

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.11.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

C.R.P. (PD) .No.1275 of 2010

and

M.P.No.1 of 2010

Mr.M.Venkataswamy (Deceased)

1. Mrs.T.A.Saraswathi

2. Mr.V.Janarthanan ... Petitioners

- Vs -

1. Mrs.Mythira Devi

2. Mr.Mahendra Babu

3. Mr.V.Ramakrishnan ... Respondents

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India against the Order dated 06.01.2010 and made in I.A.No.5596 of 2007 in O.S.No.6075 of 2006 on the file of the learned II Additional Judge, City Civil Court, Chennai.

For Petitioners	:	Mr.V.Baskaran
For 1 st Respondent	:	Mr.S.Manohar
For 3 rd Respondent	:	Mr.A.Srinivasan

O R D E R

This Civil Revision Petition is directed against the fair and decreetal order dated 06.01.2010 and made in the

application in I.A.No.5596 of 2007 in the suit in O.S.No.6075 of 2006 on the file of the learned II Additional Judge, City Civil Court, Chennai.

2. The revision petitioners herein are the defendants 3 and 5 in the suit whereas the 1st respondent herein is the plaintiff and the respondents 2 and 3 are the defendants 2 and 4 respectively.

3. The 1st respondent had filed the above said suit in O.S.No.6075 of 2006 as against the revision petitioners as well as the respondents 2 and 3 herein seeking the relief of partition in respect of her 1/5th share in the suit property. This suit was resisted by the revision petitioners and the respondents 2 and 3 by filing their respective written statements.

4. After formulating necessary issues, the trial was commenced. The process of recording of evidences on behalf of both sides was completed. Only under this circumstance, the revision petitioners being the defendants 3 and 5 along with the 1st defendant in the suit had chosen to file an application in I.A.No.5596 of 2007 under Order 26 Rule

10(A) of C.P.C. r/w Section 47 of the Indian Evidence Act, to refer the thumb impression of the 1st respondent/plaintiff found place in Ex.B2 partition deed to finger print expert for being compared with the thumb impression of the 1st respondent/plaintiff which may be obtained before the trial court and send the same through an Advocate Commissioner and to file a report to that effect. This petition was strongly contested by the 1st respondent/plaintiff and after hearing both sides, the learned Trial Judge had proceeded to dismiss the petition on 06.01.2010 on the ground that the revision petitioners had not substantiated the factum that the 1st respondent/plaintiff had only signed as Delli bai and that the 1st respondent/plaintiff could not be compelled to put her thumb impression before the Court for being compared with the disputed thumb impression found place in Ex.B2 partition deed.

5. Having been aggrieved by the impugned order, the revision petitioners stand before this Court with this revision.

6. Heard Mr.V.Baskaran, learned counsel appearing for

the revision petitioners and Mr.S.Manohar, learned counsel appearing for the Eleveerapandian who is on record for the 1st respondent/plaintiff and Mr.A.Srinivasan, learned counsel appearing for the 3rd respondent.

7. Facts which are necessary for the disposal of this memorandum of Civil Revision are as under:-

The 1st respondent/plaintiff and the 1st revision petitioner/D3 are sisters. The 2nd revision petitioner and the respondents 2 and 3 / D2 and D4 are brothers. Their father is one A.Venkatasamy who is the 1st defendant in the suit (since deceased). Their mother late Kanthammal had purchased the vacant house site measuring 4880 sq.ft., bearing Door No.11, 4th street, Kamaraj Nagar, Choolaimedu, Chennai under a registered sale deed dated 26.06.1956. Out of 4880 sq.ft., their mother had surrendered an extent of 600 sq.ft., to the Government for the purpose of expansion of Road. The remaining extent is 4280 sq.ft., Their mother had died on 12.07.1970. Since the request of the 1st respondent/plaintiff for effecting partition was ended in futile, she was constrained to file the above suit for partition claiming 1/5th share in the suit property.

