

Before Harbans Lal, J.

BHAJAN KAUR AND OTHERS,—Appellants

versus

TARLOK SINGH,—Respondent

R.S.A. 4157 of 2004

12th November, 2008

Code of Civil Procedure, 1908—Negotiable Instruments Act, 1883—S. 118-A—Execution of pronote and receipt by predecessor-in-interest of defendants—Defendants denying execution, passing of consideration as well as thumb impressions of deceased—Appellant failing to examine any finger prints expert to prove that disputed pronote and receipt bear thumb impressions of deceased—Examination of such witness was necessitated—Appeal allowed, judgment and decree passed by 1st Appellate Court decreeing suit for recovery with interest set aside.

Held, that the disputed pronote was without consideration. The plaintiff-appellant did not have the courage to examine any Finger prints expert to prove that the disputed pronote and receipt to bear the thumb impressions of the deceased Dilbagh Singh. Examination of such witness was necessitated in view of the fact that the defendants had denied the execution, passing of consideration as well as the thumb impressions of the deceased Dilbagh Singh on the disputed pronote and receipt.

(Para 14)

Vikas Bahl, Advocate *for the appellants*.

R.K. Singla, Advocate *for the respondent*.

JUDGMENT

HARBAN LAL, J.

(1) This appeal is directed against the judgment/decree dated 28th September, 2004 passed by the Court of learned District Judge, Kapurthala whereby he accepted the appeal and decreed the suit

of the plaintiff for the recovery of Rs. 79,980 with *pendente lite* interest at the rate of Rs. 12% per annum from the date of filing of the suit until the decree and future interest at the rate of 6% per annum, from the date of the decree until realisation of the amount on the principal amount with the further observations that the respondents shall also be liable to pay the decretal amount to the extent, they have inherited the property of Dilbagh Singh, their predecessor-in-interest by setting aside the judgment and decree dated 1st April, 2003 rendered by the Court of learned Civil Judge (Junior Division), Phagwara whereby she dismissed the suit with costs.

(2) The facts which form the backdrop of the suit are that Dilbagh Singh, predecessor-in-interest of the defendants obtained a sum of Rs. 62,000 as loan from the plaintiff on 9th November, 1998 and in consideration thereof, executed the pronote and receipt of even date in his favour with the promise to repay the same on demand together with interest at the rate of Rs. 4% per mensem. The former did not repay even a single penny either towards principal or interest. He breathed his last and is survived by his legal representatives-defendants, who were requested number of times to make the payments of the above-mentioned amount together with interest, but in vain. On these allegations, this suit has been filed for the recovery of Rs. 62,000 being principal amount along with interest amounting to Rs. 17,980 together with interest at the rate of 12% per annum. In answer to this claim, the defendants repudiated the alleged execution of the promissory note as well as receipt of Rs. 62,000 by Dilbagh Singh deceased. It has been alleged that the pronote and receipt are forged and fabricated documents and are without consideration. Traversing other facts in the plaint, it has been prayed that the suit may be dismissed with costs.

(3) The following issues were framed :—

- (1) Whether defendant had executed the pronote and receipt in favour of the plaintiff on 9th November, 1998 ? OPP
- (2) If Issue No. 1 is proved, whether the plaintiff is entitled for recovery, if so, at what rate of interest ? OPP
- (3) Whether the suit is not maintainable ? OPD
- (4) Whether the plaintiff has no cause of action and *locus standi* to file the present suit ? OPD

(5) Relief.

(4) After hearing the learned counsel for the parties and examining the evidence on record, the learned trial Court dismissed the suit. Feeling aggrieved therewith, the plaintiff went up in appeal which was accepted by the learned First Appellate Court in the terms as noted supra. Being dissatisfied therewith, the defendants have preferred this appeal.

(5) I have heard the learned counsel for the parties, besides perusing the record as well as the findings returned by both the Courts below with due care and circumspection.

(6) Mr. Vikas Bahl, Advocate on behalf of the appellants eloquently urged that indeed the learned Lower Appellate court only on the basis of evidence of the scribe Sanjiv Kumar, PW1 has held that the pronote Ex. P. 1 and receipt Ex. P. 2 were executed by Dilbagh Singh, deceased in favour of the plaintiff, though, this witness under the stress of cross-examination blurted out that he does not know either Tarlok Singh plaintiff or Dilbagh Singh nor can he recognise them. Thus, the question of afore-mentioned witness proving the due execution of the disputed pronote and receipt does not arise. He further argued that the aforesaid witness in his examination-in-chief has testified that Gurditta Ram, the attesting witness cannot walk, although Gurditta Ram has appeared and tendered evidence as DW1. The learned Lower Appellate Court also failed to consider that Ranjit Singh, PW2 was neither authorised nor had any personal knowledge about the transaction. More importantly, it is in his cross-examination that the plaintiff had come to the Court on the date of his (Ranjit Singh, PW2) evidence yet, he (plaintiff) did not get himself examined and thus, he did not subject himself to cross-examination. Sequelley, an adverse inference has to be drawn against him. To add further to it, DW1 Gurditta Ram has completely destroyed the plaintiff's case by specifically stating that no pronote was executed and no money was exchanged nor Rs. 62,000 were taken in his presence. Furthermore DW2 Palwinder Singh, defendant has stated in categoric terms that Ex. P. 1 and Ex. P. 2 do not bear the thumb impression of his father Dilbagh Singh and the alleged pronote has been prepared by the plaintiff in collusion with the Deed Writer

