

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.01.2018

PRONOUNCED ON : 01.02.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1597 of 2003

Vasantha ... Appellant/Appellant/plaintiff

Vs.

Sekar ... Respondent/Respondent/Defendant

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 13.12.2001 made in A.S.No.31 of 1997 on the file of the Principal District Court, Cuddalore, confirming the Judgment and Decree dated 20.03.1997 made in O.S.No.41 of 1996 on the file of the Subordinate Court, Vridhachalam.

For Appellant : Mr.P.Dinesh Kumar
for M/s.Sarvabhauman Associates
For Respondent : No appearance
(set ex parte)

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 13.12.2001 passed in A.S.No.31 of 1997 on the file of the Principal District Court, Cuddalore, confirming the Judgment and Decree dated 20.03.1997 passed in O.S.No.41 of 1996 on the file of the Subordinate Court, Vridhachalam.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for recovery of money.

4. The case of the plaintiff, in brief, is that the defendant borrowed a sum of Rs.40,000/- from her on 13.04.1993 and in evidence thereof, executed the suit promissory note promising to repay the borrowed sum with interest as recited in the suit promissory note and despite several reminders and also the issuance of legal notice dated 02.01.1996, the defendant neither responded to the notice nor paid the amount as promised and hence, according to the plaintiff, she has been necessitated

to lay the suit for recovery of money with interest.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts and that, he had not borrowed any sum much less Rs.40,000/- from the plaintiff on 13.04.1993 as claimed and there is no necessity on the part of the defendant to borrow such a huge sum from the plaintiff and also, not executed the suit promissory note in evidence of the alleged borrowal and further, the plaintiff is not possessed of sufficient means to pay the huge sum of Rs.40,000/- in one lump sum and not economically well placed to advance such a huge amount and further, there is no need for the defendant to borrow the said sum and the suit promissory note is a fabricated document and the defendant borrowed a sum of Rs.3,000/- as hand loan during 1991 and the defendant was running the chit transaction and the plaintiff was also a member in the above said chit transaction and in respect of the above said transaction, a sum of Rs.7,000/- was due to be paid to the plaintiff by the defendant and in respect of the said sum, the plaintiff, with the help of her henchmen, threatened the defendant and took away his Television Set worth Rs.4,000/- for the above said sum and also obtained a sum of Rs.1,000/-, from the defendant's father-in-law and a sum of Rs.5,000/- is due to be paid to the plaintiff and the defendant is residing in his father-in-law's house and accordingly, in order to wreak vengeance against the defendant, the plaintiff has created and fabricated suit promissory note and laid the false suit without any cause of action and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs 1 to 3 were examined and Exs.1 to 3 were marked. On the side of the defendant, DW1 was examined and no document has been marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit. On appeal by the plaintiff, it is found that on the side of the plaintiff, two additional documents have come to be marked in the appellate Court as Exs.A4 & A5. The first appellate Court, on an appreciation of the materials placed, was pleased to confirm the judgment and decree of the trial Court and thereby, dismissed the appeal preferred by the plaintiff. Impugning the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) Having found that the signature
in the suit pronote is that of the

defendant, whether the lower appellate court is correct in law in not applying the presumption under Section 118 of the Negotiable Instruments Act with reference to passing of consideration?

(ii) Whether the judgment of the Court below, which have failed to apply the statutory rules prescribed under Sections 20 and 118 of The Negotiable Instruments Act is legally sustainable?"

9. In brief, according to the plaintiff, the defendant borrowed a sum of Rs.40,000/- from her on 13.04.1993 and in evidence thereof, executed the suit promissory note marked as Ex.A1 agreeing to repay the said sum with interest as agreed to and despite several reminders and the issuance of legal notice marked as Ex.A2, the defendant having failed to repay the borrowed sum with interest as promised, according to the plaintiff, she has been necessitated to institute the suit against the defendant for recovery of money.

