

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL No.267 of 2016

JUDGMENT

The defendant in O.S.No.26 of 2011 on the file of the Junior Civil Judge, Guntakal and appellant in A.S.No.44 of 2014 on the file of the VI Additional District Judge, Anantapur, preferred this Second Appeal under Section 100 of CPC, challenging concurrent findings recorded by the trial court as well as the appellate court while passing a decree for recovery of amount due under the promissory note.

For the sake of convenience, the parties hereinafter referred as arrayed before the trial court.

The plaintiff filed the suit for recovery of a sum of Rs.99,200/- basing on the promissory note executed by the defendant on 12-01-2010 for Rs.80,000/- agreeing to repay the same together with interest at 24% per annum either to the plaintiff or to his order as and when demand. In spite of repeated demands by the plaintiff including issuance of registered notice, the defendant did not discharge the debt. Hence, the suit.

The defendant filed written statement denying material allegations *inter alia* contending that he neither borrowed any amount from the plaintiff nor executed promissory note in favour of the plaintiff and the promissory note is a forged document. He further contended that he alongwith plaintiff and others started Software project and deposited Rs.5,00,000/- with the plaintiff and they have settled their terms and the entire amount has been received by the plaintiff and the plaintiff obtained signature of the defendant on the reverse of non-judicial stamp.

The plaintiff with fraudulent intention filed the suit for wrongful gain and the signature on the revenue stamp does not belong to the defendant and it is a forged signature. Thus, the promissory note is not enforceable and on the strength of such promissory note, the court cannot pass a decree.

Basing on the above pleadings, the trial court framed two issues. On 21-07-2014, the trial court framed two additional issues.

During trial, on behalf of the plaintiff, PWs.1 and 2 were examined and Exs.A-1 to A-3 were marked. On behalf of the defendant, DWs.1 and 2 were examined and Ex.B-1 was marked.

Upon hearing the argument of both the counsel, the trial court believed execution of Ex.A-1-promissory note while disbelieving the opinion of handwriting expert-DW.2, assigned its own reasons and undertook an exercise under Section 73 of the Indian Evidence Act, came to conclusion that the suit promissory note was executed by the defendant in favour of the plaintiff receiving consideration of Rs.80,000/- mentioned therein and passed a decree in favour of the plaintiff for recovery of suit amount together with costs and subsequent interest.

Aggrieved by the decree and judgment of the trial court, the defendant preferred appeal before the VI Additional District Judge, Anantapur and the learned District Judge dismissed the appeal confirming the decree passed by the trial court.

Aggrieved by the concurrent findings recorded by the trial and the appellate courts in passing decree in favour of the plaintiff, the present

Second Appeal is filed raising several contentions regarding appreciation of evidence of DW.2-Expert. It is contended that the reasons for disbelieving the evidence of DW.2 by the trial court and accepting the same by the appellate court show that the burden is always on the plaintiff to prove execution of Ex.A-1-promissory note but the trial court on erroneous appreciation of evidence passed a decree placing burden of proof on the defendant about passing of consideration.

The counsel for appellant formulated as many as six substantial questions of law, however the following are the only substantial questions of law formulated by this Court.

1. Whether exercise of power under Section 73 of Indian Evidence Act by the trial court, despite expert opinion Ex.B1, is permissible ?
2. Whether initial onus of proof that the promissory note Ex.A1 is not supported by consideration is on plaintiff, if not, the decree is liable to be set aside?

SUBSTANTIAL QUESTION No.1:-

As seen from the record, the trial court disbelieved the evidence of DW.2-Government handwriting expert and undertook an exercise under Section 73 of the Evidence Act to come to a conclusion that Ex.A-1 was executed by the defendant in favour of the plaintiff and assigned reasons for undertaking such exercise, while referring to Ex.B-1-opinion of the expert-DW.2. The appellate court also accepted the reasoning recorded by the trial court for not accepting oral evidence of DW.2 coupled with Ex.B-1. Therefore, both the trial court and appellate court recorded concurrent finding assigning reasons for not accepting the evidence of DW.2 coupled with Ex.B-1-opinion of expert.

The core contest of the defendant is that the burden of proof is on the plaintiff to prove due execution of Ex.A-1 when he pleaded that Ex.A-1- is a forged document. There is no dispute regarding onus of proof, in such case and to substantiate the contentions of the plaintiff, the plaintiff himself was examined as PW.1 besides examining one of the attestors as PW.2, who consistently testified about execution of promissory note and passing of consideration under Ex.A-1.

