

Sait Tarajee Khimchand and Others

Vs

Yelamarti Satyam Alias Sateyya and Others

Civil Appeal No. 2255 of 1966

(C. A. Vaidialingam, A. N. Ray JJ)

19.04.1971

JUDGMENT

RAY, J. -

1. This is an appeal by certificate from the judgment dated January 13, 1964 of the High Court of Andhra Pradesh modifying the decree passed by the Subordinate Judge on November 27, 1958 and allowing the appeal from the decree by giving the defendants credit for payment of Rs. 19,000 on December 31, 1953 towards the mortgage bond.

2. The appellants are the plaintiffs. The first appellant is a registered firm and other appellants are its partners. The defendants Nos. 1 to 4 were the principal defendants and as sued as mortgagees. Defendants Nos. 5 and 6 were partner of the plaintiff firm who had retired. Defendants No. 7 and 8 were the subsequent mortgagees. Eventually, some of the heirs and legal representatives of the plaintiffs partners were brought on the record of the suit. They were numbered plaintiffs Nos. 6 to 10.

3. The appellants instituted the suit for the recovery of Rs. 27,995-11-0 with further interest and costs on the basis of a mortgage bond dated January, 1, 1948 executed by the first defendant and his sons defendants Nos. 2 to 4 in favour of the plaintiff firm. The principal sum secured Rs. 17,500 was repayable with compound interest at 1% per mensem with half-yearly rests. The plaintiff firm after giving credit to the defendants for the sums paid towards the loan on the mortgage deed claimed the sum of Rs. 27,995-11-0 and interest. The plaintiff firm in paragraph 8 of the plaint further alleged that on January 12, 1955 the first defendant acknowledged in writing on the mortgage bond liability for about Rs. 26,000 and odd then found due while endorsing the payment in part for a sum of Rs. 410.

4. Defendants Nos. 1 to 4 applied to the Court for examination and scrutiny of the mortgage bond on two grounds. First defendants Nos. 1 to 4 alleged that besides the payments mentioned in the plaint, the defendants had made a payment of Rs. 19,000 to the plaintiffs on December 31, 1953 and the same was endorsed on the second page of the mortgage bond and the plaintiffs had not given the defendants credit for the same. The second ground was that the alleged acknowledgment of Rs. 26,000 by the defendants was not correct. The defendants alleged that they acknowledged liability for Rs. 2,600 being the balance of the amount then due under the bond.

5. The plaintiffs filed a counter-affidavit alleging that the defendants Nos. 1 to 4 not paid Rs. 19,000 on December 31, 1953 and the allegation that the payment was endorsed on the second page of the mortgage bond was not true. The plaintiffs further alleged that the defendants Nos. 1 to 4 had

acknowledge a debt of Rs. 26,000 and Rs. 2,600.

6. Defendants Nos. 1 to 4 were allowed to examine and scrutinize the mortgage bond before the Sheristadar on notice to the plaintiffs. The defendants Nos. 1 to 4 filed a written statement as follows. They admitted execution of the mortgage bond and receipt of the consideration. They made a payment of Rs. 19,000 on December 31, 1953 to the plaintiffs. The first defendant had endorsed on the mortgage bond the said payment of Rs. 19,000 on the reverse side of the first page of the mortgage bond. On inspection it appeared that the plaintiffs rubbed the said endorsement with regard to the payment of Rs. 19,000, and after obliterating the said endorsement the plaintiffs wrote an endorsement in Marwari language over the said rubbed portion. The plaintiffs did not file a true translation of the said endorsement in Marwari. The over-writing was visible on the document itself. The writing in Marwari was done with a view to the covering up the endorsement made by the defendants with regard to payment. The plaintiffs wilfully and deliberately tampered the endorsement made by the defendants with regard to acknowledgment of liability for Rs. 2,600 into a liability for Rs. 26,000.

