HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.895 OF 2016

JUDGMENT:

Defendant in O.S. No.664 of 2014 on the file of the II Senior Civil Judge, City Civil Court, Hyderabad, is appellant in the present Second Appeal. He suffered a decree of trial Court - II-Senior Civil Judge Court in the aforesaid suit and lost regular appeal preferred by him in A.S. No.286 of 2015 on the file of II-Additional Chief Judge, City Civil Court, Hyderabad. Respondent herein is the plaintiff.

2. For the sake of convenience, the parties herein are referred to as they were arrayed in the Original Suit before the trial Court.

3. Plaintiff filed the suit for recovery of an amount of Rs.2,90,000/- with interest and costs lent by her to the defendant on 23.08.2012 free from interest. Sometime later, the defendant executed a bond on a stamped paper worth Rs.50/- who undertook to repay the said amount within four (4) months from the date of execution, with a condition that in case he fails to repay the hand loan, the plaintiff can approach the Court and claim interest at 24% per annum after the stipulated period of four months.

i) Since the defendant failed to pay the amount despite issue of legal notice, she laid the claim. She has also recorded the conversation through the mobile phone of the elders and well-wishers mediation, containing the admission of the defendant and presented a compact disc exhibiting it as Ex.A-4.

4. The defendant took the usual defence of resisting the request denying the hand loan and execution of the bond itself. According to him, the plaintiff is in the habit of filing cases against her co-employees and got unjust enrichment under the guise of the proceedings and the documents filed by the plaintiff are fabricated for the purpose of case and, therefore, sought to dismiss the suit by awarding exemplary costs.

5. The learned trial Court on the basis of the pleadings put forth by rival parties, settled the following three issues:

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i) Whether the hand loan document dt.23-8-2012 is true, valid and binding on the defendant?

ii) Whether the plaintiff is entitled to recover the suit claim amount as prayed for?

iii) To what relief? "

6. During trial, the plaintiff examined herself as PW.1 and marked Exs.A-1 to A-4, whereas the defendant examined himself as DW.1, and he has not examined any other witnesses nor filed any documents.

7. On issue No.1, the learned trial Court noted that during pendency of the suit, the plaintiff got issued a notice to the defendant

for production of original of Ex.A-1, and since the defendant failed to produce the same, she obtained permission under Section 65 of the Indian Evidence Act, 1872 (for short 'Act, 1872') exhibited the photostat copy as Ex.A-1. On Ex.A-4, it is according to the trial Court that it contains voice recording of the defendant admitting the loan transaction and promising to repay the same and having gone through Ex.A-4, perhaps, by playing the Compact Disc, the learned trial Court affirmed the admission made by the defendant as to the borrowal of the amount as hand loan and promising to repay the same. The trial Court also based on a probability derived from the circumstance that the defendant's evidence in chief-examination was totally a denial but in his cross-examination, he has answered that he does not know whether he had executed any document in favour of the plaintiff in recording findings on Issues Nos.1 and 2. The trial Court has also drawn yet another probability noting that in the written statement, the defendant has taken a plea that the plaintiff was in the habit of filing cases against her co-employees and got enriched unjustly under the guise of legal proceedings, but he made categorical admissions stating that except the present suit, there are no other disputes pending between himself and the plaintiff disbelieved the stand put forth by him. The trial Court has also taken into consideration the admission made by the defendant that they worked together in SETWIN for two years.

i) Thus, basing on the evidence of PW.1 and probabilities referred to in the above, the trial Court recorded findings on issue Nso.1 and 2 in favour of the plaintiff and against the defendant, and thereby concluded that the defendant is liable to pay Rs.2,90,000/- with interest at 6% per annum from the date of suit till realization.

8. Aggrieved over the same, the defendant preferred the first appeal before the appellate Court. The learned appellate Court, in its judgment and decree, dated 16.09.2016, formulated the following point for consideration in paragraph N.10.

> "Whether the judgment and decree passed by the II Senior Civil Judge, City Civil Court, Hyderabad in O.S. No.664 of 2014 is liable to be set aside as prayed for?"

9. On re-appreciation of evidence on record, more particularly, referring to the oral evidence of PW.1 and DW.1, recorded a finding that the defendant borrowed the amount as hand loan from the plaintiff and the fact that he did not answer the notices under Exs.A-2 and A-3 would lend assurance to the case of the plaintiff, and thereby dismissed the appeal holding that the trial Court did not go wrong in recording the findings in favour of the plaintiff and against the defendant.

10. Aggrieved of the said judgment and decree passed by the learned appellate Court, the defendant preferred the present second appeal.

