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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07.07.2021

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1426 of 2008

&

M.P.No.1 of 2008

O.M.Karuppannasamy

...Appellant/Appellant/Defendant

Vs.

A.S.Sivakumar

...Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the Additional District Judge, (Fast Track Court No.2), Gobichettipalayam in A.S.No.12 of 2007 dated 30.11.2007 confirming the Judgement and Decree of the learned District Munsif, Gobichettipalayam in O.S.No.137 of 2005 dated 12.07.2005.

For Appellant :Mr.A.K.Kumarasamy
Senior Counsel
for Mr.S.Kaithamalai Kumaran

For Respondent :Ms.Zeenath Begum

JUDGMENT

The defendant in a promissory suit is the appellant before this Court challenging the decree passed in a suit for recovery of money due on promissory note. The parties are referred to in the same array as in the Trial Court.

Plaintiffs case:

2. The plaintiff had filed the suit O.S.No.154 of 1997 on the file of the Subordinate Court, Gobichettipalayam, which was subsequently re-numbered as O.S.No.137 of 2005 on the file of the District Munsif, Gobichettipalayam for recovery of a sum of Rs.42,545/- together with future interest and cost. The plaintiff would contend that the defendant is his neighbor and was in the habit of borrowing money from him on the security of



promissory notes. On 14.10.1994 the defendant acknowledging that he owed a sum of Rs.33,500/- had executed a promissory note agreeing to repay the sum on demand and also promising to pay interest at 15% per annum. However, contrary to the assurance the defendant contended that the amounts were time barred and he was not liable to repay the same and considering the fact that the defendant was an agriculturist the interest has been restricted to 9 % per annum. Therefore, the plaintiff has come forward with the suit.

3. The defendant had filed a written statement inter alia contending that he had not executed the promissory note on 14.10.1994 and the said document is nothing but a rank forgery. The signature found in the document is not that of the defendant. The defendant further submitted that from the year 1991 the defendant and the plaintiff were in logger heads regarding the properties situate at R.S.F.60/5 of Mettupalayam Village before the Revenue Authorities and a suit had also been filed by the plaintiff in O.S.No.3 of 1995 and the defendant had also instituted a suit in O.S.No.211 of 1995 against the plaintiff. The suits are pending Judgement before the District Munsif, Gobichettipalayam.

4. The defendant would submit that nowhere in the suit filed by the plaintiff viz; O.S.No.3 of 1995, had he mentioned the date of the promissory note. The defendant also contended that whenever he borrowed money on the security of the promissory note he had himself filled up the promissory notes. The defendant would further submit that the plaintiff had not issued a pre suit notice which would clearly go to show that the suit promissory note was a fabricated one. The defendant would submit that no amounts were due by him to the plaintiff. He therefore prayed for a dismissal of the suit.

5.The learned District Munsif, Gobichettipalayam had framed the following issue:

"(i)whether the contention that the defendant had executed the promissory note on 14.10.1994 for a sum of Rs.33,500/- towards the pre existing debt dues is true?

(ii)Whether the plaintiff is entitled to the reliefs claimed?

(iii)To what other relief?"

6.The plaintiff had examined himself as P.W.1 and had marked Ex.A.1 to Ex.A.5. The defendant had examined himself as D.W.1 but had not marked any documents on his side. The learned District Munsif, Gobichettipalayam proceeded to decree the suit



on the following grounds:

(a) The defendant had not sought to have the signatures compared by sending it for an expert opinion.

(b) The defendant as D.W.1 was not able to differentiate the signatures in the admitted documents and the disputed document.

© The defendant is trying to take advantage of the fact that Ex.A.1 promissory note has not been written in his hand.

(d) The litigation between the parties was only in the year 1995 after the execution of the promissory note. Therefore, the allegation that there was enmity is totally false.

7. Challenging the said Judgement and Decree the defendant had filed AS.No.16 of 2006 on the file of the Principal Subordinate Court, Gobichettipalayam, which was subsequently transferred to the Additional District Court (FTC II), Gobichettipalayam and re-numbered as A.S.No.12 of 2007. The Appellate Court without framing the points for consideration had simply framed the following point for consideration:

"Whether the appeal can be allowed?"

8. The learned Additional District Judge had dismissed the appeal and confirmed the Judgement and Decree of the Trial Court. The learned Judge had also more or less adopted the findings of the Trial Court but exercising the provisions of Section 73 of the Evidence Act had proceeded to compare the signatures of the defendant in the admitted documents, namely, Ex.A.4 and Ex.A.5 with the disputed signature in Ex.A.1 and came to the conclusion that the signatures were identical. Challenging the same the defendant has moved this Court.

