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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.07.2020

PRONOUNCD ON : 26.08.2020

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 1058 of 2011

&

M.P.No.1 of 2011

1. Chinnammal
2. Sumathi
3. Karthik Kumar
4. Janani

...Appellants/Defendants

Vs.

Jitendra B. Chopra

...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the judgment and decree dated 1.12.2010 made in A.S.No.110 of 2009 on the file of the Principal District Judge, Erode reversing the judgment and decree dated 30.10.2008 made in O.S.No.108 of 2005 on the file of the I Additional Sub Judge, Erode.

For Appellants : Ms. Zeenath Begum
for M/s. V. Rajesh

For Respondent : Mr.M. Guruprasad

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 01.12.2010 passed in A.S.No.110 of 2009 on the file of the Principal District Court, Erode, reversing the judgment and decree dated 30.10.2008 passed in O.S.No.108 of 2005 on the file of the I Additional Subordinate Court, Erode.

2.For the sake of convenience, the parties are referred to as per their rankings assigned to them in the trial court.

3.Suit for recovery of money.

4.The case of the plaintiff, in brief, is that on 17.01.2003, the son of the first defendant, the husband of the second defendant and the father of the defendants 3 and 4, namely K. Duraisamy, had borrowed a sum of Rs.2,50,000/- from him for his business purpose at Erode. For receiving the said amount, the said K.Duraisamy, on 17.01.2003 itself, had issued a



post dated cheque dated 17.03.2003 drawn on City Union Bank Limited, Erode, bearing cheque No. 0655152 for Rs.2,50,000/- drawn in favour of the plaintiff promising to repay the same with interest at 12% per annum. Despite the repeated demands, the said K. Duraisamy had been postponing to repay the same and assured to settle the amount very soon. However, unfortunately, the said K. Duraisamy died on 12.02.2003 leaving the defendants as his legal heirs and after his demise, the plaintiff informed the defendants in person about the borrowal of the amount by K. Duraisamy and the issuance of cheque by him to the plaintiff and the defendants had been, however, postponing the payment of the amount borrowed by the deceased K. Duraisamy on some pretext or the other stating that they would settle the dues shortly. However, inasmuch as the defendants had failed to settle the amount due to the plaintiff, left with no other alternative, the plaintiff issued a legal notice dated 13.12.2004, calling upon the defendants to pay the amount due to him. Though the defendants had received the legal notice, they had not responded to the same. Aggrieved over the same, according to the plaintiff, he had been necessitated to file the suit for the recovery of the amount.

5.The defendants resisted the plaintiff's suit, contending that the case of the plaintiff that the deceased K. Duraisamy borrowed a sum of Rs.2,50,000/- from him and issued the post dated cheque for the said amount in favour of the plaintiff is false and also contended that the case projected by the plaintiff that the plaintiff had been demanding the deceased to settle the amount and the deceased had been postponing the same is also false. Further the defendants have also contended that the case of the plaintiff that after the demise of K.Duraisamy, the plaintiff had been requesting the defendants to settle the amount and the defendants had been delaying the same on some pretext or the other is also false. According to the defendants, the plaintiff has no means for lending such a huge amount to the deceased K. Duraisamy and further also put forth that the plaintiff is an unknown person to the deceased K.Duraisamy and to the defendants and the deceased never borrowed any amount from the plaintiff and the cheque projected by the plaintiff is a forged one and therefore, according to the defendants, the plaintiff is not entitled to maintain the suit against the defendants and prayed for the dismissal of the plaintiff's suit.

6.In support of the plaintiff's case P.Ws.1 and 2 were examined, Exs. A1 to A11 were marked. On the side of the defendants D.W.1 was examined and no document has been marked.



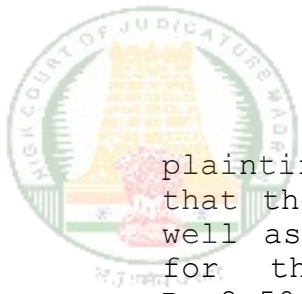
7. On a consideration of the materials placed on record, both oral and documentary, and on an appreciation of the same, the trial court was pleased to dismiss the suit laid by the plaintiff with costs. Aggrieved over the same, the plaintiff preferred the first appeal and the appeal preferred by the plaintiff was allowed by the appellate court and resultantly, the appellate court decreed the suit in favour of the plaintiff. Impugning the judgment and decree of the appellate court, the present second appeal has been preferred by the defendants.