8. The contention of the revision petitioners and the respondents 2 and 3 is that on 14.12.1998 a partition was effected between the legal heirs of the deceased Kanthammal and the same was reduced into writing and registered as document No.3754/1998 on the same date in the Office of Sub-Registrar at Kodambakkam. It is also their case that the 1st respondent/plaintiff and the defendants 1 to 5 were parties to the above said partition deed dated 14.12.1998. In the said partition deed, the 1st respondent/plaintiff had signed as Delli bai and the said partition deed was accepted and acted upon. Suppressing the earlier partition, dated 14.12.1996, the 1st respondent / plaintiff had filed the present suit and therefore, she is not entitled to get the relief of partition. It is also their specific case that as per the said partition deed dated 14.12.1998, the suit schedule property bearing Door No.11 situated at 4th street, Kamaraj Nagar, Choolaimedu, Chennai was divided between the defendants 2, 4 and 5. Schedule-A therein was allotted to 5th defendant, Schedule-B was allotted to 2nd defendant and schedule - C was allotted to 4th defendant. It is also their case that out of Joint Family funds Rs.10,000/- which is described in B schedule was given to 1st defendant. Another sum of Rs.10,000/- described in E-

schedule given to 3rd defendant and another sum of Rs.10,000/- described under F-schedule was given to the 1st respondent/plaintiff. As per the above arrangement, as detailed in the partition deed dated 14.12.1998, the defendants 2, 4 and 5 viz., the 2nd revision petitioner herein and the respondents 2 and 3 herein have been in possession and enjoyment of their respective shares as aforestated which was admitted by the 1st respondent/plaintiff and the 1st revision petitioner/D3 as well as by the deceased 1st defendant.

9. It is significant to note here that the 1st respondent/plaintiff had not chosen to file her reply statement to the written statement filed by the defendants.

10. As per the counter statement filed by her in the application in I.A.No.5596 of 2007, she has stated that her name is Mythiradevi and not Delli bai as alleged and that the pension Book from the Port Trust Account, voter I.d., and Ration Card would reflect her name as Mythiradevi. It is also her contention that in fact the 3rd respondent/4th defendant had also issued a cheque in the name of Mythiradevi and not in the name of Delli bai. She has also

stated that the revision petitioners are well aware that her name is only Mythiradevi and despite this fact, they have filed the above said application vexatiously so as to send the disputed document under Ex.B2(Partition Deed) to the Finger Print Expert, for being compared with the thumb impression which may be obtained from her in the Court.

11. As observed in the opening paragraphs, the learned Trial Judge after accepting the contention of the 1st respondent/plaintiff had dismissed the petition and therefore, the revision petitioners stand before this Court with this revision.

12. The petition in I.A.No.5596 of 2007 has been filed under Order 26 Rule 10(A) of C.P.C., read with Section 47 of the Indian Evidence Act. It may be relevant to note here that after the commencement of trial witnesses from both sides were examined and almost at the fag end of the proceedings i.e., before hearing the arguments on either side, the application in I.A.No.5596 of 2007 came to be filed by the revision petitioners.

13. No doubt, the Court is empowered under the

provisions of Section 75 of the Code of Civil Procedure to issue commission subject to the following conditions:-

- a) To examine any person;
- b) to make a local investigation;
- c) to examine or adjust accounts or ;
- d) to make a partition ;
- e) to hold a scientific, technical or expert investigation;
- f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court binding the determination of the suit;
- g) to perform any ministerial act.

(Clause-(e) of Section 75 has been inserted by the Act 104 of 1976 in view of Section 26 with effect from 01.02.1977).

14. Indeed, the Court has discretion to grant commission but the discretion has to be examined judicially and not whimsically and it has to be exercised in aid of justice and not only for the benefit of a party to litigation.

15. Rule 10(A) of Order 26 of C.P.C., deals with the

issuance of Commission for scientific investigation (i.e.,) for the purpose of corresponding to the one mentioned in clause-e of Section 75 of C.P.C. There are such technical investigation which cannot in the opinion of the Court be conveniently be conducted before the Court.

16. It is obvious to note here that Rule-10 (A) has been inserted in Order 26 C.P.C., as a consequence of amendment in Section 75 wherein clause (e) to (g) have been inserted by C.P.C. Amendment of 1976.

17. From the provisions of Rule 10(A), it is clear that a discretion has been vested in the civil court to get any scientific investigation conducted only if it thinks necessary or expedient in the interest of justice. The basic rationale of the provision is that if the opinion of the scientific investigation is going to help in extracting the truth and determining the controversy raised in the dispute before the Court then such an investigation could be permitted. The basic idea is whether such scientific investigation is going to advance the cause of justice and would be necessary for adjudication for the rights of the parties. Therefore, this Court is under the obligation to

see as to whether there is any ground to interfere with in the impugned order passed by the learned Trial Judge. As stated in the fore going paragraphs, it is the case of the 1st respondent/plaintiff that her name is only Mythira devi and not Delli bai.

