

Chelladurai Vs. Velmurugan

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Court : Chennai

Decided On : Apr-01-2014

Judge : P.R.Shivakumar

Appellant : Chelladurai

Respondent : Velmurugan

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATE:

1. 4.2014. CORAM THE HON'BLE MR.JUSTICE P.R.SHIVAKUMAR S.A.No.653 of 2006 Chelladurai Appellant vs. Velmurugan Respondent Second Appeal against the judgment and decree dated 28.2.2006 in A.S.No.119 of 2004 on the file of the Principal District Judge, Namakkal as against the judgment and decree dated 6.9.2000 in O.S.No.205 of 1996 on the file of the Sub Judge, Sankari. For appellant : Mr.G.Arul Murugan For respondent : Mr.R.Krishnaprasad for M/s.Sarvabhauman Associates

JUDGMENT

Defendant in the original suit in O.S.No.119 of 2004 on the file of the Sub Court, Sankari is the appellant in the second appeal.

2. The respondent herein filed the above said suit for recovery of money based on a promissory note dated 25.6.1995 alleged to have been executed by the appellant herein on his borrowing a sum of Rs.35,000/= agreeing to repay the

same together with an interest at the rate of 24% per annum. The suit was resisted by the appellant herein contending that there was no loan transaction between himself and the respondent herein and the respondent herein/plaintiff was a stranger to him and he was not known to him and that the suit promissory note was a rank forgery. In order to prove his case, the respondent herein/plaintiff, besides examining himself as PW1, examined one Udayashankar, the scribe of the suit promissory note as PW2. The suit promissory note dated 25.6.1995 was produced as Ex.A1. Except Ex.A1, no other document was produced on either side. The appellant herein/defendant appeared as sole witness (DW1) on his side. The learned Trial Judge, at the end of trial, considered the evidence in the light of the arguments advanced on both sides, and upon such consideration, came to the conclusion that the suit promissory note was not genuine and dismissed the suit with cost by judgment and decree dated 6.9.2000. The said decree of the Trial Court dismissing the suit was challenged before the learned appellate Judge viz., the Principal District Judge, Namakkal in A.S.No.119 of 2004. The learned lower appellate Judge, after hearing both sides, re-appraised the evidence and on such re-appreciation, reversed the finding of the Trial Court regarding the proof of the suit promissory note and held that the suit promissory note was proved to be genuine. Consequently, the lower appellate Judge allowed the appeal, set aside the decree of the Trial Court by which the suit had been dismissed and decreed the suit as prayed for with cost and subsequent interest at the rate of 24% per annum from the date of plaint till the date of decree and further interest at the rate of 6% per annum from the date of decree till realisation. Challenging the said decree passed by the lower appellate court on 28.2.2006, the second appeal has been filed on various grounds set out in the memorandum of grounds of second appeal.

3. The second appeal came to be admitted identifying the following questions to be substantial questions of law involved in the second appeal:- 1) Whether the plaintiff has discharged the burden of proving the execution of Ex.A1?. 2) Whether the first appellate court is correct, in law, in decreeing the suit by comparing the signature found in the vakalat and written statement which came into existence long after the suit document particularly, when such mode of comparison is against the law laid down in 2006(2) CTC201 and 2003 (1) CLJ637 3) Whether the

procedure adopted by the first appellate court under section 73 of the Evidence Act is correct in law especially when the petition filed by the plaintiff seeking opinion of the handwriting expert under section 45 of the Evidence Act has been rejected in I.A.No.14 of 2006 and the said mode of comparison by naked eye is not permissible in law as held in (1979) 2 SCC158 The additional substantial question of law that arises for consideration and framed now is as under:- 1) Whether the decree passed by the lower appellate court is not in conformity with section 34 of the Code of Civil Procedure warranting interference by this court?.

4. The arguments advanced by Mr.G.Arul Murugan, learned counsel for the appellant and Mr.R.Krishnaprasad, learned counsel for the respondent are heard. The materials available on record are also perused.

