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A.S.No.667 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.04.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.667 of 2016

Yashotha

... Appellant

Vs.

Eswari

... Respondent

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure against the judgment and decree made in O.S.No.307 of 2008 on the file of the II Additional District and Sessions Judge, Erode District dated 05.03.2016.

For Appellant : M/s.Naveen Kumar Murthi

For Respondent : M/s.Kandasamy for sole respondent.

JUDGMENT

The plaintiff whose suit for recovery of money had been dismissed is the appellant before this Court.



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2. The facts are hereinbelow set out briefly and the parties are referred to in the same ranking as before the Trial Court, namely, the II Additional District and Sessions Judge, Erode in O.S.No.307 of 2008.

3. The plaintiff had filed the suit O.S.No.307 of 2008 on the file of the II Additional District and Sessions Judge, Erode District for the following reliefs :-

(a). directing the defendant to pay a sum of Rs.20,38,500/- with future interest at the rate of 12% p.a for Rs.15,00,000/- from the date of the suit till the date of realization.

(b) directing the defendant to pay the costs of the suit.

Plaintiff's Case:-

4. The suit is filed by the plaintiff through her power agent, D.Ravikumar. It is her case that the defendant had borrowed a sum of Rs.10,00,000/- from the plaintiff and had executed a promissory note in her favour. The defendant had failed to discharge the said amount. Therefore, the plaintiff had filed a suit O.S.No.173 of 2004 on the file of the I



Additional Sub Judge, Gobichettipalayam. Pending the suit defendant had requested the plaintiff to withdraw the suit and undertook to pay the debt amount with interest which was calculated at a sum of Rs.15,00,000/-. She had undertaken to discharge the said amount within a period of 6 months and had also executed a confirmation document dated 17.11.2005 and acknowledged her liability.

5. To repay the said sum of Rs.15,00,000/-, the defendant had also executed 3 promissory notes all on the same date i.e; on 17.11.2005 for a sum of Rs.5,00,000/- each. The plaintiff would further submit that on her request the defendant had promised to repay the said sum by 14.11.2008 without fail. However, the assurance was observed in the breach thereby constraining the plaintiff to file the suit in question.

Written Statement of the Defendant:-

6. The defendant had filed a written statement denying the case of the plaintiff. She would submit that she has not borrowed any amount from the plaintiff and further, the plaintiff did not have the means to lend such a huge amount. The proceeding in O.S.No.173 of 2004 was not a genuine



proceeding. The defendant had also denied the execution of the documents dated 17.11.2005. That apart, as an alternate the defendant had also pleaded limitation. The defendant had denied the alleged compromise talks in the suit O.S.No.173 of 2004 and that she had agreed to repay a sum of Rs.15,00,000/- within a period of 6 months. The defendant would submit that the signatures found in the promissory note and in the undertaking document is not her signature and once again reiterated that the plaintiff did not have the means to extend such a huge amount. The defendant therefore sought for the dismissal of the suit.

Trial Court:-

7. The Court below had framed the following issues:-

- 1. Whether the suit filed by the power agent is maintainable?*
- 2. Whether this Court has no jurisdiction to try this suit?*
- 3. Whether the suit is barred by limitation?*
- 4. Whether the defendant has executed the suit promissory notes?*



5. *Whether the suit promissory notes are supported by consideration?*

6. *To what relief the plaintiff is entitled to?*

8. The plaintiff had examined herself as P.W.1 and one Gunadharan and Tamaraiselvan as P.W.2 and P.W.3 and marked Ex.A.1 to A.5. The defendant had examined herself as D.W.1 and one Dhatchinamurthy as D.W.2 and marked Ex.B.1 to B.12. The handwriting expert's report and reasoning sheet were marked as Ex.X.1 and X.2 respectively.

9. The Trial Court on considering the evidence on record had dismissed the suit. Challenging the same the plaintiff is before this Court.

