THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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A.S.No. 727 OF 1997

JUDGMENT:

The 1st defendant in O.S.No. 95 of 1993 on the file of the Court of Principal Subordinate Judge, Kurnool (for short, 'the trial Court'), preferred the present appeal challenging the decree and judgment dated 05-11-1996, whereunder the suit filed by the plaintiff for recovery of amount was decreed together with subsequent interest and costs.

2. For convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout this judgment.

3. The plaintiff filed the suit for recovery of amount based on promissory note executed by the 1st defendant in favour of the 2nd defendant alleging that the 1st defendant borrowed Rs.1,00,000/- on 01-01-1991 from the 2nd defendant agreeing to repay the same together with interest at 24% *p.a.* either to the 2nd defendant or his transferee as and when demanded. Despite demands made by the 2nd defendant, the 1st defendant did not discharge the debt due. As the 2nd defendant was in need of money, he transferred the promissory note in favor of the plaintiff receiving consideration of Rs.1,00,000/- and endorsed the same on the reverse of the promissory note on 20-04-1993. Thereafter, the plaintiff demanded the 1st defendant to repay the debt due under the promissory note but no purpose was served. Thereupon, the plaintiff got issued legal notice dated 26-04-1993. Receiving the said notice, the 1st defendant got issued reply dated 29-04-1993 with false allegations. Hence, the 1st defendant is liable to pay the debt due to the plaintiff and prayed to pass decree for recovery of the suit amount with subsequent interest and costs.

4. The 1st defendant filed written statement denying material allegations *inter alia* contending that he never borrowed Rs.1,00,000/- from the 2nd defendant for his family expenses and never executed promissory note on 01-01-1991 agreeing to repay the same with interest at 24% *p.a.* The 2nd defendant never demanded for

payment of the amount due under the alleged promissory note. The 1st defendant denied transfer of promissory note for consideration on 20-04-1993 in favour of the plaintiff authorizing him to recover the amount but admitted receipt of legal notice dated 26-04-1993 while contending that he got issued appropriate reply with true facts.

The 1st defendant contended that the 2nd defendant has been running chit fund business, the 1st defendant is also one of the subscribers in a chit for Rs.1,00,000/-, participated in auction, became the highest bidder agreeing to forego an amount of Rs.41,000/- and, as per rules, he executed promissory note on 01-01-1991 for Rs.1,00,000/- in favour of the 2nd defendant. As a member of the said chit, the 1st defendant paid entire chit installments but the promissory note was not returned by the 2nd defendant.

The plaintiff and the 2nd defendant are close friends. Taking advantage of the situation and misunderstanding between defendant Nos. 1 and 2, the 2nd defendant transferred the promissory note in favour of the plaintiff and got filed the suit with false allegations. Thus, the 1st defendant is not liable to pay the amount either to the 2nd defendant or to the plaintiff and the suit is liable for dismissal *in limine*.

5. Subsequently, the 1st defendant amended his written statement *vide* order in I.A.No. 40 of 1995 dated 05-06-1995 contending that the plaintiff is not a holder in due course, transfer endorsement is devoid of consideration and obtained the transfer endorsement with knowledge that the promissory note in favour of the 2nd defendant is not supported by consideration. Hence, the plaintiff has no *locus standi* to file the suit and prayed for dismissal of the suit.

6. Thereupon, the plaintiff filed re-joinder reiterating that he is a holder in due course as he paid consideration under transfer endorsement.

7. On the strength of the above pleadings, the trial Court framed the following issues:

Issues:

1. *Whether the pronote dated 1-1-91 came into existence in a chit transaction conducted by 2nd defendant?*

2. Whether the transfer of pronote in favour of plaintiff is correct?

3. Whether the cause of action is correct?

4. Whether the plaintiff is entitled to suit amount?

5. To what relief of parties?

8. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and got marked Exs.A1 to A5. On behalf of the defendants, D.Ws.1 and 2 were examined and got marked Exs.B1 to B61.

9. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court, disbelieving the contention of the 1st defendant, passed decree in favour of the plaintiff entitling him to recover the suit amount together with subsequent interest at 6% *p.a.* from the date of decree till realization.

10. Aggrieved by the decree and judgment of the trial Court, the 1st defendant preferred the present appeal raising the following contentions:

(a) The trial Court did not consider the contention of the 1st defendant that Ex.A2 was not supported by any consideration; thereby, the plaintiff was not a holder in due course and, therefore, not entitled to claim the suit amount but the trial Court ignored the same and no specific finding was recorded on it;

(b) Voluminous documentary evidence coupled with evidentiary admissions about running of chit business by the 2nd defendant is sufficient to conclude that Ex.A2 was obtained as collateral security for the chit transaction and, in such case, transfer of promissory note for consideration would not confer any right on him to collect amount from the 1st defendant but the trial Court did not consider this contention in proper perspective and, therefore, the decree and judgment of the trial Court are liable to be set aside; and

(c) Since the plaintiff failed to establish that he is holder in due course and that the promissory note was executed on receipt of consideration of Rs.1,00,000/- from the 2nd defendant, the suit is liable to be dismissed but the trial Court decreed the suit on erroneous appreciation of facts and law.

11. During the course of argument, learned counsel for the 1st defendant contended that the plaintiff had no capacity to pay Rs.1,00,000/- in view of the admission that he could not pay the amount due under agreement of sale; therefore, advance of sale consideration paid under agreement of sale was forfeited; thereby, it is sufficient to conclude that the plaintiff has no capacity and, therefore, the plaintiff is not holder in due course but this fact was not considered by the trial Court in proper perspective. It is further contended that there is voluminous evidence, more particularly admissions of P.W.3, to establish that the 2nd defendant was carrying on chit fund business; suit promissory note was executed in connection with chit transaction only as collateral security for the prize amount he received in the chit and for due payment of future installments; thereby, Ex.A2 is not supported by consideration and, therefore, the 1st defendant is not liable to pay any amount either to the plaintiff or to the 2nd defendant. In support of his contentions, learned counsel for the 1st defendant placed reliance on ***Meharunnisa Begum and 2 others Vs. Shaik Chand Bi (died) and 8 others***.

12. Learned counsel for the plaintiff did not advance any argument despite listing the matter under the caption for judgment. Therefore, I have no other alternative except to decide the appeal on merits.

13. Considering the contentions of learned counsel for the 1st defendant and perusing material available on record including the decree and judgment under challenge, the points that arise for consideration are thus:

1. *Whether Ex.A2 promissory note was executed as collateral security for due payment of chit installments to the 2nd defendant who was allegedly running chit fund business at the relevant date of execution of Ex.A2?*

2. *Whether Ex.A2 promissory note is supported by consideration?*

3. *Whether the plaintiff is holder in due course, if so, is he entitled to recover the suit amount together with subsequent interest?*

14. **<u>In Re. Point No.1:</u>**

The first and foremost contention raised by learned counsel for the 1st defendant is that Ex.A2 was executed as collateral security for due payment of other installments to the 2nd defendant who was running chit business as on the relevant date of execution of Ex.A2 *i.e.* on 01-01-1991. Thus, the 1st defendant admitted about execution of Ex.A2 promissory note but explained the reasons for execution of Ex.A2. At this stage, it is relevant to advert to the evidence of P.Ws.2 and 3.

