
(1979) 09 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 6 of 1968

Radhakisan Tijulal Agrawal	Vs	APPELLANT
Jayantilal Hargovindas and another		RESPONDENT

Date of Decision : 03-09-1979

Acts Referred:

Evidence Act, 1872 — Section 35
Stamp Act, 1899 — Section 35

Citation : (1980) MhLj 120

Hon'ble Judges : B.C. Gadgil, J

Bench : Single Bench

Advocate : S.C. Mehadia, for the Appellant; P.D. Thakar, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Gadgil, J.—Defendant No. 1 in Civil Suit No. 229 of 1964 of the file of the Civil Judge, Junior Division, Gondia, has preferred this second appeal against the decree for money passed in that suit. The said decree has been confirmed by the Assistant Judge, Bhandara, in Civil Appeal No. 54 of 1966.

2. Defendant No. 1 had been carrying on business at Gondia in the name of "Tijulal Radhakisan". The plaintiff's case, in brief, is that defendant No. 2 was the Munim i. e. the manager of defendant No. 1 and he was managing the business of defendant No. 1 at Gondia. In his capacity as such manager, he, on 1-12-1961, took Rs. 2500 for and on behalf of defendant Mo. 1 as a hand loan and agreed to pay interest at 9 per cent per annum. Thereafter it is stated in the plaint that defendant No. 2 had executed a receipt which is on record as Ex.31. The plaintiff demanded the amount from the defendants. He sent a notice (Ex. 34) to defendant No. 1 on 28-7-1964 calling upon him to pay the amount. Defendant No. 1 gave a reply on 3-8-1964 contending that he had no transaction with the plaintiff. The plaintiff thereafter sent a notice (Ex. 32) dated 8-8-1964 to defendant No. 2 informing him that defendant No. I had disowned the transaction. Defendant No. 2 sent a reply dated 14-8-1964 that the transaction

had been entered for and on behalf of defendant No. 1 and as such defendant No. 2 could not be liable. After this correspondence, the plaintiff tiled the suit under appeal to recover the principal amount of Rs. 2500 together with the interest of Rs. 618.75 from defendant No. 1. The suit was based on the original consideration and not on the receipt.

3. Defendant No. 2 by his written statement (Ex. 15) contended that he was one of the Mwums or the managers of defendant No. 1 at Gondia. As far as the suit transaction was concerned, he alleged that the plaintiff had previously made a deposit with defendant No. 1 of Rs. 2500 and that it was renewed from time to time. According to him, the receipt (Ex. 31) was a renewal and nothing more. The written statement of defendant No. 1 is at Ex.14. He contended that defendant No. 2 had no authority to incur any loan. According to him, no such loan was incurred as he was neither informed nor his consent or approval was taken by defendant No. 2.

4. On these pleadings, the learned Civil Judge heard the suit. He accepted the plaintiff's version that defendant No. 2 was an agent of defendant No. 1 and in that capacity he was entitled to take loan for the principal i. e. defendant No. 2. A finding was also recorded that on 112-1961 defendant No. 2 did borrow Rs. 2500 for and on behalf of defendant No. 1 and executed the receipt (Ex. 3 I). There were certain averments that the transaction was covered by the Bombay Moneylenders Act and that the suit would be bad as the plaintiff did not possess a licence under that Act. This aspect, however, is not relevant at this stage. It was urged before the trial Court that the receipt (Ex. 31) would be a pronote and that it would not be admissible in evidence for insufficiency of stamp. This contention was accepted. Defendant No. 1 had urged that the suit on the original consideration of a loan would not be tenable as the promissory note had wiped off the previous loan transaction. The learned Civil Judge held that this would not be the position. Thus, a decree was passed and that decree had been confirmed in appeal.

5. At the time of the arguments of this appeal, Mr. Mehadia for the appellant wanted to reagitate the question as to whether defendant No. 2 was authorised to take loan for and on behalf of defendant No. 1 and whether the amount of Rs. 2500 was actually so taken by defendant No. 2. There are, however, questions of fact. The two Courts below, after appreciating the evidence led by the parties in that respect, reached to a conclusion in favour of the plaintiff. I was taken through the relevant evidence and I am satisfied that the findings are based upon good and cogent evidence. Hence the appellant will not be able to challenge these findings in second appeal.

