

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.07.2017

Delivered on: 25.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

Second Appeal No.1201 of 2011
and M.P.No.1 of 2011

K.V.Saleem

... Appellant/Defendant

Vs.

Mahadevappa

... Respondent/Plaintiff

Prayer : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree of the Principal District Judge, Erode, dated 07.09.2010 passed in A.S.No.111 of 2006 allowing the appeal setting aside the judgment and decree of the learned First Additional Subordinate Judge, Gobichettipalayam, Erode, in O.S.No.39 of 2004 dated 27.09.2006.

For Appellants : Mr.K.Ramu

For Respondent : Mr.B.Kumarasamy

J U D G M E N T

This Second Appeal is filed against the Judgment and Decree of the Principal District Judge, Erode, dated 07.09.2010 passed in A.S.No.111 of 2006 allowing the appeal and setting aside the judgment and decree of the First Additional Subordinate Judge, Gobichettipalayam, Erode, in O.S.No.39 of 2004 dated 27.09.2006.

2. The defendant in the suit is the appellant herein. At the time of admission the following substantial questions of law are formulated by this court:-

"(1) Whether the lower appellate Court misconstrued itself to come to the conclusion that there is no evidence on record by following the judgment in AIR 1976 RAJ Page 40. In fact in the said judgment the ratio that evidence of a person who has not presented himself for cross-examination has to be rejected in toto has been rejected and thus the lower appellate Court has wrongly understood the dictate of

law in the said decision and misapplied the same the same to the facts of the case ?

2) Whether the lower appellate court mis-directed itself in applying a ratio which is non-existent and therefore liable to be set-aside?

(3) Whether the lower appellate Court has committed grave irregularity in not taking any efforts to give a finding on the question of variance of signature of the defendant, which has been an issue gone into by the trial court and a finding rendered and thus has erred in not going into the same ?

(4) Whether the lower appellate court misdirected itself in not going into the issue of comparison of signature and variance in the signature under Ex.A.1 as found by the trial court and thus committed grave irregularity in not at all considering the said aspect, while decreeing the suit of the plaintiff ?”

3. The plaintiff filed the suit in O.S.No.39 of 2004 seeking specific performance on the basis of sale agreement entered into by him with the defendant on 25.01.2003. According to the plaintiff, after executing Ex.A-1 sale agreement, on the date of execution of sale agreement, he paid a sum of Rs.1,00,000/-, out of sale consideration of Rs.1,44,000/- and subsequently, even though expressed his readiness and willingness to pay the balance sale consideration of Rs.44,000/- and complete the sale, the defendant deliberately delayed and failed to complete the sale. Hence, the plaintiff caused legal notice Ex.A.2 to the defendant but the defendant evaded to receive the same and the returned Postal Cover is produced as Ex.A.3. Hence, the plaintiff has come forward with the suit.

4. On the other hand, disputing and denying the claim of the plaintiff, it is contended by the defendant that Ex.A.1 sale agreement was never executed by him and he never signed in it. According to him, it is a fabricated document and he never received Rs.One lakh from the plaintiff whom he does not know. The defendant also contended that the signature in sale agreement Ex.A.1 is not his signature and produced Exhibits B.1 and B.2 Copy of Credit Cards issued by UDI and ICICI Banks and contended that the signature in Ex.A.1 agreement is totally different from his signature in the said two documents. It is further contended by the defendant that the plaintiff has not discharged the burden on him to prove the genuineness of the sale agreement and as such the plaintiff is not entitled to the equitable relief of specific performance. Hence, he seeks for dismissal of the suit.

5. Before the trial court, the plaintiff examined himself as P.W.1 and two other attesting witnesses P.Ws.2 and 3 and

produced Ex.A.1 to Ex.A.3, whereas, the defendant examined himself as D.W.1 in chief only and produced Ex.D.1 and Ex.D.2. On the basis of the said oral and documentary evidence, the trial court dismissed the suit. Aggrieved over the same, the plaintiff preferred A.S.No.111 of 2016 before the First Appellate Court and the same was allowed reversing the finding of the trial court and the suit in O.S.No.39 of 2004 was allowed as prayed for.

6. Aggrieved over the said finding of the First Appellate Court, the defendant has come forward with this appeal stating that as the execution of sale agreement is disputed by him; the burden is on the plaintiff to prove that Ex.A.1 sale agreement is genuine and executed by the defendant, but he failed to do so and the same was not taken into consideration by the First Appellate Court. The learned counsel for the appellant/defendant also pointed out that apart from stating in his evidence that a sum of Rs.1,00,000/- was paid by the plaintiff towards sale consideration, nothing is stated as to when and where the amount was paid. The learned counsel for the appellant/defendant contended that the First Appellate Court failed to appreciate the documents Ex.B.1 and Ex.B.2 produced by the defendant properly solely on the ground that D.W.1 does not present himself for the cross examination. It is also pointed out that the trial court has compared the signature of the defendant in Ex.A.1 sale agreement with that in Ex.B.1 and Ex.B.2 credit cards and concluded that the signature in sale agreement is not that of the defendant. In such circumstances, the First Appellate Court erred in rejecting the entire evidence of the defendant on the sole ground that he failed to present himself for cross examination and the same is not proper. It is also pointed out that if the defendant failed to present himself for cross examination, it is not necessary that his evidence has to be rejected in toto and the First Appellate Court has misinterpreted the ruling reported in AIR 1976 Rajasthan page 40. Hence, the appellant seeks to allow the Second Appeal by setting aside the judgment of the First Appellate Court.

