

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.02.2015

Delivered on : 13.02.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.835 of 2006

B.Venkataraman ... Appellant/Defendant

-Vs-

Vincent Jayasekaran ... Respondent/Plaintiff

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 21.01.2003 made in A.S.No.178 of 2000 on the file of the First Additional District Judge cum Chief Judicial Magistrate, Coimbatore confirming the judgment and decree dated 30.11.1999 made in O.S.No.829 of 1995 on the file of the Sub Judge, Tiruppur.

For Appellant : Mr.P.Chandrasekar

For Respondents : Mr.S.Mukunth
for M/s.Sarvabhauman
Associates

JUDGMENT

The defendant in the original suit is the appellant in the second appeal. The respondent herein filed the suit O.S.No.829 of 1995 on the file of Sub Court, Tiruppur for recovery of money due on a promissory note dated 20.12.1992 allegedly executed by Balasubramanian, the father of the appellant herein, in favour of the respondent herein for a sum of Rs.1,50,000/- for value received. As the borrower Balasubramanian died after the execution of the promissory note and his son, the appellant herein, got his properties under a will left by him, the suit came to be filed by the respondent herein against the appellant for the recovery of the amount due under the promissory note from out of the properties he got under the will of his father.

2. The appellant/defendant took a plea that the suit promissory was not genuine and his father did not borrow the amount alleged in the plaint under the suit promissory note. It was also contended that a promissory note should have been signed by the scribe and also attested by two witnesses and that since the suit promissory note does not contain the signature of any person other

than the scribe, the suit promissory note was not valid. It was also contended by the appellant/defendant in his written statement that there was no necessity for his father to make borrowal under the suit promissory note; that the signature and thumb impression found in the suit promissory note were not that of his father and that they were forged and the suit promissory note had been fabricated with forged signature and thumb impression.

3. Based on the above pleadings, the learned trial judge framed three issues which are as follows:

1. Whether the plaintiff is entitled to a judgment and decree against the defendant as prayed for in the suit?

2. Is not the signature found in the promissory note that of the father of the defendant? Whether the signature is forged? Whether it is a false document? Whether the thumb impression found therein is not that of the father of the defendant?

3. To what relief the plaintiff is entitled?

4. The parties went for trial based on the above said issues, in which, two witnesses were examined as PWs.1 and 2 and four documents were marked as Exs.A1 to A4 on the side of the respondent herein/plaintiff and two witnesses were examined as DWs.1 and 2 and one document was marked as Ex.B1 on the side of the appellant herein/defendant.

5. The learned trial judge, on an appreciation of evidence, came to the conclusion that the suit claim was proved by the respondent herein/plaintiff, whereas the appellant herein/defendant failed to prove his defence plea that the suit promissory note was a false and fabricated document. Based on the said finding, the learned trial judge granted a decree against the appellant herein/defendant as prayed for in the suit by a judgment and decree dated 30.11.1999.

6. As against the decree of the trial court dated 30.11.1999, the appellant herein/defendant preferred an appeal in A.S.No.178/2000 on the file of the District Court, Coimbatore. The same was made over to the First Additional District Judge cum Chief Judicial Magistrate, Coimbatore for disposal according to law. The learned First Additional District Judge cum Chief Judicial Magistrate, Coimbatore, on re-appreciation of evidence, concurred with the finding of the trial court and dismissed the appeal by judgment and decree dated 21.01.2003.

7. As against the said decree of the lower appellate court confirming the decree passed by the trial court, the appellant

herein has brought-forth the present second appeal on various grounds set out in the memorandum of grounds of second appeal.

8. The second appeal has been admitted identifying the following to be the substantial question of law involved in the second appeal:-

"Whether non-examination of the signature of the executant of Ex.P1 (Pronote) by the finger print expert would affect his case, when the other circumstances are in favour of this appellant/defendant?"

