

(2014) 06 GUJ CK 0073
In the Gujarat High Court
Case No : Second Appeal No. 188 of 1991

Ramilaben Jashubhai Patel and Others

APPELLANT

Vs

Rasiklal Chunilal Kothari

RESPONDENT

Date of Decision : 30-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100 — Evidence Act, 1872 - Section 73 —
Negotiable Instruments Act, 1881 - Section 118, 118(a)

Citation : (2015) 1 GLR 597

Hon'ble Judges : N.V. Anjaria, J.

Bench : Single Bench

Advocate : D.T. Shah, for the Appellant; Nilesh A. Pandya, for the Respondent

Final Decision : Allowed

Judgement

N.V. Anjaria, J.?The suit of the original plaintiff-respondent herein was based on the Promissory Note. The trial Court held that the plaintiff had "miserably failed" to prove the execution of the Promissory Note. The first appellate Court took a view to conclude that the plaintiff had proved the Promissory Note "to the hilt". The moot issue is therefore whether the execution of the suit Promissory Note (Exh. 32) was proved on evidence.

1.1. Regular Civil Suit No. 219 of 1981 instituted by the plaintiff for recovery of the amount based on the Promissory Note came to be dismissed on 29-9-1983 by the Court of learned Civil Judge (J.D.), Dabhoi. The respondent-plaintiff preferred Regular Civil Appeal before the Court of learned 2nd Extra Assistant Judge at Vadodara. The said Appeal was allowed by judgment and decree dated 8-2-1991 and the first appellate Court decreed the suit directing recovery of principal amount with 6% interest from 16-5-1981 till realisation.

1.2. The challenge in this Second Appeal by the appellants-original defendants is directed against the aforesaid judgment and decree passed on 8-2-1991 by the first appellate Court.

Following order was passed in the present proceedings on 10-9-2013, formulating the substantial questions of law as under:

"The papers of this appeal placed before the Court by the Registry showed that as per the entry in the register, the appeal was admitted. However, the record did not have any order reflecting substantial question of law, which must have been framed at the time of admission. This being a Second Appeal under Sec. 100 of the Code of Civil Procedure, 1908, the same is required to be heard and decided on substantial question of law. Therefore, substantial question of law, which may be arising in the appeal are required to be formulated."

1.3. In the above view, in the aforesaid order, the following substantial questions of law were formulated:

"(i) Whether on the facts and in the circumstances of the case the appellate Court committed any error in holding that Promissory Note (Exh. 32) was proved?

(ii) Whether the first appellate Court erred in framing the issues?"

2. The facts leading to the present Second Appeal and giving rise to the substantial questions of law above may be usefully stated. The plaintiff instituted Regular Civil Suit No. 219 of 1981 before the Court of Civil Judge (J.D.), Dabhoi praying for recovery of Rs. 19,999/- with 15% interest. The case of the plaintiff was that the deceased Jasbhai Muljibhai borrowed from him for his household expenses and agricultural expenses Rs. 15,235/- on 21-5-1978 and in that regard said Jasbhai executed a Promissory Note. It was the case that despite repeated demands, he did not pay the amount and after his death, his heirs - the defendants were requested to pay the amount, but they also did not pay. It was alleged that by conduct of the defendants, the plaintiff was likely to be deprived of his legitimate claim in respect of the amount given. The suit was instituted praying to recover Rs. 19,999/- with interest. In the suit proceedings the plaintiff also filed an application for attachment of the properties of the defendant before judgment, which is Exh. 5 on record.

2.1. The defendants filed the written statement at Exh. 22. They denied that amount Rs. 15,235/- was borrowed by deceased Jasbhai from the plaintiff and further denied that any such amount was taken. It was further denied that deceased had executed any Promissory Note as alleged. In other words, the defendants denied the very execution of the Promissory Note dated 21-5-1978. They further contended that the plaintiff and the deceased had no transactions between them and no amount was due to the plaintiff. It was stated that they knew about the filing of the suit only when the proceedings were taken out by the plaintiff for attachment of properties. It was the say of the defendants further that the land owned by the plaintiff situated at Village Bithili was cultivated by deceased Jasbhai Muljibhai from 1968-1969 to 1977-1978 and the deceased used to give to the plaintiff every year the produce obtained from the land. It was stated that after death of Jasbhai, they continued to give the produce to the plaintiff for 10 years and somewhere in 1979 they handed over the land in

question back to the plaintiff. The defendants contended that the Promissory Note was fabricated by the plaintiff by filling in figures and putting the date thereon near to the date of death of Jasbhai and the suit was falsely brought.

