(2018) 03 KL CK 0107

In the High Court Of Kerala

Case No : Appeal Suits No. 116 Of 2003

K.K.Sunilkumar, APPELLANT

Vs

M.N.Anilkumar RESPONDENT

Date of Decision : 05-03-2018

Acts Referred:

Negotiable Instruments Act, 1881 — Section 118(a)
Evidence Act, 1872 — Section 60, 67

Citation : (2018) 03 KL CK 0107

Hon'ble Judges : K.Abraham Mathew, J

Bench : Single Bench

Advocate : K.S.Babu, N.Sudha, Jose Pallattukaran

Final Decision : Allowed

Judgement

1. The plaintiff against whom a decree for recovery of money has been passed in the suit instituted by the respondent is the appellant. The respondent alleged that on 13.4.1998 the appellant for his business purpose borrowed from him Rs.1,50,000/- executing a promissory note undertaking to repay the amount with interest at 18% per annum and in spite of demand he failed to pay the amount. He prayed for recovery of the amount with interest at 18% per annum. The appellant contended that he did not borrow money from the respondent and did not execute the promissory note relied on by the latter. His version is that he had certain money transactions with the respondent's brother and in connection with those transactions he had given him signed and stamped blank papers and other papers and the promissory note produced in the case was prepared on one of those papers. The trial court decreed the suit as prayed for. This is assailed in this appeal.

2. Heard the learned counsel for the appellant and the respondent.

3. The following points arise for consideration

a) Did the appellant borrow Rs.1,50,000/- from the respondent executing Ext A1 promissory note undertaking to repay it with interest at 18% per annum ?

b) Whether the decree of the lower court is liable to be set aside?

Points

4. On 9.9.1998 the respondent through his advocate sent Ext A2 notice to the appellant demanding payment of the amount shown in Ext A1 promissory note with interest at 18% per annum. Within seven days from the date of receipt of the notice. It was received by the appellant on 12.9.1998 as seen from Ext A2(a) postal acknowledgment card. Even before the receipt of the notice the respondent instituted the suit. The reason stated is that he knew that the appellant was making attempts to dispose of his property.

5. The appellant does not dispute genuineness of his signature in Ext A1 promissory note. At the same time, he does not admit that he executed the promissory note. His version is that the promissory note was prepared on a signed stamped blank paper he had handed over to the respondent's brother with whom he had some money transactions. The admission of a party should be read as a whole. The appellant's admission that he signed the stamped blank paper does not amount to admission of execution of the promissory note. The trial court has referred to Section 118(a) Negotiable Instruments Act. Under this provision once execution is admitted or proved the presumption is that the negotiable instrument is supported by consideration. The trial court has entered a finding that the evidence adduced by the respondent is sufficient to prove that he lent Rs.1,50,000/- to the appellant. The presumption under Section 118(a) negotiable instruments can be rebutted in several ways. In Kundan Lal Rallaram v. Custodian Evacuee Property, Bombay (AIR 1961 SC 1316) a three Judge bench of the Supreme Court held that to rebut the presumption it is not necessary for the defendant to adduce any evidence. He can rely on the weakness of the plaintiff's case, the probabilities in the case inferences that may be drawn from the facts available in the case including the facts and circumstances brought out in the evidence of the plaintiff.

6. PW1 to PW3 deposed that the loan transaction and execution of A1 promissory note took place at the residence of PW1, the respondent. Section 67 of the Evidence Act provides that the contents of a document may be proved by proving the signature or the handwriting of the person who signed or wrote it. At the same time, Section 60 of the Evidence Act makes it clear that if the fact sought to be proved is the one which could be seen the person who saw it shall depose to it. PW1 and PW3 deposed that Ext A1 is the promissory note executed by the respondent. But they did not specifically testify that they saw the appellant sign it. But PW2 deposed that he saw the appellant sign Ext A1 promissory note.

