IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.Nos.944 of 2016 and 67 of 2017
C.M.P.No.19072 of 2016
in S.A.No.944 of 2016

C.Venkatesan .. Appellant in S.A.No.944/2016 /Respondent in S.A.No.67/2017 /Defendant

Vs.

K.Thirunavukkarasu ..Respondent in S.A.No.944 /2016 /Appellant in S.A.No.67/2017 /Plaintiff

* * *

Prayer S.A.No.944 of 2016 : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 25.08.2015 made in A.S.No.274 of 2014 on the file of the learned IV Additional City Civil Court, Chennai, partially dismissing the appeal and partially confirming the judgement and decree dated 28.04.2014, made in O.S.No.6730 of 2011 on the file of the V Assistant City Civil Court, Chennai.

Prayer S.A.No.67 of 2017 : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 25.08.2015 made in A.S.No.274 of 2014 on the file of the learned IV Additional City Civil Court, Chennai, modifying the judgement and decree dated 28.04.2014, made in O.S.No.6730 of 2011 on the file of the V Assistant City Civil Court, Chennai.

* * *

For Appellant in S.A.No.944/2016/Respondent in S.A.No.67/2017 : Mr.D.S.Ramesh

For Respondent in S.A.No.944/2016/Appellant in S.A.No.67/2017 : Mr.G.Elamurugu

COMMON JUDGEMENT

Challenge in this Second Appeal is laid to the judgment and decree dated 25.08.2015 passed in A.S.No.274 of 2014 by the learned IV Additional City Civil Court, Chennai, modifying the judgement and decree dated 28.04.2014, passed in O.S.No.6730 of 2011 on the file of the V Assistant City Civil Court, Chennai.

2. One Thirunavukkarasu, who is the plaintiff in O.S.No.6730 of 2011, entered into an agreement to sell with the defendant one C.Venkatesan on 25.09.2007 in respect of the suit property, in and by which, the plaintiff agreed to purchase the property for a sale consideration of Rs.4,00,000/- and also paid a sum of Rs.1,50,000/- as advance. It is stated further that on 26.01.2009, the defendant came to the plaintiff and borrowed another sum of Rs.2,00,000/- for the purpose of discharging a mortgage deed, which is executed by the defendant in favour of one Mrs.Saraswathi. The defendant also executed an "On Demand Promissory Note" in favour of the plaintiff agreeing to repay the same with interest at the rate of 18% p.a. and the defendant also promised to execute the sale deed in favour of the plaintiff within a period of one year from the date of execution of the promissory note and agreed to deduct the amount from the sale price. As the defendant did not come forward to perform his part of the contract, as per the terms of the agreement dated 25.09.2007 and the consequent promissory note executed on 26.01.2009, the plaintiff issued a legal notice on 01.11.2010 demanding the defendant to execute the sale deed and repay the excess sum of Rs.13,000/- paid to the defendant as on the date of the notice. Later, the plaintiff also applied for encumbrance certificate and found that there were several mortgages executed by the defendant with respect to the property agreed to be sold, however, without any reference to the sale agreement. Since the property was encumbered, the plaintiff did not want to proceed with the sale and restricted his remedy only with reference to the recovery of the money paid. Hence, the plaintiff had filed a suit for recovery of Rs.3,50,000/- and another sum of Rs.1,00,000/- as compensation for breach of the contract.

3. The defendant denied the facts that led to the cause of action to the suit. The defendant contended that the suit is barred by limitation. The sale agreement and promissory note based on which, the suit is laid, were alleged to be fabricated documents created for the purpose of the suit. It is the specific case of the defendant that he had availed loan from the plaintiff for a sum of Rs.1,80,000/- and a deed of mortgage was executed in favour of the plaintiff on 05.04.2006. At the time of availing the said loan, the plaintiff had obtained his

signatures on blank papers and blank stamp papers stating that it would be returned on redemption of mortgage. The mortgage was duly redeemed by the defendant on 15.02.2007. However, the blank papers on which the defendant had signed were not returned to him. The other allegation that the defendant agreed to execute a sale deed in favour of the plaintiff was also denied. Hence, he sought for dismissal of the suit.

