

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:25.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.1408 of 2008

Judgment reserved on 19.06.2015	Judgment pronounced on 25.06.2015
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1.Chikkannan (died)
2.S.Pazhaniammal
3.C.Balu
4.S.ThavamaniAppellants/2nd plaintiff

(Appellants 2 to 4 brought on record as legal heirs of the deceased sole appellant vide order of the Court dated 26.06.2012 made in M.P.No.1 of 2012 in S.A.No.1408 of 2008)

Vs

1.A.R.Perumal (deceased) ...1st Respondent/1st Defendant
2.Palanisamy
3.Pachiyammal
4.Karuniammal ...Respondents 2 to 4/Plaintiffs 3 to 5
5.Ramalingam
6.Neelvannan ...Respondents 5 to 6

(RR5 and 6 recorded as legal heirs of the deceased R1 vide Order of Court dated 02.02.2015 made in Memo dated 21.12.2010 in S.A.No.1408 of 2008)

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 26.07.2005 made in A.S.No.55 of 1990 on the file of the Principal Sub-Court, Gobichettipalayam, reversing the judgment and decree dated 16.09.1989 made in O.S.No.401 of 1981 on the file of the Additional District Munsif Court, Gobichettipalayam,

Erode District.

For Appellants : Mr.V.Raghavachari
for Mr.MA.P.Thangavel

R1 : died (steps taken)

For RR2 to 4 : Mr.K.Raman

For R5 and R6 : Mr.I.C.Vasudevan

JUDGMENT

The second appeal arises out of the judgment and decree dated 26.07.2005 made in A.S.No.55 of 1990 on the file of the Principal Sub-Court, Gobichettipalayam and reversing the judgment and decree dated 16.09.1989 made in O.S.No.401 of 1981 on the file of the Additional District Munsif Court, Gobichettipalayam, Erode District.

2.The averments made in the plaint are as follows:-

(i)The suit property belongs to the first defendant and the defendants wanted to sell the property. The plaintiffs were in the look out for the purchase of the property. Both parties agreed for the said course fixing the sale consideration of Rs.8,000/-and entered into an agreement on 29.06.1977. The first defendant entered into a sale agreement on behalf of himself and the minors/defendants 2 and 3 and received Rs.1,500/- from the plaintiffs on the date of agreement. It was also agreed that if the plaintiffs paid the balance of sale price of Rs.6,500/- before the 15th Thai namely, 28.01.1978, the first defendant would receive the amount and execute a sale deed for himself and as guardian for the minor defendants 2 and 3 in favour of the plaintiffs. The plaintiffs were also put in possession of the suit property on the date of agreement itself.

(ii)Subsequent to the date of agreement, the first defendant received Rs.4,500/- from the plaintiffs on 21.09.1977 and he had made an endorsement also in the agreement itself, hence there is only a balance of Rs.2,000/- towards balance of sale price.

(iii)Even though the plaintiffs are ready and willing to perform their part of contract, the first defendant was postponing to perform his part of contract. Ultimately, the plaintiffs tendered the amount of Rs.2,000/- to the first defendant on 21.01.1978 and purchased stamp papers for the sale deed, but the first defendant refused to execute the sale deed. Therefore, the plaintiffs issued a registered notice to the first defendant, but the first defendant refused to receive the same.

(iii) During the pendency of the suit, both the defendants attained majority and declared as major, first plaintiff died and his legal heirs are impleaded as plaintiffs 3 to 5.

(iv) Since the defendants are not ready to execute the sale deed, the plaintiffs constrained to file the suit for specific performance directing the defendants to receive the balance sale price of Rs.2,000/- from plaintiffs and execute a sale deed for Rs.8,000/- in favour of the plaintiffs and if the defendants failed to do so within the time stipulated, directing the execution of the sale deed through process of Court. Since the plaintiffs are already in possession of the suit property in pursuance of the contract, no separate relief of possession is prayed for. Thus, the plaintiffs prayed for decree.

3. The gist and essence of the written statement filed by the first defendant is as follows:

(i) This defendant did not execute any agreement in favour of the plaintiffs as alleged by the plaintiffs and did not want to sell any property. The sale agreement itself is a forged one.

(ii) The suit is barred by limitation. Under law, the suit for specific performance cannot be against minor. Therefore, he prayed for dismissal of the suit.

4. The gist and essence of the written statement filed by the defendants 2 and 3 are as follows:

(i) The suit against these defendants who are minors is not maintainable and the relief of specific performance against the minors is misconceived one. The value of the suit property is much more than the paltry sum of Rs.8,000/-, which is fixed as sale consideration as alleged by the plaintiffs. Therefore, defendants 2 and 3 prayed for dismissal of the suit.

5. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1 to P.W.4, D.W.1, D.W.2 and Exs.A1 to A7 and Exs.B1 to B4, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the first defendant preferred an appeal in A.S.No.55 of 1990 on the file of the Principal Sub-Court, Gobichettipalayam.

6. The learned First Appellate Court has considered the arguments advanced on either side, framed necessary point for consideration, reversed the Judgment and Decree passed by the Trial Court and allowed the appeal preferred by the first defendant. Against the Decree and Judgment passed by the first Appellate Court, the second plaintiff namely, Chikkannan has preferred a second appeal in

S.A.No.1114 of 1993 before this Court and this Court remanded back the matter to the first appellate Court with the direction to obtain specimen signature of the first defendant and to send the same to Forensic Department for comparison and after getting report from the handwriting expert, to decide the matter on merits. The first appellate Court allowed the appeal on the basis of the handwriting expert's report Ex.C1, against which, the present second appeal has been preferred by the second plaintiff/first appellant herein. During the pendency of the second appeal, the second plaintiff/Chikkannan/first appellant died and his legal heirs are impleaded as appellants 2 to 4.

7. At the time of admission, the following substantial questions of law have been framed:

1. Whether the Lower Appellate Court correct in holding that the negative the relief of claim on the basis of handwriting expert opinion, specifically disputed the signature and specimen signature or affixed between the gap of the 27 years?

2. Whether the relief of specific performance could refused to the plaintiff even though he is well established that the ready and willingness to perform the contract through by Exs.A2, A3, A5 and A6?

3. Whether the judgment and decree of the lower Appellate Court is correct and justified in passing the rolled down orders on the basis of the handwriting expert's opinion?

4. Whether the Lower Appellate Court has followed the mandatory provision that Order 41 Rule 31 without determining the point for consideration?

5. Whether the Lower Appellate Court correct and justify the negative the relief of plaintiff's suit based on the opinion of expert's is not a conclusive proof at all?

8. Learned counsel for the appellants/second plaintiff has mainly focused upon the report of handwriting expert and submits that it is not a conclusive proof and without examining the handwriting expert, Ex.C1/handwriting expert's report shall not be looked into. He further submits that specimen signature of the first defendant has been obtained on 30.12.2004, but Ex.A1 is dated 29.06.1977. It shows that after 27 years, specimen signature of the first defendant was obtained and compared with Exs.A1 and A2 and hence, it must be vary. Furthermore, during the second appeal, after remand only, specimen signature of the first defendant has been obtained. So there is a possibility for the first defendant to modify his signature. Moreover, when D.W.1/first defendant was in witness box, he disputed his signatures in Exs.A1, A2 and summons. But this aspect was not considered by the first appellate Court. So the judgment of the first appellate Court is perverse and hence, it has to be set aside.

Therefore, he prayed for allowing the second appeal. To substantiate his arguments, he relied upon the following decision:

- (i) AIR 1967 SC 778 (The State of Gujarat v. Vinaya Chandra Chhota Lal Pathi);
- (ii) 2001 (4) SCC 756 (Madhukar and others v. Sangram and others);
- (iii) 2010 (9) SCC 286 (Keshav Dutt v. State of Haryana);
- (iv) 2012 (1) MWN (civil) 642 (Kadirvelu Pillai v. V.Arjunan);

9. Resisting the same, learned counsel for the respondents has drawn attention of this Court through para-20 of the judgment passed by this Court in S.A.No.1114 of 1993 and submits that while remanding the matter, there was a specific direction to obtain signature of the first defendant to send for comparison and to get report from the handwriting expert, give an opportunity to both sides to argue the matter and decide the same on merits. Against which, the second plaintiff has not preferred any Special Leave Petition before the Apex Court. Furthermore, if the first Appellate Court has not obeyed the order of this Court, it would face contempt proceedings. In such circumstances, non examination of handwriting expert does not arise. Therefore, he prayed for dismissal of the second appeal.

