

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.04.2017

Pronounced on : 02.06.2017

Coram :-

THE HONOURABLE MR. JUSTICE R. SUBBIAH
AND
THE HONOURABLE MR. JUSTICE M.S. RAMESH

A.S.No.954 of 2010

P.Ethiraj ... Appellant/Defendant

vs.

M.Nowsath Seth ... Respondent /Plaintiff

Prayer:Appeal Suit is filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 12.08.2010 passed by the learned Additional District Judge, Coimbatore in O.S.No.888 of 2008.

For Appellant :Ms.P.Veena Suresh

For Respondent :Mr.I.Abrar Md. Abdullah

JUDGMENT

(Judgment of the Court was made by M.S.RAMESH.J,)

The present Appeal has been filed by the defendant in a suit for recovery of money based on two promissory notes and a deed of undertaking.

2.The case of the plaintiff/respondent is as follows:

i)According to the averments in the plaint, the defendant has borrowed a sum of Rs.7 lakhs on 13.06.2007 for his business commitments and had executed a promissory note dated 13.06.2007. On 17.07.2007, the defendant had borrowed another sum of Rs.8,10,000/- for the same purpose for which he had executed another promissory note dated 17.07.2007.

ii)Ratifying the debt, on 30.09.2007, the defendant had executed a Deed of Undertaking, agreeing to settle the total amount of Rs.15,10,000/-. Again on 28.04.2008, the defendant had

borrowed a sum of Rs.6,50,000/- from the plaintiff for which he had executed a document dated 28.04.2008. According to the plaintiff, the defendant had made a part payment of Rs.1,30,500/- on 27.05.2008 and 31.08.2008 and on various other occasions through one S.A.Kumar, Proprietor of Nandhi Dhals. Apart from the above payment, the defendant had failed to repay the borrowed amount inspite of several requests made by the plaintiff. Hence, on 15.09.2008, the plaintiff had issued a legal notice, calling upon the defendant to pay the amount due under the promissory notes. The defendant who had received the legal notice on 17.09.2008, had sent a reply dated 25.09.2008 stating that he was liable to pay only a sum of Rs.9 lakhs as against the plaintiff's demands. Since the defendant had defaulted in paying the borrowed amount, the plaintiff had filed the suit in O.S.No.888 of 2008 before the learned Additional District Judge, Coimbatore.

iii)As per the averments in the written statement, the defendant had entered into a sale agreement with one S.A.Kumar, Proprietor of Nandhi Dhals on 10.10.2007 for a sale consideration of Rs.5 Crores and had received a sum of Rs.20 lakhs as advance from S.A.Kumar on 21.05.2008. The defendant had also entered into a commercial agreement with the said S.A.Kumar whereby, the purchaser had executed a power of attorney and had further undertaken to settle the debts of the defendant before execution of the sale deed. According to the defendant, as per the terms of the commercial agreement and the power of attorney executed by S.A.Kumar, a sum of Rs.22,25,000/- has been paid to the brother of the plaintiff towards the defendant's debts to Mr.Mohammed Moideen, S/o.Mohammed Jakkariya, one of the relatives of the plaintiff and hence, the defendant alleges that he is liable to pay a sum of Rs.9 lakhs alone to the plaintiff. According to the defendant, the promissory notes were executed without any amount filled therein and it had the defendant's signature alone therein. It is the further case of the defendant that from the ledger accounts of S.A.Kumar, it is seen that a sum of Rs.3 lakhs dated 31.05.2008 under Voucher No.11039 is witnessed. Further, a sum of Rs.1,30,500/- dated 16.07.2008 which was received by the plaintiff under voucher No.18785 is also found in the ledger accounts. Apart from this amount, it is evident from the ledger accounts that the plaintiff has received Rs.20 lakhs by way of cash from S.A.Kumar on various dates, which amounts have not been accounted by the plaintiff. According to the defendant, S.A.Kumar is a proper and necessary party in all the transactions and hence, the suit is liable to be dismissed for non joinder of S.A.Kumar as a party-defendant. With these averments, the defendant alleges that the plaintiff has no cause of action to file the suit in O.S.No.888 of 2008 and that he is not entitled for the claim. The trial Court had decreed the suit in favour of the plaintiff and aggrieved over

the same, the present appeal has been filed.

