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Alex Mathew Vs. Philip Philip

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Court : Kerala

Decided On : Mar-20-1973

Reported in : AIR1973Ker210

Judge : P. Govindan Nair and; K. Sadasivan, JJ.

Acts : Negotiable Instruments Act, 1881 - Sections 118

Appeal No. : A.S. No. 733 of 1972

Appellant : Alex Mathew

Respondent : Philip Philip

Advocate for Def. : P. Balagangadhara Menon, Adv.

Advocate for Pet/Ap. : Panicker, Adv.

Disposition : Appeal dismissed

Judgement :

Govindan Nair, J.

1. This is an appeal by the second defendant in a suit for money instituted by the respondent in which the respondent claimed that the appellant and his father, the first defendant in the suit, be jointly and severally made liable for the amount claimed in the plaint. The trial Court found that the case pleaded by the plaintiff

that there had been borrowings by the first and second defendants, as pleaded in paragraphs 6, 7 and 8 of the plaint for the purpose of the business conducted by the first and second defendants is not true, and that the first defendant had not borrowed any amounts as pleaded by the respondent. Issues 1 and 3. in the suit, are in these terms :--

'1. Whether the defendants have borrowed money from the plaintiff as alleged ?

3. Whether the defendants are jointly and severally liable for the plaint amount ?'

2. These issues were found against the respondent. However a decree was given to him against the appellant for the plaint amount on the basis of the cheques Exts. P-2 to P-6 that were admittedly issued bv the appellant in favour of the respondent. The appellant has admitted that he issued those cheques in favour of the respondent. We shall later refer to the case of the appellant relating to the Circumstances in which those cheques were issued.

3. Shortly stated, the contention raised on behalf of the appellant is that the case that the respondent pleaded having been found against by the trial Court and the finding of the trial Court in this regard having become final -- the respondent has not filed any appeal from the decree -- the suit should have been dismissed even against the appellant. The respondent, on the other hand, sought to support the decree on the basis of the presumption arising under Section 118(a) of the Negotiable Instruments Act. 1881 (for short the Act).

4. The case has been argued elaborately and a number of decisions have been referred to. Certain aspects may be taken to be well settled. These are. that the presumption that can be drawn under Section 118(a) of the Act is only 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. The presumption does not indicate the nature of the consideration. The presumption under the section is not that the consideration stated in the instrument is the consideration for the document; but merely that the instrument is supported by consideration. This is the view that has been taken by the Bombay High Court in the decision in

Tarmahomed Haji Abdul Rehman v. Tyeb Ebrahim (AIR 1949 Bom 257) and this view has been accepted by this Court in its decision in Kunhikalandar v. Abdul Khader (1971 Ker LT 620). Decisions have been brought to our notice, wherein it has been laid down that when a plaintiff pleaded a consideration different from that stated in the negotiable instrument and failed to prove the particular consideration pleaded the presumption available under Section 118(a) will not be available to him. We need not attempt to consider the correctness of this view, because the negotiable instrument with which we are concerned (the cheques Exts. P2 to P6) does not contain as is tobe expected any statement regarding the consideration for these cheques.

5. There has been conflict of opinion on the question whether the failure on the part of a plaintiff to prove the particular case relating to consideration that he pleaded would result automatically in the rebuttal of the presumption under Section 118(a). One view is that the mere failure on the part of the plaintiff to prove the particular form of consideration that he pleaded does not rebut the presumption. This is the view taken by the Bombay High Court in the decision that we have already referred to. AIR 1949 Bom 257. We shall only refer in addition to the warning sounded by Sulaiman, J. as he then was in Girwar Lal v. Dau Dayal, (57 All 895 = AIR 1935 All 509) quoted in the decision against the conclusion that the mere failure on the part of a plaintiff to establish the particular consideration that he pleaded would result in the rebuttal of the presumption. Sulaiman. J. observed, referring to Md. Shaft Khan v. Md. Moazzam Ali. (AIR 1923 All 214) an earlier decision of the Allahabad High Court:--

'We are not satisfied that it was meant to be laid down in that case that where the plaintiff merely fails to prove that consideration passed and the defendant also fails to prove that he did not get consideration, there is no presumption in favour of the plaintiff.'