2.2. The trial Court framed issue at Exh. 24. The first issue whether the plaintiff proved that on 21-5-1978 deceased Jasbhai borrowed Rs. 15,235/- and executed Promissory Note (Exh. 32) was answered in negative as the trial Court held that the plaintiff failed to prove execution of the Promissory Note (Exh. 32). The second issue whether the suit was time-barred, was answered in negative. Consequently the suit came to be dismissed. The trial Court while dismissing the suit on the basis of various facts and circumstance, came to a conclusion that the plaintiff had failed to prove the Promissory Note. The first appellate Court held otherwise and decreed the suit as noted above.

3. Heard learned Advocate Mr. Nilesh M. Shah for the appellant and learned Advocate Mr. Nilesh M. Pandya for the respondent.

3.1. Learned Advocate for the appellant submitted that the decree passed by the first appellate Court was erroneous in law because the Court committed an error in holding that the Promissory Note was proved. He submitted that the plaintiff did not adduce any evidence and the execution of the Promissory Note was not established. He submitted that the document of Promissory Note was admitted in the evidence, it did not amount to proof thereof, rather it was submitted that the defendants had specifically disputed and denied about the execution of the Promissory Note by their father-deceased Jasbhai. He submitted that the trial Court rightly considered the evidence on record and other circumstances to come to a finding that the plaintiff had failed to prove the execution of the Promissory Note. Learned Advocate relied on the provisions of the Evidence Act, 1872 and submitted that the burden of proof was on the plaintiff. He submitted that the statutory presumption as regards the validity of negotiable instrument could arise only if the execution is admitted or proved which is not the case here.

3.2. In support of his contentions, learned Advocate for the appellant relied on the following decisions : (i) Kundan Lal Rallaram Vs. Custodian, Evacuee Property, Bombay, ; (ii) Visvonata Raghunath Audi v. Mariano Colaco, AIR 1976 Goa, Daman and Diu 60; (iii) A.S. Duraisami Chettiar Sons Vs. S. Rathnaswami Gounder, ; (iv) oral judgment dated 15-1-2013 of this Court in Sureshbhai Mangaldas Patel v. Ushaben N. Shah, being Second Appeal No. 108 of 1997 and (v) H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam, .

3.3. As against the above submissions, learned Advocate for the respondent supported the judgment and decree of the first appellate Court, by submitting that the first appellate Court rightly came to conclusion that the Promissory Note was executed. He submitted that a finding of fact was recorded by the first appellate Court proving factum of borrowing of money. This, according to the submission of learned Advocate for the respondent, was a strong circumstance established on record. He submitted that the aspects noted by the trial Court did

not suggest anything contrary to the execution of the Promissory Note and its genuineness. He submitted that the Court had power to compare the signature under Sec. 73 of the Evidence Act.

4. Adverting to the question of law, the entire case and claim of the respondent-plaintiff was based on the Promissory Note (Exh. 32) for Rs. 15,235/- claimed to have been executed by deceased Jasbhai. The defendants denied the execution of the Promissory Note. It is settled principle that a person desiring a Court to give a judgment as to any legal right or liability is required to prove the facts on which the right is founded by him and/ or liability is sought to be fastened on the other side. In this case, when the plaintiff's case was that Jasbhai executed Promissory Note as he borrowed amount, it was for the plaintiff to prove and establish the execution of the Promissory Note. It is true that Promissory Note being a Negotiable Instrument, under the Negotiable Instruments Act, 1881, certain presumptions are raised with regard to its validity, in terms of clauses (a) to (f) of the Section. For instance, clause (a) says that every negotiable instrument is presumed to be made or drawn for consideration.

4.1. There is no presumption, however, as to the execution of the instrument. The presumption statutorily raised under Sec. 118 would come into operation only after and provided that the factum of execution of the instrument is admitted or established in accordance with the rules of evidence. In other words, when the case of the plaintiff was that the Promissory Note was executed, and it was specifically denied by the defendants in the written statement, the burden of proving the execution rested on the plaintiff. The plaintiff was required to lead evidence, and thereby, to shift the onus of proof on the other side. Focus of consideration is therefore that whether the plaintiff led sufficient and satisfactory evidence strong enough to prove the execution and discharge his burden in law.

