

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 09.07.2018

PRONOUNCED ON : 12.07.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1454 of 2001

1. A.Natarajan (Died)
2. Vanitha
3. N.Raju
4. N.Bhuvaneswari
5. N.Anand

... Appellants/Defendants LRS
of Defendants

(Appellants 2 to 5 brought on record
as LR's of the deceased sole appellant
vide order of Court dated 29.06.2018
made in CMP.No.10927 to 10929/2018
in S.A.No.1454/2001 (PRMJ)

Vs

Pavayee

... Respondent/Plaintiff

PRAYER:Second Appeal filed under Section 100 of C.P.C, against
the judgment and decree dated 28.03.2001 made in A.S.No.78 of
1998 on the file of Sub-Court, Sankari, confirming the judgment
and decree dated 27.02.1998 made in O.S.No.84 of 1990 on the
file of District Munsif Court, Sankari.

For Appellants : Mrs.K.R.B.Dhaaranee
for Mr.T.R.Rajaraman

For Respondent : Mr.D.Shivakumaran

JUDGMENT

This Second Appeal has been filed by the defendant against
the judgment and decree passed by the learned Sub-Judge, Sankari
in A.S.No.78 of 1998 dated 28.03.2001, confirming the judgment
and decree passed by the learned District Munsif, Sankari in
O.S.No.84 of 1990 dated 27.02.1998.

2. The respondent herein has filed a suit, based on a promissory note, to direct the appellant herein to pay a sum of Rs.13,760/- with subsequent interest and cost. The learned District Munsif, Sankari by the judgment dated 27.02.1998 has decreed the suit directing the appellant herein to pay a sum of Rs.13,760/- with interest at the rate of 24% per annum on the principal amount of Rs.8,000/- from the date of filing of the suit till the date of decree and thereafter at the rate of 6% per annum and also directed the appellant herein to pay cost of the suit. Aggrieved by the same, the appellant herein has filed an appeal in A.S.No.78 of 1998 on the file of the learned Sub-Judge, Sankari. The learned Sub-Judge, Sankari has dismissed the said appeal confirming the judgment and decree passed by the trial Court. As against the same, the defendant has filed the present Second Appeal. For the sake of convenience the parties are referred to as described before the trial Court.

3.The averments made in the plaint are, in brief, as follows:

On 31.03.1987 the defendant borrowed a sum of Rs.8,000/- for his family expenses and executed a promissory note, agreeing to re-pay the said amount, on demand, with interest at the rate of Rs.2/- for Rs.100/- per month. In spite of the repeated demands made by the plaintiff, the defendant did not come forward to pay the amount. The plaintiff made requests with the defendant through the Panchayatdars and thereafter the defendant told the plaintiff that he will pay the amount, however he did not make any payment. Hence, the suit.

4.The averments made in the written statement are, in brief, as follows:

The allegations that the defendant borrowed a sum of Rs.8,000/- and executed the suit promissory note are all false. The signature and the thumb impression found in the suit promissory note are not that of the defendant. The suit promissory note is a forged document. On 31.03.1987, the defendant was not available at Chettimakurichi Village. He was at Arakkonam on that date. The plaintiff is not having capacity to pay a sum of Rs.8,000/- to the defendant. Even before filing of the suit, the plaintiff with the help of rowdies made a false complaint against the defendant before the police. The plaintiff was working as a coolie in the fields of the defendant's father. The defendant is now aged about 29 years only. He had a brother aged 24 years. The plaintiff dragged the defendant's brother for illicit intimacy and because of that his brother died. Therefore, the plaintiff started trying on the defendant, who is physically well and having a good physique. The defendant avoided her. Therefore, the plaintiff started to give all sorts of troubles to the defendant and his parents. She gave a false complaint to the police just to harass the

defendant and to make a black mark on him because he is in police force. The above suit is based on a forged document and hence he prayed to dismiss the suit.

5. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and also examined two more witnesses as P.W.2 and P.W.3. She has marked the suit pronote as Ex.A1. On the side of the defendant, the defendant examined himself as D.W.1 and he has marked Ex.B1 to Ex.B4 as exhibits.

6. The learned District Munsif, after considering the materials placed before him, found that the suit promissory note has been executed by the defendant and it was supported by consideration. Accordingly, he decreed the suit as stated above. Aggrieved by the same the defendant has filed an appeal in A.S.No.78 of 1998 on the file of the Sub-Judge, Sankari. The learned Sub-Judge, Sankari has dismissed the said appeal, confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant has preferred the present Second Appeal.

7. At the time of admitting this Second Appeal, this Court has formulated the following substantial questions of law:-

"1) Is the learned Subordinate Judge correct in decreeing the suit holding that the burden is on the defendant to prove that he has not executed the document?

2) Is the learned Subordinate Judge correct in decreeing the suit when the plaintiff has not taken any steps to send the suit document for comparison and hence has not proved the execution of the suit promissory note?

