

(1987) 11 MAD CK 0017
In the Madras High Court

Ramaswami Pillai

APPELLANT

Vs

T.S. Soundarapandia Mudaliar

RESPONDENT

Date of Decision : 12-11-1987

Acts Referred:

Citation : (1987) 2 MLJ 367

Hon'ble Judges : Swamikkannu, J

Bench : Division Bench

Judgement

Swamikkannu, J.—This is an appeal preferred by Ramaswami Pillai-the plaintiff against the judgment and decree dated 14.8.1979 in O.S.

No. 472 of 1978 on the file of the learned First Additional Subordinate Judge, Tiruneiveli on a suit based on a promissory note, granting a decree

for recovery of Rs. 358.50 with proportionate costs.

2. The case of the plaintiff/appellant before the lower Court is as follows:

2. The defendant/respondant herein accepting cash consideration of Rs. 7,000 and undertaking to pay interest of 9% per annum executed a

promissory note dated 23.11.1972. But he has not paid any part of the principal or interest. The appellant demanded the money through a notice

issued by his advocate. The respondent gave a reply making false allegations. The averments in the reply notice are not supported by bona fides.

Hence the suit was laid.

3. In his written statement before the lower Court, the defendant/respondent admitting the execution of the promissory note dated 23.11.1972

denied the averments in the plain and contended as follows: He never accepted consideration of Rs. 7,000 on the date of promissory note or any

other date. The appellant is hiding the real facts and has come forward with the suit falsely. The appellant's maternal grand-father Sivasubramania

Pillai was an usurious money-lender. He used to get pronotes for amounts by far in excess of the actual amount paid to the promisor. While so, on

13.9.1959 the respondent accepting a loan of Rs. 400 from Sivasubramania Pillai executed a promissory note for Rs. 500, Though pro-note

purports to stipulate interest at the rate of 12% per annum, as per the oral arrangements between the parties, defendant/respondent was paying

interest at the rate of 18%. The respondent therefore was paying Rs. 25 towards interest every month. On 22.12.1959 the respondent paid the

entire interest. To this effect he made an endorsement also. Subsequently on 7.7.1960 the respondent made an endorsement of payment of Rs. 10.

Lastly on 27.1.1967 the balance of interest together with principal was arrived at Rs. 481-10-2 (Rs.481 Anas 10, Paise 2). On that day, the

respondent accepting another loan for Rs. 1,000 and for the aggregate sum of Rs. 1481-10-2, he executed a pro-note for an enhanced sum of Rs.

2,000 on 27-1-1967 in favour of Selva Gomathiammal - mother of the appellant. Though 6% interest is charged in the pro-note, it was agreed that

the defendant/respondent should pay interest at the rate of 18% per annum. At this rate, the respondent paid interest upto 3.1.1971. In the

meanwhile, the respondent owed a sum of Rs. 3,000 to one Subrainania Mudaliar of Avarakadu. With a view to discharge that debt, the

respondent and his son jointly borrowed a sum of Rs. 3,000 from the appellant's maternal grand-father Sivasubramania Pillai. For this amount, the

respondent and his son jointly executed a pronote for the enhanced amount of Rs. 4,500 on 15.8.1968. Though the interest charged in that pro-

note was only as per agreement between the parties, the respondent herein was paying interest at the rate of 18% per annum. While so,

Sivasubramania Pillai, on behalf of Selva Gomathiammal, issued a notice dated 28.12.1970 asking for repayment of the debts covered by the

pronote dated 27.1.1967 executed in favour of Selva Gomathiammal and also the pronote dated 15-8-1968. Upon acceptance of notice, the

respondent paid interest in respect of both the pronotes upto 10.3.1971. Subsequently on 23.11.1972 the respondent was found in arrears of Rs.

156 only towards both the pro-notes. The appellant has taken the suit pronote dated 23-11-1972 for the amounts covered by the two prior pro-

notes dated 27.1.1967 and 15-8-1968 as well as the balance of interest amounting to Rs. 156. While executing the suit pronote, Lakshmana Pillai, father of the appellant, on behalf of the respondent wanted the pronote to be executed for Rs. 7,000. The suit pro-note is in renewal of the old pro-note only. The appellant herein had no financial capacity to pay Rs. 7,000 in a lump sum at the time of Ex. A. 1 pro-note. The appellant's maternal grand-father Sivasubramania Pillai left no issues except Selva Gomathiammal. The appellant is her only son. Selva Gomathiammal is living with her family in the house of the said Sivasubramania Pillai. The respondent is entitled to the benefits of Act 4/1938 as amended by Act 8/1973 and also under Act 40/1978. There was no instance of the appellant borrowing Rs. 5,000 from one V. Sivasubramania Pillai of Pananjadi. He was a servant of the appellant. He had no capacity to pay Rs. 5,000 by way of loan. The recitals were falsely made just to give colour of genuineness. The Suit is barred by limitation. The explanation for the delay in filing the plaint is not correct. To the appellant's notice, the respondent has given reply disclosing the real facts. In as much as the debt is completely wiped out, the appellant herein is not entitled to any relief. On the other hand, the respondent is entitled to compensatory costs.

4. On the above pleadings, the lower Court framed the following issues for trial:

1. Whether the suit pro-note was executed in renewal of the previous debts as pleaded by the defendant?
2. Whether the various payments pleaded by the defendant in respect of the previous debts are true?
3. Whether the defendant is entitled to the benefits of Madras Act 4 of 1938 as amended by Act 8/73 also?
4. Whether the suit debt is fully wiped out by the provisions of the Debt Relief Acts as stated in the written statement?
5. Whether the suit is barred by time?
6. Whether the defendant is entitled to compensatory costs?
7. To what relief is the plaintiff entitled?