3.Before the trial Court, on the side of the plaintiff, seven documents namely, Ex.A1 to A7 were marked and three witnesses namely, P.W.1 to P.W.3 were examined. The defendant had also marked six documents namely, Ex.B1 to B6 and had examined three witnesses namely, D.W.1 to D.W.3, the details of which are as under:

The promissory notes dated 13.06.2007 and 17.07.2007 were marked as Ex.A1 and Ex.A2 respectively. The undertaking letter dated 30.09.2007 executed by the defendant was marked as Ex.A3 and the confirmation letter dated 28.04.2008 was marked as Ex.A4. The plaintiff had examined himself as P.W.1. While the attesor of Ex.A1 to Ex.A4 was examined as P.W.2, the Scribe of Ex.A3 was examined as P.W.3. On the side of the defendant, the complaint in STC in 712/2009 was marked as Ex.B1; the photocopy of the Commercial Agreement dated Nil was marked as Ex.B2; Ex.B3, B4, B5 are the receipts; and the memo in I.P.No.65 of 2009 was marked as Ex.B6. The Defendant had examined himself as D.W.1 and S.A.Kumar was examined as D.W.2. and one Mr.A.L.Babu was examined as D.W.3.

4.On the above pleadings, the trial Court had framed the following issues:

- 1)Whether the plaintiff is entitled for the amount claimed?
- 2)Whether the defendant is justified in stating that he had not borrowed money from the plaintiff through the promissory notes?
- 3)To what other reliefs, the plaintiff is entitled for?

5.After considering both the oral and documentary evidence adduced on either side, the Trial Court has decreed the suit in favour of the plaintiff/respondent herein. Aggrieved over the same, the present appeal has been filed by the appellant/defendant.

6.Mrs.Veena Suresh, the learned counsel for the appellant/defendant submitted that it is the specific case of the appellant that he had not executed promissory notes viz., Ex.A1 and Ex.A2 and the same were fabricated by the respondent/plaintiff. According to the learned counsel for the appellant/defendant, the plaintiff had obtained thumb impressions of the defendant in blank sheets and there was no money transaction between the plaintiff and the defendant. The learned counsel further submitted that the suit promissory

notes/Ex.A1 and A2 and the documents marked as Ex.A3 and Ex.A4 were created for the purpose of the suit.

7.The learned counsel further submitted that when the plaintiff had admitted in the plaint that he has recovered Rs.1,30,000/- through one S.A.Kumar on behalf of the defendant, the claim for Rs.26,28,626/- without giving credit to the admitted sum of Rs.1,30,000/- is baseless. According to the learned counsel for the appellant, when the plaint and documents suffers from infirmity, the defence of the defendant seems to be reasonably correct. She also submitted that there is material alteration of date in Ex.A1, whereby the year 2006 was changed to 2007 and hence, the same leads to an inference that the documents were created and therefore, the trial Court ought not to have decreed the suit as prayed for.

8.Per contra, Mr.I.Abrar Md. Abdullah, the learned counsel for the respondent/plaintiff submitted that the defendant had admitted the execution of the promissory notes in his written statement and hence, the plea that Ex.A1 to Ex.A4 were fabricated is baseless. According to the learned counsel for the respondent, all the evidences in the ledger accounts of D.W.2 pertains to payments that are not connected with the suit promissory notes. The learned counsel contended that since there is no specific plea in regard to material alteration in the written statement, the appellant cannot take a defence on that aspect now and hence, such a ground need not be considered in the present appeal. In addition, he contended that even assuming that there was material alteration in the date of Ex.A1, no adverse inference can be drawn since the suit would still be not barred by limitation, had it been filed in the year 2006 itself.

9.Drawing our attention to the cross examination of D.W.2, the learned counsel for the respondent submitted that D.W.2 in categorical terms had stated that he does not know the defendant at all and therefore, the defence taken by the appellant/defendant is highly improbable.

10.The learned counsel for the respondent submitted that the defendant had borrowed all the three loans for business and its development purpose under Ex.A1 to Ex.A3 and as such, the trial Court had rightly decreed the suit and no interference is required in the present appeal.

11.We have carefully considered the submissions made by the respective counsels as well as perused the pleadings, exhibits and the judgment passed by the trial court.

12.With regard to the first and foremost submission of the

appellant that the promissory notes under Ex.A1 and Ex.A2 were fabricated is concerned, it is seen that the defendant in para 4 of the written statement has stated as follows:

"... Strictly speaking the defendant had executed the unfilled promissory notes with defendant's signature without mentioning the sum of amount in favour of the plaintiff ..."

13.D.W.1 in his oral evidence has also admitted for having executed the promissory notes/Ex.A1 to Ex.A4. While that being so and particularly, when the defendant had admitted in the written statement having executed the promissory notes, cannot take the stand that promissory notes as well as the undertaking and the confirmation letters marked as Ex.A1 to A4 are fabricated for the purpose of the suit. The defendant's admission of his execution of Ex.A1 to Ex.A4 alone is sufficient for the plaintiff to maintain the suit.

