

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1188 of 2013

JUDGMENT:

This appeal is filed by the plaintiff, under section 100 CPC, assailing the judgment and decree dated 08.04.2013 passed in A.S.No.3 of 2011 on the file of Senior Civil Judge Court, Chirala, wherein whereby the decree and judgment dated 28.01.2011 passed in O.S.No.238 of 2007 on the file of Principal Junior Civil Judge Court, Chirala, dismissing the suit filed by the plaintiff for recovery of suit amount, was reversed.

2. Heard the learned counsel appearing for both the parties and perused the record.

3. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

4. The facts leading to filing of the second appeal are briefly as follows: It is the case of the plaintiff that on 28.06.2004, the defendant borrowed an amount of Rs.55,000/- from Y.Ravi Sankar and executed a promissory note in his favour on even date agreeing to repay the same with interest at 12% per annum. The said Y.Ravi Sankar transferred the promissory note in favour of the plaintiff on 23.01.2007 after taking an amount of Rs.55,000/- from him as consideration. The plaintiff got issued a legal notice directing the defendant to repay the amount. The defendant did not choose to issue reply. Having no other alternative, the plaintiff filed the suit for recovery of the amount.

5. The defendant filed a written statement denying all the averments made in the plaint *inter alia* contending that his son-in-law filed insolvency petition and in that connection, he executed a promissory note in favour of Y. Ravi Sankar as a security. The suit promissory note is not supported by consideration. Hence, the suit is liable to be dismissed.

6. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the suit promissory note is supported by consideration?
2. Whether the plaintiff is entitled for suit amount?
3. To what relief?

7. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 4 were examined and Exs.A1 to A4 were marked. On behalf of the defendant, D.Ws.1 to 3 were examined and no documents were marked. The chief-examination of P.W.3 was eschewed.

8. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the defendant borrowed an amount of Rs.55,000/- under Ex.A1 from Y.Ravi Sankar and consequently, decreed the suit. Feeling aggrieved by the judgment and decree of the trial Court dated 28.01.2011 in O.S.No.238 of 2007, the defendant preferred A.S.No.3 of 2011 on the file of Senior Civil Judge Court, Chirala. The learned Senior Civil Judge after reappraising the oral and documentary evidence available on record independently, arrived at a conclusion that the suit promissory note is not supported by consideration and allowed the

appeal setting aside the decree and judgment passed by the trial Court. Hence, the unsuccessful plaintiff preferred the present second appeal.

9. The substantial question of law urged by the learned counsel for the appellant is:

“Whether the first appellate Court misconstrued Section 118 of the Negotiable Instruments Act?”

POINT:

10. Suffice it to say that once the plaintiff establishes execution of promissory note, the burden of proof shifts on the defendant to establish that promissory note is not supported by consideration. Once the defendant discharged the burden of proof, the onus of proof again shifts on the plaintiff to establish that promissory note is supported by consideration.

11. To substantiate the argument, learned counsel for the defendant has drawn the attention of this Court to the decision in **G. Vasu v. Syed Yaseen Sifuddin Quadri**¹ wherein it was held at Para 32 as follows:

“32. For the aforesaid reasons, we are of the view that 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 suit notice or in the plaint is not true and rebut the presumption under S.118 by showing a 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. The words 'until the contrary is proved' in S.118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the Court

¹ AIR 1987 Andhra Pradesh 139

to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of S. 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden. Thereafter, the presumption under S.118 does not again come to the plaintiff's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance.

12. Let me consider the facts of the case on hand in the light of the above legal principle.

13. The oral testimony of P.Ws.1 and 2 reveals that the first defendant executed Ex.A1 promissory note in favour of P.W.4. The testimony of P.W.4 reveals that he transferred Ex.A1 promissory note in favour of the plaintiff on 23.01.2007 under Ex.A2 endorsement. The burden of proof lies on the plaintiff to prove execution of Ex.A1 promissory note. Even if the testimony of P.W.1 is taken into consideration, he was not present at the time of execution of Ex.A1 promissory note by the defendant (D.W.1) in favour of P.W.4. If the testimony of P.W.4 is taken into consideration, he is the scribe of Ex.A1 promissory note. The recitals of Ex.A1 negate the contention of P.W.4 that he is the scribe of Ex.A1. P.W.4 in unequivocal terms deposed that he does not know who are the attestors of Ex.A1 promissory note. P.W.4 is not in a position to say who is the scribe and who are the attestors of Ex.A1 promissory note. Taking into consideration the totality of facts and circumstances of the case, the appellate Court rightly discarded the testimony of P.W.4, who is the transferor of Ex.A1

