

\$ IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA 384/2012

YOGESH JAIN & ANR

..... Appellants

VERSUS

SUDHA JAIN & OTHERS

..... Respondents

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Date of Decision: 3rd January, 2013

Advocates who appeared in this case:

For the Appellant : Mr. Subhashish Mohanty, Advocate.
For the Respondent :

CORAM:

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

SUDERSHAN KUMAR MISRA, J.

RFA 384/2012 & CM No.15639/2012 (for leading additional evidence)

1. The appellants were the defendants in the court below. They have impugned the judgment and decree passed by that court on 9th May, 2012, whereby the suit of the respondents/plaintiffs was decreed granting them possession of the suit property whilst at the same time, declaring a General Power of Attorney; Agreement to Sell; Affidavit; a Receipt; Possession Letter and a Will dated 13th August, 2003, relied upon by the appellants to establish their title to the suit property, to be, “forged and fabricated, null and void, and having no effect in law”. In addition, plaintiffs were also granted a decree of mesne profits @ Rs.4,000/- per month with effect from the date on which the suit was filed before the court below, i.e., 8th October, 2009, towards use and occupation of the suit

property by the appellants. The appellants were also restrained by a decree of permanent injunction from creating any third party right in the suit property. Costs of the suit were also awarded to the plaintiffs/Respondents.

2. Counsel for the appellants has tried to impeach the judgment of the court below on three grounds. First, that the court below ought not to have relied solely upon the report of the Handwriting Expert, who was produced by the respondents/plaintiffs in support of their case. Secondly, that the court below was not justified in ignoring the testimony of the second appellant, Smt. Babita Jain, to the effect that the consideration of Rs.3,50,000/- was duly paid to the previous owner of the suit property, namely, late Sh. Harish Kumar Jain, who had executed all the documents in question in her favour. And thirdly, that the court below failed to appreciate the fact that the second appellant, Smt. Babita Jain, who was arrayed as defendant No.2 before the court below, was unable to prove the Will dated 13th August 2003 by late Sh. Harish Kumar Jain bequeathing the suit property to her because the onus in this behalf was placed upon the respondents/plaintiffs by the court below.

3. Admittedly, the previous owner of the suit property was the late Sh. Harish Kumar Jain, who died on 20th September, 2007. The respondents are his children and his only legal heirs. Admittedly also, even the appellants/defendants in the suit are also related to the late Sh. Harish Kumar Jain and that the appellants were inducted in the suit property by him. While the respondents/plaintiffs claimed that the defendants/appellants had been inducted in the suit property by their late father, Sh. Harish Kumar Jain, as gratuitous licensees; the case of the appellants/defendant was that they were inducted by late Sh. Harish Kumar Jain as tenants @ Rs.500/- per month. At the same time, the second appellant, Smt. Babita Jain, admitted

in cross examination that no written agreement was executed between the parties and nor were any rent receipts taken by her from the late Sh. Harish Kumar Jain to whom she claimed that rent was paid in cash. She further stated that, in fact, her husband, Sh. Yogesh Jain, i.e., the defendant No.1, who is the appellant No.1 herein, was actually the tenant of the late Sh. Harish Kumar Jain in the suit property and that, although her husband was regularly filing the Income Tax Returns, payment of rent is not reflected therein. Significantly, the appellant No.1 did not enter the witness box. No other collateral evidence to bear out the stand of the appellants with regard to the tenancy, stated to have been created by the late Sh. Harish Kumar Jain in favour of Smt. Babita Jain, has been led.

4. I have heard counsel for the appellants at some length and feel that the matter deserves to be dismissed in *limine* for the reasons that follow:

5. Before the court below, while the plaintiffs/respondents claimed that the previous owner, Sh. Harish Kumar Jain, had inducted the appellants as mere licensees, without consideration, in the suit property; the appellants/defendants claimed that the second appellant, Smt. Babita Jain, had purchased the suit property from the late Sh. Harish Kumar Jain on the basis of six unregistered documents i.e., an Agreement to Sell; an Affidavit; a Receipt; Possession Letter; a General Power of Attorney and a Will, all dated 13th August, 2003; and further, that the said Will dated 13th August, 2003 had also bequeathed the suit property to her.

