



S.A.No. 92 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	<i>28.08.2024</i>
<i>Pronounced on</i>	<i>20 .09.2024</i>

CORAM:

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No.92 of 2022
and C.M.P.Nos.2036 of 2022

1. G.Krithika
2. R.K.Swetha
3. D.Sarojini

... Appellants

Vs.

S.P.Chitra

... Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, against judgment and decree dated 24.08.2021 passed in A.S.No.114 of 2019 on the file of the III Additional District Judge, Coimbatore in reversing the judgment and decree dated 17.06.2019 dismissing the suit in O.S.No.1537 of 2013 on the file of the II Additional Sub-ordinate Judge, Coimbatore.

For Appellants : Mrs.S.Yogalakshmi

For Respondent : Mrs.A.L.Gandhimathi
Senior Counsel
for M/s.S.Meenakshi



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JUDGMENT

The defendants are the appellants in the second appeal. The respondent / plaintiff filed a suit for recovery of money based on the suit promissory note dated 28.10.2011 said to have been executed for a sum of Rs.7,00,000/-. The respondent / plaintiff has pleaded that one Ramachandran had borrowed a sum of Rs.7,00,000/- from the plaintiff on 28.10.2011 and executed the promissory note on the same date in favour of the plaintiff and she agreed to repay the same with interest @ 18% per annum. On 18.06.2012 the executant of the promissory note Ramachandran died. The defendants are the wife, daughter and mother of the deceased Ramachandran and they have been impleaded as legal heirs of late Ramachandran and the claim has been made against them for seeking a decree for the suit amount to be payable by the defendants from the estates of late Ramachandran inherited by them. An interest of a sum of Rs.9,62,500/- has been claimed.

2. The defendants 1 and 2 have contested the suit by raising a defense that the suit has been filed just to harass the defendants on an imaginary claim. The signature on the suit promissory note is not the signature of late Ramachandran. The defendants did not know the alleged scribe or witnesses shown in the promissory note. The suit promissory note is a fabricated one and created by colluding with the alleged witnesses and the scribe.



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3. Late Ramachandran, his father Duraisamy and his brother Vijayakumar were carrying on business under the name and style RVM Textiles Pvt. Ltd., at Punjai Pulimapatti. As they sustained huge loss, Duraisamy and Vijayakumar wanted to get out of the business. Hence, Ramachandran along with the first defendant took over all the liabilities of the said company and was running the business in the company's name Sriram Air Compressors (Cbe) Pvt., Ltd. The said company had availed loans from M/s. Corporation Bank, IF Branch, Coimbatore. Ramachandran stood as a guarantor and he mortgaged his property situated in Upplipalayam, Coimbatore as security for the loan. The mortgage is still pending. However the plaintiff had obtained an order of attachment before the judgment on the same property without bringing the existing mortgage to the notice of the Court. The first defendant knew Subbiah who is the husband of the plaintiff as the acquaintance of her father-in-law Duraisamy, as Subbiah was supplying raw material to the Mill. After the business was taken over by the first defendant's husband, Subbiah pressurized the first defendant's husband to settle dues not supported with any proof. The first defendant's husband Ramachandran died on 18.06.2012. This promissory note has been concocted by the said Subbiah in the name of the plaintiff who is his wife.



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WEB COPY 4. The third defendant has taken up a plea that the deceased Ramachandran was never in need of huge money and hence he need not borrow any money from the plaintiff. The plaintiff approached the defendants for repayment of money and they sought time for payment. In the meanwhile the plaintiff had filed the suit as though the amount has been borrowed by the first defendant's husband Ramachandran on a promissory note.

5. On the basis of the above pleadings, the trial Court has framed the following issues:

- i) *Whether the suit promissory is true and valid ?*
- ii) *Whether the plaintiff is entitled for the suit claim ?*
- iii) *To what relief the plaintiff is entitled?*

6. During the course of trial on the side of the plaintiff two witnesses have been examined as P.W.1 and P.W.2 and Exs.A1 to A5 were marked. On the side of the defendants one witness has been examined as D.W.1 and one document was marked as Ex.B1. At the conclusion of the trial, the trial Court dismissed the suit. However, on the first appeal filed by the plaintiff, the first appellate Court reversed the judgment of the trial Court and decreed



the same.

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7. Now the defendants as appellants have filed this Second Appeal by stating that the first appellate Court has not appreciated the matter in a proper perspective and raised some questions of law.