7. The issue involved in the suit is as to whether Ex.A.1 sale agreement was genuine and truly executed by the defendant on receipt of Rs.1,00,000/- as advance sale consideration as claimed by the plaintiff. If so, whether the plaintiff is entitled to the relief of Specific Performance as sought for by him.

8. As stated earlier, the defendant has disputed the execution of sale agreement. The defendant filed his proof affidavit in chief examination and produced Ex.B.1 and Ex.B.2 Credit Cards issued to him by the concerned Banks, for comparison with the signature in Ex.A.1 sale agreement. However, the defendant failed to present himself for the cross

examination. It is also pointed out that the defendant examined himself in chief examination, produced xerox copies of the credit cards issued to him by Banks as Ex.B.1 and Ex.B.2 and the signature in the said documents is totally different from the alleged signature of the defendant in Ex.A.1-sale agreement. In such circumstances, the trial court concluded that Ex.A.1 sale agreement is not genuine one and dismissed the suit. On appeal, the First Appellate Court reversed the same on the ground that after filing proof affidavit, the defendant has not presented himself for cross examination and as such the oral and documentary evidence produced by him, cannot be looked into and in the absence of any contra evidence, the plaintiff's plea has to be entertained and decreed the suit. Aggrieved by the same, the defendant has come forward with this Second Appeal, contending that such conclusion arrived at by the First Appellate Court is not correct and the same is not just and proper. The learned counsel for the defendant contended that even assuming that the defendant remained exparte, the duty is cast on the court concerned, to find out as to whether the plaintiff has established his claim and then only decree has to be granted.

9. Further, in the case on hand, it is pointed out by the learned counsel for the defendant that in the written statement as well as in the chief examination of D.W.1, he has disputed the execution of Ex.A.1 sale agreement and the attesting witness to Ex.A.1 examined by the plaintiff as P.W.3 has stated in his cross examination that on seeing the photo shown to him in Court, he cannot identify the defendant. Further, it is also pointed out that there is no acceptable evidence to prove the payment of Rs.1,00,000/- by the plaintiff to defendant and execution of Ex.A.1 sale agreement is not established.

10. Admittedly the plaintiff has not taken any steps to refer the disputed Ex.A.1 sale agreement document to the Handwriting Expert to ascertain the genuineness of the defendant signature in the sale agreement. Even though Ex.B.1 and Ex.B.2 are only xerox copies and the original is not available before the court, as rightly pointed out by the learned counsel for the appellant/defendant, the burden is heavily cast on the plaintiff to prove the genuineness of Ex.A-1 sale agreement and he has not taken steps to get expert opinion about Ex.A.1 or any other evidence to establish his claim. The learned counsel for the defendant relied upon the Ruling of Madurai Bench of this Court in the case of Robinson Vs. Ramachandran reported in 2014(6) CTC 195 and contended that even assuming that the defendant has not presented himself for cross examination, since he has produced Ex.B.1 and Ex.B.2 Credit Cards and disputed his alleged signature in Ex.A.1 sale agreement, it is the duty of the plaintiff to take steps to send it for expert opinion and in the

absence of the same, the court can compare on its own and the finding of the trial court in that regard is perfectly correct. In the said ruling, it is held as follows:-

"14. The defendant had also filed Ex.B.1-PAN Card which could have been sent to the expert for comparison. But not in all cases, this court can compare the signature. When the defendant denied the execution of the Pro-Note it is the duty of the Plaintiff to establish his case. The Plaintiff having failed to discharge the burden cast upon him cannot take advantage of the fact that the Court had compared the signatures and found the signature of the Defendant to be the same. Since the Plaintiff failed to discharge the burden cast upon the Plaintiff, the Decree granted in his favour cannot be sustained."

The learned counsel also relied upon the Ruling of this Court in the case of Boorasamy Naidu Vs. Kannusamy Naidu and Company represented by its Proprietor, R.Bashayam Naidu reported in (2002) 1 MLJ 809 and contended that it is open to the court to compare the disputed signature with the other documents placed before it. Likewise, he has also relied upon the ruling of this court in the case of S.Murugesan Vs. V.Vijay Sai and Others, reported in (2007) 7 MLJ 960, wherein, in paragraph 20, it is held as follows:-

"20. Section 73 of the Indian Evidence Act contemplates that the court may compare the disputed signature, writing or seal of a person with the signature, writings or seals which have been admitted or proved to the satisfaction of the court to have been written or made by that person. The court may rely upon its own comparison of the signatures, writing or seal. There is no legal bar to the court for using its own eyes to compare the disputed signature, writing or seal with the admitted signature, writing or seal under Section 73 of the said Act. Thus, the trial court after careful comparison of Ex.A3 to A6 with Ex.A1, came to the conclusion that the signatures found in E.A1 and Exs.A3 to A6 are not one and the same and they are not tallying with the admitted signature of the 1st Defendant."

