

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE H.P.SANDESH

RFA.No.1091/2007(MON)

Dated:11-12-2019

SMT. SHAKUNTALA GUPTA vs. MR. KIRAN BHARTIA

**J U D G M E N T**

This appeal is filed challenging the judgment and decree of dismissal dated 13.12.2006 passed in O.S.No.4198/1993, on the file of the VI Additional City Civil Judge, Bangalore (CCH-11).

2. The parties are referred to as per their original rankings before the Court below to avoid the confusion and for the convenience of the Court.

Brief facts of the case:

3. A suit was filed by the appellant – plaintiff for recovery of a sum of Rs.29,250/- with interest at 24% per annum contending that the defendant No.1 had purchased the flat from the defendant No.2 and he was in short fall of the amount. Hence, he approached the plaintiff for an amount of Rs.17,500/- on 4.1.1990. The defendant No.1 executed the promissory note and consideration receipt with a promise to repay the amount with interest at 24% per annum. The defendant No.1 failed to repay the amount. Hence, legal notice was issued on 1.4.1993. In spite of the issuance of the legal notice, the defendant No.1

did not pay the amount and also did not give any reply to the notice. With interest at 24% per annum from 4.10.1990 to 4.7.1993, the defendant No.1 is liable to pay a sum of Rs.29,250/-. Hence, the plaintiff filed the suit for recovery of the same.

4. In pursuance of the suit, the defendant No.1 appeared and filed the written statement contending that neither he approached the plaintiff for loan nor he has borrowed any amount from the plaintiff, much less Rs.17,500/- and the plaintiff is a total stranger to defendant No.1. Defendant No.1 contended that he has not executed any promissory note or consideration receipt. It is believed that the plaintiff has forged the promissory note and the consideration receipt for the purpose of filing this case. It is also contended that no legal notice was served on him. A person who has money, he will purchase the premises of flat and the person who does not have the money, he will never purchase the flat. Defendant No.1 has not borrowed any money from the plaintiff for making payment in favour of defendant No.2. Defendant No.1 had purchased the portion of the land from defendant No.2 for a total consideration of Rs.1,40,800/- and the said amount was paid before May 1990. He has given the details of payment. Defendant No.1 in the written statement contended that the plaintiff in this case is a benami person. The person behind her, who got the suit filed is

one Sri D.P. Gupta, who is carrying on business under the name and style of M/s. Madhu Steel Corporation. For the purpose of record, his wife Shankuntala Gupta is the Proprietor. Totally eight suits are filed based on the fabricated documents by Sri D.P. Gupta under different names. In one case, his wife is the plaintiff and in another case, his employee by name Narasimhan is the plaintiff. In other six cases, six persons who have nothing to do with the suit have filed the suit at the instance of Sri D.P. Gupta. On close scrutiny of the documents i.e., legal notice, promissory note and the plaint averments and advocate for the plaintiff in all the cases, will contemplate and demonstrate that one single person is behind all these cases and all the documents have been forged, fabricated and concocted. Hence, prayed the Court to dismiss the suit.

5. Based on the pleadings of the parties, the Court below framed the following issues:

1. *Whether the plaintiff proves that she gave a loan of Rs.17,500/- to the defendant No.1, under an On Demand Pronote and consideration receipt?*
2. *Whether the plaintiff proves that defendant No.1 has agreed to repay the loan with interest at 2% p.m.?*
3. *Whether the plaintiff proves that the defendant executed an On Demand Pronote and consideration receipt?*
4. *Whether plaintiff is entitled to the relief as prayed?*

5. *What Order?*

6. The plaintiff in order to substantiate her case, examined her husband, who is the power of attorney holder of the plaintiff as P.W.1 and got marked the documents at Exs.P.1 to 41. On the other hand, the defendant No.1 examined himself as D.W.1 and got marked the documents at Exs.D.1 and 2.

7. The Court below, after recording the evidence of the parties, heard the arguments of respective counsels and answered issue Nos.1 to 4 as 'negative' in coming to the conclusion that the plaintiff has not proved the fact that she gave a loan of Rs.17,500/- to the defendant under on-demand promissory note and consideration receipt. Being aggrieved by the dismissal of the suit, the appellant/plaintiff has filed the present appeal.

