(1958) 02 AP CK 0011

In the Andhra Pradesh High Court

Case No : Second Appeal No. 907 of 1954

Manchalal Magraj Firm and others — APPELLANT

Vs

Akkala Surya Rao — RESPONDENT

Date of Decision : 25-02-1958

Acts Referred:
Evidence Act, 1872 — Section 92

Citation : AIR 1958 AP 638

Hon'ble Judges : Bhimasankaram, J

Bench : Single Bench

Advocate : D. Srimannarayana Choudary and R.V. Ram Rao, for the Appellant; K. Rama Chandra Rao, for the Respondent

Judgement

Bhimasankaram, J.—The plaintiff who is the appellant in the second appeal filed the suit against the sole defendant for recovery of a sum of money alleged to be due under a promissory note dated 14-10-1948 made by the defendant in his favour. The plaint stated that the defendant borrowed from the plaintiff a sum of Rs. 1,800/- for his business (sic) 14-10-1948 and executed a promissory note agreeing to pay interest at the rate of one anna per hundred per day. It added however that the plaint was claiming interest only at the rate of 12 per cent per annum.

The plaint proceeded to state that the defendant had filed a criminal complaint against the plaintiff alleging cheating, on the file of the Addition First Class Magistrate, Kakinada, with respect the consideration payable under the promises note. It was added that when the promissory n(sic) was with the police as a result of the complaint t(sic) defendant with the connivance of the police substituted another promissory note exactly the sa(sic) as the original one except that it bore the atte(sic)ing signatures of two friends of the defendant stead of the signatures of the original attestors.

The plaint claimed that the defendant was able to pay the suit amount with interest. It st(sic)ed further that although the promissory note (sic) made at

Mandapeta in the East Godavari District where the debtor resided, the plaintiff was ent(sic)ed to institute the suit at Eluru wherefrom demand was made, because it was so provided the promissory note.

2. In his written statement, the defend denied that he borrowed Rs. 1,800/- from the plaintiff on 14-10-48. He also asserted that he did execute a promissory note in favour of the plain attested by the persons named in the plaint as (sic)testors. He however admitted that he had executed in favour of the plaintiff with Yedida Rama I(sic) and Gutti Veerabhadra Rao as attestors there a promissory note for Rs. 1,800/- on 14-10-1948.

He added however that the plaintiff refused pay him the consideration payable under the n(sic) and also refused to return the promissory note (sic)leging that the defendant had to pay him (the plaintiff) Rs. 400/- which was remitted to him (the defendant) on a previous promissory note executed (sic) one year ago, a remission of which the plaintiffs father did not approve as also a sum of 170/- due from his brother. The written statement added that the plaintiff had stated that till the aforesaid sums were d, he would not return the promissory note executed by the defendant. It was further stated that police were asked to investigate the matter and seize the promissory note in the presence of (sic)diators and that the promissory note so seized : the one attested by the aforesaid Rama Rao and (sic)rabhadra Rao. The defendant denied that he substituted another promissory note with different (sic)stors for the original promissory note. He also (sic)ied that the persons, whose attesting signatures (sic)ear on the promissory note admitted by him to (sic) been made are his friends. ''"The promissory note set up in the plaint was (sic). No amount was lent by the plaintiff to the defendant". The defendant questioned the mainability of the suit without filing the promis(sic) note alleged to have been executed by the defendant in favour of the plaintiff." He asserted the District Munsif''s Court, Eluru, had no diction to entertain the suit. 3. Upon these pleadings, the principal issues (sic)d for determination by the trial Court were the (sic)wing:

1. Whether the suit pronote is true, valid and (sic)orted by consideration?

2. Whether the loss of the pronote set up in plaint is true?

3. Whether this Court has no jurisdiction to (sic)tain this suit?

learned District Munsif who tried the suit found these issues that the loss of the promissory note (sic) in the plaint was true that the original property note was valid and supported by consideration and that the District Munsifs Court, Eluru, jurisdiction to entertain the suit. In the result, decreed the suit.

4. On appeal taken to the learned Subordinate Judge, Eluru, he framed the following points determination:

Is the alleged loss of the pronote true? Is the pronote sued on, true, supported by (sic)eration and valid?