15. P.W.2 is the 2nd defendant *i.e.* transferor of the plaintiff. In examination in chief, as usual, P.W.2 reiterated about payment of Rs.1,00,000/- to the 1st defendant, execution of Ex.A1 promissory note in his favour agreeing to repay the same together with interest either to the 2nd defendant or to his order as and when demanded, failure of the 1st defendant to discharge the debt and transfer of the promissory note. In cross-examination of P.W.2, it was elicited that P.W.2 was the managing partner of Balaji Finance Corporation and several suggestions were put to him that he was running chit fund business but nothing was elicited to establish that P.W.2 was running chit fund business and the 1st defendant is one of the subscribers of chit under him. In further cross-examination dated 24-06-1996, P.W.2 admitted that Balaji Finance Corporation stopped its business about 4 years ago *i.e.* 4 years prior to his cross-examination on 24-06-1996 which relates back to 1992. A suggestion was put to P.W.2 that he was running his office at his house but got denial of it. P.W.2 admitted that corporation was only giving loans but not carrying on chit fund business. Though the business was stopped, shares of the partners are not divided in the finance corporation. Thus, the facts whatever elicited in cross-examination would not suffice to accept the contention that Ex.A2 was executed in connection with chit fund transaction. In cross-examination dated 24-06-1996, P.W.2 admitted signatures and handwriting of P.W.3-M.Nageswaraiah on Exs.B1 to B11. At best, this admission would go to show that chits were in the handwriting of P.W.3.

16. In cross-examination of P.W.3, learned counsel for the 1st defendant could elicit that Ex.B1 refers to commission on chits as well as his fee for writing bond for Rs.5/-. Similarly, Exs.B2 to B12 pertain to commission on chits paid to the 2nd defendant. P.W.3 further admitted that D.W.2 and Dr. Sudhakar Reddy were also subscribers of chits under the 2nd defendant. At best, this piece of evidence would support the contention of the 1st defendant that the 2nd defendant carried on chit fund business for sometime. Ex.B1 relates to payment of commission of Rs.5,479/- which includes

fee of P.W.3 for writing bond and bond value. Thus, it is established by Ex.B1 that the 2nd defendant was carrying on chit fund business on 01-01-1991 when Ex.A2 was executed. Exs.B1 to B11 also established that the 2nd defendant was carrying on chit fund business though he denied in clear terms. The cumulative effect of the facts elicited in the cross-examination of P.Ws.2 and 3 is sufficient to hold that the 2nd defendant was carrying on chit fund business but, as seen from the contents of Ex.A2, it is clear that the 1st defendant borrowed Rs.1,00,000/- from P.W.2 on the day when Ex.B1 was executed. Ex.B1 is silent as to whom the amount was agreed to be paid and whether or not it is in connection with chit transaction between the 1st defendant and the 2nd defendant but it was produced by the 1st defendant himself. Similarly, several chits were produced by the 1st defendant. However, those receipts do not pertain to the 1st defendant and did not explain how the 1st defendant came into possession of those chits. If really Ex.B1 refers to the name of the 1st defendant, it can be connected with chit transaction. In the absence of any details as to whom receipts were issued, it is difficult for me to hold that Exs.B1 to B12 are pertaining to chit transactions between the 1st defendant and the 2nd defendant. Therefore, the trial Court rightly concluded that the 1st defendant failed to establish the connection between chit transaction and the 2nd defendant since Exs.B1 to B12 are not sufficient to directly connect chit transaction and borrowing in the absence of any details in Exs.B1 to B12.

17. Learned counsel for the 1st defendant, in support of his contentions, placed reliance on ***Meharunnisa Begum and 2 others Vs. Shaik Chand Bi (died) and 8 others*** (1st *supra*). The facts of the above judgment are almost identical but there the defendant could establish that there was direct connection between chit transaction and promissory note. The principle laid down in the above judgment is not in quarrel but the same cannot be applied to the present facts of the case for the reason that the 1st defendant here miserably failed to establish direct connection between Ex.B1 and Ex.A2 though they bear the same date. Hence, on the strength of the above judgment, it is difficult to hold that Ex.A2 was obtained in connection with chit transaction. The trial Court, after elaborately discussing the material available on record with reference to law, held that the 1st defendant miserably failed to establish the connection between Ex.B1 and Ex.A2, Ex.A2 promissory note was not executed

in connection with chit transaction and the said finding does not call for interference of this Court. Accordingly, the point is held in favour of the plaintiff and against the 1st defendant.

