

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.01.2017

PRONOUNCED ON : 09.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.535 of 2011

and

M.P.No.1 of 2011

Kathirvel

... Appellant/Plaintiff

Vs.

Purushothaman

... Respondent/Defendant

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 03.11.2009 made in A.S.No.35 of 2009, on the file of the Fast Track Court II, Tindivanam, confirming the judgment and decree dated 27.08.2008 made in O.S.No.267 of 2006, on the file of the Principal District Munsif Court, Tindivanam.

For Appellant : Mr.D.Ravichander

For Respondent : Mr. R.Thiagarajan

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 03.11.2009 made in A.S.No.35 of 2009 on the file of the Fast Tract Court No.II, Tindivanam confirming the judgment and decree dated 27.08.2008 made in O.S.No.267 of 2006 on the file of the Principal District Munsif Court, Tindivanam.

2. The suit has been laid by the plaintiff for recovery of money on the basis of the promissory note.

3. According to the plaintiff, the defendant borrowed a sum of Rs.50,000/- from him on 08.04.2002 and in evidence thereof, executed a suit promissory note promising to repay the said amount with interest at the rate of 12% per annum on demand and inasmuch as the defendant did not repay the amount despite several demands and also after the issuance of legal notice, it is stated that the plaintiff has been necessitated to lay the suit.

4. The defence has been taken by the defendant that the suit promissory note is not supported by consideration and that the plaintiff opened a fertilizer shop at Saram and the defendant was helping the plaintiff in the above said business at Saram and according to the defendant, fertilizers were distributed to the farmers on credit basis with the consent of the plaintiff

and inasmuch as the plaintiff had closed the shop at the above place without any intimation to the defendant. the defendant was unable to collect the dues from the farmers and it is therefore alleged that the plaintiff, out of compulsion and force, obtained the signature of the defendant on a blank paper and making use of the same had fabricated the promissory note and hence, the suit is liable to be dismissed.

5. Inasmuch as, according to the plaintiff, the defendant has admitted his signature in the suit promissory note, the presumption under Section 118 of the Negotiable Instruments Act has to be invoked and as the defendant had not rebutted the presumption raised in favour of the plaintiff, it is argued that the suit promissory note is supported by consideration and accordingly, the suit should have been decreed in favour of the plaintiff. But, according to the plaintiff's counsel, the courts below have on an erroneous approach of the matter wrongly shifted the burden on the plaintiff to establish that the suit promissory note is supported by consideration and therefore, contended that the findings of the courts below are misdirected against the evidence on record and also erroneous in law and liable to be reversed.

6. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

" (i) Are the courts below right in shifting the burden on the shoulders of the plaintiff, despite categorical admission of the defendant that he signed the pronote and his only defence was that he stood only as a guarantor?

(ii) Are not the judgments of the courts below liable to set-aside as the courts below proceeded their judgments against Sec 118 of the Negotiable Instruments Act?

7. The courts below have, based upon the evidence of the plaintiff that the defendant had borrowed the amount from him under the suit promissory note only for his family expenses and not in respect of any amount due by way of the sale of fertilizers and having further asserted that recitals to that effect alone are incorporated in Ex.A1, the suit promissory note and he has laid the suit on the said promissory note and apart from the said promissory note, he has no other promissory note containing the signature of the defendant, found that inasmuch as the above evidence of the plaintiff are completely contradictory to the recitals found in Ex.A1, the suit promissory note, proceeded to hold that the plaintiff has to

establish that the suit promissory note is supported by consideration as deposed by him during the course of his evidence and inasmuch as the plaintiff has failed to establish his case, disallowed the plaintiff's case.

8. A perusal of Ex.A1 would go to show that the amount mentioned therein is stated to be the dues pending in connection with the sale of fertilizers of the plaintiff to the defendant and there is no recital that the amount had been borrowed by the defendant from the plaintiff for meeting his family expenses.

9. According to the plaintiff's counsel, even though the consideration set up in the suit promissory note is different from the consideration set out during the course of evidence of the plaintiff still the invocation of Section 118 of the Negotiable Instruments Act should be made and in this connection, he placed reliance upon the decisions reported in 98 LW 800 (M.Krishnaswamy Naicker V. S.Radhakrishna Naicker), 100 LW 925 (Balakrishna Pillai Vs. A.Kannappa Pillai), 2008 (3) CTC 470 (Ganapathy Thevar Vs. Shanmuga Thevar) and 2006-3-L.W.451 (N.S.Arumugam Vs. Trishaul Traders Dealers in Ferrous and non-Ferrous Iron Scrap Rubbish, Contractors, No.119, T.H.Road, Madras - 81 and two others) and also, though not produced the concerned authority relied upon certain passages made by the Hon'ble Judges in the decision reported in AIR 1949 BOM 257 (Tarmahomed Haji Vs. Tyeb Ebrahim).

10. However, the counsel for the defendant contended that presumption under Section 118 of the Negotiable Instruments Act would not arise, when the plaintiff pleads a consideration different from one found in the promissory note and in this connection, he placed reliance upon the decision of the apex court reported in (1996) 8 Supreme Court Cases 586 (K.P.O.Moideenkutty Hajee Vs. Pappu Manjooran and Another) and the decision reported in 64 L.W. Page 475 (G.Venkatareddi V.P.Nagireddi).

