

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.02.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1632 of 2011
and M.P.No.1 of 2011

K.Ramakrishnan

... Appellant/ Plaintiff

-Versus-

1.The Sub Registrar,
Alandur.

2.Nagammal

3.Revathi

... Respondents/ Defendants

This second appeal is filed against the judgment and decree dated 26.07.2011 passed in A.S.No.21 of 2010 by the learned Subordinate Judge, Poonamallee, confirming the judgement and decree dated 28.01.2010 passed in O.S.No.377 of 2004 b y the learned Principal District Munsif, Poonamallee.

For Appellant : Mr.G.Vijay Anand and
Mr.Rajendra Kumar

For Respondents : Mr.R.Muthukumarasamy,
Senior Counsel for
Mr.S.P.Sudalaiyandi for R2 and R3
No Appearance for R1

JUDGMENT

The plaintiff in O.S.No.377 of 2004 on the file of the learned Principal District Munsif, Poonamallee, is the appellant herein. He filed the said suit for a decree for specific performance on the allegations that the 1st defendant Mr.V.Raj (since died) had entered into an agreement of sale dated 05.05.1993 thereby agreeing to sell the suit property for a total consideration of Rs.40,000/- and received an advance of Rs.20,000/- on the same day itself. According to the plaintiff, subsequently, when he demanded the 1st

defendant - Mr.Raj to complete the sale, he declined to do so. With these allegations, the plaintiff filed the said suit.

2. In the written statement, 1st defendant - Mr.Raj contended that the sale agreement was never executed by him and the signature found in the same was never made by him. He further contended that he never intended to sell the suit property to the plaintiff.

3. On the above said pleadings, the trial court framed appropriate issues and both the parties were called upon to let in oral and documentary evidence. During trial, on the side of the plaintiff, as many as 4 witnesses were examined and few documents were marked. P.W.4 is the Finger Print Expert, who gave opinion that the signature found in the disputed document differs from the admitted signatures of the 1st defendant - Mr.Raj. The 1st defendant died during the pendency of the suit and, therefore, his legal heirs, viz., the defendants 3 and 4 (the respondents 2 and 3) herein were added. On the side of the defendants, neither oral evidence, nor documentary evidence was let in.

4. Having considered both the oral and documentary evidence, the learned Principal District Munsif, Poonamallee, by decree and judgement dated 28.01.2010, dismissed the suit. As against the same, the plaintiff preferred an appeal in A.S.No.21 of 2010 before the learned Subordinate Judge, Poonamallee. By decree and judgement dated 26.07.2011, the learned Subordinate Judge dismissed the said appeal thereby confirming the decree and judgement of the trial court. Challenging the same, the plaintiff is now before this court with this second appeal.

5. When the second appeal was admitted this court has framed the following substantial questions:-

(1) Whether the decree and judgement of the courts below are unsustainable on the ground that the courts below have failed to draw adverse presumption under Section 114 of The Evidence Act for the failure of the defendants to depose in support of Ex.A.1?

(2) Whether the courts below were right in accepting the evidence of the Forensic Expert [P.W.4] and his Report Ex.C.1, when he had not compared the disputed signatures with the contemporaneous admitted signatures?

(3) Whether the decree and judgement of the first appellate court are liable to be interfered

with on the ground that the procedure contemplated under Order 41, Rule 31 of CPC has not been followed?

(4) Whether the decree and judgement of the courts below are liable to be interfered with on the ground of improper appreciation of evidence of P.W.1 to P.W.3?

(5) Whether the courts below are correct in law in non suiting the plaintiff by exercising the discretionary power vested with them?

(6) Whether the judgement and decree of the courts below are perverse?

(7) Whether the first appellate court has properly appreciated and applied the principles in dealing with the application for receiving Additional Evidence as per the requirements contemplated under Order 41, Rules 27 and 28 of CPC?

6. I have heard the learned counsel for the appellant and the learned senior counsel for the respondents 2 and 3 and also perused the records carefully.

7. The learned counsel for the appellant would submit that by examining P.Ws.2 and 3, who are the attestors to the document in question, Ex.A.1 - sale agreement has been proved. He would further submit that the courts below have not properly appreciated the evidence of P.Ws.2 and 3 so as to hold that Ex.A.1 was duly executed only by Mr.Raj.

8. The learned counsel would further submit that the defendants 3 and 4 viz., the respondents 2 and 3 herein did not come forward to give any evidence and, therefore, the courts below ought to have drawn an adverse inference against them. The learned counsel would also submit that the evidence of a Hand-Writing Expert cannot be conclusive and, therefore, the courts below ought not to have relied on the same to hold that Ex.A.1 was not duly executed by the deceased Mr.Raj [1st defendant]. For this proposition, the learned counsel relied on a judgement of the Division Bench of this Court in Kanagambaram Ammal v. Kakammal and others, 2004 (4) CTC 596.