8. The Second Appeal has been admitted on the following Substantial Questions of Law :

“ 1. *Whether the Lower Appellate Court had erred in observing that the lower Court should not have made adverse inference as per Section 114(g) of the Indian Evidence Act ?*

2. *Whether the lower Appellate Court had erred in observing that the Memo of Commissioner and the expert opinion cannot be considered as evidence per se as per Order 26 and Rule 10(2) CPC?*

Arguments of the Appellants:

9. Mrs.S.Yogalakshmi, the learned counsel for the appellants / defendants, submitted that the suit has been filed by the legal heirs of one Ramachandran who alleged to have executed the suit promissory note. Prior to filing of the suit, the appellants were not given any pre-suit notice. Even though the trial Court has rightly dismissed the suit, the appellate court has



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decreed the suit on the finding that the expert's opinion obtained in pursuant to the steps taken by the plaintiff has not been marked by the defendants. It is the plaintiff who had filed an application to send the suit promissory note for expert opinion, and the expert's opinion was not in his favour. So the plaintiff did not prove the essential facts of the case and the trial Court has no right to place a reverse burden upon the appellants and state that the defendants have failed to prove that the signature on the suit promissory notes is not the signature of the deceased Ramachandran. The above appreciation of evidence and the basis on which the appeal has been allowed itself is perverse and hence the appeal should be allowed.

Arguments of the respondents:

10. Mrs.A.L.Gandhimathi, the learned Senior Counsel for the respondent, submitted that the lower court has dismissed the suit only on the ground that the plaintiff did not mark the expert opinion and will go against him. However, the appellate court has rightly appreciated the validity of the expert's evidence and has proceeded to appreciate the material available on record and decreed the suit. Even the expert opinion is a weak piece of evidence, and the First Appellate Court is right in ignoring the same and decreed the suit on the basis of oral evidence. The Appellate Court had also



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appreciated the other evidence available on record and then only proceeded to decree the suit, and hence the appeal should be dismissed.

Discussion:

11. The suit is based upon a promissory note executed by the deceased Ramachandran as the husband / father / son of the appellants 1 / 2 / 3 respectively. Whenever a suit promissory note is filed and signature on the promissory note is admitted, the claimant who is the plaintiff has got an initial presumption in his favour in accordance with Section 118 of the Negotiable Instruments Act. In the instant case the appellants who are the legal heirs of the deceased Ramachandran who alleged to have executed the promissory note, have denied the very execution of the promissory note itself. Hence, the plaintiff is not entitled to get the initial presumption under Section 118 Negotiable Instruments Act Act. So the burden would lie upon the plaintiff to prove whether the suit promissory note itself has been executed by the deceased Ramachandran for the alleged considerations shown therein.

12. On being not satisfied with the plaintiff's evidence, the trial Court dismissed the suit. While dismissing the suit, the learned trial Judge has observed that the plaintiff has not proved the execution of the promissory note. Even though the appellants who are the defendants in the suit had



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denied the signature in the promissory note, they did not resort to the course of sending the disputed signature for the examination of a handwriting expert. On the other hand, with all confidence it is the plaintiff who had taken a step to get an expert opinion of the signature on the alleged promissory note. Unfortunately, it went against the plaintiff's interest and the expert had given an opinion stating that the admitted signature of the deceased Ramachandran does not tally with the disputed signature on the suit promissory note. As the opinion was adverse to the plaintiff's interest, the plaintiff proceeded to rely upon the substantial evidence of the witnesses on his side. However, the learned trial Judge had rendered his findings taking on the failure of the plaintiff to mark the expert opinion as evidence.

13. Curiously the learned trial Judge has invoked the application of Section 114 (g) of the Indian Evidence Act, 1872 against the plaintiff. Section 114 (g) of the Indian Evidence Act would state that if a party could produce any evidence and if it is not produced, the Court can make a presumption that the evidence is unfavourable to the person who withholds the same. For the sake of clarity section 114(g) of the Indian Evidence Act, is extracted hereunder:

“ 114. Court may presume existence of certain facts. — The Court may presume the existence of any fact which it thinks likely to have



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happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The Court may presume:

.....

