



S.A.No.387 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2024

CORAM:

THE HON'BLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.387 of 2013

G.Vasu

... Appellant

Vs.

1.Prabhavathy

2.Manimegalai

... Respondents

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree of the Principal District Judge of Tiruvallur dated 03.07.2012 in A.S.No.70 of 2010 confirming the Judgment and Decree of the Subordinate Judge of Ponneri dated 04.03.2009 in O.S.No.59 of 2006.

For Appellant : Mr.Vigneshwar,
for Mr.V.Nicholas

For Respondents : Mr.E.Prabu

JUDGMENT

The present second appeal arises out of the Judgment and Decree dated 03.07.2012 passed in A.S.No.70 of 2010 on the file of the learned



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Principal District Judge, Tiruvallur in confirming the judgment and decree of the court of Subordinate Judge, Ponneri in O.S.No.59 of 2006 dated 04.03.2009.

2. For the sake of clarity and convenience, the parties will be referred to as their ranks in the suit.

3. O.S.No.59 of 2006 is a suit for recovery of money on the foot of promissory note. It is the case of the plaintiff that on 10.05.2005, the defendants borrowed a sum of Rs.1,00,000/- agreeing to repay the amount together with interest at the rate of 24% per annum. The purpose of the loan was to settle the family debts, education of their daughter and for other expenses. Despite oral demand, since the defendants did not repay the amount, the plaintiff presented the suit.

4. The defendants filed separate written statements. According to the first defendant, he had not borrowed any amount from the plaintiff and the signature found in the document is not his signature. Similar defence was



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taken by the second defendant. On the basis of these pleadings, the following

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issues were framed:

- “1. வழக்கு மூலம் உள்ளதா?
2. தாவா நிலைக்கத்தக்கதா?
3. தாவாவில் கோரியவாறு வாதிக்கு தொகை கிடைக்கக்கூடியதா?
4. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் என்ன?”

5. On the side of the plaintiff/Prabavathy, she examined herself as PW1 and the attesting witness/Mr.Sampath as PW2 and Pro Note/Ex.A1 was marked. The first defendant examined himself as DW1 and examined one Purushothaman as DW2. The second defendant examined herself as DW3. On the side of the defendants, Ex.B1 to Ex.B7 were marked.

6. On the basis of the pleadings and evidence, the trial judge decreed the suit as prayed for on 04.03.2009. Aggrieved by the same, the first defendant alone filed an appeal before the learned Principal District Judge at Thiruvallur in A.S.No.70 of 2010.



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7. After hearing both sides, the learned first appellate judge dismissed the appeal confirming the decree of the trial court. Against the said judgment and decree, the present second appeal was presented before this Court.

8. On 05.04.2013, this Court had ordered notice regarding admission and finally, it was admitted on the following substantial questions of law on 12.04.2022:

“(a) Whether both the Courts below were right in exercising power under Section 73 of the Indian Evidence Act, 1872 by comparing the disputed signature of the 1st defendant with the signature found in the vakalat and the written statement, without calling for a contemporaneous document with the admitted signature of the 1st defendant and sending it for an expert opinion?

(b) Whether both the Courts below went wrong in fixing the liability against the 2nd defendant without properly appreciating the preponderance of probabilities



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*based on the oral evidence and the documents relied upon
by the 2nd defendant?*

*(c) Whether the findings of both the Courts
below suffers from perversity due to improper
appreciation of the oral and documentary evidence?”*

9. I heard Mr.Vigneshwar, learned counsel for Mr.V.Nicholas learned counsel for the appellant and Mr.E.Prabhu learned counsel for the respondent.

10. Mr.Vigneshwar would commence his argument by submitting that the document under Ex.A1 is not a pro-note but one of a “bond”. He would submit that since the document has been attested by witnesses, the character of the document under Ex.A1 described as a pro-note would become a bond and therefore, it ought to have been valued in accordance with the Stamp Act, since bond has higher value than that of a pro-note and that not having been done, it is fatal to the case of the plaintiff. His second submission is that the signature of the first defendant under Ex.A1 differs



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and the court committed an error in comparing the document/Ex.A1 with the vakalat, written statement and proof affidavit. Therefore, this error entitles him to have the appeal accepted by this court and the suit has to be dismissed.

11. Mr.E.Prabhu would submit that insofar as the defence on bond or a pro-note is concerned, it had not been raised in the written statement and with respect to the stamp duty, his submission is that the judgment of the Supreme Court in *Javer Chand and Others vs. Pukhraj Surana, (1962) 2 SCR 333* would apply and finally he would state that it does not lie in the mouth of the first defendant to argue that the court had compared the signatures because he had invited the court to compare the same.

