



S.A.(MD)No.254 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 24.01.2025

PRONOUNCED ON : 31.01.2025

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

S.A.(MD)No.254 of 2022 &
C.M.P.(MD)No.3422 of 2022

1.Y.Amaladass

2.A.Nithya

...Appellants

vs.

1.Y.JosephJesuraj

2.J.Tamilselvi

...Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure praying to set aside the Judgement and Decree in A.S.No.47 of 2019 dated 21.10.2021 on the file of the I Additional District Judge, Madurai confirming the Judgement and Decree in O.S.No.190 of 2012 dated 11.08.2018 on the file of the II Additional Subordinate Judge, Madurai.

For Appellants : Mr.J.Barathan
for Mr.V.Muthu Kamatchi



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For Respondents : Mr.S.Meenatchi Sundaram
Senior Counsel
for Mr.K.Samidurai

J U D G E M E N T

This Second Appeal was filed aggrieved over the Judgement and Decree dated 21.10.2021 passed in A.S.No.47 of 2019 on the file of the learned I Additional District Judge, Madurai.

2. For the purpose of easy reference, the appellants herein may be referred hereinafter as the defendants and the respondents herein may be referred hereinafter as the plaintiffs.

3. Initially, the plaintiffs filed a suit in O.S.No.190 of 2012 before the II Additional Subordinate Judge, Madurai. The brief facts of the case of the plaintiffs are as follows.

3.1. The plaintiffs are husband and wife. The 1st defendant is the brother of the 1st plaintiff and the 2nd defendant is the wife of the 1st defendant. On 02.08.2010, the defendants borrowed a sum of Rs.



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5,00,000/- from the plaintiffs as a loan for discharging previous debt, development of their business and to meet urgent expenses. The defendants agreed to repay the same with interest at the rate of 18% per annum and they have also executed a demand promissory note on the same date. The plaintiffs demanded the defendants to repay the loan amount with interest. The defendants have not taken any sincere effort to repay the same. Hence, the plaintiffs sent a lawyer notice to the defendants on 15.06.2011 and 31.07.2011. The defendants sent their reply notices to the plaintiffs on 27.06.2011 and 12.08.2011 respectively. Since the defendants failed to repay the loan amount, the present suit.

4. The defendants filed their written statement before the Trial Court and the brief averments in the written statement are as follows.

4.1. The relationship between the parties are admitted. The defendants never borrowed the loan of Rs.5,00,000/- on 02.08.2010 from the plaintiffs. On 30.04.2007, the 1st defendant obtained Rs.3,00,000/- as mortgage loan from the 1st plaintiff and in this regard the 1st defendant



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executed a mortgage deed in respect of his property. With regard to the same, the 1st plaintiff filed a suit in O.S.No.185 of 2012. The 1st defendant had paid the interest for Rs.3,00,000/- and also repaid a sum of Rs.1,50,000/- - in the principal amount. On 01.05.2011, the plaintiffs, the mother of the 2nd plaintiff and two others, namely, Regina and Deisy trespassed into the defendants' house and assaulted them in filthy language. The defendants have also lodged a criminal complaint in this regard. Keeping the same in the mind, the plaintiffs forged the signatures of the defendants in the suit promissory note and filed the suit. The suit is barred by limitation.

5. The plaintiffs have also filed reply statement denying the fact that the first plaintiff and his sister trespassed into the defendant's house and threatened the defendants.

6. Before the Trial Court, on behalf of the plaintiffs, PW1 to PW3 were examined and Exs.A1 to A6 were marked. However, on behalf of the defendants, no one was examined and no documentary evidence was



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marked. Court Witness Ex.C1 was marked.

7. On completion of pleadings, the Trial Court framed the following issues.

- "(i) Whether the suit promissory note was bogusly created?*
- (ii) Whether the plaintiffs are entitled for the relief of recovery of suit money from the defendants?*
- (iii) What are the other reliefs the plaintiffs are entitled to?"*

8. After hearing both the parties, the Trial Court came to the conclusion that the promissory note is not bogusly created and decreed the suit as prayed for by the plaintiffs. Aggrieved over the said Judgement and Decree, the defendants filed an appeal in A.S.No.47 of 2019 before the I Additional District Judge, Madurai, wherein, the defendants have also filed an application in I.A.No.43 of 2021 seeking to mark 12 documents as narrated therein. The first Appellate Court framed the following issues for consideration.

