
(2002) 02 AP CK 0069

In the Andhra Pradesh High Court

Case No : Second Appeal No. 249 of 1989

D. Nagarathnamma and Others

APPELLANT

Vs

Pulicherla Krishna Reddy and Others

RESPONDENT

Date of Decision : 01-02-2002

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (2002) 2 ALD 682 : (2002) 2 AnWR 411

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : C. Sadasiva Reddy, for the Appellant; K.S. Raju, for the Respondent

Final Decision : Allowed

Judgement

G. Yethirajulu, J.—This second appeal is preferred by the plaintiffs in O.S.No.7 of 1975 on the file of the District Munsif, Puttur of Chittoor District against the judgment and decree of the Principal Subordinate Court, Tirupathi in A.S.No.77 of 1978 preferred by the defendants challenging its validity and legality. The facts leading to the preferring of the second appeal by the plaintiffs are briefly as follows:

The defendant for himself and as Manager of the joint family borrowed a sum of Rs.3,250/- and executed a suit promissory note dated 10-10-1974 in favour of the 1st plaintiff promising to repay the same on demand with interest @ 6% per annum. Despite the repeated demands the defendant failed to repay the amount. Hence he filed the suit for recovery of the amount covered by the suit promissory note with interest and costs.

The defendant while admitting the execution of the suit promissory note pleaded that it is not supported by consideration. The defendant pleaded that he did not receive Rs.3,250/- or any amount on the date of the suit promissory note or at any time from the plaintiff. The suit promissory note came into existence under the following circumstances:

The defendant executed a promissory note on 29-7-1968 for Rs.4,500/- in favour of P.W.2-K.Narayan Reddy and repaid a sum of Rs.5,280/- towards principal and interest on various occasions. There was exchange of notices between them and P.W.2 filed O.S.No.355 of 1974 in the same court on 09-10-1974 against the defendant for a sum of Rs.2,909.40 ps. and also obtained orders of attachment of immovable property of the defendant. Though P.W.2 sought for attachment of 100 bags of groundnuts, the court did not order attachment before judgment, but on 10-10-1974 P.W.2 accompanied by the Court Amin falsely stated to the defendant that the Court also attached the groundnuts and he has to produce them in the court. At that time one Krishnamurthy Naidu, the Ex-Village Munsif of Karvetinagar held mediation and in that mediation, P.W.2 and the plaintiff herein, D.Velayudha Reddy and K.Narsimhulu Reddy, brother of P.W.2 were present. The mediators felt that unless the correct particulars are verified from the Court it would not be possible to get the matter settled. Therefore, it was agreed in the same mediation that the defendant should execute the suit promissory note for Rs.3,250/- in favour of the plaintiff herein. The plaintiff should execute a promissory note for Rs.3,500/- in favour of P.W.2's brother K.Narsimhulu Reddy and the two promissory notes should be kept with the Ex.Village Munsif of Karvetinagar. After verification of the correct amount due from the defendant, if any, it was agreed that after the payment of the said balance amount, the promissory note executed by the defendants in favour of K.Narsimhulu Reddy should be returned to him. On verification of the records it was found that the defendants paid a sum of Rs.91.28 ps. in excess of the amount due to P.W.2. Therefore he requested for return of the promissory note dated 10-10-1974, but it was not returned on account of the mischief played by P.W.2. The suit covered by O.S.No.355 of 1974 filed against him was dismissed with costs.

2. The defendant further averred that the suit promissory note came into existence under the above circumstances and it is not valid and binding on him. He therefore requested to dismiss the suit with costs.

3. On the basis of the pleadings of both parties, the trial court framed the issues to the effect whether the suit promissory note is not supported by consideration and whether the suit promissory note came into existence under the circumstances stated by the defendant.

4. During the pendency of the suit the plaintiff died and his legal representatives were brought on record as plaintiffs 2 to 6. The plaintiffs in order to prove their case examined P.Ws.1 and 2 and marked Ex.A.1-promissory note. The defendant examined D.Ws.1 to 4 and marked Ex.B.1-carbon copy of written statement in O.S.No.355 of 1974, Ex.B.2-copy of the plaint in O.S.No.355 of 1974, Ex.B.3-copy of I.A.No.1119 of 1974 in O.S.No.355 of 1974, Ex.B.4-carbon copy of the decree in O.S.No.355 of 1974 and Ex.B.5-office copy of the notice issued by the defendant's counsel to the plaintiff and others.