Ramaswarni Pillai-The plaintiff examined himself as P.W. 1. Ex. A1 copy of notice dated 16.9.1978 sent by the appellant to the respondent; Ex.

A2 reply notice dated 25.9.1978 to Ex. A.1 sent by the respondent to the appellant; Ex. A3 suit pronote dated 23.11.1972 for Rs. 7,000

executed by the respondent in favour of the appellant; Ex. A4 discharged pronote dated 9-8-1972 for Rs. 5,000 executed by the respondent in

favour of one Subbiah Pillai; Ex. A5 endorsement (dated 23.11.-1972) of discharge on Ex. A4; Ex. A6 registered settlement deed executed by

Siva-rainasubramania Pillai in favour of the appellant and others; "Ex. A7 registered will dated 17.11.1971 executed by Siva-rarnasubramania

Pillai and Ex. A8 to Ex. A22 kist receipts issued to the appellant herein were filed on the side of the plaintiff/-appellant before the lower Court.

Sankara-pandia Mudaliar-defendant/respondent examined himself as D.W. 1 on the side of the defendant. Ex. B1 discharged pronote for Rs. 500

dated 13.7.1957 executed by the respondent in favour of Sivarama-subramania Pillai; Ex. B2 discharged pro--note for Rs. 2,000 dated 27-1-

1967 executed by the respondent in favour of Selva Gomathiarnmal; Ex. B3 discharged pronote for Rs. 4,500 dated 15-8-1968 executed by the

respondent and his son in favour of Selva Gomathiarnmal; Ex. B4 and Ex. B5 notices dated 26.12.1970 and 28.12.1970 sent by Sivasubramania

Pillai to the respondent and his son; Ex. B6 rough chit dated 23.11.1972 in the handwriting of the respondent; Ex. B7 a rough chit of calculations

and Ex. B8 diary for the year 1969 maintained by the respondent's son were filed on the side of the respondent/defendant before the lower Court.

On a consideration of the above evidence available on record, both oral and documentary, under issues 1 and 2, the lower Court held that Ex. A3

suit pronote is executed in lieu of the principal debt covered by Ex. B2 and Ex. B3 together with the balance of Rs. 156 due by way of interest and

that the defendant/respondent has all along been paying interest at the rate of 18%. In that context, the lower court also held that Ex. A7 will

confers on the appellant herein all the outstandings including cash payable to Sivasubramania Pillai, and that the suit pronote Ex. A3 was taken in

lieu of the principal sum covered by Ex. B2 and Ex. B3 together with the balance of interest viz., Rs. 156 payable under them.

5. It is contended by Mr. T.R. Mani, learned Counsel for the appellant herein, that the endorsement made on Ex. A4 is by the debtor-respondent

himself who had executed the promissory note and as such, that endorsement has to be given weight and it should be taken into consideration and

no debtor will make an endorsernant in a discharged promissory note stating that he had discharged the amount due and payable with respect to

the promissory note. i.e. Ex. A4, Ex. A5 is the endorsement made, not by the creditor under Ex. A4, but by the debtor himself. It is not the case of

the appellant herein that the said creditor is not available so as to be examined before the lower Court since there is no endorsement by the

creditor that he had received Rs. 5,000 due and payable to him from the debtor who had executed the suit, promissory note dated 23.11.1972.

Merely because there is a reference to the endorsement in Ex. A4 the promissory note, viz., Rs. 5,000 has been received by the creditor and the

promissory note was discharged, cannot be a question that confronts this Court.

6. The point that arises for consideration in this appeal is whether the defendant/- respondent is liable to pay the suit amount?

7. Ex. A3 suit promissory note dated 23-11-1972 for Rs. 7,000 executed by the defendant/respondent in favour of the plaintiff/appellant reads as

follows:

Ex A discharged pronote for Rs 5,000 dated SI-&-1972 executed by the respondent in favour of Subbiah Pillai reads as follows

Ex. A5 endorsement (231 11 1972) of discharge on Ex. A4 reads as follows:

8. The appellant herein was aged 29 years at the time of trial before the lower Court. His maternal grand-father Sivasubramania Pillai, during his

life-time executed Ex. A6 settlement deed dated 15.12.1968 conferring upon the appellant 3 acres and 59 cents of nanja lands At that time, P.W.

1 the appellant was a minor. Therefore, he would not have enjoyed the properties covered by Ex. A.6 settlement while he was a minor. The

probability is that his father Lakshmana Pillai must have been in enjoyment of those properties. Subsequently Ex. A.7 Will dated 17.1.1971 was

executed by his grand-father conferring on him part of his estate. Admittedly Sivasubramania Pillai died after 1972. It is also on record that the

appellant's mother Selva Gomathi-ammal was given under the Will extensive lands. During his life-time, Sivasubramania Pillai was taking pro-notes

in the name of his daughter Selva Gomathiammal. It is admitted that Selva Gomathi Ammal though given in marriage was with her parents. Under

such circumstances, the appellant normally could have stayed with his parents and grand-father Sivasubramania Pillai. In the absence of any

disruption in the family, there is no prospect of P.W. 1 directly enjoying the lands or earning separately. On the other hand, he normally must have

