



S.A.No.1489 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:11.08.2023

Delivered on: 22.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.1489 of 2010

&

C.M.P.No.2675 of 2017

K.Meenakumari

... Appellant

Vs.

K.N.Prasad

... Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 07.06.2010 passed in A.S.No.699 of 2005 on the file of V Additional City Civil Court, Chennai, reversing the judgment and decree dated 02.09.2005 passed in O.S.No.1744 of 1999 on the file of XI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.R.Thiagarajan

For Respondent : Mr.K.S.Narayanan



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JUDGMENT

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The unsuccessful defendant in a suit for recovery of money based on a promissory note is the appellant in the present Second Appeal. In order to adjudicate the second appeal, the necessary facts are briefly culled-out hereunder, the parties being described as per the rank in the suit.

2. The plaintiff one Mr.K.N.Prasad, alleges that the defendant had borrowed a sum of Rs.2,00,000/-from one Mr.P.Premkumar on 15.05.1996, on execution of demand promissory note, agreeing to repay the same together with interest at 36% p.a. It is the further case of the plaintiff that the defendant, besides the execution of the promissory note, also deposited title deeds of her house properties, covered by 5 sale deeds, with an intent to create a valid equitable mortgage by deposit of title deeds, securing due repayment of the amount borrowed by her by execution of a demand promissory note. The said undertaking letter of deposit of title deeds confirming the borrowing and offering the documents as security was executed on the very next day i.e., 16.05.1996. It is the further case of the



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plaintiff that though the defendant paid interest upto 16.11.1996 to the original lender P.Premkumar, thereafter she failed to pay any amount, either towards interest or towards principal. The case of the plaintiff is that the said P.Premkumar made over the said promissory note in his favour, together with the title deeds deposited by the defendant, against receiving full consideration, inclusive of interest to the tune of Rs.3,26,000/-. Claiming to be a bonafide holder of the demand promissory note dated 15.05.1996, together with the equitable mortgage by deposit of title deeds dated 16.05.1996, the plaintiff made several demands on the defendant for repayment of the money due. A lawyer's notice was also issued on 23.11.1998, to which the defendant did not even send a reply, though she received the said lawyer's notice. Thus, the plaintiff prayed for a decree to the tune of Rs.3,61,000/- representing principal amount of Rs.2,00,000/- and interest component of Rs.1,61,000/-, together with future interest and costs.

3. The defendant had filed a written statement stating that she is a divorcee and though she married, one Dr.Chandrasekar, the said person also



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tried to grab her money and proceedings initiated before the Family Court, Chennai. It is the case of the defendant that her husband, Dr.Chandrashekar took away all the defendant's documents including cheques and started blackmailing the defendant that he would misuse the documents and cheques besides also spoiling the image of the defendant in the general public. It is also the specific case of the defendant that by forging her signature, her husband also filed Section 138 proceedings under the Negotiable Instruments Act, against her. The plaintiff is none else than the sister's son of Dr.Chandrashekar and therefore the promissory note was also a forged one and according to the defendant she never executed any promissory note either in favour of P.Premkumar or the plaintiff, at any point of time Insofar as the claim of depositing a title deeds it is stated that her husband had taken away all the documents and therefore taking advantage of having custody of the same, he might have stage managed her situation as if the defendant's title deeds were also deposited as a security for repayment of the alleged money borrowed by the defendant.



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4. Before the Trial Court, the plaintiff examined himself as PW-1 and exhibited documents namely Ex.A1 to A7. On the side of the defendant she examined herself as DW1 and exhibited documents Ex.B1 and B2. Curiously, the original lender who is said to have made over the promissory note in favour of the plaintiff was examined as DW2. The trial court held that the suit promissory note was fabricated and a forged one and also disbelieved the theory of deposit of title deeds and ultimately dismissed the suit.

5. Aggrieved by the said dismissal of the suit, the plaintiff preferred A.S.No.699 of 2005.

6. The First Appellate Court reversed the findings of the Trial Court and decreed the suit, holding that under Section 118 of the Negotiable Instrument Act, the burden of proof that initially vested on the plaintiff stood shifted to the defendant on proof of due execution of the promissory note and also on the ground that DW-2, the original lender was examined on behalf of the plaintiff was not treated as a hostile witness by the defendant and



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consequently failed to cross examine him. However, the First Appellate Court did not go into the issue of deposit of title Deeds which was also an additional plea taken by the plaintiff to support the borrowing made by the defendant at the first instance.

