(2013) 12 MAD CK 0075

Madras High Court

Case No: Appeal Suit No. 119 of 2005

V.S. Veerasamy and Another	APPELLANT
Vs	
K. Subramaniam	RESPONDENT

Date of Decision: Dec. 20, 2013

Citation: (2014) 1 LW 316

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: G. Rajagopalan, for Mr. N. Srinivasan, for the Appellant; S. Parthasarathy, for M/s. Sarvabhauman Associates, for the Respondent

Judgement

R.S. Ramanathan, J.

The defendants in O.S. No. 1023 of 1994 on the file of the Second Additional Subordinate Judge, Coimbatore are the appellants. The respondent/plaintiff filed a suit for recovery of a sum of Rs. 8,28,000/- with subsequent interest from the appellants/defendants and the Court below passed a preliminary decree for a sum of Rs. 4,72,000/- and aggrieved by the same, this Appeal is filed. The case of the respondent/plaintiff is as follows:-

The appellants are husband and wife and on 27.1.1992, they jointly borrowed a sum of Rs. 20,000/- from the plaintiff and executed a registered mortgage deed in favour of the plaintiff for the said sum and also deposited original title deeds of the property, which was mortgaged with the plaintiff. Subsequently, on 6.5.1992, they borrowed a total sum of Rs. 6,00,000/- from the plaintiff and executed 2 promissory notes for a sum of Rs. 3,00,000/- each and also created equitable mortgage for the said sum of Rs. 6,00,000/- by depositing the documents of title deed which were already deposited with the plaintiff for the earlier mortgage and the defendants agreed to pay 15% interest per annum on the amount borrowed from the plaintiff. No payment was made by the defendants either towards principal or towards interest and on 25.7.1994, the plaintiff came to know that the defendants were attempting to sell their property and therefore, he filed the suit for recovery of a

sum of Rs. 8,28,000/- due on the mortgage created by the defendants.

2. The first defendant filed a statement denying the allegation that on 27.1.1992, he and his wife borrowed a sum of Rs. 20,000/- and executed a mortgage deed and also borrowed a sum of Rs. 6,00,000/- on 6.5.1992 and executed 2 promissory notes and created an equitable mortgage in favour of the plaintiff agreeing to repay the same with 15% interest per annum. But, the defendants admitted that they borrowed a sum of Rs. 2,00,000/- from the plaintiff on 27.1.1992 and executed a mortgage deed for a sum of Rs. 20,000/- as per the request of the plaintiff and also executed 6 blank promissory notes and handed over the same to the plaintiff. Out of the six blank promissory notes, 2 promissory notes were signed by the first defendant and 2 promissory notes were signed by the second defendant and the remaining 2 blank promissory notes were signed by both the defendants. The plaintiff also obtained the title deeds of the property as a further security and also got further 4 blanks cheques signed by the first defendant drawn on Union Bank of India. Thereafter, the first defendant paid a sum of Rs. 89,000/- on various occasions through Account Payee Cheques drawn on State Bank of Bikaner & Jaipur in favour of the plaintiff. Subsequently, the first defendant issued 3 cheques for a total sum of Rs. 59,000/- in the name of Lakshmana Perumal and two cheques for a total sum of Rs. 14,000/- in the name of Rangasamy, who was a close associate of the plaintiff and therefore, the defendants have paid a sum of Rs. 1,60,000/- towards the loan received by them. On 18.2.1994, balance was arrived at and the plaintiff agreed that the defendants were liable to pay Rs. 1,37,000/- and a cheque bearing No. 749016 drawn on State Bank of Bikaner and Jaipur for the amount was issued on 5.4.1994. That cheque was returned by the plaintiff on the request of the first defendant as he could not raise the fund and thereafter, the first defendant issued 4 post dated cheques drawn on State Bank of Bikaner and Jaipur bearing Nos. 749047 to 749050 dated 5.7.1994, 10.7.1994, 18.7.1994 and 2.8.1994 for a sum of Rs. 45,000/-, Rs. 50,000/-, Rs. 21,000/- and Rs. 21,000/- respectively. However, the first defendant was not able to raise funds for the first two cheques and therefore, issued a letter to the plaintiff dated 2.7.1994 requesting the plaintiff not to present the two cheques dated 5.7.1994 and 10.7.1994 on the respective dates and requested him to present those cheques on 20.7.1994 and 27.7.1994. The plaintiff agreed to the request of the first defendant and returned 2 cheques bearing No. 749049 and 749050 which were issued for a sum of Rs. 21,000/- each and demanded fresh 2 cheques and the first defendant issued two cheques drawn on Lakshmi Vilas Bank on 18.4.1994 and 2.8.1994. In those 2 cheques, the first defendant filled up the amount and those 2 cheques were realised by the plaintiff through one Murugesan and therefore, the defendants are liable to pay only a sum of Rs. 95,000/- against the loan of Rs. 2 lakhs received. The plaintiff also presented Cheque Nos. 749047 and 749048 by filling the payee''s name as Balaji and those cheques were dishonoured and the payee Balaji filed a criminal complaint against the first defendant in C.C. No. 745 of 1994 before the Judicial Magistrate No. 1, Coimbatore and the criminal case was also dismissed