8. In the memorandum of appeal, the main contention urged by the appellant/plaintiff is that the Court below has committed an error in not raising the statutory presumptions of the law of Negotiable Instrument Act attached to the on-demand pro-note and consideration receipt when the appellant proved the execution of on-demand pro-note and consideration receipt in accordance with the settled law. It is also contended that the plaintiff has examined one of the attesting witness and both of them were familiar with the signatures of the defendant and

further produced several admitted signatures of the defendant for comparison of the Court with the disputed signatures. It is also his contention that the Court below has failed to bestow its judicial mind to the nature of suit and also failed to exercise the powers available under Section 73 of the Evidence Act. The very findings of the Trial Court is perverse and has erroneously made the observation that the plaintiff has failed to discharge the primary burden of proving the execution of on-demand pro-note and consideration receipt.

9. The other contention of the learned counsel for the appellant/plaintiff is that even though the Court below observed that the evidence adduced by the defendant cannot be relied upon and has come to the conclusion that the defendant has suppressed material facts, however did not consider the said fact and has erroneously rejected the claim of the plaintiff. The Court below has also discussed with regard to the several matters pending against the defendant and keeping this aspect of the matter in mind, the Court below proceeded under the wrong impression that the plaintiff has not proved the very execution of the documents, pro-note and consideration receipt. The very approach of the Trial Court is not in accordance with law and settled principles of law. Hence, the judgment and decree is liable to be set aside.

10. The learned counsel appearing for the appellant/plaintiff in his argument vehemently contended that

the Court below has failed to take note of the evidence of P.W.2 and the documents produced to substantiate the fact that the defendant himself has executed the pro-note and consideration receipt. The defendant in the cross-examination admitted his signatures which were confronted to him. When such being the case, the Court below ought to have considered the evidence of P.W.2, who is an attesting witness. However, the Court below discarded the evidence of P.W.2 only on the ground that he has also filed a suit against the defendant. The Court below also failed to compare the signatures available on record which are admitted signatures with that of the signatures in the disputed documents viz., pro-note and consideration receipt and the same has also not been done. The defendant took the defence that the signatures available on pro-note and consideration receipt are forged one and the same are not his signatures. To substantiate this fact, the defendant has not taken any steps to prove the fact of forgery and in spite of the same, the Court below has dismissed the suit erroneously.

11. The learned counsel appearing for the appellant/plaintiff in support of his contention has relied upon the judgment of the Delhi High Court in the case of *Nepal Singh -vs- Om Pal Singh* reported in 2005 AIR (Delhi) 330. The learned counsel referring this judgment would contend that the Court below ought to have exercised the power under Section 73 of the Evidence Act. He also pointed out the fact that Delhi High

Court in this judgment with regard to the promissory note and suit for recovery of money, based on the pro-note-cum-receipt held that when the signatures of defendant in pro-note-cum-receipt is compared with his signatures appearing in other documents, which are on record, clearly prove and establish that all signatures are of the defendant and ordered to decree the suit to pay the suit claim with interest upholding the judgment.

12. The learned counsel appearing for the plaintiff also relied upon the judgment of Andhra Pradesh High Court in the case of *Duggineni Seshagiri Rao -vs- Kothapalli Venkateswara Rao* reported in 2001 (6) ALT 95 to contend that when the promissory note executed has been proved there is presumption of consideration and it is the duty of the defendant to rebut that presumption, if he pleads forgery of the signatures. The learned counsel referring these two judgments would contend that the principles laid down in the judgments referred supra is aptly applicable to the case on hand, since similar issues are involved herein. Hence, prayed this Court to allow the appeal setting aside the judgment of the Court below.