18. Ex.B2 is the partition deed dated 14.12.1998. According to the revision petitioners, the suit property was already partitioned on 14.12.1998 and the same was registered under document No.3754/98 in the Sub-Registrar Office of Kodambakkam. It is also their contention that the 1st revision petitioner/plaintiff was also a party to the above said partition and she had also signed in the said partition deed. It is signed as Delli bai, but the 1st respondent/plaintiff is very stubborn on her stand that her name is not Delli bai and that her name is only Mythiradevi.

19. In order to dis-prove the contentions of the 1st respondent/plaintiff, Mr.V.Baskaran, learned counsel for the revision petitioner has drawn the attention of this Court to the evidence of PW1 (i.e.) evidence of Respondent/plaintiff particularly to the cross-examination.

20. On perusal of the cross-examination of PW1 dated 01.03.2007, she has answered that till 1965, her name was Delli bai, and after her marriage, her name was changed as Mythira devi. But, admittedly, in Ex.B2, it is signed as Delli bai. However, the disputed thumb impression of the 1st respondent/plaintiff has been affixed in Ex.B2. Mr.V.Baskaran has also contended that since the 1st respondent/plaintiff herself had admitted that her name was Delli bai till the year 1965 and subsequently, it was changed as Mythira devi, the 1st respondent/plaintiff had lost her locus-standi to dispute her signature as Delli bai. He has also argued that the name of Delli bai might have been changed at any time, but, the ridge character of her left hand thumb impression would never change. Therefore, it had become necessary for the revision petitioners to send the disputed document viz., Ex.B2 to an expert to compare the disputed left hand thumb impression of the respondent/plaintiff which may be obtained from her in the open Court.

21. On the other hand, Mr.S.Manohar, learned counsel appearing for the 1st respondent/plaintiff has argued that

in order to ascertain as to whether a signature, writing or seal was that of a person by whom it purports to have been written or made, any signature writing or seal admitted or proved to the satisfaction of the Court to have been written or made by the person might be compared with one which was to be sought for. He has also maintained that since the name of the 1st respondent/plaintiff was Mythira devi, the comparison could be only if the signature was in the name of Mythira devi and not by any other name.

22. The learned Trial Judge in his impugned order has observed that the respondent/plaintiff had produced documentary evidence to show that her name is only Mythira devi and not Delli bai and that she never had signed as Delli bai. On the other hand, in order to substantiate the fact that the 1st respondent/plaintiff had alone signed in Ex.B2 as Delli bai, the revision petitioner/defendant had not produced any documentary proof.

23. It has to be noted that in her cross-examination, the respondent/plaintiff has admitted that till 1965, her name was Delli bai and thereafter her name was changed as Mythira devi after her marriage. It is the common judicial

parlance that an admitted fact need not be proved.

24. The provisions of Section 58 of the Evidence Act also ratify this position. Section 58 envisages that:

'No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided If the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.'

25. Since the respondent/plaintiff had admitted that till 1965, her name was Delli bai and after her marriage her name was changed as Mythira devi, the burden heavily rests on her shoulder to prove, un ambiguously as to from what date her name was changed as Mythira devi. It is also for her to produce any gazette publication which was caused to be published declaring the change of her name as Mythira devi but no such authenticated proof has been proved by the 1st respondent/plaintiff.

26. However, according to the revision petitioner, her left hand thumb impression is found place in Ex.B2 and as

observed in the foregoing paragraphs, a person may change his/her name at any point of time; but the ridge character of his/her left hand thumb impression would never change. Therefore, for taking a fair decision and in the interest of justice Ex.B2 dated 14.12.1998 shall have to necessarily be sent to Government Hand Writing and Finger Print expert for comparison with the left hand thumb impression of the respondent/plaintiff that may be obtained from her in the Court.

