Supreme Court of India Bharat Barrel And Drum ... vs Amin Chand Payrelal on 18 February, 1999 Author: Sethi Bench: V.N. Khare., R.P. Sethi. PETITIONER: BHARAT BARREL AND DRUM MANUFACTURING COMPANY

Vs.

RESPONDENT: AMIN CHAND PAYRELAL

DATE OF JUDGMENT: 18/02/1999

BENCH: V.N. KHARE., & R.P. SETHI.

JUDGMENT: SETHI, J. The defendant-respondent is admitted to have executed a Promissory Note for a sum of Rs.6.20.000/- on 11.10.1961 agreeing to pay the aforesaid amount to the plaintiff on demand. On his failure to repay the amount borrowed, the appellant served a legal notice calling upon the defendant-respondent for making the payment of the amount borrowed. Neither the amount was paid nor the notice was replied with the result that the appellant-plaintiff was forced to file a suit under Order XXXVII of the Code of Civil Procedure in the original side of the High Court of Calcutta on 10.8.1962. The respondent was granted leave to defend the suit by the learned trial Judge. In the written statement filed, the respondent alleged that the Promissory Note had not been executed "for the value received" as mentioned therein but was executed by way of collateral security. It was further submitted that in August 1961 the respondent had offered to import 10160 metric tones of steel drum sheets from the appellant which was accepted on 15.9.1961 with the condition that the goods should be shipped on or before 30.11.1961 before the expiry of the appellantt's import licence. The Promissory Note was stated to have thus been executed under such circumstances which were, in fact, intended to be collateral security. Due to freezing of lakes the contract of import of steel drum sheets could not be performed, the same was cancelled with the appellant which absolved the defendant-respondent from any liability arising out of and in relation to the document executed by him. The suit was dismissed by the learned trial Judge of the High Court holding that as evidence led by the plaintiff and the defendant was not believable, the suit could not be decreed as according to the learned judge, the appellant filed an appeal before the Division Bench of the High Court. In view of the important question of law involved being difficult to answer, the Division Bench referred the entire appeal to a large Bench. By reason of the majority view, the appeal filed by the appellant-plaintiff was dismissed vide the judgment impugned in this appeal. Not satisfied with the judgement of the Full Bench of the Calcutta High Court, the present appeal has been filed by the appellant. On the pleadings of the parties the trial Judge of the High Court has framed the following issues: 1. was the promissory note dated October 11, 1961, executed by the defendant as collateral security in the circumstances and on the agreements mentioned in paragraphs 6 and 7 of the Written Statement? 2. was there no consideration for the promissory note fail? 3. Did the consideration, if any, for the said promissory note fail? 4. To what relief, if any, is the plaintiff entitled? To prove its case the defendant

