IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.12.2017

CORAM

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**

C.S.No.869 of 2003

T.Hemachalam .. Plaintiff

..Vs..

1.S.Srinivasan (deceased)
2.S.Ambiga
3.S.Krishnamurthy
4.Dhanalakshmi
5.Saraswathy ..Defendants

(Defendants 2 to 5 brought on record as LR's of the deceased 1st defendant by order dated 26.02.2010 in A.No.1145 of 2010).

Plaint filed under Order VII Rule 1 of C.P.C. read with Order IV Rule 1 of O.S.Rules praying to pass a judgment and decree:-

a) directing the Defendant to pay a sum of Rs.40,00,000/- towards principal amount due on two promissory notes dated 09.02.1999 and 10.02.1999 for a sum of Rs.23,50,000/- and Rs.16,50,000/- respectively.

b)directing the defendant to pay a sum of Rs.28,80,000/- towards interest on Rs.40,00,000/- at the rate of Rs.24% per annum from 09.02.1999 to 09.02.2002.

c)directing the defendant to pay future interest at the rate of 24% per annum from the date of filing of the plaint to till the date of realisation.

For Plaintiff : Mr.P.Valliaappan

For Defendants : Mr.D.Rajagopal for D-2 to D-5

JUDGMENT

The suit is for recovery of a sum of Rs.68,80,000/- due on two promissory notes dated 09.02.1999 and 10.02.1999 executed by the 1st defendant. Since the 1st defendant died pending the suit, the legal representatives have been brought on record as defendants 2 to 5 by an order dated 26.02.2010 made in A.No.1145 of 2010.

The brief facts contained in the plaint are as follows:-

2.The plaintiff is a business man engaged in exporting of mangoes to Singapore and Malaysia. During in the year 1999, the 1st defendant, who is also a fruit merchant residing at Triplicane, Chennai, approached him for financial help for expanding his fruit business and the plaintiff thus advanced a sum of Rs.23,50,000/- on 09.02.1999, and a sum of Rs.16,50,000 on 10.02.1999 respectively. As a security for borrowing, the 1st defendant had executed two promissory notes dated 09.02.1999 and 10.02.1999 respectively agreeing to repay the same with interest at 24% per annum. It is also claimed that the deceased 1st defendant had deposited the original title deeds viz., sale deed dated 15.09.1994 registered as document no.1254 of 1994 with reference to Mango Garden in Chittoor District, and another sale deed dated 15.09.1994 executed in favour of his wife registered as document no.1258 of 1994. As evidence of deposit of title deeds, the 1st defendant had executed a letter of confirmation dated 09.02.1999. It is also claimed that the deceased 1st defendant had executed another letter of confirmation confirming the borrowing of Rs.16,50,000/- on 10.02.1999, and deposited xerox copies of the sale deeds dated 14.04.1976 executed by one Suseela Ammal in his favour and the sale deed dated 30.09.1988 executed by M/s.Lakshmi and P.Srividya in favour of the 1st defendant and his wife the 2nd defendant.

3.The plaintiff would further claim that on 10.08.2001, the 1st defendant issued 2 cheques for a total sum of Rs.40,00,000/- drawn on

Indian Bank, Sowcarpet Branch, Madras-600 001, and on 10.09.2001, he had issued 2 cheques for a sum of Rs.12,40,000/- each for the interest payable on the aforesaid amounts and all the four cheques were returned on presentation. The plaintiff had launched proceedings under Section 138 of Negotiable Instruments Act. But, the said proceedings could not be prosecuted in view of the death of the 1st defendant during the pendency of those criminal complaints. On the strength of the above promissory notes, the plaintiff has come forward with the above suit for recovery of Rs.68,80,000/-.

4.The deceased 1st defendant did not file a written statement. After his death, his legal representatives were impleaded, and they have filed a written statement contending that there was no borrowing on 09.02.1999 and 10.02.1999 as claimed in the plaint. The defendants 2 to 5 would claim that the deceased 1st defendant had some financial transactions with the plaintiff during the years 1995-1996, and had borrowed s sum of Rs.23,50,000/- from the plaintiff, during the said period. The plaintiff had deducted a sum of Rs.5,04,000/- towards interest, and the balance of Rs.18,46,000/- was paid over to the 1st defendant.

5.While admitting the signatures in the promissory notes, as well as the confirmation letters dated 09.02.1999 and 10.02.1999, the defendants in the written statement contended that those documents were signed in blank, and the same have been filled by the plaintiff to suit his convenience. As far as the issue of the cheques is concerned, the defendants would claim the cheques were issued for the purpose of security for the loan transaction and even in 1995-1996, and the same have been filled up by the plaintiff to enable him to sue upon the same.