Has District Munsif''s Court, Eluru no jurisdiction to entertain this suit?

(sic)scussed all the three points together and stat(sic) the material question in the case was (sic)er Ex. B-l is the promissory note substituted the original promissory note which is alleged have been attested by Pattabhiramana and (sic)la Rao." On the evidence and probabilities, (sic)ched the conclusion that the case of substitute Ex. B-l for the original promissory note was (sic)de out.

(sic) therefore held that there being no proof of (sic)s of the original, secondary evidence of its (sic)s was inadmissible. In his view, as the suit (sic) based upon the original loan but upon the (sic)the lost promissory note it had to be dismissal was of the opinion that "the admission of defendant that he had executed Ex. B-l did not to an admission of the loss of the original (sic)ory note.

(sic) also held that the Eluru District Munsif''s had no jurisdiction to try the suit, as it could proved that the original promissory note con(sic) term that the money was payable at the therefrom the demand would be made. His (sic)g on this aspect of the matter is best put in words:

The learned District Munsif relying on the clause contained in Ex. B-l thought that the original pronote also should have contained the same clause. I do not think that there is any material to warrant such an inference. When secondary evidence is about the pronote lost, it is the duty of the plaintiff to make out that the pronote contained such a clause as that. I, therefore, conclude that District Munsif''s Court, Eluru, had no jurisdiction to try this suit based on the original pronote, if Ex. B-l is only a substituted one.

As a result of his findings, he allowed the appeal and dismissed the plaintiffs suit. Hence the present second appeal.

5. It seems to me that the lower appellate court has entirely misdirected itself in disposing of the appeal as it did. On a fair reading of the pleadings, it is perfectly clear that the defendant admitted the execution on 14-10-1348 of a promissory note for Rs. 1,800/- in favour of the plaintiff containing the same terms as those which are to be found in Ex. B-l. The only point of difference between the parties was as to who were the attestors of that promissory note.

While the plaintiff would have it that it was attested by P. Ws. 2 and 3, it was attested, according to the defendant, by D. W. 2 and Edida Rama Rao who has not been examined in the case. It seems to me that in view of this admission, there is no need for proof of the terms of the original promissory note. The plaintiff would have been constrained to establish the loss of the original promissory note in order that he might adduce secondary evidence as to its terms if it had been the defendant''s case that the promissory note contained terms other than those to be found in Ex. B-l.

It is elementary that what is admitted need not be proved. But it is said that the defendant admitted the execution of Ex. B-l and not the original promissory note alleged to have been destroyed and replaced by Ex. B-l and that the suit being based upon that lost promissory note cannot be maintained without proving that loss. I must confess considerable difficulty in appreciating the argument. The suit is upon a promissory note containing certain terms. If it is not denied that a promissory note containing those terms was made, then there is no need to prove the existence or loss of such a promissory note.

The question as to who attested the promissory note is only of indirect importance Plaintiffs case in the plaint amounted to this:

The defendant borrowed Rs. 1,800/- from me. He gave me a promissory note for the suit with specified stipulations. It was attested by P.Ws. 2 and 3. That promissory note was destroyed and replaced by a promissory note containing the same terms but purporting to be attested by Edida Rama Rao and D.W. 2 The purpose of the substitution was that the defendant might have the advantage of the evidence of the alleged attestors who both being his friends will swear to the non-receipt of the consideration." The defendant''s answer to this may be put thus "It is true that I made on 14-10-1948 a promissory note in favour of the plaintiff for a sum of Rs. 1,800/-, with the stipulations specified but I did not however receive any consideration for it. The plaintiff raised a dispute and refused to pay me any money. It is attested not by the persons mentioned by the plaintiff but by those mentioned by me.

6. On these pleadings, the real issue between the parries was, it seems to me, only whether the defendant received the consideration for the promissory note. In arriving at its conclusion, on this point, the court will have of course to weigh the evidence of the persons who claimed to have attested the promissory note. In doing so, it must also decide the question as to who the real attestors were. But it is not proper, in my opinion, to have treated the suit as one based upon a lost promissory note and requiring the plaintiff to establish the loss before he sought to prove its terms by secondary evidence.

