(2011) 10 MAD CK 0111

Madras High Court (Madurai Bench)

Case No: S.A. No. 1047 of 2006 and C.M.P. No. 2 of 2006

S. Valayapathy	APPELLANT
Vs	
G. Bernardsha Samuel	RESPONDENT

Date of Decision: Oct. 29, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 31
- Evidence Act, 1872 - Section 101, 106, 114, 68, 73
- Negotiable Instruments Act, 1881 (NI) - Section 118

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: V. Meenakshi Sundaram for Mr. M. Vallinayagam, for the Appellant; S.P. Maharajan, for the Respondent

Final Decision: Dismissed

Judgement

Honourable Mr. Justice M. Venugopal

1. The Appellant/Defendant has filed the instant Second Appeal as against the Judgment and Decree of the First Appellate Court, viz., the Second Additional Sub-Court, Tirunelveli, dated 08.09.2005 in A.S. No. 197 of 2005, in reversing the Judgment and Decree, dated 28.02.2005, in O.S. No. 393 of 2004, passed by the Learned Principal District Munsif, Tirunelveli.

2. The First Appellate Court, viz., the Second Additional Sub-Court, Tirunelveli, while passing the Judgment in A.S. No. 197 of 2005, dated 08.09.2005, has inter alia observed that PW-1, G.Bernardsha Samuel and PW-2, Peer Mohammed, have been examined to establish the execution of suit pronote Ex. A-1, and there is no necessity to examine the witnesses mentioned in suit pronote as per Section 68 of the Indian Evidence Act 1872 and has come to a resultant conclusion that the Appellant/Defendant has not proved that he has not received the loan from the Respondent/Plaintiff and further that the Respondent/Plaintiff has proved his case

and consequently, allowed the Appeal by setting aside the Judgment and Decree of the Trial Court, dated 28.02.2005, in O.S. No. 393 of 2004 and decreed the suit as prayed for in the plaint together with costs.

3. Before the Trial Court, in the main suit two issues have been framed for adjudication. On behalf of Respondent/Plaintiff, witnesses PW 1 and 2 have been examined and Ex. A-1 to A-5 have been marked. On behalf of Appellant/Defendant, DW-1 has been examined and no document has been marked.

4. The Trial Court, on an appreciation of oral and documentary evidence available on record, has dismissed the suit, leaving the parties to bear their own costs.

5. The Appellant/Defendant, as an aggrieved person, has preferred the Second Appeal before this Court. At the time of admission of the Second Appeal, this Court has formulated the following substantial question of law:-

i. Whether the Judgment of the Lower Appellate Court warrants interference since the Lower Appellate Court has not framed points for determination as contemplated under Order 41 Rule 31 of C.P.C.? and

ii. Whether the Lower Appellate Court has committed error in casting the burden of proof upon the Defendant/Appellant, while the Respondent/ Plaintiff has to prove the execution of pronote in accordance with law, when the Defendant denies the execution?

6. The Contentions, Discussions and Findings on point No. 1 and 2. The Learned counsel for the Appellant/Defendant contends that the First Appellate Court has only framed two points for consideration in A.S.No. 197 of 2005 and in fact it has not formulated the points for determination, the decision thereon, the reasons for the decision etc, and since the Judgment of the First Appellate Court, viz., the Second Additional Sub-Court, Tirunelveli, is not in conformity with Order 41 Rule 31 of C.P.C, the same is not in accordance with law and on this simple ground alone, the Second Appeal is to be allowed in imini.