6.On the above rival contentions, the following issues were framed by this Court.

i) Whether the defendant had borrowed a sum of Rs.23,50,000 and Rs.16,50,000/- on 09.02.1999 and 10.02.1999 respectively from the plaintiff and had executed two promissory notes, dated 09.02.1999 and 10.02.1999 respectively in favour of the plaintiff.

ii) Whether the plaintiff is entitled to recover a sum of Rs.23,50,000/- and Rs.16,50,000/- from the defendant along with interest at the rate of 24% from

09.02.1999 and 10.02.1999, respectively?

iii) Whether the defendant had handed over the original title deeds of the immovable properties to the plaintiff, as security for the repayment of the amount of Rs.40,00,000/- to the plaintiff?

iv) Whether the defendant had created charge over his property, as security for the repayment of the amount of Rs.40,00,000/- to the plaintiff?

v) Whether the defendant had created a mortgage, by deposit of title deeds in favour of the plaintiff towards the security for the repayment of the amount of Rs.40,00,000/- to the plaintiff?

vi)Whether the defendant had issued four cheques in favour of the plaintiff, for the repayment of the loan amount by the defendant?

vii) Whether the plaintiff is entitled to file the present suit in addition to the criminal case under Section 138 of the Negotiable Instruments Act, filed against the defendant?

viii) Whether the plaintiff is entitled to recover a sum of Rs.68,80,000/- from the defendant along with future interest from the date of the suit at 24% per annum?

ix) Whether the suit is barred by limitation?

x) Whether the suit based on promissory note is maintainable, when the defendant had created a mortgage by deposit of title deeds by executing two letters in favour of the plaintiff confirming the deposit of title deeds, creating charge over the properties in favour of the plaintiff?

xi) To what relief the plaintiff is entitled to?

7.Upon hearing the arguments of the learned counsel on either side, the issues are re-cast as follows:-

i) Whether the defendant had borrowed a sum of Rs.23,50,000/- and 16,50,000/- on 09.02.1999 and 10.02.1999 from the plaintiff and had executed two promissory notes?

ii) Whether the plaintiff is entitled to recover a said sum of Rs.23,50,000/- and Rs.16,50,000/- from the defendant along with interest at 24% p.a. from 09.02.1999 and 10.02.1999 respectively?

iii) Whether the defendant had issued 4 cheques in favour of the plaintiff for repayment of the loan amount ?

iv) Whether the plaintiff is entitled to the suit claim?

v) Whether the plaintiff is entitled to file the present suit in addition to the criminal case under Section 138 of the Negotiable Instruments Act, filed against the defendant?

vi) Whether the suit based on the promissory notes is maintainable, when the defendant had created a mortgage by deposit of title deeds by executing two letters in favour of the plaintiff confirming the deposit of title deeds, creating charge over the properties in favour of the plaintiff?

vii) To what relief the plaintiff is entitled to?

Issue Nos.1 & 2:-

8.It is the consistent case of the plaintiff that the defendant borrowed a sum of Rs.23,50,000/- on 09.02.1999, and had executed a promissory note marked as Ex.P-1, as well as the letter of confirmation marked as Ex.P-5, he again borrowed a sum of Rs.16,50,000/- from the plaintiff on 10.02.1999 and had executed a promissory note marked as Ex.P-2, and confirmation letter dated 10.02.1999 marked as Ex.P-6. The witnesses to the promissory notes, as well as the confirmation letters have been examined as PW's-2 and 3. The claim of the 1st defendant in the reply notice dated 15.11.2001 is that the promissory notes were executed in blank for the borrowing that took place some time in February 1995, October 1995, January 1996 and March 1996. It is also stated in the said reply that the documents that were relied upon in the pre suit notice were prepared by the plaintiff utilising the signatures obtained in blank forms and blank papers at the time of the borrowings in 1995 and 1996. No where in the said reply notice, the 1st defendant had denied the signatures in any of the four documents viz., the two promissory notes dated

09.02.1999, and 10.02.1999, and the confirmation letters of even dates. Even in the written statement filed in the present suit by the legal representatives, the signature of the 1st defendant found in those documents is not denied. DW-1 in box, however, deposed that the signature in one of the promissory notes viz., Ex.P-1 dated 09.02.1999 is not her husband's signature. However, the said witness would categorically admit the signatures found in Ex.P-2, 5 and 6 as that of her husband's.