We may say with great respect to the Judge that this statement very succinctly and correctly indicates the principle. Its application has given rise to conflict of judicial opinion, some of which has been noticed by the Punjab High Court in the decision referred to by counsel on behalf of the appellant in M/s. Krishna end Co v.

Firm Bhagat Ram Girdhari Lal. (AIR 1968 Punj & Har 552). wherein there is the following observation in para 12 of the judgment :

'The cases referred to above clearly disclose conflict of judicial opinion on the question of onus where it is found that the consideration originally pleaded has been found to be false. I am, however, bound by the decisions of this Court which are in consonance with the view taken by the Lahore High Court and following those decisions. I am bound to hold that once the defendant bad shown that the cash consideration which was originally pleaded for the Hundi did not pass, he had discharged the onus which lay upon him of proving the lack of consideration in view of the presumption that is attached to the Hundi as a negotiable instrument under Section 118 of the Negotiable Instruments Act and the onus then shiftedupon the plaintiff to prove that there was consideration.'

6. There is no authoritative pronouncement of the Supreme Court or of this Court on the matter preferring one or the other of the views referred to in the Punjab decision.

7. Counsel referred to the decision of the Supreme Court in Kundan Lal Rallaram v. Custodian, Evacuee Property. Bombay. (AIR 1961 SC 1316), therein the view has been taken that 'under certain circumstances' a presumption that may have to be drawn applying Section 114. Illustration (g) of the Evidence Act would be sufficient to rebut the presumption under Section 118(a) of the Act. The case, of course, does not lay down what those circumstances are and naturally cannot be considered an authority for the proposition that whenever a presumption has been drawn against a plaintiff by applying Section 114(g) of the Evidence Act, that presumption will automatically negative the presumption arising under Section 118(a) of the Act. The true principle where different cases have been pleaded and evidence has been let in, in support of both these sets of cases is that the entire evidence in the case adduced by the plaintiff and the defendant and the findings entered by the Court or which are to be entered by the Court, as well as the presumptions of law and fact which have to be drawn from all the facts established and attendant circumstances must be looked into as a whole to find out whether the presumption under Section 118(a) of the Act has been rebutted or not. It would

not be correct merely on the basis of the finding negativing the case of a plaintiff regarding consideration to hold that the presumption under Section 118(a) has been rebutted. We shall extract a passage from the judgment in AIR 1949 Bom 257, referred to twice before, if we may say so with respect, lays down the correct principle :

'It is one thing to say that the plaintiff has failed to prove a particular consideration for the three hundis; it is an entirely different thing to say that it was proved that there was no consideration at all for the three hundis. The mere failure to prove consideration on the part of the plaintiff did not establish that the hundis were for accommodation as the defendant alleged, or that the defendant had succeeded in proving that there was no consideration at all for these hundis.'

7-A. No doubt. It Is true that if the plaintiff had failed to establish the case that he had set out to prove, he cannot without an amendment of thepleadings in the case set up a different version, though not inconsistent case, from that he pleaded and pray for a decree in his favour. This rule laid down by the Supreme Court in Messrs. Trojan and Co. v. Nagappa Chettiar, (AIR 1953 SC 235) was relied on by counsel for the appellant; but this does not militate against the view that the presumption under Section 118(a) is a general one, general in the sense that it enjoins the Court to assume that the instrument Is supported by consideration, not as we pointed out that it is supported by consideration in any particular form or manner. The fact, therefore, that a particular form of consideration pleaded by the plaintiff had not been proved will not negative the presumption under the section and will not enable the Court to come to the conclusion that the instrument is not supported by any consideration at all. That presumption must still be there unless we are able to say, on the facts and circumstances and the evidence let in. either by the defendant who attempted to rebut the presumption, or by the admissions made by the plaintiff or from other attendant circumstances which may be referred to, that the presumption had been rebutted and the rebuttal must be that the instrument is not supported by consideration at all. We are not able to discern any principle against this proposition in the decision of the Supreme Court in Official Receiver. Kanpur v. Abdul Shakoor, (AIR 1965 SC 920), also relied on by the counsel for the appellant. This decision lays down the proposition that the