7. The plaintiffs thereafter filed a statement in reply. The plaintiffs denied that the first defendant made any payment of Rs. 19,000 on December 31, 1953 and further that the first defendant made any endorsement with regard to payment of Rs. 19,000. In the second place the plaintiffs alleged that the first defendant on January 12, 1955 made an endorsement on the mortgage bond acknowledging a debt of Rs. 26,000. Thirdly the plaintiffs alleged that the plaintiffs did not rub any endorsement of payment of Rs. 19,000 as alleged by the defendants but the plaintiffs wrote in Marwari language on the mortgage bond as follows :

"Simple Mortgage Bond dated January 1, 1948 for Rs. 17,500 in words Rupees Seventeen thousand five hundred executed by Yelamarty Satyam alias Sateyya, Poleswararao, Chennarao, Narayamurthi of Rajamundry on Poshwad Punchami of the year two thousand four".

It may be stated there that the translation of the Marwari writing as set out in the written statement was different to the translation referred to by the Courts as Ex. B-3 which will be referred to by the Court as Ex. B-3 which will be referred to later on.

8. On these pleadings the two principal questions in controversy between the parties were first whether the first defendant made a payment of Rs. 19,000 on December 31, 1953 and made an endorsement on the mortgage bond in respect of the said payment; secondly, whether the defendants on January 12, 1955 acknowledged liability for Rs. 26,000 as alleged by the plaintiffs or for Rs. 2,600 as alleged by the defendants.

9. The plaintiffs' case was that on January 12, 1955 the first defendant approached the plaintiffs for a further loan for depositing a certain amount in the Subordinate Judges' Court at Rajahmundry for setting aside a sale of some of his property. The plaintiffs refused to give any further loan as the amount due on the mortgage had become a large sum. The plaintiffs then took out the document and found out the amount due on the bond. The plaintiffs found out a writing in Telugu language in an unusual place on the second page of the first sheet, which he could not decipher. One of the plaintiffs was apprised that the first defendant had meddled with the document. On being questioned by the plaintiff the first defendant confessed that he dishonestly wrote the endorsement, sometime previously when the first defendant took the document from the plaintiffs for purposes of making a copy of the schedule for his immediate use. The partner of the plaintiff firm thereupon threatened

that he would launch criminal case. The first defendant thereupon apologised and begged the plaintiff not to proceed farther. The first defendant hurriedly rubbed off endorsement. The said plaintiff then insisted that the said defendant should make an endorsement of the amount due on that date. The defendants thereupon on the same day January 12, 1955 acknowledged the liability to the extent of Rs. 26,000 and odd. The necessity for endorsing the acknowledgment of liability was because the first defendant borrowed on January 12, 1955 Rs. 1,500 from another firm of some of the plaintiffs for depositing a sum into the court and out of that sum of Rs. 1,500 the first defendant made a payment of Rs. 410 to the plaintiffs towards the mortgage amount.

10. The original mortgage deed with regard to the rival cases as to the alleged endorsement for payment of Rs. 19,000 indicates that has been erasing and rubbing off and an endorsement in the Marwari script has been made on the identical palace where there has been rubbing off. The endorsement in Marwari script Ex. B-3 is as follow :

"Rs. 17,500 Today Amavasya day Rs. 17,5000 (in words rupees seventeen thousand five hundred) Yelamarti Chinnayya, Jajan Satyam, Someswar Rao, Sinna Rao, Enkatanarayan Moorthy at the rate of 101 he will pay January 1, 1948 year 2004 rupees quantity 101 year 2004 5th of P A H O i.e., January 1, 1948."

11. The second feature on the writing of the mortgage deed is in respect of the rival contentions as to acknowledgments of liability. The writings is in Telugu. The digits are in English. The endorsement Ex. A-2 reads as follows :

"Towards the amount of Rs. 2,600-0-0 being the amount of principal and interest accrued up to this day, a sum of Rs. 410 (in words rupees four hundred and ten) is the amount settled to be adjusted from out of rent payable by you to us.

(Sd. in Telugu) Yelamurti Satyam."

12. The bone of contention between the plaintiffs and the defendants with regard to the latter endorsement Ex. A-2 is that according to the plaintiffs, it was Rs. 26,000 which was later on tampered into Rs. 2,6000-0-0 whereas, according to the defendants to the defendants, the endorsements was for Rs. 2,600-0-0 only.

13. The two rival cases as to endorsements for Rs. 19,000 and Rs. 2,600 are inextricably bound up. If the finding will be that there was an endorsement for payment of Rs. 19,000 there could not be an acknowledgment for Rs. 26,000.

