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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

S.A.No.524 of 2013

and

M.P.No.1 of 2013

Govindarajan
S/o.Palaniappa Gounder

.. Appellant

vs.

Kandasamy
S/o.Palaniappan

..Respondent

Second Appeal filed under Section 100 of CPC against the judgment and decree dated 15.10.2012 made in A.S.No.10 of 2012 on the file of the Court of Subordinate Judge, Rasipuram, confirming the judgment and decree dated 01.07.2011 in O.S.No.136 of 2006 on the file of District Munsif Court, Rasipuram.

For Appellant : Mr.N.Suresh

For Respondent : Mr.S.Joel

J U D G M E N T

The present second appeal arises out of a judgment and decree on the file of District Munsif Court at Rasipuram in O.S.No.136 of 2006



dated 01.07.2011 as confirmed by the learned Subordinate Judge at Rasipuram in A.S.No.10 of 2012 dated 15.10.2012. O.S.No.136 of 2006 is a suit for recovery of money at Rs.77,000/-.

2. For the sake of convenience, the parties shall be referred to by their respective ranks in the suit.

3. The case of the plaintiff is that the defendant had borrowed a sum of Rs.77,000/- for his urgent family expenses on 04.02.2004. On the very same day, he executed a promissory note for the said sum promising to repay the same at the rate of 12% per annum on demand. Since the defendant did not repay the amount, the plaintiff issued a notice on 06.06.2006. In the said notice, he had mistakenly mentioned the date of borrowal as 04.01.2004 instead of 04.02.2004. On the receipt of the said notice, the defendant issued reply on 29.06.2006 and 06.07.2006 denying the borrowal. The defendant called upon the plaintiff to issue a xerox copy of pro-note. Since the amounts were demanded and not paid, the plaintiff presented O.S.No.136 of 2006.

4. On service of summons, the defendant entered appearance and



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presented a written statement. His primary case is that the defendant had entered into a chit transaction with one Palanivelu, the brother-in-law of the present plaintiff and during the course of chit transactions, the said Palanivelu had taken blank promissory notes from the defendant. He further pleaded that before the Inspector of Police, Velukurichy, a muchalika was entered into on 06.07.2004 whereby the defendant had paid a sum of Rs.31,000/- to the said Palanivelu as full and final settlement. He further pleaded that said Palanivelu, out of five promissory notes, had returned only one promissory note and had not returned four promissory notes and by utilizing one of those blank promissory notes, the present suit came to be filed. According to him, the defendant had not borrowed any amount from the plaintiff and therefore, prayed for dismissal of the suit.

5. On the basis of these pleadings, the trial Court framed the following issues :

'1. Whether it is true that the defendant has borrowed a sum of Rs.77,000/- from the plaintiff on 04.02.2004 and executed a promissory note agreeing to repay the amount with 12% interest per annum?

2. Whether the plaintiff is entitled to recover the



amount from the defendant as prayed by him in the suit?

3. Whether the suit pro-note was created with the help of the signed, unfilled promissory note allegedly handed over by the defendant to the co-brother of the plaintiff namely, Palanivelu?"

6. Before the trial Court, the plaintiff examined himself as P.W.1 and another witness was examined as P.W.2 and marked Ex.A1 to Ex.A6. The defendant examined himself as D.W.1 and two other witnesses were examined as D.W.2 and D.W.3 and marked Ex.B1 to Ex.B5.

7. The trial Court, on consideration of all the evidences and documents, came to a conclusion that the plaintiff is a creditor and defendant is a debtor and decreed the suit on 01.07.2011.

8. Aggrieved by the same, the defendant preferred an appeal before learned Subordinate Judge, Rasipuram who confirmed the decree, against which the present second appeal.