7. Aggrieved by the reversing finding, the defendant has preferred the present Second Appeal.

8. At the time of admission of the second appeal, the following substantial questions of law have been framed by this Courts:

1) Whether the Appellate Court is right in drawing a presumption contrary to the provisions contained in Section 114 of the Evidence Act, 1872, and Section 118 of the Negotiable Instrument Act 1881?

2) Whether the Appellate Court is right in holding that the respondent is a holder in due course of a negotiable instrument under Ex.A-1 which has not been validly proved in accordance with law?

3) The respondent having miserably failed to establish the claim of



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equitable mortgage which had been given up by the alleged original mortgagee who opted to assign the promissory note in favour of the respondent herein who in the absence of proof of an assignment as contemplated in law under Ex.A-1, whether the judgment of the Appellate Court can be sustained?

9. Heard Mr.R.Thiagarajan, counsel for the appellant and Mr.K.S.Narayanan, counsel for the respondent. I have also perused the records as well as the decisions relied on by the counsel for the appellant.

10. It is not in dispute that the plaintiff claims to be a bonafide holder in due course of a negotiable instrument namely a promissory note, said to have been executed by the defendant, in favour of one P.Premkumar. It is the further case of the defendant that the said P.Premkumar was a close acquaintance of the plaintiff and therefore, for consideration, the said promissory note was made over in his favour and consequent to the same the plaintiff has issued a lawyer's notice which remained unresponded which was



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followed with the filing of the suit, seeking recovery of monies allegedly due to him, from the defendant.

11. Mr.R.Thiagarajan, counsel for the appellant, would vehemently contented that the suit is not merely based on a promissory note alone but also on specific pleadings that the said borrowing was supported by a deposit of title deeds with an intention to secure the original borrowing. However, the suit was laid only based on the promissory note, thereby giving up the more secure claim available to the plaintiff under a mortgage.

12. It is also brought to my notice by Mr.R.Thiagarajan counsel for the appellant that, pending the first appeal the plaintiff sought to amend the plaint by converting the suit as to one of a mortgage suit from a simpliciter suit for recovery of money. Infact, the said amendment application came-up for consideration before this Court in C.R.P.No.1851 of 2008, and the said amendment application was dismissed, holding that having not sought for this amendment when the suit was pending before the Trial Court, the



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amendment cannot be permitted invoking Order VI Rule 17 of the Code of Civil Procedure, treating the suit as one on a mortgage.

13. The said revision was disposed-off on 18.12.2008 and subsequently the suit as originally framed was tried and decided. Therefore, it is the submission of the counsel for the appellant Mr.R.Thiagarajan that the plaintiff knew very well that there was no lawful claim against the defendant and pursuant to dismissal of the suit, a feeble attempt was also made to get a decree as if the suit was one on a mortgage. The learned counsel for the appellant would also contend that no consideration passed under the alleged promissory note and therefore the general presumption available under the Evidence Act or the Negotiable Instruments Act cannot be applied to the facts of the present case. Moreover, the plaintiff who claims to be a holder in due course of a negotiable instrument ought to prove that he is the bonafide transferee for consideration, which according to the counsel for the appellant, the plaintiff has miserably failed in doing so. Mr.R.Thiagarajan would also contend that when it was the specific case of the defendant that her husband



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fraudulently took away all her documents and also cheques in respect of which she had already initiated criminal action, the First Appellate Court ought to have accepted the findings of the Trial Court which were based on proper pleadings and credible evidence.

14. Mr.R.Thiagarajan would also find fault with the Appellate Court's finding endeavouring to compare the disputed signature in the promissory note with the admitted signature of the defendant on the ground that the Courts have repeatedly deprecated such practice, though there may not be a legal bar for the Court to compare signatures.

15. The counsel for the appellant relied on the following judgments:-

i). *AyyaKannu Goundar Vs. Virudhammbal Ammal* reported in (2005) 1 CTC 409, where this Court has held that the plaintiff has to establish his case and cannot pick holes in the defendant's case.