12. I have carefully considered the arguments on either side and gone through the documents.

13. I agree with Mr.Prabhu that the aspect of bond and the pro-note had not been raised before the trial court or the lower appellate court.



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However, being an interesting point, I permitted Mr.Vigneshwar to make his submission on the same.

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14. The argument of Mr.Vigneshwar is that since the document has been attested by two witnesses, the document metamorphosis itself from that of a pro-note to a bond. Mr.Vigneswar would very stoutly place reliance upon the Full Bench Judgment of the Madhya Pradesh High Court in ***Santsingh vs. Madandas Panika and Others, AIR 1976 MP 144.***

15. A careful perusal of the Full Bench Judgment of the Madhya Pradesh High Court shows that it had culled out the difference between a pro-note and a bond. In the said judgment, the learned Chief Justice speaking for the Full Bench held as follows:

“ 18.As a result of the above discussion, we would answer the two questions set out in the beginning as follows:—

(1)An instrument is a promissory note if there are present the following elements:

(i) There should be an unconditional undertaking to pay;

(ii) The sum should be a sum of money and should be certain;

(iii) The payment should be to the order of a person who is certain, or



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to the bearer of the instrument; and

(iv) The maker should sign it.

(2) An instrument is a bond within the meaning of Section 2(5)(b) of the Stamp Act, if the following elements are present:—

(i) There must be an undertaking to pay;

(ii) The sum should be a sum of money but not necessarily certain;

(iii) The payment will be to another person named in the instrument;

(iv) The maker should sign it;

(v) The instrument must be attested a witness; and

(vi) It must not be payable to order bearer.

(3) A bond has two distinguishing features:—

(i) Positive - it must be attested by a witness.

(ii) Negative - it must not be payable to order or bearer.

(4) For the purposes of the Stamp Act, it is only the definition as contained in Section 4 of the Negotiable Instruments Act which is to be read as if reproduced verbatim in Section 2(22) of the Stamp Act, but no other provision of the Negotiable Instruments Act can be read Section 2(22) of the Stamp Act, because of the restrictive words “as defined in.”

(5) Explanation (1) of Section 13 of the Negotiable Instruments Act may have own its own effect and impact on a promissory note for the purposes of the Negotiable Instruments Act, but it has nothing to do with the “definition” of a promissory note and, therefore, that explanation is wholly relevant for the purposes of the Stamp Act. It cannot, therefore, be said that every promissory note must be excluded from the definition of Stamp Act, unless it contains an express prohibition within the meaning of the explanation to Section 3 of the Negotiable Instruments Act.”



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16. I searched in vain as to whether the Full Bench has held that if a pro-note is attested, it becomes a bond. Nowhere in the said judgment such a position has been laid down and the judgment having been rendered by such eminent Judges, I would have been surprised to find such a finding also.

17. The essential difference between a pro-note and a bond is that in respect to the bond, it requires an attestation by a witness and it must not be payable to an order or bearer. Insofar as a pro-note is concerned, it must be paid on demand to an order or bearer authorised by the order.

18. In this particular case, going through Ex.A1, I am able to see that the defendants have agreed to repay the amount “on demand” to the plaintiff or any person authorised by the plaintiff. This shows that it is an “on demand promissory note”.

19. I am unable to stretch the definitions of a bond and a pro-note to such an extent that even if a document answers all the characteristics of a pro-note, it would become a bond by the very fact that it has been attested. A



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Pro-note does not require attestation, but for the sake of safety and to prevent all kinds of fancy defences that would be taken in a pro-note suit, especially as in the present case, the signatures of the attesting witnesses are taken so that in case of any dispute at a later date, the evidence of the attesting witnesses will be used for the purpose of proving the document. In fact, a reading of *AIR 1976 MP 144* cited *supra* does not support the case of the defendant but goes in favour of the plaintiff. Therefore, I conclude that it is a demand promissory note and not a bond as sought to be argued by Mr.Vigneshwar.

20. It has to be further noted that the purpose for Mr.Vigneshwar arguing this point that it is a bond and not a promissory note is because in case, I had read the document as a bond, then by virtue of Section 6 of the Stamp Act, higher stamp duty will be payable for bond. Therefore, the net effect of the argument of Mr.Vigneshwar is that Section 35 of the Stamp Act is attracted and consequently, the document is inadmissible in evidence.



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21. Insofar as Stamp Act is concerned, if a document is insufficiently stamped or unstamped, the document can never be received as an evidence for any purpose including collateral purpose which is not the case, if a document is not registered. An unregistered document can be read under collateral purpose by virtue of proviso to Section 49, whereas the bar under Section 35 is absolute. Having said this, I have to look further as to whether any objection was taken by the first defendant at the time of marking of the document under Ex.A1.

