Ponnammal vs Nagappan on 21 November, 2014

Author: P.Devadass

Bench: P.Devadass

```
 BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 21.11.2014
CORAM
THE HONOURABLE MR.JUSTICE P.DEVADASS
SECOND APPEAL (MD) No.553 of 2011

Ponnammal                                          ... Appellant

-vs-

Nagappan                                                ... Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil
Procedure, against the Judgment and Decree, dated 05.02.2009, passed in
A.S.No.50 of 2006, on the file of the learned  Additional Subordinate Judge,
Dindigul, reversing the Judgment and Decree, dated 28.03.2006, passed in
O.S.No.331 of 2004, on the file of the learned District Munsif, Nilakkottai.
!For Appellant       : Mr.R.Nandakumar

^For Respondent   : Mr.A.Hariharan

:JUDGMENT
```

First, the plaintiff succeeded in the Trial Court, next, the defendant succeeded in the First Appellate Court, thus, the plaintiff is before us.

2. The plaintiff sued the defendant on the foot of Ex.A1 Promissory Note, dated 05.09.2001, for recovering the principal of Rs.50,000/- together with 9% interest. Plaintiff pleaded that she advanced a sum of Rs.50,000/- to the defendant for his family and agricultural expenses.

3 The suit has been resisted by the defendant by filing a written statement. He admits execution of the Promissory Note, but, denies the manner of passing of consideration.

4 The defendant's case is that, at the time of marriage of his daughter, Muthulakshmi, plaintiff gave her a gold chain weighing four sovereigns. In the marriage hall, it was missed. In this connection,

dispute arose between both sides. Sedapatti Subbiah and Kurumbapatti Subbiah have mediated the matter. In lieu of the missing gold chain, the suit Promissory Note was executed by the defendant.

5 In her reply statement, plaintiff reiterated her paying of Rs.50,000/- to the defendant and also denied a jewel matter pleaded in the written statement.

6 On these divergent pleadings, the Trial Court framed issues. Tried the suit. Plaintiff examined herself as PW1 and marked Exs.A1 to A3. Defendant-Nagappan, examined himself as DW1 and Sedapatti Subbiah and Kurumbapatti Subbiah as DWs.2 and 3. He did not mark any document.

7 The Trial Court appreciating the arguments of both sides and the evidence accepted the plaintiff's case of execution of Ex.A1, by the defendant and rejected the defendant's case and thus decreed the suit.

8 In the circumstances, the defendant went to the next Court, namely, Additional Subordinate Court, Dindigul, by way of A.S.No.50 of 2006.

9 The First Appellate Court reappraised the entire evidence. It held that actually Ex.A1 has been executed in lieu of a missing gold chain, so, there was no consideration for Ex.A1 and thus, allowed the appeal, set aside the Judgment and Decree of the Trial Court.

10 In the circumstances, the plaintiff appealed to this Court.

11 At the time of admission, the then learned Brother formulated the following substantial questions of law:

> (1) Whether the defendant has rebutted the presumption of consideration as required under Section 118 of Negotiable Instruments Act as he has admitted his signature in the suit promissory note ?
>
> (2) Whether on the basis of the evidence of the scribe and attestor to the suit promissory note, can it be said there was no passing of consideration and whether the defendant has discharged the burden cast on him ?

12 The specific plea of the plaintiff is that as against execution of Ex.A1, she paid Rs.50,000/- to the defendant.

13 The defendant admits his execution of Ex.A1, but pleads that it was not executed for receipt of any money, actually, it was executed in lieu of a missing gold chain weighing four sovereigns, which the plaintiff gave to defendant's daughter, Muthulakshmi at the time of her marriage.