5. Ex.X.1-office copy of the reply notice and Ex.X.2-postal acknowledgment were

marked through P.W.2. The trial court after considering the evidence adduced by both parties held that the plaintiff is entitled for the suit amount and accordingly the suit was decreed with costs.

6. The defendant being aggrieved by the said judgment and decree dated 08-11-1978 preferred A.S.No.97 of 1978 on the file of the Principal Subordinate Court, Tirupathi and the appeal was allowed by the Subordinate Court through its judgment dated 30-11-1988 holding that the suit promissory note was not supported by consideration and that the suit is liable to be dismissed with costs. The plaintiff being aggrieved by the judgment and decree of the 1st appellate court preferred this appeal challenging its validity and legality. In view of the pleadings and the evidence, both oral and documentary, the following points arise for consideration by this court; 1. Whether the 1st appellate court was right in holding that there is a duty cast upon the plaintiff to examine all the attesters and scribe despite the presumption u/s 118 of the Negotiable Instruments Act regarding passing of consideration, and examination of plaintiff and one attester? and 2. Whether the 1st appellate court erred in not considering the effect of Ex.A.2 withdrawal Memo which probabilises the plaintiff's version regarding passing of consideration?

POINT NO.1:

The defendant who was examined as D.W.1 admitted the execution of the suit from issory note covered by Ex.A.1, but he denied the receipt of consideration. When ever the defendant admits the execution of the suit promissory note, the burden is on him to prove that the suit promissory note is not supported by consideration and the circumstances under which he executed the suit promissory note. The executant of the suit promissory note Sri Velayudha Reddy died during the pendency of the suit. Therefore his wife, who is the second plaintiff in the suit, got examined herself as P.W.1. She stated that the defendant executed the suit promissory note in favour of her husband and the defendant failed to repay the amount covered by the pro-note. The plaintiffs in support of their case examined P.W.2-K.Narayana Reddy. He stated that the defendant was indebted to him on a pro-note and he filed O.S.No.355 of 1974 on the file of the same court and obtained orders of attachment before judgment in that suit. When the Court Amin came for attachment, the defendant borrowed money from the 1st plaintiff to discharge the debt due to him and executed the suit promissory note in favour of the 1st plaintiff. He was one of the attesters for the suit pro-note and he issued a receipt to the defendant for receiving the entire amount due to him in O.S.No.355 of 974. Ex.B.5 is the registered lawyer notice issued on behalf of the defendant wherein it was mentioned that there was a mediation before elders regarding the amount due to P.W.2 and it was agreed in the mediation that he should execute a promissory note for Rs.3,250/- in favour of P.W.2 and P.W.2 in turn should execute a promissory note for Rs.3,500/- in favour of K.Narsimhulu Reddy and both the pro-notes should be kept with Ex-Village Munsif Krishnaswamy Naidu. It was further agreed that after verification

of the credit, if any, due to P.W.2 and after payment of the correct amount, the pro-notes should be returned to P.W.2 and himself, and on verification of the records it was noticed that he paid Rs.91.28 ps. in excess of the amount due to P.W.2 and promissory notes were not returned to him and P.W.2

7. In the written statement the defendant took the same plea. The defendant as D.W.1 stated that Ex.A.1-pro-note was executed in lieu of the debt due to P.W.2. He further stated that he has no record to show that the recitals of Ex.A.1 are not true. He executed Ex.A.1-pro-note after reading and understanding the contents. Ex.A.1 was executed for the amount due under the suit filed by P.W.2. He did not pay any amount to P.W.2 after execution of Ex.A.1. The evidence of D.W.1 further discloses that he was in the habit of borrowing monies and execute promissory notes which is evident from the following evidence of D.W.1: I was doing business in cloth under the name and style of Bombay Cloth Stores. I was maintaining accounts while doing business and was lending monies on promissory notes also. I also borrowed from others on executing pro-notes. When I discharge any debt under pro-note, I am in the habit of getting endorsements on pro-notes or obtain the receipts for the payment made by me.

