

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.11.2018

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.557 of 2008

S.R.Muthusamy

..... Appellant /Plaintiff

Vs

K.A.Palanisamy

..... Respondent/Defendant

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, against the judgment and decree dated 30.11.2007 made in A.S.No.28 of 2007 on the file of the Principal District Court, Erode, reversing the judgment and decree dated 29.9.2006 made in O.S.No.38 of 2005 on the file of the First Additional Sub Court, Erode.

For Appellant : Ms.Zeenath Begum
for Mr.V.Rajesh

For Respondent : Mr.T.S.Thevaraj
for Mr.G.Vivekanand

JUDGMENT

The plaintiff in O.S.No.38 of 2005 on the file of the First Additional Sub Court, Erode, had come forward with this appeal, challenging the decree dated 30.11.2007, passed by the First Appellate Court in A.S.No.28 of 2007, dismissing the said suit. Parties would be referred to by their rank before the trial Court.

2.The brief facts are: The suit is laid for recovery of a sum of Rs.1,50,000/- along with interest calculated at 18%, both totalling to Rs.2,28,850/- along with future interest at the rate of 18%. The case of the plaintiff is that on 10.06.2002, the plaintiff had advanced a sum of Rs.1,50,000/- to the defendant under a promissory note executed on that date, and as the amount was not repaid, he issued a suit notice dated 08.12.2004, that the defendant had sent a reply dated 15.12.2004, denying the execution of very promissory note and

required the plaintiff to send him a copy of the said document. Accordingly, the plaintiff Vide his rejoinder notice dated 15.12.2004, enclosed a copy of the promissory note, but that did not evoke any response from the defendant. Hence, the suit is laid.

3. The defendant has filed his written statement and stuck to his earlier statement made in the reply notice, and has pleaded that the promissory note is a fabricated one. In addition, he also has pleaded that the plaintiff's wife and his (defendant's) mother-in-law were sisters, that there was a dispute between them over some property issue, and this began brewing differences within the family owing which cordiality within the family took a flight. It is to wreck vengeance borne out of this enmity, the plaintiff has fabricated the promissory note and has laid the suit.

4. Before the trial Court, the plaintiff examined himself as P.W.1 and has examined the witnesses and the scribe of the promissory note respectively as P.W.2 and P.W.3, and the defendant had examined himself as D.W.1. The promissory note in question is marked as Ext.A-1, the suit notice as Ext.A2, the reply notice of the defendant as Ext.A-4 and the rejoinder is marked as Ext.A-5. On his part, the defendant has produced Ext.B-1, house tax receipt dated 31.3.2002, which bear his signature and Ext.B-2, Kissan credit book of Canara Bank, which also has his signature.

5. While the trial Court has entered a finding in favour of the plaintiff and decreed the suit, the First Appellate Court found merit in the defense offered by the defendant/respondent herein and dismissed the suit. On admission, this Court raised the following substantial questions of law :

- i. Whether the burden is still on the plaintiff to prove the suit promissory note, as found by the lower Appellate Court, when he discharged his initial burden by examining the attesor and scribe of suit promissory note whose deposition are in support of such execution?
- ii. Whether an adverse inference can be drawn against the plaintiff for not obtaining an opinion from a handwriting expert about the genuineness of the defendant's signature, who disputes his signature on the suit promissory note, particularly when the admitted signatures will be available only with the defendant?

6. The core issue in this case is all about the burden of proof, which is covered by the first of the substantial questions raised by this Court. When the plaintiff has issued the suit notice under Ext.A2, it prompted a reply from the defendant repudiating the very execution of Ext.A1 as a fabrication. It is in this background, the learned counsel for the appellant would submit that in response to the reply notice, the plaintiff had issued a rejoinder along with a copy of the promissory note, but the defendant chose not to reply the same. This would amount to a tacit admission on the part of the defendant, which the first appellate court has overlooked. Secondly, as to the factum of execution of the promissory note, the plaintiff has examined P.W.2 and P.W.3, who are strangers to the family of the plaintiff. And there is one discrepancy in their evidence as to the execution of the document, but it needs to be reckoned that the evidence was recorded some four years after the execution of the document, and some inconsistency is bound to be there due to lapses in memory, and this may have to be provided some cushion while appreciating the evidence.

