

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.09.2021
PRONOUNCED ON : 30.09.2021

CORAM

THE HONOURABLE MRS. JUSTICE S.KANNAMMAL

S.A.Nos. 1247 of 2019

S. Mala ...Appellant/Respondent/Plaintiff

Vs.

V.Chokkalingam ...Respondent/Appellant/Defendant

Prayer: This Second appeal filed under section 100 of Civil Procedure Code, to set aside the judgment and decree dated 24.04.2019 made in A.S.No. 77 of 2018 on the file of the learned Sub Court, Ulunderpet reversal of the judgment and decree dated 01.08.2017 made in O.S.No. 26 of 2013 on the file of the learned Principal District Munsif Court, Ulundurpet.

For Appellant : Mr.N.Manoharan

For Respondent : Mr.T.Gandhi

JUDGMENT

The present Second Appeal arises out of the judgment and decree dated 24.04.2019 made in A.S.No. 77 of 2018 passed by the Learned Sub Judge, Ulundurpet reversing the judgment and decree dated 01.08.2017 passed in O.S.No. 26 of 2013 by the Learned Principal District Munsif, Ulundurpet.

2. The brief facts which led to the filing of the present appeal, can be stated as under.

3. The appellant herein is the plaintiff and the respondent is the defendant. For the sake of convenience, the parties as arrayed in the Original Suit, can be referred hereinafter.

4. The plaintiff has filed a suit in O.S.No. 26 of 2013 before the Principal District Munsif, Ulundurpet against the defendant for recovery of a sum of Rs.1,00,000/- (Rupees One Lakh only), the principal amount is Rs.50,000 along with the

interest at 12% per annum from the date of the plaint till the date of realization.

5. According to the plaintiff, the defendant borrowed a sum of Rs.50,000/- (rupees Fifty Thousand only) from her on 19.07.2004 to meet out his family expenses and executed a promissory note, agreeing to repay the said amount with interest at the rate of Rs.1.00 per Rs.100/-. On 01.07.2007, the defendant made a part payment of Rs.500/- (Rupees Five Hundred only) and also again on 03.06.2010, he paid another Rs.500/- (Rupees Five Hundred only) towards part payment of the borrowed amount. Thereafter, despite the several requests made by the plaintiff, the defendant has failed to repay the suit amount, which prompted the plaintiff to issue a legal notice on 24.12.2012, but there was no reply. Hence, the plaintiff has filed the above suit.

6. Defending the suit filed by the plaintiff, the defendant filed a Written Statement, inter-alia that denying the borrowal of Rs.50,000/- from the plaintiff on 19.07.2004 and execution of the suit pronote as well as subsequent part payments made on 01.07.2007 and 03.06.2010 towards pronote amount.

7. According to the defendant, he approached the husband of the plaintiff, one Arumugam, for a loan of Rs.25,000/- on behalf of the one Elumalai who is employed in his house. The plaintiff's husband informed the defendant that as per the village practice, he has to execute pronote for Rs.50,000/- towards loan of Rs.25,000/-. Accordingly of on behalf of the said Elumalai, the defendant executed a pronote for Rs.50,000/- in the name of the plaintiff for the loan of Rs.25,000/- received by the Elumalai. As such, according to the defendant, the pronote is only valid for Rs.25,000/- and there was no consideration of Rs.50,000/-. It is also stated by the defendant that plaintiff's husband demanded interest at the rate of Rs.3/- per Rs.100/- for Rs.25,000/- and obtained a signature from the defendant, stating that the limitation period for the pronote is likely going to be end. But the defendant did not pay any amount towards part payment and made endorsements.

8. The plaintiff's husband fabricated a signature of the defendant and made entry on 01.07.2007. The borrower Elumalai paid the principal amount of Rs.25,000/- along with interest of Rs.35,000/- and totally Rs.60,000/- to the plaintiff's husband and requested him to return the pronote. But, the plaintiff's husband informed that the pronote was already barred by limitation and hence, the defendant did not get back pronote.

The plaintiff's husband is in the habit of filing many Civil and Criminal cases by fabricating the documents and like this he fabricated the endorsements dated 03.06.2010 and filed the present suit. The defendant denied his signature dated 03.06.2010 contained in the pronote, with these contentions the defendant sort for dismissal of the suit.

