(1996) 1 ALD(Cri) 704 : (1996) 3 ALT 222 : (1996) 2 CivCC 314

Andhra Pradesh High Court

Case No: Second Appeal No. 668 of 1988

Putta Lakshmi Narayana Reddy		APPELLANT
	Vs	
Putta Mysura Reddy		RESPONDENT

Date of Decision: April 23, 1996

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 33
- Evidence Act, 1872 - Section 146
- Negotiable Instruments Act, 1881 (NI) - Section 118

Citation: (1996) 1 ALD(Cri) 704 : (1996) 3 ALT 222 : (1996) 2 CivCC 314

Hon'ble Judges: B.K. Somasekhara, J

Bench: Single Bench

Advocate: C.V. Nagarjun Reddy, for the Appellant; Sanath Kumar, for the Respondent

Final Decision: Allowed

Judgement

B.K. Somasekhara, J.

The appellant and respondent are brothers. The respondent filed Original Suit No. 60 of 1983 in Subordinate Judge''s Court at Proddatur for recovery of Rs. 16,176/- with costs etc., based on Ex. A-1 pronote dated 16-7-1977 alleging that for a consideration of Rs. 9,800/- the appellant had obtained from him, he executed the suit pronote and had agreed to repay it with interest at 12 per cent per annum. On demand he paid Rs. 500/- on 16-7-1980 regarding which an endorsement was made on the back of Ex. A-1 and in spite of the demand and the notice issued to him as per Ex. B-1, which was replied as per Ex. A-3 he did not pay the amount and therefore he had to file the suit. The defendant resisted the suit by denying the execution of the suit pronote and passing of the consideration thereunder. He sought for the dismissal of the suit These issues were framed:

(1) Whether the suit pronote is supported by consideration?

(2) Whether the plaintiff is entitled to recover the claim from the defendant?

(3) To what relief?

2. The plaintiff examined himself as P.W.I and two witnesses as P.Ws. 2 and 3, where as the defendant examined himself as D.W.I and this was by way of oral evidence. By way of documentary evidence Ex. A-1 to A-3 were marked for the plaintiff and Ex. B-1 to B-4 were marked for the defendant. After hearing both the sides and with the materials, the learned Subordinate Judge held that suit pronote is executed by defendant, but it is not supported by consideration. Consequently the suit was dismissed. Thus the plaintiff preferred the appeal. The learned District Judge after hearing both the sides and after reassessment of the whole material before him came to the conclusion that the suit pronote is supported by consideration and therefore set aside the finding of the learned Subordinate Judge and also judgment and decree of the dismissal of the suit. Consequently by allowing the appeal he decreed the suit. That has resulted in the present Second Appeal by the defendant in the suit.

3. In view of the concurrent finding of the courts below that the plaintiff has proved the execution of the suit pronote, Ex. A-1, by defendant and for the adequate reasons given by them this Court finds no reasons to interfere with the same. Therefore the only question of variance between the courts is whether the suit pronote is supported by consideration or not.

4. The learned advocate for the appellant has raised the following questions of law or substantial questions of law which requires to be considered in this Second Appeal viz.,

(1) The question whether the suit pronote Ex.A1 is supported by consideration or not is wrongly decided by the learned District Judge by drawing wrong inferences without going in to the question of burden of proof and shifting of focus and burden of this case on the plaintiff to establish that the suit pronote is supported by past consideration and not the consideration pleaded in the plaint and stated in the evidence.

(2) The reasoning of the learned District Judge in support of the view that the suit pronote is supported by consideration is against the evidence in the case and the facts and circumstances emanating from evidence is erroneous.

5. The judgment of the learned District Judge unnecessarily interfered with the finding of the learned Subordinate Judge that the suit pronote is not supported by consideration as pleaded which was supported by evidence and adequate reasons. The judgment of the learned District Judge is liable to be set aside both on facts and in law.

6. Mr. Sanath Kumar, learned advocate appearing for the respondent while trying to repel the above contentions has contended that when once the plaintiff proved the execution of the suit pronote by the defendant he was to do nothing more and the learned Subordinate Judge was totally wrong in unnecessarily entering into the question whether the

consideration as pleaded by the plaintiff was established or not as the whole burden of proof by virtue of Section 100 (Section 118) of the Negotiable Instruments Act was heavily upon the defendant which he did not discharge and therefore the learned District Judge was justified in setting aside such a finding of the learned Subordinate Judge and in decreeing the suit.

