



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.394 of 2007

HABEEB JOHN

... Appellant / Respondent/ Defendant

Vs

T.P.ABDUL AZIZ

... Respondent/ Appellant/ Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment in A.S.No.37 of 2005 on the file of the Principal Subordinate Judge, Thanjavur dated 11.07.2006 reversing the judgment and decree in O.S.No.183 of 2004 on the file of the District Munsif, Thiruvaiyaru dated 22.02.2005.

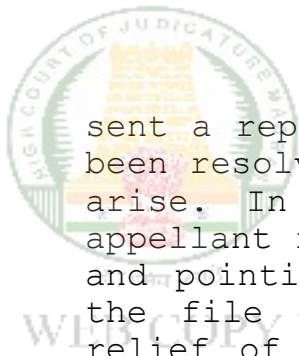
For Appellant : Mr.V.Chandrasekar

For Respondent : No appearance

JUDGMENT

The defendant in O.S.No.183 of 2004, on the file of District Munsif Court, Thiruvaiyaru, is the appellant in this Second Appeal. The respondent herein namely, T.P.Abdul Aziz, filed the said suit for recovery of a sum of Rs.35,000/- with interest from the appellant.

2. The case of the respondent is that he owned the front portion of the house bearing Door Number-29, (New number 24), Railway Station Road, Ayyampettai. He entered into an agreement with one Mohammad Kasim, agreeing to sell the property for a sum of Rs.4,35,000/-. Later, the appellant herein had stepped into the shoes of the agreement holder and purchased the property vide sale deed, dated 19.04.2004. The brother of the plaintiff owned the back portion of the said house. The appellant herein raised a doubt that concurrence of the plaintiff's brother namely, Mohammed Zeyavudeen, must be obtained with regard to the enjoyment of the common rights to the said house. The appellant withheld a sum of Rs.35,000/- promising to pay the same upon resolving of the dispute that involved the brother of the plaintiff. In this regard, a document dated 19.04.2004 (Ex.A1) was executed between the parties. The specific stand of the plaintiff is that even though, some legal action was anticipated from his brother Zeyavudeenn, nothing really turned out. Hence, the plaintiff caused to issue Ex.A2-legal notice dated 15.06.2004 formally calling upon the appellant to pay the balance amount of Rs.35,000/-. The appellant received the same and



sent a reply, dated 23.06.2004 (Ex.B2) that since the issue has not been resolved, the question of releasing the withheld amount did not arise. In these circumstances, the suit came to be filed. The appellant filed written statement controverting the plaint averments and pointing out that Zeyavudeen had filed O.S.No.141 of 2004, on the file of the District Munsif Court, Thiruvaiyaru seeking the relief of permanent injunction. Therefore, the question of paying the said amount did not arise at all. Based on the divergent pleadings, the trial Court framed the necessary issues. The plaintiff examined himself as PW1 and marked Exs.A1 to A3. The appellant's father was examined as DW1 and Exs.B1 and B2 were marked.

3. After considering the evidence on record, the trial Court by Judgment and Decree, dated 22.02.2005 dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.37 of 2005 before the Principal Sub-Court, Thanjavur. The first appellate court, by the impugned judgment and decree, dated 11.07.2006, set aside the judgment and decree passed by the trial court and allowed the appeal and decreed the suit as prayed for. Challenging the same, the Second Appeal came to be filed.

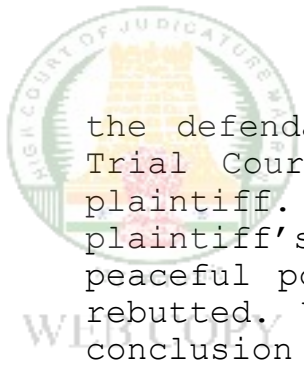
4. The Second Appeal was admitted on the following substantial questions of law:

" (i) Whether the judgment and decree of the First Appellate Court could be sustained on the face of it when Ex.A1 is misconstrued as a Negotiable Instrument when the recitals of Exhibit shows that it is a bilateral agreement?

(ii) Whether the judgment and decree of the First Appellate Court is right in taking into consideration only the nomenclature of the Ex.A1 without reading the document as a whole?"

