

John Premkumar Vs. T.Selvam

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Court : Chennai

Decided On : Nov-18-2011

Judge : G.Rajasuria, J.

Acts : [Interest Act 1978](#) - Section 3; Indian Evidence Act - Sections 73, 45

Appeal No. : S.A.(MD) No.138 of 2008

Appellant : John Premkumar

Respondent : T.Selvam

Judgement :

1. This Second Appeal is focussed by the original defendant animadverting upon the judgment and decree dated 12.06.2007, passed in A.S.No.21 of 2006 by the learned District Judge, Kaniyakumari at Nagercoil in confirming the judgment and decree dated 29.09.2005, passed in O.S.No.5 of 2005 by the learned I Additional Subordinate Judge, Nagercoil.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3. Shorn and bereft of unnecessary details, the relevant facts absolutely necessary for the disposal of the Second Appeal would run thus: The plaintiff filed the suit for recovery of a sum of Rs.2,00,000/- (Rupees Two Lakh only) based on the cheque No.621787, drawn on State Bank of India, Nagercoil, dated 05.04.2004, issued by

the defendant in favour of the plaintiff, in consideration of the the defendant having received a sum of Rs.2,00,000/- (Rupees Two Lakh only). Subsequently, according to the plaintiff, the defendant failed to honour his commitment and did not choose to discharge the loan. Whereupon the suit was filed.

4. Per contra, the learned counsel for the defendant resisted the suit by taking various pleas, including the one that the suit cheque did not bear the signature of the defendant and it is a forged one.

5. Whereupon, the relevant issues were framed by the trial Court.

6. During trial, the plaintiff examined himself as P.W.1 and marked Exs.A.1 to A.10 on his side. The defendant examined himself as D.W.1 and marked Exs.B.1 and B.2 on his side.

7. Ultimately, the suit was decreed by the trial Court, as against which the appeal was filed by the defendant, for nothing but to be dismissed.

8. Being aggrieved by and dissatisfied with the judgment and decree of the Courts below, the defendant preferred this Second Appeal on various grounds, suggesting the following substantial questions of law:

(A) Whether the cheque issued by the borrower to the creditor for the amount allegedly issued by him by way of a loan could be regarded as a proof of evidence for the receipt of such payment especially when the date of borrowal and the date of cheque are on the very same day and simultaneous.

(B) When the disputed signature with all the naked eyes differ from the admitted signatures, whether the finding that there is no dissimilarity as observed by the lower Appellate Court is legal.

(C) Whether the comparison of admitted and disputed signatures, the question of similarity or dissimilarity was not considered with reference to each and every letter in between the signatures, is it not the duty of the Court to point out the similarity or dissimilarity by giving detailed reasons.

(D) Whether the award of interest at the rate of 24% per annum when the commercial rate of lending by a Nationalised Bank was only 10%, is not usurious and exorbitant and contrary to Section 3 of the [Interest Act 1978](#). (Extracted as such)

9. I would like to fumigate my mind with the principles as found enunciated and enshrined in the following decisions of the Honourable Apex Court:

(i) Hero Vinoth (Minor) v. Seshammal reported in (2006) 5 Supreme Court Cases 545.

(ii) Kashmir Singh v. Harnam Singh and another reported in 2008 (4) SCALE 300.

(iii) State Bank of India and others v. S.N.Goya reported in 2009-1-L.W.1.

10. The aforesaid precedents would indicate and exemplify that unless any substantial question of law is involved, the question of entertaining a Second Appeal would not arise.

11. My learned Predecessor framed the following substantial questions of law:

(1) Whether the judgment and decree of the Courts below are perverse on account of its mis-construction of the documents exhibited on either side?

(2) Whether the procedure adopted by the Courts below to come to the conclusion that Ex.A.1 is a valid document is perverse? (Extracted as such)

12. On hearing both sides, I found that it is fit to frame the following additional substantial question of law:

(i) Whether both the Courts below were justified in invoking Section 73 of the Indian Evidence Act in comparing the disputed signature of the defendant with that of his admitted signatures without giving the reason for arriving at the conclusion that the disputed signature was that of the defendant?

(ii) Whether the awarding of pendente lite interest at the rate of 24% per annum is justifiable?

