



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.10.2020

PRONOUNCED ON: 13.10.2020

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CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.NO.547 OF 2010
& M.P.NO.1 OF 2010

Perumal,
S/o.Jayarama Kounder,
residing at Naduvananthal Village,
Tindivanam Taluk

... Appellant/Defendant

/versus/

Dhanalakshmi Ammal,
W/o.Pattusamy Kounder,
Aged 52 years residing at
Naduvanthal Village,
Tindivanam Taluk.

... Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of C.P.C., praying against the judgment and decree dated 31.03.2010 passed in A.S.No.36 of 2009 on the file of the Additional District and Sessions Judge, Fast Track Court No.II, Tindivanam, confirming the judgment and decree dated 30.03.2007 made in O.S.No.163 of 2004, on the file of Additional District Munsif, Tindivanam.

For Appellant : Mr.B.Harikrishnan

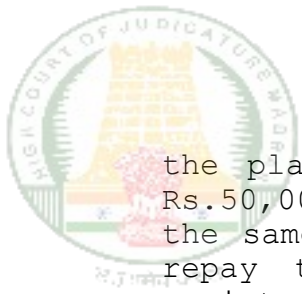
For Respondent : Mr.P.Dinesh Kumar,
for Mr.D.Ravichander

JUDGMENT

(The case has been heard through video conference)

This Appeal is filed by the defendant against the concurrent finding of the Courts below in a money suit on the pro-note alleged to have been executed by the defendant in favour of the plaintiff.

2. The short facts of the case is that, the suit was laid for recovery of Rs.68,000/- being the principal amount of Rs.50,000/- and interest Rs.18,000/- @ 12% p.a. According to



the plaintiff, on 19.09.2000, the defendant borrowed a sum of Rs.50,000/- from her and executed a pro-note, promising to repay the same on demand with interest @ 12%. The defendant failed to repay the loan amount. Hence, notice dated 29.08.2003 by registered post was caused to the defendant. The defendant received the same and replied on 06.09.2003 denying the liability and execution of the pro-note.

3. In the plaint, it is averred that the defendant kidnapped the plaintiff's son and extracted ransom and obtained signatures in the blank papers from her husband. He had fabricated false documents and proceeded against the plaintiff's husband. Filed money suit in O.S.No.262 of 2001 against her husband, based on one such fabricated document. Since the plaintiff's husband died on 17.11.2002, she is taking efforts to pursue the suit.

4. In the written statement, the defendant has denied the plaint averments. She has specifically denied the execution of pro-note in favour of the plaintiff, on 19.09.2000 and borrowal of consideration of Rs.50,000/-. The allegation in the plaint that the defendant kidnapped the plaintiff's son and obtained signature in blank papers from the plaintiff's husband also denied.

5. According to the defendant, Pattusamy Gounder, husband of the plaintiff borrowed Rs.95,000/- on 13.05.2000 and executed a pro-note in favour of the defendant. When the defendant demanded the money through lawyer notice dated 26.09.2001, the plaintiff husband replied through his counsel vide reply notice dated 09.10.2001. If the borrowing Rs.50,000/- under the pro-note dated 19.09.2002 was true, the plaintiff's husband would have mention about this in his reply notice dated 09.10.2001. Silence about this transaction in the reply notice proves that the suit pro-note relied by the defendant is a document fabricated latter.

6. It is specifically contended by the defendant that the present suit is to counter blast the pending money suit against the plaintiff's husband initiated by the defendant in O.S.No.262 of 2001.

7. Before the trial Court, the plaintiff was examined P.W.1 and one Stephen was examined as P.W.2. Five exhibits were marked in support of the plaintiff. On behalf of the defendant, two witnesses were examined and two Exhibits were marked.

8. The Trial Court decreed the suit and on appeal by the defendant, the Appellate Court confirmed the same.



9. The Trial Court has compared the disputed signature found in the pro-note marked as Ex.A.1 with that of the signature found in the vakalat and written statement filed by the defendant in the present suit. The trial Court has also compared the signature marked as Ex.A.5, which was admitted by the defendant during the cross examination. The Trial Court on comparing the signature on his naked eye has arrived at a decision that, the signature found in Ex.A.1 is that of the defendant. It has held that under Sections 118 & 20 of the Negotiable Instrument Act, the presumption is against the defendant regarding consideration and permission to fill up the blank signed pro-note, so liable for decree.