4. To substantiate their contentions, the plaintiff and defendant were examined themselves as P.W.1 and D.W.1, apart from marking Exs.A.1 to A.9 and Exs.B.1 and B.2 respectively.

5. The trial court decreed the suit in part and on appeal by the defendant, the suit was party decreed only for a sum of Rs.1,50,000/-, which was paid as advance for the purchase of the property and the sum of Rs.2,00,000/- claimed to have been paid under the promissory note was dismissed.

6. Aggrieved by the judgement and decree in A.S.No.274 of 2014, the defendant had preferred S.A.No.944 of 2016 challenging the award of the return of the advance amount alleged to have paid as per Ex.A.1 - sale agreement on the following substantial question of law :

> "(1) Whether the lower appellate court was right in holding that the admission of signature on Ex.A.1 would amount to admission of the contents of the document ?"

7. Similarly, the plaintiff had preferred S.A.No.67 of 2017 challenging the disallowed the claim of Rs.2,00,000/- based on the promissory note on the following questions of law :

> "(i) Whether the appellant is entitled to raise a new plea in the appeal in the absence of specific plea regarding admissibility of Ex.A.2, that too after admitting the document in evidence ?
>
> (2) Whether Ex.A.2-pronote is with the contingency or not a pronote and the plea raised by the respondent/defendant for the first time in the appeal is maintainable ?

8. Learned counsel appearing for the appellant contended that the promissory note under Ex.A.2 is not legally enforceable, as the same contains a condition. According to him, a "promissory note on demand" should not have a conditional clause. Hence, the suit itself is not maintainable based on the promissory note. Further, it is argued in the written statement that the defendant had not taken such a plea that the promissory note is with a condition and that the same is unenforceable. The only defence taken by the defendant is that the promissory note was fabricated for the purpose of the suit and reserved his right to send the same to the forensic department for obtaining

an expert opinion. The promissory note is defined in Section 4 of the Negotiable Instruments Act, 1881, according to which, a "promissory note" is an instrument in writing (not being a Bank-Note or Currency Note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to, or to the order of certain person, or to the bearer of the instrument. Learned counsel pointed out that as per the above definition, a promissory note should have an unconditional undertaking, whereas, in Ex.A.2, there is a condition, which is as follows :

> "மேலும் நான் தங்களுக்கு ஏற்கனவே 25.09.2007–ம் தேதியில் எழுதி கொடுத்துள்ள ஒப்பந்தப்படி இன்று தேதியில் இருந்து ஒரு வருட காலத்திற்குள் தங்களுக்கு கிரயப்பத்திரம் எழுதி கொடுக்கிறேன் என்றும் உறுதியளிக்கிறேன்."

9. It is also pointed out that it is admitted by the defendant that on an earlier occasion, when the defendant mortgaged his property with the plaintiff, he had obtained his signatures on several stamp papers and also blank papers, which were now utilised by the plaintiff. The defendant also had further alleged that there is a material alteration on the promissory note, which would vitiate the document.

10. So far as the condition that is pointed out in Ex.A.2 promissory note is concerned, the learned counsel for the plaintiff/appellant argued that such defence is not available to the defendant/respondent at this point of time, as the same was not raised in the written statement. Secondly, though Section 4 of the Negotiable Instruments Act, 1881, defines the promissory note to be one with an unconditional undertaking, Section 2(22) of the Indian Stamp Act, 1899, which also defines promissory note, permits such condition. Section 2(22) of the Indian Stamp Act, defines promissory note as follows :

> "Promissory note means a promissory note as defined by Negotiable Instruments Act, 1881. It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available or upon any condition or contingency which may or may note be performed or happen."

It also includes a note promising the payment of any sum of money out of any particular fund, which may nor may not be available or upon any condition or contingency, which may or may not be performed or happened.

