BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.11.2022

Pronounced on : 02.12.2022

CORAM:

THE HON'BLE MR.JUSTICE **K.MURALI SHANKAR**

A.S.(MD)No.169 of 2018
and
C.M.P.(MD)No.10132 of 2022

1. Ganesan
2. Murugan ...Appellants/Defendants

Vs.

A.T.Sambantham ...Respondent/Plaintiff

Prayer : This Appeal Suit filed under Section 96 r/w Order XLI of the Code of Civil Procedure, to allow this first appeal and set aside the judgment and decree passed by the learned District Judge, Sivagangai on 22.11.2016 in O.S.No.59 of 2013 and dismiss the suit.

For Appellants : Mr.V.Baskaran

For Respondent : Mr.J.Jeya Kumaran

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.59 of 2013 dated 22.11.2016 on the file of District Court, Sivagangai.

2. Gist of the plaint is as follows:-

The defendants are brothers. The defendants, to meet out their family expenses and business expenses borrowed a sum of Rs.10,00,000/- on 23.02.2013 from the plaintiff agreeing to repay the same with interest at Rs.2 per hundred per month to the plaintiff or his order on demand and executed a promissory note at the plaintiff's house. The defendants have not paid any amount either towards principal or interest. Though the plaintiff has been demanding the defendants to repay the loan amount, in person and through persons, the defendants have been postponing the same on some pretext or the other. Hence, the plaintiff sent a legal notice dated 28.11.2013 directing the defendants to pay loan amount with interest. Having received the legal notice, the defendants have neither sent any reply nor made any payment. Hence, the plaintiff was constrained to file the above suit for recovery of money.

3. The defence of the defendants in short is as follows :-

(a) The defendants have never borrowed any amount on promissory note to meet out their family expenses or for business purposes. The plaintiff is doing business in gold and silver. The defendants are running jewelry shop in the name of 'Karpagam Jewellers'. The plaintiff's concern used supply gold and silver jewels on credit basis and collect the amounts from the defendants. Since the plaintiff has demanded the defendants to furnish security for supplying silver articles, they have produced the title deeds relating to the properties situated in Melavaniyankudi in favour of the second defendant. In addition to that, the second defendant had subscribed his signature in the blank stamp papers and the defendants 1 and 2 had subscribed their signatures in the blank promissory note. The plaintiff, by utilizing the unfilled promissory note, filed the present suit.

(b) The defendants have paid a sum of Rs.5,00,000/- through cheque on 04.07.2013 for the amount due on the jewel loan to the plaintiff and subsequently, they have paid a sum of Rs.2,20,000/- on 23.11.2013 directly and the plaintiff having received the said amount, has written in the chit. The defendants, after receiving the legal notice dated 28.11.2013, approached the plaintiff and asked him as to why the legal notice was sent. The plaintiff has informed them that he will not file any suit, if the defendants repay the jewel loan amount immediately and that therefore, no reply was sent. Since the defendants have not borrowed any loan amount on pronote, the suit itself is not maintainable. The cause of the action alleged by the plaintiff is false and fraudulent. Hence, the suit is liable to be dismissed.

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

(1) Whether the suit pronote dated 23.02.2013 is valid and true?

(2) Whether the suit loan was discharged as stated by the defendants?

(3) Whether the plaintiff is entitled to relief as prayed for?

(4) To what other relief, the plaintiff is entitled to?

5. During trial, the plaintiff has examined himself as P.W.1 and exhibited four documents as Ex.A.1 to Ex.A.4. The defendants have examined the first defendant Ganesan as D.W.1 and one Maheswaran as D.W.2 and exhibited 6 documents as Ex.B.1 to Ex.B.6.

6. The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing the arguments of both the sides, has passed the impugned judgment dated 22.11.2016 decreeing the suit as prayed for, directing

the defendants to pay a sum Rs.11,94,666/- with interest at 9% per annum from the date of plaint till the date of decree for principal amount and at 6% from the date of decree till the date of realization. Aggrieved by the said judgment and decree, the defendants have come forward with the present appeal.

