

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 24.01.2019

Judgment Pronounced on : 01.02.2019

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A. No. 353 of 2016

and CMP.No.6376 of 2016

Veeran ..Appellant/ Respondent/Defendant
Vs.

Kaliyamurthy ..Respondent/ Appellant/ Plaintiff

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree in A.S. 41 of 2013 dated 13.06.2014 on the file of the Principal Subordinate Judge at Villupuram in partly reversing the Judgment and Decree in O.S. 58 of 2005 dated 22.09.2011 on the file of the Principal District Munsif Court at Ulundurpettai by decreeing the suit with respect to Ex A-1 is manifestly erroneous, illegal, unjust and against the settled principles of law.

For Appellant : Mr.P.Vasanth

For Respondent : Mr.Krishna Prasad

JUDGMENT

The defendant in O.S.No. 58 of 2005 has come forward with this second appeal. The suit is filed by the plaintiff/respondent for recovery of money on two promissory notes. The trial Court dismissed the suit whereas the first appellate court has partly allowed it. Parties would be referred to by their rank before the trial Court.

2. The first of the two promissory note is dated 08.03.2002 for a sum of Rs.28,000/- and the same is marked as Ex.A-1, and the second one is dated 08.03.2003 for Rs.12,200/- and is marked Ext.A-2. In the written statement the defendant /appellant had denied the execution of both the promissory notes.

3. During trial, the plaintiff had examined himself as PW1. The attestors to Ext.-A1 and A-2 promissory notes were examined as PW.4 and PW.2 respectively and the

scribe was examined as PW.3. On appreciating the evidence before him the trial court dismissed the suit. Challenging the same plaintiff/ respondent moved the First Appellate Court in A.S. No. 41 of 2013.

4. In its judgment the First Appellate Court has held that the Respondent /Plaintiff has proved the passing of consideration and execution of Ext.A1 promissory note through P.W.2 that the appellant has not proved that he had not executed Ex.A1 Promissory note. However, Ex.A2 the First Appellate Court dismissed it, essentially based on the testimony of the plaintiff as P.W.1 wherein he had made an admission that Ext.A-2 was executed only towards interest payable on Ext.A-1.

5.Challenging the decree directing the defendant/appellant to pay the sum due Ex.A-1 promissory note, this appeal was preferred. The plaintiff/respondent has not preferred any cross objection as regards Ext.A-2.

6.The appeal came to be admitted raising on the following substantial questions of law:-

"(A)Whether the Lower Appellate Court is right in law in shifting the burden on the defendant, especially, when the plaintiff has failed to substantiate passing of consideration with respect to Ex A-1?

(B) When the evidence of witness and scribe to Ex A-1 deposed before the Court that they have not witnessed the passing of consideration and the Trial Court has dismissed the suit on appraising the evidence in correct perspective, whether the Appellate Court is right in law in decreeing the suit with respect to Ex A-1, especially having held that the plaintiff had concocted the Ex A-2?

(C)Whether the Lower Appellate Court is justified in reversing the decree of Trial Court with respect to Ex A-1, on mere surmises and on resting burden on the defendant?

(D)Is not the Lower Appellate Court committed serious error in not drawing adverse inference as against plaintiff, especially having held that the plaintiff has approached the Court with unclean hands by concocting suit promissory note, Ex A-2?

(E)Whether the Appellate Court is right in law in partly decreeing the suit on the footing

that the defendant had not lodged any complaint for return of suit promissory note?

(F) Whether the judgment and decree of the Appellate Court is sustainable in law for want of specific finding regarding passing of consideration with respect to Ex A-1 especially when the Trial Court has dismissed the suit on the finding that the plaintiff has failed to substantiate the passing of consideration?

(G) When the Court below had specifically held that the evidence of P.W.1 to P.W.4 are mutually contradictory, whether the Appellate Court is right in law in partly decreeing the suit on mere surmises?

(H) When the onus is not discharged by the plaintiff, whether the Appellate Court is right in law in resting burden on the defendant?"

7. There are as many as eight questions raised. But they all ultimately can be brought two heads: (i) Whether the first appellate Court has fixed the burden of proof rightly; and (b) whether it has committed a serious flaw in appreciating the evidence.