14. The oral evidence on behalf of the defendants was that there was payment of Rs. 19,000 on December 31, 1953 and there was an endorsement to that effect made by the first defendant. The defendants proved the payment of Rs. 19,000 by an entry dated December 31, 1953 in Ex. B-6(a) at page 184 of the books of account. The first defendant proved the books of account and the debit entries. The book was maintained in the regular course of business and the entry was made by Narayan Rao. Exhibit B-7(a) is that debit entry in the ledger under the date December 31, 1953 showing the payment of Rs. 19,000. Exhibit B-6(a) is the daily account book showing credit and debit entries. In the daily account book Ex. B6(a) there is debit for Rs. 19,000 towards the principal and the interest under the mortgage deed.

15. The plaintiffs wanted to rely on Exs. A-12 and A-13 the day book and the ledger respectively. The plaintiffs did not prove these books. There is no reference to these books in the judgments. The

mere making of an exhibit does not dispense with the proof of documents. It is common place to say that the negative cannot be proved. The proof of the plaintiffs' books of account became important because the plaintiffs' accounts were impeached and falsified by the defendants case of large payments than those admitted by the plaintiffs. The irresistible inference arises that the plaintiffs books would not have supported the plaintiffs.

16. The other significant feature with regard to the endorsement in Marwari script Ex. B-3 is that the plaintiffs evidence is that the first defendant rubbed the writing and acknowledged that it was a wrong entry. If it were a wrong entry, the most obvious thing would have been to ask the first defendant to cancel it by his own hand and get it signed by him. A person who would ask for apology and admit a wrong comply with such a request at once. No such request was made. On the contrary, it appears that the plaintiff brought into existence an endorsement in Marwari script. The endorsement has no intrinsic worth because it has neither any meaning nor any justification. The mortgage amount, the date of the mortgage, the amount of interest were all mentioned in the deed. Therefore, there was no occasion for making an entry to the effect. It is established beyond any doubt that the plaintiff obliterated the writing made by the first defendant and thereon brought into existence the writing in Marwari script. The first defendant's evidence that Rs. 19,000 was paid on December 31, 1953 is proved first by oral evidence, secondly contemporaneous books of account, and, thirdly, the obliteration of the writing, which lends direct support to the first defendant's evidence that he made an endorsement for payment of Rs. 19,000 on December 31, 1953.

17. The mortgage bond was all along with the plaintiff. The plaintiff's version that the first defendant some time prior to January 12, 1955 had taken the mortgage bond for the purpose of making a copy and at that the time made an entry for payment of Rs. 19,000, without the knowledge of the plaintiff firm does not find support either from conduct of parties or course of business dealing. If the plaintiff's version be correct that the defendants took the mortgage bond for purposes of making a copy it would be inexplicable that the plaintiff's would not look into the document when the defendant would return it. It would be the most obvious thing for any business man to check that the defendants would take the document for purpose of copy and return it to the plaintiffs within 15 minutes. The documents ran into 6 pages and contained closely written portions. It would also be strange that the plaintiffs would not look into the mortgage bond for calculation of interest when demanding money of the defendants in the year 1954 by notice in writing. He shall later deal with the truth of the alleged notice of demand. Suffice it to say here that the plaintiffs' case of the surreptitious endorsement by the first defendant of payment of Rs. 19,000 is totally repelled by the document itself and surrounding circumstances.

18. It appears that the High Court in dealing with the endorsement for Rs. 19,000 said "We have to notice that the endorsement does not appear to have been merely rubbed off, but that it was obliterated effectively by other processes probably by the use of the some chemical. That this is so is admitted by the counsel for the plaintiffs-respondents. If that were so, the story given by the plaintiffs relating to erasure cannot be accepted." Counsel for the appellant submitted the there was no such admission by counsel for the plaintiffs in the High Court. We are unable to accept that submission. If it were the appellant's case that the admission was erroneously noticed by the High Court the appellant should have brought it to the notice of the High Court and the High Court would have expressed views thereon. This court would then have had the benefit of the views of the High Court. There is no such ground of appeal. If such a ground had been taken the respondents would have dealt with it. If such a ground had been taken the respondents would have dealt with it. The High Court made the observation in the context of dealing with the evidence of the parties. The evidence on behalf of the defendant was that there was payment of Rs. 19,000. The High Court

found that an endorsement of payment of money was made by the first defendant. P.W. 9 the second plaintiff completely obliterated the endorsement made by the defendants and did not say what the endorsement was. The further evidence of P.W. 9 was that he asked the first defendant to read the endorsement but the latter did not do so. P.W. 9 also said that when the first defendant said that he committed a blunder P.W. 9 asked him to endorse on that portion of the document to the affect. But the first defendant said that the it was unnecessary.