14 The learned counsel for the appellant/plaintiff would read the evidence of PW1 and the admission of execution of Ex.A1 promissory note by the defendant himself in his pleadings and would submit that in the circumstances, flowing of the legal presumption under Section 118 of the Negotiable

Instruments Act, 1881 is automatic. He would also add that it can be rebutted. However, it was not rebutted by the defendant. The evidence of DWs.2 and 3 is not useful to the defendant to cut the flowing of the legal presumption. The learned counsel for the appellant reading the pleadings in the written statement would submit that it cannot be said that there was no consideration at all for Ex.A1 promissory note.

15 On the other hand, the learned counsel for the respondent/defendant would submit that the defendant is bound to disprove the legal presumption, however, to dislodge it, the defendant need not let in any direct evidence, he can show to the Court by the circumstances of the case and record of the case that the existence of the consideration is improbable, doubtful or illegal. However, in this case, as against the sole oral testimony of PW1, D.Ws.1 to 3 have spoken to about the non-existence of consideration as pleaded in the plaint and the defendant has successfully proved the jewel case. In this connection, the learned counsel for the respondent also cited BHARAT BARREL & DRUM MANUFACTURING COMPANY VS. AMIN CHAND PAYRELAL [1999 (3) SCC 35 : 1999 (1) CTC 497] 16 The learned counsel for the respondent would also submit that no consideration has moved at the desire of the promisor. Ex.A1 was executed at the instance of one of the mediators. Thus, it is not consideration as per section 2(d) of the Indian Contract Act.

17 Another argument of the learned counsel for the respondent is that as a consideration for plaintiff to abstain from preferring a police complaint against defendant , defendant had executed Ex.A1. Such a promise is opposed to public policy. Such a contract is not enforceable in a Court of Law. This principle has been incorporated in Section 23 of the Indian Contract Act, 1872. In this connection, the learned counsel also would cite LOGANATHAN [MINOR] AND OTHERS VS. PONNUSWAMI NAICKER AND OTHERS [AIR 1969 Madras 15 D.B.) 18 The learned counsel for the respondent also would submit that as per the decision in KRISHNA JANARDHAN BHAT VS. DATTATRAYA G. HEDGE [AIR 2008 SC 1325], there is stipulation under the Income Tax Act for the issuance of demand drafts in transaction involving more than Rs.20,000/-. However, in this case, no D.D. was given to the defendant.

19 In reply, the learned counsel for the appellant would submit that the evidence of DWs.1 to 3, is not sufficient to displace the legal presumption under section 118 of the Negotiable Instruments Act.

20 The learned counsel for the appellant would also reply that considering the defendant's admission in his written statement and in his evidence, it cannot be said that for Ex.A1, there is no consideration at all. He would also submit that in the circumstances, the plaintiff could have made some alternative plea, he did not make it in the plaint but that would not debar the Court from granting her the relief. In this connection, the learned counsel for the appellant would cite FIRM SRINIVAS RAM KUMAR VS. MAHABIR PRASAD AND OTHERS [AIR (38) 1951 SC 177].

21 The learned counsel for the appellant would further reply that the evidence shows that defendant desired the execution of Ex.A1. It will fall under section 2(d) of the Indian Contract Act.

22 The learned counsel for the appellant would also reply that as per the admitted case of the defendant on account of missing of gold chain, the defendant has been placed in a situation of

launching a prosecution. In such view of the matter, invoking of Section 23 of the Indian Contract Act will not arise in this case. No doubt, there is a stipulation in the Income Tax Act to pay in D.D. in transaction involving more than Rs.20,000/-, but, that would not make passing of the consideration based on the evidence on record otiose.

23 Replying the appellant's submission, based on alternative relief, the learned counsel for the respondent would submit that de hors the pleadings no amount of evidence should be looked into. Even in her reply statement, the consistent case of the plaintiff is consideration passed in the form of cash and Ex.A1 was not executed in lieu of missing of a gold chain. In such circumstances, plaintiff cannot seek alternative relief.

24 I have anxiously considered the rival submissions, perused the evidence on record, the judgment of the Courts below and the decisions cited at the bar.