7. On perusal of the First Appellate Court Judgment in A.S.No.197 of 2005, dated 08.09.2005, it transpires that the First Appellate Court, viz., the Second Additional Sub-Court, Tirunelveli, has framed the two points (1) Whether the Trial Court is correct in stating the Judgment of dismissing the original suit as against the Appellant/Plaintiff?; and (2) Whether the Appeal is to be allowed?. These two points for determination are nothing but a omni bus or wholesale points, which the First Appellate Court has framed. At this stage, this Court necessarily points out that the ingredients of Order 41 Rule 31 of C.P.C., are mandatory and it is the primordial duty of the First Appellate Court to frame the points for consideration so as to clear up the pleading and focus the attention of Court and of the parties on the specific and rival contentions, which crop up for determination. It is desirable that the First Appellate Court should frame necessary points for consideration and to record its

findings on all vital issues so as to avoid a remand of the case, in case, the Court of Appeal is not in crime with any of the findings rendered by the Trial Court.

8. It is true that the First Appellate Court, viz., the Second Additional Sub-Court, Tirunelveli, has not framed the necessary/essential points for determination in Appeal, as per Order 41 Rule 31 of C.P.C. However, the same will not preclude this Court from dealing with the merits of the matter on the basis of available oral and documentary evidence on record. Therefore, this Court holds that even though the First Appellate Court has not framed the necessary points for determination, as per Order 41 Rule 31 of C.P.C., yet this Court is not remanding the matter on that ground. However, this Court proceeds with the matter on the basis of available oral and documentary evidence on record, in as much as there is no fetter in law for this Court to deal with the merits of the matter in Second Appeal on the basis of substantial question of law framed by this Court and accordingly the first point is so answered.

9. Coming to the aspect of the ''Burden of proof'' under the Indian Evidence Act 1872, it is to be pointed out that as per Section 118 of the Negotiable Instruments Act, the presumption to be attached to a Negotiable Instrument unless the contrary is established certain presumption can readily be drawn. It is to be noted that before a presumption can be drawn, execution of the pronote must be either admitted or proved, it is to be borne in mind that there is no presumption before the execution of a Negotiable Instrument and in case of rebuttal/denial by the other side, the party restricting its claim on such instrument is to fully proved its execution. If the execution of the pronote is admitted, then the presumption as per Section 118(a) of the Negotiable Instruments Act arises. But this presumption can be a rebuttal one either by a circumstantial evidence or by presumption of fact drawn as per Section 114 of the Indian Evidence Act. Any presumption as to the quantum of consideration as defined by the mere existence of consideration, has to be drawn, not by virtue of Section 118 of the Negotiable Instruments Act or even u/s 114 of the Indian Evidence Act, but only from the recitals. The presumption under law is that a Court of law shall presume that an Negotiable Instrument or the endorsement has been made or endorsed for consideration. In substance, the burden of proof as regards the failure of consideration is thrown on the maker of the pronote or the endorser, as the case may be. It is to be remembered that the burden of proof is of two kinds: (1) as a matter of law and pleading; and (2) the burden of establishing a case. The earlier one is termed as a question of law on the basis of pleadings and remains unchanged during the full trial. But the latter will not remains static to shifts as soon as a party let in sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden may be through a oral or documentary evidence or admissions may by the opposite party. Even it may consists of either the presumption of law or fact or a circumstantial evidence.

10. The burden of proof as a question of law falls on the plaintiff as soon as the execution is proved, Section 118 of the Negotiable Instruments Act cast a duty on account of law to raise presumption in his favour that the said instrument has been made up for consideration. As per Section 118(a) of the Negotiable Instruments Act, every negotiable instrument is made for consideration undoubtedly, a pronote is a negotiable instrument. When execution of the pornote is admitted or duly proved, the presumption u/s 118(a) of the Negotiable Instruments Act is that the note is fully supported by consideration mentioned in the document. If the defendant fails to prove the absence of consideration of the pronote, then in law, a plaintiff is entitled to get the principle amount with interest when there is a clear evidence on record of proof, the execution of pronote, there is no question of comparing the signature as per Section 73 of the Indian Evidence Act. A defendant may rely upon presumptions of fact mentioned in Section 114 of the Indian Evidence Act. The Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of particular case. Example (g) to Section 114 says that the Court may presume that evidence which could be and is not produced would, if produced be unfavourable to the person, who withholds it. Whether a presumption is denied or rebutted by the rest of evidence in a given case is a question of fact.

