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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.09.2017

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.655 of 2014

and

M.P.(MD).No.1 of 2014

Thangavel ... Appellant //Defendant

Vs.

1.Madasamy Thevar

2.Madathi ... Respondents /Plaintiffs 2 & 3

PRAYER: Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 11.03.2014, made in A.S.No.54 of 2012 on the file of the Principal District Judge, Tirunelveli, reversing the judgment and decree dated 29.10.2011 in O.S.No.9 of 1999 on the file of the Sub Judge, Ambasamudram.

For appellant	... Mr.M.Sekar,
	for Mr.A.Arumugam
For respondents	... Mr.M.P.Senthil

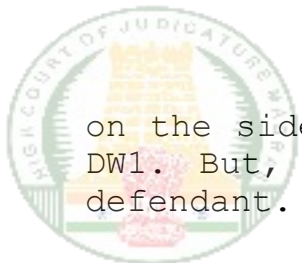
JUDGMENT

The defendant in the suit has filed this appeal challenging the judgment and decree passed by the first appellate Court in A.S.No.54 of 2012. The suit was filed by the plaintiffs for recovery of money based on two registered simple mortgage deeds.

2.The plaintiffs have based their claim on two mortgage deeds of the value of Rs.25,000/- and Rs.35,000/-, dated 24.09.1992, in which the first and second schedule properties respectively were mortgaged as securities by the defendant in favour of the first plaintiff. As there was no repayment of either the principal or the interest, the plaintiffs had issued notice to the defendant. The defendant, having received the same, sought for time only to reply. But, there was no reply from the defendant. Hence, the plaintiffs had filed the suit demanding a sum of Rs.1,04,839/- with interest.

3. The suit was resisted by the defendant denying the allegation that he had executed mortgage deeds. The signature in the mortgage deeds were also denied.

4. Before the trial Court, on the side of the plaintiffs, the first plaintiff himself was examined as PW1 and the other witnesses were examined as PW2 to PW4 and Exs.A.1 to A.7 were been marked, and



on the side of the defendant, the defendant himself was examined as DW1. But, no documentary evidence was marked on the side of the defendant.

5. The trial Court, after considering the evidence, had dismissed the suit. Aggrieved by the same, the plaintiff had filed an appeal. The first appellate Court, after considering the facts and circumstances, had held the mortgage deeds are valid and thus, passed a preliminary decree. Aggrieved by the same, the defendant has come up with the above appeal.

6. At the time of admission, only notice was ordered.

7. Heard the learned counsel for the appellant and the learned counsel for the respondents

8. The case of the plaintiffs is that the defendant by giving the first and second schedule suit properties in mortgage, had borrowed a sum of Rs.25,000/- and Rs.35,000/- on 24.09.1992. Both the mortgage deeds were registered on the same date. However, the defendant had contended that no such amount was received by him from the first plaintiff either on the date of mortgage or on any other date. It is the case of the defendant that the said mortgage deeds are forged one and the signatures found on the same are not his signatures. As the first plaintiff's son was a money lender and he had been collecting exorbitant interest, a complaint was lodged against him at the instance of the defendant. Hence, the mortgage deeds were created by forgery and money is demanded to wreck vengeance.

9. The question that has to be decided in this case is as to whether the mortgage deeds marked as Exs.A1 and A2 are true and valid or they are forged one as contended by the defendant.

10. In support of the case of the plaintiffs, the first plaintiff himself was examined as PW1, and PW2 and PW3, who are the attestors, were also examined. PW4 is the expert appointed in this case to give an opinion about the signature and thumb impression found on the mortgage deeds. However, in the evidence, PW2 and PW3, though admitted that they attested in the mortgage deeds, deposed that they have not seen the defendant signing the documents. On the basis of the evidence of PW2 and PW3, the trial Court had dismissed the suit. However, it can be noticed that on Exs.A1 and A2, the defendant had not only put his signatures but also affixed his thumb impressions. Hence, the plaintiffs had sought for the opinion of the expert, who was examined as PW4. Even eschewing the evidence of PW2 and PW3, if the plaintiffs is able to prove the execution of mortgage deeds by independent evidence, he will be entitled to a decree. Admittedly, Exs.A1 and A2 are the registered documents. The expert had also compared the thumb impressions found on Exs.A1 and A2 with the original thumb impressions which were summoned from the Sub Registrar Office, Kadayam, and marked as Exs.Q1 and Q2. The



expert also had opined that the thumb impressions found on Exs.A1 and A2 and the thumb impressions found on the relevant registers in the Office of the Sub-Registrar, are that of the defendant. Therefore, even if the defendant contended that he used to sign only in English or in Tamil, it loses its significance, when the thumb impressions are available in the documents.

