

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.01.2017

Pronounced on : 19.01.2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.40 of 2011

K.Rajendra Kumar Jain

.. plaintiff

vs.

1. D.Jayanthi

2. D.Dhanasekar

.. Defendants

Civil Suit filed under Order IV Rule 1 of Original Side Rules 1956 read with Order VII Rule 1 CPC praying for the following judgment and decree against the defendant.

a) Directing the defendants 1 and 2 to pay a sum of Rs.38,12,500/- to the plaintiff together with future interest at the rate of 18% p.a. From the date of plaint to till the date of payment as the transaction is commercial one.

c) costs of the suit;

For plaintiff : Mr.M.Mahendra Kumar

For Defendants : Mr.R.Ganesh Kumar

J U D G M E N T

The suit is filed for recovery of a sum of Rs.38,12,500/- together with interest at the rate of 18% per annum from the date of plaint till the date of realisation.

2. The brief facts of the case of the plaintiffs are as follows:

The first defendant is the owner of the vacant land situate in Vayalur Village. The second defendant is her husband. In the month of June 1998, the defendants approached the plaintiff for financial assistance for construction of a Kalyana Mandapam in the said vacant land and agreed to give title deeds relating to the vacant land. Accordingly, the plaintiff has agreed to lend financial assistance. Since the defendants have handed over the title deeds, the plaintiff has advanced a sum of Rs.5,00,000/- to the first defendant on 21.06.1998 and she has also executed a promissory note for the said amount agreeing to pay interest at the rate of 18% per annum. The second defendant stood as a guarantor for the due payment of the loan amount. Similarly, the defendants have borrowed an additional sum of Rs.5,00,000/- each from the plaintiff on 20.06.1999 and 09.12.1999 on the strength of the title deeds already handed over to the plaintiff and agreed to pay interest at the rate of 18% on the amounts borrowed. Subsequently, on 20.12.2005 another sum of Rs.17,50,000/- was borrowed by the defendants for furniture and fixtures required for the additional building of the kalyana mandapam. For the above amount also, the defendants have executed a demand promissory note and agreed to pay interest at the rate

of 18% per annum. Besides, they have also deposited the title deeds. The defendants have made several part payments on several occasions commencing from 21.06.1998 to 20.11.2007. After giving credit to all the above payments for part payment of interest, remaining unpaid balance along with interest culminated periodically. Thereupon on 20.12.2007 accounts were reconciled and a settlement was arrived between the defendants and the plaintiff waived huge amount of interest in the above settlement. Pursuant to the said settlement, the defendants have agreed to pay Rs.25,00,000/- towards full and final settlement and executed one demand promissory note in favour of the plaintiff and also handed over undated blank cheques to the plaintiff. They have agreed to pay the amount within 6 months. However, they have failed to pay the amount inspite of the request made by the plaintiff. Hence, the plaintiff issued a legal notice dated 20.01.2010. The cheque given by the first defendant was dishonoured and in this regard, notice was also issued on 12.08.2010. Hence, the suit for recovery of a sum of Rs.38,12,500/- along with interest.

3. Brief contentions of the written statement filed by the defendant :

Denying the entire allegations in the plaint, it is the contention of the defendants that the first defendant has borrowed a sum of Rs.15,000/- from the plaintiff on 20.07.1998 by mortgaging her property. Apart from the mortgage, the plaintiff has also taken the title deeds and blank cheques from the defendants. That apart, the first defendant was regularly paying the monthly interest. Even