examined Shri Sat Pal Sharma, the Manager of its Bombay Office and Shri Jit Paul, a partner of the defendant firm. Shri Bhagwandas kella, production Manager of the plaintiff's factory at Bombay, Shri Banwarilal Shroff, Secretary of the plaintiff company, Shri L.P. Goenka, a Director of the plaintiff company, Shri Tebriwal, Calcutta Manager of the plaintiff company and Shri Shankar Lal Shroff appeared as witnesses on behalf of the plaintiff. On appreciation of evidence led in the case and while dealing with issue No.1, the learned Trial Judge held "In the circumstances, the conclusion is irresistible that the promissory note was not executed by way of a collateral security as alleged by the defendant." However, while dealing with issue No.2 the learned Judge referred to the evidence mainly of the plaintiff and concluded "I reject the plaintiff's case that a sum of Rs. 6,20,000/- was paid to Aminchand Pyarelal at Bombay by the plaintiff on 11th October 1961 by way of loan or at all." He also held:- "The plaintiff's case as sought to be made out in the evidence of Goenka is that the only consideration for the promissory note was the loan and no other. The defendant's case is that the promissory note was made by way of a collateral security for due performance of the contract. As I have already said, I am unable to accept that the promissory note was executed by way of a collateral security. I am equally unable to accept the plaintiff's case that a sum of Rs. 6,20,000/- or any other sum was advanced by the plaintiff to the defendant in consideration of the promissory note. The plaintiff is entitled to the benefit of the presumption spoken of in section 118 of the Negotiable Instruments Act. In the abstract, it is necessary for the defendant to prove that no consideration of any description was given for the promissory note before the defendant can succeed. In other words, it will be for the defendant to prove the universal negative. It is the plaintiff's specific case made through geonka at the trial that no consideration other than the consideration of loan was given for the promissory note. Therefore, all categories of consideration other than the consideration of loan have been disproved by the evidence led on behalf of the plaintiff. After all, the defendant is entitled to rely on the plaintiff's evidence. Therefore, the only consideration which remains to the consideration of loan. As I have not accepted the plaintiff to the defendant, the consideration of loan, in may opinion, has been disproved. Therefore, the presumption raised by section 118 of the Negotiable instruments Act has been completely dislodged." The learned Judge further held that once the plaintiff produced evidence, the same has to be considered because on the evidence of the plaintiff themselves consideration for the instrument may be disproved and presumption raised by Section 118 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act' by dislodged. He opined "if however, the evidence of the plaintiff be, that no consideration other than the one he claims was given for the instrument and the plaintiff fails to prove the consideration he claims, the universal negative is prove and the defendant is entitled to succeed." After referring to Kundan Lal Railaram Vs. Custodian Evacuee Property, Bombay (AIR 1961 SC 1316) he concluded that if the specific consideration of which the plaintiff relied, was disproved on evidence, nothing was left for the defendant to disprove. As the plaintiff was held to not have proved the consideration relied upon by it, the presumption under

Section 118 of the Act stood rebutted, with the result that the loan transaction was disproved. Despite holding that result that the loan transaction was disproved. Disproved. Despite holding that issue No.1 was proved i negative, the learned Judge held issue No.2 to have been proved in the affirmative. Issue No.3 was not decided by him and the suit of the appellant was dismissed. In appeal, after referring the various judgments of different High Courts on the point regarding the interpretation of Section 118 of the Act, the Division Bench of the High Court found that:- "The point is not free from difficulty. We are satisfied that the learned trial Judge was right in holding the defendant had been unable to prove the allegations of facts made by him. The plaintiff also did not adduce reliable evidence in support of his contention. The only question that falls for determination is whether in such a situation the legal presumption raised by the Negotiable Instruments Act will disappear. This question of law in our view must be decided by larger Bench. We direct the case to be placed before His Lordship the Chief Justice for setting up a larger Bench to consider this question of law." The appeal was thereafter heard by a Full Bench comprising of (Hon'ble Umesh Chandra Banerjee, Hon'ble Satya Brata Sinha and Hon'ble Ruma Pal, JJ.) of the High Court. The majority view (Hon'ble U.C. Banerjee and Hon'ble Satya Brata Sinha, JJ.) was:- We therefore, hold that although the presumption under Section 118(a) is mandatory but the same being a presumption of law can be rebutted in certain circumstances. Thus, where relevant evidence withheld by plaintiff, Section 114 of the Evidence Act enables the court to draw a presumption to the effect that if produced it would be infavourable to the plaintiff. This presumption can rebut the presumption of law raised under Section 118(a). Presumptions can be rebutted not only by direct evidence but also by presumption of law or fact. In my opinion, the learned trial Judge is right as the defendant can take advantage of anything appearing in the plaintiff's evidence to show that no consideration was paid. Whether the burden has been discharged by the defendant would depend upon the fact of each case. A little difference or additional fact may bring about different result in same situation. Once the court upon taking into consideration disbelieves the stories putforth by the both the plaintiff and defendant in their pleadings, the question of decreeing the plaintiff's suit by continuing the said presumption does not arise inasmuch as once a finding is arrived at that contrary has been proved and thus the presumption raised under Section 118(a) or Section 114 of the Evidence Act stands rebutted, the presumptive evidence being no longer in existence cannot be revived back to life. The presumption, thus, when rebutted, the defendant discharges the burden of proof and in that view of the matter the court will have no other option but to hold that the plaintiff's suit cannot be decreed as the legal burden is always upon him which never shifts." The third Judge (Hon'ble Ruma Pal, J.) in her dissenting judgment held: "In my opinion, the evidential burden does not shift to the plaintiff until, in the language of the section, the defendant proves that no consideration supported the making and execution of the promissory note. To sum up, my view is that the presumption under Section 118(a) requires the Court to be satisfied by proof that no consideration alleged. Only the would be presumption be rebutted. Such proof