3) Is the learned Subordinate Judge correct in decreeing the suit at 24% interest per annum in spite of the admission by the plaintiff that the transaction was for family necessities?

4) Is the learned Subordinate Judge correct in holding that the suit promissory note is valid one when the finger print expert returned the suit promissory note as unfit for comparison?

5) Is the learned Subordinate Judge correct

in not appreciating that no valid legal notice was given before filing of the suit?"

8. Heard Mrs.K.R.B.Dhaaranee for Mr.T.R.Rajaraman, learned counsel for the appellant/defendant and Mr.D.Shivakumaran, learned counsel appearing for the respondent / plaintiff.

9.Question Nos. 1 to 5:

The learned counsel for the appellant has submitted that the courts below failed to consider that the plaintiff failed to prove the execution of the suit promissory note and also passing of the consideration. She further submitted that the courts below failed to consider that before filing of the suit, the plaintiff has not issued any notice demanding the defendant to make payment. She further submitted that the courts below failed to consider the material contradictions found in the evidence of the PWs 1, 2 and 3 with regard to the place and the time of execution of suit promissory note. She further submitted that the courts below failed to consider that there was an enmity between the defendant and the P.W.3 and only due to the said enmity he deposed against the defendant. She further submitted that the courts below failed to consider that the plaintiff is not having capacity to lend a loan of Rs.8,000/-. She further submitted that as per the suit promissory note the amount was advanced only for family expenses and that being so the trial court should not have awarded interest at the rate of 24% per annum and the first Appellate Court also should not have confirmed the said judgment and decree.

10. In support of her contentions, she placed reliance upon the following decisions:

1. Perumal Vs. V.Balasubramanian, 2011(5) CTC 416
2. Ashok Kumar Vs. Ms. Latha (2017) 5 MLJ 423
3. C.K.Sasankan Vs. Dhanalakshmi Bank Limited (2009) 11 SCC

60.

11. The learned counsel for the respondent, on the contrary, contended that since P.W.2, during cross examination deposed against his chief examination, he was treated as hostile witness and hence the defendant is not entitled to rely upon the evidence of the P.W.2. He further submitted that the defendant has admitted in his evidence that the plaintiff is having agricultural land and as such it is not open to him take a plea that the plaintiff is not having means to pay the amount of Rs.8,000/-. He further submitted that P.W.3 is the sister's husband of the defendant and at the time of executing the suit promissory note, there was no enmity between the P.W.3 and the defendant. He further submitted that the defendant after knowing fully well that the thumb impression found in the suit

promissory note is not clear, he has taken steps to send the pronote for getting finger print experts opinion. He further submitted that when the defendant has come forward for getting the finger print expert's opinion, he has not taken steps for getting hand writing expert's opinion with regard to the signature found in the suit promissory note and that itself would show that he has acted with a malafide intention. He further submitted that since the defendant promised that he will settle the amount, the plaintiff did not issue notice and that non-issuance of presuit notice is not fatal to the case. He further submitted that the trial Court after taking into consideration of all the materials found that the plaintiff has proved the execution of the suit promissory note and also found that the consideration was passed and the first Appellate Court also confirmed the same. He further submitted that since the courts below came to the conclusion based on the factual findings, in the said concurrent findings, this Court cannot interfere.

12. According to the plaintiff, on 31.03.1987, the defendant borrowed a sum of Rs.8,000/- from her for his family expenses and executed the suit promissory note agreeing to re-pay the said amount on demand with interest at the rate of Rs.2 for Rs.100/- per month. Her further case is that in spite of repeated demands he did not re-pay the amount and finally she made a complaint before the Panchayatdars and before the said Panchayatdars, the defendant has promised that he will settle the amount, but subsequently, the defendant did not make payment and hence she was forced to file the suit. In order to prove her case she examined herself as P.W.1 and also marked the Promissory Note as Ex.A1. Apart from her, she also examined the scribe as P.W.2 and attester as P.W.3.

13. P.W.1 has stated in her evidence that the suit Promissory Note was executed in her house at about 8.00 a.m. But P.W.2 has stated in his evidence that the suit Promissory Note was executed in the defendant's house at 9.00 a.m. Considering the aforesaid statement the plaintiff's counsel made request before the trial Court to treat him as hostile witness. The trial Court also, considering the said request, has treated him as hostile witness and permitted the plaintiff's counsel to cross examine P.W.2. P.W.2 has admitted in his evidence that the defendant and himself have studied together in the high school at Chettimakurichi. So, it appears that due to the said friendship with a view to help the defendant, he gave evidence to some extent in favour of the defendant. It is well settled that the evidence of the hostile witness need not be rejected in toto. The portion of the evidence which is supporting the case of the plaintiff can be taken into consideration. In this case, PW2 has stated in his evidence that he only wrote the suit

Promissory Note and in his presence, the defendant has signed. Further, he has stated that a Panchayat was conveyed in which the defendant has agreed to pay a sum of Rs.12,000/-, but the plaintiff has demanded more money. The aforesaid portion of the evidence supported the case of the plaintiff and the same can be taken into consideration in favour of the plaintiff.

