



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.450 of 2012

T.P.A.Alagarsamy (Died)

1.Subbulakshmi

2.A.Mahendran

3.Sundarajan

4.Manimegalai

... Appellants/
Respondents/Defendants

(Cause title accepted vide order dated 30.09.2011 & made in MP(MD)
1/2011 in SA(MD)Sr.51430/2011

-Vs-

K.Selvaraj

...Respondent/Appellant/
Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 18.12.2008 passed in A.S.No.211 of 2005 on the file of the Principal Subordinate Judge, Dindigul, by reversing the Judgment and decree, dated 28.04.2005 passed in O.S.No.105 of 2004 on the file of the District Munsif Court, Nilakkottai.

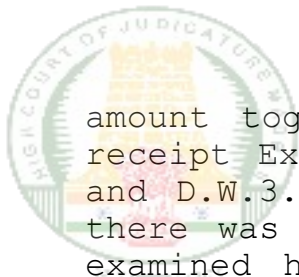
For Appellants	: Mr.S.Vijaya Shanthi
For Respondent	: Mr.H.Lakshmi Shankar

JUDGMENT

The defendant in O.S.No.105 of 2004 on the file of the District Munsif Court, Nilakkottai is the appellant in this second appeal.

2.The case of the plaintiff Selvaraj is that the defendant Alagarsamy approached him on 09.12.1999 and borrowed a sum of Rs.30,000/- after executing the suit promissory note Ex.A1. The defendant had agreed to pay interest at the rate of 12% per annum. The defendant turned out to be a defaulter. Therefore, the plaintiff issued Ex.A2-notice dated 07.11.2002 calling upon the defendant to pay the principal amount with interest. The defendant sent a reply dated 25.11.2002 (Ex.A4). Since the demand set out in Ex.A2 notice was not complied with, the plaintiff had to file the aforesaid suit.

3.The defendant admitted the suit transaction. However, he stated that on the very next day ie., 10.12.1999, he returned the



amount together with interest and the plaintiff had executed the receipt Ex.B1. The receipt was executed in the presence of D.W.2 and D.W.3. Since the suit liability had already been discharged, there was no cause of action for filing the suit. The plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A4. The defendant examined himself as D.W.1 and the attestors as D.W.2 and D.W.3. Ex.B1 and Ex.B2 were also marked. The receipt said to have been issued by the plaintiff was marked as Ex.B1. The reply notice was marked as Ex.B2. The learned trial Munsif after consideration of the evidence on record, dismissed the suit by Judgment and decree dated 28.04.2005. Aggrieved by the same, the plaintiff filed A.S.No.211 of 2005 before the Principal Sub Court, Dindigul. Before the Appellate Court, the plaintiff filed I.A.No.70 of 2008 seeking to mark the additional documents. The Appellate Court allowed the said I.A and marked the additional documents as Ex.A5 and Ex.A6. The appeal was also allowed by the Judgment and decree dated 18.12.2008 and the Judgment and decree passed by the trial Court was set aside. Aggrieved by the same, the defendant filed this second appeal. The second appeal was admitted on 23.07.2012 on the following substantial question of law:-

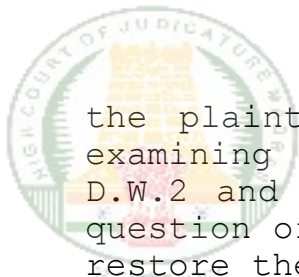
"Whether the Judgment and decree passed by the Lower Appellate Court is correct in law in allowing the appeal by reversing the Judgment of the trial Court by picking holes in the deposition of D.W.1 to D.W.3 when the plaintiff has not disputed the signature in Ex.B.1?"

During the pendency of the second appeal, the defendant passed away and his legal heirs have come on record. I carefully considered the rival contentions and went through the evidence on record.

