

(2001) 12 AP CK 0046
In the Andhra Pradesh High Court
Case No : A.S. No. 2889 of 1987

Boggarapu Subba Guruvaiah

APPELLANT

Vs

Dornipadu Prahallada Rao and Another

RESPONDENT

Date of Decision : 19-12-2001

Acts Referred:

Contract Act, 1872 — Section 12
Evidence Act, 1872 — Section 58
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (2002) 2 ALD 5 : (2004) 7 ALT 578

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : N. Ramamohana Rao, for the Appellant; C. Sadasiva Reddy, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The unsuccessful plaintiff in O.S. No. 63 of 1981 is the appellant. The appellant-plaintiff instituted the suit referred to supra on the strength of a promissory note dated 2.9.1978.

2. It is the case of the appellant-plaintiff that the 1st respondent-1st defendant as manager of the joint family borrowed a sum of Rs.18,000/- from one Shaik Abdul Khader s/o Mohd. Hussain, A. Kodur village, Nandyal Taluq and executed a demand promissory note in his favour on 2.9.1978 at Nandyal promising to repay the same with an interest at 1.75ps. per cent and the 1st respondent-1st defendant had not paid any amount due under the aforesaid promissory note. It was also further pleaded that the said Shaik Abdul Khader had transferred the said promissory note debt or consideration in favour of the appellant-plaintiff at Nandyal on 21.8.1981 and made an endorsement on the reverse of the promissory note and simultaneously he had assigned the said debt by executing an assignment deed and thus the appellant-plaintiff is entitled to recover the suit amount. Since the 1st respondent-1st defendant had not made any payment

towards the said promissory note debt, the appellant-plaintiff was constrained to issue a legal notice and subsequent thereto had instituted the present suit. It was also further pleaded that since the amount was borrowed for joint family necessity, the 2nd respondent-2nd defendant also was impleaded as a party, being the son of the 1st respondent-1st defendant. It was also pleaded that the appellant-plaintiff came to know that the 1st respondent-1st defendant had created a partition deed showing as to the division between the 1st respondent-1st defendant and the 2nd respondent-2nd defendant and the said partition deed is only a sham and nominal document intended to defraud the creditors.

3. The 1st defendant filed a detailed written statement. In para 4 of the written statement a specific stand was taken by the 1st defendant stating that the allegations in para 4 of the plaint are specifically denied. It was also further pleaded that the said Shaik Abdul Khader has absolutely no means to lend any amount much less the huge sum of Rs.18,000/- and the appellant-plaintiff is also put to strict proof of the capacity of Shaik Abdul Khader to lend such amount. In para 5 of the written statement, the 1st defendant had pleaded as follows:

"5. This defendant being given to bad company is addicted to drink and gambling. The said Shaik Abdul Khader, this defendant and one Yelisetty Subramanyam used to indulge in gambling with high stakes. When this defendant was in a drunken state, the said Shaik Abdul Khader might have obtained a promissory note said to be due in the activity of gambling from this defendant. It is relevant to submit that the other person Yelisetty subramanyam had also obtained such similar promissory note from this defendant, the previous date i.e. 1.9.1978 for a similar sum of Rs.18,000/- said to be due in the activity of gambling".

4. Several other facts have been pleaded in paras 6, 7, 8, 9, 10 and also 11 of the written statement. A specific stand was also taken that the appellant-plaintiff was not a bona fide holder in due course and cannot claim better rights than Shaik Abdul Khader himself and hence the appellant-plaintiff is put to strict proof of the alleged transfer endorsement and the alleged consideration said to be paid thereunder and also that it is endorsed on a sufficient stamp paper.

5. The 2nd defendant also filed a written statement taking a stand that it is not true to say that the 1st defendant and 2nd defendant are members of Hindu joint family and that the 1st defendant was manager thereof, and a specific plea was taken that there was partition of joint family properties on 2.11.1979 under a registered partition deed. The 2nd defendant also had pleaded several other facts in paras 5, 6 and 7 of the written statement.