and that his father had expired on 20th May, 1999. The suit had been filed after two years of his death without serving any notice with regards to the repayment of the alleged amount. He further agitated at the bar that even proper stamps etc., have not been affixed on the pronote and receipt. There are large number of cuttings and overwritings in the pronote and receipt, which make it inadmissible in evidence. There is also not even a remote proof as to whether any estate of Dilbagh Singh, deceased has devolved upon the defendants so as to make them liable. An important question with respect to inheritance of the deceased by the defendants has been left undecided by the First Appellate Court. It is significant to note that the appellants have specifically denied of their having inherited any property of the deceased Dilbagh Singh. Thus without adjudicating above facts, the defendants could not have been held liable.

(7) To tide over these submissions, Mr. R. K. Singla, Advocate representing the respondent-plaintiff argued that on evaluating the evidence of Sanjiv Kumar PW1, the scribe of the disputed promissory note, it emanates that the due execution of the disputed pronote as well as receipt stands established. Section 118-A of the Negotiable Instruments Act raises a statutory presumption of there being consideration, when the execution of the disputed pronote and receipt is proved.

(8) On cogitating the rival contentions seriously, it follows that the contentions raised by Mr. Singla are unsustainable for the discussion to follow hereunder.

(9) Ranjit Singh PW2, the power of attorney holder appointed by the plaintiff has stated in no uncertain terms in his cross-examination that Tarlok Singh (referring to the plaintiff) had given the power of attorney today by coming to the Court at 11:00 a.m. and now it is 12:15 p.m. This evidence speaks volumes of the plaintiff's presence in the Court premises on the day, this witness was examined. It is beyond comprehension as to why he himself did not come forward to depose about the execution of the disputed promissory note as well as passing of the consideration, when it was to his pointed knowledge that the attesting witness was not to be examined. In his next breath, this witness

has deposed that he (Ranjit Singh) was very much present at the time of execution of the pronote, but did not attest the same. To me, it appears that he is lying on this aspect for the reason that if he was in attendance at the material time, he being the man of the plaintiff, the latter would have certainly taken the precaution to obtain his attestation with an end in view that he will support him in the Court *qua* execution of the pronote and receipt besides passing of consideration, if the need be. Ranjit Singh regretted his inability to tell as to from which source, Tarlok Singh had arranged this amount. He further deposed that he is unable to tell the purpose for which Tarlok Singh had borrowed the money or that how much fee was given to the scribe or how many stamps were affixed on the pronote or from where the same were fetched by the Deed Writer or what was the de-nomination thereof. He further regretted his inability to tell whether Gurditta Ram (referring to the alleged attesting witness is alive or dead or that the pronote was scribed with black ink or some other ink or that the thumb impression was obtained with black or blue ink or that Gurditta Ram had appended his signatures with the pen of the scribe or that Sanjiv Kumar of his own went on scribing the pronote and receipt or at the instance of Sagli Ram. Ostensibly, this witness has equivocated on number or questions or in other words, has given evasive replies to material questions, which could be answered one way or the other only by the plaintiff being within his personal knowledge. That being so, it was obligatory upon the plaintiff to have stepped into the witness box. In re : **Iswar Bhai C. Patel @ Bachu Bhai Patel versus Harihar Behera and another (1)**, the Apex Court has held that if a party does not enter into the witness box to make statement on oath in support of his pleadings, an adverse inference would be drawn that what he has stated in the pleadings is not correct. In view of these observations, an adverse inference has to be drawn against the conduct of the plaintiff for abstaining or keeping himself off the witness box.

(10) In re: **Janki Vashdeo Bhojwani versus Indusind Bank Ltd., (2)**, Hon'ble the Supreme Court has held that attorney holder cannot be allowed to appear and depose as a witness on behalf of the

(1) 1999 (2) Civil Court Cases 1 (S.C.)

(2) 2005 (1) Recent Civil Reports (Civil) 240

principal in the matter of his personal knowledge. He can only appear as a witness in his own capacity to depose with regards to the acts done by him on behalf of the principal.

(11) Harking back to the present case, it follows from the preceding discussion that certain facts to which Ranjit Singh could not give answer were in the personal knowledge of the plaintiff who having not appeared as a witness, the evidence of Ranjit Singh is not permissible.

