



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

A.S.(MD)No.168 of 2020

and

C.M.P.(MD)No.6191 of 2020

C.Selvam ... Appellant / Defendant

-Vs-

P.Gunabalan ... Respondent / Plaintiff

PRAYER: Appeal Suit filed under Order 41 Rule 1 of C.P.C r/w Section 96 of the Civil Procedure Code, against the judgment and decree dated 13.02.2020 passed in O.S.No.54 of 2014 on the file of the first Additional District Court, Thoothukudi.

For Appellant : Mr.M.Karthikeyavenkatachalapathy
For Respondent : Mr.R.Vijayakumar

JUDGMENT

The defendant in O.S.No.54 of 2014 on the file of the first Additional District Court, Thoothukudi is the appellant herein.

2. Gunabalan / respondent herein filed the said suit for recovering a sum of Rs.13,06,350/- from the appellant herein with interest. The case of the plaintiff is that the defendant was known to him and that on 27.05.2012, the defendant borrowed a sum of Rs.9,00,000/- from him for business purpose. He also executed Ex.A1-promissory note in favour of the plaintiff. The defendant did not honor his obligation in the matter of repayment. The plaintiff therefore issued Ex.A2-suit notice dated 06.11.2014 calling upon the defendant to clear the loan liability. Though the defendant received the notice as evidenced by Ex.A3-acknowledgement card, neither reply was sent nor the demand set out in the notice complied with. Therefore, the plaintiff filed the said suit on 01.12.2014.

3. After entering appearance, the appellant herein filed written statement controverting the plaint averments. According to the defendant, he had financial transactions with A.S.Gopala Kannan, son of Subramanian, of Mettur during the course of which he signed a pro-note. The said A.S.Gopala Kannan had misused the signed pro-note and filed the present suit through the plaintiff herein. The defendant's specific stand was that he had no contact whatsoever with the plaintiff. The plaintiff was an utter stranger to him.



Based on the divergent pleadings, the Court below framed the necessary issues. The plaintiff examined himself as P.W.1 and the attester of the pro-note as P.W.2. Ex.A1 to Ex.A5 were marked. The defendant examined himself as D.W.1. Three other witnesses were marked on his side. Ex.X1 was marked through D.W.2. After considering the evidence on record, the Court below came to the conclusion that the plaintiff had established the genuineness of Ex.A1-pro-note and decreed the suit by the impugned judgment and decree dated 13.02.2020. The defendant was directed to pay a sum of Rs.13,06,350/- with interest at the rate of 12% on Rs.9,00,000/- from the date of plaint till the date of decree and thereafter @ 6% per annum. Challenging the same, this appeal came to be filed.

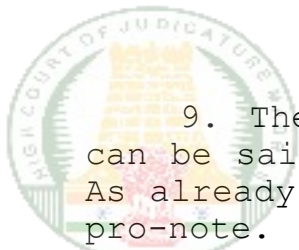
4. The point for determination in this appeal is whether the impugned judgment and decree can be sustained by upholding the genuineness of Ex.A1-pro-note. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to reverse the impugned judgment and decree and allow this appeal and dismiss the suit.

5.Per contra, the learned counsel appearing for the respondent/plaintiff submitted that the trial Judge had correctly appreciated the evidence on record and wanted this Court to sustain the impugned judgment and decree.

6.I carefully considered the rival contentions and re-appreciated the evidence on record.

7. The learned counsel appearing for the respondent pointed out that the defendant failed to respond to the pre-suit notice dated 06.11.2014. The defendant received the same on 11.11.2014. The suit came to be filed only on 01.12.2014. If the stand of the defendant was that the plaintiff was an utter stranger, certainly, the defendant would have responded to the suit notice immediately. He had not done so. Though this contention of the learned counsel appearing for the respondent is well founded, it is well settled that failure to respond to the suit notice cannot always be fatal to the defence of the defendant.

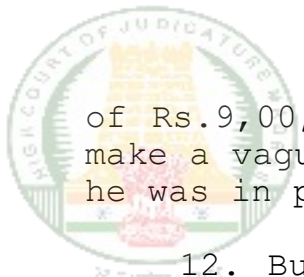
8.It is also true that the defendant had not examined A.S.Gopala Kannan with whom the defendant admittedly had transaction. Yet failure to examine A.S.Gopala Kannan is not fatal to the defence of the appellant. It is obvious that the relationship between the defendant and A.S.Gopala Kannan had broken down and they were antagonistic to each other. The defendant could not have summoned him and examined him. Had he so examined him, the witness would have definitely taken an adverse stand and thereafter, the defendant would have to have him declared as hostile. Therefore, the defendant was probably advised not to summon the said Gopala



