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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2021

PRONOUNCED ON : 01.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1387 of 2010

&

M.P.No.1 of 2010

K.Mariappan ... Appellant/Respondent/Plaintiff

Vs.

M.P.Kumarasamy ... Respondent/Appellant/Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 07.07.2010 made in A.S.No.127 of 2009 on the file of the learned Principal District Judge, Erode, reversing the judgment and decree dated 30.06.2009 made in O.S.No.53 of 2004 on the file of the learned Principal Subordinate Judge, Gobichettipalayam.

For Appellant : Mrs.R.Gouri

For Respondent : Mr.V.Anandha Moorthy

J U D G M E N T

The present appeal is directed against the judgment and decree dated 07.07.2010 made in A.S.No.127 of 2009 on the file of the learned Principal District Judge, Erode, reversing the judgment and decree dated 30.06.2009 passed in O.S.No.53 of 2004 dated 30.06.2009, on the file of the learned Principal Subordinate Judge, Gobichettipalayam.

2. The appellant/plaintiff has filed a suit before the learned Principal Subordinate Judge, Gobichettipalayam in O.S.No.53 of 2004 seeking the relief of direction, directing the defendant to pay a sum of Rs.1,21,665/- with subsequent interest at the rate of 12% per annum to the plaintiff.



3. By judgment and decree dated 30.06.2009, the learned Principal Subordinate Judge, Gobichettipalayam, allowed the suit and directed the defendant to pay the suit amount to the plaintiff. Being dissatisfied with the said findings, the defendant preferred an appeal in A.S.No.127 of 2009 on the file of the learned Principal District Judge, Erode, praying to set aside the judgment and decree dated 30.06.2009 passed by the learned Principal Subordinate Judge, Gobichettipalayam.

4. By judgment and decree dated 07.07.2010, the learned Principal District Judge, Erode, allowed the appeal and dismissed the suit filed by the plaintiff. Feeling aggrieved by the same, the plaintiff is before this Court with the present second appeal.

5. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

6. The averments made in the plaint, in brief are as follows:

The defendant borrowed a sum of Rs.1,00,000/- from the plaintiff on 29.05.2002 for his urgent business and family expenses and executed a promissory note to repay the same with interest at the rate of 12% per annum. In spite of repeated demands and notice dated 27.01.2004, the defendant did not pay the amount and instead he has given reply notices on 04.02.2004 and 21.02.2004 making false allegations. Hence, the suit for recovery of Rs.1,21,665/- together with subsequent interest and costs.

7. The case of the defendant, as averred in the written statement, is as follows:

It is denied that the defendant borrowed Rs.1,00,000/- on 29.05.2002 and executed a promissory note agreeing to repay the same with interest at 12% per annum. The suit promissory note is a forged one. There is no demand on the part of the plaintiff. The suit promissory note is created subsequent to the notice. The defendant is not liable to pay any amount since the suit pronote is created in collusion with the attester and the scribe to get unlawful gain. Hence, the suit is liable to be dismissed.



8. Based on the above pleadings, the learned Principal Subordinate Judge, Gobichettipalayam, framed necessary issues and tried the suit. On the side of the plaintiff, the plaintiff examined himself as PW1. He examined two more witnesses on his side as PW2 and PW3 and marked seven documents as Ex.A1 to Ex.A7. On the other hand, none have been examined as defendant's side witness. However, during the time of cross examination of PW1, the defendant exhibited six documents as Ex.B1 to Ex.B6.

9. Having considered all the materials placed before him, the learned Principal Subordinate Judge, Gobichettipalayam, concluded the suit that the plaintiff is entitled to receive the suit amount from the defendant. In the appeal filed by the defendant before the learned Principal District Judge, Erode, in A.S.No.127 of 2009, the findings arrived at by the trial Court was reversed and held that the plaintiff has not proved his case.

10. Feeling aggrieved over the same, the plaintiff is before this Court with this present second appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether the Lower Appellate Court has erred in not appreciating that the appellant herein as plaintiff has proved the execution of promissory note by the defendant by examining PW2 the attesting witness and PW3 the scribe and that they have clearly deposed that on the date of execution of Ex.A1, promissory note, the defendant received the amount and executed the promissory note?

2. Whether the Lower Appellate Court has erred reversing the well considering findings of the trial Court that the execution of the suit promissory note has been proved by the plaintiff corroborated with the report of the expert opinion who has clearly opined that the signature found in Ex.A1 is that of the defendant?

3. Whether the Lower Appellate Court has failed to apply the rule of law that once the plaintiff has proved the execution of the suit promissory note, Section 118 of the Negotiable Instruments Act creates a Statutory presumption that the same was executed on the date mentioned in the document after receiving



the consideration and that the burden of proof lies upon the defendant to disprove the same?

4. Whether the Lower Appellate Court is right in not dismissing the appeal and decreeing the suit on the sole ground that the defendant has failed to appear and depose his evidence by entering into the witness box and no witnesses has been examined on the side of the defendant to deny or disprove the pleadings of the plaintiff?

5. Whether the Lower Appellate Court is right in not dismissing the appeal and decreeing the suit on the sole ground that admittedly that defendant in his written statement has not denied his signature in the promissory note and has equally not chosen to enter into the witness box to depose his evidence to disprove the case of the plaintiff?

11. Heard Mrs.R.Gouri, learned counsel appearing on behalf of the appellant and Mr.V.Anandha Moorthy, learned counsel appearing on behalf of the respondent and perused the materials available on record.