9. The above Second Appeal was admitted on the following Substantial Questions of law:

(i) Are the Courts below justified in holding that the execution of suit promissory note is proved since the previous promissory note are proved, overlooking that except the ipsi dixit of P.W.1 / plaintiff, there is no evidence on record to prove the execution of promissory note especially when the execution is denied by the defendant / appellant?

(ii) Is not the Judgement of the Lower Appellate Court vitiated in as much as the provisions of Order 41 Rule 31 CPC which is mandatory, is not complied with?"

10. Mr.A.K.Kumarasamy, learned senior counsel arguing on behalf of the learned counsel for the appellant / defendant



would submit that the Appellate Court had not followed the procedure contemplated under Order XLI Rule 31 of the Code of Civil Procedure which clearly mandates that the Appellate Court while writing the Judgement should state the point for determination and decision there on along with the reason for such decision.

11. He would further submit that though the appellant / defendant has in very clear terms disputed his signature in Ex.A.1 promissory note, the respondent / plaintiff has not chosen to prove its execution by examining the scribe named in Ex.A.1. It is only his ipsi dixit to prove the execution. He would further submit that the dispute had existed between the parties right from 1991 before the Revenue Court, which thereafter moved to the Civil Court and therefore the question of executing the suit pronote is impossible.

12. He would argue that the Appellate Court had proceeded to believe the execution of Ex.A.1 promissory note only on the ground that the defendant had admitted the execution of Ex.A.4 and Ex.A.5. The Appellate Court has overlooked the contention of the defendant that the signature found in the suit promissory note was not his signature. The Appellate Court had erred in assuming the role of an expert and therefore the Judgement requires to be reversed and considering the fact that the point for determination was not framed the matter may be remanded back to the Appeal Court for fresh enquiry.

13. Per contra, Ms.Zeenath Begum appearing on behalf of the respondent / plaintiff would contend that the learned Additional District Judge has exercised his powers under Section 73 of the Indian Evidence Act to arrive at the conclusion that the suit promissory note had been executed by the defendant. She would submit that on the date of the execution of the promissory note there was no dispute between the parties since the suit had been filed only in the year 1995. The promissory note was an year earlier.

14. She would further submit that non framing of the point for consideration was not fatal and would rely upon the Judgement of the Hon'ble Supreme Court reported in (2006) 3 SCC 224 - G.Amalorpavam and others Vs. R.C. Diocese of Madurai and others, where the Hon'ble Supreme Court has observed that is it was possible to make out that there was a substantial compliance of the provisions of Order XLI Rule 31 of the CPC and justice has not suffered the non-compliance will not vitiate the Judgement and Decree.



15. She had also relied upon the Judgement of this Court reported in 2017 (5) CTC 520 - K.M.Balasubramanian Vs. S.Shanmugam and others, in support of her arguments that there is no bar for the Court to compare the signatures. She would further submit that the defendant having admitted the execution of Ex.A.4 and Ex.A.5 promissory notes and the suit promissory note had been executed only for the outstanding amounts both the Courts below were right in decreeing the suit.

16. Heard the learned counsels and perused the records.

17. The defendant had questioned the veracity of the promissory note and the Judgement on the following grounds:

(a) The signature contained therein is not his signature but a rank forgery.

(b) At the relevant point of time the plaintiff and the defendant were at logger heads in respect of some property disputes.

(c) Despite the signatures being disputed the plaintiff on whom the burden of proof lay has not taken any steps to send the signatures for expert opinion.

18. The execution of the promissory note has not been proved by the plaintiff by examining an independent witness especially in the light of the fact that the defendant had denied executing the said Ex.A.1 promissory note and that apart had termed the signature therein as a rank forgery. Therefore, the burden to prove shifts on the plaintiff who has to prove that the signature contained in Ex.A.1 is that of the defendant. It is the admitted case of the plaintiff that the scribe of Ex.A.1 was his relative. In his cross examination as P.W.1 he would submit as follows:

“மேற்படி வா.சா.ஆ.1னை எழுதியவர் ஒருவகையில் எனக்கு சகலை என்றால் சரிதான்”

19. There is no explanation given by the plaintiff as to why he has not examined the scribe particularly when the defendant had cross examined him extensively on the fact that the plaintiff had not examined the scribe because the scribe would speak the truth. The plaintiff has not even taken steps to have the disputed signature compared with the admitted signatures by sending it for an expert opinion. It is rather strange that the Courts below have placed the onus of proof upon the defendant when it is the plaintiff who had to prove the execution of the said document when the same is denied by the defendant.