7. Admitted and proved facts should find the record to proceed with controversies raised as above. As already pointed out, the plaintiff and defendant are brothers. Although initially cash consideration was set up by the plaintiff it was given a go-by and the past consideration by adjustment in a division between the brothers was set up. The defendant not only denied the passing of the consideration under suit pronote but also denied such past consideration by adjustment during division. The plaintiff as P.W.I denied any partition (sic. patty) in support of such division. P.W.2, the attest or of the pronote who claimed to be present at the time of partition did not say anything regarding such a patty. P.W.3, the scribe of the pronote exhorted a categoric expression that not only he was present at the time of division of the family properties between the parties but also he scribed the patties. The plaintiff did not suggest his theory to the defendant in cross-examination about the adjustment of the difference in the shares in the division among the brothers by executing a pronote by defendant. The defendant did not adduce any more evidence than this regarding want of consideration for the suit pronote. Now the law operates upon such admitted facts and proved facts and conduct of parties. The suit is based upon a pronote, a negotiable instrument u/s 4 of the Negotiable Instruments Act, 1881 (in short ''the Act''). By virtue of Section 108 (sic. 118) Sub-clause (sic. clause) (a) of the Act until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration. Such a presumption is available to the plaintiff in regard to Ex. A-1. Till he altered the nature of the consideration to Ex. A-1. from cash payment, to adjustment during the division among the brothers, initial burden of proving want of consideration for the pronote very strongly rested on the defendant. This he shifted to the plaintiff not only by the change of stands but also by his denial of consideration on oath. There fore the parties allowed the state of affairs to swing from one side to the other like a pendulum moving by oscillations. It is the duty of the court to find where the pendulum stops, after the pendulum lost its momentum. The defendant by his negative oath sent the oscillation to the plaintiff. The plaintiff by his testimony sent it back to the defendant. The defendant when he faced the cross-examination was not confronted with the plaintiffs (sic. theory) of the adjustment by division, sent back the pendulum again by oscillation to the plaintiff. The plaintiff has pushed back this to the Court to ultimately decide about the matter whether really the suit pronote is supported by consideration or not.

8. Mr. Nagarjun Reddy, learned advocate for the appellant is right in contending that the initial burden rested on the defendant was shifted tome plaintiff, by the shifting of onus due to his sway from one theory to the other and due to the defendant''s negative oath and failure to be confronted with the theory of the plaintiff. As rightly pointed out by him

that in a suit like this ultimately the concept of burden of proof which is the rule of evidence loses its importance and becomes an academic question when it is the duty of the Court to find out whether the suit pronote is really supported by consideration by assessing the evidence in the case in addition to the totality of the circumstances and the conduct of the parties. Reliance on two precedents by Mr. Nagarjun Reddy in G. Vasu Vs. Syed Yaseen Sifuddin Quadri, and Kundan Lal v. Custodian, Evacuee Property AIR 1961 SC 1316 is totally justified in this regard. The concept of burden of proof in such a situation has been" elaborately dealt with by our own High Court in G. Vasu v. Syed Yaseen 1987(1) ALT 1 : AIR 1967 A.P. 139 stated supra and there cannot be any improvement upon that Apart from its being binding on this Court, the learned expressions therein based on the settled law supported by precedents is a total guiding factor. Para Nos. 32, 33 and 36 are the operative and the concluding expressions of the Full Bench of this Court regarding which nothing more man the repetition would be a befitting and commending recognition. Relevant Para Nos. 32,33 and 36 are extracted hereunder.

"32. For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recltals in promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption u/s 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words "until the contrary is proved" in Section 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities mat such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption "disappears". For the purpose of rebutting the initial evidential burden, the defendant canrely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden. Thereafter, the presumption u/s 118 does not come to the plaintiff"s rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its, importance-

33. Before leaving the discussion on these aspects we would like to make it clear that merely because the plaintiff comes forward with a case different from the one mentioned

in the promissory note it will not be correct to say that the presumption u/s 118 does not apply at all. In our view the presumption applies once the execution of the promissory note is accepted by the defendant but the circumstance that the plaintiffs case is at variance with the one contained in the promissory note or the notice can be relied upon by the defendant for the purpose of rebutting the presumption and shifting the evidential burden to the plaintiff who has also the legal burden. To the above extent, we agree with the view of the Bombay High Court in Tarmahomed Haji Abdul Rehman Vs. Tyeb Ebrahim Bharamchari, . Our dissent is only to the extent of the principle laid down in that case that even when the case of the plaintiff and that of the defendant is disbelieved still the suit is to be decreed on the basis of the presumption u/s 118 of the Negotiable Instruments Act.

