Mallavarapu Kasivisweswara Rao vs Thadikonda Ramulu Firm & Ors on 16 May, 2008

Equivalent citations: AIR 2008 SUPREME COURT 2898, 2008 (7) SCC 655, 2008 AIR SCW 4777, 2008 (8) SCALE 680, (2008) 6 ALLMR 8 (SC), (2008) 68 ALLINDCAS 173 (SC), 2008 (6) ALL MR 8 NOC, (2008) 41 OCR 142, (2008) 2 NIJ 127, (2009) 66 ALLCRIC 475, (2008) 8 MAD LJ 123, (2008) 3 RAJ LW 2717, (2008) 3 RECCRIR 205, (2008) 3 BANKCAS 416, (2008) 3 RECCIVR 336, (2008) 8 SCALE 680, (2008) 72 ALL LR 508, (2008) 3 CIVILCOURTC 392, (2008) 3 BANKCLR 289, (2008) 6 BOM CR 826

Author: Tarun Chatterjee

Bench: Tarun Chatterjee, Harjit Singh Bedi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5597 of 2001

MALLAVARAPU KASIVISWESWARA
RAO ..Appellant

VERSUS

THADIKONDA RAMULU FIRM
and Ors. ..Respondents

JUDGMENT

TARUN CHATTERJEE,J.

1. This appeal is directed against the final judgment and order dated 30th of July, 1999 passed by a Division Bench of the High Court of Judicature of Andhra Pradesh at Hyderabad in AS No. 721/92 whereby the High Court had affirmed the judgment and decree dated 5th of August, 1991 in OS No. 33/87 of the 1st Court of the Additional Subordinate Judge, Kakinada, E.G. District, Andhra Pradesh decreeing the suit filed by the appellant in part for a sum of Rs. 2,33,125/- with interest @ 18% from the date of the suit till realization.

2. The facts leading to the filing of this appeal as emerging from the case made out by the appellant in the plaint are as under.

The appellant is the son-in-law of respondent no.2. The respondent nos. 3 and 4 are the sons of respondent no. 2 while respondent no. 1 is the firm belonging to respondent nos. 2 to 4 whose managing partner is respondent No.2. The appellant introduced one Pynda Ramakumar to the respondents who agreed to advance monies to the respondents on the understanding that the respondents would repay the amount while the appellant would execute pronotes as surety. The appellant accordingly executed certain pronotes whose consideration was received by the respondents. As regards repayment, the respondents were sending monies by drafts or otherwise in the name of one Narayan Murthy, who was the clerk of the appellant, by depositing the same in his account. The appellant would withdraw such amount deposited in the clerk's account by encashing the TTs or Drafts which was then paid to Pynda Ramakumar who then got the endorsements signed by the appellant. This continued for some time but when the respondents failed to repay the balance amount due to Pynda Ramakumar, he pressurized the appellant for payment of the balance amount due to him. The appellant made several demands to the respondents for payment of the amounts due to Pynda Ramakumar but when the respondents could not pay the amounts, the respondent no. 2 as manager of the joint family and also on behalf of the respondent No. 1 firm executed two pronotes for sums of Rs. 2,15,000/- and Rs. 4,72,000/- being Ex.A-20 and Ex.A-21 respectively and a Khararnama in favour of the appellant whereby the respondent No. 1 agreed to repay amounts with interest at Rs. 2.50 ps. and Rs. 1.50 ps. respectively per annum. After execution of such pronotes, when, despite several demands, the respondents did not pay the amounts, a notice dated 3rd of October, 1986 was issued to them by the appellant stating that the pronotes and khararnama were executed by respondent no. 1 in favour of the appellant which may be discharged. The respondents vide letters dated 16th of October, 1986 and 20th of October, 1986 replied to the notice wherein they did not specifically deny the execution of the pronotes and the Khararnama but referred to the allegations made in such notice as false and vague.

3. In the backdrop of the above mentioned facts, in 1987, the appellant, therefore, filed O.S. No. 33/1987 in the 1st Court of the Additional Subordinate Judge, Kakinada for recovery of the amounts due under the pronotes of Rs. 4,72,000/- and Rs. 2,15,000/- with interest and costs. The respondent No. 2 contested the suit by filing written statement on his own behalf and also on behalf of the respondent No. 1 firm denying any execution of the pronotes in favour of the appellant and further stating that the pronotes were forged by the appellant with the assistance of his brother-in-law and the Clerk. It was further alleged that the appellant bore a grudge against the respondents and was involved in many criminal cases and since he was not looking after his wife and children properly, the respondents had opened an account in the name of Narayanmurthy and were sending monies regularly in that account for the maintenance of the appellants' family and therefore, it was alleged that no money was ever borrowed from the said Pynda Ramakumar, whom the respondent no.2 did not know, through the appellant for the respondent No. 1 firm. It was also alleged by the respondent no. 2 that the respondent no. 1 firm was not carrying on any business and in fact, all its branches were closed and the respondent Nos. 2 to 4 were partitioned in the year 1980.