stayed with his parents. This being so, the appellant cannot be expected to have separate earnings of his own. In this context it is very material that the appellant had no cash with him at the relevant time for he had no accounts in the bank. Therefore it is improbable that the appellant parted with cash Rs. 7,000 under Ex. A.3 pro-note admittedly executed by the respondent. Only because kist receipt - Ex. A.8 to Ex. A.22 between the years 1971 and 1978 are taken in the name of the appellant, this Court is unable to come to the conclusion that the appellant is actually in enjoyment of the properties covered by Ex. A.6 settlement and Ex. A.7 Will. On the other hand, his parents beir. hale and healthy, the probability is that it is his parents who are in management of the estate left behind by Sivasubramania Pillai. P.W. 1 claims that he is living separately after his marriage]But this is not a circumstance to conclude that he has got his separate earnings. This view finds confirmation from the fact that P.W. 1 does not have any bank account of his own. Therefore, the case of P.W. 1 the appellant herein that he gave cash of Rs. 7,000 under Ex. A.3 cannot be accepted.

9. Section 18 of the Negotiable Instruments Act (26 of 1981), reads as follows:

118. Presumption as to negotiable instruments-

Until the contrary is proved, the following presumption shall be made:

Of consideration: - (a) 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, endorsed negotiated or transferred, for consideration;

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

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

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

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

thereon;

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

That Holder Is A Holder In Due Course - (g) that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its 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.

10. The Negotiable Instruments Act, (Bhashyam and Adiga,) 14th Edition/deals with the several aspects of law-relating to presumption as to

negotiable instruments in a comprehensive way at pages 688 to 700.

11. "Section 18 is essentially a product of English Law, and the special rules of evidence laid down, in this section have been intended to apply

only as between the parties to the instrument or those claiming under them. In other cases, e.g., in suit against the undivided sons of a father on a

note by him after his death, this section is not applicable, as the essential feature of liability under a negotiable instrument is absent in such suit, a

presumption u/s 114, Evidence Act, is permissible. Where, therefore, a suit is instituted against the undivided sons of a Hindu promisor after his

death on a pro-note executed by him, the suit cannot be regarded as one against the heirs or representatives of the promisor, because it only seeks

to enforce the Hindu Law theory of pious obligation in respect of the property which the sons have taken by survivorship. The pious obligation can

arise only on the assumption of the debt due by the father, and in that case the onus of proof of existence of the debt is prima facie on the creditor.

The case may be different in the case of a note executed on behalf of a joint family business in the business name. Though this section is in terms

general and does not refer to a proceeding in suit where the various presumptions directed to have been raised it was not intended to apply to a

proceeding which is not in the nature of a civil dispute between the parties to the negotiable instrument or their privies. Thus when a debt set ired

by a promissory note is sought to be proved insolvency, Court must inquire into the reality and the quantum of consideration. The presumption

under this section that every negotiable instrument was made or drawn for consideration cannot avail against the Receiver of the estate of the

insolvent in a proceeding u/s 33 of the Provincial Insolvency Act as it is not a

proceeding between the insolvent and the proving creditor but as one between the creditors represented by the Official Receiver and the insolvent. Before a presumption can be drawn, execution of the instrument be admitted or proved. There is no presumption about the execution of a Negotiable Instrument and in case of denial by the opposite party, basing its claim on such instrument must prove execution.

12. Under the Common Law, a person seeking to enforce simple contract must aver that he has paid the consideration, and must also support the same by proof. For purposes of trade, the usage and custom of trade has relaxed this rule in respect of negotiable instruments, and now every bill or note is presumed to be honest and supported by consideration. This rule of presumption was obtained even before the Act came it to force; for it finds a place in illustration, (c) to Section 114 of the Evidence Act which gives the Court discretion to presume consideration in the case of bills

of exchange. But a decree cannot be given for the full amount on the strength of the presumption, when the plaintiff gives evidence to show that he paid some consideration, but gives no evidence as to how much he paid.. The section provides for nothing more than the rule that a bill or note

prime facie imports consideration or value, and it does not justify any presumption as to the quantum of consideration. Varadachariar, J., in

Mallavarapu Narasamma and Others Vs. Boggavarapu Bulli Veerraju, , observed as follows:

Any presumption as to quantum of consideration as distinguished from the mere existence of consideration, has to be drawn, not by virtue of

Section 118, Negotiable Instruments, Act or even u/s 114, Evidence Act, but only from the recitals, it has long been established that being prima

facie evidence against the parties to the instrument, they may operate to shift on to the party pleading the contrary, the burden of rebutting the

inference raised by them, But the weight due to recitals may vary/according to circumstances and in particular circumstances the burden of

rebutting them may become very light, especially when the Court is not satisfied that the transaction was honest and bona fide.

The consideration referred to is valuable consideration, that is any consideration which will support a simple, contract. The rule is stated in Byles on

Bills in the following terms: ""Consideration is presumed until the contrary

appears or at least appears probable."" The expression until the contrary is proved in the beginning of the section must also be read in this sense, having regard to the definitions of the word "disproved" and the expression "shall presume" in sections 3 and 4 of the Evidence Act. The presumption is not one to be derived from the recitals in the instruments, but is one of law.