18. **In Re. Point No. 3:**

One of the contentions of learned counsel for the plaintiff is that he paid Rs.1,00,000/- to the 2nd defendant and got Ex.A2 promissory note transferred in his favour under Ex.A1 transfer endorsement. Thereafter, the plaintiff got issued Ex.A3 notice demanding the 1st defendant to repay the debt due to him. Ex.A4 is postal acknowledgement evidencing receipt of Ex.A3 notice by the 1st defendant. Ex.A5 is reply notice got issued by the 1st defendant to the plaintiff, wherein the 1st defendant categorically denied execution of Ex.A2 promissory note receiving Rs.1,00,000/- while contending that it was executed as collateral security for due payment of future installments of chit but did not disclose anywhere as to when he became the highest bidder in auction held by the 2nd defendant and whether it was in the month of January or prior to that both in evidence and written statement.

19. It is the contention of learned counsel for the plaintiff that since the 2nd defendant was in need of money, the plaintiff paid Rs.1,00,000/- to the 2nd defendant and got Ex.A2 promissory note transferred in his favour under Ex.A1 transfer endorsement. The said fact was mentioned in Ex.A3 notice. However, by amending written statement, the 1st defendant raised a specific contention that the plaintiff was not holder in due course as he has no capacity to pay Rs.1,00,000/- at a time. Though P.W.1 specifically testified about payment of Rs.1,00,000/- and admitted by P.W.2 both in his examination in chief and cross-examination, still learned counsel for the 1st defendant would draw my attention to admission of P.W.1 about his inability to pay balance of sale consideration under agreement of sale. At the end of last four lines in page No. 4 of his cross-examination, P.W.1 admitted thus:

> *"I entered into an agreement of sale with D.1, his brothers and his father for the purchase of five acres of their land on 14.12.1992 and I paid Rs.10,000/- as an advance and I agreed to pay the balance of sale consideration before 30.4.1993 and get the sale deed executed in my favour. I could not pay the balance of sale consideration and therefore the agreement was cancelled and the advance amount was forfeited."*

Taking advantage of the specific admission, learned counsel for the 1st defendant would submit that when the plaintiff has no capacity to pay balance of sale consideration under agreement of sale and got the advance amount forfeited, question of payment of Rs.1,00,000/- under Ex.A1 cannot be accepted. No doubt, this admission at best shows that the plaintiff purchased property under agreement of sale on 14-12-1992 *i.e.* almost two years after execution of Ex.A2 and 4 months prior to Ex.A1 transfer endorsement. Merely because the plaintiff was unable to pay balance of sale consideration under agreement of sale, it is difficult to hold that the plaintiff has no capacity to pay Rs.1,00,000/- for the reason that value of the property agreed to be purchased under agreement of sale was not disclosed in the entire cross-examination. If consideration was more than Rs.1,00,000/-, the plaintiff might not have capacity to pay balance of sale consideration. Therefore, in the absence of any details about value of the property agreed to be purchased under agreement of sale, it is difficult to hold that the plaintiff has no capacity to pay Rs.1,00,000/- under Ex.A1 to the 2nd defendant.

20. P.W.2, original promisee under Ex.A2 who transferred the promissory note receiving Rs.1,00,000/- as consideration to the plaintiff, asserted in his evidence that he received Rs.1,00,000/-. However, in cross-examination, P.W.2 admitted that total amount together with interest by the date of Ex.A1 comes to Rs.1,30,000/- but he received only Rs.1,00,000/- giving up Rs.30,000/-.

21. The evidence on record clinchingly established that the 2nd defendant received Rs.1,00,000/- as against the total amount due of Rs.1,30,000/- which includes interest. When Ex.A2 promissory note was transferred for consideration under Ex.A1, the plaintiff became holder in due course under Section 9 of the Negotiable Instruments Act, 1881 (for brevity, 'the Act of 1881'). Thereby, the plaintiff is entitled to recover the amount due under the promissory note. The trial Court, after appreciation of entire evidence, rightly concluded that the plaintiff is holder in due course and entitled to recover the amount. The finding of the trial Court, therefore, does not call for interference of this Court since I find no legal infirmity warranting interference of this Court. Accordingly, the finding of the trial Court is hereby confirmed holding this point against the 1st defendant and in favour of the plaintiff.

