

(2000) 02 MAD CK 0008

In the Madras High Court

Case No : Second Appeal No. 1539 of 1999 and C.M.P. 16996 of 1999

Avalappa

APPELLANT

Vs

Palaniswamy (died) and Aruna Devi (2nd respondent
impleaded as legal representative of deceased first
respondent as per order of the Court dated 31.1.2000 in CMP
1049/2000

RESPONDENT

Date of Decision : 29-02-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Negotiable Instruments Act, 1881 (NI) — Section 118, 118(a), 118(g), 81

Citation : (2000) 02 MAD CK 0008

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; M.V. Krishnan, for the Respondent

Final Decision : Allowed

Judgement

S.S. Subramani, J.—Plaintiff in O.S.452 of 1996 on the file of Sub Court, Hosur is the appellant. Material facts of the case could be

summarised thus:

Under Ex.A1 dated 25.10.1993, defendant borrowed an amount of Rs. 30,000/- from one Rukmaniammal agreeing to return the same with

interest at 12% per annum. According to plaintiff, promissory note was assigned to him for valid consideration on 22.5.1996, evidenced by Ex.A2.

Within a few days thereafter, plaintiff issued Ex.A3 registered notice dated 28.6.1996, for which defendant sent reply under Ex.A4 denying his

liability and also took a contention that he has discharged the liability to Rukmaniammal on 15.9.1995 itself and therefore the assignment is invalid.

Suit was therefore laid for recovery of amount due under promissory note with

interest.

2. In the written statement filed by defendant, he admitted execution of promissory note in favour of Rukmaniammal. He further said that on

15.9.1995, as evidenced by Ex.B1 he has discharged the entire debt by paying principal amount and also interest,. Rukmaniammal executed a

receipt and also a letter undertaking to compensate defendant since original promissory note could not be returned. According to defendant,

Rukmaniammal could not return the promissory note executed by him, since it was found to be misplaced. He further alleged that after receipt of

notice, he sent a reply and after getting summons in the case he also wrote a letter to Rukmaniammal about the assignment, for which

Rukmaniammal had sent a reply, as evidenced by Ex.B4 alleging that promissory note might have been taken by plaintiff without her knowledge

and asserting that she has not executed any assignment. According to defendant, Rukmaniammal did not assign promissory note in favour of

plaintiff and plaintiff cannot be said as holder in due course and consequently suit is liable to be dismissed.

3. On the above pleadings, parties went on trial. Oral evidence consist of PWs.1 and 2 of whom PW1 is plaintiff. On the side of defendant,

DWs.1 to 6 were examined of whom DW1 is defendant. DW4 is daughter-in-law of Rukmaniammal and DW5 is grandson of Rukmaniammal.

DW6 is the writer of Ex.A2 and DWs.2 and 3 are witnesses to Ex.B1. Documentary evidence consist of Exs.A1 to A4 and Exs.B1 to B9.

4. Trial Court, after discussing entire evidence as per judgment dated 27.2.1998 decreed the suit with costs. Trial Court held that when defendant

pleads discharge, it is for him to prove that he has paid the amount and trial Court did not believe the evidence of witnesses. It also come to the

conclusion that defendant and late Rukmaniammal are closely associated among themselves in various transactions and subsequent denial of

endorsement or assignment of promissory note is not true. Trial Court further held that the denial is only consequent on the request of defendant

and that too after institution of suit. Trial Court also found fault with defendant in not producing Ex.B1 receipt along with written statement and for

not disclosing details of the receipt. Trial Court held that Ex.B1 could have been created after institution of the suit and long delay in getting reply

from Rukmaniammal was also taken into consideration by trial Court in holding that the discharge is not true. It also found that plaintiff is in

possession of promissory note and there is also an endorsement by Rukmaniammal. Taking into consideration the evidence of PWs.1 and 2 along

with the evidence of DW6, it held that the assignment is proved and plaintiff is holder-in-due-course. Trial Court further held that even if

Rukmaniammal has received any amount from defendant, that will not affect the right of plaintiff in instituting a suit for recovery of amount on the

promissory note. Remedy of defendant is only to get compensation from Rukmaniammal in a Civil Suit. Suit was therefore decreed as prayed for.