9. The said substantial question of law needs revision insofar as the marking of the suit promissory note has been referred to as Ex.P1, whereas it was marked as Ex.A1. The question is also ambiguous insofar as it states that the signature of the executant of the promissory note was not examined by a fingerprint expert. If at all the signature is to be examined in comparison with the admitted signature, it should be done by a handwriting expert and not a fingerprint expert. In case the disputed fingerprint is to be proved or disproved to be that of the father of the appellant herein/defendant, then only the examination of the same with the admitted thumb impression of the father of the appellant/defendant by a fingerprint expert will arise. The said question also proceeds on the basis that other circumstances are in favour of the appellant/defendant. Therefore, the substantial question of law formulated at the time of admission, is revised and re-formulated as follows:

"Whether the failure to refer the disputed document, namely the suit promissory note marked as Ex.A1, to a handwriting expert and a fingerprint expert for opinion along with the document/documents containing the admitted signatures and thumb impression would affect the case of the respondent herein/plaintiff?"

10. The arguments advanced by Mr.P.Chandrasekar, learned counsel for the appellant and by Mr.S.Mukunth, learned counsel appearing for M/s.Sarvabhauman Associates, counsel on record for the respondent/plaintiff were heard. The judgments of the courts below and the materials available on record were also perused.

11. For the sake of convenience the parties are referred to in accordance with their ranks in the suit.

12. At the outset this court wants to point out that the defendant took untenable stand in his written statement to the effect that a promissory note, to be valid, should be attested by two witnesses. Such a plea is in ignorance of the fact that promissory note is a negotiable instrument and it need not be attested.

13. The suit is one filed for recovery of money on the basis of the suit promissory note dated 20.12.1992 marked as Ex.A1. According to the plaintiff, the same was executed by Balasubramanian, the father of the appellant herein/defendant for a sum of Rs.1,50,000/- borrowed by him from the plaintiff. It has been prepared in a printed form and it contains the signature and left thumb impression of Balasubramanian. One Chinnasamy of Ram Nagar, Tiruppur has also signed as the scribe and witness. He was examined as PW2. The plaintiff, who figured as PW1 and the said Chinnasamy who figured as PW2, identified the signature and the thumb impression to be that of Balasubramanian. They have also asserted in clear and categorical terms that the signature and the thumb impression found in Ex.A1-promissory note were affixed by Balasubramanian in their presence and that the suit promissory note (Ex.A1) was thus executed by Balasubramanian in favour of the plaintiff on borrowing a sum of Rs.1,50,000/- from the plaintiff.

14. In addition to the production of Ex.A1-promissory note and adducing oral evidence through PWs.1 and 2, the plaintiff also produced a letter written by Balasubramanian on 05.05.1986 to the plaintiff as Ex.A4. In the said letter, he had stated that he had gone to Madurai to raise funds and that he would arrange for making payment to the plaintiff after entering into an agreement with the prospective purchaser of his house in Coimbatore. Besides making such an assurance in the letter for payment of money due to the plaintiff, he had also tendered apology for the delay caused by him. The said letter, according to the plaintiff, was written in respect of previous transaction and the same was produced to show that the plaintiff and Balasubramanian did have earlier transactions under which Balasubramanian, the father of the defendant had borrowed money from the plaintiff and acknowledged the same by writing such a letter.

15. The suit promissory note is said to have been executed on 20.12.1992. The appellant herein/defendant contended that Balasubramanian, the father of the defendant, got admitted in T.M.F. Hospital, Tiruppur on 12.12.1992 for diabetic complications leading to the amputation of his left leg and he died on 22.12.1992 without being discharged from the said hospital. In order to prove the admission of the father of the appellant herein/defendant in the hospital as an in-patient on 12.12.1992 and he died on 22.12.1992, the xerox copy of the case record maintained in the hospital has been produced as Ex.B1. Of course, the said document shows that he was admitted in the said hospital for diabetic complications leading to gangrene and ultimately his left leg was amputated by surgery on 21.12.1992 and however, he died on 22.12.1992, the very next day. The said document was produced in order to set up an alibi and show that Balasubramanian, the father of the plaintiff could not have borrowed the suit amount from the plaintiff and executed Ex.A1-Promissory Note on 20.12.1992.