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ii) ***Swaminathan @ Selvam Vs M.Kumar*** reported in ***(2007) 2 LW 797***, wherein this Court has held that presumption of law or presumption of fact may be rebutted by not only direct or circumstantial evidence but where legal presumption under Section 114 also raised. Infact in the said judgment reliance is placed on judgment of the Hon'ble Supreme Court in ***Kundan Lal Rallaram Vs Custodian, Evacuee Property, Bombay*** reported in ***A.I.R 1961 S.C. 1316***, in which case the Hon'ble Supreme Court has held that the defendant can prove non-existence of consideration by raising a probable defence and if the defendant is able to prove that the existence of consideration was improbable or doubtful or that the same was illegal, then the onus shifts back to the plaintiff, thereafter he will be obliged to prove as a matter of fact upon failure to prove, this would disentitle him to the grant of relief on the basis of the negotiable instrument.

iii) In ***Bharat Barrel and Drum Manufacturing company Vs. AmenChand Payrelal*** reported in ***(1999) 3 SCC 35***, the Hon'ble Supreme Court the presumption regarding promissory note being one for consideration



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is rebuttable and the initial burden lies on the defendant to prove non-existence of consideration by bringing on record such facts and circumstances which may lead the Court to believe non-existence of consideration or non-existence so probable that a prudent man could act upon the plea that it did not exist and that if such burden is discharged, the onus shifts back to the plaintiff to prove passing of consideration.

16. Per contra, the counsel for the respondent would submit that the plaintiff caused a lawyer's notice which was admittedly received by the defendant and having chosen not to reply to the same, the defendant cannot setup any defence in the suit as the non-issuance of reply to the pre-suit notice was fatal. He would also content that the High Court exercising jurisdiction under Section 100 of CPC cannot reappreciate evidence and findings of facts arrived at by the First Appellate Court

17. Insofar as the exercise of comparison of signature undertaken by the First Appellate Court, the counsel for the respondent would submit that

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the defendant herself filed an application to refer the disputed promissory note in Ex.A-1, for expert opinion, but she never chose to pursue the same and therefore is not open to the defendant to contend that the Court ought not to have undertaken the exercise of comparison of signatures. The learned counsel for respondent would conclude his submissions stating that there is no substantial question of law involved in the present Second Appeal and therefore prayed for dismissal of the second appeal.

18. I have heard the counsel for the appellant and counsel for the respondent and I have also perused the original records and also the various decisions relied on by the counsel for the appellant.

19. As all the three substantial questions of law are interlinked, all relating to the borrowing made by the defendant from one P.Premkumar, who in turn made over the promissory note to in favour of the plaintiff and in support of the said borrowing, she is alleged to have created an equitable mortgage for deposit of title deeds, a common consideration of the legal



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position and application of the same to the facts of the present case would suffice to answer all the three substantial questions of law.

20. Admittedly the defendant has specifically denied the very execution of the promissory note Exhibit A-1. According to the defendant her estranged husband one Dr.Chandrashekhhar has forged her signature in the suit promissory note. It is also her specific case that all her property documents were taken-away by her estranged husband, including cheques and other papers and she had also set the criminal law in motion by lodging a complaint and that the same is pending investigation.

21. Section 118 of the Negotiable Instrument Act, 1881 deals with presumptions as to Negotiable Instruments. The same is extracted for easy reference:-

Section 118: Presumptions as to negotiable instruments. –Until the contrary is proved, the following presumptions shall be made:–

(a) of consideration –that every negotiable



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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;

(b) as to date –that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance –that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer –that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements –that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps –that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course –that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence



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or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

22. Thus, it can be seen that a presumption with regard to consideration is available subject to the contrary being proved by rebuttal evidence only where execution of the negotiable instrument is accepted or admitted, the initial burden of proof is on the plaintiff to establish or prove due execution of the promissory note. Only on such burden being discharged by the plaintiff, the court is entitled to raise a presumption that the said negotiable instrument namely the promissory note in the present case was for consideration. Even in such a case, it is open to the defendant to lead rebuttal evidence and establish that the promissory note was not supported by consideration. If the defendant succeeds in leading such rebuttal evidence, then that burden shift back to the plaintiff to prove passing of consideration. Here, admittedly the defendant has denied the execution of the promissory note. Therefore, it is for the plaintiff to first establish that the promissory note



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was duly executed by the defendant, before becoming entitled to a presumption that the promissory note was for consideration. On carefully perusing the oral and documentary evidence, it is seen that though the plaintiff has categorically denied her signature in Ex.A-1, promissory note, she has not led any evidence whatsoever in support of the said contention of forgery. On the other hand, the plaintiff had examined the original lender as DW-2, and he has spoken about the factum of the defendant having executed the promissory note in respect of amounts borrowed by him. It is also seen that though the defendant attempted to have the disputed signature compared by an expert, she did not pursue the said application. In such circumstances, I find that the First Appellate Court was not in error in holding that the execution of the promissory note was proved by the plaintiff and that the burden shifted to the defendant thereupon to establish non-passing of consideration.