promissory note. P.W.1 and D.W.1 being the parties to the proceedings, the possibility of distortion of facts in order to suit their claim cannot be ruled out. Therefore, the Court has to scrutinise the testimony of P.W.1 and D.W.1 meticulously so as to eliminate the exaggerations, if any, in order to ascertain the truth. It is the case of the defendant that he executed Ex.A1 promissory note in favour of P.W.4 in the presence of elders in order to save his son-in-law, who filed insolvency petition. The trial Court decreed the suit on two grounds. (1) The defendant has not issued a reply notice to Ex.A3 legal notice. A duty is cast on the defendant to issue a reply to the legal notice Ex.A3. Mere non-issuance of legal notice that itself is not a valid ground to grant decree in favour of the plaintiff. The trial Court without taking into consideration the settled principle of law, simply granted the decree in favour of the plaintiff on the ground that the defendant has not issued a reply notice. The trial Court also made an observation that the defendant did not choose to examine his son-in-law. It is not the case of the plaintiff that the son-in-law of the defendant is either the scribe or the attester of the document. Non-examination of son-in-law of the defendant may be one of the grounds to substantiate the stand of the plaintiff. However, mere examination of the son-in-law of the defendant itself is not a valid ground to decree the suit in favour of the plaintiff without taking into consideration the scope of Section 118 of Negotiable Instruments Act.

14. In the instant case, the burden of proof lies on the defendant that Ex.A1 is not supported by consideration in view of his

admission. D.W.2 is the scribe, D.W.3 is the attester of Ex.A1 promissory note. One way D.Ws.2 and 3 are independent witnesses. If the testimony of D.W.2 is taken into consideration, Ex.A1 promissory note is not supported by consideration. D.W.2 being a scribe of Ex.A1 is the competent person to speak about payment of Rs.55,000/- by P.W.4 to the defendant. If the testimony of P.W.4 is taken into consideration, D.W.2 is not the scribe of Ex.A1 promissory note. The fact remains D.W.2 is the scribe of Ex.A1 promissory note.

15. It is not elicited in the cross-examination of D.W.2 that due to previous animosity between him and the plaintiff, he is speaking false in order to support the case of the defendant. There is no necessity for D.W.1 to speak false in order to help the defendant. The testimony of D.W.2 remains unchallenged in all aspects. D.W.3 is one of the attestors of Ex.A1 promissory note. If the testimony of D.W.3 is taken into consideration, the defendant executed a promissory note in favour of P.W.4. His testimony further reveals that P.W.4 did not pay consideration in their presence to the defendant. The very purpose of the cross-examination of the witness is to elicit the truth. For the reasons best known, the plaintiff did not choose to cross-examine D.W.3, who is an attester of Ex.A1 promissory note. The testimony of D.W.3 remained unchallenged. D.Ws.2 and 3 are independent witnesses, whose testimony cannot be discarded on flimsy grounds.

16. On the other hand, D.Ws.2 and 3 inspires the confidence of the Court. The material placed on record clinchingly establishes

that Ex.A1 promissory note is not supported by consideration. Having regard to the facts and circumstances of the case as well as the principle enunciated in the case cited supra, I am of the considered view that Ex.A1 is supported by consideration. Absolutely, there is no material on record to show that Ex.A1 promissory note is supported by consideration. The first appellate Court considered the oral testimony of witnesses in the light of Section 118 of the Negotiable Instruments Act and arrived at a conclusion that Ex.A1 promissory note is not supported by consideration. On the other hand, the trial Court decreed the suit without properly appreciating the testimony of D.Ws.2 and 3. Viewed from factual or legal angle, the judgment and decree of the trial Court is not sustainable. I am fully endorsing the findings of the appellate Court.

17. Having regard to the facts and circumstances of the case, there is no question of law much less substantial question of law involved in this appeal. Hence, the appeal is liable to be dismissed.

18. Accordingly, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

05.11.2018

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