



A.S.Nos.772 of 2014 and 321 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:15.02.2023

Delivered on: 18.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

A.S.Nos.772 of 2014 and 321 of 2015

&

C.M.P.No.21943 of 2022

A.S.No.772 of 2014

L.A.Abuthahir

.. Appellant

Vs.

1.Sulaika

2.V.M.Badhrudeen

3.V.I.Farook

4.V.I.Noordheen

5.V.I.Rafiq

6.V.I.Samad

7.V.I.Sathar

.. Respondents

Prayer:- Appeal Suit filed under Or.41 R.1 r/w Sec. 96 of Code of Civil Procedure against the judgment and decree dated 30.04.2014 made in



A.S.Nos.772 of 2014 and 321 of 2015

O.S.No.9 of 2012 on the file of V Additional District and Sessions Court,
Coimbatore.

For Appellant : Mr.V.Anandha Murthy

For Respondents : Mr.N.A.Nissar Ahmed, Senior Counsel
for
Mr.N.A.Nassir Hussain for R1,2,4 to 7

Mr.V.I.Abdul Farook (Party in person)
R3

A.S.No.321 of 2015

M.M.Shahisham

.. Appellant

Vs.

1.Sulaika

2.V.M.Badhrudeen

3.V.I.Farook

4.V.I.Noordheen

5.V.I.Rafiq

6.V.I.Samad

7.V.I.Sathar

.. Respondents

Prayer:- Appeal Suit filed under Or.41 R.1 r/w Sec. 96 of Code of Civil Procedure against the judgment and decree dated 30.04.2014 made in O.S.No.11 of 2012 on the file of V Additional District and Sessions Court, Coimbatore.



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A.S.Nos.772 of 2014 and 321 of 2015

For Appellant : Mr.C.R.Prasanan
For Respondents : Mr.N.A.Nissar Ahmed, Senior Counsel
for
Mr.N.A.Nassir Hussain for R1,2,4 to 7
Mr.V.I.Abdul Farook (Party in person)
R3

COMMON JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

The array of parties before the Trial Court is being adopted for the sake of convenience.

2. These two appeals, A.S.No.772 of 2014 and 321 of 2015 have been filed by the respective plaintiffs in O.S.Nos.9 of 2012 and 11 of 2012 against the judgment and decreed dated 30.04.2014 made by the learned V Additional District and Sessions Judge, Coimbatore.

3. The defendants in both the suits are the same. It is only the plaintiffs who are different in the two suits. However, both the suits have been filed for recovery of monies due to the respective plaintiffs, from and out of the assets of one Late V.M.Ismail, who is the husband of the 1st



A.S.Nos.772 of 2014 and 321 of 2015

defendant and father of the defendants 2 to 7.

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4. The plaint averments and allegations in both the suits are identical:

It is the case of the plaintiffs in both the suits that one Late V.M.Ismail borrowed a sum of Rs.20,00,000/- from the plaintiff in O.S.No.9 of 2012 and Rs.19,50,000/ from the plaintiff in O.S.No.11 of 2012 on same day i.e 28.09.2010. It is the specific case of the plaintiffs that in respect of the said borrowings, Late V.M.Ismail had executed separate promissory notes in favour of the respective plaintiffs, agreeing to repay the amount borrowed together with interest at 15 % p.a (O.S.No.9 of 2012) and 16.2% p.a. (in O.S.NO.11 of 2012). Alleging that the said V.M.Ismail did not repay any amount, either towards interest or principal, during his life time and that he died on 01.06.2011, leaving behind the defendants as his legal heirs and since the defendants did not come forward to pay the amounts due to the plaintiffs despite repeated demands, the plaintiffs were constrained to issue lawyer's notices on 26.12.2011 to which the defendants 2, 4 to 6 had sent a reply with false averments. The plaintiffs therefore filed their respective suits seeking recovery of alleged amounts borrowed by late V.M.Ismail and prayed that a decree be passed



A.S.Nos.772 of 2014 and 321 of 2015

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against the defendants to meet the liability from and out of the assets of
Late V.M.Ismail.

5. The second defendant filed a written statement which was adopted by defendants 4,5 and 6. The 3rd defendant filed an independent written statement. In the written statement of 2nd defendant which was adopted by defendants 4,5 and 6, they have denied their liability and also contended that the plaintiff was a total stranger and that Late V.M.Ismail never executed any promissory note and taking advantage of the demise of Late V.M.Ismail, the suit has been filed after his death.

