



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.696 of 2011

N.Ramamoorthy

... Appellant / Respondent /
Plaintiff

vs

1. M.Mahadevan (Died)

... Respondent / Appellant /
Defendant

2.Amutha

3.Akila

4.Parameshwari

... Respondents

(R-2 to R-4 are brought on record as LR's.

Of the deceased sole respondent vide Order

dated 27.07.2021 made in C.M.P.(MD)No.4258 of 2021).

Prayer: Second appeal filed under Section 100 of C.P.C., against the decree and judgment of the Principal District Judge, Thanjavur passed in A.S.No.5 of 2008 dated 19.12.2008 reversing the decree and judgment of the Additional Subordinate Judge, Thanjavur passed in O.S.No.116 of 2006 dated 07.01.2008.

For Appellant : Mr.G.Karnan

For Respondents : Mr.R.Murali

JUDGMENT

This second appeal arises out of a money suit. According to the plaintiff, the defendant availed cash loan from him by executing a promissory note and that he failed to repay the same even after receiving the suit notice. The suit was filed to recover the amount with interest. The trial court decreed the suit. The first appellate court reversed the decision of the trial court and dismissed the suit after holding that presumption under Section 118 of the Negotiable Instruments Act, 1881 could not be invoked when the transaction did not conform to the mandate set out in Section 269SS of the Income Tax Act, 1961.



2.The second appeal was admitted on the following substantial questions of law :

"1.Whether the finding of the first appellate court that the plaintiff is not entitled to recover the suit amount on the basis of Ex.A1 promissory note is perverse ?

2.Whether the plaintiff can be non-suited on the ground of non-adherence to the provisions of the Income Tax Act, 1961?"

3.The case of the plaintiff was that the defendant borrowed a sum of Rs.1,50,000/- from him on 20.07.2004 by executing Ex.A.1 promissory note undertaking to repay the same with interest @ 18% p.a. Since the defendant did not make any payment either towards principal or interest in spite of repeated demands, the plaintiff issued notice dated 26.09.2006 (Ex.A.2) which elicited Ex.A3 reply notice dated 08.10.2006. In the reply, the defendant not only denied the notice averments but also projected a different version. Since his demand was not complied with, the plaintiff filed the aforesaid suit for recovering a sum of Rs.2,00,000/- from the defendant with interest. The defendant filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial Court framed the necessary issues. The plaintiff examined himself as P.W.1 and the attester of the promissory note, namely, Paramasivam as P.W.2. Ex.A1 to Ex.A3 were marked. The defendant examined himself as D.W.1 and one Ganesan as D.W.2. One Senthilkumar who was shown as the scribe in Ex.A1 was examined as D.W.3. Ex.B.1 and Ex.B.2 were marked. After considering the evidence on record, the trial Court by judgment and decree dated 07.01.2008 decreed the suit as prayed for. Aggrieved by the same, the defendant filed A.S.No.5 of 2008 before the Principal District Judge, Thanjavur. By the impugned judgment and decree dated 19.12.2008, the first appellate Court set aside the decision of the trial Court and allowed the appeal and dismissed the suit. Challenging the same, this second appeal came to be filed.

4.The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial Court.

5.During the pendency of the appeal, the defendant passed away and his legal heirs have been brought on record as respondents 2 to 4. Their counsel submitted that the impugned judgment and decree do not call for any interference. In response to the suit notice, the defendant had given a detailed reply vide Ex.A.3. The plaint did not meet the defence projected in the said reply. It is rather cryptic. By examining himself and two other witnesses including the scribe of the pro-note, the defendant effectively rebutted the presumption raised against him. Thereafter, the onus shifted back to the plaintiff. The plaintiff was therefore obliged to prove that the consideration actually passed under Ex.A.1



promissory note. The learned counsel placed reliance on the decisions reported in (2006) 6 SCC 39 (M.S.Narayana Menon V. State of Kerala) and 2009 (1) CTC 552 (M/s.Kumar Exports Vs. M/s.Sharma Carpets). He also took me through the testimonies of the various witnesses and submitted that the plaintiff had failed to establish the venue of borrowal. He contended that DW.3 (Senthilkumar/scribe) had supported the case of the defendant. The amount of Rs.1,50,000/- said to have been lent under Ex.A.1 promissory note was a huge sum. It should have been reflected in the income tax returns of the plaintiff which, however, were not produced. Further, the statutory mandate is that any money transaction exceeding Rs.20,000/- can be carried out only in the manner set out in Section 269SS of the Income Tax Act, 1961. Therefore, the first appellate court was justified in holding that since the transaction did not conform to the said statutory scheme, presumption under Section 118 of the Negotiable Instruments Act cannot be pressed into service. The first appellate court had given convincing reasons to non-suit the plaintiff. The learned counsel would further add that the questions raised by the appellant are broadly factual in nature and therefore, the matter did not warrant interference under Section 100 of C.P.C. He sought dismissal of the second appeal.

