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S.A.No.1148 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2024

CORAM:

THE HONOURABLE Ms.JUSTICE R.N.MANJULA

S.A.No.1148 of 2012

and

CMP Nos. 17612 & 17614 of 2024

Palanisamy

...

Appellant/Plaintiff

Vs.

1.Kuzanthaivel

2.Rajasekaran

3.Nagarajan

...

Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C against to set aside the Judgement and Decree dated 30.09.2011 made in A.S.No.46 of 2009 on the file of the Sub Judge, Ariyalur, reversing the judgement and decree dated 12.10.2007 passed in O.S.No.98 of 2004 on the file of the District Munsif, Jayankondam and decree the suit in O.S.No. 98 of 2004.

For Appellant : Mr.T.S.Baskaran

For Respondents : Mrs.K.Kaviya for



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Mr.N.Nithiyanandam for R1 & R2
: Notice dispensed with- for R3

JUDGEMENT

The plaintiff is the appellant, who has filed the suit against the defendants 1 to 3 for recovery of money based on the equitable mortgage on deposit of title deeds. The relief is sought only against defendants 1 and 2.

2. The short facts pleaded in the plaint are as follows:

On 23.12.1974, the 1st defendant had availed a loan of Rs.8,000/- from the 3rd defendant by executing a registered mortgage as his security in respect of the suit property. The mortgage has been executed by the 1st defendant for himself and on behalf of his minor son, the 2nd defendant. On 27.05.1992, the 3rd defendant made over the mortgage in favour of the plaintiff. On 15.11.1986 the 1st defendant had paid a sum of Rs. 500/- towards the loan amount and to that effect, an endorsement has been made on the mortgage deed itself. The defendants 1 and 2 did not repay the loan amount and hence the plaintiff sent a legal notice on 26.09.1998 demanding them to repay the loan amount. The 1st defendant received the notice but did not send any reply. As the defendants 1 and 2 did not repay the loan amount availed from the 3rd defendant, which was



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made over in favour of the plaintiff by executing the mortgage in respect of the suit property, the plaintiff has filed this suit for seeking relief of a preliminary decree for recovery of the suit amount.

3. The brief facts of the written statement filed by the 1st defendant are as follows:

The 1st defendant had availed a loan for a sum of Rs. 8000/- from the 3rd defendant and executed a mortgage deed on 23.12.1974 as his security to the loan amount. The 1st plaintiff had paid the loan amount along with interest to the 3rd defendant during November 1996 itself and discharged the same. The said payment was done in front of one S.N.S. Gunasekaran and his father S.N. Somasundhara Mudhaliyar. After discharging the loan, the 1st defendant asked the 3rd defendant to return the mortgage deed, but the 3rd defendant has stated that he has misplaced it. It is false to state that on 15.11.1986, the 1st defendant has paid a sum of Rs. 500/- towards the loan amount and in respect of that, an endorsement has been made. The made-over in favour of the plaintiff is for name sake only and it is not true. The suit has been filed after 25 years from the date of the original mortgage from the year 1974 which is barred by limitation.

4. On the basis of the above pleading, the learned trial judge has framed



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the following issues:

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- 1) 23,12,74 /ம் தேதிய பெந்தக பத்திரத்தில் 15,11,86/ம் தேதி +பாய் 500./ செலுத்தி 1ம் பிரதிபாதி வரவு வைத்து கொடுத்துள்ளாரா?
- 2)வாதி தாக்கல் செய்துள்ள 27,5,92/ம் தேதிய மேடோவர் பத்திரம் தகுந்த முத்திரைத்தாளில் எழுதப்பட்டுள்ளதா? அது செல்லத்தக்கதா?
- 3)23,12,74/ம் தேதிய பெந்தகக் கடன் தீர்க்கப்பட்டு விட்டதாக 1. 2 பிரதிபாதிகள் கூறுவது உண்மையா?
- 4)தாவா வழக்கு காலாவதி தோ/த்தால் பாதிக்கப்பட்டுள்ளதா?
- 5)பிராதில் கோரியுள்ள தொகை வாதிக்கு கிடைக்கத்தக்கதா?
- 6) வாதிக்கு கிடைக்கத்தக்க வேறு பரிகாரங்கள் என்ன?