23. Insofar as the passing of consideration is concerned, it is the specific case of the plaintiff himself by marking Ex.A-5, being a bank



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statement, that on the relevant date the plaintiff was not in possession of sufficient funds to have settled the claim of the defendant to the original lender P.Premkumar and thereafter made over the promissory note in his favour. Further, it is also noticed that the sum of Rs.2,00,000/- said to have been borrowed by the defendant from the said P.Premkumar is by way of cash. Secondly the said amount, together with accrued interest is said to have been settled by the plaintiff to the said P.Premkumar, in consideration of which the promissory note has been made over in the plaintiff's favour. In such view of the matter, when the plaintiff himself has chosen to exhibit his bank statement vide Ex.A-5 and the same clearly evidences that the plaintiff could not have settled the amount of Rs.3,26,000/- on the relevant date to and in favour of P.Premkumar and got the promissory note made over in his favour.

24. Curiously, this document has been exhibited by the plaintiff himself probably in order to establish that he was in possession of sufficient funds. However, unfortunately the said document does not come to his



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support to establish the said factum of payment of Rs.3,26,000/-, to the original lender P.Premkumar. In this backdrop, even assuming that the findings of the First Appellate Court regarding due execution is held against the defendant, in view of Ex.A-5, the defendant's stand is fortified by the fact that there was no possibility for the plaintiff who have paid such a huge amount Rs.3,26,000/- to the original lender P.Premkumar which entitled him to have the promissory note made over in his favour. Thus, applying the mandate of Section 118 of Negotiable Instrument Act, I hold that the burden originally on the plaintiff stood shifted to the defendant on a prima facie proof of execution of the promissory note, especially in the light of no contra or rebuttal evidence let in by the defendant. However, insofar as passing of consideration, the defendant has clearly succeeded in rebutting the presumption of consideration having been duly passed under the Negotiable Instrument Act and thereby shifting the burden back to the plaintiff. The plaintiff has not been able to discharge the said burden of proof regarding payment of Rs.3,26,000/- to P.Premkumar which alone would entitle him to the transfer of the promissory note in his favour and thereafter enable him to



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claim the same from the defendant.

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25. One another interesting factor is that in the suit promissory note, the endorsement regarding the making over of the promissory note in favour of the defendant is made on the reverse of the original promissory note. However on a perusal of the original promissory note, I find that though the original lender, P.Premkumar appears to have signed below an endorsement which states that he has transferred the promissory note together with the equitable mortgage rights in favour of K.N.Prasad for valuable consideration of Rs.3,26,000/- received by him on 17.8.1998, I find an endorsement made by the counsel for the plaintiff on 15.02.1999, that there is no endorsement on the said reverse of the original promissory note. This certainly raises eyebrows. When the counsel for the plaintiff has made in an endorsement that there are no endorsements in the reverse of the promissory note, the genuineness of the endorsement, a shadow of doubt is certainly cast on the genuineness of the endorsement itself. Though it is stated that the entire sum of Rs.3,26,000/- had been received by P.Premkumar from the plaintiff on

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17.08.1998, the mode of payment of the said amount is also not mentioned.

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Moreover, there are no persons who have witnessed the said transaction of making over of the promissory note. Ex.A-5 passbook in the plaintiff's name for the period 13.10.1998 onwards only discloses the fact that the maximum available credit balance was at any point of time was only Rs.1,08,500/- and nothing more. Infact, subsequent to October 1998, it is seen that the balance maintained is only in the range of a few thousands, not exceeding Rs.10000/- at any point of time. Again, viewing it from the angle that this document was exhibited by the plaintiff himself, it only results in playing havoc to his own case. Apart from Ex.A-5, the plaintiff has not produced any shred of evidence, except the oral *ipse dixit* evidence suggesting that he had sufficient funds to pay the original holder of the promissory note. In fact the defendant has not only denied the execution of the promissory note in favour of said P.Premkumar but additionally she has specifically doubted the role of her estranged husband Dr.Chandrasekaran in creating the said promissory note. In this connection she has filed Ex.B-1 and B2. On a perusal of the FIR lodged by her exhibited vide Ex.B-1, it is seen that the defendant has made a