then the plaintiff has sought for an additional amount for closing the account. The first defendant being a lady and having subjected her name in the mortgage transaction, she had pay a sum of Rs.3,00,000/- as per the unreasonable demand of the plaintiff during the year 2001 and closed down the loan transaction. However, the plaintiff had sought time for cancelling the registered mortgage deed and to return the cheques. However, the plaintiff has not come forward to cancel the mortgage deed. When the matter stood thus, in the month of January 2010, the plaintiff issued a notice claiming huge sum of Rs.34,37,500/-. Immediately, the second defendant met the plaintiff with regard to the notice and questioned about the legal notice. The plaintiff has informed that the same is issued only for some income tax accounting purpose. Thereafter, the plaintiff has also filled a unfilled bank cheque issued by the second defendant for a sum of Rs.36,62,500/- and presented it before the bank for collection and sent a legal notice dated 12.08.2010. The allegation that they have borrowed Rs.15,00,000/- on various dates and 17,50,000/- on 20.12.2005 is denied by the defendants. It is also denied by the defendants that there was a settlement in which they have agreed to pay Rs.25,00,000/- towards full satisfaction of the loan amount and executed a fresh promissory note. It is the contention of the defendants that they never executed the suit promissory note as alleged by the plaintiff. Hence prayed for dismissal of the suit.

4. On the above pleadings, the following issues were framed by this

Court :

1. Whether the reconciled settlement of accounts dated 20.12.2007 is true and supported by consideration?

2. Whether the plaintiff is entitled to the suit claim?

3. Whether the suit is barred by limitation?

4. To what relief the parties are entitled?

5. The plaintiff is examined as P.W.1 and Ex.P.1 to P.9 were marked on the side of the plaintiff. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.D1 marked.

Exhibits produced on the side of the plaintiffs:

S.No	Exhibits	Date	Description
1.	P-1	16.07.1997	Original sale deed executed by R.Kannan in favour of the first defendant
2.	P-2	20.12.2007	Original demand promissory note
3.	P-3	30.07.2010	Original cheque along with cheque return memo
4.	P-4	22.01.2010	Copy of legal notice sent by the plaintiff to the defendants
5.	P-5	23.02.2013	Postal acknowledgment cards
6.	P-6	12.08.2010	Copy of the legal notice sent by the plaintiff to the defendants
7.	P-7	23.08.2010	Copy of legal notice sent by the defendants to the plaintiff

S.No	Exhibits	Date	Description
8.	P-8	13.01.2010	Original Encumbrance Certificate
9.	P-9	--	Photographs of the defendants' Kalyana Mandapam

Exhibits produced on the side of the defendant:

S.No.	Exhibits	Date	Description of documents
1.	D-1	20.07.1998	Certified copy of the mortgage deed

Witnesses examined on the side of the plaintiffss:

P.W.1. - K.Rajendra Kumar Jain

Witnesses examined on the side of the defendant

D.W.1 – D.Jayanthi

D.W.2 – Dhanasekar

6. The learned counsel appearing for the plaintiff submitted that the plaintiff has advanced various amounts to the defendants from the year 1998 on the basis of the deposit of the title deeds made by the defendants. The defendants have borrowed a sum of Rs.5,00,000/- on 21.06.1998 and borrowed Rs.5 lakhs each on 20.12.99 and 09.12.1999 respectively and executed demand promissory notes in respect of the transactions and agreed to pay interest at the rate of 18% per annum. Thereafter, again on 20.12.2005 another sum of

Rs.17,50,000/- was borrowed by the defendants and also executed a demand promissory note. As the principal and interest accumulated, there was a settlement on 20.12.2007 and the defendants have agreed to pay Rs.25,00,000/- towards the entire loan amount and executed Ex.P.2 promissory note dated 20.12.2007. The original title deeds and cheques have been handed over by both the defendants. Legal notice was sent by the plaintiff. The execution of the promissory note has not been denied by the defendants.

7. It is the further contention of the learned counsel for the plaintiff that if really, the defendants borrowed 15,000/- only, there was no necessity for them to settle Rs.3,00,000/- in the year 2001. The above facts clearly show that the defence set up by the defendants is not true. The execution, signature in the promissory note has not been denied by D.W.1. Therefore, submitted that the entire amount has been advanced for the purpose of construction of kalyana mandapam and the evidence of the defendants also clearly show that they have constructed kalyana mandapam in the land owned by the first defendant. Once the execution of Ex.P.2 promissory note dated 20.12.2007 is established, the defence set forth by the defendants is not at all maintainable. Hence, prayed for decree and judgment.

