

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 965 OF 2019

Kanta Tejus Maun

...Petitioner

Versus

Tejus Kanubhai Maun
and others

...Respondents

....

Mr. Y.E. Mooman a/w. Tabish Mooman, Advocate for the Petitioner.
Mr. R.T. Lalwani, Advocate a/w. Sadhana Jaykar i/b. Prakash Mahadik,
Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 24th JANUARY, 2019

P.C.

1. Not on board. At the request of Mr. Mooman taken up for admission.
2. Heard Mr. Y.E. Mooman, learned counsel for the petitioner and Mr.R.T. Lalwani, learned counsel for the respondents, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'Kanta', has challenged the order dated 3.8.2018 below Exhibit-239 as also the order dated 3.8.2018 below Exhibit-233 in Petition No.B-87/2008 passed by the learned Judge, Family Court No.5, Mumbai.
4. By order dated 3.8.2018 below Exhibit-239, the learned trial Judge allowed the prayer made in paragraph-6(a) of the application

Exhibit-239 and rejected the prayer made in paragraph-6(b). In paragraph-6(a), the respondent, hereinafter referred to as 'Tejus', has requested the Court to compare the signatures of Satish Nimbalkar on eight documents produced by him in the course of Kanta's cross-examination on 22.9.2016 with the signature of Satish Nimbalkar on documents produced by Kanta. In paragraph-6(b), Tejus prayed that in the event the Family Court is of the opinion that assistance of an expert is necessary then the documents may be referred to handwriting expert for instance Helik Advisory or any other appropriate agency for the said purpose.

5. By order dated 3.8.2018 below Exhibit-233, the learned trial Judge has granted the prayers made in paragraphs-10(a) and 10(b) of the application and rejected the prayer made in paragraph-10(c). By paragraph-10(a), Tejus requested the Family Court to compare his handwriting and signatures, wherever available, on the six out of seven pay-in slips on record at Exhibit-166 collectively (except one dated 12.1.1995) with his handwriting and signature on documents produced along with separate list of documents, originals of which are already on record of the Court. By paragraph-10(b), Tejus requested the Court to compare Kanta's signature on Exhibit-220 with her signature on Exhibit-168. By paragraph 10(c), request was made that in the event the

Family Court is of the opinion that assistance of an expert is necessary, then the documents be referred to handwriting expert for instance Helik Advisory or any other appropriate agency for the said purpose.

6. In support of this Petition, Mr. Mooman submitted that the learned trial Judge was not justified in passing the order below Exhibit-233. He submitted that the learned trial Judge was of the view that the present case is for final arguments and the Court can compare the alleged signatures, handwriting etc. at the time of delivering the judgment and this is not the proper stage to compare it. He submitted that under Section 73 of the Indian Evidence Act, 1872 (for short, 'Evidence Act'), the Court should not take upon itself the comparison of admitted and disputed signatures. Though initially he contended that Tejus did not assert that his paying-in slips are in his handwriting, upon showing the case pleaded by Tejus, he did not press this contention. Nonetheless having regard to Section 73 of the Evidence Act, he submitted that the learned trial Judge was not justified in passing the order below Exhibit-233.

7. Insofar as the order below Exhibit-239 is concerned, he has taken me through the document dated 15.2.1995 which is at Exhibit-168 in the trial Court. He submitted that said document was neither relied by Tejus in his petition nor in examination-in-chief. Tejus cannot

confront Kanta during the course of her cross-examination and take her by surprise. He submitted that in the examination-in-chief, Tejus did not state that the letter bears the signature of Kanta. He also does not state that Kanta made signature in his presence. He, therefore, submitted that the impugned orders are liable to be set aside.

8. On the other hand, Mr. Lalwani supported the impugned order below Exhibit-233. He submitted that Kanta was confronted with these documents during her cross-examination. She denied it. Tejus, therefore, made application Exhibit-233 for the reliefs. Having regard to the set of facts, the learned trial Judge was justified in rejecting the application.

9. Insofar as the order below Exhibit-239 is concerned, he submitted that in view of Order XIII Rule 1(3) of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), nothing in sub-rule (1) thereof is applicable. Order XIII Rule 1 lays down that the parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement. He, therefore, submitted that no case is made out for interfering with the impugned order.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the

material on record.

11. Mr.Mooman submitted that Tejus did not rely upon the document dated 15.2.1995 at Exhibit-168 either in his Petition nor in his examination-in-chief. He has, however, confronted Kanta with that document during her cross-examination. Tejus cannot take her by surprise. Order VII Rule 14(4) reads thus:

**“ORDER VII
PLAINT**

14. Production of document on which plaintiff sues or relies.--

xxxxxx

xxxxxx

xxxxxx

(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.”

12. In the case of **Salem Advocate Bar Association, T.N. Vs. Union of India, (2005) 6 SCC 344**, the Apex Court has observed in paragraph-34 thus :

“34. Order 7 Rule 14 deals with production of documents which are the basis of the suit or the documents in plaintiff's possession or power. These documents are to be entered in the list of documents and produced in the Court with plaint. Order VII Rule 14(3) requires leave of Court to be obtained for production of the documents later. Order 7 Rule 14(4) reads as under:

"14.(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's

witnesses, or, handed over to a witness merely to refresh his memory."

In the aforesaid Rule, it is evident that the words "plaintiffs witnesses" have been mentioned as a result of mistake seems to have been committed by the legislature. The words ought to be "defendant's witnesses". There is a similar provision in Order 8 Rule 1A(4) which applies to a defendant. It reads as under:

"1-A. (4) Nothing in this rule shall apply to documents -

- (a) produced for the cross-examination of the plaintiff's witnesses, or
- (b) handed over to a witness merely to refresh his memory."

[emphasis supplied]

13. Order XIII Rule 1(3) of C.P.C. reads thus:-

**"ORDER XIII
PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS**

- 1. Original documents to be produced at or before the settlement of issues.----**

XXXXX

XXXXX

- (3) Nothing in sub-rule (1) shall apply to documents-
- (a) produced for the cross-examination of the witnesses of the other party; or
 - (b) handed over to a witness merely to refresh his memory."

14. In view thereof, I do not find any merit in the submission of Mr. Mooman.

15. By orders dated 3.8.2018 below Exhibits-233 and 239, the learned trial Judge has decided to compare the signatures, handwriting at the time of delivering judgment. Section 73 of the Indian Evidence

Act, 1872 reads thus:

“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.”

16. In the case of **State of Maharashtra & Ors. Vs. Sukhadeo Singh & Ors.**, AIR 1992 SC 2100, the Apex Court held that the Court should be slow to compare disputed document with admitted document for comparison although Section 73 empowers the Court to compare disputed writings with the specimen/admitted documents shown to be genuine. 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.

17. In the case of **State Vs. Pali Ram**, AIR 1979 SC 12, the Apex Court held that despite no legal bar to Judge using his eyes, the Judge

should hesitate to base his findings with regard to identity of handwriting solely on comparison made by himself.

18. In the present case, while passing the impugned orders below Exhibits-233 and 239, the learned trial Judge noted that the case is for final arguments and the Court can compare the alleged signatures, handwritings etc. at the time of delivering the judgment and this is not the proper stage to compare it. Thus, the learned trial Judge has decided to compare the signatures, handwriting at the time of delivering judgment. The learned trial Judge will keep in mind the ratio laid down by the Apex Court in the aforesaid decisions. If he finds it difficult to compare the signatures, handwriting etc., at that stage he will consider to refer the matter to handwriting expert. Subject to this clarification, the Petition fails and the same is dismissed.

19. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of C.P.C. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)