

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.44 OF 2016

JUDGMENT:

The defendants in O.S.No.233 of 2006 on the file of the learned Principal Senior Civil Judge's Court, Srikakulam and respondents in A.S.No.1 of 2011 on the file of the Principal District Judge's Court, Srikakulam, preferred this appeal, challenging the decree and judgment of the Principal District Judge, Srikakulam in A.S.No.1 of 2011 dated 07.04.2014, whereunder, the defendants were directed to pay the suit amount together with interests and costs.

For convenience of reference, the parties to the appeal hereinafter to be referred as defendants (appellants) and plaintiff (respondent) respectively.

The suit was filed for recovery of an amount of Rs.3,63,376/- with subsequent interest at the rate of 12% per annum, alleging that both the defendants are husband and wife, jointly borrowed Rs.3,50,000/- from the plaintiff on 31.08.2006 for their family expenses and jointly executed a promissory note in favour of the plaintiff, agreeing to repay the same together with interest at the rate of 12% per annum, either to the plaintiff or to her order within three months. Both the defendants executed security bond on 31.08.2006 for due payment of the amount covered by the promissory note. However, inspite of the repeated demands made by the plaintiff, the defendants failed to repay the amount. Hence, the plaintiff filed the suit.

The first defendant filed written statement denying material allegations, which is adopted by second defendant, *inter alia* contending that they have no acquaintance with the plaintiff at any point of time and they never executed any promissory note or document in her favour and that the said promissory note and security bond were fabricated, as the defendants refused to sell their property

to the plaintiff. It is further contended that when M. Ramakrishna Raju, a relative of the plaintiff has been insisting the defendants to sell their house, for his proposed business in the particular locality, they refused to sell their house. Hence, the plaintiff got the suit promissory note and other documents fabricated and filed the suit.

Based on the above pleadings, the Trial Court framed the following three issues.

- 1. *Whether the plaintiff is entitled to recover the suit amount as prayed for?***
- 2. *Whether the suit pronote and the documents of security are created as contended by the defendants? And***
- 3. *To what relief?***

After examining P.W.2, the defendants filed additional written statement raising their specific plea that P.W.2

Smt.M.Lakshmi and her husband Ramakrishna Raju who are powerful persons, came to their house along with others, obtained the signature of the first defendant on mutual agreement-cum-receipt by coercion and collected an amount of Rs.5,50,000/- in cash from the defendants, executed a mutual agreement-cum-receipt and also issued another receipt by P.W.2 Lakshmi on 05.12.2007 in favour of the defendants and in the said mutual agreement, P.W.2 Lakshmi agreed to withdraw the suit. Thus, the suit promissory note and other documents are not executed for valid consideration and prayed for dismissal of suit.

After filing additional written statement, no additional issue was framed by the Trial Court.

During the Trial, plaintiffs P.W.1 to P.W.3 were examined and Exs.A-1 & A-2 were got marked and on behalf of the defendants, D.Ws 1 & 2 were examined and Ex.B-1 receipt dated 05.12.2007 was got marked.

Upon hearing the arguments on both sides, the Trial Court

dismissed the suit with costs by its judgment 12.08.2010, holding that Ex.A-1 & A-2 were fabricated.

Aggrieved by the Decree and Judgment of the Trial Court, the plaintiff in the suit preferred an appeal A.S.No.1 of 2011 and the Appellate Court by framing two points for consideration, allowed the appeal by setting aside the judgment passed by the Trial Court and passed a decree in favour of the plaintiff for recovery of the amount with subsequent interest and costs.

Aggrieved by the reversal judgment of the First Appellate Court, the present second appeal is preferred, raising several contentions regarding non-consideration of evidence and accepting the Exs.A-1 & A-2 without support of any expert evidence. It is further contended that the plaintiff herself in her cross-examination admitted that she is unable to identify the defendants in the open Court. This fact is suffice to conclude that the transaction covered by Exs.A-1 & A-2 are fabricated, but the first Appellate Court did not appreciate the evidence in proper perspective and decreed the suit by allowing A.S.No.1 of 2011. Hence, it is prayed to set-aside the decree and judgment passed by the first Appellate Court in A.S.No.1 of 2011 dated 07.04.2014.