5. It is the contention of the learned counsel for the appellant that the lower appellate court committed an error in assisting the respondent herein/plaintiff in proving the execution of the suit promissory note marked as Ex.A1 by making a comparison of the signatures found therein with the signatures found in the vakalat and written statement of the appellant herein/defendant. It is the further contention of the learned counsel for the appellant that the procedure followed by the learned lower appellate Judge by making a comparison of the signature found in the disputed document with the signatures found in the vakalat and written statement of the appellant herein/defendant to arrive at a conclusion whether the signatures found in Ex.A1 promissory note is that of the appellant herein/defendant, is totally erroneous and it is against the dictum laid down by a learned Single Judge of this court in PATTABIRAMA REDDIAR v. NAVANEETHA SUNDARAM (2006(2) CTC201. The learned counsel for the appellant contended further that the Honourable Apex Court has deprecated the practice of court itself comparing the admitted and disputed signatures with the naked eye and that the learned lower appellate Judge did the said act of comparing the disputed and admitted signatures with the naked eye without the assistance of a handwriting expert's opinion to arrive at a conclusion that the suit promissory note was not a forged one and the signatures found therein were that of the appellant herein/defendant. It is the contention of the learned counsel for the appellant that the said procedure adopted by the learned lower appellate Judge is against the ratio laid down by the

Apex Court in THE STATE (DELHI ADMINISTRATION) v. PALI RAM reported in (1979) 2 SCC158 6. Per contra, the learned counsel for the respondent contends that the abovesaid two judgments are not applicable to the facts of the case on hand and that under a misconception, the abovesaid arguments of the learned counsel for the appellant came to be made.

6. This court paid its anxious consideration to the submissions made by both sides.

7. The original suit was filed by the respondent herein/plaintiff for recovery of money due on the suit promissory note produced as Ex.A1. According to the respondent herein/plaintiff, the suit promissory note was executed by the appellant herein/defendant on 25.6.1995 when he borrowed a sum of Rs.35,000/= agreeing to repay the said amount together with an interest at the rate of 24% per annum. Of course, the alleged borrowal and the execution of the promissory note are denied by the appellant herein/defendant. In the light of such denial, the burden of proving the execution of Ex.A1 promissory note shall stand cast upon the respondent herein/plaintiff. In order to discharge the burden of proof, the respondent herein/plaintiff examined himself as PW1 and in addition to that, he has examined one Udayashankar as the scribe of the suit promissory note. Both of them uniformly deposed that Ex.A1 promissory note was executed on the date mentioned therein by the appellant herein/defendant when he borrowed a sum of Rs.35,000/= from the respondent herein/plaintiff. They have also clearly deposed that the respondent herein/defendant put two signatures in the promissory note, one on the revenue stamp affixed therein and another below the stamp and that besides the signatures, he also affixed his left thumb impression. They also speak in one voice regarding the presence of the persons who attested the promissory note. No remarkable discrepancy is found in their evidence. When such a kind of evidence is adduced regarding the lending of money by the plaintiff to the defendant and execution of the promissory note by the appellant/defendant to the respondent/plaintiff, the burden of proving the lending of money and execution of promissory note cast on the respondent herein/plaintiff stands discharged whereupon, the burden of disproving it or proving the document to be a forged one shall stand cast on the appellant herein/defendant. In this regard, when the burden

itself stood shifted on the appellant herein/defendant, he was content with his own interested testimony as DW1 without adducing any other evidence, either oral or documentary, in proof of his case that the respondent herein/plaintiff was not known to him before the filing of the suit; that there was no money transaction between them; that the suit promissory note was not executed by him and that the suit promissory note was a forged one. Under such circumstances, the learned lower Appellate Judge seems to have rightly held that the respondent herein/plaintiff by production of Ex.A1 and by the oral testimonies of P.Ws.1 and 2, clearly discharged his burden of proving the execution of Ex.A1 promissory note. Hence, the question formulated as the first substantial question of law deserves to be answered accordingly against the appellant and in favour of the respondent herein.

8. The learned counsel for the appellant has relied on the judgment of a learned Single Judge of this court in PATTABIRAMA REDDIAR's case reported in 2006(2) CTC201 in support of his contention that the signatures found in the vakalat and written statement of the appellant herein/defendant ought not to have been compared with the signatures found in the disputed document viz., Ex.A1. Of course, it is true that the learned Single Judge (Thiru.Justice K.Mohanram, J.), in the case cited above, made an observation that the genuineness of the handwriting should not be tested by the court merely on the basis of personal comparison though there is no legal bar for the Judge using his own eyes to compare the disputed writing with the admitted writing and that the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate, to base his findings with regard to the identity of a handwriting which forms the main controversy between the parties on the basis of personal comparison. The learned Single Judge made the said observation regarding the procedure adopted by the Trial Court in comparing the signature found in the disputed document with the signatures found in the vakalat and written statement filed by the defendant therein. The learned Single Judge in PATTABIRAMA REDDIAR's case, opined that the comparison of the signatures found in the disputed cheque with the signatures found in the written statement and vakalat of the defendant therein, was not prudent. However, the learned Single Judge chose to reverse the finding of the Trial Court in the said case not