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complaint that she has earned properties out of her own income and her husband was looking after her business and he has access to her cheque books and other documents including bond papers and signed unwritten documents held by her for business purposes, for day-to-day administration& the same were misused by her estranged husband after taking away all the signed blank cheques and signed bond papers and signed blank sheets without her knowledge. Infact the defendant has apprehended that her husband would misuse the documents and conspire against the defendant in order to cause wrongful loss to her. Though the initial burden of proof was discharged by the plaintiff, in the instant case the defendant has been able to thereafter discharge the onus on her to show that the consideration did not exist and that it is highly improbable and doubtful. The burden of proof in such cases of claims made on the basis of promissory note can be discharged by showing direct evidence that consideration non-existent or also by adducing such evidence on record to establish that the preponderance of probability in the light of circumstances placed and relied upon by this court. In such cases it is also needless to state that the defendant is also entitled to



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rely upon the evidence adduced by the plaintiff, as already seen hereinabove the documentary evidence filed on the side of the plaintiff itself comes to the aid of the defendant's case. Thereafter, from over all consideration of pleadings and evidence on record, I hold that the defendant has disproved the presumption originally arising under Section 118(a) of the Indian Evidence Act in favour of the plaintiff, consequent to which the plaintiff not able to prove passing-off proof or existence of consideration.

26. Thus, apart from the fact that the plaintiff has been unable to establish the passing of consideration, coupled with the specific allegation made by the defendant in the written statement and also substantiated by Ex.B-1, it can be safely concluded that the plaintiff has not been able to discharge the burden of proof in so far as passing of consideration is concerned. That being the position, he cannot claim himself to be a bonafide holder of the promissory note in due course.



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27. The Trial Court has discussed all these aspects in great detail and come to a conclusion that the promissory note was not supported by consideration. The Trial Court also found that merely because the application filed by the defendant seeking expert opinion was not pursued, it would not have any adverse impact on her defence. However, the First Appellate Court proceeded on a wrong footing that the presumption under Section 118 of Negotiable Instruments Act, 1881 was available to be applied to the facts of the present case, when the defendant had categorically denied the very execution of the promissory note itself and also passing of the consideration. The First Appellate Court clearly fell in error in placing the burden of proof on the defendant. The First Appellate Court has not even discussed the issue of the capacity of the plaintiff to have paid a sum of Rs.3,26,000/- to the original lender P.Premkumar at the first instance which alone would have entitled him to making over of the promissory note in his favour. It is also brought out in evidence that the plaintiff is closely related to the estranged husband of the defendant. All these aspects have not been properly appreciated by the First Appellate Court before reversing the well-considered



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findings of the Trial Court. Infact, by applying Section 114 of the Evidence Act the Court could have only presumed having regard to common course of natural events, human conduct as well as public and private business, that the promissory note could not have been endorsed in favour of the plaintiff for valuable consideration.

28. Answering the submission of the counsel for the respondent that the fact that the defendant did not reply to the pre-suit notice, it would be fatal to her case in the suit, I am unable to accept the said submission. **In C.T.Devaraja, Proprietor of Jayalakshmi Industries and also of ‘Vil Ambu’ a Tamil Weekly, T.Nagar, Madras, reported in (2008) 8 MLJ 862,** this court has held that *“The contention, that no reply was given to the lawyer’s notice and that this would prove admission of the fact of instruction and defamation is too absurd to be discussed. Law in the Republic of India will not oblige the man who receives such an absurd and vexatious notice to reply to it”*.



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29. Merely because a pre-suit notice is not replied to, it would certainly not be fatal to the defence to be set-up by the defendant subsequently in the suit. It is always open to the defendant to explain or justify as to why a reply was not sent to such a pre-suit notice. The defendant cannot be non-suited and his defence struck off just because he did not send a reply to the pre-suit notice. Non-reply to a pre-suit notice would never become fatal to the defendant's case. Hence, I am unable to agree with the arguments advanced by the counsel for the respondent in this regard.

For all the foregoing discussions, I answer all the three substantial questions of law in favour of the appellant. The second appeal is allowed. However, there shall be no order as to costs.

22.09.2023.

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Neutral Citation: Yes/No
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To

- 1.The V Additional City Civil Judge, Chennai,
- 2.The XI Assistant Judge, City Civil Court, Chennai

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P.B.BALAJI, J.,
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Pre-delivery Judgment in
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