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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 29 / 08 / 2024

JUDGMENT PRONOUNCED ON : 05 / 11 / 2024

CORAM

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.NO.738 OF 2018

AND

CMP NO.21476 OF 2018

1.A.Parameswaran

2.Vijayalakshmi

... Appellants / Respondents /
Defendants

Vs.

Tirumalayan Finance

Karaikurichi, Selliyayeepalayam,

Namakkal by its Managing Partner

... Respondent / Appellant /
Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 praying to set aside the Judgment and Decree dated March 28, 2017 passed in A.S.No.23 of 2015 on the file of Principal District Court, Namakkal, reversing the Judgment and Decree dated April 10, 2015 passed in O.S.No.154 of 2005 on the file of Subordinate Court, Namakkal.

For Appellants : Mr.T.L.Thirumalaisamy

For Respondent : Mr.S.Muthukrishnan

J U D G M E N T



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This Second Appeal is directed by the unsuccessful defendants before the First Appellate Court, against the Judgment and Decree dated March 28, 2017 passed in A.S.No.23 of 2015 on the file of 'Principal District Court, Namakkal' ['First Appellate Court' for short], whereby the Judgment and Decree dated April 10, 2015 passed in O.S.No.154 of 2005 on the file of 'Subordinate Court, Namakkal' ['Trial Court' for short] was reversed.

2. Hereinafter, for the sake of convenience, the parties will be denoted as per their array in the Original Suit.

Plaintiff's Case in Brief:

3. In the Complaint, the plaintiff has averred that the defendants, who are husband and wife, borrowed a sum of Rs.1,00,000/- with interest at the rate of 24% per annum, for their family and business expenses on May 29, 2002, by executing a Promissory Note. On July 2, 2002, they paid Rs.4300/- towards principal and Rs.1,200/- towards interest. Thereafter, despite repeated demands, they failed to pay the dues. Hence the Suit for recovery of sum of Rs.1,61,776/- along with subsequent interest on the



principal sum of Rs.95,700/-.

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Defendants' Case in Brief:

4. The first defendant filed written statement and the same was adopted by second defendant. The defendants deny that they borrowed a sum of Rs.1,00,000/- with interest at the rate 24% per annum, for their family and business expenses on May 29, 2002, by executing a Promissory Note. They deny the alleged payment made on July 2, 2002. The first defendant is working as a conductor in Tamil Nadu State Transport Corporation and the second defendant is working in Block Development Office. Both being in government jobs, there is no need to borrow money from the plaintiff. The signatures and the thumb impressions found in the Suit Promissory Note are not those of the defendants. Further, the Court Fee paid is incorrect. Accordingly, they prayed that the Suit shall be dismissed.

Trial Court:

5. At Trial, on the side of the plaintiff, P.W.1 and P.W.2 were examined and Ex-A.1 was marked. On the side of the defendants, the first defendant was examined as D.W.1 and no document was marked.

5.1. Upon hearing both sides and considering the oral and



documentary evidence, the Trial Court concluded that execution of Ex-

A.1- Promissory Note and the passing of consideration are not proved by the plaintiff. Accordingly, dismissed the Suit without costs.

First Appellate Court:

6. Aggrieved by the Judgment and Decree passed by the Trial Court, the plaintiff approached the First Appellate Court by way of an appeal under Section 96 of the Code of Civil Procedure, 1908 ['CPC' for short]. The First Appellate Court upon hearing both sides and analysing the oral and documentary evidence, concluded that the evidence of P.W.1 and P.W.2 prove the execution of Ex-A.1 - Promissory Note; and that the Trial Court wrongly understood the concept of burden of proof and dismissed the Suit without appreciating the evidence in the right perspective. Accordingly it allowed the appeal, set aside the Judgment and Decree of the Trial Court and decreed the Suit.

Substantial Questions of Law:

7. Aggrieved with the Judgment and Decree of the First Appellate Court, the defendants preferred this Second Appeal and the same was admitted on December 6, 2018 on the following Substantial Questions



of Law:

“(a) Whether Lower Appellate Court is correct in law in allowing the appeal without reversing the finding given by the Trial Court on the various issues?

(b) Whether the Lower Appellate Court is correct in law in allowing the appeal without reversing the finding of the Trial Court regarding the evidence of PW2 and the accounts maintained by respondent?”