11. In the instant case on hand, the Respondent/Plaintiff has filed the suit alleging that the Appellant/Defendant has borrowed a sum of Rs.40,000/-from him for his urgent family necessity and for other purposes on 27.08.2000 and executed suit pro-note in his favour promising to repay the principle to him or his order of demand.

12. Also, the plea of the Respondent /Plaintiff is that he caused a notice on 19.03.2003 though his advocate to the Appellant/Defendant, demanding the repayment of a sum of Rs.40,000/-. Though the Appellant/Defendant has received the Respondent/Plaintiff lawyer''s notice, dated 24.03.2003, as seen from the acknowledgment, he has not issued any reply nor repaid the amount so borrowed.

13. The Learned counsel for the Respondent/Plaintiff submits that the Appellant/Defendant not sending a reply to Respondent/Plaintiff lawyer''s notice, dated 24.03.2003, is an adverse circumstance against the Appellant/Defendant and further the Respondent/Plaintiff has filed the present suit claiming a sum of Rs.40,000/-from the Appellant/Defendant together with costs.

14. The stand of the Appellant/Defendant, has projected in the written statement is that he has not borrowed a sum of Rs.40,000/-as alleged by the Respondent/Plaintiff. As a matter of fact, he borrowed a sum of Rs.15,000/-from the Respondent/Plaintiff and executed a pronote for Rs.15,000/-only in favour of the Respondent/Plaintiff. In short, the Appellant/Defendant has averred that the promissory note alleged to have been executed by the Appellant/Defendant for a

sum of Rs.40,000/-is a created document and the Respondent/Plaintiff has forged the Appellant/Defendant''s signature prepared the document and committed the offence to forgery. To put it precisely, the stand of the Appellant/Defendant is that at no point of time, he has executed a pronote for a sum of Rs.40,000/- in favour of the Respondent/Plaintiff.

15. The Appellant/Defendant has also mentioned in the written statement that due to harassment of Respondent/Plaintiff, he has given a complaint to the Inspector of Police, Economic Offence Wing I, Tirunelveli. Moreover, there is no cause of action for the Respondent/Plaintiff to file the present suit, claiming a sum of Rs.40,000/- from him.

16. As per Section 101 of the Indian Evidence Act, the onus to prove rests on the individual, who asserts a certain fact of any right or liability. The burden of proof in law does not depend upon the form of the proposition, but the burden of proving the claim is on the party who asserts it.

17. In this connection, Section 106 of the Indian Evidence Act speaks of burden of proving fact, especially within the knowledge of that person. Though the Appellant/Defendant in the instant case contents that the suit pronote is a fabricated one and at no point of time, he has executed the suit pronote for a sum of Rs.40,000/-in favour of the Respondent/Plaintiff and further has come out with a specific plea that he has borrowed only a sum of Rs.15,000/-from the Respondent/Plaintiff and that he has only executed pronote for Rs.15,000/-, these averments that he has executed a pronote for Rs.15,000/-only in favour of the Respondent/Plaintiff and it is not for the suit pronote, but a different pronote and hence, the present suit filed on the basis of alleged pronote, dated 27.08.2000, executed by the Appellant/Defendant in favour of the Respondent/Plaintiff for Rs.40,000/-, have not been substantiated by the Appellant/Defendant to the subjective satisfaction of this Court.

18. PW1 (the Respondent/Plaintiff) in his evidence has clearly deposed that on the date of loan date, he has paid a sum of Rs.40,000/- from his hands, which amount will not be seen in his income tax accounts and the suit pronote has been returned only when the money has been paid to the Appellant/Defendant and that the suit pronote has been written by one Peer Mohammed and further it is incorrect to state that the Appellant/Defendant has received only a sum of Rs.15,000/-from him as loan and for which, only he has executed a pro-note and further he has not received a loan of Rs.40,000/-, etc.