20. The very execution of Ex.A.1 though shrouded with suspicion the plaintiff has not dispelled this effectively by examining an independent witness or by having the document examined by an expert. Further, there is no explanation on the side of the plaintiff as to the promissory notes under which the sum of Rs.33,500/- was due. The plaint is deafeningly silent in this regard. The only averment made by the plaintiff is that the defendant was in the habit of borrowing and on 14.10.1994 he was due and owing a sum of Rs.33,500/-. The details of how the sum of Rs.33,500/- has been arrived at is absent. If the amounts are due towards Ex.A.4 and Ex.A.5 then these promissory notes which are of the year 1987 would have been time barred in the year 1990. Therefore, the plaintiff is bound to provide the above details particularly when the execution of the said document has been denied by the defendant.

21. The plaintiff has filed the above suit just a day prior to expiry of the limitation. The plaintiff has waited till the last minute to file the suit particularly when in the written statement in O.S.No.3 of 1995 the defendant has categorically stated that he does not owe any money much less a sum of Rs.33,500/- to the plaintiff.

22. The contention of the defendant that there was proceedings pending between the plaintiff and the defendant from the year 1991 stands confirmed by the statement in the written statement of the defendant that proceedings were pending before the Revenue Court and that while the appeal filed before the Revenue Divisional Officer, Gobichettipalayam was pending the plaintiff had come forward with the present suit. This fact has not been refuted by the plaintiff either by filing a reply statement or in evidence. This has not been considered by the Courts below.

23. The Appellate Court has proceeded to act as an expert by comparing the admitted signatures found in Ex.A.4 and Ex.A.5 with the disputed signature in Ex.A.1. Except for stating that the signature in the disputed document is the same as the signatures found in Ex.A.4 and Ex.A.5, the learned Judge has not given any reason for coming to such a conclusion. Another factor which has been overlooked by the Courts below is that Ex.A.4 and Ex.A.5 had been written in the hands of the defendant whereas the disputed document has been written in the hand of one Karupanna Gounder. The plaintiff has not given reasons as to why Ex.A.1 alone has been written by different person and not by the defendant which once again casts a doubt on the veracity of Ex.A.1. Even in the Judgement relied upon by the learned



counsel for the plaintiff, namely, 2017 (5) CTC 520 the learned Judge had relied upon the Judgement of the Hon'ble Supreme Court reported in (2008) 4 SCC 530 - Thiruvengadam Pillai vs. Navaneethammal and another and had observed as follows:

"The Trial Court has not discussed the features of the signatures before holding that the signatures found in Ex.A1 are that of 1st defendant based on comparison. While it is true that the Court can compare the signatures and come to the conclusion, the Honble Supreme Court has cautioned that the Court before exercising such a power it should make a thorough study of the case. It must point out the basis on which, the Court has come to the conclusion that the signatures are all of the same persons or others. In the absence of such basis or opinion, comparison by the Court is deprecated by the Honble Supreme Court."

24. In the instant case the Appellate Court had simply observed that the signatures in the admitted documents and the disputed document is one and the same. This observation does not conform to the dicta laid down by the Hon'ble Supreme Court in the Judgement reported in (2008) 4 SCC 530 - Thiruvengadam Pillai Vs. Navaneethammal and another. Therefore, the plaintiff has miserably failed to prove that Ex.A.1 has been executed by the defendant.

25. The argument of the learned senior counsel that the Appellate Court has not followed the provisions of Order XLI Rule 31 of CPC cannot be countenanced since a reading of the Judgement would clearly indicate that the Appellate Court has considered the entire evidence, discussed the same and given its reasons for the same and therefore there is substantial compliance of provisions of Order XLI Rule 31 of the Code of Civil Procedure.

26. In fine, the Second Appeal is allowed. The Judgement and Decree of the Courts below is set aside with costs throughout. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar(I)

// True Copy //

Sub Assistant Registrar



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- 1.The Additional District Judge,
(Fast Track Court No.2), Gobichettipalayam
- 2.The District Munsif, Gobichettipalayam .

+1cc to M/s.Zeenath Begum, Advocate SR.No.32241

S.A.No.1426 of 2008

SMI (CO)
CB(06/07/2022)