7. PW2 was a police constable and PW3 a contractor. Both of them claimed that they together went to the house of PW1 where the alleged transaction took place. The trial court held that these two witnesses are reliable and their evidence fully supports the testimony of the respondent (PW1).

8. Questions were put to PW1 in the cross-examination as to his source to lend Rs.1,50,000/-. It came out in his evidence that his daily income from his business was Rs.2,500/- to Rs.3,000/-. In 1998 this was a very very high income. But he admitted that he did not pay income tax return or sales tax. So he is a self proclaimed offender. From the fact that he had not filed income tax return or sales tax return compels this court to draw an inference that he did not have the income to pay income tax or even sales tax. He admitted that his bank account would not show withdrawal of any amount. According to him, he had only Rs.30,000/- with him on the date of the transaction, Rs.1,20,000/-was the amount PW3 who had borrowed from him repaid. It dropped from PW1 in the cross-examination that he maintained an account at his shop. But he did not produce it. As observed by the Supreme Court in Kundan Lal Rallaram v. Custodian Evacuee Property, Bombay (AIR 1961 SC 1316) the inference is that if he had produced it, it would have been unfavourable to him.

9. How PW2 and PW3 happened to be present when PW1 allegedly lent the money to the appellant. PW2 was a police constable in Kerala Police. He was a friend of PW3. On the relevant date, PW3 claimed, he was on duty from 10 a.m to 5 p.m in the police control room at Thevara. PW3 came to his office and took him to the house of PW1 so that PW3 might pay back Rs.1,20,000/-he had borrowed from PW1.

10. The deposition of PW3 that on 13.4.1998 PW2 was working in police station at Thevara is inconsistent with the testimony of PW2 that he was working in police control room at Thevara. According to PW2, his duty was from 10 to 5 p.m. The Station House Officer was one Thomas Philip. He did not remember who were the Circle Inspectors in the control room on the relevant date. But he remembered that he left the station at 5.45 p.m with the permission of Sub Inspector so that he might go with PW3 Gopi. The evidence of DW2 who was an inspector in the control room during the relevant period is that in the control room there was no Station House Officer. The charge of the control room was with an Assistant Commissioner of Police. The testimony of DW3 and the facts noted in Ext X2 Roaster of Duty maintained at the control room for April 1998 undoubtedly proves that PW2 was on duty on working arrangement in Kerala Police Association during the whole month except a few days, on which dates he was on some other duty. Ext X1 General Diary abstract of police control room proves that on 13.4.1998 PW2 was on duty in Kerala Police Association Office and his duty started at 8 in the morning. What more is necessary to prove that the evidence of PW2 and PW3 is false. PW2 gave false evidence that he was on duty in the police control room from 10 a.m to 5 p.m. He is an untrustworthy witness. It follows that the evidence of PW3 that just before 5 p.m he met PW3 at police station at Thevara and he took PW3 also along with him to the house of PW1 also is not true.

11. The computer precise memory of PW2 and PW3 is surprising. PW2 remembered that he left the police station at 4.45, reached the house of PW1

after 5, the appellant signed Ext A1 promissory note after 5.30 and PW2 left the house of PW1 at 6.15 p.m in the evening, and the amount of Rs.1,20,000/-PW3 paid PW1 were bundles of R.100/- currency notes. In the cross-examination he made a modification: there were two bundles of Rs.50/-currency notes also. Coming to the evidence of PW3, he could also say that he met PW2 at the police station at 4.30, reached the house of PW1 after 5 and the amount of Rs.1,20,000/- he paid PW1 were bundles of Rs.100/- currency notes and he borrowed it on 10.10.1997. I have no doubt that PW2 and PW3 were tutored witnesses and they entered the witness box with the intention of giving false evidence and they gave false evidence.

12. Both PW2 and PW3 testified that before they attested Ext A1 promissory note they had read it, which is not normal. Had they any personal interest in the transaction? Otherwise why should they read it?

