

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.1033 of 2015

M.Varadharajan

... Appellant

Vs.

V.Balasubramanian

... Respondent

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgment and decree of the learned Principal District Judge, Thiruvallur dated 16.07.2015 passed in A.S.No.2 of 2014 allowing the appeal and setting aside the decree and judgment of the learned Subordinate Judge, Ponneri in O.S.No.32 of 2008 dated 01.10.2013.

For Appellant : Mr.R.Krishnaswamy

JUDGEMENT

The plaintiff in O.S.No.32 of 2008 on the file of the learned Subordinate Judge, Ponneri is the appellant herein. The respondent is the defendant in the suit. It was a suit filed for recovery of money due under a promissory note. The trial Court by decree and judgment dated 01.10.2013, decreed the suit as prayed for. As against the same, the respondent/defendant filed an appeal in A.S.No.2 of 2014 on the file of the learned Principal District Judge, Thiruvallur. By decree and judgment dated 16.07.2015, the First Appellate Court has allowed the appeal and set aside the decree and judgment of the trial Court. As against the same, the plaintiff/appellant is before this Court with this second appeal.

2.This second appeal has come up today for admission. I have heard the learned counsel for the appellant and I have also perused the records carefully.

3.The case of the plaintiff is as follows:-

The defendant borrowed a sum of Rs.1,20,000/- on 11.03.2005 from the plaintiff and duly executed a promissory note thereby promising to repay the said amount with interest @ 24% per annum

on demand. Subsequently, despite demand, the defendant did not repay the amount. Therefore, the plaintiff issued a legal notice on 27.04.2007 to the defendant demanding repayment of the amount due under the promissory note. Thereafter, the defendant paid a sum of Rs.10,000/- on 10.05.2007 as a part of the interest due under the promissory note. Though, further demand was made by the plaintiff, the defendant did not repay the balance amount. Therefore, the plaintiff filed the present suit on 11.03.2008 before the trial Court.

4.The defendant disputed the very borrowal of money by him from the plaintiff. He also disputed the execution of the promissory note and he further disputed the signature found in the said promissory note. He also denied his liability to pay any amount to the plaintiff. According to him, in the year 2002, he had borrowed a sum of Rs.25,000/- from the plaintiff for which, he had executed a promissory note. That amount was repaid but, the said promissory note was not returned. Subsequently, the defendant issued a notice on 10.10.2003 as though, a sum of Rs.1,00,000/- had been borrowed by the defendant from the plaintiff on 11.03.2002. According to the defendant, no such amount was ever borrowed by him from the plaintiff, as it was demanded in the said legal notice. Since, the defendant had not borrowed any amount on 11.03.2002, he did not sent any reply. Again the plaintiff sent another legal notice on 27.04.2007 to the defendant as though, he borrowed a sum of Rs.1,20,000/- from the plaintiff on 11.03.2005 and executed a promissory note. This is stated to be the suit promissory note which is under dispute. Thus, according to the defendant, the suit is liable to be dismissed.

5.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff, he was examined as P.W.1. The suit promissory note was marked as Ex.A.1 and the copy of the legal notice issued by the plaintiff was marked as Ex.A.2. On the side of the defendant, he was examined as D.W.1 and the legal notice sent by the plaintiff to the defendant on 10.10.2003 was marked as Ex.B.1. During the course of trial, the suit promissory note was sent for examination by a handwriting expert from the Tamil Nadu Government Forensic Lab. A report was received from the Expert, after comparison of the admitted signature with the disputed signature of the defendant found in the promissory note that the disputed signature found in the promissory note differs from the admitted signature of the defendant. However, the expert was not examined before the trial Court and the said expert opinion was also not proved in evidence.

6.Based on the above materials, the trial Court decreed the suit as prayed for and the same was later on reversed by the First Appellate Court. That is how the appellant/plaintiff is

before this Court with this second appeal.

7. In this second appeal, the learned counsel for the appellant would submit that the First Appellate Court was not right in relying on the written opinion of the hand writing expert, in the absence of examination of the Expert so as to afford opportunity to the plaintiff to challenge the correctness of the opinion of the Expert. The learned counsel would further submit that as per the presumption under Section 118 of the Negotiable Instruments Act, 1881, the First Appellate Court ought to have raised a presumption and since, the said presumption has not been rebutted by the defendant, the First Appellate Court ought to have confirmed the decree and judgment of the trial Court. The learned counsel would further submit that the execution of the promissory note has been duly proved. For these reasons, according to the learned counsel, the decree and judgment of the First Appellate Court deserves to be set aside.

8. I have considered the above submissions.

9. At the out set, I should say that there is no substantial question of law much less a substantial question of law at all involved in this matter warranting admission of this second appeal. As rightly contended by the learned counsel for the appellant, the promissory note governed by the Negotiable Instruments Act, does not require any attestation. In other words, it is a document not requiring any attestation at all. In the instant case, Ex.A.1 does not contain the attestation by any witness.