19. PW-2 (the scribe of the suit pronote and witness) has deposed that he has written the suit pronote and at the time of writing the suit pronote, it is morning around 8.30 a.m., and after he has written the pronote, the Appellant/Defendant has received the amount and affixed his signature and it is incorrect to state that the suit pronote has been created in a fake manner.

20. DW-1 (the Appellant/Defendant) in his evidence has deposed that he has not issued any reply for the Respondent/Plaintiff lawyer''s notice, dated 19.03.2003 and that it is correct to state that he has stated that he has received only a sum of Rs.15,000/-as loan and executed a pronote and in his complaint before the Manager of the Appellant/Defendant, dated 22.04.2003, he has mentioned that he has received a sum of Rs.10,000/-as loan from plaintiff and executed the pro-note and that he has given two pro-notes to the Respondent/Plaintiff, which fact has not been made mention of by him in the written statement.

21. DW-1 goes on to add in his evidence that in Ex. A-1 suit pronote, the signatures seen is not that of his signature and he has received the money from the Respondent/Plaintiff and has given the unfilled pronotes to him and it is not correct to state that the said pronote is Ex. A-1.

22. Significantly DW-1 in his proof affidavit has categorically mentioned that there is no necessity for him to repay the sum of Rs.40,000/-as alleged by the Respondent/Plaintiff and only for Rs.15,000/-, he has executed a pronote and received only a loan of Rs.15,000/-from the Respondent/Plaintiff.

23. As per Section 73 of the Indian Evidence Act, the Court of Law is entitled to make a comparison of signatures through its naked eyes. However, the said exercise is an hazardous one in the considered opinion of this Court.

24. The Learned counsel for the Appellant/Defendant submits that the witness mentioned in Ex. A-1, A.M.Shake Ibrahim has not been examined as a witness before the Trial Court on behalf of the Respondent/Plaintiff and this raises a suspicion about the genuineness of Ex. A-1 pronote, dated 27.08.2000, for Rs.40,000/-. It is true that the witness A.M.Shake Ibrahim mentioned in Ex. A-1, pronote has not been examined before the Trial Court. But it is to be remembered that on behalf of the Respondent/Plaintiff, the scribe of Ex. A-1, pronote has been examined not only as a writer of the pronote but also as witness. PW-2 in his evidence has categorically stated that the Appellant/Defendant has executed the pronote by affixing the signature and that too after receiving money from the Respondent/Plaintiff. The examination of the scribe and witness, viz., PW-2 in the case helps the case of the Respondent/Plaintiff and the non-examination of witness, viz., A.M.Shake Ibrahim in Ex. A-1, pronote will not in anyway materially affect the case of the Respondent/Plaintiff in the considered opinion of this Court. To put it differently, the non-examination of witness, A.M.Shake Ibrahim, is not an adverse or unfavorable circumstance in favour of the Respondent/Plaintiff.

25. On a perusal of Ex. A-1, pronote, dated 27.08.2000, it is quite clear that the preamble portion of the pronote is filled up in Tamil except the initials of the parties, which has been written in English. The latter portion of Ex. A-1, pro-note, dated 27.08.2000 is printed in Tamil and the whole of the pronote has been filled up in ink.

26. Though a specific plea has been taken on behalf of the Appellant/Defendant that he has only borrowed a sum of Rs.15,000/-from the Respondent/Plaintiff and executed only a pronote for a sum of Rs.15,000/-in favour of the Respondent/Plaintiff which is not the suit pronote, yet this Court is not able to accept the said plea because of the simple fact that PW-1 and 2 in their evidence have clearly deposed that the Appellant/defendant has executed Ex. A-1, suit pro-note for a sum of Rs.40,000/-on 27.08.2000 and has received a consideration of Rs.40,000/-from the Respondent/Plaintiff.