7. Strong reliance is placed by Mr. Ramachandra Rao, learned counsel for the respondent, on the decision reported in Sundara Rajali Vs. Gopala Thevan and Another, . In that decision Walsh, J., was dealing with a case in which the plaintiff sued on a lost promissory note which according to him, had been executed in his favour by the two defendants.

While the 2nd defendant, who was the mother of the 1st defendant remained ex parte, the 1st defendant who contested the suit admitted the execution of the promissory note by both but stated that out of the sum of Rs. 100/- for which it had been executed, only Rs. 80/- was received by him. He further pleaded that he had discharged the note except for a sum of Rs. 10/-. The trial court found that the promissory note was lost and that the discharge pleaded by the defendant was not true. On revision, the learned Judge set aside the finding that the loss was proved as being supported by no evidence and then he proceeded to say as follows:

That being so the petitioner''s learned advocate contends that the suit is not maintainable at all. For this he had the direct authority of Ram Saran Das v. Tulsi Ram, AIR 1922 Lah 417 (B). That was a very strong case, for the secondary evidence sought to be adduced was of a photograph of the original note and of the photographer who took it. The execution of the pronote was also admitted by the defendants, yet it was held that the suit could not be maintained and that secondary evidence of the contents of the note was inadmissible.

For the respondents is quoted Rahimathulla Sahib v. Kamaraja Pandiya, 1930 Mad W.N. 417. (C). But it will be seen that in that case the suit was dismissed on the evidence, and that the question of the maintainability of the suit was expressly left undecided as unnecessary. To treat the admission of defendant 1 that he and defendant 2 executed the pronote, but to divorce it from his statement that the note was discharged except for Rs. 10/- that this payment was endorsed and that the suit was time-barred would appear to contravene the principle laid down by the Privy Council in Motabhoy Mulla Essabhoy v. Mulji Haridas, ILR 39 Bom 399: (AIR 1915 PC 2) (D).

In AIR 1922 Lah 417 (B), what was decided was that where a suit is based upon a lost promissory note and the loss is not proved, secondary evidence of the note is inadmissible. In that case, the basis of the suit was a promissory note alleged to have been executed by the defendant on the 7th December, 1915. According to the plaintiff, the consideration was paid in cash and the amount was to bear interest at 60 per cent per annum.

The plaint was actually presented on the 15th of February, 1917 and on the 26th of February, before the defendant appeared the plaintiff applied for the attachment before judgment of certain property belonging to the defendant. The property was attached on the 28th of February. On the 1st of March the defendant appeared and objected to the attachment. On the latter day, the plaintiff''s counsel stated in court that the original promissory note which had been attached to the plaint was missing and that a copy had been substituted.

The defendant''s pleader also stated that the promissory note to be found on the record was no the original promissory note. On the 5th March the defendant put in his written statement in which he admitted having signed a promissory note and receipt for Rs. 8000/- in favour of the plaintiff in stated circumstances. His main plea was that the promissory note and the receipt were executed (sic) the security until the defendant should convey house to the plaintiff''s brother and he added the the intended conveyance was not affected because of a dispute.

He contended that no suit could be brought of the promissory note in the circumstances. The plaintiff in his evidence deposed that the consideration for the promissory note was a cash loan while to defendant swore that the note signed by him was not the original of the one in court, that he had (sic) read the note which he had signed and that he (sic) not liable for the suit claim.

The plaintiff filed three documents (1) the original receipt for Rs. 8,000/- dated 7th April, 19(sic). (2) a photograph which the plaintiff alleged was of the original promissory note, and (3) office copy of the promissory note and the principle issue in the case was framed in the follow terms:

Is the whole suit liable to dismissal owing the original pronote having been tampered with the addition of words as regards interest?

The learned Judges of the High Court found the promissory note on which the suit was (sic) was not proved to have been lost and that se(sic)dary evidence of its contents could not therefore given. It must be noticed that in that case terms of the promissory note were not admitted the defendant.

