

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Raja Basu Chowdhury

FA 80 of 2022

Saleha Bibi @ Chhabi & Anr. –vs- Asim Kumar Chatterjee
with
[IA No.: CAN 4 of 2019 (Old No.CAN 11108 of 2019)]

For the Appellants : *Ms. Rita Patra,*
Ms. Puspita Das.

For the Respondents : *Mr. Saiful Alam*

Hearing is concluded on : *22nd July, 2022.*

Judgment On : **30th September, 2022.**

Raja Basu Chowdhury, J.

1. The appellants have challenged the judgment and decree dated 29th August, 2018 and 10th September, 2019 respectively passed in Money Suit No. 15 of 2016, on several grounds. The plaintiff, who is the respondent in the instant appeal had filed a suit for recovery of Rs.6,90,000/- paid by the plaintiff to the predecessor-in-interest of the defendant nos. 1 and 2.

2. The plaint case proceeds on the premise that the plaintiff had a long-standing acquaintance with one Sk. Piru son of Md. Jan. The plaintiff had lent and advanced an amount aggregating Rs.6,90,000/- (Rupees Six Lac Ninety Thousand) only to Sk. Piru for construction of house as also for business purpose. The plaintiff claims to be a retired service holder and had given such amount to Sk. Piru from his retirement benefits.

3. On 19th November, 2013 Sk. Piru executed a promissory note and agreed to repay Rs.6,90,000/- within 11 months from the date of execution of the promissory note to the plaintiff. Sk. Piru did not repay the loan, he expired in the year 2014. The defendants are the legal heirs of Sk. Piru. After the death of Sk. Piru the plaintiff on several occasions, demanded repayment of the loan amount from the legal heirs of Sk. Piru, who had inherited all the moveable and immoveable properties of Sk. Piru, but the defendants refused to repay the loan amount. Hence the suit.

4. The defendants contested the suit by filing written statement. The defendants claim that the defendants' predecessor had never approached the plaintiff at any point of time, for any loan, either for construction of house or for business purpose. No amount was borrowed from the plaintiff. Execution of the promissory note including the figure of outstanding amount indicated in such promissory note is false and fabricated. The purported notice dated 31st May, 2016 demanding repayment, was never served on the defendants. The claim made by the plaintiff is false. As would appear from the above, the contest is not only regarding the execution of promissory note but also regarding advance of Rs.6,90,000/- including requirement of the predecessor-in-interest of the defendants to take the loan amount.

5. The learned Judge framed five several issues:

- (i) Is the suit maintainable in its present form?
- (ii) Has the plaintiff any cause of action to initiate the instant suit?
- (iii) Has the plaintiff any right, title and interest in respect of the suit property?
- (iv) Is the plaintiff entitled to the decree as prayed for?
- (v) To what other relief, if any, is the plaintiff entitled?

6. The learned Judge took into consideration the evidence of the plaintiff, who himself had deposed in the proceeding as plaintiff witness (hereinafter referred to as PW) 1, the evidence of attesting witness Abhijit Roy, who is also son-in-law of the plaintiff, who deposed as PW 2 and the evidence of Hasibul Hoque, who deposed as PW3. After taking into consideration the above three depositions, the factum of marking of the promissory note as Exhibit-1 and proceeding on the premise that the defendants did not challenge the said document which was marked as exhibit-1, the learned Judge concluded that the plaintiff had proved his case and accordingly, decreed the suit thereby directing the defendants to make payment of Rs.6,90,000/- (Rupees Six Lac Ninety Thousand) only to the plaintiff, within three months from the date of the judgment.

7. Being aggrieved the defendants/ appellants have filed this appeal.

8. By an order dated 19th September, 2019 a Coordinate Bench of this Hon'ble Court was, *inter alia*, pleased to stay the aforesaid judgment and decree subject to the appellants depositing the decretal amount. The defendants did not comply with the aforesaid order. By an order dated 6th

December, 2019 by reason of non-compliance of the order dated 19th September, 2019, this Hon'ble Court made it clear that there is no subsisting interim order, it is open to the decree-holder to proceed with the execution case irrespective of the pendency of the appeal.