may be circumstantial or direct. It may include an admission or be based on a legal presumption. But the rebuttal must establish the universal negative by establishing or rendering probable a case which is inconsistent with the presumption of any consideration at all. The rather picturesque metaphor quoted by the Full Bench in G.Vasu Viz:"presumptions may be looked on as the bats of law, fitting in the twilight but disappearing in the sunshine the facts" was in my view incorrectly appreciated. If at all a legal question of interpretation can be resolved by reference to a metaphor, it would appear that by the plaintiff's failure to establish his case, or by the defendant demolishing the plaintiff's case all that happens is that a part of the twilight may disappear in the sunbeam of the particular fact leaving sufficient gloom for the bats of presumption to continue to filt with undiminished vigour." We have heard the learned counsel appearing for the parties and perused the record. In order to properly appreciate the rival contentions in the light of almost admitted facts, it is necessary to keep in mind the purpose and object for which the Act was enacted and special provision for trial of suits based upon the Act was made under Order XXXVII of the Code of Civil Procedure. Generally speaking, the law relating to negotiable instruments is the law of thee commercial would which was enacted to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, the trade and commerce activities were likely to be adversely affected as it was not practicable for the trading community to carry on with it the bulk of the currency in force. The introduction of negotiable instruments owes its origin to the bartering system prevalent in the primitive society. The negotiable instruments are, in fact, the instruments of credit being convertible on account of the legality of being negotiated and thus easily passable from one hand to another. The source of Indian law relating to such instruments is admittedly the English Common Law. The main object of the Act is to legalise the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The purpose of the Act was to present an orderly and authoritative statement of the leading rules of law relating to the negotiable instruments. The Act intends to legalise the system under which claims upon mercantile instruments could be equated with ordinary goods passing from hand to hand. To achieve the objective of the Act, the Legislature in its wisdom thought it proper to make provision in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special procedure in case the obligation under the instrument was not discharged. Procedure prescribed under Order XXXVII of the Code of Civil Procedure is a step in that direction providing for summary procedure for trial of commercial cases based upon negotiable instruments. The privilege conferred under the Act including the presumptions under Section 118 of the Act and summary procedure provided under the C.P.C. are aimed at providing certainty, security and continuity in business transactions. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it, despite there being deviation from the general presumptions of law and