It is clear from the above said rulings that it is open to the court to compare the disputed signature with other signature of the same person in the documents placed before it on its own in the absence of any steps being taken to get expert opinion. However, in the case on hand, the defendant who produced Ex.B.1 and Ex.B.2 has failed to present himself for cross examination. Even though the trial court has concluded that the evidence of D.W.1 in chief and the documents produced before him could be

looked into inspite of his failure to present himself for cross examination, dismissed the suit upholding the claim of the defendant on the ground that the plaintiff failed to discharge his burden of proving the signature of defendant in Ex.A.1 sale agreement as true and correct and as such, arrived at the conclusion that the said sale agreement is not genuine one. However, the First Appellate Court considered the factor that D.W.1 has not presented himself for cross examination and concluded that his evidence in chief cannot be looked into at all and in such circumstances, as there is no contra evidence to P.W.1 evidence, the trial court finding is liable to be set aside and the suit has to be decreed as prayed for. However, in the light of the above said Ruling, relied upon by the defendant that even if the defendant has not presented himself for cross examination, the burden is on the plaintiff to prove the genuineness of Ex.A.1 sale agreement when the same has been disputed in the Written Statement. In the case on hand, the plaintiff has not taken steps to get expert opinion about the genuineness of Ex.A.1 sale agreement when the same has been disputed in the written statement. Further, as stated earlier, the attesting witness P.W.3 has stated in his cross examination that he cannot identify the defendant from the photo shown to him in the court. The evidence of the attesting witness P.W.3 and other witness P.W.2 examined by the plaintiff to corroborate his evidence has not instilled confidence to the court to accept the plea of the plaintiff.

11. The learned counsel for the plaintiff contended that he is prepared to let in additional evidence to prove the fact of genuineness of Ex.A.1 sale agreement. Likewise, the learned counsel for the defendant also contended that he is prepared to present D.W.1 for cross examination before the court to prove the fact that Ex.A.1 is not genuine one. It is also stated that due to peculiar family circumstances, D.W.1 was not able to present himself for cross examination before the trial court.

12. Taking into consideration the rival contentions of both sides and following the above said ruling relied upon by the defendant, it is apparent that as the execution of sale agreement is denied and disputed by the defendant, the burden is cast on the plaintiff to prove the genuineness of the sale agreement. In the case on hand, D.W.1 even though produced documents Ex.B.1 and Ex.B.2 to disprove his signature in Ex.A.1 sale agreement, he has not presented himself for cross examination which according to the plaintiff prevented him from disproving the defendant's claim. Further, the original of Ex.B.1 and Ex.B.2 is not placed before the court and only xerox copies are available. In such circumstances, it will be in the interest of justice if parties are given opportunity to let in additional evidence to prove the genuineness or otherwise of

Ex.A.1 sale agreement and so that just and correct conclusion can be arrived at.

13. The learned counsel appearing for both sides also conceded that they are prepared to let in additional evidence to substantiate the rival contention about the genuineness or otherwise of Ex.A.1 sale agreement and pleaded to remand back the suit to the trial court for that purpose.

14. In the light of the above said discussion, to establish the claim of the plaintiff as well as the defendant, regarding the genuineness of Ex.A.1 sale agreement, it will be appropriate that the defendant be given an opportunity to present himself before the trial court for cross examination and also for the plaintiff, if he so seeks, to let in further evidence or get expert opinion regarding the defendant's signature and the genuineness of the Ex.A.1 Sale Agreement. Hence, this Court is of the view that the judgment of the First Appellate Court is to be set aside and the matter be remanded back to the trial court for fresh disposal after giving opportunity to both parties to let in additional oral and documentary evidence to prove the genuineness of Ex.A.1 sale agreement. The additional evidence shall be in addition to the oral and documentary evidence already on record and it will only relate to the execution of Ex.A.1 sale agreement and for cross examination of D.W.1 in that regard.

15. In the result, the Second Appeal is allowed. The judgment and decree passed by the Principal District Judge, Erode, dated 07.09.2010 in A.S.No.111 of 2006 and judgment in O.S.No.39 of 2004 on the file of First Additional Sub Judge, Gopichettipalayam, is set aside and the suit is remanded back to the trial court for fresh disposal. The trial court is directed to dispose of the matter within three months from the date of receipt of the records on the basis of available evidence and after giving due opportunity to both sides to produce additional evidence and to complete the cross examination of D.W.1 and for the plaintiff to let in any additional evidence which are relevant to establish the genuineness of Ex.A.1 sale agreement. Both sides are directed to cooperate with the trial court to dispose of the matter within the time stipulated by this court. Parties shall bear their own costs. Connected MP is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal District Judge,
Erode.
- 2.The First Additional Subordinate Judge,
Gobichettipalayam, Erode.
- 3.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.K.Ramu,Advocate, S.R.No.52616
+1cc to Mr.B.Kumarasamy, Advocate, S.R.No.53102

Second Appeal No.1201 of 2011

RK (CO)
CA(27/10/2017)



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