6. The 3rd defendant in his written statement has stated that his father did not borrow any money during his life time and that there was no necessity for him also to borrow any money. The 3rd defendant also contended that the alleged suit pronote were bogus and manipulated by the plaintiffs.

7. Before the Trial Court, the respective plaintiffs were examined as P.W.1 and in O.S.No.9 of 2012, Exs.A1 to A16 were marked. The 2nd



A.S.Nos.772 of 2014 and 321 of 2015

defendant was examined as D.W.1 and no documents were exhibited on the side of the defendants. In O.S.No.11 of 2012, Exs.A1 to A14 were marked on the side of the plaintiff and the 2nd defendant was examined as D.W.1 and no exhibits were marked.

8. The Trial Court framed an issue in the suits as to whether the plaintiffs were entitled to a decree as prayed for.

9. The Trial Court after appreciating the oral and documentary evidence, held that the plaintiffs had not proved the suit promissory notes and passing of consideration and thereby dismissed the suits with costs.

10. Aggrieved by the dismissal of the suits, the respective plaintiffs have filed the above A.S.No.772 of 2014 and 321 of 2015 on the following grounds:

(i) The Trial Court erred in overlooking the law that examination of witness to the promissory note to prove execution of promissory note is not mandatory.

(ii) The Trial Court ought to have compared the signatures available



A.S.Nos.772 of 2014 and 321 of 2015

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in Exs.A11 to A14 with the suit promissory notes with the admitted signatures in other documents exhibited before the Court.

(iii) The Trial Court erred in placing the burden of proof on the plaintiffs instead of calling upon the defendants to disprove the claim of the plaintiffs.

(iv) The Court below ought not to have ventured to even consider the plea of passing of consideration when the defendants admitted that they did not know anything about the execution of promissory note itself.

11. Heard Mr. V.Anandha Murthy, learned counsel for the appellant in A.S.No.772 of 2014 and Mr.C.R.Prasanan, learned counsel for the appellant in A.S.No.321 of 2015 and Mr.N.A.Nissar Ahmed, learned Senior Counsel for Mr.N.A.Nassir Hussain for R1,2, 4 to 7 and Mr.V.I.Abdul Farook (Party in Person) for R3.

12. This Court, keeping in mind the rival contentions put forth by the appellants and the respondents and also the materials available on record viz., oral and documentary evidence in both the suits has paid its anxious consideration to the points for adjudication.



A.S.Nos.772 of 2014 and 321 of 2015

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13. It is the specific case of the plaintiffs that they lent monies to one late V.M.Ismail. However, no steps were taken by them during the life time of the said V.M.Ismail to recover the alleged monies lent to him. Only after his demise, alleging that despite the lawyer's notice issued, the defendants having not come forward to settle the amounts due and payable, the plaintiffs were constrained to approach the Court.

14. The learned counsel for the plaintiffs vehemently contended that the defendants ought to have disproved due execution and passing of consideration, when the defendants had specifically set up a plea that the plaintiffs were total strangers to them and that Late V.M.Ismail had not borrowed any money. The counsel also drew the attention of this Court to the findings of the Trial Court with regard to the plaintiffs' capacity to lend money and their failure to examine any of the attesting witnesses to the promissory notes and contended that no law required that a witness to a promissory note should be examined before the Court and that the burden was only on the defendants since they have expressly denied any knowledge about even the execution of the promissory notes.



A.S.Nos.772 of 2014 and 321 of 2015

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15. Per contra, learned Senior counsel appearing for the defendants supported the findings of the Trial Court and also invited us to various findings with regard to plaintiffs miserably failing in proving due execution of the promissory notes as well as the factum of their lending monies to Late V.M.Ismail. Learned Senior counsel prayed for dismissal of the appeals as the judgment and decree of the Trial court did not warrant any interference.

16. C.M.P.No.21943 of 2022 has been filed by the plaintiffs U/s. 45 of the Indian Evidence Act. In and by the said miscellaneous petition, pending the above appeals, the plaintiffs seek for the signature in Ex.A1 pronote to be compared with signatures of Late V.M.Ismail in Exs.A11 to A14 by an expert. The 2nd respondent has filed a counter to the said application contending that at this belated stage such an application cannot be filed. In fact, the same request was made before the Trial Court also and the Trial Court declined to compare the signatures since the Exs.A11 to A14 were photostat copies. The 3rd respondent filed a counter stating that what was not done before the Trial Court cannot be permitted at the appellate stage.