11. The lower appellate court had discussed the same and held that for the purpose of defining a promissory note one can only look into the Negotiable Instruments Act, 1881, and not the Indian Stamp Act, as the Indian Stamp Act is only for the purpose of payment of the required stamp duty. It is argued

that in Ex.A.2, there is a reference with respect to Ex.A.1 as per which, within a year from the date of promissory note, the defendant agreed to execute a sale deed, and in case of default, the amount mentioned in Ex.A.2 would be paid back to the plaintiff with interest. Therefore, it was held that the suit promissory note with a condition is unenforceable. A reading of the promissory note Ex.A.2, though appears to have a condition, the said condition is not be performed for the purpose of recovery of money. The condition that is incorporated in the promissory note is separately written in another document, namely, Ex.A.1. There is no dispute between the parties that there were two transactions, one is based on Ex.A.1 agreement to sell under which, the defendant had taken a sum of Rs.1,50,000/- and the second transaction under Ex.A.2 promissory note in question under which Rs.2,00,000/- as a further sum was taken. The purpose of the promissory note is also mentioned in Ex.A.2, namely, a sum of Rs.2,00,000/- that was borrowed for discharging the loan taken from one Mrs.Saraswathi to redeem the mortgage. The promissory note itself says that there is a separate document dated 27.05.2009, under which, the parties have specifically agreed to perform their part of the contract and money was paid to the defendant. Therefore, there are two independent transactions between the parties and the defendant cannot take advantage of the mentioning about Ex.A.1 in the promissory note as a condition and defeat the claim of the plaintiff. In fact, the lower appellate court though had held that Ex.A.2 is not a promissory note, had concluded that the said document can be used as a receipt evidencing loan transaction. Thus, looking at any angle, having admitted the signature on the promissory note, the defendant cannot take shelter under the recitals, which only evidence previous transaction between the parties.

12. The defendant had also taken the defence of material alteration on the suit promissory note. Admittedly, the defendant had signed on blank papers, which according to him, were filled up by the plaintiff as a promissory note, the question of material alteration does not arise. The lower appellate court also has rightly found that the defence of material alteration, as alleged by the defendant on Ex.A.2, is not available in the facts and circumstances of the case. Once the execution is proved, the onus automatically shifts on the defendant to establish that no consideration passed under Ex.A.2. The plaintiff has examined himself as P.W.1 and he has stated that a sum of Rs.2,00,000/- was paid to the defendant on the date of promissory note. Once it is admitted that the defendant had signed on blank paper and admitted his signature, the execution is proved. Then automatically the presumption under Section 118 of the Negotiable Instruments Act, 1881, come into play. The reason stated in the promissory note for discharge of the debt and redeem the mortgage given in favour of

one Saraswathi. The plaintiff also had produced Exs.A.5 and A.6, which are the encumbrance certificates and it is found that there were several mortgages of the suit property with several persons. It is also admitted by the defendant in his evidence that he had mortgaged the suit property to various persons and presently it is mortgaged to one Deenadayalan. The evidence of D.W.1 in this regard is as follows :

> "..... அந்த நிலங்களின் பேரில் நான் சரஸ்வதி என்பவரிடம் கடன் வாங்கி திரும்ப கொடுத்துள்ளேன். அந்த கடனை எந்த தேதியில் வாங்கினேன் என்று ஞாபகமில்லை. 2006–ல் வாதியிடம் அடமானம் போட்டு மீட்டபிறகு இரண்டு நபர்களிடம் அதே சொத்தின் பேரில் கடன் வாங்கியிருந்தேன். ....."

13. Hence, the purpose of borrowal is also proved and as per Section 118 of the Negotiable Instruments Act, 1881, it has to be presumed that valid consideration had passed under Ex.A.2. Therefore, the finding of the lower appellate court that the suit promissory note with a condition cannot be deemed to be a promissory note and dismissed the claim of the plaintiff, which is set aside, in view of the above discussions.