10. Considered the rival submissions made on both sides and perused the materials available on record.

11. The deceased second plaintiff/first appellant herein has filed a suit for specific performance stating that the suit property belongs to one A.R.Perumal/first defendant and he had entered into a sale agreement Ex.A1 with the plaintiffs on 29.06.1977 on behalf of his minor sons/defendants 2 and 3 in respect of 5 acres 95 cents from the total extent of 11 acres 90 cents in S.No.563. The sale consideration was fixed as Rs.8,000/-, out of which, Rs.1,500/- was paid by the plaintiffs as an advance. It was agreed that if the plaintiffs paid the balance sale price of Rs.6,500/- before 15th of Thai (i.e.) 28.01.1978, the first defendant execute the sale deed. Out of the balance amount of Rs.6,500/-, Rs.4,500/- was paid by the plaintiffs on 21.09.1977 under Ex.A2. Since the first defendant refused to execute the sale deed, the plaintiffs issued a registered notice Ex.A6 on 25.01.1978. Since the first defendant refused to receive the same, the plaintiffs issued another notice under Ex.A8 and the same was also returned. Even though the plaintiffs have purchased the stamp papers to execute the sale deed, the first defendant was not ready and willing to perform the part of contract, so the plaintiffs filed the suit for specific performance.

12. The respondents/defendants pleaded that Ex.A1 sale agreement and the endorsement for receipt of amount in Ex.A2 are forged and

concocted for the purpose of this case. Further they raised a plea that the suit is barred by limitation. The trial Court decreed the suit, against which, the first defendant preferred an appeal before the first Appellate Court. The first appellate Court after considering both the oral and documentary evidence dismissed the suit. Against which, the second plaintiff Chikkannan has preferred a second appeal in S.A.No.1114 of 1993 before this Court and this Court allowed the second appeal by setting aside the decree and judgment passed by the first Appellate Court and remitted the matter back to the first Appellate Court to obtain specimen signature of the first defendant for comparison with his signatures in Exs.A1 and A2 and send the same to the Forensic Department for getting handwriting expert's opinion and after giving opportunity to both the parties to advance arguments, decide the matter on merits. After receiving Exs.C1 and C2 (i.e.) Handwriting expert's report and admitted signature of the first defendant in Exs.A1 and A2, the first Appellate Court dismissed the suit stating that the signature of the first defendant in Exs.A1 and A2 are not tallied with specimen signature obtained on 30.12.2004. Aggrieved over the same, the second plaintiff preferred the present second appeal.

13.It is the duty of the plaintiffs to prove that Exs.A1 and A2 are true and genuine. To prove the same, the plaintiffs examined P.W.2/Marappan and P.W.3/Vellaiyanna Gounder, scribe and attester of Ex.A1. The trial Court considered their evidence and came to the conclusion that Ex.A1/sale agreement is true and genuine, whereas the first appellate Court disbelieved the evidence of P.W.2 and P.W.3. Under such circumstances, since Exs.C1 and C2 are relied upon without examining its author, the judgment of the first appellate Court is perverse. So I am of the view, this Court has to reappraise the evidence.

14.At this juncture, it is appropriate to consider the decision relied upon by the learned counsel for the appellants reported in 2001 (4) SCC 756 (Madhukar and others v. Sangram and others), wherein it was held that the Court of first appeal must record its findings only after dealing with all issues of law as well as of fact and with the evidence, oral as well as documentary, led by parties. The Court must give reasons in support of its findings. In such circumstances, the High Court ought to have considered the grounds of appeal, evidence and dispose of the matter in accordance with the law. But the above decision is not applicable to the facts of the present case. Because in that decision, the High Court is the first appellate Court, but the case on hand is the second appeal. In such circumstances, this Court has empowered to reappraise the evidence provided the judgment of the first appellate Court which is the last

fact finding Court is perverse.

15.As already stated that the first appellate Court, which is a last fact finding Court, in para-10 of its judgment held that Exs.A1 and A2 are not true and genuine by considering only on the basis of Ex.C1/the handwriting expert's report that too without assigning any reason and without examining the handwriting expert. So the findings of the first appellate Court is perverse. Under such circumstances, this Court has to reappraise the oral and documentary evidence and decide the matter on merits.

16.It is true, in the earlier second appeal preferred by the 2nd plaintiff/first appellant herein, the following direction has been given by this Court vide judgment dated 09.08.2004:

"20.Hence, the lower appellate Court is directed to retain the appeal in order to carry out the following directions. Firstly, after obtaining the specimen handwriting and signatures from D.W.1, the same should be sent to the Government Handwriting Expert along with the disputed signatures and the handwriting in Exs.A-1 and A-2 for comparison and report which has to be marked as Court exhibit thereafter the counsel appearing for both the parties may be given opportunity to argue with reference to the expert's report and then the lower appellate Court is directed to dispose of the appeal in accordance with law. "

17.Admittedly, as per the direction of this Court, the first appellate Court has obtained specimen signature from the first respondent herein namely, A.R.Perumal on 30.12.2004 and the same has been sent for comparison to the Forensic Department, Ex.C1 report has been received and the specimen signature of the first defendant/first respondent herein was marked as Ex.C2. As per the dictum of the Apex Court, expert's opinion is not a conclusive proof, which has given only assistance to the Court to come to correct conclusion. However, without examining the author of Ex.C1, the same cannot be looked into.