4.The learned counsel appearing for the appellant submitted that when the plaintiff issued Ex.A2-notice, the defendant had given a reply dated 25.11.2002. In the said reply, the defendant had taken a specific stand that the liability covered under the pro-note had already been discharged. But the plaint is blissfully silent on the stand taken by the defendant. That apart, the Appellate Court had allowed the plaintiff to adduce additional evidence. As per the additional documents, there appear to have been an understanding between the parties that the plaintiff will be allowed to enjoy the usufruct of the coconut grove of the defendant and that, when dispute arose in that regard, the plaintiff gave a police complaint on 25.11.2002. The learned counsel appearing for the appellant pointed out that in this regard, there is absolutely no pleading in the plaint. When there is no pleading in the plaint, the plaintiff cannot be allowed to set up a new case.

5.The learned counsel for the appellant would point that the Appellate Court could not have marked the additional documents and exhibited them without giving opportunity to the defendant to cross examine. She would point out that the procedure set out in Order 41 Rule 28 of C.P.C., was not followed by the First Appellate Court.

<https://hcservices.e-courts.gov.in/services> stated that Ex.B1-receipt was actually issued only by



the plaintiff and the defendant had proved its due execution by examining himself and also the attestors of the document namely D.W.2 and D.W.3. She wanted this Court to answer the substantial question of law in favour of the appellant and allow this appeal and restore the Judgment and decree passed by the trial Court.

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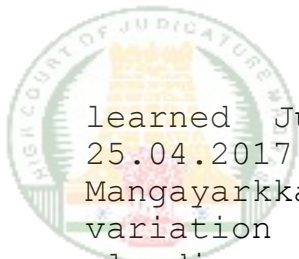
6.Per contra, the learned counsel appearing for the respondent submitted that the impugned Judgment does not call for any interference. He would point out that the plaintiff had specifically challenged the genuineness of Ex.B1-receipt and therefore, the very framing of substantial question of law is incorrect. He pressed for dismissal of the second appeal.

7.I carefully considered the rival contentions and went through the evidence on record. I must straight away concur with the submission of the learned counsel appearing for the appellant that Ex.A5 and A6 could not have been straight away marked by the Appellate Court after allowing the petition filed by the plaintiff under Order 41 Rule 28 of C.P.C. Order 41 Rule 28 of C.P.C reads as follows:-

"28.Mode of taking additional evidence- Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

8.The learned counsel for the respondent would contend that there was no objection from the side of the defendant in this regard. He would point out that no counter was filed to I.A.No.70 of 2008 filed by the plaintiff before the First Appellate Court. I am not able to accept the submission of the learned counsel for the respondent. If the counsel for the contesting party makes an endorsement that they have no objection for exhibiting the documents as additional evidence, then, probably, the Appellate Court can straight away do so. In this case, there is no such endorsement. Therefore the Appellate Court was obliged to follow the procedure set out in Order 41 Rule 28 of C.P.C. Since in this case, the First Appellate Court has not done so, I have to necessarily exclude Ex.A5 and Ex.A6 from consideration. That apart, there is another formidable contention raised by the learned counsel for the appellant. She would state that by adducing additional evidence, the plaintiff has come out with a new case altogether. She would point out that when there is no pleading in support of the additional evidence, the application for additional evidence ought not to have been entertained at all.

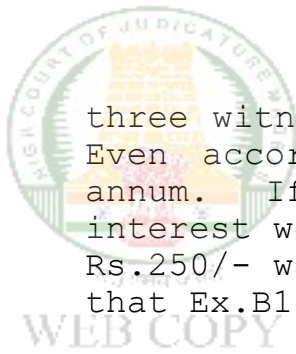
9.The learned counsel appearing for the respondent would rely on (1994)1 MLJ 401. for the proposition that when the other side is not put to prejudice even in the absence of pleadings, evidence can be allowed to adduce. I am not able to accept the aforesaid proposition advanced by the learned counsel for the respondent. A



learned Judge of this Court, vide Judgment and Decree dated 25.04.2017 in Appeal Suit No.640 of 2016 (A.Meiazhagan Vs. Mangayarkkarasi and others) held that if there is a marginal variation or deviation, then certainly, even in the absence of pleadings, evidence can be taken in that regard. This principle will apply not only for reception of additional evidence, but even in the original trial also. When the party wants to set up a new case altogether, then, the aforesaid proposition cannot be called in aid. I sustain the contention of the learned counsel for the appellant because of absence of pleadings, Ex.A5 and Ex.A6 could not have been received in evidence. Now the only question that arise for my determination is whether Ex.B1 has been proved by the defendant.

