

(1995) 02 OHC CK 0016

In the Orissa High Court

Case No : Second Appeal No. 89 of 1985

State Bank of India

APPELLANT

Vs

Ramayanapu Krishna Rao and Others

RESPONDENT

Date of Decision : 24-02-1995

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 2(8), 4
Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 34

Citation : AIR 1995 Ori 244 : (1996) 1 CivCC 225

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : M.M. Das, for the Appellant; J. Patnaik and B.K. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

Pasayat, J.—Reversal of success by the learned District Judge, Koraput, Jeypore, has brought the State Bank of India (described for convenience as the "plaintiff") before this Court. The suit is one for recovery of money based on a demand promissory note.

2. The facts position presented by the parties essentially is as follows:

First the plaintiff's stand. Plaintiff, a banking company constituted under the State Bank of India Act, 1955, having one of its branch office at Gunupur in the district of Koraput, had advanced loan to the defendants-respondents in this appeal. On being approached by the defendants for loan, cash credit loan of Rs. 4,000/- was sanctioned on 7-6-1977. Defendant No. 1 executed a demand promissory note in favour of defendants Nos. 2 and 3, and the said defendants duly endorsed the said promissory note in favour of the plaintiff-bank on 7-6-1977. Defendants 2 and 3 signed in acceptance of the terms and conditions stipulated in the agreement. Defendant No. 1 hypothecated his stock of goods in favour of the plaintiff-bank by executing the agreement wherein defendants 2

and 3 signed in acceptance of the terms and conditions stipulated therein. On the same day, i.e., 7-6-1977 defendants 2 and 3 also executed a bond of guarantee in favour of the plaintiff-bank. On 20-12-1979, all the defendants acknowledged the liability by executing revival letters. In spite of the revival letters acknowledging liability, the amount having not been paid in spite of demand, the suit was filed for recovery of the sum of Rs. 3044.41 paise, which included the out-standing loan with interest, and also pendente lite and future interest on the contractual loan. The agreement for hypothecation is Ext. 5 and the letter of revival in Ext. 6 Defendants 2 and 3 also executed a letter of revival vide Ext. 7, acknowledging their liability on the demand promissory note. Defendants entered their appearance and filed written statement taking the stand that they had not taken any loan from the plaintiff-bank. The execution of the demand promissory note, deed of hypothecation, agreement for guarantee and letters of revival were denied by them. It was stated that defendant No. 1 applied for loan from the plaintiff-bank, and the staff of the bank took his signatures, and that of other defendants on various papers in a set, and they promised that they would forward those papers to their higher authorities for sanction of loan. In good faith the defendants had signed on printed papers, having some blanks. Defendant No. 1 approached the bank authorities several times to give money, or in alternative to return the papers signed by them. But that was not done, and the suit has been falsely filed.

3. The trial Court framed fifteen issues, the important issues being issues Nos. 1 and 2. The first issue was; Whether the defendants have executed the demand promissory note and revival letters? and the second issue was; Whether the defendants have executed guarantee letters and jointly letters and jointly and severally liable for the amount? No witness was examined on behalf of the contesting defendants. In support of its case plaintiff examined two witnesses. The first witness was the Branch Manager and the second witness was the Divisional Manager, Agriculture, State Bank of India, Gunupur. P. W. 1 was admittedly the Branch Manager at the time the promissory note was allegedly executed by defendant No. 1. He proved the signatures of defendant No. 1 on various exhibits by stating that he was acquainted with the signature of defendant No. 1. Relying on the evidence of P. Ws. 1 and 2, the trial Court came to hold that the promissory note had been duly executed, and the same was binding on the defendants, and the defendants were jointly and severally liable. Accordingly the suit was decreed. Being aggrieved by the said judgment and decree, an appeal was filed before the learned District Judge, Koraput, Jaypore. The learned District Judge on reassessment of evidence, came to hold that the demand promissory note and the signature of defendant No. 1 thereon had not been duly proved. He also held that the certified copy of the ledger account (Ext. 2) was not proved. Accordingly the suit was dismissed, and the appeal was allowed. Being aggrieved by such judgment and decree, the present second appeal has been filed u/s 100 of the Code of Civil Procedure, 1908 (in short, the "Code").

4. Mr. M.M. Das, learned counsel appearing for the appellant, submitted that since the demand promissory note and the revival letter were admitted in evidence without objection, the learned District Judge should have relied on those documents to find out the liability of the defendant No. 1, without searching for evidence to find out as to whether those documents had been proved or not. Similarly in respect of the bond of guarantee it was submitted that the contents thereof and the signatures of defendants 2 and 3 therein had been admitted dispensing with its proof and accordingly the joint and several liability of those defendants along with defendant No .1 had been duly established. With reference to S. 4 of the Bankers' Books Evidence Act, 1891 (hereinafter referred to as the "Bankers' Act") it is submitted that the certified copy of the ledger account establishes primary liability of defendant No. 1, and accordingly liability should have been fixed.

The learned counsel for respondents, however, contended that the judgment of the lower appellate Court is in order.