8. The second appeal has been admitted on the following questions of law:

- A) Whether the alleged issuance of Ex.A1 cheque by the late Duraisamy in favour of the plaintiff will itself be proof, that, it was issued in consideration of a loan obtained by him?
- B) Whether the judgment of the lower appellate court is perverse in that, it has decreed the suit by making presumptions not supported by any evidence on record?
- C) Whether the judgment of the lower appellate court is vitiated in that, it has exercised power under Section 73 of the Indian Evidence by comparing documents which are not contemporaneous?

9. The plaintiff has laid the suit against the defendants for the recovery of money and according to the plaintiff's case, the deceased K.Duraisamy, son of the first defendant and the husband of the second defendant and father of the defendants 3 and 4, had borrowed a sum of Rs.2,50,000/- from him for his business purpose on 17.01.2003 and towards the same, according to the plaintiff, the deceased K.Duraisamy had issued a post dated cheque dated 17.03.2003 for the abovesaid amount in favour of the plaintiff. It is the further case of the plaintiff that the deceased K.Duraisamy had been assuring to settle the amount due to the plaintiff, however, he had died on 12.02.2003 leaving behind the defendants as his legal heirs and after his demise, though the plaintiff had been insisting the defendants to settle the amount due to him and as the defendants had not come forward to settle the amount despite the issuance of the legal notice, according to the plaintiff, he has been necessitated to levy the suit against the defendants.

10. The defendants have taken a plea that the deceased K.Duraisamy had not borrowed any amount from the plaintiff on 17.01.2003 as alleged by the plaintiff and not issued the post dated cheque in favour of the plaintiff and according to the defendants, the cheque dated 17.03.2003 projected by the



plaintiff is a fabricated document and further it is put forth that the plaintiff is a stranger to the deceased K.Duraisamy as well as to the defendants and therefore, there is no necessity for the deceased K.Duraisamy to borrow the amount of Rs.2,50,000/- from the plaintiff and further it is also stated that the plaintiff has no means to lend such a huge sum and therefore, according to the defendants, the plaintiff is not entitled to seek any relief against them.

11.For the lending of Rs.2,50,000/- to the deceased K.Duraisamy, the plaintiff mainly relied upon the cheque alleged to have been issued by the deceased K.Duraisamy in his favour and according to the plaintiff, the cheque issued by the deceased K.Duraisamy is a post dated cheque dated 17.03.2003. The abovesaid cheque has been marked as Ex.A1. As above pointed out, the defendants have disputed the genuineness of the cheque dated 17.03.2003 and according to them, the abovesaid cheque is a fabricated record at the instance of the plaintiff for sustaining his case. In such view of the matter, at the foremost, the plaintiff has to establish that the deceased K.Duraisamy had issued the post dated cheque dated 17.03.2003 in his favour for the alleged amount borrowed by him on 17.01.2003.

12.Insofar as this case is concerned, it is seen that the plaintiff has not endeavoured to compare the alleged signature of the deceased K.Duraisamy available in the disputed cheque Ex.A1 with his admitted signatures before the trial court. Mainly pointing to the same, the trial court is found to have non suited the plaintiff. As above noted, aggrieved over the judgment and decree of the trial court, the plaintiff has preferred the first appeal. It is found that the plaintiff during the course of the first appeal has preferred an application in I.A.No.319 of 2010 for sending the disputed document Ex.A1 and the signatures of the deceased K.Duraisamy contained in Exs.A5 and A6 for expert's scrutiny. It is found that the abovesaid application has come to be dismissed by the appellate court.