6. The main contention of the appellant is that the plaintiff, after having obtained an insufficiently stamped pro-note (Ex.31) in connection with the suit transaction, cannot base his suit on the original consideration i. e. the loan transaction. My attention was drawn to section 35 of the Indian Stamp Act, 1899. The relevant part of that section reads as follows :

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

* * * *

There is no dispute that the payment of stamp duty and penalty is not permissible if the case is of an insufficiently stamped negotiable instrument or a promissory note. Along with the above provision, Mr. Mehadia relied upon the provisions of section 35 of the Evidence Act which lays down that when the terms of a contract have been reduced to writing, no evidence except the document itself (of the secondary evidence) is admissible. On the basis of these two provisions, it was contended that as the pro-note (Ex. 31) is in writing, no other evidence will be permissible except that writing. Secondly the said writing itself is inadmissible as it is insufficiently stamped. With this hypothesis a contention is raised that the plaintiff cannot base his claim on the pro-note. It should not, however, be forgotten that the plaintiff has in fact not based the suit claim on the pro-note. He has specifically alleged in paragraph 6 of the plaint that he was filing the suit on the original transaction.

7. It was next urged that the suit on the original transaction of Rs. 2500 would not be permissible as the plaintiff had already taken a pro-note (Ex. 31) which is not admissible in evidence. An answer to this question would depend upon a number of circumstances. The main factors to be considered are (i) whether the pro-note is taken as accord and full satisfaction of the loan; and (ii) whether the amount is loan on terms mentioned in the pro-note. If the finding on any of these points is recorded in the affirmative the lender will not be able to fall back upon the original consideration to get over the difficulty arising out of the inadmissibility in evidence of the insufficiently stamped pro-note. Mr. Mehadia further submitted that the handing over of the money and the execution of the pro-note had taken place simultaneously and at one and the same time and, therefore, the loan transaction cannot be said to exist independently of the pro-note.

8. Mr. P. D. Thakar for the plaintiff-respondent No. 1 submitted on the other hand that the advancement of the loan and the execution of the pro-note are independent causes of action and the plaintiff would have a right to base his claim on either of them. According to him, the main transaction is that of advancement of loan and that the execution of the receipt (i. e. the pro-note) is an ancillary or collateral event. He argued that this is exactly what was pleaded by the plaintiff in the plaint. He further submitted that a pro-note may be in absolute discharge of a loan or it may be a conditional payment or a collateral Security. He further submitted that the pro-note does not enumerate as to what was intended by the parties and hence the pro-note does not contain all the terms of the transaction. It is in this background that he relied upon the averments in the plaint that the transaction between the parties was that of

advancement of a loan and that thereafter a receipt was issued. As far as the evidence is concerned, the plaintiff has deposed consistent with the plaint allegation. Neither defendant No. 1 nor defendant No. 2 has stated that the loan was not an advance. They have not deposed that the payment was made for securing the pro-note, so as to constitute the execution of the pro-note and giving of money as consideration of each other. If such a contingency existed the plaintiff would not have been able to ignore such composite and complete transaction and then to urge that he be given a decree on a part of the contract, namely, the advancement of money.

9. What will be the effect of the execution of a pro-note or a bill in connection with the advancement of money is considered in Halsbury's Law of England, Volume VII page 243 in the following words:

If a bill of exchange or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended till the maturity of the instrument in the hands of the creditor. If the security is paid when it becomes due, this is equivalent to payment of the original debt, & if it is paid in part, the original debt is discharged "pro tanto". If the instrument is dishonoured, payment of the original debt may be enforced as if no security had been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor's remedy continue to be suspended.

10. The result, therefore, is that in the present case the pleadings and the evidence make it abundantly clear that the plaintiff mainly alleged that he advanced the amount of loan to defendant No. 2. In such a case, mere execution of a pro note would not mean that the transaction of loan has incited into that of loan. The loan transaction still continues to exist and there is nothing illegal if in these circumstances the plaintiff bases his claim on the original consideration. This is more so when, as discussed above, the pro-note has not been taken in absolute discharge of the loan or as in accord of full satisfaction of the loan transaction. Here the loan and the pro note are not consideration for each other. The result is that the appeal fails. The appeal is accordingly dismissed with costs.