13. The gist and kernel of the arguments of the learned Counsel for the defendant would run thus:

(a) The defendant's plea that the plaintiff was an utter stranger to the plaintiff, was turned out to be untrue and simply based on that the good case of the defendant should not have been discarded as a false and frivolous one. (b) Time and again the Hon'ble Apex Court has held that Section 73 of the Indian Evidence Act should be sparingly resorted to by the Courts and if they invoke Section 73 of the Indian Evidence Act, then they should assume the role of an expert and consider each and every characteristics of the disputed handwriting and a Court would not be justified in simply stating in the judgment that it compared the disputed signature with the admitted signatures and got satisfied with the disputed signature as the one that of the defendant. In this case, merely based on such visual comparison, without assigning any reason, both the Courts below simply held as though the disputed signature is that of the defendant.

(c) Awarding pentende lite interest at the rate of 24% interest per annum in the absence of any contract was unconscionable.

14. In a bid to mince meat and shoot down, and in addition to torpedo and pulverize the contentions on the side of the defendant, the learned counsel for the plaintiff would advance his argument, which could be tersely and briefly set out thusly:

(a) The Courts below au fait with law thoroughly analysed the evidence and appropriately and appositely arrived at the conclusion that it was the defendant, who signed the cheque, but subsequently having a volte face, turned turtle and disputed his own signature and in such a case as against the concurrent finding, no interference in Second Appeal is warranted. (b) The award of 24% per annum by no stretch of imagination held as illegal or unconscionable for the reason that the Courts below took into account what was going on the market while lending amounts for loan. As such, he prayed for the dismissal of the Second Appeal.

15. The indisputable or at least the admitted facts would run thus: The plaintiff and the defendant were known to each other even before the alleged suit transaction.

However, the learned counsel for the defendant by way of overreaching himself out of anxiety to put up his defence, pleaded as though the plaintiff was a stranger, but that it does not mean that he should be disentitled to prove his defence.

16. My mind is reminiscent and redolent of the following decisions of the Hon'ble Apex Court:

(i) (2008) 4 SCC 530 (Thiruvengadam Pillai vs. Navaneethammal and another); certain excerpts from it would run thus:

16. While there is no doubt that court can compare the disputed handwriting / signature / finger impression with the admitted handwriting / signature / finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression. The comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. Where the court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in a position to identify the characteristics of fingerprints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal.

17. The decision in Murari Lal and Lalit Popli should not be construed as laying a proposition that the court is bound to compare the disputed and admitted finger impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the

disputed document is vague or smudgy or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further, even in cases where the court is constrained to take up such comparison, it should make a thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The court should avoid reaching conclusions based on a mere casual or routine glance or perusal..

19. The trial court had analysed the evidence properly and had dismissed the suit by giving cogent reasons. The first appellate court reversed it by wrongly placing onus on the defendants. Its observation that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, it was for the defendants to establish that the document was forged or concocted, is not sound proposition. The first appellate court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate court lost sight of the fact that the party who propounds the document will have to prove it. In this case the plaintiff came to court alleging that the first defendant had executed an agreement of sale in his favour. The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative. The issues also placed the burden on the plaintiff to prove the document to be true. No doubt, the plaintiff attempted to discharge his burden by examining himself as also scribe and one of the attesting witnesses. But the various circumstances enumerated by the trial court and the High Court referred to earlier, when taken together, rightly create a doubt about the genuineness of the agreement and dislodge the effect of the evidence of PWs 1 to 3. We are therefore of the view that the decision of the High Court, reversing the decision of the first appellate court, does not call for interference.

(ii) The decision of this Court reported in 2008 (3) CTC 470 (Ganapathy Thevar v. Shanmuga Thevar); certain excerpts from it would run thus:

14. The Court cannot assume the role of an expert in comparing the disputed handwriting with that of the admitted ones. No doubt, the Court as per Section 73 of the Evidence Act, in certain circumstances could exercise its power with caution. In such an event, it is the bounden duty of the Court to specify clearly as to what are the salient features based on which the finding is arrived at.

15. It is common knowledge that the science of analysing the questioned documents contemplates certain principles and theories. Here, both the Courts below were not objective in analysing the impugned handwriting.