5. During the course of trial, on the side of the plaintiff, three witnesses have been examined as PW.1 to PW.3 and Ex.A1 to Ex.A9 were marked. On the side of the defendants, two witnesses have been examined as D.W.1 and D.W.2 and Ex.B1 was marked.

6. After the conclusion of the trial and on considering the evidence available on record, the learned Trial Judge has decreed the suit and granted the relief of preliminary decree as prayed for. On the First Appeal preferred by the defendants 1 and 2, the First Appellate Court had allowed the Appeal and reversed the judgement of the Trial Court and dismissed the suit. Aggrieved over that, the plaintiff has preferred this Second Appeal by raising the following



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substantial questions of law:

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"1. Whether the first Appellate Court was correct in ignoring the evidence of PW.3, witness to Ex.A2 to set aside the lower Court findings as to genuineness of Ex.A2 solely on the ground of lack of expert opinion?

2. Has not the first Appellate Court erred in holding that the 1st defendant had discharged the mortgage debt filed on the side of the defendants but solely depending of the evidence of the D.W.2 who is a relative of the 1st defendant?

3. Whether the first appellate Court failed to exercise its jurisdiction under Section 73 of Evidence Act to arrive at a correct finding as to the genuineness of Ex.A2?"

7. The learned counsel for the appellant /plaintiff submitted that the First Appellate Court has not appreciated the evidence in a proper prescriptive and had chosen to rely on the evidence of DW.2 and recorded the finding that the mortgage loan has been discharged. It is further submitted that the learned First



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Appellate Judge has given an erratic finding as to the endorsement made in respect of the payment of Rs. 500/- during November 1986. The finding is that the signature in Ex.A2-endorsement is identical with that of the signatures found in Ex.A1 mortgage deed, but the same was not properly appreciated by the learned First Appellate Judge.

7.1. The learned counsel for the appellant/plaintiff further submitted that the First appellate Court failed to give due credence to the findings of evidence of PW.3, who is the witness to the payment endorsement made by the 1st defendant on 15.11.1986 and he has also deposed evidence that he stood as a witness while the 1st defendant had made the payment of Rs. 500/- and made the endorsement on the mortgage deed itself by affixing his signature.

7.2. It is further submitted that the First Appellate Court had gone in favour of the evidence of D.W.2, who has stated that he had seen the 1st defendant repaying the loan amount along with interest to the tune of Rs.19,000/- to the 3rd defendant during November 1986. The endorsement Ex.A2 has also been made in the month of November 1986. When the 1st defendant has made a defence statement that he was not available in station



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during the period from 03.11.1986 to 22.11.1986, it would not have been probable that the 1st defendant could have settled the loan amount to the 3rd defendant during November 1986. The inconsistencies in the pleadings and the evidence of the defendant were also not appreciated by the First Appellate Court in order to reverse the well-appreciated judgement of the Trial Court.

8.The learned counsel for the respondents submitted that the First Appellate Court had undertaken the exercise of comparison of signature with its own eyes under Sec. 73 of the Indian Evidence Act and had rejected Ex.A3 endorsement as a forged one. The reason stated by the First Appellate Court to reject the endorsement is acceptable and it is elaborate and detail. As D.W.2 has given evidence by stating that he had seen the 1st defendant repaying the loan amount of Rs. 19,000/- to the 3rd defendant, the First Appellate Court is right in believing his evidence and reversing the judgement of the trial Court by allowing the First Appeal.

9. The fact that the 1st defendant, for himself and on behalf of his minor son, the 2nd defendant, had executed a mortgage deed in favour of the 3rd defendant on 23.12.1974 by loan of Rs. 8,000/- was not denied. On 15.11.1986



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the 1st defendant had made a payment of Rs. 500/- towards the repayment of the loan and made an endorsement on the back side of one stamp paper of the mortgage deed, and thereafter on 27.05.1992 the 3rd defendant had made over the mortgage in favour of the plaintiffs.

