BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
JUDGMENT RESERVED ON : 16.03.2022
JUDGMENT PRONOUNDED ON : 16.06.2022
CORAM:
THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR
S.A.(MD).No.759 of 2021
and CMP(MD).No.10143 of 2021

A.S.Sakthivel ...Appellant/Respondent /Defendant

Vs

M.Perumal ...Respondent/Appellant /Plaintiff

PRAYER : Second Appeal is filed under Section 100 of C.P.C, to set aside the judgment and decree in A.S.No.38 of 2020 dated 31.03.2021 on the file of the I Additional District Court, Tuticorin as reversing by the judgement and decree in O.S.No.122 of 2015 dated 05.02.2020 on the file of the Subordinate Court, Tuticorin.

For Appellant : Mr.KA.Ramakrishnan
For Respondent : Mr.T.Arul
For Mr.R.Balakrishnan

JUDGMENT

The defendant is the appellant.

2.The plaintiff filed O.S.No.122 of 2015 on the file of the Subordinate Court, Tuticorin for the relief of recovery of money of a sum of Rs.2,00,000/- based upon a post dated cheque executed by the defendant in favour of the plaintiff. The trial Court dismissed the suit. As against the same, the plaintiff had filed A.S.No.38 of 2020 before the I Additional District Judge, Tuticorin. The learned District Judge was pleased to allow the appeal and granted a decree as prayed for. As against the same, the defendant has filed the above second appeal.

3.The plaintiff has contended that the plaintiff and the defendant are friends. The defendant had borrowed a sum of Rs.2,00,000/- from the plaintiff on 19.06.2014 for urgent family needs and he agreed to repay the said amount within a period of one month. According to the plaintiff, the defendant has issued a post dated cheque drawn on HDFC Bank, Tuticorin Branch in favour of the plaintiff for a sum of Rs.2,00,000/-. According to the plaintiff, the defendant presented the said cheque for collection in Vijaya Bank, Tuticorin Branch on 20.07.2014 and the same was returned on 21.07.2014 with a memo stating that the defendant's bank account has been closed by him. The plaintiff had issued a legal notice to the defendant under Exhibit A3 and Exhibit A4 is an acknowledgement for the same. Hence, the plaintiff filed the present suit for recovery of money.

4.The defendant has filed a written statement disputing the borrowal of a sum of Rs.2,00,000/- from the plaintiff. The defendant has also disputed that he had issued a cheque dated 19.07.2014 drawn from HDFC Bank, Tuticorin Branch to the plaintiff. According to the defendant, there is no relationship whatsoever with the plaintiff. The plaintiff and the defendant are not in talking terms due to some election dispute. The defendant had further contended that he does not have any account in HDFC Bank and the cheque that is relied upon by the plaintiff also does not belong to the defendant. The defendant also disputed that the signature found in the said cheque is not his signature. The defendant had further contended that he has never borrowed any sum much less Rs.2,00,000/- from the plaintiff and hence, he is not liable for the said claim.

5.The trial Court after considering the oral and documentary evidence, arrived at a finding that the cheque under Exhibit A1 is said to have been issued by authorised signatory on behalf of Gowri Enterprises in favour of the plaintiff. The trial Court found that there is no document whatsoever to establish that the defendant is the owner of Gowri Enterprises or he is in any way connected with Gowri Enterprises. The trial Court further found that when the defendant has disputed his signature in the cheque, the plaintiff has not initiated any action to send the cheque for expert opinion. The trial Court further found that there is also no evidence to the effect that at least the defendant is one of the partners in the said Gowri Enterprises. The trial Court also relied upon the deposition of PW2. PW2 is the Manager of Vijaya Bank to whom the cheque was presented by the plaintiff. However, the Manager of HDFC Bank namely the drawer Bank has not been examined. The trial Court further found that the plaintiff has not established the fact that the cheque belongs to the defendant. Based upon the said finding, the trial Court dismissed the suit filed by the plaintiff.

6.The First Appellate Court found that Gowri Enterprises was managed by the defendant's sister's husband by name one Anthonisamy. In such circumstances, there was a possibility that the said cheque has been used by the defendant. The First Appellate Court also arrived at a finding that had the cheque belonging to the defendant been issued, he would be liable for prosecution and hence, the defendant had wantonly used the cheque of Gowri Enterprises in order to cheat the plaintiff. The defendant has not issued a reply notice to the plaintiff and hence, this Court could draw adverse inference as against the defendant. The First Appellate Court further found that the defendant has signed in Tamil at the time of receiving summons, in the vakalath as well as in the written statement. But, the cheque has been signed in English. Hence, it is evident that the defendant is in the habit of signing in both English as well as in Tamil.

7.The First Appellate Court further found that the defendant has not taken any steps to prove that his signature in the said cheque has not been signed by him. The First Appellate Court also invoked the presumption under Section 118 of Negotiable Instrument Act to fix the burden of proof upon the defendant to establish that the cheque has been issued for proper consideration. The First Appellate Court ultimately concluded that after receiving Rs.2,00,000/- from the plaintiff, the defendant with an intention to cheat the plaintiff has used the cheque belonging to his sister's husband. Based upon the said findings, the First Appellate Court allowed the appeal and decreed the suit as prayed for. As against the same, the second appeal has been filed by the defendant.

8.The second appeal has been admitted on the following substantial questions of law:

"(i)Whether the First Appellate Court is right decreeing the suit when the Exhibit A1 is not proved that its stands in the account defendant?

