IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.10.2024

CORAM :

THE HON'BLE MR. JUSTICE K. RAJASEKAR

S.A. No. 149 of 2022

Krishnasamy ... Plaintiff / Respondent / Appellant

Vs.

1. N. Rajendran
2. R. Usha ... Defendants/ Appellants / Respondents

Second Appeal filed Under Section 100 of Civil Procedure Code against the Judgment and Decree dated 09.09.2021 made in A.S. No.4 of 2019 on the file of the II Additional District Judge at Vellore @ Ranipet, by reversing the Judgment and Decree dated 24.07.2018 made in O.S. No.24 of 2016 on the file of the Sub-Ordinate Court at Arakkonam.

For Appellant	:	Mr. M. Samuel Raja
For Respondents	:	No Appearance

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JUDGMENT

The appellant herein is the plaintiff, he has come forward to institute the suit for recovery of Rs.1,00,000/- with interest on the basis of the promissory note dated 16.02.2013.

2. The case of the plaintiff is that the defendants have jointly received Rs.1,00,000/- from the plaintiff on 16.02.2013 and executed a promissory note on the same day, as security for repayment of the loan amount. Even though, the plaintiff had demanded the defendants to repay the money, they have not come forward to repay the same, hence he constrained to issue legal notice dated 23.01.2016 and the same was received by the first defendant on behalf of the second defendant on 27.01.2016, even thereafter, the defendants have not come forward to repay the money, hence the suit was instituted by the plaintiff.

3. The first defendant filed a written statement and stated that the first defendant and the plaintiff were doing Multi Travel Marketing, like a chain link business, in which the first defendant was working under the

plaintiff. The plaintiff had invested Rs.50,000/- in the said business on behalf of the first defendant and promised that the first defendant will earn Rs.10,000/- per month, on that basis the plaintiff had received three unfilled promissory notes signed by the first defendant and his wife on 16.02.2013 and also a cheque bearing No.188366 drawn on the State Bank of India, Arakkonam Branch. Since there was a loss in the said business, the plaintiff had demanded repayment of money and also claimed interest @ 60% per annum, which was not accepted by the defendants. Due to the pressure put on the defendants by the plaintiff, the first defendant had entered into a registered mortgage deed of his property with the plaintiff for a sum of Rs.3,00,000/- on 28.04.2014. Further, the plaintiff had also filed separate suits against the defendants before the District Munsif Court, Arakkonam in O.S.No.13 of 2016 based on another promissory note for recovery of a sum of Rs.50,000/- and also a cheque bounce case in C.C.No.232 of 2015 on the file of the Judicial Magistrate Court at Thiruttani. All these facts have been suppressed by the plaintiff, hence prays to dismiss the suit.

4. The Trial Court after considering the pleadings made on both sides framed following issues:

1. *Whether the plaintiff is entitled for recovery of a sum of*

Rs.1,71,933/- with interest as prayed for?

2. To what other relief?

5. The Trial Court after considering the submissions and evidence placed on record, accepted the case of the plaintiff, based on the Hon'ble Apex Court judgment reported in **[1999 (1) CTC 497 (S.C)]**, while interpreting presumption arising under Section 118 of the Negotiable Instruments Act and held that the defendants have failed to probablize their case for non passing of consideration and thereby, decreed the suit.

6. Aggrieved over the judgment and decree of the Trial Court, the defendants have filed an appeal in A.S. No.4 of 2019 on the file of the II Additional District Judge, Vellore @ Ranipet. After considering the arguments of both sides and evidence placed on record, the lower Appellate Court, after framing necessary points had held that there is suppression of vital materials with regard to filing of various cases against the defendants and further one of the attester's evidence recorded in O.S. No.13 of 2016, the passing of consideration is found to be doubtful, thereby allowed the appeal.

6. Aggrieved over the same, the plaintiff has come forward with this

appeal and while admitting the appeal, this Court had framed the following substantial question of law:

> *1. Whether the complaint under Section 138 of the Negotiable Instruments Act, 1881 and Summary suit under Order XXXVII CPC can be filed simultaneously?*
>
> *2. Whether the offence under Section 138 of Negotiable Instruments Act, 1881, a purely criminal offence which results in imposition of a jail sentence or fine or both, being punishments exclusively awardable under Section 53 of the Indian Penal Code, 1860 only in a criminal proceeding, is falls within "summary suit" contemplated by Order XXXVII of CPC?*

7. This Court had sent notice to the respondents but they have not come forward to appear and contest the case. After hearing the appellant, this Court framed the following additional question of law as follows:

> *1. Whether reversing of judgment by the lower Appellate Court based on the evidence recorded in connected cases in O.S. No.13 of 2016 on the file of the District Munsif Court at Arokkonam to hold that there is no passing of consideration is proper or not?*

8. The learned counsel appearing for the appellant/ plaintiff submits that the judgment and decree of the Trial Court has been reversed by the lower Appellate Court on the ground that there is no passing of consideration and the Appellate Court had also failed to invoke Section 118(a) of the Negotiable Instrumentation Act, 1881 for presuming the passing of consideration. He

further submitted that the defendants have not adduced any proper evidence to probabilize their case and there is no acceptable evidence for shifting the burden of proof for passing of consideration has been established, thereby the lower Appellate Court has erred in setting aside the judgment and decree of the Trial Court, hence prays to restore the order and decree of the Trial Court and allow this appeal.

9. I have considered the submissions and perused the evidence placed on record.

10. Admittedly, in this case, the plaintiff had received three promissory notes and one cheque from the defendants. It is also admitted that a separate criminal case in C.C. No.232 of 2015 on the file of the Judicial Magistrate was instituted by the plaintiff against the defendants and further the plaintiff has also filed a separate suit for recovery of Rs.50,000/- by way of another promissory note in O.S. No.13 of 2016 on the file of the District Munsif Court, Arakkonam. Whereas, the entire evidence adduced on the side of the plaintiff shows that, as if the defendants have received a sum of Rs.1,00,000/- on 16.02.2013 from the plaintiff and executed promissory note for the same. The plaintiff has not spoken or stated anything about the other

money transactions taken between the plaintiff and the defendants. There is a categorical defence taken by the defendants that three unfilled promissory notes, one cheque had been given only as a security for investment made by the plaintiff in the Multi Travel Marketing business, but the plaintiff had misused those documents.

11. By way of admission and by marking exhibits filed in connected suit, at the time of cross-examination of the plaintiff, the defendants have probabilized their case that they have executed three promissory notes and a cheque as a security for the investment made by the plaintiff. Further, the defendants were able to probabilize that they have involved in the Multi Travel Marketing business. All the above facts have been suppressed by the plaintiff and he has framed the entire suit, as if promissory note was executed by the defendants for the loan amount of Rs.1,00,000/-.

12. The Hon'ble Apex Court in ***Kundan Lal Rallaaram vs. Custodian Evacuee Property, Bombay [AIR 1961 SC 1316]*** declared that the Section 118 of the Negotiable Instruments Act lays down a special rule of evidence. It enables the Court to presume that the negotiable instruments or the endorsement was made or endorsed for consideration and the burden of proof

of failure of consideration is thrown on the maker of the note or the endorser as the case may be.

13. In ***Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal [1999 (3) SCC 35]***, the Apex Court has considered the scope of both Section 118 of Negotiable Instruments Act and burden of proof in paragraph No.12 it is observed as follows:

> *"12. This Court in **Kundan Lal Rallaaram v. Custodian Evacuee Property, Bombay MANU/SC/0422/1961 : AIR (1961) SC 1316** declared the Section 118 of the Act lays down a prescribed special rule of evidence applicable to negotiable instruments. The presumption contemplated thereunder is one of law which obliges the Court to presume, inter alia, that the negotiable instruments or the endorsement was made or endorsed for consideration and the burden of proof of failure of consideration is thrown on the maker of the note or the endorser as the case may be. Relying upon the law laid down in **Rameshwar Singh v. Bajit Lal MANU/MH/0029/1929 : (1929)31BOMLR721** approved by this Court in **Hiralal v. Badkulal MANU/SC/0004/1953 : [1953]4SCR758** , it was held:*
>
> *This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The question is, how the burden can be discharged? The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase 'burden of proof has two meanings - one the burden of proof as a matter of law and pleading and the other the burden of establishing a case, the*

former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under Section 101 of the Evidence Act, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist." Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in Section 118 of the Negotiable instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is proved, Section 118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is the burden of establishing a case shifts to the defendant. 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. He may also rely upon presumptions of fact, for instance those mentioned in Section 114 and other Sections of the Evidence Act. Under Section 114 of the Evidence Act "The Court may presume the existence of any fact which it think likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case." Illustration (g) to that Section shows that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff, who says that he had sold certain goods to the defendant *and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, S. 114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."*

14. Further, the Apex Court, after considering the various previous Judgments of the Apex Court and also the Judgments of various High Courts as held in concluding paragraph as follows:

"Upon consideration of various Judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the

consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and Andhra Pradesh High Court in this regard."