presumption under Section 118(a) of the Act will be available only when the question is between the parties to an instrument. It was ruled that the presumption will not be available in favour of creditors who have to prove their debts in insolvency. This is the principle that has been laid down by Varadachariar. J.. Narayana Rao v. Venkatappayya, (AIR 1937 Mad 182), wherein it was held that when the son of a Hindu father is sought to be made liable on the basis of a promissory note executed by his deceased father on the ground of pious obligation the presumption under Section 118(a) will not be available to the plaintiff. This decision has been quoted with approval in the Supreme Court decision (AIR 1965 SC 9201.

8. Counsel on behalf of the appellant laid particular emphasis on a part of the judgment in the above case towards the end of paragraph 16. wherein it is observed :--

'Section 118 of the Negotiable Instruments Act. however, enacts a special rule of evidence which operates between parties to the instrument or personsclaiming under them in a suit or proceeding relating to the bill of exchange and does not affect the rule contained in Section 114 of the Evidence Act. in cases not falling within Section 118 of the Negotiable Instruments Act.'

From the above observations, it was contended, that the presumption will be available only when the action itself is on the instrument and it was urged that the above passage supports this view. We are unable to accept this contention. The wording used is 'relating to the bill' and not that when the action is 'on the bill'. The true position seems to be what is stated in the decision in Jagjiwan v. Sakarchand. (AIR 1940 Sind 217), which is as follows :--

'It is true that under Section 118, Negotiable Instruments Act. there is a presumption of consideration for a promissory note, while in a suit to recover a debt it is for plaintiff to prove consideration. But. in a suit on the debt if a promissory note is evidence of the debt, the presumption would still arise.'

9. We have been referred to the decision of the Nagpur High Court in Fulchand v. Laxminarayan, (AIR 1952 Nag 308) in support of the contention that the failure on

the part of a plaintiff to establish the case that he pleaded would result in the rebuttal of the presumption under Section 118 of the Act. With great respect, we think that the case has not been correctly decided. We shall extract the relevant passage from the judgment :--

'Reverting therefore to the plaint we find that the plaintiff himself stated that the sum of Rs. 5,000 was not paid on the 1st August. 1942. He did not also bring his case on the promissory note-Instead he pleaded in his plaint that a sum of Rs. 4,981/4/- was paid on the 16th July. 1942. Both the sum and the date are therefore contrary to the tenor of the promissory note and the question thus arises whether the plaintiff has not bv his own pleading set at naught the presumption which would normally have been drawn.

In this connection we cannot overlook the fact that the defendant pleaded on the other hand that the promissory note was executed on the 27th June. 1942. It is obvious that as between the plaintiff and the defendant the issue had to be tried whether the promissory note was executed on the 16th July 1942 or on the 27th June. 1942. Once that issue is tried, it is apparent that if the decision be in favour of the defendant then the statement of the plaintiff that the sum of Rs. 5,000 was advanced to the defendant on the 16th July 1942 must also fail. In our judgment, the plaintiff insetting up such a case himself destroyed the presumption by pleading facts contrary to the plain tenor of the promissory note. The presumption which could have been drawn was that the promissory note was executed on the 1st August, 1942 and that a sum of Rs. 5,000 was the value for it. Whether or not. that sum was paid then or earlier would have of course been material if denied by the defendant. The presumption would still have been in favour of the plaintiff. But the plaintiff in the present suit has himself shown that the date which the promissory note bore was not the date on which it was executed and the sum which according to the promissory note, was the value was not the sum which was actually handed over. It is impossible therefore to take recourse to the presumption and though the presumption would normally have been drawn it is the plaintiff who has deprived himself of the presumption by pleading facts contrary to what would be presumed.'