It is utterly unbelievable that a businessman would be content with the conduct of the first defendant in not reading it and the answer that it was unnecessary to make a note in the hand-writing particularly when the first defendant admitted to have made an endorsement by blunder.

19. The evidence of the defendants is correct that Rs. 19,000 was paid on December 31, 1953. It will follow that there could not therefore be an endorsement on January 12, 1955, for acknowledgment of liability for Rs. 26,000. The endorsement on January 12, 1955, contains intrinsic evidence to nullify the plaintiffs' version that the defendants acknowledged liability for Rs. 26,000. On behalf of the plaintiffs there were three witnesses. The two attestors deposed that when the endorsement was made it was for Rs. 26,000 and there was a vertical line immediately after the figures Rs. 26,000 and that there were no dots in between the figures. If that were so the amount in figures would be Rs. 26,000. On the contrary, the defendant's version is that the amount was Rs. 2,600-0-0. A question would arise as to whether there was any mutilation of the digits. No such case is found in the pleadings. Even after inspection of the documents by the parties, the plaintiffs did not allege that it was tampered by the defendants. The document was all along in the possession of the plaintiffs. When the document was produced in court it was the plaintiffs' case that the figures were Rs. 26,000. Two witnesses were examined on either side. On behalf of the plaintiffs there was the evidence of P.W. 8 Subrahmanyeswara Rao. His evidence was that he filed the plaint in this suit as counsel of the plaintiffs. He saw the mortgage bond Ex. A-1 when he filed the plaint. He said that he had seen all the endorsements on the mortgage before it was put into court. The endorsement, Ex. A-2, when he saw it was for Rs. 26,000 and not for Rs. 2,600-0-0. As to the other endorsement in Marwari script marked Ex. B-3, the evidence of the witness was that it was that it was in the same condition as it was when he saw it before he filed it in court. In cross-examination P.W. 8, said that the instructions given by the plaintiffs were that a spurious endorsement was scored in the space where the endorsement in Marwari script Ex. B-3 was made. But he had the doubt whether he should mention it in the plaint. As to the other endorsement for Rs. 26,000 his evidence was that after filing the document in court he saw it again before putting it in the sealed cover. He then found the spraying of ink at the place where the figure Rs. 26,000 was found at the time when the bond was put in the sealed cover. This was an equivocal answer.

20. On behalf of the defendants Shri M. Nagabhushnanarao counsel for the defendants gave evidence. He said that the endorsement marked Ex. B-3 in Marwari script was in the same condition as he saw at the time of inspection. A question was put to him that if the two dots and the last zero were eliminated, it could obviously read Rs. 26,000 and the witness said that it was obvious. The witness was then asked as to whose interest it was to put the two dots and the last zero. The question was objected to by counsel for the defendants. Counsel for the plaintiffs yet asked as to whether it was not obvious that it would be in the interest of the defendants to do so. The question was answered by the witness as follow :

"I understand your question as asking for my opinion on the question posed by you. In my opinion, it is in the interest of both the mortgagor and the mortgagor to have the correct figures noted in every type of endorsement on the mortgage bond."

It was highly improper to put such a question to the counsel who gave evidence. The plaintiffs did not make any definite case as to when and how the document was tampered and who tampered it. There was no charge of tampering against the defendants. In that context, counsel for the defendants rightly objected to such a question being put to the counsel who gave evidence. Counsel for the appellants submitted that the court should read the document and find out that a zero was added. In the absence of a charge in the pleadings, in the absence of a case made in the pleadings, in the absence of issues raised in the pleadings, in the absence of proof that a zero was added by the defendants it would be opposed to all rules and principles to entertain such a plea.

21. The defendants' evidence is consistent with the defendants' payment of Rs. 19,000. The other endorsement also is proved to be a genuine one for Rs. 2,600. The presence or absence of a vertical line makes no difference.