6. On the strength of the respective pleadings, the Court below had framed as many as six issues, which are as follows:

"1. Whether the suit promissory note is true and valid?

2. Whether the assignment of the debt covered by the suit promissory notice in favour of the plaintiff as claimed by him is valid?

3. Whether the debt covered by the suit promissory note is Avyavaharika?

4. Whether the suit debt finds D-2's share in the properties belonging to the joint Hindu family constituted by D-1 and D-2.?

5. Whether the defendants are entitled to have the contractual interest scaled down as envisaged in A.P. (A.A.) Act IV of 1938?

6. To what relief?

7. On behalf of the appellant-plaintiff three witnesses were examined and Exs.A-1 to A-13 were marked and also Ex.X-1 was marked and the 1st respondent-1st defendant had examined himself as DW-1 and the mother of the 2nd defendant was examined as DW-2. The Court below at paras 7 and 8 had discussed the issue No.1 and came to the conclusion that the suit promissory note was not proved and at para 9 issue No.2 was answered to the effect that the assignment of deed covered by suit promissory note in favour of the appellant-plaintiff is not proved. At paras 10, 11 and 12, issues 3, 4, 5 and 6 have been answered and ultimately the suit was dismissed. The appellant-plaintiff, being aggrieved by the judgment and decree of the Court below, made in O.S. 63 of 1981 on the file of the Subordinate Judge, Nandyal dated 5th day of August 1987, had preferred the present appeal.

8. Sri Potti Venkataramana Rao, representing Mr. Ram Mohan Rao, had strenuously contended that the Court below had totally erred in proceeding on the ground that the execution of the promissory note was denied but in fact the execution of the promissory note marked as Ex.A-1 was admitted by the 1st defendant. The learned counsel had placed reliance on the pleading of 1st defendant, especially para 5 of the written statement. The learned counsel had also taken me through the evidence of PWs 1, 2 and 3 and also the documentary evidence and further had pointed out that Ex.A-1 is in the own handwriting of the 1st respondent-1st defendant. The learned counsel also had contended that the finding relating to Avyavaharika nature of debt and other aspect had not been established at all. Since there was no specific denial of the execution of Ex.A-1, it can be taken that the appellant-plaintiff had proved the execution of Ex.A-1 and in fact the presumption u/s 118 of the Negotiable Instruments Act 1882 comes to his aid. The learned counsel also had placed reliance on Section 58 of the Indian Evidence Act 1872 to the effect that the admitted facts need not be proved. The learned counsel had drawn my attention to the conduct of DW-1 in taking a false stand in evidence that he does not know Shaik Abdul Khader at all having pleaded at para 5 of the written statement that they were involving in certain gambling activities.

9. The learned counsel had placed strong reliance on Kundan Lal v. Custodian, Evacuee Property¹; M. Janakalakshmi v. Madhava Rao²; Kuppuswami v.

Arumugam³, S. Basavaraj v. V.N. Adilakshma⁴ and also Venkataratnam v. Kanakasundara Rao⁵. The learned counsel had submitted that even the other documentary evidence Exs.A-2 and A-3 - the transfer entry and also the deed of assignment - and Ex.A-4 the office copy of the lawyer's notice and Exs.A-6, A-7, A-8 and Exs.A-9 to A-13 also clearly establish the probabilities which go to show that the 1st defendant in fact is due to pay the amount covered by Ex.A-1.

10. Sri C. Sadasiva Reddy, the learned counsel representing the 1st respondent, had contended that a reading of the written statement of the 1st respondent-1st defendant clearly shows that the execution of Ex.A-1 - the suit promissory note is specifically denied and when such stand had been taken, the mere plea taken at para 5 of the written statement will not change as far as discharging the burden is concerned and since the appellant-plaintiff had failed to discharge the burden in accordance with law, the Court below had arrived at the correct conclusion and had dismissed the suit. The learned counsel also had pointed out that when it is the case of the appellant-plaintiff that it was scribed by 1st respondent-1st defendant in his own handwriting, it is of very prime importance to prove initially that the handwriting contained in Ex.A-1 is that of the 1st respondent-1st defendant. No steps have been taken in this regard and in fact even it was not suggested to DW-1 in cross-examination. The learned counsel also had pointed out that the suit was filed immediately after issuance of notice and had pointed out several facts and commented that the transaction is nothing but fishy. The learned counsel also had submitted about the non-examination of Shaik Abdul Khader, a material witness, to prove the suit transaction and had pointed out the relevant findings recorded by the Court below in this regard. The learned counsel had taken me through the evidence of PWs 1 to 3 and also the evidence of DWs 1 and 2.

