

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.241 OF 2015

JUDGMENT:

This Second Appeal is filed by the defendants assailing the decree and judgment dated 11.06.2012 in A.S.No.253 of 2010 on the file of the Court of the V Additional District Judge, West Godavari District at Eluru, wherein and whereby the decree and judgment dated 10.03.2010 in O.S.No.137 of 2006 on the file of the Court of the Additional Senior Civil Judge, Eluru, decreeing the suit in favour of the plaintiff was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the present appeal are briefly as follows: One Mothukuri Nagabhushanam borrowed an amount of Rs.1,20,000/- from the plaintiff on 10.03.2003 for his family necessities and executed a promissory note in favour of the plaintiff on the same day agreeing to repay the same with interest at the rate of 24% per annum. The said Nagabhushanam died on 01.11.2003 leaving behind him defendant Nos.1 to 4 as his legal heirs. On 20.09.2005 the plaintiff got issued a legal notice demanding the defendants to repay the amount covered under the promissory note dated 10.03.2003. Defendant Nos.2 and 4 received the legal notices, but did not choose to issue reply notice. Hence, the suit.

4. The first defendant filed written statement denying all the averments made in the plaint *inter alia* contending that late Nagabhushanam did not execute the promissory note on

10.03.2003 in favour of the plaintiff. The plaintiff is an unauthorised money lender. The plaintiff never demanded late Nagabhushanam or the defendants to repay the amount covered under the promissory note. The plaintiff has no *locus standi* to file the suit. Defendant Nos.2 to 4 filed a memo adopting the written statement of the first defendant.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether Sri Mothukuri Nagabhushanam during his life time borrowed money and executed suit pronote in favour of plaintiff?
2. Whether the plaintiff is entitled for recovery of suit claimed amount?
3. To what relief?

6. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.6 were marked. On behalf of the defendants, DWs.1 to 3 were examined and Ex.B.1 was marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that late Nagabhushanam borrowed money from the plaintiff and executed the promissory note and consequently, decreed the suit. Feeling aggrieved by the decree and judgment dated 10.03.2010 in O.S.No.137 of 2006, the defendants have preferred A.S.No.253 of 2010 on the file of the Court of the V Additional District Judge, West Godavari District District at Eluru. The first appellate Court, after reappraising the oral and documentary evidence available on record, concurred with the finding recorded by the trial Court and dismissed the appeal. Hence, the second appeal.

8. Learned counsel for the defendants (appellants herein) strenuously submitted that the plaintiff never demanded money from late Nagabhushanam during his life time that itself indicates falsity of the promissory note Ex.A.1. He further submitted that the findings recorded by the Courts below are perverse and hence, liable to be set aside.

9. Basing on the submissions made by the learned counsel for the defendants (appellants herein), the question of law that arises for consideration in this second appeal is: *Whether the findings recorded by the Courts below are perverse?*

10. Both the Courts below concurrently held that Ex.A.1 promissory note was executed by late Nagabhushanam. The first defendant is the wife and defendant Nos.2 to 4 are the daughters of late Nagabhushanam. The defendants, being the legal heirs of late Nagabhushanam, are liable to discharge the debt amount borrowed by him. The defendants denied the execution of promissory note by late Nagabhushanam. The burden of proof lies on the plaintiff to establish that Ex.A.1 promissory note was executed by late Nagabhushanam and the same was supported by consideration. Once the plaintiff proves the execution of the promissory note, then onus of proof shifts on the defendants to prove that Ex.A.1 promissory note was not executed by late Nagabhushanam. In order to prove the execution of promissory note, the plaintiff examined himself as PW.1. PW.2 is the attesor and PW.3 is the scribe of Ex.A.1 promissory note. As per the testimony of PWs.2 and 3, late Nagabhushanam borrowed money from the plaintiff and executed Ex.A.1 promissory note, in their presence, agreeing to repay the same with interest at 24% per

annum. In the cross-examination of these two witnesses, nothing is elicited to disbelieve their testimony. The first defendant examined herself as DW.1. DW.2 is the son-in-law of DW.1 and DW.3 is an independent witness. The oral testimony of these witnesses no way helpful to establish that Ex.A.1 promissory note was not executed by late Nagabhushanam. The plaintiff got issued a legal notice dated 20.09.2005 directing the defendants to discharge the debt amount. Exs.A.3 and A.4 are returned notices and Exs.A.5 and A.6 are the postal acknowledgments. Defendant Nos.2 and 4, having received the legal notices, did not choose to give a befitting reply. This Court is very much conscious that mere non-issuance of reply notice by itself is not a valid ground to discard the version put forth by the defendants. No explanation was put forth by DW.1 for non-issuance of reply notice. If the findings of the Courts below are based on no evidence or based on evidence, which is not legally admissible, then those findings can be termed as perverse. In the instant case, PWs.2 and 3, who are the independent witnesses, are competent to say whether late Nagabhushanam borrowed money from the plaintiff or not. The trial Court believed the testimony of PWs.1 to 3. The first appellate Court reappreciated the oral and documentary evidence available on record and arrived at a conclusion that late Nagabhushanam executed the promissory note in favour of the plaintiff. The first appellate Court is the fact finding final Court. The findings recorded by the Courts below are supported by oral and documentary evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellants that the findings recorded by the Courts below are perverse and hence, liable to be set aside. The material available on record clinchingly

establishes that late Nagabhushanam borrowed money from the plaintiff and executed Ex.A.1 promissory note. There is a legal obligation on the part of the defendants to repay the amount borrowed by late Nagabhushanam.

11. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

12. Having regard to the facts and circumstances of the case and also the principles enunciated in the case cited supra, I am of the considered view that the point raised by the learned counsel for the appellants will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law is involved in this appeal.

13. In the result, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 10.11.2017
Ivd

¹ (2010) 13 SCC 216