27. Apart from the above, even though the Appellant/ Defendant has taken another plea in the written statement that the Respondent/Plaintiff has prepared the document suit pronote and committed an offence of forgery by forging the Appellant/Defendant''s signature, yet such a plea is untenable because of the simple fact that the evidence of PW 1 and 2 in the present case are so overwhelming, cogent, coherent and clinching that it is only the Appellant/Defendant has executed the Ex. A-1, suit pronote for a consideration of Rs.40,000/-on 27.08.2000 and has received the amount of Rs.40,000/-mentioned in the said pronote in the considered opinion of this Court.

28. Indeed, the evidence of PW 1 and 2 as to the passing of the consideration of Rs.40,000/-, as to the payment of Rs.40,000/-, which has since been received by the Appellant/Defendant is worthy of credence and the same is accepted by this Court.

29. Before this Court in C.M.P.No. 2 of 2006, the Appellant/Defendant has filed the stay petition praying for the operation of the decree passed in A.S.No. 197 of 2005.

30. In the affidavit in C.M.P.No. 2 of 2006, the signature of the Appellant/Defendant is differently seen as that of the signature found over the revenue stamp in Ex. A-1, suit pronote dated 27.08.2000. The signature in Ex. A-1, suit pronote over the revenue stamp and the signature in written statement of the Appellant/Defendant are alike.

31. While dealing with the contention of the learned counsel for the appellant that PW-2 in his evidence no where as stated that he has seen the Appellant/Defendant signing the suit pronote and that also the Appellant/Defendant has seen in etc., and obviously the Learned counsel for the Appellant/Defendant though harped on the ingredients of Section 68 of the Indian Evidence Act, they are not very much required to prove the execution of Ex. A-1, suit pronote. As a matter of fact, even in the absence of any witness in a pronote/negotiable instrument, it is open to a Suitor/Plaintiff to establish his case on the basis of oral, convincing and acceptable documentary evidence in a given case.

32. The Trial Court has in its Judgment in the suit has observed that the Respondent/Plaintiff has failed to establish that the signature seen in suit pronote is that of the Appellant/Defendant. Even the non-examination of the witness A.M.Shake Ibrahim, has been found fault with by the Trial Court, as seen from the

Judgment. However, the Appellate Court has in its Judgment has rightly observed that the finding rendered by the Trial Court as per Section 68 of the Indian Evidence Act in the main suit is not correct, etc.

33. Be that as it may, on a over all assessment of the entire gamut of the facts and circumstances of the case and in view of the qualitative and quantitative detailed discussions and also upon anlaysis of the oral and documentary evidence on record, this Court comes to an inevitable conclusion that Ex. A-1, suit pronote, dated 27.08.2000, has been executed by the Appellant/Defendant in favour of Respondent/Plaintiff for a sum of Rs.40,000/-and further it cannot be said that the First Appellate Court has committed an error in resting the burden of proof upon the Appellant/Defendant and instead in the present case, the Respondent/Plaintiff has established the execution of pro-note in the manner known to law and in accordance with law and accordingly, the second substantial question of law is answered against the Appellant/Defendant.

34. For the foregoing reasons, the Second Appeal is dismissed leaving the parties to bear their own costs. Consequently, the Judgment and Decree of the First Appellant Court in A.S.No. 197 of 2005, dated 08.09.2005 are confirmed by this Court for the reasons assigned in this Appeal. The connected Miscellaneous Petition is also dismissed.

35. It is brought to the notice of this Court that the Appellant/Defendant has paid a sum of Rs.10,000/-in execution proceedings towards the part satisfaction for the decree in O.S.No.393 of 2004. This amount of Rs.10,000/- has been received as part satisfaction in execution proceedings and the same has been recorded by the Executing Court in E.P.No. 101 of 2006. Apart from the said payment of Rs.10,000/-, for the balance payment of the suit principle amount, the Appellant/Defendant is granted four months time from the date of receipt of a copy of this Judgment.