22. On a careful perusal of the evidence of the plaintiff PW1 through whom the document was marked, I do not find any objection at all. On the contrary, the evidence of PW1 shows that placing reliance upon the document Ex.A1, questions were asked to PW1 with respect to the document. This shows that the document was not only accepted by both sides, but the plaintiff and PW2, the attesting witness had been put through the ordeal of cross examination on the basis of the document. This shows that both the



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parties had relied on the document. Consequently, Section 36 of the Stamp

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Act would kick in.

23. In this particular case, though I am satisfied that it is a pro-note, since Mr.Vigneshwar made a submission on the inadmissibility of the document, I am constrained to go into the issue of Section 36. As per Section 36, if a document is not objected at the time of admission, it cannot be objected at a later stage. I have to enter a caveat here. By the mere fact that it is admitted during the interlocutory proceedings does not mean, objection cannot be raised at the time, when the evidence is recorded in the suit. However, that situation does not arise here because both the parties merrily joined at trial on this issue and had examined themselves as well as subjected themselves to cross-examination.

24. The issue whether the party having permitted the admission of a document and thereafter, can turn around and plead that it is inadmissible, had been settled by the four judges Bench of the Supreme Court in *Javer*



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Chand and Others vs. Pukhraj Surana, 1962 2 SCR 333. The relevant

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portion of the said judgment is extracted hereunder:

*“That section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception recognised by the section is the class of cases contemplated by Section 61, which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the court, rightly or **wrongly**, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the court. The court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case.”*



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25. In this particular case, as the objection had not been taken at the time of admission of the document, Section 36 would operate and therefore, the objection of Mr.Vigneshwar has to fail.

26. Now we turn to the sheet anchor of the argument of Mr.Vigneswar that the court did not have the power to compare the document with the written statement, vakalat and proof affidavit and come to a conclusion that it was the signature of the first defendant. It is too well settled but nonetheless since it has been argued, I have to reiterate that insofar as comparison of documents under Section 73 of the Indian Evidence Act is concerned, the Court should compare the document which has been put-forth in the suit with the document which is contemporaneous to the transaction.

27. In this particular case, the said position had been changed on account of the fact that the defendant/appellant's counsel himself had invited the court to compare Ex.P1/Pro-note with the vakalat, Proof-affidavit and



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written statement. Having invited the court to compare the documents, I find it surprising that in the second appellate stage, it is argued that the court committed an error adopting the request that has been made by the defendant/appellant's counsel itself.

28. This is a suit for recovery of money based on a pro-note. The initial burden of proof lies on the plaintiff to prove that the document had in fact been executed. Section 118 of the Negotiable Instruments Act does not demand the court to presume that the document is true. It places the initial burden on the plaintiff to prove that the document had been executed and presumption under Section 118 arises only thereafter.

29. In this particular case, I have gone through the proof affidavit of PW1, where she has categorically stated that it was the defendants who had executed the document, as well as the evidence of PW2, Mr.P.K.Sampath, the attesting witness. Both have spoken about the execution



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of the document and the borrowal of the amount by the defendants. Once the initial burden had been discharged by the plaintiff, automatically the onus shifts to the defendants by virtue of Section 118 of the Negotiable Instrument Act.

30. Apart from requesting the court to compare the document, the defendants did not even lift a little finger to discharge the burden caused on him. No application was taken out by the first defendant for the purpose of comparison of the signature on the disputed document under Ex.A1 with his signature. The defendants ought to have produced a contemporaneous document along an application and should have then requested the court to send the document for forensic examination. Not having done that and having missed the bus at Ponneri, it is too late for Mr.Vigneshwar to attempt to board the same at Parry's Corner. The argument is one in vain and does not appeal to me.



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31. In a money suit, the court should normally impose costs but as pointed out by Mr.Vigneshwar, no pre-suit notice demanding repayment of the amount had been issued. Therefore, I have to presume that there had been an oral demand. As notice had not been issued, the plaintiff would not be entitled for the cost in the suit alone. The plaintiff would be entitled for the cost in the first appeal as well as in the second appeal.

32. In fine, the judgment and decree of the trial court in O.S.No.59 of 2006 dated 04.03.2009 and that of the lower appellate court in A.S.No.70 of 2010 dated 03.07.2012 stands confirmed. Second appeal is dismissed. The plaintiff will be entitled for cost in the first appeal as well as in the second appeal and would not be entitled for the cost in the suit.

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Speaking order/Non-speaking order

Neutral Citation : Yes/No



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To



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- 1.The Principal District Judge of Tiruvallur
- 2.The Subordinate Judge of Ponneri



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V.LAKSHMINARAYANAN, J.

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