14.It is pertinent to mention here that whenever a person signs or delivers a paper either wholly blank or filled up, he gives prima-facie authority to the holder to recover the amount borrowed thereunder and such person shall be liable for the said amount.

15.Section 20 of the Negotiable Instruments Act reads as follows:

"Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments, then in force in India [substituted by Act 3 of 1951, Section 3 and Schedule, for "the States"], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby, gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder-in-due course for such amount:-

Provided that no person other than a holder-in-due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

16.In the light of Section 20 of the Negotiable Instruments Act, it can be safely presumed that the defendant who had admitted the execution of the promissory notes had done so for a valid consideration. An Hon'ble Division Bench of this Court in

the judgment in Ramasami Moopar Vs. Ramaswami Moopanar and Karuppa Moopar reported in 2002 (4) LW 360, while dealing in this aspect has held as follows:

"7.The Supreme Court in Mohideenkutty Hajee vs. Pappu Manjooran , following a number of earlier pronouncements, held that when a suit is based on a promissory note and the promissory note is proved to have been executed, Section 118 (a) raises a presumption, until the contrary is proved, that the promissory note was made for consideration. In the case of Kundan Lal vs. Custodian, Evacuee Property (AIR 1961 SC 1316), the Supreme Court has held that the presumption under Section 118 Negotiable Instrument Act is one of law and a Court shall presume, inter alia, that the Negotiable Instrument was made or endorsed for consideration. Therefore, the said Judgment of the learned Single Judge is not in conformity with the Judgment of the Supreme Court. Under Section-118 of the Negotiable Instruments Act, there is a valid presumption with respect to consideration also. Inasmuch as the learned Single Judge has held that there is no presumption for consideration, it is not a good law."

17.The defendant had taken a specific plea that a sum of Rs.1,30,500 was recovered through one S.A.Kumar on behalf of the defendant and hence, the suit for recovery of Rs.26,28,626/- without giving credit to the admitted sum of Rs.1,30,500/- is not maintainable. In this regard, we have perused the memo of valuation in the plaint and there, it is found that there is a specific entry in the memo of valuation whereby credit was given for a sum of Rs.1,30,500/- towards payment made on 25.05.2008 and 31.05.2008. Hence, the appellant's statement that the suit claim includes the part-payment of Rs.1,30,500/- made by the defendant is incorrect.

18.The further stand of the appellant that there was a commercial agreement between D.W.2 and the defendant whereby D.W.2 had undertaken to settle all the debts of the defendant has no relevance since the suit was filed for the default committed by the defendant against the promissory notes. It is also seen from the written statement filed on behalf of the defendant, wherein, the defendant had referred to various payments under 12 vouchers and claimed that a major portion of the suit claim has already been settled and that the plaintiff had suppressed this fact. On a perusal of the details of payments referred to in the written statement, it is seen that the amounts pertain to the entries of the ledger accounts of D.W.2 and that they are in no way connected with the suit

promissory notes. As a matter of fact, D.W.2 in his cross examination has stated that he does not know the plaintiff personally. He has also admitted that Ex.D2 which is a commercial agreement was executed between D.W.2 and the defendant, in which, there is no reference to the plaintiff. He had also stated that neither plaintiff nor his brother Jakkariya had signed in any document. While that being so, the defendant's case is that there was an arrangement between the defendant and S.A.Kumar for settlement of debts of the defendant, cannot be of much help since there was no material evidence before the trial court evidencing payments made by S.A.Kumar to the plaintiff, particularly, when it is the specific case of the plaintiff that the amounts due under the promissory notes remained unpaid.

19.As stated earlier, the payments claimed to have been repaid by the defendant relates to the ledger accounts of S.A.Kumar alone and there is no other document to establish that the amounts claimed to have been made has been received by the plaintiff towards the amount due under the promissory notes. Hence, the defendant's plea that the major portion of the amount due to the plaintiff has been paid, cannot be accepted.

20.With regard to the appellant's claim that there was an alteration in the year of execution in Ex.A1 and that his scribe's handwriting is different in Ex.A1 and Ex.A2 is concerned, we have perused the originals of Ex.A1 and A2 and it is seen that there is a material alteration in the year of execution of Ex.A1. The year of 2006 in Ex.A1 has been altered to 2007 but we are unable to appreciate as to what adverse inference that could be drawn from such alteration. The suit has been filed in the year 2008. Even assuming that the alteration has been made for the purpose of limitation, the suit would have been well in time even if Ex.A1 was executed in the year 2006.