6. The claim of the second appellant, Babita Jain to the ownership of the suit property was denied by the plaintiffs/respondents, who took the stand that the aforesaid unregistered documents; on the basis of which the second appellant, Smt. Babita Jain, is claiming to have purchased the suit property from late Sh. Harish Kumar Jain; do not create any right in the suit

property in favour of the second appellant; and that the said documents are forged and fabricated.

7. On the basis of the respective stands of the parties, the court below framed the following issues:

“(1) Whether Late Sh. Harish Kumar Jain, the owner of the suit property had allowed the defendants to reside in the suit property only as a licensee and therefore, defendants have no right to say in the suit property? OPP.

(2) Whether the plaintiffs being the legal heirs of Sh. Harish Kumar Jain, have a right of recovery of possession of the suit property on account of Sh. Harish Kumar Jain having died intestate? OPP

(3) Whether Late Sh. Harish Kumar Jain, had executed a will dated 13.08.2003 in favour of Smt. Babita i.e., defendant No.2 and as to whether after the death of Late sh. Harish Kumar Jain, Smt. Babita had become the owner of the suit property by virtue of this suit? OPP.

(4) Whether defendant No.2 had purchased the suit property from Sh. Harish Kumar Jain, vide Agreement to Sell, Affidavit, receipt and possession letter etc. and whether these unregistered documents are capable of creating any right in favour of defendant No.2? OPD.

(5) Whether the Will dated 13.8.2003 executed by Sh. Harish Kumar Jain is a forged fabricated documents and therefore, null and void? OPD.

(6) Whether the other documents i.e, GPA, Agreement to Sell, Affidavit, receipt and possession letters all dated 13.08.2003 are also forged and fabricated and therefore, null and void? OPP.

(7) Whether plaintiffs are entitled for recovery of damages/mesne profits and permanent injunction as prayed in the plaint? OPP.

(8) Relief.

(9) Costs.”

8. In order to discharge the onus placed upon them with regard to the documents relied upon by the appellants; which the plaintiffs/respondents had claimed were forged and fabricated; the plaintiffs applied to the court under Section 45 of the Evidence Act and were permitted to produce one Sh. Kamal Kant Khandelwal as an Expert witness. This witness filed his report after comparing the admitted signature of the late Sh. Harish Kumar Jain, stated to have been placed by the latter on a registered General Power of Attorney (Exhibit PW 1/4) executed in his favour by one Sh. Raju, son of Sh. Shanker Singh, on 26th March, 1998; with the disputed signatures on all the disputed documents dated 13th August, 2003. In his report, the Handwriting Expert categorically pointed out that he had found specific dissimilarities with regard to, “the speed, curves, movement, alignment, slant, rhythm, line quality, skills, spacing,

size and in pictorial aspects in both sets of signatures”. He also found that the signatures on the questioned documents had been written in, “slow speed, with normal formation of curvatures and blunt terminal strokes whereas A1 has been written in fast speed with fine formation of curvatures, sharp terminal strokes and written in normal and routine”. The said Expert also found that these signatures have, “tremors, hesitations, unnatural pen lifts and pen pauses”. In other words, the questioned signatures differed significantly from the admitted signature of late Sh. Harish Kumar Jain.

9. The court below did not stop at that. It thereafter proceeded to compare the admitted signatures on the General Power of Attorney dated 26.03.1998 with the disputed signatures on its own and concluded that, while the admitted signatures appear to be, “written smoothly without any tremors”, the disputed signatures do not appear to be as smooth and appear to “have been written with an unstable or shivering hand”. Apart from this, the court also summoned the records relating to two Bank Accounts of late Sh. Harish Kumar Jain, and visually examined and compared the two signatures on each Account Opening Card with the signatures on the questioned documents and again came to the conclusion that the latter also do not match the signatures in the Accounting Opening Cards.

10. According to counsel for the appellants, the court below has solely relied upon the opinion of the Handwriting Expert examined by the plaintiffs/respondents, which, according to him, is impressible in law. He contends that the opinion of every Expert must be corroborated by independent evidence before it can be relied upon by the court. For this purpose, counsel for the appellants had relied on the decision of this Court in the case of **Alok Gupta v. Rubfila International Limited**, CS (OS) No.2497/1999; decided on 22.12.2010 by a single Judge of this Court;

Gulzar Ali v. State of H. P. (1998) 2 SCC 192; *Fakruddin v. State of M. P.*, AIR 1967 SC 1326; and *State of H.P. v. Jai Lal & Others.*, 1999 (7) SCC 280, for the proposition canvassed by him.