11. In the decision reported in (1996) 8 Supreme Court Cases 586 (K.P.O.Moideenkutty Hajee Vs. Pappu Manjooran and Another), the position of law as to the invocation of the presumption under Section 118 of the Negotiable Instrument of Act when the plaintiff pleads a consideration different from the one found in the promissory note is postulated as follows:

" When the suit is based on pronote, and promissory note is proved to have been executed, Section 118(a) raises the presumption, until the contrary is proved, that the promissory note was made for

consideration. That initial presumption raised under Section 118(a) becomes unavailable when the plaintiff himself pleads in the plaint different considerations. If he pleads that the promissory note is supported by a consideration as recited in the negotiable instrument and the evidence adduced in support therefor, the burden is on the defendant to disprove that the promissory note is not supported by consideration or different consideration other than one recited in the promissory note did pass. If that consideration is not valid in law nor enforceable in law, the court would consider whether the suit promote is supported by valid consideration or legally enforceable consideration. The burden of proof is of academic interest when the evidence was adduced by the parties. The court is required to examine the evidence and consider whether the suit as pleaded in the plaint has been established and the suit requires to be decreed or dismissed.

12. In the decision reported in 64 L.W page 475 (G.Venkatareddi Vs. P.Nagireddi) as regards the above issue, the position of law is summarised as follows:-

" Negotiable Instruments Act, S..118 - consideration of a promissory note-Burden of proof on defendant - Shifts to plaintiff when he avers consideration different from the one recited in the note.

Where in the suit on a promissory note the plaintiff contends that the consideration is different from the one recited therein the burden of proving want of consideration does not rest with the defendant but it is for the plaintiff to prove consideration for the note.

1929 M.W.N.425 : Foll.

13. Therefore, following the above dictum of the Supreme Court, it could be seen that when admittedly the plaintiff has taken out a plea during the course of evidence about the consideration different from what that had been recited in the suit promissory note, it could be seen that the invocation of the Presumption Section 118 of the Negotiable Instruments Act

cannot be taken as such and in such circumstances, the burden is placed only upon the plaintiff to adduce evidence to establish that the suit promissory note is supported by consideration as stated by him.

14. In so far as this case is concerned, for the proof of the plaintiff's case, we have only the ipse dixit testimony of the plaintiff. Therefore, the Courts below have rightly not accepted the case of the plaintiff and held that the plaintiff has failed to establish that the suit promissory note is supported by consideration.

15. A perusal of the judgement of the first appellate court would go to show that the first appellate court, though, had proceeded to hold that the plaintiff has to establish that the suit promissory note is supported by consideration, on the assessment of the evidence adduced by the respective parties held that the defendant has rebutted the presumption under Section 118 of the Negotiable Instruments Act by placing acceptable evidence and even thereafter, inasmuch as the plaintiff has failed to establish that the suit promissory note is supported by consideration as put forth by him, disallowed the plaintiff's case.

16. The defendant has examined the attesting witness of the suit promissory note as DW2. DW2 has deposed that at the time of writing Ex.A1, he was not present. However, he has admitted his signature in the document. Further, according to DW2, at the time of affixing his signature in the suit promissory note, only the plaintiff was present. Further, he also deposed that even though he is aware of the defendant's signature on the revenue stamp, according to him, he is not aware as to when the defendant signed in the suit promissory note and the defendant did not sign in the revenue stamp in his presence. Therefore, it could be seen that as deposed by DW2, the attesor to the suit promissory note, the defendant was not present at the time of writing the contents of the suit promissory note or at the time of attestation of the same by DW2 and it is therefore evident that the consideration had not passed on to the defendant under the suit promissory note at the time of execution of the document as put forth by the plaintiff.

17. According to the plaintiff, in respect of the selling of fertilizers, there is no amount due to him. Therefore, when the plaintiff's evidence is found to be inconsistent to the recitals found in the suit promissory note, it could be seen that the amount mentioned in the suit promissory note would not have been the consideration or received by the defendant from the plaintiff under the said document, with reference to the dues in respect of the sale of fertilizers of the plaintiff. Therefore, it could be seen that the plaintiff has not projected

consistent case about the suit promissory note and on the other hand, he has made inconsistent pleas in the plaint as well as in the evidence with reference to the passing of consideration under the suit promissory note.

18. In the light of the above position, it could be seen that the courts below have held that the plaintiff having taken a stand diametrically opposite to the recitals found in the promissory note as regards the passing of consideration held that it is for the plaintiff to establish that the suit promissory note is supported by consideration as put forth by him and accordingly, having found that the plaintiff has failed to establish his case negatived the relief sought for by the plaintiff.

19. In such view of the matter, the contention of the plaintiff's counsel that the courts below have erroneously shifted the burden on his shoulder as such cannot be accepted. On the other hand, it could be seen that based upon the evidence adduced by the respective parties, particularly, the evidence of the attesor examined as DW2 and also, the inconsistent pleas of the plaintiff as regards the passing of consideration, the Courts below have held that the defendant had discharged the initial burden placed upon him and thereby raised the presumption that could be laid under Section 118 of the Negotiable Instrument Act and when the burden is again shifted to the plaintiff to establish the passing of consideration under the suit promissory note, the plaintiff having failed to discharge his burden, rightly disallowed the plaintiff's case.

20. In view of the above discussions, the contention of the plaintiff's counsel that the courts below have erred in shifting the burden on the shoulder of the plaintiff and also erred in dismissing the plaintiff's case as against the principles of law outlined under Section 118 of the Negotiable Instruments Act as such cannot be countenanced. Accordingly, the substantial questions of law formulated in the second appeal are answered against the plaintiff and in favour of the defendant.

At the end, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

sms

To

1. The Judge,
The Fast Track Court II,
Tindivanam.
2. The Principal District Munsif Court,
Tindivanam.

+1 cc to Mr.D.Ravichander Advocate sr 1842

S. A.No.535 of 2011
and
M.P.No.1 of 2011

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