10. On appeal, the Appellate Court confirmed the decree of the Trial Court and dismissed the appeal.

11. In the Second Appeal, the Learned Counsel appearing for the appellant would submit that the Trial Court failed to properly examine the suit pro-note marked as Ex.A.1. It is in a printed format carrying name of the plaintiff and other details except the name of the borrower, the amount, date and percentage of interest. The plaintiff has not examined the witness to the pro-note. P.W.2 was not the witness to the document. His evidence is liable to be rejected being hear say in nature. When the very execution of the document is disputed, the Trial Court ought to have send the disputed signature for comparison with the admitted signatures for examination by an expert. Instead, he has ventured to compare the signature exercising power under Section 73 of Indian Evidence Act and has arrived at a wrong conclusion. The documents compared are not contemporaneous document. Ex.A.5, is the photocopy of the signature obtained by duress by the plaintiff's husband in the police station. Hence, the Trial Court decision is erroneous. The Appellate Court has verbatim translated the vernacular judgment into English language and has confirmed the Trial Court decree without applying its mind and without framing the relevant point for consideration.

12. The Learned Counsel appearing for the respondent/plaintiff would submit that there is no bar for the Court to compare the signature under Section 73 of Indian Evidence Act. The attesting witness to a pro-note is not a mandatory witness to be examined. Further more, the plaintiff has explained why she could not examine the attesting witness and same has been accepted by the Courts below. The production of statement of accounts in a money transaction is not a mandatory requirement to prove a pro-note. Therefore, the Learned Counsel would contend that there is no substantial questions of law involved in this case to interfere the concurrent finding on facts.



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13. On perusing the records and the grounds of appeal, this Court has formulated the following substantial questions of law.

(i). Whether not the Courts below misapplied the Section 118 of Negotiable Instrument Act, to presume the execution of subject pro-note marked as Ex.A.1?

(ii). Whether not the Courts below erred in comparing the signature found in disputed pro-note marked as Ex.A.1 under Section 73 of Indian Evidence Act with photocopy signature marked as Ex.A.5?

14. Ex.A.1 is a pro-note dated 19.09.2000. It is a printed format pro-note. The plaintiff name is also printed as lender. The name of the defendant, his signature, amount and percentage of interest are filled up in the printed form. Two signatures of the plaintiff is found in the pro-note (i). One the stamp paper and one below it. The said signatures are denied by the defendant.

15. The Trial Court has exercised the power under Section 73 of Indian Evidence Act, to compare the signature in the pro-note Ex.A.1 with that of the admitted signature of the defendant found in vakalat and written statement filed in this case. For the said purpose, the disputed signature dated 19.09.2000 has been compared with the signature found in the written statement dated 16.09.2004 and vakalat of the same day. They are not contemporaneous document for comparison. It is well known fact that signature change or vary by passage of time. The only contemporaneous document compared by the Trial Court is the signature marked as Ex.A.5. We find that, it is a photocopy of a letter, in which the admitted signature of the defendant is found. In the cross examination, the said document (Ex.A.5) has been marked. The defendant has explained under that circumstances the letter in which the signature found was obtained from him.

16. The Trial Court, after recording that the secondary evidence namely the photocopy cannot be introduced and not admissible in evidence without leave of the Court and the plaintiff failed to explain the non-availability of the original document in her possession, despite the legal impediment, had allowed to mark Ex.A.5 for comparison purpose.

17. This Court is of the view that admitting Ex.A.5 photocopy itself is improper. Further more, for comparison of the signature or hand-writing even experts insist upon the production of original. Genuineness of the signature cannot be compared in a photocopy, since there is a scope for manipulation



like "lift" and "fixing".

18. Section 118 of Negotiable Instrument Act refers about rebuttable presumption in respect of consideration, date etc., but not execution. There is no presumption for execution. In this case, apart from the plaintiff no other witnesses has been examined, who witnessed to the transaction. P.W.2 had deposed what he heard about the transaction through P.W.1 and her husband.

19. To disbelieve the defendant's plea that the pro-note was a fabricated document, the Trial Court has observed that the witness to the pro-note was a person known to the borrower. The plaintiff has seen the witness for the first time, when she gave the money to the defendant. She is not aware of the whereabouts of the witness. Had the document is a fabricated document by the plaintiff, she should have mentioned any known person as witness and made him to deposed in her favour. This observation based on the self service explanation of the plaintiff is purely based on surmise and conjunction.

20. Further more, this Court finds that there was earlier transaction between the plaintiff's husband and the defendant. When the matter has gone to police station, it is alleged both by plaintiff and the defendant that documents were obtained from either side. So, the suspicion about genuineness of executing a pro-note by the defendant is very high. The plaintiff ought to have produced probable evidence to sustain her case.

21. This Court finds that, the plaintiff though admits that they are maintaining accounts for the money transaction, not produced the account book which leads to an adverse inference. When the execution of signature itself is disputed, the plaintiff should have taken steps to compare the signature in the pro-note with any other admitted contemporaneous signature of the defendant through an scientific expert.

22. The signature of a person will change or vary with passage of time. Comparing signature with two different period by naked eye will not give a conclusive result. Even the opinion of the experts regarding the handwriting is not a conclusive proof but only have a pervasive value. In such circumstances, the Court venturing to compare the signatures of different period by naked eye without any expertise of knowledge is not prudent.

