

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-1727-2016

Date of decision: 05.08.2019

Raj Kumar

...Appellant

V/s.

Kapil Kumar

...Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI.

Present: Mr. Narender Pal Bhardwaj, Advocate for the appellant.

Mr. J.S. Malik, Advocate for the respondent.

RITU BAHRI, J. (Oral).

The appellant-defendant has come up in appeal against the judgment of the trial court dated 21.09.2013 and lower appellate court dated 15.01.2016 whereby suit filed by the plaintiff Kapil Kumar for recovery of Rs.1,36,550 (Rs.1,00,000/- as principal amount and Rs.36,550/- as interest @ 10%) has been decreed.

The case pleaded by the plaintiff was that defendant had borrowed a sum of Rs.1,00,000/- from him on 29.06.2007 and had also executed a pronote (Ex.P1) and receipt (Ex.P2) in favour of the plaintiff. As per the agreement the defendant had agreed to return the aforesaid amount on demand alongwith interest @1% per month.

After issuing notice, following issues were framed on 21.07.2019:-

1. Whether the plaintiff is entitled to the recovery of Rs.1,36,550/- from the defendant with interest @ 1% per

month from the date of filing of the suit till the date of actual realization? OPP.

2. Whether the plaintiff has no cause of action against the defendant? OPD.
3. Whether the suit of the plaintiff is not maintainable in the present from? OPD.
4. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD.
5. Whether the plaintiff has not come in the court with clean hands and has suppressed true and material facts from the court? OPD.
6. Whether the plaintiff has no locus standi to file the present suit? OPD.
7. Whether the suit of the plaintiff is time barred? OPD.
8. Relief.

Both the courts below after going through the evidence have returned a concurrent finding of fact that the plaintiff while appearing as PW1 had stated that his loan as well as loan of his father was separate and defendant had not paid even a single penny of loan given by the plaintiff. Plaintiff examined PW3 Satish Kumar, Deed Writer who in his affidavit Ex.PW3/A deposed that he had written the pronote and receipt in favour of the plaintiff Kapil Kumar at the instance of the defendant Raj Kumar. The plaintiff examined PW2 Yashpal Chand, Handwriting and Finger Print Expert who submitted his report Ex.PW2/B and in this report he opined that the disputed signatures marked Q1 to Q4 on the pronote and receipt were written by Raj Kumar, who had given his admitted signatures marked as S1 to S5. This expert witness PW2 Yashpal Chand proved that the pronote Ex.P1 and receipt Ex.P2 bear the signatures of defendant Raj Kumar.

The plaintiff examined PW4 Sat Narain Clerk to prove the legal notice dated 22.06.2010 Ex.P3 and this witness stated that on the

cover of this notice, the same had not been accepted by the defendant and he refused to take delivery.

The case of the defendant was that execution of pronote Ex. P1 and receipt Ex.P2 was result of fraud but he did not lead any hand writing expert to disapprove this fact that the above said document did not carry his signatures. He examined DW1 Dinesh Kumar. The case of the defendant was that he deposited Rs.30,000/- on 03.04.2010, Rs.10,000/- on 06.07.2010 in the account of mother of the plaintiff vide vouchers Ex.D1 and Ex.D2. These vouchers were proved by DW 1 Dinesh Kumar, Clerk cum Cashier. As per the entry in his diary Ex. D4, he paid Rs.1,20,000/- to the father of the plaintiff Phool Singh and hence total amount of Rs.1,60,000/- had been paid to the father of the plaintiff and nothing was due from him. The defendant examined Phool Singh, father of the plaintiff as DW3 and he denied all the receipts except Rs.20,000/- and stated that he had a separate transaction with the defendant and this amount had not been paid against the loan of Kapil. It had been contended by the defendant that as per writing diary Ex.D4, Rs.1,20,000/- had been paid in cash in the presence of Balwan Singh. However, the defendant did not examine the witness Balwan Singh and from the diary it could not be inferred for which liability Rs.20,000/- or Rs.1,20,000/- had been paid to the father of the plaintiff.

The plea taken by the defendant that the suit was hopelessly time barred, has also been considered by both the courts and held that loan was taken by the defendant on 29.06.2007 and the suit could have been filed upto 28.06.2010. The suit was filed on 16.07.2010 after a delay of 18 days.

