IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 284 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

==

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ZUBEDABAI ABDULBHAI

Versus

GANGARAM MOTIRAM

Appearance:

MR SURESH M SHAH for Petitioners

MR PJ KANABAR for the Respondent

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 30/06/2000

ORAL JUDGEMENT

1. This Second Appeal is preferred to challenge the judgment and decree passed in Regular Civil Appeal No.214 of 1982, by District Judge, Rajkot.

2. The litigation begun thus:

2.1 The present appellants preferred Regular Civil Suit No.847 of 1978 in the Court of learned Civil Judge (S.D.), at Rajkot. The suit was then transferred to the Court of learned Civil Judge (J.D.), Rajkot, who, after considering the evidence on record, dismissed the suit. The case of the plaintiffs-appellants against the defendant was for a decree of an amount of Rs.6646/together with interest and costs. The case in the plaint was that the plaintiffs are the wife and the husband, i.e. plaintiff No.1 is the wife and plaintiff No.2 is the husband, who are appellants No.1 and 2, respectively, before this Court as well. Plaintiff No.1-Zubedabi was a partner of a registered partnership firm doing business in the name and style of M/s Kamruddin Thavarbhai & Sons and the defendant had dealings with the said firm. Because of these dealings, the parties knew each other. The defendant, therefore, approached plaintiff No.2 and requested for a loan of Rs.6525/-. Plaintiff No.2 did not have funds on hand and he, therefore, asked plaintiff No.1 to advance the said amount to the defendant and, on that recommendation, plaintiff No.1 advanced the said amount to the defendant. The defendant, by way of security for the said amount, had executed a promissory note in favour of plaintiff No.1-Zubedabai. Besides executing the promissory note, the defendant had also executed/created equitable mortgage in respect of certain properties situate at Rajkot. According to the plaintiffs, the defendant was bound to pay the said amount with interest on demand, but when such demand was raised, the defendant failed to repay the loan amount. The plaintiffs, therefore, issued a legal notice on June 22, 1978, which was duly served on the defendant. The defendant still failed to repay the loan amount and, therefore, the suit was filed. The plaintiff had prayed for a decree for an amount of Rs.6646/- together with interest and costs and has also prayed for a decree in respect of equitable mortgage created by the defendant.

2.2 The defendant-present respondent opposed the case of the plaintiff by filing written statement at Ex.13. The defendant took up the defence of denial. In the written statement, the defendant has denied all the contentions raised in the plaint by the plaintiffs. A contention was raised by the defendant in the written statement that plaintiff No.2 is not a necessary party. The defence of the defendant was that, he had certain relations with M/s Kamruddin Thavarbhai & Sons (firm) and that he wanted to dispose of his house property and, therefore, he had handed over the title deeds of the said

property to the said firm. The plaintiffs have attempted to misuse the said position. The defendant, therefore, prayed for dismissal of the suit.

2.3 The Trial Court, after considering the case of the rival sides, framed issues at Ex.14 on August 18, 1979 and came to conclusion that the plaintiffs had failed to establish their case against the defendant and the suit was, therefore, dismissed. The main findings of the Trial Court were that the plaintiffs' evidence and the pleadings in the plaint contradict each other. The evidence led by the plaintiffs had no supporting plea in the plaint. The Court, ultimately, found that the entire transaction sought to be proved and supported through the evidence of the plaintiffs' witness-Akbarali is not believable. Even his presence at the time of the so called execution of the promissory note cannot be accepted and the suit was, therefore, ultimately, dismissed.

2.4 Aggrieved by the said judgment and decree of dismissal of the suit, the plaintiffs approached the District Court, at Rajkot, by preferring Regular Civil Appeal No.214 of 1982. The learned District Judge, after hearing both the sides, decided the appeal on July 26, 1984 and dismissed the appeal. The First Appellate Court agreed with the findings of the Trial Court. The First Appellate Court also dealt with the legal contentions raised before it regarding presumption as to consideration envisaged under Section 118 of the Negotiable Instruments Act. It was contended before the First Appellate Court that only because neither of the plaintiffs is examined, it could not have been held by the Trial Court that passing of consideration is not established. Witness-Akbarali has been examined and execution of promissory note is proved. The promissory note is brought on record and, therefore, a promissory note being a negotiable instrument, a presumption as to consideration has to be drawn. That presumption is not rebutted by the other side and, therefore, the Trial Court had committed an error. The learned District Judge, while dealing with this aspect, also considered the decision in the case of Kundanlal Rallaram v. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316 relied upon by the appellants, but, relying on observations made in that very judgment, did not accept the plea of the appellants. The appeal came to be dismissed, which has resulted into present Second Appeal.