10. Per contra, it is the case of the defendant that he had not borrowed the suit sum from the plaintiff on 13.04.1993 as claimed in the plaint and not executed the suit promissory note in evidence thereof and according to the defendant, the suit promissory note is a fabricated document, which is created by the plaintiff to wreak vengeance against him on account of the earlier transaction pending between the parties and in this connection, it is stated by the defendant that in respect of the chit transaction run by him, the plaintiff was also a member and with reference to the same, a sum of Rs.7,000/- was due to be paid to the plaintiff and as the defendant was unable to pay the said sum, the plaintiff forcibly with the help of her henchmen took away the Television Set worth Rs.4,000/- and also obtained a sum of Rs.1,000/- from his father-in-law and still a sum of Rs.5,000/- is due to be paid to the plaintiff in respect of the above said transaction and accordingly, with a view to unjustly enrich herself, it is contended that the plaintiff has fabricated the suit promissory note and laid the false suit. Further, according to the defendant, there is no necessity on his part to borrow the said huge amount from the plaintiff as put forth in the plaint and further, it is also pleaded by the defendant that the plaintiff is not economically well placed and possessed of sufficient means to pay such a huge amount in one lump sum and hence, the suit is liable to be dismissed.

11. In the light of the above said pleadings put forth by the respective parties and as rightly determined by the Courts below, the burden is heavy upon the plaintiff to establish that

the defendant borrowed a sum of Rs.40,000/- from her on 13.04.1993 and executed the suit promissory note in evidence thereof as claimed.

12. The specific defence projected by the defendant is that the plaintiff is not economically well placed and also not possessed of sufficient means to pay the suit amount of Rs.40,000/- in one lump sum to the defendant and therefore, it is contended on behalf of the defendant that the consideration pleaded by the plaintiff would not have been passed under the suit promissory note as alleged. Despite the above defence projected by the defendant, no acceptable and reliable material has been placed by the plaintiff to show that she was possessed of sufficient means to pay the suit amount in one lump sum to the defendant at the relevant point of time. In this connection, the plaintiff would claim that the lands belonging to her husband had been acquired by the Neyveli Lignite Corporation and with reference to the same, a considerable amount had been advanced to her husband at the relevant point of time. As rightly determined by the Courts below, to buttress the above claim of the plaintiff, there is no material whatsoever placed by the plaintiff as such. As found by the Courts below, the plaintiff has not placed any material to show as to what extent of land was owned by her husband by giving reference about the survey number, extent of the said land, etc., and further, the plaintiff has also not placed any material to show as to when the said alleged lands had been acquired by the Neyveli Lignite Corporation and what was the amount paid and when the said amount had been received by her husband etc., and with reference to the above said facts, there is no clear cut evidence on the part of the plaintiff and also no material to sustain the same. Further, it has also not been established as to when actually the amount was disbursed by the Neyveli Lignite Corporation and whether the said amount had been deposited in the bank etc., Further, it is also not the case of the plaintiff that to the knowledge of her husband, she had lend the amount to the plaintiff under the suit promissory note on 13.04.1993. Therefore, it is seen that absolutely, there is no material placed on the part of the plaintiff to show that she was possessed of sufficient solvency at the relevant point of time to advance the sum of Rs.40,000/- to the defendant under the suit promissory note. No exception thus could be taken to the conclusions of the Courts below with reference to the above aspect of the matter. It is thus found that the plaintiff has miserably failed to establish that she had the means and capacity to pay a sum of Rs.40,000/- to the defendant by way of Ex.A1 promissory note on 13.04.1993 as put forth in the plaint.

