

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2016

CORAM :

THE HONOURABLE MS. JUSTICE R.MALA

C.R.P.(PD) No.3747 of 2015

And

M.P.No.1 of 2015

And

C.R.P.(PD) No.3748 of 2015

Kannagi
Rep. by her General Power of
Attorney Agent, Govindharaj

... Petitioner in both C.R.P.(PD)s.

Vs.

1.K.Kandasamy
2.M.Thara

... Respondents in both C.R.P.(PD)s.

Common Prayer:

Petitions have been filed under Article 227 of the Constitution of India, to set aside the decreetal and common fair order dated 09.06.2015 passed in I.A.Nos.55 and 56 of 2015 respectively, in O.S.No.44 of 2011, on the file of the Principal District Judge, Dharmapuri, by allowing this Civil Revision Petition.

For Petitioner : Mr.S.Subbiah
For respondents : Mr.S.C.Vishwanath for R1
No Appearance for R2

COMMON ORDER

Challenging the impugned order dated 09.06.2015 passed in I.A.Nos.55 and 56 of 2015 respectively, in O.S.No.44 of 2011, under Section 45 of the Indian Evidence Act to send the documents Ex.A2 and Ex.B2 to expert for comparing the signature of the second defendant and her sons and under Order 26 Rule 10(A) of C.P.C., to send the documents Ex.A2 and Ex.B2 to expert and to obtain a report from him, respectively, which came to be dismissed, these revisions have been filed.

2.Heard both sides.

3.The learned counsel for the petitioner would submit that the first respondent as the plaintiff filed the suit in O.S.No.44 of 2011 for specific performance stating that the properties originally belong to the second defendant and she executed Power of Attorney in favour of the first defendant on 15.12.2010 and on that basis he entered into a sale agreement on 04.07.2011 and since the second defendant has not executed the sale deed, he filed the suit for specific performance after issuance of notice. Now, the second

defendant/ petitioner herein raise the plea that the document under Ex.B2, the receipt for Rs.2 Lakhs does not contain her signature and that document has been concocted for the purpose of the case as if the sale consideration has been paid to this petitioner. To prove the document is forged one, she filed these two applications, but those applications have been dismissed stating that as per Section 73 of the Indian Evidence Act, the Court is empowered to compare the admitted signature with the disputed signature, against which the present revisions have been preferred.

4.The learned counsel for the petitioner would further submit that now, the plaintiff and the Power of Attorney colluded together and they created a sale agreement under Ex.A2 and Ex.B2, the signatures in that is not true and genuine and they used a scientific method and created Ex.B2. He further submitted that in the Ex.A2 last page the attestor are the children of this petitioner, who is the second defendant and the attestor to Ex.B2 is also the children of the petitioner/ second defendant.

5.He would further submit that there is a scientific method to transferring the digital handwritten and that can be used for

concocting document. For that reason he has taken me to the Forensic Science in Criminal Investigation and Trials, Fifth Edition by Dr.B.R.Sharma and taken me to the Scanned Image which is as follows:

"10.7.4.5 Scanned Image

A scanner (of a computer) is an instrument of choice to copy the signatures of a person. A scanner can pick up signatures and store the digital image in computer. The computer can print it on any document in any colour, in any size. High quality imitation can thus be achieved."

so to prove that the signatures are scientifically forged, expert's opinion is necessary.

6.To substantiate his argument, he referred upon various decisions of the Apex Court and this Court and prayed for setting aside the order.

7.Resisting the same, the learned counsel for the first respondent would submit that it is the duty of the plaintiff to prove the document is true and genuine. The defendant need not prove

the document is forged. Furthermore, as per as per Section 73 of the Indian Evidence Act, the Court is empowered to compare the admitted signature with the disputed signature. He would further submit that in Ex.B2, the signatures of the second defendant and the sons were also find place and it is impossible for concocting the signatures of all of them. Hence, he prayed for the dismissal of the revisions.

8.Considering the rival submissions and on perusal of the typed set of papers, the admitted facts are that the properties are belonging to the petitioner/ second defendant. It is also admitted fact that she executed the Power of Attorney in favour of the first defendant on 15.12.2010 as per Ex.A2. The only dispute is Ex.B2.