8. On the contrary, it is contended by the defendants that they have borrowed only Rs.15,000/- in the year 1998 on mortgage deed. Ex.D.1 is the

mortgage deed. Thereafter, they have paid interest regularly and the settled entire loan by paying a sum of Rs.3,00,000/-. The learned counsel for the defendants further submitted that the suit as framed itself is not maintainable. The second defendant has not borrowed any amount from the plaintiff. He has just signed as a witness in the promissory note. Therefore, the allegation that both the defendants borrowed the amount does not arise at all.

9. It is the contention of the learned counsel for the defendants that the execution of the promissory note also has not been proved in the manner known to law. It is highly improbable to contend that merely on the basis of some documents from the year 1998 till 2005, the persons have been advancing huge amount. Absolutely, there is no evidence to prove the passing of consideration as alleged by the plaintiff. The alleged pleading of settlement by the plaintiff in the year 2007 is also highly improbable. The same has been pressed into service only for the purpose of limitation for filing the suit. There is absolutely no evidence to show passing of consideration. The mortgage deed executed by the defendants in the year 1998 has been suppressed by the plaintiff. Even in Ex.P.4 legal notice, he has admitted that he used to obtain blank cheques and documents. All these clearly show that Ex.P.1 promissory note was obtained by the plaintiff in the year 1998 at the time of advancing the loan on the basis of the mortgage and the same has been utilised at a later point of time. The evidence of P.W.1 also clearly show that Ex.P.2 has been fabricated at a later point of

time. Hence prayed for dismissal.

10. Now this Court has to analyse the issues one by one.

11. Issue Nos.1 and 2 :

The suit has been laid for recovery of a sum of Rs.38,12,500/- on the basis of Ex.P.2 promissory note dated 20.12.2007 said to have been executed by the defendants. The plaint pleadings show as if the defendants were in the habit of receiving loan from the year 1998. This Court does not find any mention in the plaint about the mortgage deed executed by the first defendant in the year 1998. The plaint pleading proceeds as if various loan amounts were advanced to the defendants on the basis of the the original title deeds handed over by the defendants. It is to be noted that it is the contention of the plaintiff that the defendants have borrowed a sum of Rs.5,00,000/- on 21.06.98 and executed a separate promissory note. Thereafter on 20.06.1999 they borrowed Rs.5,00,000/- and executed another promissory note. Similarly on 09.12.1999, they have borrowed another Rs.5,00,000/- and executed a promissory note. In all the promissory notes they have agreed to pay the interest at the rate of 18% per annum. Besides they have also borrowed another sum of Rs.17,50,000/- on 20.12.2005 and executed a demand promissory note.

12. From the plaint pleadings, the categorical case of the plaintiff is that he has almost advanced a sum of Rs.32,50,000/- on the basis of the alleged

deposit of title deeds and also on the basis of the promissory notes said to have been executed by the defendants. It is further to be noted that the evidence of P.W.1 clearly indicate that he is a money lender and doing financial business. He has also admitted that he is maintaining separate account for every individual borrower. But no such accounts whatsoever has been placed before this Court to countenance the pleading of the plaintiff that the defendants have made some part payments on several occasions between the period commencing from 21.6.1998 to 20.12.2007.

13. Whereas, it is the specific contention of the defendants that they borrowed Rs.15,000/- from the plaintiff in the year 1998 and executed a mortgage deed in favour of the plaintiff. Ex.D1 certified copy of the said mortgage deed is also filed by the defendants. This mortgage deed was executed in favour of the plaintiff by the first defendant on 20.07.1998 for a loan of Rs.15,000/- advanced by the plaintiff to the first defendant at the relevant point of time.

