

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.12.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.2302 of 2012
and
M.P.No.1 of 2012**

K.Raja

.. Petitioner

Vs.

1.John Daniel
2.Ratinakumar
3.P.L.Mohan Babu

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Fair and Decretal order dated 15.09.2011 in I.A.No.580 of 2011 in O.S.No.19109, on the file of the Subordinate Judge, Poonamallee.

For Petitioner : Mr.M.R.Khapali

For Respondents : Mr.A.Gouthaman (for R1)

R1 and R2 - Exparte

No Appearance (for R3)

ORDER

The plaintiff is the civil revision petitioner before this Court, challenging the order passed in I.A.No.580 of 2011 in O.S.No.19 of 2009, dated 15.09.2011, on the file of the Subordinate Court, Poonamallee.

2.The case of the plaintiff is that he has filed the suit in O.S.No.19 of 2009 before the learned Subordinate Court, Poonamallee, for specific performance against the respondents/defendants, based on the sale agreement dated 04.10.2007. The defendants, who are the original owners of the property were denied the suit allegations set out by this petitioner/plaintiff.

3.When the agreement was in existence, the first defendant, who is the owner of the property only on pretext to cheat the petitioner/plaintiff had sold the suit property to the 3rd defendant Mr.P.C.Mohan Babu through the power of attorney the 2nd defendant herein, executed by the 1st defendant in favour of the 2nd defendant on 15.10.2007.

4. Though the summons were served in the suit, but the defendants 1 and 2 were not appeared before the Court, hence they were set exparte. The 3rd defendant, who is the alleged purchaser of the property alone was appeared and filed his written statement, denying the allegations set out in the plaint.

5. Though the plaintiff was filed the suit for specific performance, the executants of the sale agreement dated 04.10.2007 namely, the first defendant should be examined, but purposely since because he was sold the property to the 3rd defendant, has not appeared and his power of attorney namely the 2nd defendant also not appeared before the Court. In the said circumstances, this plaintiff has filed an application under Order 26 Rule 10A of CPC read with Section 47 of the Indian Evidence Act, by way of an Interlocutory Application in I.A.No.580 of 2011 before the learned Subordinate Court, Poonamallee, for sending the signature signed both in Ex.A1 – Sale agreement dated 04.10.2007 executed in favour of the plaintiff and Ex.B4, the alleged power of attorney executed by the 1st defendant in favour of the 2nd defendant to the expert to compare that whether both the signatures are one and the same in the interest of justice.

6. In the said petition, the petitioner/plaintiff stated that if the 1st defendant is appeared before the Court and giving evidence about the Ex.A1—the sale agreement executed in favour of the petitioner/plaintiff, then comparison of signature in respect of Ex.A1 and Ex.B4 would not be aroised. Therefore, he prayed the trial Court namely Subordinate Court, Poonamallee, without sending the signature both found in Ex.A1 and B4, the genuineness of the Ex.A1 Sale agreement would not be proved, since the executant namely the defendant has not appeared in the Court.

7. Denying the above allegation on the petition, the 3rd defendant has filed his counter stating that though the matter is posted in the argument stage and the argument was also advanced on the side of the 3rd defendant and at this belated stage, the petitioner/plaintiff was filed the application in I.A.No.580 of 2011 is not maintainable.

8. The respondent/3rd defendant also states that when the petitioner/plaintiff has not stated any reason for not examining the attesting witnesses to the impugned document and they have failed to examine the attesting witness to the impugned document, the

petitioner/plaintiff cannot seek for expert opinion and the provision of law quoted by the petitioner is also not correct. Therefore, the respondents/defendants prayed the trial Court for dismissal of the above application.