7. The appellants/defendants have raised the following grounds in the present appeal:-

The judgment and decree passed by the trial Court is against law, weight of evidence and facts and circumstances of the case. The trial Court has failed to note that Ex.A.1-suit promissory note was obtained by the respondent/ plaintiff as a security to the gold and silver transactions and that no consideration was passed on the date of Ex.A.1. Admittedly, there existed gold and silver transactions between the respondent/plaintiff and the appellants/ defendants on loan basis from 23.02.2012 onwards. The appellants/defendants have signed in the blank pronote only on 23.02.2012, but the respondent/ plaintiff had filled the promissory note as Ex.A.1 dated 23.02.2013 to suit their convenience. The respondent/plaintiff has admitted that he received Rs.5,00,000/- on 04.07.2013 and Rs.2,20,000/- on 23.11.2013, all totalling Rs.7,20,000/-. The trial Court has failed to consider the evidence of D.W.2, who is the attesting witness and he would say that Ex.A.1 was executed with regard to business transaction held between the respondent/plaintiff and the appellants/defendants in connection with the gold and silver ornaments. The trial Court has also erred in holding that the evidence of D.W.1, D.W.2 and Ex.B.1 to Ex.B.6 are not sufficient to prove the facts that the appellants/defendants have discharged the loan amount of Rs.5,00,000/- paid on 04.07.2013 through cheque and a sum of Rs.2,20,000/- by cash on 23.11.2013. The trial Court ought to have held that by making use of the appellants/defendants' signatures in the unfilled blank promissory note, the respondent/plaintiff has concocted the unfilled promissory note as if the appellants/defendants had borrowed a sum of Rs.10,00,000/- in cash for their family expenditures and business transactions. The trial Court failed to consider the variation in the scribe of Ex.A.1. The respondent/plaintiff had suppressed several material particulars before the Court and had come out with a false case. Hence, the appeal is liable to be allowed and the judgment and decree of the trial Court are to be set aside.

8. The points that arise for determination are:

(i) Whether the trial Court erred in not considering the main contention of the appellants/defendants that Ex.A.1 was obtained by the respondent/plaintiff from the appellants/defendants as a security for the business transaction that existed between the parties?

(ii) Whether the trial Court erred in deciding that the appellants/ defendants have not proved the discharge of the loan amount of Rs.5,00,000/- through cheque on 04.07.2013 and a sum of Rs.2,20,000/- by cash on 23.11.2013, despite the production of ample evidence through Ex.B.1 to Ex.B.6 and D.W.1 and D.W.2?

(iii) Whether the appeal is to be allowed?

(iv) To what other relief, the parties are entitled to?

Points (i) to (iv) :-

For the sake of convenience and brevity, the parties herein-after will be referred as per their status / ranking in the trial Court.

9. Admittedly, the defendants 1 and 2 are brothers and they had acquaintance with the plaintiff even from the days of their father.

10. It is not in dispute that the plaintiff as well as the defendants were doing jewelry business earlier and that they had business transactions with each other. Even according to the defendants, the plaintiff used to supply gold and silver jewels on credit basis and thereafter, collect the amount.

11. The case of the plaintiff is that the defendants to meet out their family expenses and for business purposes borrowed a sum of Rs.10,00,000/- agreeing

to repay the same with interest at Rs.2 per hundred per month to the plaintiff or his order on demand and executed the suit promissory note under Ex.A.1.

12. The defence of the defendants is that they have never borrowed any amount for their family expenses or for business purposes by executing a promissory note, that the plaintiff had demanded security for supplying the silver articles and the defendants have produced the title deeds relating to the properties situated in Melavaniyankudi Village standing in the name of the second defendant and also the second defendant had subscribed his signature in the unfilled stamp papers, that the defendants 1 and 2 had subscribed their signatures in the unfilled promissory note and that the plaintiff, by utilizing the signed unfilled promissory note, has filed the above suit.

13. It is their further defence that they had repaid a sum of Rs.5,00,000/- on 04.07.2013 through cheque and a sum of Rs.2,20,000/- in cash on 23.11.2013 and that the plaintiff having received the said amount has recorded in the chit.

14. Before entering into further discussion, it is necessary to refer the legal position relating to the promissory notes and burden of proof.