36. Applying the above principles to the facts of the case, it will be seen that initially the evidential burden lay on the defendant. In this case, the plaintiff admitted that no cash was lent as recited in the promissory note. The plaintiff recalled the defendant and suggested a new case that the promissory notes were executed in renewal of earlier notes. At all these stages, the preseumption has to be applied u/s 118 but the defendant can rely on these facts and also on the circumstances that the plea of renewal of earlier promissory notes by virtue of the suit note is contrary to the recitals in the suit pronotes, and that the same is not set out in the suit notice or in the plaint nor was it suggested to the defendant before he was recalled. We are of the view that by relying on these pieces of direct and circumstantial evidence the defendant has successfully discharged the evidential burden initially lying on him by a preponderance of probabilities. From men on, the presumption u/s 118 "disappears" and becomes "functus officio" and the "evidential burden" shifts to the plaintiff who has also the legal burden arising out of the pleadings to prove consideration. On a consideration of the entire evidence we are of the view that the plaintiff has not discharged the "legal burden". He can not at that stage once again rely on the presumption u/s 118 of the Negotiable Instruments Act. The fitting of the bat of presumption in the twilight is over and it has "disappeared" in the "sun shine of actual facts"

9. By operating these principles we have to know whether the facts and circumstances of this case are sufficient to hold that the burden of proving want of consideration to the suit pronote is established by the defendant in the first place and secondly whether this court is able to come to the conclusion, based on evidence, that the suit pronote is supported by consideration holding that the concept of burden of proof is nothing but academic. Reference to Sharada Bai v. Syed Abdul Hai 1971 (2) Mys. L.J. 4O7 in this regard would be appropriate as rightly pointed out by Mr. Nagarjun Reddy, learned counsel. To conclude when all the materials are placed before the Court, the concept of burden of proof vanishes and the real burden or the task falls on the Court to find out the truth and to render justice.

10. The plaintiff"s theory that the difference in the shares in the partition among brothers is adjusted by execution of pronote has different dimensions for the purpose of proof viz.,

(1) Proof of partition or division (2) Proof of the allotment of shares leaving difference in the allotment of shares and (3) Adjustment of the difference in the shares by executing the pronote by one or the other brothers.

11. In this case there appears to be no dispute regarding the partition among the brothers (it is brought out that mere are three brothers). The testimony of the plaintiff and the witnesses P. Ws. 2 and 3 except consistently stating that there was a division, has failed to give the details of the division, details of the allotment of shares and the difference of adjustment of the shares. Their testimony is no doubt consistent that the defendant executed the pronote in the context of adjustment of the shares in the partition. The third dimension is based upon dimensions 1 and 2. In view of the proof or admission of the partition, the first dimension is projected. The question whether there was difference in the shares or not is totally silent from the testimony of the plaintiff and his witnesses. That it was adjusted by executing the pronote by defendant in favour of the plaintiff is found only in the expressions of plaintiff and his witnesses. As rightly submitted by Mr. Sanath Kumar, learned advocate for the respondent, that would become the subject of the appreciation of evidence of the plaintiff and his witnesses in this regard. If their evidence is accepted, then nothing more is to be done in this regard. Mr. Nagarjun Reddy, learned advocate also does not differ in this regard. Rightly the learned Subordinate Judge appreciated the evidence in this regard. The learned District Judge adopted a very easy course in not dwelling into these things except to draw inference with presumptuous methods in regard to the existence of a past consideration which was the subject matter of proof. So this Court is examining the material on record to know the truth in the matter.