9. Based on the above pleading the following issues are framed:

1. Whether the Defendant has executed a suit Promissory note from the Plaintiff and borrowed Rs.50,000/- from him?
2. Whether the Plaintiff is entitled to recover the suit claim from the Defendant?
3. To what other relief?

10. In order to prove their respective cases, the plaintiff examined herself as P.W.1 and got marked exhibits A1 to A5 and on behalf of the defendant, he himself examined as DW1, apart from examining one Veerasamy as DW2 and no exhibits were marked on his side.

11. On consideration of both the oral and documentary evidence, the trial court found that the defendant has admitted the signature in Ex. A1 pronote as well as the Ex.A2 endorsements made by the defendant as regards the payment of Rs.500/- made on 01.07.2007 and as such the trial court drew presumption under section 118 of the Negotiable Instruments Act that Ex.A1 pronote was duly executed by the defendant after having received Rs.50,000/-. The trial court has also observed that the defendant has not chosen to examine one Elumalai and whose behalf the defendant according to him borrowed Rs.25,000/- and as such the non examination of Elumalai is fatal to the case of the defendant. As regards the denial of signature in receipt of the endorsements Ex.A3 dated 03.06.2010 is concerned, the trial court observed that while the defendant in his examination admitted his signature in Ex.A1 and Ex.A2 and he could not reply to the Ex.A4 legal notice issued by the plaintiff and as such, the trial court was of the view that the defendant has failed to rebut the presumption in favor of the plaintiff. Having observed so, the trial court judgment dated 01.08.2017 decreed the suit. Aggrieved by the said judgment, the defendant preferred an appeal in A.S.No. 77 of 2018 before the Sub Court, Ulundurpet. On appreciation of the entire evidence, available on record as well as the findings of the trial court, the Lower Appellate Court deferred with the findings of the trial court and allowed the appeal by reversing judgment and decree of the trial Court.

12. According to the Lower Appellate Court, though the defendant admitted Ex.A1 and A2, but he specifically denied Ex.A3 endorsement made in Ex.A1 pronote and in such circumstances Ex.A3 was sent to the handwriting expert, who in turn has given opinion that it was not possible to give any reliable opinion. In such circumstances, the burden lies on the plaintiff to prove the same, but the plaintiff has not discharged his burden by examining any other witnesses or by producing any documents. Therefore, when the plaintiff has failed to prove Ex.A3, the lower Appellate Court has come to the conclusion that the pronote is barred by limitation and accordingly allowed the appeal.

13. Questioning the judgment and decree of the Lower Appellate Court, the plaintiff has preferred the present second appeal.

14. While admitting the present appeal, the following substantial question of law were framed by this Court.

1. Has not the First Appellate Court committed an error in dismissing the money suit filed on the basis of a promissory note, when the defendant having admitted the execution, has failed to prove the factum of discharge of liability under Ex.A1?

2. Whether the judgment of the First Appellate Court is perverse for ignoring the settled judicial principle laid down in 1993(3) SCC 35?

15. Issue Nos.1 & 2:

The learned counsel appearing for the plaintiff would submit that the lower Appellate Court has not dealt with the issues in proper perspective and has not considered the material evidence available on record which clearly established the factum that the Defendant has executed the pronote Ex.A1 and also made endorsement Ex.A2 by which the plaintiff has discharged his burden while the defendant having taken plea that he has not executed Ex.A3 endorsement, has failed to discharge his burden. The learned Counsel appearing for the appellant would also contend that the defendant has not chosen to give reply to the legal notice Ex.A4 and only during the course of the trial, in his cross-examination, while admitting Exs.A1 and A2, cleverly denied Ex.A3 only to defeat the case of the plaintiff and to get the suit claim barred by limitation.

16. The learned Counsel appearing for the Defendant would submit that admittedly, there is no rebuttal evidence on record to show that Ex.A3 was executed by the defendant. He pointed out that though the defendant admitted Ex.A1 and A2, it cannot be held that the suit claim is well within the time limit and not barred by the limitation. He also pointed out that even the handwriting expert has also given opinion that it was not possible to give any reliable opinion, which shows that the defendant has not executed Ex.A3. He would contend that in order to save the limitation, the plaintiff has fabricated Ex.A3 and filed the suit which is not maintainable. Therefore, he contended that once Ex.A3 is not proved, the presumption under section 118 of the Negotiable Instrument Act cannot be drawn.