3. The plaintiffs have approached this Court with this appeal under Section 100 of the Code of Civil

Procedure. The appeal came to be admitted for deciding the following substantial questions of law :-

(1) Whether presumption of law arising as per section 118 of Negotiable Instruments Act stands rebutted because of failure of the plaintiffs to examine themselves as witnesses?

(2) Whether legal equitable mortgage between the parties can be said to have been created?

4. Learned advocate, Mr. Shah, appearing for the appellants, has drawn attention of this Court to Section 118 of the Negotiable Instruments Act, which contemplates a presumption as to consideration. He submitted that both the Courts below have committed an error of proceeding on a premise that passing of consideration is not proved by the plaintiffs because neither of the plaintiffs have entered the box. The consideration flew from plaintiff No.1 to the defendant. Plaintiff No.1 was available when the trial was going on. Plaintiff No.1 is not examined and, therefore, the Courts below have come to conclusion that passing of consideration is not proved. Mr. Shah submitted that both the Courts have not considered provisions of Section 118 of the Negotiable Instruments Act. After that is considered, passing of such consideration is not required to be proved. When such presumption is there, if the defendant wants to raise a plea of want of consideration, it is for the defendant to prove the want of consideration. In the instant case, Mr. Shah submitted that the defendant has not established this aspect. He submitted that presumption under Section 118 of the Negotiable Instruments Act is a legal presumption as held in Kundanlal Rallaram v. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316 and, therefore, it would be just and proper for this Court to enter into that question also. While trying to support the appellants' case, Mr. Shah has drawn attention of this Court towards the conduct of the defendant. He submitted that, although notice was given before filing the suit, it has not been replied to. If no promissory note was executed, no mortgage was created and no money was borrowed by the defendant, ordinary human conduct of the defendant would have been to immediately deny the case of the plaintiff in the notice by giving a suitable reply. Besides this, the documents of title of the property mortgaged are in possession of the plaintiffs. This indicates that mortgage, as claimed by the plaintiffs, was, in fact, executed. These aspects have not been considered by the First Appellate Court. He, therefore, submitted that

this appeal may be allowed, the judgment and order of the First Appellate Court may be quashed and set aside and the plaintiffs' suit may be decreed.

5. Mr. P.J. Kanabar, learned advocate appearing for the defendant, submitted that the plaintiffs are before this Court in a second appeal, the scope of which is very narrow and limited. He urged that the Court may not enter into the arena of re-appreciation of evidence. He further submitted that, no question of law is involved and the appeal, therefore, deserves dismissal.

5.1 Mr. Kanabar, however, made his submissions on merits as well. He submitted that the argument regarding presumption under Section 118 of the Negotiable Instruments Act can be accepted provided the plaintiffs' case of execution of a promissory note following the monetary transaction is established or at least accepted to have been established. According to Mr. Kanabar, both the Courts below have not accepted the execution of promissory note and, if execution of promissory note is not accepted factually, no legal presumption can be drawn regarding consideration as envisaged under Section 118 of the Negotiable Instruments Act. Mr. Kanabar, therefore, submitted that the appeal may be dismissed.

6. Having regard to rival side contentions and facts of the case, it would be better if both the questions raised while admitting the appeal are dealt with simultaneously.

7. The facts of the case and the evidence led by the parties, if considered in light of the contentions raised before this Court, there appears no reason for this Court to entertain this appeal for the reasons that would be discussed in the following paragraphs.

8. The case of the plaintiffs, in the plaint, is that defendant approached plaintiff No.2 for a loan and, as he had no money, he requested plaintiff No.1 - his wife - to loan the amount to the defendant, who, in turn, loaned the amount and got executed the documents. Nowhere in the pleadings, it is stated that this transaction took place in presence of Akbarali. Against this, if the evidence is seen, none of the plaintiffs have entered witness box. Akbarali, who happens to be brother of plaintiff No.2, has deposed to the effect that the defendant approached him (contrary to the plea in the plaint that defendant approached plaintiff No.2) and, as he had no money, he requested plaintiff No.1 to loan the amount to the defendant, who, in turn, did so and got the

documents executed. Akbarali states that the promissory note was written by him and signed by the defendant in his presence. He has been cross-examined and he states that he deals in waste paper and he found out a format from such waste paper and prepared the promissory note.