Learned counsel for the defendants/appellants Sri S. Srinivasa Rao at the stage of admission would submit that the admission of plaintiff in her cross-examination that she could not identify defendants itself indicates that she had no acquaintance with the defendants. In such a case, the First Appellate Court would have dismissed the suit. Apart from that, learned counsel would also urge that, when the defendants are contending that Exs.A-1 & 2 are fabricated documents, the First Appellate Court would have insisted for expert opinion to pass a decree, but on erroneous appreciation of evidence, the First Appellate Court decreed the suit without assigning specific reasons.

Whereas, the learned counsel for the respondents Sri V.V. Satish argued totally in support of the finding recorded by the First Appellate

Court and prayed for dismissal of the second appeal, pointing out their lacunae in the judgment of the Trial Court.

In the second appeal, before this Court under Section 100 of Civil Procedure Code, the defendants (appellants) have to establish that there is a substantial question of law. What is substantial question of law depends upon the facts of each case. To be 'substantial', a question of law must be debatable, not previously settled by the law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will depend on the facts and circumstance of each case whether a question of law is a substantial one, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolonging the life of any *lis*. (**Boodireddy Chandraiah v. Arigela Laxmi**^[1] and **Santosh Hazari v. Purushottam Tiwari**^[2])

The Apex Court reiterated the same principle while deciding the subject "what is substantial question of law" in "**Union of India v. Ibrahim Uddin**"^[3].

Thus, in view of the meaning of substantial question of law, the facts and circumstances of the present case have to be considered. In the grounds of appeal, the learned counsel for the defendants/appellants framed as many as six substantial questions of law, but, all the substantial questions framed by the Court are only questions of facts but not substantial questions of law.

The first and foremost contention raised by the learned counsel for the defendants is that when the defendants are contending that the documents Exs.A-1 & A-2 are fabricated, the Court should have insisted for opinion of an expert, but without insisting expert's opinion, the First Appellate Court decreed the suit in favour of the plaintiff. As

seen from the written statement, the specific contention urged by the defendants is that Exs.A-1 & A-2 are fabricated and they did not even contend that they are forged documents. There is lot of distinction between 'Fabrication' and 'Forgery'. The word 'Fabrication' means to invent or make up, concoct. The word 'Fabrication' is not defined anywhere, except in Indian Penal Code. In the original written statement filed by the defendants, they did not specify how their signatures were obtained by the plaintiff or her relative Ramakrishna Raju has fabricated a document. But, in the additional written statement, they invented altogether a different theory of obtaining the signature of the first defendant on the mutual agreement-cum-receipt, coercively and collected cash of Rs.5,50,000/- from the defendants, executed mutual agreement-cum-receipt and also issued another receipt by P.W.2 dated 05.12.2007 in favour of the defendants, styling it as mutual agreement. The plea in the original written statement and the additional written statement are inconsistent to one another and it is not their case at any point of time that their signatures were obtained on blank papers, and taking advantage of those signatures, the documents Exs.A-1 & A-2 were fabricated. But, during hearing the learned counsel for the defendants/appellants, contended that Exs.A-1 & A-2 were fabricated utilising the blank signed papers obtained by the husband of P.W.2. But, this contention was not raised in the written statement.