13. In *Kundan Lal v. Custodian, Evacuee Property* AIR 1961 S.C. 1316, the Supreme Court examined the scope of the presumption under this

section and also the different methods available to persons against whom such a presumption is drawn to rebut the same and the law is stated thus:

14. This section lays down a special rule of evidence applicable to a negotiable instrument. The presumption is one of law and thereunder a Court

shall presume inter alie that negotiable instrument for the endorsement was made or endorsed for consideration. In effect it throws the burden of

proof of failure of consideration on the maker of the note or the endorser as the case may be. The question is how the burden be discharged? The

rules of evidence pertaining to burden of proof are embodied in "Chapter VII of the Evidence Act. 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 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 i.e. oral or documentary evidence or admissions made by opposite party, it may comprise circumstantial evidence or presumptions of

law or fact. To illustrate how this doctrine works practice, we may take a suit on a promissory note. u/s 101 of the Evidence Act, ""Whoever

desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts

exist"". Therefore the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the

execution of the promissory note is proved, the rule of presumption laid down, in Section 118 of the Negotiable Instruments Act helps him to shift

the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff, but as soon as the execution is proved,

Section 18 of the Negotiable Instruments Act imposes a duty on the Court to

raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and if he adduced acceptable evidence, the burden again shifts to the plaintiff and so on. The defendant may also rely upon the circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of facts, for instance those mentioned in Section 114 of the Evidence Act. "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Illustration (g) to that section shows that the Court may presume that evidence which could be, and is not produced would, if produced be unfavourable to the person, who withholds it. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff Section 114 enables the Court to draw a presumption to the effect that, if produced, that said account would be unfavourable to the plaintiff. 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 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.

15. The question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact. Under this section, the presumption is not left to the discretion of the Court; and in every suit on negotiable

instruments, the Court shall presume that such instruments were made, drawn, accepted or negotiated for consideration, so much so it was held, that where the lower Court ignored the presumption and found that the document was not supported by consideration, the decision regarding consideration was vitiated. This throws the burden of proving failure of consideration on the maker of the note, and the burden is not shifted by the mere fact that consideration or part of it is shown not to have been paid in cash as stated in the note, nor can a suit be dismissed on that ground alone. Where parties went to adduce evidence as to consideration and the Court disbelieved the plaintiff's case, the presumption as to consideration could " not avail the plaintiff in revision from the judgment, It cannot be contended that the section raises a presumption only in favour of the consideration as recited in the instrument. But, where in a suit to recover money on a note which stated that the amount was borrowed in cash, and where the plaintiff alleged the same, but where after the defendant's denial of any portion of the alleged consideration, plaintiff stated that the consideration was release of certain proprietary rights to the defendant, it was held that the initial presumption of consideration had been rebutted and that the onus had been shifted on to the plaintiff to prove consideration. Thus, it may be said that where the recital of the consideration in the promissory note is admittedly false, the presumption is displaced, and the burden of proving consideration is shifted on to the holder of the promissory note himself; and much stronger therefore would be the case when the consideration has to be proved against third parties. But a contrary view has been taken, and there is a conflict of judicial opinion on this question. The difference of opinion consists in this viz., where the plaintiff sues on a promissory note or HUNDI and the actual consideration recited in the document sued on and the consideration alleged in the plaint differs whether the plaintiff is entitled to rely on this sub-section. One view is that the presumption will nevertheless apply and the other view is the plaintiff cannot in such a case rely upon the statutory presumption. The former view is best expounded by Chagla, C.J., in the case reported in Tarmahomed Haji Abdul Rehman Vs. Tyeb Ebrahim Bharamchari, . According to the learned Chief Justice, the language of Section 18(a) clearly shows that consideration is of no consequence. For

according to the learned Chief Justice emphasis must be laid upon the following words viz., ""that every negotiable instrument was made or drawn

for consideration"". And the learned Chief Justice proceeds to say at page 258.

The presumption that is raised u/s 18 is not in respect of Consideration mentioned in the Negotiable Instrument. The presumption is in favour of

there being a consideration for the negotiable instrument any consideration which is a valid consideration in law.

16. Govindan Nair, J., has observed in the decision in Alex Mathew Vs. Philip Philip, , that the presumption is a general one, general in the sense

that it enjoins the Court to assume that the instrument is supported by consideration, not as we pointed out that it is supported by consideration in

any particular form or manner. The fact, therefore, that a particular form or consideration pleaded by the plaintiff had not been proved will not

negative the presumption under the section and will not enable the Court to come to the conclusion that the instrument is not supported by

consideration at all.

17. The opposite view can be best expressed in the language of " Tekchand, J., in the case reported in Chandan Lal Joura Vs. Amin Chand

Mohan Lal and Others, . which is as follows at page 508:

The moment the plaintiff as his own witness detailed an entirely different story regarding the passing of consideration, he eo instante took upon

himself the burden of proving that consideration different from that, which had been alleged in the promissory note had in reality. passed in this

case. Thus, the plaintiff by his own act relieved the defendants from the burden cast upon them by Section 118 (a) of the Negotiable Instruments

Act.

Till this conflict is actually decided by the Supreme Court, the difference is bound to continue, each High Court being free to accept whichever

view commends itself to it. However, there is a good deal of logic and force in the enunciation of the law on the subject by Chagla C.J. in the case

referred to above. Supposing a plaintiff files a suit on a negotiable instrument, which simply recites in respect of the consideration ""for value

received"" and in the plaint, it is simply stated that the promissory note was executed for value received, it will be obvious that the presumption

would apply to such a case. When the plaintiff sets up consideration different

from what is stated in the instrument, it cannot be said that he has given up the position that the defendant has received the value. The strict abstract rule of presumption may be academic in most cases." It is significant to note that there are no English cases on the point. We have no direct pronouncement of the Supreme Court on the Doint either. It may be observed that in the draft bill contained in the 11th Report of the Law Commission relating to the Negotiable Instrument Act, Section 118 is replaced by Section 102. But the language of Section 102 is exactly similar to Section 118(a) of the Act. At page 65 of the Report the Commission observes no change is proposed in Sees. 118 to 120. The presumption under this section does not extend to anything beyond consideration: It does not raise any presumption that the amount was advanced and that it was for legal necessity.