25 The frame of the suit is a simple suit for recovery of money based on Ex.A1, Promissory Note, dated 05.09.2001, which is stated to have been executed for the receipt of principal amount of Rs.50,000/- repayable on demand with prescribed rate of interest. DW3 scribed Ex.A1 and D.W.2 is an Attestor.

26 In Negotiable Instruments Act, 1881, certain Special Rules of Evidence have been introduced. In Section 118, there is a presumption that every negotiable instrument has been executed for consideration. It is by law. So it is a legal presumption. The word employed is 'may presume'. So, this presumption is rebuttable.

27 Primarily, the plaintiff has to prove execution. This will never change. Once it is proved, then flowing of the presumption that the negotiable instrument has been executed for consideration shall be presumed. It is also with reference to name, date etc. 28 A general denial in the written statement that there is no consideration is not sufficient. The defendant must plead a probable defence in his written statement. He must show to the Court that in the facts and circumstances passing of consideration is improbable, doubtful or illegal. He need not show it by letting in any direct evidence. But, he must show to the Court by the circumstances of the case and the record of the case as to the non-existence of passing of consideration and it is such that in the circumstances of the case no prudent man will believe that there is consideration. Once it is so proved, the defendant's job is over. The presumption will go away. However, to keep it alive, it is the job of the plaintiff to reiterate the execution. But, if the defendant failed to discharge his said task, the legal presumption will stand as it is. And the plaintiff will be entitled to the decree. This is the dictum laid down in KUNDAN LAL RALLARAM VS. CUSTODIAN, EVACUEE PROPERTY, BOMBAY [AIR 1961 SC 1316]. It was reiterated in BHARAT BARREL (1999(3) SCC 35). It is pertinent to note that the presumption under section 118 Negotiable Instrument Act is based on law, while the presumption under section 114 of the Evidence Act is based on facts. BHARAT BARREL & DRUM MANUFACTURING COMPANY (supra) also has been restated in KRISHNA JANARDHAN BHAT [A.I.R. 2008 SC 1325].

29 Now, we will revert to our case.

30 Ex.A1 has been introduced in evidence by P.W.1 plaintiff Ponnammal. Before the trial Court she deposed in extenso as to the execution of Ex.A1 promissory note by the defendant. In this regard, the duty of the plaintiff has been lessened by the defendant himself by his admission in the written statement and by the evidence of D.Ws.1 to 3. There is no difficulty in holding that execution of Ex.A1 Promissory Note has been established.

31 The plea of the defendant in his written statement is that Ex.A1 Promissory Note was executed in lieu of missing of a gold chain weighing four sovereigns, which is stated to have been given to defendant's daughter, Muthulakshmi at the time of her marriage, whereas the specific case of the plaintiff in her plaint and her reply statement and evidence is that Ex.A1 has been executed as against paying of cash Rs.50,000/-.

32 D.Ws.2 and 3 deposed before the trial Court that in connection with the issue relating to the missing of the gold chain, a panchayat took place and they have vouchsafed the execution of Ex.A1 by the defendant. However, they have consistently, deposed that Ex.A1 has been executed only in lieu of the missing gold chain. They have withstood the elaborate cross-examination of the plaintiff. On this aspect, no significant dent has been made in the evidence of DWs.2 and 3 by the plaintiff. In evaluating the evidence on record, the first Appellate Court did a meticulous work and recorded a clear- cut finding that Ex.A1 has been executed only in lieu of the missing gold chain and not for any cash.

33 It is pertinent to note that DWs.1 to 3 have testified before the Trial Court. The Trial Judge had the opportunity to record their evidence, see them while they were deposing. Therefore, the Appellate Court will be slow in differing with the view of the Trial Court in the evaluation of the testimony of the witnesses deposed before it. However, the first Appellate Court is also a fact finding Court. It is a final Court of fact. There is no appreciation of evidence by this Court under Section 100 C.P.C. But, when the Courts below have misread the evidence of witnesses which is manifest, the Appellate Court can interfere.