(i) 2015 -1-T.N.C.J. 225 :

Thiravium Vs. Masanakonar

*"12. There were lot of confusion fairly for a long time as to the proving and disproving of a negotiable instrument, because of several conflicting decisions. In **Bharat Barrel and Drum Mfg. Co. V. Amin Chand Payarelal (1999 (3) SCC 35),** the Honourable Apex Court laid down guidance with regard to proving and disproving of a negotiable instrument and application of Section 118 of Negotiable Instruments Act. The dictum of the Apex Court is that it is the first and foremost duty of the plaintiff to prove due execution of the promissory note. Once, it is so proved, arising of section 118 of N.I. Act is automatic, which will also imply as to the passing of consideration, date, name time etc., It creates a presumption. Such presumption has been created by law, so it is a legal presumption. However, the word employed is 'may' so it is rebuttable. The defendant by setting up a probable defence can refute the legal presumption, but to do so he need not let in any direct evidence, but he must show the non-existence of consideration to the Court by factual matrix or circumstances of the case, which can be culled out even from the mouth of the plaintiff and his witnesses.*

13. The plaintiff's initial burden is to prove the execution and the defendant's initial burden is to disprove the legal presumption arising under section 118. Once, exception of the *promissory note is displaced by the defendant, again the position will revert back to the plaintiff to prove the execution. Once the defendant failed to disprove the presumption arose under section 118 of Negotiable Instruments Act it will stand as it is."*

(ii) 2015 (2) M.W.N. (Civil) 264 :
R. Pandyan and another Vs M. Palgani

"18. In ***Bharat Barrel & Drum Manufacturing Co. V. Amin Chand Pyarelal 1999 (1) C.T.C. 497 (SC) : 1999 (3) SCC 35,*** *it was held that the plaintiff, who comes to the Court seeking recovery of money on the foot of a Negotiable Instrument viz., the Promissory Note must prove due execution of the Promissory Note. On his such proving arises the presumption under section 119 of the Negotiable Instruments Act. It is a rebuttable presumption. It is a legal presumption. Thereupon the defendants has to disprove it. He should set up a probable defence. He should show to the Court either by direct evidence or by the circumstances of the case, record of the case the passing of consideration is improbable, doubt or illegal, in the circumstances a reasonable prudent man disbelieve passing of consideration. The duty to prove due execution of Promissory Note is permanently fixed on the plaintiff. It will not change. It will never change. But disproving of it, is also permanently fixed on the Defendant. It will also not change. Once, the defendants disproved the legal presumption, then the plaintiff has to reiterate the*

execution of Promissory Note. If the Defendants fails to disprove, then the legal presumption arose under Section 118 of the Negotiable Instruments Act, will remain as it is. This is the gist of the dictum of Hon'ble Apex Court in the said case."

15. Considering the above, it is very much clear that when the suit is based on a promissory note and the defendant denies the execution of the same, the plaintiff is duty bound to prove the execution of the promissory note and in case, if the plaintiff discharges his onus of proof and proves the execution, arising of presumption under Section 118 of Negotiable Instruments Act is automatic as to the passing of consideration, date, name, time etc., and in that situation, the burden of proof get shifted to the defendant and it is for the defendant to disprove the legal presumption by setting up a probable defence. When the defendant proves his case through tangible evidence, then the liability shifts to the plaintiff to prove that the promissory note was executed by the defendant. Let us consider as to whether the plaintiff has discharged his initial burden of proving the execution of promissory note under Ex.A.1.

16. No doubt, the plaintiff has examined himself as P.W.1 and examined no other witnesses.

17. The plaintiff in his evidence would reiterate the plaint contentions regarding the execution of promissory note. He would say that the defendants have borrowed a sum of Rs.10,00,000/- to meet out their family expenses and business purposes on 23.02.2013 agreeing to repay the same with interest at Rs.2 per hundred per month and executed a promissory note on 23.02.2013 in the house of the plaintiff.

18. Though the plaintiff was subjected to lengthy cross-examination, nothing was elicited by the defendants in their favour. In the cross-examination, he would say that one Narayanan and Maheswaran had subscribed their signatures in Ex.A.1-promissory note, that the said Narayanan was his erstwhile partner and that he had no other transaction with the first defendant except the suit transaction, but is having transaction with the second defendant.

19. As rightly pointed out by the learned counsel appearing for the plaintiff, the defendants have specifically admitted their signatures found in Ex.A.1. But in the written statement, the defendants have stated that both of them have subscribed their signatures in the unfilled promissory note and that the same was utilized by the plaintiff for filing the above suit. The first

defendant, in his chief examination affidavit, would say that the second defendant had subscribed his signature in the unfilled stamp papers, that himself and the second defendant had subscribed their signatures in the unfilled promissory note and that the plaintiff has utilized the unfilled stamp papers and created the promissory note and filed the above suit.