8. The defendant did not make any mention in his evidence about the pro-notes said to be executed by P.W.2 in favour of K.Narsimhulu Reddy along with the pro-note executed by him in favour of the 1st plaintiff. His evidence disclosed that the amount due to Narayan Reddy under O.S.No.355 of 1974 was roughly Rs.3,260/-. Since he executed the suit promissory note for Rs.3,250/- it is one of the circumstances that the defendants executed Ex.A.1-promissory note for the amount almost equal to the amount due under the pro-note covered by O.S.No.355 of 1974 filed by P.W.2.

9. The defendant did not examine any one of the mediators said to have advised him to execute the promissory note in favour of the 1st plaintiff. According to the defendant, P.W.2 filed a suit and attached his properties before judgment. P.W.2 was not agreeable to release the attached properties unless the amount is paid. In Ex.A.1 it is specifically mentioned that in order to discharge the amount due to P.W.2, Ex.A.1-promissory note was executed in favour of the plaintiff. Though the defendant stated that he executed Ex.A.1 at the instance of elders pending verification of the correctness of the payment made by him, he did not examine any one of the elders of the mediation. D.Ws.2 to 4 are not the elders of the mediation. Though D.W.2 claims that he was also present at the time of mediation, he did not mention about execution of two promissory notes as alleged by the defendant in Ex.B.5. D.W.2 speaks only about Ex.A.1 pro-note. He was not cited as a mediator by the defendant in Ex.B.5 or in the written statement. D.W.2 also stated that he does not know the contents of Ex.A.1 and nobody read-over the contents to him. Though D.W.1 and D.W.2 stated that the 1st plaintiff has no capacity to lend money, D.W.2 admitted that the 1st plaintiff was doing brokerage business in paddy, groundnut and other agricultural products, in addition to the cultivation of land. Though D.W.3 denied a

suggestion that he is the farm servant of the defendant he admitted that he occasionally cultivates the lands of the defendant. He is neither the attester nor the scribe of Ex.A.1. He does not know what is written in Ex.A.1. He has not asked anybody about the contents of Ex.A.1. He cannot give the date of Ex.A.1. He does not know for what purpose Ex.A.1 was executed in favour of the 1st plaintiff. He further stated that the defendant accepted the contents of Ex.A.1 and signed on it. D.W.4 also deposed that he is not an attester to Ex.A.1. The defendant after knowing the contents of Ex.A.1 signed on it voluntarily. The evidence of D.Ws.2 to 4 is no way helpful to the defendant to establish that the suit pro-note was not supported by consideration. After excluding the evidence of D.Ws.2 to 4, there is no evidence either oral or documentary to prove that the suit pro-note was not supported by consideration, except the self-serving testimony of D.W.1.

10. The defendant pleaded that the amount due to P.W.2 was paid in excess on various occasions and the suit was filed by P.W.2 unnecessarily and attachment was brought before the judgment. Ex.X.1-reply notice given by P.W.2 coupled with the evidence of P.W.2 establishes that in order to make the payment due under O.S.No.355 of 1974 the defendant executed the suit promissory note borrowing money from the plaintiff for the said purpose. In Ex.X.1-reply notice dated 08-1-1975 P.W.2 mentioned that the defendant borrowed the amount from the 1st plaintiff and paid the entire suit amount of Rs.3269.15 ps. due under O.S.No.355 of 1974 and he filed a Memo into court withdrawing the suit. The defendant contended that the amount covered by O.S.No.355 of 1974 was not paid by him or by anybody else and the suit was dismissed for default. After remand from the High Court the plaintiffs filed Ex.A.2-Certified copy of Memo of withdrawal in O.S.No.355 of 1974. Non-pressing of the suit covered by O.S.No.355 of 1974 and the non-appearance of the plaintiff to further prosecute the suit is an indication that the plaintiff was not particular to recover the amount in view of the payment of the amount by the 1st plaintiff in pursuance of the suit promissory note executed by the defendant in his favour.