18.It is true, as per Section 73 of the Indian Evidence Act, the Court can compare the admitted signature with the disputed signature. At this juncture, it is appropriate to extract Section 73 of the Indian Evidence Act, which reads as follows:

"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."

19. Now it is appropriate to consider the decision relied upon by the learned counsel for the appellants reported in AIR 1967 SC 778 (The State of Gujarat v. Vinaya Chandra Chhota Lal Pathi), wherein it was specifically held that it is unsafe to rely upon the document of handwriting expert without examining him. Para-10 is extracted hereunder:

"10. This statement is not factually correct also as the trial Court had itself compared these writings and signatures with certain other writings which had been proved to be of the respondent. A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of S. 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing. It was therefore not right for the learned Judge to consider it unsafe to rely upon the evidence of the complainant in a case like this, i.e., in a case in which no handwriting expert had been examined in support of his statement."

The above proposition has been reiterated in para-15 and 16 of the decision of the Apex Court reported in 2010 (9) SCC 286 (Keshav Dutt v. State of Haryana);

20.Learned counsel for the appellants also relied upon another decision of this Court reported in 2012 (1) MWN (civil) 642 (Kadirvelu Pillai v. V.Arjunan), in para-15 it is held as follows:

"15. It is palpably and pellucidly, glaringly and clearly evident that opinion of an handwriting expert will not automatically become evidence unless he is examined before the Court. His examination before Court is sine qua non for marking his report and treating it as evidence. He has to be examined but his report should be treated as no evidence. But, in this case, in paragraph No.20 of the judgement, the lower Court, despite consciously knowing that the expert's opinion was not marked by summoning the expert, did choose to rely upon it to render the judgement.

21.Considering the above decisions, I am of the view, the first appellate Court without examining the handwriting expert solely relied upon Ex.C1 report of the handwriting expert and dismissed the suit, so the judgment of the first appellate Court is perverse and it is non application of mind. Furthermore, Ex.A1/sale agreement is dated 29.06.1977, but the specimen signature of the first defendant was obtained on 30.12.2004 that too after 27 years.

22.As per Section 45 of the Indian Evidence Act, 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. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness. So handwriting expert's opinion is not a conclusive proof, it is only a corroborating evidence. In such circumstances, Ex.C1 is not a conclusive proof and hence, non examination of handwriting expert has deprived the right of the second plaintiff/first appellant to cross-examine the expert. Therefore, no reliance can be placed on Ex.C1/handwriting expert's report, which is not a conclusive proof.

23. Now this Court has to decide whether Ex.A2 an endorsement made for receipt of Rs.4,500/- was written by the first defendant? According to D.W.1/first defendant, his signature in Ex.A2 was a forged one. But I am unable to understand that if the plaintiffs want to forge the signature of the first defendant and even if they can forge his signature, how can they forge the writings of the first defendant in Ex.A2. In Ex.A2, it was specifically mentioned that the first defendant has made an endorsement that he received the amount on his behalf and also on behalf of the minor defendants 2 and 3. But that factum was not considered by the first appellate Court. A prudent man can forge the signature of third party, but he cannot forge his writings. Under such circumstances, I am of the considered view, Ex.A2 is true and genuine.

24. On perusing the evidence of P.W.1 to P.W.4, it reveals that P.W.2/Marappan and P.W.3/Vellaiyanna Gounder are the scribe and attester of Exs.A1 and A2 respectively. P.W.4/Periya Chikkannan deposed that he has dictated the terms of Ex.A1, since he is having poor vision. So the evidence of P.W.1 to P.W.4 clearly proved that Exs.A1 and A2 are true and genuine document and the same was correctly held by the trial Court. But whereas the first appellate Court disbelieved the evidence of P.W.1 to P.W.4 stating that P.W.2 is having dispute with the first defendant. But there is no enmity between P.W.2 and first defendant.

25. Moreover, D.W.1/first defendant in his evidence fairly conceded that P.W.2/Marappan is a relative of both the first defendant and second plaintiff. P.W.2 and P.W.3 have also spoken about the possession of the suit property. In such circumstances, the finding of the first appellate Court that Exs.A1 and A2 are forged on the basis of Ex.C1 is perverse. Because D.W.1 in his cross-examination itself denied his signature in Exs.A1 and A2.