10.The case of the plaintiff is that on 09.12.1999, the defendant borrowed a sum of Rs.30,000/- from the plaintiff after executing the suit promissory note Ex.A1. The defendant admitted the transaction that he borrowed a sum of Rs.30,000/- on 09.12.1999. He admitted the execution of the suit promissory note. His defence is that the liability under the suit promissory note had been discharged. Therefore, the burden lay on the defendant to prove that the liability has been discharged. The defendant has projected Ex.B1-receipt said to have been issued by the plaintiff. The plaintiff had categorically challenged the execution of Ex.B1-receipt. I must remark that the substantial question of law has been incorrectly framed. The substantial question of law assumes that the plaintiff had admitted the execution of Ex.B1-receipt. The plaintiff had not admitted the execution of Ex.B1-receipt. He had consistently taken the stand that it is a fabricated document. When that is the stand of the plaintiff, the defendant must have taken steps to have the same referred for opinion of the hand writing expert. No such step was taken by the defendant. Even if the defendant had not taken such step, the trial Court could have compared the signature appearing in Ex.B1 with the admitted signature of the plaintiff. The trial Court did possess such power under Section 73 of the Indian Evidence Act, 1877. The trial Court did not undertake the said task. Therefore, we are left to determine if by examining himself and the attesting witnesses, Ex.B1 had been proved by the defendant. I went through the contents of Ex.B1 and also the testimony of the defendant's witnesses. Ex.B1 reads that the promissory note executed by Alagarsamy had been misplaced. It has been further undertaken that the executant of Ex.B1 will not misuse the said pro-note. When it is admitted that pro-note was executed on 09.12.1999, it is inconceivable that it could have been lost or gone missing on the very next day. When the borrowal had taken place a day before, it is again improbable that the loan would have been repaid on the very next day. The attestors are none other than the son of the defendant and a close friend of him. D.W.2 had deposed that it was he who wrote Ex.B1 receipt. D.W.3 on the other hand would state that it was the

<https://hccases.hccourt.gov.in/hccservices/> wrote the receipt and put his signature. All the



three witnesses stated that a sum of Rs.250/- was paid as interest. Even according to the pro-note, interest rate was only 12% per annum. If the loan amount had been repaid on the very next day, interest would be only a sum of Rs.9.50/-. The version that a sum of Rs.250/- was paid as interest cannot be believed. Therefore, I hold that Ex.B1 had not at all been proved by the defendant.

11.The learned counsel for the appellant would point out that in Ex.A4-reply notice, the defendant had spoken about the return of the loan amount on 10.12.1999 and that the plaintiff has neither filed rejoinder notice nor denied the same in the plaint. Even though this submission of the appellant's counsel is factually correct, still that would not lift the burden from the shoulder of the defendant.

12.Since I have held that the defendant has not proved the genuineness of the receipt Ex.B1, even though I have faulted the approach of the first Appellate Court in the matter of reception of the additional evidence, the Judgment and decree passed by the Appellate Court does not call for interference. The second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Principal Subordinate Judge, Dindigul.

2.The District Munsif, Nilakkottai.

3.The Section Officer-2 copies

Vernacular Records,

Madurai Bench of Madras High Court,

Madurai.

+1 CC to Mr.H.LAKSHMI SHANKAR, Advocate (SR-18143[F] dated 30/04/2021)

Judgment made in
S.A.(MD)No.450 of 2012
29.04.2021

KM(04.06.2021) 5P 6C