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. ”

14. Before applying Section 114(g) of the Indian Evidence Act, the trial Court ought to have appreciated whether the above evidence has been withheld by the plaintiff. In fact the expert's opinion has been brought to the Court through the Commissioner and that was very much available before the Court, though neither of the parties nor the Court had chosen to mark it as a document. As the plaintiff knew that it was not in his favour, he opted not to mark the same. While exercising the choice of producing the best evidence before the Court, the plaintiff has chosen to produce the oral evidence of his witnesses and not the opinion of the handwriting expert, though she had taken the efforts of sending the document for getting the expert's opinion. The law of evidence does not cast a duty upon the plaintiff that the signature of the promissory note should always be proved based on the expert's opinion and not otherwise. In fact, Section 47 of the Indian Evidence Act comes to the rescue of the plaintiff who does not have the advantage of examining the person who is alleged to have signed the



document. Section 47 of the Indian Evidence Act would state that the opinion of a person who acquainted with the handwriting or signature of a person who is alleged to have written a document would assume relevance. Section 47 of the Indian Evidence Act would read as under:

“47. Opinion as to hand-writing, when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.”

15. Among the third persons whose opinions are relevant for proving the signature on the document, the expert's opinion also assumes relevance under Section 45 of the Evidence Act. The plaintiff, who has filed the suit while exercising his option between Section 45 and 47 of the Indian Evidence Act, has proceeded to rely on Section 47 of the Indian Evidence Act and chosen to take the course of examining the witnesses who are said to have acquainted with the signature of the deceased Ramachandran.

16. While the facts are being so, the learned trial Judge without adverting into the appreciation of oral evidence has simply cut short the exercise of appreciation by resorting to Section 114(g) of the Indian Evidence Act. So far as Section 114 (g) of the Indian Evidence Act is concerned it



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should be the evidence which was withheld by either of the parties despite it being the best evidence for the matter in issue.

17. Mrs.A.L.Gandhimathi, the learned Senior Counsel for the respondent / plaintiff, submitted that the expert's opinion being a piece of evidence, the plaintiff did not choose to rely on the same even though she had taken efforts to obtain the same. According to the plaintiff, the best evidence was the oral evidence of the witnesses and hence she had chosen to examine them. Had the plaintiff withheld to examine any of the witnesses who could express the opinion about the handwriting alleged to have been affixed by the deceased Ramachandran that might attract Section 114(g) of the Indian Evidence Act. Further, the opinion of the handwriting expert is very much available before the court and the Court could have exercised its power under Section 165 of the Indian Evidence Act, if it considered it relevant and marked the same by following the procedure contemplated under Section 165 of the Indian Evidence Act and then appreciate the same. So it is not a material withheld by any of the parties or taken out of the sight of the Court.

18. While conducting a trial and deciding a case, the Court should also be proactive in the interest of substantial justice. If in the opinion of the Court, marking the expert's opinion by resorting to sec.165 of the Indian



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Evidence Act is unnecessary, the right way would be to appreciate the evidence placed by the parties. In such case, it is right for the plaintiff to choose the best evidence for his side and place it before the court.

19. There is a vast difference between withholding a piece of best evidence that would prove a fact and choosing the best evidence and make it available for proving a fact. Admittedly, the expert's evidence was not in favour of the plaintiff and hence it is unfair to expect the plaintiff to be imprudent and mark it as an exhibit of his side.

20. It is not even a situation where the defendants have issued notice to produce document available with the plaintiff and the plaintiff had refused to produce and withheld it. So there is no question of taking any adverse inference against the plaintiff. The trial Judge ought to have appreciated the oral evidence before arriving at a conclusion about the validity and genuineness of the suit promissory note.

21. In fact, the trial Court ought to have framed issues as to whether the suit promissory note has been executed by the deceased Ramachandran and fixed the burden on the plaintiff. The trial Court has omitted to frame such an important issue. When the matter reached the first appellate Court,



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the first appellate Court shifted the blame upon the second defendant's father's failure to summon the handwriting expert in order to bring the expert evidence before the Court. However, the first appellate Court relieved the plaintiff from the improper presumption taken against him by the trial court. The above approach of the first appellate court is no doubt correct. The first appellate Court had also made a right observation that the trial Court could have called the expert to give evidence, if in the opinion of the Court the expert's report is relevant and necessary to decide the facts in issue and **the first substantial question of law is thus answered.**

22. The next substantial question of law in respect of the observation of the first appellate Court is that the memo of the Commissioner and the expert opinion cannot be considered as evidence *per se* under Order 26 Rule 10(2) of CPC. I feel that the said observation has any significance only when the Court adverted to mark the expert's opinion as evidence either *suo motu* or through the expert by summoning him. It is not a case where the appointment of the Commissioner is required to record evidence by standing in the shoes of the court. Hence the application of Order 26 Rule 10(2) is extraneous to the situation in hand.