5. Against the decree and judgment of trial Court, defendant preferred A.S.90 of 1998 on the file of Principal District Judge, Dharmapuri. Lower

Appellate Court reappreciated the entire evidence and set aside the decree and Judgment of trial Court holding that defendant has already

discharged the debt under Ex.B1, and the assignment in favour of plaintiff is not true. By allowing appeal, lower Appellate Court dismissed the suit.

6. It is against the said decree and judgment of lower Appellate Court, plaintiff preferred this Second Appeal.

7. The following questions of law have been raised in the memorandum of appeal:

(A) Whether the Court below is right in dismissing the suit, when the plaintiff is a bona fide transferee for value of the Negotiable Instruments Act

under Ex.B1?

(B) Whether the lower Appellate Court ought not to have drawn an adverse inference against the case of the defendants in the absence of

examination of Rukmaniammal?

(C) Whether the Lower Appellate Court ought not to have appreciated the collusion between Rukmaniammal and the respondent herein which is

ex facie evidence since the reply notice issued under Ex.B4 is subsequent to the receipt of summons?

(D) Whether the Lower Appellate Court ought not to have followed the well considered principles laid down in 1948 Madras 171, 1965-2-MLJ

518 and whether its order to the contrary is not legally so unsustainable?

8. Since caveat was entered by respondent, I heard the Second Appeal itself at the admission stage. After hearing counsel on both sides, I feel that

all the questions of law could be considered together.

9. Respondent herein admits that he borrowed a sum of Rs. 30,000/- from Rukmaniammal and also executed Ex.A1 Promissory note. According

to him, he has discharged the debt as evidenced by Ex.B1, dated 15.9.1995. Being a case of discharge, it is for defendant to prove and

substantiate the same, especially when promissory note was not returned.

10. u/s 81 of the Negotiable Instruments Act, defendant is entitled to be in possession of promissory note on settling the promissory note. The case

of defendant is that after payment, it was found out that promissory note was misplaced and therefore Rukmaniammal agreed to compensate him if

he sustained loss by not returning promissory note. Whether this explanation is correct or not is an important factor to be considered.

11. DW2 Arjuna is a witness to Ex.B1. According to him, Rukmaniammal came to him to intervene in the matter for settling the transaction. This is

what he said in his chief examination.

12. Before a Panchayat could be convened, Panchayatdars also must be convinced that there is a document which shows that defendant has

borrowed amount from Rukmaniammal, and it is also the duty of Panchayatdars to see that the document is returned to the debtor. But, as against

this evidence, evidence of DW4 shows otherwise. It is the case of defendant as well as DW4 that when the matter was settled on payment of Rs.

36,800/-, she was also present. She further says, after payment of amount by defendant to DW2, who in turn paid amount to Rukmaniammal,

defendant requested or demanded for return of promissory note. At that time, Rukmaniammal searched for promissory note and found that the

same has been misplaced. She further says that Rukmaniammal even asked her daughter-in-law to search for the promissory note and she also

searched for the same and she could not trace it. Statement of DW2 that even before Panchayat Rukmaniammal informed that promissory note is

misplaced, cannot be true.

13. Evidence of DW1, who is defendant himself is very categorical. In his cross-examination he said that he has no case of any Panchayat.

According to him, Rukmaniammal never demanded return of amount. He voluntarily paid the entire amount in lump. He also admitted that he has

no records to show that he is having sufficient funds to discharge the entire debt. Evidence of DW1, DW2 and DW4 are inconsistent and

improbabilise the case of defendant that he has discharged the debt on 15.9.1995. This inconsistency was not considered by lower Appellate

Court while disposing of the appeal.

14. Admittedly, promissory note has not been returned by Rukmaniammal to the defendant. Plaintiff is an utter stranger. Acquaintance of plaintiff

with Rukmaniammal is only in regard to purchase of a property nearby. It is the case of defendant as well as DW5, who is grandson of

Rukmaniammal that plaintiff as well as PW2 used to visit Rukmaniammal's house regarding purchase of property. It is too much to think that plaintiff

might have taken away the promissory note without the knowledge of Rukmaniammal or other relations in the house.

15. The case that promissory" note has been lost or the same has been assigned to plaintiff is only on the basis of reply notice alleged to have been

issued by Rukmaniammal long after institution of the suit.

16. Before institution of the suit, plaintiff along with Rukmaniammal informed defendant about the assignment of promissory note and also

demanding defendant to discharge the debt to plaintiff. It is true that DW5 says that Rukmaniammal might not have gone to advocate's office to

give instructions. But when the advocate says that on instructions of Rukmaniammal and plaintiff, he has sent the notice, best evidence would have

been the evidence of advocate alone. For reasons better known to defendant, counsel who issued Ex.A3 notice was not examined to prove that

Rukmaniammal did not give instructions.