18. It is prima facie incumbent upon the defendant who wants to dispute the plaintiff's title to recover the money on the ground of want of consideration, to allege and prove the same. The fact that the payee does not produce his account books makes no difference. Similarly where it is alleged that a note was endorsed for collection only, the fact must be proved by the party alleging it. Where, in a suit on a promissory note, the defendant denied execution but did not plead want of consideration, and admitted the correctness of the alleged previous transactions, it was held that the question of consideration could not be gone into. This privilege conceded to negotiable instruments is available not only between the original parties, but also between others who by endorsement or otherwise, become bona fide holders of the instrument. The result may at times be to secure decrees for money to plaintiffs, who never paid the quid pro quo. The rule may also be said to be Based on the fact, that a person is not bound to keep careful proof of matters which the law says he need not prove. This presumption that the holder of a bill has given, consideration, is rebutted when it appears that the acceptance is a forgery or that the instrument has been obtained by means of"" a fraud or an offence, or for an unlawful consideration; otherwise, the Court is bound to apply the presumption. Again the presumption is not conclusive, and ,is sometimes very easily shifted. Thus, where a money-lender sued the defendant who, at the time of, the execution of the note was a young man of extravagant

habits, and where the defendants alleged that a part of the consideration was paid and that part was immoral, the Court laid down the following rule with reference to the onus of proof.

The ordinary rule that a negotiable instrument has been executed for value is so much weakened by the allegation of the defendant, a young man, that he has not received the full consideration, and this is sufficient to shift the burden of proof, and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full". (Vide *Moti Gulabchand v. Mahomed Mehdi* ILR (1896) 20 Bom. 367

19. Where in a suit upon three promissory notes executed in quick succession of each other by a young man who died pending the suit leaving a

young widow, it was found that he was a man of considerable property, but at the time was out of possession, the property being in the

management of his elder brother, and that he was a man of extravagant habits, it was held that the onus would be shifted on to the plaintiff, to make

out that full consideration was paid as alleged, by him. Other circumstantial evidence also may be given to rebut the initial presumption, for in the

case of rebuttable presumption it is common knowledge that the Court is often obliged to rely more upon direct or definite evidence negating the

facts presumed. Thus, where the plaintiff's agent made inconsistent statements about the consideration, the Court held that the onus was shifted.

So also, where a note was executed in consideration of withdrawal of a compoundable offence, but the plaintiff persisted that the consideration

was paid in cash, the suit is liable to be dismissed on his allegations being disbelieved. This in no way touches upon the ordinary rule that the

defendant must prove absence of consideration, if that is his case. The defendant may even take advantage of anything appearing in the plaintiff's

evidence to show that no consideration was paid; for example when the note recites that the consideration was in cash, but the plaintiff admitted

that it was partly in cash and the rest in some other way, the onus is on him to have the latter; otherwise, his claim will fall to that extent. Again, the

defendant may rely on the flaws in the plaintiff's evidence, and show that on the record as it stands the burden has been discharged. The plaintiff

may always prove that, the consideration recited in the note is not the true one but that the note was executed for a different consideration.

20. Dealing with the relationship between attorney and client, Ameer Ali J. quoted a passage from *Lawless v. Mansfield* (1841) 1 Drv. & War.

557, which is as follows:

Now, I take it, that, these two propositions are perfectly clear in law, first that where the relation of attorney and client subsists, in questions of

accounts between the parties, the common rule does not prevail, though the party only alleges generally that the accounts are erroneous, the Court

will make a decree opening the accounts, if sufficient cause is shown; and secondly, that a solicitor, to whom his client has given bonds or bills,

cannot produce those securities, and say, as a third person might, they prove the existence of his debt; but from the relationship in which the parties

stood, and the alarm of this Court, lest by means of such relationship any undue influence should have been exerted, the solicitor is bound,

irrespective of his securities, to prove the debt, for which those securities were given.

This is also the practical effect of illustration (c) to Section 14 of the Evidence Act and its explanation.

21. The presumption mentioned in the section does not arise in the case of non - negotiable instruments, or in the case of mere hand-notes, while in

the case of Government promissory notes which come within the definition of negotiable instruments, the presumption laid down in this section is

always raised.

22. Under Hindu Law, it is doubtful whether a promissory note imports consideration, at all events it is certain that the maker may show that there

was no consideration. Not even the fact that the defendant accepted or endorsed the bill for the accommodation of the drawer and that he

received no consideration, for so accepting or endorsing it, will avail the defendant to shift the onus of proof on to the plaintiff, though the rule may

be otherwise, when the holder's title is impeached on the ground of fraud.

23. The presumption as to receipt of full consideration arising from a debtor's signature on a promissory note can only be invoked against the

debtor personally but not against the Official Receiver or a creditor in insolvency proceedings.

24. Again, the presumption as to consideration does not apply to criminal cases, and the prosecution has to prove that consideration was in fact

paid.

