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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.02.2021

PRONOUNCED ON : 08.03.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.NO.1559 OF 2008

M.Muthammal,
W/o, Muruganandam,
Palaniappa Street,
Thavittupalayam,
Anthiyur, Bhavani Taluk.

... Appellant/Respondent/
Plaintiff

Vs.

G.Vasantham,
W/o, Kuppusamy Gounder,
185/91, Anna Salai,
Thavittupalayam, Anthiyur,
Bhavani Taluk, Erode District.

... Respondent/Appellant/
Defendant

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 20.10.2005 made in A.S.No.33 of 2005 on the file of the Principal District Judge, Erode, reversing the judgment and decree dated 28.09.2004 made in O.S.No.166 of 2002 on the file of the Subordinate Judge, Bhavani.

For Appellant : Mr.T.Murugamanickam, SC
for M/s.Zeenath Begum

For Respondent : Mr.V.S.Kesavan

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 20.10.2005 passed in A.S.No.33 of 2005 on the file of the Principal District Court, Erode, reversing the judgment and decree dated 28.09.2004 passed in O.S.No.166 of 2002 on the file of the Subordinate Court, Bhavani.



Challenging the same, the present second appeal has been laid.

9. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(a) Whether the Lower Appellate Court was in error by comparing the admitted signatures of the defendant with the disputed signatures, particularly when the signatures were of two different periods?

(b) Whether it is necessary to examine an attester for proving a promissory note?

10. The suit has been laid by the plaintiff for recovery of money against the defendant based on the suit promissory notes marked as Exs.A1 and A2. According to the plaintiff, the defendant borrowed a sum of Rs.1,00,000/- and Rs.50,000/- under the suit promissory notes and agreed to repay the borrowed sum with interest as recited in the promissory notes, but failed to honour her promise and hence the suit.

11. The defendant resisted the plaintiff's suit contending that she had not borrowed any money from the plaintiff under the alleged suit promissory notes and put forth the case that the suit promissory notes are fabricated documents created by the plaintiff and the defendant is well placed and owns several properties and not necessitated to borrow any money from the plaintiff and the plaintiff has no wherewithal to lend the suit amount and according to her, the suit is liable to be dismissed.

12. The defendant having put forth the defence that she has not borrowed the suit amount from the plaintiff and not executed the suit promissory notes in evidence of the borrowal as claimed by the plaintiff, the burden is heavy upon the plaintiff to sustain her case that the defendant had borrowed money from her under Exs.A1 and A2 promissory notes as claimed by her. The notice has been marked as Ex.A3 and the reply given by the defendant has been marked as Ex.A4 and in the reply Ex.A4, the defendant has clearly come out with the version that she has not borrowed any amount from the plaintiff and not executed the promissory notes in evidence of the alleged borrowals. Therefore, right from the inception, the defendant has set up her case ie., she had not borrowed any money from the plaintiff and not executed any suit promissory notes.



13. In the light of the abovesaid defence putforth by the defendant, it is upon the plaintiff to establish that the suit promissory notes are true and based on the same, the defendant had borrowed the suit sum from the plaintiff as putforth in the plaint. The suit promissory notes are found to be attested by the attestors and the same has been written by a scribe. To sustain her case, the defendant has examined one of the attestors as P.W.2. However, it is found that after adducing the evidence, after the examination in chief, P.W.2 has not subjected himself for cross examination. Therefore as rightly concluded by the Courts below, the evidence of P.W.2 cannot be considered in any manner for upholding the plaintiff's case.

14. As rightly contended by the plaintiff's counsel as well as held by the first appellate court, when P.W.2 examined on behalf of the plaintiff had not subjected himself to cross examination, his evidence in the chief examination cannot at all be considered as the evidence in the eyes of law and it has to be totally rejected. The abovesaid proposition of law can be gathered from the decision reported in 2000 MLJ Supplement 246[Sundaram, Partner, India Metal Trading Company, Madras] and in the abovesaid decision, it has been held that when the witness had been examined in chief, but is not available for cross examination, his evidence cannot be accepted and the acceptance of his evidence is perverse and the position of law has been outlined in the abovesaid decision as follows:

(A) Evidence Act (I of 1872), Sec.33 - Witness examined in chief but is not available for cross examination- Acceptance of his evidence is perverse. In the absence of cross-examination, there is no evidence at all and the evidence of P.W.2 ought to have been completely rejected. Acceptance of such evidence is perverse.

In the decision reported in 2003(1) MLJ Page 291, [Kaliappan and others Vs. Vijayalakshmi and another] it has been held that when a party to a case do not endeavor to come to the box to establish his plea raised in the written statement, an adverse inference is to be drawn against the defendant by virtue of the principle laid down by the Supreme Court in 1999 (3) MLJ 22 (Supreme Court) [Iswar Bhai C.Patel alias Bachi Bhai Patel Vs. Harihar Behera and another], and the position of law has been outlined in the abovesaid decision as follows:

Evidence Act (I of 1872), Sec.114-Presumption-When can be drawn-Plaintiff claiming right under a settlement deed - First



defendant denying the same and contending that it is sham and nominal - Plaintiff establishing her case by entering the witness box - First defendant not entering the witness box to prove his plea in the written statement - Whether adverse inference can be drawn against him.

Once it is established that on the strength of Ex.A4, the possession was handed over to 'N', it is for the first defendant, who executed the settlement deed, to establish that the document was only a sham and nominal document and the same has not been acted upon. Even though such a stand was taken by the first defendant through his written statement, he did not choose to come to box to establish his plea raised in the written statement. As such, an adverse inference is to be drawn against the defendants by virtue of the principle laid down by the Supreme Court in 1999(3) M.L.J.22(S,C):2000(1) L.W.178.

