BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATE: 26.11.2021
CORAM
THE HON'BLE **MRS.JUSTICE V. BHAVANI SUBBAROYAN**
S.A.(MD) No.28 of 2018
and
CMP(MD) No.510 of 2018

M.Arumugam ... Appellant/Appellant/1st Defendant

vs.

1. M.V.P.Mariappan ... 1st Respondent/1st Respondent/Plaintiff

2.I.Shakthivel ... 2nd Respondent/2nd Respondent/2nd Defendant

Second Appeal filed under Section 100 of CPC against the Judgment and Decree dated 06.07.2017 passed in A.S. No.196 of 2011 on the file of the Sub Court, Thoothukudi confirming the judgment and decree dated 21.11.2009 passed in O.S.No.689 of 2004 on the file of the Principal District Munsif, Thoothukudi.

For Appellant : Mr.M.P.Senthil

For Respondents :
No.1 : Mr. S.Senthil Sankaranathakumar
No.2 : Dispensed with

JUDGMENT

The present second appeal has been filed challenging the judgment and decree dated 06.07.2017 passed in A.S. No.196 of 2011 on the file of the Sub Court, Thoothukudi, confirming the judgment and decree dated 21.11.2009 rendered in O.S. No.689 of 2004, on the file of the Principal District Munsif Court, Thoothukudi.

2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

3.The case of the plaintiff, as per the averments made in he plaint, in short, reads as follows :

The plaintiff is running a money lending business in the name and style of 'Venkatachalapathy Bankers' in Thoothukudi. On 28.05.2003, the defendants had obtained Rs.2,50,000/- from the plaintiff Bankers, for purchasing a lorry, and agreed for payment of interest @Rs.1 for Rs.100/- and executed a promissory note. The second defendant had executed an equitable mortgage by an unregistered document dated 29.05.2003. Thereafter on 28.08.2003, the defendants paid a part amount of Rs.2,25,000/- and the same has been entered in the ledger book maintained by the plaintiff. When the plaintiff asked for the balance amount of Rs.25,000/-, the defendants have not paid the said amount. For non payment of balance amount, the plaintiff has sent a legal notice to the defendants on 27.08.2004 . The first defendant received the legal notice on 01.09.2004 and the second defendant refused to receive the same. Hence, the plaintiff has filed a suit seeking for recovery of a sum of Rs.28,316.64/- with 12% interest, in case of failure to repay the said amount, to execute the equitable mortgage deed executed by the 2nd defendant and to to sale the same.

4. The first defendant filed a written statement, denying the allegations made in the plaint, submitted that the first defendant had not executed any promissory note and not received any amount, as claimed by the plaintiff. The signature in the pronote does not belong to him. The first defendant, after filing the written statement has filed additional written statement wherein, he had admitted that he had received a sum of Rs.30,000/- only on 10.09.2001 from the plaintiff and agreed to pay 12 % interest for the same, for which, the plaintiff has taken cheque leaves from the first defendant and on 24 occasions the plaintiff had withdrawn money from the first defendant's bank account, through his agents namely Selvaraj, Meharaj, Namachivayam and Rajendraprasad. Further, on 21.06.2003, one Rajendraprasad had taken a sum of Rs.45,000/- from the account of the first defendant, for which, he has given a complaint against him before the Superintendent of Police, Thoothukudi District, on 04.07.2003. Since no action has been taken by the Superintendent of Police, Thoothukudi, he has approached the High Court and the Supreme Court. The plaintiff has taken seven cheque leaves, bearing Nos.915553 to 915560 and immediately, the first defendant has sent 'stop payment' instruction to the bank by way of telegram on 25.07.2003. The plaintiff issued notice under Section 138 of the Negotiable Instrument Act, to pay a sum of Rs.2,50,000/-,failing which, he will initiate legal action. The cheque leaf bearing No.915555, which is one of the cheque taken away by plaintiff, by way of extortion. It is alleged that on 18.12.2003 the plaintiff had requested the first defendant not to appear before the Vigilance enquiry held by the High Court and if he do not appear as per request, he will withdraw the case suit in O.S. No.232 of 2003 and therefore, prayed for dismissal of the suit.

