

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL No.321 of 2011

JUDGMENT

The unsuccessful plaintiff before the 1st appellate court in A.S.No.143 of 2010 on the file of District Judge, Ongole, preferred this appeal under Section 100 of CPC, whereby the judgment of trial court was reversed by dismissing the suit for recovery of money.

For the sake of convenience, the parties hereinafter be referred as plaintiff and defendant.

The plaintiff filed the suit for recovery of money based on the promissory note executed by the defendant on 25-06-2005 for Rs.80,000/- agreeing to repay the same with interest at 24% per annum either to the plaintiff or to his order on demand. Despite demands made by the plaintiff, the defendant failed to discharge debt due under promissory note.

The defendant filed written statement contending that the defendant is not having any financial capacity and he is running a small bunk and there was no necessity for him to borrow Rs.80,000/- and that he never executed any promissory note in favour of the plaintiff and the plaintiff has no capacity to lend such huge amount. There were only hand loan dealings between the defendant and the plaintiff and the defendant need not pay any amount in connection with the said hand loan transactions. The suit promissory note is a rank forgery and was created by the plaintiff. Hence, the suit has to be dismissed with exemplary costs.

Basing on the above pleadings, the trial court framed following two issues :-

1. Whether the suit promissory note is true, valid and binding on the defendant ?
2. To what relief ?

On behalf of the plaintiff, PWs.1 and 2 were examined and Ex.A-1 was marked. On behalf of the defendant, DW.1 was examined and no

documents were marked.

Upon hearing argument of both the counsel, the trial court decreed the suit for the suit amount of Rs.1,37,600/- together with subsequent interest at 12% per annum from the date of suit till the date of decree and 6% from the date of decree till the date of realisation.

Aggrieved by the decree and judgment of the trial court, the defendant preferred an appeal in A.S.No.143 of 2010 before the District Court, Ongole. The District Judge upon hearing arguments of both the counsel dismissed the suit setting aside the decree and judgment of the trial court and thus reversed the findings recorded by the trial court declining to grant decree in favour of the plaintiff/appellant herein.

Aggrieved by the decree and judgment of the 1st appellate court, the present Second Appeal is filed on various grounds and raised several questions and most of them are not substantial questions of law except perversity in the judgment of the 1st appellate court, as the judgment is not based on evidence on record and misconstrued the word 'attestation' in view of absence of PW.2 at the time of actual completion of execution of Ex.A-1-promissory note.

Heard the counsel appearing for the appellant at the stage of admission and none appeared for the defendant/respondent, though notice was served on the defendant/respondent.

Admittedly, the suit was filed before the trial court for recovery of amount on the basis of promissory note-Ex.A-1, dated 25-06-2005. The only defence before this court is that the suit promissory note was rank forgery document as there were no financial dealings between the plaintiff and defendant and plaintiff has no capacity to lend such huge amount.

The trial court framed specific issue as to the validity and genuineness of the promissory note but accepted that the suit promissory note was executed by the defendant in favour of the plaintiff for Rs.80,000/- and granted a decree in his favour.

The appellate court reversed the judgment only on the ground that PW.2, attesor of the document, was not present at the time of signing of the

document by defendant.

Under Section 3 of Transfer of Property Act, the word 'attested' means

"....in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

In view of the definition of the word "attested" under Transfer of Property Act, mere receiving an acknowledgment from the person, who signed on the document by the attester is sufficient to constitute attestation of an instrument. His presence at the time of execution of the document and signing on the document etc., is not a requirement to constitute an attestation. In the cross-examination of PW.2 except eliciting that he was not present at the time of execution nothing was elicited about receipt of acknowledgment about signing on the document by the executant of the document i.e., defendant. In fact, Ex.A-1 promissory note is not compulsorily attestable document but the evidence of PW.2 is helpful to prove passing of consideration. Therefore, dismissal of the suit reversing the judgment of the trial court on the sole ground that PW.2 attester of the document was not present at the time of completion of execution alone is not a ground to reverse the finding recorded by the trial court, in view of the definition of the word "Attested" under Section 3 of the Transfer of Property Act. Such contention is neither raised before the trial court nor before the 1st appellate court but the contention was that Ex.A-1 was a rank forgery.

The word 'forgery' is defined under Section 463 of IPC, which reads as follows:-

"Forgery :- Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or

with intent to commit fraud or that fraud may be committed, commits forgery.”

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When the defendant set up a specific plea of forgery, it is for the plaintiff to prove that the document was really executed by the defendant and it is enforceable under law since the forgery voids the document.

