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S.A.No.611 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2024

CORAM:

THE HON'BLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.611 of 2013

Ettiyan

... Appellant

Vs.

1.Amavasai

2.Rani

... Respondents

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 28.07.2011 in A.S.No.5 of 2011 on the file of the Principal Sub Court, Tindivanam reversing the Judgment and decree dated 25.10.2010 in O.S.No.71 of 2007 on the file of the District Munsif cum Judicial Magistrate Court, Vanur.

For Appellant : Ms.Lavanya,
for Mr.T.Saikrishnan

For Respondents : Mr.N.Subramani

JUDGMENT



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The present second appeal arises out of the Judgment and Decree dated 28.07.2011 in A.S.No.5 of 2011 on the file of the Principal Sub Court, Tindivanam in reversing the judgment and decree dated 25.10.2010 in O.S.No.71 of 2007 on the file of the District Munsif cum Judicial Magistrate Court, Vanur.

2. For the sake of clarity and convenience, the parties will be referred to as their ranks in the suit.

3. O.S.No.71 of 2007 is a suit for recovery of money on the foot of promissory note. According to the plaintiff, a sum of Rs.31,125/- was paid on 16.06.2004 and a promissory note was executed for due and valid consideration. It is the case of the plaintiff and it is found in the promissory note that the amount was received towards the marriage expenses of Priya, the daughter of the defendants and the said amount has to be repaid at the rate of 12% per annum. Demanding the repayment, a notice was issued on



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15.09.2006. The defendants did not receive the notice. The plaintiff agreeing that the defendants were agriculturists, instead of 12%, sought 9% on the amount advanced.

4. The defence, which is evident from the written statement filed by the first defendant and adopted by the second defendant, is that they have not received any amount from the plaintiff and the pro-note is a fabricated one. According to them, Priya had been married as early as 27.05.2001 and therefore, there is no necessity to borrow the amount on 16.06.2004. They further pleaded that the wife of the plaintiff had lodged a complaint in CSR.No.60 of 2005, which had been closed as civil in nature and therefore, a criminal complaint was lodged in C.C.No.98 of 2006, which was pending on the date of lodging of the civil suit.

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



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- “1. வழக்கு கடனுறுதிச்சீட்டு உண்மையானதா?
2. வாதிக்கு ஆவர் கோரியவாறு தொகை கிடைக்கத்தக்கதா?
3. வாதிக்கு கிடைக்க வேண்டிய இதர பரிகாரங்கள் என்ன?”

6. On the side of the plaintiff, the plaintiff examined himself as PW1 and two other witnesses as PW2 and PW3 and marked Ex.A1 to Ex.A3. The defendants examined themselves as DW1 & DW2 and another witness as DW3 and marked Ex.B1 and Ex.B2.

7. On the basis of the evidence available before the court, the learned District Munsif at Vanur decreed the suit as prayed for. An appeal was preferred from the said judgment and decree to the file of the learned Principal Subordinate Judge at Tindivanam. The learned Principal Subordinate Judge took the appeal on file in A.S.No.5 of 2011 and allowed the appeal on 28.07.2011 and dismissed the suit. Against the reversal of the judgment, the plaintiff is on appeal before me.



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8. This Court was pleased to issue notice of admission in the above appeal on 22.07.2013. Thereafter, the matter had been posted before Mediation and Lok Adalat, but as the matter was not settled, it has been listed before me on 23.01.2024.

9. I heard Ms.G.Lavanya representing Mr.T.Saikrishnan and Mr.N.Subramani for the respective parties.

10. I heard the appeal on following questions of law:

“1.Whether or not the burden is on the plaintiff to prove that the promissory note is given for valid consideration or proving the execution of promissory note is sufficient in view of Section 118 of Negotiable Instruments Act?

2.Whether or not the burden shift on the respondent/defendants immediately on plaintiff proving the execution of Promissory Note?



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3. Whether or not the burden is on the plaintiff to prove the Promissory Note is supported by consideration, while the defendant had admitted the signature contained in Promissory Note in view of Section 101, 102 of Indian Evidence Act?”

10. Being a money suit, the appeal was heard on all the substantial questions of law taken up together.

11. Ms.G.Lavanya would argue that, the plaintiff having proved the promissory note by examination of PW1 to PW3, the burden of proof shifts on the defendants to discharge the presumption under Section 118 of the Negotiable Instruments Act. That not having been done, the lower appellate court fell in error by allowing the appeal. She further added that the lower appellate court had not even referred to Section 118 of the Negotiable Instruments Act, which renders the judgment perverse.



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12. In an attempt to torpedo these arguments, Mr.N. Subramani would argue that, though three persons were found in the document i.e., the defendants as well as their son/Prakash, Prakash had not been made as a party to the suit and therefore, it is fatal to the proceedings. He would further point out that in the evidence of attesting witnesses viz., PW2, PW3 and DW3, they have deposed that no amount was paid before them. Therefore, the plaintiff has not discharged the burden.