(ii)Whether the First Appellate Court is right decreeing the suit when the signature of the defendant is not proved will the presumption under Section 118 of Evidence Act shall be raised?

(iii)Whether the First Appellate Court is right in considering the presumption under Section 118 of Evidence Act is in favour of plaintiff when the basis ingredients for presumption is not discharged by the plaintiff?"

9.The learned counsel for the appellant had contended that the suit cheque has been issued by Gowri Enterprises to the plaintiff for a sum of Rs.2,00,000/-. According to the learned counsel for the appellant, the said Gowri Enterprises or its proprietor has not been made as a party to the suit. The learned counsel had further contended that the appellant has specifically disputed the signature in the suit cheque and hence, the First Appellate Court was not right in invoking Section 118 of Negotiable Instrument Act. He had further contended that the plaintiff has not established that the signature found in the suit cheque is that of the defendant. When there is no pleading to the effect that the defendant has cheated the plaintiff by issuing a cheque belonging to a third party, the First Appellate Court was not right in arriving at such a finding. Hence, he prayed for allowing the second appeal.

10.Per contra, the learned counsel for the respondent had contended that the defendant has borrowed a sum of Rs.2,00,000/- and he has issued a post dated cheque drawn from HDFC Bank, Tuticorin to clear the said debt and hence, the First Appellate Court was right in arriving at a finding that the defendant had cheated the plaintiff by issuing a cheque belonging to the third party. Hence, the defendant is liable for payment of Rs.2,00,000/-. Therefore, he prayed for dismissal of the second appeal.

11.I have given anxious consideration to the submissions made on either side.

12.The present suit for recovery of money has been filed based upon a post dated cheque said to have been issued by the defendant on 19.07.2014 towards receipt of Rs.2,00,000/- on 19.06.2014 from the plaintiff. The cheque has been drawn from HDFC Bank Limited, Tuticorin Branch. According to the plaintiff, when the cheque was presented for collection at Vijaya Bank, it was returned by the HDFC Bank with a memo that his account has already been closed. The defendant has specifically disputed his signature in the post dated cheque. The defendant has also contended that he is no way connected with Gowri Enterprises. A careful perusal of the pleadings on either side will clearly show that the defendant has specifically disputed his connection with Gowri Enterprises and his signature found in the post dated cheque. The defendant has also contended that he has no account in the HDFC Bank at all. In view of the specific denial made on the side of the defendant, the entire burden will be upon the plaintiff to establish that the suit post dated cheque was issued by the defendant.

13.The plaintiff apart from himself has examined the Bank Manager of the drawee Bank namely the Vijaya Bank. The deposition of the said Bank Manager will not be of any use to the plaintiff because only the Bank Manager of HDFC will be having knowledge about in whose name the account stands and when the account was closed by the said customer. Though the cheque has been issued by the authorised signatory of Gowri Enterprises, the said Gowri Enterprises or its proprietor have not been impleaded as party to the suit. Though the defendant has specifically disputed his signature in the suit cheque, the plaintiff has not taken any steps to send the cheque for expert opinion. In view of the above said facts, this Court can safely come to a conclusion that the plaintiff has not proved that the said cheque has been issued by the defendant.

14.Now let us consider whether the plaintiff has established the loan transaction with the defendant dehors of Exhibit A1 post dated cheque. A careful perusal of deposition of the plaintiff as PW1 will clearly show that the plaintiff was not able to establish the borrowal of the defendant from him. The plaintiff had solely relied upon the post dated cheque said to have been issued by the defendant. The plaintiff was also not able to discredit the deposition of the defendant who was examined as DW1.

15.The claim of the plaintiff is that the defendant has borrowed money from the plaintiff but a cheque has been issued by

Gowri Enterprises. There is no explanation whatsoever from the plaintiff why a cheque from Gowri Enterprises was received by the plaintiff for the liability of the defendant. When the entire case of the plaintiff solely rests upon the post dated cheque, the First Appellate Court was not right in drawing certain adverse inferences as against the defendant. The entire evidence on the side of the plaintiff in his chief examination discloses that he solely relies upon Exhibit A1 cheque. When the plaintiff has not chosen to invoke the original cause of action of the alleged transaction between the plaintiff and the defendant for claiming the relief, the First Appellate Court was not right in decreeing the suit as prayed for, especially when the plaintiff has failed to prove Exhibit A1 cheque.

16.It is settled position of law that the presumption under Section 118 can be invoked only when the defendant admits his signature or the plaintiff proves the signature in the disputed document. In the present case, the defendant has disputed the signature and the plaintiff has not chosen to send the said signature for expert opinion. In such circumstances, the First Appellate Court had erred in invoking the presumption under Section 118 of Negotiable Instruction Act as against the defendant.

17.In view of the above said discussion, all the substantial questions of law are answered in favour of the appellant. The judgment and decree of the First Appellate Court is set aside. The suit in O.S.No.122 of 2015 on the file of Subordinate Court, Thoothukudi is dismissed. The second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/06/2022

Sub Assistant Registrar(CS)

msa

To

1.The I Additional District Judge
Tuticorin

2.The Subordinate Judge
Tuticorin

COPY TO:-

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.R. BALAKRISHNAN, Advocate (SR-26510[F] dated 17/06/2022)

Judgment made in
S.A.(MD).No.759 of 2021
and CMP(MD).No.10143 of 2021
16.06.2022

SE(CO)
GC(27.06.2022) 6P 6C