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S.A.No.289 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.10.2023

PRONOUNCED ON : 28.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.289 of 2017

Vijayalakshmi @ Vennila

... Appellant

vs.

P.Kandaswamy

... Respondent

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code, praying to set aside the Judgement in A.S.No.10 of 2015 and decree dated 29.07.2015 on the file of the Principal District Judge, Namakkal confirming the judgement and decree dated 07.10.2013 made in O.S.No.317 of 2008 on the file of the Sub-Ordinate Judge of Trichencode.

For Appellant : Mrs.V.Srimathi

For Respondent : Mr.N.Manokaran

J U D G M E N T

The unsuccessful defendant in a suit for recovery of money based on promissory note is the appellant. The respondent herein filed a suit for recovery of money. The suit was decreed by the Trial Court and the findings



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of the Trial Court were affirmed by the First Appellate Court. Aggrieved by the concurrent findings of the First Appellate Court, the appellant is before this Court.

2. According to the respondent/plaintiff, the appellant herein borrowed a sum of Rs.1,50,000/- from the respondent for family expenses on 02.01.2005 and executed a suit promissory note agreeing to pay interest at the rate of 18% per annum. In spite of several demands by the respondent, appellant failed to repay the same and hence, the suit was laid for recovery of money based on the said promissory note.

3. The appellant/defendant filed written statement denying very execution of the promissory note and borrowal of amount by her. The averment of the respondent as if, he demanded the money back was also denied in the written statement. It was further averred by the appellant that her father A.Muthusamy executed a Settlement Deed in respect of a small house in her favour. The brother of the appellant requested the appellant to



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transfer the said house in his name and the same was refused by the appellant. Therefore, the said Ramachandiran developed ill will against appellant and instigated his close associate the respondent to file a suit with concocted forgery document. On these pleadings, she sought for dismissal of the suit.

4. The Trial Court on appreciation of oral and documentary evidences available on record, came to the conclusion that execution of suit promissory note was duly proved and consequently, granted a decree for recovery of money as prayed for. Aggrieved by the same, the appellant herein preferred an appeal in A.No.10 of 2015 on the file of the Principal District Judge, Namakkal. The First Appellate Court affirmed the findings of the Trial Court and dismissed the appeal. Aggrieved by the concurrent findings, the appellant is before this Court.

5. The learned counsel appearing for the appellant submitted that the Courts below erred in granting decree for recovery of money based on



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promissory note when the said original promissory note was misplaced from the custody of the Court and the same was reconstructed with the xerox copy of original promissory note. The learned counsel further submitted that the order reconstructing the original promissory note was passed without issuing any notice to the appellant herein. The learned counsel further submitted that before filing of suit for recovery of money, no pre-suit notice was issued by the respondent demanding payment of money and the same creates suspicion with regard to the genuineness of the suit promissory note. The learned counsel further submitted that pending first appeal, an application was filed by appellant for sending the suit promissory note for comparison of the signature of appellant found thereon with the admitted signature of the appellant in the documents filed along with the application and the said application has not been taken into consideration by the First Appellate Court. The learned counsel further submitted that the difference in the handwriting of scribe in the main body of the promissory note and the handwriting found in bottom wherein the address of the scribe was written do not match with each other and therefore, the genuineness of Ex.A1-



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Promissory Note is very much in doubt.

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6. The suit filed by the respondent is based on promissory note. The execution of the promissory note was totally denied by the appellant/defendant. In such circumstances, it is for the respondent to prove the due execution of promissory note to the satisfaction of the Court. In the case on hand, in order to prove the due execution of suit promissory note, the respondent herein examined himself as PW.1 and he deposed in favour of plaintiff averments. The Attestor to the suit promissory note was examined as PW.2. He clearly deposed about the execution of promissory note by the appellant in his presence and payment of amount by respondent to the appellant. The appellant not only signed in the suit promissory note, she also affixed her left thumb impression in the right hand side top corner of the suit promissory note. The same has been clearly spoken to by the Attestor-PW.2. The appellant not succeeded in discrediting the said witness PW.2 in cross examination. It also appears that PW.2 is one of the sharer of the appellant. In such circumstances, there is nothing on record to disbelieve



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the version of PW.2. The scribe of the suit promissory note was examined as PW.3. He also deposed about the execution of suit promissory note by appellant and receipt of consideration. The appellant is not successful in discrediting the said witness also in cross examination. The evidence of PW.3 namely the scribe of Ex.A1-suit promissory note corroborates the evidence of Attestor-PW.2.

7. It is pertinent to note that proof affidavit of PW.2 was filed on 22.07.2011 and he was cross examined extensively on 23.01.2012. Likewise, proof affidavit of PW.3 was filed on 22.07.2011 and all these things have taken place well prior to alleged misplacement of suit promissory note. PW.2 identified the suit promissory note-Ex.A1 and deposed about it's execution. Therefore, based on the evidence of PW.2 and PW.3, the Courts below rightly came to the conclusion that the respondent succeeded in proving the due execution of suit promissory note. Once the execution of suit promissory note is held to be proved, the respondent is entitled to presumption under Section 118 of the Negotiable Instruments



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Act, 1881 regarding passing of consideration. In fact PW.2 and PW.3 also spoken about passing of consideration. In such circumstances, this Court comes to a conclusion that execution of suit promissory note is duly proved and the same is supported by consideration.

