**(2008) 10 KL CK 0042**

**High Court Of Kerala**

**Case No:** C.R.P. No. 1085 of 2005

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| Peringottukara Finance and Investments Co. | | APPELLANT |
| | Vs | |
| Harikumar C. and Others | | RESPONDENT |

**Date of Decision:** Oct. 3, 2008

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 115
- Negotiable Instruments Act, 1881 (NI) - Section 118

**Citation:** (2008) 4 ILR (Ker) 492 : (2008) 3 KLJ 655

**Hon'ble Judges:** Harun-Ul-Rashid, J

**Bench:** Single Bench

**Advocate:** V.R. Kesava Kaimal and N.M. Madhu, for the Appellant; Mathew John (K) and Sujesh Menon V.B., for the Respondent

**Judgement**

@JUDGMENTTAG-ORDER

Harun-Ul-Rashid, J.
The unsuccessful plaintiff/appellant who suffered concurrent decrees passed by the courts below is the revision petitioner. The parties herein are referred to as the plaintiff and defendants as in the suit.

2. According to the plaintiff, the 1st defendant and defendants 2 and 3 as guarantors availed a business loan of Rs. 10,000/- from the branch of the plaintiff company and executed a Promissory note agreeing to repay the amount with interest at the rate of 21 % per annum with quarterly rests. Out of the three defendants, defendants 2 and 3 remained exparte. The 1st defendant who contested the suit interalia contended that no loan was sanctioned to him as alleged in the plaint, that in fact the 1st defendant had some earlier financial transactions with the plaintiff company for which the 2nd and 3rd defendants stood as guarantors. It is also contended that for the said purpose defendants were asked to

affix their signatures on unfilled printed form of a promissory note wherein two revenue stamps were affixed. The 1st defendant also issued a signed blank cheque and another blank stamp paper for the said transaction. The agreed rate of interest for the said transaction was 16% simple interest per annum.

3. Before the trial court, PWs 1 and 2 were examined and Exts. A1 to A4 were produced. On the defendants'' side DW1 was examined and Exts. B1 and B2 were produced and marked. Exts. B1 and B2 are receipts issued by the plaintiff for repayment of Rs. 7,000/- and Rs. 613/- respectively.

4. The trial court examined the question as to whether the Promissory note is one executed by the defendants or not and whether it was supported by consideration. The trial court on evidence held that the plaintiffs evidence is not sufficient to prove the execution of the Promissory note and therefore entered the finding that Ext. A1 Promissory note cannot be accepted as one duly executed by the defendants. The trial court also took into consideration the fact that besides Ext.A1 promissory note, there were other records like agreement, Loan register, Cash book, Pay-in-slip and other connected records in respect of the alleged loan availed of by the defendants and nothing has been produced in support of Ext.A1 promissory note. The trial court also arrived at such a conclusion taking note of the fact that no attestor to Ext. A1 promissory note was examined. P W2 is neither an attestor to Ext.A1 promissory note was examined. PW2 is neither an attestor nor is he its scribe. Therefore I am of the view that, the findings entered by the trial court on facts which were confirmed by the lower appellate court on the very same materials cannot be interfered with in this revision.

5. Both the courts below examined the question in view of the presumption u/s 118 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the ''Act''). The courts below rightly held that the presumption u/s 118 of the said Act arises either when execution of the Promissory note is admitted by the defendants or it is duly proved by the plaintiff. Since neither of these circumstances are available, the courts below held that the evidence on the side of the plaintiff is unsatisfactory and the presumption u/s 118(a) is not attracted.

6. When the courts below have entered concurrent findings on the basis of pure questions of fact, this Court would not ordinarily interfere with those findings and review the evidence for the third time in revision u/s 115 of the C.P.C. unless there are exceptional circumstances justifying departure from the normal practice. However the case before this Court has nothing unusual in it and only involves pure question of fact.