11. While laying emphasis on procedural aspects in the grounds of appeal, the appellant agitates that the appellate Court failed to follow the procedure as contemplated under Order XLI Rule 31 of the Code of Civil Procedure, 1908 (for short 'CPC'); the appellate Court tendered wrong findings recording that the plaintiff proved her case against the defendant, for the reasons that the plaintiff has filed application under Section 45 of the Act 1872 in the suit as well as in the appeal, but failed to pursue; the appellate Court being the final Court of fact finding ought not to have skipped the duty of giving findings by it; mere marking of document does not amount to proving the contents unless it is proved as per the provisions of the Act, 1872; the objections raised as to the maintainability of the suit under Order VII Rule 14 (3) of CPC mentioned in the written arguments filed in the trial Court as well as in the appellate Court were ignored and the appellate court has not formulated points on the questions of law as (A) to (H) in paragraph-8 of the Grounds, and sought to allow the appeal setting aside the judgments and decrees rendered by the Courts below.

12. On 16.11.2016, this Court admitted the second appeal formulating the substantial questions of law thus:

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1) Whether the Ex.A1-xerox copy of the so called acknowledgment-cum-undertaking of hand loan letter without foundation of existence of original from mere admission is a valid marking as admitted and if so, even whether it is duly proved of the alleged oral hand loan transaction from the so

called subsequent acknowledgment, from the contest by the defendants of there is no such oral hand loan transaction for absence of any material in proof of the alleged hand loan?

2) Whether the Ex.A-4-CD by mere marking tantamounts to proof despite the legal bar under Section 65-B of the Indian Evidence Act without compliance with the requirements including certification and in the absence of which, whether placing on reliance on Ex.A4-CD contains without even filing translated copy in verbatum of so called contents and by recording is unsustainable and contrary to law and perverse in arriving the finding by placed reliance on it and without referring to the written statements of the appellant/defendant is contrary to law and unsustainable?

3) To what relief? "

On the same day, in S.A.M.P. No.2267 of 2016, execution of trial Court's decree was stayed subject to deposit of half of the decretal amount and costs before the Court within a period of six weeks, and on such deposit and on furnishing security, the decree-holder was permitted to withdraw the amount pending the appeal, failing which, the petition would entail in dismissal.

13. The learned counsel for the respondent would submit that when there is no specific denial in the written statement and the denial being very vague, the inference is that it amounts to admission and, therefore, irrespective of the fact whether Ex.A4 – original Compact Disc, is admissible or inadmissible the decrees passed by the Courts below cannot be upset.

14. Second submission is, Order 41 Rule 31 of C.P.C., no doubt, provides for formulation of points by the Appellate Court since it is final fact assessing court, but, merely because distinct points have not been framed, it cannot be said that the Appellate Court has not properly reappraised the evidence on record as comprehensive point formulated by the Appellate Court would substantially answer the grounds agitated in the Appeal before the Appellate Court.

15. Next submission is that the probabilities would favour the respondent and they stand adverse to the case of the appellant. Therefore, it is her submission that none of the grounds now agitated in the Second Appeal and the substantial questions of law formulated by this Court would affect the concurrent findings recorded by the Courts below and the conclusion arrived at thereon, and, therefore, sought to dismiss the Second Appeal.

16. In the context of Order 41 Rule 31 of the Code, the learned counsel would place reliance in **G. Amalorpavam v. R.C. Diocese of Madurai**[1].

17. Concerning substantial questions of law and necessity to formulate, in the context of the principle that merely because on appreciation of evidence another view could have been taken, it cannot be said that High Court has assumed jurisdiction by terming such a substantial question of law and remanding a case for

[1] (2006) 3 SCC 224

reappreciation of evidence and fresh decision in matter like the case before the Hon'ble Supreme Court was held nothing but harassment of litigant and unnecessary delay in final disposal of a *lis*, shakes faith of litigants in Court, the learned counsel places reliance in **Lisamma Antony v. Karthiyayani**[2].

18. The learned counsel places reliance in **Laxmidevama v. Ranganath**[3] for the proposition that the High Court's interference on erroneous reappreciation of evidence with concurrent findings of trial Court and appellate Court in second appeal is unsustainable, more particularly, when no substantial questions of law arisen, in exercise of jurisdiction under Section 100 of C.P.C. based on oral and documentary evidence and concurrent findings of fact cannot be upset by the High Court unless findings so recorded are shown to be perverse.