(12) As surfaces in the cross-examination of Sanjiv Kumar, PW1, the scribe, he did not know Dilbagh Singh (referring to the deceased defendant) nor Tarlok Singh (referring to the plaintiff). Towards the end of his cross-examination, he has deposed that "I am unable to recognise Tarlok Singh and I also cannot say as to whether or not he is present in the Court today and I also cannot tell whether or not Dilbagh Singh is in attendance in the Court today." It is deducible from this evidence that he was not known to the parties. As such, it would be going too far to say that the person who had received the alleged loan amount was Dilbagh Singh or who gave the same was Tarlok Singh. Furthermore, it is in the cross-examination of this witness that the money was not counted by him nor he knows about the currency notes. A suggestion has been put to him that changes have been introduced in the pronote by making over-writing at Points A, B, C and D. A cursory glance through the pronote Ex. P. 1 with an unaided eye would reveal that the figure 62 at Point A and the figure 31 at Point C and the words Sixty two at Point B and the words Thirtyone at Point D bear over-typewriting. It appears that initially the amount was other than Rs. 62,000. Thus, palpably this witness is telling a lie. These unattested over-typewriting tantamount to material alterations as these do not bear the thumb impressions of Dilbagh Singh or the typist of Ex. P. 1. These over-typewriting have been categorically denied by the scribe Sanjiv Kumar. These can be deemed to have been introduced later on. In re: **Narayanprasad Rai Gokulprasad Rai versus Ghanshyam Lal alias Shukhlal Jawaharlal Kurmi (3)**, a Division Bench held that "the alteration which has the effect of making the instrument void under Section 87 of the Negotiable Instruments Act, 1887, should have been brought about by the plaintiff or by anyone with his consent or on

account of his negligence. If the alteration is brought about by an accident, or by some stranger who came in possession of the instrument in an unauthorised manner, then the instrument would not be rendered void. The burden of proving how the alterations were made in the document lies on the plaintiff suing on the document and in the absence of any proof, it should be presumed that they were made by him or by his next friend, who was in custody of the document. Where the defendant pleads that although certain amount had been received by him, it cannot be recovered on the basis of the pronote which is materially altered and become void under Section 87. The plea of the defendant does not amount to an admission of claim to such amount." Here in this case, the defendants have denied the execution as well as the passing of the consideration in relation to the disputed pronote. Thus, if the matter is viewed in the background of the above observations, the pronote Ex. P. 1 is rendered inadmissible for there being material alterations at Points A, B, C and D which have not been explained by the plaintiff nor the same bear the thumb impression of the borrower or the signatures of the scribe. Thus these material alterations are unauthenticated. Alteration may be material by change of date, time and place of payment or by change in the sum payable or its medium or in the interest to be paid or it may be as affecting the number or relation of parties or legal character of instrument. The effect of material alteration in view of the provisions of Section 87 *ibid* is that it renders the instrument void. In re : **Allampati Subba Reddy versus Neelapareddi Ramanareddi (4)**, it has been held that the plaintiff seeking to enforce promissory note must explain to Court as to when and how alteration was made. In absence of such explanation, the plaintiff must fail and onus is on him to show that material alteration was made either with the consent of parties or in order to effectuate common intention of parties. In absence of such plea, presumption is that material alteration was made subsequent to execution of document. Promissory note is, therefore, void under Section 87 of the Negotiable Instruments Act. It cannot be enforced in Court of law. In the current case, the plaintiff has not explained as to when and how the pointed alterations were made. Thus, it has been rendered void. As observed in re : **K. M. Basappa and another versus Patel Marule Gowda and another (5)**,

(4) AIR 1996 Andhra Pradesh 267

(5) AIR (38) 1951 Mysore 102

the party who has the custody of an instrument made for his benefit is bound to preserve it in its original state and any material alteration will vitiate the instrument. The alteration of the month in the deed mentioned in the pronote is a material alteration. Where a party sues on an instrument which on the face of it appears to have been altered, it is for him to show that the alteration had not been improperly made.

(13) In the case at hand, the material alterations at Points A, B, C and D in the promissory note Ex. P. 1 on their face appear to have been made, which have not been explained by the plaintiff. This may be the reason for the plaintiff to withhold himself from the witness box. In view of the preceding discussion, the pronote Ex. P. 1 is irreceivable into evidence.

(14) Coming to the deposition of Gurditta Ram, DW1, the alleged signatory to the receipt Ex. P. 2 as attesting witness, he has solemnly affirmed that when his signatures were obtained on the pronote and receipt, at that time, the same were blank and that within his view, no mandatory transaction took place in between Dilbagh Singh and Tarlok Singh. It is in his further evidence that I do not know Dilbagh Singh son of Pala Singh, a resident of Saprur and that I appended signatures at the asking of the deed writer and I do not know when it was prepared. When he was subjected to cross-examination, no material favorable to the plaintiff could be elicited. Thus, it is held that the disputed pronote was without consideration. The plaintiff-appellant did not have the courage to examine any Finger prints expert to prove that the disputed pronote and receipt do bear the thumb impressions of the deceased Dilbagh Singh. Examination of such witness was necessitated in view of the fact that the defendants had denied the execution, passing of consideration as well as the thumb impressions of the deceased Dilbagh Singh on the disputed pronote and receipt.

(15) As a sequel of the preceding discussion, this appeal is accepted and the judgment/decreed rendered by the learned First appellate Court is hereby set aside and the judgment/decreed passed by the learned trial Court is restored. Of course, having regard to the peculiarity of facts and circumstances of the case, the parties are directed to bear their own costs.