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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.08.2021

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.1156 OF 2008

Mrs. Namita Jain

... Plaintiff/
Appellant/Appellant

Vs.

P. Sundareswar

...Defendant/
Respondent/ Respondent

Prayer:

Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 10.09.2007 on the file of the IV Additional City Civil Court, Chennai, in A.S. No.469 of 2006 confirming the decree and judgment of the XV Assistant City Civil Court, Chennai, dated 19.01.2006, in O.S. No.3109 of 2003.

For Appellant : Mr. Sandeep Shah

For Respondent : Mr. Valliappan

JUDGMENT

The unsuccessful plaintiff before both the courts below, has filed the present Second Appeal.

2. For the sake of convenience, the parties are arrayed as per their rankings before the trial court. Though this second appeal was filed in the year 2008, till date the same has not been admitted.

3. The brief facts of the case of the plaintiff are as follows:

The defendant, P. Sundareswar, borrowed a sum of Rs.40,000/- on 10.06.2000 from the plaintiff to meet his business and family requirements and executed a Promissory Note (Ex.A2) in favour of the plaintiff, promising to repay the principal together with interest at the rate of 30% per annum on demand by the plaintiff or to his order. Since no amount was forthcoming from the defendant, in spite of repeated demands made by the



plaintiff, the plaintiff issued a legal notice dated 16.05.2003 (Ex.A3) to the defendant to make good the payment due on the promissory note (Ex.A2). However, the defendant sent a reply dated 27.05.2003 (Ex.A4), which, according to the plaintiff, contained false allegations. Therefore, the plaintiff issued a rejoinder dated 02.06.2003 (EX.A5) to the defendant. Since no amount was forthcoming from the defendant, the plaintiff filed the suit in O.S. No.3109 of 2003 before the XV Assistant Judge, City Civil Court, Chennai.

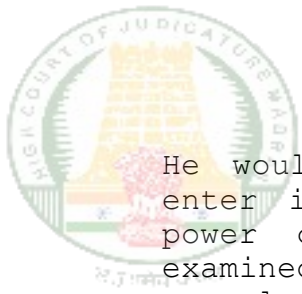
4. The defendant filed a Written statement denying all the allegations of the plaintiff. He had also denied the execution of the suit promissory note. His further contention is that, he does not know who the plaintiff is and that the suit promissory note Ex.A1 is a rank forgery.

After full contest, the trial court dismissed the suit on the following grounds.

- 1) The plaintiff did not prove the execution of the suit promissory note.
- 2) The plaintiff neither examined herself nor the scribe of the suit promissory note Ex.A2 to prove the execution of the promissory note.
- 3) It is not safe to rely on the evidence of P.W.1 since he has contradicted his own versions on certain vital aspects during the course of cross examination.
- 4) The plaintiff did not take any steps to send the suit promissory note for expert's opinion, especially, when the defendant has alleged that the suit promissory note is a forged document.

5. Aggrieved over the decree and judgment dated 19.01.2006 passed by the trial court, the plaintiff filed the first appeal before the IV Additional Judge, City Civil Court in A.S. No.469 of 2006. He also filed a petition in CMP No.781 of 2007, for comparing the signatures of the defendant found in the promissory note (Ex.A2) with his admitted signature in the copy of a cheque (Ex.A8) issued by the defendant. The first appellate court, after analysing the evidence, dismissed the appeal. Aggrieved over the same, the present Second Appeal has been filed by the plaintiff.

6. Mr. Sandeep Shah, learned counsel for the plaintiff/appellant, contended that both the courts below had committed an error by placing the entire burden of proof on the plaintiff with regard to the execution of the promissory note.



He would further contend that since the plaintiff could not enter into the witness box on account of her pregnancy, her power of attorney holder, Thiru. Suresh Kumar (P.W.1) was examined on her behalf and that both the courts below have wrongly held that non examination of the plaintiff is fatal to the case of the plaintiff. It is also his contention that neither the trial court nor the first appellate court compared the signature of the defendant found in Ex.A2 and Ex.A8. He also relied on the following decisions in

1. 2004 Lawsuit (SC) 879 (A.C. Ananthaswamy vs. Boraiah (D) by Lrs.)
 2. AIR 2008 Supreme Court 1749 (Kashmir Singh vs. Hamam Singh and Anr.)
 3. 2012 Lawsuit (SC) 632 (Ajay Kumar Parmar vs. State of Rajasthan)
 4. 2013 Law Suit (SC) 14 (Gian Chand & Brothers and another vs. Ratta Lal @ Rattan Singh)
 5. 2003 Lawsuit (MP) 299 (Tejumaal vs. Ram Pratap Jaiswal)
- and contended that

- (1) If the courts below have wrongly cast the burden of proof on the plaintiff and ignored the material evidence, the High Court can interfere with the findings of the courts below.
- (2) Forgery is to be pleaded and proved and an ambiguous statement in the written statement that the suit promissory note is a forged document cannot be accepted.
- (3) Since the opinion of the hand writing expert is fallible like that of any other witness, the courts can compare the signature by using its own eyes.
- (4) The Account books regularly maintained during the course of business should be taken to be correct unless there are strong and sufficient reasons indicating that they are unreliable.

