of the matter, the comment made by the First Appellate Court that the plaintiff should assign reasons for the non impleading the other joint promisor and thereby proceeding to reject the plaintiff's case, as such, cannot be countenanced.

12. For the reasons aforestated, I hold that the plaintiff's suit is maintainable without impleading the other joint promisor namely Vijayakumar as per section 43 of the Indian Contract Act.

13. It is the specific case of the plaintiff that both the defendant and Vijayakumar had borrowed the suit amount from the plaintiff and in evidence thereof, executed the promissory note marked as Ex.A1. According to the defendant, Vijayakumar was a subscriber in the chit run by one Murugesan @ Murugan and Vijayakumar bid in the said chit and shared the bid amount along



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with the defendant and for that purpose obtained the signatures of the defendant in blank promissory note and further according to the defendant, Vijayakumar had handed over the said signed blank promissory note to Murugesan @ Murugan and in turn, Murugesan @ Murugan had levied the suit against the defendant in the name of the plaintiff and therefore contended that the plaintiff's suit is liable to be dismissed. Prior to the institution of the suit, the plaintiff has caused the issuance of a legal notice to both the defendant and Vijayakumar calling upon them to repay the borrowed sum as promised by them under Ex.A1 promissory note. The receipt of the legal notice has not been controverted by the defendant. In such circumstances, if the abovesaid defence putforth by the defendant has any semblance of truth, pointing to those facts, the defendant should have sent a reply to the legal notice sent by the plaintiff. On the other hand, it is admitted by the defendant that he has not sent any reply to the legal notice, despite the receipt of the legal notice sent by the plaintiff as according to the defendant, since he did not have any monetary transaction with the plaintiff in any manner, he had not chosen to respond to the legal notice. However, if the abovesaid version of the defendant is true, as rightly contended by the plaintiff's counsel, the defendant should have set forth his defence in the reply notice and sent the same to the plaintiff. Therefore, considering the abovesid factors in toto, in my considered opinion, the non-sending of the reply by the defendant to the legal notice sent by the plaintiff is fatal to the defence set out by the defendant.

14. As regards the factum of the lending of the suit sum to the defendant and Vijayakumar and the execution of the suit promissory note by them in favour of the plaintiff, the plaintiff had tendered evidence as P.W.1 and also examined one of the attestors of the suit promissory note as PW.2 . As held by the trial court and even by the appellate court, the defendant in particular, has not disputed his signatures found in the suit promissory note. The evidence of P.Ws.1 and 2 are found to be consistent, inspiring confidence and totally acceptable. It is thus noted that the evidence of P.Ws.1 and 2 buttress the plaintiff's case in toto and therefore the trial court has rightly held that the plaintiff has established the suit transaction through the evidence of P.Ws.1 and 2 in a convincing manner. Even the First Appellate Court has also held that qua the authenticity of Ex.A1 promissory note the plaintiff has discharged his burden by examining the attestor and scribe and therefore the burden is upon the defendant to adduce the rebuttable evidence. In such view of the matter, as rightly determined by the trial court, the presumption under section 118 of the Negotiable Instruments Act arises in favour of the plaintiff and it is for the defendant to rebut the presumption



to escape from the liability under the suit promissory note.

15. As above pointed out, according to the defendant, in respect of the chit transaction conducted by Murugesan @ Murugan, Vijayakumar bid in the same and shared the bid amount along with the defendant and only in connection with the same, Vijayakumar had obtained the signatures of the defendant in blank promissory note and subsequently handed over the same to Murugesan @ Murugan and in turn Murugesan @ Murugan had levied the suit falsely against the defendant in the name of the plaintiff. To evidence that Murugesan @ Murugan had been conducting chit transaction and Vijayakumar was the subscriber in the said transaction, absolutely there is no material worth acceptance projected on the part of the defendant. In particular, the defendant in the written statement, has not come out with a clear case with reference to the details of the abovesaid alleged chit transaction and when the said Vijayakumar bid in the chit and what was the understanding between Vijayakumar and the defendant while sharing the bid amount etc., Concerning the abovesaid factors, no details have been set out by the defendant in the written statement and consequently, no material worth acceptance has also been projected by the defendant to substantiate the abovesaid defence. Furthermore, there is no material to show that Vijayakumar had handed over the alleged signed blank promissory note given by the defendant to Murugesan @ Murugan. Therefore when absolutely no material pointing to the same has been projected by the defendant, the abovesaid defence version putforth by the defendant cannot at all be countenanced in any manner.

