K.P.O. Moideenkutty Hajee vs Pappu Manjooran & Anr on 6 February, 1996

Equivalent citations: JT 1996 (3), 329 1996 SCALE (2)784, AIR 1996 SUPREME COURT 3356, 1996 (8) SCC 586, 1996 AIR SCW 2756, 1996 WLC(RAJ)(UC) 230, (1996) 2 SCR 227 (SC), (1996) 3 JT 329 (SC), 1996 (3) JT 329, (2009) 1 NIJ 59, (1996) 3 CIVLJ 156, (1996) 2 RRR 7, (1996) 3 CURCC 33, (1996) 2 LANDLR 114, (1996) 2 MAHLR 345, (1996) 2 RECCRIR 9, (1996) 1 LJR 481, (1996) 3 BANKLJ 446, (1997) 1 BANKCAS 357, (1996) 2 ICC 470, (1996) 2 BLJ 684, (1997) BANKJ 86, (1996) 1 KER LT 651, (1996) 2 CURLJ(CCR) 1, (1996) 2 BANKCLR 88

Author: K. Ramaswamy

Bench: K. Ramaswamy, B.L Hansaria

PETITIONER:
K.P.O. MOIDEENKUTTY HAJEE

Vs.

RESPONDENT:
PAPPU MANJOORAN & ANR.

DATE OF JUDGMENT: 06/02/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
HANSARIA B.L. (J)
G.B. PATTANAIK (J)

CITATION:
JT 1996 (3) 329 1996 SCALE (2)784

ACT:

HEADNOTE:

JUDGMENT:

O R D E R Impleadment allowed.

Leave granted.

We have heard the counsel on both sides. The appellant defendant is assailing the concurrent findings of the High Court in A.S. No.372/83, dated 12.6.1990 and the Civil Court in O.S. No.67/81, dated 12.10.1981 that though promissory note, Ex.A1, dated October 28, 1978 executed for a sum of Rs.1.5 lakhs recites cash consideration, since the consideration, as pleaded in the plaint, namely, an additional land of 3 acre and 44 cents bearing survey no.8/1A2 and a building, was delivered, in addition to 10 acres of land delivered under agreement of sale dated July 21, 1978, Ex.B1, the consideration for Ex.A1 has been proved; and the suit for recovery of the amount on the basis of Ex.A1 is valid in law.

The facts in support thereof are that the first respondent as a general power of attorney had entered into an agreement of sale, Ex.B1, to sell 35 acres of land for a total consideration of Rs.10 lakhs. In furtherance thereof, on paying Rs.4 lakhs as part consideration, 10 acres of land was put in possession of the appellant. On the appellant requiring additional land and as he did not have cash with him, had executed promissory note, Ex.A1, for a sum of Rs.1.50 lakhs and in furtherance thereof possession of three acres and forty four cents of land and building was given to the appellant. It is not necessary for us to proceed further in this matter relating to Ex.B1 for the reason that Ex.B1 has fallen through and the contract has not been completed.

Chapter VIII of the Negotiable Instruments Act, 1881 (for short the `Act') provides special rules of evidence. Section 118 draws presumption as to the negotiable instruments. "Until the contrary is proved", under clause

(a) presumption shall be made of consideration that every negotiable instrument was made instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, negotiated or transferred for consideration.

This Court in Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316], speaking through K. Subba Rao, J.[as he then was] considering the scope of the presumption had laid down the law thus:

> "Section 118 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 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 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 pleading and so unchanged during the entire trial whereas the latter is not constant but shifted as soon as a party adduces sufficient evidence to raise a presumption in his favour.

The evidence required to shift the burden need not necessarily be directed evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. 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 reflected for a particular consideration should produce the said account books. If such a relevant evidence is withheld by the plaintiff, S.114, Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff.

This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instrument Act."

In that case the appellant was doing business in radio and gramophones in Karachi in partnership with one Sarup Singh. He had transferred his shop to his friend Iqbal Hussain and the stock in trade for consideration to Abdul Satar Ahmedbhoy. In consideration thereof he received Rs.96- 1-0 in cash and an endorsed in his favour a promissory note for Rs.37,000/- executed by another. On that basis he laid claim before the Custodian of Evacuee Properties. The Custodian General had held that from circumstantial evidence of not placing the relevant material, the presumption under section 118(a) was rebutted and the appellant had not proved that consideration had been passed under that promissory note endorsed for consideration, This Court after elaborate consideration of all the case law for withholding material evidence by the appellant had held that the presumption raised under Section 118, in certain circumstances, stands rebutted. The burden of proof may be shifted by presumption of law or fact or presumption of law may be rebutted not only by direct or circumstantial evidence but also by presumption of law and fact. The question of irrebuttable presumption of law was not gone into. Accordingly rejection of the claim on the basis of the presumption under Section 118 was rebutted.