9.It is the case of the petitioner that the payment of Rs.2 Lakhs and issuance of receipt Ex.B2 was not pleaded in the plaint. It was produced at the time of examination of the first defendant. So the first defendant/ Power of Attorney, then only came to know that the document has been concocted. So immediately, she filed these applications since nowadays, the scientific equipments are there to scan the digital signature and scanned images and that

computer can print it on any document in any colour and in any size.

10.It is appropriate to extract the relevant portion from Forensic Science in Criminal Investigation and Trials, Fifth Edition by Dr.B.R.Sharma which reads as follows:

"10.7.4.5 Scanned Image

A scanner (of a computer) is an instrument of choice to copy the signatures of a person. A scanner can pick up signatures and store the digital image in computer. The computer can print it on any document in any colour, in any size. High quality imitation can thus be achieved."

11.To substantiate the same, he relied upon the documents Ex.A2 and Ex.B2. In Ex.A2, last page, the attestors are mentioned as the sons of this petitioner. He has taken me to page nos. 7 and 9 of the additional typed set of papers and submits the same. So considering the same, along with the decision, there may be all possibility of scanning the image. In such circumstances, an opportunity must be given to this defendant to verify whether there

is any scientific method to be adopted to fabricate Ex.B2.

12.It is true that the learned Trial Judge has not considered the above argument, but the Trial Court has considered Section 73 of the Indian Evidence Act and passed the order stating that the Court is empowered to compare Ex.A2 and Ex.B2 and decided the fact.

13.So it is appropriate to consider the decision of the Apex Court reported in **1967 Crl.L.J.1197 (Vol.73, C.N.314)(1) (Fakhruddin Vs. State of M.P.)**, the relevant portion of which reads as follows:

“10.Evidence of the identity of handwriting receives treatment in three sections of the Indian Evidence Act. They are Sections 45, 47 and 73. Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and if it is available the evidence of any other kind is rendered unnecessary. The Evidence Act also makes relevant the opinion of a

handwriting expert (S.45) or of one who is familiar with the writing of a person who is said to have written a particular writing. Thus besides direct evidence which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to the comparison of handwritings on a scientific basis. A third method (S.73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person.

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."

14. Also the decision of the Apex Court reported in **(1980) 1 Supreme Court Cases 704 (Murari Lal Vs. State of Madhya**

Pradesh), the relevant portion of which reads as follows:

"12.The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and two voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the

court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that **Shashi Kumar V. Subodh Kumar** and **Fakhruddin Vs. State of M.P.** were cases where the Court itself compared the writings.”

15.Also the decision of the Apex Court reported in **(2012) 12 Supreme Court Cases 406 (Ajay Kumar Parmar Vs. State of Rajasthan)**, the relevant portion of which reads as follows:

“28.The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the

opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision."

16. Also the decision of the Apex Court reported in **(2013) 4 Supreme Court Cases 546 (Garre Mallikharjuna Roa (dead) by LRS. and others Vs. Nalabothu Punniiah)**, the relevant portion of which reads as follows:

"14. In *Ajay Kumar Parmar Vs. State of Rajasthan*

while dealing with the provisions of Section 73 of the Evidence Act, 1872, this Court observed that courts should be slow to base their findings solely on comparison made by it. The Court further held: (SCC pp.417-18, para 28)

"28.The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes

such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision."

17. Furthermore, in the decision of this Court reported in **(2010) 3 MLJ 65 (S.Chinnathai Vs. K.C.Chinnadurai)** in

paragraph 18 it has been held as follows:

“18.However, on a consideration of the above said legal position, the following principles emerge for consideration:

1.The civil Court is having jurisdiction to send the document to the Forensic Expert for comparing the signatures between the disputed documents with the admitted documents by appointing a Commissioner and get a report.

2.When the civil Court is exercising its power under Section 73 of the Indian Evidence Act, the civil Court will have to exercise its power under Order 26 Rule 10A of the Code of Civil Procedure instead of invoking Section 73 of the Indian Evidence Act.

3.The Advocate Commissioner, being an officer of the Court can be asked to take the original document.

