A KAPIL KUMAR

v.

RAJ KUMAR

(Civil Appeal No. 5854 Of 2022)

B OCTOBER 14, 2022

[M. R. SHAH AND KRISHNA MURARI, JJ.]

Negotiable Instruments Act, 1881 – ss. 4 and 118 – Promissory note – Appellant instituted recovery suit against respondent C *contending that the latter borrowed Rs. 1 lakh from him and also executed a pro-note in favour of appellant – Respondent denied execution of pro-note and took the stand that no loan was taken by him – Trial court decreed the suit – Decree upheld by First Appellate Court – Second appeal allowed by High Court on ground that attesting witness to the pro-note was not examined and therefore,* D *content of the pro-note was not proved – Held: High Court erred in upsetting the findings of facts recorded by trial court and confirmed by First Appellate Court – Even the substantial question of law framed by the High Court cannot be said to be as such a question of law much less substantial question of law – On merits also, the* E *signature of respondent on the pro-note was established and proved and even execution of the pro-note was established – In the circumstances, non-examination of the witness to the pro-note cannot be held against the appellant – There is presumption of consideration in a negotiable instrument – Such presumption may be rebutted, however, no rebuttal evidence led by the respondent –* F *Impugned judgment of High Court accordingly unsustainable both on law as well as on facts – Code of Civil Procedure – s.100 – Second Appeal.*

Code of Civil Procedure – s.100 – Second Appeal – Unless concurrent findings recorded by the courts below are found to be G *perverse, the same are not to be interfered with by the High Court u/s.100 CPC.*

Allowing the appeal, the Court

HELD:1. There were concurrent findings of facts recorded by the Trial Court as well as the First Appellate Court on execution H

of pro-note by the defendant in favour of the plaintiff. The said findings were on appreciation of entire evidence on record. Therefore, unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 of CPC. Even the substantial question of law framed by the High Court cannot be said to be as such a question of law much less substantial question of law. It appears that what was considered by the High Court was whether the plaintiff has proved the execution of pro-note and the receipt by leading cogent evidence. The aforesaid can be said to be a question of facts and cannot be said to be a question of law much less substantial question of law. The High Court committed a very serious error in upsetting the findings of facts recorded by the trial court confirmed by the First Appellate Court on execution of pro-note by the defendant in favour of the plaintiff. [Para 5.1][559-D-G]

2. Even otherwise on merits also, the impugned judgment of the High Court is unsustainable. The signature of the defendant on the pro-note has been established and proved by the plaintiff by examining the handwriting expert-PW2. No contrary evidence has been led by the defendant to disprove his signature on the pronote. Even the execution of pro-note has been established by the plaintiff by examining the deed writer-PW3. In view of the facts and circumstances of the case emerging from the evidence on record, non-examination of the witness to the pro-note cannot be held against the plaintiff. It is noted that as per the provision of Section 118 of the NI Act there is a presumption of consideration in the negotiable instrument [Section 118(a)]. Though such presumption may be rebutted, however, no rebuttal evidence is led by the defendant. Therefore, the High Court erred in allowing the second appeal and quashing and setting aside the decree passed by the Trial Court confirmed by the First Appellate Court. [Paras 6 and 6.1][559-G-H; 560-A, B-D]

M.S. Narayana Menon alias Mani v. State of Kerala and Anr. **(2006) 6 SCC 39 : [2006] 3 Suppl. SCR 124 – referred to.**

A *Mirza Gorgani v. (Firm) Bhola Mal Nihal Chand* **AIR 1934 Lahore 293 – referred to.**

Case Law Reference

[2006] 3 Suppl. SCR 124	**referred to**	**Para 4.3**

B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5854 of 2022.

From the Judgment and Order dated 05.08.2019 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 1727 of 2016.

C Jayprakash Somani, Ms. Shobha Somani, Rainish Kumar, Ms. Mamta Rani, Mohanty, Aqsha Shohar, Ms. Manju Jetley, Advs. for the Appellant.

Bharat Bhushan, Adv. for the Respondent.

