

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

APPEAL SUIT No.491 OF 2002

JUDGMENT:

The unsuccessful plaintiff preferred the present Appeal Suit under Section 96 of the Code of Civil Procedure, 1908, assailing the judgment and decree dated 29.03.2001 in O.S. No.930 of 1993 passed by the learned I Additional Senior Civil Judge, Vijayawada.

2. The fact-situation would reflect that one Addada Sambasiva Rao, who is shown as plaintiff, filed the aforesaid suit for recovery of Rs.30,000/- with compound rate of interest at 24% per annum from the defendants, who said to have borrowed the said amount, by securing a promissory note dated 07.04.1991. Despite repeated demands, as the loan was not discharged, the plaintiff got issued a legal notice dated 16.08.1993, to both the defendants demanding them to pay the amount. Defendant No.1 having received it, got replied on 24.08.1993, with all incorrect allegations. Their defence is that they are agriculturists and therefore, they are entitled to the benefits of Act 4 of 1938 or Act 45 of 1987. The claim of the plaintiff was that the defendants were not agriculturists and, therefore, they are not entitled to benefit either under Act 4 of 1938 or Act 45 of 1987.

3. Before the trial Court, respondent No.2 (defendant No.2) remained *ex parte*.

4. Defendant No.1 filed his written statement resisting the suit claim. In fact, he has denied the entire promissory note transaction specifically pleading that neither he knows the plaintiff nor ever heard his name nor seen him at any time and that the promissory note is a rank forgery and on his enquiries, he came to know that the plaintiff is set up by a foreman of Siri Varsha Chit Fund Private Limited. According to him, he joined as member in three broken chits of the said company worth Rs.5,000/-, Rs.10,000/- and Rs.25,000/- and paid monthly installments till 11.09.1991. He pleaded, while admitting him (defendant No.1) as a member, a foreman of the said chit fund company took several signatures on blank promissory note forms affixed with revenue stamps towards security and thus, sought to dismiss the suit.

5. The trial Court based on the pleadings, settled the following two issues for trial:

“1. Whether the suit pronote is true, valid and supported by consideration?

2. To what relief?”

Before it, on behalf of the plaintiffs, PWs.1 to 3 were examined and Exs.A-1 and A-2 were marked and on behalf of the defendants, defendant No.1 examined himself as DW.1 and marked Ex.B-1.

6. The trial Court, on issue No.1, having extracted the evidence of PW.1 referred to the answers given in cross-examination.

The vernacular portion in paragraph No.10 and, in fact, PW.1, is not plaintiff as such, and a power of attorney holder, and Ex.A-1 is the power of attorney, which is filed; the Court below has extracted the acquaintance between PW.1 and the plaintiff and making certain observations on the extracted portion and giving credence to what has been stated by defendant No.1 in his reply that there is no such person by name 'A. Sambasiva Rao' and he has never seen such person nor ever heard the name of the so called 'A. Sambasiva Rao' while executing the promissory note; the whole burden rests on the plaintiff to prove the suit transaction and since the plaintiff did not step in to witness box and the evidence of PW.1 is varying with the pleas put-forth in the plaint, held that evidence of PW.1 is not helpful to the plaintiff to prove Ex.A-2 promissory note. The trial Court also did not agree with the attestors', PWs.2 and 3, evidence, and thereby dismissed the suit with costs.

7. The aforesaid judgment and the decree are under challenge in the present appeal suit by the plaintiff claiming that the trial Court ought not to have carried away by the version of the defendant and ought to have seen that the defendants borrowed a sum of Rs.30,000/- and consequently executed Ex.A-2 and the suit claim was proved through the evidence of PWs.1 to 3 and the trial Court did not properly appreciate the evidence of PWs.1 to 3, and, therefore, prayed to decree the suit by allowing the appeal.

8. The value of the appeal is shown as Rs.1,07,563/-.

9. Heard Sri Kowturu Pavan Kumar, learned counsel for the appellant - plaintiff.

10. None appears for the respondents - defendants.

11. The learned counsel for the appellant places reliance in **Lalit Tyagi v. M. Cahndrakala. CrP No.21303 of 2004 dated 0808.2006, an unreported order rendered by a learned Single Judge of this court¹**. Paragraph No.8 is to the following effect:

“8. The ratio in the decisions relied on by the Counsel for both sides is that the General Power of Attorney of a party can speak about the facts which are within his knowledge, but he cannot be treated as a substitute for the party who is the donor of the Power of Attorney. If both the General Power of Attorney and the party have knowledge about the facts in issue of the case both are competent witnesses. In such cases, if the party does not go into the witness box as a witness, question whether an adverse inference, for his not being examined as a witness or not depends on the facts and circumstances of each case.”

12. In the present case, when the defendant has taken a distinct plea in his reply answering the legal notice got issued by the plaintiff even prior to the suit, certainly, the plaintiff cannot screen himself by just executing a power of attorney in favour of PW.1 to conduct the case. Had the legal notice got issued by the plaintiff stood

unanswered and no specific plea was taken up by defendant No.1, certainly, the decision relied on by the learned counsel for the appellant would render assistance.

13. Thus, on facts, certainly, the principle enunciated in paragraph No.8, the fact-situation occurring in the present case, when scanned the evidence of PW.1, there is nothing forthcoming to show that the plaintiff was totally incapable of attending the Court or to give evidence as a witness. In such an event, certainly, the finding recorded by the Court below, since based on proper appreciation of evidence, cannot be withheld.

14. Therefore, the present Appeal Suit is dismissed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in the appeal stand dismissed.

A. SHANKAR NARAYANA, J

October 24, 2017.

PV

¹ 2006 (6) ALD 740