the procedure provided for the redressal of the grievances to the litigants. After going through the detailed and lengthy judgments of the learned Judges of the High Court, who dealt with case, we feel that a rational view has not been adopted by anyone. Extreme views taken by the learned Judges in the matter are required to be reconciled on the basis of the law already settled. While interpreting the scope of Section 118 of the Act and the presumptions arising under it the learned Judges of the High Court appear to have completely lost sight of the purpose and object for which the Act was enacted. Section 118 of the Act deals with the presumptions as to negotiable instruments. One of such presumptions is "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." This presumption is based upon a principle and is not a mere technical provision. The principle incorporated being, inferring of a presumption of consideration in the case of a negotiable instrument. A Full Bench of the Rajasthan High Court in Heerachand Vs. Jeevraj and Anr. (AIR 1959 Raj. 1) held that, "presumption, therefore, as to consideration is the very ingredient of negotiability and in the case of negotiable instrument, presumption as to consideration has to be made." A Full Bench of the Andhra Pradesh High Court is G. Vasu Vs. Syed Yaseen Sifuddin Quadri (AIR 1987 Andhra Pradesh 139) while dealing with the words "until the contrary is proved" held that it was permissible for the Court to look into the preponderance of the probabilities and the entire circumstances of the particular case. After referring to Sections 3,4 and 101 to 104 of the Evidence Act, the Court held that while dealing with the absence of consideration, the Court shall have to consider not only whether it believed that consideration did not exist but also whether it considered the non-existence of the consideration so probable that a reasonable man would, under the circumstance of a particular case, could act upon the supposition that the consideration did not exist. Once the defendant showed either by direct evidence or circumstantial evidence or by use of the other presumptions of law or fact that the promissory note was not supported by consideration in the manner stated therein, the evidentiary burden would shift to the plaintiff and the legal burden reviving his legal burden to prove that the promissory note was supported by consideration and at that stage, the presumption of law covered by Section 118 of the Act would disappear, Merely because the plaintiff came forward with a case different from the one mentioned in the promissory note it would not be correct to say that the presumption under Section 118 did not apply at all. Such a presumption applies once the execution of the promissory note is accepted by the defendant. The circumstances that the plaintiff's case was at a variance with the once contained in the promissory note could be relied by the defendant for the purpose of rebutting the presumption of shifting the evidential burden to the plaintiff. After referring to the catena of authorities on the point, the Full Bench held:- Having referred to the method and manner in which the presumption under Section 118 is to be rebutted and as to how, it thereafter 'disappears' we shall also make reference to three principles which are relevant in the context. The first one is connected with the practical dif-

ficulties that beset the defendant for proving a negative, namely that no other conceivable consideration exists. We had occasion to refer to this aspect earlier. Negative evidence is always in some sort circumstantial or indirect, and the difficulty or proving a negative lies in discovering a fact or series of facts inconsistent with the fact which we seek to disprove (Gulson, Philosophy of Proof, 2nd Edition, P. 153 quoted in Cross on Evidence, 3rd Edition, page 78 Fn). In such situations, a lesser amount of proof than is usually required may avail. In fact, such evidence as renders the existence of the negative probable may shift the burden on to the other party (Jones, quoted in A Sarkar on Evidence, 12th Edition, p. 870). The second principle which is relevant in the context is the one stated in S. 196 of the Evidence Act. That section states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It is very generally stated that, where the party who does not have the evidential burden, such as the plaintiff in this case, possesses positive and complete knowledge concerning the existence of fact which the party having the evidential burden, such as the defendant in this case, is called upon the negative or has peculiar knowledge or control of evidence as such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disapproved by the party having such knowledge or control. The difficulty or proving a negative only relieves the party having the evidential burden from the necessity of creating a positive conviction entirely by his own evidence so that, when he produces such evidence as it is in his power to produce, its probative effect is enhanced by the silence of the opponent (Corpus Juris, Vol. 31, Para 113). The third principle that has to be borne in mind in the one that when both parties have led evidence, the onus of proof loses all importance and becomes purely academic. Referring to this principles, the Supreme Court stated in Narayan Vs. Gopal, AIR 1960 SC 100 as follows: "The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail, where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic." We have referred to these three principles as they are important and have to be borne in mind by the Court while deciding whether the initial 'evidential burden' under As. 118 of the Negotiable instruments Act has been discharged by the defendant and the presumption 'disappeared' and whether the burden has shifted and later whether the plaintiff has discharged the 'legal burden' after the same was restored. For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under S.118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all concenivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words 'until the contrary is proved' in S.118 do not mean that