The Judgment of the Court was delivered by

D **M. R. SHAH, J.**

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 05.08.2019 passed by the High Court of Punjab and Haryana at Chandigarh in Regular Second Appeal No. 1727 of 2016, by which, the High Court has allowed the said appeal preferred by the E original defendant and has set aside the judgment and order passed by the First Appellate Court as well as the Trial Court decreeing the suit for recovery of Rs. 1,36,550/- the original plaintiff has preferred the present appeal.

2. The appellant herein – original plaintiff instituted the suit against F the respondent – original defendant for recovery of Rs. 1 lakh. It was the case on behalf of the plaintiff that the defendant has borrowed a sum of Rs. 1 lakh from him on 29.06.2007 and has also executed a pro-note (exhibit P1) and receipt (exhibit P2) in favour of the plaintiff. The defendant denied the execution of pro-note and took the stand that no loan was taken by the defendant and in fact the transaction was in between G the father of the plaintiff and the defendant had paid the whole amount borrowed by him from the father of the plaintiff. The learned Trial Court framed the relevant issues.

2.1 The plaintiff examined four witnesses, namely, PW1 – Kapil Kumar (plaintiff), PW2 – Yashpal Chand (handwriting and finger print

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expert), PW3 – Satish Kumar (deed writer) and PW4 – Sat Narian (clerk to prove legal notice). A

2.2 The defendant examined three witnesses, namely, DW1 – Dinesh Kumar (clerk cum cashier, SBI to prove the deposit of amount in bank account), DW2 – Raj Kumar (defendant) and DW3 – Phool Singh s/o Puran Singh (father of plaintiff). B

2.3 On appreciation of evidence, the learned Trial Court believed the execution of pro-note executed by the defendant in favour of the plaintiff and consequently decreed the suit. The appeal filed by the defendant before the learned First Appellate Court came to be dismissed. In the second appeal under Section 100 of Code of Civil Procedure, the C High Court has interfered with the concurrent findings recorded by both the courts below on execution of the pro-note by the defendant in favour of the plaintiff, solely on the ground that attesting witness to the pro-note has not been examined therefore, the content of the pro-note has not been proved and consequently has allowed the second appeal.

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2.4 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court the original plaintiff has preferred the present appeal.

3. Learned counsel appearing on behalf of the appellant – original plaintiff has vehemently submitted that in the facts and circumstances E of the case the High Court has erred in upsetting and/or quashing the concurrent findings recorded by both the courts below on execution of the pro-note by the defendant in favour of the plaintiff, in exercise of powers under Section 100 of CPC.

3.1 It is submitted that when the findings on facts were recorded F by both the courts below on execution of pro-note by the defendant in favour of the plaintiff which as such were on appreciation of evidence on record, more particularly, the testimony of PW3, the same was not required to be interfered with by the High Court in exercise of powers under Section 100 of CPC.

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3.2 It is submitted that if the deposition of PW3 is considered as a whole, it is apparent that PW3 – deed writer has specifically stated that when he asked the defendant as to whether he had received the money then the defendant admitted the receipt of money. It is submitted in that view of the matter and the deposition of PW1 – plaintiff and the deposition of deed writer – PW3 the execution of pro-note and even the content of H

payment of the consideration mentioned in the pro-note has been established and proved. Therefore the High Court has committed a very serious error in allowing the second appeal and consequently quashing and setting aside the judgment and decree passed by the learned Trial Court confirmed by the learned First Appellate Court.

3.3 It is further submitted that even the signature on the pro-note of the defendant has been established and proved by the plaintiff by examining handwriting expert – PW2.

3.4 Making the above submissions and relying upon Section 4 of the Negotiable Instruments Act, 1881 (NI Act) and the findings recorded by the learned Trial Court as well as the learned First Appellate Court, it is prayed to allow the present appeal and restore the judgment and order passed by the learned Trial Court confirmed by the learned First Appellate Court.

4. While opposing the present appeal the learned counsel appearing on behalf of the original defendant has vehemently submitted that as the plaintiff has failed to prove the execution of pro-note by examining the witness to the pro-note the High Court has rightly quashed and set aside the decree passed by the learned Trial Court confirmed by the learned First Appellate Court.