14. The other appeal is filed by the defendant aggrieved by the decree granted for refund of the advance amount paid under Ex.A.1. Ex.A.1 is the sale agreement between the plaintiff and the defendant. The defendant had categorically admitted in his cross-examination that he had signed Ex.A.1. As per Ex.A.1, the defendant had agreed to sell his property for a sum of Rs.4,00,000/- and paid a sum of Rs.1,50,000/- as advance. In the said document, it is admitted by him that as the property was under mortgage with one Saraswathi, from whom, he had taken Rs.2,00,000/-, the execution of the sale deed would be done by the defendant, after settling the mortgage loan and the time agreed by the parties is two years from the date of redeeming the mortgage from the said Saraswathi. When the defendant himself had categorically admitted that the signature found on Ex.A.1 belongs to him, the question that arises for determination is whether it was only a loan transaction, and that it was converted into an agreement to sell, as alleged by the defendant is true or not ?.

15. When the defendant had specifically admitted his signature found on Ex.A.1, it can be stated that he had signed the same without knowing the recitals of the document. If the defendant had affixed the signatures on blank stamp papers without knowing the nature of the document, then the defendant has to take the consequences also. It is argued by the learned counsel for the defendant that admission of signature will not amount to admission of the document. Since the defendant had not admitted the execution of Ex.A.1 agreement for sale and also

specifically taken a stand that the plaintiff had used the signature subscribed by him on blank papers and stamp papers which were given as security for redemption of the loan, it is the defendant, who has to prove that no consideration has passed. It is settled principle that a civil suit itself is determined only based on preponderance of probabilities. In the present case, the defendant had specifically denied the execution of both Exs.A.1 and A.2, though admitted the signatures found on them. So far as Ex.A.2 promissory note is concerned, once it is admitted that the person signed on a blank paper, Section 20 of the Negotiable Instruments Act, 1881, comes into play. However, with respect to the agreement to sell under Ex.A.1, wherein also, the defendant had admitted the signatures, there may not be a straight jacket formula to presume that the defendant had received the amount under Ex.A.1, as the signature is admitted. Then the burden still lies with the plaintiff to establish that he had paid the money under Ex.A.1. As Ex.A.2 has already been held to be valid and the plaintiff had proved that the defendant had borrowed money for discharge of the mortgage loans, in the said context, there is a mention about Ex.A.1, which is also between the same parties. In fact, the plaintiff by way of abundant caution had mentioned the existence of Ex.A.1 in Ex.A.2, which again is taken advantage of by the defendant as calling it a promissory note, as it did not have an unconditional undertaking.

16. It is demonstrated by the plaintiff that the stamp paper on which agreement was entered into was issued by the Treasury on 24.07.2007 in the name of the plaintiff. As the said stamp paper was issued by the Treasury in the year 2007, the plaintiff could not have fabricated the same for the purpose of the suit, as alleged by the defendant, because the allegation of the defendant is that the stamp papers were signed by him during the year 2006, when he borrowed money from the plaintiff. Thus, the contention of the defendant that his signatures found place in the stamp papers of the year 2007 is unacceptable. Accordingly, the plaintiff had discharged the burden cast on him coupled with the fact that the defendant had admitted his signature on Ex.A.1.

17. Though Ex.A.1 is the agreement to sell, the plaintiff had confined his remedy only to return of the advance amount and not asked for specific performance of the agreement to sell. Thus, this Court is of the view that the plaintiff has proved Exs.A.1 and A.2 in the manner known to law and he is entitled for the decree based on the same. Accordingly, the substantial questions of law raised in these appeals are answered in favour of the plaintiff and against the defendant.

18. In the result, S.A.No.944 of 2016 preferred by the defendant is dismissed. Consequently, S.A.No.67 of 2017

preferred by the plaintiff is allowed and the suit is decreed restoring the judgement and decree of the trial court. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gg

To

1.The IV Additional City Civil Court Judge,
The IV Additional City Civil Court, Chennai.

2.The V Assistant City Civil Court Judge,
The V Assistant City Civil Court, Chennai.

3.The Section Officer
VR Section High Court, Madras

+2 ccs to M/s.D.S.Ramesh Advocate sr 23073 & 23702

+2 ccs to M/s.G.Ila Murugan Advocate sr 22525 & 22526

Common Judgement
in S.A.Nos.944 of 2016
and 67 of 2017

ad(co)
aa12/04/2018