



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 09.01.2024

Pronounced on: 31.01.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.335 of 2018

and

C.M.P.No.9631 of 2018

Tmt. Vanaroja (Died)

1.P.Annamalai

2.A.Kumaran

3.A.Raja

...Appellants

Vs.

S.Murugan

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 21.08.2017 made in A.S. No.2 of 2014 on the file of the Principal District Judge, Coimbatore reversing the Judgment and Decree dated 08.10.2013 made in O.S. No.642 of 2012 on the file of the First Additional Subordinate Judge, Coimbatore.

For Appellants : Mr.C.Munusamy



WEB COPY



S.A.No.335 of 2010

For Respondent : Mr.R.Krishnaswamy

JUDGMENT

The defendant in a suit for recovery of money based on a promissory note, is the appellant in the present Second Appeal.

2. The plaintiff filed O.S.No.642 of 2012 for recovery of a sum of Rs.3,19,000/-, together with future interest, basing his claim on a promissory note executed by the defendant on 05.09.2009. The case of the plaintiff is that the defendant failed to pay any amount subsequent to the borrowing and execution of the promissory note and therefore the plaintiff issued a notice on 30.12.2011, which was received by the defendant, pursuant to which the defendant sent a reply on 05.01.2012 with false allegations and hence the suit came to be filed.

3. The defendant filed a written statement denying the execution of the promissory note and also the alleged borrowing. Before the Trial Court, the plaintiff examined himself as P.W.1 and one Mr.Annadurai as P.W.2



and marked exhibits Ex.A1 to A4 and on the side of the defendants there is no oral or documentary evidence adduced. The Trial Court proceeded to dismiss the suit, finding that the plaintiff had failed to prove execution of the promissory note.

4. However, on appeal filed by the plaintiff in A.S.No.2 of 2014, the first Appellate Court reversed the finding of the Trial Court and decreed the suit mainly on the ground that the defendant had not even entered the witness box in order to prove the defence set up by way of written statement.

5. On 12.11.2018, this Court has admitted the above Second Appeal on the following substantial questions of law:

" i) Whether the lower appellate Court was right in holding that the suit pronote was executed when the defendant specifically denied the signature, execution, and averred that the suit pronote was fabricated?

ii) Whether the lower appellate Court was right in taking adverse inference on non examination of defendant when the plaintiff failed to discharge his burden of proof with



WEB COPY



S.A.No.335 of 2016

respect to the genuineness of the suit pronote?

*iii)Has not the lower appellate Court committed grave
illegality in not framing the proper point for consideration
as is required under Order 41, Rule 31 C.P.C?"*

6. I have heard Mr.C.Munusamy, learned counsel for the legal heirs of the defendant and Mr.R.Krishnaswamy, learned Counsel for the respondent. I have gone through the judgments of the Courts below and also the decisions on which reliance is placed on by the respective counsel.

7. The learned counsel for the appellant would state that the First Appellate Court has grossly erred in allowing the First Appeal and failed to advert to the oral and documentary evidence adduced by the plaintiff himself and ought to have not proceeded to decree the suit, only for the reason that the defendant did not choose to enter the witness box. The learned counsel for the appellant would further state that the plaintiff had to establish the factum of due execution of the promissory note and also passing of consideration and the plaintiff had miserably failed to establish the same and the burden of proof would not stand shifted to the defendant



and therefore the non-examination of the defendant was not fatal. Learned counsel for the appellants would also state that admittedly the plaintiff and the defendant were strangers and not even from the same village which has come out in evidence and there is absolutely no iota of evidence as to how the defendant knew the plaintiff in the first place, for him to even borrow money by execution of a promissory note.

8. He would also rely on the decision of the Hon'ble Supreme Court in *Santosh Hazari Vs. Purushottam Tiwari(dead) by Lrs*, reported in *AIR 2001 SC 965*, where the Hon'ble Supreme Court has held on the facts of the said case that the First Appellate Court failed to discharge the duty cast on a Court of First Appeal and the High Court having noticed such failure, ought to have framed substantial question of law and proceeded to hear the Second Appeal on such substantial question of law framed.