4.1 It is vehemently submitted by the learned counsel appearing on behalf of the defendant that as held in the case of **Mirza Gorgani Vs. (Firm) Bhola Mal Nihal Chand; AIR 1934 Lahore 293 (2)** burden to prove the execution of promissory note is on the plaintiff, even if signatures are admitted and execution of document is denied.

4.2 It is further submitted that even the plaintiff has to prove the consideration which in the present case plaintiff has failed to prove. It is submitted that in the facts and circumstances of the case presumption under Section 118 of the NI Act shall not be attracted as the execution of pro-note has not been proved.

4.3 It is submitted that as rightly observed by the High Court non-examination of witness to the pro-note is fatal to the case of the plaintiff. It is submitted that as observed and held by this Court in the case of **M.S. Narayana Menon alias Mani Vs. State of Kerala and Anr.; (2006) 6 SCC 39** in the case of negotiable instrument in case of withholding of relevant evidence adverse inference can be drawn against

the person and presumption can be rebutted on the bases of preponderance of probabilities. A

4.4 Making the above submissions it is prayed to dismiss the present appeal.

5. We have heard learned counsel appearing on behalf of the respective parties at length and have gone through the judgment and findings recorded by the learned Trial Court while decreeing the suit confirmed by the learned First Appellate Court. We have also gone through the impugned judgment and order passed by the High Court. We have also re-appreciated the entire evidence on record including the deposition of relevant witnesses examined by both the sides. B C

5.1 At the outset it is required to be noted that as such there were concurrent findings of facts recorded by the learned Trial Court as well as the learned First Appellate Court on execution of pro-note by the defendant in favour of the plaintiff. The said findings were on appreciation of entire evidence on record. Therefore, unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 of CPC. Even the substantial question of law framed by the High Court cannot be said to be as such a question of law much less substantial question of law. From the impugned judgment and order passed by the High Court it appears that as such no specific substantial question of law seems to have been framed by the High Court. However, it appears that what was considered by the High Court was whether the plaintiff has proved the execution of pro-note and the receipt by leading cogent evidence. The aforesaid can be said to be a question of facts and cannot be said to be a question of law much less substantial question of law. Therefore, as such the High Court has committed a very serious error in upsetting the findings of facts recorded by the learned Trial Court confirmed by the learned First Appellate Court on execution of pro-note by the defendant in favour of the plaintiff. D E F

6. Even otherwise on merits also the impugned judgment and order passed by the High Court is unsustainable. The signature of the defendant on the pro-note has been established and proved by the plaintiff by examining the handwriting expert – PW2. No contrary evidence has been led by the defendant to disprove his signature on the pro-note. Even the execution of pro-note has been established by the plaintiff by G H

A examining the deed writer - PW3. Now so far as the consideration mentioned in the pro-note is concerned there may be some minor contradictions in the depositions of PW1 and PW3. However, at the same time if the deposition of PW3 as a whole is considered, in the cross-examination it has come out that when the deed writer asked the defendant that he has received the consideration, he has admitted the same.

6.1 In view of the above facts and circumstances of the case emerging from the evidence on record, non-examination of the witness to the pro-note cannot be held against the plaintiff. At this stage it is required to be noted that as per the provision of Section 118 of the NI Act there is a presumption of consideration in the negotiable instrument [Section 118(a)]. It is true that such presumption may be rebutted. However, no rebuttal evidence is led by the defendant. Under the circumstances also the High Court has erred in allowing the second appeal and quashing and setting aside the decree passed by the learned Trial Court confirmed by the learned First Appellate Court.

7. In view of the above and for the reasons stated above the impugned judgment and order passed by the High Court is unsustainable both, on law as well as on facts and the same deserves to be quashed and set aside and the same is accordingly quashed and set aside. The judgment and decree passed by the learned Trial Court decreeing the suit confirmed by the learned First Appellate Court is hereby restored. The present appeal is accordingly allowed. No costs.

Bibhuti Bhushan Bose Appeal allowed.
(Assisted by : Rakhi, LCRA)