10. The categorical contention of the defendants by filing the written statement is that the loan amount has already been discharged by the 1st defendant during the month of November 1986 itself by making a payment of Rs.19000/- which included both the principal and the accrued interest. While the trial court had disbelieved the repayment as alleged by the defendants, the First Appellate court had chosen to believe the same by giving weight to the evidence of PW.2. Before adverting into the plea of repayment, it is to be seen whether the endorsement dated 15.11.1986 was very much true and whether the signature in Ex.A2 was that of the 1st defendant. The endorsement, i.e., marked as Ex.A2 would show that the following details have been written on the back side of the second stamp paper of the mortgage deed:

"1986 ம் ஆண்டு நவம்பர் திங்கள் 15ம் நாள் இந்தப்பத்திரத்தில் கண்ட அசல் வட்டி

பாக்கிக்காக ரூ,500/- மட்டும் செலுத்தி வரவு வைக்கப்பட்டது, சுகஸ்தலிகிதம்."



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11.The witness to the endorsement has been examined as PW.3, and he

has stated in his evidence that he had seen the 1st defendant paying Rs.500/- and was making endorsement in his own hand writing on the back side of the mortgage deed. Even though the trial Court did not find any difference in the signatures of the 1st defendant between the mortgage deed and the endorsement, the learned First Appellate Judge had undertaken the very same exercise of comparing the signature with its own eyes and had recorded the reasons as to why the First Appellate Court does not believe the signature in Ex. A2 could not be that of the 1st defendant.

12. Before comparing the signature by resorting to Section 73, it has to be ensured that the signatures for comparison should be the contemporary signatures. The disputed signature was of the year 1986, and the other signature for the comparison has been taken as the signature affixed by the 1st defendant in the year 1974, when the Ex.A1 mortgage deed was executed. There can be a difference in the signature of a person after several years. Even in the mortgage deed that was executed in the year 1974 and on which the 1st defendant has admitted to having made his signature, there is a difference found in the signature on the first and succeeding stamp papers.



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13. In fact, the signature of the 1st defendant on the first stamp paper more or less tallies with the signatures that have been found in the Ex.A2 endorsement. Even though the 1st defendant had made a specific plea that the signature in Ex. A2 is forged, he did not file any application for comparing the signature by a handwriting expert. It is a trite law that even the evidence of a handwriting expert is not conclusive proof about the signature. So the Court has to appraise the genuineness of the signature and the genuineness of the whole of the Ex.A2 endorsement only by appreciating the evidence available on record in a holistic manner.

14. No doubt the plaintiff, who had filed the suit, has got the burden to prove that Ex.A2 endorsement is true and valid. The burden seems to have been discharged by the plaintiff with the examination of the witnesses to the endorsement PW.3. PW.3 has stated assertively that he had seen the 1st defendant making an endorsement and affixing his signature, which is available at Ex.A2. In such a case, the burden would shift to the first defendant to prove the contrary.

15. The contrary evidence that is being let in by the defendant is the



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evidence of D.W.2. The said witness, by name Gunasekaran, D.W.2, is said to be a person who had seen the repayment of loan amount by the 1st defendant to the 3rd defendant during November 1986. In such a case, instead of having a witness to evidence repayment, the 1st defendant could have insisted the 3rd defendant to execute a receipt and get it registered. The 1st defendant has stated that even after repaying the whole amount outstanding when he wanted the 3rd defendant to execute the discharge, the 3rd defendant has stated that he had misplaced Ex.A1 mortgage deed somewhere. Even in that case, a prudent man would have got the stamped receipt executed by the first defendant and he will not simply be satisfied that P.W.3 was present and the mortgage deed if found out later, cannot be of any trouble to him.

16. The 1st defendant's denial to Ex,A2 endorsement is on the pleading that he was not available in station between the period from 03.11.1986 to 22.11.1986. Since the endorsement was dated 15.11.1986 and it has been marked as Ex.A2, and the same is proved through the evidence of the witness to the endorsement PW.3, the learned trial Judge had appreciated whether the 1st defendant had proved that he was not available on 15.11.1986 to make his



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endorsement. In other words, the defendant has to prove the contrary once the plaintiffs have proved their endorsement Ex.A2, that he was not available in station during the relevant point of time.