Points for consideration:-

10. The points that arise for consideration in the above First Appeal are:-

1. *Whether the defendant had executed Ex.A.1 to A.3 promissory notes and Ex.A.4 undertaking letter?*

2. *Whether consideration has passed under the suit*



promissory notes?

3. Whether the suit is barred by limitation?

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Submission:-

11. Mr.Navin Kumar, learned counsel for the plaintiff would submit that the defendant had executed Ex.A.1 to A.3 promissory notes after the compromise talks had taken place in the earlier suit O.S.No.173 of 2004. He would submit that the consideration for Ex.A.1 to A.3 were the amounts due towards the suit O.S.No.173 of 2004. He would further submit that the expert has opined that the signatures in the promissory notes is that of the defendant and therefore the Court below was wrong in placing the onus of proof on the plaintiff even after the execution of the same had been proved by him. He would submit that under Section 118 of the Negotiable Instruments Act once the onus of execution has been proved by the plaintiff it is for the defendant to let in evidence to show that no consideration had passed. In this regard, the defendant had failed to discharge this onus cast upon her. In support of his argument he would rely upon the judgment reported in ***(2008) 7 SCC page 655 - Mallavarapu Kasivisweswara Rao Vs. Thadikonda Ramulu Firm and Others*** where the Hon'ble Supreme Court has held that a mere denial of non receipt of consideration would not suffice



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and that it has to be proved by the respondent. He would rely upon the observations in paragraph nos.17 and 22 of the said judgment. He would also rely upon the judgment reported in **(2022) 10 SCC page 281 - Kapil Kumar Vs. Raj Kumar**. He would rely upon the observations in paragraph no.15 of the said judgment.

12. Per, contra, Mr.S.Kandasamy, learned counsel for the respondent would submit that the entire suit is a concocted one. The earlier suit O.S.No.173 of 2004 has been withdrawn by the plaintiff and the endorsement made is that the suit has been settled out of Court. After the suit has been settled out of Court, there is no question of the defendant having executed promissory notes thereafter. He would therefore submit that the Court below has considered the evidence in detail and dismissed the suit.

13. Heard the counsels on either side.

Discussion:-

14. A perusal of the evidence of P.W.1 would clearly prove that consideration had not passed under the suit promissory notes. Although the



plaintiff has contended that the amounts due towards the suit O.S.No.173 of 2004 forms the consideration for Ex.A.1 to A.3 promissory notes however in these promissory notes it is stated that cash has been paid. Likewise, statement in Ex.A.5 that Rs.15,00,000/- is paid is also incorrect. P.W.2 is the husband of the plaintiff. From the evidence of P.W.2 it is seen that the power agent is none else than the brother of the plaintiff. In his cross examination, P.W.2 would submit that he has paid a sum of Rs.9,00,000/- to the defendant on behalf of his wife. However, the suit O.S.No.173 of 2004 was filed to recover a sum of Rs.4,00,000/- and not the sum of Rs.9,00,000/- . He would also submit that the amounts under Ex.B.2 to B.4 were paid by his wife from out of her own money and it was not he who had paid the money. This runs contrary to his earlier statement that he had paid a sum of Rs.9,00,000/- to the plaintiff. A perusal of the evidence of P.W.2 would show the contradictions in his statement regarding the amounts paid and the execution of the document. That apart, at one place he would submit that he has paid the amounts whereas in another place he would state that it is his wife who has paid the money. There are several contradictions between the evidence of P.W.1 and P.W.2 and in the evidence of P.W.2 himself.