5. On the side of the the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 13 documents were marked as Exs.A1 to A13. On the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 23 documents were marked as Exs. B.1 to B.23 . One Court witness was examined as X.W.1 and through him Exs.X1 to X5 were marked.

6.On analysis of the oral and documentary evidence, the Trial Court has allowed the suit. Aggrieved by the same, the first defendant has preferred an appeal in A.S. No.196 of 2011, on the file of the learned Subordinate Judge, Thoothukudi.

7. The first appellate court, after considering the oral and documentary evidence of the parties, had dismissed the appeal suit. Aggrieved by the Judgment and decree passed by the first appellate Court, the present Second Appeal has been filed the 1st defendant.

8. At the time of admission of the Second Appeal, this Court has formulated the following substantial questions of law?

> a) Whether the judgment and decree of the Courts below are vitiated in decreeing the suit even with adverting that the 1st respondent as plaintiff has not even discharged the initial onus of proof relating to the due execution of Ex.A.1, alleged pronote, especially it is the specific caseof the appellant is that he has not executed Ex.A.1 at all ?
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> b)Have not the Courts below committed a serious error in law in decreeing the suit on the basis of Ex.A.2 even without adverting that the very document itself is admissible in evidence, as it is not only duly stamped as well as unregistered?
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> c)Whether the Courts below are right in decreeing the suit even after the examination of the Branch Manager of the Bank as XW.1 and marking Ex.X.1 to X5 which would *prima facie* show that the appellant has paid an extensive sum to the 1st respondent in respect of the money earlier borrowed?
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> d) Have not the Courts below committed a serious error in law in not legally inferring that the 1st respondent/plaintiff is in the habit of creating documents and filing vexatious suits which has been clearly substantiated by the appellant by producing document under Ex.B.1 2 to Ex.B.21?

9. The learned counsel appearing for the appellant / 1st defendant would submit that the very execution of pronote under Ex.A1, the alleged pronote, has been disputed in the written statement and no tangible steps was taken by the plaintiff to prove the due execution of Ex.A1, either for seeking expert opinion for comparing the signature. The Courts below have committed error in entertaining Ex.A2 in evidence without adverting to the specific bar provided under the Indian Stamp Act as well as the express provisions under the Indian Registration Act in receiving the said document even in evidence. The courts below completely overlooked that the 1st defendant has specifically pleaded that the amount borrowed by him has been duly discharged which has also been substantiated on the basis of the evidence of X.W.1 and the same has

been substantiated by the evidence of P.W.2, which clearly shows that the 1st defendant has received the entire amount which has to be paid by the 1st appellant . The Courts below ought to have inferred from the complaint preferred by the 1st defendant against the plaintiff and his wife before the Registrar (Vigilance) of the High Court in Ex.B5 are much earlier to the legal notice sent by the plaintiff, under Ex.A10, dated 27.08.2004. Hence, the learned counsel prayed for setting aside the order of Courts below.

10. The learned counsel appearing for the 1st respondent / plaintiff would submit that the plaintiff is running a money lending business in the name and style of 'Venkatachalapathy Bankers' in Thoothukudi. On 28.05.2003, the defendants had obtained Rs.2,50,000/- from the plaintiff Bankers and executed a promissory note to that effect. The second defendant had executed an equitable mortgage by an unregistered document dated 29.05.2003. It is the contention of the plaintiff the balance amount of Rs.25,000/- has not been paid by the defendants and therefore, he filed the suit for recovery of sum of Rs.28,316.64/- with 12% interest. According to the 1st defendant, the first defendant had not executed any promissory note and signature in the pronote does not belong to him.

11. Heard the learned counsel for the appellant / 1st defendant and the learned counsel for the plaintiff / 1st respondent and also perused the materials available on record.