11. The learned counsel appearing for the appellant strenuously contended that PW2 and PW3, who are the attestors, had turned hostile and the purpose of their examination was lost. The plaintiffs had not treated them as hostile. Hence, the mortgage deeds have not been proved. As stated earlier, since their evidence is being eschewed, the said question need not be discussed.

12. If the evidences of PW2 and PW3 are eschewed, as they had deposed that they had not seen the executant putting his signatures on the documents, whether the mortgage deeds can be taken to be proved?. The two attesting witnesses, who have been examined as PW2 and PW3, have admitted their signatures. Hence, the signatures of the attestors found on the mortgage deeds were of their own. The plaintiffs also have established the thumb impressions found on the mortgage deeds as that of the defendant by getting an expert opinion. It is submitted by the learned counsel for the appellant that the Court cannot mechanically rely on expert evidence, which is only an opinion, without discussing the merits and demerits of his opinion. In support of the said contention, he relied upon the following decisions:

(a) **AIR (2010 SC 806 (Ramesh Chandra Agrawal Vs. Regency Hospital Limited and others)**, wherein at paragraph No.16, the Hon'ble Supreme Court has held as follows:

"16. In the case of State of Maharashtra v. Damu S/o. Gopinatha Shinde and others, (AIR 2000 SC 1691 at page 1700): (2000 AIR SCW 1617), it has been laid down that without examining the expert as a witness in Court, no reliance can be placed on an opinion alone. In this regard, it has been observed in the State (Delhi Administration) vs. Pali Ram, [AIR 979 SC 14] that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him."

(b) **AIR 2010 SC 762 (Musheer Khan @ Badshah Khan and another Vs. State of M.P.)**, wherein at paragraph No.38, the Hon'ble Supreme Court has held as follows:

"39. It will be noticed that under the Indian Evidence Act, the word 'admissibility' has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Indian Evidence Act. But one thing is clear that evidence of finger



print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record."

13. In this case, admittedly, the defendant had not filed any objections to the report of the expert nor he had cross-examined the expert even when opportunity was available. On the other hand, the respondents placed reliance on **2011 (2) MWN (Civil) 536 (Selvan Vs. Azhagan and others)**, wherein at paragraph No.17, a learned Single Judge of this Court has held as follows:

"17. In the reported case, the expert was only 26 years old and associated with a Private Detective Agency, whereupon the Division Bench of this Court doubted very much the capacity and the unbiased attitude of the expert concerned. Nowhere it is found stated that the assistance of a private fingerprint expert should not be taken by the Court at all. If the opinion given by the private expert is beyond doubt, then there should be no harm in placing reliance on such opinion. In this case, for the reasons to be recorded, the Courts placed reliance on the opinion of the expert. Even before this Court nothing has been highlighted so as to shaken the opinion given by the expert in this regard. Over and above that, the Courts below also referred to the oral and documentary evidence adduced on either side and ultimately upheld the evidence of the plaintiff."

14. So far as the question of passing of consideration is concerned, the defendant had already admitted that the first plaintiff's son was doing money lending business and he had the wherewithal to lend money to the defendant. As the execution of the documents are established, considering the preponderance of probabilities in the case, it is found that the valid consideration has passed under Exs.A1 and A2.

15. In the light of the above facts, this Court does not find any reason to interfere with the judgment and decree passed by the first appellate Court. Thus, the question of law is answered in favour of the plaintiffs.

16. In the result, this second appeal fails and the same is, accordingly, dismissed, confirming the judgment and decree passed by the first appellate Court. No costs. Consequently, connected miscellaneous is also dismissed.

Sd/-

Assistant Registrar

/True Copy/



To

1. The Principal District Judge, Tirunelveli.

2. The Sub Judge, Ambasamudram.

Copy to:

The Section Officer,
V.R. Section, Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.A.ARUMUGAM Advocate in SR. No. 80256

+1cc to Mr.M.P.SENTHIL Advocate in SR. No. 80191

GCG

JS/MR.KKR/SAR.1/10.10.2017/5P-6C

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