

Prashant Damodhar Katkade ... Petitioner
versus
Kachru Baban Avhad
and Another ... Respondents

 $1/8$

2] The operative portion of the impugned order reads thus:

- “1. Application is allowed.*
- 2. The original General Power of Attorney filed on record along with Exh. 56 be send to the Government Handwriting Expert along with admitted signature of defendant No. 1 as well as the specimen signature and thumb impression for comparison and report of opinion, as early as possible at the most within one months, as the matter is time bound in view of directions issued by Hon'ble Bombay High Court.*
- 3. Defendant No. 2 to deposit tentative fees Rs. 5,000/- for above comparison within a week.”*

3] Mr. Shinde, the learned counsel for the Petitioner made the following submissions in support of the Petition:-

A) That the application as made by Respondent No. 2, had invoked the provisions of section 73 of the Evidence Act, 1872(*“said Act”*). This section empowers the Court to direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

However, as has been held by the Hon'ble Apex Court in the case of "*State of Haryana vs. Jagbir Singh and Another*"¹ the direction which the Court may give under Section 73 of the said Act is for the purpose of enabling the Court to compare and not for the purpose of enabling some other agency to compare. In such circumstances, the impugned order, which direct the Petitioner to give his specimen signature and thumb impression for comparison by a Government handwriting expert, is clearly contrary to the provisions contained in Section 73 of the said Act, more particularly as interpreted by the Hon'ble Apex Court in the case of Jagbir Singh (*supra*).

B) In the present case, the Plaintiff as well as the Petitioner(original Defendant No.1) have already completed their evidence. The Plaintiff did not, at any stage, urge that the Power of Attorney which contains alleged signatures and thumb impression of the Petitioner, be referred to the

1. AIR 2003 SUPREME COURT 4377.

opinion of the handwriting expert. In such circumstances, the Court erred at such a belated stage to entertain the plea of Defendant No. 2 and exercise powers under Section 73 of the said Act. Further, since the application was made in the context of provision contained in Section 73 of the said Act, the learned civil Court erred taking recourse to provision contained in Section 45 of the said Act.

4] Having heard the learned counsel for the parties, perused the record as well as impugned order, in my judgment, there is no jurisdictional error warranting interference with the impugned order. This is because the suit is seeking specific performance of agreement dated 7th December, 2006 executed by Defendant No. 2 with the Plaintiff. The agreement came to be executed by Defendant No. 2 in his capacity as Power of Attorney holder for the Petitioner(original Defendant No.1). The case of the Petitioner is that the signatures and the thumb impression upon such Power of Attorney are not his.

In such circumstances, the Defendant No. 2 who is asserting that the signatures and thumb impression on the Power of Attorney are that of the Petitioner was certainly entitled to seek some relief in the matter of ascertainment of the veracity of signatures and thumb impression. It is true that in the application made by Defendant No. 2, made reference of Section 73 of the said Act. However, such circumstance by itself does not in any manner circumscribe the powers vested in the Court. As long as, the exercise of power is intra vires, the same can not be faulted on the ground of quotation of a particular section or omission to quote the some other section.

5] In the present case, it must be noted that the Power of Attorney is allegedly bears not merely the signature of the Petitioner but also the thumb impression of the Petitioner. Further, the decision in the case of Jagbir Singh (supra) is basically an authority that in order to enable the exercise of powers under Section 73 of the said Act, the

pendency of a proceeding before the Court is the *sine qua non*. The Hon'ble Apex Court has held that the language of Section 73 of the said Act does not permit the Court to give specimen writing for anticipated necessity for comparison in proceedings which may later be instituted in Court. The decision accordingly is distinguishable and cannot said to apply to the facts and circumstances of the present case where admittedly proceedings are pending before the Court.

6] In terms of Section 45 of the said Act, when the Court is required to form an opinion as to the identity of handwriting or finger impression, the opinion on that point of person specifically skilled in question as to identity or finger impression are relevant facts. Notwithstanding the circumstances that the application made by Defendant No. 2, made reference to the provisions contained in Section 73 of the said Act. The civil Court would always have the power to make reference of disputed signatures or thumb impression for the

opinion of experts in terms of Section 45 of the said Act. Such exercise cannot be said to be in excess of jurisdiction.

7] In fact, the learned Civil Judge was right in not himself exercising the powers under Section 73 of the said Act, particularly because the document in question was of the year 2006 and further there was the issue of comparison of thumb impression.

8] The learned counsel for Respondent No. 2 submitted that the evidence of Defendant No. 2 is on and therefore it can not be said that the application came to be moved at some highly belated stage. This statement is however, disputed by the learned counsel for the Petitioner. Nevertheless, the fact remains that the application upon which the impugned order was made was filed before the evidence of Defendant No. 1 was to commence.

9] Taking into consideration, the aforesaid

circumstances, it can not be said that the impugned order is vitiated by any jurisdictional error of perversity.

10] The Petition is accordingly, dismissed.

11] There shall be no order as to cost.

(M. S. SONAK, J.)