Section 464 of the Indian Penal Code deals with fabrication of document, whereas, Section 463 defined 'Forgery'. On an analysis of definitions of Forgery and Fabrication of a document, there is a thin difference between these two. Forgery and Fabrication are totally different and distinct under Criminal Law. Even otherwise, Forgery is nothing but creation of a document to claim title whereas, Fabrication is creating a document to claim any right or title in the property or otherwise taking advantage of papers available. In view of the contentions of the defendants that Exs.A-1 & A-2 are fabricated, it

means that taking advantage of the papers available, the plaintiff and her relative Ramakrishna Raju concocted and created a document to claim amount from the defendants. In such a case, it is obligatory on the part of the plaintiff to prove that Exs.A-1 & A-2 are genuine, valid documents and binding on the defendants to enforce the same.

A document can be proved in different modes as contemplated under Indian Evidence Act. At this stage, it is relevant to note the principle laid down by the Apex Court in **State (Delhi Administration)**

v. Pali Ram^[4], at page 23 which reads as follows:

"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:

(1) By the evidence of a handwriting expert (Section 45).

(2) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question (Section 47).

(3) Opinion formed by the Court on comparison made by itself (Section 73).

All these three cognate modes of proof involve a process of comparison. In mode (1), 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 (2), 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 (3), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned."

In view of the principle laid down in Pali Ram's case, a document can be proved by resorting to any of the modes contemplated in the above judgment.

In the instant case on hand, the plaintiff got examined herself besides examining two attestors and got marked Exs.A-1 and A-2 and it is one of the modes contemplated under the Evidence Act as held by the Apex Court in Pali Ram's case, i.e. by the evidence of some witness who saw it written. The learned counsel for the defendants contended that both the attestors are not residents of the place where the promissory note Exs.A-1 & A-2 were executed, but their signatures were brought into existence subsequently. In fact, it is not the case of the defendants that they executed document and the attestation took place subsequently after completion of execution. Even otherwise, P.Ws.2 & 3 are only attestors and the word attestation is defined under Section 3 of the Transfer of Property Act as follows.

"*attested*", 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 acknowledgment 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 attestation, a person can attest the document or has seen some other person sign the instrument in the presence and by the direction of the executant or when the executant admitted the signature on the document, even subsequent to completion of execution of document. In the entire evidence nothing was elicited that Exs.A-1 & A-2 were attested subsequent to execution of documents and completion of transaction through P.W.2. Their presence cannot be doubted at the time of completion of execution of Exs.A-1 & A-2. Therefore, the plaintiff resorted to the second method, i.e. by examining the persons in whose presence Exs.A-1 & A-2 were executed, proved their execution.

Even to accept the contention of the defendants that Ex.A-1 & 2 are fabricated documents, they must directly admit signatures on the papers, otherwise the question of fabrication does not arise. During hearing of the case, the learned counsel specifically contended that these two documents Exs.A-1 & A-2 were created taking advantage of signed blank papers, but no such evidence was brought on record. Even otherwise, when the defendants admitted the signatures, the question of insisting for report of an expert under Section 45 is totally unnecessary. When the plaintiff proved by examining the witness, it is for the defendants to disprove the execution of Exs.A-1 & A-2 by adducing satisfactory evidence. Here the defendants contention is that P.W.2 passed receipts styling it as mutual agreement, whereunder, she agreed that she will not prosecute the suit, further. But the same cannot be accepted for the reason that the defendants contention from the beginning is that they have no acquaintance with the plaintiff. P.W.2 is only an attestor of Exs.A-1 & A-2. She is incompetent to pass such receipts or agreements or execute mutual agreement. Therefore, the evidence of D.W.1 would not serve any purpose.

One of the contentions raised before the Trial Court and the Appellate Court was that no consideration was passed under Exs.A-1.

Ex.A-1 is a promissory note and when execution is proved or admitted, the initial onus of proof is on the defendants to rebut the presumption under Section 118 of Negotiable Instruments Act, by adducing independent evidence or by eliciting substantial material from the cross examination of the witnesses examined by the plaintiff.

In **Bharat Barrel and Drum Manufacturing Company v. Amin**

Chand Payrelal^[5], the Apex Court held as follows:

“Once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118 (a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which

is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist.”

