

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.1169 of 2012

JUDGMENT:

Defendant in O.S.No.63 of 2005 on the file of Principal Junior Civil Judge, Nuzvid, who is the appellant in A.S.No.23 of 2010 on the file of Senior Civil Judge, Nuzvid, preferred this Second appeal under Section 100 of the Code of Civil Procedure, 1908 ('CPC' for short) challenging the decree and judgment passed by the trial Court, which was confirmed by the appellate Court in its Judgment and Decree dt.14.03.2012 for recovery of Rs.69,300/- together with subsequent interest.

2. For convenience of reference, the ranks given to the parties before the trial Court in O.S.No.63 of 2010 will be adopted throughout the Judgment.

3. The plaintiff filed the suit on the foot of two promissory notes dt. 22.02.2002 each for Rs.22,500/- for a total sum of Rs.45,000/- executed by the defendant in favour of the plaintiff agreeing to repay the same with interest 18% either to the plaintiff or to his order as and when demanded. But, the defendant did not discharge the debt due under the said promissory notes despite oral demands made by the plaintiff, hence, the suit.

4. The defendant filed written statement raising a specific contention that he borrowed only Rs.22,500/- and executed one promissory note. But, when the plaintiff informed that the promissory note, which was executed by him was spoiled, he executed second promissory note on the same day and thus the second promissory note was not supported by any consideration and thereby the defendant is not liable to pay the debt under

second promissory note and finally prayed for dismissal of the suit.

5. Basing on the above pleadings, the trial Court framed only one substantial issue.

6. During trial, on behalf of plaintiff, PWs. 1 and 2 were examined and Exs. A.1 and A.2 were marked. On behalf of defendant, Dw.1 was examined and no documents were marked.

7. Upon hearing argument of both counsel, the trial Court held that the plaintiff proved execution of two promissory notes for total a sum of Rs.45,000/- executed by the defendant and decreed the suit for Rs.69,300/- together with subsequent interest at 12% p.a. from the date of suit till the date of decree on the principal sum of Rs.45,000/- and at 6% p.a. from the date of decree till the date of realization.

8. Aggrieved by the decree and judgment of the trial Court, the defendant being unsuccessful preferred an appeal in A.S.No.23 of 2010 before Senior Civil Judge, Nuzvid, which ended in dismissal, while confirming the decree and judgment passed by the trial Court, dt. 12.08.2010.

9. The defendant being unsuccessful before the trial Court and the appellate Court preferred this Second Appeal under Section 100 of CPC formulating three substantial questions of law and extracted hereunder:

- 1) Whether the judgment of lower appellate Court is perverse and non consideration of material evidence on record and against the settled principles of law ?
- 2) Whether the Courts below are correct in placing the burden on defendant inspite of specific plea that defendant not borrowed amount as demanded ?
- 3) Whether the Courts below are correct in granting

interest even though there is no written demand for discharge of alleged debt ?

10. Sri Sreenivasa Rao Velivela, learned counsel for appellant, contended that the findings recorded by the courts below are perverse, due to non consideration of the material evidence on record. No doubt, perverse finding gives raise to a substantial question of law and it is for the appellant to explain what evidence was not considered or passed the decree and judgment on extraneous evidence. But, he did not bring to my notice of such non consideration of material evidence by both the trial Court and the appellate Court. The only contention before me is that the burden of proof was placed on the defendant erroneously and ignoring the testimony of DW.1, the trial Court decreed the suit.

11. No doubt, the burden of proof is initially on the plaintiff to prove the execution of the promissory notes. But here, the defendant himself admitted the execution of two promissory notes on 22.02.2002 while admitting passing of consideration under the first promissory note for Rs.22,500/-, denying passing of consideration under second promissory note. All the more, execution of two promissory notes each for Rs.22,500/- is admitted, he has to explain under what circumstances he executed the said promissory notes. But, the circumstances explained, which led to execution of second promissory note, was not satisfactory. Therefore, the trial Court and the appellate Court disbelieved the plea of the defendant, which led him to execute second promissory note. Once a fact finding is recorded regarding the execution of the promissory note by the trial Court and the appellate Court, this Court cannot interfere with the concurrent fact findings recorded by the trial Court and appellate

court by exercising power under Section 100 of CPC, unless they are perverse. Here, I find no perversity in the findings recorded by the trial Court and the appellate Court regarding the execution of both alleged first and second promissory notes.

12. When the execution of the promissory notes is admitted, the burden of proof shifts on to the defendant to dispel the statutory presumption under Section 118 of Negotiable Instrument Act ('N.I.Act' for short) and the defendant can rebut such presumption either by eliciting some thing in the cross examination of the plaintiff or by adducing independent evidence, since, the defendant is not expected to adduce negative evidence. But here, the defendant was not successful in establishing that the second promissory note for Rs.22,500/- was not supported by any consideration.

13. This Court in **G.Vasu v. Syed Yaseen Siffudin Quadri**^[1] has considered the scope of Section 118 of NI Act at length and the Court is bound to draw a statutory presumption under Section 118 of NI Act while shifting the burden on the defendant to rebut the statutory presumption under Section 118 of NI Act, otherwise, the Court shall presume passing of consideration based on the admission of the plaintiff regarding execution of the promissory notes. Similarly, in **Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal**^[2], the Apex Court expressed the same view as expressed in **G.Vasu's** case (1 supra).

14. In view of the above two judgments, the burden of proof is on the defendant to prove that second promissory note was not supported by consideration. Hence, the findings of the trial Court and the Appellate Court that two promotes are supported by consideration as the defendant failed to rebut the statutory

presumption under Section 118 of N.I.Act and the findings of the trial Court regarding passing of consideration is confirmed by the first appellate Court in its Judgment dt. 14.03.2012. Therefore, both the trial Court and the appellate court rightly placed the burden on the defendant in view of the presumption under Section 118 of NI Act and that the findings of both trial Court and the appellate court are not perverse. Hence, I find no questions of law much less substantial questions of law to reverse the judgment of the trial Court and the appellate Court, in view of the limited scope conferred on this Court under Section 100 CPC. Therefore, the second appeal is liable to be dismissed.

15. At this stage, the counsel for appellant requested this Court for grant of installments to discharge the decree debt. But, this Court cannot grant installment decree without giving notice to the defendant. However, the appellant is permitted to move an application under Order 20 Rule 11 CPC before the trial Court specifying sufficient reasons for seeking installments for discharge of the decree debt.

16. In view of my foregoing discussion, I find no ground to interfere with the concurrent findings recorded by both the trial Court and the Appellate Court, hence this Second Appeal is liable to be dismissed at the stage of admission itself.

17. Accordingly, this Second Appeal is dismissed giving liberty to the appellant to move an application under Order 20 Rule 11 CPC before the trial Court within limitation prescribed.

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

M. SATYANARAYANA MURTHY, J

Date: 28-07-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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[\[1\]](#) AIR 1987 AP page 139

[\[2\]](#) AIR 1999 SC 1008