16. Besides producing the xerox copy of the case record as Ex.B1, one Dr.T.Palanisamy employed in the said hospital has been examined as DW2. He corroborates the evidence of DW1 and the

entries found in Ex.B1 to the effect that Balasubramanian was admitted in the said hospital as an in-patient on 12.12.1992; that surgery was conducted on 21.12.1992 and that he died on 22.12.1992. Though DW2 would have stated that from the date of admission as in-patient Balasubramanian's condition was critical and they had decided to conduct surgery for amputating the left leg in order to save his life on the date of admission itself, the surgery was postponed, since his wife did not give consent for such surgery in the absence of her son, namely the defendant. According to his further evidence, again on 19.12.1992 they decided to conduct surgery and the son of the patient gave his consent on 20.12.1992. It is his further evidence that the pre-surgery tests were conducted on 20.12.1992 morning and that the patient could not have gone out for executing promissory note on 20.12.1992. Though DW2 would have stated that the son of the patient gave consent on 20.12.1992, he was not able to give the name of the defendant.

17. On the other hand, PW1, in clear terms, stated that the suit promissory note was executed by Balasubramanian on 20.12.1992 and two or three days after the execution of the promissory note Balasubramanian passed away. Though he has not disputed the fact that a surgery Balasubramanian underwent a surgery on 21.12.1992 and he died on 22.12.1992, he made a clear assertion that on 20.12.1992 Balasubramanian came to him, borrowed Rs.1,50,000/- and executed the suit promissory note in the presence of PW2, who acted as the scribe of the promissory note. PW2 also corroborated the evidence of PW1. PW2 stated that it was about 11.00 a.m when the suit promissory note was executed. The evidence of DW2 makes it clear that the surgery was conducted for amputating the left leg of Balasubramanian only on 21.12.1992 and he died on the very next day, namely 22.12.1992. According to the evidence of DW2, since Balasubramanian had been admitted as an in-patient and the surgery had been proposed to be conducted on 21.12.1992, he could not have gone out on 20.12.1992 and that during the whole day on 20.12.1992 Balasubramanian was in the hospital and pre-surgery tests were conducted. DW2 is one of the doctors, who conducted the surgery. His evidence is not unequivocal that Balasubramanian had not gone out on 20.12.1992. There is also absence of clear evidence that throughout the day on 20.12.1992, Balasubramanian was in the hospital and he did not leave the hospital for any purpose. Normally, when a party takes a plea of alibi, such plea needs a stronger proof by adducing sufficient and reliable evidence. Though evidence has been adduced to the effect that surgery was conducted on 21.12.1992 and pre-surgery tests were conducted on 20.12.1992, there is want of reliable evidence to show that Balasubramanian could not have gone out for a brief spell on 20.12.1992, during which spell he could have executed the suit promissory note. Therefore, the plea of the alibi taken by the defendant cannot be said to have been established by preponderance of probabilities, ruling out the possibility of Balasubramanian having gone out for a brief spell to execute Ex.A1-promissory note.

18. Furthermore, it is the specific case of the appellant

herein/defendant that the signature found in Ex.A1-promissory note

and the thumb impression found therein are not that of his father Balasubramanian and that the signature of his father was forged by the respondent herein/plaintiff after having seen the signature of Balasubramanian, when he attested the will executed by Balasubramanian as a witness. It is not the case of the respondent herein/plaintiff that the will of Balasubramanian was available with him to copy and forge his signature in the suit promissory note. Moreover, Ex.A4 makes it clear that there had been prior money transaction between the plaintiff and Balasubramanian and in respect of one of such transactions, Balasubramanian had sent an inland letter through post to the plaintiff. The defendant has made an attempt to project Ex.A4 also to be a forged one created by the plaintiff for the purpose of this case. Ex.A4 is dated 05.05.1986, whereas Ex.A1-Promissory Note is said to have been executed after 6-1/2 years from the date of Ex.A4. It cannot be assumed that 6-1/2 years prior to the date of Ex.A1, plaintiff created Ex.A4 in anticipation of filing a suit on the basis of Ex.A1-Promissory Note. It cannot also be contended that Ex.A4 is antedated. Besides the date mentioned at the top of the letter, date has been noted below the signature of Balasubramanian date has been noted. The date of the postal seal itself contains the date 06.05.1986. Therefore, it cannot be contended that Ex.A4 has been antedated and fabricated.