Arguments:

8. Mr.T.L.Thirumalaisamy, learned Counsel for the appellants/defendants would argue that the First Appellate Court’s Judgment and Decree is not in consonance with Order XLI Rule 31 of CPC. Though the defendants denied the signatures and thumb impressions contained in Ex-A.1 - Promissory Note as theirs, the plaintiff did not take steps to send Ex-A.1 for forensic examination/expert opinion. The burden is upon the plaintiff to prove the execution of Ex-A.1.

8.1. He would further argue that since the plaintiff is a partnership firm and the accounts being audited by an auditor, the plaintiff is supposed to maintain accounts books. When the plaintiff’s contention is that the defendants paid certain amount on July 2, 2002, the plaintiff ought to have produced the accounts books to substantiate the same. Adverse



inference is to be drawn from his failure to do so. The First Appellate Court failed to consider these aspects in the right perspective and reversed the Trial Court's Judgment and Decree, while there was no need for any need for interference.

8.2. Last but not the least, he would argue that the Suit has been filed after the period of limitation. Accordingly, he would pray to allow the Second Appeal, set aside the First Appellate Court's Judgment and Decree and restore the Trial Court's verdict.

8.3. He would rely on the following decision in support of his contentions:

(i) *Siddiqui's Case* - Judgment of Hon'ble Supreme Court in *H. Siddiqui -vs- A. Ramalingam*, reported in (2011) 4 SCC 240.

9. In response, Mr.S.Muthukrishnan, learned Counsel for the respondent / plaintiff would argue that the plaintiff examined P.W.2 - a witness to Ex-A.1 - Promissory Note, and proved the execution of Ex-A.1 and pursuant passing of consideration. Hence, Ex-A.1 attracts the presumption under Section 118 of 'Negotiable Instruments Act, 1881'



(henceforth 'N.I. Act'). Moreover, the plaintiff filed an Interlocutory Application for subjecting the fingerprints found in Ex-A.1 to expert opinion and the same was allowed by the Trial Court. Despite sufficient opportunities, the defendants did not turn up to furnish samples for the same. Hence, adverse inference is to be drawn from their conduct.

9.1. Further would argue that, the Suit is based on Ex-A.1 - Promissory Note and not on accounts and hence, there is no need to produce the accounts. Further, in the Plaint Paragraph No.4, it has been specifically stated that from April 30, 2005 to June 5, 2005, since the Civil Courts were on vacation, the Plaint was filed on the day of reopening *i.e.*, June 6, 2005. Hence, the Suit is well within the period of limitation. The Trial Court erred in dismissing the Suit while the First Appellate Court rightly decreed the Suit by allowing the appeal. Accordingly, he would pray to dismiss the Second Appeal and confirm the First Appellate Court's Judgment and Decree.

Discussion:

10. This Court has heard on either side and perused the materials available on record in light of the Substantial Questions of Law.



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11. Ex-A.1 - Promissory Note is dated May 29, 2002. The Suit was filed on June 6, 2005. The plaintiff ought to have filed the Plaint on or before May 29, 2005. However, Paragraph No. 4 of the Plaint specifically states that since the Civil Courts were on vacation from April 30, 2005 to June 5, 2005, the Suit was filed on the day of reopening viz., June 6, 2005. The defendants neither in their Written Statement nor in their evidence, denied the said specific Plaint averment. Question of limitation is generally a mixed question of fact and law. In case if it is a purely legal question, then it can be raised at any time even at the stage of appeal. In this case, limitation is not a purely legal question. Hence, it cannot be raised at the stage of appeal. This Court has verified the Official Memorandum issued by Registrar General in R.O.C.No.3489-A/2004/C3 dated October 8, 2004. Relevant portion of the Official Memorandum Reads thus:

“R.O.C.No.3489-A/2004/C3

OFFICIAL MEMORANDUM

*SUB: Vacation and holidays – Period of adjournment
for vacation and holidays for all Subordinate
Courts in the State for the year 2005 –*



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S.A.No.738 of 2018

Observance of – Reg.

REF: *Civil Rules of Practice and Circular Orders
(Volume – II)*

1.The Subordinate Civil Courts in the State of Tamil Nadu viz., The City Civil Court, Court of Small Causes, Chennai, District Courts and all other Subordinate Civil Courts including District Munsif Courts are required to observe the following period of adjournment in respect of Summer Vacation for the year 2005.