No doubt, as per settled law, there are different ways and means of proving a transaction as held by the Hon'ble Apex Court in the decision reported in State (Delhi Admn.) Vs. Pali Ram¹, wherein in para 23, it made the following observations:

“Just as in English Law, the Indian Evidence Act recognizes two direct methods of proving the handwriting of a person:

- 1) By an admission of the person who wrote it; and
- 2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are:

- i) By the evidence of a handwriting expert (Sec.45);
- ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question (Sec.47); and
- iii) Opinion formed by the Court on comparison made by itself (Sec.73).

All these three cognate modes of proof involve a process of comparison. In mode (i), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In

¹ AIR 1979 SC. page 14

(ii), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge of repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned”.

In the instant case on hand, the plaintiff adduced direct evidence to prove the suit transaction. Whereas the defendant while denying execution of Ex.A.1, resorted to procedure under Section 45 of Evidence Act referring questioned signatures and standard signatures of D.W.1 for opinion of expert-DW.2.

DW.2-Scientific Officer, A.P.Forensic Science Laboratory, gave opinion under Ex.B-1, which runs as follows:-

“The questioned signatures marked as Q has been carefully compared with the standard signatures marked S1 to S14. The standards are written freely and show natural variations among them.

The questioned and standards do not agree in the writing characteristics. The questioned signatures are wrist movement, good line quality, medium speed, medium skill, but the standard signatures are wrist to advance wrist, perfect line quality, rapid speed, superior skill. The detailed designs in the formation of letters also differ between questioned and standards. The distance between two horizontal strokes are more than the standards, execution of letter ‘e’ differ between questioned and standards; ‘dd’ differ between questioned and standards; execution of letter ‘y’ terminal part is prominent in questioned but not in standards; the total execution of signature is differ between questioned and standards.

There are no fundamental similarities between standards and questioned. The general similarities are due to limitation. The

differences in the writing characteristics are significant and sufficient to form a definite opinion.

Basing on the above observations, it is opined that;

“The person who wrote the red enclosed signatures marked S1 to S14 did not write the red enclosed signature marked Q”.

Thus, the expert/D.W.2 expressed his opinion that the signatures on Ex.A.1 were not written by defendant No.1. On the strength of opinion marked as Ex.B.1, counsel for defendant contended that opinion of an expert is sufficient to disprove execution of Ex.A.1 and to prove that signatures on Ex.A.1 of defendant are forged. No doubt, opinion of expert went against case of plaintiff, but evidence of handwriting expert is not a conclusive evidence and before accepting the same, court must be guarded with caution and it is not so easy to believe report of expert, unless he proved to be experienced in the field of handwriting comparison.

Counsel for plaintiff mainly contended that D.W.2 is not an expert in the field of comparison of handwriting and to issue opinion, because he was not properly trained and not worked in association with senior most experts and drawn the attention of this court to evidence of D.W.2. In examination-in-chief itself, DW.2 admitted that he underwent training in Lokanayak Jayaprakash Narayanan National Institute of Criminology and Forensic Sciences, Ministry of Home Affairs, Rohini, New Delhi and also Government Examiner of Question Documents, Ministry of Home Affairs, Ramanthapur, Hyderabad and he did post-graduation in Physics, and did PGDCA.

Though DW.2 alleged that he underwent training in Loknaya Jayaprakash Narayanan National Institute of Criminology and Forensic Sciences, New Delhi and Government Examiner of Questioned Documents, Hyderabad, he did not produce any proof in support of it. If really he underwent training under the experts specialized institutions as spoken by him, there must be some documentary proof in support of the same. Unless he proves that he was trained in particular field, he cannot be called as an expert.

No doubt, the word 'expert' is not defined anywhere in Evidence Act, but the term 'expert' has been defined in Powell as follows:

"An expert witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on the points on which he is asked to state his opinion. His evidence on such points is admissible to enable the tribunal to arrive at a satisfactory conclusion."

Lawson defines 'expert' as follows:

"A person who has special knowledge or skill in the particular calling to which the inquiry relates."

Strickland defines 'expert' as follows:

"Persons professionally acquainted with the science of practice."