9. It has been, however, submitted by the advocates representing the parties that the aforesaid decree till date remains unsatisfied.

10. Ms. Patra, the learned advocate representing the appellants has submitted that the promissory is a fabricated document. She says although the promissory note and the plaint case proceeds on the premise, that a loan was taken by Sk. Piru for construction of his house, the house has been constructed long back prior to 1995.

11. She argues that the plaintiff had failed to prove his case. The learned Judge did not approach the case from a proper perspective. No issue was framed whether Sk. Piru, the husband of the appellant no.1 received the said sum of Rs.6,90,000/- from the plaintiff, notwithstanding the pleadings giving rise to the same. The learned Judge did not take into consideration the specific contest as regards not only the factum of execution of the promissory note but also about the question whether any money at all was lent or advanced by the plaintiff to Sk. Piru.

12. Drawing our attention to paragraph 4, 5 and 6 of the written statement, she submits that no finding had been rendered by the learned Judge whether the husband of the appellant no.1 had borrowed Rs.6,90,000/- from Sk. Piru or not. The promissory note has been brought into existence to defraud the defendants. Unless plaintiff can prove, that he had lent and advanced Rs.6,90,000/- to the husband of the appellant no. 1,

no credence can independently be given to the promissory note which is a suspect document. The learned Judge overlooked the fact that the plaintiff did not run their case based on the promissory note, but the case was based on the loan, that was allegedly advanced to Sk. Piru. Admittedly, no suit has been filed during the lifetime of Sk. Piru. There is no discussion in the judgment regarding the aforesaid. The learned Judge has merely proceeded to pass a decree based on the promissory note without in any manner discussing whether the plaintiff had been able to prove the factum of advancing Rs.6,90,000/- to Sk. Piru.

13. She submits that the instant case ought to be remanded back to the Trial Court and her clients should be afforded with an opportunity to adduce evidence. In support of her contention she has relied on the case of *K.R. Mohan Reddy Vs. Net Work INC* reported in (2007) 14 SCC 257.

14. *Per Contra*, Mr. Alam, the learned advocate representing the respondent/plaintiff submits that this is a suit based on execution of promissory note and money lent and advanced by the plaintiff to the predecessor-in-interest of the appellants/defendants. The defendants have not come-forward to lead evidence, no objection was raised when the promissory note was exhibited. On the contrary not only the plaintiff but also two other attesting witnesses, who had witnessed execution of the promissory note had deposed. Plaintiff had been able to prove his case, the appeal should be dismissed.

15. We have considered the submissions and pleadings of the parties, the depositions, the exhibits and the judgment and decree.

16. We find that the plaint case is based on execution of promissory note supported by consideration in the form of money being lent and advanced to Sk. Piru.

17. We find that the plaintiff had deposed as PW-1. In his evidence the plaintiff had, *inter alia*, claimed that he had advanced the sum of Rs.6,90,000/- to Sk. Piru and had paid such amount for business purpose and also for house construction. PW 1 also claimed that the entire payment was made in cash through installments and that PW 2, Abhijit Roy was present when he paid the installments to the defendants' predecessor-in-interest. He later, however, volunteered and claimed that PW2 was not present on all occasions.

18. The oral testimony of the plaintiff and the execution of the promissory note supports that the plaintiff had lent and advanced a sum of Rs.6,90,000/- to the predecessor-in-interest of the defendants.

19. Abhijit Roy, PW-2 claimed that he was present when the promissory note was executed.

20. The oral testimony of the other attesting witness Habibul Hoque, who has deposed as PW3 in the aforesaid suit held on to his testimony as regards his claim, to have put his signature as attesting witness on the promissory note.