23. The burden of proving the execution is upon the plaintiff. Once the execution is proved, then, in view of the presumption under Section 118 of Negotiable Instrument Act, the



burden of disproving, passing of consideration will pass on to the defendant.

24. In this case, the plaintiff has not proved initial burden of the execution. Comparison of the disputed signature with signature found in the documents executed four years later and with photocopy signature exercising power under Section 73 of Indian Evidence Act is not safe.

25. Surprisingly, the trial Court as well as the Lower Appellate Court known fully well that the secondary evidence cannot be admitted as a matter of facts, has not only admitted Ex.A.5 photocopy but also relied upon the document for comparing the signature.

26. In Ajay Kumar Parmar Vs. State of Rajasthan reported in 2012 (12) SCC 406, the Hon'ble Supreme Court has referred catena of judgments rendered by Hon'ble Supreme Court in the matter of exercising the power under Section 73 of the Indian Evidence Act and has held as below:-

"19. Evidence of identity of handwriting has been dealt with by three Sections of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') i.e. Sections 45, 47 and 73. Section 73 of the said Act provides for a comparison made by the Court with a writing sample given in its presence, or admitted, or proved to be the writing of the concerned person. (Vide: Ram Chandra & Anr. v. State of Uttar Pradesh, AIR 1957 SC 381; Ishwari Prasad Misra v. Mohammad Isa, AIR 1963 SC 1728; Shashi Kumar Banerjee & Ors. v. Subodh Kumar Banerjee, AIR 1964 SC 529; Fakhruddin v. The State of Madhya Pradesh, AIR 1967 SC 1326; and State of Maharashtra v. Sukhdeo Singh & Anr., AIR 1992 SC 2100).

20. In Murari Lal v. State of Madhya Pradesh, AIR 1981 SC 363, this Court, while dealing with the said issue, held that, in case there is no expert opinion to assist the court in respect of handwriting available, the court should seek guidance from some authoritative text-book and the courts own experience and knowledge, however even in the absence of the same, it should discharge its duty with or without expert, with or without any other evidence.



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21. In *A. Neelalohithadasan Nadar v. George Mascrene & Ors.*, 1994 Supp. (2) SCC 619, this Court considered a case involving an election dispute regarding whether certain voters had voted more than once. The comparison of their signatures on the counter foil of the electoral rolls with their admitted signatures was in issue. This Court held that in election matters when there is a need of expeditious disposal of the case, the Court takes upon itself the task of comparing signatures, and thus it may not be necessary to send the said signatures for comparison to a handwriting expert. While taking such a decision, reliance was placed by the Court, on its earlier judgments in *State (Delhi Administration) v. Pali Ram*, AIR 1979 SC 14; and *Ram Pyarelal Shrivastava v. State of Bihar*, AIR 1980 SC 1523.

22. In *O. Bharathan v. K. Sudhakaran & Anr.*, AIR 1996 SC 1140, this Court considered a similar issue and held that the facts of a case will be relevant to decide where the Court will exercise its power for comparing the signatures and where it will refer the matter to an expert. The observations of the Court are as follows:

"The learned Judge in our view was not right...taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with



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admitted signatures, the caution administered by the Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to the ultimately rendered." (See also: [Lalit Popli v. Canara Bank & Ors.](#), AIR 2003 SC 1795; [Jagjit Singh v. State of Haryana & Ors.](#), (2006) 11 SCC 1; [Thiruvengada Pillai v. Navaneethammal](#), AIR 2008 SC 1541; and [G. Someshwar Rao v. Samineni Nageshwar Rao & Anr.](#), (2009) 14 SCC 677).

23. The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. Therefore, when the Court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the Court must keep in mind the risk involved, as the opinion formed by the Court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The Court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision."



27. In this case, the Courts below has compared the signatures of different period and also the signature found in a photocopy document (Ex.A.5) to hold against the defendant. When the plaintiff had enough opportunity to prove the loan transaction and execution of the pro-note by producing accounts book and sending the disputed document for comparison by expert, had failed to do so and heavily relied upon the rebuttable presumption mentioned in Section 20 and Section 118 of Negotiable Instrument Act. Both these Sections are not available for the plaintiff, who has not discharged the primary burden of proof regarding the execution of the document in the manner known to law.

28. Hence, this Court holds that the Second Appeal is deserves to be Allowed. The Substantial Questions of law are answered in favour of the defendant. The Trial Court decree and judgment as confirmed by the Lower Appellant Court is hereby set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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To,

1. The Additional District and Sessions Judge,
Fast Track Court No.II,
Tindivanam,
2. The Additional District Munsif,
Tindivanam
3. The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.B.Harikrishnan, Advocate, S.R.No.33794

S.A.No.547 of 2010
& M.P.No.1 of 2010

RGN(CO)
GMY(01/09/2021)