

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1016 OF 2018**

Mrs. Epifania Angela Soares e Fernandes,
major of age, residing at Panarim, Aldona,
Bardez-Goa.

.... Petitioner

Versus

1. Miss Indira Arena Martha Menezes,
D/o Late Teotonio Antonio Vicente do
Menezes, R/o H. No. 65, Behind
Camilo Menezes House, Belsur Vaddo,
St. Mathias Diwar-Goa.
2. Sahakar Housing Co-Operative Society
Ltd., Registered with the Registrar of
Co-operative Societies under No.
60/15/83/TB, represented this act by
its Chairman, Mr. Maruti Manguirish
Shiroon, Mapusa, Bardez-Goa.
3. Mr. Jerman D'Mello, major of age,
residing at Shelter Enclave S2, Vodlem
Bhat-Taleigao, Ilhas-Goa.

.... Respondents

Mr. Nigel Da Costa Frias with Ms. Maria Correia, Advocates for
the Petitioner.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar,
Advocate for the Respondent No. 2.

Mr. Ryan Menezes, Advocate for the Respondent No. 3.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 23rd January, 2019.

PRONOUNCED ON: 22nd April, 2019.

JUDGMENT:

Rule made returnable forthwith. Ms. Palyekar, the
learned Counsel, waives service for the contesting respondent
no. 2 and Mr. Menezes, the learned Counsel, waives service for
the respondent no. 3. Heard finally by consent of parties.

2. This is the third round of litigation, between the parties before this Court, on an issue of a will dated 17.02.1990 and an agreement dated 14.05.1987 being referred to the Government Examiner of questioned documents.

3. The petitioner is the original plaintiff, in Special Civil Suit No. 2/2003, pending on the file of the learned Senior Civil Judge at Mapusa, in which, the respondent nos. 1, 2 and 3 are respectively the defendant nos. 1, 3 and 4. The petitioner has filed the aforesaid suit for declaration and cancellation of sale deed dated 02.09.1988, for specific performance of the agreement dated 15.04.1987 and for consequential reliefs.

4. The case made out in the plaint, is that by an agreement dated 14.05.1987, late Teotonio Menezes and his daughter Ms. Indira Menezes (defendant no. 1) agreed to sell to the plaintiff the suit property for a consideration of Rs.10 lakhs, out of which, an amount of Rs.3 lakhs was paid towards part consideration. That, as agreed, the plaintiff effected payment of further amount of Rs.2 lakhs, within two months from the date of the agreement. The petitioner also claims that on execution of the said agreement, he was put in physical possession of the said property. The petitioner subsequently

learnt from a public notice dated 17.06.2002 in daily Navhind Times, that the suit property is subject matter of dispute in Special Civil Suit No. 63/1995, as being fraudulently sold to the respondent no. 2, Co-operative Society. It is in these circumstances, the petitioner is seeking specific performance of the agreement of the year 1987.

5. The petitioner filed an application (Exhibit-D/100), for referring the agreement for sale for the report of the handwriting expert (in as much as the respondents were disputing the signature of late Teotonio Menezes on the said document), which was refused by the Trial Court on 21.06.2017. The said application was filed after the parties had closed their evidence. The application was mainly rejected on the ground that earlier there was an application for recall of PW-2 to depose about the alleged agreement, which was not allowed, which order was confirmed by this Court. PW-2 happens to be one of the witnesses to the agreement dated 14.05.1987. The learned Trial Court found that the application for referring the document for handwriting expert was belated. The petitioner challenged the said order before this Court, in Writ Petition No. 600/2017. This Court finding that the refusal to recall PW-2, cannot have any bearing on the question of

agreement of sale being referred to the report of the handwriting expert, the application (Exhibit-D/100) was sent back to the learned Trial Court for deciding it afresh, in accordance with law.

6. Thereafter, the learned Trial Court again dismissed the said application by order dated 27.10.2017, on the ground that the deed of sale was executed on 02.09.1988 and it is a registered document, whereas the alleged agreement is dated 14.05.1987, which is neither registered before the Sub-Registrar nor before the Notary. The learned Trial Court found that the suit was filed on 09.01.2003 i.e. after about five years of the registration of the sale deed and the suit property has already been sold to the defendant no. 4 by late Teotonio Menezes about 29 years back. It was found that it was in these circumstances that the document cannot be sent to the handwriting expert as the petitioner has not made an attempt to get the document examined from the private handwriting expert to prove the signature of Teotonio on the said document. This order dated 27.10.2017, was challenged by the petitioner before this Court in Writ Petition No. 974/2017, which was allowed on 27.11.2017, by consent of parties and the application D/100 was remanded back to the learned Trial

Court for deciding it afresh in accordance with law and particularly in the light of the provisions of Order XXVI, Rule 10-A of CPC and Section 45 and Section 73 of the Evidence Act. After this, the learned Trial Court has again rejected the application, by impugned order dated 04.09.2018. Hence, this petition.

7. I have heard Mr. Costa Frias, the learned Counsel for the petitioner and Mr. Usgaonkar, the learned Senior Counsel for the contesting respondent no. 2. Perused record.

