

(1991) 01 MAD CK 0074
In the Madras High Court

A.S. Duraisami Chettiar Sons and Others	APPELLANT
Vs	
S. Rathnaswami Gounder	RESPONDENT

Date of Decision : 11-01-1991

Acts Referred:

Evidence Act, 1872 — Section 114
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (1991) 2 MLJ 183

Hon'ble Judges : Abdul Hadi, J

Bench : Division Bench

Judgement

Abdul Hadi, J.—The second appeal by the defendant firm is against the judgment and decree of the District Judge, Coimbatore, dated 7.2.1980 in A.S. No. 81 of 1979, reversing the judgment and decree of the Sub-Judge, Coimbatore in O.S. No. 374 of 1976 dated 13.9.1978. The suit is for recovery of Rs. 8,442.15, the amount due under the hundi Ex A-1, dated 12.4.1973 for a sum of Rs. 5, 000 with interest thereon. The suit was dismissed by the trial Court on the ground that the suit hundi was not supported by consideration. But, the lower appellate court has decreed the suit on the ground that the suit hundi is supported by consideration. No doubt, there was some dispute even with reference to execution of the suit hundi. As per the written statement, the defendant only admitted his signature in the suit hundi, and his case is that at the time of the execution of a prior hundi, the plaintiff had obtained the signature of the defendant in two blank hundies which ought to have been probably utilised by the plaintiff in fabricating the document Ex. A-1. The prior hundi was executed on 20.3.1969 was admittedly executed on 20.3.1969. The written statement does not give any specific date as to when according to the defendant he put the signature in blank hundies. Only in the witness box, the defendant stated that. He (he time of execution of the prior hundi the signature was obtained in a blank hundi. But, this cannot be true, as pointed out by the Courts below, since the seal of Ex. A-1 for purchase of the stamp paper on which it is executed is dated 10.2.1971. That is why the execution of the hundi by the defendant is found by

the Court below. In the second appeal there can be no serious challenge to the said finding regarding execution and I uphold the said finding.

2. Then, coming to the other defence in the suit that the defendant did not receive the abovesaid sum of Rs. 5, 000 and that hence the hundi was not supported by the consideration, the onus lies on the defendant that the Ex. A-1 is not supported by consideration, in view of the mandatory presumption arising u/s 118 of the Negotiable instruments Act. On this question, the trial Court has observed as follows:

The plaintiff is admittedly a professional Money lender. Under law he is expected to maintain the regular books of account. The defendant has called upon the plaintiff to produce his accounts to prove the payment of cash on the date of 12.3.1973. P.W. 1 stated in the box that he can produce the account within four hours and prove his payment. But when actually he was called upon to produce the account he was adopting delaying tactics and he never produced the accounts inspite of adjournments as well as notice.... In fact the defendant took summons even to the auditor of the plaintiff, but without success because the auditor evaded the receipts of the summons. The plaintiff has purposely suppressed the accounts, because the production of the said accounts will disprove his case that he advanced a sum of Rs. 5,000 on 12.4.1973.... Under such circumstances, I prefer to draw an adverse inference against the plaintiff and hold that the production of account would show that no money was advanced by the plaintiff to the defendant on 12.4.1973 and the before I hold that the suit hundi is not supported by consideration.

On the other hand, the lower appellate Court has observed as follows:

In the circumstances, from The mere fact that the plaintiff had not produced the books of account maintained by him cannot be taken as a circumstance to totally reject the plaintiffs claim in the light of the other evidence on record. The plaintiff appears to have also sent lawyer's notice prior to the filing of the suit. Ex. A-2 is the postal acknowledgment signed by the defendant for receipt of the notice and it is dated 28.9.1974. The plaintiff has stated that he has misplaced the office copy of the notice issued. The defendant when confronted with Ex. A-2 has admitted the acknowledgment though he would state that he did not receive any notice and does not remember what the contents of this communication were. Evidently, the defendant is trying to suppress this fact by taking advantage of the misplacement of the office copy of the notice by the plaintiff. The point is answered against the defendant and in favour of the appellant.

3. The before, the only question which was seriously argued in the present second appeal is how far the presumption arising u/s 118 of the Negotiable Instrument Act has been rebutted by the defendant. The contention of the learned Counsel for the appellant is that the said presumption u/s 118 has been rebutted in view of the deliberate non-production of the account books of the plaintiff by him and the other presumption that consequently arises u/s 114 of

the Evidence Act. Section 114 of the Evidence Act runs as follows:

Court may presume existence of certain facts. The court may presume the existence of any fact which it thinks 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.

and Illustration-G therein also points out 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. The learned Counsel for the appellant cited the following decisions in support of contention:

1. Kundanlal v. Custodian, Evacuee Property AIR 1961 S.C. 1316; 2. Sahney Motor Corpn. and Another Vs. Sm. Sova Mukherjee, ; 3. Official Receiver, Kanpur and Another Vs. Abdul Shakur and Others, ; 4. Thirumalai Iyengar v. Subba Raja (1969) 1 M.L.J. 193; 5. Himjit Construction Vs. Tarun Sarkar, .