11. To my mind, none of these authorities lay down an absolute proposition of law that the opinion of a single Handwriting Expert must never be believed or relied upon by the court trying the suit. On the contrary, all the aforesaid cases, except that of *Alok Gupta* (supra), are matters dealing with the criminal prosecutions where the standard of proof required to establish a guilt of the accused beyond reasonable doubt is much higher than the standard of proof required by a civil court in a suit in deciding an issue one way or the other on what is known as the, 'preponderance of probabilities'. Furthermore, in the case at hand also, it is not as if the court below has blindly accepted the opinion of the Handwriting Expert without applying its mind to the nature of that opinion. It has clearly also applied its own mind to the dissimilarities being pointed out by the Expert and has carried out its own visual comparison of the admitted signatures on the aforesaid General Power of Attorney (A1) dated 26.03.1998 given by Sh. Raju, son of Sh. Shanker Singh, with the disputed signatures.

12. As a matter of fact, in *Fakhruddin's* case (supra) also, while stating that evidence given by an Handwriting Expert cannot be conclusive, the Supreme Court has concluded that nevertheless, such an opinion is relevant in terms of Section 45 of the Indian Evidence Act, 1872. Further, in that case also, the Supreme Court sent for the disputed writings, along with the admitted one, to see for itself the similarities and differences between the two, and to verify whether the conclusions of the Handwriting Expert were proper or not. The contention of counsel for the appellant in

that matter to the effect that such a course was not open to the court was rejected in paragraphs 9, 11 and 12 of that judgment, which are as under.

“9. Mr. Kohli said that these cases establish that the evidence of the handwriting expert is worthless and the Court cannot compare the writing for itself and the only possible evidence should have been of one who either saw Fakhruddin write or was familiar with his writing. We had sent for the writings which are disputed and the writings with which they were compared with a view to observe for ourselves the similarities and differences between the two and to verify whether the conclusions of the handwriting expert were proper or not. Mr. Kohli contended that this was not open to us. We do not agree.

11. Both under S. 45 and S. 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one case and to appraise the value

of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.

12. Therefore, to satisfy ourselves whether the testimony of the handwriting expert is acceptable or not, we sent for the record and compared the disputed writings with some comparable material.....”

13. In this context, the Supreme Court also adverted, inter alia, to Section 73 of the Indian Evidence Act, 1872, which prescribes one of the methods to prove the handwriting of a particular person. In the instant case also, the court below has done precisely that. After examining the testimony of the Expert, it has itself examined and compared the disputed

signatures with the admitted signature; and having applied its own observations to verify the opinion of the Expert, it has satisfied itself that it is safe to accept that opinion. Furthermore, the court below did not let matter rest there, it also permitted the production of the specimen signature Cards pertaining to the two Bank Accounts held by the late Sh. Harish Kumar Jain. Each of these Cards had two signatures of the deceased Sh. Harish Kumar Jain. The disputed signatures were also visually compared with these signatures by the court who found that they did not match.

14. Another factor which appears to have prevailed with the court in concluding that no reliance can be placed on the disputed documents was also the fact that the second appellant, Smt. Babita Jain, claimed to have paid Rs.3,50,000/- in cash to late Sh. Harish Kumar Jain; out of which, her mother, Smt. Shobha Jain had contributed Rs.1,00,000/- and her brother had given another Rs.1,50,000/- besides she herself having sold jewellery to the tune of Rs.1,00,000/-. Although the second appellant stated that her mother had withdrawn the Rs.1,00,000/- which she contributed towards the sale price from her Bank Account, but this was contradicted by her mother who stated in cross examination that she did not have any Bank Account at that time; and that she had kept the amount in her house in cash. Again as regards the alleged amount of Rs.1,50,000/- contributed by the brother of the second appellant in cash; the appellants failed to examine him as a witness. Furthermore, even with regard to the black and white photographs of the late Sh. Harish Kumar Jain affixed on the disputed documents there was some inconsistency since the second appellant, Smt. Babita Jain, had contradicted herself in cross-examination by first stating that they were in her possession for a long time before they were affixed on the documents; and then she stated that they had been prepared by photographer just 2 or 3 days prior to the execution of the disputed documents on 13th August, 2003.

