

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 01.09.2020
Pronounced on: 03.09.2020

Coram::

The Honourable Dr.Justice G.Jayachandran

S.A.No.1003 of 2009
and M.P.No.1 of 2009

Ponnambalam

... Appellant/Defendant

/versus/

Dhanalaksmi

... Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, praying to set aside the judgment and decree dated 29.11.2008 made in A.S.No.105 of 2006 on the file of the Subordinate Judge, Kallakurichi, confirming the judgment and decree dated 16.03.2006 made in O.S.No.314 of 2005 on the file of the Principal District Munsif Court at Kallakurichi.

For Appellant : Mr.R.Balasubramanian
For Respondent : M/s.R.Shase
For Mr.M.Guruprasad

J U D G M E N T

(The case has been heard through video conference)

Against the concurrent findings in the suit on a promissory note, the aggrieved defendant has filed the present second appeal.

2. The plaintiff case is that on 10/02/2002 the defendant to meet his family expense borrowed Rs.50,000/- from the plaintiff and promised to repay it on demand with 1% interest per month. He executed Promissory note to that effect in the presence of witnesses. The plaintiff issued notice dated 18/08/2004 demanding the money back with interest. The defendant failed to pay the money inspite of the demand. Hence the suit for recovery of money with interest.

3. The defendant case is that, the alleged pro-note is a forged document. He never borrowed Rs.50,000/- from the plaintiff either on or after or before 10/02/2002. He never executed pro-note for the said imaginary borrowing. In fact the plaintiff's husband Kombaiyan borrowed Rs.70,000/- on 25/07/2002 from one Gunasekaran, who is the son-in-law of this defendant. For recovery of that money,

suit in O.S.No.1022/2004 was filed and ended in attachment of the plaintiffs house. Hence the instant suit pro-note has been fabricated to wreck vengeance. The plaintiff have no wherewithal to advance loan of Rs.50,000/-.

4. The Trial Court framed the following issues:

- (i) Whether the plaintiff is entitled for the suit claim ?
- (ii) What relief the plaintiff entitled ?

5. To prove her case, the plaintiff and two other witnesses deposed and marked 3 exhibits. The defendant deposed as DW-1. Ex.A-1 is the pro-note. Ex.A-2 is the pre suit notice and Ex.A-3 is the reply received from the defendant. The plaintiff is PW-1. Witness to the pro-note is PW-2. The scribe to the pro-note is PW-3. Through these documents and witnesses, the execution of Ex.A-1 pro-note was held to be proved by the Trial Court.

6. The Appellate Court after comparing the signature in the pro-note with the admitted signatures in the vakalat and summons, confirmed the Trial Court judgement and decree. Hence the second appeal.

7. The learned counsel for the appellant submitted that the Courts below erred in accepting the evidence of PW-1 to PW-3 regarding the execution of the pro-note Ex.A-1 by the defendant. The witnesses to the plaintiff PW-2 and PW-3 are close relatives and interested witnesses. The Courts below should have taken adverse notice for not examining neutral witnesses. The lower appellate Court ought not to have exercised its power of comparing the signature under section 73 of the Evidence Act. The Courts below failed to take note of the money suit for Rs.70,000/- between the husband of the plaintiff and the son-in-law of the defendant. The property of the plaintiff family was brought to auction due to the inability of the plaintiff's husband to clear the decree. This gives strong inference that the plaintiff had no source of money to lend.

8. The main defence taken by the defendant is that the pro-note was not executed by him. The suit is a counter blast to the earlier money suit initiated by his son-in-law against the plaintiff's husband.

9. The plaintiff had discharged her burden of proving the pro-note by examining the witness (PW-2) and the scribe (PW-3). In the pro-note Ex.A-1, the signature as well as the thumb impression of the borrower is found. The cross examination by the defendant has not impeached the credential of the plaintiff witnesses. PW-1 denial of knowledge about the signature of the defendant found in the summon only adds her credential since, it was not signed in her presence. The subject matter of the suit is Ex.A-1 pro-note. The lender and the witness to the Pro-note had deposed their presence during the execution of the pro-note by Ex.A-1. No contra evidence to dislodge the case of the plaintiff adduced by the defendant.

