



A.S. No.693 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2023

CORAM:

THE HON'BLE MR. JUSTICE R. SUBRAMANIAN
AND
THE HON'BLE MR. JUSTICE N. SENTHILKUMAR

A.S. No.693 of 2018 & C.M.P. No.19208 of 2018

T. Mohan Kumar

Appellant

v

R. Asok Kumar

Respondent

Appeal Suit filed under Order XLI read with Section 96 of the Civil Procedure Code against the judgment and decree dated 05.02.2018 in O.S.No.213 of 2015 on the file of the II Additional District and Sessions Court, Erode.

For appellant Mr. Ramanlaal
For respondent Mr. Kingsly Solomon

JUDGMENT

The unsuccessful defendant in O.S. No.213 of 2015 on the file of the II Additional District and Sessions Court, Erode (for brevity “the Trial Court”), is the appellant herein. Challenge is to the decree for money granted in the said suit which was predicated on a dishonoured cheque.

1/13



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A.S. No.693 of 2018



2 For the sake of convenience, the parties will be adverted to as per their rank before the Trial Court.

3 According to the plaintiff, the defendant borrowed a sum of Rs.23 lakhs from him on 04.11.2012 and issued a post-dated cheque dated 05.12.2012. The cheque that was presented for payment by the plaintiff was dishonoured on 27.12.2012. The plaintiff issued a notice on 04.01.2013 seeking repayment, and the defendant, having received the notice, did not send any reply. The defendant agreed to pay interest @ 12% per annum from the date of borrowal and the plaintiff restricted the claim to 9% per annum from the date of the suit. On the basis of dishonour of the cheque, a criminal case in S.T.C. No.459 of 2013 was also launched by the plaintiff before the Judicial Magistrate Court No.III, Erode, which was dismissed and on appeal by the plaintiff, there was conviction, which is challenged by the defendant in a revision and the said revision is pending.

4 The defendant resisted the suit contending that he never borrowed any money from the plaintiff. The plaintiff, who had the support of a local politician and M.L.A., joined hands with his power agent Jaffar

3/13



Ali, trespassed into his office and took away some documents, including the dishonoured cheque, which were kept in his custody. There was no borrowal at all by the defendant and the cheque was not supported by consideration. Owing to the political influence the plaintiff and his close relative had, the defendant was not in a position to take the help of the police and take action against the plaintiff and the partners in crime.

5 On the above pleadings, the Trial Court framed the following issues:

1 Is it true that the suit cheque was issued for repayment of loan as claimed?

2 Is the suit cheque supported by consideration?

3 Is the plaintiff entitled for a decree for recovery of money, as claimed?

4 To what other reliefs the parties are entitled to?

6 Before the Trial Court, the plaintiff was examined as P.W.1 and one Jaffar Ali was examined as P.W.2 and Exs.A.1 to A.12 were marked. The defendant examined himself as D.W.1 and there was no documentary evidence on his side. Exs.A.1 to A.3 are the certified copies of the cheque,

4/13



A.S. No.693 of 2018

return memo and office copy of the legal notice, respectively. Ex. A.4 is the acknowledgment card; Ex.A.5 is the dishonour note issued by the bank. Ex.A.6 to A.11 are the documents which were alleged to have been handed over by the defendant to the plaintiff at the time of borrowal. Ex.A.12 is the certified copy of the sale deed, the consideration received on execution of which was used to advance the loan to the defendant by the plaintiff.

7 The Trial Court invoked the presumption under Section 118 of the Negotiable Instruments Act, 1881, and granted a decree, as prayed for, finding that the defendant had not chosen to reply to the legal notice issued by the plaintiff and it was not a normal human conduct for a person to have kept quiet and contend that the documents were snatched from him by force. The said judgment of the Trial Court is assailed in this appeal.

8 We have heard Mr. Ramanlal, learned counsel for the defendant and Mr. Kingsly Solomon, learned counsel for the plaintiff.



9 The issue that emerges for the consideration of this Court is whether the defendant has rebutted the presumption under Section 118 of the Negotiable Instruments Act, 1881.

10 Mr. Ramanlaal, learned counsel for the defendant, would take us through the cross-examination of P.W.1 and submit that the evidence of P.W.1, by itself, would demonstrate that the entire case of borrowal is false. In support of this contention, he drew our attention to the judgment of the Hon'ble Supreme Court in **Bharat Barrel & Drum Manufacturing Company v Amin Chand Payrelal [(1999) 3 SCC 35]**, wherein, it has been pointed out that the rebuttal of presumption under Section 118, *ibid.*, need not be by means of positive evidence to prove the negative and it can also be by other materials placed before the Court, which would lead the Court to disbelieve the case pleaded by the plaintiff. He would further submit that the Hon'ble Supreme Court had held that when the defendant showed either by direct evidence or circumstantial evidence or by use of the other presumptions of law or fact that the promissory note was not supported by consideration in the manner stated therein, the evidentiary burden would shift to the plaintiff reviving his legal burden to prove that the

6/13



promissory note was supported by consideration and at that stage, the presumption of law covered by Section 118, *ibid.*, would disappear.