7. At the outset, it may be observed that the plaintiff Mrs. Namitha Jain, who has filed the suit in O.S. No.3109 of 2003 before the XV Assistant Judge, City Civil Court, did not examine herself as a witness, especially, when the defendant P. Sundareswar (D.W1) had denied the very execution of the suit promissory note Ex.A2. P.W.1, who was examined on behalf of the plaintiff had deposed that the plaintiff was very much available in town at the time of his examination and that she can go over to the court for adducing evidence. Therefore, the contention of Mr. Sandeep Shah, the learned counsel for the plaintiff/appellant, that the plaintiff could not attend the Court on account of her pregnancy during the relevant period cannot be accepted. It cannot also be held that the plea of the defendant in the written statement that the suit promissory note



was not executed by him and that it is a forged document is an ambiguous statement since even prior to the filing of the suit, the defendant has sent a reply notice dated 27.05.2003 (Ex.A4) to the legal notice Ex.A3 issued by the plaintiff denying the execution of the promissory note. He has mentioned in an unequivocal term that the suit promissory note is a rank forgery both in the reply notice as well as in the written statement. Therefore, the initial burden to prove the execution of the promissory note is on the plaintiff and once the execution of the pronote is proved by the plaintiff, then only, the statutory presumption available under Section 118 of the Negotiable Instruments Act comes into operation in favour of the plaintiff as to the passing of consideration. In the instant case, as already observed, the plaintiff failed to prove the execution of the promissory note. The P.W.1, who was examined on her side, though, at one stage, had contended that the defendant himself executed the promissory note, contradicted himself by stating that a person, who came along with the defendant wrote the promissory note. He could not also state the name of that person. The other discrepancies in the evidence of P.W.1 were clearly pointed by both the courts below and they have concurrently held that the suit promissory note was not executed by the defendant. The first appellate court also, after analysing the evidence on record, found that Books of Accounts Ex.A6 and Ex.A7 cannot be considered as accounts maintained by the plaintiff during the regular course of business and that they are self serving documents. This is purely based on appreciation of evidence and by no stretch of imagination the same can be recorded as perverse. Thus, the finding of both the courts below are based on facts and appreciation of evidence and this Court cannot interfere with the same as per the provisions of Section 100 of the Code of Civil Procedure.

8. In the decision in the case of Kashmir Singh vs. Hamam Singh and Anr, cited supra by the learned counsel for the plaintiff/appellant, the Hon'ble Supreme Court has held that it is not within the domain of the High Court to investigate the case on which the findings were arrived at by the last court of facts, being the first appellate court, and that the High Court should be satisfied that the case involves substantial question of law. In the decision reported in 2000 (3) SCC 708 (Roop Singh vs. Ram Singh), the Hon'ble Supreme Court has held as follows:

"7. It is to be reiterated that under Section 100 jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact



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while exercising its jurisdiction under Section 100. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further the fact findings courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and then was no perversity, illegality of irregularity in those findings. if the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession (Thakur Kishan Singh vs. Arvind kumar (1994 (6) SCC 591). hence the High Court ought not to have interfered with the findings of fact recorded by both the courts below."

9. Since both the courts below have appreciated the evidence on record in the right perspective, this Court does not see any reason to interfere with the same. In the decision in the case of Ajay Kumar Parmar vs. State of Rajasthan (cited supra), the Hon'ble Supreme Court held that there is no legal bar to prevent the courts from comparing the signatures by using its own eyes. Section 73 of the Evidence Act, empowers the Court to compare the disputed signatures with the admitted signatures. However, it would be unsafe for the Courts to compare the signatures without the aid of scientific opinion of an expert. As far as the present case is concerned, the plaintiff did not take any steps to get the opinion of the hand writing expert, especially, when the defendant has not only disowned his signature on the suit promissory note but also contended that he does not know who the plaintiff is. The decision in the case of Gian Chand & Brothers and another vs. Ratta Lal @ Rattan Singh (cited supra), may not also apply to the facts of the present case since in that case, the courts below had wrongly placed the onus of proof on the defendant to prove that the signature had been forged, moreso, when there was denial of the same. Interestingly, this



particular ruling is not in favour of the plaintiff and the plaintiffs in that suit also had chosen to adduce acceptable evidence to prove the entries in the books of accounts maintained by them in the regular course of business. Similarly the other rulings relied on by the plaintiff may not also apply to the facts of the present case.

For the reasons aforesaid, the Second Appeal is dismissed. No costs. The decree and judgement passed by the courts below are upheld.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

bga

To

1. The IV Additional City Civil Judge, City Civil Court, Chennai.
2. The XV Assistant City Civil Judge, City Civil Court, Chennai.
3. Section Officer, VR Section, High Court, Madras

+1cc to Mr. Valliappan, Advocate, S.R.No.37992
+1cc to Mr.Shah & Shah, Advocate, S.R.No.38324

S.A.No.1156 of 2008

AK(CO)
PM/22/10/2021