4. In Kundanlal v. Custodian, Evacuee Property AIR 1961 S.C 1316, it was held, after referring to earlier Privy Council and Supreme Court decisions, as follows:

These three decisions lay down that it is the duty of a party to a suit in possession of important documents to produce them in court, and if that duty is not discharged the court may as well draw the presumption which it is entitled to do u/s 114 of the Evidence Act. A Division Bench of the Madras High Court in Narayana Rao v. Venkatapayya ILR (1937) Mad. 299. AIR 1937 Mad. 182, considered the interaction of the provisions of Section 118 of the Negotiable Instruments Act and Section 114 of the Evidence Act in the matter of rebuttal of the presumption under the former section. After considering the earlier decisions, including those of the Privy Council, Varadachariar J., summarized the law at P. 311 (of ILR Mad) : (at p. 187 of A.I.R.) thus:

It has to be borne in mind that, when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances; Yellappa Ramappa Naick v. Tippanna 56 M.L.J. 287 : AIR 1929 Mad. 8, and that even the onus u/s 118 of the Negotiable Instruments Act need not always be discharged by direct evidence adduced by the defendant; Kunwar Muhammad Shafi Khan Vs. Kunwar Muhammad Moazzam Ali Khan, ; Singar Kunwar Vs. Basdeo Prasad and Others, and Bishambar Das v. Ismail AIR 1938 Lah. 1029. Not merely can the court base its conclusion of the effect of the evidence taken as a whole but it may also draw adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so; Murugesan Pillai v. Gnanasambandha Pandora Sannadhi AIR 1917 P.C. 6, Guruswami Nadan v. Gopalaswami Odayar ILR 42 Mad. 629 : AIR 1919 Mad. 444 and S.K. Raghavendra Rao Vs. Venkatasami Naickan and Others, . We respectfully accept the correctness of the said observations.

5. In Sahney Motor Corpn. and Another Vs. Sm. Sova Mukherjee, , also it was pointed out that the mandatory presumption u/s 118 of the Negotiable

Instruments Act would stand rebutted under certain circumstances even by a contrary, though permissive, presumption u/s 114 and Illustration (g) thereof of the Evidence Act arising out of a deliberate withholding of material evidence.

6. In the decision reported in *Balakrishna Pillai v. Kannappa Pillai* 100 L.W. 925, this Court also held that to rebut the presumption u/s 118 of Negotiable Instruments Act, the defendant may also rely upon the presumption of facts for instance those mentioned in Section 114 and other sections of the Evidence Act. In other words, the presumption of law or presumption of fact may be rebutted by not only direct or circumstantial evidence but also by presumption of law or fact. It has also been observed in that decision that the difference between Section 114, Evidence Act and Section 118, Negotiable Instruments Act consists only in this, that under the first the court has a discretion to make the presumption or not, whereas under the second, the court is bound to start with the presumption but once the presumption is made, there is no difference between the two cases, in the matter of displacing the presumption or disproving the "presumed" fact.

7. In the present case, it is clear the plaintiff has deliberately withheld the production of his account books, since the production would disprove his case, that he advanced a sum of Rs. 5, 000 on 12.4.1973. His own evidence is P.W. 1 given on 14.7.1978 is that he is maintaining account books and that on 12.4.1973 and abovesaid sum of Rs. 5,000 has been entered in his accounts and that he could produce the said account books within four hours. But he did not produce so. So, the defendant sent Ex. C-1 notice on 17.7.1978 to the plaintiffs counsel calling upon the plaintiff to produce the said account books. But, even then, he did not produce the said account books. On 28.7.1978, the defendant was recalled and examined again. Then, he deposed that the said account books were with the auditor and when he made efforts to get the said account books from the auditor, the auditor said that he would look up and give them to the plaintiff. Even after the said deposition, after recall, the plaintiff did not produce the account books at any time later. At least he could have produced the account books at the first appellate stage. Even that he did not do. The second appeal was pending for the past 8 years. At least in the second appeal he could have produced the account books and sought the permission of this Court to receive them as additional evidence. Even that, he did not do, Further, while the matter was pending in the trial court, the defendant had to take out summons to the above said auditor for production of the said account book, but, the lower court found, the auditor had evaded the receipt of the summons. The before, it is abundantly clear that the defendant deliberately suppressed the abovesaid account books and in such circumstances, the court is entitled to draw adverse inference that if the account books are produced, it would disprove the plaintiffs case, that he advanced a sum of Rs. 5, 000 on 12.4.1973 pursuant to Ex. A-1.