4. The respondent nos. 3 and 4 also filed separate written statements contending, inter alia, that they had not signed any pronotes and the scribe of the pronotes in question was the clerk of the appellant and the Attester was his brother-in-law. They also contended that they were not aware of the alleged borrowing by the respondent no.2 for the respondent no. 1 firm from the said Pynda Ramakumar or the appellant and in fact, the pronotes in question did not show that the amounts so borrowed were for the business of the respondent no.1 firm. It was further alleged in the written statement filed by the respondent Nos. 3 and 4 that the pronotes were fabricated on account of family disputes between the appellant and the respondent No. 2 and that they had no necessity to borrow any amount from some other person. Infact, Pynda Ramakumar was a friend and an associate of the appellant. Even otherwise, the pronotes were not binding on them as no amounts were borrowed for the benefit of the firm and they were not signatories to the said pronotes. It was further the case of the respondent Nos. 3 and 4 that there was no joint family because the properties of the respondents were partitioned in the year 1980 and, therefore, the respondent no. 2 had no right or authority to borrow debts for the firm on their behalf. Accordingly, all the respondents prayed for dismissal of the suit filed by the appellant.

5. On the basis of the pleadings of the parties, the following issues were framed by the trial court for consideration: -

a) Whether the two suit pronotes dated 29.08.86 and 29.08.1986 are true, valid and binding on the defendants?

b) Whether the plaintiff is entitled to recover the suit amount with subsequent interest and costs thereon?

c) Whether the 2nd defendant executed the suit pronotes in the capacity of Manager of the joint family of the defendants 2 to 4 so as to bind the defendants 3 and 4?

executed pronotes as the Managing Partner of D.1 firm so as to bind its partners 3 and 4?

e) To what relief?

6. As noted herein earlier, by the judgment dated 5th of August, 1991, the 1st Court of the Additional Subordinate Judge, Kakinada decreed the suit of the appellant in part for a sum of Rs. 2,33,125/- with proportionate costs and subsequent interest @ 18 % p.a. from the date of suit till realization holding the same to be a commercial transaction(Ex.A-20). As regards recovery of the amount due under the other pronote Ex.A-21, the trial court held that the appellant was not entitled to recover the same because the said pronote was not supported by consideration and accordingly, the rest of the claim of the appellant was dismissed with proportionate costs. Feeling aggrieved by the said judgment of the trial court, both the appellant and the respondents filed two appeals before the High Court of Andhra Pradesh at Hyderabad being A.S. NO. 721/87 and 1872/92 respectively. By the impugned judgment of the High Court dated 30th of July, 1999, both these appeals were dismissed. The appellant has filed this special leave petition before us against the aforesaid judgment of the High court passed in A.S. No. 721/87.

7. We have heard the learned counsel for the parties and examined the judgment of the High Court as well as the trial Court and other materials on record including the oral and documentary evidence. The only question that needs to be decided in this appeal is whether in the absence of any rebuttal by the respondents to the fact that the promissory note was for consideration as required, which gave rise to the presumption under Section 118 of the Negotiable Instruments Act, the courts below were justified in holding that since the appellant had given evidence inconsistent with such presumption, no decree could be passed on the basis of such presumption.

8. The learned counsel for the appellant contended before us that the trial court had found that the existence of both the pronotes was proved by evidence and the materials on record. The learned counsel for the appellant accordingly contended that although it was never the defence of the respondents that the pronotes were not supported by consideration, nevertheless, the trial court had held that since the appellant had failed to prove that he had borrowed those amounts from Pynda Ramakumar and lent the same to the respondent firm, the pronote Ex.A-21 could not be believed. The learned counsel for the appellant, therefore, vehemently argued that the conclusion reached by the trial court and the High Court to the effect that since the evidence adduced by the appellant was inconsistent with the presumption, in the absence of any evidence by the respondent to rebut the presumption about the pronote, such conclusion was contrary to law. The learned counsel for the appellant, while elaborating her argument further also contended before us that once the execution of the pronote Ex.A-21 was proved, the presumption under Section 118 of the Negotiable Instruments Act came into play and after such presumption, the initial burden was on the respondents to prove the non-existence of the consideration by adducing direct evidence or by preponderance of probabilities showing that the existence of such consideration was improbable, doubtful or illegal and since they had failed to discharge such initial burden, the appellant was entitled to the benefit of the presumption that the pronote was for consideration. In this regard, the learned counsel for the appellant strongly relied on a decision of this court in Bharat Barrel & Drum Company Vs. Amin Chand Payrelal [(1993) 3 SCC 35].