19. When the defendant has taken a stand that the signature found in the suit promissory note and the thumb impression found therein are not that of his father Balasubramanian, he could have very well produced contemporary documents containing the signatures of his father and the documents containing the left thumb impression of his father so as to enable the court to have the benefit of comparing the admitted/proved signature and thumb impression with the signature and thumb impression found in promissory note, with the help of a handwriting expert and fingerprint expert respectively. But the defendant has not chosen to produce any such document containing the admitted signature and admitted left thumb impression of his father Balasubramanian. The appellant/defendant also failed to take steps to have the signature found in Exs.A1 and A4 compared with the admitted signatures of his father Balasubramanian with the help of a handwriting expert.

20. When the plaintiff has adduced clear and categorical evidence to the effect that Balasubramanian borrowed Rs.1,50,000/- and executed the suit promissory note on 20.12.1992 in the presence of DW2 and he affixed his signature as well as the thumb impression in Ex.A1-promissory note, which evidence shall be sufficient to discharge the burden cast on the plaintiff, at least to the extent of causing shifting of the burden on the defendant to disprove the signature and thumb impression found in the suit promissory note, the defendant ought to have taken steps to have the same compared with the admitted signature and left thumb impression of his father Balasubramanian with the help of an expert, more so, when the weak plea of alibi has also not been substantiated with concrete evidence. Instead of discharging the reverse burden cast upon him, the defendant has chosen to point his index finger against the

plaintiff to find fault with him for not having the signature and thumb impression found in Ex.A1-promissory note compared with the admitted signature and thumb impression of Balasubramanian, the father of the defendant, with the help of a handwriting expert and the fingerprint expert. The defendant did not do what was expected of him. The attempt made by the defendant in the second appeal by projecting the failure of the plaintiff to have the disputed document compared with the admitted document, with the help of handwriting expert and fingerprint expert as fatal to the plaintiff's case, is nothing but an attempt to cast the burden of proof erroneously on the plaintiff, even after the plaintiff has discharged his initial burden of proof by adducing clear evidence through PWs1 and 2 and producing Ex.A1 and A4.

21. The above said discussions will make it clear that for the failure to refer the document (Ex.A1) to a handwriting expert and a fingerprint expert for comparing the signature and the left thumb impression therein with the admitted signature and admitted left thumb impression of Balasubramanian, the father of the defendant, the plaintiff cannot be blamed and on the other hand, the entire blame has to be borne by the defendant. Accordingly, this court comes to the conclusion that the substantial question of law has been wrongly formulated and projected with a view to cast the burden of proof on the plaintiff, even after the discharge of his initial burden leading to the shifting of the burden of proof and casting of the same on the defendant and that hence the said question has to be answered in favour of the respondent herein/plaintiff and against the appellant herein/defendant. The failure to refer the document to a handwriting expert/fingerprint expert would affect the case of the defendant and not the case of the plaintiff as projected by the defendant in the substantial question of law formulated in the second appeal and the said question is answered accordingly against the appellant herein/defendant and in favour of the respondent/plaintiff.

22. In view of the foregoing discussions and the answer given to the substantial question of law, this court finds no merit in the second appeal. This court is of the view that the decree of the lower appellate court based on the concurrent finding confirming the decree of the trial court does not deserve any interference and that the second appeal deserves to be dismissed as there is no merit in it.

In the result, the second appeal is dismissed with cost.

Sd/-
Assistant Registrar
Dated:24.2.15

True Copy

Sub Assistant Registrar

To

The First Additional District Judge cum
Chief Judicial Magistrate,
Coimbatore.

+1 cc to M/s.Sarvabhauman Associates,Advocates,SR.8263

+1 cc to Mr.P.Chandrasekar, Advocate,SR.8122.

mg(co)
krd 18/3

Judgment
in S.A.No.835 of 2006



WEB COPY