HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.19 of 1998

JUDGMENT:

This Second Appeal under Section 100 of Code of Civil Procedure (for short 'CPC') is filed by the defendants/appellants in O.S.No.40 of 1992 on the file of Subordinate Judge, Pithapuram, who are respondents in A.S.No.61 of 1993 on the file of III Additional District Judge, Kakinada, challenging the decree and judgment passed by the first Appellate Court in A.S.No.61 of 1993 reversing the decree and Judgment passed by the trial Court in O.S.No.40 of 1992.

2. For convenience of reference, the parties to the appeal will herein be referred, as ranked in O.S.No.40 of 1992 before the Subordinate Judge's Court, Pithapuram, through out the judgment.

3. The Plaintiff filed the suit for recovery of Rs.23,100/- together with interest based on the promissory note executed by the defendants on 16.04.1985 for Rs.15,000, which is marked as Ex.A.1, agreeing to repay the same together with interest and thereafter, the defendants failed to discharge the debt due under the promissory note, despite demands made by the plaintiff.

4 (a) Defendants filed Written Statement admitting the execution of the promissory note while denying borrowing of any amount and specifically pleaded that there was a settlement of disputes between the plaintiff and defendants by the elders and in the settlement, defendant No.2 was asked to pay Rs.15,000/- towards settlement of all claims to the plaintiff and thus, no cash consideration was passed under the promissory note as the cash was not readily available to the defendant, the defendants did not pay the amount, as per the settlement deed, and executed the promissory note.

b) It is further contended that the defendants paid Rs.15,000/- as agreed by them in terms of the settlement and the promissory note was with one N. Dhanyamraju Narasimha Murthy and the same was not returned to the defendants, despite demands made by them, he has refused to return the promissory note. Therefore, taking advantage of the promissory note available with Narasimha Murthy, the present suit is filed for recovery of the amount.

5. Basing on the above pleadings, the trial Court framed the following issues for trial :

> i) Whether the defendants have executed the suit pronote under the circumstances pleaded by them in their Written Statement?
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> ii) Whether the suit pronote is not supported by consideration ?

iii) To what relief ?

6. During trial, on behalf of plaintiff, PW. 1 was examined and Exs. A.1 to A 4 were marked. On behalf of defendants, DW. 1 was examined and Exs. B.1 to B.6 were marked.

7. Upon hearing argument of both the counsel, the trial Court dismissed the suit, without costs.

8. Aggrieved by the said Decree and Judgment of the trial Court, the plaintiff, being unsuccessful before the trial Court, preferred first appeal in A.S.No.61 of 1993 before III Additional District Judge, Kakinada, and the same was allowed, decreeing the suit for recovery of the amount, as claimed, with subsequent interest and costs, by its decree and judgment dt. 23.04.1997.

9. Aggrieved by the decree and judgment of first appellate Court, the defendants/respondents in A.S.No.61 of 1993, preferred this appeal on various grounds and mainly contended that the defendants rebuted the statutory presumption under Section 118 of Negotiable Instrument Act (for short 'NI Act') by eliciting that Ex.A.1 was executed as per the Settlement arrived by the plaintiff and defendants regarding settlement of all claims on the intervention of elders and executed the promissory note without receiving any amount as consideration. But, the

Appellate Court did not consider the crucial admissions in the evidence of PW.1 regarding settlement and the execution of the promissory note without passing any consideration thereunder as on the date of execution of Ex.A.1, but passed a decree based on the presumption under Section 118 of NI Act and thus, the Appellate Court committed an error in passing the decree and judgment and prayed to set aside the same allowing the Second Appeal.

10. During pendency of the appeal, the plaintiff/respondent in this appeal, expired and his legal representatives were brought on record as respondent Nos. 2 to 5, vide Order dt. 7.04.2005 in CMP No.14485 of 2003.