9.Of course, Mr.D.Rajagopal, learned counsel appearing for the defendants would contend that there are certain contradictions in the evidence of PW-2 and PW-3 with reference as to who invited them to the house of the plaintiff on 09.02.1999 and 10.02.1999, as such, their evidence is unreliable. PW-2 in his proof affidavit has stated that he went to the house of the plaintiff upon invitation from the deceased 1st defendant. But in his cross examination, he had deposed that he went the house of the plaintiff he was asked to be present on 09.02.1999 by the plaintiff and not by the 1st defendant. PW-3 in his proof affidavit has stated that he was requested to be in plaintiff's house by the 1st defendant.

This witness also in his cross examination, deposed that he and the plaintiff are very closely related and he went to the house of the plaintiff on invitation by the plaintiff and not by the 1st defendant. The 2nd defendant wife of the deceased 1st defendant has been examined as DW-1. She has in her cross examination admitted the signatures found in Ex.P-2, 5 and 6. She would say that the signatures found in Ex.P-10 are that of her husband. Apart from Ex.P-1, 2, 5 and 6 the plaintiff has also produced four cheques issued by the 1st defendant on 10.08.2001 and 10.09.2001 which have been marked as Ex.P-9, and P-10 series. To a specific question in cross examination, DW-1 had deposed that the signatures found in the four cheques are that of her husband. She would however claim that her husband did not have any account in Indian Bank, Sowcarpet Branch, Chennai. She would further depose that blank papers in which her husband had signed are not Ex.P-1 and P-2. DW-1 has further deposed after perusing Ex.P-5 and P-6 as follows:

> "In these two documents my husband had signed in the documents, he had also stated that the two property documents Exs.P-7 and P-8 were in favour of the plaintiff Hemachalam. According to me, a sum of Rs.20,00,000/- is to be repaid to the Hemachalam.

10.In the light of the above oral and documentary evidence, it is clear that the execution of the promissory notes has been proved by the plaintiff. Once the execution of the promissory note is proved, onus is on the defendants to show absence of consideration, in view of the statutory presumption under Section 118 of Negotiable Instruments Act. Even assuming that the promissory notes had been executed in blank, having been signed as blank forms, Section 20 of the Negotiable Instruments Act enables the holder in due course to fill up and sue upon the same. It is also settled position of law that the presumption relating passing of consideration enumerated under Section 118 of the Negotiable Instruments Act would apply to such filled up promissory notes also. Therefore, it is for the defendants to establish absence of consideration.

11.Mr.D.Rajagopal, learned counsel would rely upon the cross examination of PW-1 wherein he stated these amounts have not been reflected in his income and sales tax returns and would require the Court draw an inference that the defendants have established absence of consideration. I am afraid that such an inference would be against the evidence on record, particularly in view of the overwhelming evidence that is available on the side of the plaintiff to show passing of consideration. Apart from signing Ex.P-1 and P-2 promissory notes, the 1st defendant had signed Ex.P-5 and P-6 letters of confirmation, the 1st defendant has handed over sale deeds of properties that stood in his name and in the name of his wife to the plaintiff along with Ex.P-5. Xerox copies of sale deeds standing in his name and the joint names of himself and his brothers have been handed over to the plaintiff along with Ex.P-6. Apart from the above, the 1st defendant had also issued four cheques in the year 2001 which were dishonoured on presentation. The combined fact of above documentary evidence as well as evidence of PW-2 and PW-3 it is very clear that Ex.P-1, P-2, P-5 and P-6 were executed by the 1st defendant on 09.02.1999 and 10.02.1999. I do not think, the defendants have established failure of consideration by letting in enough evidence, to dislodge the presumption created under Section 118 of the Negotiable Instruments Act. Hence, Issue nos. 1 and 2 are answered in favour of the plaintiff and against the defendants.

Issue No.3:-

12.It is the contention of the defendants 2 to 5, that the four cheques dated 10.08.2001 and 10.09.2001 were issued only as security for the amount said to have been borrowed in the years 1995-1996. The cheques have been marked as Ex.P-9 series and P.10 series. A perusal of the said documents shows that they have been returned at the same time. All the instruments are MCIR instruments which were not prevalent in 1995-1996. Therefore, the claim of the defendants that the cheques were issued as security for repayment of the loan during the years 1995-1996 cannot be believed. The cheques have been presented and have been returned with an endorsement "Account Closed". Based on the returns, the plaintiff had issued a notice dated 14.11.2001 to the 1st defendant under Section 138 of Negotiable Instruments Act. DW-1 in her cross examination would admit the signatures of her husband in the cheques. I do not think that the claim of the defendants that the cheques were issued in the years 1995-1996 as security for repayment of loans borrowed by the 1st defendant during year 1995-1996 could be accepted. Hence, issue no.3 is decided in favour of the plaintiff against the defendants.