19. In the same context, the learned counsel places reliance in **Syeda Rahimunnisa v. Malan Bi (dead) by LRs. and another**[4], **Vishwanath Agarwal v. Sarla Vishwanath Agarwal**[5], **Gurudev Kaur v. Kaki**[6], and **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar**[7].

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2 (2015) 11 SCC 782
3 (2015) 4 SCC 264
4 2017 (1) ALD 8 (SC)
5 (2012) 7 SCC 288
6 (2007) 1 SCC 546
7 (1999) 3 SCC 722

20. As to when inferences on findings of fact in second appeal are permissible, the learned counsel for respondent places reliance in **P. Chandrasekharan v. S. Kanakarajan**[8] wherein the Hon'ble Supreme Court held that inferences are permissible if findings are based on misreading of evidence or are so perverse that no reasonable person of ordinary prudence could take the said view.

21. Adverting to the present case, substantial questions of law have been referred to in the above. Two main grounds are insisted by the learned counsel for the appellant. First ground is that the respondent lead secondary evidence, but before leading secondary evidence the circumstances under which secondary evidence can be permitted to be let in were not established, as required by the provisions of Section 65 of the Act, 1872. Incidentally, it is his submission that the suit itself is not maintainable for the reason that the Photostat copy of the alleged agreement has been placed and, therefore, hit by Order VII Rule 14 (3) of C.P.C. He places reliance in **H. Siddiqui v. A. Ramalingam**[9] for the proposition that mere admission of a document in evidence does not amount to its proof, rendered in the context of Sections 61 to 65, 67 and 73 of the Evidence Act, 1872. He also places reliance in **Shakthi Concrete Industries, Hyderabad v. Ganesh Gupta**[10], a Division Bench of this Court placed reliance in *Life Insurance Corporation of India v. Ram*

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[8] (2007) 5 SCC 669
[9] (2011) 4 SCC 240
[10] 2015 (6) ALD 739 (DB)

Pal Singh Bisen, (2010) 4 SCC 491, and *Kaliya v. State of Madhya Pradesh*, (2013) 10 SCC 758, for the propositions that mere filing and marking of documents does not dispense with proof and exhibiting a document in Court does not amount to proof of its contents and marking a Photostat copy is no proof in the eye of law as held in **H. Siddiqui** (9 supra) and also for the proposition that in case where original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. Yet another decision in **U. Sree v. U. Srinivas**[11] is relied on for the proposition that in the absence of foundational evidence to be laid for leading secondary evidence, secondary evidence, is inadmissible.

22. Second is, Ex.A-4, which is the compact disc, is inadmissible and has not been proved in accordance with evidentiary rule, as contemplated by the provisions of Section 65A and 65B of the Act, 1872, for the reason that certificate as required from the competent authority is not filed along with Ex.A4. In support of his submission, he placed reliance in **Anvar P.V. v. P.K. Basheer**[12] for the proposition that electronic record by way of secondary evidence shall not be admitted in evidence unless requirements under Section 65B are satisfied and in the case of CD, VCD, Chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B

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[11] (2013) 2 SCC 114
[12] (2014) 10 SCC 473

obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. It is, therefore, his submission that when Exs.A1 and A4 are excluded, there is nothing on record to show that the respondent lent the suit amount to the appellant and the Courts below, somehow, lost sight of these two grounds despite alerting the Courts by filing written arguments even.

23. Yet another submission is, that the procedure contemplated by Order 41 Rule 31 of C.P.C. is not complied as the Appellate Court did not formulate the relevant points for consideration rather one point only was formulated by it and, therefore, in view of the law declared by the Hon'ble Supreme Court and the Hon'ble High Courts either the appeal be remitted to the Appellate Court or to set aside the judgment and decree passed by the Appellate Court as well as the trial Court.

24. The learned counsel for the appellant also places reliance in **Shasidhar v. Ashwini Uma Mathad**[13]. It is also his submission that, though, the application was filed by the respondent under Section 45 of the Act, 1872, to send Ex.A1 document for opinion of the expert, still, the said application was not decided and failure on the part of the respondent to get expert opinion on the signature purported to be that of the appellant in Ex.A1 is a circumstance from which an

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[13] (2015) 11 SCC 269

inference adverse to the case of the respondent has to be invariably drawn.

These have been the submissions made by the learned counsel for the appellant.