9. The next question is whether the defence of the appellant can be said to have been established on a balance of probabilities. As already pointed out, the suit was laid on the strength of Ex.A1-pro-note. The defendant is a permanent resident of Mettur in Salem District. The plaintiff is a permanent resident of Thoothukudi. The categorical stand of the defendant in the written statement is that the plaintiff is an utter stranger and that they have not had any kind of relationship between them. Therefore, the plaintiff ought to have adduced some kind of evidence to show that the defendant was known to him and that is why, the plaintiff advanced a sum of Rs.9,00,000/- even without security. In the course of cross examination, a specific question was put to the plaintiff as to how he made the demand for repayment. The plaintiff answered that he had met the defendant in person and demanded repayment. Interestingly, the plaintiff would state that he never telephonically contacted the defendant. The plaintiff was not even aware of the mobile phone number of the defendant. When the defendant is based in Salem District and the plaintiff is based in Thoothukudi District, the claim that they never had any telephonic contact or conversation through mobile phone sounds highly improbable. It must be stressed that a huge sum of Rs.9,00,000/- was made without any security.

10. In the written statement, the wherewithal of the plaintiff has not been challenged. But during the course of cross examination, several questions had been put in this regard. The plaintiff is a retired Government Servant. He admitted that he is an IT assessee and that he was filing his annual returns till 01.03.2012. But after his retirement, he did not file any return. It is well known that an IT assessee is statutorily obliged to file his annual returns even if there is no taxable income. A sum of Rs.9,00,000/- would definitely fall within the taxation net. Income Tax Act also contemplates that transaction beyond a certain ceiling limit will have to be done only through instruments. The suit transaction is not finding place in the income tax returns of the plaintiff. During the course of cross examination, the plaintiff further admitted that his nephew is an advocate before the Court at Mettur. His brother is also based in Mettur.

11. From these circumstances, I hold that the defendant on a balance of probabilities has effectively rebutted the presumption that was bound to be raised against him under Section 118 of the Negotiable Instruments Act. The defendant had admitted the signature in Ex.A1-pro-note. Since the plaintiff had also examined the attessor, the Court below was justified in raising presumption under Section 118 of the Negotiable Instruments Act against the defendant. By his effective cross examination, the defendant had rebutted the said presumption. Therefore, I have to necessarily interfere with the finding of the trial Court that the genuineness of Ex.A1-pro-note had been established. The plaintiff could have



of Rs.9,00,000/- for the purpose of lending. The plaintiff would make a vague claim that he had sold a piece of land and that is how, he was in possession of the funds.

12. But then, I cannot lose sight of the admitted case of the defendant. The defendant admits that he had borrowed a sum of Rs.7,00,000/- from A.S.Gopala Kannan. Though the defendant would make a claim that he had repaid the said amount, there is absolutely no proof for having made such repayment. If really, the defendant had made the repayment, he would have definitely sent a communication to A.S.Gopala Kannan demanding return of the blank pro-note signed by him.

13. The defendant is not an illiterate villager. He is a businessman. Therefore, final installment would not have been paid without getting back the document from the creditor. It is obvious that the plaintiff is batting for the said A.S.Gopala Kannan. This being the admitted case of the defendant, the learned counsel appearing for the appellant on instructions, informs the Court that the impugned decree may be modified to a sum of Rs.7,00,000/- instead of Rs.9,00,000/-. The learned counsel appearing for the appellant also states that the appellant is agreeable to pay the cost awarded by the trial Court.

14. Taking note of the aforesaid submission made by the counsel for the appellant, on instructions, the impugned judgment and decree passed by the Court below is modified. The appellant is directed to pay a sum of Rs.7,00,000/- with interest at the rate of 12% from the date of pro-note till the date of decree ie., 13.02.2020 and at the rate of 6% per annum on Rs.7,00,000/- from the date of decree till the date of realization. The appeal is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

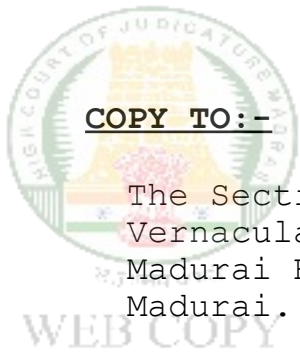
/ /2021

Sub Assistant Registrar(CS)

Rmi

To

1.The first Additional District Court,
Thoothukudi.



COPY TO:-

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-21909[F] dated 09/07/2021)

Judgment made in
A.S. (MD) No.168 of 2020
and
C.M.P. (MD) No.6191 of 2020
08.07.2021

VR (CO)
GC (26.10.2021) 5P 5C