6.I carefully considered the rival contentions and went through the evidence on record.

7. The learned counsel for the respondent contended that the plaint is defective as it is silent on the defence set out in the reply notice. I find no merit in this submission. Order VII Rule 1 of CPC sets out the particulars that should be contained in a plaint. Along with other things catalogued in the said provision, the plaint should contain the facts constituting the cause of action and when it arose. There is no need to deal with the defence of the defendant in the plaint. It is quite possible that a defendant may not stick to the stand taken earlier. Even in the case on hand, though in the reply notice, the defendant challenged the financial capacity of the plaintiff to lend the suit amount, the written statement not only did not raise the said contention but went to the extent of admitting that whenever the defendant was in financial difficulties, he sought the intervention of the plaintiff to raise funds. The case of the plaintiff cannot be doubted merely because it does not meet the contentions raised by the defendant in response to the pre-suit notice. The plaint has to conform to the requirements of Order VII of CPC. Appendix A Form No.1 of CPC contains the format of a plaint in a money suit. It expects the plaintiff to aver that he lent the defendant a certain sum of rupees repayable by a certain date and that the defendant has not paid the same in full. As contemplated by Order VII Rule 6 of CPC, if the suit is instituted after the expiration of the limitation period, the ground on which exemption is claimed must be shown. The plaintiff need not exert his drafting skills beyond what is



8.The promissory note was marked as Ex.A.1. The signature attributed to the defendant in Ex.A.1 was not denied. The plaintiff examined himself and also the attesor of the document. The trial Court rightly invoked the presumption under Section 118 of the Negotiable Instruments Act, 1881 against the defendant. The only question that called for consideration was whether the defendant had rebutted such presumption and shifted the onus back to the plaintiff. The learned counsel appearing for the respondent is right in his contention that this rebuttal can be done in several ways. The issue was not the mode of rebuttal. It was whether the presumption was actually rebutted. The defendant claimed that through the good offices of the plaintiff, he had financial dealings with two individuals, namely, Muruganandham and Ganesan and that he had handed over signed blank promissory notes to them. His defence was that one such note had been misused by the plaintiff. Ganesan against whom the defendant had used strong words in the written statement appeared as defence witness. The trial court rightly rejected this defence because the defendant was not himself clear whether the suit promissory note was the one given by him to Muruganandham or Ganesan. The trial Court had categorically held that the burden lay only on the defendant but he failed to take a definite stand. Muruganandham who was also referred to in the written statement was not examined. In fact, it was he who was the second attesor of the suit promissory note.

9.It is true that the scribe Senthilkumar was examined by the defendant. In his proof affidavit, he stated that some two years ago, two persons came to his office and told him to write out a promissory note as if the milk vendor Mahadevan borrowed money from N.Ramamoorthy. D.W.3 had stated that the details were furnished by those two individuals. He of course stated that money was not handed over in his presence. He also stated that he did not go to anybody's house and that the promissory note was written in his office only. In my view, this testimony of D.W.3 far from undermining the case of the plaintiff, reinforces the same. Of course, certain contradictions had been elicited during the cross examination of the witnesses examined on the side of the plaintiff as regards the exact venue where the transaction had taken place. Those discrepancies are rather minor and do not really go to the root of the matter.

10.The first appellate court non-suited the plaintiff primarily on the ground that the provisions of the Income Tax Act have been infringed. Of course, considering the amount involved, the suit transaction ought to have been reflected in the income tax returns of the plaintiff. It is equally true that Section 269SS of the Income Tax Act was not followed. On this ground, the first appellate court went to the extent of holding that presumption under Section 118 of the Negotiable Instruments Act, 1881 could not have



was right in adopting such an approach.

11. Section 269SS of the Income Tax Act, 1961 is as follows :

"Mode of taking or accepting certain loans, deposits and specified sum.