26. One more adding circumstance is that before 15th Thai namely, 28.01.1978, the first defendant would receive the amount for himself and as guardian for the minor defendants 2 and 3 and execute the sale deed in favour of the plaintiffs. Since the first defendant refused to execute the sale deed, the plaintiffs issued notice to the defendants under Ex.A3 and that has been returned. Subsequently, the plaintiffs sent another notice under Ex.A6 and the same was also refused to receive by the first defendant. It is to be noted that D.W.1/first defendant in his cross-examination fairly conceded that address mentioned in the cover is his address. It clearly shows that the first defendant wantonly refused to receive the notice.

27.Considering the aforestated circumstances of the case, I am of the view, evidence of P.W.1 to P.W.4 are clearly proved that Exs.A1 and A2 are true and genuine. The plaintiffs are always ready and willing to perform their part of contract and they also purchased the stamp papers which was evidenced by Ex.A4. Since the defendants are not ready and willing to execute the sale deed, the plaintiffs have forced to file the suit, so the suit is not barred by time. The trial Court considered all the above aspects in proper perspective and rightly decreed the suit. As already stated that the judgment passed by the first appellate Court is perverse and therefore, the decree and judgment passed by the first appellate Court are hereby set aside. Hence, the judgment and decree passed by the trial Court are hereby restored and this second appeal is allowed. Thus, substantial questions of law are answered accordingly.

28.In fine,

- The Second Appeal is allowed.
- The judgment and decree passed by the first Appellate Court are hereby set aside.
- The judgment and decree passed by the trial Court are hereby restored.
- There is no order as to costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Sub-Court,
Gobichettipalayam.

2.The Additional District Munsif Court
Gobichettipalayam,
Erode District.

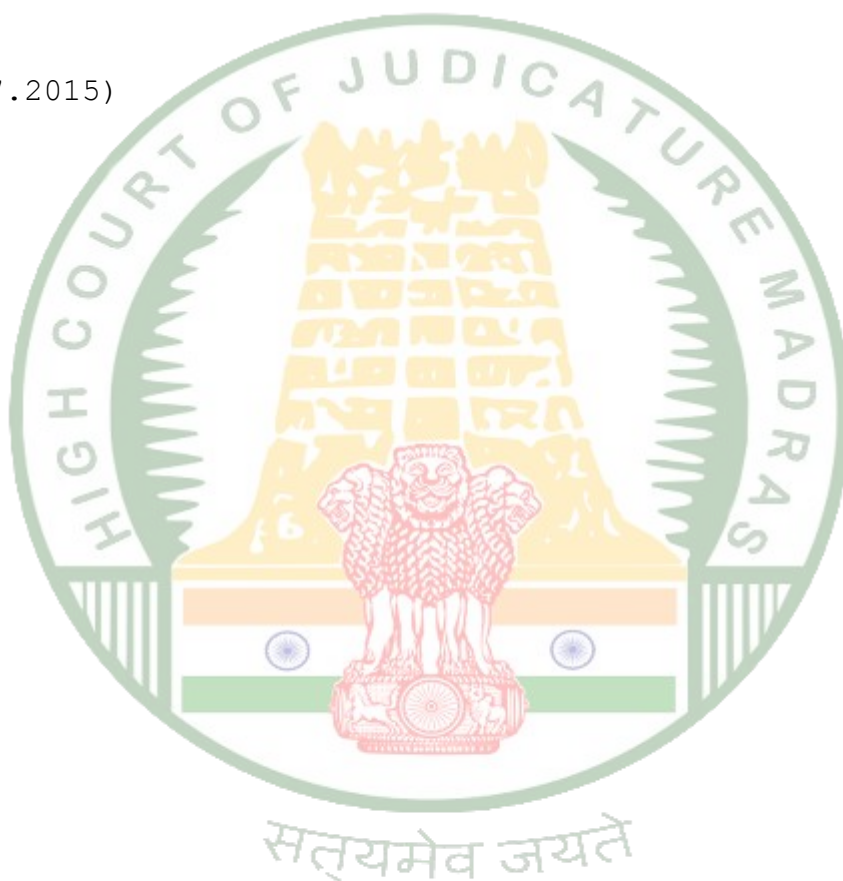
3.The Record Keeper,
V.R.Section,
High Court, Chennai.

1 CC to Mr.MA.P.Thangavel, Advocate SR.No. 31605

1 CC to Mr.I.C.Vasudevan, Advocate SR.No. 31519

S.A.No.1408 of 2008

RJ (CO)
PSI (15.07.2015)



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