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AS.No.189 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2024

(Reserved on 24.07.2024)

CORAM :

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

and

THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

A.S.No.189 of 2024

and

CMP.No.6990 of 2024

R.Venkatesan @ Venkatesh

... Appellant

vs.

Jitesh Kumar Jain

... Respondent

Prayer : Appeal filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 28.08.2023 in O.S.No.109 of 2021 on the file of the VI Additional City Civil Court, Chennai.

For Appellant : Mr.C.R.Prasanan

For Respondent : Mr.C.P.Sivamohan

JUDGMENT

(Judgment of the Court was made by **R.SUBRAMANIAN, J.**)

With the consent of the counsel on either side, the appeal itself is taken up for final disposal since the records of the trial Court has been received.



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2. Challenge in this appeal is to the decree for payment of money granted by the trial Court in O.S.No.109 of 2021 in favour of the respondent herein. The respondent/plaintiff sued for recovery of a sum of Rs.34,40,000/- allegedly due under a promissory note dated 25.12.2017 with interest at 12% per annum on the sum of Rs.20,00,000/- from the date of plaint till date of realisation.

3. The substance of the averments in the plaint is as follows:

The defendant and his brother Mr.R.Govindaraj had moved the plaintiff's father Manohar Jain who was a money lender. On the recommendation of the said Govindaraj and upon request by the defendant, the plaintiff's father advanced a sum of Rs.5,00,000/- to the defendant during October 2013. As a security for repayment of the said sum of Rs.5,00,000/- with interest at 24% per annum, the defendant had executed a simple mortgage in favour of the father of the plaintiff on 18.10.2013 and the same was registered as Document No.4107 of 2013 in the office of the Sub Registrar, Anna Nagar. The original title deeds relating to the property that was mortgaged, were also deposited with the plaintiff's father. Though the defendant had agreed to repay the monies



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borrowed within three years, he did not repay as assured and he was buying time on some pretext or the other. While so, in or about October 2015, the defendant informed the plaintiff that he requires a sum of Rs.20,00,000/- over a period of two years for development of his business. Despite reluctance, the plaintiff and his father were lured by the defendant to advance monies to him on the pretext that the original sum of Rs.5,00,000/- advanced on the strength of the mortgage in the year 2013 will also be repaid along with interest only if he is able to plough in more money into his business. After informing the defendant's brother regarding the transaction, the plaintiff paid a sum of Rs.20,00,000/- over a period of two years. The defendant executed a temporary receipt for Rs.5,00,000/- on 25.12.2017. After payment of the entire amount of Rs.20,00,000/-, the defendant offered to execute a second mortgage in respect of the property that was covered by the simple mortgage dated 18.10.2013. However, the plaintiff insisted upon some other property security. The defendant came forward with the suggestion to deposit the original title deeds of the property belonging to his brother situate at Kanchipuram as security for repayment of the entire loan. The plaintiff, believing the defendant's assurance, obtained a promissory note on 25.12.2017, wherein, the defendant promised to repay the sum of Rs.20,00,000/- with interest at 24% per annum. It is also claimed that the original sale deed dated 28.08.2006 relating to the property



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situate at Kancheepuram was also deposited as security. To his dismay, the defendant neither repaid the loan covered by the mortgage deed nor the loan covered by the promissory note. During October 2020, the defendant met the plaintiff and pleaded sometime in view of the outbreak of the pandemic. The plaintiff agreed to wait subject to the defendant making a token payment of not less than Rs.5,000/- and endorsing the same on the promissory note. According to the plaintiff, the defendant who agreed to pay an amount not less than Rs.5,000/-, did not come back with the payment. As things stood thus, the defendant issued a legal notice on 21.10.2020 requiring the plaintiff to accept the principal amount due under the mortgage and with interest from November 2016 and also seeking return of the sale deeds. Surprisingly, the said notice also claimed that the plaintiff and defendant's brother Govindaraj had colluded together and created documents. The plaintiff sent a reply on 11.11.2020. A copy of the same was also marked to R.Govindaraj, the brother of the defendant. In the above circumstances, the plaintiff had lodged the suit for recovery of a sum of Rs.20,00,000/- due under the promissory note. As regards the debt secured by the mortgage, the plaintiff reserved his right to proceed independently under Section 69 of the Transfer of Property Act, 1882, since the mortgage deed authorised him to proceed under Section 69.