solely based on the abovesaid observation, but also on the basis of the observation that the plaintiff therein, who claimed to have maintained regular account books for the past fifteen years, had not produced the account books. If the judgment of the learned Single Judge in PATTABIRAMA REDDIAR v. NAVANEETHA SUNDARAM is considered in full, it will be obvious that the said observation was only an obiter dicta and that did not influence the decision of the court. In that case, though the Trial Court relied on its finding on a comparison of the signature found in the disputed cheque with the signatures found in the vakalat and written statement of the defendant concerned as a firm piece of evidence to arrive at the conclusion that the disputed document was found with the signature of the said defendant, ultimately the learned Single Judge based on other pieces of evidence, held that the plaintiff therein was able to prove his lending to the defendant therein and his execution of the disputed document. Ultimately, the decree granted against the person, who allegedly executed the disputed document therein, was confirmed. Hence, the obiter dicta found in the said judgment is in no way be helpful to the appellant in the case on hand in support of his contention that the procedure adopted by the lower appellate court in making the comparison of the signature found in Ex.A1 promissory note with the admitted signatures of the appellant herein/defendant found in his written statement and vakalat was erroneous and that the same would render the finding regarding the genuineness of Ex.A1 promissory note to be reversed and set aside.

9. In this regard, it shall be appropriate to refer to the earlier judgment of a Division Bench of this court in KALAIMANI AND ANOTHER v. CHINNAPAIYAN ALIAS PERUMAL GOUNDER (2004(5) CTC617. It is pertinent to note that the said judgment was that of a Division Bench and had been decided two years prior to the judgment of the Justice K.Mohanram in PATTABIRAMA REDDIAR's case. Hence, the ratio decided by the Division Bench was binding on the learned Single Judge. However, the learned Single Judge has chosen not to follow the decision of the Division Bench rendered in KALAIMANI's case and chose to express a contrary view. Such a contrary view expressed against the view expressed by the Division Bench shall be per incuriam as a learned Single Judge cannot overrule the view expressed by a Division Bench or disregard or differ from the view expressed by a Division Bench. In 2004 (5) CTC617 viz., KALAIMANI's case, the

Division Bench of this court, after referring to various decisions, made the following observation:- ".The approach of the Trial Court is very much assailed contending that the Trial Court suo motu ought not to have compared the signatures of the defendants and such suo motu comparison is erroneous. In this regard, reliance is placed upon the decision of the learned Single Judge reported in Somasundaram v. Palani, 2000(1) L.W. 511 wherein learned Single Judge has observed, "....Even though the Court may have the power to compare the signatures, there must be some admitted signature of the defendant, on the basis of which a comparison will have to be made...". In the case before the learned Single Judge, the facts are entirely different. The Suit on the Promissory Note was dismissed on such comparison of signature of the defendant with vakalat and written statement. On those factual findings, learned Single Judge has observed that even though the Court may have the power to compare the signatures, the comparison should not have been made on the basis of the signatures affixed by the defendant in the vakalat and the written statement after the dispute arose. The case in hand stands entirely on a different footing where the finding of the Trial Court on such comparison is only an additional piece of evidence, corroborating the testimony of P.Ws. 1 and 2."

10. It was further observed therein as follows:- ".In addition to the modes of proving the handwriting as provided by Sections 45 and 47 of the Indian Evidence Act, Section 73 of the Act provides another mode by direct comparison of the disputed signatures or written or finger impression with one, which is admittedly genuine or proved to be so. Section 73 of the Indian Evidence Act enables the Court using its own eyes to compare the disputed signatures with the admitted signatures. It happens not infrequently that in spite of evidence rendered, the Court cannot help comparing handwriting or signature with their own eyes for the proper assessment of the value of the total evidence. ".