13.Considering the materials placed on record, particularly the family card of K.Duraisamy marked as Ex.A7 and the family card of the plaintiff marked as Ex.A8 and the RC book of the plaintiff's vehicle marked as Ex.A9, it is noted that the plaintiff had been the tenant in one of the premises belonging to K.Duraisamy and therefore, it is found that the defence of the defendants that the plaintiff is a stranger to the deceased K.Duraisamy as well as to the defendants, as such, cannot be readily countenanced. Therefore, the first appellate court is justified in holding that the defence raised by the defendants that the plaintiff is a stranger to the deceased K.Duraisamy is a false one. It is mainly contended by the counsel appearing for



the defendants that merely because the plaintiff has been held to be a tenant in the house of the deceased K.Duraisamy, it cannot be presumed that the plaintiff had advanced a sum of Rs.2,50,000/- to the deceased K.Duraisamy on 17.01.2003 as put forth by the plaintiff and according to her when the plaintiff has failed to establish that the cheque marked as Ex.A1 has been really issued by K.Duraisamy in evidence of the borrowal of a sum of Rs.2,50,000/- on 17.01.2003, according to her, the appellate court is not correct in holding that the cheque in question, namely, Ex.A1 has been issued only by the deceased K.Duraisamy. Further according to her, the appellate court is not correct in exercising the power under Section 73 of the Indian Evidence Act by comparing the disputed signature with the signatures of the deceased K.Duraisamy available in Exs.A5 and A6 and according to her, when the signatures contained in Exs.A5 and A6 do not belong to the contemporaneous period as that of the disputed cheque, the approach of the appellate court in comparing the said signature is vitiated and therefore, it is put forth by the appellant's counsel that the judgment of the appellate court is liable to be set aside for the reasons that the appellate court has proceeded to uphold the plaintiff's case only on the mere comparison of the disputed signature with the signatures of the deceased K.Duraisamy in Exs.A5 and A6, particularly without assigning any reason as to in what respects they are similar and therefore, according to her, the judgment and decree of the first appellate court is liable to be set aside.

14.As above adverted to, the endeavour made by the plaintiff' to forward the disputed signature for comparison with the signatures of the deceased K.Duraisamy available in Exs.A5 and A6 for expert's scrutiny has been disallowed by the appellate court. However, the appellate court has proceeded to compare the disputed signature with the signatures available in Exs.A5 and A6 and proceeded to hold that the signature contained in Ex.A1 is similar to the signatures available in Ex.A4 to A6 and on that basis, proceeded to hold that the deceased K.Duraisamy had issued the post dated cheque Ex.A1 only in evidence of the borrowal of a sum of Rs.2,50,000/- received from the plaintiff on 17.01.2003 and thereby upheld the plaintiff's case. On a perusal of the judgment of the appellate court, it is found that for coming to the abovesaid conclusion, the appellate court has give only the following reason:

"On perusal of Ex.A1, A4, A5 and A6, the signature found in Ex.A1 us similar to Ex.A4 to A6. So the signature found in Ex.A1 would be the signature of deceased Duraisamy"



Therefore, it is seen that the appellate court on a mere perusal of Exs.A1, A4, A5 and A6, has proceeded to hold that the signature found in Ex.A1 is similar to the signatures available in Exs.A4 to A6. On a perusal of the documents marked as Exs.A4 to A6, they are found to be pertaining to the year 2001. Therefore, those signatures are found to be not contemporaneous to the signature available in Ex.A1. According to the plaintiff, Ex.A1 cheque has been issued to him by the deceased K.Duraisamy on 17.01.2003 by post dating the same as 17.03.2003. Therefore, when it is seen that the appellate court has endeavoured to compare the disputed signature with the signatures which do not belong to the contemporaneous period, as rightly contended by the appellant's counsel, the abovesaid approach of the appellate court, in my considered opinion is erroneous. In this connection, in the decision reported in 2008 (1) CTC 816 (Ammani Ammal Vs. Dhanalakshmi Bank Ltd., Tiruppur and others), the division bench of our High Court has held that signature can be compared with admitted signature available prior in point of time and contemporaneous as lapse of time may result in difference in signature of a person. The above position of law has also been reiterated in the decision reported in 2009 -5- L.W. 271 (Xavier (deceased), X.Herald Vs. Vaidooriyam & 8 others) by holding that admitted document as well as the disputed document must belong to a contemporaneous period and if the documents are not of the contemporaneous period, then it is not advisable to send the documents to the expert for his opinion for comparison of signatures. The same position of law has also been reiterated in the decision reported in 2014 (2) MWN (Civil) 822 (Chelladurai Vs. Velmurugan), wherein also it has been held that normally admitted or proved contemporary signatures alone should be used for comparison with the disputed signatures. Further, in the decision reported in 2013 (2) MWN (Cr.) DCC 60 (Mad.), (V.Barathidasan Vs. J.Ramu), it has been held that the disputed signature of 1997 claimed to be of the year 2008 and when no contemporaneous admitted signatures /writings filed for purpose of comparison by expert, signatures of accused even if procured now in open court, would not serve any purpose in view of gap of 16 years, between two signatures and further, held that in the absence of contemporaneous signatures for comparison with disputed signatures, no useful purpose would result in sending documents to expert for opinion.

