
(2010) 11 MAD CK 0083
In the Madras High Court
Case No : Second Appeal No. 590 of 2004

N. Adhilakshmi	Vs	APPELLANT
A.P. Narayanan		RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 118, 78, 8, 82

Citation : (2010) 11 MAD CK 0083

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : T. Dhanyakumar, for the Appellant; K.S. Lakshmi Kumaran, for the Respondent

Final Decision : Allowed

Judgement

R. Mala, J.—The Second Appeal has been filed against the judgment and decree dated 11.3.2002 in A.S. No. 162 of 2002 on the file of

the Additional District and Sessions Judge, Fast Track Court No. 1, Chennai-1, confirming the judgment and decree dated 6.2.2001 in O.S. No.

9629 of 1993 on the file of the XIII Assistant Judge, City Civil Court, Chennai.

2. The averments in the plaint are as follows:

On 10.12.1990, the Respondent/Defendant borrowed a sum of Rs. 20,000/- from the Appellant/Plaintiff and executed a Promissory Note in

favour of the Appellant/Plaintiff undertaking to repay the sum with interest @ 24% per annum on demand. In spite of repeated demands, the

Defendant did not repay the amount, and hence, the Appellant/Plaintiff was constrained to file the suit for recovery of the amount due on the

Promissory Note.

3. The gist and essence of the written statement filed by the Respondent/Defendant are as follows:

The Respondent/Defendant and the Appellant/Plaintiff's husband R. Narasimhalu, were working in the Central Training Institute, Guindy and the transaction was completed only through the said Narasimhalu, the husband of the Appellant/Plaintiff; the Defendant received only Rs. 11,000/- from the husband of the Plaintiff, by way of four cheques and the interest calculated is Rs. 8,750/- and another sum of Rs. 250/- has been added and the Promissory Note for Rs. 20,000/- has been executed and so, the suit Promissory Note is not supported by consideration to the tune of Rs. 9,000/-. The Defendant pleaded discharge and stated that he paid the amount to the Plaintiff's husband, namely Narasimhalu, by way of cheques and also made cash payment and also issued five cheques/demand drafts in favour of one V. Ravikumar, S/o M.R. Venugopal and so, there is no amount due from the Defendant and he prayed for dismissal of the suit.

4. The trial Court, after considering the averments both in the plaint and in the written statement, framed necessary issues and considering the oral and documentary evidence on both sides, dismissed the suit, stating that the Promissory Note has already been discharged; aggrieved by the judgment and decree of the trial Court, the Appellant/Plaintiff filed First Appeal before the lower appellate Court and the lower appellate Court framed necessary points for consideration and after considering the arguments on both sides, dismissed the First Appeal, confirming the judgment and decree of the trial Court. Hence, the present Second Appeal by the Appellant/Plaintiff.

5. At the time of admission of the Second Appeal, this Court framed the following substantial questions of law for consideration:

- (i) Whether the Courts below erroneously placed the burden on the Plaintiff to prove contents of the suit Promissory Note contrary to the provisions and presumption available u/s 118 of the Negotiable Instruments Act ?
- (ii) Whether the payments made by the Defendant to the third parties contrary to Section 78 of the Negotiable Instruments Act, is valid payment in discharge of liability towards the Plaintiff ? and
- (iii) Whether the judgment of the lower appellate Court is vitiated for not

considering the evidence and failure to give finding on all issues ?

6. Learned Counsel for the Appellant/Plaintiff submitted that the Respondent/Defendant raised a plea that the Promissory Note is not supported by

consideration to the tune of Rs. 9,000/- and also raised a defence of discharge of the amount, and so, it is the duty of the Respondent/Defendant to

prove the same. As per the averment of the Respondent/Defendant in the written statement that he issued the cheque(s) in favour of the said Ravi

Kumar and also to the Appellant/Plaintiff's husband, as per Section 78 of the Negotiable Instruments Act, the amount has to be paid to the Plaintiff

and not to any other person. In support of his contentions, learned Counsel for the Appellant/Plaintiff relied on the decision of this Court reported

in Chelliah Thevar (died) and Others Vs. Muthirulappa Kudumban, and prayed for allowing the Second Appeal.