8. As far as the contention raised by the learned counsel for the appellant that reconstruction of misplaced suit promissory note was ordered by the Trial Court without issuing any notice to the appellant is concerned, a perusal of the order passed by the Trial Court ordering reconstruction of misplaced suit promissory note dated 28.01.2013 would suggest that the Court exercised its inherent power under Section 151 of the Civil Procedure Code *suo motu* ordered reconstruction of Ex.A1. In the very same order, the Trial Court directed issue of court notice to both side counsel and directed plaintiff to produce xerox copy of Ex.A1-promissory note for reconstruction. Therefore, it is clear the reconstruction was intimated to both the parties by express notice with direction to reconstruct Ex.A1 with xerox copy. The appellant failed to raise any objection regarding



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reconstruction before the Trial Court. On the contrary, she proceeded with the case and conducted trial by continuing the cross examination of witnesses without any murmur. In these circumstances, the contention raised by the learned counsel appearing for the appellant that reconstruction of suit promissory note was ordered without notice to appellant cannot be accepted.

9. Further the Division Bench of this Court in ***Marakkarutti and others vs. T.P.M. Veeran Kutty and others*** reported in ***MANU/TN/0027/1923 = AIR 1923 Mad 647***, held that the Court has got inherent power to reconstruct the original documents misplaced from it's custody. In this regard, the relevant observation of the Division Bench of this Court reads as follows:-

“2. I think that one can safely start with the proposition that there is inherent power in every Court to reconstruct its own records, and I think it follows that there is inherent power in the Appellate Court to reconstruct the records of the Court from which an appeal lies to it. This power has been recognised in England and in America, which follows the English Common Law, and also in this Country.



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The English case that is quoted on the subject is Douglass v. Yallop 97 E.R. 532. The matter was more fully discussed in an American case, McLendon v. Jones 42 Am. Dec. 640, a judgment of the Court of Alabama which quoted and followed Douglass v. Yallop 97 E.R. 532 and a case which had been decided by the Supreme Court of New York; and that case points out, "Cases must frequently have occurred in which, by accident, the records of Courts of Justice have been destroyed or lost, and it would seem strange if the Common Law had provided no adequate means by which the injuries growing out of such accident could be averted or remedied, " and then goes on to discuss the methods by which the remedy should be provided. I call attention, to it because it states the matter more fully than the other reported cases. In this country the matter came before the Calcutta High Court in 1867 in Babu Guru Dayal Singh v. Durbaree Lal Tewaree (1867) 7 W.R. 18, a judgment of Sir Barnes Peacock, C.J. and Jackson, J. In that case records had been lost in transit from the first Court to the second; the second Court acted on some documents purporting to be office copies which the High Court held were not regularly proved or admitted. The Court held that there were two alternative courses open, to direct the lower appellate Court to receive such secondary evidence of the contents of



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original records as may be forthcoming, or to order an entirely new trial. It decided against the second alternative for very cogent reasons with which we agree.”

In the case on hand, the xerox copy of suit pronote was received and reconstructed and both the parties proceeded with trial without any objection. Even in the proof affidavit of DW.1, she referred about misplacement of suit promissory note and its reconstruction. The appellant neither objected reconstruction nor filed any petition before Trial Court seeking recall of order passed by Trial Court on the ground she was not issued with any notice before reconstruction. She simply proceeded with further cross examination of PW.2 and PW3. Therefore, I do not find any infirmity in reconstruction of original promissory note misplaced from the custody of the Court.

10. It is also submitted by the learned counsel appearing for the appellant that respondent failed to issue any pre-suit notice demanding payment of amount due under the promissory note and the same creates doubt with regard to the genuineness of suit promissory note. When the



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respondent/plaintiff was examined as PW.1, he clearly deposed that since he got information that appellant/defendant was attempting to alienate her property, in order to obtain attachment of her property, the suit was filed immediately without issuing any pre-suit notice. When the reason for filing the suit without issuing pre-suit notice is very well explained by the respondent as PW.1, the said contention of the learned counsel for the appellant also rejected.

11. The appellant herein filed an application under Order 41 Rule 27 of Civil Procedure Code before First Appellate Court to mark certain documents containing her admitted signature for comparing the same with signature of the appellant found in suit promissory note. The said application was filed on 14.07.2015. As submitted by the learned counsel for the respondent the said application has not been numbered and in fact, the appeal itself was taken up for final hearing on 14.07.2015 as seen from the preamble portion of the judgement and decree and upon hearing the arguments, the final judgement was passed on 29.07.2015. When appellant



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has not taken any steps to get the said application numbered, before appeal is taken up for hearing, the appellant cannot complain that his application filed under Order 41 Rule 27 was not considered by the First Appellate Court. Further, when appellant had ample opportunity before the Trial Court to file those documents and seek comparison of signature found in the promissory note with the admitted signatures, she has not taken any steps to do so before the Trial Court. Though the appeal was filed before the First Appellate Court on 25.06.2014, the appellant has not taken any steps to file a petition to raise additional evidence till 14.07.2015, when the appeal is taken up for final disposal.

12. In such circumstances, the contention raised by the learned counsel for the appellant as if, the petition filed by her for raising additional evidence was not at all considered by the First Appellate Court is not acceptable to this Court. The application was not numbered till the appeal is taken up for hearing. The appellant also failed to raise any grounds in memorandum of second appeal regarding the application filed by her for



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raising additional evidence before the First Appellate Court. In these circumstances, the said contention raised by the learned counsel for the appellant is also rejected.

13. In view of the discussion made earlier, I do not find any substantial question of law arising for consideration in this second appeal to enable this Court to interfere with the concurrent findings of the Courts below. Accordingly, the Second Appeal is dismissed.

In Nutshell:-

(i) The Second Appeal is dismissed.

(ii) In the facts and circumstances of the case, there shall be no order as to costs.

28.11.2023

Index : Yes
Speaking order : Yes
Neutral Citation : Yes
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S.SOUNTHAR, J.

dm

To

- 1.The Principal District Judge,
Namakkal.
- 2.The Subordinate Judge,
Trichencode.

Pre-delivery judgement in
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