In U.Ponnappa Moothan sons, Palghat v. Catholic Syrian Bank Ltd. & Ors. [(199l) 1 SCC 113], a Bench of two Judges of this Court was to consider the presumption under Section 118(g) and Section 9 of the Act when the proviso to Section 118 was put in issue. This Court held that when the presumption, as provided under section 118(g), gets rebutted under the circumstances mentioned therein, the burden of proving that he is a holder in due course lies upon him. In a given case, the court, while examining these requirements including valid consideration must also go into the question whether there was a contract express or implied, for crediting the proceeds to the account of the bearer before receiving the same. It was held that it is a question of fact in each case, namely, whether there was such a contract express or implied that the customer should be entitled to draw presumption against the amount of cheque before it is clear. The words "without having sufficient cause to believe" have to be

understood in this background. In Indian Bank v. K. NatarajaPillai & Anr. [(1993) 1 SCC 493], another Bench of two Judges was to consider whether for granting a short-term loan by the bank, further loan of Rs.1,00.000 was sanctioned to cover up the deficiency for which promissory note wan executed alongwith property hypothecated for short- term loans. It was contended that the sanction of Rs. 1,00,000/under the promissory note was towards discharge of the equitable mortgage and not for cash consideration and that, therefore it was not supported by consideration, It was held that the promissory note was fully supported by consideration and the presumption of passing of the consideration got attracted.

In G. Ramatulasamma v. K. Gowaraiah [1984 (2) Andhra Law Times 333]. the facts were that a promissory note was executed for a sum of Rs.3,000/-, On its basis the suit was laid for its recovery with interest. The defence of the appellant was that he had executed a mortgage bond for a sum of Rs.10,000/- in favour of the son-in-law of the plaintiff. For excess interest payable thereon at 25% per annum, the promissory note was executed. The excess rate was in violation of usurious rate of interest. The promissory note was not supported by legal consideration since the appellant was a small farmers entitled to the benefit of the provisions in Small Farmers and Debtor's Relief Act VII of 1977 under which the debt stood extinguished. On those facts, the question arose as to when the presumption stands rebutted? It was held by Andhra Pradesh High Court that the presumption is one of law. The Court, therefore, shall presume that the negotiable instrument was made for consideration. It throws burden of proof of failure of consideration on the maker of the promissory note. The burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. On its proof the rule of presumption under Section 118 [a] helps him to shift the burden on the defendant. The burden of proof as a question of law rests, therefore, on the plaintiff but as soon as the execution is proved, Section 118 imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. That presumption shifts the burden of proof, namely, establishing a case that the promissory note is not supported by consideration to the defendant. The defendant may adduce direct or circumstantial evidences to prove that the promissory note was not supported by consideration. If he adduces acceptable evidence, the burden again shifts to the plaintiff. If the circumstances relied on by the defendant are so compelling, the burden is on the plaintiff to prove the contra. The statutory presumption, though is one of law, is also a question of fact to be proved in each case. The presumption raised under section 118 is not in respect of the consideration mentioned in negotiation instruments, the presumption is in favour of there being a consideration for the negotiable instrument. Any consideration which is a valid consideration in law is valid and enforceable. If a particular consideration mentioned in the negotiable instrument is found to be false and some other consideration is set up that is a factor which the court would take into consideration in deciding whether the defendant has discharged the burden cast on him by Section

118. The Court is required to consider the entire evidence laid before the court. Very often important admissions elicited by counsel for the defendant in the cross-examination of the plaintiff certainly can be availed of by the defendant. The court, therefore, must always bear in mind the statutory presumption under Section 118 [a] and also the fact that the burden of proof lies on the defendant and to see whether the burden has been discharged on not. How burden can be discharged or whether it has been discharged is a matter of appreciation of evidence. The failure of the plaintiff to prove a particular consideration may itself probabilise the defendant's version and lead to the conclusion that there was no consideration at all; on the other hand, it may not have any consideration. The expression "until the contrary is proved", in Section 118 of the Act must also be read in an expanded sense, having regard to the definition of the word 'disapproved' and of the expression 'shall presume' in Sections 3 and 4 of the Evidence Act. It was, therefore, held that the courts below proceeded merely on the presumption under section 118 [a] without considering the true legal import vitiating the approach of the courts as an error of law. Accordingly, the suit was remitted to the trial Court to give opportunity to the parties to adduce evidence afresh and decide the case on the merits in the light of the law thus laid down.