4. The defendant resisted the suit contending that he had no necessity to borrow any money since he has been a Cab driver and he meets out the family expenses from the income derived from the said job. It is the defendant's brother Govindaraj who was carrying on construction business and was a good friend of the plaintiff and his father, had colluded with the plaintiff to mulct an enormous liability on the defendant. The defendant admitted the borrowing of Rs.5,00,000/- under the mortgage. He would claim that the plaintiff extracted several documents from him including blank promissory notes and other stamp papers. The claim that the documents in respect of the Kancheepuram property were handed over by the defendant was stoutly denied. It was also claimed that the suit promissory note is not supported by consideration. The defendant also relied on the fact that he had issued the notice even prior to the filing of the suit on 21.10.2020 denying execution of the promissory note. The defendant also claimed that the entire transaction is a make believe affair stage-managed by the plaintiff and the defendant's brother Govindaraj to grab his property. The alleged meeting on 15.10.2020 or any other date was disputed.

5. On the above pleadings, the learned trial Judge framed the following issues:



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1. Whether the defendant has borrowed Rs.20,00,000/- from the plaintiff?

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2. Whether the defendant has executed two promissory notes, one dated 23.10.2015 which was cancelled and demand promissory note for Rs.20,00,000/- dated 25.12.2017 for valid consideration?

3. Whether the plaintiff is entitled for interest at the rate of 24% per annum on the principal amount from 25.12.2017?

4. Whether the plaintiff is entitled for decree as claimed in the suit?

5. Whether else reliefs the parties are entitled to?

6. At trial, on behalf of the plaintiff, he was examined as PW1 and one Prabakar was examined as PW2. Exs.A1 to A7 were marked. On the side of the defendant, the defendant was examined as DW1 and no other document was marked. On a consideration of the evidence on record, the learned trial Judge concluded that the promissory note Ex.A4 is supported by consideration and hence, the defendant is liable to the suit claim. The trial Court heavily relied upon the fact that the defendant admitted his signatures in the suit promissory note in view of the presumption under Section 118 of the Negotiable Instruments Act, 1881. The trial Court faulted the defendant for not letting in any other evidence except his oral evidence. On the above conclusions, the learned trial Judge decreed the suit. Aggrieved, the defendant is on appeal.



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7. We have heard Mr.C.R.Prasanan, learned counsel appearing for the appellant and Mr.C.P.Sivamohan, learned counsel appearing for the respondent.

8. Mr.C.R.Prasanan, learned counsel appearing for the appellant would vehemently contend that the trial Court erred in relying upon the presumption enacted in Section 118 of the Negotiable Instruments Act, 1881. The learned counsel would vehemently contend that once it is claimed by the defendant that the suit promissory note was signed in blank and the same was not supported by consideration and a probable case is made out by the defendant which would have the effect of improbabilising the plaintiff's claim, the Court cannot mechanically rely upon the presumption created by Section 118 to grant a decree. In order to buttress his submission, the learned counsel would rely heavily upon the evidence in cross examination of PW1. Drawing our attention to various answers in the cross examination of PW1, the learned counsel would submit that the presumption raised under Section 118 of the Negotiable Instruments Act, 1881, stood rebutted.