13. The counsel appearing for the defendant in his argument would contend that suit is filed based on the forged pro-note and consideration receipt. The plaintiff, in order to substantiate and prove the pro-note and consideration receipt

examined a witness as P.W.2, who has also filed a case against the defendant. Hence, it is natural that he is supporting the case of the plaintiff and in fact, the Court below has considered this aspect and has come to the conclusion that he cannot be an independent witness. The Court below has given anxious consideration to both oral and documentary evidence available on record and has rightly dismissed the suit. The Court below has also observed that the plaintiff did not appear before the Court and contends that plaintiff is the benami person and the person behind him is one Sri D.P. Gupta, the husband of the plaintiff, who had filed eight suits against him in the name of different persons. The Court below, while dismissing the suit has assigned reasons for dismissal and there are no grounds to interfere with the findings of the Court below and hence, prayed this Court to dismiss the appeal.

14. Having heard the arguments of learned counsel for the plaintiff and the defendant and keeping in view the contentions urged by learned counsel for both the parties, the points that arise for consideration of this Court are:

- (i) Whether the Court below has committed an error in dismissing the suit in coming to the conclusion that the plaintiff has not discharged the burden by proving the pro-note and consideration receipt?
- (ii) Whether the Court below has committed an error in not exercising the power under Section 73 of the Evidence Act in comparing the

admitted signatures available on record with the disputed signatures?

(iii) Whether the Court below has committed an error in not drawing the presumption under Section 118 of the Negotiable Instrument Act?

(iv) What order?

Point Nos.(i) to (iv):

15. Having considered the rival contentions of both the parties, it is the main contention of the plaintiff that the defendant had borrowed an amount of Rs.17,500/- on 04.10.1990 agreeing to pay interest at 24% per annum and executed on demand pro-note and consideration receipt. The defendant did not repay the amount as agreed and hence, legal notice was issued to the defendant on 01.04.1993 and inspite of receipt of legal notice, the defendant did not repay the amount. It is also the case of the plaintiff that the defendant had purchased a flat and he was in short fall of the amount and hence, he availed hand loan of Rs.17,500/- from the plaintiff. The defendant in the written statement has denied the very averment made in the plaint and contended that the signatures available on pro-note and consideration receipt are not that of his signatures and those signatures are forged one and there was no need of money to him to receive the same from the plaintiff. It is also contended that the husband of the plaintiff Sri D.P. Gupta had filed eight cases against him in the benami names and this is also one of the said case filed through the plaintiff, the wife of

Sri D.P. Gupta.

16. The plaintiff, in order to substantiate her claim, did not choose to examine herself and examined the power of attorney as P.W.1, who is none other than the husband of the plaintiff. P.W.1 has reiterated the averments of the plaint in the affidavit in lieu of chief examination and got marked the documents Exs.P1 to P41. P.W.1 was subjected to cross-examination. In the cross-examination, it is elicited that, he knows the defendant since, 1988. The defendant No.1 used to supply steel to M/s. Madhu Steel Corporation. It is elicited that he does not remember whether he had filed suit in his individual capacity before the Court and also he cannot remember in how many cases he has deposed before the Court as general power of attorney holder. He denied the suggestion that he gave the evidence in eight cases. It is suggested in the cross-examination that several cases are filed against the defendant in the name of different persons and the same was denied. He admits that in the suit in O.S.No.10498/1993, he was present at the time of the attachment executed by the Amin in the said suit and he signed as a witness to the mahazar. It is suggested that Exs.P2 and P3 are forged and fabricated documents and it has not been executed by Sri Kiran Bhatia, the defendant and the same was denied. However, he admits that the contents of the pro-note and consideration receipt are in his hand writing. It is suggested that signatures at Exs.P2(a) and P3(a) are forged by him by using the same pen and the same was denied.

17. P.W.1 was cross-examined in detail with regard to the other suits. He admits that Mrs. Irena D'Zouza has filed criminal cases against him for the forgery and fraud. The witness volunteers that the said cases have been dismissed and he can produce the copy of the dismissal order. He also admits that in the suit in O.S.No.4193/1993 filed by one Sri Narasimhan, he is the scribe of the pro-note. In the said pro-note in O.S.No.4193/1993, there are two witnesses by name Roopakala and Kishore and the said Kishore had filed the suit against Sri Kiran Bhatia in O.S.No.4194/1993. He admits that his wife has disclosed in the income tax returns about the amount due from the defendant and he can produce the income tax returns. He admits, in the accounts books of M/s. Madhu Steel Corporation, the suit loan is not reflected and claims that the same is reflected in the personal account of his wife.