In Y.M. Prasad and Anr. v. The Sanathnagar Wire Products & Ors. [1987 (2) Andhra Law Times 947] facts were that the plaintiff, partnership firm had two promissory notes Ex.A5 and A6 for a sum of Rs.30,000/and Rs.20,000/- respectively from the appellant defendant. Two cheques A7 and A8 were executed by second defendant as collateral security. Before expiry of Ex.A5 and A6, a renewal, the promissory note Ex.A9 was executed on the basis of which the suit was filed. The defence was that no amount was borrowed. It was pleaded that the appellant- first defendant's business was being looked after by the husband of the second defendant who had lent a sum of Rs.50,000/- to the first defendant and he executed a promissory note in his favour. A suit filed by him for recovery of that amount was already decreed. The husband of the second defendant was lending money without licence. He got signatures on blank papers from the appelnant-first defendant for the purpose of income-tax and other transactions. Therefore, he did not execute Ex.A9, promissory note nor receive any consideration thereunder. He also denied that Ex.A9 was renewal of Ex.A5 and A6, promissory notes nor they were supported by consideration. After considering the case law and the evidence it was held by the High Court that the appellant had proved that Ex.A5 and A6, promissory notes were not supported by consideration. lt was held that the expression "until the contrary is proved" under section 118 of the Act does not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant his the option to ask the court to consider the non-existence so probable that a prudent man ought, in the circumstances of the case, to act upon the supposition that the consideration did not exist. Though the evidential burden is initially placed upon the defendant by virtue of section 118, it can be rebutted by the defendant by showing the 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. The burden is on the plaintiff to prove that the pronote is supported by coast consideration as recited in the pronote. lt was also further observed that when the Act was made the presumption was drawn when the moral values were high in the society. With the passage of time when moral standard eclipsed to its ebb: and money lending has become a profession and means to an end, several subterfuges are being adopted to exploit the indigent people due to the economic necessity. The statutory presumption under section 118 [a] requires re-look consistent with Article 39A which guarantees as a fundamental right equal justice read with Articles 14 and 21 which provides procedural fairness. A statutory presumption requires re-examination.

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 different 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 disapprove 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 As 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 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.

In this case, the plea of the appellant is that he had executed Ex.A-1, promissory note to show to the principal of the first respondent, the power of attorney/agent under which the respondent had entered into the agreement. that Ex.B1 would be proceeded with and on the faith thereof, they intended to proceed to perform their part of the contract under Ex.B1. Later, the respondent got Ex.B1 cancelled and consequently, Ex.B1 contract became unenforceable and that, therefore, Ex.A1 is not supported by consideration and so the respondents cannot recover the amount.

After adduction of evidence, the trial Court considered the evidence and recorded a finding in para 36 thus:

"Thus there is exuberance of documentary evidence and circumstances to prove that the defendant executed Exhibit A1 promissory note when they were put in possession of the remaining extent of 3 acres and 44 cents in R.S.8/1A2."

The High Court in the appeal has further reinforced the finding holding thus:

> "There is oral and documentary evidence which would show that the consideration so pleaded, namely, for putting the defendants in possession of an additional area uncovered by the agreement, and in relation to certain buildings therein, situate in R.5.8/1A2, has been fully established. One important circumstance for evaluating the rival contentions is the series of correspondences which had been flowing from Pappu Manjuran to the Ist defendant starting from Ext. B2 dated 28.6.1979. That letter specifically referred to the payment due under the promissory note for a sum of Rs.1,50,000/- and the non-payment of the principal amount or even the interest. The letter reads natural and is a true reflection of the feelings of the Ist plaintiff. The distress felt by him in not getting the payment, and not having the sale transaction completed is indicated therein. The letter Ext.
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> B10 dated 21.7.1979 has already been referred to. It recapitulates the circumstances under which for the entirety of the period one year after the execution of the agreement, no step whatever had been taken by the defendants for having the sale deeds executed."
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> It is true as contended by Shri Sivasubramaniam. learned senior counsel for the appellant that the trial Court raised presumption of passing of cash consideration under Section 118(a) and burden of proof was wrongly shifted to the defendant and when the plaintiff pleads different considerations, the presumption under Section 118 (a) is not available. As held earlier, once the plaintiff pleads consideration different from the one found in negotiable instrument, the statutory presumptions does not arise. Under Section 118(a) of the Act. until the contrary is proved, presumption shall be made that every negotiable instrument was made for consideration. Once there is admission of the execution of the promissory or the same is proved to have been executed, the presumption under Section 118(3) is raised that it is supported by consideration. That initial presumption will not be available to the plaintiff in this case. He, however, not only relied on Ex.A1 but also the exuberance of documents that came into existence, viz., Ex.B1 agreement, correspondence, conduct of the parties and the endorsement on the agreement, Those documents do show that though cash consideration was recited under Ex.A1, in fact, the consideration was for the transfer of the land, namely, to the extent of 3 acres 44 cents and the building thereon in R.S.8/1A2 and that Ex.A1 is supported by valid consideration.
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> As seen, the finding of the trial Court as well as the appellate Court is that valid consideration was passed under Ex.A1 for a sum of Rs.1.50 lakhs. Since the respondents had delivered possession of 3 acres 44 cents of land and the building to the appellant which is in addition to the lands covered under Ex.B1, the possession of land having been passed into the hands of the appellant and since in consideration thereof he had executed Ex.A1 promissory note, it is supported by legally enforceable consideration. Therefore, the decree granted by both the courts below in that behalf

is not beset with illegality warranting interference.

The appeal is accordingly dismissed. No costs.