25. The learned counsel for the respondent would submit that, in fact, the respondent denied that the original of Ex.A1 was in the custody of the appellant and though, notice was issued, the appellant has not produced it and that itself would suffice to show that the respondent is successful in establishing the circumstances which compelled her by filing Photostat copy as secondary evidence. Concerning Ex.A4, the learned counsel would submit, the very fact that the appellant has not specifically denied and though, he has set up forgery and fabrication of Ex.A1, he has not come forward to prove the same despite the fact that initial burden resting on the respondent was discharged and the probabilities that are derived stand against the appellant and in favour of the respondent aiding the documentary evidence, Exs.A2 and A3 and, therefore, shifted to the appellant, but the appellant did not even make an attempt in that regard to rebut the same.

26. So far as the second submission that Ex.A4 is inadmissible and ought not to have looked into by the trial Court for want of certificate as mandated by Section 65B(4) of the Act, 1872, canvassed by the learned counsel for the appellant is concerned, it is true, in **Anvar P.V.** (12 supra) the Hon'ble Supreme Court declared

that certificate as specified in Section 65B(4) of the Evidence Act has to be accompanied to the statement. In the present case, to consider the compact disc as secondary evidence of electronic record, the mandatory pre-requirement of annexing certificate thereto is wanting. Hence, though, compact disc is marked as Ex.A4, still, it is to be held that the contents thereof are not proved and cannot be looked into. There is no need to reemphasize the well settled proposition of law that mere marking of a document as an exhibit does not amount to proving the contents thereof as held by the Hon'ble Supreme Court in **H. Siddiqui** (9 supra), **Ganesh Gupta** (10 supra) and **U. Sree** (11 supra). Hence, the finding recorded by the trial Court as well as the appellate court on Ex.A4 suffers from legal infirmity. But the effect thereof would be dealt with a little later.

27. Turning to the first submission of the learned counsel for the appellant that Ex.A1 ought not to have been looked into by the Courts below for the reason that no leave of the trial court was obtained prior to introducing Ex.A1 to lead secondary evidence and even the circumstances under which the respondent intended to introduce secondary evidence were not established, it is not in dispute that the interlocutory application was filed to lead secondary evidence as required by the provisions of Section 65 of the Act, 1872. It is not as though the respondent just kept quiet without making effort to compel the appellant to cause production of the original agreement. In fact she has given a notice to cause production of original of

Ex.A1, which stood unanswered. Further, the entire claim is not based on Ex.A1. The respondent only intended to introduce Ex.A1 for the purpose of showing that there was a prior contract of loan obtained by the appellant from the respondent as hand loan free from interest. After considerable lapse of time, Ex.A1 came into vogue between the parties specifying four months time, within which the amount borrowed was sought to be repaid by the appellant associated with the stipulation indicating failure by the appellant to repay the amount borrowed within the said period will entail in payment of interest at 24% per annum thereon.

28. The submission in regard to non-compliance of Order VII Rule 14 (3) of C.P.C. is concerned, the appellant though, filed copy of the plaint along with material papers, but it appears that the appellant has filed part of the plaint as the copy ends with verification column. Therefore, it is not clear whether Ex.A1 was filed or not along with plaint. However, the very fact that the appellant herein has referred to Ex.A1 in his written statement, would clearly indicate that Ex.A1 was filed by the respondent along with plaint. Therefore, the said submission is without any merit.

29. Now, the conduct of the appellant is worth commenting in the context of Ex.A1 document. In his written statement, he has come up with complete denial of execution of Ex.A1. Even borrowal of amount earlier thereto was also wholly denied by him. He did not stop at that stage, but he went on commenting, that the respondent

fabricated Ex.A1 so as to harass him and exploit the situation by collecting the amounts from him. He did not even stop there. He went on attempting to lay foundation assassinating the character of the respondent by putting forth the plea that the respondent is in the habit of filing litigations against co-employees and by threat or blackmail, collecting the amounts. Even in regard to his case he has come up with definite averment that the respondent has even subjected him to litigations in various *fora*. It is really strange and un-understandable as to why the appellant has put forth such pleas, without laying factual foundation thereon and utterly failing to prove any of them as he makes an unequivocal admission that except the present *lis* no other cases are filed by the respondent against him.

30. It is no doubt true that initial burden rests on the respondent to prove that she has lent amount as hand loan to the appellant and the appellant received it promising to repay the same free from interest. In that direction, now it is to be seen whether there is concrete material to convince the conscience of any of the courts in the hierarchy.

31. Nothing more is required to answer this point as there is concrete material on record to condemn the stand taken by the appellant and prove positively the plea put forth by the respondent completely clinching the main controversy.