15.Applying the principles adverted to in the abovesaid decisions to the case at hand, when the lower appellate court has endeavoured to compare the disputed signature with the signatures of the deceased K.Duraisamy available in Exs.A4 to A6 not belonging to the contemporaneous period, in such view of the matter, and furthermore when the lower appellate court has declined to forward and scrutinise the disputed signature with



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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



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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 caution, 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



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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



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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".

18. In the light of the above position, it is seen that the Court should be very very careful in comparing the disputed signatures with the admitted signatures and if at all the Court proceeds to take up the task on itself without deriving support from any expert on the subject, the court in such event should give plausible reasons as to how it had come to the conclusion that the admitted and disputed signatures are either similar or dissimilar as above explained.



19.As above pointed out, when there is no reason at all given by the appellate court for holding as to how the disputed and admitted signatures tally, in such view of the matter, it is seen that the appellate court had completely fallen into error in upholding the plaintiff's case merely on the naked comparison of the signatures in question without pointing out in a scientific and acceptable manner as to how the two sets of signature either tally or do not tally. The appellate court is thus found to have flawed in its approach and erred in upholding that the plaintiff has established his case merely on the basis that the two sets of signatures which it had compared are similar which decision is found to be only on the basis of the subjective satisfaction of the appellate court and not on any detailed and scientific analysis as required to be done as per law. In such view of the matter, the judgment and decree of the appellate court cannot at all be allowed to sustain further.

20.Insofar as this case is concerned, though the plaintiff has examined P.W.2, the bank employee in support of his case, however, as rightly held by the trial court, when P.W.2, during the course of cross examination, has admitted that he does not know as to how the cheque in question had come to be possessed by the plaintiff and when he has further admitted that only when the disputed cheque is presented in their bank they would be in a position to speak about its authenticity and when he is found to be in complete ignorance as to the circumstances of the existence of Ex.A1, in such view of the matter, as held by the trial court, the evidence of P.W.2 as adduced by him during the course of chief examination would not be helpful to sustain the plaintiff's case for holding that the cheque in question, namely, Ex.A1 had been indeed issued by the deceased K.Duraisamy in favour of the plaintiff. When the plaintiff has not established that the deceased K.Duraisamy had indeed borrowed a sum of Rs.2,50,000/- from him on 17.01.2003 and for the said case projected by him, the plaintiff would rely only upon Ex.A1 cheque and when the authenticity of Ex.A1 cheque particularly when the plaintiff has failed to establish that Ex.A1 cheque had been indeed issued by the deceased K.Duraisamy and when with reference to the abovesaid case of the plaintiff, the evidence of P.W.2 is not useful and as above pointed out when the approach of the lower appellate court in comparing the signature available in Ex.A1 with the signatures available in Exs.A4 to A6 is not based on proper reasons and on that score the approach of the appellate court is found to be unsustainable for the reasons aforesaid even assuming for the sake of arguments that Ex.A1 cheque had been indeed issued by the deceased K.Duraisamy, on that basis alone it cannot be held ipso facto that the deceased K.Duraisamy had borrowed a sum of Rs.2,50,000/- from the plaintiff on 17.01.2003 as alleged by the plaintiff.



