
A. Kaliyamurthi Vs A. Thandavaraya Nainar

S.A. No. 1277 of 2007

Court: Madras High Court

Date of Decision: Oct. 10, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Section 100#Evidence Act, 1872 â€” Section 114, 92#Negotiable Instruments Act, 1881 (NI) â€” Section 118, 118(a)

Citation: (2014) 8 MLJ 616

Hon'ble Judges: Pushpa Sathyanarayana, J

Bench: Single Bench

Advocate: S.K. Rakhunathan, Advocates for the Appellant; R. Sunilkumar, Advocates for the Respondent

Judgement

Pushpa Sathyanarayana, J.

This second appeal is filed by the plaintiff inveighing the judgment and decree dated 25.4.2006 passed by the

Principal District Judge, Cuddalore, in A.S. No. 12 of 2006 wherein and by which the judgment and decree dated 02.11.2005 recorded in a suit

for recovery in O.S. No. 46 of 2004 on the file of the Subordinate Judge, Panruti, were reversed allowing the First Appeal at the instance of the

defendant. The case of the plaintiff is that the defendant borrowed a sum of Rs. 50,000/- on 17.4.1998 by executing a promissory note in his

favour undertaking to repay the same on demand with interest at 12% and on 15.4.2001, he paid a sum of Rs. 200/- towards the said pro-note

and made an endorsement for the same. It is stated that again, on 17.4.2001, the plaintiff lent him a sum of Rs. 44,000/- on another promissory

note with the same undertaking. While so, when the plaintiff demanded repayment of the amount, the defendant did not discharge the said pro-

notes and hence, he issued an advocate notice on 05.4.2004 but the same was not received by the defendant. Hence, the plaintiff filed the suit for

recovery of the amount of Rs. 1,45,640/-.

2. Resisting the suit, the defendant filed written statement denying all the averments made in the plaint. According to him, on 17.4.1985, he

borrowed Rs. 4600/- from the plaintiff as a hand loan with interest at 36% per annum and subsequently, at the request of the plaintiff, he executed

a promissory note for Rs. 50,000/-. He also denied the issuance of notice and sought for dismissal of the suit.

3. Before the trial Court, the plaintiff examined himself as P.W. 1 and marked Exs. A.1 to A.5. To nullify the evidence of the plaintiff, the defendant

examined himself as D.W. 1 and marked Ex. B.1.

4. The trial Court/learned Subordinate Judge, Panruti, on consideration of the evidence adduced and the materials available thereon, decreed the

suit as prayed for. Challenging the same, the defendant preferred appeal in A.S. No. 12 of 2006. The Lower Appellate Court, after appreciating

the facts, finding that the loan transaction involved a sum of Rs. 26,000/- allowed the appeal in part modifying the judgment of the trial Court to the

effect that the plaintiff could claim only the principal sum of Rs. 26,000/- with interest thereon while rejecting the remaining claim. Feeling aggrieved

by the rejection of one part of claim, the plaintiff has come up with this Appeal.

5. At the time of admission of this appeal, this Court formulated the following substantial question of law for consideration:

Is not the judgment and decree of the Lower Appellate Court vitiated by its failure to apply the presumption contained in Section 118 of the

Negotiable Instruments Act to the suit promissory note?

6. Heard Mr. S.K. Rakhunathan, learned counsel appearing for the appellant/plaintiff and Mr. R. Sunilkumar, learned counsel for the

respondent/defendant and perused the records.

7. It is a case of two Headmasters trying to prove each other's case on arithmetic. The entire issue revolves around execution of Exs. A.1 to A.3

and B.1. Ex. A.1 is the first pro-note for Rs. 50,000/- while Ex. A.2 is an endorsement for receipt of Rs. 200/- on the same. Ex. A.3 is the second

pro-note and Ex. B.1 is the letter written by plaintiff to the defendant. The execution of the above documents are not disputed by the respective

parties. Though the trial Court decreed the suit in entirety, the lower Appellate Court based on Ex. B.1, had decreed the suit in part only.