No doubt, as per settled law, there are different ways and means of proving of a transaction as held by the Hon'ble Apex Court in the decision reported in ***State (Delhi Admn.) Vs. Pali Ram***^[1], wherein the Hon'ble Apex Court in para 23 made the following observations:

“Just as in English Law, the Indian Evidence Act recognizes two direct methods of proving the handwriting of a person:

- 1) By an admission of the person who wrote it; and
- 2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are:

- i) By the evidence of a handwriting expert (Sec.45);
- ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question (Sec.47); and
- iii) Opinion formed by the Court on comparison made by itself (Sec.73).

All these three cognate modes of proof involve a process of comparison. In mode (i), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (ii), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge of repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned”.

In view of the modes of proof as held in ***PALIRAM's case*** (1 *supra*), the plaintiff adopted the second method of proof i.e., examining himself as an witness and by examining the attester, who saw signing the document by the

defendant or who received personal acknowledgment of signing of defendant on Ex.A1. PW.2's evidence is direct evidence as to signing on the document if he received personal acknowledgment about signing on the document Ex.A-1 by defendant. Therefore, failure to refer the document to the expert inviting opinion under Section 45 of the Evidence Act is not a ground to reverse the findings recorded by the trial court. Therefore, the reversal finding recorded by the appellate court is beyond Section 99 of CPC read with Order 41 Rule 33 CPC.

Section 99 CPC deals with powers of the appellate court. Section 99 of CPC reads as follows:-

“No decree be reversed or modified for error or irregularity not affecting merits or jurisdiction:- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.”

Therefore, on technical consideration of evidence, the appellate court is not expected to reverse the reasoned finding recorded by the trial court.

On overall consideration of material available on record including the judgment of the trial court and the judgment of the appellate court, there is substantial evidence to prove execution of Ex.A1 as required under law i.e., plaintiff himself was examined as PW.1 besides examining attester as PW.2 and producing Ex.A-1 primary evidence. When the plaintiff proved the execution of promissory note-Ex.A-1, the onus of proof shifts to the defendant to disprove the execution, but the defendant miserably failed to disprove execution of Ex.A-1. Thus, the appellate court erroneously reversed the fact findings recorded by the trial court and the finding of appellate court is perverse since it is not based on any evidence.

When the plaintiff proved execution of Ex.A1, the onus of proof will be on the defendant to prove that Ex.A-1 was not supported by consideration in view of the statutory presumption under Section 118 of the Transfer of Property Act either by eliciting any material in the cross-examination of the plaintiff's witnesses or by adducing independent evidence to rebut the

presumption under Section 118 of N.I.Act by preponderance of probabilities.

In the present case, the trial court decreed the suit believing execution of Ex.A1-promissory note and passing consideration thereof since the defendant failed to dispel the presumption of Section 118 of the N.I.Act.

Even otherwise, this Court in ***G.Vasu Vs. Syed Yaseen Sifuddin Quadri***^[2], and Apex Court in ***Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal***^[3] consistently held that when the plaintiff proved execution of promissory note, by applying statutory provision under Section 118 of the N.I.Act, it is obligatory on the part of defendant to prove that promissory note is not supported by consideration. Since the defendant failed to dispel the statutory presumption under Section 118 of the N.I.Act, by applying the principle laid down in ***VASU's case*** (2 supra) and ***BHARAT's case*** (3 supra) I hold that promissory note is supported by consideration drawing statutory presumption under Section 118 of N.I.Act, which is a special rule of evidence under the Negotiable Instruments Act.

In view of my foregoing discussion, I am of the view that the first appellate court committed error in reversing the finding recorded by the trial court and dismissing the suit setting aside the decree passed by the trial court and it is totally perverse for the reason that in the entire cross-examination of PW.2 the defendant did not put his case and when a party to the suit failed to put his defence, whatever stated by the witness is to be accepted, in view of the principle laid down ***A.E.G. Carapiet Vs. A.Y.Derderian***^[4] ***And M.B.Ramesh Vs. K.M.Veerajee (D) by LRs.***^[5]

Hence, the judgment of the 1st appellate court is hereby set aside, restoring the decree passed by the trial court in favour of the plaintiff.

Accordingly, the Second Appeal is allowed. No order as to costs.

Miscellaneous petitions, if any, pending shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: 25-07-2016

Prv

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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- [\[1\]](#) AIR 1979 S.C. page 14
 - [\[2\]](#) AIR 1987 A.P. page 139
 - [\[3\]](#) AIR 1999 Supreme Court Page 1008
 - [\[4\]](#) AIR 1961 CALCUTTA 359
 - [\[5\]](#) AIR 2013 SC 2088