- 1) Whether the decree and judgment dated 11.08.2018 in O.S.190/2012 on the file of the II Additional Sub Court, Madurai are liable to be set aside?*
- 2) Whether the trial court is right in accepting the contention of the plaintiffs that the burden lies with the defendants?*



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3) Whether the appeal has got to be allowed or not?

9. After hearing both sides, the Appellate Court decided all the issues in favour of the plaintiffs and dismissed the appeal filed by the defendants. Aggrieved over the same, the defendants are before this Court by way of filing the present Second Appeal.

10. This court after hearing the parties, framed the following substantial questions of law.

"(A) The First Appellate Court is not correct in decreeing the suit filed by the plaintiffs for recovery of money on the basis of Ex. A1 promissory note as time barred one by holding the material alternation relating to the year of the execution of the promissory note Ex.A1 is amaterial alternation under Section 87 of the Negotiable Instrument Act and the same was void one?

(B) Whether both the Courts are correct in decreeing the suit filed by the plaintiffs without proof of second plaintiff signature when the case of the plaintiffs is joint execution of promissory note by both the plaintiffs, more particularly the defendants denied the execution and signature by taking the plea of the forgery under the circumstances of criminal case and other cases pending between them on the constrained relationships?

(C) Whether the First appellate Court is correct in decreeing the suit on the basis of the hand writing expert opinion without considering the principle that



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opinion report is not conclusive?

(D) Whether the First Appellate Court is correct in dismissing I.A.No.43 of 2021 filed under Order 41 Rule 27 of CPC without considering the documents are material bearing in establishing the defendant case to the satisfaction of the theory of preponderance of probabilities?

(E) Whether the First Appellate Court is correct in not holding that the plaintiffs transaction is unaccounted and illegal transaction upon considering the special circumstances that the second plaintiff was Teacher and there was a detailed prohibition under the conduct code to advance the loan to any party by properly applying the principal laid down by the Hon'ble Supreme Court in 2004(12) SCC 83?"

11. The learned counsel appearing for the appellants / defendants would submit that, in the present case, the defendants have filed I.A.No. 43 of 2021, wherein they have pleaded before the Appellate Court to mark 12 documents, which are all vital to establish their case and make a claim on the basis of bogus promissory note. He would submit that the averment in the promissory note is that the defendants have borrowed the money for the purpose of personal expenses, settling the loan and business expenses. As on the date of alleged borrowing, the first defendant was admittedly liable to pay mortgage loan of Rs.3,00,000/- to the first plaintiff. Thereafter, a suit was filed by the first plaintiff in the



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year 2012 and in the said suit, decree was obtained and ultimately decreed amount has been paid by the first defendant. Promissory note is dated 02.08.2010. According to the plaintiffs, the defendants have borrowed a sum of Rs.5,00,000/- on 02.08.2010 for the purpose of family expenses, to settle the loan and for business expenses, which means that when the first defendant is liable to pay a sum of Rs.3,00,000/- to the first plaintiff, in the event borrowing of Rs.5,00,000/- was made really as alleged by the plaintiffs, out of the said borrowed amount, the existing loan due of Rs.3,00,000/- ought to have been settled by the first defendant. However, the same has not been settled because, the promissory note was bogusly created and no such amount of Rs. 5,00,000/- was borrowed by the defendants. The learned counsel would submit that since the defendants' lawyer has not properly conducted the case before the Trial Court, the defendants were not able to adduce any evidence, except filing of the written statement. In the written statement, the defendants have categorically denied the execution of promissory note. Even though the defendants have not examined anyone, it is the duty of the plaintiffs to prove their case. Since the defendants raised