13. The sheet anchor of his case is that CC.No.98 of 2006, which was presented before the learned Judicial Magistrate at Vanur had ended in acquittal and therefore, the civil suit should also be dismissed. As his last submission, he would point out that the address of the attesting witnesses had not been found on the promissory note and this causes huge doubt over the case of the plaintiff.



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14. I have carefully considered the arguments on either side and gone through the records.

15. It is found from the evidence of PW1 to PW3 that the signature of the defendants had been proved on the document. The initial burden is on the plaintiff to prove that the document had been executed by the defendants and once the burden is discharged, the onus shifts to the defendants to show that the Court should not draw an inference under Section 118 of the Negotiable Instruments Act.

16. Now let me deal with the arguments seriatim of Mr.N.Subramani. Insofar as the non-impleading of Mr.Prakash, the son of the defendants is concerned, I went through the written statement and I do not find that the non-impleading of the said Prakash has been pleaded as being fatal to the suit. Under Order I Rule 13 of the Code of Civil Procedure, the



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objection as regards non-impleading of parties should be raised at the earliest

available opportunity, or else it is deemed to be waived.

17. Apart from the lack of pleading, I also have to take note of Section 99 of the Code of Civil Procedure, which mandates that unless and until the non-impleading affects the jurisdiction of the court or the merits of the case, a decree cannot be reversed or even remanded for that purpose. Non-impleading not having been pleaded and the fact that Prakash, not being made as a party to the suit is not dealing with the jurisdiction of the court or the merits of the dispute on the pro-note, I am constrained to reject the first argument of Mr.N.Subramani.

18. Insofar as the second argument that the attesting witnesses had deposed that the money was not paid in their presence is concerned, it is pertinent to point out that

(i) a pro-note does not require any attesting witness as a pro-note is



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different from a bond. A bond requires an attesting witness, but such a

requirement is not necessary in the case of a pro-note.

(ii) It is not the case of the plaintiff that the amount was paid in the presence of the attesting witnesses.

(iii) Further the attesting witnesses have gone into the witness box and admitted to their signatures on the document.

19. If at all the deposition of the attesting witnesses can be taken into consideration, it is for the purpose of coming to a conclusion about whether there is any suspicion on the execution of the document. All the attesting witnesses viz., two on the side of the plaintiff and one on the side of the defendants have categorically admitted to their signatures in the document, which implies that the execution of the document has prima facie been proved and the onus would now shift to the defendants to discharge the presumption that lays heavily on them under Section 118. No steps were taken by the defendants to disprove the signatures that have been made on the



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document, though they have pleaded that the document is forgery.

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20. The plaintiff, having prima facie proved to the court that the signatures were those of the defendants by examination of the attesting witnesses, the least that the defendants should have done was take out an application for appointment of an advocate commissioner to take the document to the forensic science laboratory and have obtained a report that the document is an act of forgery and does not contain their signatures. Unfortunately for Mr.N.Subramani, this act has not been done. This will also answer the argument of Mr.N.Subramani that the address of the attesting witnesses had not been mentioned in the document.

21. Finally, I have to turn to the submission of Mr.N.Subramani that since C.C.No.98 of 2006 on the file of the learned Judicial Magistrate, Vanur ended in acquittal, I have to follow the judgment and dismiss the second appeal. A judgment of a civil court is not binding on the criminal



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court and vice versa. Apart from that, the judgment on acquittal had not been brought on record by the defendants. Therefore, the basis on which the said acquittal had been rendered, had not been made available to the court. A party relying upon a document must produce the document before the court and the mere fact that they have pleaded in the written statement about its pendency is insufficient for the court to conclude otherwise.

22. As rightly pointed out by Ms.G.Lavanya, the lower appellate court has not even discussed the scope of Section 118 of the Negotiable Instruments Act. In a suit based on the Negotiable Instruments Act, the presumption under Section 118 is a crucial point on law and in fact, not having been referred to, it amounts to the learned Appellate Judge ignoring the vital provisions of law and thus, requires interference.

23. In the light of the above discussion, the substantial questions of law are answered in favour of the appellant and against the respondents. The



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judgment and decree in A.S.No.5 of 2011 on the file of the learned Principal Subordinate Court at Tindivanam dated 28.07.2011 in reversing the judgment and decree of the court of District Munsif at Vanur in O.S.No.71 of 2007 dated 25.10.2010 is set aside. O.S.No.71 of 2007 shall stand decreed as prayed for. The plaintiff will be entitled to recover the sum of Rs.31,125/- together with interest at 6% per annum instead of 9%, since the plaintiff himself has admitted that the defendants are agriculturists.

24. In fine, Second appeal is allowed. Costs throughout.

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Index : Yes/No

Speaking order/Non-speaking order

Neutral Citation : Yes/No



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To

1.The Principal District Judge of Tindivanam

2.The Subordinate Judge of Vanur



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V.LAKSHMINARAYANAN, J.

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