16. On the other hand, as rightly held by the trial court, on a perusal of the evidence adduced by the defendant, it is found that when the defendant had subscribed his signature in the promissory note, the amount had been filled up in the same and therefore it is clear that the defendant had voluntarily executed the promissory note. Though the defendant would claim that he had given the signed promissory note to Vijayakumar, pointing to the abovesaid defence, no proof meriting acceptance has been placed by the defendant. When it is found that both the defendant and Vijayakumar are the joint promissors and considering the cross examination made by the defendant with the plaintiff examined as P.W.1, it is seen that the defendant has only pleaded that the plaintiff should have proceeded against Vijayakumar at the first instance and only thereafter against the defendant. As above pointed out the plaintiff has pleaded that Vijayakumar has made two payments towards the borrowed sum under Exs.A1(A) and A1(B). The defendant had admitted that he had made payments to Vijayakumar on several occasions. The abovesaid facts clearly support the case of the plaintiff. Now according to the defendant, he had discharged the borrowed sum



received from Vijayakumar. If the abovesaid version of the defendant has any element of truth, on the discharge of the borrowed sum, the defendant would have insisted Vijayakumar to hand over the signed blank promissory note given by him as security to Vijayakumar or else, on the failure of Vijayakumar to hand over the sum, he would have caused the issuance of the legal notice, calling upon Vijayakumar to hand over the same or he would have instituted necessary civil or criminal action against Vijayakumar with reference to the same. However, the defendant had not taken any one of the abovesaid actions. Though the defendant would claim that he has sent a legal notice to Vijayakumar, no material pointing to the same is forthcoming on the part of the defendant.

17. On the other hand, from the materials placed on record, it is found that it is only Vijayakumar who had laid/lodged the complaint against the defendant and in connection with the same, both the defendant and Vijayakumar had been enquired by the police and the statements had been recorded from them, which had been exhibited as Exs.X1 and Ex.X2. On a perusal of Exs.X1 and X2, as rightly held by the trial court, there is nothing to show that the same relates to the suit transaction and also nothing to point out that the plaintiff has given the signed blank promissory note to Vijayakumar in connection with the chit transaction run by Murugesan @ Murugan and in turn, Vijayakumar had handed over the said promissory note to Murugesan @ Murugan. At the best, Exs.X1 and X2 can only be held to be having nexus with the monetary transactions between the defendant and Vijayakumar and the abovesaid documents per se are not shown to be having any nexus with the suit transaction under Ex.A1 promissory note. Therefore, the trial court has rightly not placed reliance upon Exs.X1 and X2 and on the other hand, without any analysis of the abovesaid factors, in the wrong perspective, the first appellate court has placed reliance upon Exs.X1 and X2 by holding that the same probablize the defence version putforth by the defendant. As above pointed out, when the defendant has not placed any material as regards the chit transaction said to have been conducted by by Murugesan @ Murugan and the factum of Vijayakumar bidding in the said chit and the sharing of the bid amount by Vijayakumar and the defendant and the payment of the borrowed sums by the defendant to Vijayakumar, when all these factors are not substantiated by the defendant by projecting acceptable materials and when Exs.X1 and X2 do not advance the above said defence version of the defendant and not found to be having any connection with the suit transaction, it is seen that the reliance of the First Appellate Court upon Exs.X1 and X2, being the statements given before the police to uphold the defence version as such cannot at all be upheld in the eyes of law as provided under section 25 of the Indian Evidence act and more so, when the alleged



statements contained in Exs.X1 and X2 do not in any manner relate to the suit transaction under Ex.A1 promissory note. The rejection of the plaintiff's case by the first appellate court purely based upon Exs.X1 and X2 does not merit acceptance and liable to be set aside.

18. The plaintiff having established his case through the evidence of P.Ws.1 and 2 and by way of Exs.A1 to A4, the presumption arising in favour of the plaintiff under section 118 of the Negotiable Instruments Act, it is for the defendant to discharge his burden that Ex.A1 is not supported by any consideration and came into existence as pleaded by him. However, considering the abovesaid discussions, when the defendant has miserably failed to establish his defence version in any manner and as rightly determined by the trial court, no safe reliance could be attached to the evidence of D.Ws.1 to 3, without any material worth acceptance substantiating their testimony, as held by the trial court, on the defendant failing to repudiate the presumption raised in favour of the plaintiff under section 118 of the Negotiable Instruments Act, the trial court is found to be justified in upholding the plaintiff's suit and granting the relief in favour of the plaintiff accordingly.

19. The Senior Counsel appearing for the defendant would contend that no substantial question of law arises for consideration in this Second Appeal and on that score alone, the Second Appeal is liable to be rejected. However, as above pointed out, the substantial questions of law arises for consideration in this Second Appeal. In this connection, he placed reliance upon the decisions reported in

1. 1999(II) CTC 468 [Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar]

2. 2019(2) MWN (Civil)68 [S.Subramanian Vs. S.Ramasamy and others]

3. 2020(6) CTC 320 [Nazir Mohamed Vs J.Kamala and others]

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

20. In the light of the above said discussions, the substantial questions formulated in the Second Appeal are answered in favour of the plaintiff and against the defendant.

21. In conclusion, the judgment and decree dated 17.04.2007 passed in A.S.No.132 of 2006 on the file of the Additional



Subordinate Court, Salem, are set aside and the judgment and decree dated 10.04.2006 passed in O.S.No.1590 of 2004 on the file of the I Additional District Munsif Court, Salem are confirmed. Accordingly, the Second Appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Additional Subordinate Judge,
Salem.
2. The I Additional District Munsif,
Salem.

+3CCs to Mr.V.B.Perumal Raj, Advocate, Sr.No.2090
+1CC to Mr.P.Jagadeesan, Advocate, Sr.No.2621

S.A.No.967 of 2008

VD (CO)
K.RK. (08.09.2021)