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dispute about the creation of Ex.A1 promissory note, the plaintiffs filed an application for sending the promissory note for experts opinion. While the promissory note was alleged to be created as early as on 02.08.2010, contemporary signature was not obtained during the relevant period, but signature was obtained only in the year 2017, in the open Court, by the learned Judge of the trial Court at the time of hearing. Even then, only the signature of the first defendant was obtained and sent for the experts opinion and the signature of the second defendant was not at all obtained. Even though the above issues were raised before the first Appellate Court, the first Appellate Court did not give any finding on those issues. The first Appellate Court dismissed the application filed by the defendants for marking 12 documents, without permitting the defendants to file those documents and adduce evidence, which ultimately proves that the defendants have not borrowed any money from the plaintiffs. Before filing the suit, the plaintiff ought to have issued demand notice to all the defendants. However, in the present case, notice was received only by the first defendant (husband) and no notice was received by the second defendant (wife). Notice to the second defendant



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was sent in the name of 'A.Vidhya'. In reply, the second defendant has sent a letter, stating that no such person is available in the name of A.Vidhya. However, no further steps were taken by the plaintiffs to issue demand notice to the second defendant. The learned counsel insisted that to file a case, proper demand should be made. But, without proper demand, the present suit has been filed. Though this aspect was brought to the knowledge of the first Appellate Court, no finding was rendered in this regard. Therefore, the learned counsel requested that instead of answering the substantial questions of law, this Court may be pleased to remand the matter to the first Appellate Court, so that, the defendants will have an opportunity to re-agitate all the above issues.

12. On the other hand, the learned senior counsel appearing for the plaintiffs strongly opposed the contentions of the defendants. As far as the demand notice is concerned, he would submit that the first defendant has received the demand notice correctly. For the second defendant also the notice was sent, however, her name was written in a different manner. Two suits were simultaneously filed in the year 2012, one is mortgage



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suit and another is promissory note suit. As regards the marking of 12 documents before the first Appellate Court is concerned, those documents are with regard to the criminal proceedings, which is no way connected to the present case. Before the Trial Court, on behalf of the defendants, no one was examined and no document was also marked. If at all, evidence was available on the side of the defendants, they should have adduced them before the Trial Court itself. The learned senior counsel would fairly submit that though the defendants have not examined anyone on their side, it is the bounded duty of the plaintiffs to prove their case. The plaintiffs have also done so by examining PW1 to PW3 on their side, who were also cross examined by the defendants. The plaintiffs have also marked Exs.A1 to A6 on their side. The experts have also sent opinion after comparing the signatures, which ultimately proves that the signature in the promissory note and the contemporary signature sent for expert's opinion are one and the same. Taking into consideration all these aspects, both the Trial Court as well as the Appellate Court have arrived at the conclusion in favour of the plaintiffs. Therefore, he would submit that there is no need for remanding the matter to the first



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Appellate Court and the appeal is liable to be dismissed. In support of his contentions, he referred to the Judgment of the Apex Court in the case of *Sirajudheen vs. Zeenath and others* reported in 2023 (6) CTC 435.

13. I have given due consideration to the submissions made on either sides and perused the materials available on record. Upon hearing and perusal of the documents, it appears that the defendants have filed an application before the first Appellate Court for marking 12 documents and the same was dismissed without assigning any reason. According to the defendants, these are all very vital documents to establish their case with regard to the creation of the bogus promissory note.

14. A perusal of the promissory note shows that borrowing was made by the defendants for the purpose of personal expenses, to settle the loan and for business expenses, which means, the entire loan amount would be within a sum of Rs.5,00,000/-. As on the date of alleged borrowal, the first defendant is liable to pay a sum of Rs.3,00,000/- towards mortgage loan to the first plaintiff. When the alleged amount of



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Rs.5,00,000/- was borrowed for personal expenses, to settle the loan and for business expenses, definitely, the first defendant would have settled the entire mortgage loan amount to the first plaintiff, if the defendants really borrowed. However, there was no finding on this aspect either by the Trial Court or by the Appellate Court. Finding on this aspect is required when a stand was taken by the defendants that the promissory note was bogusly created and no amount was borrowed. In the event, if money was borrowed, the Court has to give finding on the aspect what was the reason for not settling the loan out of the sum of Rs.5,00,000/- borrowed by the defendants from the plaintiffs. Further, a question also arises why the plaintiffs have not recovered the sum of Rs.3,00,000/- out of Rs.5,00,000/- which the plaintiffs alleged to have lent to the defendants.

