

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

901 WRIT PETITION NO. 10793 OF 2015

VIJAYKUMAR GULABCHAND BALDAVA
VERSUS
GAUTAM PRAKASH KULKARNI

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Advocate for Petitioner : Shri N. S. Jaju
Advocate for Respondent : Shri. S. S. Chapalgaonkar h/f
Shri. S. R. Andhale

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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 28th NOVEMBER, 2018.**

PER COURT :

1. RULE. Rule made returnable forthwith and heard finally by the consent of the parties.
2. I have heard the learned advocates for the respective sides at length on 27.11.2018 and the matter was posted today for passing orders.
3. The petitioner, who is the original defendant in Special Civil Suit No. 117 of 2006, is aggrieved by the order dated 09.10.2015 passed by the learned Trial Court below Exh.189 and Exh.190.
4. The petitioner had raised two issues before the Trial Court. Firstly, that certain documents were produced by the plaintiff under the leave of the Court by order dated 09.10.2015 below Exh.189. Secondly, that the Trial Court has rejected application Exh.190 by order dated 09.10.2015, by which, a particular document was not referred to a Forensic Laboratory, for seeking an expert opinion, as regards the age of the ink

appearing in the signature of the petitioner and the age of the ink used for writing certain terms on a blank bond paper.

5. In so far as the first impugned order below Exh.189 is concerned, the Trial Court permitted the plaintiff to produce the cheque bearing No. 026316, the cheque returned memo and the letter of the bank. In so far as proving these documents by the party who produces it is concerned, the Trial Court has concluded that the evidenciary value of the document would be considered at the final stage and as these documents are in original form, they can be exhibited. Grievance of the petitioner is that the petitioner /defendant would not get an opportunity to confront the said documents.

6. I find that the apprehension of the petitioner is misplaced since mere exhibiting of a document, does not mean that the contents of the document are proved. The Trial Court cannot consider this document to the extent of its contents unless the said contents are proved. The Indian Evidence Act lays down the procedure for proving the contents of the said document. As such, I do not find that the petitioner would be prejudiced in any manner since the Trial Court would not be in a position to consider the evidenciary value of such

document and its contents unless they are proved by following the due procedure. On these premises, the impugned order dated 09.10.2015 does not call for any interference. The Trial Court, however, shall be conscious of the observations set out herein above.

7. In so far as the order below Exh.190 is concerned, the learned advocate for the respondent /original plaintiff has strenuously opposed this petition and prays for its dismissal for the reason that a similar application Exh.44 was filed earlier by the petitioner / defendant, which was rejected by the Trial Court. Filing application Exh.190 after a lapse of six years, seeking the same relief, naturally would justify its rejection, is the contention of the respondent.

8. The learned advocate for the petitioner draws my attention to the judgment delivered by this Court (Coram : S. V. Gangapurwala, J.) dated 13.02.2013 when the petitioner was before this court in First Appeal No. 3675 of 2011. The suit of the appellant plaintiff was dismissed. This Court, while allowing the appeal and in order to give an opportunity to the plaintiff to contest the suit on its merits, imposed costs and observed in paragraph Nos. 9(a) as under :

*“ In the result, I pass the following order :
(a) The impugned judgment and decree is quashed*

and set aside. The matter is remanded to the Trial Court for deciding the suit afresh. The parties shall appear before the Trial Court on 11.03.2013. The appellant shall pay costs of Rs.20,000/- (Rupees twenty thousand) to the respondent on or before 11.03.2013. If the cost is deposited in the Trial Court, the defendant / respondent is allowed to withdraw the same. The Court shall allow the plaintiff and defendant an opportunity to adduce evidence so also cross-examine the respective witnesses.

9. The petitioner contends that this Court set aside the judgment in the civil suit while allowing the appeal, restored the civil suit and directed the Trial Court to decide the suit afresh. All the parties were granted liberty to adduce evidence and cross-examine respective witnesses. It is, therefore, contended that Exh.190 filed by the petitioner was based upon recent Law as well as in view of this Court having granted an opportunity to the parties to lead fresh evidence and having directed the Trial Court to decide the suit afresh.

