IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.221 OF 1995

Balvant Hari Patil-Akurdekar,
Adat Shop through Dinkar Balvant
Patil since deceased by legal heirs
and representatives

1. Smt. Shanta Dinkar Patil And Others … Appellants
Versus
1. Yashwant Shiva Patil, since
deceased by his heirs and representatives
1A. Kundlik Yashwant Patil And Others … Respondents

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Mr. K.V. Saste for the Appellants.
None for the Respondents.

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CORAM : S.C. GUPTE, J.

DATE : 16 FEBRUARY 2017

P.C. :

. Heard learned Counsel for the Appellants. The Respondents, though duly served and represented by an advocate, are absent. The matter was called out on 2 February 2017 and again on 13 February 2017. The Respondents did not appear on either of these dates. The second appeal is, accordingly, heard ex-parte.

2 The second appeal challenges a judgment and order dated 16 June

1993 passed by the Vth Additional District Judge, Kolhapur in Regular Civil Appeal No.2 of 1986. By the impugned judgment and order, the learned District Judge allowed the Respondent's appeal and set aside a judgment and order passed in Regular Civil Suit No.334 of 1979 in favour of the predecessor of the Appellants.

3 The Appellants are legal heirs of the deceased original Appellant (original Plaintiff) who had filed the present suit against the predecessor in title of the Respondents (original Defendant) for recovery of a loan of Rs.14,500/- alongwith interest. The suit was based *inter alia* on a promissory note executed by the Defendant as well as on the original consideration, namely, the loan advanced by the Plaintiff to the Defendant. The Plaintiff carried on money lending business under a money lending licence duly issued in his favour. The Defendant in his written statement denied receipt of the amount of Rs.14,500/- or any part thereof from the Plaintiff. He submitted that at the instance of the Defendant, two accounts were opened by two individuals, Yeshwant Krishna Patil ("Yeshwant") and Bhiva Bapu Patil ("Bhiva"), in the Plaintiff's shop. It was further the Defendant's case that monies were really due from these two individuals, but in good faith the Defendant executed a promissory note in the Plaintiff's favour. The Defendant submitted that as for himself only an amount of Rs.197.78 ps was due on that date from him to the Plaintiff, when he executed this promissory note in good faith, relying on the Plaintiff's promise that he would mention the correct amount after verifying the same from his account books; but that the Plaintiff took undue advantage of the Defendant's signature and filed the present suit on the basis of the promissory note, claiming the amount which was actually

due from Yeshwant and Bhiva. The Trial Court found that the amount of Rs.14,500/- originally claimed by the Plaintiff towards the principal amount was not paid to the Defendant. The Trial Court, however, found that the Defendant executed the subject promissory note, and invoked the presumption under Section 118 of the Negotiable Instruments Act of such execution being for a lawful consideration, which could be rebutted only by offering proof of want of consideration. The Trial Court found that no such proof was tendered by the Defendant. The Trial Court, however, found fault with some amount which was purportedly charged illegally towards interest by the Plaintiff and accordingly decreed the Plaintiff's suit only partly by directing the Defendant to pay Rs.14,443/- to the Plaintiff, which was inclusive of interest, together with further simple interest at 5 % per annum from the date of the suit till the actual payment. The First Appellate Court, however, set aside the judgment and decree in appeal holding that the Plaintiff had failed to prove that the Defendant had received the amount of Rs.14,500/- as claimed in the plaint and that the promissory note appeared to have been executed for an amount which was actually due to Yeshwant and Bhiva. Significantly, the First Appellate Court also observed at another place in the impugned judgment that the documents and evidence on record showed that the subject promissory note was prepared and executed by the Defendant for the amount standing in the names of Yeshwant and Bhiva, as the Defendant was a surety, though the Trial Curt noted that this evidence was inconsistent with the pleadings of the Plaintiff and accordingly nonsuited the Plaintiff.

4 The impugned judgment and order of the First Appellate Court suffers from a serious error of law. Whether the Defendant had executed

the promissory note as a principal borrower or a surety, he is clearly liable on it. The First Appellate Court, after having specifically found that the Defendant had executed the promissory note as a surety for Yeshwant and Bhiva, could not have non-suited the Plaintiff simply on the ground that this finding was inconsistent with the Plaintiff's pleading, where the Plaintiff had claimed that the Defendant was a principal borrower. The only question that needs to be asked in the case of liability of the drawer of a promissory note is whether or not the promissory note is supported by consideration. There is always presumption in favour of such consideration. It is for the drawer to rebut that presumption. Besides, the consideration of a promissory note may not necessarily flow directly from the payee to the maker of the note. In fact, the definition of consideration, even generally, under Section 2 (a) of the Contract Act does not require this. The consideration may be any act or abstinence on the part of the promisee at the desire of the promisor. The benefit of such act or abstinence may actually go to any third party. Whereas the Trial Court simply went by the presumption in favour of such consideration under Section 118 of the Negotiable Instruments Act, which according to it was not rebutted by the Defendant (which itself is the correct basis of granting relief on the pronote), the First Appellate Court actually found the Defendant to be a surety for the principal borrower. That clearly implies a perfectly lawful consideration. This important aspect of the matter of the law of negotiable instruments was completely disregarded by the First Appellate Court. The impugned judgment and order of the First Appellate Court, thus, cannot be sustained.

5 The second appeal is, in the premises, allowed and the impugned judgment and order of the Vth Additional District Judge, Kolhapur dated

16 June 1993 is set aside and the judgment and decree passed by the IIIrd Joint Civil Judge, Junior Division, Kolhapur in Regular Civil Suit No.334 of 1979 on 5 October 1985 is restored. No order as to costs.

(S.C. GUPTE, J.)