**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 169 OF 1996
(OLD SECOND APPEAL NO. 505 OF 1989)**

Chandmal Dhonduram Bamb,
age 56 years occupation Money Lender
R/o land No. 4, Dhule. ..APPELLANT
(Original plaintiff)

VERSUS

1. Nathmal S/o Kasturchand Lodha
age 76 years,
(Appeal abated vide order dated 06/10/1999)

2. Chandmal S/o Nathmal Lodha,
age 58 years,

3. Shantilal S/o Nathmal Lodha,
age 46 years

All businessmen by occupation and
R/o Kothrud, Pune – 411 029 ...RESPONDENTS
(Original defendants)

Mr P.D. Bachate, Advocate holding for Mr R.B. Raghuwanshi,
Advocate for appellant.

CORAM : N.W. SAMBRE, J.

DATE : 27th July 2017

J U D G M E N T

The present appellant is original plaintiff in Special Civil Suit

No. 42 of 1975, initiated for recovery of amount of Rs. 10,000/- being principal amount and Rs. 950/- being interest thereon from the respondents/defendants against pro-note (Exh. 133). The suit came to be decreed by the judgment and decree dated 30th June 1981, passed by the Joint Civil Judge (Senior Division), Dhule.

2. The present respondents/defendants preferred a Regular Civil Appeal being No. 187 of 1983, which came to be allowed by the learned District Judge, Dhule, vide judgment and decree dated November 21, 1988. As such, this Second Appeal.

3. The Second Appeal came to be admitted on September 26, 1989, on following question of law:

> " Mr Raghuvanshi is heard.
>
> Admitted.
>
> The substantial question of law being whether the District Court erred in holding that the suit pro-note was without consideration ? "

4. As such, this appeal is taken out for final hearing.

5. Heard Shri Bachate, learned Counsel for the appellant. None

appears for the respondents/original defendants. The appeal though stood abated against defendant No.1 i.e. respondent No.1 herein, however, since his legal representatives were already on record being respondents No.2 and 3/original defendants No.2 and 3, the appeal, in my opinion, can be prosecuted against the respondents.

6. It is the case of the present appellant that on 9th November 1974, the defendants, who are members of joint Hindu family, carrying on grocery business jointly at Pune, obtained cash amount of Rs. 10,000/-, by executing a demand promissory note and further agreeing to pay interest at the rate of 15% per annum. Though repeatedly demanded, the defendants failed to repay the amount. As such, notice dated 18th September 1975 was served on defendants by the plaintiff. The defendants by their reply dated 27th January 1975, denied plaintiff's claim, resulting into suit being brought into action for recovery.

7. The defendants filed their written statement at Exh. 23 denying the entire transaction and liability to pay the amount. It is claimed by defendants that the account of the plaintiff/appellant is fabricated. It is claimed that the pro-note (Exh. 133) was fraudulently obtained, which was in blank form and there is false insertion of the contents. The Trial Court accordingly framed issues at Exh. 83, which are answered as follows:

"1) Does plaintiff prove that on 9th November 1974 the defendants No. 1 to 3 took a sum of Rs. 10,000/- from him as a loan ?

2) Does plaintiff also prove that the defendants No. 1 to 3 also executed a pro-note in his favour of the aforesaid amount on the aforesaid date ?

3) Does plaintiff prove that the defendant agreed to pay interest at 15 per cent as alleged ?

4) Do the defendants prove that plaintiff fabricated the suit pro-note by obtaining a blank form of pro-note bearing their signatures by deceiptful means as contended in para 7 of their written statement Exhibit 23 ?

5) What is due to the plaintiff if any by way of principal and interest ?

6) Is the plaintiff entitled to notice charges ?

7) Are the defendants entitled to compensatory costs ?

8) What order and decree ?

Findings

1) Yes

2) Yes

3) Yes

4) Not proved

5) Rs. 10,000/- towards principal and Rs. 910 towards interest

6) No

7) No

8) As per final order below"

8. In support of the claim for recovery of the amount, plaintiff examined himself at Exh. 132. The pro-note is at Exh. 133 and counterfoil of the pro-note is at Exh. 141. The pro-note contains the note at its bottom, acknowledging receipt of Rs. 10,000/-.

9. Defendant No.2 examined himself at Exh. 166 and denied entire claim. He tried to narrate the circumstances under which blank pro-note was kept with defendants, which claimed to have been removed by the son of the present appellant, namely Parasmal. The suit pro-note and the counterfoil was admitted. It was also admitted that the acknowledgment at the bottom and pro-note of Rs. 10,000/- is in the hand of original defendant No.1.