In one of the judgments reported in *Oli alias Abdul Kader*², this Court defined 'expert' as follows:

"An expert is one who has acquired special knowledge, skill or experience in any science, art, trade or profession. Such

² 1976 LW. (Cr.) page 38

knowledge may have been acquired by practice, observation, research or careful study. But, it is the duty of the Judge to decide whether the skill of any person in the matter on which evidence of the Expert's opinion is offered is sufficient to entitle him to be considered as expert. It is the duty of the Judge to decide the question of competency of the witness. An expert, in order to be competent as a witness, need not have acquired his knowledge professionally, it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject or acquired experience therein."

Therefore, from the definition of various renowned authors like Powell, Lawson, Strickland and definition of High Court in *Oli alias Abdul Kader's* case referred supra, expert is a person who acquired special knowledge, skill or experience in any science, art, trade or profession.

In the instant case, as per the admissions made by D.W.2, he underwent training in Loknayak Jayaprakash Narayanan National Institute, New Delhi and also underwent training under Government Examiner of Questioned Documents, Hyderabad, but did not produce any evidence to prove his experience and undergoing training in the field of comparison of handwriting and to give opinion. Unless he proves that he became an expert by observation, working in the field, research as handwriting expert, he cannot be termed as 'expert'. Therefore, D.W.2 failed to establish that he underwent training in a particular field of comparison of handwriting to give opinion or he worked in research, handwriting or by observation, etc., as required under law as per the definition of

‘expert’ in *Oli alias Abdul Kader’s* case referred supra. Therefore, it is difficult to act upon the opinion of D.W.2 marked as Ex.B.1.

In the examination-in-chief, D.W.2 specifically testified that questioned signature is marked as “Q” and also 1 CPDC acquittance register, in which the standard signatures are marked as S.1 to S.14 for the purpose of comparison and opinion. He has carefully and thoroughly examined the original documents in suit No.26/2011 in all angles of handwriting identification and detection of forgery with sophisticated instruments like Magnifiers, Stereo Micro scope and Video spectral comparator and issued Ex.B-1-opinion.

In the cross-examination, DW.2 admitted that there is no specific educational qualification for him to examine the questioned document except training by Government. In India, there is no educational institution to impart education to examine the questioned documents. He also stated that there are similarities between S.1 to S.14. However, there are normal variations observed between S.1 to S.14 but they differed with questioned signature “Q”. The suggestion put to DW.2 that there are no dissimilarities between “Q” and S.1 to S.14 was denied. He admitted that every person is having distinct quality of writing. He did not mention in Ex.B-1 the distinct quality of writing of the writer of “Q”. He has not mentioned in Ex.B1 the range of variations in the admitted signatures “S.1 to S.14”.

Therefore, the opinion marked as Ex.B-1 is not complete and did not disclose the variations he found in the handwriting in "Q". He stated that tremors and hesitations are part and parcel of imitation signatures not traced forgery and it is not a traced forgery.

He further testified that there is difference in line quality in respect of 'Q' and S1 to 14, so also letter characteristics. He also found variation in pen lifting of writings in "Q" and also S1 to 14. He did not take photographs of signatures in "Q" and S1 to S14 and enlarge them for the purpose of giving opinion. Witness adds that the photographic method is the oldest method and he has used highly sophisticated instruments with highly zooming convenient question and standard, side by side method.

Though DW.2 explained the variations in Q and S1 to 14 they are not found in Ex.B-1-opinion, like pen lifting, characteristics.

A perusal of the evidence of DW2 goes to show that he conveniently improved the reasons for his opinion.

Besides the above requirements, the handwriting expert is generally supposed to take into consideration the following aspects:

- (a) Those pertaining to the act itself like movement and its qualities. Since writing is produced by a series of movements, it is more fundamental than any other characteristic.
- (b) Those of style such as slant, roundness, angularity.
- (c) Those of form and formulations and their inconspicuous details, such as beginnings, endings, curves, angles, etc.

- (d) Those pertaining to the writing as a whole, such as arrangement, spacing, alignment, margins, paragraphing and punctuation.
- (e) Qualities like skill, symmetry, fixity and artistic quality.
- (f) Natural variation-its range.
- (g) General appearance or pictorial effect.

If the expert took into consideration all the above aspects, while comparing the signatures, the opinion can be passed without any corroborative evidence.