on 28.2.1996. Therefore, according to the first defendant, he was liable to repay only Rs. 95,000/- and he never borrowed Rs. 6,00,000/- as alleged by the plaintiff.

3. On the basis of the above pleadings, the following issues were framed:-

(i) Whether the defendants executed a mortgage deed and availed loan from the plaintiff?

(ii) Whether the defendants have repaid various amounts as stated in the written statement?

(iii) Whether the plaintiff is entitled to claim the amount as stated in the plaint?

(iv) To what relief, the plaintiff is entitled to ?

4. On the side of the plaintiff, 3 witnesses including the plaintiff were examined and on the side of the defendants, 3 witnesses including the first defendant were examined. On the side of the plaintiff, 8 Exhibits were marked and 13 Exhibits were marked on the side of the defendants. The lower Court tried issues 1 to 3 together and held that under Ex. A. 1, the defendants borrowed a sum of Rs. 20,000/- and executed a mortgage deed on 27.1.1992 for the said amount and deposited Exs. A. 2 to A. 5 and on 6.5.1992, the first defendant executed a pro-note for a sum of Rs. 3,00,000/- and on the same date, the second defendant also executed a pro-note for Rs. 3,00,000/- under Exs. A. 6 and A. 7 and that was proved by the plaintiff by examining PWs. 2 and 3 and for the loan amount of Rs. 6,00,000/-, documents were deposited with the intention of creating equitable mortgage and the defendants have repaid a sum of Rs. 1,48,000/- and liable to repay Rs. 4,72,000/- and decreed the suit for Rs. 4,72,000/- and passed preliminary decree. Aggrieved against the same, this appeal is filed by the defendants.

5. Mr. G. Rajagopalan, learned Senior Counsel appearing for the appellants, submitted that the Court below erred in holding that the defendants/appellants borrowed a sum of Rs. 6,00,000/- on 6.5.1992 and executed 2 promissory notes and also deposited title deeds, which were already deposited with the plaintiff and on 27.1.1992, the defendants borrowed a sum of Rs. 2,00,000/- and executed a mortgage for Rs. 20,000/- as per the request of the plaintiff and also proved various payments as evidenced by Exs. B. 4 to B. 13 and there was no necessity for the defendants to execute mortgage deed for Rs. 20,000/- after having obtained the loan for Rs. 2,00,000/- and the plaintiff denied various payments made by the defendants and that was also falsified by the appellants by producing Exs. B. 4 to B. 13 and therefore, the Court below ought to have held that the defendants/appellants are liable to pay only Rs. 95,000/- as claimed by the defendants and the Court below ought not to have decreed the suit for Rs. 4,72,000/-. He also submitted that the execution of Exs. A. 6 and A. 7 is not proved by the plaintiff and the defendants only admitted the signature and did not admit the execution of the promissory note and that the admission of signature would not

amount to proof of execution and relied on the judgment reported in Sayyaparaju Surayya Vs. Koduri Kondamma, ; N. Ethirajulu Naidu Vs. K.R. Chinnikrishnan Chettiar, ; 1997 (II) CTC 385 in the matter of S.S.M. Soundappan and 5 others v. K.G. Balakrishnan and 14 others, in support of his contention. The learned Senior Counsel also submitted that having regard to the conduct of the respondent/plaintiff in denying the receipt of various payments made by the defendants towards the amount, the Court ought to have drawn adverse inference against the plaintiff and ought not to have believed the case of the plaintiff with respect to Exs. A. 6 and A. 7.