8. A scrutiny of Ex. B.1 letter dated 07.6.2000 written by the plaintiff to the defendant reveals that the principal sum is shown as Rs. 26,000/- as

on 17.4.1998 whereas Ex. A.1. Dated 17.4.1998 is for Rs. 50,000/-. Hence, the Lower Appellate Court presumed that admittedly, the amount

due was only Rs. 26,000/-. The Lower Appellate Court had misdirected itself in deciding the case based on Ex. B.1 when the case is filed for

recovery of money on the basis of Exs. A.1 and A.3. It is evident from the materials available on record that the parties are friends and there had

been lending and repayment from 1985 onwards. It is the specific case of the plaintiff that Ex. B.1 related to a different transaction unconnected to

the suit transactions. The non-mentioning of Ex. A.1 transaction in Ex. B.1 is turned against the plaintiff. The endorsement in Ex. A.2 also does not

find a mention in Ex. B.1. If really the principal outstanding was only Rs. 26,000/- as stated in Ex. B.1, there is no reason for the defendant to have

executed Exs. A.1, A.2 and A.3. Even presuming that he was compelled to execute the pro-note, nothing prevented from giving a reply to Ex. B.1

letter explaining the transactions. The defendant also has not explained how the interest charged are usurious when he had executed Exs. A.1 to

A.3 without any murmur. It is the defendant who had borrowed money from the plaintiff from 1985 and as such, he has to maintain account for the

repayment. There is no such thing as repayment made is established by the defendant independent of Ex. B.1 which is unconnected.

9. When a suit is based on pro-note and promissory notes are proved to have been executed, Section 118(a) of the Negotiable Instruments Act

raises the presumption till the contrary is proved that the pro-note was made for consideration. If the plaintiff pleads that the pro-note is supported

by consideration as recited in the Negotiable Instrument and evidence adduced in support thereof, the burden is on the defendant to disprove that

the pro-note is not supported by consideration or different consideration other than the one recited in the pro-note, did pass. If that consideration

is not valid in law nor enforceable in law, the Court would consider whether the suit pro-note is supported by valid consideration or legally

enforceable consideration. In the instant case, the Lower Appellate Court has held that usurious and unconscionable rate of interest cannot be

enforced by the Court. Then this Court is required to examine the evidence and consider whether the suit as pleaded in the plaint had been

established and the suit requires to be decreed or dismissed.

10. At this juncture, this Court finds it necessary to see as to what is the burden of proof. It has two meanings. One is that burden of proof is a

matter of law and pleadings and the other is the burden of establishing the case. The former is fixed as a question of law based on pleadings while

the latter is not constant but shifts as soon as a party adduces evidence to raise a presumption in his favour.

11. In this case, the defendant has admitted the execution of pro-note and also receipt of partial consideration. Since he has unequivocally admitted

the execution, presumption under Section 118 of the Negotiable Instruments Act applies. Now, this Court finds it relevant to see the scope of the

said presumption. The presumption that is raised under this Section is not in respect of the consideration mentioned in Negotiable Instrument but

the presumption in favour of there being consideration for Negotiable Instrument, any consideration which is valid in law.

12. As per Section 118(a) of the Negotiable Instruments Act, the presumption that can be drawn is for consideration and that every Negotiable

Instrument when it has been accepted, indorsed, negotiated or transferred, was accepted for consideration. The presumption, then, is not that

consideration stated in the instrument but merely that instrument is supported by consideration. No doubt, Section 118(a) of the Act will have

application to the present case. But the burden is on the respondent/defendant to prove how Exs. A.1 and A.3 are not supported by consideration

to the extent of Rs. 50,000/- and Rs. 45,000/-.

13. For better appreciation of the case, it would be relevant to refer the applicability of Section 92 of the Evidence Act, which reads as under:

92. Exclusion of evidence of oral agreement.-When the terms of any such contract, grant or other disposition of property, or any matter required

by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement

shall be admitted, as between the parties to any such instrument or their representatives in interest, for purpose of contradicting, varying, adding to,

or subtracting from, its terms:

Proviso (1).-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating

thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, (want or failure) of consideration, or

mistake in fact or law.

