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S.A.(MD)No.659 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.06.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN

S.A. (MD) No. 659 of 2012

and

M.P. (MD) No. 1 of 2012

K. Kuppusamy

... Appellant/Appellant/Defendant

-Vs-

N. Natarajan

... Respondent/Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree in A.S.No.2 of 2008 on the file of the Principal District Court, Dindigul, dated 30.11.2009 confirming the Judgment and decree passed in O.S.No.134 of 2003 on the file of the Sub Court, Palani, dated 31.08.2007.

For Appellant : Mr.D.Venkatesh
For Respondent : Mr.S.Satheeskumar

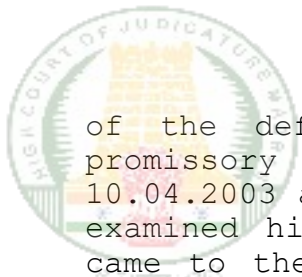
JUDGMENT

The defendant in O.S.No.134 of 2003 on the file of the Sub Court, Palani, is the appellant in this second appeal. The suit was filed by the respondent herein Thiru.Natarajan for recovering a sum of Rs.1,24,500/- from the appellant herein.

2.The case of the plaintiff is that Kuppusamy / defendant borrowed a sum of Rs.1,00,000/- on 21.07.2000 agreeing to repay the same with interest at the rate of 12% per annum. He also executed the suit promissory note. The plaintiff issued notice dated 10.04.2003 calling upon the defendant to clear the loan liability. Since the defendant did not come forward to do so, the said suit came to be filed.

3.The defendant Kuppusamy filed his written statement denying the plaintiff's averments. He contended that the plaintiff's family and the defendant's family though relatives were not on talking terms for several years. The defendant's father is said to have given a complaint against the plaintiff's father before the local police station. According to the defendant, he was working as Sub Contractor along with relatives by name Thambidurai and Subramani. The business venture ended in loss. Therefore, they had to borrow a sum of Rs.50,000/- from one Kalimuthu. The said Kalimuthu insisted that the defendant should execute a blank promissory note. The defendant executed a blank promissory note and gave it to the said Kalimuthu. Later, the defendant paid a sum of Rs.25,000/- representing his share of liability. The said Kalimuthu is said to have stated that only if the balance amount is also paid, the promissory note would be returned. According to the defendant, the said Thambidurai managed to obtain the promissory note from the said Kalimuthu, filled it up and filed the instant suit through the plaintiff. The trial Court framed the necessary issues. The plaintiff examined himself as P.W.1. Interestingly, Thambidurai who is referred to in the written statement

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of the defendant was examined as P.W.2 as the attesor of Ex.A1-promissory note. The plaintiff marked the suit notice Ex.A2, dated 10.04.2003 and the reply issued by the defendant as Ex.A3. The defendant examined himself as D.W.1 and marked Ex.B1 to Ex.B5. The trial Court came to the conclusion that the plaintiff has established his case and decreed the suit as prayed for. Aggrieved by the same, the defendant filed A.S.No.2 of 2008 before the Principal District Judge, Dindigul. By Judgment and decree dated 30.11.2009, the appeal was dismissed. Challenging the same, this second appeal came to be filed.

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

"Whether the Courts below are right in law in granting decree when the plaintiff did not discharge his onus of proof after the burden was shifted to him?"

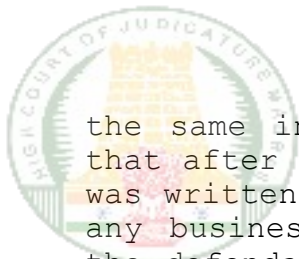
5.Heard the learned counsel on either side.

6.The learned counsel appearing for the appellant reiterated the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellant and allow this appeal and dismiss the suit filed by the respondent herein.

7.Per contra, the learned counsel appearing for the respondent submitted that the Judgments of the Courts below do not call for any interference. I carefully considered the rival contentions and went through the evidence on record.

8.This second appeal arise out of a money suit. The suit was laid on the strength of Ex.A1-pro-note. There is no dispute that the appellant / defendant K.Kuppusamy had signed in the said pro-note. Therefore, the learned counsel appearing for the plaintiff would submit that the presumption under Section 138 of the Negotiable Instruments Act will get attracted and the onus was entirely on the defendant to rebut the presumption.