This plea of delay has been rejected by the courts as the civil courts were

closed due to summer vacation w.e.f. 16.06.2010 to 15.07.2010 and the suit was filed immediately on the first day of the opening i.e. 16.07.2010. Hence the suit was filed within the limitation.

Learned counsel for the appellant/defendant has argued that the plaintiff appeared as PW1 and in his cross examination, he stated that he gave money to Satish Kumar Deed Writer and Satish Kumar immediately gave it to Raj Kumar/defendant. However Satish Kumar, Deed Writer has denied in his cross examination that this transaction did not take place in his presence. The execution of the pronote (Ex.P1) become doubtful as the witness of the pronote i.e. Ram Parshad son of Bibban has not been examined by the plaintiff during the trial. Even if the signature of Raj Kumar was proved by PW2 Yashpal Chand, Handwriting and Finger Print Expert, it would not amount to due execution of a pronote (Ex.P1). The suit of the plaintiff cannot be decreed simply on the ground that father of the plaintiff Phool Singh while appearing as DW3 had admitted his signature on the receipt Ex.D4 whereby the loan amount taken by the defendant from Phool Singh had been returned in the presence of Balwan Singh, who had not been examined. The suit of the plaintiff can only be decreed if the execution of pronote (Ex.P1) and receipt (Ex.P2) have been duly proved in accordance with law. He has referred to the judgment passed by the Karnataka High Court in ***C.Sesha Reddy V/s. T. Basavana Goud*** 2003(4) RCR (Civil) 15, ***Vishnu Kumar V/s. Prem Lata and others*** 2011(2) Law Herald 1524 and the judgment passed by Supreme Court in ***Uma Pandey and another V/s. Munna Pandey and others*** 2018(4) JT 142 to contend that if the execution of the pronote has not been proved, the documents is

inadmissible in evidence, it then constitutes a substantial question of law and the Regular Second Appeal has to be allowed.

Learned counsel for the respondent has argued that the due execution of the pronote (Ex.P1) was proved by PW3 Satish Kumar, Deed Writer and he admitted the receipt of Rs.1,00,000/- from plaintiff and once the scribe has proved the execution of the pronote then as per the Supreme Court judgment of *Joseph Johan Peter Sandy V/s. Veronica Thomas Raj Kumar and another* 2013 (3) CCC 270, the suit of the plaintiff has been rightly decreed for loan amount of Rs.1,00,000/- alongwith interest and no substantial question of law arises for consideration in the Regular Second Appeal.

After hearing learned counsel for the parties, the case of the plaintiff has to be examined keeping in view whether he has proved execution of pronote (Ex.P1) and receipt (Ex.P2) by leading cogent evidence.

A perusal of the record shows that pronote (Ex.P1) has been duly signed by defendant Raj Kumar and plaintiff Kapil Kumar. It bears the signature of Ram Parshad son of Bibban who signed as a witness. As per the witness PW2 Yashpal Chand, Handwriting and Finger Print Expert who submitted his report Ex.PW2/B and photographic chart Ex.PW2/C, the pronote bears signature of Raj Kumar. The plaintiff while appearing as PW1 in his cross examination has denied that Rs.30,000/- was deposited in account of mother vide receipt Mark D and Rs.10,000/- vide receipt Mark D1 and further denied that whether his father received Rs.1,20,000/- from the defendant and put his signatures in Mark D3. In the cross-examination, **the plaintiff has admitted that he gave money to Satish Kumar and**

Satish Kumar immediately gave it to defendant Raj Kumar. However, in cross-examination this witness Satish Kumar, Deed Writer admitted that transaction of giving of the amount was not in his presence. This fact was given to him at the time of writing deed by the plaintiff. He further stated that he had not brought the register and he denied that he did not bring the register as there was no entry. He further stated that witness Ram Parshad had signed in his presence with his pen. Hence the transaction of giving Rs.1,00,000/- was not in the presence of PW3 Satish Kumar Deed Writer and the plaintiff in his cross-examination had specifically stated that money was given to Satish Kumar Deed Writer and he immediately had given it to defendant Raj Kumar. If the transaction of giving Rs.1,00,000/- to the defendant was in the presence of Satish Kumar, he would have admitted it. Moreover, the only eye witness to the pronote (Ex.P1) was Ram Parshad son of Bibban and he has not been examined. In this backdrop, even if report of handwriting expert that the pronote (Ex.P1) bears signature of Raj Kumar is taken to be correct, then the transaction of giving loan of Rs.1,00,000/- has not been duly proved by the plaintiff.