the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the court to consider the non-exestence of consideration so probable that a prudent man ought, under the circumstances of the case, to fact upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of S.118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden. Thereafter, the presumption under S.118 does not again come to the plaintiff's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. Before leaving the discussion on these aspects we would like to make it clear that merely because the plaintiff comes forward with a case different from the one mentioned in the promissory note it will not be correct to say that the presumption under S.118 does not apply at all. In our view the presumption applies once the execution of the promissory note is accepted by the defendant but the circumstance that the plaintiff's case is at variance with the one contained in the promissory note or the notice can be relied upon by the defendant for the purpose of rebutting the presumption and shifting the evidential burden to the plaintiff who has also the legal burden. To the above extent, we agree with the view of the Bombay High Court in Taramhomed's case (AIR 1949 Bombay 257 (supra). Our dissent is only to the extent of the principle laid down in that case that even when the case of the plaintiff and that of the defendant is disbelieved still the suit is to be decreed on the basis of the presumption under As. 118 of the Negotiable instruments Act. We, therefore, respectfully follow the decision of the Supreme Court is Kundanlal's case. (AIR 1961 SC 1316) (supra) and dissent from the judgment of the Bombay High Court in Tarmahomed vs. Syed Ebrahim in so far as it held that even after the plaintiff's version and the defendants version are disbelieved, still the presumption under S.118 operates, We also dissent from the judgments of the Kerala High Court in Alex Mathew vs. Philip, AIR 1973 Ker 210, as also from the judgment of the Allahabad High Court in Lal Girwarlal vs. Daul Dayal, AIR 1935 All 509; pf the Nagpur High Court in Prem Raj vs. Nathumal, AIR 1936 Nag 130; of the Calcutta High Court in Ramani Mohan vs. Surjya Kumar Dhan, AIR 1943 Cal. 22; of the Patna High Court in Barham Deo Singh Vs. Kari Singh, AIR 1936 Pat 498 and of the views of Abdur Rahim, J. in Venkataraghavalu Chetty Vs. Sabapathy Chetti, (1911) 21 Mad LJ 1013 of the Madras High Court. We accordingly overrule the decision of our High Court in M. Janaka Lakshmi Vs. Madhava Rao, (AIR 1973 Andhra Pradesh 103). On the contrary, we follow the views of Varadachariar J. in the decisions of the Madras High Court in Narasamma Vs. Veerraju, (AIR 1935 Mad 769)

and Lakshmanaswamy Vs. Narasimha Rao, AIR 1937 Mad 223 of the views of Wanchoo, C.J. (as he then was) in Heerachand Vs. Jeevraj case, (AIR 1959 Raj 1(FB), Rajasthan High Court and of Teckchand, J. of the Punjab High Court in Chandanlal Vs. Amin Chand, AIR 1960 Punj 500 and the lahore High Court in Sundar Lal SIngh vs. Klushi Singh, AIR 1927 Lah 864 rendered by Teckchand, J. of thee Allahabad High Court in Md. Shafi vs. Md. Moazzam Ali, AIR 1923 ALL 214 of Pandey and A.P. Sen, JJ. of the Madhya Pradesh High Court in Indermal Vs. Ram Prasad, AIR 1970 Madhya Pradesh 40 and of Honnaiah and E.S. Venkataramiah, JJ. of the Mysore High Court in Sharada Bai vs. Syed Abdul Hai, (971) 2 Mysore LJ 407; We approve of the views expressed by our High Court in Maddam Lingaiah Vs. Hasan." This Court in Kundan Lal Rallaaram vs. Custodian Evacuee Property, Bombay (AIR 1961 SC 1316) declared the Section 118 of the Act lays down a prescribed special rule of evidence applicable to negotiable instruments. The presumption contemplated there under is one of law which obliges the Court to presume, inter alia, that the negottiable instruments or the endorsement was made or endorsed for consideration and the burden of proof of failure of consideration is thrown on the maker of the note or the endorser as the case may be. Relying upon the law laid down in Rameshwar Singh Vs. Bajit Lal (AIR 1929 PC 95) approved by this Court in Hiralal Vs. Badkulal (AIR 1953 SC 225)., it was held:- "This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia that the negotiable instrument or 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 can 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 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 necesarily 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. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under 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 S.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, S.118 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 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. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compeling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in S.114 and other Section of the Evidence Act. Under Section 114 and other Sections of the Evidence Act. Under section 114 of the Evidence Act "The Court may presume the existence of any fact which it think 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 unfavorable 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 withhold by the plaintiff, S.114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavorable to the plaintiff. This presumption, if raised by a court can under certain circumstances rebut the presumption of law raised under 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." Again in K.P.O. Maideenkutty Hajee Vs. Pappu Manjooran and Anr. (1996) 8 SCC 586) this Court declared that when the suit is based on a pronote which is proved to have been executed, Section 118 (a) raises a presumption, until the contrary is proved, that the promissory note was made for consideration. Initial presumption raised under the Section becomes unavailable when the plaintiff himself pleads in the plaint different consideration. If the plaintiff pleads that the promissory note is supported by a consideration as is recited in the instrument, the burden is on the defendant to disprove that the promissory note is not supported by consideration or different consideration, other than the one as cited in the promissory note did pass. If that consideration is not valid in law nor enforceable the court would consider wether the instrument is supported by by valid and legally enforceable consideration. The position of law was thus summarised; "It would thus be clear that when the suit is based on pronote, and promissory note is proved to have been executed, Section 118(a) raises the presumption, until the contrary is proved, that the promissory note was made for consideration. That initial presumption raised under Section 118(a) becomes unavailable when the plaintiff himself pleads in the plaint considerations. If he