10. The Trial Court then decreed the suit. However, the Appellate Court held that the defendants/respondents had discharged their burden of proving that the pro-note was executed without any consideration, and allowed the appeal.

11. Shri Bachate, learned Counsel for the appellant, would urge that the pro-note (Exh. 133) and counterfoil (Exh. 141) are admitted documents. According to him, the pro-note contains acknowledgment of receipt of Rs. 10,000/- in the handwriting of original defendant No.1, which was also proved, and as such, in view of provisions of Section 118 of the Negotiable Instruments Act, there is presumption in favour of this appellant/plaintiff that same was executed for admitted debt. He would then urge that since the defendants are coming out with a plea of fraudulently obtaining pro-note, the burden was on the defendants to

prove the same, which was not discharged. According to him, the Appellate Court without respecting findings of the Trial Court, based on the admitted facts and cogent evidence, has not respected the same, being a possible view. According to him, the lower Appellate Court unnecessarily gave importance to non-disclosure of certain information by the appellant, which he was not duty bound under statute to disclose for dismissing the claim of the plaintiff/appellant. He would then urge that the appeal needs to be allowed.

12. Though served, none appears for the respondents/defendants.

13. In the aforesaid backdrop, it is a duty of this Court to appreciate findings recorded by both the Courts below and to answer the question of law i.e. already framed by this Court.

14. In the evidence of plaintiff, who was examined in support of the suit claim, it is brought on record by him that the pro-note (Exh. 133) was signed by defendants No.1 to 3 by putting their signatures in his presence. He has also deposed about acknowledging amount of Rs. 10,000/- by defendant No.1, so also, about the chargeable interest. It is claimed that it was agreed that the amount would be repaid after *Diwali*.

In his cross-examination, he has admitted that the contents of Exh. 133 and Exh. 141 are written by him.

15. It is then claimed by him that on March 27, 1980, in Regular Civil Suit No. 449 of 1968, he brought his original books of account in the Court, however, same were stolen away. He then admitted in cross-examination that he and his son Parasmal were on visiting terms with the defendants. He denied suggestion that blank forms Exh. 133 and Exh. 141 have been stolen by his son. He then stated that he has stopped business of sale of articles viz. Sugar, Biscuits in the name of Chandmal Dhonduram Bamb.

16. In the testimony of defendant No.2 Chandmal, he admitted that defendant No.1 is his father and defendant No.3 is his brother. According to him, he runs grocery ration shop, one at Kothrud, and another at Deccan Gymkhana, which were registered under the Bombay Shops and Establishments Act. He tried to demonstrate opening and closing balance of the accounts of the firm Nathmal and Sons as on 08/11/1974, 10/11/1974, 8th to 13th November 1974. The said aspect is brought on record so as to demonstrate that there was sufficient cash and balance in their accounts on the date of suit transaction.

17. He further denied that on 09/11/1974, he came to Dhule alongwith his father and brother. According to him, he owns a Motor Car bearing Regn. No. MHU 6893 in the name of defendant No.1. It is brought on record in his cross-examination that certain suits for recovery were brought by bank and individuals against them. The defendants also examined one Waman Sohoni, working as Shop Inspector in Poona Municipal Corporation, so as to prove that the shop was inspected on 09/11/1974 and defendants were very much present at Pune.

18. After analysing the evidence, the Trial Court noted that defendant No.2 in his evidence has brought on record that one Vishwanath executed an agreement of sale of his land on 28th November 1973 in favour of defendants. Said Vishwanath in terms of agreement with Vimalabai Karve, land owner, directed to keep ready pro-note. Hence, upon direction of Vishwanath Tamhankar, a pro-note was kept ready, which was removed by son of the plaintiff and used in the present suit.

19. So far as alleged pro-note (Exh.133) and its counter foil is concerned, same was duly admitted by defendant No.2. The endorsement of acknowledgement of Rs. 10,000/- was also admitted. The Trial Court then considered the burden pursuant to the provisions of

Section 118 of the Negotiable Instruments Act and proceeded to analyse Exh. 240 and Exh. 241, the true extracts of books of account of appellant/plaintiff. The Trial Court then having noted that neither Vishwanath Tamhankar nor Vimalabai Karve, who claimed to have been entered into agreement with defendant No.1 on 22nd March 1975 for sale of their land, were examined. Hence, question of keeping ready pro-note for Rs. 10,000/- and removal of the same by son of the plaintiff was not proved by the respondents/defendants, in view of burden to that effect cast on them. The Trial Court also noticed that a blank signed pro-note cannot be kept ready by an individual like that of defendants-businessmen, and as such, disbelieved the defence of the respondents.