17. As rightly observed by the Trial Court, the 1st defendant did not produce any evidence to show that he was undergoing the training program between the period from 03.11.1986 to 22.11.1986 and that he was not available on 15.11.1986 to affix his signature in Ex.A2. But when the 1st defendant denies his availability between the period from 03.11.1986 to 22.11.1986, which falls largely in the month of November 1986, he has pleaded that he had made the repayment also during the month of November 1986 and for which D.W.2 stood as a witness. So that contradiction in the pleadings of the 1st defendant would probabalise the submission of the 1st defendant that he had made the repayment during the month of November 1986. But this important factor was also not captured by the First Appellate Court, while the Trail Court has given the reasons as to why the Ex.A2 endorsement is true.

18. When the Trial Court has given the reasons as to why the Ex.A2 endorsement is true on the basis of other facts and circumstances available



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before the Court, the first Appellate Court has proceeded only on the basis of examination of the signature by the Court. As stated already, the comparison was not made by the Court with that of the contemporaneous signature of the 1st defendant. It has been further observed that there is a difference in the signature of the 1st defendant even on the first and subsequent stamp pages of the mortgage deed. When the plaintiff has executed a mortgage deed, and in that event of making repayment as early as in the year 1986, he would not have kept quiet for several misdirected years without inviting the 3rd defendant to come and execute the discharge or register the receipt in order to safeguard himself. Such action has not been taken by the 1st defendant.

19. These facts, circumstances, and materials would only probabalise the fact that Ex.A2 endorsement is very much true and valid, and the First Appellate Court has misled itself to take a contradictory stand from that of the trial Court. Hence it can only be held that the trial court has appreciated the evidence and decreed the suit. The First Appellate Court has misdirected itself by making unnecessary analysis and making observations as though the Court is an handwriting expert. **So, the first substantial question of law is answered in favour of the appellants.**



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20. Section 73 of the India Evidence Act contemplates only bare eye examination and naturally that bare eye examination cannot be done as that of the examination done by the handwriting expert. For the very same reason, the Court, which is undertaking the bare eye examination, cannot be an accepted reason as that of the handwriting expert for not accepting the genuineness of the signature.

21. In fact, the 1st defendant has written the recitals in both the mortgage deed and endorsement (with his own handwriting by affixing the word எகஸ்தலிகிதம்.) meaning '*written by himself*'. Though the trial court has rightly appreciated all these materials on record and had chosen to decree the suit, the First Appellate Court has misconstrued itself about the scope of Section 73 and other probabilities that would tilt the case in favour of the plaintiff. **Thus, the second and third substantial questions of law are answered in favour of the appellants.**

22. Since the finding of the first appellate court is contrary to the well-established principles of comparing the signatures under Section 73 and it is a



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failure to compare the contemporary signature, much weight cannot be given to the findings of the first appellate Court in this regard. As the plaintiffs who have got made over from the 3rd defendant have proved the made over also by examining the 3rd defendant, the plaintiff has got the right to recover the mortgage amount from the 1st and 2nd defendants. As the plaintiff has proved the liability of the 1st and 2nd defendants, the first appellate Court ought not to have reversed the judgement of the trial Court.

23. In the result, this Second Appeal is **allowed**. The Judgement and Decree dated 30.09.2011 made in A.S.No.46 of 2009 on the file of the Sub Judge, Ariyalur is set-aside and the judgement and decree dated 12.10.2007 passed in O.S.No.98 of 2004 on the file of the District Munsif, Jayankondam and decree the suit in O.S.No. 98 of 2004 is upheld. No costs. Consequently, the connected miscellaneous petition in CMP No. 17612 of 2024 is closed as 'not pressed,' based on the endorsement made by the learned counsel for the appellant. Similarly, CMP No. 17614 of 2024 is also closed.

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jrs



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Index : Yes/No
Speaking/ Non-Speaking
Internet: Yes/No
Neutral: Yes/No

R.N.MANJULA, J.

jrs

To

1. The Sub Judge, Ariyalur.
2. The District Munsif, Jayankondam
3. The Section Officer, V.R.Section,
High Court, Madras.

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and

CMP Nos. 17612 & 17614 of 2024



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