4.When the Advocate Commissioner takes the original document, then a certified copy of the same will have to be kept under the custody of the Court.

5.The civil Court cannot direct the disputed document to be compared with the vakalat or written

statement of a party.

6. When the civil Court comes to the conclusion that the power under Order 26 Rule 10A of the Code of Civil Procedure should be invoked, then the civil Court shall invoke the same even without an application from the parties concerned in the interest of justice and in order to solve the dispute between the parties.

7. When a document is sent to an expert it should be sent only to the Government Department Expert and not to a private Expert. While sending a document to an expert, the original of the same has to be sent since it is not possible to compare the xerox copies with the other admitted documents.

8. The civil Court shall not dismiss an application seeking for the examination of the document by an expert on the ground of wrong quoting of provision of law and in such a case, the Court shall exercise under Order 26 Rule 10A of the Code of Civil Procedure.

9. The civil Court shall exercise under Order 26 Rule 10A of the Code of Civil Procedure even when a prayer is sought for a direction to summon the expert to

the Court for the purpose of examining the document.

10. An application filed under Order 26 Rule 10A of the Code of Civil Procedure will have to be filed at the earliest opportunity in the normal circumstances.

11. However, an application under Order 26 Rule 10A of the Code of Civil Procedure cannot be dismissed merely on the question of delay alone, unless the same is willful and deliberate."

18. Also the decision of this Court reported in **2013 (2) CTC 394 (Saharban Beevi Vs. S.Mumtaj)**, the relevant portion of which reads as follows:

"8. "Scientific Investigation" would mean and include ascertainment of facts by observation and experiment, tested systematized and brought under a set of principle as held in (S.Chinnathai Vs. K.C.Chinnadurai), 2010 (1) MWN (Civil) 413 : (2010) 3 MLJ 65. If in the opinion of the Civil Court that the evidence of forensic expert is very much necessary for deciding the dispute between the parties, the Civil Court instead of exercising the powers under Section 73 of the

Evidence Act, shall have to invoke the provisions of Order 26, Rule 10 of C.P.C. There is no bar for the Court to order appointment of Advocate commissioner for the purpose of taking a document to an expert.

11.Coming back to the merits of the case, the apprehension of the Respondent/ Plaintiff was that the Petition seeking Expert's opinion, ought to have been filed only to drag on the proceedings. This apprehension is baseless. Moreover, the objection ought not to have been entertained by the Trial Court, because the burden of proof is only on the Plaintiff to prove that the signature as found in Ex.A1 is that of the signature of the 1st Defendant. It is the duty of the Plaintiff to take such steps. Instead, the petitioner/ 1st Defendant has taken such steps. Therefore, there cannot be any serious and valid objection when the First Defendant himself has chosen to take such steps. Under such circumstances, the Trial Court should have allowed the Petition."

19.So considering the above said citations, even though the

Trial Court has held that the Court is empowered to compare the admitted signature with the disputed signature and given a finding, I am of the view that, as per the decision of the Apex Court and this Court, the Court while exercising powers under Section 73 of the Indian Evidence Act, the Court must get the aid of the expert opinion and decide the fact. In such circumstances, I am of the view that appointment of Advocate Commissioner is necessary to send the disputed document to Forensic Science Department for comparison of the admitted signature and Ex.A2 wherein, nearly 10 admitted signatures of this petitioner and his sons is available for contemporary period.

20. Accordingly, these Civil Revision Petitions are allowed and the order dated 09.06.2015 passed in I.A.Nos.55 and 56 of 2015 respectively, in O.S.No.44 of 2011 is hereby set aside. The learned Principal District Judge, Dharmapuri is directed to appoint a Commissioner and fix the fees and send the documents viz. Ex.A2 and B2 to Forensic Science Department for obtaining a report. No costs. Consequently, connected Miscellaneous Petition is closed.

11.01.2016

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Index: Yes/ No Internet: Yes/ No

To

1.The Principal District Judge, Dharmapuri

R.MALA,J.

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**C.R.P.(PD) No.3747 of 2015
And
M.P.No.1 of 2015
And
C.R.P.(PD) No.3748 of 2015**

11.01.2016