17. A perusal of the entire evidence available of record, it is clearly revealed that the defendant has borrowed Rs.50,000/- from the plaintiff on 19.07.2004 and executed pronote Ex.A1 in favor of the plaintiff. Though, it is claimed by the defendant that for and on behalf of the one Elumalai who is working under him, he approached the plaintiff's husband and borrowed Rs.25,000/- only, but executed pronote for Rs.50,000/- in favor of the plaintiff at his instance, but it is pertinent to note that for the reasons best known to the defendant, he has not chosen to examine Elumalai on his behalf to prove his case. In fact, this Court fails to understand as to what prompted the defendant to execute Ex.A1 pronote for Rs.50,000/- when he alleged to have received only Rs.25,000/-. Further it is not in dispute that the endorsement Ex.A2 dated 01.07.2001 on the backside of the Ex.A1 was made by the defendant since, the defendant himself has categorically admitted the same in his cross-examination.

18. As regards the endorsement dated 03.06.2010 made on the backside of the Ex.A1 under Ex.A3 is concerned, the defendant denied the same and according to him it was fabricated by the plaintiff only to save the limitation for the purpose of filing the suit. In this regard, Ex.A3 was also sent for handwriting expert's opinion, but no fruitful result came since, the handwriting expert has opined that it was not possible to give any reliable opinion. But, it is to be noted that the defendant has categorically admitted the execution of pronote Ex.A1 and endorsement Ex.A2 towards payment of Rs.500/-, but only denied Ex.A3 endorsement dated 03.06.2010. In this regard, it is to be noted that though, the handwriting expert has not given a clear finding, but when this Court carefully compared the admitted signatures of the defendant contained in Ex.A1 pronote, Ex.A2 endorsement dated 01.07.2001 and in the Written Statement filed

by him as well as in his deposition dated 05.08.2015, with that of the alleged signature contained in Ex.A3 dated 03.06.2010 this Court finds that in fact in order to escape liability and in order to shift his burden, the defendant has cleverly put his signatures with different styles and this Court on such comparison, found that the signature contained in Ex.A3 endorsement is also belonging to the defendant. The defendant cannot be permitted to take advantage of the evidence of appellant/plaintiff in his cross examination that handwriting varies from the 1st page of Ex.A1 to second page. Even the signature of the defendant in his deposition before the trial Court is also differed from the admitted signature found in Ex.A1 and Ex.A2.

19. Taking advantage of the handwriting expert's opinion, the defendant has contented that he has not made endorsement in Ex.A3 and the burden lies only on the plaintiff to prove the same. Apart from this technical issue, the fact remains is that the defendant has admittedly borrowed Rs.50,000/- for and on behalf of his employee Elumalai, who in turn, has also repaid the said amount to the defendant. Therefore, the defendant admitted Ex.A1 and A2, and also as observed by this Court even he made endorsement Ex.A3 and as rightly contended by the learned Counsel for the appellant, the burden lies only on the defendant to prove non existence of consideration.

20. In this regard, it is worthwhile to refer a decision reported in (1999) 3 Supreme Court Cases 35, wherein the Hon'ble supreme Court has categorically held in para 12 as under:-

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defense. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-

existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defense. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist.

21. In the present case, having admitted the execution of the pronote Ex.A1 and endorsement Ex.A2 and as observed and found by this Court even the endorsement Ex.A3, the burden lies on the defendant to prove non existence of consideration by bringing on record a cogent and reliable evidence, but the defendant failed to do so. Therefore, this Court is of the view that the defendant is liable to pay the suit amount along with interest thereon.

22. In the light of the above discussion, the substantial questions of law are answered in favor of the appellant/plaintiff and as against the defendant/respondent.

23. In the result, the Second Appeal is allowed and the judgment and decree dated 24.04.2019 passed by the learned Sub

Judge, Ulundurpet in A.S.No. 77 of 2018 are hereby set aside while confirming the judgment and decree dated 01.08.2017 passed by the learned Principal District Munsif, Ulundurpet in O.S.No. 26 of 2013. The parties shall bear their own costs throughout.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Ulunderpet.
2. The Principal District Munsif, Ulundurpet
3. The Section Officer, V.R.Section, High Court, Madras

+1 CC to Mr.N.Manoharan, Advocate sr 51335
+1 CC to Mr.T.Gandhi, Advocate sr 51065.

S.A. No.1247 of 2019

GMI (CO)
SP(24/11/2021)