21.The defendants have also taken a plea that the plaintiff has no means to lend the suit amount to the deceased K.Duraisamy and no reliable material has been projected by the plaintiff to hold that he has been possessed of sufficient funds to lend a sum of Rs.2,50,000/- to the deceased K.Duraisamy on 17.01.2003. Therefore, when the appellate court has proceeded to hold that the suit amount had been lent by the plaintiff to the deceased K.Duraisamy from his personal account and the same would not be reflected in the account submitted to the income tax department and particularly when the defendants have taken a plea that the plaintiff has no means to lend the suit amount to the deceased K.Duraisamy on the alleged date of borrowal, accordingly as rightly contended by the defendants' counsel, the plaintiff has failed to establish his wherewithal and capacity for lending the suit amount to the deceased K.Duraisamy on 17.01.2003. When the suit amount is not reflected in the account books projected by the plaintiff, the same would not be useful to sustain the plaintiff's case that he had lent a sum of Rs.2,50,000/- to the deceased K.Duraisamy on 17.01.2003 as putforth by him. As above pointed out, the plaintiff has failed to establish that the disputed cheque has been indeed issued by the deceased K.Duraisamy more so the plaintiff has miserably failed to establish that the disputed cheque Ex.A1 has been issued by the deceased K.Duraisamy in evidence of the borrowal of Rs.2,50,000/- on 17.01.2003. In the light of the abovesaid factors merely because the plaintiff was a tenant in the deceased K.Duraisamy's premises, without acceptable material, it cannot be presumed that the deceased K.Duraisamy had borrowed the suit amount from the plaintiff on 17.01.2003 and issued the post dated cheque in favour of the plaintiff and when the issuance of the post dated cheque on the part of the deceased K.Duraisamy itself has not been established by the plaintiff as above pointed out, in such view of the matter, the appellate court has committed a manifest error in upholding the plaintiff's case merely on the comparison of the disputed signature with the signatures available in Exs.A4 to A6 without assigning any reason as to how the two sets of signatures tally.

22.Insofar as this case is concerned, no doubt the plaintiff has issued a pre-suit notice calling upon the defendants to settle the suit amount. It is found that the defendants have not responded to the legal notice issued by the plaintiff. However, as held by the trial court, merely because the defendants have failed to issue a reply to the legal notice, it cannot be construed that the defendants have acceded to the claim of the plaintiff made under the pre suit notice. When the defendants have in toto, tooth and nail, opposed the case of the plaintiff in the written statement and despite the same, the plaintiff having miserably failed to establish his case by



adducing acceptable and reliable materials other than projecting the disputed cheque Ex.A1 and when the factum of the issuance of Ex.A1 cheque by the deceased K.Duraisamy itself has not been established by the plaintiff as above pointed out and when the plaintiff for the reason best known to him has not endeavoured to compare the disputed signature with the available signature of K.Duraisamy before the trial court and when his endeavour with reference to the same before the first appellate court has ended in vain, in all, it has to be held that the plaintiff has failed to establish his case of lending a sum of Rs.2,50,000/- to the deceased K.Duraisamy on 17.01.2003 and the issuance of the post - dated cheque by the deceased marked as Ex.A1 in favour of the plaintiff and as above pointed out when the judgment of the appellate court is vitiated on account of the improper exercise of power under Section 73 of the Indian Evidence Act for the reasons assigned supra, in such view of the matter, the judgment and decree of the first appellate court upholding the plaintiff's case are liable to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendants and against the plaintiff.

23.In the light of the abovesaid discussions, the judgment and decree dated 1.12.2010 passed in A.S.No.110 of 2009 on the file of the Principal District Court, Erode, are set aside and the judgment and decree dated 30.10.2008 passed in O.S.No.108 of 2005 on the file of the I Additional Sub Court, Erode, are restored. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS-V)

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Sub-Assistant Registrar

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To

1. The Principal District Judge, Erode,
2. The I Additional Sub Judge, Erode

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+1 CC to Mr.M. Guru Prasad, Advocate sr 27733.

S.A.No.1058 Of 2011

VGI (CO)

SP(01/09/2021)