It seems to have been contended however the plaintiff that he could be given a decree on defendant''s admission that he had signed a (sic)misspry note for Rs. 8,000/-. The learned Judge stated that that admission was only a piece of (sic)condary evidence of the existence of the pr(sic)sory note on which the suit was based and (sic) not be taken into consideration in the absent proof of the loss of the original.

8. With great respect to the learned Judge it seems to me that they were not right in (sic) with an admission in a pleading as evidence court should not raise an issue between the (sic) in regard to a matter upon which they are in a (sic)ent. That case could easily have been rest my opinion on the ground that the actual ten the promissory note sued on were not adm(sic). Further, there was reason to suspect that the plaintiff suppressed the original promissory note, (sic)sibly because he had tampered with the (sic)nal.

In any case, the matter was not discuss (sic) principle and with the greatest respect to the (sic)ed Judges, I am not prepared to treat this sound precedent. I am also of the opinion (sic) Sundara Rajali Vs. Gopala Thevan and Another, Walsh, J., was wr(sic) thinking that the learned Judges in the Lahor "refused to allow evidence to be adduced photograph of the original note." He also fa(sic) notice that the terms of the promissory note on were not admitted by the defendant.

9. It is only necessary to see whether principle laid down in ILR 39 Bom 399 (sic) which the learned Judge referred, is contract by treating the plea of the defendant in the (sic) case as an admission of which the plaintiff take advantage. The principle is stated by Wa(sic) be contained in these words of their Lordships:

It is permissible for a tribunal to accept part (sic)d reject the rest of any witness''s testimony. But admission in pleading cannot be so dissected (sic)d if it is made subject to a condition it must her be accepted subject to the condition or not (sic)epted at all.

order to examine the scope of this observation the Privy Council, it is necessary to state in (sic)ef the circumstances of the case with which the Privy Council were dealing. The appeal before (sic) Lordships arose out or a suit on a promissory (sic)e dated 23rd December, 1907 executed by the defendant and a firm and payable on demand.

The defendant pleaded that by an oral agreement between him and the plaintiff, his liability on note was to cease on 30th January, 1908, a sim(sic) acknowledgment by the firm being then subsisted for the note. The plaintiff stated in his (sic)nt that the defendant''s liability was only to (sic)e to an end at the date named provided he (the plaintiff) had then received full security for the ad(sic)ces he had made to the firm and that because such security was furnished the defendant considered to be liable. A single Judge of the Bombay High Court who tried the suit proceeded on the (sic)ing that this averment in the plaint was tenant to an admission that the defendant''s liability (sic)ed on 30th January, 1908 and holding that the plaintiff had failed to prove the allegation as to (sic)er security, upheld the defence and dismissed suit.

That decision however was reversed on appeal Divisional Bench under the Letters Patent, on ground that evidence of the oral agreement re-(sic) on by the defendant was inadmissible under (sic) 2 of the Evidence Act. The Judicial Committee (sic)ver held that the agreement pleaded fell sub-(sic)ially within the terms of the proviso (2) to section 92 and held also that it was however "upon the defendant clearly to establish an oral agreement (sic)h will have the effect of leaving matters other-(sic) than if they had depended on the written (sic)ment alone." They then proceeded to make following observations:

Their Lordships are of opinion that this has been sufficiently realised by the learned Judge (sic)st instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated security being given for the whole debt by (sic)rally (the firm) by the 30th January, the learned judge takes it as a necessary sequitur that the defendant''s case is established.

But the agreement alleged by the defendant be substantively proved, and it is here, in their (sic)hips'' judgment, that the defendant fails ....(sic) argument the defendant''s counsel sought to is case thus: He said that Mulji (the defendant himself admitted in his pleading that the pro-(sic) note was not to represent the true state of (sic)s after 30th January, that no doubt he adhibit(sic) condition that security was by that date to (sic)en, but that as the Judge of first instance dismissed the story that any such condition was the matter rested on his own confession that promissory note lost its efficacy after 30th (sic)y.