7. Learned Counsel for the Respondent/Defendant submitted that Ex.A-2 - Promissory Note is not supported by consideration to the tune of Rs.

9,000/- and the Defendant received only Rs. 11,000/-, that too from P.W.1 Narasimhalu, the husband of the Appellant/Plaintiff ; that there is no

transaction between the Defendant and the Plaintiff; that the Defendant issued notice to the Plaintiff to produce the documents, as per Ex.B-1

letter, which has been duly received by the Plaintiff, but the Plaintiff did not produce those documents, i.e. the cheques issued in favour of the said

Ravi Kumar and P.W.1 Narasimhalu and so, the Defendant fully discharged the amount due to P.W.1 Narasimhalu. Learned Counsel for the

Defendant further submitted that as per Section 118 of the Negotiable Instruments Act, the ""presumption"" is rebuttable and that has been proved

by way of indirect evidence. He further submitted that the trial Court and the first appellate Court considered the said aspects in proper

perspective. To substantiate his arguments, learned Counsel for the Respondent/Defendant relied on a decision of the Supreme Court reported in

Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay AIR 1961 SC 1316 and a decision of this Court reported in A.S. Duraisami

Chettiar Sons v. S. Rathnaswami Gounder AIR 1992 Mad 132 and prayed for dismissal of the Second Appeal.

8. While considering the rival submissions of the learned Counsel for both sides, it is true that Ex.A-2 Promissory Note was alleged to have been

executed by the Defendant/DW1 A.S. Narayanan, in favour of the Appellant/Plaintiff on 10.12.1990 and it is for Rs. 20,000/-. The interest

claimed is 24% and the genuineness of the document Ex.A-2 Promissory Note is not disputed. The case of the Respondent/Defendant is that he

received the amount through P.W.1 Narasimhalu for four times to the tune of Rs. 11,000/- and calculated the interest to the tune of Rs. 8,750/-

and by adding Rs. 250/-, it was stated as Rs. 20,000/- and accordingly, Ex.A-2 Promissory Note has been executed for Rs. 20,000/-. On a

perusal of Ex.A-2 Promissory Note, it is seen that it was executed only on 10.12.1990 and the date has been mentioned by the

Respondent/Defendant on the same and the Defendant also corrected the rate of interest and made initials therein. Since the execution of Ex.A-2

Pro-note is admitted, the presumption u/s 118 of the Negotiable Instruments Act, will come into play. In this regard, it is appropriate to

incorporate Section 118 of the Negotiable Instruments Act, as follows:

Section 118: Presumptions as to negotiable instruments.--Until the contrary is proved, the following presumptions shall be made:

(a) of consideration.--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;

(b) as to date.--that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance.-- that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer.--that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements.--that the indorsements appearing upon a negotiable instrument were made in the order in which they appear

thereon;

(f) as to stamp.--that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course.-- that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or

from any person in lawful custody thereof, by means of an offence

or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of

proving that the holder is a holder in due course lies upon him.

9. So, as per Section 118(a) of the Negotiable Instruments Act, until the contrary is proved, the presumption "of consideration" shall be made. It is

true that the "presumption" u/s 118 of the Negotiable Instruments Act, is rebuttable and so, the burden is upon the Respondent/Defendant to prove

that Ex.A-2 Pro-Note is not supported by consideration to the tune of Rs. 9,000/-.