In the absence of the specific plea of forgery, the contention that the First Appellate Court would have insisted for report of expert's opinion and it is not required to decree the suit, is a baseless ground. In view of the judgment in Pali Ram's case, the plaintiff may resort to prove a document in any of the modes. Opinion of an expert is one of the modes of proof by opinion evidence and the evidence of a hand writing expert is only relevant under Section 45 of the Evidence Act, but it is not a substantive piece of evidence. Therefore, there is no error in the judgment of the Appellate Court, since, the evidence on record is sufficient and satisfactory. The opinion of the expert under Section 45 is unnecessary.

The other contention raised before this Court is that P.W.1 admitted that she could not identify the defendants in the open Court, whereas, the contention of the plaintiff is that the entire transaction was contemplated through P.W.2 and only on one occasion, the plaintiff could see the defendants, as such it is not a ground to dismiss the suit. P.W.1 admitted that she cannot identify the defendants in open court during cross examination. P.W.1 had an occasion to see both the defendants only when they approached through P.W.2. In such case, it is difficult for anyone to identify such person suddenly in the Court during cross examination, because of their rural background. However, that is not a ground to dismiss the suit since, the defendants admitted that their signatures were obtained on a blank paper and fabricated the

document. Of course, specific contention of fabrication was disbelieved in view of the discussion in the earlier paragraphs. The Trial Court based on minor discrepancies in the evidence of P.W.1 concluded that Ex.A-1 is a fabricated document. This was reversed by the First Appellate Court. Even before this Court, no material is shown to accept the reason recorded by the Trial Court. However, these questions are not substantial questions of law, but only the questions of fact which this Court need not go into while deciding the appeal under Section 100 of Civil Procedure Code.

The Trial Court arrived at a conclusion that it had no jurisdiction since the execution did not take place within the territorial jurisdiction of Trial Court in paragraph 14 of the Judgment, but the Appellate Court reversed it assigning its own reasons. However, the learned counsel for the plaintiff would contend that the place of execution is different from the place of preparation of document. The document was prepared outside the territorial jurisdiction of the Trial Court, but executed within the jurisdictional limits of the Trial Court. The Trial Court though recorded a finding in paragraph 14 of the judgment, no issue was framed as to the jurisdiction of Trial Court and in the written statement, no such plea was urged before the Court, regarding the territorial jurisdiction of the Trial Court to try the suit. A close scrutiny of the written statement and additional written statement filed by the defendants discloses that, they did raise no plea that the trial Court lacks territorial jurisdiction.

According to Section 21 (1) of the Civil Procedure Code, no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice. The Apex Court specifically held that the objection relating to jurisdiction to be raised at the earliest

point of time in **Indermani Kirtipal v. Union of India**^[6]. In order that an objection to the place of suing may be entertained by an Appellate or Revisional Court, the following conditions are to be fulfilled.

1. The objection was taken in the Court of first instance;
2. Objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement;
3. Thereupon, a consequent failure of justice.

Even otherwise, the absence of territorial jurisdiction is only irregularity and not illegal. Therefore, in view of the bar under Section 21 (1) of C.P.C. the objection as to the territorial jurisdiction of the Court, cannot be entertained, since it is only an irregularity and not an illegality.

Therefore, I do not find any merit in the grounds urged in the grounds of appeal, much less, no substantial question of law is found, in view of the discussions in the above paragraphs.

Therefore, I find no merit in this second appeal and it is accordingly dismissed, but without costs.

Consequently, miscellaneous applications pending if any shall also stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

17.06.2016.

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[\[1\]](#) (2007) 8 SCC 155
[\[2\]](#) 2001(3) SCC 179
[\[3\]](#) (2012) 8 SCC 148
[\[4\]](#) AIR 1979 SC 14
[\[5\]](#) **AIR 1999 Supreme Court Page 1008**
[\[6\]](#) 1996 AIR 1567