9. These submissions of the learned counsel for the appellant were contested by the learned counsel appearing on behalf of the respondents. The learned counsel appearing on behalf of the respondents have contended that the appellant is not entitled to the benefit of presumption under Section 118 of the Negotiable Instruments Act and that the impugned judgment of the High Court was passed after considering the evidence in extenso to hold that the pronote Ex. A-21 was not supported by any consideration. The learned counsel for the respondents further submitted that the presumption under Section 118 is rebuttable and that the respondents had all along denied the execution of the pronotes.

10. Having heard the learned counsel for the parties, we are of the view that this appeal deserves to be allowed for the reasons set out hereinafter.

11. Section 118 of the Negotiable Instruments Act deals with presumptions as to negotiable instruments. One of such presumptions appearing in Section 118(a), with which we would be concerned in this appeal is reproduced as under:-

> "that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration."

12. Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. In this connection, reference may be made to a decision of this Court in the case of Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Payrelal [supra]. In paragraph 12 of the said decision, this court observed as under: -

> "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 a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a 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 disentitle 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 the 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....."

13.From the above decision of this court, it is pellucid that 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 would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. It is also discernible from the above decision that if 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.

14.Keeping the aforesaid in mind, let us now see if the respondents in this case had discharged the initial burden, which lay on them to prove that the pronote being Ex.A-21 was not supported by consideration.

15. The learned counsel for the appellant, as noted herein earlier, contended that the respondents had neither taken the plea that there was no consideration for the pronote Ex.A-21, either in the reply notice or in the written statement, nor had they adduced any evidence to prove the non-existence of the consideration. The learned counsel for the respondents, however, contended that the respondents had denied the very execution of the pronotes and referred the same as forged both in the reply notice as also in the written statement. We are unable to accept the contentions of the learned counsel for the respondents. In the written statements, the plea of the respondents was that on the face of the pronotes, no cash was paid by the appellant and therefore, the respondents were not liable to pay the amount because the pronotes were forged. It was a finding of the trial court, which was affirmed by the High Court in the impugned judgment that the pronotes were indeed executed by the respondents. It was also a finding of the High Court that except in the reply notice issued by the respondents, nowhere had they stated that the consideration had not passed. It is also an admitted position that the findings of the two courts below was that the execution of the pronotes having been proved, the presumption under Section 118(a) must come into play and the appellant must be entitled to a decree in the absence of evidence to the contrary. Having said this, the High Court proceeded to observe that if there was evidence inconsistent with the presumption under Section 118(a) of the Act, the court would not be in a position to pass a decree in favour of the appellant on the basis of the presumption and therefore, proceeded to examine the evidence of the appellant in extenso. In view of the decision of this Court in Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Payrelal [supra] and also in view of the findings arrived at by the Courts below, we are of the view that since the initial burden on the respondents to show that the pronote being Ex.A-21 was not supported by any consideration was not discharged by them, the High Court was not justified in not decreeing the suit of the appellant in respect of the amount covered by the pro-note Ex.A-21. It is an admitted position that the finding as to the execution of the pronotes had become final. Also, we are of the view that the respondents had not discharged the initial burden of proving the non-existence of consideration either by direct evidence or by preponderance of probabilities. The mere denial, if there be any, by the respondents that no consideration had passed would not have been sufficient and something probable had to be brought on record to prove the non-existence of consideration. In this view of the matter, we are, therefore, of the view that once the execution of the pronote has been proved, the appellant would be entitled to the benefit of the presumption under Section 118(a) of the Negotiable Instruments Act because the respondents had

failed to discharge the initial burden and therefore, the High Court was in error in appreciating the evidence of the appellant to come to the conclusion that since such evidence was inconsistent with the pronote being Ex.A-21, the appellant could not be given the benefit of the presumption.

16. For the foregoing reasons, the appeal is allowed and the judgments of the courts below are, therefore, modified to the extent that the suit of the appellant must stand decreed in its entirety. There will be no order as to costs.

.....J.
[TARUN CHATTERJEE]

New Delhi ;
.....J.
May 16, 2008

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[HARJIT SINGH BEDI]