10. Admittedly, except the ipse-dixit of P.W.1., no other independent witness was examined on the side of the Appellant/Plaintiff. Learned

Counsel for the Respondent/Defendant submitted that the Defendant issued Ex.B-1 notice to the Plaintiff to produce the document(s). It is

appropriate to consider Ex.B-1 dated 14.7.2000, whereby the Defendant issued notice to produce the statement of accounts for payment made

by the Respondent/Defendant through various cheques bearing respective numbers, in favour of P.W.1 Narasimhalu and one Ravikumar, the

nephew of P.W.1. Admittedly, the documents were not produced by the Plaintiff as sought for by the Defendant, and hence, the

Respondent/Defendant filed Exs.B-2 to B-10 which are the exhausted cheques/counterfoils, alleged to have been issued in favour of P.W.1

Narasimhalu and his brother's son, the nephew Ravi Kumar and the Plaintiff-Adhi Lakshmi.

11. At this juncture, it is appropriate to consider the decisions relied on by the learned Counsel for the Respondent/Defendant reported in Kundan

Lal Rallaram v. Custodian, Evacuee Property, Bombay AIR 1961 SC 1316, in which it was held by the Supreme Court that the phrase "burden of

proof" has two meanings--one, the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is

fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant, but shifts as soon

as a party adduces sufficient evidence to raise a presumption in his favour, the evidence required to shift the burden need not necessarily be direct

evidence, i.e. oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of

law or fact. The Supreme Court went on to further hold as follows:

5. ...This presumption if raised by a court, can under certain circumstances rebut the presumption of law raised u/s 118 of the Negotiable

Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumption or

presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned

here with irrebuttable presumptions of law.

8. ...The said circumstantial evidence and the wilful withholding of the material evidence in the case would be legal evidence on the basis of which

the custodian-General held that the presumption raised u/s 118 of the Negotiable Instruments Act was rebutted....

12. Learned Counsel for the Respondent/Defendant also relied upon the decision of this Court reported in AIR 1992 Mad 132 (A.S. Duraisami

Chettiar Sons v. S. Rathnaswami Gounder), in which, this Court held as follows:

9. The learned Counsel no doubt also refers to the decision reported in V.R.S.R.M. Ramaswami Chettiar and Another Vs. Sri Devi Talkies by

partner K. Ramakrishnan and Others, wherein it was held that to rebut the presumption u/s 118, the Defendant must adduce acceptable evidence.

But, as already stated, there are several authorities including that of the Supreme Court holding that the said rebuttal need not always be by direct

evidence adduced by the Defendant may be by presumption of law or fact.

12. But it should be noted that the lower appellate court has stated in its judgment that from the mere fact that the Plaintiff has not produced the

books of accounts maintained by him cannot be taken as a circumstance for totally rejecting the Plaintiff's claim in the light of other evidence on

record. This observation shows that the said court has not taken into consideration and other material factors and evidences which I have pointed

out earlier in para 7 whereby one could easily come to the conclusion that the Plaintiff has deliberately withheld the production of the account

books and that it is not a case of a mere non production of account books. It is settled law, as already pointed out by me, that when such

deliberate withholding of the material evidence is there, adverse inference can certainly be drawn by the court. The non-consideration by the lower

appellate court of the above referred to material evidences and other features in

this case (which clearly proved the deliberate withholding of the account books on the part of the Plaintiff) and the failure of the lower appellate court to correctly understand and apply the correct legal position on this aspect, certainly give rise to substantial questions of law and could be raised in the second appeal (Vide Damadilal and Others Vs. Parashram and Others,). Further, "the other evidence on record" pointed out by the lower appellate court is only Ex.A.2 the postal acknowledgment. That by itself cannot prove that suit notice has been issued, particularly when the Defendant, though admitted Ex.A.2, has stated that he did not receive the said notice. So the lower appellate court taking into consideration Ex.A.2 alone as the other evidence, is also a serious error giving rise to a substantial question of law. Therefore, the above referred two decisions are not applicable to the present case.

13. In the present case, even though a notice for production of documents, under Ex.B-1, was issued by the Defendant to the Plaintiff, the Plaintiff did not produce those documents and statements as sought for by the Defendant, and in such circumstances, adverse inference can be drawn against the Plaintiff.