11. Heard both the counsel.

12. The points which arise for consideration in this appeal are:

- a) Whether the suit promissory note is true, valid and binding?
- b) Whether the assignment of debt as pleaded by the appellant-plaintiff is valid and binding?
- c) Whether in the facts and circumstances of the case, the suit debt can be recovered even from the share of the 2nd respondent-2nd defendant?
- d) To what relief?

13. Points (a) and (b) can be discussed together for the purpose of convenience.

14. The 1st respondent-1st defendant was examined as DW-1 and DW-2 - the mother and the guardian of the minor 2nd respondent-2nd defendant was examined. The relationship between respondent No.1 and respondent No.2 is not in dispute. The appellant-plaintiff had examined himself as PW-1 and no doubt PW-1 deposed that the 1st defendant borrowed a sum of Rs.18,000/- from Shaik

Abdul Khader for necessity of the joint family consisting himself and 2nd defendant and had executed a promissory note in favour of Shaik Abdul Khader for Rs.18,000/- on 2.7.1978 and on 21.8.1981 Shaik Abdul Khader endorsed the suit promissory note in favour of the plaintiff for consideration. The promissory note dated 2.9.1978 was marked as Ex.A -1 and the transfer endorsement and the deed of assignment were marked as Exs.A- 2 and A-3. The first question on which both the learned counsel had advanced elaborate arguments is the aspect of burden of proof. It is the contention of the learned counsel for the appellant that in view of the pleading in para 5 of the written statement the execution of Ex.A-1 by the 1st defendant should be taken to have been admitted and hence automatically the plaintiff is entitled to have the benefit of the presumption u/s 118 of the Negotiable Instruments Act. However, as far as allegations in para 4 of the plaint are concerned, a specific denial is there and the 1st issue which was settled by the Court below also is to the effect whether the suit promissory note is true and valid. Apart from this aspect, the plea taken by the 1st defendant in para 5 appears to be a vague plea stating that Shaik Abdul Khader might have obtained a promissory note said to be due in the activity of gambling from the 1st defendant. But, DW-1 in the witness box had specifically denied the execution of Ex.A-1. Except the evidence of DW-1, there is no other evidence to prove either the execution or the passing of consideration of Ex.A-1. The competent person to speak about the execution and also passing of consideration is Shaik Abdul Khader. But, for the reasons best known, the appellant-plaintiff had not taken steps to examine Shaik Abdul Khader. Apart from it, though it is stated that Ex.A-1 is in the handwriting of the 1st defendant himself, no steps had been taken to prove at least that the contents of Ex.A-1 are in the handwriting of the 1st defendant. Even in cross-examination no suggestion was put to him to the effect that it is in his own handwriting. Hence, the Court below had arrived at a correct conclusion relating to the validity and the binding nature of Ex.A-1, since absolutely there is no evidence at all except the evidence of PW-1 who has nothing to do with Ex.A-1 transaction. By virtue of Exs.A-2 and A-3 - the transfer endorsement and the deed of assignment, the appellant-plaintiff claims that he is entitled to recover the said amount. Since the appellant-plaintiff had miserably failed in discharging the burden cast upon him, in the facts and circumstances there is no question of drawing any presumption u/s 118 of the N.I. Act relating to the passing of consideration in this regard.