9. Both the Courts below found that the case of the plaintiff cannot be believed for the reason that the pleadings in the plaint do not speak of presence of Akabarali at the time of transaction or preparation of the promissory note by Akabarali. Akbarali's own version about preparing the promissory note on basis of a format found by him from waste paper is also not believed by the Courts below. These are two concurrent findings of fact of both the Courts below. The Courts below have also observed that the very genesis of the transaction, as emerging from the plaint and from the evidence of the plaintiffs, do not coincide or corroborate with each other but go contrary to each other and, therefore, they have not accepted the case of the plaintiffs about execution of the promissory note. The Trial Court has, in unequivocal terms, stated that deposition of Akbarali cannot be relied upon as it is found to be untrustworthy and unreliable for the reason that it goes contrary to the plaintiffs' own case. Both the Courts below also found that both the plaintiffs were alive and available when the trial took place. Factually, it emerges from the cross-examination of Akabarali that plaintiff No.2 was very much present in the Court sitting near to the window of the Court and still none of the plaintiffs have entered the witness box. The outcome is that Akbarali's evidence is contrary to the plaintiffs' pleadings and the plaintiffs themselves have not entered the witness box. The Court below have, therefore, not believed the plaintiffs' case of the promissory note. In view of this Court, there appears not any reason for interfering with the findings of fact recorded by both the Courts below while deciding this Second Appeal.

10. Now, therefore, the question that requires to be considered is on what count, this appeal can be otherwise entertained. Mr. Shah's contention is that presumption under Section 118 of the Negotiable Instruments Act is a legal presumption as held by the Apex Court in the case of Kundan Lal Rallaram (supra). It is submitted that, as held in that judgment, the presumption is one of law and thereunder the Court shall presume, inter alia, that the negotiable instrument or the endorsement was made or was endorsed for consideration. He submitted that, in that judgment, it has been observed that, in effect, this presumption throws burden of proof of failure of

consideration on the maker of the note or the endorser, as the case may be. Mr. Shah, therefore, submitted that both the Courts below have committed an error by not drawing a presumption. It is not possible to accept the submission advanced by Mr. Shah for the reason that presumption under Section 118 of the Negotiable Instruments Act would come into play only if the execution of the document, namely, the promissory note, is properly established by cogent and reliable evidence. Technically, execution is established, but the evidence of Akbarali, through whom the execution of promissory note is tried to be proved, is not believed by both the Courts below and, therefore, when the evidence of execution is not believed or accepted, there is no question of drawing presumption under Section 118 of the Negotiable Instruments Act. This Court, as discussed above, also finds no error committed by the Courts below in coming to the above conclusion and, therefore also, the argument regarding presumption under Section 118 of the Negotiable Instruments Act cannot be accepted.

11. Apart from the above aspect, the presumption under Section 118, though a legal one, is rebuttable. In the case of Kundan Lal Rallaram (supra) itself, the Apex Court observed thus :

> "The evidence required to shift the burden need not necessarily the direct evidence, i.e. oral or documentary evidence or admissions, made by opposite party; it may comprise of circumstantial evidence or presumption of law or fact."

Their Lordships of the Apex Court further clarified thus:

> "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 relevant documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, Section 114 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 Instruments Act.'

It is, therefore, clear that, if the relevant evidence is withheld by the plaintiff, Section 114 of the evidence Act itself would enable the Court to draw a presumption to the effect that, if produced, the said evidence would be unfavourable to the plaintiffs.

12. Now, in the instant case, it can be said that, though presumption regarding consideration arises, the other evidence on record shifts the burden on the shoulder of the plaintiffs, which they have failed to discharge as the plaintiffs have not adduced any evidence in support of the passing of consideration, namely, advancement of loan by plaintiff No.1. There is no evidence to indicate that plaintiff No.1 had money with her to be advanced to the defendant and, in absence of such material, Section 114 of the Evidence Act would come into play.

13. The second question that is raised while admitting the appeal is regarding equitable mortgage. In the instant case, as has rightly been observed by the Lower Appellate Court, there is absolutely no evidence to indicate delivery of the title deeds with an intention to create security for the transacted amount. In total absence of evidence in this regard, the question has to be answered in the negative.

14. In view of above discussion, there appears not any reason for interfering with the impugned judgment and decree.

15. The upshot of the above discussion is that, both the questions raised while admitting the appeal result in a negative answer and the appeal, therefore, must fail. The appeal is, therefore, dismissed.

[A.L. DAVE, J.]

gt