14. It is true that Ex.A-2 Promissory Note was for Rs. 20,000/- and the attestors to Ex.A-2 have not been examined before Court to prove that Ex.A-2 Pro-Note is not supported by consideration to the tune of Rs. 9,000/-. Except the ipse-dixit of P.W.1, the attestors of Ex.A-2 were not examined. In such circumstances, as per Section 118 of the Negotiable Instruments Act, I am of the view that Ex.A-2 Pro-Note is supported to the entire consideration of Rs. 20,000/-.

15. While considering the argument advanced by learned Counsel for the Respondent/Defendant that the Respondent/Defendant issued Ex.B-1 notice to the Appellant/Plaintiff to produce the Statement of Accounts in respect of five cheques issued in favour of P.W.1 (husband of the Plaintiff) and one Ravikumar, admittedly, the Statement of Accounts were not produced and hence, Exs.B-2 to B-10 were marked, which are the "used/exhausted cheques" details, to show that some of the cheques have been issued in the name of the Appellant/Plaintiff, some to P.W.1 Narasimhalu and one cheque to Ravikumar. In such circumstances, now this Court has to decide as to whether the discharge has been proved by

the Respondent/Defendant.

16. Learned Counsel appearing for the Appellant/Plaintiff relied upon the decision of this Court reported in Chelliah Thevar (died) and Others Vs.

Muthirulappa Kudumban, in which, this Court held as follows:

3. The promissory note stands in the name of the Plaintiff and the discharge by payment made to a person who is not the holder of the promissory

note, cannot prevent the holder of the promissory note from suing on the note for recovery of the amount due. u/s 78 of the Negotiable Instruments

Act, the promisee alone can maintain a suit and no payment made to a person who is not the holder can be recognised. On this question there is a

direct decision in Subha Narayana Vathiar v. Ramaswami Iyer ILR 1907 Mad 88 : 1907 (16) MLJ 508) to the following effect:

In our opinion Sections 78 and 8 are clearly applicable.... Section 78 provides that subject to the provision of Section 82(e) which do not apply

here "payment of the amount due on a promissory note must, in order to discharge the maker, be made to the holder. These provisions are

imperative and in our opinion preclude the maker when sued on the instrument from pleading discharge by payment to anyone but "the holder".

4. Following the above decision, I hold that the plea of discharge by payment to the brother of the payee put forward by the Defendant, cannot be

accepted in a suit filed by the holder of a promissory note. The order of the lower Court is set aside and the suit decreed as prayed for....

17. Relying on the said decision of this Court reported in Chelliah Thevar (died) and Others Vs. Muthirulappa Kudumban, , learned Counsel for

the Appellant/Plaintiff contended that the Respondent/Defendant has made an averment that he has repaid the amount to one Ravikumar, but as

per Section 78 of the Negotiable Instruments Act, the payment of the amount due on a Promissory Note in order of discharge the maker or

acceptor, be made to the holder of the instrument. In the present case, the amount has not been paid to the Plaintiff and so, the trial Court and the

first appellate Court committed error in accepting the discharge alleged to have been made by the Respondent/Defendant.

18. At this juncture, it is appropriate to consider the documents exhibited before the trial Court. Admittedly, the Appellant/Plaintiff filed the

documents/Exs.A3 to A6. Ex.A-3 dated 3.5.1993, Ex.A-4 letter dated 7.5.1993,

Ex.A-5 letter, dated 24.4.1993 and Ex.A-6 letter dated

8.6.1993, were all sent by the Defendant to the Plaintiff with cheques each for Rs. 1,000/-. It is pertinent to note that on 3.1.1992, P.W.1 issued a

notice that he received Rs. 1,050/- on 10.11.1991, but the said P.W.1 Narasimhalu did not repay the same to the Appellant/Plaintiff. Even though

the Defendant issued cheque, it has bounced, as evidenced by Ex.A-7. Ex.A-8 is the letter dated 3.10.1989, sent by the Defendant to the

Plaintiff's husband, namely Narasimhalu, stating that he was in need of Rs. 3,000/- for admitting his daughter in College and he also stated therein

that he will return the money after getting Rs. 4,000/- from SRM. This shows that the Defendant was in the habit of borrowing hand-loan from

P.W.1 Narasimhalu and repaying the same. But this factum has been proved by P.W.1 Narasimhalu in his cross-examination, wherein, P.W.1

stated that the Respondent/Defendant was in the habit of receiving loan from him, but the Defendant did not repay the same. P.W.1 also fairly

conceded in his cross examination that the cheque issued in favour of his wife (Plaintiff) was encashed.