22. **<u>In Re. Point No. 2:</u>**

One of the major contentions of learned counsel for the plaintiff is that the 2nd defendant lent an amount of Rs.1,00,000/- and obtained Ex.A2 promissory note, whereunder the 1st defendant agreed to repay the said amount together with interest at 24% *p.a.* but failed to repay the debt due under Ex.A2 promissory note either to the 2nd defendant or to the plaintiff after transfer of Ex.A2 for consideration under Ex.A1. The plaintiff demanded for repayment of amount due under Ex.A2 promissory note by issuing Ex.A3 notice but no purpose was served. In the entire cross-examination of P.Ws.1 and 2, except suggesting that no consideration was passed under Exs.A1 and A2, nothing could be elicited to discredit the testimony of P.Ws.1 and 2 regarding passing of consideration. Moreover, the contention of learned counsel for the 1st defendant is that it was executed as collateral security for due payment of future installments of chit but he failed to establish that Ex.A2 promissory note was executed as collateral security in view of my finding on point No. 1. In the evidence of D.Ws.1 and 2, they admitted execution of Ex.A2 but denied passing of consideration.

23. When execution of Ex.A2 promissory note was admitted, burden is upon the 1st defendant to prove that Ex.A2 was not supported by consideration. The presumption under Section 118 of the Act of 1881 is rebuttable presumption since the language used in the Section itself indicates that the Court shall draw a presumption until the contrary is proved. Therefore, it is the obligation of the 1st defendant to prove that Ex.A2 was not supported by consideration to dispel the legal rebuttable presumption contained under Section 118 of the Act of 1881. In the facts of the present case, except contending that no consideration was passed under Ex.A2 and it was executed as collateral security in connection with chit transaction for due payment of future installments, nothing was established that no consideration was passed.

24. When once execution of promissory note is admitted, a presumption under Section 118 of the Act of 1881 shall be drawn that the promissory note is supported by consideration as has been held by this Court in ***G.Vasu Vs. Syed Yaseen Sifuddin Quadri***, wherein this Court discussed the scope of Section 118 of the Act of 1881 and the view expressed by this Court was approved by the Apex Court in ***Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal***.

25. In ***K.Prakashnan Vs. Surenderan***, it was held as follows:

> *"Whether presumption stood rebutted or not would depend upon the facts and*

circumstances of each case."

The same view is reiterated in ***Kumar Exports Vs. Sharma Carpets***.

In ***Krishna Janardhan Bhat Vs. Dattatraya G.Hedge***, the Apex Court held that

"Defendant can prove non-existence of a 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 disentitle him to the grant of relief on the basis of the negotiable instrument. 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."

26. From the law declared by the Apex Court and this Court, it is for the 1st defendant to establish non-passing of consideration or non-existence of consideration by producing any positive evidence. In the instant case, the 1st defendant from the beginning contended that Ex.A2 was executed in connection with chit transaction but failed to establish the same eliciting anything in the cross-examination of P.Ws.1 to 3 directly connecting Ex.B1 and Ex.A2 and also failed to establish that he was one of the subscribers of chit and became the highest bidder before execution of Ex.A2. In such case, it can safely be concluded that Ex.A2 promissory note and Ex.A1 transfer endorsement are supported by consideration in view of the consistent evidence of P.Ws.1 to 3 and drawing a legal presumption under Section 118 of the Act of 1881. Hence, I find that the trial Court rightly decreed the suit and did commit no error warranting interference of this Court in the decree and judgment under challenge. Therefore, I hold that Exs.A2 and A1 are supported by consideration and the plaintiff, being transferee for consideration under Ex.A1, is entitled to recover the amount due under Ex.A2. Accordingly, the point is held against the 1st defendant and in favour of the plaintiff.

27. In view of my finding on point Nos. 1 to 3, I find that the appeal is devoid of merits and it deserves to be dismissed.

28. In the result, the appeal is dismissed but without costs in the circumstances of the case. Pending miscellaneous petitions in this appeal, if any, shall stand dismissed in consequence.

M.SATYANARAYANA MURTHY, J.

Date: 06-07-2015.

JSK