23. In the case on hand, the Commissioner has been appointed for the



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purpose of co-ordinating between the court and the office of the expert for subjecting the documents the examination of the expert and getting his opinion. It appears that the commissioner has received the cover containing the opinion and the documents after the expert has examined and given his opinion and handed it to the court, however without any report. It would have been fine if the Commissioner had given a report while handing over same to the court. Even then, his report would only speak about the manner in which he had taken the document for examination and how he had returned the same to the Court along with the opinion of the experts. Had the Commissioner inspected any place based upon the order of the Court and noted down any features for reducing oral evidence, such report would assume more significance and relevance. Obviously because, the report so filed by the Commissioner would substitute the oral evidence of the parties.

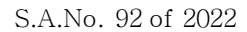
24. What was done by the Commissioner in this case is a function contemplated under Order 26 Rule 10(b) of CPC. It is nothing but a ministerial assistance of taking the documents with the seal and approval of the Court to the expert and then bringing it back once the examination is done and the report is ready and duly authenticated by the expert. So the



Commissioner's report or his oral evidence does not have anything to do with the opinion of the expert on the disputed signature on the suit promissory note. So the first appellate Court need not have confused to invoke Order 26 Rule 10(2) of CPC for the functions done by the Commissioner under Order 26 Rule 10(b) of CPC. The appropriate provision applicable to his functions in this case is Order 26 Rule 10(b) of CPC and hence the discussion touching upon Order 26 Rule 10(2) of CPC is unnecessary. **The second substantial question of law is thus answered accordingly.**

25. It is true that the defendants could have taken advantage of calling the expert who has given his opinion as to the signature on the promissory note if the defendants thought it fit that it would support their defence. Had the first appellate Court arrived at a conclusion that the failure on the part of the defendants to mark the expert opinion and call upon the expert to adduce evidence is the clinching factor to decide the issue in favour of the plaintiff, that would not have been correct. Because the burden is very much on the plaintiff to prove that the suit promissory note is signed by the deceased Ramachandran and she cannot rest on the failure on the part of the defendants in establishing their defence.

26. The first appellate Court had ventured to appreciate the oral



27. The learned counsel for the appellants / defendants submitted that it would be in the best interest of parties if the matter is remanded back to the the trial Court to allow the defendants to mark the expert's evidence or to direct the Court to take it as an evidence and re-appreciate the matter. As the expert evidence is very much available on record, the defendants did not think it fit to file an application to consider that as additional evidence in their



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favour even before the first appellate court. Even if the defendants have brought the handwriting expert's opinion as evidence that would not do marvels, because it is only a weak piece of evidence. So far as the Court's power under Section 165 of the Indian Evidence Act is concerned, it is discretionary and not mandatory. Hence the Court cannot be compelled to mark the expert's evidence as court exhibit and appreciate the same.

28. Except the wrong application of Order 26 Rule 10(2) of CPC for the situation that has arisen in this case and which does not alter the course or result of the suit, all other appreciation and observations made by the first appellate Court on the judgement of the trial Court is valid and proper in the context of the grounds of appeal. Hence the conclusion arrived by the first appellate court as an outcome of such an exercise, in my opinion does not suffer from any infirmity.

29. In so far as the request to remand the matter back to the trial Court is concerned, this Court does not feel any compelling necessity. As the first appellate Court has rightly dealt the matter and appreciated the substantial evidence already available on record with the other corroborative evidence and circumstances for arriving at its conclusion, I do not find any infirmity.

As I find that the first appellate Court has properly appreciated the grounds



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of appeal and rectified the defective appreciation of evidence made by the trial Court and arrived at a right conclusion of decreeing the suit, I find no reason for interference.

30. In the result, the Second Appeal is dismissed and the judgment and decree dated 24.08.2021 passed in A.S.No.114 of 2019 on the file of the III Additional District Judge, Coimbatore, is hereby confirmed. No costs. Connected miscellaneous petition is closed.

20.09.2024

Index:Yes/No
Speaking Order / Non-speaking order
Neutral Citation Case : Yes / No
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To:

1. The III Additional District Judge, Coimbatore.
2. The II Additional Sub-ordinate Judge, Coimbatore.



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R.N.MANJULA, J.

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Pre-delivery judgment made in
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