5. Though the respondent/plaintiff's was served and he entered appearance through counsel, there has been no representation on the side of the respondent for the last six hearings, ie., from 19.04.2021 itself. It was made clear that if the respondent did not appear, the appellant will be set exparte as contemplated under Order XXXI Rule 17(2) CPC. In view of the continued non-appearance on the side of the respondent, the respondent was set exparte and the appeal is being heard on merits.

6. The learned counsel appearing for the appellant pointed out that the first appellate court, without any basis, held that in a suit for recovery of money due, the burden initially rests on the plaintiff to prove that the document was executed by the defendant and on such proving, the plaintiff will be entitled for presumption against the defendant as provided under Section 118 of the Negotiable Instruments Act. The first appellate court noted that the case of the plaintiff is based on Ex.A1. Ex.A1 was not disputed by

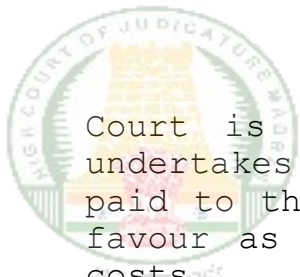


the defendant. Therefore, the First Appellate Court held that the Trial Court ought to have drawn a presumption in favour of the plaintiff. Since the defendant could not establish that the plaintiff's brother has caused obstruction or interference with her peaceful possession and enjoyment, the presumption was held as un-rebutted. Viewing in that light, the Appellate Court came to the conclusion that the suit deserved to be decreed.

7. I am at a loss to understand the approach adopted by the first appellate court. The presumption under Section 118 of the Negotiable Instruments Act will apply only to negotiable instruments. The expression "negotiable instrument" has been defined under Section 13 of the Negotiable Instruments Act, 1881, as a promissory note, bill of exchange or cheque payable either to order to direct. Promissory note has been defined in Section 4 as an instrument in writing containing an unconditional undertaking signed by a neighbour to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument. Ex.A1 cannot be termed as a promissory note. The appellant had undertaken to pay the withheld amount of Rs.35,000/- upon resolving of the dispute relating to the enjoyment of the common rights. Only, if the instrument contains an unconditional undertaking, it can be called as a promissory note. Ex.A1 is obviously not a promissory note. It also cannot be called as a bill of exchange or a cheque. The Court below proceeded on an erroneous premise that a suit for recovery of money was anchored on a document executed by the defendant, then presumption under section 118 of the Act will apply. The very assumption on the first appellate court is faulty. The first appellate court ought to have considered the issue as to whether Ex.A1 will fall within the definition of the term "negotiable instruments". Only after satisfying that Ex.A1 is a negotiable instrument, presumption under Section 118 could have been invoked. I have decided that Ex.A1 is not a negotiable instrument. Therefore, the question of invoking presumption in favour of the plaintiff will not at all arise. The first appellate Court totally misdirected itself in law as well as on facts. The substantial questions of law are answered in favour of the appellant.

8. The appellant had established that she was justified in withholding the suit amount of Rs.35,000/- Even according to the plaintiff, he would be entitled to the said amount only if the dispute with his brother regarding the use and enjoyment of the common rights is resolved. It is not in dispute that the plaintiff's brother had filed O.S.No.141 of 2004 seeking the relief of permanent injunction. The very institution of the suit by the plaintiff's brother indicates that the issue is yet to be resolved. Therefore, the first appellate court could not have reversed the well considered decision of the trial court.

9. In this view of the matter, the judgement passed by the first appellate court is set aside and the decision of the Trial



Court is restored. The second appeal is allowed. The appellant undertakes that the amount of Rs.35,000/- (without interest) will be paid to the plaintiff, when the dispute is finally resolved in her favour as contemplated by EX.A1. This undertaking is recorded. No costs.

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Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

kmm

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The District Munsif, Thiruvaiyaru
2. The Principal Subordinate Judge, Thanjavur.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.V.CHANDRASEKAR, Advocate (SR-28280[F] dated 06/09/2021

S.A. (MD) No.394 of 2007
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TP(CO)
KB(09.02.2022) 4P 6C