11 If we were to examine the evidence of P.W.1 in the light of what has been laid down by the Hon'ble Supreme Court in the aforesaid judgment, we find that the evidence of P.W.1, by itself, would demolish the presumption created by operation of law, *viz.*, Section 118, *ibid.*

12 P.W.1, in his cross-examination, has deposed that he has not produced his bank accounts, income tax returns or any other document to show that he had a sum of Rs.23 lakhs on the date on which he is said to have lent money to the defendant. He would admit that he is not an Income Tax assessee. He has not explained the source of a whopping sum of Rs.23 lakhs. He has also deposed that he had a sum of Rs. 5 lakhs with him; he sold his mother's property in 2006 for a sum of Rs.4 lakhs; he had that money with him and his mother lent him a sum of Rs.15 lakhs. As regards the source of money for his mother, he would state that his mother sold her property under Ex.A.12 on 08.11.2006. But, a perusal of Ex.A.12, sale deed, would show that the sale consideration under the same is only Rs.4



A.S. No.693 of 2018

lakhs and not Rs.15 lakhs, as claimed by the plaintiff. The plaintiff would claim that he had some agricultural lands which he had sold. But, he would admit that he has not produced any document in support thereof. He would claim that he has some industry in his name. But, he would admit that he has not produced any document to show that he was doing some business. He would also admit that he has not paid profession tax or property tax. This evidence of the plaintiff, in our considered opinion, would conclusively prove and establish the fact that he was not a man of means and he could not have had a sum of Rs.23 lakhs to be lent to the defendant on the relevant date, viz., 04.11.2012.

13 Mr. Ramanlal would strenuously contend that in view of the judgment of the Hon'ble Supreme Court in **Bharat Barrel & Drum Manufacturing Company, supra**, the presumption that is raised under Section 118, *ibid.*, stood dissolved by the evidence of the plaintiff himself.

14 Contending contra, Mr. Kingsly Solomon, learned counsel for the plaintiff, would submit that the conduct of the defendant needs to be looked into. He would contend that though the defendant alleges that the

8/13



documents were snatched from him, he had not chosen to lodge a police complaint. The conduct of the defendant in not sending a reply to the legal notice issued by the plaintiff, is also sought to be taken advantage of by the learned counsel for the plaintiff, to buttress his submission that the presumption that is raised under Section 118, *ibid.*, cannot be said to have been rebutted by the defendant. Stressing upon the need for positive evidence to prove the negative, the learned counsel would submit that in the absence of any evidence regarding failure of consideration, the Court will have to go by the presumption and the Trial Court was justified in drawing such a presumption.

15 We have considered the rival submissions and perused the materials available on record.

16 No doubt, a strong presumption arises by the force of Section 118, *ibid.* in a case where the suit is filed based on a negotiable instrument. But, such a presumption is rebuttable. While considering the question as to how such a presumption can be rebutted, the Supreme Court in, **Bharat Barrel & Drum Manufacturing Company, *supra***, has observed thus:



A.S. No.693 of 2018

“11. Once the defendant showed either by direct evidence or circumstantial evidence or by use of the other presumptions of law or fact that the promissory note was not supported by consideration in the manner stated therein, the evidentiary burden would shift to the plaintiff and the legal burden reviving his legal burden to prove that the promissory note was supported by consideration and at that stage, the presumption of law covered by Section 118 of the Act would disappear.....”

In the same judgment, the judgment of the Supreme Court in **Hiralal v Badkulal [AIR 1953 SC 225]**, wherein, it was held as follows, was also adverted to:

“11.The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and, if he adduced acceptable evidence the burden again shifts to the plaintiff, and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff.....”

17 If we were to look at the evidence on hand in the light of the principles laid down by the Supreme Court in the judgment alluded to above, we find that Mr. Ramanlal is justified in his contention that the



evidence of P.W.1 itself would completely demolish the presumption created under Section 118, *ibid*. As already pointed out, the plaintiff has admitted that he has not produced any document to show the lending; he has not produced any document to show that he was in possession of a sum of Rs.23 lakhs on 04.11.2012, the date of alleged lending; he has not produced any document to show that he was carrying on some business fetching him income on the relevant date; he has admitted that he had no bank account; he has also admitted that he is not an Income Tax assessee. His claim that his mother lent him a sum of Rs.15 lakhs, has been proved to be false by his own document, *viz.*, Ex.A.12, sale deed, which shows that his mother had sold the property six years ago for a paltry sum of Rs.4 lakhs.

18 Therefore, a reading of the cross-examination of P.W.1, in our opinion, would show that not even a single utterance of him in his proof affidavit and the plaint is true. Undoubtedly, the conduct of the defendant in not lodging a police complaint and not sending a reply to the legal notice militates against him. But, we find that the presumption that we can draw from the silence on the part of the defendant cannot undo the damage done by the plaintiff in his own cross-examination as P.W.1. The evidence in

11/13



A.S. No.693 of 2018

cross-examination of P.W.1 leads us to firmly believe that the presumption under Section 118, *ibid.*, stood rebutted by the force of such evidence of P.W.1 himself.

19 In view of the discussion aforesaid, we are not inclined to agree with the Trial Court in granting a decree for payment of money.

Accordingly, the judgment and decree of the Trial Court are set aside and this appeal, is, therefore, allowed with costs throughout. As a sequel, the suit in O.S. No.213 of 2015 on the file of the Trial Court will stand dismissed. Connected C.M.P. is closed.

(R.S.M., J.) (N.S., J.)
06.12.2023

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To

- 1 The II Additional District and Sessions Judge
Erode
- 2 The Section Officer
V.R. Section
High Court of Madras

12/13



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A.S. No.693 of 2018

R. SUBRAMANIAN, J.

and

N. SENTHILKUMAR, J.

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A.S. No.693 of 2018

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