15. No doubt, strong reliance was placed on Venkataratnam v. Kanakasundara Rao (referred (5) supra) to the effect that the plaintiff's claim cannot be thrown out on the mere ground of non-examination of Shaik Abdul Khader. However, the facts are distinguishable. In Kuppuswami v. Arumugam (referred (3) supra) while dealing with the aspect of burden of proof in the case of misrepresentation, it was held that where a party alleges that the deed executed by him was vitiated by misrepresentation, onus is upon him to establish the plea of misrepresentation.

16. In Kundan Lal v. Custodian, Evacuee Property (referred (1) supra), it was

held that Section 118 lays down a special rule of evidence applicable to Negotiable Instruments. In *M. Janakalakshmi v. Madhava Rao* (referred (2) supra) it was held that where in a suit based on negotiable instrument the defendant fails to discharge the burden that there was no consideration, the plaintiff is entitled to a decree notwithstanding that his plea of cash consideration turns out to be false.

17. Reliance also was placed on a decision in *S. Basavaraj v. V.N. Adilakshmama* (referred (4) supra) wherein it was held:

"Under normal circumstances if it is established that the executant was not only given to the consumption of alcohol but what one may categorise as a long term addict, a Court would take judicial notice of the fact that such a person would for the greater part sink to a very weak mental condition. An addict presupposes the fact that the person cannot do without recurrent consumption of alcohol and that, therefore, the lucid movements would be few and far between, if at all there are some. What is more important, however, is that one cannot generalise with regard to such situations because there may be lucid breaks when the party is perfectly and completely sober and it is for this reason that even in the case of such a person that the law requires that there must be strict factual proof of the fact that the infirmity was present at the point of time when the contract was being executed. It is well-settled that even in medical circles that in the cases of persons who have psychological disturbances or persons who have been medically categories as being of unsound mind, that as a result of treatment or otherwise, there are periods of time when this infirmity does not exist. It is for this respondent reason that even the exception that is provided for the I.P.C. is not available to a criminal unless there is conclusive evidence of the fact that the person was not in control of his or her senses to the time when the offence was committed. The position in civil law is identical and the reading of Section 12 of the Contract Act leaves no doubt about the fact that this profits condition precedent. Here that there is a well-settled advantage of its own wrong and in this view of the law, if a person puts himself into a position of alcoholic addiction executes contract after accepting money from third parties and creating rights that the law would be extremely slow in allowing such a party to escape the consequences of the contract unless it is demonstrated to the hilt that the executant virtually did not know what he was doing when the contract takes place".

18. As far the propositions of law which have been elaborately advanced by Sri Potti Venkataramana Rao are concerned, there cannot be any quarrel or dispute. But, however, in the facts and circumstances of the case, whether the Court below had recorded proper findings while appreciating the evidence may have to be decided by this appellate Court. As already referred to supra, except the evidence of PW-1, there is no other evidence as far as Ex.A-1 is concerned. PW-2 is the attesor of the transfer endorsement and when the burden relating to Ex.A-1 itself was not discharged, there is no necessity of dealing with the validity

of the transfer in detail.

19. Be that as it may, here also the non-examination of Shaik Abdul Khader will take the crucial role, since, except the evidence of PW-2 there is no other evidence to prove the transfer endorsement or the passing of cash consideration. A specific plea was taken by the 1st defendant that the plaintiff is not a bona fide holder in due course and hence the Court below had recorded detail and convincing reasons while answering this aspect also at para 9 of the judgment. Hence, in the light of the convincing findings recorded by the Court below on appreciation of both oral and documentary evidence at paras 7, 8 and 9, I am not inclined to disturb those findings recorded by the courts below relating to points (a) and (b).

19. Point No.(c): The Court below on this aspect while deciding issues No. 3 and 4 at para 10 had arrived at a conclusion that there is no satisfactory evidence to hold that the 1st defendant was addicted to vices and that the suit debt is a pre-partition debt. In the light of the findings recorded above disbelieving the very suit transaction, there need not be any elaborate discussion on this point.

20. Point No.(d): For the foregoing reasons which had been discussed above and in the light of the fact that the appellant-plaintiff failed to discharge the burden cast upon him in proving the execution of Ex.A-1, I do not find any merits in this appeal and accordingly the appeal is dismissed with costs.