11. During hearing, Sri E.V.V.S.Ravi Kumar, learned counsel for appellants/defendants reiterated the contentions urged in the grounds of appeal and drawn the attention of this Court to crucial admissions in the evidence of PW.1 regarding settlement and execution of the promissory note without passing any consideration thereunder, but those admissions were not taken into consideration by the first Appellate Court and erroneously decreed the suit in favour of respondents herein and the judgment passed by the first Appellate Court is against the law declared by the full bench of this Court in G. Vasu v. Syed Yaseen Sifuddin Quadri[1]

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[1] 1987 (1) ALT 1

and prayed to set aside the decree and judgment passed by the first appellate Court since the admissions are sufficient to rebut the presumption and whereas the plaintiff failed to establish passing of consideration by adducing any satisfactory evidence.

12. Sri Shammuka Rao, learned counsel for the respondents herein/plaintiff would contend that the admissions in the Written Statement are sufficient regarding the execution of the promissory note and thereby presumption would come into operation under Section 118 of the NI Act and in such case, the defendants have to dispel or rebut the presumption and drawn the attention of this Court to para No.5 of the Written Statement, where the defendants pleaded discharge of the debt due by payment of Rs.15,000/- to Sri Narasimha Murthy and the alleged discharge would arise only when the defendants received cash consideration under the promissory note. Therefore, the presumption remained un-rebutted, but the trial Court erroneously dismissed the suit. However, the Appellate Court rightly decreed the suit in his favour and he drawn the attention of this Court to a judgment reported in *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm and others*[2] in support of his contentions.

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[2] (2008) 7 SCC 655

13. Upon considering rival contentions and perusing material available on record, the substantial question of law that arise for determination by this Court is :

> " Whether the defendants could rebut the presumption under Section 118 of N.I.Act either by eliciting anything in the cross examination of PW.1 or by any independent evidence, if not, whether the plaintiff is entitled to recover the amount though there are clear admissions regarding non-passing of consideration under Ex.A.1, if so, the judgment of first Appellate Court be sustained ?

14. In *re*: Undisputedly, the promissory note was executed by the defendants in favour of plaintiff. But, their plea is very specific that the promissory note was executed in view of the settlement of all claims between second defendant and the plaintiff, as per the settlement that took place in the presence of elders D. Appa Rao, Ch. Appa Rao and Ch. Suryanarayana Raju, and thus, no consideration, as alleged in Ex.A.1, was passed on the date of execution and therefore, the promissory note was not supported by consideration. When the defendants admitted the execution of the promissory note, normally statutory presumption under Section 118 of NI Act would come into operation and by drawing such presumption, the Court can

conclude that the consideration as mentioned in Ex.A.1—Promissory note was passed. But, the presumption under Section 118 of NI Act is a rebuttal presumption and such presumption can be rebutted by adducing independent evidence or by eliciting anything in the cross examination of the plaintiff's witnesses.

15. In the present facts of the case, the counsel for defendants could elicit from the testimony of PW.1 under what circumstances the promissory note was brought into existence or executed by the defendants, which are marked as Exs. B.1 to B.6 before the trial Court.

16. In the cross examination of earlier suit in O.S.No.181 of 1985, the plaintiff—Singampalli Satyanarayana was examined as PW.1 and specific parts of his deposition was confronted to him in cross examination and denied, but marked as Exs. B.1 to B.6 before the trial Court. In Ex.B.1, the plaintiff as PW.1 admitted the arrangement and agreement where Appalanarasamma, who agreed to pay Rs.15,000/- to PW.1 in the presence of D. Narasimha Murthy. Similarly, in Ex.B.2, he admitted that Appalanarasamma utilized the same amount without giving it to him. Thus, there are disputes between the parties and to settle those disputes, the promissory note was executed. On the other hand, in Ex.B.6, the plaintiff herein

categorically admitted that there are no prior disputes between them and no financial transactions took place between the plaintiff and defendants. This crucial admission does go to establish that no cash consideration was passed since there were no financial transactions between the plaintiff and defendants. Under Ex.B.3, he admitted that Bangarayya and Nageswara Rao executed promissory note for Rs.15,000/- in his favour for the amount due and the said promissory note was in the custody of Narasimha Murthy and he gave it when he sent the word that the amount will be repaid. Therefore, these crucial admissions are suffice to conclude that the promissory note under Ex.A.1 is not supported by any consideration since it was executed towards settlement of previous claims, as admitted in Ex.B.3 by both *the defendants*. These admissions are suffice to disbelieve passing of consideration under Ex.A.1-Promissory Note by the plaintiff. The admissions in the cross exam ination of PW.1 marked as Exs. B.1 to B.6 are relevant to decide whether the presumption under Section 118 of NI Act is rebutted or not.