22. Counsel on behalf of the appellants relied on some documents consisting of letters and pleadings in support of the contention that the documents indicated that the plaintiffs' firm made a demand for a sum of money which could not be asked for by the plaintiffs if the defendants had paid Rs. 19,000 on December 31, 1953.

23. The first was Ex. A-40, a letter, dated April 1, 1954, written by the plaintiffs to the defendants. In that letter the mortgage amount of Rs. 17,500 was mentioned and it referred to payments for the sum of Rs. 8,100 made by the defendants from time to time and demand was made for the outstanding. This letter did not specifically mention the amount outstanding but it was said that the implication suggested that the defendants should have replied stating that Rs. 19,000 had been paid on December 31, 1953. This letter was not served on the defendants. The plaintiffs cannot therefore rely on that document.

24. The second document on which the plaintiffs relied is Ex. A-7, a letter, dated June 14, 1954. This was a letter from the defendants' lawyer to Harakchand Surajmal demanding rent for a shop occupied by the firm of Harakchand Surajmal. The firm of Seth Harakchand Surajmal is a different firm from though Harakchand and Surajmal happen to be common partners of the plaintiff firm. This letter is in the first place not inter-partes, secondly, it is not relevant to the mortgage transaction, and thirdly it was not shown to the defendant in cross-examination.

25. The third document on which the plaintiff relied is Ex. A-8 being a letter, dated June 17, 1954, addressed by the lawyer of the firm Seth Harakchand Surajmal to the defendant's lawyer. In that letter there is a statement as follow :

"As regards Rs. 735-0-0 being the amount of rent payable for the period July 9, 1952 to April 9, 1954, your client has subsequently asked my client to credit the same towards the interest on about Rs. 25,145-11-0 being the amount of principal and interest remaining due after deducting the payment of Rs. 8,100-0-0 for which on endorsement has been made, in respect of the simple mortgage deed for Rs. 17,500-0-0 executed by your client in favour of my client's Tarajee Khimchand firm on January 1, 1948."

It was said on behalf of the plaintiffs that this letter indicated that the amount due to the plaintiffs from the defendants was Rs. 25,145 and secondly that the defendants had paid Rs. 8,100 towards the mortgage bond of Rs. 17,500. This letter is again not inter-partes because the firm of Seth Harakchand Surajmal is a different firm from of the plaintiffs. Secondly this letter Ex. A-8 was also

not shown to the defendants in cross-examination and therefore cannot be used against the defendants. Thirdly, any statement by a different firm has to be proved as a fact. Documents do not prove themselves. The contents of the document have to be proved. The controversy in the present case is whether the plaintiff firm has given the defendants credit for Rs. 19,000. The answer to that question would decide the truth or falsity of the statement provided also the statements were shown to the defendants.

26. The fourth document on which the appellant relied is Ex. A-41 being a copy of the written statement of Harakchand Surajmal in suit No. 105 of 1954. The written statement is dated August 7, 1954. Defendant No. 1 was the plaintiff in that suit and Seth Harakchand Surajmal was the defendant. This document was relied on by the plaintiffs for the statement made there that a sum of Rs. 25,145 was owed by the defendant No. 1 to Seth Harakchand Surajmal. Seth Harakchand Surajmal is a different firm.

27. Ex. A-42 is an affidavit, dated July 28, 1954, made by Seth Harakchand Surajmal in the suit filed by defendant No. 1 against the firm of Seth Harakchand Surajmal. This document was relied on for the same purpose that a sum of Rs. 25,145 was mentioned by Harakchand Surajmal as due by the plaintiff there to Harakchand Surajmal. This is an inaccurate statement. The transaction was not with that firm but a different firm. It may be that Harakchand and Surajmal were partners of the plaintiff firm. That would not make the document admissible. These documents Exs. A-41, Ex. A-42, were not shown to defendant No. 1 at the time of giving oral evidence. They were not relevant to the mortgage transactions. These documents would not by themselves prove the truth of the statements contained therein particularly because of the issues in suit.

28. The High Court rightly upheld the contentions of the defendant, that the mortgage decree would be modified by giving the defendant's credit for payment of Rs. 19,000 paid on December 31, 1953.

29. The appeal fails and is dismissed with costs.

30. C.M.P. 2452 of 1971 is dismissed.

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