21.As rightly submitted by the learned counsel for the respondent, the plea of alteration of the year in Ex.A1 has not been taken in the written statement and assuming that alterations were made at the time of filing the suit, no adverse inference can be drawn therefrom since such an alteration cannot be regarded as a material alteration that neither alters the right or liabilities of the parties to the instrument nor affects the legal effect of the instrument. In these regards, it would be appropriate to refer the dictum of the Hon'ble Supreme Court of India in the judgment in Kalianna Gounder Vs. Palani Gounder and another reported in 1970 (1) SCC 56, wherein it is held as under:

“That the plea that there was an alteration in the memorandum in material particulars cannot

be sustained. Even if it be assumed that the sentence regarding encumbrance was written after the deed was executed it will not invalidate the deed. The second defendant and his witnesses have admitted that there was no discussion at the time of the writing and execution of the agreement about the encumbrances upon the land. There is not even evidence, that there were any encumbrances subsisting on the land. Ordinarily when property is agreed to be sold for a price, it would be the duty of the vendor to clear it of all the encumbrances before executing the sale deed. The alteration, if any, cannot therefore be regarded as material. Since the defendants were liable to clear the encumbrances, if any, subsisting on the land before executing the sale deed, assuming that the covenant was incorporated after the execution of the deed, it cannot be regarded as a material alteration on that account, for, it does not alter the right or liabilities of the parties or the legal effect of the instrument."

22. Applying the dictum laid down in the above said judgment to the present facts of the case, we are of the opinion that in the instant case, material alteration made in the promissory notes does not affect either the right or liability of the parties or the legal effect of the instruments. When that being so, we cannot attach any significance to the submission made by the learned counsel for the appellant/defendant that since there is alteration of year in the promissory notes, the trial Court ought to have dismissed the suit.

23. For the foregoing reasons, there is no merit in the present appeal. Accordingly, the appeal shall stand dismissed and hereby, confirming the judgment and decree dated 12.08.2010 passed by the learned Additional District Judge, Coimbatore in O.S.No.888 of 2008. There shall be no orders as to costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Judge,
Coimbatore.

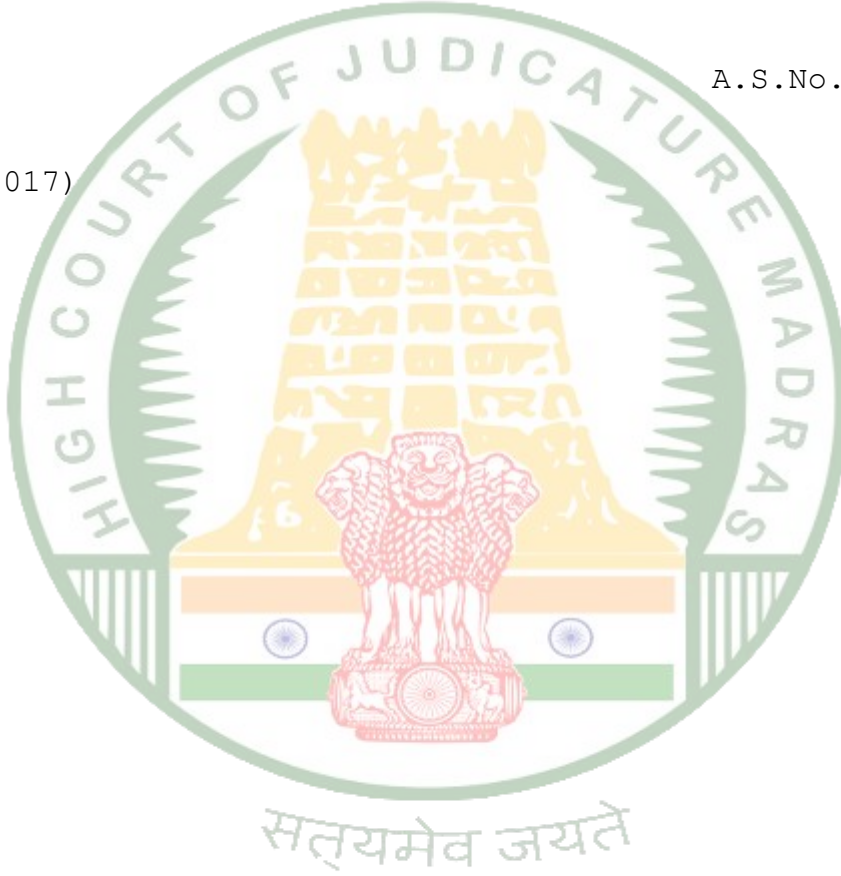
2.The Section Officer,
VR Section, High Court,
Madras.

+lcc to T.R.Rajaraman, Advocate SR.No.39986

+lcc to Mr.J.Abrar md Abdullah, Advocate SR.No.39843

A.S.No.954 of 2010

NM(CO)
GN(06/07/2017)



WEB COPY