13. It is found that as seen from the evidence tendered by the respective parties, the defendant had been running some chit transaction and the plaintiff had been a member of the same. It is further found that in respect of the said chit transaction, a sum of Rs.7,000/- was due to be paid to the plaintiff by the defendant. Inasmuch as the defendant was unable to pay the said amount to the plaintiff, it is seen that the plaintiff had taken away the Television set belonging to the defendant, which is said to be worth Rs.4,000/- and also obtained a sum of Rs.1,000/- from his father-in-law in respect of the above said amount. Further, it is noted that a sum of Rs.5,000/- is still due to be paid to the plaintiff by the defendant. It is therefore seen that when the parties are known to each other even prior to the suit transaction and when the relationship between the parties is found to be not cordial and smooth and on the other hand, found to be strained and when it is found that to the knowledge of the plaintiff, the defendant is unable to pay even a paltry sum of Rs.7,000/- due to her in respect of the chit transaction and with reference to the same, when the plaintiff had, either by force or with the consent of the defendant, retrieved the Television Set belonging to the defendant and also secured a sum of Rs.1,000/- from his father-in-law and when it is found that the above said transaction had occurred during the period 1992 and when it is further seen that the defendant is only employed in a provision store as an attender and is residing with his father-in-law's house and when these facts are not disputed by the plaintiff as such, despite the above said relationship between the parties concerned, particularly, when to the knowledge of the plaintiff, the defendant has no means at all to pay the borrowed sum as above discussed even a sum of Rs.7,000/-, the case of the plaintiff that on 13.04.1993, she had advanced a sum of Rs.40,000/- to the defendant without any demur as such that to purely on the basis of a promissory note as such cannot be readily accepted in any manner. Therefore, it is highly doubtful whether at all the plaintiff would have advanced such a huge sum to the defendant, particularly, when the economical status of the defendant is very weak and the said fact is well known to the plaintiff at the relevant point of time and further, it is highly preposterous that the plaintiff would have given such a huge amount to the defendant without obtaining any adequate security from him with reference to the same. Therefore, in the light of the above said circumstances, the case of the plaintiff that she had advanced the sum of Rs.40,000/- to the defendant on 13.04.1993, has been rightly disbelieved by the Courts below and in my considered opinion, no interference at all is called for with reference to the above said conclusions arrived at by the Courts below.

14. The plaintiff, in order to support her case, has examined one of the attestors in the suit promissory note viz., Kandasamy as PW2. Though PW2 would claim that the defendant had received the suit amount from the plaintiff under the promissory note marked as Ex.A1, in which, he had attested, a perusal of his evidence would go to show that admittedly several disputes are pending between him and the defendant. It is found that several disputes are pending between PW2 and his father-in-law on the one hand and the defendant and his brother on the other hand and it has been admitted by PW2 that it is he, who had assisted his father-in-law in the above said litigation. Such being the position, the Courts below have rightly not placed reliance upon the evidence of PW2 to accept the plaintiff's case. I therefore do not find any infirmity in the determination of the Courts below in not believing the evidence of PW2, particularly, when it is found that there is serious enmity between the said witness and the defendant as above discussed.

15. The scribe of the promissory note has been examined as PW3 and he would also claim that the defendant had borrowed the suit amount from the plaintiff. However, it is seen from the evidence of PW3 that he does not know directly as to for what reason the defendant borrowed the amount from the plaintiff. However, he would claim that the defendant borrowed the sum from the plaintiff for repairing his house and further, it is seen that as rightly determined by the Courts below, PW3 seems to be a procured witness of the plaintiff and considering the above facts and circumstances, particularly, when the plaintiff has failed to establish that she had the requisite means to pay the said amount to the defendant at the relevant point of time and further, when it is noted that at the relevant point of time, the relationship between the plaintiff and the defendant was not cordial and smooth and more so in particular, the plaintiff is fully aware of the poor condition of the defendant as to his inability to pay even the paltry sum of Rs.7,000/- due to her and when it is further seen that the defendant does not even own any house and is residing with his father-in-law's house and doing sundry job in a provision store and when according to PW3, he does not know the reason for the borrowal of the suit amount by the defendant, as such, no safe credence could be attached to the evidence of PW3 to uphold the plaintiff's case. Therefore, it is found that the Courts below had rightly disbelieved the evidence of PW3 also. Further, as rightly found by the first appellate Court, PW1 in her evidence clearly admitted that both the attestors as well as the scribe are inimical towards the defendant and though the plaintiff's counsel would endeavour to explain that the said deposition of PW2 has been taken in isolation by the first appellate Court, on the other hand, when the evidence of PW2 as recorded by the trial Court is seen from

the original, it is found that PW1 has clearly admitted that both the attestors Kandasamy as well as the scribe PW3 are inimically disposed of towards the defendant and the suggestion put to her that the suit promissory note has come to be fabricated by her with their help on account of the above said position. Thus, it is found that the scribe is also not well disposed of towards the defendant as above discussed, no safe credence could be attached to his testimony for accepting the plaintiff's evidence.