10. As per the Indian Evidence Act, a document requiring attestation can be proved by examining one of the attesters to the document. This is a legal necessity. So far as a document which does not require attestation, there is no question of examining any attester. As provided in Section 72 of the Indian Evidence Act, even if there is attestation of a document which, in law, does not require attestation the same may be proved as though it was un-attested. In the instant case, the suit promissory note which requires no attestation requires to be proved as required under Section 67 of the Indian Evidence Act. Section 67 of the Indian Evidence Act reads as follows:-

"67. Proof of signature and handwriting of person alleged to have signed or written document produced.

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

11. A close reading of Section 67 of the Indian Evidence Act would make it very clear that the handwriting and the signature in the document should be proved to have been made only by the person concerned. Here, in this case, it is alleged that the suit promissory note contains the signature and the handwriting of the defendant, but, the same is disputed by the defendant. Therefore, it becomes the burden of the plaintiff to prove that the said signature and the handwriting are that of the defendant.

12. The learned counsel for the appellant would submit that since there was no attester, the plaintiff was not able to produce any attester in the case as a witness to prove the signature and the handwriting. Regarding that submission, there can be no second opinion. But even then, law requires that these facts should be proved by other means. If the transaction was witnessed by anybody else, that person should have been examined. Assuming that this is the one to one transaction between the plaintiff and the defendant and the plaintiff alone witnessed the execution of the document namely, Ex.A.1, he should speak about the same in evidence, so as to prove its execution. Here, in this case, in the plaint, it is stated that the document was written by the defendant. But Ex.A.1, as has been pointed out by the Courts below, is in a printed form originally, with some blanks. The blanks have been filled up in hand writing. According to the plaint averment as well as Ex.A.2 notice, Ex.A.1 was executed by the defendant in his hand writing. But, the plaintiff while under examination, has not at all stated that he witnessed the defendant signing the document (Ex.A.1) and that he filled up the same in his handwriting. When the signature of the defendant in Ex.A.1 is disputed, it is not understood as to why the plaintiff had hesitation to identify the signature in Ex.A.1 and the handwriting and to speak to the fact that it was made only in his presence.

13. A perusal of the chief examination of the plaintiff would go to show that he has not stated anything about the execution of Ex.A.1 at all. He has not spoken to the fact that the signature found in Ex.A.1 is that of the defendant. Thus,

the legal requirement as provided under Section 67 of the Evidence Act has not been satisfied at all by the plaintiff. Thus, in my considered view, the plaintiff has failed to prove the very execution of Ex.A.1.

14.The learned counsel for the appellant would submit that the First Appellate Court ought to have raised the presumption under Section 118 of the Negotiable Instruments Act. This argument does not persuade me at all. Under Section 118 of the Negotiable Instruments Act, the execution of promissory note cannot be presumed. What could be presumed is, the passing of consideration and the date of the document, etc., as enumerated in Section 118 of the Negotiable Instruments Act. Such a presumption could also be raised, if only, due execution of the document is proved. In other words, unless, the execution of the document is proved, there is no question of raising any presumption under Section 118 of the Negotiable Instruments Act.

15.The learned counsel would further submit that the defendant has not rebutted the said presumption under Section 118 of the Negotiable Instruments Act. There can be no doubt that the presumption under Section 118 of the Negotiable Instruments Act, is not a conclusive proof of fact which is presumed, but, it is only a rebuttable presumption. The question of rebutting a presumption would arise, if only, the presumption itself is raised by the Court. As I have already pointed out, since the execution of Ex.A.1 itself has not been proved, it is not possible for this Court to raise any presumption under Section 118 of the Negotiable Instruments Act and therefore, question of rebutting the presumption does not arise at all.

16.The learned counsel would next contend that the First Appellate Court was not right in relying on the expert opinion. I find every force in the said argument of the learned counsel. The First Appellate Court has relied on a judgment of this Court in Alagesan and others v. Ramanujam (died) and others (2004 1 CTC 839), to come to the conclusion that even in the absence of examination of the hand writing expert, his opinion could be relied on. But, a perusal of the judgment in Alagesan and others v. Ramanujam (died) and others (cited supra) would go to show that, it is in respect of an Advocate Commissioner's report. The Advocate Commissioner is not an Expert falling under Section 45 of the Indian Evidence Act. Therefore, the report of an Advocate Commissioner cannot be equated to the opinion of an Expert under Section 45 of the Evidence Act. Therefore, I concur with the learned counsel for the appellant that the reliance made by the First Appellate Court on the judgment of this Court in Alagesan and others v. Ramanujam (died) and others (cited supra) is misconceived.