6. On the other hand, Mr. S. Parthasarathy, learned Senior Counsel appearing for the respondent/plaintiff, submitted that the plaintiff proved the payment of consideration of execution of Exs. A. 6 and A. 7 by examining PWs. 2 and 3 and once the signature is admitted, the presumption can be drawn u/s 118 of the Negotiable Instruments Act regarding the passing of consideration and the case of the defendants that blank promissory notes were executed for the loan availed for a sum of Rs. 2,00,000/- and issuance of various cheques cannot be believed. He also submitted that the evidence of DW. 1 is contrary to the statement filed by him and having advanced a sum of Rs. 2,00,000/- as per the statement of the first defendant, the plaintiff would not have obtained mortgage deed for Rs. 20,000/- and such story cannot be believed. He also submitted that admission of signature in respect of sale deed and other documents can be equated to the admission of execution of the promissory note and even assuming that the blank promissory notes were executed as alleged by the appellants, u/s 20 of the Negotiable Instruments Act, the name of the payee can be filled up by the person to whom the blank promissory notes were given and by giving blank promissory notes, prima facie authority was given to the holder; to complete the document and make it negotiable and therefore, once the defendants admitted the signature of the promissory note, it is for them to prove that the blank promissory notes were executed without receiving any consideration received as stated therein but for some other purpose. He also relied on the judgment reported in Samikannu Naicker Vs. Sigamani, and K. Mani Vs. Elumalai, , in support of his contention. He, therefore, submitted that the defendants/appellants failed to prove that they gave only blank promissory notes and the defence taken by them in the statement was not spoken to in evidence while DW. 1 was examined and even the plaintiff did not admit various payments and according to the plaintiff, various cheques were issued for other transactions. Therefore, the defendants are liable to pay the amount. He also submitted that even according to the defendants, the registered mortgage deed Ex. A. 1 was executed on 27.1.1992 and at the time of execution of mortgage deed, the original documents of title of Exs. A. 2 and A. 8 were also obtained and having executed the mortgage, the defendants would not have executed the blank promissory notes as claimed by them. He also submitted that when the plaintiff was having custody of the documents of title which were deposited in connection with the earlier mortgage, the same documents of title

deed were retained for subsequent loan and there is nothing unnatural and this aspect was properly appreciated and the lower Court rightly decreed the suit for a sum of Rs. 4,72,000/-.

7. On the basis of the above submissions, the following points for consideration arise in this appeal:-

(i) Whether the appellants borrowed a sum of Rs. 6,00,000/- on 6.5.1992 as claimed by the respondent/plaintiff and executed 2 promissory notes in favour of the plaintiff?

(ii) Whether the appellants deposited the title deeds for the loan of Rs. 6,00,000/-?

(iii) Whether the defendants borrowed a sum of Rs. 2,00,000/- on 27.1.1992 and executed a mortgage deed for a sum of Rs. 20,000/-?

8. The appellants admitted signature in Exs. A. 6 and A. 7 and submitted that those 2 promissory notes were executed at the time of execution of Ex. A. 1 for a sum of Rs. 20,000/-. It is the specific case of the appellants that on 27.1.1992, a sum of Rs. 2,00,000/- was borrowed from the plaintiff and for that, mortgage for a sum of Rs. 20,000/- was executed and for that purpose, 6 blank promissory notes were executed as stated in the written statement and also four blank cheques drawn on Union Bank of India signed by the first defendant were given to the plaintiff. u/s 20 of the Negotiable Instruments Act, when a blank Promissory Note was executed, the executant gives authority to the holder to fill the blank promissory note and therefore, when the signature in the Promissory Note is admitted, the execution of the Promissory note and passing of consideration can be presumed as admitted and it is for the defendants to prove that they did not receive any consideration for the Promissory Notes executed by them and the Promissory Notes were obtained for other reasons. In the judgment reported in 2002-3-L.W. 692 and K. Mani Vs. Elumalai, , the said principle has been reiterated.

9. In the judgment reported in AIR (37) 1950 Mad. 239 [C.N. 109] and N. Ethirajulu Naidu Vs. K.R. Chinnikrishnan Chettiar, , it has been stated that when a person admitted his signature on a blank piece of paper and that blank piece of paper was fabricated later into a document, the onus of proof of the execution of the document is on the plaintiff who sues on the document. In the judgment reported in 1997 (II) CTC 385, cited supra, the following passage from "Pollock & Mulla-Indian Contract and Specific Relief Act"-11th Edition (1995), is usefully extracted for the purpose of the case.