16. The trial Court has found that the defendant used to put his signature only in Tamil and accordingly, noted that in the documents placed on record or available on record, the signatures of the defendant are only in Tamil and therefore, disbelieved the plaintiff's case that the defendant had borrowed the suit amount and executed the suit promissory note as such and it is noted that in the suit promissory note Ex.A1, the signature of the defendant is found to be in English. The trial Court has also noted that even in the acknowledgement card marked as Ex.A3, the defendant has signed only in Tamil and therefore held that the case of the plaintiff that the defendant had signed in English as such cannot be believed. However, in the first appellate Court, additional documents have come to be marked by the plaintiff as Exs.A4 & 5 and they being the claim statements of the defendant in LAOP proceedings, wherein, in one document, it is found that the defendant has also signed in English. The said fact has not been controverted by the defendant as such. Accordingly, it appears, the first appellate Court, on the basis of the above position, on a comparison of the signature of the defendant, found in Ex.A4 with that of the signature found in Ex.A1, holding them to be similar, proceeded to hold that the contention of the defendant that the signature found in Ex.A1 is not his signature cannot be true. This finding of the first appellate Court is canvassed before this Court by the plaintiff's counsel contending that the plaintiff has established that the signature found in the suit promissory note is that of the defendant and therefore, the presumption should be drawn under Section 118 of the Negotiable Instrument Act and therefore, it is only the defendant, who has to establish the plea of non passing of the consideration under the suit promissory note and the defendant having failed to establish the same and when the plaintiff has established her case through the mouth of PWs 2 & 3, according to her, the Courts below had erred in disbelieving the plaintiff's case and in this connection, the reliance placed upon by her in the decision reported in (2017) 3 MLJ 88 (Elangovan Vs. Sivasamy). However, in my considered opinion, the above contention of the plaintiff's counsel does not merit acceptance as such.

17. No doubt, by way of Ex.A4 marked as additional evidence in the first appellate Court, the plaintiff has established the fact that the defendant also used to sign in English as well as in Tamil. In the document marked as Ex.A5, the signature of the defendant is found in Tamil. However, on that score alone, it cannot be held that the signature available in Ex.A1 in English is that of the defendant without any basis. In this connection, the plaintiff's counsel relied upon the above said conclusion of the first appellate Court based upon the mere comparison. The first appellate Court has on a mere comparison of the signature available in Ex.A4 and the signature available in Ex.A1 proceeded to hold that as both the signatures tally, the signature found in Ex.A1 should be the signature of the defendant. However, when in the light of the above said discussions, it is found that the plaintiff has miserably failed to establish that the defendant had borrowed the suit amount from her and signed the suit promissory note as projected by her and when the witnesses examined on her behalf as PWs2 & 3 are found to be unacceptable and not trustworthy to sustain the plaintiff's claim and further, when the plaintiff failed to establish that she had been in possession of sufficient means to pay the suit amount to the defendant at the relevant point of time and more in particular, when at the relevant point of time, the relationship between the plaintiff and the defendant was not cordial and on the other hand, was strained and when the plaintiff was possessed of full knowledge that the defendant is not economically sound to pay even a paltry sum of Rs.7,000/-, to say that she had advanced a huge sum of Rs.40,000/- to the plaintiff merely on the basis of the promissory note without obtaining any acceptable security as such cannot be believed. That apart, the determination of the first appellate Court that the signatures found in Exs.A4 and A1 tally and therefore, the signature found in Ex.A1 should be only that of the signature of the defendant on a mere comparison without giving reasons for the same as such cannot be accepted in any manner. No doubt, the Courts are empowered to compare the disputed signatures with that of the admitted signatures as per Section 73 of Indian Evidence Act.