10. The learned advocate for the plaintiff relies upon the decision of the Kerala High Court delivered in the matter of ***Chellappan Vs. State of Kerala, 1995 CRI.L.J. 150***. It is submitted that, in view of the conclusion drawn by the said Court, once an issue was already decided earlier, the rule of estoppel would apply and the concerned party

would not be permitted to reopen an issue. Reliance is placed on paragraph No.8 of the said judgment, which reads as under :

8. *Where an issue has been decided by a competent court on a former occasion, such a finding constitutes an estoppel or res judicata against the parties to that proceedings. It will operate as a bar to reception of evidence to disturb that finding in a subsequent trial or proceedings. This principle is known as 'rule of estoppel'. The principle of 'issue estoppel' was stated by Xixon, J. in King V. Wilkes 77, CLR 511, as :-*

“There is issue estoppel if it appears by record of itself or as explained by proper evidence that the same point was determined in favour of a prisoner in a previous trial which is brought in issue on a second criminal trial of the same prisoner”.

In order to invoke the rule of 'issue estoppel', the parties in the two proceedings must not only be the same, but also the fact in issue must be identical, i.e. the issue that was decided earlier must be identical with that which is sought to be reagitated. According to Their Lordships of the Supreme Court in Ravinder Singh v. State of Haryana, AIR 1975 SC 856, 1975 Cri. LJ 765.

“Issue-estoppel' does not prevent the trial of an offence as does autre fois acquit but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and specific finding recorded at an earlier criminal trial before a court of competent jurisdiction”.

11. With due respect to the judgment delivered in **Chellappan** (*supra*), it cannot be ignored that firstly, the said judgment was delivered in a criminal matter considering Section 300 of the Cr.P.C. and

secondly, there was no direction in the said matter, by which, the said proceedings were reopened for a retrial, as like in this case where the judgment of this Court dated 13.02.2013, operative part of which is reproduced herein above, by which, this Court directed the Trial Court to decide the suit afresh and permitted the litigating sides to adduce fresh evidence.

12. In view of the above, it needs to be considered as to whether the prayer made by the petitioner /defendant in application Exh.190 could be entertained.

13. This Court in the matter of *Vijay Achyut Ashtikar and another Vs. Vinayak Achyut Ashtikar, Writ Petition No. 6751 of 2016* has taken a view vide order dated 08.02.2018 delivered at the Nagpur Bench that the technology is now available to consider the age of the ink appearing on a document. If the original copy of the document containing the writing is available, the Neutron Activation Analysis, BABC, Mumbai has the facility to find out the approximate range of the time during which the writings would have been made. The said Institution is a Central Government Organization. This Court, therefore, ruled in favour of referring the document for the purposes of seeking an expert

opinion upon the approximate age of the ink, by observing in paragraph

Nos. 4, 5 and 6 as under :

4. *I have heard the learned counsel for the parties at length and I have perused the material placed on record. Under provisions of Order XXVI Rule 10A of the Code a discretion is conferred on the Court to direct scientific examination of any document which in its opinion would be relevant for adjudicating the dispute in question. The Will dated 06/11/1991 is the document of contest between the parties. That document has been laminated and therefore, the defendants were justified in expressing an apprehension that removal of lamination cover could affect the document itself. It is, therefore, that a statement has been made on behalf of the respondent that the expert concerned without removing the lamination would examine the said document in presence of the parties or their representatives. The manner in which such examination would be done is stated in pursis dated 02.08.2017.*

5. *I find that by taking adequate precaution to ensure that the document in question as laminated is handled with care, its scientific examination can be permitted in the light of discretion exercised by the trial Court. The same can be done by following the modality as stated by the expert and mentioned in the pursis dated 02/08/2017. It is to be noted that after the document is examined, the opinion of the expert would be available on record. While according to the defendants it is not possible to determine the age of the ink on the document, according to the expert sought to be appointed by the plaintiff such determination is possible. I find that the value of that report as well as the question whether the method adopted by the expert throws light on the age of the ink on the document are matters which can be considered after the report of the expert is received. The contentions of both the parties in that regard can be kept*

open for evaluation by the trial court in the light of provisions of Order XXVI Rule 10-A(2) of the Code are concerned.

6. In that view of the matter I do not find any interference is called for as far as the order passed by the trial Court. The trial Court shall direct examination of the document dated 06/11/1991 by taking into consideration the contents of pursis dated 02/08/2017. It is made clear that both the parties would be free to subject to the report of the Commissioner and the question whether the age of the ink on the Will can be determined by such examination would also considered by the trial Court.