5. Section 4 of the Bankers' Act reads as follows:

"4. Mode of proof of entries in bankers' books.-

Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

It provides that subject to provisions of the Act certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry. Clause (8) of Section 2 of the said Act defines what is a certified copy. It reads as follows:

"2. Definitions.-- In this Act, unless there is something repugnant in the subject or context,--

(1) to (7) xxx xxx xxx xxx (8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title." .

There is ample evidence to show that the copy of ledger account Ext. 2 is in

respect of defendant No. 1 and the same has been maintained in ordinary course of business. In that copy of the ledger account, a certificate has been appended to by the concerned Branch Manager. It is stated to the following effect:

"Certificate that the above is the true copy of the entries in the cash credit ledger which is one of the ordinary book of the Bank and that such entries are made in the usual and ordinary course of business and that such books are still in the custody of the bank."

It essentially meets the requirement of Clause (8) of Section 2. Additionally it is the certified copy of ledger account in respect of defendant No. 1, and the same having been maintained in regular course of business is admissible u/s 34 of the Indian Evidence Act, 1872 (in short, the "Evidence Act") and can only be used as a piece of evidence corroborating any substantive evidence on record indicating liability if any. Admittedly P. Ws. 1 and 2 were not present when demand promissory note, the revival letter and bond of guarantee was executed. However, P. W. 1 has categorically stated that he was acquainted with the signatures of the defendants. None of the defendants was examined to deny such assertion. On the other hand, the demand promissory note, and the bond of guarantee were admitted without objection. The learned District Judge without considering the effect of exhibiting those documents without any objection by the contesting defendants, came to hold that the contents therein having not been duly proved, the defendants could not be saddled with any liability. It is not disputed that if the demand promissory note and the bond of guarantee are taken into consideration, then all the defendants will be jointly and severally liable for any amount due against defendant No. 1. Section 61 of the Evidence Act deals with proof of contents of documents and provides that the contents of documents may be proved either by primary or by secondary evidence. Section 64 deals with proof of documents by primary evidence. It inter alia provides that the documents must be proved by primary evidence except in the cases referred to in S. 65. Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. Objection to the admissibility of a document should be taken at the earliest stage though doubtless the absence of any such objection does not preclude a party from challenging its genuineness at a later stage. But once at the time of marking a document as an exhibit no objection is taken it necessarily follows that formal proof of the document is dispensed with and it will not be open to the party to later on say that the document should be formally proved in accordance with law. If the objection is confined only to the mode of proof, it must be taken at the earliest point of time when the documents are tendered in evidence in the trial Court. The objection is not permissible to be raised at a subsequent stage or in appeal. (See P.C. Purushothama Reddiar Vs. S. Perumal, .

6. In AIR 1943 83 (Privy Council) , Ramakrushna Mohapatra and Others Vs. Gangadhar Mohapatra and Others, and Annapurna Sahuani Vs. Narendra Prasad Sahu and Others, the principles laid down have been elaborated that when a document is admitted in evidence without any objection, it should be taken that the contents and signature/signatures therein have been proved and the party allowing that document to be marked as an exhibit, is precluded from raising the plea that the document has not been properly proved either in the later stage of the same proceeding or in appeal. The purpose behind it is that if the party against whom such document is exhibited had raised objection as to formal proof, then the party producing the document would have led due evidence to prove the same.

7. In the case at hand the demand promissory note and the bond of guarantee were allowed by the defendants to be admitted in evidence without objection, and even they did I not examine themselves in Court to deny their genuineness. They were, therefore, pecluded from contending before the learned District Judge that the said documents had not been duly proved.

8. No person can be charged with liability merely on the basis of entries in books of account, even when such books of accounts are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with the liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them. The original entries alone u/s 34 of the Evidence Act would not be sufficient to charge any person with liability and as such copies produced u/s 4 of the Bankers" Act obviously cannot charge any person with liability. (See Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd.,

9. It is to be noticed that the adjudication relating to signature is dealt with in Section 67 of the Evidence Act. Then a Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact.

10. The writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an Expert competent to do comparison of handwritings on a scientific basis. A third method is comparison by the Court with the writing made in the presence of the Court or admitted or proved to be the writing of the person. Both under Sections 45 and 47 the evidence is an opinion in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. Where an Expert"s opinion is given, the Court must see for itself and with the assistance of the Expert come to its own conclusion whether it, can safely be held that the two

writings are by the same person. That is not to say that the Court must play the role of an Expert but to say that Court may accept the fact proved only when it has satisfied itself on its observation that it is safe to accept the opinion whether of the Expert or other witness. (See *Fakhruddin v. State of Madhya Pradesh* AIR 1967 SC 1326 1967 Cri LJ 1197. In the cross-examination there is no suggestion given that P.W. 1 was not acquainted with the handwriting of defendants.

11. In the aforesaid background, the inevitable conclusion is that the decision of the learned District Judge absolving the defendants from the liability cannot be sustained. The appellate decree is set aside, and that of the trial Court is restored. The appeal is allowed with costs.