34 In my view, the first Appellate Court has rightly read the evidence of PW.1 and DWs.1 to 3 and rendered a finding on the factual aspects that Ex.A1 Promissory Note, has not been executed for any cash consideration and it has been executed only in lieu of a missing gold chain of the plaintiff. There is no manifest error in recording such a factual finding by the first Appellate Court.

35 Now, we are clear of the fact that Ex.A1 has been executed not for any cash consideration. Then what for it has been executed. The admitted case of the defendant is that it has been executed in lieu of missing of a gold chain weighing four sovereigns.

36 Formation of a contract consists of offer and acceptance . It will result in an agreement. But, to be enforceable, it must be for a valid consideration. Then what is 'consideration'? That is stated in Section 2(d) of the Indian Contract Act, 1872. which runs as under:

> "2(d) When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to

abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

37. 'Consideration' is an integral part of a valid contract. The importance of 'consideration' has been emphasised by Lord Denning MR in COMBE VS. COMBE [1951 (2) KB 215] by stressing that at common law, consideration is so strong that it cannot be overthrown not even by a violent side wind.

38 A contract without consideration is a 'nudum pactum'. It is an empty promise. It will not give rise to any legal obligation. It cannot be enforceable in a Court of law. Consideration is a quid pro quo. Something in return for other. There must be consideration. It must be real. Adequacy of consideration is immaterial. But it should not be illusory.

39 There shall not be a contract for illegal purpose, and unlawful purpose. Consideration should not be opposed to public policy. (See Section 23 of Indian Contract Act). If the object of contract is illegal in nature, it becomes unenforceable.

40 As regards consideration, there is a marked difference between the Indian Law and the English Law. In English Contract Law, past consideration is not a good consideration. However, in Indian Contract law, past consideration is a good consideration. It is also evident from Section 2(d) of the Indian Contract Act. Therefore, under the Indian Contract Law, consideration need not be passed across the table between the negotiating parties. It need not be in presents.

41 Consideration must be at the desire of the promisor. It is a cache word. It is a condition precedent. A reading of the evidence of DWs.2 and 3, would show the transaction leading to the execution of Ex.A1. In connection with the missing of a gold chain, there was mediation. At last, an agreement to execute a promissory note by D.W.1 in lieu of the missing gold chain has been arrived at and the plaintiff also agreed. D.W.2 deposed in the trial Court that under the circumstances both have agreed for this and thus, Ex.A1 was scribed and executed by D.W.1. The gold chain issue is already pre-existing. It is the background of the bargain. Under the circumstances, there was reciprocal promises. Under those circumstances, Ex.A1 came into being. It will fall under Section 2(d) of the Indian Contract Act.

42 In LOGANATHAN (A.I.R. 1969 MADRAS 15) it was held that abstinence from launching a criminal prosecution for commission of an offence cannot be a valid consideration and even if a part of a transaction is tainted, it is opposed to public policy. It will be hit under Section 23 of the Indian Contract Act. It will not be enforceable in a Court of law.

43 In the instant case, a gold chain was missing at a marriage function. There was a compromise. In lieu of the missing gold chin, Ex.A1 has been executed. From the evidence, it emanates that the gold chain of the plaintiff was missing. The evidence of DW.1 is that he did not prefer any complaint. The gold chain was missing from his possession. There should be initiative from him. There is no plea in the written statement that Ex.A1 was executed by defendant in lieu of plaintiff not preferring a complaint against him. Thus, there is no occasion here to invoke Section 23 of the Indian Contract

Act.

44 It is seen that Ex.A1 has been executed for some consideration. It is executed in lieu of a missing gold chain. It is not illegal. It is a valid consideration. It is enforceable.

45 In such circumstances, question arises whether relief could be granted to the plaintiff even in the absence of pleadings to that effect in the plaint.