8. It is submitted by Mr. Costa Frias, the learned Counsel for the petitioner that inspite of this Court directing the Trial Court to decide the application in the light of the provisions of Order XXVI, Rule 10-A of CPC and Section 45 and Section 73 of the Evidence Act, the Trial Court except reproducing the above provisions, has not dealt with the request in a proper perspective. It is thus submitted that there is clear non application of mind, while deciding the application (Exhibit-D/100) in accordance with law.

On behalf of the petitioner, reliance is placed on the the decision of this Court in the case of **Srikant Balwant Nalawade Vs. Bajarang Yashwant Nimbalkar & Others**

(2014) 4 ALL MR 302 and Gangadhar Deoram Kadam Vs. the State of Maharashtra & Another (2014) ALL MR (Cri) 206, the decision of the Karnataka High Court in the case of **B. Nagarajappa Vs. Smt. Boramma & Others 2010(5) ALL MR (Journal) 35**, the decision of the Madras High Court in the case of **V.K. Sridhar & Others Vs. C.R. Shankar & Others 2010 SCC Online Mad 40** and the decision of the Andhra Pradesh High Court in the case of **Guru Govindu Vs. Devarapu Venkataramana AIR 2006 AP 371, Ghulam Ghouse Vs. Madarse Jeelania Shama-ul-uloom Educational Society 2007 4 ALD 435** and **Jalagadugula Eswara Rao Vs. Davala Surya Rao AIR 2011 AP 78**.

9. On the contrary, Mr. Usgaonkar, the learned Senior Counsel for the respondent no. 2 has supported the impugned order. It is submitted that the suit is at the stage of final arguments and thus, the application which is belated, has rightly been rejected, as the application is filed with a view to protract the suit. It is submitted that the Court is clothed with powers to compare the signature by invoking Section 73 of the Evidence Act and thus, the dismissal of the application is legal and proper. Reliance is placed on the decision of the Madras High Court in the case of **Venkatachalam Vs. Angammal &**

Another, AIR 2003 MADRAS 361.

10. Mr. Costa Frias, the learned Counsel for the petitioner has distinguished the decision in the case of **Venkatachalam** (supra) on the ground that in that case the plaintiff had never taken a stand, during the course of the trial, disputing the signature, on the questioned document and therefore, the belated application seeking handwriting opinion was rejected.

11. Order XXVI, Rule 10-A of CPC provides for issuance of commission for scientific investigation, wherein the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission for such scientific investigation, which would include a report by the handwriting expert. Section 45 of the Evidence Act provides that the opinion of the handwriting expert is relevant within the meaning of the said section. Section 73 of the Evidence Act permits the comparison of the signature by the Court. The enabling power as contained in Section 73 of the Evidence Act, has to be read with Order XXVI, Rule 10-A of CPC and Section 45 of the Evidence Act. The Supreme Court in the case of **State of Maharashtra Vs. Sukhdeo Singh AIR 1992 SC**

2100 has held that the Court should be slow to compare the questioned documents/signature, with the admitted one, although Section 73 of the Evidence Act empowers the Court to compare the disputed writing/signature with the specimen/admitted documents shown to be genuine. The Hon'ble Supreme Court has held that prudence demands that Court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. A similar view has been taken in the case of **Ajit Vs. State AIR 1997 SC 3255**. There are decisions holding that mere delay may not always be decisive in granting an application for referring the document to the handwriting expert, which is otherwise found to be necessary and justified. In the present case, the signature of late Teotonio Menezes on the agreement for sale has been disputed and thus, it is appropriate that the learned Trial Court grants that application, referring the said application to the handwriting expert.

12. Although, the petitioner has relied upon several authorities, it is not necessary to refer to each of them. Suffice it to mention that in similar circumstances, the Courts have held that the document was required to be referred to the

report of the handwriting expert. The question although, would depend upon fact and circumstances of each case, having regard to the nature of defence taken since inception by the petitioner, a reasonable opportunity ought to have been granted to the petitioner to establish her case on the basis of the agreement for sale dated 14.05.1987. In an appropriate case, if the application is filed at a belated stage, the Court can always put conditions including that of payment of costs. Although, by an order dated 27.11.2017, the learned Trial Court was directed to consider the application in the light of the provisions of Order XXVI, Rule 10-A of CPC and Section 45 and Section 73 of the Evidence Act, the learned Trial Court except the bare reproduction of the said sections in the impugned order, has not considered the application in the light of the said provisions.

13. In the case of **Venkatachalam** (supra), on which reliance is placed on behalf of the respondent no. 2, the plaintiff had disputed the document at a belated stage, which was never the stand taken at the stage of the trial, which was the main reason why the Court held that the dismissal of the application was proper. In my considered view, the case is distinguishable on facts.

14. In the result, the following order is passed:

ORDER

- (i) The petition is allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application (Exhibit-D/100) is allowed, subject to costs of Rs.10,000/- being paid to the contesting respondent no. 2, within two weeks from today.
- (iv) On payment of the costs, the application (Exhibit-D/100), shall stand allowed as prayed.
- (v) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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