pleads that the promissory note is supported by a consideration as recited in the negotiable instrument and the evidence adduced in support thereof, the burden is on the defendant to disprove that the promissory note is not supported by consideration or different consideration other than one recited in the promissory note did pass, if that consideration is not valid in law nor enforceable in law, the court would consider whether the suit pronote is supported by valid consideration or legally enforceable consideration. Take for instance, a pronote executed for a time barred debt. It is still a valid consideration. The falsity of the plea of the plea of the plaintiff also would be a factor to be considered by the Court. The burden of proof is of academic interest when the evidence was adduced by the parties. The court is required to examine the evidence and consider whether the suit as pleaded in the plaint has been established and the suit requires to be decreed or dismissed." Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and Andhra Pradesh High Court in this regard. In the instant case, the existence of the consideration mentioned in the promissory note was denied by the defendant with reference to the circumstance which according to him showed the non-existence of such consideration. It was submitted that the parties to the litigation had been having business dealings and transactions with respect to import of steel

including drum sheets. In or about August 1961 the defendant claimed to have offered to arrange to import for the consideration of 10160 metric tonnes of steel drum [sheets from USA on the terms and conditions contained in the letter dated 10.8.1961. The plaintiff was alleged to have accepted the offer and stated that the shipment of the materials would have to be made within the validity period of import licence, issued in the name of the plaintiff and that all requisite formalities at the level of the authorities concerned would have to be complied within the time. The defendant claimed to have confirmed that the order placed by the plaintiff had been booked and requested the plaintiff to open the necessary letter of Credit on the terms and conditions contained in the letter of the defendant dated 15.9.1961. The total price of the goods to be imported under the said import licence and the aforesaid arrangement with the plaintiff was about Rs. 55,30,000/-. The plaintiff through its director Shri L.P. Goenka was stated to have represented to the defendant in October 1961 that until and unless the assurance or guarantee that deliveries would be made in time could be given, the letter of Credit would not be opened by the plaintiff. Shri Goenka insisted that the defendant should either give a guarantee or provide some security for the due performance by the defendant of its obligation under the said arrangement for supply of goods under the Letter of Credit. It was further suggested that the defendant should execute a promissory note for the sum of Rs. 620000/- by way of collateral security for payment to the plaintiff of damages, in any event, which the plaintiff might actually suffer in consequence of non-supply of the goods due to default on the part of the supplier. Eventually, the defendant in order that its reputation in the foreign market and that the foreign suppliers might not be injured, was compelled to agree to execute a promissory note for Rs. 6,20,000/- by way of collateral security. It was specifically pleaded that:- "On or about October 11, 1961, at the request of the plaintiff and on the express agreement or understanding between the plaintiff and the defendent as aforesaid the defendant executed the Promissory Note for Rs. 62,000/(Which-Promissory Note is the subject matter of the suit) in favour of the plaintif by was of collateral security for payment to the plaintiff of damages not exceeding, in any event, the said amount which the plaintiff might actually suffer in consequence of non supply of goods due to default on the part of the foreign supplier." Denying the consideration the defendant submitted that: "The defendant states that