15. The lower Appellate Court has held that, to prove the execution of the Ex.A.1 and also for passing of consideration, the plaintiff has examined himself as P.W.1 and also examined P.W.2 - Mani. As stated in the earlier paragraph, admittedly, the plaintiff has suppressed various material facts in his pleadings and he was not able to give any reasons for this suppression. He has also deposed that in another connected case in O.S.No.13 of 2016 pending on

the file of the Chief Judicial Magistrate, Arakkonnam, the plaintiff have received a sum of Rs.1,50,000/- and executed the promissory note. The very same evidence that the plaintiff had received a sum of Rs.1,00,000/- on 16.02.2013 and executed the present promissory note, as stated by him. Based on this contradictory evidence and also the fact that the pleadings and evidence to the effect that the plaintiffs have received two promissory notes and one cheque from the defendants and there was no evidence regarding passing of consideration for the above said amounts, thereby the lower Appellate Court has rightly held that the evidence of P.W.1 and P.W.2 is not sufficient to prove the passing of consideration.

16. The Trial Court had invoked Section 118(a) of the Negotiable Instrumentation act by relying on the judgment of the Hon'ble Apex Court in ***Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal [1999 (3) SCC 35]*** and accepted the evidence of P.W.2 and shift the burden on the defendant. The Trial Court has further held that the defendants have failed to prove the fact and also to discharge their onus and also held that the evidence of P.W.2 before the District Munsif Court, Arakonnam is not contrary to the present case.

17. In the evidence of P.W.2 - Mani, he has stated that the defendants have received Rs.1,50,000/- from the plaintiff and executed two promissory notes on 16.02.2013. This loan was received to meet out the family expenses and he has subscribed his signature in the Ex.B.1, whereas the evidence of the plaintiff is to the effect that the defendants have jointly borrowed Rs.1,00,000/- and executed the promissory note on 16.02.2013. It is not the plaintiff's case that the defendants have borrowed Rs.1,50,000/- and executed the promissory note. This evidence of P.W.2 is not corroborative to the evidence of P.W.1, as held by the Hon'ble Apex Court in ***Bharat Barrel and Drum Manufacturing Company case*** cited supra, that if the execution of the promissory note is admitted, then only the presumption under Section 118(a) of the Negotiable Instrumentation Act arises that it is supported by consideration, this presumption is rebuttable. If the defendants can able to prove that the execution of promissory note was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. Further, it is held by the Apex Court that the burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities.

18. In this case, the evidence of the plaintiff and P.W.2 is totally contrary to each other regarding the consideration for execution of the promissory note. According to P.W.1, the defendants have received Rs.1,00,000/- and executed the promissory note, whereas P.W.2 has stated that the defendants have received Rs.1,50,000/- and executed two promissory notes, he has also not stated about the consideration passed on each promissory note or the consideration agreed to be repaid by the defendants to the plaintiff on each promissory note. This contradictory evidence of P.W.1 and P.W.2 was not properly considered by the Trial Court and the same was properly appreciated by the lower Appellate Court.

19. In this case, the defendants were able to probabilize their case that the passing of consideration is doubtful and they were already involved in business activities and this fact also been suppressed by the plaintiff. Under these circumstances, invoking Section 118(a) of the Negotiable Instrumentation Act in favour of the plaintiff, is not permissible.

20. The lower Appellate Court had properly appreciated the evidence adduced on both sides and found passing of consideration is not

proved and rightly held that the plaintiff fails to probabilize his case against the defendants, thereby set aside the judgment and decree of the Trial Court. This Court finds, the lower Appellate Court had properly appreciated the evidence of P.W.1, the evidence in support of the defendant and rightly allowed the appeal in favour of the defendants. Thus the additional substantial question of law framed is answered, accordingly.

21. With regard to the substantial question of law 1 and 2 are concerned, I am of the view that, this suit filed based on promissory note and Section 138 of the Negotiable Instrumentation Act, 1881, has no application in the present suit, therefore, I am of the view that, the substantial question of law framed, does not arise and no need for rendering answer, in this regard.

22. In view of the above discussions, this Court finds that there is no reason to interfere in the judgment and decree of the lower Appellate Court by setting aside the judgment and decree of the Trial Court, thereby inclined to dismiss this appeal.

23. Accordingly, this second appeal is dismissed. No cost.

19.10.2024

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Index:Yes/No
Speaking Order : Yes/No
Neutral Citation Case : Yes/No

K. RAJASEKAR, J.

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To:

1. The Section Officer,
   VR Section,
   High Court, Madras.

S.A. No. 149 of 2022

19.10.2024