9.Considering both side cases, the learned Subordinate Court, Poonamallee, was pleased to dismiss the application on the ground that the 1st defendant, who executed Ex.A1 was set exparte in the suit and the case of the 3rd defendant is he purchased the property for valuable consideration without knowing the agreement Ex.A1, so a bonafide purchaser, he entitle to get the benefit of Section 19(b) of Specific Relief Act. When the 1st defendant executed the Ex.A1 and Ex.B4 are contemporaneous document, but the first defendant not denied the execution of Ex.A1, the 3rd defendant has in generally denied the agreement. Therefore, the mere proving the signature of the 1st defendant found in Ex.A1 is not the crux of the case. Therefore, to decide the bonafide of purchaser the 3rd defendant will not be serve anything for the comparison of the signature. Apart from this, the learned Judge also states that the petitioner/plaintiff has to prove that the 3rd defendant purchased the property with the knowledge of the existence of Ex.A1 and therefore, the opinion is not necessary and

dismissed the petition filed by the petitioner on 15.09.2011. Challenging the said order, the present civil revision petition is filed before this Court.

10.I heard Mr.M.R.Khapali, learned counsel appearing for the petitioner. The respondents 1 and 2 are set exparte and no one appeared for R3 and perused the entire records.

11.It is the case of the plaintiff that the first defendant, who is the owner of the property had executed a sale agreement on 04.10.2007 for a valuable sale consideration of Rs.1,80,000/- in favour of the plaintiff and on the same day, he has received a sum of Rs.30,000/- as advance and this petitioner/plaintiff has agreed to pay the balance sale consideration of Rs.1,50,000/- to the 1st respondent within a period of three months from the date of agreement and registered the document in his favour on his own expenses.

12.When the petitioner/plaintiff has ready for the payment of the balance sale consideration and for executing the sale deed, but the first defendant has not come forward and he refuse to consider the sale deed. Therefore, the plaintiff has sent a legal notice to the 1st

defendant and expressing his ready and willingness to pay the balance sale consideration of Rs.1,50,000/- and call for the 1st defendant to execute the sale deed in his favour, but the same was returned as 'Left' and thereby the 1st defendant failed to comply the demand of the plaintiff. After issuing legal notice dated 10.10.2008, when the petitioner/plaintiff perusal of Encumbrance Certificate issued by the Sub-Registrar Office, Avadi, the plaintiff was shocked and surprise and found that the 1st defendant sold out the suit property to the 3rd defendant through the power of attorney of the 2nd defendant on 15.10.2007. Therefore, the plaintiff has filed the above suit for specific performance against all the three defendants before the learned Subordinate Court, Poonamallee. Though in a suit, the 1st defendant who is the original owner of the property sold out the suit himself to the 3rd defendant through the power of attorney namely Rathinakumar were set exparte, whereas the 3rd defendant P.L.Mohan Babu has appeared through his counsel and filed his written statement and denied the sale agreement dated 04.10.2007, which was executed in favour of the 1st defendant. The 3rd defendant also states that he was a bonafide purchaser and based on the power of attorney dated 15.10.2007, the 1st defendant in favour of the 2nd defendant as power

of attorney agent of the 1st defendant conveyed the suit property to this defendant as per registered sale deed dated 17.10.2007.

13.The 3rd defendant also states that the petitioner/plaintiff is the brother of one K.Ravi and the 3rd defendant was a tenant under the said K.Ravi in respect of another property. The 3rd defendant also states that there was a dispute between him and the plaintiff's brother K.Ravi and the said K.Ravi also filed RCOP.No.6 of 2008 for eviction of the 3rd defendant from his property and denying vengeance against the 3rd defendant, the said K.Ravi has to file the present suit and the petitioner/plaintiff has to file the suit based on the fabricated document.

14.In a suit for specific performance either the executant, who is the owner of the property was neither appear before the Court nor filing the written statement, but the suit can be decided only on merits, but the case in hand, the first defendant, who is the owner of the property, the 2nd defendant, who is the power agent of the property have purposely not before the Court and both of them were set exparte.

15.It is the case of the 3rd defendant is that the 2nd defendant, who is the power agent of the property has executed the sale deed dated 17.10.2007 in favour of the 3rd defendant and in his written statement, the 3rd defendant has denied the execution of sale agreement dated 04.10.2007, but he represented that his sale deed and the power of attorney deed dated 15.10.2007 are valid one. Thus being the case, when the original executant of the sale agreement dated 04.10.2007 are not denying the sale of agreement before the Court. The sale agreement dated 04.10.2007 is valid one and not executed, since the 3rd defendant has not author of the sale agreement dated 04.10.2007.