269SS. No person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed], if,-

(a) the amount of such loan or deposit or specified sum or the aggregate amount of such loan, deposit and specified sum; or

(b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit or specified sum taken or accepted from, or any loan or deposit or specified sum taken or accepted by,-

(a) the Government;

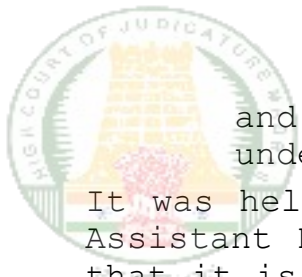
(b) any banking company, post office savings bank or co-operative bank;

(c) any corporation established by a Central, State or Provincial Act;

(d) any Government company as defined in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013);

(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

Provided further that the provisions of this section shall not apply to any loan or deposit or specified sum, where the person from whom the loan or deposit or specified sum is taken or accepted and the person by whom the loan or deposit or specified sum is taken or accepted, are both having agricultural income



and neither of them has any income chargeable to tax under this Act."

It was held in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala v. Assistant Director of Inspection, Investigation [1992 LW (CrI) 400] that it is only the borrower who is put under an obligation to take the loan in the manner specified in the provision. The lender is not brought within its fold.

12. Section 118 of the Negotiable Instruments Act, 1881 is as follows :

"Presumptions as to negotiable instruments

Description: Until the contrary is proved, the following presumptions shall be made:-- (a) of consideration:-- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration; (b) as to date:-- that every negotiable instrument bearing a date was made or drawn on such date; (c) as to time of acceptance: that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity; (d) as to time of transfer:-- that every transfer of a negotiable instrument was made before its maturity; (e) as to order of indorsements:-- that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon; (f) as to stamp:-- that a lost promissory note, bill of exchange or cheque was duly stamped; (g) that holder is a holder in due course:-- that the holder of a negotiable instrument is a holder in due course : provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.

Section 118 occurs in Chapter XIII which bears the heading "Special Rules of Evidence". Section 4 of Indian Evidence Act, 1872 states that whenever it is directed by the Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. Since 118 of the N.I Act also directs that it shall be presumed that every negotiable instrument was made or drawn for consideration. P Ramanatha Aiyar's Advanced Law Lexicon states that "Presumptions" are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. 'Presumption' literally means



'taking' as true without examination or proof. The term 'presumption' is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the 'presumed fact'.

13. Section 118 of the Negotiable Instruments Act, 1881 states that the presumptions set out therein 'shall be made'. This is equivalent to saying 'shall presume'. It was held in **P.R.Metrani Vs. CIT (2007) 1 SCC 789** that a presumption in the form of 'shall presume' leaves no option with the Court not to make the presumption. The Court is bound to take the fact as proved until evidence is given to disprove it. Therefore, the first appellate court had no option but to apply Section 118 of the Negotiable Instruments Act, 1881. There is no statutory provision anywhere that the court is relieved of the duty to make the said presumption if the transaction in question is not in consonance with the provisions of the Income Tax Act. Therefore, the approach adopted by the first appellate court is bereft of any legal foundation.

14. In case after case, it has been held that merely because the transaction in question has not been shown in the income tax returns, it would not be rendered void. If the lender has advanced a certain amount which ought to have been reflected in the tax returns but he failed to disclose the same in his returns, that would not exonerate the borrower from the liability to repay. The default committed by the lender may attract penal action from the department. But his right to recover the amount from the borrower cannot be extinguished. (*vide Dr.Jagannath Ganesh Hegde Vs. In Depth Entertaining Arts Private Limited 2016 SCC Online Bom 10400*). Right to recover the money lent is a valuable civil right that is recognised both by common law as well as statute. It can be made unenforceable only by statutory intervention. For instance, law of limitation can render a claim otherwise valid unenforceable. The government of the day can bring in legislation offering succour to debtors. If the suit transaction falls within the scope of a debt relief legislation, the lender cannot maintain an action outside its framework. But failure to disclose in the tax returns cannot render the amount irrecoverable. It cannot extinguish the right of the creditor. A civil remedy can be stifled only by a statutory provision and not by judicial innovation.

15. In the case on hand, the first appellate court contrary to the statutory mandate failed to presume a certain fact in favour of the plaintiff and that led to the dismissal of the suit. It also misconstrued the evidence on record. I therefore answer the substantial questions of law in favour of the appellant. The impugned judgment and decree passed by the first appellate court is set aside. It is however noted that the appellant did not file the appeal in time. There was a delay in filing. He will not be entitled to any interest for the said period. Subject to this, the



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decision of the trial court is restored. The second appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PMU

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 Principal District Judge, Thanjavur.

2. The Additional Subordinate Judge,
Thanjavur.

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

+1 CC to M/s.R.MURALI, Advocate (SR-28851[F] dated 13/09/2021)

+1 CC to M/s.G.KARNAN, Advocate (SR-28749[F] dated 09/09/2021)

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