IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 04.12.2018

Judgment Pronounced on : 21.12.2018

CORAM :

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.No.677 of 2008

A.Deivasigamani (died)

1.Kamalathal
2.D.Chidambaram .... Appellants/Plaintiffs

Vs

K.C.Muthusamy .... Respondent/Defendant

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree partly allowed in A.S.No.40 of 2007 on the file of the Principal District Court, Erode, Erode District dated 20.12.2007, modifying the judgment and decree passed in O.S.No.939 of 2003 on the file of II Additional Sub Court, Erode, dated 22.08.2006.

For Appellants : M/s.S.Varsha

For Respondent : Mr.V.P.Sengottuvel
for Mr.T.Bhuvaneshwar

JUDGMENT

The plaintiffs in O.S.No.939 of 2003, a suit he has laid on promissory notes, are the appellants herein. The suit was initially laid by a certain Deivasigamani before the II Additional Subordinate Judge, Erode for recovery of money on two promissory notes, both dated 05.01.2001. He died pending litigation and hence the appellants were impleaded as plaintiffs 2 and 3. parties would be referred to by their rank in the suit.

2. In his written statement , the defendant has pleaded that he was severely indebted, that he had been obtaining several loans under several promissory notes from the plaintiff

(Deivasigamani) even prior to 05.01.2001, and that there held a meeting between him and his creditors, and it that meeting, it was agreed that the defendant would sell his properties and discharge his outstanding loans. Subsequent to this arrangement, the defendant had executed as many as 13 promissory notes on 05.01.2001, of which, three promissory notes were undated. He would further plead that pursuant to the arrangement between him and his creditors, he sold one of his properties under a sale deed dated 14.12.2001 to the plaintiff, and towards the sale consideration which Deivasigamani was required to pay the defendant, an amount of Rs.75,000/- payable under Ext.A-2, promissory note, was adjusted and accordingly the debt created by Ext.A-2 stands discharged. Having pleaded thus, the defendant would also proceed to state that both the promissory notes were fabricated.

3.1 The suit went for trial. As referred to above, Deivasigamani, who laid the plaintiff had died, and his legal heirs were impleaded. The promissory notes were maked as ext.A-2 and A-3, and the sale deed that the defendant had executed in favour of Deivasigamani is makred as Ext.B-1. For the plaintiffs, P.W.1, the son of the Deivasigamani, P.W.2 Kuppusamy, nephew of Deivasigamani and an attestor to Exts.A-2, A-3 promissory notes and Ext.B-1 sale deed, were examined. Turning to the defendant, he examined himself as D.W.1, and besides he had examined two other creditors as D.W.2 and D.W.3 of his to prove his meeting with his creditors that he had alleged in the written statement.

3.2 As indicated, the trial Court decreed the suit, and for entering a decision in favour of the plaintiffs, the trial court has relied on the admission of D.W.1 in his cross-examination during which he had testified that the signatures in Ext.A-2 and Ext.A-3, promissory notes were his. When the matter reached the first Appellate Court, the first Appellate Court has scanned through the evidence and has found that the promissory note dated 05.01.2001 for a sum of Rs.75,000/- and referred to in Ext.B-1, sale deed, would only represent Ext.A-2, promissory note and accordingly, dismissed the suit to the extent represented by Ext.A2. This is now in challenge.

4. The appeal was admitted on the following substantial questions of law :

> " 1.Has not the lower Appellate Court committed an error of law to the facts and circumstances of the case in not holding that in view of the admission regarding execution of Ext.A-2 by the defendant, the onus is on him to prove that the consideration has not passed as contemplated under Section 118(a) of the Negotiable

Instruments Act imposing statutory presumption against him.

2. Has not the lower Appellate Court committed an error of law to the facts and circumstances of the case in not holding that in the absence of any pleadings or evidence on behalf of the defendant, the courts itself cannot give a reason regarding the satisfaction of Ext.A-2."

5. The learned counsel for the appellants submitted :

- The defendant has taken up an alternate and inconsistent plea in that he would say that both Ext.A-2 and Ext.A-3 were fabricated even as he has pleaded that the promissory note, dated 05.01.2001 for Rs.75,000/- was adjusted against part of the sale consideration payable by the plaintiff under Ext.B-1 sale deed. While it is permissible for a defendant to take alternate and inconsistent pleas, it is essential for him to elect one during trial, and if he defaults to do so, the inconsistency in his pleadings would destroy his defense in entirety. The defendant has not chosen to elect positively and with clarity and has pressed into service both the defenses simultaneously.