17. In this regard, I should state that the opinion of an Expert as enumerated in Section 45 of the Evidence Act, has been declared as a relevant fact and therefore, it is admissible. Such an expert opinion, though admissible, should be admitted in evidence first. If the opinion of an Expert is in writing, it should be admitted in evidence, by properly proving the same. Such proof is possible only by examining the author of the document, who falls within the ambit of Section 45 of the Evidence Act. If only the expert is examined in respect of his opinion, it will be possible for the adverse party to challenge the correctness of the same. If the Expert has not come to the Box to give evidence and if the Expert opinion is not proved properly, then, the same cannot be relied at all by the Court. In other words, a document which has not been brought on record by way of evidence cannot be considered by the Court for any purpose.

18. At the same time, the Court is not precluded from comparing the hand writing/signature in the disputed document with the admitted hand writing/signature in the document of the party concerned. This is possible under Section 73 of the Evidence Act. The Expert opinion under Section 45 of the Evidence Act is not conclusive proof of the fact. It is only an opinion to guide the Court to arrive at a correct conclusion as to whether the disputed signature was made by the individual concerned or not. Thus, it involves an adjudication by the Court. For such adjudication, the Court can take the help of the expert or the Court itself may compare under Section 73 of the Evidence Act. If the Court finds that it is too difficult to arrive at a conclusion by mere comparison as provided under Section 73 of the Evidence Act, then, the Court may, in addition, seek opinion from an Expert so as to get the assistance of the Expert. Here, in the instant case, even in the absence of Expert opinion and in the absence of comparison under Section 73 of the Evidence Act by the Court itself, the plaintiff is bound to lose the case because, the plaintiff has failed to discharge his burden to prove the execution of Ex.A.1. For these reasons, the reversal of the decree and judgment of the trial Court by the First Appellate Court deserves to be confirmed. Thus, I do not find any merit at all in this second appeal.

19.In the result, the second appeal fails and accordingly, the same is dismissed and the decree and judgment of the First Appellate Court in A.S.No.2 of 2014 dated 16.07.2015 is confirmed. There shall be no order as to cost.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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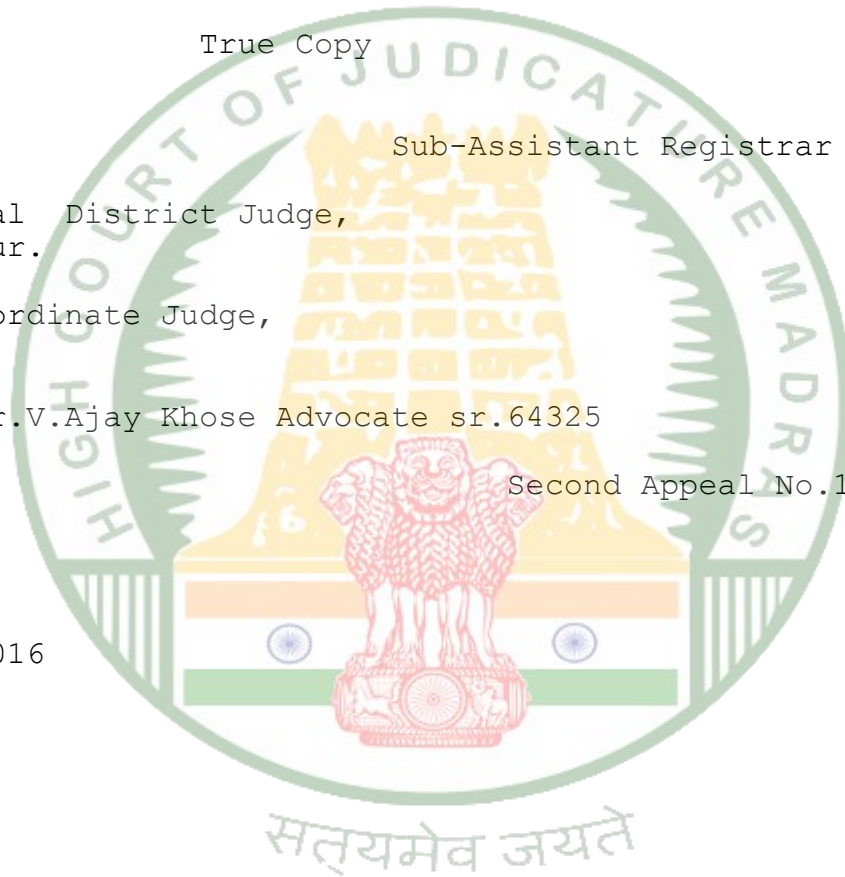
1.Principal District Judge,
Thiruvallur.

2.The Subordinate Judge,
Ponneri.

+1 c to Mr.V.Ajay Khose Advocate sr.64325

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