46 It has been pointed out by the learned counsel for the respondent that it is an attempt to bid farewell to the cherished principle of Civil Rules of pleadings and in the absence of pleadings, no evidence shall be looked into. [See SIDDIK MAHOMED SHAH VS. MT.SARAN AND OTHERS [AIR 1930 PC 57 (1)].

47 In course of time under certain circumstances, the strict rule of pleadings has been diluted.

48 The philosophy behind the principle that in the absence of pleadings, no evidence is to be looked into is that no party should be taken by surprise. A party should have reasonable opportunity to meet the case of the opposite party in advance. In drafting his pleadings, a party should not be handicapped. However, as to a new plea, which has been culled out from the pleadings of the defendant himself and also based on his unambiguous admission and also backed by his evidence there is question of taking him by surprise arises.

49 Almost similar situation arose before the Honourable Apex Court in FIRM SRINIVAS RAM KUMAR VS. MAHABIR PRASAD & OTHERS (A.I.R. 1951(38) SC 177). It is a simple case of a suit for specific performance based on a sale agreement. The defendant took the specific stand that it was not executed as a sale agreement, it was executed as security for a loan transaction. Defendant did not deny his execution of the sale agreement, he also did not deny his receipt of money under the agreement. This has been accepted by the trial Court, but, it refused to grant any relief to the plaintiff based on the admission of the defendant. Ultimately, this case reached the summit Court. It was argued before a three-Judge of the Hon'ble Apex Court that there was no pleading in the plaint for seeking the alternative relief of return of his money.

In such circumstances, the Honourable Apex Court held as under:

> "9.As regards the other point, however, we are of the opinion that the decision of the trial court was right and that the High Court took an undoubtedly rigid and technical view in reversing this part of the decree of the Subordinate Judge. It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs 30,000 was advanced by way of loan to the defendants second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing

> in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in MOHAN MANUCHA V. MANZOOR AHMAD [70 I.A.1 : AIR [30] 1943 PC 29]]. This appeal arose out of a suit commenced by the plaintiff appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by both the lower courts as well as by the Privy Council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under Section 65 of the Indian Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellant even though the appeal was heard ex parte in the absence of the respondent."

50 The said position of law expounded by the Honourable Apex Court has been subsequently followed by a Division Bench of the Madhya Pradesh High Court in INDERMAL TEKAJI MAHAJAN Vs. RAMPRASAD GOPILAL AND ANOTEHR [AIR 1970 M. P. 40].

51 With this background of law, now, we will revert back to our case.

52 A contract without consideration is void. Ex.A1 is not a Nudum Pactum. It is not an empty promise. It has been executed for some consideration. The plaintiff pleaded, cash consideration. But defendant admits that it is for a different consideration, namely, executed in lieu of missing of a gold chain. It is not illegal. It is not opposed to public policy. Even in his evidence, DW1 had sought for some time to repay the amount.

53 Ex.A1 cannot be said to be void for want of consideration. There is consideration though not in the form, in which, it was pleaded in the plaint but in different form, which is not illegal, which is not opposed to public policy.

54 In the facts and circumstances of this case, the dictum laid down by the Honourable Apex Court in FIRM SRINIVAS RAM KUMAR [supra], squarely applies to the facts of this case.

55 In the circumstances, we answer the substantial questions of law as against the respondent.

56 Ultimately, this second appeal succeeds. The Judgment and Decree of the first Appellate Court, are set aside. The Judgment and Decree of the Trial Court are restored for different reasoning. However, in the facts and circumstances, the parties shall bear their respective costs in the second appeal.

21.11.2014

Internet : Yes
Index : Yes

smn2/vaan

To:

1.The Principal District Judge,
Dindigul.

2.The Additional Subordinate Judge,
Dindigul.

3.The District Munsif,
Nilakkottai.

P.DEVADASS, J..
smn2/vaan

SECOND APPEAL (MD) No.553 of 2011

21.11.2014