16.On the other hand, the 3rd defendant has agreed that the power of attorney dated 15.10.2007 has valid one and true document. If the power of attorney dated 15.10.2007 is valid one and true document and denied the execution of sale agreement dated 04.10.2007, the Court must have sent both the documents Sale agreement, which was marked as Ex.A1 and the power of attorney dated 15.10.2007, which was marked as Ex.B4 must be tested and get expert opinion in the Court itself.

17.It is my considered opinion that even there is no application taken out by the plaintiff under Order 26 Rule 10A of CPC and Section 47 of the Indian Evidence Act, the trial Court namely the Subordinate Court, Poonamallee himself ought to be sent the signature for comparison, since there was a sale agreement dated 04.10.2007 in favour of this plaintiff, but not denied by the author of the sale agreement dated 04.10.2007 by the first defendant. But, on the other hand, the 3rd defendant confirmed that the power of attorney dated 15.10.2007, which was marked as Ex.B4 was true document.

18.As per Section 26 Rule 10(a) of CPC as follows:

“10A. Commission for scientific investigation.-(1)

Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of Rule 10 of this Order shall, as

far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.”

19. Section 47 of the Indian Evidence Act says:

“47. Opinion as to handwriting, when relevant.-

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is relevant fact.”

20. As per the above provisions, it is made clear that the documents namely Ex.A1 was denied. As per Order 26 Rule 10A of CPC and Section 47 of the Indian Evidence Act, the Court can have scientific investigation in respect of the disputed documents namely Ex.A1 dated 04.10.2007 and Ex.B4 power of attorney.

21. Apart from this, as per Section 73 reads as follows:

“73. Comparison of signature, writing or seal with

others admitted or proved- 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.

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.

[This section applies also, with any necessary modifications, to finger impressions.]”

22.As per the above Section 73 of the Indian Evidence Act, the Court himself has directly get a signature in the open Court himself and send it for expert opinion, this aspect was considering by this Court and the Hon’ble Apex Court in various cases, particularly the

learned Judge of this Court in a case of ***N.Chinnasamy v. P.S.Swaminathan***, reported in **2006 (4) CTC 850**, the learned Judge has followed the guidelines to be followed when the Defendant denies his signature in the written statement. The following are some of the guidelines laid down therein:

“10.Merely because of the reasons that the Trial Court has by itself compared the admitted signature and the disputed signature invoking Section 73 of the Indian Evidence Act there is no bar or ban for the First Appellate Court for sending the documents to get the expert opinion.

11.Expert opinions could give much more clarity for arriving at a decision upon the truth and genuineness of a disputed document.

12.When the Defendant denies the signature in a particular document which is very much relied on by the Plaintiff, it is for the plaintiff to take steps for examination of the disputed signature by sending the document to a handwriting expert.”

23. Apart from this, it is my absolute opinion that there is no prejudice would be caused to the respondent/defendant, if the signature is send for verification, as the evidence of the expert is only advisory in character. It is primary duty of the Court to form an opinion after getting such an opinion and that is the scope of Section 45 of the Indian Evidence Act in a case of ***State of Himachal Pradesh v. Jai Lal and others*** reported in ***AIR 1999 Supreme Court 3318*** para 17 and 18 reads as follows:

“17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identify of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as identify of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate

knowledge of the subject.

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions."

24. Considering all these facts, this Court in the judgment in ***D. Janaki v. S. Jayalakshmi*** reported in ***2012-2-TLNJ 80 (Civil)***, the learned Judge of this Court has passed orders as follows:

"16. In order to get rid off the fear of the revision

petitioner/defendant that the application is filed to protract the litigation, the court below is directed to follow the procedure prescribed in paras 37 and 38 of the decision in K.R.Chinnasamy – vs. – K.R.Chinnasamy reported in 2011 (2) MWN (Civil) 637, which reads as follows:-

“37.Further, in the light of certain guidelines given in the decision reported in Muniraj v. Velu, 2009 (2) MWN (Cr.) DCC 88, the Court below is hereby directed to send for the document mentioned in I.A.No.50 of 2006 and after the said document is received in Court, the lower Court shall appoint an Advocate Commissioner for the following purposes:

- 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; and

e. bring it back and lodge it with the Court.