<u>Issue No.4</u>:-

13.Mr.D.Rajagopal, learned counsel appearing for the defendants would submit that there cannot be a personal decree against the defendants 2 to 5 for the borrowings by the 1st defendant. He would also rely upon the judgment of this Court in **R.Thimmaiyyan .Vs. M/s. SMT Chits and Finance Corporation and Others** reported in **2017 (5) LW 222.** In the said decision it has been held that a personal decree cannot be passed on the legal representatives for the borrowings of the 1st defendant. I am in respectful agreement of the conclusions reached in the aforesaid judgment. Therefore, I conclude that the plaintiff would be entitled to a decree as against the estate of the 1st defendant in the hands of the defendants 2 to 5 only. The issue No.4 is answered as above.

<u>Issue No.5</u>:-

14.It is the contention of the defendants 2 to 5 that the plaintiff having initiated proceedings under Section 138 of the Negotiable Instruments Act for dishonour of cheques cannot maintain a Civil Suit for recovery. This contention is stated to be rejected. The scope of the proceedings under Section 138 of Negotiable Instruments Act is not one for recovery of money. It is only to punish the accused whose cheque is dishonoured. Section 138 of the Negotiable Instruments Act does not contemplate a mechanism for recovery of money. It is well open to the plaintiff to file a suit for recovery and also seek prosecution under Section 138 of the Negotiable Instruments Act. Issue No.5 is also answered against the defendants in favour of the plaintiff.

<u>Issue No.6</u>:-

15.It is also the contention of Mr.D.Rajagopal, learned counsel for the defendants that if Ex.P-5 and P-6 are to be treated as documents creating an equitable mortgage by deposit of title deeds, the plaintiff cannot sue for a money decree on the strength of the promissory notes. Insofar as Ex.P-6 is concerned, it does not create equitable mortgage by deposit of title deeds. It is only xerox copies of the title deeds that were deposited with the plaintiff. So far as Ex.P-5 is concerned, Mr.D.Rajagopal, learned counsel would contend that it cannot be treated as memorandum of deposit of title deeds, because it does not acknowledge a prior deposit of title deeds with an intention to create a mortgage.

16.I do not propose to go into the question in as much as the present suit is filed only based on the promissory notes for recovery of money. The plaintiff does not seek a decree on mortgage. Even assuming that Ex.P-5 & P-6 would amount to creation of an equitable mortgage, it is well open to the plaintiff to give up the security and file a security for money. Therefore, I conclude that the suit as framed for recovery of money is maintainable in spite of the fact that Ex.P-5 and P-6 operate to create an equitable mortgage in favour of the plaintiff.

17.In the result, there will be a decree for a payment of Rs.68,80,800/- with interest on Rs.40,00,000/- at 12% p.a. from the date of suit till date of decree and at 6% p.a. thereafter, till date of realisation along with proportionate costs.

08.12.2017

KP

Index : No
Internet : Yes
Speaking Order

To
The Sub Assistant Registrar,
Original Side,
High Court, Madras.

List of the witnesses examined on the side of the plaintiff:-

PW-1	T.Hemachalam
PW-2	N.Gnanasekaran
PW-3	D.Sivakumar

List of Exhibits marked on the side of the plaintiff: -

Sl. No.	Exhibits	Date	Description of Documents
1.	P-1	09.02.1999	Promissory Note.
2.	P-2	10.02.1999	Promissory Note.
3.	P-3	15.09.1994	Original Sale Deed.
4.	P-4	15.09.1994	Original Sale Deed.
5.	P-5	09.02.1999	Letter given by 1st defendant to the plaintiff.
6.	P-6	10.02.1999	Letter given by 1st defendant to the plaintiff.
7.	P-7	14.04.1976	Xerox copy of sale deed.
8.	P-8	30.09.1988	Xerox copy of sale deed.
9.	P-9 (series)	10.08.2001	Two cheques.
10.	P-10 (series)	10.09.2001	Two cheques.
11.	P-11	01.11.2001	Cheque return memo.
12.	P-12	02.11.2001	Cheque return memo.
13.	P-13	--	Copy of complaint given by the plaintiff.

Sl. No.	Exhibits	Date	Description of Documents
14.	P-14	--	Copy of complaint given by the plaintiff.
15.	P-15	12.11.2001	Legal notice issued by the plaintiff's counsel to the defendant along with proof of delivery.
16.	P-16	12.11.2001	Legal notice issued by the plaintiff's counsel to the defendant along with proof of delivery.
17.	P-17	15.11.2001	Reply notice issued by the defendant's counsel to the plaintiff's counsel.
18.	P-18	15.11.2001	Reply notice issued by the defendant's counsel to the plaintiff's counsel.

08.12.2017

KP

R.SUBRAMANIAN,. J.

KP

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