14. It is curious to note that this mortgage deed executed in the year 1998 is totally suppressed in the plaint. Even in the evidence of P.W.1, he had denied the existence of the mortgage. Even in the re-examination, he has stated that since he was not aware of Ex.D.1 mortgage deed, he has not mentioned about the same in the plaint. The above conduct of the plaintiff clearly indicate

that the plaintiff has not come to the court with clean hands. The encumbrance certificate filed by him which is marked as Ex.P.8 dated 13.01.2010 clearly reflects the mortgage deed executed by the first defendant in the year 1998. It is the contention of the learned counsel for the plaintiff that the mortgage deed has been registered only by the first defendant and the plaintiff is not aware of that. That contention is falsified by mere perusal of the mortgage deed. The recitals in the mortgage deed clearly indicate that the stamps have been purchased only by the plaintiff. Therefore, the contention of the plaintiff in the regard is found to be false. It is further to be noted that having pleaded that the defendants have made part payments till 20.12.2007 from 1998, it is the duty of the plaintiff to establish such plea.

15. Further there is no evidence whatsoever adduced by the plaintiff to show that the defendants have borrowed such huge amount at the relevant point of time merely on the basis of the promissory notes said to have been executed by them. It is curious to note that for a meagre sum of Rs.15,000/- borrowed at the earliest point of time, i.e., in the year 1998, the mortgage deed came to be executed by the first defendant. Thereafter, advancing of such huge amount of Rs.32,50,000/- merely on the basis of the promissory notes is highly improbable. At any event, it is the evidence of P.W.1 in the chief examination that all the promissory notes executed by the defendants from time to time have been destroyed. This fact has been spoken in the chief examination in para 7 for the

first time. He has categorically admitted that the earlier promissory notes dated 21.06.1998, 20.06.1999, 9.12.1999 and 20.12.2005 executed by the defendants were destroyed. This part of the evidence has been introduced only in the chief examination. There is no pleadings in the plaint about the destruction of the promissory notes executed by the defendants.

16. Be that as it may, one fact emerging from the admission of the plaintiff in his chief examination to the effect that the plaintiff said to have obtained promissory notes on 21.06.1998, 20.06.1999, 09.12.1999 and 20.12.2005. To assess a particular aspect of the evidence spoken by P.W.1, when his cross examination entirely perused, he has taken a totally contrary stand about the promissory notes. He has stated in the cross examination that he has returned the above promissory note to the defendants. In his cross examination dated 25.03.2015, he has stated that he has returned the previous promissory notes at the time of settlement said to have been taken place in the year 2007. The stand of the plaintiff clearly falsifies his contention and in fact probabilise the contention of the defendants that in the year 1998 promissory notes were obtained by the plaintiff.

17. On a careful perusal of Ex.P.2 promissory note, it reveals that the same is a printed form and the date and name of the payee has has been written

only by pen as if the same has been executed on 20.12.2007. The original printed form clearly indicate that this promissory note was printed prior to the year 2000. If really the promissory note was executed in the year 2007, the printed form must contain the year after 2000. These facts clearly probabilise the defendants' case that this promissory note was handed over originally in the year 1998 and not as alleged by the plaintiff in the year 2007. This fact is further probabalised by the admission of the P.W.1 himself. P.W.1 in his evidence has categorically admitted that Ex.P.2 suit promissory note is not filled by the defendants. In the cross examination dated 20.05.2015, the plaintiff had admitted the contents of Ex.P.2 is not written by the defendants. These facts clearly establish that the suit promissory note was not executed by the defendants as alleged by the plaintiff at the time of settlement on 20.12.2007. Though the signature found in Ex.P.1 is not seriously denied by the first defendant, mere signing a document at no stretch of imagination amounts to execution. The execution implies reading out, understanding and signing the document. Therefore, merely because in a loan transaction of the year 1998, some blank promissory notes have been given by the defendants, the defendants who are in dire need of funds at the relevant point of time, the execution of the promissory note cannot be presumed. It is well settled that initial burden always lies on the plaintiff to prove the execution of the promissory note, once the execution of the promissory note is established in the manner known to law, then the statutory presumption available under section 118 of the

Negotiable Instrument Act comes into operation in favour of the plaintiff.