32. Firstly, the respondent got issued notice demanding him to repay the loan amount prior to the institution of suit, it stood unanswered. The appellant has not assigned any reasons as to what compelled him in maintaining silence without controverting the allegations mentioned in the notice got issued by the respondent nor did he make any attempt to deny the contents of that notice nor did he give any explanation in his affidavit in chief-examination therefor nor did he suggest to the respondent in her cross-examination that such a notice was not at all issued by her or such a notice was not received by him. Similar is the case with the notice under Ex.A3. This conduct on the part of the appellant gives rise to an inescapable inference that unless hand loan transaction set out by the respondent/plaintiff is true, the appellant/defendant would not have kept quiet and that meaningful silence is sufficient to infer that the respondent lent Rs.2,90,000/- to the appellant. When, once, such a conclusion is arrived at, the onus automatically shifts to the appellant to rebut it, since the presumption drawn is a rebuttable presumption in which direction there is absolutely nothing on the side of the appellant. Therefore, even overlooking Exs.A1 and A4, it would be suffice to hold that the aforesaid circumstances would clinchingly establish the loan transaction set out by the respondent based on original cause of action. The rulings in **Bollam Venkataiah v. Venumuddala Venkata Ramana Reddy**[14] and in **P.C. Gopinathan Nair v. Paramu Pillai Appu Pillai**[15] fortify the same.

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[14] AIR 1985 AP 26

33. Second, concerning the secondary evidence let in by the respondent, the findings recorded by the Courts below cannot be faulted. Even turning to Ex.A1, mere circumstance that an application ought to have been made along with the plaint but failure to make such an application is not a ground to overturn the concurrent findings recorded by the Courts below.

34. Now, adverting to the submission made by the learned counsel for the appellant that though, interlocutory applications were filed by the respondent seeking permission of the Court to send Ex.A1 to the Handwriting Expert for opinion as to the signature occurring on Ex.A1 to ascertain whether it belongs to the appellant or not and the said application has not been pursued, certainly, would not be a ground to reject the claim of the respondent. It is true, the courts ought to have disposed of the applications filed by the appellant, but in fact when a plea of fabrication of Ex.A1 is put forth that too in specific terms by the appellant, the whole burden rests on the appellant to discharge the same positively by referring the document to the Handwriting Expert. In fact such burden is cast on the appellant, but not on the respondent as fabrication invariably involves forging the signature of the appellant. Thus, the burden that rested on the appellant remained undischarged and no attempt is made by the appellant in that direction, but, on the other hand, comes up commenting at the respondent that she did not pursue the application

[15] AIR 1991 Kerala 16

filed by her before the Courts below and requests the Court to derive probability and to draw inference adverse to the respondent's case, which is wholly unconvincing.

35. As regards yet another submission made by the learned counsel for the appellant that there has been no compliance of Order 41 Rule 31 of C.P.C., the appellate Court formulated comprehensive point for determination without formulating the points distinctly, but the judgment of the appellate Court would clearly show that it has covered the main grounds agitated by the appellant before the Courts below. Even otherwise, substantial compliance of the procedural requirement mandated by the provisions of Order 41 Rule 31 of C.P.C. would suffice and, therefore, the judgment and decree passed by the appellate Court cannot be set aside on mere technicality. The decisions relied on by the learned counsel for the respondent would support it.

36. From the foregoing discussion, when lending of amount as hand loan is substantiated by the probabilities based on notice got issued by the respondent, the other aspects, which are incidental, such as execution of Ex.A1 between the parties, whether it is genuine or otherwise, and Ex.A4 – Compact Disc, even excluded, still, there is no case for the appellant, more particularly, when concurrent findings recorded by the Courts below cannot be viewed as patently perverse.

37. Turning to the questions of law formulated, the first substantial question of law referred to in paragraph-11 above, relates to the factual aspect and cannot be construed as substantial question of law. So far as the second substantial question of law is concerned, while referring to the ruling in **Anvar P.V.** (12 supra) in the context of Ex.A4, it was held hereinbefore both the Courts below went wrong in relying on Ex.A4 despite non-compliance of pre-mandatory requirement of Section 65B(4). That was the reason it is held in paragraph-26 that Ex.A4 is inadmissible. Whether this finding would affect the case of the respondent is concerned, it is to be answered in the negative, since as discussed in the foregoing paragraphs the claim in the instant case is based on original cause of action. The other rulings relied on by the learned counsel for the appellant would not assist in improving the case of the appellant.

38. Thus, the Second Appeal is devoid of merits and, accordingly, the same is dismissed with costs.

As a sequel thereto, miscellaneous petitions if any pending in the Second Appeal shall stand closed.

A. SHANKAR NARAYANA, J

Dt. 02.08.2017
Mgr/gbs