in the premises there was no consideration for execution of the said Promissory Note by the defendant. No amount or value whatsoever was received by the defendant for the execution of the said Promissory Note. The defendant further states that in any event, the consideration, if any (which is denied) for the said Promissory Note has failed. The same is no longer enforceable or binding or the defendant. The defendant has no liability whatsoever to the plaintiff on the Promissory Note or otherwise. The plaintiff has suffered no damages. Further the said Promissory Note having been given and accepted as collateral security the plaintiff is not entitled to sue thereon without suing for damages, if any, actually suffered and then only to the extent of such damages upto a maximum of Rs. 6,20,000/-" A perusal of the written statement of the defendant would clearly and unam-

biguously show that to disprove the consideration of the Promissory Note, he had brought certain circumstances to the notice of the Court which he wanted to probabilising by leading evidence. The evidence led by the defendant in that regard was not accepted by any of the judges dealing with the case as noticed herein earlier. In the absence of disproving the existence of the consideration, the onus of proof of the legal presumption in favour of the plaintiff could not be shifted. It is true that the plaintiff had produced evidence in the case and the evidence was in fact the evidence in rebuttal, of the evidence produced by the defendant in the case. After holding issue No.1 to have not been proved, the High Court was not justified in holding that the defendant had discharged the onus of proof of issue No. 2. In fact both the issues were required to be decided together which was not done with the result that miscarriage of justice crept into the proceedings depriving the plaintiff of its rights on account of the pendency of this litigation in the courts for a period of about now four decades. The technicalities of law and procedural wrangles deprived the plaintiff of its due entitlement. The justice claimed by the plaintiff was buried under the heaps of divergent legal pronouncements on the subject conveyed and communicated in sweetly coated articulate language and the oratory of the persons which is shown to have been resorted to present the rival claims. The approach adopted by the majority of the Judges in dealing with the case was contrary to the basic principles governing the law relating to negotiable instruments. Faith of business community dealing in mercantile and trade cannot be permitted to be shaken by resort to technicalities of law and the procedural wrangles as appears to have been done in the instant case. Even though it is true that the plaintiff's evidence was not believed yet we are of the opinion that the same could not be made basis for rejecting its claim because obligation upon the plaintiff to lead evidence for the purposes of "to prove his case", could not have been insisted upon because the defendant has prima facie or initially not discharged his onus of proof by showing directly or probabilising the non existence of consideration. We do not agree with the submission of the learned counsel for the defendant that issues Nos. 1 to 3 were based upon different pleas raised in the defence. In the contextual circumstances, we find that all the three issues were based upon the plea relating to non existence of consideration, namely, the Promissory Note allegedly having been procured by the plaintiff as a collateral security and not for the purpose which was mentioned in it namely, "for value received". The finding that the plaintiff had failed to prove the case despite holding the defendant had not discharged his initial burden of proving the non existence of consideration amounted to negating the presumption arising under Section 118(a) of the Act. In the circumstances, the appeal. The suit of the appellant-plaintiff for the recovery of Rs. 6,51,900/- is decreed with pendente lite and future interest at the rate of 6% per annum. The appellant is also held entitled to costs throughout.