District Courts and Sub Courts:-

Sunday, the 1st May, 2005 to Sunday, the 5th June, 2005 (both days inclusive)

District Munsif Courts:-

Sunday, the 1st May, 2005 to Thursday, the 31st May, 2005 (both days inclusive)

... ..
... ..

HIGH COURT, MADRAS

Sd/-

DATED : 08.10.2004

REGISTRAR GENERAL”

11.1. Verification of the concerned High Court Memorandum would show that the Courts of District Judiciary were to be reopened on June 6, 2005 after summer vacation. Hence, even while assuming that plea of limitation can be raised at the stage of appeal in this case, the conclusion would be that the Suit is filed well within the period of limitation. In short,



the Suit is not barred by limitation.

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Execution of Promissory Note and Non-production of accounts

12. Defendants in their Written Statement have not denied the signatures and thumb impressions contained in Ex-A.1 firmly but have done so evasively. P.W.1 in his evidence deposed that the defendants executed Ex-A.1 - Promissory Note after receiving Rs.1,00,000/-. Further deposed that the defendants paid certain amounts towards the principal and the interest on July 2, 2002. The plaintiff also examined P.W.2 who is a witness to Ex-A.1. P.W.2 has clearly deposed about the execution and passing of consideration. Nothing could be elicited through cross-examination of P.W.1 and P.W.2 so as to shake their chief examination. Moreover, the plaintiff filed an Interlocutory Application in I.A.No.39 of 2014 before the Trial Court calling upon the defendants to produce their thumb impression samples for expert opinion. The defendants never came forward to give the samples. In these circumstances, the evidence of P.W.1 and P.W.2 raise the presumption provided under Section 118 of N.I. Act in favour of Ex-A.1. Now the onus shifts onto the defendants. They have not taken any steps to discharge the onus.



13. The Suit is filed on the basis of Ex-A.1 - Promissory Note.

Had the Suit been filed based on the accounts of the plaintiff or had Ex-A.1 been executed to discharge pre-existing debts standing / based on the plaintiff's accounts, in such scenarios, production of accounts book is necessary. But when the Suit is filed based on Ex-A.1 - Promissory Note, Promissory Note is considered the best evidence and therefore, this Court is of the view that there is no need to produce the accounts.

14. In this case, since non-production of accounts is not fatal to the plaintiff's case and since the defendants have failed to rebut the presumption under Section 118 of N.I. Act as stated *supra*, this Court is of the opinion that execution of Ex-A.1 and pursuant passing of consideration have been proved by the plaintiff.

Order XLI Rule 31

15. The First Appellate Court framed the following points for consideration:

- “1) *Whether the appellant/Plaintiff has proved the execution of the promissory note by the defendants?*
- 2) *Whether the appeal can be allowed ?”*

16. It has discussed on these two points and has assigned



proper reasons for its decisions thereon. As held in *Siddiqui's Case* (*supra*), it has independently assessed the evidence on each point. The brevity of the Judgment alone does not imply that it lacks consideration. The Judgment is in consonance with Order XLI Rule 31 of CPC. This Court does not find any infirmity with its Judgment.

Conclusion:

17. The Trial Court failed to consider the fact that the Suit is based on Promissory Note and erred in its finding that non-production of accounts is fatal to the plaintiff's case. Further, the Trial Court erred in appreciating the evidence of P.W.2 as if the Promissory Note is a compulsorily attestable document and as if P.W.2 is an attestor while actually he is a witness. The dismissal of the Suit based on this erroneous approach of the Trial Court is not sustainable in law. The First Appellate Court rightly allowed the appeal and decreed the Suit, and this Court does not find any infirmity with the same. Substantial Questions of Law are answered accordingly in favour of the plaintiff.

18. Resultantly, the Second Appeal stands dismissed. The First Appellate Court's Judgment and Decree is hereby confirmed.



S.A.No.738 of 2018

Considering the nature of the dispute, there shall be no order as to costs for this Second Appeal. Consequently, connected Civil Miscellaneous Petition is closed.

05 / 11 / 2024

Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
TK
To

1.The Principal District Court
Namakkal.

2.The Subordinate Court
Namakkal.

R. SAKTHIVEL, J.

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S.A.No.738 of 2018

PRE-DELIVERY JUDGMENT MADE IN
S.A.NO.738 OF 2018

05 / 11 / 2024