7. Per contra, the learned counsel for the respondent/defendant argued, when the execution of the promissory note is denied, when the defendant has made available the documents bearing his signature, which are either before or immediately after the execution of Ext.A1, in the form of Exts.B-1 and B-2, the plaintiff failed to take any efforts to compare the same through an expert. The plaintiff has also failed to persuade the Court to have the signatures compared under Section 73 of the Evidence Act. When the initial burden has thus not been discharged, this Court should go slow in interfering with the finding of the first Appellate Court.

8. On appreciating the rival submissions, this Court finds merit in the submission of the learned counsel for the respondent. It is too rudimentary a principle on burden of proof that it lies on the one, who affirms the fact. In a situation where the defendant has not only denied the execution of Ext.A1, but has also provided Exts.B-1 and B-2 containing his signature, the burden primarily lies on the plaintiff to have those signatures compared by an expert or prove it in a manner known to law. In this regard the testimonies of P.W.1 and P.W.3 are self-serving and may not be advantageous to the cause of the plaintiff.

9. In the result, this Court does not find any merit in this appeal and the same is dismissed and the judgment and decree

dated 30.11.2007 made in A.S.No.28 of 2007 on the file of the Principal District Court, Erode, reversing the judgment and decree dated 29.9.2006 made in O.S.No.38 of 2005 on the file of the First Additional Sub Court, Erode, is hereby stands confirmed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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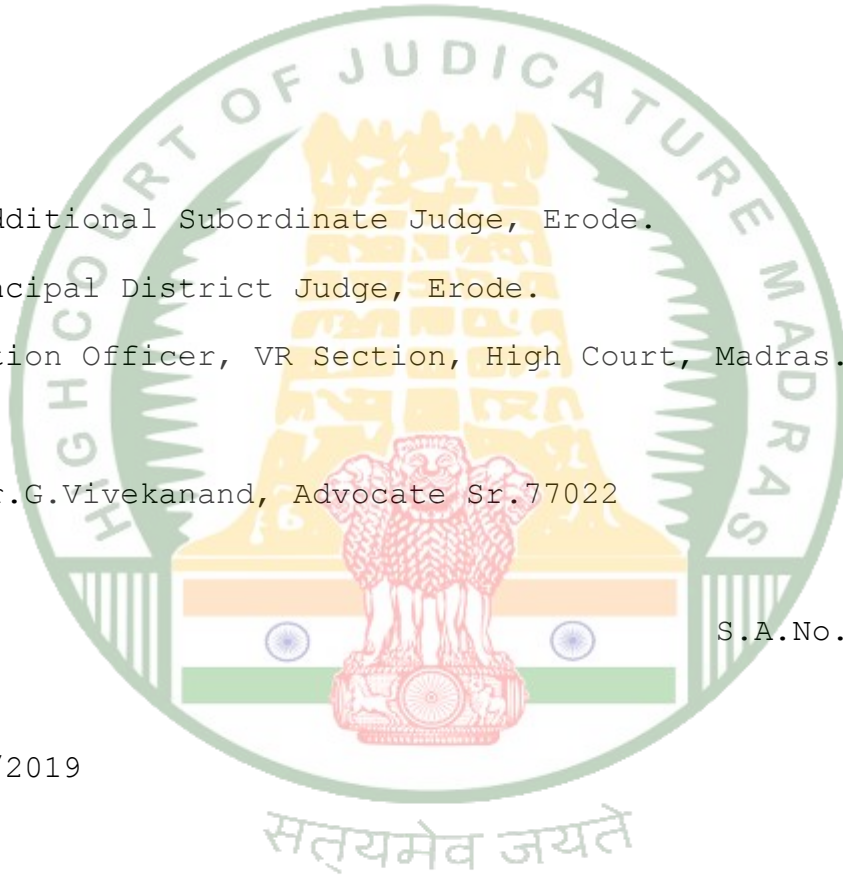
To:

- 1.The I Additional Subordinate Judge, Erode.
- 2.The Principal District Judge, Erode.
- 3.The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.G.Vivekanand, Advocate Sr.77022

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