9. The first contention of the learned counsel on the evidence is that



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the plaintiff who was aged only 23 years at the time of lending, did not have the wherewithal to lend such huge amount of Rs.20,00,000/-. Drawing our attention to the claim of the plaintiff that the amount was paid on different dates between October 2015 and December 2017 would by itself show that the claim of the plaintiff is artificial. He would also draw our attention to the evidence that the plaintiff had admitted that he is an income-tax assessee, but he has chosen to add that he does not remember as to when he became an assessee. This, according to the learned counsel, is only to explain the failure to produce the income tax returns to demonstrate the borrowing. The learned counsel would also point out that a money lender like the plaintiff who charges exorbitant interest of 24%, would never lend money for over a period of two years without any security whatsoever. The learned counsel would also draw our attention to the claim of the plaintiff that he is not maintaining any statement of accounts and the answer 'No' given by the plaintiff to a suggestion whether he has disclosed all the payments made to the defendant in his income tax returns. These answers, according to the learned counsel, would demonstrate without any further proof that the promissory note is not supported by consideration.

10. Further reliance is also placed by the learned counsel on the cross



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examination of PW1, where, he admits that he was just 21 years old in 2015 when he claims that the actual lending started and that he has not filed any document to show part payments were made prior to 25.12.2017 namely, the date of execution of the promissory note. The following questions and answers is heavily relied upon by the learned counsel to contend that the entire claim is fictitious:

"Ques : I put it to you that you have not filed any document to show that you have made payment to the defendant on 25.12.2017?

Ans : I have not filed document to show that on 25.12.2017 what amount I have paid to the defendant. But on 25.12.2017 the defendant had executed Ex.A4 promissory note.

Ques : I put it to you that you did not have such a source and means to pay such a huge amount of Rs.20 Lakhs to the defendant?

Ans : I deny the suggestion. Even during my student life, I was doing small business and also avail financial help from my parents and grand parents, friends and thereby I had a source."

11. The learned counsel for the appellant would also draw our attention to the evidence of PW2, the alleged Attestor of the promissory note dated 25.12.2017 just to demonstrate that his evidence runs counter to the evidence of PW1 and that it is artificial. While the plaintiff in his evidence would claim that monies were paid for over a period of 2 years from October 2015 to December 2017 and the suit promissory note was executed on



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25.12.2017, PW2 would claim that the defendant received more than Rs.10,00,000/- on 25.12.2017 at the time of execution of the document.

Pointing out to the above contradiction, the learned counsel would submit that the evidence of PW2 cannot be safely relied upon as proof of execution of the instrument. The learned counsel would also invite our attention to a judgment of the Hon'ble Supreme Court in **Bharat Barrel & Drum Manufacturing Company vs. Amin Chand Payrelal** reported in (1999) 3 SCC 35, wherein, the Hon'ble Supreme Court has held that the rebuttal of the presumption under Section 118 can be done by direct evidence or by preponderance of probabilities showing existence of consideration was improbable, doubtful or illegal. He would also invite our attention to the judgment of a Division Bench of this Court to which one of us (**R.SUBRAMANIAN, J.**) was a party in **T.Mohan Kumar vs. R.Asok Kumar** reported in 2024 (1) MWN (Civil) 734, where, it was held that if the plaintiff fails to prove that he was in possession of funds on the date of the alleged advance, the presumption under Section 118 stood rebutted.

12. Contending contra, Mr.C.P.Sivamohan, learned counsel appearing for the respondent would submit that once the execution of the promissory note is admitted, then, it is for the defendant to show absence of consideration. In



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the absence of any other evidence except his interested testimony, the defendant had failed to discharge the initial burden in order to shift the onus on the plaintiff to prove consideration. The learned counsel would contend that the discrepancies that have been pointed out by the learned counsel for the appellant cannot in any manner belittle or efface the presumption under Section 118 of the Negotiable Instruments Act, 1881. The fact that the defendant had borrowed from the father of the plaintiff by executing a mortgage deed, was also pressed into service to buttress the contention of the learned counsel.

13. We have considered the rival submissions.

14. On the arguments of the counsel for the parties, the following point arises for determination:

Whether the trial Court was justified in invoking the presumption without advertent to the conflicts and contradictions in the evidence of PW1 and PW2 as well as between the proof affidavits filed in chief examination and the cross examination of the plaintiff as PW1.