A.S.Nos.772 of 2014 and 321 of 2015

17. This Court has considered the affidavit filed in support of the application filed U/s. 45 of the Indian Evidence Act as well as the two counter affidavits filed opposing the said request.

18. Or.41 R.27 C.P.C reads as follows:

“ 27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or



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A.S.Nos.772 of 2014 and 321 of 2015

witness to be examined.

(2) Whenever additional evidence is allowed to the produced, by an Appellate Court, the court shall record the reason for its admission.

19. Now it is well settled law that unless the party seeking to produce additional documents at the appellate stage, makes out a strong case, falling under any one of the limbs of Or.41 R.27 C.P.C, the Court should not permit the same. Here, admittedly, the very same documents that were available before the Trial Court are now sought to be sent for expert's opinion. In fact the plaintiffs attempted to have the signatures compared even before the Trial Court, though unsuccessfully. Even along with the appeal, no such application has been filed and only at the fag end, when the appeal have been posted for final hearing, the above CMP has been taken out, seeking a report from the experts, to compare the signatures in the promissory note with the admitted signatures in Exs.A11 to A14. The petitioner has not made out any case, much less a justifiable one to invoke the provisions of Or.41 R. 27 C.P.C. This Court does not find any reason to entertain the request made at this fag end of the proceedings, especially when the appeals have been posted for arguments. C.M.P.21943 of 2022



A.S.Nos.772 of 2014 and 321 of 2015

is therefore dismissed.

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20. On a perusal of the evidence available on record, this Court finds that the defendants have consistently denied the execution of the promissory note by Late V.M.Ismail which was the case pleaded by way of defence in the written statement as well. In such circumstances, the burden is certainly on the plaintiffs to establish not only due execution of promissory notes by Late V.M.Ismail, but also the factum of the plaintiffs having lent the alleged sums and late V.M.Ismail having borrowed the said sums, agreeing and undertaking to repay the same with interest. The plaintiffs could have examined the witness who signed the promissory notes. Infact, it is the specific case of the plaintiffs that the witness, one Mr.Shamim was a good friend of the plaintiffs and infact the amount itself was paid only at one Mr.Mubarrak's house, who also happens to be the brother-in-law of the plaintiff. Even the said Mubarak was not examined by the plaintiffs.

21. One another factor that weighed in the mind of the Trial Court is that the plaintiffs have alleged in unison that their wives' jewellery were



A.S.Nos.772 of 2014 and 321 of 2015

mortgaged to lend money to Late V.M.Ismail and though the plaintiffs had contended that the jewels had been mortgaged with Muthoot Finance, no documentary evidence was filed in support of the same. The Trial Court also disbelieved the version of the plaintiffs that a person would pledge jewels in order to lend money and that the theory itself sounded improbable.

22. This Court also gathers from the evidence on record that the plaintiffs were not even able to confirm the rate of interest agreed to be paid by the Late V.M.Ismail. Also, the case that the money was brought from Palakkad in Kerala to Coimbatore where the same was lent to V.M.Ismail, also stands unproved. Further, this Court is unable to believe such a version that the lender comes to the borrower's city and hands over the money borrowed. It is common knowledge and practice that it is only the borrower who goes over to the lender's place and borrows the required money, across the execution of documents like promissory notes etc. In any event, this Court is unable to find any material whatsoever in support of the plaintiffs' case that the plaintiffs lent monies to Late V.M.Ismail and that the said Late V.M.Ismail executed promissory notes in their favour



A.S.Nos.772 of 2014 and 321 of 2015

agreeing and undertaking to repay the sums borrowed together with interest .

23. This Court does not find any reason to interfere with the findings of the Trial Court which are all well founded and based on oral and documentary evidence adduced by the parties to the lis.

24. In fine, both the Appeals are dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R.J) & (P.B.B.J)
18.04.2023

Internet : Yes
Index: Yes/No
Neutral Citation: Yes/No
To

1.The V Additional District and Sessions Judge,
Coimbatore

2.The Section Officer
VR Section, High Court, Madras



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A.S.Nos.772 of 2014 and 321 of 2015

S.S.SUNDAR, J.,
and
P.B.BALAJI, J
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Pre-delivery judgment in
A.S.Nos.772 of 2014 and 321 of 2015

18.04.2023