19. Considering the cross examination of P.W.1, while filing the suit, the Plaintiff did not give credit to the amount received for the loan obtained

and as per Ex.B-1, the Defendant (D.W.1) stated that he has issued the cheque in the name of one Ravikumar to the tune of Rs. 5,250/-; but as

per the decision of this Court relied on by the learned Counsel for the Appellant/Plaintiff, the payment for discharge of the Promissory Note, should

be only to the holder of the Promissory Note and not to third parties. P.W.1 Narasimhalu is the husband of the Appellant-Plaintiff Adhi Lakshmi,

but the said Ravikumar, is no way connected with the Appellant-Plaintiff, though he is stated to be the nephew of P.W.1. There is no document to

show that the Appellant/Plaintiff or P.W.1 Narasimhalu, authorised the Respondent/Defendant to pay the amount through Ravikumar. Considering

the said aspects, I am of the view that as per the decision reported in Chelliah Thevar (died) and Others Vs. Muthirulappa Kudumban, , the

amount paid by way of cheques issued in favour of the said Ravikumar, is not for the discharge of the suit Pro-note executed in favour of the

Appellant/Plaintiff by the Respondent/Defendant. Hence, the Appellant/Plaintiff is entitled to recover the amount due on the Promissory Note, with

interest from the Respondent/Defendant, except Rs. 5,250/- + Rs. 4,000/- = Rs. 9,250/-.

20. It is true that the first appellate Court neither considered the documentary evidence, nor the oral evidence, and hence, the findings of the first appellate Court on the issues framed therein, are liable to be set aside and hence, the judgment and decree of the first appellate Court, are liable to be set aside.

21. In such circumstances, it is the duty of the Respondent/Defendant to prove that Ex.A-2 Promissory Note is not supported by consideration

and so, the Respondent/Defendant did not prove that Ex.A-2 Promissory Note is not supported by consideration to the tune of Rs. 9,000/-. As

already decided in the earlier paragraphs of this judgment, for discharge of the amount due on the said pro-note, the parties have not filed any

document. As per Ex.B-1 notice, the cheque for Rs. 5,250/- had been issued in favour of P.W.1 Narasimhalu; but as per Exs.A-3 to A-6, the

Plaintiff received Rs. 4,000/- and even if the Court comes to the conclusion that the parties have not filed the relevant documents, adverse

inference could be drawn against the Plaintiff and in view of Ex.B-1, the discharge was only in respect of Rs. 9,250/- and not more than that

amount. In such circumstances, I am of the view that even though the Appellant/Plaintiff filed the cheque book(s), with counter-foils with details of

cheques issued on the dates stated therein, the Plaintiff did not file any statement of the bank accounts to show that the cheques were honoured

and the amounts were received by the Appellant/Plaintiff. But however, P.W.1 Narasimhalu in his cross-examination in his evidence, fairly

conceded that the cheque issued by his wife (Plaintiff) had been encashed. The letters Exs.A-3 to A-6 have been filed and as per Ex.B-1 letter, I

am of the view that Rs. 5,250/- plus Rs. 4,000/- = Rs. 9,250/- alone had been discharged and the balance amount is yet to be discharged by the

Defendant.

22. So, the Appellant/Plaintiff is entitled to the suit claim, less Rs. 9,250/-. The Second Appeal is liable to be allowed. The substantial questions of law are answered accordingly.

23. Accordingly, the Second Appeal is allowed in the following terms:

(a) The Appellant/Plaintiff is entitled to decree, with interest as prayed for in the

plaint, less Rs. 9,250/-.

(b) No costs.