Here, the expert only took into consideration few aspects like movement, speed, quality, size of letters, ignoring style, such as slant, roundness, angularity, formulations and their inconspicuous details, such as, beginnings, endings, curves, angles, so also, arrangement, spacing, alignment, margins and natural variation and its range. Therefore, the expert/D.W.2 did not take necessary precautions while comparing questioned signatures with the standard signatures of D.W.1. In such circumstances, the court can exercise its power under Section 73 of the Evidence Act and compare admitted signatures with disputed signatures and come to an independent conclusion basing on those similarities.

In normal course of events, there is a possibility of variations in signatures basing on different aspects i.e., space in signatures, quality of paper, support taken at the time of signing, quality of pen and mental condition of persons signing.

In the instant case, in 'Q' the signature on Ex.A-1-promissory note is in dispute in the written statement. The defendant denied execution of Ex.A-1-. In the evidence, DW.1 denied the signature in the column meant for execution of Ex.A-1 categorically. However, the plaintiff examined the attesor who witnessed signing on Ex.A-1 document as executant i.e., by defendant resorting to first mode of proof as laid down in *PALIRAM*'s case referred supra.

The main contention of the counsel for the defendant before this court is that when the expert gave opinion based on his expertise in the field of comparing of handwriting, the court has to accept it and cannot resort to undertake exercise under Section 73 of the Evidence Act and the same shall be used sparingly in rarest of rare cases and placed reliance upon the judgment of this Court in *MOHAMMED SULTAN Vs. NAWAZUNNISA*³ wherein this Court, in para '5', relying upon *KHAMARUNNISSA Vs. FAZAL HUSSAIN* (1997 (1) ALD 317) held as follows:-

"The law is settled that the recourse to Section 73 should be in extreme cases where the parties will be unable to prove the handwriting and signature through the above procedure and the ends of justice will fail if recourse is not take to Section 73 of the Evidence Act. Such a provision should be taken recourse by the Courts in the rarest of the rare cases only to meet the ends of justice and not in a routine manner and unless in the absence of any other evidence produced by the parties. The Courts cannot supplement what the parties fail. It can only judicially supplement it by adopting a method permissible in law. It must be noted with

³ 1997 (3) ALD 631

concern and caution that any such course adopted by the Courts would instead of serving the ends of justice may defeat the same.”

There is change in law in subsequent judgments, which I will refer at appropriate stage regarding exercise of power under Section 73 of the Evidence Act.

Time and again, the Apex Court considered the scope of evidentiary value of expert's opinion and held that it is difficult for the court to rely on the evidence of an expert whose opinion is not conclusive, as held in *Ishwari Prasad Misra Vs. Mohammad Isa*⁴, wherein Full Bench of Apex Court held in para 26 as follows:

“We have so far not considered the evidence of the experts. Mr. Bennett examined by the appellant supports the appellant's case, whereas Nasrat Hussain examined by the respondent supports his case. Evidence given by experts of handwriting can never be conclusive, because it is, after all, opinion evidence. Since we have come to the conclusion that the evidence given by the attesting witnesses and the scribe and the appellant is wholly satisfactory, that evidence proved the execution of the document by the respondent and the said evidence does not really need to be corroborated by the opinion of experts.”

Incidentally, I have gone through the decisions of Hon'ble Apex Court reported in *Murarilal Vs. State of M.P.*⁵, *State of Maharashtra Vs. Sukhdeo Singh and another*⁶, *Fakhruddin Vs. The State of M.P.*⁷, and *Baddam Prathap Reddy Vs. Chennadi Jalapathi*

⁴ AIR 1963 Supreme Court page 1728

⁵ AIR 1980 Supreme Court Page 531

⁶ AIR 1992 SC. 2100

⁷ AIR 1967 SC. 1326

Reddy and another⁸. In all the judgments, the consistent view of the Hon'ble Apex Court and this Court is that, if the opinion of the expert is based on sound reasoning, it can be accepted without any corroboration, but in the instant case, the report of expert is not based on any reasoning let alone sound reasoning and simply taking into consideration 4 or 5 aspects like variation in letter characteristics and pen lifting, concluded that signature 'Q' marked on Ex.A.1 was not written by the person who wrote S1 to S14 without observing commencement, beginning, etc.