On the Point

No doubt, Section 118 of the Negotiable Instruments Act, 1881, enacts



the presumption as to consideration once the execution of the promissory note is admitted, but the said presumption is rebuttable. How the said presumption could be rebutted is laid down by the Hon'ble Supreme Court in **Bharat Barrel & Drum Manufacturing Company's case** referred to supra. The Hon'ble Supreme Court while dealing with the said question, had observed as follows:

"12. Upon consideration of various judgments as noted herein above, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in



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his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and Andhra Pradesh High Court in this regard."

15. In **T.Mohan Kumar's case** referred to supra, this Court after referring to the judgments in **Bharat Barrel & Drum Manufacturing Company's case** (supra) and **Hiralal vs. Badkulal** reported in **AIR 1953 SC 225**, wherein, the Supreme Court had held that the defendant may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff, had held that direct evidence of absence of consideration is not the only mode of proving



absence of consideration. Surrounding circumstances and probabilities can also be relied upon by the Court to non suit the plaintiff on the ground of absence of consideration.

16. If we are to examine the evidence on record in the light of the above observations of the Hon'ble Supreme Court, we find the following features:

(i) The plaintiff had claimed that his father had lent a sum of Rs.5,00,000/- to the defendant in 2013 and the defendant has neither repaid the interest nor the principal.

(ii) The plaintiff would state that though he was reluctant to advance further sum to the defendant, he had agreed to do so on the recommendation of the defendant's brother sans any security.

(iii) The plaintiff who was aged about 23 years at the time of the lending and claimed that his father was a money lender, had chosen to advance monies without even obtaining any acknowledgment of borrowing from the defendant.

(iv) The plaintiff though claims that he was an income-tax assessee, he has not produced his income-tax returns and he has answered in the negative to a suggestion that he has shown this lending in his income-tax returns.

(v) The plaintiff has not chosen to produce even a scrap of paper to show



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that he was possessed of funds during the relevant period for having lent the money.

(vi) The evidence of PW1 and PW2 are contradicting on the manner in which the money was lent. While PW2 would claim that the plaintiff paid at least Rs.10,00,000/- on 25.12.2017, the date of execution of the promissory note, PW1 would claim that on 25.12.2017, the defendant executed the promissory note acknowledging the receipt of the money earlier.

17. These features definitely would shake or at least weaken the presumption under Section 118. We find that the defendant had probalised his defence by way of cross examination and the answers given by PW1 in the cross examination by themselves would have the effect of rebutting the presumption under Section 118. Once that is done, it will be incumbent upon the plaintiff to place some evidence which would improbabilise the case of the defendant. We find that the plaintiff has miserably failed in establishing or placing such evidence before the Court. As we had already pointed out, the Hon'ble Supreme Court has held that it will be open to the defendant in the suit on a promissory note to improbabilise the case of the plaintiff by establishing circumstances which would have the effect of weakening the presumption under Section 118. The learned trial Judge had gone by the statutory



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presumption without advertent to the evidence on record to decree the suit.

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18. A holistic reading of the evidence of PW1 and PW2 impels us to believe the version of the defendant. Once we find that the version in defence is more probable, we will have to necessarily look for something more than the mere oral evidence of PW1 to establish the passing of consideration. Unfortunately for the plaintiff, the evidence of PW2 is also not very helpful. His evidence contradicts the evidence of the plaintiff. Therefore, if we are to take the entire evidence together, it is clear that the plaintiff has not established passing of consideration and the presumption under Section 118 stood rebutted by the prevailing circumstances. We are, therefore, unable to sustain the findings of the trial Court which do not reflect the impact of the evidence on record.

19. In view of the above conclusion of us, the Appeal Suit stands allowed with costs and the suit in O.S.No.109 of 2021 stands dismissed. Consequently, connected miscellaneous petition is closed.



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(R.S.M, J.) (R.S.V, J.)

27.09.2024

Index : Yes

Neutral Citation : Yes

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To

The Judge,
VI Additional City Civil Court,
Chennai.



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R.SUBRAMANIAN, J.

and

R.SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT

MADE IN

A.S.No.189 of 2024

DATED : 27.09.2024