



A.S(MD)No.19 of 2009

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.06.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.19 of 2009

and

M.P(MD)No.2 of 2009

1)R.Suresh
2)R.Lakshmi
3)Giddie @ Lakshmi
4)Indira
5)Ramesh

... Appellants/Defendants 2 to 6

vs.

A.D.Maniraj

... Respondent/Plaintiff

Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree passed in O.S.No. 95 of 2006 on the file of the learned Additional District cum Sessions Judge (Fast Track Court-I), Madurai, dated 23.09.2008.

For Appellants : Mr.M.P.Senthil

For Respondent : Mr.D.Senthil



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JUDGMENT

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The appellants are defendants 2 to 6 and the respondent is the plaintiff. The plaintiff filed the suit against the defendants 1 and 2 for recovery of money. Pending suit, the 1st defendant died and his legal representatives were impleaded as defendants 3 to 6. After trial, the suit was decreed. Challenging the said judgment and decree, the appellants/defendants have filed the present appeal.

2. Brief facts stated in the plaint are as follows:-

The 1st defendant is the father of the 2nd defendant and they approached the plaintiff at Madurai on 10.09.2004 and borrowed a sum of Rs.4,00,000/- from the plaintiff for their business and family expenses and both of them jointly executed a promissory note in favour of the plaintiff and agreed to pay interest @ 18% per annum. Thereafter, despite repeated demands by the plaintiff, the defendants did not repay the loan amount. Hence, the plaintiff issued a notice dated 10.01.2006 through his advocate. The defendants sent



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a reply on 21.01.2006 stating that they did not borrow any amount from the plaintiff and they did not know the plaintiff and the plaintiff in collusion with one Sundar, fabricated the suit promissory note. According to the plaintiff, the said Sundar is a friend of the defendants 1 and 2 and he has introduced the defendants 1 and 2 for the purpose of borrowing amount from the plaintiff. The 1st defendant had given a list of properties owned by him and also the copy of the judgment in O.S.No.189/98, to show that he is having properties in his name. Hence, the suit.

3. Brief averments stated in the written statement filed by the 1st defendant are as follows:-

The allegations of the plaintiff that the defendants approached him at Madurai on 10.09.2004 and borrowed a sum of Rs.4,00,000/- from him for their business and family expenses and both of them jointly executed a promissory note in favour of the plaintiff and agreed to pay interest @ 18% per annum are denied. According to the 1st defendant, he was not



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aware of the plaintiff and it is only the plaintiff in collusion with the said N.Sundar, had forged and fabricated the suit promissory note. In fact, the said Sundar was the erstwhile lessee of the 1st defendant in respect of certain properties at Nilgris and due to certain misunderstandings between them, the said Sundar had instituted O.S.No.198/99 against the 1st defendant and others, as such, there is no question of said Sundar introducing the defendants to the plaintiff. The allegation that the 1st defendant had given a copy of the judgment in O.S.No.189/98, to show that he is having properties in his name, is denied. According to the 1st defendant, the suit properties shown in the said suit are his ancestral properties. Further, there are material altercations in the suit promissory note, as such, the suit based on such altered document is not maintainable. The 2nd defendant also filed written statement reiterating similar contentions.

4. Based on the pleadings, the trial Court framed the following issues:-



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1. Whether the plaintiff is entitled to recover the amount mentioned in the plaint from the defendants?

2. To what relief the plaintiff is entitled?

5. During trial, in order to substantiate his claim, on the side of the plaintiff, two witnesses were examined as PW1 and PW2 and six documents were marked as Exs.A1 to A6. On the side of the defendants, one witness was examined as DW1 and six documents were marked as Exs.B1 to B6.

6. After completion of trial and hearing the arguments advanced on either side, the trial Court decreed the suit. Challenging the said judgment and decree, the appellants/defendants have filed this appeal.

7. The learned counsel for the appellants/defendants would submit that the defendants 1 and 2 never borrowed any money from the plaintiff and they have no acquaintance with the plaintiff and also there is no privity of contract between the



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defendants 1 and 2 and the plaintiff. There was a dispute between the 1st defendant and the said Sundar who was the lessee of the 1st defendant and therefore, he filed O.S.No. 189/98 against the defendants 1 and 2. In order to take vengeance, the said Sundar colluded with the plaintiff and created the document Ex.A1-suit promissory note, as if, the defendants 1 and 2 borrowed a sum of Rs.4 Lakhs from the plaintiff. Even prior to the suit, the plaintiff sent a notice to the defendants 1 and 2, for which, they suitably replied and denied the borrowal and execution of the suit promissory note and also the signatures therein.

8. He would further submit that even though the plaintiff contended that one Sundar introduced the defendants 1 and 2 to him for borrowing money from the plaintiff, the plaintiff did not examine the said Sundar to substantiate his contention and even in the promissory note, the said Sundar had not put his signature as a witness or guarantor. Even though the defendants 1 and 2 denied the execution of the suit



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promissory note and also the loan transaction, the plaintiff did not take steps to send the disputed document for getting handwriting experts' opinion as to whether the signatures found in the suit promissory note are that of the defendants 1 and 2. Though by examining witnesses and marking documents, the plaintiff proved the initial burden, but however, while the defendants 1 and 2 denied acquaintance, execution of promissory note and the alleged borrowal, it is the duty of the plaintiff to prove his case, but during cross examination, when photographs shown to the plaintiff, he could not identify the 1st defendant. Therefore, the onus has been shifted by the defendants to the plaintiff by preponderance of probabilities. Though presumption under Section 118 of the Negotiable Instrument Act, 1881, is a rebuttable presumption, the defendants 1 and 2 can rebut the presumption by preponderance of probabilities and there need not be always with the direct evidence and once the onus is shifted to the plaintiff, it is the duty of the plaintiff to prove the onus. Since he has not taken any steps to send the disputed document



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invoking Section 45 of the Indian Evidence Act, 1872, he has not proved his case, whereas, the defendants have rebutted the presumption in the manner known to law. However, the learned trial Judge failed to appreciate the evidence and only believing the evidence of PW2 who is said to have witnessed Ex.A1 suit promissory note, erroneously decreed the suit. Therefore, the appeal has to be allowed and the judgment and decree passed in the suit has to be set aside.