12. The learned counsel for the appellant/plaintiff would contend that the first appellate Court without considering the report given by the handwriting expert and without considering the evidence given by PW2 and PW3, who are the persons drawn and attested in the pro-note came to the conclusion that the plaintiff has not proved the execution and therefore, the statutory presumption does not arise and accordingly, held that the plaintiff has not proved his case. He would further submit that the evidence given by PW2 and PW3, is sufficient to accept the execution of pro-note. Further, the said finding arrived at by the handwriting expert is in support of the evidence given by PW2 and PW3. Therefore, in the absence of any material, the first appellate Court came to the conclusion that the execution of the pronote was not proved, and accordingly, the findings arrived at by the first appellate Court is a perverse one.

13. Per contra, the learned counsel appearing for the respondent/plaintiff would contend that previous to the occurrence, PW1 and PW2 are the employees under the defendant. The defendant being the employer retrenched PW1 and PW2 for the reason that they committed a fraud. In the said circumstances, it would not be necessary for the defendant to avail loan from the plaintiff. Further in respect to the signature, though the



handwriting expert gave opinion positively in favour of the plaintiff without proving the contents of the said document, by examining the author/maker of the content, the said document cannot be taken into account for considering the case of the plaintiff. More than that, the contradictions available in the evidence given by PW1 and PW2 is sufficient to accept the case of the defendant as the execution of the pronote is not proved.

14. The submission of the either side counsel is considered.

15. It is true in a suit for the recovery of money based on pronote, minor inconsistencies in deposition of lender cannot be given much importance. In this regard, this Court while at the time of disposing S.A.No.387 of 2012 on 07.01.2019, has observed as above.

16. Now placing reliance on the above said judgment, here it is a case, in respect to the payment of loan amount, PW1 gave evidence in his cross examination as after receiving Rs.1,00,000/- from his brother, Vellamuthu, the same was given to the defendant, as a loan. On the other hand, PW2-Selvam, who is the attester in the promissory note gave evidence as the plaintiff had collected the loan amount from his friends viz., Karuppanna Gounder, K.M.Palanisamy and K.M.Kumarasamy. He specifically states that the plaintiff received Rs.30,000/- from K.M.Kumarasamy, Rs.20,000/- from K.M.Karuppanna Gounder and Rs.50,000/- from K.M.Palanisamy. Therefore, in respect to the possession of debt amount, the prosecution witnesses gave a different version and the same would create a doubt as to whether the evidence given by PW1 is found correct or not.

17. Here it is a case, the stand taken by the defendant is that execution of pro-note, is not proved. On the other hand, it is the stand taken by the plaintiff that the execution of pronote is proved and therefore, under Section 118 of the Indian Evidence Act, the defendant is having the duty to rebut the presumption as arisen under Section 118 of the Indian Evidence Act and accordingly, he has to prove that the suit pronote was not supported by consideration.

18. In this connection, it is the specific submission made by the learned counsel appearing for the appellant/plaintiff that in the written statement filed by the respondent/defendant, he has not denied the execution and therefore, the subsequent stand taken by the defendant cannot be taken into account. Therefore, in the said circumstances, it would be necessary to see the written statement filed by the defendant. In the



written statement filed by the defendant in paragraph No.7, the defendant has clearly averred as the plaintiff fabricated the suit pronote with the help of the attester. Therefore, it cannot be said that the defendant has not denied the execution. Accordingly, the initial burden is upon the plaintiff to show the execution of the pronote.

19. As already observed, in respect to the payment of consideration, the evidence of PW1 and PW2, create a doubt over the case of the plaintiff. In otherwise, in respect to the signature found in the suit pronote, though PW1 to PW3 gave evidence that the signature found in the suit pronote belongs to the defendant, in his cross examination, PW1 states that the signature of the defendant found in the summon and the signature found in the pronote are different. Only in the said circumstances, the plaintiff filed an application before the trial Court for comparing the different signatures found in the pronote and other documents. After taking efforts, the report has also been received in the trial Court. Thereafter, for the reason best known to the plaintiff, the said document is not exhibited through the author of the document.

20. In this aspect, without any reason, the duty cast upon the plaintiff has not been discharged. The trial Court at the time of disposing the suit, after taking judicial notice, came to the conclusion that the signature found in the suit pronote belongs to the defendant. As rightly pointed out by the learned counsel for the respondent the said finding arrived at by the trial Court is erroneous. Without proving the contents of the document by examining the relevant witness, taking judicial notice is unnecessary. Accordingly, I am of the view that in the present case, the plaintiff has not proved the execution of pronote and therefore, non entering of the defendant in the witness box cannot be held as the same is fatal to the case of the defendant.

21. The standard of proof evidentially is principles of preponderance of probability. Inference of preponderance of probability can be drawn not only from the materials on record, but also by reference to the circumstances upon which, he relies.

22. Here it is a case, PW1, admitted himself as he was working under the defendant as a clerk, further, he had held that the defendant has not paid his salary. Similarly, PW2 has also given evidence as for the reason he committed fraud, the defendant ousted him from his company.



23. Therefore, the evidence in respect to the execution of pronote coupled with the said circumstances create a doubt and shows a probability that the present case has been foisted against the defendant for the ulterior motive having by PW1 and PW2. Therefore, it cannot be said that the findings arrived at by the first appellate Court is a perverse one.

24. In view of the above discussions, the substantial questions of law are all answered affirmatively in favour of the respondent/defendant. The Second Appeal is dismissed. The judgment and decree dated 07.07.2010 made in A.S.No.127 of 2009 on the file of the learned Principal District Judge, Erode, reversing the judgment and decree dated 30.06.2009 made in O.S.No.53 of 2004 on the file of the learned Principal Subordinate Judge, Gobichettipalayam, is confirmed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

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To

1.The Principal District Judge,
Erode.

2.The Principal Subordinate Judge,
Gobichettipalayam.

Copy to

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.V.Anandhamoorthy, Advocate Sr.62669

S.A.No.1387 of 2010

gj[co]
srg 06/01/2022