11. In the said case, the signature of the first defendant therein found in the disputed document was compared with the signatures in his deposition recorded in the court and the signature of the second defendant therein was compared with his signature found in his vakalat. It was contended therein that the signatures of the defendants in the deposition, vakalat and written statement should not be

regarded as reliable standard signatures or standard writings for comparison as there was every possibility of the signatures being easily disguised in order to ensure that the same do not resemble the disputed signatures. However, rejecting the said contentions and holding that those signatures were made spontaneously without any attempt to disguise, the Division Bench held that it was the document containing standard signature to be compared with the signature found in the disputed documents and that the said comparison provided corroboration to the other evidence which were found enough to prove the case of the plaintiff therein.

12. On an analysis of the said judgment in *THE STATE (DELHI CORPORATION) v. PALI RAM* reported in (1979) 2 SCC158 and the judgment in *AJITH SAVANT MAJAGVAI v. STATE OF KARNATAKA* reported in (1997) 7 SCC110 relied on by the learned counsel for the appellant, it is found that the Honourable Supreme Court advocated a cautious approach in making comparison of the disputed and admitted signatures without the help of handwriting expert. It was also observed therein that contemporary signatures should be preferred for comparison rather than the documents which came into existence after the dispute reached the court as there was possibility of a disguised signature or writing being made.

13. A conjoint reading of the judgments discussed above will make it clear that in none of the judgments, it has been held that the court does not have the power to make a comparison of the disputed signature with the admitted or otherwise proved signatures as such power has been spelt out in the statutory provision in Section 73 of the Evidence Act. However, while exercising such a power, the courts have been directed to make a cautious approach so as to avoid making a comparison of the disputed signatures with the admitted signatures as there is a possibility of the same being consciously disguised.

14. From the above said discussion, the following proposition will emerge: i) In case, a party, whose signature is disputed, wants his own signature found in the documents that came into existence much later in point of time or after the dispute has arisen and the same is opposed by the party relying on the document containing the disputed signature, it shall be prudent for the court not to make such a comparison. ii) On the other hand, if the person, who relies on the disputed

signature, does have no objection for comparing it with, or seeks comparison of the same with, the admitted signature contained in a document even though the same came into existence after the dispute has arisen as he believes that the signatures are not disguised and they are good for comparison, then, the person disputing his signature in the document in question cannot have any valid objection for making such comparison. iii) Only when the party who relies on the disputed document expresses an apprehension that the document of recent origin or the farthest document shall not be suitable for making comparison, the admitted or proved contemporary signatures alone should be used for such comparison.

15. In the case on hand, the respondent herein/plaintiff, who filed the suit based on Ex.A1 promissory note, has let in sufficient evidence through himself as PW1 and another person as PW2 in proof of its execution of Ex.A1 and passing of consideration. Both of them have also identified the signatures found therein and also the thumb impression found therein to be that of the appellant herein/defendant. Even in the absence of comparison, the said evidence would have been enough to arrive at a conclusion that the execution of Ex.A1 promissory note has been proved by the respondent herein/plaintiff. The comparison made by the lower appellate court is only for confirmation of the finding arrived at based on other evidence. Even otherwise, as there is no dispute regarding the signature of the appellant herein/defendant even in the written statement and vakalat and there is no contention that the signature could have been deliberately disguised, reliance made for comparison of the said signatures with the disputed signatures to find out whether Ex.A1 was genuine or not cannot be found fault with. If at all, there is any scope for finding fault with such a procedure, the scope shall be available only for the plaintiff and not for the defendant who is the author of the admitted signatures. For the abovesaid reasons, the second and third substantial questions of law are answered against the appellant and in favour of the respondent.

16. The answers given to substantial questions of law 1 to 3 will take us to the next question: ".whether the decree passed by the lower appellate court is in accordance with law and whether such a decree needs interference?". This court, while answering substantial questions of law 1 to 3, has held that the findings of the lower appellate court that the suit promissory note was genuine and the loan

transaction evidenced by the suit promissory note was proved by the respondent herein/plaintiff. The appellant herein/defendant has not claimed discharge. It is not the case of the appellant herein/defendant that the suit is otherwise barred by any statute or limitation. As such, as per the contractual terms, the respondent herein/plaintiff incorporated in the promissory note, the respondent herein/plaintiff, as rightly found by the lower appellate court, was entitled to recovery of the amount covered by the promissory note with interest upto the date of plaint at the rate stipulated therein and such finding cannot be said to be either defective or erroneous *moreso*, when there is no contention raised by the appellant herein/defendant that the interest claimed therein was usurious. However, the learned lower appellate Judge has chosen to commit an error, in law, without considering the scope of section 34 of the Code of Civil Procedure in awarding *pendente lite* interest and post decree interest and the learned lower Appellate Judge, as done by many of the Judges of the Subordinate Courts, committed a mistake in simply providing with an operative part of the judgment stating that the suit was decreed with interest as prayed for, without specifying whether any *pendente lite* interest or post decree interest was awarded and if so, on what rate. This had resulted in Ministerial Staff drafting the decree to specify the rate of *pendente lite* interest and post decree interest and also on which sum, such interest should be calculated. Of course, though the decree is drafted by the Ministerial Staff, the same is to be signed by the Judge and there are precedents to the effect that if such omission had taken place in the operative part of the judgment, that itself would not vitiate the clauses in the decree. But, in the case on hand, though such clauses are there in the decree, they are not in conformity with section 34 of the Code of Civil Procedure.