9. Originally, notice regarding admission was ordered by this



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Court on 30.04.2013. Thereafter on 25.03.2019, the second appeal came to be admitted on the following substantial question of law :

'1. Whether the Courts below have erred in decreeing the suit without considering the evidence let in without taking into consideration the admissions made by the plaintiff and his witness and their inconsistent stand taken during the course of trial?'

10. I heard Mr.Suresh for the appellant and Mr.Joel for the respondents.

11. The defence that had been taken by the appellant / defendant makes it clear that he had admitted the signature on the pro-notes. However, during the course of trial, it transpires that the defendant denied the thumb impression on Ex.A1 and therefore, the said pro-notes had been sent to Superintendent of Police, Tamil Nadu Finger Print Bureau, SCRB Buildings, Chennai-28. This report was filed as Ex.C1. A perusal of the report shows that the disputed thumb impression which had been marked as 'D' and the admitted thumb impression which had been marked as 'S' are identical. The expert concluded that both had been made by one and the same finger and the same person namely,



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defendant. For the reasons best known, the appellant / defendant did not choose to summon or cross-examine the expert whose report had been filed as document Ex.C1 before the Court. This shows that the defendant, who had already admitted to the signature in the pro-note, had also been constrained to admit those thumb impressions as seen from the Forensic Science Laboratory Report.

12. The fulcrum of the case of Mr.Suresh, who vehemently contended on behalf of appellant, is that he had rebutted the presumption on the existence of the pro-note as well as the passing of consideration. He would state that there was an agreement between the defendant and Palanivelu which had been produced before the Court and that there had been a settlement on 19.07.2004. This agreement had been marked as Ex.B2 before the Court.

13. A perusal of Ex.B2 shows only the said Palanivelu and the defendant were parties and the respondent/plaintiff had not been a party to the proceedings. Further, a reading of Ex.B2 shows that the settlement had been arrived at on 06.07.2004 and not on 19.07.2004 as pleaded by the appellant.



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14. No records had been produced before the Court to show that prior to the institution of the suit, the defendant had called upon the said Palanivelu to handover the four blank promissory notes alleged to have been retained by him. Had the story of the settlement with Palanivelu been proved, the least that the plaintiff would have done is issued a notice to the said Palanivelu calling upon him to handover the blank pro-notes. Even if those pro-notes had not been handed over by Palanivelu, that would have raised a presumption that Palanivelu's brother-in-law had utilized the pro-notes for the purpose of presentation of the plaint.

15. Apart from that, the defendant did not choose to examine the Inspector of Police before whom the said agreement is said to have been entered into. *Ipse dixit* the filing of Ex.B2 and a statement that the Police had settled the matter on 19.07.2004 does not satisfy the requirements of law. On the plea that the plaintiff ought to have examined Palanivelu to substantiate the case, further plea was raised by Mr.Suresh that the plaintiff had not examined Palanivelu in order to substantiate his case. I agree with the lower Appellate Court that had the presumption under Section 118 of the Negotiable Instruments Act, 1881, against the



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appellant been discharged, the question of summoning Palanivelu would have arisen. In the particular case, as the signature and thumb impression on the pro-notes had been admitted, burden lies very heavily on the defendant to dislodge the presumption under Section 118 of NI Act. The evidence tendered by the defendant is not sufficient and therefore, I do not find any reason to take a different view from the view taken by the Courts below.

16. In the light of the above discussion, the judgment and decree of the Court of the Subordinate Judge in A.S.No.10 of 2012 dated 15.10.2012 in confirming the judgment and decree of learned District Munsif, Rasipuram in O.S.No.136 of 2006 dated 01.07.2011 stands confirmed. The substantial question of law is answered against the appellant. Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. Costs throughout.

05.02.2024

Index:Yes/No

Neutral Citation:Yes/No

Speaking Order / Non-speaking order

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1. Learned Subordinate Judge,
Subordinate Court,
Rasipuram.
2. Learned District Munsif,
District Munsif Court,
Rasipuram.



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V. LAKSHMINARAYANAN, J.

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