- If this is contrasted with his categorical admission in the cross-examination, that he had executed Ext.A2 and Ext.A3 promissory notes, necessarily the conclusion to be arrived is that the defendant is liable to pay Rs.75,000/- payable under Ext.A2 promissory note.

6. Per contra, the learned counsel appearing for the respondent/defendant would argue that even though the defendant has pleaded alternate and inconsistent pleas, yet if the evidence is closely read, it would indicate that he has elected one of the two defenses that he has raised in his pleadings. This becomes evident on a combined reading of the cross-examination of P.W.1 and P.W.2 as well in the oral testimony of the defendant as D.W.1 in all of which he has substantially laid emphasis only on his defense pertaining to adjustment of the amount payable under Ext.A2 towards the sale consideration payable under Ext.B-1, even though towards the end of his affidavit of chief-examination, he did state that Ext.A2 is fabricated. However, this solitary sentence in the chief examination cannot affect the quality of the evidence taken as a whole, nor would affect the preponderating probable effect that flows from it. This would therefore, will leave the most probable inference that the amount payable under Ext.A-2 was adjusted under Ext.B1, sale deed, as the only option. He also emphasised there is no case for the plaintiffs, that other than

the promissory note referred to in Ext.B-1, sale deed, there remained another promissory note dated 05.01.2001 for a sum of Rs.75,000/- which the defendant had to pay.

7. In the context of the first of the substantial questions of law raised, it must be stated that it not a case where the defendant has pleaded failure of consideration to invoke the presumption under Sec.118(a) of the Negotiable Instruments Act, but chiefly one pleading discharge or satisfaction of the debt repayable under Ext.A-2 promissory note. If so looked then what remains is only the second of the substantial questions raised alone is available for consideration.

8. Here, the primary thrust seen in the arguments of the learned counsel for the plaintiffs/appellants is that the defendant having pleaded alternate and inconsistent pleas, has not chosen to elect one. Factually, this may not be correct since the line of cross examination of P.W.1 and P.W.2 and the oral testimony of D.W.1 strongly project only one of the two alternate defenses, if a stray sentence in the affidavit of chief examination of D.W.1 is discounted. It is true, the defendant did aver in this affidavit that Ext.A-2 is fabricated, but if it is read alongside the entire evidence available on record, this solitary sentence in the affdavit (of Chief Examination) pale into insignificance.

9. This now leaves it for consideration if the conclusion arrived by the first Appellate Court is an impossibility, and if it has read the evidence erroneously as to baffle the conscience of this court. Here this Court finds that the first Appellate Court has been logical in appreciating the evidence for arriving its conclusion. Admittedly, the plaintiffs have pleaded about the existence of only one promissory note for Rs.75,000/- dated 05-01-2001. And, Ext.B-1, sale deed under which plaintiffs have to pay the sale consideration to the defendant refers to an adjustment of Rs.75,000/- payable under a promissory note dated 05-01-2001. If Ext.A-2 is not the promissory note that could be related to what is recited in Ext.B-1 sale deed, then which is the one that the latter refers to, especially when the plaintiffs do not have a case that there existed another promissory note for the same sum bearing the same date? This shifts the onus on the plaintiffs, and except relying on the testimony of the defendant admitting the execution of promissory notes, which at rate he has never seriously denied even in the written statement, the plaintiffs have done precious little to discharge the onus.

10. In conclusion, this Court does not find merit in the appeal and hence, the same is dismissed and the judgment and decree in A.S.No.40 of 2007 on the file of the Principal District Court,

Erode, Erode District dated 20.12.2007, modifying the judgment and decree passed in O.S.No.939 of 2003 on the file of II Additional Sub Court, Erode, dated 22.08.2006 is hereby confirmed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

ds Sub Assistant Registrar

To:

1. The Principal District Judge,
Erode.

2. The II Additional Sub Judge,
Erode.

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

+1 cc to M/s.S.Varsha, Advocate, S.R.No.89412

+1 cc to Mr.T.Bhuvaneswari, Advocate, S.R.No.89769

Judgment in
S.A.No.677 of 2008

CNR(CO)
SSM(07/03/2019)