12. It is not in dispute that the plaintiff is running a money lending business in the name and style of 'Venkatachalapathy Bankers' in Thoothukudi. On 28.05.2003, the defendants had obtained Rs.2,50,000/- from the plaintiff Bankers, for purchasing a lorry, and agreed for payment of interest @ Rs.1 for Rs.100/- and executed a promissory note. The second defendant had executed an equitable mortgage by an unregistered document dated 29.05.2003. Thereafter on 28.08.2003, the defendants paid a part amount of Rs.2,25,000/- and the same has been entered in the ledger book maintained by the plaintiff. When the plaintiff asked for the balance amount of Rs.25,000/-, the defendants have not paid the said amount. For non payment of balance amount, the plaintiff has sent a legal notice to the defendants on 27.08.2004 . The first defendant received the legal notice on 01.09.2004 and the second defendant refused to receive the same. Hence, the plaintiff has filed a suit seeking for recovery of a sum of Rs.28,316.64/- with 12% interest, in case of failure to repay the said amount, to execute the equitable mortgage deed executed by the 2nd defendant and to sale the same.

13. In the additional written statement filed by the first defendant, he admitted that on 10.09.2001, he had received a sum of Rs.30,000/- from the plaintiff, agreeing to pay 10% interest for the same, for which, the first defendant executed Ex.A1 - Pronote, to

the wife of the plaintiff. Ex.A2 is an unregistered equitable mortgage executed by the 2nd defendant, dated 29.05.2003. As per the contention of the 1st defendant, he paid the entire amount of Rs.30,000/- to the plaintiff along with interest. When that being the case, this court at loss to understand why the 1st defendant agreed to pay the interest in the subsequent months to the wife of the plaintiff. Ex.A9 is the Ledger containing the details of income and expenditure, which has been produced by the plaintiff. On perusal of Ex.A9 it is clear that the 1st defendant received Rs.2,50,000/- from the plaintiff and paid Rs.2,25,000/-. The 1st defendant has not raised any serious objection, when Ex.19, produced before this Court as document and the genuinity of the document had also not been questioned by the 1st defendant in his additional written statement. Therefore, this Court unable to agree with the contention of the 1st defendant in respect of the plea that he had not received Rs.2,50,000/- from the plaintiff. According to the appellant he received only Rs.30,000/- f rom the plaintiff and paid the same. The contention of the 1st defendant that the plaintiff is the habit of creating documents and filing vexatious suits, cannot be accepted without any valuable proof. No valuable evidence has been adduced by the 1st defendant to prove his case. As noted earlier, the courts below, on appreciation of the oral and documentary evidence on record, accepted the case of the plaintiff and decreed the suit and I have no reason to interfere with the same. The substantial questions of law are answered accordingly.

14. There is no answer from the defendants what was the further action taken after issuance of 'stop payment' to the bank. What is the action taken for allowing the agents to encash the cheques. When there is no answer, whether he has appeared before the High Court for enquiry or not and the results not known, this Court is not inclined to accept the case as projected by the defendants.

15. In the result, the Second Appeal is dismissed, confirming the Judgment and Decree, passed in A.S.No.196 of 2011, by the learned Sub Judge, Thoothukudi, confirming the judgment and decree dated 21.11.2009 rendered in O.S. No.689 of 2004, on the file of the Principal District Munsif Court, Thoothukudi. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID 19 pandemic, a web copy of the order may be utilised 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 Sub Court, Thoothukudi

2.The Principal District Munsif, Thoothukudi.

COPY TO:
The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai. (2 COPIES)

+1 CC to M/s.M.P. SENTHIL, Advocate (SR-36227[F] dated 29/11/2021)

+1 CC to M/s.S. SENTHILSANKARANATHAKUMAR, Advocate (SR-36530[F] dated 30/11/2021)

S.A.(MD) No.28 of 2018
26.11.2021

RD(7.01.2022) 6P 7C