10. Relatives witnessing the pro-note transaction, is not a circumstance to draw suspicion. In addition to the witness to the execution, the scribe PW-3 also examined by the plaintiff and he has deposed that he saw the defendant affixing his signature and thumb impression. The defendant who denies the signature and thumb impression, not taken any steps to refer the disputed signature and thumb impression for comparison by experts. The Courts below pointing out this, had compared the disputed signature with the admitted signature found in the vakalat and summon and found to be from same person. The reason for arriving that conclusion is elaborated in the Appellate Court judgment at paragraph 19.

11. Ex.A-1 being a negotiable instrument, the special rules of evidence under chapter XIII of the Negotiable Instruments Act is applicable. Under section 118 of the Negotiable Instruments Act, until the contrary is proved, the presumption of consideration and date are in favour of the plaintiff. The plaintiff burden is only to prove its execution. In this case, the plaintiff had satisfactorily proved the execution through PW-2 and PW-3. Thus the burden has shifted to the defendant to prove the contrary. He has not taken any steps to positively prove the contrary. In the said circumstances, the Courts below after recording the reason for invoking section 73 of the Evidence Act had proceeded to arrive at a conclusion.

12. Section 73 of the Evidence Act permits the Court to compare the signature though rarely, in the absence of initiative from the defendant to call for the experts. The Court to satisfy itself, has to exercise its power under section 73 of the Evidence Act. It is the burden on the person who asserts a fact contrary to the document. In the case under consideration, the plaintiff has placed the pro-note and the witnesses before the Court to prima facie establish that the pro-note was executed by the plaintiff, the signature as well as the thumb impression found on the document is that of the defendant.

In K.P.O. Moideenkutty Hajee vs Pappu Manjooran & Anr Reported in 1996 JT 1996 (3) 329 =1996 SCALE (2)784 , the Hon'ble Supreme Court has observed :-

"The burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. On its proof the rule of presumption under section 118 helps him to shift the burden on the defendant. The burden of proof as a question of law rests, therefore, on the plaintiff but as soon as the execution is proved, Section imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. That presumption shifts the burden of proof, namely, establishing a case that the promissory note is not supported by consideration to the defendant. The defendant may adduce direct or circumstantial evidences to prove that the promissory note was

not supported by consideration. If he adduces acceptable evidence, the burden again shifts to the plaintiff. If the circumstances relied on by the defendant are so compelling, the burden is on the plaintiff to prove the contra. The statutory presumption, though is one of law, is also a question of fact to be proved in each case."

13. The defendant though had pleaded that the pro-note was not executed by him, he has not placed any acceptable proof to disbelieve the ocular evidence of PW-2 and PW-3. The best way to disprove is by calling the expert. This option was not exercised by the defendant.

14. In Chelladurai vs Velmurugan reported in 2014 (4) CTC 606, this Court on an identical facts held that, "The respondent herein/plaintiff, who filed the suit based on Ex.A1 promissory note, has let in sufficient evidence through himself as PW1 and another person as PW2 in proof of its execution of Ex.A1 and passing of consideration. Both of them have also identified the signatures found therein and also the thumb impression found therein to be that of the appellant herein/defendant. Even in the absence of comparison, the said evidence would have been enough to arrive at a conclusion that the execution of Ex.A1 promissory note has been proved by the respondent herein/plaintiff. The comparison made by the lower appellate court is only for confirmation of the finding arrived at based on other evidence. Even otherwise, as there is no dispute regarding the signature of the appellant herein/defendant even in the written statement and vakalat and there is no contention that the signature could have been deliberately disguised, reliance made for comparison of the said signatures with the disputed signatures to find out whether Ex.A1 was genuine or not cannot be found fault with. If at all, there is any scope for finding fault with such a procedure, the scope shall be available only for the plaintiff and not for the defendant who is the author of the admitted signatures."

15. In Kalaimani -vs- Chinnapaiyan alias Perumal Gounder reported in 2004 (5) CTC 617 -Division Bench of this Court made the following observations:

"In addition to the modes of proving the handwriting as provided by section 45 and 47 of the Indian Evidence Act, section 73 of the Act provides another mode by direct comparison of the disputed signatures or written or finger impression with one, which is admittedly genuine or proved to be so. Section of the Indian Evidence Act enables the Court using its own eyes to compare the disputed signatures with the admitted signatures. It happens not infrequently that in spite of evidence rendered, the Court cannot help comparing handwriting or signature with their own eyes for the proper assessment of

the value of the total evidence."