Proviso (2).-The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its

terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).-The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such

contract, grant or disposition of property, may be proved.

Proviso (4).-The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may

be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered

according to the law in force for the time being as to the registration of documents.

Proviso (5).-Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description,

may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).-Any fact may be proved which shows in what manner the language of a document is related to existing facts.

14. The above section bars adducing any evidence either oral or documentary which contradicts, varies, adds or subtracts from the terms of

written statement. However, proviso gives an exception and enables a party to prove any fact which may invalidate the document. Hence, it is

failure of consideration.

15. Insofar as drawing of presumption is concerned, there is a difference between Section 114 of the Evidence Act and Section 118 of the

Negotiable Instruments Act. Under Section 114 of the Evidence Act, the Court has discretion to make the presumption or not while under Section

118 of the Negotiable Instruments Act, the Court is bound to draw presumption. Therefore, any presumption as to quantum of consideration has

to be drawn only from the recitals. However, if there is a rebuttal evidence from the defendant to disprove the presumption of passage of

consideration, then the burden shifts. Though the burden of proof is on the respondent/defendant, that can be done only by pleading and proving

the same. The plaintiff and the defendant are admittedly working as Headmasters and the plaintiff is not a money lender. There seems to have been

transaction between them from 1985. Therefore, it follows that when the execution of pro-note is admitted, law presumes that it is one for

consideration. There is no presumption as to the nature of consideration or quantum of consideration. While attempting to prove that the document

is not supported by consideration, the defendant is only attempting to prove that the statement contained therein, is not true.

16. Since the trial Court and the Lower Appellate Court have expressed divergent opinions, this Court is entitled to consider whether the findings

of the Courts below are based on evidence and whether such evidence is based on pleadings.

17. The statement of the defendant as per the written statement is that he was requested to execute the suit pro-notes. Even Ex. A.2

acknowledgment is not challenged by the defendant. Likewise, there was no reply for Ex. A.5 notice. Even in the evidence, D.W. 1 has admitted

that he had written Exs. A.1 to A.3 by his hand. It is also admitted by D.W. 1 that the borrowings from 1985 onwards from the plaintiff, had not

been discharged by him. If the suit pro-notes were executed by him voluntarily under Section 118 of the Negotiable Instruments Act, taken along

with the admission in the pro-notes, it has to be accepted that there was passing of consideration. No other circumstance has been pleaded to

invalidate the case of the plaintiff. Ex. A.2 also gains importance along with Exs. A.1 and A.3.

18. The Lower Appellate Court has strained itself in connecting Ex. B.1 with the suit transaction. The defendant had not pleaded that Rs. 50,000/-

and Rs. 45,000/- were arrived at when Exs. A.1 and A.3 were executed. In such circumstance, this Court is of the opinion that the Lower

Appellate Court was wrong in accepting that part of evidence. The Lower Appellate Court being the final Court of facts, ought to have considered

the evidence as a whole to see any element of improbability arising from proved circumstances. In the light of the above discussion, this Court

comes to an inevitable conclusion that the Lower Appellate Court, being a final Court of fact, dismissed the suit in respect of one part of claim

made by the plaintiff without considering the reasons given by the trial Court regarding the failure on the part of the defendant to establish his case

thereby leading to perverse finding.

Though under Section 100 CPC, this Court cannot re-appreciate the evidence, in view of the facts and circumstances of the case, this Court is

inclined to hold that the preponderance of probabilities are in favour of the plaintiff and the questions of law raised are answered materially and

substantially in favour of the plaintiff. As such, the rejection of one part of claim by the Lower Appellate Court, is to be held as not based on

correct reasoning and any pleadings.

In the light of the foregoing discussion, the Second Appeal succeeds and stands allowed and the judgment and decree of the trial Court dated

02.11.2005 passed in O.S. No. 46 of 2004 are restored decreeing the suit in favour of the plaintiff. Consequently, the judgment and decree

passed by the Lower Appellate Court are set aside. However, in the circumstances of the case, there shall be no order as to costs.