21. It thus cannot be said that the plaintiff was unable to prove his case, considering the presumption, that the promissory note was drawn for consideration. It is true that the above presumption is rebuttable. It is also equally true that the defendants did not lead any evidence. The above testimony of PW1, PW2 and PW3 establishes due execution of promissory

note. From the pleadings and the oral testimony it cannot be construed that execution of the promissory note was unlawful.

22. The presumption drawn under section 114 of the Indian Evidence Act, 1872 (hereinafter to as the Evidence Act) is different from the presumption drawn under Section 118 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the N.I. Act).

23. As would appear from the above when a suit is based on promissory note and execution of the promissory note having been proved, Section 118 (a) of the N.I. Act, raises a presumption, until contrary is proved, that the promissory note was made for consideration. The exception being, the initial presumption raised under Section 118(a) becomes unavailable when plaintiff himself pleads in the plaint a different consideration. If, however, the plaintiff pleads in the plaint, that the promissory note is supported by a consideration, as recited in the promissory note and evidence is adduced in support thereof, the burden is on the defendants to disprove the same.

24. Although it has been argued that it was for the plaintiff to prove the factum of Rs.6,90,000/- being lent as an advanced to the defendants' predecessor especially when receipt of the aforesaid sum had been denied and that the Court had erred, firstly in not framing an issue and secondly in not discussing the same, we are of the view that the judgment passed by the learned Court cannot be faulted on such ground. In the instant case, the promissory note has been marked as exhibit-1. The said document was permitted to be exhibited without any objection. Once the document is permitted to be marked as an exhibit without questioning its authenticity,

the defendants without leading any evidence should not be permitted to question the genuinity of such document.

25. In the present case the plaintiff did not make out a case different from what it was recited in the promissory note. In fact the plaintiff himself deposed in the proceedings and corroborated what was stated in the promissory note and the plaint. The two other witnesses also corroborated the factum of execution of promissory note by Sk. Piru. Once the defendants did not challenge the tender and marking of the aforesaid document as exhibit, they can no longer question the execution of such document by Sk. Piru especially having not come forward to depose in the suit. The presumption as regards existence of any fact including payment of consideration as is to be drawn under Section 114 of the Evidence Act cannot be made applicable in the present case. Once the factum of execution of promissory note is established or the same is proved to have been executed, the presumption under Section 118(a) of the N.I. Act is raised, that the promissory note is supported by consideration.

26. In the instant case, it cannot thus be said that the promissory note was not made or drawn for consideration or that the learned Judge had erred in not deciding or discussing the factum of payment of Rs.6,90,000/-. The challenge raised by the appellants as regards plausibility of the plaintiff's case cannot be looked into further once execution of the promissory note is proved.

27. The only other issue raised by the appellants is with regard to presentation of the promissory note for payment. The plaintiff has proved the same. Reliance is placed on exhibit-2 and exhibit-3 series.

28. We find that the learned Judge has rightly arrived at a conclusion that the plaintiff had been able to prove his case. Although it has been argued that the matter should be remanded for permitting the appellants to lead additional evidence, we do not find any reason to remand the matter. The appellants have not taken out any application for leading additional evidence. The appellants have neither disclosed nor have been able to demonstrate as to what additional evidence the appellants seek to rely. No case far less a case of remand has been made out. The case of *K.R. Mohan Reddy Vs. Net Work INC* (supra) cited by the appellants does not come in aid of the appellants. Paragraph 18 of the aforesaid report makes it clear that the provision of Order 41 Rule 27 of the Code of Civil Procedure does not authorise the Appellate Court to let in fresh evidence only for the purpose of pronouncement of judgment in a particular way.

29. The appeal and the connected applications are accordingly dismissed. There shall, however, be no order as to cost.

30. The judgment and decree impugned herein are hereby affirmed.

31. Let a decree be drawn up accordingly.

32. Urgent photostat copy of this judgment, if applied for, be made over to the parties as expeditiously as possible.

(Raja Basu Chowdhury, J.)

(Tapabrata Chakraborty, J.)