With respect to this lapse, reference can be made to the judgment passed by the Karnataka High Court in ***C.Sesha Reddy V/s. T. Basavana Goud*** 2003(4) RCR (Civil) 15 to contend that if the consideration amount in the pronote is paid in the presence of two witnesses and they are not examined and even if payment of consideration is not supported by the witnesses then the plaintiff would have failed to prove the execution of the pronote and payment of consideration.

A coordinate Bench of this Court in ***Vishnu Kumar V/s. Prem Lata and others*** 2011(2) Law Herald 1524, while examining the execution

of the pronote for consideration, had examined the pronote under Section 118 of the Negotiable Instrument Act and it was held that the presumption of execution would arise only if execution of the negotiable instrument i.e. the pronote is proved. A person who has attested this pronote cum receipt has not been examined by the plaintiff as a witness, adverse inference is to be drawn against the plaintiff. In para 7, 8 and 9, it was observed as under:-

“7. Plaintiff's oral bald statement is not corroborated by any other cogent evidence. Statement of Ajay Kumar PW2 has been rightly discarded because he is not witness or signatory to the pronote. On the other hand, one Partap Singh attested the pronote-cum-receipt as witness but said Partap Singh has not been examined as witness by the plaintiff. Consequently, adverse inference has been rightly drawn against the plaintiff. On the contrary, statements of plaintiff and Ajay Kumar have also been found to be contradictory and therefore, not reliable.

8. In addition to the aforesaid, the plaintiff himself admitted that he had obtained thumb impressions of defendant Ram Singh on blank pronote-cum-receipt. However, plaintiff came out with new version that he had returned the same to the defendant. In view of aforesaid admission of the plaintiff also, the impugned pronote-cum-receipt becomes highly suspicious. In this view of the matter, self serving oral statement of the plaintiff is not sufficient to prove his case particularly because he has not examined Partap Singh witness of the pronote-cum-receipt in question.

9. Learned counsel for the appellant contended that there is presumption under section 118 of the Negotiable Instruments Act, 1881 that pronote was executed for consideration. There is no dispute with the legal proposition but the same is not applicable to the facts of the instant case. Aforesaid presumption would arise only if execution of the negotiable instrument i.e. pronote is proved. In the instant case, however,

plaintiff-appellant has failed to prove execution of the impugned pronote by the defendant. Consequently, plaintiff-appellant cannot avail of the presumption under section 118 of the Negotiable Instruments Act, 1881.”

The Supreme Court in ***Pankajakshi (dead) through LRs and others V/s. Chandrika and others*** AIR 2016 SC 1213 has considered the proposition as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Supreme Court while examining the provisions of Section 41 of the Punjab Courts Act which was expressly in conflict with amending law i.e. Section 100 over ruled the full bench judgment of the High Court in the case of ***Ganpat [AIR 1978 P&H 137]*** and held that as per Section 41 of the Punjab Courts Act at the time of deciding Regular Second Appeal, there was no requirement of framing substantial questions of law. In para 27 it has been held as under:-

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the

commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

In the present case, learned counsel for the plaintiff/respondent has not referred any other evidence to prove the execution of the pronote (Ex.P1) and receipt (Ex.P2). Even the non-examination of witness Ram Parshad son of Bibban coupled with the admission of PW3 Satish Kumar Deed Writer that no money is paid in his presence, falsifies the case of the plaintiff that after executing the pronote (Ex.P1) and receipt (Ex.P2), Rs.1,00,000/- was paid to the defendant in the presence of witness Ram Parshad son of Bibban and PW3 Satish Kumar, Deed Writer. Hence, no substantial questions of law requires to be framed for deciding the present Regular Second Appeal.

Keeping in view the above facts and evidence, the plaintiff has miserably failed to prove that loan of Rs.1,00,000/- was given by him to Raj Kumar and inadmissible evidence cannot be made a ground to dismiss the Regular Second Appeal. Hence, Regular Second Appeal is allowed and the finding given on issue No. 1 is required to be set aside and reversed. The

judgments of trial court dated 21.09.2013 and of lower appellate court dated 15.01.2016 are set aside.

(RITU BAHRI)
JUDGE

05.08.2019
Divyanshi

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No