17. Admissions are two types, one is judicial admission and the another is evidentiary admission. Admissions are not conclusive proof, but the admissions estop the person who made such admission under Section 31 of the Evidence

Act. Moreover, the judicial admission is on different footing than the evidentiary admission. When a judicial admission is made in the pleadings or in any document regarding a particular fact in issue, such fact need not be proved, by adducing any amount of evidence, in view of Section 58 of Indian Evidence Act. It is settled law that admission is best piece of evidence, in view of the principle laid down in Sita Ram Bhau Patil v. Ramachandra Nago Patil[3], *Nagubai Ammal and others v. B. Shama Rao and others*[4], *Union of India (UOI) v. Ibrahim Uddin and another*[5] *and Amba Lal v. Union of India*[6]. In the last judgment of *Amba Lal's* case, the constitution Bench of Apex Court held that when a decision is to be based on admission, it must be in writing. In paragraph No.10 of the Judgment, the Supreme Court held that admission is more satisfactory if a body entrusted with functions such as the customs authorities are entrusted, which takes that precaution when its decision is mainly to depend upon such admission. Therefore, the admissions, which are in writing, covered by Exs. B.1 to B.6, the deposition of PW.1 in the earlier round of litigation in O.S.No.181 of 1985, are suffice to conclude that the promissory note was executed only in terms of

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[3] AIR 1977 SC 1712
[4] AIR 1956 SC 593
[5] (2012) 8 SCC 148
[6] AIR 1961 SC 234

settlement of claim between the wife of defendant No.2 and the plaintiff .

18. Here, the main grievance of the respondents herein is that the admission in para No.8 of the Written Statement regarding discharge of debt due under the promissory note, disproved the contention of the defendants that the promissory note was not supported by consideration. No doubt, the initial onus of proof is on the defendants to prove that Ex.A.1—Promissory Note is not supported by any consideration, in view of Section 118 of NI Act. But, after adducing evidence by both the parties, onus of proof loses its importance and at best, the Court is required to decide whether the defendants could dispel the presumption by adducing any independent evidence or by eliciting anything in the cross examination of plaintiff's witnesses. If the admissions of PW.1,which are marked as Exs. B.1 to B.6, are taken into consideration, it can safely be concluded that statutory presumption under Section 118 of NI Act is rebutted or dispelled by eliciting certain facts in the cross examination of PW.1. Therefore, when the defendants dispelled the presumption under Section 118 of NI Act, the onus of proof automatically shifts to the plaintiff to prove that Ex.A.1 is supported by consideration. But, the plaintiff failed to establish that Ex.A.1 was supported by consideration and did not explain under what circumstances

the admissions covered by Exs. B.1 to B.6 were made before the trial Court in O.S.No.181 of 1985. In the absence of satisfactory evidence adduced by the plaintiff to prove passing of consideration under Ex.A.1 and more particularly, when the defendants are able to dispel or rebut the presumption under Section 118 of NI Act, no decree can be passed in favour of the plaintiff for the suit amount. Admission in para No.8 of the Written Statement would not come into the way of defendants for the reason that their contention was that in view of the settlement arrived between the plaintiff and the wife of D.2, the defendants agreed to pay Rs.15,000/- and as cash was not available readily with the defendants and the wife of D.2, D.1 and D.2 were forced to execute the promissory note and thereafter they discharged the obligation under the agreement, in view of the settlement that effected in the presence of D. Appa Rao, Ch. Appa Rao and Ch. Suryanarayana Raju. Therefore, this admission in para No.8 of Written Statement is of no avail since it is only discharge of liability, in view the settlement, but not under the promissory note.