27. Mr.V.Baskaran, learned counsel for the petitioners in support of his contention has made reference to the decision of the **Haryana High Court in Sheo Narain and another vs. Rawat and others (AIR 1986 P&H 174)**. In this case, it has been observed as under:-

'Under Ss.45 and 73, the Court is empowered to direct any party to give specimen signature or handwriting with a view to get the same compared with the disputed one. This power can be exercised by the Court for its own satisfaction or even on an application being made by any party to the proceedings. Accordingly, the Court has power to call upon a party, whose thumb impression on a document is disputed by the other party, to give his specimen thumb impression at the request of the

other party for comparison with the disputed one and this request cannot be declined merely on the ground that it had been made by a Party to the litigation and could be used as evidence by such party. 1976 Cur LJ (Civ) 447 (Punj and Har), Rel.on.) ''

28. In an another case in **Sri Maruthi processors a registered Firm by Partner R.Palanisamy Kalathukadu Opp. to K.P.T.Petrol Bunk, Salem N.H.47, Bye Pass Main Road, Komarapalayam, Tiruchengode Taluk, Namakkal District & Others vs. R.Subramanian (2013-1-L.W.(Crl.)440)**, the Court's power and scope of Section 73 of Evidence Act, have been clearly explained by a Single Judge of this Court. In the above cited case, a prayer was sought for to direct the petitioner to affix his thumb impression in the open Court and send it for comparison with the signature of the accused in the promissory note for the opinion of the Government Hand Writing and Finger Print expert at Chennai. In this case, it is held that Section 73 indicates Summoning of any person as witness, or examining any person in attendance as a witness or re-call and re-examine any person already examined if his evidence appears to it to be essential to the just decision of the case.

29. The learned judge has also observed that the order of lower court directing the petitioner/accused to give thumb impression in the open court for the purpose of comparison with the admitted signature is proper and does not require any interference.

30. Mr.A.Srinivasan, learned counsel for the 3rd respondent in support of the case of the revision petitioners has also placed reliance upon to the decision in ***Sheo Narain and another vs. Rawat and others (AIR 1986 P&H 174)***. It is also relied upon by Mr.V.Baskaran, in support of the case of the revision petitioners.

31. In this case, it has also been held that ***There can, thus, be no manner of doubt that the Court was indeed empowered to call upon a party to give his specimen thumb impressions and this request could not be declined merely on the ground that it had been made by a party to the litigation and could be used as evidence by such party.***

32. Mr.S.Manohar, learned counsel for the 1st respondent/plaintiff has made reference to the finding of the learned Trial Judge in the impugned order saying that

for the comparison of the disputed thumb impression found place in Ex.B2 the 1st respondent/plaintiff could not be compelled to put her left hand thumb impression as it was not for the interest of justice. In this connection, he has also placed reliance upon a decision of the Apex Court in **State of Uttar Pradesh vs. Ram Babu Misra (AIR 1980 SC 781)**.

33. In the above cited case, in a criminal case, an investigation was pending as against the accused and in this circumstance, it was held that the Magistrate cannot direct the accused person to give his specimen in writing, when the case is still pending under investigation. The observation made in the above cited case by the Division Bench of the Apex Court is extracted as under:-

'Though a direction by the Magistrate to the accused to give his specimen writing when the case is still under investigation would surely be in the interests of the administration of justice, the language of S.73 of the Evidence Act does not enable the Magistrate to give such a direction when the case is still under investigation. The section contemplates pendency of some proceedings before a Court. It does not permit a Court to give a direction to the accused to give

specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further, Section 73 of the Evidence Act makes no distinction between a Civil Court and a Criminal Court.'

34. This Court has gone through the above cited decision with due care and caution and on considering the nature of the present case on hand, this Court is of view that the above cited decision is not made applicable. Because, the respondent/plaintiff herself has admitted in the cross-examination that her name till 1965 was Dellibai and only after her marriage, her name was changed as Mythira devi. When such being the case, it has become necessary for this Court, on the basis of the application of the revision petitioners, to send the disputed document Ex.B2 to the Government Hand writing and Finger Print Expert to compare the disputed left hand thumb impression with that of the left hand thumb impression which may be obtained from the 1st respondent/plaintiff in the Court.