(sic)assage referred to by Walsh J. follows after sentences and is accompanied by the following sentence:

Therefore the admission that the promissory was to be held as satisfied on 30th January, now debt on the part of Hyderally (the firm) 58 Andh. pra. D.P./41 provided that security was found for the whole debt by that date, cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

I find myself unable to agree with the learned Judge, who seems to have thought that their Lordships were laying down in this case a general rule that no part of a pleading can ever be separated from another part and treated as an admission in any circumstances whatsoever. If, for instance, the defendant in a suit on a promissory note says that he has executed the promissory note but has discharged it, I cannot think that their Lordships intended to say that the plea could not be construed as containing an admission of execution, although to do so it has to be divorced from the further allegation that it was discharged.

If the decision of the Privy Council is to be so understood and I respectfully assert that it cannot be - it seems to me that pleadings will lose half their value. In the case before their Lordships, while the plaintiff stated that the defendant should be discharged from all liability on the note only on the condition that the firm had furnished full security and that as that condition had not been fulfilled, the defendant''s liability continued, the defendant''s case in his written statement was that his liability was to cease automatically on a fresh note being granted by the firm. That was the substance of the plea of the defendant as summed up by their Lordships in their own words at page 408 of the report.

Surely, the mere statement by the plaintiff in the plaint that the defendant''s liability would be discharged only when full security was furnished cannot be taken as an admission by him that the promissory note was to be held satisfied on the agreed date and that it was for him therefore to prove that there was no such satisfaction.

That view of the pleadings in that case was clearly unsustainable. The onus always lies upon a defendant to prove the discharge of an admitted liability and the mere fact that the plaintiff said that there should be a discharge under the circumstances specified by him and not under the circumstances stated by the defendant cannot operate to shift the burden of proof on to the plaintiff to show that there was no discharge. The plea with which their Lordships were dealing was by its nature unitary and to use their own word could not be "dissected" without destroying its integrity. It would not be right to say the same thing of a plea like that of the defendant in the case with which I am now dealing.

Here the execution as well as the terms of the promissory note are admitted. It would be ridiculous in my opinion to deal with this plea as a statement that he admitted the execution of a promissory note under which he did not receive the consideration while denying the execution of a promissory note, the consideration for which was received by him.

10. Before concluding, it is only fair to the learned Judge who decided Sundara Rajali Vs. Gopala Thevan and Another, to say that actually he merely observed that "to treat the statement of the defendant as an admission of execution divorcing it from his statement that it was discharged would appear to contravene the principle laid down by the Privy Council." Speaking for myself, I must say that I do not share the doubt entertained by the learned Judge. I may also note that the learned Judge''s conclusion was not entirely based upon this reasoning and that this observation of his was an obiter dictum.

11. I shall therefore proceed upon the basis that at in the case before me, there

was an admission of execution of the promissory note followed by the allegation that it was not supported by consideration. The lower appellate court, as already stated, decided the case upon the footing that the burden lay upon the plaintiff to establish not only the loss of the promissory note but also the passing of the consideration.

If, as I hold, the burden is really upon the defendant by virtue of the fact that S. 118 of the Negotiable Instruments Act comes in aid of the plaintiff, the conclusion reached by the trial Court on the evidence tendered by the defendant that he "had not established that the promissory note was not supported by consideration" seems to me to be right.

One aspect of the case which appears to have escaped the attention of both the courts below is that when the plaintiff was in the witness box, the positive case of the defendant that the plaintiff declined to pay the consideration recited in the note on the ground that the defendant should first account for two sums-one alleged to be still outstanding from him and another sum due from his brother was not put to the plaintiff.

Further, there is another very significant fact to which sufficient weight was not given by the lower courts and that is the long interval of time between the execution of the promissory note and the complaint lodged by the defendant with the police. The promissory note is stated to have been executed at 10 A.M., and the complaint was made to a police officer, whose station was in the same village, only at 8 P.M.

12. The lower appellate court''s view as to the burden of p(sic) has, in my opinion, clearly vitiated its finding as to consideration and it cannot therefore be accepted.

13. I accept the finding of the trial Court, reinforced as it is, in my opinion, by the observations I made in the previous paragraph.

14. I cannot agree with Mr. Ramachandra Rao for the respondent that this suit must be treated as one based upon a lost promissory note and that the plaintiff should be non-suited in the absence of proof of such loss.

15. The appeal is therefore allowed and the decree of the trial Court restored with costs here and in the lower appellate court. No leave.