14. P.W.3 is the sister's husband of the defendant. He has stated in his evidence that his marriage with the defendant's sister was performed 13 years ago and they lived happily for five years and thereafter only she filed a case against him alleging that he caused cruelty by demanding dowry. He further stated that at the time of execution of the suit Promissory Note, his wife was living with him and at that time a cordial relationship was prevailing between himself and the defendant. He further stated that in his presence, the defendant borrowed a sum of Rs.8,000/- from the plaintiff and executed the suit Promissory Note. He further stated that the suit Promissory Note was written by the P.W.2 and the defendant has put his signature and thumb impression and he signed as witness.

15. It is seen from the trial Court's judgment that the defendant has taken steps for getting finger print expert's opinion by sending the suit promissory note, but the finger print expert has sent back the suit promissory note as the finger print found in the suit promissory note is not clear. It is to be pointed out that the defendant has not taken any steps for getting handwriting expert's opinion. In the absence of the expert's opinion, nothing wrong to rely upon the oral evidence of Pws 1 to 3. In fact their evidence is the direct evidence. They have seen the execution of the suit promissory note and also passing of the consideration.

16. Though the defendant has taken a defence in his written statement that the plaintiff was having illicit intimacy with his brother and because of the said illegal intimacy his brother died, in his evidence during cross examination, he has categorically admitted that his brother's death was a natural one. Further, the defendant has not produced any other evidence to show that the plaintiff was having illicit intimacy with the defendant's brother and after his death, she forced the defendant to have illicit intimacy and for that he refused and that was the reason for filing the present case. Therefore based on the bald allegations made by the defendant it cannot be said that the plaintiff was having illicit intimacy with the defendant's brother and because of the said intimacy he died and subsequently, she forced the defendant to have illicit intimacy with her and for that he did not agree and hence she created the false promissory note and filed the above suit. The Courts below relying upon the evidence of Pws 1 to 3, concurrently found that

the plaintiff has proved the execution of the suit Promissory Note by the defendant and also passing of the consideration. In the said findings, this Court cannot interfere.

17. The next question that arises for consideration is what is the rate of interest, the plaintiff is entitled to. In *Perumal Vs. V.Balasubramanian* (supra), this Court, taking into consideration, the defendant is a poor driver and he borrowed money for the purpose of his daughter's marriage, awarded for pendente lite interest at the rate of 6% per annum. But in this case, admittedly, the defendant is working as police constable. So, the aforesaid decision cannot be applied to the facts of this case.

18. In *Ashok Kumar Vs. Ms. Latha* (supra), P.W.2 in her evidence though spoken about the signing of the document by the defendant, the cross-examination of P.W.2 clearly shows that her evidence also doubtful about the entire transaction. Further, in that case P.W.2 and P.W.3 clearly stated that they have seen the defendant only for the first time at the time of execution of promissory note. But in this case, the defendant is already well known to the PWs 1 to 3. Further, even though P.W.2 was treated as hostile witness and happened to be the schoolmate of the defendant, he has categorically stated that he only executed the suit promissory note and in his presence defendant has signed in the suit promissory note. Further, P.W.3 is the own sister's husband of the defendant. Though it was suggested that enmity was prevailing between the P.W.3 and the defendant, at the time of execution of the suit promissory note, the defendant's sister was living with the P.W.3 and at that time there was no necessity for the P.W.3 to sign in the false document which was said to have been created against the defendant. Therefore, the aforesaid decision will not apply to the facts of this case.

19. In *C.K.Sasankan Vs. Dhanalakshmi Bank Limited* (supra) after referring to several decisions finally awarded 9% interest towards for pendente lite and future interest. In that case, the transaction was a commercial one. Where as in this case, as per the suit promissory note, the defendant borrowed the amount for his family expenses. Hence, this court is of the view that from the date of filing of the suit, till the date of decree if he is ordered to pay interest at the rate of 9% per annum and thereafter at the rate of 6% per annum till the date of realization would meet ends of justice. Accordingly, these substantial questions of law are answered.

20. In the result, the judgment and decree passed by the Courts below are modified as follows:

(i) that the defendant is directed to pay a sum of

Rs.13,760/- with interest at the rate of 9% per annum for the principal amount of Rs.8,000/- from the date of plaint till the date of decree and thereafter at the rate of 6% per annum till the date of realisation; and

ii) that the defendant is directed to pay the cost to the plaintiff throughout.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

vsa

To

1. The Subordinate Judge, Sankari.
2. The District Munsif, Sankari.
3. The Section Officer,
VR Section, High Court,
Madras-104 (2 Copies)

+1cc to Mr.D.Shivakumaran, Advocate, S.R.No.45793

+1cc to Mr.T.R.Rajaraman, Advocate, S.R.No.46310

S.A.No.1454 of 2001

KJI (CO)
CS/10/10/2018

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