18. The plaintiff also examined one witness R. Mohan as P.W.2. In his evidence, he states that defendant borrowed Rs.17,500/- as a hand loan from the plaintiff in his presence and executed on demand pro-note and consideration receipt which are marked as Exs.P2 and P3 and he identifies the signature of the defendant as Exs.P2(a) and P3(a). He was subjected to cross-examination. He admits that the husband of the plaintiff is an Advocate. The plaintiff is carrying on hardware business in

the name and style M/s. Madhu Steel Corporation. He admits that the plaintiff paid the amount of Rs.17,500/-by way of cash to the defendant and also admits that plaintiff had filed a case against the defendant for recovery of Rs.17,500/-. He does not know about the case filed by other persons against the defendant. He also admits that one Sri Noor Ahamed has also attested Ex.P3. He admits that he is carrying on hardware business in the name and style M/s. Mohan Steel Corporation. He admits that he and Sri D.P. Gupta are friends. It is suggested that the said pro-note is forged one and that he attested the same only on account of friendship with Sri D.P. Gupta and the same was denied. It is suggested that Exs.P2(a) and P3(a) are not the signatures of the defendant and the same was denied.

19. The defendant examined himself as D.W.1. In his evidence, he reiterates the averments of the written statement and has also given the details of the amount paid to his vendor, when he purchased the flat. The defendant was subjected to cross-examination. In the cross-examination, he admits that suits filed against him by P. Shobha, R. Mohan and S. Narasimhan were decreed and they have filed the execution petition against him. The plaintiffs in other suits are confronted and he admits the same which are marked as Exs.P21 to 28. Several documents are confronted to him during the course of cross-examination and the admitted documents are marked as exhibits. It is also elicited in the cross-examination that,

several criminal cases are filed against him and during that time, P.W.1 himself helped him to release him on bail. It is suggested that he has signed the pro-note and consideration receipt, Exs.P2 and P3 and he is giving false evidence that signatures not belongs to him and the same was denied. However, he admits his signatures in Exs.P6(a), P7(a), P8(a) and P37(a). It is suggested that the signatures in Exs.P2 and P3 are similar to his admitted signatures and the same was denied. It is further suggested that Exs.P2(a) and P3(a) are signed in the presence of the plaintiff and her husband and in the presence of attesting witnesses and the same was denied.

20. Now let this Court consider both oral and documentary evidence available on record keeping in view the contentions urged by learned counsel for both the parties. The main contention of the plaintiff is that the defendant had borrowed the amount of Rs.17,500/-, for which he had executed pro-note and consideration receipt. The defendant has denied the signatures available on the said documents, Exs.P2 and P3 and contend that those signatures are forged signatures. It is important to note that, inspite of the plaintiff examining a witness as P.W.2, the Court below ignored the evidence of P.W.2. It is to be noted that the Court below while coming to the conclusion that the plaintiff has not proved the case has observed that an adverse inference can be drawn that the plaintiff has not been examined and on her behalf, the power of attorney holder has been examined.

21. In the case on hand, the power of attorney holder is none other than the husband of the plaintiff. It is his case that he is having acquaintance with the transaction. It is also the case of the plaintiff that in the presence of P.W.1 only the amount was paid to the defendant and during that time, attesting witnesses were also present. It is the specific case of the plaintiff that only after availing the loan amount, the defendant executed Exs.P2 and P3. In the cross-examination of P.W.1, though an attempt is made that signatures available on Exs.P2 and P3 not belongs to the defendant, nothing is elicited with regard to the same. P.W.2 claims that in his presence only, the amount was paid and Exs.P2 and P3 are signed by the defendant. No doubt in the cross-examination of P.W.2, it is elicited that he also filed the suit against the defendant, the Court below taking note of the fact that P.W.2 had filed the suit against the defendant has come to the conclusion that he cannot be an independent witness. It is pertinent to note that, during the cross-examination of P.W.2, it is elicited that the defendant is also having acquaintance with P.W.2 and he is not the stranger to the parties. No doubt, it is elicited in the cross-examination of P.W.2 that he was friend of Sri D.P. Gupta, merely because he has also filed the suit against the defendant, the Court cannot ignore the material available on record. The Court below also while appreciating the evidence of P.W.1 and D.W.1 has come to the conclusion that the parties are not telling the truth before the Court. The Court below while appreciating the evidence of D.W.1 has