In a recent judgment reported in Khandavalli Amith Kumar Vs. State of Andhra Pradesh⁹, this Court while deciding the case under Section 304-B of Indian Penal Code, in Para 38 discussed about scope of Sections 73 and 45 of Indian Evidence Act and held as follows:

“When there is a dispute regarding signatures on a particular document, examination can be done by the Court to come to a conclusion exercising powers under Section 73 of Indian Evidence Act. Handwritings, when similar and identical and apparently seem to be convincing in its nature even to naked eye, expert opinion can be taken as additional evidence for giving finding about handwriting of author of documents in question.”

The same view was expressed by the Hon'ble High Court in the earlier judgment reported in G.Narayanappa (D.2) Vs. Ganne Lakshmamma and others¹⁰.

⁸ 2008(5) ALT192

⁹ 2012(2) ALD (CrL.) page 553 (AP)

¹⁰ 2002(1) AWRpage 269 (AP)

In the recent judgment reported in Malay Kumar Ganguly Vs. Dr.Sukumar Mukherjee and others¹¹, the Apex Court in Paras 33 and 34 held as follows:

"A Court is not bound by expert's evidence which is to a large extent advisory in nature. The Court must derive its own conclusion upon considering opinion of experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point on which he deposes. Medical science is a difficult one. The Court for the purpose of arriving at a decision on the basis of opinions of experts must take into consideration difference between an expert witness and an "ordinary witness". The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted, how much weight should be given thereto, lies within the domain of the Court. Evidence of an expert should, however, be interpreted like any other evidence."

But, the principle laid down in the above decision is pertaining to opinion of a medical expert.

From a reading of the principles laid down in the above decisions, it is clear that the Court has to scrutinize the entire evidence with reference to the expert's opinion, but cannot base its decision on the opinion of an expert alone, since there is every danger to accept the opinion of handwriting expert as held by the Hon'ble Apex Court in the judgments reported in Hari Singh Vs. Lachhman Devi¹² in Baswant Bajirao Vs.Emperor¹³ and in Abhynanda Misra Vs. State of Bihar¹⁴.

¹¹ (2009) 9 Supreme Court Cases page 221

¹² 1933 Cr.L.J. page 735

In all the above judgments, the courts held as follows:

“In considering the value of the evidence of an expert “it must be borne in mind that an expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simple and solely because it has been ascertained that he holds views favourable to its interests.”

In Happu Vs. Emperor¹⁵, the Hon’ble Justice J.Young held as follows:

“The Chemical Examiner and his assistant, both being human, are liable to err, especially in such a delicate operation as the Mash Berzelius process. There is not in this case the slightest allegation against the Chemical examiner but it is equally possible that these privileged persons might be half blind, incompetent, or even corrupt. Judicial notice may be taken of the fact that an inquiry is now taking place in India as to whether a Chemical examiner has made a false report.”

Therefore, in view of the principles laid down in the above decisions, there is every danger to base the judgment on the report of an expert. Even otherwise, expert opinion is only a corroborative piece of evidence and not conclusive, as held by the Apex Court in Ishwari Prasad Misra Vs. Mohammad Isa¹⁶. Hence, it is difficult for me to accept the opinion of D.W.2 for the reason that expert did not follow required procedure mentioned in the earlier paras.

¹³ 1949 Cri.L.J. page 181

¹⁴ AIR 1959 Patna page 328

¹⁵ AIR 1933 Allahabad page 837

¹⁶ AIR 1963 SC page 1728

The trial court made sincere and honest effort while undertaking exercise under Section 73 of the Evidence Act to compare the questioned signature with standard signature or admitted signatures of DW.1 and to come to a conclusion that the defendant himself wrote the signature on Ex.A1 and it is difficult to substitute any other opinion by this court while exercising power under Section 100 CPC. Therefore, the irregularity or illegality in the judgment pointed out by the counsel is not based on any material and law declared by any court more particularly the Apex Court or this court. Therefore, in such circumstances, it is difficult to hold that the trial court ignored the opinion of expert DW.2 marked as Ex.B-1 without recording any reasons and in fact, the trial court and appellate court assigned reasons for non-consideration of Ex.B1 opinion of expert and based on comparison by the court under Section 73, concluded that Ex.A1 was executed by DW.1, the defendant herein.