7. The learned Counsel for the revision petitioner/plaintiff brought to my attention the decision of the Supreme Court in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, and also an unreported decision of this Court in C.J. John v. Kathru and Ors. S.A. No. 929 of 1998. He contended that a decree can be granted on the basis of the

admission by the defendants though the claim might not have been made by the plaintiff on that basis is clear from the facts of the case in Firm Srinivas Ram Kumar''s cited supra. In that case which arises out of a suit for specific performance of a contract, the defendants agreed to sell a house to the plaintiff firm for a consideration of Rs. 34,000/-. Out of this consideration, a sum of Rs. 30,000/- was paid by the plaintiff-firm on behalf of the vendors. It is also pleaded that the vendors in their turn put the plaintiff in possession of the house agreed to be sold in part performance of the contract. The defendants contended interalia that they never agreed to sell their house to the plaintiff firm and that the story of a contract of sale as set up by the plaintiff was entirely false. The defendants admitted that they were in need of money and hence approached the plaintiff for a loan and the plaintiff advanced to them a sum of Rs. 30,000/- carrying interest at the rate of 6% per annum. It is also contended by the said defendants that it was entirely facilitating payment of interest due on this loan and not in part performance of the contract of sale that the plaintiff was put in possession of the sale. The learned Sub Judge who heard the case in the second round of litigation concluded on the basis of the finding that the story of contract of sale as alleged by the plaintiff was not established and further held that it was not in pursuance of the house. The learned Sub Judge also held that the defendants'' story was true and that the plaintiff advanced a sum of Rs. 30,000/- to the defendants by way of loan and not as a part payment for the property. In view of these findings the learned Sub Judge dismissed the plaintiff''s claim for specific performance but as the defendants admitted that they had taken a loan of Rs. 30,000/- from the plaintiff, a money decree was given to the plaintiff for this sum against these defendants with interest at the rate of 6% from the date of the suit till realisation.

8. In the appeal and cross-objection filed against the decree thus passed, a Division Bench of the Patna High Court dismissed the appeal of the plaintiff and allowed the cross objection preferred by the defendants and reversed the decree passed by the learned sub Judge to the effect of granting Rs. 30,000/- plus interest to the plaintiff.

9. When the matter was taken up before the Supreme Court in appeal by the plaintiff, the Supreme Court held that the finding of the High Court to the effect that the money decree granted against the defendants was not warranted in law as no case of a loan was made by the plaintiff in the plaint and no relief was claimed on that basis is not sustainable under law. According to the Supreme Court the stand of the High Court is too rigid and technical. The Supreme Court also noted the fact that it was no part of the plaintiff''s case as made in the plaint that the sum of Rs. 30,000/- was advanced by way of loan to the defendants. But it was-certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. It is observed that such a prayer would have been inconsistent with the other prayer is not really material. The Supreme Court also observed that the plaintiff may rely upon different

rights alternatively and there is nothing in the C.P.C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question was directly answered by the Supreme Court in that case. The Supreme Court held that even in the absence of any such alternative case in the plaint it is open to the Court to give him relief on the basis of admission made by the defendants. The general law undoubtedly is that the Court cannot grant relief to the plaintiff in a case for which there is no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendants in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff, a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendants own plea cannot be possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. On the basis of the said reason the Supreme Court held that when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit. In that premise, the Supreme Court allowed the appeal holding that the plaintiff is entitled to a money decree for the sum of Rs. 30,000/- against the defendants with interest at 4% per annum from the date of suit till realisation.

10. The question that arises for decision in this case is that can the court pass a decree on the basis of admission by the defendant though the claims might not have been made by the plaintiff and that the transaction admitted is an independent transaction not pleaded which is unconnected with the cause of action of the case.

11. The learned Counsel for the defendants vehemently contended that the principle stated in the decision in Firm Srinivas Ram''s case cited supra, is not applicable so far as this case is concerned. According to him, as far as the facts in that case are concerned the decree granted is justifiable. According to him, the transaction in this case in which the amount is due to the plaintiff is an independent transaction which is grossly unconnected with the cause of action of the case, alleged by the plaintiff. The learned Counsel also contended that going by the written statement there is no admission in the pleadings that the 1st defendant owes money to the plaintiff and therefore the cause of action for the suit does not call for passing a decree.

