

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 600 OF 2017

MRS. EPIFANIA ANGELA SOARES E
FERNANDES.,

... Petitioner

Versus

MISS. INDIRA ARENA MARTHA MENEZES
AND 3 ORS.,

... Respondents

Shri Nigel da Costa Frias, Advocate for the Petitioner.
Shri Wilson Rodrigues, Advocate for the Respondent No. 2(a).
Shri Sushant Adelkar, Advocate for the Respondent No. 2(b).
Shri Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat
Ghanekar, Advocate for the Respondent No. 3.
Shri Ryan Menezes, Advocate for the Respondent No. 4.

Coram:- C. V. BHADANG, J.

Date:- 2nd August, 2017

ORAL ORDER:

On 05.07.2017, a notice for final disposal was issued in this case. As such, the petition is being disposed off finally.

2. The petitioner, who is the plaintiff before the Trial Court is challenging the order dated 21.06.2017, passed by the learned Senior Civil Judge at Mapusa in Special Civil Suit No. 2/2003/C, by which application (Exhibit-D/100), filed by the petitioner for referring the agreement of sale, for the report of a hand writing expert, has been rejected.

3. The petitioner has filed the aforesaid suit for specific performance of agreement of sale dated 14.05.1987, which is

executed by now deceased, Teotonio Menezes and his daughter (respondent no. 1). The respondents are disputing the signature of late Teotonio on the said document. After the parties closed their evidence, the petitioner filed application (Exhibit-D/100), purportedly under Order XXVI, Rule 10A of the Civil Procedure Code, read with Section 45 of the Indian Evidence Act, for referring the document to a hand writing expert.

4. The application was opposed inter alia on the ground that the petitioner could not seek assistance of the Court to collect evidence.

5. The learned Trial Court has rejected the application mainly on the ground that earlier, there was an application for recall of PW-2, which was dismissed by the Trial Court, which order was confirmed by this Court. PW-2 happens to be one of the attesting witnesses to the agreement of sale. The learned Trial Court has also found that the application is belated, as it is filed at the time of the final hearing of the matter and that it is an attempt to lead evidence, which has already been disallowed by this Court.

6. I have heard Shri Costa, the learned Counsel for the petitioner, Shri Rodrigues, the learned Counsel for the respondent no. 2(a), Shri Adelkar, the learned Counsel for the respondent no.

2(b), Shri Usgaonkar, the learned Senior Counsel for the respondent no. 3 and Shri Menezes, the learned Counsel for the respondent no. 4.

7. It is submitted by Shri Costa, the learned Counsel for the petitioner that the order refusing to recall PW-2, has no bearing on the question of referring the document to hand writing expert. It is submitted that the Trial Court was in error in referring to the earlier order by which, recall of PW-2 was disallowed, in rejecting the present application (Exhibit-D/100). Secondly, it is submitted that although, under Section 73 of the Evidence Act, the Court can compare the disputed signature with the admitted one, the Court should be slow in doing so. Reliance in this regard is placed on the decision of the Supreme Court in the case of *AJAY KUMAR PARMAR Vs. STATE OF RAJASTHAN*, (2012) 12 SCC 406 (para 23).

8. On the contrary, it is submitted by Shri Usgaonkar, the learned Senior Counsel for the respondent no. 3, as well as the learned Counsel for the other respondents that there is gross delay in filing the application, in as much as the suit is filed in the year 2003, while the application is made in the year 2017. It is submitted that such a belated application, has rightly been rejected. Reliance is placed on the decision of the Madras High Court in the case of *VENKATACHALAM Vs. ANGAMMAL &*

ANOTHER, AIR 2003 MADRAS 361, in order to submit that in similar circumstances, an order refusing to refer the disputed document, has been upheld by the High Court.

9. Shri Menezes, the learned Counsel for the respondent no. 4 supports the petition and has no objection for sending the document to the hand writing expert.

10. I have carefully considered the rival circumstances and the submissions made. As noticed earlier, PW-2 was examined on behalf of the petitioner as an attesting witness to the agreement of sale. There was some discrepancy about the place whether, the deceased Teotonio had signed the agreement of sale and in the context thereof, recall of PW-2 was sought, which was not allowed by the learned Trial Court. This Court by order dated 22.12.2016 in Writ Petition No. 743/2016 has declined to interfere, reserving the liberty to challenge the said order in case any adverse order is passed in the suit, at the time of final disposal of the suit on merits. It appears that refusal to recall PW-2, cannot have any bearing on the question of agreement of sale being referred to the report of the hand writing expert. It is now well settled that primarily, it is for the Court to find whether, the document needs to be referred to the hand writing expert and the discretion which is required to be exercised being a judicial discretion, has to be exercised in facts and

circumstances of each case. The impugned order shows that the Trial Court has rejected the application primarily on the ground that the recall of PW-2 was not allowed. In my considered view, it will thus be appropriate that the Trial Court reconsiders the application (Exhibit-D/100) and decides the same in accordance with law, after hearing the parties.

11. In such circumstances, the following order is passed:

O R D E R

- (a) The Writ Petition is partly allowed.
- (b) The impugned order dated 21.06.2017, is set aside.
- (c) The learned Trial Court shall decide the application (Exhibit-D/100) afresh, in accordance with law after hearing the parties.
- (d) Rival contentions of parties are left open.
- (e) The petition is disposed of in the aforesaid terms.

C. V. BHADANG, J.

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