9. The learned counsel for the respondent would submit that the plaintiff is doing business in Ooty. The 2nd defendant is the son of the deceased 1st defendant and they came to Ooty and one Sundar introduced the defendants 1 and 2 to the plaintiff. They borrowed money of Rs.4 lakhs and executed the suit promissory note, in which, PW2 put his signature as a witness. When the plaintiff demanded money, the defendants 1 and 2 failed to repay. Therefore, the plaintiff sent a notice, for which, the defendants 1 and 2 sent a reply with false allegations and hence, the plaintiff filed the suit,



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examined PW2-witness to promissory note and marked EX.P1-suit promissory note and also the notice sent to the defendants 1 and 2 as well as the registration certificate of his business. In that way, the plaintiff proved his case and initial burden is shifted to the defendants 1 and 2. Once promissory note is produced, the plaintiff proved that there is a presumption under Section 118 of the Negotiable Instruments Act, 1881, and the defendants 1 and 2 have not rebutted the said presumption and the trial Court rightly appreciated the evidence and decreed the suit.

10. Heard both sides and perused the records.

11. It is the case of the plaintiff that the defendants 1 and 2 borrowed money from the plaintiff at Madurai and executed the promissory note and failed to repay and therefore, he sent a notice and then filed the suit. In order to substantiate his case, the plaintiff examined himself as PW1 and examined one Kannan as PW2. The specific case of the



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defendants 1 and 2 is that they did not know the plaintiff and they never seen each other and never borrowed money from the plaintiff and executed suit promissory note to and in favour of the plaintiff. There was a dispute between the 1st defendant and one Sundar, erstwhile lessee of the 1st defendant and the said Sundar filed a civil suit before the Sub Court, Nilgris. In order to take vengeance, the plaintiff in collusion with the said Sundar forged and fabricated the suit promissory note to make believe that the suit promissory note has been executed by the defendants 1 and 2 in favour of the plaintiff. The said fact is false and they never executed any promissory note and never borrowed any money and they never went to Madurai and never seen the plaintiff. The trial Court believed the evidence of the case of the plaintiff and decreed the suit. Now the defendants have challenged the decree and judgment passed in the suit, in this appeal.

12. A careful reading of the pleadings and evidence shows that it is the specific defence taken by the defendants



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that they never seen the plaintiff and never executed the suit promissory note and borrowed money and the signature found in the suit promissory note is not that of his signature. The defendants 1 and 2 had taken this defence consistently from the reply notice, subsequently in the pleadings, in the written statement and also in the proof affidavit filed by DW1. The plaintiff also admitted that Sundar introduced the defendants 1 and 2 to him. When the defendants stoutly denied that they have not seen the respondent/plaintiff and they were not aware of him, the plaintiff ought to have examined the said Sundar to prove acquaintance as to whether he had introduced them to the plaintiff. Even during the cross examination of PW1/plaintiff, the plaintiff could not identify the 1st defendant in the photograph shown to him, which clearly shows that the defence of the defendants is genuine. When the appellants/defendants have denied the borrowal and execution of the document and signatures, Section 118 of the Negotiable Instruments Act, 1881, would not attract, because, if the execution and signatures are admitted, then only, presumption



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under Section 118 of the Negotiable Instruments Act, 1881, can be drawn. Even assuming that presumption can be drawn, the defendants always can rebut the presumption by preponderance of probabilities and the defendants need not rebut the presumption by direct evidence.

13. In this case, when the appellants/defendants stoutly denied the borrowal and execution of promissory note, it is the duty of the plaintiff to send the disputed document for getting handwriting experts' opinion and the plaintiff has failed to do the same and even in the promissory note, PW2 alone signed as witness. Both PW1 and PW2 were not able to say who is the scribe of Ex.A1 and why the plaintiff had not taken steps to summon the said scribe for examining him. When the defendants have stoutly denied about the execution and the signature, it is the bounden duty of the plaintiff to prove the execution of promissory note in the manner known to law.



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14. Mere production of the promissory note alone is not sufficient to get a decree as if the plaintiff has proved his case. Non sending of the disputed document for getting experts' opinion and non examination of the said Sundar for acquaintance and non identification of the 1st defendant by the plaintiff in the photograph are fatal to the case of the plaintiff. The plaintiff has to prove his case on his own strength and he cannot take advantage of the loopholes left by the defendants and therefore, under these circumstances, this Court finds that the respondent/plaintiff has not proved his case in the manner known to law and the appellants/defendants have rebutted the presumption by preponderance of probabilities. Therefore, the judgment and decree passed by the trial Court is liable to be set aside

15. Accordingly, the judgment and decree passed in O.S.No.95 of 2006 on the file of the learned Additional District cum Sessions Judge (Fast Track Court-I), Madurai, dated



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23.09.2008, is set aside and this Appeal Suit is allowed with costs. Consequently, connected miscellaneous petition is closed.

20.06.2022

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Index : Yes / No
Internet : Yes

To

The Additional District cum Sessions Judge,
Fast Track Court-I,
Madurai.



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P.VELMURUGAN, J.

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