12. In paragraph 3 of the written statement it is pleaded by the 1st defendant that he had some earlier financial transactions with the plaintiff and for the same the 2nd and 3rd defendants stood as guarantors. It is also stated that the agreed rate of interest of the said transaction was 16% simple interest per annum. The Counsel for the respondent contended that a decree cannot be passed on the basis of this admission. To that extent the contention of the Counsel for the defendants is acceptable. But the learned Counsel for the revision petitioner/plaintiff brought to

my notice the testimony of the defendant as DW1. In chief examination he had testified that in the transaction between the plaintiff and the 1st defendant he had borrowed Rs. 20,000/- Ext.B1 and B2 are also produced by him to substantiate his case that he made repayments. The two receipts are produced in order to show that the only transaction between the parties is a loan arrangement prior to the date of execution of Ext. A1 as alleged by the plaintiff. The 1st defendant as DW.1 unequivocally testified before the Court that he owed a balance amount of Rs. 10,000/-and the interest agreed. The averments in the written statement read with the above testimony is a clear admission that he owes Rs. 10,000/- and interest at 16%.

13. It is pointed out by the Counsel for the defendants that the plaintiff having failed to make any claim in the plaint, he is not entitled to claim return of money owed to him in another transaction between the parties. According to him, it is open to the plaintiff in such cases to make alternative case to that effect, make a prayer in the alternative for a decree of money even if the allegation of the money being paid in pursuance to the transaction alleged in the plaint could not be established by evidence even if it may be a case where such a prayer set up in the plaint may be inconsistent and contrary to the plaint claim. As rightly pointed out by the Supreme Court such an alternate relief is permissible w hen a plaintiff may rely upon different rights alternatively and there is nothing in the C.P.C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The rule undoubtedly is that the Court cannot grant relief to the plaintiff in a case in which there is no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. This is the general principle of law applicable to all cases of this nature. But the question here is whether in the absence of any such alternate case is it open to the Court to grant the plaintiff reliefs on the basis of the plain admission of the defendants. In the written statement itself it is unambiguously pleaded by the 1st defendants that there was a transaction between the parties not as alleged in the plaint and that in that transaction he had availed of a loan from the plaintiff. When he entered in the witness box he testified in chief examination itself that after making some payments evidenced by Ext.B1 & B2 there remains a balance of Rs. 10,000/- as on 25.6.1997 and that he is bound to repay the same with 16% simple interest per annum. I find that such a demand of the plaintiff based on the 1st defendant''s own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would when they were expressly admitted by the 1st defendant in his deposition. The learned Counsel for the defendants requested this Court that before passing a decree in favour of the plaintiff, the defendant may be given an opportunity to contest the matter on merits and for that purpose he requested to remand the case for adducing further evidence. For the purpose of granting a decree on the basis of the unequivocal admission of the 1st defendant in the pleadings and in the deposition, I am of the view that no amount of further evidence is necessary. A

decree shall be passed in such cases to avoid multiplicity of proceedings between the parties as well. In such cases there is no necessity for any supporting evidence.

14. When there is an admission on the side of the defendants admitting a transaction, no further proof is required. In such circumstances where no injustice can possibly result to the defendants, it may not be proper to drive the plaintiff to a separate suit. This Court also in an unreported decision in C.J. John v. Kathru and Ors. S.A. 929/1998 accepted the principles of law that a decree can be passed on the basis of admission by the defendants though the claim might not have been made by the plaintiff and a demand of the plaintiff based on the defendant''s own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant. This Court followed the decision in Firm Srinivas Ram v. Mahavir Prasad and Ors. reported in AIR 1951 SCC 177.

16. The learned Counsel for the respondent submitted that the question of seeking reliefs on the basis of admission of the defendant in the written statement was raised for the first time in this revision. The plaintiff is not entitled to get 16% interest till the date of decree passed by this Court. It is also submitted by the Counsel that if a decree was passed by the trial court in favour of the plaintiff, the 1st defendant would not have suffered 16% interest from 25.6.1997 till the date of decree passed by this Court. I find that the said submission has got some force. In the circumstances 16% interest is granted from 25.6.1997 till the date of trial court decree and 12% interest thereafter till the decree passed by this Court in this revision with future interest at the rate of 6% per annum till realisation.

17. On the basis of the principles of law discussed above I am of the view that the plaintiff is entitled to a decree in terms of the admission of the contesting defendant. Accordingly the judgment and decree passed by the courts below are set aside. The plaintiff is granted a decree for recovery of a sum of Rs. 10,000/- together with 16% interest from 25.6.1997 till the date of trial court decree and 12% interest thereafter till the decree passed by this Court in this revision with future interest at the rate of 6% per annum till realisation.

18. This Civil Revision Petition is partly allowed. There will be no order as to costs.