17. Section 34 of the Code of Civil Procedure is to the effect that when a decree is passed for payment of money, in such decree, the court may order interest on such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit till the date of decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with a further interest at the rate not exceeding 6% per annum as the court deems reasonable on such principal sum from the date of decree to the date of payment or to such earlier date as the court thinks fit. The proviso to section 34(1) of the Code of Civil

Procedure provides for awarding interest exceeding 6% per annum. Such cases are cases arising out of commercial transactions.

18. The respondent herein/plaintiff has made an averment in the plaint that the amount was borrowed by the appellant herein/defendant for his family business and hence, the interest was claimed at the contractual rate. Explanation-II to section 34(1) says that the transaction is a commercial transaction, if it is connected with industry, trade or business of the party incurring the liability. Besides the averment made in the plaint that the amount was borrowed by the appellant herein/defendant for his family business, evidence has also been adduced to the effect that the appellant herein/defendant was doing business as a labour contractor for Seshasai Paper Mills. Therefore, the liability incurred by the appellant herein/defendant can be held to be one incurred in a commercial transaction in accordance with the definition of the term found in Explanation-II to section 34(1).

19. Irrespective of the fact that whether the liability was incurred in a commercial transaction or not, the pendente lite interest is not controlled by the proviso and the main clause of section 34(1) enables the court to award reasonable interest, of course, not exceeding the contractual rate, if any. The learned lower appellate Judge has chosen to award pendente lite interest at the contractual rate viz., 24% per annum from the date of plaint till the date of decree. There is no defect in it. However, the learned lower appellate Judge has committed an error which goes contrary to the provisions found in section 34(1) by awarding interest on the total amount claimed in the suit as against the principal sum adjudged. The principal sum adjudged is only Rs.35,000/= whereas by clause 2 of the decree of the lower appellate court, it has directed payment of a sum of Rs.45,500/= and pendente lite interest on the said amount at the rate of 24%. The said mistake, in the application of law, is bound to be corrected and rectified by this court in exercise of its power of appeal in the second appeal by modifying that part of the decree directing payment of pendente lite interest on Rs.35,000/= as against Rs.45,500/=. So far as the post decree interest is concerned, the learned lower appellate Judge has exercised his discretion to restrict the same to 6% per annum. But, there also very same mistake was committed by directing payment of interest on Rs.45,500/=

rather than the principal amount adjudged viz., Rs.35,000/=. The same also deserves to be modified as indicated supra. The Additional substantial question of law is answered accordingly.

20. In the result, the second appeal is allowed in part and the decree of the lower appellate court is modified as follows:- 1) The appeal in A.S.No.119 of 2004 on the file of Principal District Court, Namakkal shall stand allowed and the decree of the Trial Court dated 6.9.2000 dismissing O.S.No.205 of 1996 shall stand set aside. 2) The defendant in the suit shall pay a sum of Rs.45,500/= together with an interest on Rs.35,000/= (principal component of the amount decreed) at the rate of 24% per annum from the date of plaint till 6.9.2000, the date on which the decree was passed by the Trial Court and a further interest on Rs.35,000/= from the said date viz., 6.9.2000 till realisation at 6% per annum. 3) The plaintiff (appellant before the lower appellate court) shall be entitled to proportionate cost in both the Trial Court and the first appellate court. There shall be no order as to cost in the second appeal. 1.4.2014. Index: Yes. Internet: Yes. ssk. To 1. The Principal District Judge, Namakkal.

2. The Sub Judge, Sankari.

3. The Section Officer, V.R. Section, High Court, Madras. P.R.SHIVAKUMAR, J.

Ssk. S.A.No.653 of 2006 1.4.2014.

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