14. The Andhra Pradesh High Court considered a similar position in the matter of **Mr. Namineni Audi Sessaiah Vs. Mr. Nuburu Mohan Rao, Civil Revision Petition No. 4656 of 2018 decided vide judgment dated 25.09.2018** and concluded in paragraph Nos. 10, 11, 16 and 18 as under :

10. It is observed in *A. Inayathulla supra*, another expression of the Madras High Court in *K. Vairavan v. Selvaraj*, and that though there is scientific method available, there is no expert available who can scientifically examine particularly at the Forensic Science department of the Government of Tamilnadu. The Central Forensic Sciences Laboratory, Hyderabad, expert attended the Tamilnadu Judicial Academy to address the officials also stated that no expert is available there had and the fax message received from assistant Director of Central Forensic Sciences Laboratory, Hyderabad, of there is no validated method in their laboratory to undertake examination to determine the relative or

absolute age of the ink of the writings or signatures. It is also observed in *A. Inayathulla supra*, by referring to the expression in *R. Jagadeesan supra* that there is one institution known as Nutron Activation Analysis, BABC, Mumbai, where there is facility to find out the approximate range of the time, during which the writings would have been made and it is a Central Government Organization. It was concluded in *A. Inayathulla supra* therefrom of no purpose that could be served in sending the cheque in question to Government handwriting expert Tamilnadu.

11. In fact this Court relied upon the Apex Courts expression in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* observed as follows :

Finally we may point out that the expert admitted in his evidence that it was only by a chemical test that it could be definitely stated whether a particular writing was of a particular year or period. He also admitted that he applied no. chemical tests in this case. So his opinion cannot on his own showing have that value which it might have had if he had applied a chemical test. Besides we may add that Osborn on “Questioned Documents” at p. 464 says even with respect to chemical tests that “the chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no. reliable date upon which a definite opinion can be based”.

It further observed that the time and place of execution of promissory note in dispute including as to difference in ink, opinion of handwriting expert can be sought for under Section 45 of the Act and such opinion is not totally irrelevant for adjudication of the dispute from the opinion sought for determining the age of the disputed handwriting, it is crystal clear of the handwriting as to the year of writing can be given by expert opinion is the conclusion before the Supreme Court in its approving to consider way back in 1964 and referring to it way abck in 1994 this Court held opinion as to age of writing or signature can be sought from the

expert. It is no doubt in relation to a civil dispute.

16. As referred in Rajalingam supra it is crystal clear of Para 4 of Inayathulla supra speaks referring in Jagadeesan supra of there is one institution known as Nutron Activation Analysis, BABC, Mumbai where the facility to find out the approximate range of the time during which the writings would have been made and that is also a Central Government Organization.

18. Having heard to the above, this Civil Revision Petition is allowed by setting aside the order of the lower Court by restoring and allowing the application with a direction to the lower Court to direct the defendant to deposit Rs.20,000/- and send the document to the Nutron Activation Analysis, BABC, Mumbai, which is a Central Government Organization where the facility of determination of age of the ink available for its determination, on petitioners ascertain the full and correct address and availability of the facility and from deposit of the amount.

15. The case of the defendant is that he has signed on a blank document, which was tendered as a surety to the plaintiff. Subsequently, with the intention of misusing the blank document, the plaintiff had written an agreement on the said blank stamp paper so as to be used to the prejudice of the defendant. The plaintiff has denied these contentions and has contended that the document was prepared and duly signed by the defendant. It was in this backdrop that the defendant had moved an application in 2009 at Exh.44. The said application was rejected.

16. I find that considering the directions of this Court dated 13.02.2013 and in view of the law that has evolved in the judgments delivered in *Vijay Achyut Ashtikar* (supra) and *Mr. Namineni Audi Seshaiiah* (supra), the Trial Court should have taken a pragmatic view rather than taking a pedantic view in the matter. The endeavour of the court is to ensure that the truth surfaces. If the ends of justice are to be met and especially in view of the peculiar facts of this case when the Trial Court was directed to decide the suit afresh, the rejection of Exh.44 would not come in way of the petitioner/ defendant.

17. In view of the above, this petition is partly allowed.

18. The impugned order dated 09.10.2015 is quashed and set aside. Application Exh.190 shall stand allowed.

19. Considering the above, the Trial Court shall pass an order on Exh.190 referring the concerned document Exh.189 to the Nutron Activation Analysis, BABC, Mumbai, with a direction to decide the age of the ink appearing in the writing on the document as well as all signatures of this defendant and witnesses below the said document.

20. The requisite fees shall be deposited by the petitioner with the said Agency. The Trial Court would issue a direction to the said

Agency to submit its report along with the original document referred, in a sealed envelope and preferably within a period of 45 days from the date of the receipt of the said document along with the order of the Trial Court.

21. After the report is received by the Trial Court, it shall proceed to decide Special Civil Suit No. 117 of 2006 as expeditiously as possibly and, preferably on or before 30th day of September, 2019.

(RAVINDRA V. GHUGE, J.)

vsm/-