The decisions relied upon by the learned counsel for the appellant/defendant are already referred above but in the judgements which I referred in the earlier paras i.e., Khandavalli Amith Kumar's case, G.Narayanappa's case and Malay Kumar Ganguly's case, it is difficult to accept the contention as such power is conferred without any fetters on the powers of the court under Section 73 of the Evidence Act to undertake exercise of comparison of the disputed signature with the standard signature or admitted

signature. On the other hand, there are lacunas in Ex.B-1 opinion issued by DW.2. In such case, it is always open to the Court to undertake an exercise under Section 73 of the Evidence Act and both the trial court and first appellate court rightly held that Ex.A1 was executed by the defendant.

Accordingly, substantial question of law in this regard is answered in favour of the plaintiff and against the defendant.

SUBSTANTIAL QUESTION No.2:-

One of the contentions raised by the counsel for the appellant/defendant is that in a suit for recovery of money based on promissory note, the onus is always on the plaintiff to prove that the promissory note is supported by consideration. But, the trial court erroneously placed onus of proof on the defendant. This contention is without any legal basis in view of the statutory presumption under Section 118 of NI Act. According to it, when execution of negotiable instrument is proved or admitted, the court shall draw a presumption that negotiable instrument is supported by consideration.

Of course, the presumption under Section 118 is rebuttable presumption, which permits the defendant to dispel the statutory presumption by eliciting anything in the cross-examination of PWs.1 and 2 or by adducing independent evidence. Here, no evidence to rebut the presumption was adduced by the defendant or failed

to elicit anything in the cross-examination of PWs.1 and 2 to rebut the statutory presumption. In such case, the court is bound to draw the presumption under Section 118 that the promissory note is supported by consideration.

One of the contentions of the defendant is that the trial court quoted a wrong provision of law i.e., Section 114-A of the Evidence Act. Section 114-A also deals with general presumptions under the Evidence Act. Mere quoting of a wrong provision of law or referring provision of law is of no consequence and it is insignificant while deciding the real controversy between the parties.

In G.Vasu Vs. Syed Yaseen Sifuddin Quadri¹⁷, this Court discussed the scope of Sec.118 of Negotiable Instruments Act and the view expressed by this Court was approved by the Hon'ble Apex Court in another decision in Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal¹⁸, wherein the Apex Court 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.

¹⁷ AIR 1987 A.P. page 139

¹⁸ AIR 1999 Supreme Court Page 1008

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."

From the reading of the judgment of Hon'ble Apex Court, it is clear that negative evidence is always in some sort of indirect, and the difficulty of proving negative lies in discovering a fact or series of facts inconsistent with the fact which is sought to be disproved and 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 recitals in the promissory note, or the case set up in the suit notice or in the plaint is

not true and rebut the presumption under Section 118 of Negotiable Instruments Act by showing 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. Though the evidential burden is initially placed on the defendant by virtue of Section 118 of the Act, it can be rebutted by the defendant by showing preponderance of probabilities that such consideration as stated in the promissory note, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption disappears.

Here, the defendant did not rebut the presumption under Section 118 of Negotiable Instruments Act by showing preponderance of probabilities by adducing evidence or by eliciting anything in the cross-examination of plaintiff's witnesses. Thus, the presumption remained unrebutted.

By applying the principle laid down in the above decision and in view of my finding on issue No.1, this court has no option except to conclude that the suit promissory note is supported by consideration drawing presumption under Section 118 of N.I.Act and that apart, passing of consideration is proved by examining PW.2 attester of the document and examination of the scribe is not a requirement to prove Ex.A1.

In view of my foregoing discussion, I find that the suit promissory note is supported by consideration and both the trial court and appellate court rightly concluded that Ex.A-1 is supported by consideration and therefore, I find no ground to warrant interference with the findings recorded by the trial court and the appellate court to overturn the decree based on concurrent findings of both the courts.

In the result, the appeal is dismissed at the stage of admission.
No costs.

Miscellaneous petitions, if any, pending shall stand closed.

At the end of dictating judgment, counsel for the defendant sought instalments for payment of balance of decretal amount and counsel for the plaintiff agreed for granting instalments.

Though it is beyond the scope of Second Appeal, with the consent of plaintiff's counsel, the defendant is permitted to pay the balance of decretal amount together with subsequent interest in six equal monthly instalments commencing from 01-09-2016. In the event of failure to pay any of the instalments, the plaintiff is at liberty to execute the decree for recovery of entire amount due under the decree.

M.SATYANARAYANA MURTHY, J

Date: 18-08-2016
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