15. A demand notice was issued by the plaintiffs to the first defendant. However, no demand notice was issued to the second defendant and the notice was issued in the name of Vidhya instead of Nithya. The said notice would not be considered as proper notice and



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proper demand. No finding with regard to filing of suit against the second defendant without any proper demand has been provided by both the Trial Court as well as the Appellate Court.

16. The defendants took a plea denying their signatures in the promissory note. Therefore, the plaintiffs have filed an application to send the signatures for the opinion of the hand writing experts. The signatures are pertaining to the year of 2010 and the Trial Court is supposed to have collected the contemporary signatures, that is the signatures in and around the year 2010. However, it appears, no attempt was made by the Trial Court to get the contemporary signatures from both the defendants. When the plea of the plaintiffs was accepted to send the promissory note for the verification of the hand writing experts, then, they should have obtained signatures from both the defendants. On the other hand, it appears that the Trial Court directed the first defendant alone to sign in the papers in the open Court during the year 2017, and the same was sent for comparison to the hand writing experts. But, no steps have been taken to get the signature of the second defendant to



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send the same for the hand writing experts opinion. No finding on this aspect, as to what were the reason the signature of the second defendant was not sent and also why the contemporary signature of the first defendant had not been sent for hand writing experts opinion, is provided by both the Trial Court as well as the first Appellate Court. When such being the case, the reliability of the opinion of the hand writing experts is doubtful. But, both the Courts have not dealt with the above aspect also.

17. In the above circumstances, this Court feels that the 12 documents filed before the Appellate Court for the purpose of marking would be of relevance in the present case. However, without assigning any reason, the first Appellate Court dismissed the said application. Due to the above reason, this Court is not in a position to answer the substantial questions of law as framed by this Court. Therefore, before deciding the substantial questions of law, this Court feels that it would be appropriate to set aside the finding and remand the matter for re-consideration by the first Appellate Court. Accordingly, this Court is inclined to set aside the Decree and Judgement dated 21.10.2021 passed



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by the I Additional District Judge, Madurai in A.S.No.47 of 2019 and remand the same for reconsideration to consider the following issues.

(i) To verify and give finding on the aspect as to whether the demand notice was issued to the second respondent and in the absence of any demand notice to the second defendant, what will be the consequence of filing the suit without any demand?

(ii) When the plaintiffs filed an application to send the promissory note for the verification of the hand writing experts, whether the signatures obtained by the Court in the open Court during the year 2017, without collecting the contemporary signatures pertaining to the year of 2010 would be proper.

(iii) When the promissory note was signed by both the defendants, whether sending the signature of the first defendant alone to the experts opinion without sending the signature of the second defendant is appropriate and based on the opinion, whether the Courts can come to the conclusion in favour of the plaintiffs.

(iv) To give finding on the aspect, when the alleged loan was borrowed for a sum of Rs.5,00,000/- from the plaintiffs by the



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defendants, the reason for not settling the existing loan amount of Rs. 3,00,000/- to the first plaintiff.

(v) To reconsider the application in I.A.No.43 of 2021 filed by the defendants before the I Additional District Court, Madurai for the purpose of marking 12 documents.

Unless and otherwise, decision is arrived on the above factual issues, this Court is not in a position to answer the substantial questions of law framed by this Court.

18. In view of the above, the Judgement and Decree dated 21.10.2021 in A.S.No.47 of 2019 and the order dated 21.10.2021 in I.A.No.43 of 2021 passed by the learned I Additional District Judge, Madurai are set aside. This matter is remanded to the file of the I Additional District Court, Madurai to consider the above issues and thereafter, pass Judgement and Decree afresh. As far as the substantial questions of law are concerned, since the matter is remanded back, it is left open to the parties to raise the same in appropriate time in future.



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19. Accordingly, the Second Appeal is disposed of. No costs.

Consequently, the connected Miscellaneous Petition is closed.

31.01.2025

NCC:Yes/No

Index:Yes/No

Speaking/Non-speaking order

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To

1.The I Additional District Judge,
Madurai.

2.The II Additional Subordinate Judge,
Madurai.



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KRISHNAN RAMASAMY, J.

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Pre-Deliver Judgement in
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