17. Once it is established that on the strength of Ex.A-4, the possession was handed over to Nachayammal, it is for the first defendant, who executed the settlement deed, to establish that the document was only a sham and nominal document and the same has not been acted upon. Even though such a stand was taken by the first defendant through his written statement, he did not choose to come to box to establish his plea raised in the written statement. As such, an adverse inference is to be drawn against the defendants by virtue of the principle laid down by the Supreme Court in Iswar Bhai C.Patel Vs. Harihar Behera and another, 1999(3)M.L.J 22(S.C):2000(1)L.W.178. As a matter of fact, the trial Court's judgment would show that the first defendant, who is the main party to establish the defence, has remained exparte.

Similarly, in the decision reported in 1999 MLJ Supreme Court 22 [Iswar Bhai C.Patel alias Bachi Bhai Patel Vs. Harihar Behera and another], it has been held that when a party to a lis do not present himself for cross examination, an adverse inference has to be drawn against him on the principles contained in illustration (g) of Section 114 of the Indian Evidence Act and the position of law has been outlined as follows:

(B) Evidence Act (I of 1872), Sec.114 - Presumption under - Held, appellant's failure to go into witness box and make a statement gives rise to adverse inference against him.



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The appellant not having entered the witness box and not having presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of principles contained in Illustration (g) of Sec.114, Evidence Act.

An inference has to be drawn against the appellant that what he stated in the written statement was not correct. High Court was justified in decreeing the suit in its entirety and passing a decree against the appellant also.

Applying the abovesaid principles of law to the case at hand, when P.W.2 having not endeavored to subject himself to the cross examination and when the defendant has putforth the case that the suit promissory notes are fabricated documents and not borrowed any sum from the plaintiff at any point of time, in such view of the matter, the first appellate court is found to be justified in not placing reliance upon the plaintiff's case.

15. When the onus is heavy upon the plaintiff to sustain her case by placing acceptable materials, when the evidence of P.W.2 does not lend support to the plaintiff's case, as rightly concluded by the first appellate court, the plaintiff should have endeavored to examine the other attestor as well as the scribe. Further, as rightly held by the first appellate court, P.W.2 had only tendered evidence with reference to Ex.A1 promissory note and not stated anything with reference to Ex.A2 promissory note. Despite the abovesaid position, as above pointed, the evidence of P.W.2 cannot at all be considered and relied upon. In such view of the matter, when the plaintiff has failed to substantiate her case by calling upon the other persons associated with the alleged borrowals and the execution of the promissory notes in question, the plaintiff having failed to examine them, as held by the first appellate court, the plaintiff has miserably failed to establish her case. The plaintiff has also not endeavored to subject the suit promissory notes for expert's scrutiny in the manner known to law. Therefore, as rightly concluded by the first appellate court, the plaintiff has failed to avail the opportunity through expert, to sustain her case and in such view of the matter, as concluded by the first appellate court, the plaintiff has failed to establish the borrowal of the amount under the suit promissory notes and the execution of the suit promissory notes by the defendant in favour of the plaintiff for the alleged borrowals.



16. The first appellate court had also endeavored to compare the signatures of the defendant available in the written statement with that of signatures available in the suit promissory notes and come to the conclusion that they are not similar. In my view, the abovesaid approach of the first appellate court cannot be appreciated, particularly the first appellate court should not have endeavored to compare the signatures of the suit promissory notes with the signatures of the defendant in the written statement, when it is seen that the documents taken up for comparison containing the signatures, all do not belong to the contemporaneous period, but pertain to different periods. In any event, as above pointed out, the first appellate court has not directed the dismissal of the plaintiff's suit mainly on the comparison made by it, however for other convincing reasons as above pointed out, the first appellate court has proceeded to dismiss the plaintiff's suit.

17. The promissory note is not required to be attested as per law. Now, according to the plaintiff's case, the suit promissory notes are attested by two attestors and written by a scribe. The defendant has taken a stand that she had not borrowed any amount from the plaintiff at any point of time and executed the suit promissory notes and contended that the suit promissory notes are fabricated documents. In such view of the matter, the plaintiff should have endeavored to examine the persons who are associated with the alleged borrowals and the execution of the suit promissory notes. When the evidence of P.W.2 do not lend support to the plaintiff's case as above discussed and when the plaintiff has not solicited the assistance of the expert to prove the authenticity of the suit promissory notes as per law and when no convincing reason has been assigned by the plaintiff for not examining the other persons associated with the transaction alleged in the plaint, therefore, it is seen that the plaintiff has suppressed the best evidence to establish her case. Therefore, on that reasoning, the first appellate court has rightly held that the failure of the plaintiff to examine the other attestors and the scribe of the suit promissory notes are fatal to her case.

18. In the light of the abovesaid discussions, the substantial questions of law formulated in the second appeal are accordingly answered.

19. In conclusion, the judgment and decree dated 20.10.2005 passed in A.S.No.33 of 2005 on the file of the Principal District Court, Erode, reversing the judgment and decree dated 28.09.2004 passed in O.S.No.166 of 2002 on the file



of the Subordinate Court, Bhavani are confirmed. Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Assistant Registrar

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Sub Assistant Registrar

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To

1. The Principal District Judge,
Principal District Court,
Erode.
2. The Subordinate Judge,
Subordinate Court,
Bhavani.

Copy to
The Section Officer,
VR Section, High Court,
Chennai.

+1cc to Mr.V.S.Kesavan, Advocate, S.R.No.15030
+1cc to M/s.Zeenath Begum, Advocate, S.R.No.14645

S.A.No.1559 of 2008

BR(CO)
CS/24/11/2021