25. The presumption arises only when there is a negotiable instrument admitted to have been executed; if the fact of execution itself is in dispute,

the plaintiff has to prove not only execution and but also consideration. Where in a suit on a promissory note, it is established by the defendants

that the signatures and thumb impressions were on a blank paper and not on a written one, the entire promissory note being scribed by another

person it was necessary for the plaintiff to have proved due execution of the promissory note and it was only after due execution was established

that the presumption under this section could be raised. When the note sued upon, is alleged to be executed by the father of the defendant and

thumb-marked by him, the burden is on the plaintiff to prove that the thumb-mark is that of the executant, and a high standard of proof will be

required of the plaintiff in such circumstances.

26. Mr. T.R. Mani, learned Counsel for the appellant, refers to the decision in AIR 1938 123 (Privy Council) , wherein it has been held that where

a promissory note has been given, consideration is to be presumed and the burden to prove that there was no consideration for the promissory

note is upon, the executant. The following observation of Sir George Rankin at page 125 of the decision in AIR 1938 123 (Privy Council) , is relied

on by the learned Counsel for the appellant:

...A promissory note having been given, consideration is to be presumed. The question is not therefore whether the plaintiff has normally and

sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the appellant that there was no

consideration for the promissory note. This burden, the appellant has certainly not discharged, and there is every probability against him on the

point. It is not necessary therefore for their Lordships to decide whether under Clause 3 of Section 25 above mentioned a debt of which the

creditor might have enforced payment from the mortgagor would be excluded by the circumstance that it was not debt of his own. Their Lordships

must not be taken to cast doubt upon the view taken by the High Court if this question, which does not arise, is not now discussed. Their

Lordships are satisfied that the principal amount due on the bonds in suit is Rs. 1,30,000 as decreed by the Indian Courts.

27. In *Thirumalai Iyengar v. Subba Raja* (1962) 1 M.L.J. 193, it has been held that there is a marked contrast between Section 118 of the

Negotiable Instruments Act and Section 114 of the Evidence Act. The statutory presumption u/s 18 of the Negotiable Instrument Act is mandatory

while the presumption u/s 114 of the Evidence Act is permissive depending upon the exercise of the discretion of the Court. Bills of Exchange,

Promissory Notes and Cheques are categories of transactions in the commercial world and the Law Merchant raised a presumption of

consideration in favour of these instruments party because it is necessary and important to preserve their negotiability intact and partly because the

existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which

they are executed. The presumption of consideration is only to this extent, namely, that the negotiable instrument is supported and is not a nudem

pactum.

28. There is no presumption regarding the quantum of consideration and the amount or value mentioned in a negotiable instrument should not be

presumed to have been given or taken under the instrument. A recital in a negotiable instrument as to the passing of consideration is no doubt prima

facie evidence of such "consideration having passed and the parties to the instrument are bound by the recital till the contrary is proved.

29. The course of trial may bring in various factors and circumstances the cumulative effect of which may be sufficient to destroy the presumption

and to place the plaintiff in a position where he cannot succeed without establishing affirmatively by cogent and positive evidence that the document

sued upon is supported by consideration, and that he is entitled to recover the amount sued for.

30. In order to counteract the initial prima facie rebuttable presumption in favour of the plaintiff regarding the consideration the defendant can rely

upon the circumstances and probabilities of the case and can of course, make capital out of the absurdity in the evidence on the side of the plaintiff

himself.

31. The duty of the Court is to give effect to the inference to be drawn from the evidence on record and it is not prevented from recording a finding

which may not be consistent with the pleadings of either party in a suit.

32. Unless a party is called upon to produce into Court any documentary evidence in his custody and possession and he fails to produce such evidence deliberately and without any adequate or justifying reason the Court should not draw any adverse inference from the mere non-production of such evidence.

33. In *Official Receiver, Kanpur and Another Vs. Abdul Shakur and Others*, , It has been held that no statutory presumption of consideration u/s

No. 118 (a), Negotiable Instruments Act arises in favour of creditors in a proceeding u/s 33, Provincial Insolvency Act for settlement of schedule

of creditors and the Receiver exercising power u/s 80 is not bound to admit the debts in the schedule if the insolvent or the other creditors failed to

displace that presumption.

34. In *V.R.S.R.M. Ramaswami Chettiar and Another Vs. Sri Devi Talkies by partner K. Ramakrishnan and Others*, , it has been held that until the

contrary is proved, every negotiable instrument which is duly made or deemed to have been made should prima facie be held to be one supported

by consideration. Presumption u/s 18 of the Negotiable Instruments Act, shifts the burden of proof in the second sense, that is, the burden of

establishing a case shifts to the defendant, the defendant may adduce direct evidence to prove that the promissory note was not supported by

consideration and if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. It is therefore clear, that the burden is

ambulatory; at one time it is on the plaintiff, and according to the proof and circumstances, it shifts on to the shoulders of the defendant.

35. In *H.M. Kari Gowder Vs. S.A.K. Chinnathambi Chettiar and Others*, . it has been observed at page 197 as follows:

... Section 118 says that until the contrary is proved inter alia ""P following presumption that every negotiable instrument was made or drawn for

consideration shall be drawn. But, by now, it is well established that such a presumption is sometimes displaced by certain acceptable materials

placed by the maker of the note which under such circumstances shifts the burden of proof from the maker to the payee. The presumption that

could be raised under this section is only a prima facie presumption. If the maker of the note satisfies the conscience of the Court that at no time

consideration passed under the negotiable instrument and that he executed it

under certain circumstances which are not far from truth, then the ordinary presumption that consideration is presumed, will not arise. As a matter of fact, Courts have laid down that the maker of the note or the defendant in an action on the promissory note may also rely upon circumstantial evidence and if those circumstances are compelling, the burden would likewise shift again to the payee or the plaintiff to establish the existence of consideration or at least its probability.