15. It was in the light of all the above circumstances that the court below had concluded that the disputed documents, on the basis of which the appellants/defendants claimed to have purchased the suit property, cannot be relied upon. The fact that the appellants/defendants had even failed to prove the payment of sale consideration was also one of the factors that persuaded the court below to reach that conclusion and, to my mind, rightly so.

16. Counsel for the appellants also tried to contend that as regards the receipt of payment of the sale consideration, the same was duly acknowledged in the document itself and, therefore, court was not correct in seeking any further corroboration of that fact. I do not agree. The document in which the receipt of the consideration amount is mentioned is seriously disputed. In such a case, with a view to testing the authenticity and reliability of the disputed documents; and even otherwise to satisfy itself whether or not the money had actually changed hands, the course followed by the court below was proper. To my mind, the testimony of the second appellant, Smt. Babita Jain, that she had paid Rs.3,50,000/- to the previous owner of the suit property was, under the circumstances, validly discarded.

17. As regards the decision of a single Judge of this Court in **Alok Gupta v. Rubfila International Limited** (supra) is concerned, it merely reiterates the ratio of the aforesaid judgments in the cases of **Gulzar Ali** (supra) and other judgments, cited at the Bar, and applies the same to the facts and circumstances of that case. While it may be true that the testimonies of skilled witnesses are merely opinions and can tend to be partisan, as mentioned in Taylor's Law of Evidence, 12th Edition, Volume I, nevertheless, such an opinion remains a relevant fact which has to be

considered and duly weighed by the court trying the issue in the light of the surrounding circumstances, as has been done in the instant case.

18. The last contention is merely that even though the second appellant, Smt. Babita Jain, had relied on the Will dated 13th August, 2003, allegedly executed by the late Sh. Harish Kumar Jain, bequeathing the suit property to her, she did not consider it necessary to prove this fact because the indication of the party on whom the onus for proving issue No. 3 was placed, was expressed as 'OPP'. This argument does not have any force. A bare reading of Issue No.3, which has been reproduced above, leaves no doubt that it was squarely framed on the basis of the claim put forward by the second appellant, Smt. Babita Jain, i.e., defendant No.2 in the suit, and that the notation of the letters 'OPP' instead of 'OPD' was merely a typographical error and nothing more. Similarly, even the last word of this Issue was also erroneously typed to indicate whether, after the death of late Sh. Harish Kumar Jain, Smt. Babita Jain, defendant No.2, had become the owner of the suit property, "... by virtue of this suit". Taken literally, this also makes no sense. Obviously, the last word in that sentence was wrongly typed and it should have been, 'Will', instead; and it should have read as, "..... by virtue of this Will". No grouse has been made about this and, admittedly, the appellants/defendants understood the last sentence as setting forth the claim of the second defendant, Smt. Babita Jain, that she had become the owner of the suit property by virtue of the Will dated 13th August, 2003. It is noteworthy that at the same time, in connection with the same Will dated 13th August, 2003 propounded by the appellants, the stand of the plaintiffs/respondents to the effect that it was forged and fabricated document, was specifically framed as a separate issue with the onus on the plaintiffs. Under the circumstances, it is inconceivable to think that the appellants/defendants were misled by this typographical error or that they

failed to produce any independent evidence of their own to prove the genuineness of that document for that reason.

19. With regard to the proof of the said Will, the court below has placed reliance on the decision of the Supreme Court in **Yumnam Ongbi Tampha Ibemma Devi vs Yumnam Joykumar Singh & Ors.**, (2009) 4 SCC 780, holding that execution of a Will has to be proved in the manner laid down in Section 63 of the Indian Succession Act, 1925, as well as the relevant provisions of the Indian Evidence Act, 1872; and that, “The attesting witness should speak not only about the testator’s signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.”

Significantly, one of the so-called attesting witnesses to this document was the mother of the second appellant, namely, Smt. Shobha Jain, who came in the witness box but did not speak about the attestation of the Will by her in the manner laid down by the Supreme Court in **Yumnam Ongbi Tampha Ibemma Devi’s case** (supra).