4.2. The plaintiff examined himself (Exh. 31) to state his case in the plaint that the deceased Jasbhai had taken from him the amount; that he had executed the Promissory Note and had signed the same. The plaintiff stated that the Promissory Note was in his hand-writing. On behalf of the defendants, widow of Jasbhai - Ramilaben (Exh. 36) - entered the box. She deposed to deny that any amount was borrowed by her husband from the plaintiff. She specifically denied about execution of Promissory Note by her husband and further denied that the Promissory Note (Exh. 32) contained the signature of her husband. She expressed familiarity with her husband's signature. In the cross-examination she stated that husband had died in November, 1978, and denied about the borrowing by her deceased husband. She stated that her husband was administering the properties and also that she had with him the signature of her husband found in the documents of Bank and Co-operative Society.

4.3. The plaintiff did not produce any independent evidence except examining himself to establish the factum of the execution and to prove the signature. Even in a case where signature is admitted, the burden continues on the plaintiff to prove the contents. The proof required for establishing the execution of a

Promissory Note would include the proof of signature as well as the proof of contents thereof when its execution is under dispute. In *Sri Khetramohan Ray Vs. Udayanarayan Panda and Another*, , the Orissa High Court correctly stated the law as under:

"In cases where signature is admitted but contents of the document proved to a Promissory Note are dissented either on account of lack of knowledge of the contents or signing on a blank paper, plaintiff has to prove that defendant knowing it to be a Promissory Note put his signature. On proof of execution of the Promissory Note, presumption of law under Sec. 118(a) of the Negotiable Instruments Act, is attracted and defendant has to prove that no consideration passed under the same. Mere admission of signature or thumb impression does not mean admission of execution of me Promissory Note."

4.4. There was no evidence from his side either to prove the signature or me contents of the Promissory Note. The submission of learned Advocate for the appellant was correct that even if a document is exhibited, mere admission of a document in evidence does not amount to its proof. In the present case, the whole execution of the Promissory Note (Exh. 32) was disputed and denied by the defendants.

4.5. The first appellate Court entirely misdirected itself in applying the evidentiary principles regarding burden of proof. The first appellate Court on the basis of the circumstantial facts and the probabilities taken from evidence, concluded that in all likelihood, the deceased Jasbhai must have borrowed the amount. The first appellate Court then jumped to a conclusion that the execution of the Promissory Note was established, recording that "the execution was proved to me hilt". The entire approach was misdirected in law inasmuch as condition precedent was proving of the execution of the Promissory Note. Even the finding that money was borrowed, could not be sustained, as it was reached instead of on any cogent evidence, on the basis of conjectures and surmises. The reasoning of the first appellate Court while preceded me conclusion was thus : "There is word against word that demands were made and no demand were made. We must not forget that the parties were field neighbours and after the death of deceased, his widow-Ramliaben would have looked after the farming work. The probability is that the plaintiff would have demanded the money from her also."

5. Not only that there was no adequate or reliable evidence from the side of the plaintiff to prove either of the aspects of the Promissory Note to establish its execution, there were aspects and circumstances which raised serious doubts on the claim of execution of the Promissory Note. They were recorded by the trial Court. The trial Court observed that on the Promissory Note (Exh. 32), two revenue stamps were affixed, one of which was new. On perusal of Exh. 32 from the record, it could be seen that the observation and finding of the trial Court was not discardable. On the Promissory Note one revenue stamp affixed was of 25 Paise and the other was of 20 Paise. Both looked different as the stamp of 20

Paise denomination was new. On the said second stamp, dated 21-5-1978 was written. As was recorded by the trial Court also, the date on the said stamp was in different ink. The photocopies of Karajkhats were sought to be produced by the plaintiff after the conclusion of the arguments before the trial Court which were not Exhibited by the trial Court on the ground of its belated production and they being only photocopies without original copies produced. There was no admitted signature available in absence of original copies of said Karajkhats (Mark 45/2 to 45/5). Therefore, the view taken by the trial Court on that count booked no error.

6. As noted above, the burden to prove the execution was on the plaintiff. By not producing any reliable or sufficient evidence, the plaintiff miserably failed to discharge the burden. In light of the aspects raising suspicion on the validity of Promissory Note, highlighted by the trial Court and referred to hereinbelow, it was all the more incumbent in law for the plaintiff to convincingly establish the execution of the Promissory Note.

7. For the foregoing discussion, the impugned judgment and decree by the learned 2nd Extra Assistant Judge, Vadodara passed on 8-2-1991 allowing the Regular Civil Appeal No. 458 of 1983 cannot be sustained. The same is hereby set aside. The Appeal stands allowed. Registry to send back the record and proceedings.