36. In *T.A. Umapathy and Another Vs. T.A. Masilamani*, , it was held mere mention of superfluous reasons for borrowing amount in the body of instrument by itself would not show that instrument was not a promissory note when instruments were admitted as such by defendants.

37. In *G. Vasu Vs. Syed Yaseen Sifuddin Quadri*, , it was observed in paragraph 24 at page 146, as follows:

24. In our view, the above decision of the Supreme Court is clear authority for the proposition that once the defendant shows either by direct

evidence or circumstantial evidence or by the use of other presumption of law or fact that the promissory note is not supported by consideration, in

the manner stated in the promissory note or in the manner stated in the suit note or in the pleading, the evidential burden of the plaintiff is revived,

i.e to prove that the promissory note is supported by consideration and at that stage, the presumption of law covered by Section 18 "disappears

and no longer subsists. This is because the presumption u/s 118 raised by the statute initially in favour of the plaintiff steps, as it were into the

witness box and acts as a substitute for the plaintiff's evidence. Once -such rebuttal evidence is given by the defendant to the satisfaction of the

Court, the Court acting on a preponderance of probabilities and not requiring an absolute proof of a negative i.e absence of all conceivable form"

of consideration, the effect of the presumption shifting the initial evidential burden to the defendant "disappears". *Anumolu Narayana Rao and*

Another by their mother and guardian Anumolu Ramadevamma Vs. Ghattaraju Venkatappayya and Others, .

38. So far as the relief prayed for under the Agricultural Relief Act, the decisions in *Vaithiyam Nanjappa v. Ramanathan Chetti* (1958) 2 M.L.J.

556, and *Chellammal Vs. Abdul Gaffoor Sahib and Another*, , are relied upon.

39. In the instant case before us, it is relevant to note that the plaintiff/-

appellant has not proved that he was in possession of cash to the tune of Rs. 7,000 at the time of execution of Ex. A3 pro-note. Apart from the same, P.W. 1 plaintiff/appellant herein has in his evidence stated that he made a lumpsum payment of Rs. 7,000 to the defendant/respondent herein. This version of P.W. 1 is contrary to the recitals in Ex. A3 which read that part of the consideration was applied towards discharge of previous pro-notes"" which were executed in favour of one Subbaiah Pillai. A careful reading of the contents of Ex. A3 pro-note shows that the defendant/respondent herein was not given cash consideration of Rs.- 7,000.

40. The case put forward by the defendant/respondent is that the plaintiff's maternal grandfather Sivasubramania Pillai was an usurious money-lender and that he (respondent herein) executed Ex. B1 pro-note as early as 13.11.1959 for a sum of Rs. 500 on accepting cash consideration of Rs. 400 only. Though interest was charged at the rate of 12 per cent in the pro-note, the agreement was that the respondent should pay 18% interest. While he v/as paying interest at the rate of 18% he borrowed a sum of Rs. 1,000 on 27.1.1967 under Ex. B2 pro-note executed in the name of his daughter Selvagomathi Ammal for an enhanced sum of Rs. 2,000 on the date of Ex. B2, there was a balance of Rs. 481 annas 10, and paise 2 under Ex. B1 pro-note. D.W. 1 - the respondent herein was paying interest at the rate of 18% in respect of Ex. B2 pro-note also. On 15.8.-1968 he borrowed a loan of Rs. 3,000 and executed Ex. B3 pro-note dated 15.8.-1968 for Rs. 4,500. On the whole, the respondent herein borrowed only cash of Rs. 400 plus Rs. 1000 plus Rs. 3000: Rs. 4,400. The respondent herein paid interest at the rate of 18% upto 23.11.1972.

The suit pro-note Ex. A3 was executed for Rs. 7,000 for balance of debts outstanding as on 23.11.1977. Against Ex. B3 pro-note dated 15.8.1968, there was balance outstanding on the date of Ex. A3. This aspect is clear from the fact that in Ex. B4 notice dated 28.12.1970, Sivasubramania Pillai while writing on behalf of his daughter Selvagomathi Ammal, has disclosed that under two pronotes, the respondent herein was liable to pay Rs. 6,500. It is also relevant to note that Sivasubramania Pillai in Ex. B4 has referred to Ex. B2 and Ex. B3 pro-notes whose total consideration is Rs. 6,500. It is also relevant to note that it is not the case of the appellant herein that there was any balance of interest

outstanding against Ex. B2 and Ex. B3 pro-notes. On the other hand, in view of the fact that Ex. B2 and Ex. B3 pro-notes have been returned to the respondent herein, it is clear that no interest was outstanding in respect of Ex. B2 and Ex. B3 on the date of execution of Ex. A3 the suit pro-note. The defendant/respondent herein as D.W. 1 has stated that it was on the date of Ex. A3 pro-note, he was given Ex. B2 and Ex. B3 pro-notes. Thus, it is seen that in lieu of the consideration covered by Ex. B2 and Ex. B3 pro-notes, the suit pro-note Ex. A3 was executed by the respondent herein. Though P.W. 1 appellant herein denied the version of the respondent herein, he, on his own showing, has not enquired his parents about the transaction relating to Ex. B1 to Ex. B3 pro-notes. It is also relevant to note that the appellant herein has not examined his mother Selvagomathi Anunal or his father-Laksh-mana Pillai in connection with Ex. B2 and Ex. B3 pro-notes. A careful reading of the evidence available on record, both oral and documentary, shows that the burden of proving the consideration under Ex. A3 pro-note is shifted to the appellant herein.