20. I might mention that during the course of arguments, while making his submissions with regard to the reliance to be placed on the opinion of an Expert, which has been recorded in terms of sections 45 of the Indian Evidence Act, 1872, and keeping in mind Section 73 of the said Act; counsel for the appellants could not refute the proposition that opinion of an Expert is a relevant fact under the Indian Evidence Act, 1872 and evidence thereof can be led. However, the amount of reliance to be placed on it by the court to arrive at any conclusion with regard to existence or non existence of a fact in issue will depend on the quality of the opinion which is given, as determined by the court after applying its own mind to that opinion. In other words, the court must apply its mind to the opinion to see

whether conclusions drawn by the Expert carry conviction.

21. At one point, counsel for the appellants endeavoured to suggest that in the case at hand, a reading of the impugned judgment does not suggest that the court has itself gone into, and examined, the opinion of the Expert; and only thereafter concluded that it was worthy of reliance. I do not agree. As already noticed above, the court below not only went into the opinion of the Handwriting Expert, but also examined the disputed signatures in the light of the admitted signature which was examined by the Expert and made visual comparison of these signatures. In order to satisfy itself, it went even further by comparing the disputed signatures with the admitted signatures of the late Sh. Harish Kumar Jain on the specimen signature Cards of two of his Bank Accounts. Counsel for the appellants then endeavoured to suggest that the admitted signatures were not made contemporaneously with the disputed signatures and had been made long before and, therefore, the signatures were bound to be different. Although sufficient opportunity was granted to the appellant/defendants to cross examine the Handwriting Expert and they had, in fact, duly cross examined the Expert, however, no suggestion to this effect has been put to the Expert in cross examination and, therefore, this line of argument does not deserve consideration at this stage.

Furthermore, the admitted signature examined by the Expert was in the year 1998, whereas the year of the disputed signatures is 2003, the time difference, therefore, between the two is of about five years. The time difference between the signatures on the specimen signature cards pertaining to the bank accounts of Late Harish Kumar Jain and the disputed signatures was about fifteen years. A reading of the judgment of the court below makes it obvious that the reasoning of the court below is not merely

on the basis of blind acceptance of the opinion of the Expert. The court below has not only gone into his testimony, and examined it, and then applied its own mind to it all; it went further, and also obtained further corroboration by itself comparing the disputed signatures with some other admitted signatures found on the specimen signature cards of Late Harish Kumar Jain lying with his bankers. If it was the case of the appellants/defendants that the signatures made either five years or fifteen years earlier, do not form a good guide to the authenticity of the signatures made after that time, then that line should have been adopted first in cross examining the Expert produced by the plaintiff/respondents; and then it was also open to the appellants/defendants to produce their own evidence to testify to that effect, which was not done.

22. Along with the appeal, an application, being CM No.15639/2012, under Order XLI Rule 27 of the CPC for leading additional evidence, has also been moved by the appellants. The basis for this is merely that the onus of proving Issue No.3 has been placed by the court below on the plaintiffs/respondents and, for that reason, the appellants, who were the defendants before the court below, failed to produce the relevant evidence that was in their power and possession.

Issue No.3 read as follows:

(3) Whether Late Sh. Harish Kumar Jain, had executed a will dated 13.08.2003 in favour of Smt. Babita i.e., defendant No.2 and as to whether after the death of Late sh. Harish Kumar Jain, Smt. Babita had become the owner of the suit property by virtue of this suit? OPP.”

A bare reading of the above Issue shows that it has encapsulated the claim of the defendants/appellants with regard to the suit property, therefore, there could have been no doubt that it was for the appellants to bring whatever evidence was necessary to prove the same. The question with regard to placing of the onus on the plaintiff for proving the aforesaid issue No. 3 has been examined above at some length whilst dealing with the contention of the appellants that they were wrongly prevented from proving the Will dated 13.08.2003 of late Shri Harish Kumar Jain, on which they had relied in support of their claim to ownership of the suit property, and it has been found by this court to be untenable. As concluded earlier, this is merely an afterthought, and an attempt to take advantage of an obvious typing mistake. It appears to be a frantic attempt to grasp at any available straw to extract a further opportunity to fill up the lacunae in the evidence and nothing more. In my considered opinion, there was no possibility of the defendant/appellants having been misled by the aforesaid typographical mistake and no ground is made out for permitting any additional evidence.

23. Consequently, for the aforesaid reasons, the appeal as well as the application for additional evidence, are dismissed.

CM No.15640/2012 (Stay)

Since the appeal has been dismissed, this application does not survive and the same has been rendered infructuous and is dismissed as such.

SUDERSHAN KUMAR MISRA, J.

January 03, 2013
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