18. That apart, as seen from the decision reported in AIR 1979 SC 14 (State Delhi Administration) Vs. Pali Ram), it is found that though the Court is empowered to compare the disputed signatures with the admitted signatures as per Section 73 of the Indian Evidence Act, as a matter of prudence and caution, the Court should be hesitant in giving its findings with regard to the identity of the disputed signatures and the admitted signatures and it is not advisable on the part of the Court to take upon itself the task of comparing the admitted signatures with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the

opinion and assistance of an expert.

19. As above seen, the first appellate Court merely on a naked eye comparison has proceeded to hold that the signature found in Ex.A1 is that of the signature of the defendant as according to it, the same tally with the signature available in Ex.A4. It is seen that the first appellate Court has not given any reason in what way it had come to the conclusion that the signature found in Ex.A4 are similar in characteristics with the signature found in the disputed promissory note marked as Ex.A1. In this connection, I had an occasion to deal with the subject on a different context and in the decision rendered by me which had been reported in 2017 (4) Law Weekly, Page No.830 [Sankara Narayana Pillai Vs. Ignatious Selvaraj], the point in issue was discussed and determined in the following manner.

"8. For holding that the petitioner Sankara Narayana Pillai has resigned his post, the Court below is found to have compared his signatures found in the disputed documents with that of his admitted signatures and finding them to be similar, accepted the case of the contesting Trustees and declined the relief sought for by the petitioner. Aggrieved over the same, the present civil revision petitions have been preferred by the petitioner.

9. As rightly argued by the learned counsel for the petitioner, the Court below in the impugned orders have not cared to disclose or detail as to with what admitted signatures of the petitioner it had compared the disputed signatures. Therefore, it is unable to detect as to what are the admitted signatures of the petitioner with which the Court below had compared the disputed signatures and therefore, as rightly put forth by the learned counsel for the petitioner, the impugned orders are very silent with reference to the same and therefore, the impugned orders on that score are liable to be set aside. Further, according to the learned counsel for the petitioner, though the Court is empowered to compare the disputed signatures with the admitted signatures as per Section 73 of the Indian Evidence Act, in the light of the decision of the Apex Court and other pronouncements of the High Courts, the Court

as a matter of prudence and cautions, should be hesitant in giving its findings with regard to the identity of the disputed signatures and the admitted signatures and it is not advisable on the part of the Court to take upon itself the task of comparing the admitted signatures with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert. With reference to the same, the learned counsel for the petitioner placed reliance upon the decision reported in AIR 1979 SC 14 [State (Delhi Administration) vs. Pali Ram]. The above aspect of the matter as put forth by the learned counsel for the petitioner is pointed out in the said decision.

10. Therefore, the Court below should be careful in comparing the disputed signatures with the admitted signatures, even assuming that the Court is empowered to take up the said task by itself, in such circumstances, when the Court is suo motu taking up the role of an expert, it should clearly point out as to what are the admitted signatures with which it had compared the disputed signatures and whether the admitted signatures have been admitted by the party concerned and that apart the Court should also give the reasons in detail as to on what basis or on what aspects, it had found similarities or dissimilarities with the admitted signatures and the disputed signatures on its comparison and the Court should also endeavour to clearly spell out the varying characteristics of the similarities or dissimilarities as observed by it so as to enable the parties to understand that the Court has approached the matter in the right perspective and determined the issue rightly one way or the other and further, the Appellate Forum also would be in a position to understand that the Court below has dealt with the said issue properly and correctly in a scientific manner as that of an expert.

11. However, in so far as this case is concerned, it is found that no such attempt seems to have been made out by the Court below and it has simply held that on comparison of the signatures found in Exs.P2 and P3 with the admitted signatures, they being found to be similar, has resultantly declined the request of the petitioner. As seen above, the Court has not spelt out as to what are the admitted signatures of the petitioner with which it had compared the disputed signatures. Further, it is found that the petitioner has been kept in dark as to the above said endeavour of the Court below and therefore, it is highly doubtful whether at all the Court below would have compared the admitted signatures of the petitioner with the disputed signatures.