9. The learned senior counsel appearing for the respondents 2 and 3 would vehemently oppose this second appeal. According to him, whether Ex.A.1 was duly executed by the deceased Mr.Raj or not is the pure question of fact, which has been resolved by the courts below concurrently and there is no question of law at all involved in this second appeal.

10. The learned senior counsel would further submit that question of drawing adverse inference under Section 114 of the Evidence Act would not be applicable to the present case because there is no concealment of any document or evidence by the respondents 2 and 3 despite notice to them to produce the same. The learned senior counsel would further add that so far as the evidence of the expert is concerned, he is the witness examined by the plaintiff on his side. Therefore, legally, it is not possible for the plaintiff to argue before this court to disbelieve the said evidence. The learned senior counsel would also add that it is not only on the basis of the evidence of the expert, but also, on the basis of the evidence of P.Ws.2 and 3, inherent weakness and improbabilities and the contradictions in their evidence the courts below have held that Ex.A.1 is not true. Thus, according to the learned senior counsel, absolutely there is no merit at all in this second appeal.

11. I have considered the above submissions carefully.

12. The first substantial question of law framed in this second appeal is with reference to adverse inference to be drawn under Section 114 of the Evidence Act. Section 114 of the Evidence Act speaks of the power of the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The expression used is "may presume" and not "shall presume". So far as Section 114 of the Evidence Act is concerned, the court may presume or may not presume, depending upon the facts of each case and the opinion formed by the court.

13. In the instant case , the ground raised by the counsel for the appellant is that the respondents 2 and 3 did not come forward to give any evidence either oral or documentary and therefore, adverse inference is to drawn. In my considered opinion, such inference cannot be drawn in the instant case inasmuch as the respondents 2 and 3 herein are not parties to Ex.A.1 Agreement of Sale and they did not have any knowledge of the said agreement even. Therefore, non examination of the respondents 2 and 3 has got no bearing in the case to come to a right conclusion.

14. So far as the next substantial question of law is concerned, it relates to the evidence of the Hand Writing / Finger Print Expert. It is a curious argument advanced before this court by the learned counsel for the appellant that the courts below ought not to have relied on the evidence of the Finger Print Expert and his report under Ex.C.1 inasmuch as the same is not conclusive. In my considered opinion, it is not available for the appellant/plaintiff to make such an argument before this court inasmuch as the expert was not examined either by the defendants or by the court. The expert was examined only by the plaintiff who has stated that the disputed signature would not have been made by Mr.Raj. Having let in such positive evidence thought it is detrimental to his case, it is not open for the appellant/plaintiff now to request this court to discard the evidence of the hand writing expert. Such witness was not even treated as hostile by the plaintiff. Therefore, this argument deserves only to be rejected.

15. Insofar as the other questions of law are concerned, they are only consequential and thus, I do not find any merit at all in this second appeal.

16. Coming to the expert evidence, the learned counsel for the petitioner would again contend that the expert evidence is not conclusive. There can be no secondary opinion on the same. But, in this case, the courts below have not relied solely on the expert opinion to come to the conclusion that the disputed signature would not have been made by the 1st defendant - Mr.Raj. The courts below have compared the disputed signature with that of the signatures found in the admitted documents in exercise of the powers conferred under Section 73 of the Evidence Act and the courts below have also analysed the evidence of P.Ws.1 to 4 and found contradictions in their evidence, improbabilities and inherent weakness. It is only based on the same, the courts below have rejected the oral evidence of P.Ws.1 to 3 and for such rejection, the courts below have relied on the expert opinion as an additional piece of evidence. Thus, the courts below, in my considered opinion, were right in holding that Ex.A.1 Agreement of Sale is not a true document and therefore, the courts below were right in dismissing the suit and the appeal respectively. I find no merit at all in this second appeal and the second appeal deserves only to be dismissed.

17. In the result, the second appeal is dismissed. No costs.
Consequently, connected MP is closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

kmk

To

- 1.The Subordinate Judge, Poonamallee, Tiruvallur District.
- 2.The Principal District Munsif, Poonamallee. Tiruvallur District.

Copy to

The Section Officer
VR Section,
High Court, Madras

- 1 cc to Mr.S.P.Sudalaiyandi, Advocate, Sr. 6558
1 cc to Mr.G. Vijayand, Advocate, sr. 6113

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UG (CO)
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