17. DW6 is the writer of Ex.A2 He has been examined by defendant. He admitted that he has written Ex.A2. According to him, when he was

about to go out of town, plaintiff and PW2 requested him to write the document. He is well acquainted with PW2 and he also says that he has

written documents earlier and he has not written any document in favour of plaintiff. He only pleaded ignorance whether Rukmaniammal also came

to execute assignment. But he admitted she did not sign before him. He also admitted that it is his usual practice for the last 30 years that he used to

sign only as last witness after settling entire transaction.

On a perusal of Ex.A2 it is clear that DW6 might have signed only after all others signed the document. Even though he says that in his presence

nobody has signed, a further enquiry by him to PW2 he was informed that all

have signed. What is the necessity for DW6 to make enquiry, causes a great suspicion and that shows that he has signed along with other witnesses and executant after having written Ex.A2.

18. When notice is issued, at least at that time defendant knows that promissory note is in the possession of plaintiff. He did not issue any notice or filed complaint for return of promissory note, nor Rukmaniammal filed complaint against plaintiff. She never demanded return of Promissory note.

19. When defendant is not in a position to explain that he has funds to discharge the debt on 15.9.1995 and promissory note is also not taken by him, I do not think that the finding of lower Appellate Court that defendant has discharged the debt on 15.9.1995 could be accepted. The further case that plaintiff has taken away promissory note from Rukmaniammal's house also seems to be improbable.

20. Lower Appellate Court has compared the signature in Ex.A2 with that of Exs.B3 and B5. Lower Appellate Court failed to note whether

signature was affixed by Rukmaniammal is genuine or not. At any rate, those alleged signatures were affixed long after institution of suit and after

written notice to the Rukmaniammal about the assignment. Admitted signature of Rukmaniammal prior to Ex.A2 is not before Court. PW2 asserts

that Rukmaniammal signed in his presence and plaintiff also paid the amount to Rukmaniammal. None of the witnesses of defendant have any case

against PW2. PW2 is also well acquainted with Rukmaniammal and all her family members and he is also witness to Ex.A2. Lower Appellate

Court has not considered his evidence taken along with the evidence of DW6. Even before this Court, learned counsel for respondent was not in a

position to discredit the evidence of PW2. Lower Appellate Court did not believe the evidence of PW2 only on the ground that DW6 has spoken

otherwise. Lower Appellate Court failed to note that even DW6 has nothing to say against PW2 and for PW2, he has written various documents.

21. DW5 was also examined only to prove Ex.B1. He is also witness to Ex.A2. Definite case of plaintiff is that defendant and Rukmaniammal

along with DW5 got various transactions and they are closely associated and after assignment, DW5 has turned against him. That case of plaintiff

was believed by trial Court. One big circumstance is that there had been other money transactions with Rukmaniammal is clear from Exs.B6 to B9.

Exs.B6 to B9 are dated 21.6.1996, 15.1.1997 and 19.12.1996. Ex.A2 assignment is dated 22.5.1996. Before 19.12.1996, defendant has

already received registered notice demanding payment of Ex.A1 promissory note. All these three payments are after the assignment. At any rate,

payment dated 15.1.1997 and 19.12.1996 are after getting notice. If defendant has already paid that amount and settled transactions with

Rukmaniammal, why he waited till 13.2.1997 by sending registered notice.

22. In the written statement except to state that on 15.9.1995 the matter has been settled, who are the witnesses and in what way it has been

settled are not stated. Trial Court which had seen the witnesses and who appreciated the demeanour of those witnesses has given opinion who are

to be believed and who are not to be believed. That appreciation by trial Court should not have been lightly interfered with by Lower Appellate

Court, which did not have the opportunity to see the witnesses.

23. Finding of the lower Appellate Court that defendant discharged the debt on 15.9.1995 is not true and it is also to be held that the evidence of

PW2 fully supports the case of plaintiff that he has paid the consideration and got assignment of promissory note. He is the holder in-due-course.

24. Even if we accept the case of defendant that he has settled the transaction, if plaintiff is not aware of the settlement, in view of the settled legal

position, plaintiff is entitled to succeed and the remedy of defendant is only to sue against Rukmaniammal and get compensation for damages.