10. It is true that in a cheque, admitted to be post-dated the presumption that would have been available under Section 118(b) of the Act will not be available, because it is the case of both the drawer of the negotiable instrument as well as the holder that the instrument was not drawn up on the date it bears. But the fact that the presumption under Section 118(b) is not available has no bearing on the question whether the presumption under Section 118(a) is available or not. The two are distinct and separate presumptions; one can arise without the assistance or existence of the other. It must also be borne in mind that the presumption under the section is not that a certain amount mentioned in the promissory note or negotiable instrument was the quantum or the value of the consideration that passed; but as we stated earlier only a general one that the instrument is supported by consideration. With great respect we cannot agree with the view that any presumption was regarding the nature or quantum of the consideration. The only presumption is that the negotiable instrument is supported by consideration. The reiection of the case regarding the particular form of consideration pleaded by the plaintiff does not automatically rebut that presumption.

11. Learned counsel on behalf of the respondent invited our attention to the decision of the Madras High Court in Venkatareddi v. Nagireddi. (AIR 1951 Mad 851). We have already referred to the conflict with regard to this matter; We prefer to follow the principles laid down by the Bombay High Court in its decision in AIR 1949 Bom 257 (cited supra).

12. The question then is whether on the facts and circumstances of the case It can be said that the presumption available to the plaintiff has been rebutted or stood rebutted. This question has to be determined on the following facts.

13. The case specifically pleaded by the plaintiff that the amounts were borrowed by the 1st and 2nd defendants in the manner pleaded in paragraphs 7 and 8 of the plaint stood disproved. The case of the appellant that cheques were issued merely for the purpose of creating a record for the amounts borrowed by D. W. 8 from the plaintiff for which D. W. 8 had executed promissory notes in favour of the 2nd defendant cannot be accepted. The trial Court said that the 'explanation given by the 2nd defendant himself is unsatisfactory and even revolting to the

commonsense.' Earlier it observed :--

'Unless the 2nd defendant is able to offer satisfactory explanation as to why he issued the cheques, the explanation given by the plaintiff namely that postdated cheques evidenced the liability for the plaint claim has to be accepted.'

The case pleaded by the appellant that there was no consideration for the cheques has failed. We may notice in this connection that the appellant's ease was that amounts were borrowed by D. W. 8 from the plaintiff and that he merely introduced D. W. 8 to the plaintiff and he was instrumental in getting the respondent (plaintiff) to lend money to D. W. 8. According to him the respondent asked him to file suits on the basis of the promissory notes executed by D. W. 8 in favour of the appellant. Promissory notes were executed in favour of the appellant, it was alleged by him. because the respondent did not want it to be known that he had lent money to D. W. 8. The promissory notes were handed over to him by the respondent according to the appellant for the purpose of filing the suit. Then, as a record, for handing over the promissory notes, the plaintiff insisted that cheques must be issued and so the appellant issued cheques. As we indicated it is difficult to believe this story. It is too artificial and so unrealistic that it has to be rejected. This case, of course, was denied by the respondent as false. The case as pleaded by the respondent as well as the appellant in regard to the circumstances in which the cheques came to be executed thus stood disproved. One thing is clear. According to the case of the appellant and the respondent amounts were advanced by the respondent. According to the appellant amounts were advanced by the respondent to D. W. 8 for which D. W. 8 executed promissory notes infavour of the appellant. This case is supported by the evidence of D. W, 8. The respondent pressed for payment. He wanted suits being instituted against D. W. 8 on the promissory notes, and handed over the notes to the appellant which have been produced and marked in the case (Exts. D-1 (a). D-1 (b) and D-1 (c)). It was in these circumstances that the cheques came to be executed. It is not for us to determine in what manner the second defendant was liable under these cheques. He may be liable as a principal debtor or he may be liable only as a guarantor for the debt due from D. W. 8. because he was instrumental for persuading the respondent to part with his money to D. W. 8 as pleaded by him. Whatever it be.

the execution of the cheques raises the presumption of consideration and from that stems the liability of the second defendant. In effect this has been found by the trial Court and in all the circumstances we see no reason to reverse the decree that has been granted by the trial Court against the appellant and so we confirm it and dismiss this appeal.

14. There is conflict of decisions, as we have noticed on the question of law raised before us and we have to remember that the respondent has failed to establish the case that he pleaded. In these circumstances we direct the appellant and the respondent to bear their costs throughout.

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