12. The plaintiff categorically admitted that there is no Patty or document in regard to the partition. P.W.2 except saying that he was present did not say anything about it. P.W.3 improved the case by saying that mere was a patty (in writing) and that he was the scribe. Thus he contradicted with the plaintiff in regard to the existence of a patty or a document. Thereby, he made his testimony a doubtful one and incredible when tested with the testimony of the plaintiff. Thereby he destroyed his evidence by self-condemnation for the purpose of consideration. He also created a doubt in the testimony of the plaintiff in this regard. Thus the value of the evidence of the plaintiff regarding the adjustments of shares by executing pronote became doubtful. Then the only remaining evidence in regard to such a theory is that of the plaintiff and P.W.2. Except the bald testimony about the adjustment of such a difference in shares, no details are given by plaintiff and P.W.2. The presence of P.W.2 which he testified is not even whispered either by the plaintiff or P.W.3. The occasion, the context, the reason and the capacity in which P.W.2 could have been present at the relevant time is not forthcoming. Therefore the manner in which the plaintiff has produced the evidence in this regard is more sporadic than with strong basis. Then coming to the testimony of the plaintiff himself it could be never but a self-serving testimony made to support a theory which he is expected to prove with probability to drive home the acceptance by the Court. In that situation we have got only oath against oath in this regard viz., that of the plaintiff and the defendant. That is sufficient to cancel each

other to produce no result. In such a situation the law is settled that the totality of the circumstances and the circumstantial evidence has to be judged. That can be done by testing the actual testimony of the parties both in the examination in-chief and in the cross-examination. The theory of the plaintiff is impeached more than once by the defendant not only in the written statement but also in the cross-examination of the plaintiff and his own testimony by the defendant. The plaintiff came out with a diverted theory, a category theory to doubt the pronote, coming out to adjust the shares during partition which he spoke and which the defendant denied. In the science and art of cross-examination, the suggestion theory both in the positive and in the negative has been accepted in Law of Evidence and the rule of evidence. As a part of impeachment of the credit of the testimony of plaintiff it was expected that such a theory was to be suggested to the defendant to get a denial, admission, explanation or any other conduct which may be available for the Court to judge it including the demeanour of the party or the witness. That is not done by the plaintiff. In other words, the whole theory in regard to support of the consideration for the suit pronote is left in vacuume. Even accepting all the materials on record the real portion of the theory has to be judged whether at a partition the difference in the shares was adjusted by executing a pronote by the defendant in favour of the plaintiff. In that regard positive evidence is required and then comes the negative evidence. The plaintiff has never said that he is not in possession of the positive evidence and in fact he tried to place it before the Court with lot of suspicion and contradiction. He never stated that the defendant was having the best piece of material to produce the factum of division to produce negative evidence. He is also not cross-examined in this regard. It appears that the plaintiff Is the senior most as can be made out from the ages given in the cause title. It is nobody''s case that the father is alive. In his absence the plaintiff ought to be the Manager and the senior member in the family who is expected to be in possession of the best piece of material in the absence of other circumstances. For the reasons best known to him he has totally avoided to produce any such material. It is not as if that a partition in the family will go without arty record, atleast change of khata, payment of assessment, palapatty as is stated by P.W.3 and any other material which is normally expected to come out subsequent to partition. First of all we do not know whether there was any difference in the partition. Secondly we do not know the value of die difference and thirdly we do not know who and how that was tried to be distributed by one party in favour of the other. Therefore even after assessment of the whole evidence and circumstances of the case this Court is not able to agree with the learned District Judge that the plaintiff has proved that the suit pronote is supported by past consideration. In the considered opinion of this Court first of all there is no proof of the existence of such a past consideration. Therefore in a case like this the defendant was not expected to controvert about which he had done correctly, properly and successfully.

13. As a whole the finding of the learned District Judge on Issue No. 2 regarding the consideration for the suit pronote cannot be supported either on facts or in law. He unnecessarily interfered with the finding of the learned Subordinate Judge in this regard

although he had done it with adequate reasons, application of mind and proper assessment of the evidence which was in the nature of finding of fact based on evidence and reasons. The learned District Judge has committed a very serious error in law which requires interference by this Court in Second Appeal.

14. In the result; the appeal succeeds and it is allowed. The judgment of the learned District Judge is set aside and the judgment and decree of the learned Subordinate Judge is restored and the suit is dismissed. In the peculiar circumstances of the case the parties shall bear their own costs throughout.