19. In Ex.A.1, there is a clear mention about passing of cash consideration on the date of execution of Ex.A.1. But, as per the evidence, no cash consideration was passed under Ex.A.1—promissory note, but Ex.A.1 was executed to

pay Rs.15,000/-, as per the settlement arrived by the parties in the presence of the elders referred to supra.

20. Though the plaintiff examined himself as PW.1, the evidence on record is not sufficient to believe that cash consideration of Rs.15,000/- was paid under Ex.A.1 on the date of execution by the Defendants.

21. Learned counsel for the plaintiff drawn the attention of this Court to a judgment of Vasu' case, referred to above, wherein para No.33 of the Judgment, wherein Full Bench of this Court agreed to some extent with the law declared in Tar Mahamed v. Syed Embrahim[7] regarding presumption dissenting the principle laid down in the case that when the case of the plaintiff and defendant is disbelieved, still the suit is to be decreed on the basis of the presumption under Section 118 of NI Act. But, this paragraph in the judgment is of no avail and the principle laid down therein relates to the burden of initial onus of proof when execution of the promissory note is proved or admitted and rebutted the presumption. He also relied on the judgment reported in Bharat Barrel and Drum Manufacturing Company v. Amin Chand[8], wherein the principle laid down in G.Vasu's case, referred supra, is confirmed.

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[7] AIR 1949 Bombay 257
[8] (1999) 3 SCC 35

22. In G.Vasu's case, referred supra, the full bench of this Court discussed the scope of Section 118 of NI Act and the view expressed by this Court was approved by the Apex Court in Bharat Barrel's case referred to above, and held as follows:

> *"Once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of 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 burden upon 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. In such an event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118 (a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting*

the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

23. On perusal of the judgment of Apex Court, it is clear that Negative evidence is always in some sort circumstantial or indirect, and the difficulty of proving a negative lies in discovering a fact or series of facts inconsistent with the fact which we seek to disprove and whether 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 recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under Section 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 preponderance of probabilities that 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'.

24. In the present case, the consideration mentioned in the promissory note, Notice and the plaint is payment of Rs.15,000/- on the date of execution to the plaintiff. But, that is rebutted by eliciting in the cross examination of PW.1 coupled with Exs. B.1 to B.6 that the promissory note was executed in view of the settlement arrived by the parties i.e., the plaintiff and the wife of defendant No.2's wife in the presence of elders referred supra. Therefore, the presumption is totally disappeared.

25. By applying the principle laid down in the above decision, it can be safely concluded that the admissions made by PW.1 in the earlier round of litigation in O.S.No.181 of 1985, marked as Exs. B.1 to B.6, are suffice

to rebut the presumption and thereby the presumption disappeared in the present case. But, the plaintiff did not establish passing of actual cash consideration under Ex.A.1 on the date of its execution. On the other hand, Exs. B.1 to B.6 established that the promissory note was executed in view of the settlement arrived between the plaintiff and the wife of D.2. Therefore, the plaintiff miserably failed to establish passing of consideration at the time of execution of Ex.A.1 and consequently, the decree and judgment passed by the appellate Court reversing the Judgment of the trial Court is labile to be set aside while answering this substantial question of law in favour of defendant and against the plaintiff. But, the Appellate Court did not consider various admissions in the earlier round of litigation marked as Exs. B.1 to B.6 in proper perspective and did not even record a finding whether those documents are suffice to rebut or dispel the statutory presumption under Section 118 of NI Act and committed an error in passing a decree in favour of plaintiff, while setting aside the decree and judgment passed by the trial Court. Hence, the Judgment of the appellate Court is erroneous and the same is hereby set aside while restoring the decree and judgment of the trial Court in O.S.No.40 of 1992 on the file of Subordinate Judge, Pithapuram.

26. In the result, this Second Appeal is allowed setting aside the decree and judgment of the Appellate Court in A.S.No.61 of 1993 on the file of III Additional District Judge, Kakinada while restoring the decree and judgment of the trial Court in O.S.No.40 of 1992 on the file of Subordinate Judge, Pithapuram.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 16-09-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SA No. 19 of 1998

Dt. 16-09-2016

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