20. Though in the written statement, they have alleged that after subscribing their signatures, the unfilled promissory note has been utilized and the promissory note now in dispute has been created during trial, they have taken a 'U' turn and alleged that the unfilled signed stamp paper has been utilized.

21. It is pertinent to mention that the defendants have examined one of the witnesses to the Ex.A.1-promissory note Thiru.Maheswaran as D.W.2 and admittedly, he was working under the defendants in their jewelry shop previously. In chief examination, he would say that he had subscribed his signature as a second witness in the Ex.A.1, that he had signed in the Ex.A.1 in the building owned by the defendants, that the plaintiff has not advanced any amount to the defendants on that day and that when he signed in the Ex.A.1, the other witness has also subscribed his signature at that time. In

cross-examination, he would say that he had subscribed his signature in the Ex.A.1 as directed by the defendants, that he was aware of the contents of the Ex.A.1, that there existed business transactions between the defendants and the plaintiff, that Ex.A.1 was executed in respect of the said business transaction and that he does not know as to whether there was any other transaction subsequent to Ex.A.1.

22. As rightly pointed out by the learned counsel appearing for the plaintiff, considering the evidence of D.W.2, it is very much clear that he had admitted the execution of Ex.A.1.

23. It is pertinent to note that D.W.1-first defendant in cross-examination would admit that Maheswaran and Narayanan had subscribed their signatures in the Ex.A.1 (wrongly typed as Ex.B.1).

24. At this juncture, it is necessary to refer the following decisions of this Court,

(i) 2014 (1) L.W. 316 :
V.S.Veerasamy and another vs. K.Subramaniam

"Under Section 20 of the Negotiable Instruments Act, when a blank Promissory Note was executed, the executant gives

authority to the holder to fill the blank promissory note and therefore, when the signature in the Promissory Note is admitted, the execution of the Promissory note and passing of consideration can be presumed as admitted and it is for the defendants to prove that they did not receive any consideration for the Promissory Notes executed by them and the Promissory Notes were obtained for other reasons. In the judgment reported in ***2002-3-L.W.692*** *and* ***2002-3-L.W.845****, cited supra, the said principle has been reiterated.*

10. In the judgment reported in ***AIR (37) 1950 MADRAS 239*** *[C.N.109] and* ***AIR 1975 MADRAS 333,*** *cited supra, it has been stated that when a person admitted his signature on a blank piece of paper and that blank piece of paper was fabricated later into a document, the onus of proof of the execution of the document is on the plaintiff who sues on the document. In the judgment reported in* ***1997 (II) CTC 385****, cited supra, the following passage from "Pollock & Mulla Indian Contract and Specific Relief Act" 11th Edition (1995), is usefully extracted for the purpose of the case.*

"The plea of non-est factum applies where a party signs a document and hands it over to the other party in order to enable him to fill in details and complete the transaction and the document is not in accordance with the instructions of the executant. Even in that case, he will be bound if it is not essentially different in substance or in kind from the intended

transaction. The burden of proof is on the executant that he acted carefully and if he fails to show it he will be bound. But, negligence on the part of the executant will be a bar to the plea on non-est factum."

11. Therefore, when the defendants acted negligently and executed blank Promissory Notes, they are bound by the same and it is not open to them to take the plea that the documents cannot be acted upon as no consideration was passed."

(ii) 2017 (5) MLJ 600 :

P.Ethiraj vs. M.Nowsath Seth

"*16. In the light of Section 20 of the Negotiable Instruments Act, it can be safely presumed that the defendant who had admitted the execution of the promissory notes had done so for a valid consideration. An Hon'ble Division Bench of this Court in the judgment in* ***Ramasami Moopar Vs. Ramaswami Moopanar and Karuppa Moopar*** *reported in* ***2002 (4) LW 360****, while dealing in this aspect has held as follows:*

> 7.The Supreme Court in **Mohideenkutty Hajee vs. Pappu Manjooran,** *following a number of earlier pronouncements, held that when a suit is based on a promissory note and the promissory note is proved to have been executed, Section 118(a) raises a presumption, until the contrary is proved, that the promissory note was made for consideration. In the case of* **Kundan Lal**

> ***vs. Custodian, Evacuee Property (AIR 1961 SC 1316)****, the Supreme Court has held that the presumption under Section 118 Negotiable Instrument Act is one of law and a Court shall presume, inter alia, that the Negotiable Instrument was made or endorsed for consideration. Therefore, the said Judgment of the learned Single Judge is not in conformity with the Judgment of the Supreme Court. Under Section 118 of the Negotiable Instruments Act, there is a valid presumption with respect to consideration also. Inasmuch as the learned Single Judge has held that there is no presumption for consideration, it is not a good law.*

25. Considering the above, it is clear that when the signature in the promissory note is admitted, the execution of the promissory note and passing of consideration can be presumed as admitted and in that scenario, the defendant should prove that he did not receive any consideration for the promissory note.