11. The appellate court peculiarly observed that since the presumption u/s 118 of the Negotiable Instruments Act ("the Act" for brevity) is rebuttable and as the defendant discharged his burden that the suit pro-note was not supported by consideration by examining D.Ws.1 to 4, the burden shifts to the plaintiff to prove that the suit pro-note is supported by consideration. The judgment of the 1st appellate court is perverse in holding that the plaintiff ought to have examined the scribe and other attestors of the promissory note to discharge his burden. The judgment of the 1st appellate court is perverse in holding that the defendant discharged the burden by examining himself and D.Ws.2 to 4 and that the suit pro-note was executed without consideration in the circumstances pleaded by the defendant. Whenever the execution of a promissory note is admitted the onus is upon the executants to prove that there was no consideration. In *SETHUPATHY v. CHIDAMBARAM*¹ the Privy Council held that where a promissory note has been given consideration it is to be presumed and

the burden to prove that there was no consideration to the promissory note is upon the executant. u/s 118 of the Negotiable Instruments Act, until the contrary is proved the general presumption is that the negotiable instrument was made for consideration. The purpose for which the amount borrowed was specifically mentioned in Ex.A.1 and there was no ambiguity in the recitals of Ex.A.1. In order to discharge the burden the defendant ought to have examined any one of the elders for the alleged mediation or any one of the attestors or the scribe to prove that the document is not supported by consideration. Unless and until the presumption that the suit is supported by consideration is rebutted through evidence, the defendant is not entitled to claim that the suit pro-note is not supported by consideration. Mere examining some third parties to speak about the lack of consideration is not proper discharge of the burden by the defendant. If that is acceptable, in every transaction the debtors will bring some third parties and make them to say that the suit document is not supported by consideration. The discharge of burden should be by way of adducing either documentary proof or by examining such persons who are the attestors or scribe to the document. In the absence of such evidence there is no scope to hold that the defendant discharged his burden and the burden will not shift to the plaintiff to prove that it is supported by consideration. P.W.2 who received the consideration of the suit pro-note through the defendant who is one of the attestors to the suit pro-note is an appropriate witness to discharge the initial burden by the plaintiff that the suit promissory note was supported by consideration. The plaintiff can definitely take the advantage of the presumption u/s 118 of the Act and he can put the burden on the defendant to prove that it is not supported by consideration. The 1st appellate court failed to appreciate the rule position objectively and was wrong in allowing the appeal by setting aside the judgment and decree of the trial court. I therefore hold that the plea of the defendant that the suit promissory note is not supported by consideration cannot stand and the plaintiff should succeed. The trial court while appreciating the evidence rightly held that the defendant failed to discharge the burden that the suit promissory note was not supported by consideration and I am inclined to confirm the judgment and decree of the trial court in O.S.No.7 of 1975.

POINT NO.2:

The learned counsel for the defendant contends that the trial court dismissed the said suit for default without recording the Memo of withdrawal. Therefore, it cannot be said that the withdrawal was on account of the payment of consideration by the plaintiff to P.W.2 through the defendant.

12. Ex.A.2-copy of the withdrawal Memo indicates that within three days from the date of execution of the suit promissory note P.W.2 filed a Memo into the concerned court in O.S.No.355 of 1974 withdrawing the suit as adjusted out of court. P.W.2, having prosecuted the case effectively by attaching the properties of the defendant, would not have filed a Memo of withdrawal, unless there is adjustment of the matter out of the court. When the plaintiff filed the said memo

into court, it is for the court to take note of it and record the same while dismissing the suit, but the court without making a mention about the Memo of withdrawal dismissed the suit for default. Dismissal of the suit for default is itself an indication that P.W.2 stopped prosecuting the case due to receipt of the money under Ex.A.1-promissory note. The 1st appellate court instead of taking cognizance of the fact of filing of the Memo of withdrawal by P.W.2, came to a conclusion on a different consideration that since the other attestors were not examined, the plaintiff failed to discharge the burden. Therefore, the suit must fail. After careful consideration of the facts, I am of the view that the 1st appellate court did not appreciate the facts in the right direction and the finding of the 1st appellate court is without proper appreciation of evidence. This issue is therefore held in favour of the plaintiff and he is entitled to recover the amount covered by the suit promissory note as prayed for.

13. In the result, the appeal is allowed setting aside the judgment and decree passed by the Principal Subordinate Court, Tirupathi in A.S.No.97 of 1978 and confirming the judgment and decree of the District Munsif, Puttur in O.S.No.7 of 1975 with costs.