

**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**SECOND APPEAL NO.310 OF 2019**

**JUDGMENT:**

This second appeal under Section 100 CPC is filed assailing the judgment and decree, dated 31.12.2018 in A.S.No.09 of 2017 passed by the VIII Addl. District and Sessions Judge, confirming the judgment and decree, dated 21.11.2016 in O.S.No.609 of 2015 passed by the II Addl. Junior Civil Judge, Chittoor.

2. The respondent-plaintiff filed suit for recovery of amount on the basis of promissory note alleging that on 22.08.2013, the appellant-defendant borrowed a sum of Rs.1,50,000/- to meet her family necessities and executed a promissory note agreeing to repay the same together with interest at 24% p.a., In spite of several oral demands, the defendant did not choose to repay the amount either to the plaintiff or on his order. Therefore, the plaintiff filed the suit for recovery of amount due under the promissory note.

3. The defendant denied borrowal of the amount in her written statement while contending that the plaintiff approached her on several occasions to sell her house property to him. As the defendant refused to sell the property, the plaintiff fabricated the promissory note and filed this suit. The alleged attestors and scribe are all strangers to her and she never saw them. There is a difference in ink between the signatures of attestors and writings in the promissory note and it clearly shows that the attestors did not sign on the alleged promissory note, it was fabricated and sought for dismissal of the suit.

4. Basing on the pleadings, the trial Court framed two issues. During the trial, on behalf of the plaintiff,

P.Ws. 1 to 4 were examined and Ex.A1 was marked. On behalf of the defendant, D.W.1 was examined, but no documents were marked.

5. The trial Court upon hearing argument of both counsel and on consideration of entire oral and documentary evidence, decreed the suit with costs against the defendant for an amount of Rs.2,27,200/- together with interest at 12% p.a., on the principal amount of Rs.1,50,000/- from the date of suit till the decree and thereafter with interest at 6% p.a., till the date of realization.

6. Aggrieved by the said judgment and decree, the defendant preferred appeal, which ended in dismissal confirming the judgment and decree of the trial Court. Hence, this second appeal.

7. This second appeal is filed under Section 100 CPC on the sole ground that the witnesses and scribe have categorically admitted in the evidence that in their presence the amount was not paid. They were not present at the time when the defendant affixed her signature on the promissory note, Ex.A1. But the trial Court erroneously appreciated the evidence of the attestor and decreed the suit by invoking Section 118 of the Negotiable Instruments Act, which is confirmed in the appeal.

8. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact or on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys – of having

substance, essential, real, or sound worth, important, considerable, fairly arguable, in contradiction with – technical, formal, or no substance, no consequence or academic only. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse finding- are some of the questions, which involve substantial questions of law.

9. According to Section 100 CPC, a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure introduced such an embargo for such definite objectives and since the Courts are required to further probe on that score and the Courts while detailing out, but the fact remains in second appeal finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. The High Court can interfere with such finding recorded by the trial Court though not on law in view of judgment reported in *Kulavant Kaur v Gurdial Singh Mann*<sup>1</sup>

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<sup>1</sup> 2001 (4 SCC 262

10. Keeping in mind the scope of Section 100 CPC, I would like to decide the present appeal at the stage of admission.

11. It is an undisputed fact that the suit was based on promissory note for recovery of amount. The defendant denied the very execution of promissory note and receipt of any consideration under it. The plaintiff examined P.Ws. 1 to 4 in the suit. P.W.1 is the plaintiff, P.Ws. 2 and 3 are the attestors of the promissory note and P.W.4 is the scribe of promissory note. No doubt, P.Ws. 2 and 3 stated nothing about passing of consideration, but admitted that they attested Ex.A1 though they were absent at the time of execution of promissory note under Ex.A1. The word attestation defined under Section 3 of the Transfer of Property Act. Keeping in mind, the definition of attestation, mere witnessing execution or receipt of acknowledgment from the executant and signing as attestor is sufficient to constitute the attestation as defined under Section 3 of the Transfer of Property Act. Therefore, their absence at the time of execution makes no difference and in the entire evidence nothing was elicited whether they received any acknowledgement from the executant. However, the promissory note is not compulsorily attestable document but it is attested. Therefore, the evidence of attestors is sufficient to conclude that they signed on the document.

12. The main contention before the trial Court in the written statement is that there is variation in the ink used by the attestors and body of the promissory note, but that is not a ground to disbelieve the case for the simple reason that the attestors may sign with their own pen or pen borrowed from others connected with the promissory note. Therefore,

the variation in the ink is not a ground to disbelieve the case of the plaintiff.

13. Coming to the other aspect, the burden of proof, there is presumption under Section 118 of the N.I. Act and such presumption can be drawn only when the defendant admitted the execution of the Negotiable Instrument or when the plaintiff proved the execution, then the onus of proof shifts to the defendant to prove that promissory note was not supported by consideration. But here, the defendant did not admit the execution of the promissory note under Ex.A1. However, during trial, the plaintiff by examining P.Ws. 1 to 4 proved the execution of Ex.A1 by the defendant and thereafter, a presumption was drawn shifting onus of proof that Ex.A1 was not supported by consideration, to the defendant. But the defendant did not rebut the presumption by adducing satisfactory evidence at least by any conceivable mode. But did not place initial burden on the defendant, the to admit the second appeal, there must be a substantial question of law and initial burden was not placed on the defendant invoking the presumption under Section 118 of the N.I. Act. Therefore, the judgment of the trial Court and affirmed by the Appellate Court, do not suffer any perversity giving raise to any substantial question of law and consequently I find no substantial question of law to be decided in the appeal and hence, the appeal is liable to be dismissed at the stage of admission.

14. Accordingly, the Second Appeal is dismissed at the stage of admission itself. No order as to costs. Miscellaneous petitions, if any pending in this appeal shall stand closed.

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**M.SATYANARAYANA MURTHY, J**

**DATED: 12-07-2019**

Hsd