16. No carte blanche is given to any Court to simply compare the disputed handwriting with that of the admitted handwritings and arrive at a subjective satisfaction about the similarities and dissimilarities. There should have been reasons set out for arriving at such conclusion, but here, both the Courts below have not resorted to such a procedure. The subjective satisfaction of both the Courts below cannot be taken in favour of the defendant. Yet one other precedent is as under:

(iii) (1979) 2 SCC 158 (The State (Delhi Administration) Vs. Pali Ram.)

17. A mere poring over and perusal of those precedents unambiguously and unequivocally highlight and spotlight the fact that Section 73 of the Indian Evidence Act should be sparingly resorted to by the Courts and it is quite unsafe for a Judge to play the role of a Handwriting Expert and compare the signatures, while parties are fighting a arms length in the litigation.

18. Here, the trial Court simply compared the disputed signature with that of the admitted signatures, which are post litem motam. It is trite proposition that the disputed signature should be compared with the ante litem motam admitted signatures. The trial Court failed to consider the same. The trial Court did not assign any reason whatsoever for arriving at the conclusion that the signature found on the cheque was that of the defendant. Adding fuel to the fire, the first appellate Court simply held that the disputed signature is that of the defendant without referring to any characteristics envisaged in the Science relating to analysis of disputed signature and handwriting.

19. It is a common or garden principle, well known in the legal field that normally twelve characteristics envisaged in the said Science should be considered in comparing the disputed signature with admitted ante litem motam signatures. The opinion of an expert as per Section 45 of the Indian Evidence Act, could either be accepted or rejected by the Court, for reasons to be recorded. Without resorting to such procedures, holus bolus both the Courts below simply decreed the suit based on the deposition of P.W.1 that the disputed signature found in the cheque was that of the defendant, which warrants interference in the Second Appeal.

20. Relating to awarding of pentende lite interest at 24% p.a., I would like to highlight and indicate that the normal procedure is to take a cue from the prevailing lending rate in commercial Sector/Bank, but that was not done; hence, that also warrants interference.

21. Accordingly, the substantial questions of law and the additional substantial questions of law are answered to the effect that the judgment and decree of the Courts below are perverse in view of the procedure adopted by them in invoking Section 73 of the Indian Evidence Act in comparing the disputed signature of the defendant with that of the admitted signatures and concluding without giving adequate and acceptable reasons that the disputed signature was that of the defendant and also the awarding of the 24% interest per annum pentende lite without any basis.

22. The learned counsel for the appellant/ defendant would supinely and categorically that the defendant is prepared to deposit the decretal amount in Court depressed by the amount already deposited by him in Court and whomsoever succeed can take the amount and on such deposit the order of attachment made by the Court could be raised. I could see considerable force in the submissions made by the learned counsel for the defendant.

23. Hence, in these circumstances, I would like to set aside the judgment and decree of the first appellate Court and remit the matter back to the first appellate Court with the direction that the first appellate Court shall, at the cost of the defendant, appoint an Advocate Commissioner as under with the mission to carry out the following:

- (a) To carry the relevant documents in connection with this case personally in a sealed cover;
- (b) and produce the same before the Forensic Expert; (c) leave it in his custody under his acknowledgment for as many days as the Forensic Expert may require;
- (d) collect the record from the Forensic Expert on the day as may be fixed by him;
- (e) bring it back and lodge it with the Court.

The Forensic Expert is directed to complete the examination of the records in any event, without 48 hours after the depositing of the same by the Advocate Commissioner with him.

24. As a condition precedent for availing the above said benefits under this order, the defendant shall deposit the decree amount upto this date in the trial Court, depressed by the amount already deposited by the appellant/defendant, within four weeks from the date of receipt of a copy of this order, whereupon the attachment effected over the immovable property of the defendant shall stand vacated and to that effect necessary steps shall be taken by the trial Court.

25. The first Appellate Court, after obtaining the report of the Advocate Commissioner and the expert concerned and entertaining objections if any from both sides and on hearing both, a reasoned judgment shall be delivered. Endeavour shall be taken to see that the matter is disposed of within a period of three months from the date of deposit of the decree amount by the defendant. Both sides shall co-operate with the first appellate Court for speedy disposal of the matter. Both side shall approach the first appellate Court on 02.12.2011.

21. In the result, the Second Appeal is allowed to the extent indicated above. No costs. Consequently, connected M.Ps. are closed.