8. The learned counsel for the defendant/appellant argued:

That the First Appellate Court has wrongly fixed the burden of proof and has reasoned that he has failed to prove that Ex.A-1 was not executed by him when law casts a burden only on he who asserts the existence of a fact. He proceeded to argue that during the cross examination of DW1, Ex.A-1 was not even confronted to him. Secondly, the Plaintiff, PW1 has made a candid statement in his evidence that the defendant had earlier obtained a loan under a promissory note, that he had discharged that loan, and that the promissory note executed by him then was not handed over to him. This document admittedly should contain the admitted signature of the Defendant and it was not produced by him to enable the Court to compare it in exercise of its power under Section 73 of the Evidence Act. He therefore required the Court to draw adverse interference against the conduct of the plaintiff and relied on the authority in K. Rajendra Kumar Jain Vs D. Jayanthi & Others [Manu/TN/0177/2017]

9. Per contra, the learned counsel for the Respondent / Plaintiff submitted that he had examined PW3 and PW4, the scribe and the attesor of Ext.A-1 to prove the execution of the Ex.A1 promissory note. The First Appellate Court also found that consideration has passed and necessarily onus has shifted to the defendant to prove that Ext.A-1 promissory note does not relate to the consideration

referred to there. Ultimately the First appellate Court's entered a finding on fact and even if such finding is a plausible one, this Court may not interfere with it in the second appeal.

10. The appellant had denied the execution of Ext.A-1. Not just that, during trial he had even denied his signatures in his written statement. That by itself is not adequate enough to hold that his denial about Ext.A-1 is a lie. After all, the application falsus in uno falsus in omnibus in this country is still at a distance, since majority are illiterates, and their level of responsibility is at a huge discount. And, in his cross examination he has deposed that he does not know to read. It is this man who had denied the execution of the document.

11. Turning to burden of proof, this court finds that the approach of the first appellate Court does not appear to be faulty. It is not as if the first appellate court fixed the initial burden on the defendant to prove that the disputed signatures in the Ext.A-1 and A-2 promissory notes are not his, but had only found that inasmuch as attesting witnesses have proved the due execution of the promissory notes, the onus has shifted to the defendant/appellant, which he has failed to discharge. Since the judgement of the first appellate court was in Tamil, the right expression matching its English equivalent might not have been used, but the idea required to be conveyed has been conveyed.

12. On to the merits: It is not always that a disputed signature in a document must necessarily be sent to expert witnesses for proving that it is genuine. An expert evidence, even if there is one, is still a piece of evidence, and is not binding on the court. After all, if for a loan of Rs.28,000/- an opinion from an expert were to be obtained, the cost of litigation might well exceed the value of the litigation. Hence court itself is empowered to compare the signatures under sec.73 of the Evidence Act. Its requirement must be fitted in the context of other evidence available on record.

13. Here, the evidence of P.W.2 and P.W.3 are relevant. This Court finds them consistent, and nothing worth of discrediting their testimony have been elicited in their testimony. Turning to the evidence of the defendant (D.W.1), he does admit that he know P.W.2 and P.W.3 and also proceed to state that he has no enmity with them, mening thereby his relationship with them is cordial. Why then these witnesses should lie against the defendant.?

14. When this Court compared the signatures of the defendant in the written statement with the one in Ext.A-1 promissory note within the powers available to it under Sec.73 of the Evidence Act, this Court finds there are more points of similarity to hold that the signature of the defendant in Ext.A-1 valid. This Court does not find any perversity in the judgment of the first Appellate Court.

15. In conclusion, this Court finds that Ext.A-1 is genuine, and consequently, the appeal is dismissed, and the judgment and decree in A.S. 41 of 2013 dated 13.06.2014 on the file of the Principal Subordinate Judge at Villupuram, reversing the Judgment and Decree in O.S. 58 of 2005 dated 22.09.2011 on the file of the Principal District Munsif Court is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

may a

To

1.The Principal Subordinate Judge,
Villupuram.

2.The Principal District Munsif Court,
Ulundurpettai.

3. The Section Officer,
VR Section,
High Court, Madras

+1cc to Mr.Krishna Prasad , Advocate SR.No. 9039

S.A. No. 353 of 2016

pvs

A.SK(03/09/2019)