16. Hence this Court is of the view that this is a fit case to exercise section 73 of the Evidence Act, and find no error in Appellate Courts judgment.

17. In so far as the money dispute between two other parties namely the husband of the plaintiff and son-in-law of the defendant arising from a different transaction, they are not a relevant fact in this case. The learned counsel for the appellant submitted that at the relevant point of time the husband of the plaintiff was indebted to the son-in-law of the appellant. He allowed his property to go for auction sale. Therefore, the Court should infer that the plaintiff had no wherewithal to lend loan. This uncorroborated statement of the appellant does not carry any merit for consideration. Even assuming the husband of the plaintiff was indebted to some one, it does not lead to any inference about the financial capacity of the spouse. Further, even remotely the defendant had not proved this assertion by examining witness or filing exhibits.

18. For the reasons stated above, this Court finds that the final Court of facts had held the plaintiff has proved the execution of the pro-note by the defendant and the said debt still un discharged. In the second appeal, I find no substantial question of law for interfering the concurrent finding of the Courts below.

19. In the result, the second appeal is dismissed with costs. Consequently, the connected civil miscellaneous petition is also closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

सत्यमेव जयते

rp1

To

1.The Subordinate Judge, Kallakurichi.

2.The Principal District Munsif Court,
Kallakurichi.

WEB COPY

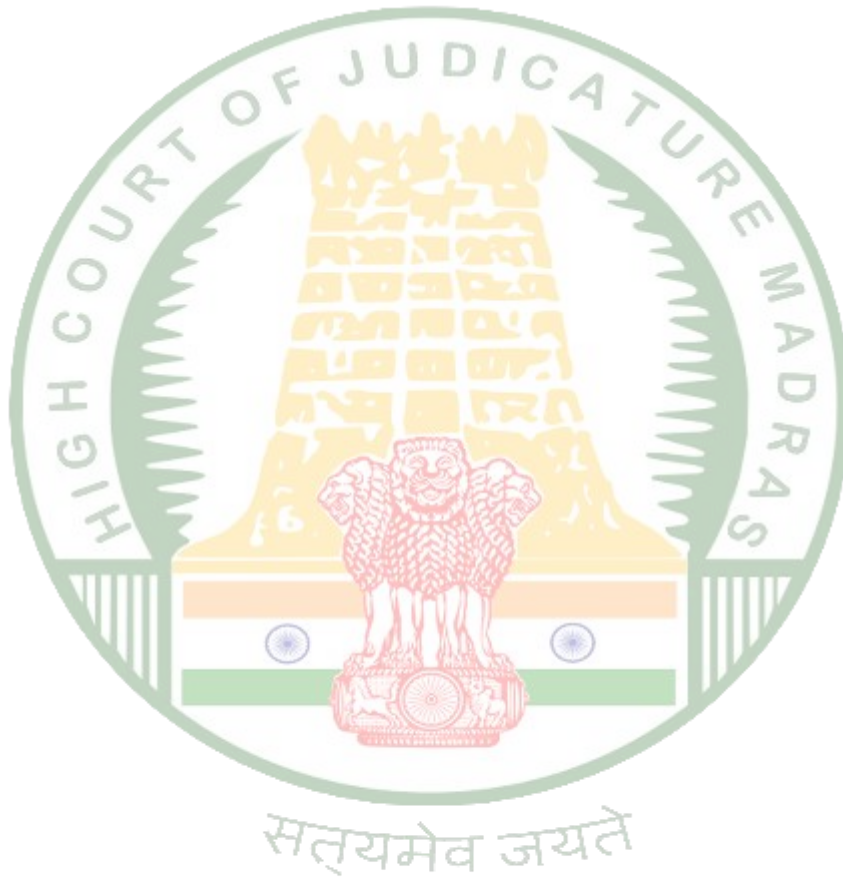
Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

+1 cc to Mr.M.Guruprasad Advocate sr29123

S.A.No.1003 of 2009
and
M.P.No.1 of 2009

pa(co)
aa12/03/2021



WEB COPY