9. Per contra, the learned counsel for the respondent would take me through the evidence of P.W.1, especially cross examination of P.W.1 and he would highlight from various portions of cross examination and the suggestions that are put to P.W.1 that by no stretch of imagination the



defendant could be said to be a stranger to the plaintiff. Further, he would contend that the defendant has not taken any steps regarding his signature in the promissory note to be compared with any admitted signature and the First Appellate Court has rightly drawn adverse inference against the defendant, especially since the defendant did not even offer himself for cross examination by entering the witness box or by marking any relevant documents supporting his defence.

10. Learned counsel for the respondent would place reliance on the judgment of the Hon'ble Supreme Court in ***Iswar Bhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and anr*** reported in ***(1999) 3 SCC 457***, where the Hon'ble Supreme Court discussed a case where the party did not enter the witness box to make a statement of oath, denying the statement of the other party regarding advancement of a sum of Rs.7,000/- by way of a cheque. The Hon'ble Supreme Court has held that adverse presumption has to be drawn on the basis of illustration (g) to Sec.114 of the Indian Evidence Act. Learned counsel for the respondent would also place reliance on the judgment of this court in ***Shanmugam Vs. Kunchithapatham (died) rep by his L.Rs*** reported in ***2013 SCC Online Mad 927***, where this Court has held



that when a party in whose knowledge there are certain facts, does not examine himself, such failure by shunning the witness box would be certainly fatal to his case. Reliance is also placed on the decision of the Gwalior Bench of the Madhya Pradesh High Court in ***Gulla Kharagjit Carpenter Vs. Narsingh Nandkishore Rawat*** reported in ***AIR 1970 M.P. 225***, where the High Court held that even though there were minor discrepancies in the case set up by the plaintiff, when the non applicant did not enter the witness box to deny the transaction and adduce evidence in support of his defence, then it has to be necessarily held that the facts pleaded by the plaintiff had to be accepted as true.

11. It is the specific case of the plaintiff that on 05.09.2009, the defendant borrowed a sum of Rs.2,50,000/- and executed the suit promissory note. The burden of proof is primarily on the plaintiff to establish due execution of the promissory note and thereafter alone he would be entitled to the presumption of passing of consideration under the said promissory note. The witness to the suit pronote Ex.A1 has been examined as P.W.2. The evidence of plaintiff as P.W.1 has been corroborated by the evidence of P.W.2, the witness. The Trial Court



WEB COPY

unfortunately made a mountain of a molehill, finding minor inconsistencies in the evidence of P.W.2 and putting the same against the plaintiff. The overall evidence adduced by P.W.1 and P.W.2 clearly establishes the fact that the suit promissory note was executed by the defendant, for consideration, in favour of the plaintiff. The burden stood shifted to the defendant thereafter to establish the contra. However, the defendant has avoided the witness box and has not even given evidence and offering himself to be cross examined by the plaintiffs counsel. It is a clear case that the defence set up by the defendant in the written statement cannot be accepted and an adverse inference can be rightly drawn, invoking the principle under Sec.114 of the India Evidence Act, more particularly illustration (g).

12. Unfortunately, the First Appellate Court has magnified the discrepancies with regard to the addresses which were not even germane to the main fact in issue viz., execution of promissory note by the defendant. Evidence of both P.W.1 and P.W.2 in so far as execution of the promissory note is very clear and cogent. The defendant has not made any attempt to rebut the presumption that can be safely drawn from the evidence of P.W.1



S.A.No.335 of 2018

and P.W.2 and has made only matters worse for himself by not letting in any oral or documentary evidence before the Trial Court. The First Appellate Court has rightly drawn an adverse inference against the defendant.

13. I do not find any reasons to interfere with the well considered findings of the Principal District Judge, Coimbatore made in A.S. No.2 of 2014 dated 21.08.2017 in decreeing the suit. Consequently, the substantial questions of law framed at the time of admission of the Second Appeal are answered against the appellants and the judgment and decree of the First Appellate Court is confirmed.

14. In fine, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

31.01.2024

Index : Yes/No
Internet : Yes/No
kpr
To

1. The Principal District Judge, Coimbatore
2. The First Additional Subordinate Judge, Coimbatore.



WEB COPY



S.A.No.335 of 2018

P.B.BALAJI, J,

kpr

Pre-delivery Judgment in

S.A.No.335 of 2018

and

C.M.P.No.9631 of 2018

31.01.2024