9.The specific stand of the appellant is that he handed over a signed blank pro-note to one Kalimuthu and that the same was obtained by P.W.2-Thambi Durai who was the erstwhile business partner of the appellant and misused. The learned counsel appearing for the appellant took me through the deposition of the plaintiff / witness. P.W.2-Thambidurai who is shown as the attesor in Ex.A1 deposed that Ex.A1 was written down by one Marichamy and that the defendant as well as P.W.2 signed in the document. He categorically stated that all of them put their signature by using the very same pen. The original pro-note is before me. Even an examination with naked eye would show that the parties have signed it by using different pens. That may not really go to the root of the matter. The pro-note was said to have been executed on 21.07.2000, while P.W.2 was examined in July 2007. Therefore, there is likely to be some lapse of memory. What clinches the case in favour of the appellant is that the signature has been put by using one pen, while the date has been put by using some other pen. Normally, when a person puts one signature with date, it will normally be by using one and



the same instrument. It is not the case of the plaintiff's witnesses that after Kuppusamy put his signature, the ink ran dry and that the date was written by using some other pen. P.W.2 has flatly denied that he had any business relationship with the defendant. To controvert the same, the defendant had marked Ex.B5 which is the copy of the deposition given by the principal contractor Subramani in C.C.No.41 of 2003 on the file of the Judicial Magistrate, Tharapuram. It was a private complaint filed under Section 138 of the Negotiable Instruments Act against P.W.2 -Thambidurai by the said Subramani. In the said testimony, Subramani had categorically stated that he had subcontracted the works to Thambidurai, Palanisamy and one Kuppusamy.

10. The learned counsel for the appellant wants me to go by this testimony to probabalise his case. There was a business relationship between the defendant and P.W.2. Though the contention is rather persuasive, I am afraid that Ex.B5 may not be admissible in view of Section 33 of the Evidence Act. The said testimony was given in a criminal case between P.W.2 and Subramani. It is not the case of the appellant that Subramani was no more or could not be produced. Therefore, Ex.B5 was clearly inadmissible in evidence and I therefore refuse to take it into account. However, from a consideration of the overall evidence on record, I hold that the Courts below ought to have held that the defendant had clearly rebutted the presumption on a balance of probabilities. Even though I answer the substantial question of law in favour of the appellant and the impugned Judgment and decree passed by the Court below are set aside, this appeal cannot be allowed in *toto*.

11.The admitted case of the appellant is that a sum of Rs.50,000/- was borrowed from Kalimuthu. Though the appellant would claim that he had paid his share of liability i.e., Rs.25,000/-, still there is no proof for the same. Kalimuthu was not examined as a witness. No receipt has been produced. If really the appellant had paid his share of liability, he would have certainly got back the blank signed pro-note given by him to Kalimuthu. The appellant had not issued any notice or communication in this regard either to P.W.2 or to Kalimuthu. Therefore, I have to necessarily hold that the loan of Rs.50,000/- availed from Kalimuthu remains uncleared and that the same has been put to use through the plaintiff. The appellant's counsel is ready to clear the principal liability of Rs.50,000/- together with interest at the rate of 6% per annum.

12.Since the transaction between the parties is commercial in nature, interest of justice requires that the defendant is directed to pay interest at the rate of 12% per annum. Therefore, the impugned decree passed by the Court below is modified and the defendant is directed to pay a sum of Rs.50,000/- to the plaintiff together with interest at the rate of 12% per annum to be calculated from the date of execution of the pro-note i.e., on 21.07.2000. Time for payment is twelve weeks.



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13.The second appeal is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS II)

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/ /2021

Sub Assistant Registrar(CS)

To

- 1.The Principal District Court, Dindigul.
- 2.The Sub Court, Palani.
- 3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1CC to Mr.D.Venkatesh, Advocate (SR20376)

S.A. (MD) No. 659 of 2012
and
M.P. (MD) No. 1 of 2012
24.06.2021

PK

RS (10.08.2021) 4P-6C