26. In the present case, as already pointed out, the defendants have nowhere denied or disputed their signatures found in the Ex.A.1-promissory note, but on the other hand, they have specifically alleged that after getting their

signatures in the unfilled stamp papers, the same have been utilized for creating the suit promissory note.

27. It is pertinent to note that Section 20 of the Negotiable Instruments Act contemplates that where one person signs or delivers an instrument either wholly blank or filled up, he gives *prima facie* authority to fill up that instrument. Even assuming for arguments sake that Ex.A.1-promissory note was given as blank, as stated by the defendants, but as per Section 20 of the Negotiable Instruments Act, it has to be taken that the defendants have impliedly authorised the holder to fill up the document.

28. Considering the above, even viewing from this angle also, it can be taken that the plaintiff has proved the execution of Ex.A.1-promissory note.

29. Now turning to the next contention of the defendants that the defendants have discharged the loan amount of Rs.5,00,000/- on 04.07.2013 through cheque and Rs.2,20,000/- by cash on 23.11.2013. At the outset, it is pertinent to note that the defendants in their written statement have stated that the said payments were made to discharge the jewel loan due by them to the plaintiff.

30. P.W.1-plaintiff in his cross-examination would say that the defendants have paid Rs.5,00,000/- through cheque on 04.07.2013 and the same was credited in his account and that he had credited the said amount towards jewel loan. He would further say that the defendants have paid Rs.2,20,000/- but does not know about the date of payment. It is pertinent to note that the defendants have themselves put a suggestion to the plaintiff-P.W.1 that the payment of Rs.7,20,000/- made by the defendants was in connection with jewel loan and the said suggestion has been admitted by P.W.1. In subsequent cross-examination, P.W.1 would deny the suggestion that the said payment of Rs.7,20,000/- was made for discharging the pronote debt.

31. It is pertinent to note that the defendants have taken a specific defence that they have not borrowed any amount on the basis of the promissory note and that the payments made at Rs.7,20,000/- was towards the jewel loan due by them.

32. The first defendant, during his cross-examination as D.W.1, would say that he has mentioned in his chief affidavit that he had paid Rs.5,00,000/- to the plaintiff on 04.07.2013, that the said amount was given credit towards the gold brought by him and that the plaintiff had entered in the account note the receipt of Rs.5,00,000/- given by the defendants on 04.07.2013 for jewel loan.

33. Considering the above, it is very much clear that the payments were made towards the jewel loan due by the defendants to the plaintiff and the same was given credit by the plaintiff and as such, the said payments have no connection whatever with the suit debt.

34. The defendants have specifically admitted that the receipt of legal notice dated 28.11.2013 under Ex.A.2. According to the defendants, after receiving the legal notice, they have enquired about the issuance of the notice and the plaintiff had informed that he will not file any case if the defendants repay the amount due for the jewel loan and that therefore they have not sent any reply. D.W.1 in cross-examination would reiterate the same version taken in the written statement, but in subsequent cross-examination, he would say that he had not met the plaintiff, after receiving the plaintiff's legal notice. Considering the above contradictory stand, the explanation offered for non sending of reply notice appears to be unbelievable.

35. Considering the above, the finding of the trial Court that the plaintiff has proved his case and that Ex.A.1 is true and valid and that the plaintiff is entitled to get the suit claim, cannot be found fault with. Hence, this Court concludes that the appeal suit is devoid of merits and the same is liable to be

dismissed and the above points are answered accordingly.

36. In the result, this Appeal Suit is dismissed. Parties are directed to bear their own costs. Consequently, connected Miscellaneous Petition is closed.

02.12.2022

Index :yes/No
Internet:yes/No
csm

K.MURALI SHANKAR,J.

csm

Pre-Delivery Order made in

A.S.(MD)No.169 of 2018
and
C.M.P.(MD)No.10132 of 2022

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