come to the conclusion that D.W.1 is denying the truth. But in the cross-examination, he admits that he was having acquaintance with legal proceedings.

22. The observation of the Court below is that the plaintiff has not discharged his burden. It is to be noted that the plaintiff has relied upon the documents Exs.P2 and P3, pro-note and consideration receipt. Apart from that, the plaintiff has also relied upon Exs.P6 to P9, the invoices and the defendant admits his signatures on Exs.P6 to P9 which are marked as Exs.P6(a), P7(a), P8(a), P9(a) and so also relied upon the signature of the defendant in Exs.P10 (a) to (c), Exs.P11 (a) to (g), P12(a) and (b), P13(a) to (f), P14(a), P18(a) and (b) and P37(a) and (b) i.e., his signature and also his counsel signature. The defendant also in the cross-examination admits Exs.P6(a) to P8(a) and Ex.P37(a). The plaintiff not only relied upon the evidence of P.W.2 but, has also produced voluminous documents containing the signatures of the defendant. The Court below has formed an opinion that the plaintiff has not proved execution of pro-note and the consideration receipt. As rightly pointed out by the learned counsel for the appellant/plaintiff that the Court below ought to have compared the signature of the defendant with the admitted signatures and also with the questioned documents.

23. The learned counsel for the appellant relied upon the

judgment of the Delhi High Court referred supra with regard to Section 73 of the Evidence Act that the Court can compare the signatures. Before exercising the power under Section 73 of the Evidence Act, I would like to refer the provisions of Section 73 of the Evidence Act, which reads as hereunder:

*73. Comparison of signature, writing or seal with others admitted or proved.—In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.*

*1[This section applies also, with any necessary modifications, to finger-impressions.]*

24. Having considered the powers conferred to the Court to compare the signatures which are admitted and proved with the disputed document, the Court can compare the same. The Hon'ble Apex Court in the judgment reported in *AIR 1999 SC 2544* in the case of *K.S. Satyanarayana -vs- V.R. Narayana Rao* in Paragraph No.7 of the judgment has held as under:

*7. A piquant situation had developed before the trial court when the 1<sup>st</sup> defendant denied his signatures on the written statement and Vakalatnama in favour of his counsel. Trial court should have immediately probed into the matter. It*

*should have recorded statement of the counsel for the 1<sup>st</sup> defendant to find out if Vakalatnama in his favour and written statement were not signed by the 1<sup>st</sup> defendant whom he represented. It was apparent that the 1<sup>st</sup> defendant was trying to get out of the situation when confronted with his signatures on the Vakalatnama and the written statement and his having earlier denied his signatures on Exh.P-1 and Exh.P-2 in order to defeat the claim of the plaintiff. Falsehood of the claim of the 1<sup>st</sup> defendant was writ large on the face of it. Trial court could have also compared the signatures of the 1<sup>st</sup> defendant as provided in Section 73 of the Indian Evidence Act. Section 73 is reproduced as under: xxx”*