41. In the instant case before us, the burden is heavily on the appellant herein to show that the transactions covered by Ex. B1 to Ex. B3 have got nothing to do with the suit pro-note Ex. A3 or that there was cash payment under Ex. A3 pro-note. Ex. B2 and Ex. B3 pro-notes stand in the name of Selvagomathi Ammal-mother of the appellant herein. There is no evidence to displace the testimony of D.W. 1-the respondent herein, aged 71 years, that he got back Ex. B2 and Ex. B3 only on the date of Ex. A3 suit pro-note. It is his case that the suit pro-note was taken by Lakshmana Pillai-father of the appellant herein in lieu of the balance of the consideration covered by Ex. B2 and Ex. B3. The non-examination of Selvagomathi Ammal is certainly fatal to the case of the appellant herein. It is not the case of the appellant herein that Selvagomathi Ammal and Lakshmana Pillai-his parents are inimically disposed towards him. Therefore, nothing prevented the appellant herein to call any one of them as his witness and displace the case of the respondent herein that money was not outstanding against Ex. B2 and Ex. B3 on the date of Ex. A3 the suit pro-note.

42. It is also relevant in this connection to note that it is not the case of the

appellant herein that Ex. B2 and Ex. B3 pro-notes were discharged at any time before the execution of Ex. A3 suit pronote. On the other hand, P.W. 1 merely pleads ignorance as to the transactions covered by Ex. B1 to Ex. B3. A careful reading of the evidence of D.W. 1 in this regard shows that it is entitled to credence. D.W. 1 has specifically stated that Ex. A3 suit pro-note was taken in lieu of the balance covered by Ex. B2 and Ex. B3. It is also relevant to note that during his life-time, Sivasubramania Pillai issued Ex. B4 notice calling upon the respondent herein to pay the principal amount of Rs. 6,500 covered by Ex. B2 and Ex. B3 pro-notes. It is also relevant to note that there is no documentary evidence to show that the defendant discharged Ex. B2 and Ex. B3 pro-notes" during the life-time of Sivasubramania Pillai. The evidence of D.W. 1 that on the date of execution of Ex. A3 suit pro-note, there was a balance of Rs. 156 only towards interest payable under Ex. B2 and Ex. B3, is acceptable, especially the chit Ex. B6 dated 23.11.1972 shows that balance as on that date was Rs. 156 only. The respondent herein claims to have paid interest at the rate of 18% per annum for all the pro-notes - Ex. B1 to Ex. B3. In Ex. B1, interest is stipulated at the rate of 12% per annum. In Ex. B2 and Ex. B3, interest is stipulated at the rate of 6% per annum. D.W. 1 has deposed that he was paying interest at the rate of 18% per annum in respect of Ex. A3 suit-promissory note also. On the court of Ex. B2, the balance outstanding on Ex. B1 pro-note was found to be Rs. 481 - 10-2, This calculation finds place in Ex. B7 chit. So the conclusion that can be arrived at is that the respondent herein was paying interest at the rate of 18% per annum in respect of Ex. B1 to Ex. B3 pro-notes. The balance covered by Ex. B1 pro-note was discharged on the date of Ex. B2 pro-note, and the balance payable under Ex. B1 viz., Rs. 481 - 10 - 2 was adjusted against "the amount covered by Ex. B2. The cash paid under Ex. B2 is Rs. 1,000. This is also clear from the contents of Ex. B7 chit. The respondent herein has admittedly executed Ex. A4 pro-note on 9-8-1972 in favour of one Subbaiah Pillai for Rs. 5,000 It is for the discharge of Ex. B4 the suit pro-note was executed. Though D.W. 1 respondent herein has admitted execution of Ex. A4, he had specifically stated that it is a document created just to support the claim under Ex. A3 the suit pro-note. The payee - Subbiah Pillai mentioned

in Ex. A4, according to D.W. 1, is a servant under the appellant herein. The appellant herein though denied this fact, has not examined the said

Subbaiah Pillai. Thus, we find that Ex. A4 pro-note was taken just to cover the consideration mentioned in Ex. A3. It is also relevant to note that

Ramalingam Pillai, an attester to Ex. A3, has not been examined by the appellant herein in support of the payment of cash consideration. The non-

examination of Ramalingam Pillai is certainly fatal to the case of the plaintiff/appellant herein. Inasmuch as Ex. A4 is not the subject-matter of the

suit, there is no presumption against the defendant/respondent herein. Thus, we find that Ex. A3 suit pro-note was executed in lieu of the principal

debt covered by Ex. B2 and Ex. B3 together with the balance of Rs. 156 due by way of interest and that the respondent herein has all along been

paying interest only at the rate of 18 per cent per annum. The point framed for determination in this appeal cannot be held in favour of the appellant

herein.

43. The respondent herein has pleaded the benefits under Act 4/1938 (as amended by Act 8/1973), as well as Act 40/1978. As already

discussed, we find that interest was paid by the defendant/respondent herein. Thus, we find that Ex. A3 suit promissory note is executed by the

respondent herein for the balance of consideration covered by Ex. B2 and Ex. B3 together with the balance of interest of Rs. 156 only. The

balance payable by the respondent herein is only Rs. 358 - 50, to which the appellant herein is entitled to a decree. We also find that the

respondent herein is entitled to extension of time under Act 15/1976. Under the circumstances, the judgment and decree of the lower Court are

correct and they are hereby confirmed.

44. There is no merit in the appeal. Hence the appeal is dismissed with costs.