The plea of non-est factum applies where a party signs a document and hands it over to the other party in order to enable him to fill in details and complete the transaction and the document is not in accordance with the instructions of the executant. Even in that case, he will be bound if it is not essentially different in substance or in kind from the intended transaction. The burden of proof is on the

executant that he acted carefully and if he fails to show it he will be bound. But, negligence on the part of the executant will be a bar to the plea on non est factum.

10. Therefore, when the defendants acted negligently and executed blank Promissory Notes, they are bound by the same and it is not open to them to take the plea that the documents cannot be acted upon as no consideration was passed. Further, the judgments reported in Sayyaparaju Surayya Vs. Koduri Kondamma, and N. Ethirajulu Naidu Vs. K.R. Chinnikrishnan Chettiar, , cannot be applied to the facts of the case. In these cases, the fabrication of document on the basis of the signature on a blank paper was considered and it was also proved that only signature was obtained in blank papers. On the contrary, in this case, PWs. 1 to 3 gave evidence regarding the execution of Exs. A. 6 and A. 7 Promissory Notes, and no worthwhile examination was conducted to disbelieve their version. Further, the case projected by the appellants for executing these 6 Promissory Notes and 4 blank cheques drawn on Union Bank of India for the loan of Rs. 2,00,000/- after executing a mortgage deed cannot be believed. No prudent person can obtain a mortgage for Rs. 20,000/- after advancing a loan of Rs. 2,00,000/-. Further, the conduct of the appellants would also make it clear that they would not have given blank Promissory Notes and blank cheques.

11. As stated supra, the defendants alleged in the written statement that 6 blank Promissory Notes were executed and 4 cheques drawn on Union Bank of India were also given. It is also submitted in the written statement that Rs. 89,000/- was paid through cheques drawn on State Bank of Bikaner & Jaipur in favour of the plaintiff and as per the evidence of DW. 2, bank officials from the State Bank of Bikaner & Jaipur, 5 cheques were given, 3 cheques were in the name of the plaintiff, which were encashed by the plaintiff and 3 cheques Ex. B. 4 to B. 6 were drawn on State Bank of Bikaner & Jaipur, 2 cheques were drawn on Corporation Bank. They are Exs. B. 7 and 8 and 2 cheques were drawn on Corporation Bank, they are Exs. B. 9 and 10 and they were also encashed by the plaintiff. When the defendants have given 4 blank cheques along with the blank promissory notes, without getting return of those cheques drawn on Union Bank of India, the defendants would not have given 5 cheques for a sum of Rs. 89,000/-. Further, the defendants have also stated in the statement that the amount was calculated and the plaintiff agreed to receive Rs. 1,35,000/- on 5.4.1994 and obtained 4 cheques in July 1994 and August 1994 for various amounts and 2 cheques were misused by presenting the cheques through some other person and also instituted a criminal complaint which was later dismissed as evidenced by Ex. B. 3 and even, thereafter, no notice was sent by the defendants calling upon the plaintiff to return the blank Promissory Notes or the various cheques issued by him. DW. 1 also stated that 18.7.1994 and 2.8.1994, he issued 2 cheques drawn on Lakshmi Vilas Bank for a sum of Rs. 21,000/- each and those 2 cheques were encashed through one Murugesan and no attempt was made to prove the same. The above facts would also lead to the conclusion that the case of the appellants cannot be believed and the plaintiff proved his case.

12. Therefore, taking into consideration the very conduct of the parties, the lower Court rightly held that the plaintiff proved the execution of mortgage Ex. A. 1 mortgage deed and Exs. A. 6 and A. 7, Promissory Notes, and the defendants received Rs. 6,20,000/- from the plaintiff and paid Rs. 1,48,000/- and decreed for the remaining amount. The lower Court also rightly held that the mortgage was created by the defendants by depositing title deeds in respect of the loan availed on 6.5.1992 and for 2 Promissory Note executed by them, and rightly passed the preliminary decree for Rs. 4,72,000/- after deducting the amount paid by the defendants. Hence, I find no infirmity in the finding of the Court below and the points for consideration are answered against the appellants holding that the plaintiff proved consideration of Exs. A. 6 and A. 7 and also the creation of mortgage for the loan availed under Exs. A. 6 and A. 7. The judgment and decree passed by the Court below are confirmed and the Appeal is dismissed. There is no order as to costs.