25. In one of the decisions of the Honourable Supreme Court reported in (1991) I S.C.C 113 (U. Ponnappa Moothan & Sons v. Catholic Syrian

Bank Ltd.), their Lordships considered who is the holder in-due-course. After comparing the Indian Law and English Law, on that point, in para

17 their Lordships held thus,

From the above discussion it emerges that the Indian definition imposed a more stringent condition on the holder in due course than the English

definition and as the learned authors have noted the definition is based on Gill Case (107 ER 806 = (1824) 3 B & C 466). Under the Indian law, a

holder, to be a holder in due course, must not only have acquired the bill, note or cheque for valid consideration but should have acquired the

cheque without having; sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. This condition

requires that he should act in good faith and with reasonable caution. However, mere failure to prove bona fide or absence of negligence on his part would not negative his claim. But in a given case it is left to the Court to decide whether the negligence on part of the holder is so gross and extraordinary as to presume that he has sufficient cause to believe that such title was defective. However, when the presumption in his favour as provided u/s 118(g) gets rebutted under the circumstances mentioned therein then the burden of proving that he is a "holder in due course" lies upon him. In a given case, the court, while examining these requirements including valid consideration must also go into the question whether there was a contract express or implied for crediting the proceeds to the account of the bearer before receiving the same. The enquiry regarding the satisfaction of this requirement invariably depends upon the facts and circumstances in each case. The words ""without having sufficient cause to believe"" have to be understood in this background.

(emphasis supplied).

I have already said that no evidence has been adduced in this case to show so that plaintiff must be aware or had sufficient cause to believe that defect existed in deriving title from whom he derived title,

26. In one of the earlier decisions of our High Court reported in Aluri Venkataratnam Vs. Alluri Kanakasundara Rao and Another, trial Court

dismissed the suit on the ground that plaintiff who claims to be holder in due course did not himself examine and there is also no evidence to show

that plaintiff paid any consideration for transfer. In that case also defendant contended that he has already discharged the debt. That contention was

accepted by trial Court. Relevant portion of the Judgment reads thus,

... The argument has been confined to the District Munsif's finding on the second point and the main complaint is that the learned District Munsif

has ignored the presumptions contained in Cls.(a), (c) and (g), S.118, Negotiable Instruments Act, and that on account of this omission to bear in

mind the legal presumptions in favour of the plaintiff the finding must be deemed to be vitiated by an error of law. There is no doubt that this

complaint is fully justified as will be seen from the following extract from the District Munsif's judgment which deals with this point.

The plaintiff is not certainly a bona fide holder in due course. The plaintiff has not

chosen to go into the box. The allegation in the plaint that the endorsement was for consideration has not been proved. I find that no consideration was paid for the transfer of the suit promissory note and that the plaintiff is not a bona fide holder in due course.

It is clear therefore that the finding was based on the fact that the plaintiff did not go into the box and did not prove that he had paid consideration

for the endorsement. It is not as if there is any evidence to show that the plaintiff did not act in good faith or did not pay consideration for the

endorsement. In these circumstances the finding cannot be upheld as it is vitiated by a material error of law... "".

(emphasis supplied).

27. In ILR 1940 Madras 382 = (1939) 50 L.W. 508 (Gopalan v. Lakshminarasamma), a Division Bench of our High Court held thus,

.... In this connection, I may point out that Section 81 of the Negotiable Instruments Act provides that any person, liable to pay and called upon

by the holder thereof to pay the amount due on a promissory note, is before payment entitled to have it shown and is on payment entitled to have it

delivered up to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him. The

respondent, having paid the promissory note without insisting on its return to her or without obtaining from the payee a guarantee, acted at her own

risk.

In Muthu Reddi alias Duraiswamy Reddi Vs. Velu Asari and Others, Seshagiri Ayyar J. held that the maker of a promissory note could not plead

against a holder in due course that he had paid the money to the payee before the endorsement and relied on the decision in Nash v. De Freville ((

1900 2 Q.B.72), in which reference to Lickbarrow v. Mason ((1787) 2 T.R.63 = 100 E.R.35) was made. The same conclusion was arrived at by

Pandurang Row J. in Alluri Venkataratnam Vs. Alluri Kanakasundara Rao and Another, . The only dissentient note is that struck by Krishnan