20. The Trial Court, rather, appreciated the evidence of the plaintiff and observed that on 9th November 1974 the amount was received by the defendants having visited in their car at Dhule. The extract of the account books of the defendants Exh. 242 dated 8th November 1974 depicting expenses of petrol worth Rs. 310-28 ps. and payment of Rs. 200/- to Baburao Driver, was appreciated.

21. The Trial Court in the backdrop of aforesaid piece of evidence, discarded the evidence of the witness of defendants, namely, Shop Inspector Shri Sohoni, and proceeded to decree the suit.

22. The Appellate Court by unnecessarily giving weightage to the material, which was not of importance, rather, which was not required to be produced or disclosed, statutorily by the plaintiff, proceeded to reverse the findings of the Trial Court. The Appellate Court without any basis has recorded finding that the plaintiff/appellant has given false explanation for non-production of account books though he has brought on record in his evidence that he has given advertisement about loss of books from the Court. Apart from above, the Appellate Court lost sight of the fact that the documents Exh. 133 – pro-note, document Exh. 141 -counterfoil of pro-note and the acknowledgment depicting cash of Rs. 10,000/- by the defendants, were admitted by the defendant in his evidence.

23. The Appellate Court has also lost sight of the fact that defendants have failed to discharge their burden of proving fact of keeping pro-note ready for Rs. 10,000/- upon instructions of one Vishwanath Tamhankar, who was not examined. The first Appellate Court without any basis has accepted evidence of the defendants of removing pro-note (Exh.133) by the son of the plaintiff. The Appellate Court, as such, in my opinion, lost the very object of provision of section 118 of the Negotiable Instruments Act and the presumption provided thereunder. The Appellate Court has failed to consider in its proper perspective the discharge of burden by the defendants/respondents to prove the fact that pro-note

(Exh.133) was never executed and it was removed by son of the plaintiff when, in fact, the signature thereon was admitted by defendants.

24. The Appellate Court unnecessarily gave importance to the non-disclosure of decree in Special Civil Suit No. 35 of 1975 and Regular Civil Suit No. 500 of 1972 . The findings recorded in the said suit though had hardly any bearing over the issues involved in the present suit, was relied upon for reversing the decree. The lower Appellate Court applied different yardstick while appreciating initiation and recording of finding against appellant in RCS No. 500 of 1972 and Special Civil Suit No. 180 of 1976 (Exh. 197) against respondents/defendants.

25. The Apex Court in the matter of **Bhaurao Dagdu Paralkar Versus State of Maharashtra [2006(1) Bom.C.R. 770]** while dealing with an issue of fraud, has recorded a finding that non-disclosure of a fact, not required by a statute to be disclosed, may not amount to fraud. The Apex Court further observed that even in commercial transactions if every fact is not disclosed, it would not vitiate the agreement. Support can be drawn from the appropriate observations to that effect made by the Apex Court in paragraph 13.

26. Drawing support from the aforesaid judgment, the inference

drawn by the Appellate Court that the appellant has suppressed information about the suit being R.C.S. No. 500 of 1972 and Special Civil Suit No. 35 of 1975 against him and closure of business, will be of hardly any bearing over the merits of the claim made.

27. Rather, the judgment of the Appellate Court appears to be based on conjectures and surmises.

28. In view of above, it has to be answered that the pro-note (Exh. 133) was duly proved in the evidence of the plaintiff and that of D.W.2 i.e. defendant No.2 including the contents thereof. As such, the judgment of the lower Appellate Court is not sustainable.

29. The appeal, as such, stands allowed.

30. The judgment and decree passed by the District Judge, Dhule, on 21st November 1988, in Regular Civil Appeal No. 187 of 1983, is hereby quashed and set aside, and the judgment of the Joint Civil Judge (Senior Division), Dhule, delivered on 30th June 1981, decreeing Special Civil Suit No. 42 of 1975, stands restored.

31. Consequently, appeal, as such, stands allowed in above

terms.

32. In view of dismissal of Second Appeal, pending Civil Application, if any, does not survive, and same stands disposed of.

(N.W. SAMBRE, J.)

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