12. Further, if at all, as rightly argued, the Court had compared the admitted signatures of the petitioner with the disputed signatures, the petitioner having not produced any document containing admitted signatures before the Court below, it should be presumed that the Court would have endeavoured its comparison only based upon the signatures available in the vakalat and written statement. However, it has been held by this Court that the Court cannot direct the disputed document to be compared with the signatures available in vakalat or written statement of a party in the decision reported in 2010-1-L.W.646 [S.Chinnathai vs. K.C.Chinnadura]. Further, it has also been held in the decision reported in AIR 1996 SC 1140 [O.Bharathan vs. K.Sudhakaran and another] that the approach of the Court in taking upon the task of the expert and comparing the admitted signatures with the disputed signatures on its own without the aid of the expert or the evidence of the person conversant with the disputed signatures is not in conformity with the spirit of Section 73 of the Indian Evidence Act. Therefore, in the light of the above said legal pronouncements, when it is found that the impugned orders do not spell out as to what are the admitted signatures the Court had taken into consideration for

comparing with the disputed signatures and further when the Court has also not given any reason whatsoever as to on what basis it has come to the conclusion that the admitted signatures and the disputed signatures are similar and further when the contesting Trustees have not established their claim that in the place of the petitioner, his brother had been elected as a Trustee and thereby one of the Trustees had been discharging his duties as the Managing Trustee lawfully, it is found that the Court below has committed an error, not sustainable in the eyes of law, in rejecting the case of the petitioner. On the mere evidence of the petitioner that he has handed over his responsibilities could not be taken as an admission that he had resigned the post of Trustee when the petitioner has stoutly denied the said fact and also disputed the resignation letter projected by the contesting Trustees as a concocted document. In such view of the matter, the Court below is expected to send the document for scientific comparison by an expert and the Court should have been cautious and hesitant to take up the task on its own and even assuming that the Court has the power to carry out the said task, having undertaken to discharge the same, it is expected of the Court that it should give plausible and acceptable reasons as to how it has come to the conclusion that the admitted and disputed signatures are either similar or dissimilar."

20. In the light of the above situation, when it is found that the first appellate Court has not given any reason whatsoever for arriving at the conclusion that the signature found in Ex.A1 is similar with the signature found in Ex.A4, I am unable to subscribe to the argument of the plaintiff's counsel that the plaintiff has established her case that the defendant has executed the suit promissory note. When it is found that the first appellate Court has flawed in its approach and erred in holding that the defendant's signature is available in Ex.A1 on the ground of comparison, based only on its subjective satisfaction without giving any detailed and scientific analysis as required to be done as per law, it is found that the above said determination of the first appellate Court cannot be sustained in the eyes of law and liable to be set aside.

21. It is found therefore that the contention of the plaintiff's counsel that the plaintiff has established that the signature available in Ex.A1 promissory note is that of the defendant as such cannot be countenanced and therefore, when in the light of the above discussions, it is found that the plaintiff has miserably failed to establish that the defendant had borrowed the suit amount from her and executed the suit promissory note in evidence thereof, it is found that Section 118 of the Negotiable Instruments Act would have no application to the case at hand in any manner and therefore, there is no question of raising the presumption in favour of the plaintiff with reference to passing of consideration under the suit promissory note. In the light of the above position, it is found that there is no substantial question of law involved in this second appeal, particularly, on the point of the raising of the presumption under Section 118 of the Negotiable Instruments Act and in any event, considering the discussions above made, when it is found that the plaintiff has miserably failed to establish that the defendant had borrowed the suit amount from her and executed the suit promissory note in evidence thereof as above discussed, the substantial questions of law formulated in this second appeal are accordingly answered.

At the end, the second appeal fails and accordingly, is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-vii)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Principal District Judge, Cuddalore.
2. The Subordinate Judge, Vridhachalam.

+1cc to Mr.sarvabhuman asso. Advocate, S.R.No. 7698

Judgment made
in S.A.No.1597 of 2003

gj (CO)
TR(12/03/2018)