8. No doubt, the learned Counsel for the respondent plaintiff brought to my notice the decision reported in *A. Kandaswami Pillai Vs. P.M. Theagaraja Pattar*, ,

where it was held that when the defendant in his cross examination does not put the plaintiff a specific question to the effect that the account books if produced would not find the suit transactions, neither he nor the court at his suggestion is entitled to draw any inference as to the contention of the account books. But from the evidence recorded in the present case, it cannot be said that no such specific question was put by the defendant during the cross examination of the plaintiff. At any rate in the present case, as already stated by me, Ex. C-1 notice was specifically given and despite the said notice, the plaintiff did not produce the account book. Such a notice was not given in the case reported in *A. Kandaswami Pillai Vs. P.M. Theagaraja Pattar*, . *A. Kandaswami Pillai Vs. P.M. Theagaraja Pattar*, , is not applicable to the present case.

9. The learned Counsel no doubt also refers to the decision reported in *V.R.S.R.M. Ramaswami Chettiar and Another Vs. Sri Devi Talkies by partner K. Ramakrishnan and Others*, , wherein it was held that to rebut the presumption u/s 118, the defendant must adduce acceptable evidence. But, as already stated, there were several authorities including that of the Supreme Court holding that the said rebuttal need not always be by direct evidence adduced by the defendant may be by presumption of law or fact.

10. No doubt, the lower appellate court points out about Ex. A-2 which is said to be postal acknowledgement for having sent the suit notice. No doubt, the defendant has admitted Ex. A-2. But he has stated that he did not received the said notice. The before, Ex. A-2 by itself, cannot be taken as "other evidence on record" which would go to prove the passing of consideration.

11. Finally, the learned Counsel for the, respondent also argues that the question whether the statutory presumption u/s 118 is rebutted by the rest of the evidence is a question of fact and cannot be raised in the second appeal. No doubt, it has been held in *Official Receiver, Kanpur and Another Vs. Abdul Shakur and Others*, , which been referred to in *M. Krishnaswamy Naicker v. Radhakrishna Naicker* 98 L.W. 800, cited by the learned Counsel for the respondent. To the same effect he has also cited the decision reported in *S. Perumal Chettiar Vs. T. Santhanam*, .

12. But it should be noted that the lower appellate court has stated in its judgment that from the mere fact that the plaintiff has not produced the books of accounts maintained by him cannot be taken as a circumstance to totally reject the plaintiffs claim in the light of other evidence on record. This observation shows that the said court has not taken into consideration the other material features and evidences which I have pointed out earlier in para 7 whereby one could easily come to the conclusion that the plaintiff has deliberately withheld the production of the account books and that it is not a case of a mere non production of account books. It is settled law, as already pointed out by me, that when such deliberate withholding of the material evidence is there, adverse inference can certainly be drawn by the court. The non-consideration by the lower appellate court of the above referred to material evidences and other

features in this case (which clearly proved the deliberate withholding of the account books on the part of the plaintiff) and the failure of the lower appellate court to correctly understand and apply the correct legal position on this aspect, certainly give rise to substantial questions of law and could be raised in the second appeal Vide : Damadilal and Others Vs. Parashram and Others, , Further, "the other evidence on record" pointed out by the lower appellate court is only Ex. A-2 the postal acknowledgment. That by itself cannot prove that suit notice has been issued, particularly when the defendant, though admitted Ex. A-2, has stated that he did not receive the said notice. So the lower appellate court taking into consideration Ex. A-2, alone as the other evidence, is also a serious error giving raise to a substantial question of law. The before, the above referred to decisions are not applicable to the present case.

13. The learned Counsel also points out that the trial court has found fault with the account books of the defendant produced by him, namely Ex. B-1 to B-14. But those account books are not material for deciding the suit transaction based on hundi Ex. A-1 executed on 12.4.1973, since those account books relate to a period prior to Ex. A-1. Further, the learned Counsel also points out that though the defendant alleged that he had made payments towards the sum due under the earlier hundies he did not produce receipts for the same. This contention has no merit since the plaintiff himself has admitted that all the earlier borrowing by the defendant have been discharged even prior to 12.4.1973 as also pointed out by the trial court.

14. In the result, the judgment and decree of the lower appellate court is set aside and the judgment and decree of the trial court is restored. The suit is the before dismissed and this appeal is allowed. However, in the circumstances of the case, no costs.