35. On coming to the provisions of Rule 10(A) of Order 26 of C.P.C., this Court would like to place it on record that it deals with the issuance of Commission for scientific investigation, (i.e.) for the purpose of

corresponding to the one mentioned in clause (e) of Section 75 of C.P.C. *There are such technical investigations which cannot, in the opinion of the Court, be conveniently conducted before the Court.*

36. From the provisions of Rule 10(A) it is clear that a discretion has been vested in the civil court to get any scientific investigation conducted only if it thinks it necessary or expedient in the interest of justice. The basic rationale of the provision is that if the opinion of the scientific investigation is going to help in extracting the truth and determining the controversy raised in the dispute before the Court then such an investigation could be permitted.

37. In this connection, this Court would like to have reference to ***Natabarbehera vs. BataKrishna (AIR 1987 Orissa 7)***. In this case, the Division Bench of Orissa High Court has observed that:

Report of handwriting expert comes within the meaning of scientific investigation thereby making O.26, R.10-A applicable.

'Scientific examination means ascertainment by observation and experiment

critically tested, systematised and brought under a set of principles. Comparison of a disputed signature with the admitted ones involves specialised skill based on study. It therefore comes within the scientific investigation. The handwriting experts for the purposes of comparison of handwritings take enlarged photographs of the disputed and admitted writings and examine the same by application of recognised principles and by critical tests which in most cases cannot be conveniently conducted before the Court.'

38. Section 73 of Evidence Act contemplates that In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

39. The Court may 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.

40. Under paragraph 2 of Section 73 it is thus made clear that *'A party may be made to write for the express purpose of comparison in the judge's presence [Doe d Devine v. Wilson, 1855, 10 Moo PCC 502, 530]. The person asked to write must be present in court. The court which can direct a person to give his specimen writing can either be a court holding the enquiry or the court trying the accused.'*

41. It is also to be noted that under Section 73, the Magistrate has no power at the investigation stage by the Police to issue a direction to the accused to appear in Court for the purpose of giving specimen hand writing and the signature at the request of the Police. Simply speaking that Section 73 does not permit a Court to give a direction to the accused to give specimen writing for comparison at the stage of investigation. Therefore, the decision which is made reference by Mr.S.Manohar, learned counsel for the 1st respondent is made applicable to the instant case on hand.

42. In this case, Ex.B2 partition deed dated

14.12.1998, seems to have been registered as document No.3754 of 1998 in the office of the Sub-Registrar at Kodambakkam, Chennai. According to the revision petitioners, the 1st respondent/plaintiff had signed her name as Delli bai in Tamil and affixed her thumb impression in the presence of two witnesses. It is also her case that her thumb impression had also been identified by her own daughter Tarabai. Since the 1st respondent/plaintiff is disputed her own name, signature and thumb impression in the partition deed (Ex.B2), in order to adjudicate the above dispute, the disputed thumb impression of the 1st respondent/plaintiff in Ex.B2 has necessarily to be referred to finger print expert for comparison with the thumb impression of the 1st respondent/plaintiff to be obtained from her in the presence of the learned Trial Judge.

43. Keeping in view of the above fact, this Court finds that without considering the purpose as well as the importance of the petition, the learned Trial Judge had proceeded to dismiss the application in I.A.No.5596 of 2007 on the ground that the revision petitioners had not produced any documentary proof to show that the

respondent/plaintiff alone had signed as Delli bai and affixed her left hand thumb impression. The impugned order is not sustainable and therefore, liable to be set aside. The learned Trial Judge had committed a serious error in dismissing the petition and therefore, it is deserved to be dismissed.

44. In the result, this Civil Revision Petition is allowed and the impugned order dated 06.01.2010 is set aside and the application in I.A.No.5596 of 2007 is allowed and the learned Trial Judge is directed to refer the thumb impression of the 1st respondent/plaintiff found place in Ex.B2 partition deed to finger print expert for comparison with the thumb impression of the 1st respondent/plaintiff which shall be obtained from her by the learned trial judge in the open court and send the same through an Advocate Commissioner and to file a detailed report.

45. The learned Trial Judge is directed to refer the Ex.B2 partition deed as aforestated to the finger print expert through the Commissioner who may be appointed by him (Trial Judge) within a period of one week from the date of receipt of a copy of this order and after receiving the

report from the Government Finger Print expert, the learned Trial Judge is directed to dispose of the suit in O.S.No.6075 of 2006, within a period of three months thereafter. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

09.11.2016

Internet:yes / No
Index :Yes / No
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