18. In this case, looking at various circumstances of the case, the execution itself has not been established by the plaintiff. Ex.P.3 cheque said to have been issued by the first defendant, when carefully analysed, the payee is mentioned as Shanthinath Finance. In this regard, when the legal notice issued by the plaintiff himself marked as Ex.P.4 when perused, the same clearly indicate that he has obtained undated blank cheques from the defendants. The above legal notice clearly indicate that he used to get blank documents. Though he has pleaded that only the first defendant has issued a signed blank cheque to the plaintiff himself, he has subsequently filled the cheque in the name of Shanthinath Finance and issued a legal notice for criminal action against the defendants. These facts clearly show that the promissory note relied upon by the plaintiff marked as Ex.P.2 is also one such blank document obtained in the year 1998. In the printed promissory note the year is printed as 19. This fact clearly show that the printed promissory note must have come in to existence only before the year 2000. Therefore, the contention of the plaintiff that only in the year 2007 the said promissory note was executed by the defendant cannot be countenanced. Merely because the signature of the first defendant is not denied, as already stated, merely signing the blank document, the execution of the promissory note cannot be presumed. In fact, the plaintiff himself has admitted that the contents have not been filled by the defendants.

19. In this regard, it is useful to refer a judgment of the Honourable Supreme Court reported in **AIR 1961 Supreme Court 1316 (Kundan Lal Rallaram Vs. Custodian, Evacue Property, Bombay)** the Honourable Apex Court has dealt with the burden of proof in respect of negotiable instruments. The judgment of the Honourable Apex Court reads as follows :

“The relevant part of S.118 of the Negotiable Instruments Act reads :

“Until the contrary is proved, the following presumptions shall be made :-

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred was accepted, indorsed, negotiated or transferred for consideration.”

(5) This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume inter alia, that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The question is, how the burden can be discharged? The

rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase “burden of proof” has two meanings – one the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under S.101 of the Evidence Act, “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.” Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved the rule of presumption laid down in S.118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is

proved, S.118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in S.114 and other sections of the Evidence Act. Under S.114 of the 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 the particular case." Illustration (g) to that section shows 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. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the

goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, S.114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under S.118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law.”

19. From the above dictum, it is clear that without proving execution of promissory note by the defendant, the plaintiff cannot rely upon the statutory presumption available under section 118 of the Negotiable Instruments Act. Similar circumstances as discussed earlier by this Court show that passing of consideration for the alleged promissory note Ex.P.2 is also highly improbable.

Therefore, this Court hold that the plaintiff failed to establish not only execution of promissory note but also passing of consideration.

20. Further analysing the entire facts of the case, the plaintiff has not only failed to prove the execution of the promissory note but also failed to establish the passing of consideration. There is no proper proof whatsoever available on record to infer such huge payment. The alleged accounts maintained by the plaintiff is not seen the light of the day. That apart, the contrary stand of the plaintiff about the previous promissory notes one in chief examination and cross examination and also in the plaint also militate against his claim. Suppression of the earlier mortgage deed of the year 1998 is also one of the ground militates against the plaintiff. From the above aspects, this court is the view that the plaintiff has not established the execution of the promissory note. Therefore, question of applying the statutory presumption available under section 118 of the Negotiable Instruments Act in his favour does not arise. Accordingly, the issues 1 and 2 are answered against the plaintiff.

21. Issue Nos.3 and 4 :

From the records it is seen that the transaction has commenced in the year 1998 when the mortgage deed has been executed. Further to show that there was continuous transactions up to 2007, no documents, whatsoever have not been placed before this Court. At any event, even if the alleged transaction

in the year 1998 is true, the suit itself is barred by limitation, particularly in the absence of any documents to show that the plaintiff has advanced such huge amount, that too in the year 2007. Accordingly, the issues are answered against the plaintiff.

22. In the result, the suit is dismissed. No cost.

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