13. Ext A1 is a promissory note typewritten in Malayalam. How it happened to be a typewritten one. PW1 stated that it was type written by his sister Rathi. There was neither computer, nor type writer in his house. When it was suggested to him the contents of the document was typewritten on a signed stamped blank paper, he explained that it was brought typewritten from a typewriting institute. But there is no explanation why it was typewritten. PW2 and PW3 also supported the testimony of PW1 that when Ext A1 was executed by the appellant and attested by them, the contents had already been typewritten. In unequivocal terms PW2 stated that Ext A1 was prepared at the house of PW1 and it was typewritten by his sister. Then he added that he saw it being given to her for being typewritten. What was given to her for being typewritten, there is no explanation. This statement indicates that the promissory note was typewritten on a signed stamped blank paper. The evidence of PW3 is different from the testimony of PW2. According to him, the sister of PW1 had conducted a typewriting institute in his house. This is inconsistent with the evidence of PW1 and PW2. The explanation given by PW1 how Ext A1 promissory note happened to be a typewritten one is false.

14. Learned counsel for the appellant submits that the appearance of Ext A1 reveals that the contents was written up on a signed blank paper. The space between the lines in it except the last two lines is double; the space between the last two lines is single. It is evident that there was effort to accommodate the contents, which indicates that it was written up on an already signed and stamped papers.

15. PW2 claimed that he had borrowed money from PW1 two or three times. On the first and second occasions the amount he borrowed was Rs.5,000/-, he gave undated cheques as security on both occasions. On the third occasion, which was on 10.10.1997, he gave a typewritten promissory note to PW1. The amount was borrowed not for the personal purpose but for the purpose of one Sabu. On all the occasions the rate of interest was 18% per annum. If what PW2 stated is true, PW1(respondent) was a money lender. It came out in evidence that

M.N.Soman, elder brother of PW1(respondent) also was doing money lending business.

16. It is seen from Ext B1 reply notice sent by the appellant that the Advocate who sent Ext A2 notice to the appellant had issued notice to the appellant on the instructions of the respondent's brother Soman also on 18.8.1998, on the allegation that the respondent's brother Soman had entered into an agreement for sale of the appellant's property on 22.9.1995. Soman filed O.S.No.466 of 1998 on 27.8.1998. Admittedly, the property was attached in August, 1998. It was in spite of this the respondent filed the suit on 11.9.1998 before the expiry of the period mentioned in Ext A2 notice through the Advocate who filed the suit for respondent's brother Soman alleging that the respondent attempted to alienate the property. This allegation is absolutely false. The testimony of PW2 proves that he and PW3 were frequent visitors in the house of PW1. PW1 would say that PW2 and PW3 were very close to his brother Soman. Even PW2 knew about the transactions between the appellant and Soman. Still PW1 would say that he did know anything about those transactions. This is unbelievable. He wanted to suppress those transactions, which is material and relevant in the context of the case.

17. It was asking leading questions material facts were brought out in the examination-in-chief of the appellant (DW1) and they are liable to be ignored. But he need not disprove what the respondent has failed to prove.

18. The totality of the facts and circumstances discussed above compels me to hold that the evidence adduced by the respondent to prove that he lent Rs.1,50,000/- to the appellant and the appellant executed Ext A1 promissory note undertaking to repay it with interest at 18% per annum is nothing but false. The trial court did not examine the trustworthiness of the respondent's witnesses and reliability of their evidence with regard to each fact deposed to by them. The decree passed by it is liable to be set aside. The points are found in favour of the appellant.

19. The appellant was allowed to prosecute the appeal as an indigent. The court fees payable on the appeal memorandum has to be recovered by the District Collector.

In the result, this appeal is allowed with costs. The judgment and the decree of the trial court are set aside and the suit is dismissed with costs. Since the respondent has been directed to pay costs to the appellant, the court fees payable on the appeal memorandum shall be recovered from the respondent. The registry shall issue a certificate to the District Collector concerned to recover the court fees from him.