38.The lower court shall direct the Forensic Expert to complete the examination of the signatures within ten days from the date of depositing the same by the Advocate Commissioner.”

25.Apart from this, the learned counsel appearing for the petitioner also produced one another judgment rendered by this Court in a case of ***Palaniammal W/o Nallusami and others v. Palaniswami and others*** reported in ***(2003) 3 M.L.J 408*** in which this Court held as follows:

“Civil Procedure Code (V of 1908), O.26, Rule 10-A read with O.41, Rule 27 – Evidence Act (I of 1872), Sec.73 – Commission for scientific investigation – Whether can be appointed at the appellate stage – Suit filed for specific performance – Execution of the sale agreement denied – Signatures compared by the trial Court – Suit dismissed – Appeal filed – Application filed for appointment of a Commissioner for comparing the signatures – Permission refused by the appellate Court – Order challenged in

revision – There is no bar for the first appellate Court to send the documents for an expert opinion – Comparison of the signatures by the trial Court will not militate against the appointment of a Commissioner at the appellate stage – Though there is delay, it will not amount to lack of bona fide – Opportunity can be granted for comparison of signature – Delay compensated by way of costs – Impugned order set aside.”

26.As per the above judgments, even in the appellate stage, the appellate Court is having power to send the document under Order 26 Rule 10A of CPC and Section 47 and Section 73 of the Indian Evidence Act, request for comparison of the signatures by the trial Court will not militate against the appointment of a Commissioner at the appellate stage.

27.This Court very clearly held in the above judgment for sending those documents for expert opinion will not be prejudiced on any way. Though, the petitioner has given wrong provision of Section 47 of the Act, but, even Section 73 of the Indian Evidence Act made very clear that the trial Court having power to invoke Section 73 of the

Evidence Act for comparison of the signature. Therefore, the trial Court has miserably failed the exercise as per Section 45, 47 and 73 of the Evidence Act, which has to enable the Court to form an opinion to the checking of the handwriting, which was disputed by the 3rd defendant in respect of the documents Ex.A1 and Ex.B4. This Court and the Hon'ble Apex Court order, it is evidence for sending Ex.A1 and Ex.B4 for comparison of signature, since the 3rd defendant, who is not at all party or author of the document in Ex.A1 sale agreement dated 04.10.2007 executed by the 1st defendant in favour of the petitioner/plaintiff cannot object for sending comparison. It is my opinion that the trial Court himself to sent the documents for comparison, but he simply dismissed the application by saying that the document in Ex.A1 namely the sale agreement dated 04.10.2007 was denied by the 3rd defendant, but the trial Court closed his eyes to see that the Ex.A1 is executed by the 1st defendant, who is the author of the said document. Therefore, in the interest of justice, it is just and necessary to send for the said documents in Ex.A1 and Ex.B4 for specific opinion for expert opinion to prove that both the documents are signed by the 1st defendant or not and there is no prejudice would be caused to the respondent/3rd defendant, who is the subsequent

purchaser. Hence, this Court warranting insist for the interference in the orders passed by the learned Subordinate Judge, Poonamallee, the same should be set aside by allowing the civil revision petition.

28.In the result:

(a) this civil revision petition is allowed by setting aside the order passed in I.A.No.580 of 2011 in O.S.No.19109, dated 15.09.2011, on the file of the Subordinate Judge, Poonamallee;

(b) the trial Court is directed to appoint an Advocate Commissioner to send for the Exs.A1 and B4 within a period of 15 days from the date of receipt of a copy of this order and get the opinion within a period of 30 days from the date of appointment of the Advocate Commissioner;

(c) on receipt of the said opinion from the Advocate Commissioner, the trial Court is directed to dispose of the suit within a period of two months, on day to day basis, without giving any adjournment to either parties and both the parties are hereby directed to give their fullest

cooperation for early disposal of the suit. No costs.

Consequently, connected miscellaneous petition is closed.

19.12.2016

Note:Issue order copy on 24.04.2017.

Index:Yes

Internet:Yes

vs

To

The Subordinate Court,
Poonamallee.

M.V.MURALIDARAN, J.

VS

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