Pandalai J. in Dumpala Venkanna Vs. Vutla Subbayya and Another, on which the respondent relies. There the facts were these. A promissory

note was executed by A in favour of B but the note came into the possession of his wife and her nephew who refused to give it up to B. As he

result B asked A to give him a fresh promissory note, which A did. The new

promissory note was subsequently negotiated by B. Eventually A paid the amount due on the promissory note to the indorsee. After B's death his wife negotiated the original promissory note and the indorsee called upon A for payment. Liability was denied by A and Krishnan Pandalai J. accepted his defence. This decision is clearly wrong. Apart from the provisions of the Negotiable Instruments Act the principle of *Lickbarrow v. Mason* 1787 2 T.R.63 = 100 E.R.35 applied. The maker of the promissory note gave of his own free will a new promissory note without insisting on the return of the original instrument or obtaining an indemnity.

Had he obtained an indemnity it would not of course have precluded the plaintiff from recovering from him, but if he had taken a proper indemnity he would have safeguarded his position. *K.C. Ethirajulu Chettiar Vs. The Official Receiver*, was wrongly decided and cannot be allowed to stand.

28. The said decision was followed by Justice Rajamannar (as he then was) in the decision reported in *Alapati Venkata Krishniah Vs. Vemuri Manikyarau*, wherein it is held thus,

.....when he made the payment, it is clear that the promisee was unable to produce the promissory note and make an endorsement of payment and even deliver it up to him cancelled. Under S. 81, Negotiable Instruments Act, defendant 1 was before payment entitled to have the promissory note shown to him and on payment entitled to have it delivered up to him, or (as is now alleged by him), if the instrument cannot be found, to be indemnified against any further claim thereon against him. This is what he should have done and if he did not act as indicated in the section, he has to blame himself. In any event, his ultimate claim must be only against the promisee whom he had paid and he cannot be allowed to plead any defence to an action by a holder in due course. The decision in *I.L.R.1940 Mad 382* on which Mr. M.S. Ramachandra Rao, the learned Advocate for the petitioner, relies, is directly in point and the principle laid down therein, when applied to the present case, will be a complete answer to the plea of defendant 1.

29. The same principle was reiterated in the decision reported in *S.D. Asirvatham and Another Vs. G. Palniraju Mudaliar*,

30. Apart from the above decisions, this Court also must take note of presumption u/s 118 of Negotiable Instruments Act. Section 118(a) says

that every negotiable Instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred, for consideration. Presumption under clause (g) is that holder of promissory note is holder in due course.

31. In one of the earlier decisions of Kerala High Court reported in ILR 1957 Kerala 853 (Shroff K.K. Koran v. T. Kara Bai), a case where plaintiff filed suit on a lost promissory note, the learned Judge held thus,The first question is whether the suit is framed by the plaintiff without the production of the promissory note relied on by her, is sustainable. The normal rule is that the document on which the suit is based should be produced along with the plaintiff. The production of the basic document is thus insisted on to afford protection to the person liable under it against a similar claim in a subsequent suit brought by a party who might claim to have legally acquired the rights under the document and produce it in support of his claim. The possibility of such risk is greater in the case of negotiable instruments which may change hands frequently by successive endorsements. Against the claim preferred by a holder in due course of such an instrument, the person liable under it may not be entitled to set up a plea that the amount due under the instrument has already been paid. Possession of the instrument by the holder in due course will be prima facie evidence of the liability not having been discharged....

(emphasis supplied)

32. This Court is well aware of its limitations u/s 100, Code of Civil Procedure. When final Court on facts has not considered the relevant provisions of law and when the findings are contrary to the mandatory provisions of Jaw and have also not considered material circumstances, which would have given another result and the decision is based on no evidence, this Court will be justified in interfering in that decision u/s 100, Code of Civil Procedure.

33. In Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, in para 5 it is held that the High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower Appellate Court were erroneous being contrary to the mandatory) provisions of law applicable or its settled position on the basis of

pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

34. I have already discussed the entire evidence not for the purpose of reappreciation but only to show how the lower Appellate Court

approached the question which is against settled legal position. In the result, I set aside the decree and judgment of lower Appellate Court in

A.S.90 of 1998 and restore the decree and judgment of trial Court in O.S.452 of 1996. The Second Appeal is allowed. Suit O.S.452 of 1996 is

decreed as prayed for. Plaintiff will be entitled to costs throughout. Consequently, C.M.P.16996 of 1999 is closed.