25. Keeping in view the principles laid down in the judgment of the Hon'ble Apex Court and also the judgments of the Delhi High Court referred supra and so also Section 73 of the Evidence Act, it is clear that there is no bar for the Court to take resort to the powers conferred under Section 73 of the Evidence Act to compare the signatures and give its findings there on which could be considered along with the findings and evidence on record. On perusal of Exs.P2 and P3 and also the disputed and admitted signature of the defendant available in Exs.P6(a) to P9(a) and also Ex.P37(a) which has been admitted by the defendant during the course of cross-examination, it is clear that, the signatures available on Exs.P2(a) and P3(a) and also the admitted signatures stated supra are the signatures of the defendant. The Court below has failed to exercise the power available under Section 73 of the Evidence Act and has only

proceeded on the wrong notion with regard to filing of eight cases against the defendant. No doubt, there are eight cases filed against the defendant, those cases are filed by the different persons. It is evident that in the evidence of P.W.1, he was examined as a power of attorney holder in three cases and not in eight cases. The Court below ought not to have carried away with the filing of other cases and should have considered the material available on record in the present case. The defendant has denied the very execution of Exs.P2 and P3, on demand pro-note and consideration receipt and the fact that the plaintiff has examined a witness as P.W.2. The Court below ignoring these aspects of the matter has come to an erroneous conclusion that P.W.2 cannot be treated as an independent witness, since he had also filed the case against the defendant and each case depends upon the facts and circumstances therein and merely because he has also filed a case against the defendant is not a ground to discard the evidence of P.W.2 and nothing is elicited in the cross-examination of P.W.2 that he is having any ill-will against the defendant. Apart from that, in the cross-examination of D.W.1, he has categorically admitted that he was having acquaintance with P.W.2 and P.W.2 is not a stranger to him. When such being the case, the trial Court ought not to have come to such a conclusion that the plaintiff has not proved the very execution of the promissory note and consideration receipt, Exs.P2 and P3. The signature of the defendant available in Exs.P2 and P3 are similar to that of the admitted signatures at Ex.P6(a) to P9(a) and Ex.P37(a). The Court below has not exercised its power under Section 73 of the Evidence Act and has only

proceeded on a wrong notion that P.W.2 is also having an interest against the defendant and such a conclusion as reached by the Court below is erroneous.

26. The learned counsel appearing for the appellant/plaintiff has also relied upon the judgment of Andhra Pradesh High Court regarding presumption and it is to be noted that the defendant has taken the defence that the signatures available in Exs.P2 and P3 are forged signatures and not his signatures. When the plaintiff has produced voluminous documents before the Court apart from Exs.P2(a) and P3(a), which are the documents containing admitted signature of the defendant, the defendant ought to have sent the documents Exs.P2 and P3 to Hand Writing Expert to find out as to whether those signatures are forged one or not. It is his specific case that those signatures are forged signatures and hence, the burden lies on the defendant to prove the fact of forgery and the same has not been done. The principles laid down in the judgment of Andhra Pradesh High Court is aptly applicable to the case on hand since, voluminous documents are placed before the Court to substantiate the fact that Exs.P2 and P3 are executed by the defendant himself and the signatures available on Exs.P2(a) and P3(a) are that of the signature of defendant. Hence, the Court below has committed an error in not appreciating both oral and documentary evidence and also committed

an error in not exercising the power under Section 73 of the Evidence Act and so also drawing the presumption under Section 118 of the Negotiable Instrument Act.

27. Having considered the material available on record, it is evident that the Court below has committed an error in dismissing the suit taking into consideration the pendency of number of cases filed against the defendant and it is the duty of the defendant to explain as to under what circumstances, he executed the said documents and the same has not been done, except making general denial that the signatures on Exs.P2 and P3 are forged signatures and not his signature. The defendant did not probablize his case sending the documents to Handwriting Expert, when the plaintiff probablized the case of the plaintiff by examining P.W.2 as well as voluminous documents are produced to prove the admitted signatures of defendant. Hence, the Court below has committed an error in dismissing the suit ignoring the material available on record and therefore, the same requires interference at the hands of this Court.

28. In view of the discussions made above, I pass the following:

ORDER

- (i) The appeal is allowed.
- (ii) The impugned judgment and decree of dismissal

dated 13.12.2006 passed in O.S.No.4198/1993, on the file of the VI Additional City Civil Judge, Bangalore (CCH-11) is set aside. The suit filed by the appellant/plaintiff is decreed granting the interest at the rate of 10% from the date of suit till the date of realization since, it is the transaction of the year 1990.

- (iii) The office is directed to draw the decree.
- (iv) The Registry is directed to send the lower Court records forthwith.