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15. The plaintiff's contention in the plaint is that a sum of Rs.10,00,000/- had been borrowed originally and to recover the said sum the suit O.S.No.173 of 2004 had been filed. A perusal of the plaint in the suit O.S.No.173 of 2004 which has been marked as Ex.B.1 would show that the suit has been filed for recovering a sum of Rs.5,00,000/- with subsequent interest at 9% on the principal amount of Rs.4,00,000/-. In that suit the contention of the plaintiff is that on 29.11.2001 at 7.a.m. the defendant had borrowed a sum of Rs.2,00,000/- and at 12 noon of the same day she had borrowed a further sum of Rs.1,50,000/- and at 6 pm, she had borrowed a further sum of Rs.50,000/- thereby making a total borrowal of Rs.4,00,000/- on 29.11.2001. The suit has been filed on 29.11.2004. The suit has been filed before the Sub Court, Gobichettipalayam. In the said plaint, the plaintiff would submit that the amounts were borrowed at Neithalapuram Village in Satyamnagalam.

16. It is seen that on 20.12.2005 under Ex.B.6, the plaintiff has filed a memo stating that the suit has been settled out of Court and therefore the suit may be dismissed as settled out of Court and half of the Court fee be refunded to the her. Pursuant to this, a judgement came to be passed on



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22.12.2005 dismissing the suit as settled out of Court and the Court fee has been refunded retaining 5% of the Court fee paid. The defendant was represented by a counsel in the said suit. Ex.B.8 is the decree passed in the earlier suit O.S.No.173 of 2004. Ex.B.5 is the written statement filed in the earlier suit O.S.No.173 of 2004 where the defendant has denied the borrowal and the execution of the documents.

17. Having taken such a stand, it is rather strange that the plaintiff would submit that the defendant had agreed to pay a sum of Rs.15,00,000/- when the suit itself is for recovering a sum of Rs.5,00,000/- with the principal amount being a sum of Rs.4,00,000/- as per the plaint filed in the earlier suit O.S.No.173 of 2005, Ex.B.1. The plaintiff has produced Ex.A.4 which is alleged to be the declaration deed signed by the defendant on 17.11.2005. The suit O.S.No.173 of 2005 is dismissed on 22.12.2005 and on 20.12.2005, the plaintiff has filed a memo stating that the suit has been settled out of Court. In the above circumstances, the plaintiff's contention that the defendant had executed an acknowledgment letter and executed 3 promissory notes is far from the truth. That apart, the passing of consideration has also not been proved.



18. The report of the hand writing expert, Ex.X.1 would read that the person who has written A.1 to A.7 is the same person who has written Q1 Q1a, Q2. Q2a. Q3 and Q3a. The expert has examined the signatures said to be that of the defendant in the disputed document and not the admitted signature. Ex.A.1 indicated in the report is the signature of one of the witnesses Gunadharan, Q2 and Q2a are the signatures purported to be that of the defendant. A.2 is once again the signature of the said Gunadharan in Ex.A.2 and Q3 and Q3a are the alleged signatures of the defendant. A.3 is the signature of Gunadharan in Ex.A.3 promissory note and Q.1 and Q1a are the alleged signatures of the plaintiff. A.4 is the signature of Gunadharan in Ex.A.4. A.5 is the signature of the Yashotha, the plaintiff in Ex.A.5 power of attorney. A.6. is the signature of Gunadharan in Ex.A.5. A.6. is the signature of Yashotha in Ex.A.5. A.7 is the signature of Yashotha in Ex.A.5 which is the signature made before Sub Registrar. The report of the expert in X.1 and X.2 would state that the person who has written the signature in A.1 to A.7 is the very same person who has put the signatures in Q1, Q1a, Q2, Q2a, Q3 and Q3a.



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19. Therefore, it is crystal clear that the defendant has not executed Ex.A.1. Further, the passing of consideration has also not been proved by the plaintiff. That apart, the suit is filed for recovering money that is alleged to have been given under the promissory note in the year 2001. Therefore, the suit filed in the year 2008 is definitely barred by limitation. The judgments relied upon by the counsel for the plaintiff/appellant would not be applicable to the facts of this case since the plaintiff/appellant has failed to prove the execution of the documents. Therefore, the points for consideration are all held against the plaintiff/appellant.

20. In fine, the First Appeal is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

08.04.2024

Index : Yes/No
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To

1.The II Additional District and Sessions Judge, Erode District.

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