

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 14264 OF 2017
WITH
WRIT PETITION NO. 14242 OF 2017**

Shri. Bachubhai Kakad Gangoda and Ors. **... Petitioners**

V/s.

Shri. Natwarsingh Ramsingh Chauhan **... Respondent**

Mr. Mandar Soman for the Petitioner.

Mr. Sachin Padaye I/b Girish Agarwal for the Respondent.

CORAM : M.S.SONAK, J.

DATE : 15TH APRIL, 2019

:ORAL JUDGMENT:

1. Heard Mr. Soman for the Petitioner in both these petitions and Mr. Sachin Padiye instructed by Girish Agarwal for the Respondent.

2. Challenge in Writ Petition No. 14242 of 2017 is the order below Exhibit 67 by which the learned Trial Judge has dismissed the Petitioner's application in which the Petitioner had applied for the following reliefs :

"7) Therefore, we pray as under :

a) That, this Hon'ble Court shall pass the order and issue the summons to the plaintiff witness No. 2 the said Mr. Naileshsinh Bhagwansinh Rathod to give sample of his signature to be handed over to Handwriting Expert or Forensic Department for report on the documents Exhibit-60 and Exhibit-61.

b) That, this Hon'ble Court shall pass the order and issue

the summons to Handwriting Expert or Forensic Department and direct to collect sample of signature of the Plaintiff witness No. 2 and also collect his original affidavit of evidence (Exhibit-60) and the original so called will (Exhibit-61) and compare his sample signature with that of his signatures on Exhibit-60 as well as Exhibit-61 and submit the report and till then the evidences of the defendants shall be allowed to be deferred.

c) That, this Hon'ble Court shall pass the order and take action for perjury against the Plaintiff and his witness No. 2, Mr. Nailesh Bhagwan Rathod after having the report of Handwriting Expert or Forensic Department about his signatures on the documents Exhibit-60 and Exhibit-61, in accordance with law.

d) Any other and further reliefs as deem fit by this Hon'ble Court considering the nature and circumstances of the case shall be granted."

3. Mr. Soman, learned Counsel for the Petitioner contends that this was the fit case for all the aforesaid reliefs were required to be granted because the signatures of the attesting witness at Exhibits 60 and 61 are entirely different. He submits that the learned Trial Court by exercising powers under Section 73 of the Evidence Act had virtually deprived the Petitioner of the opportunity of the exercising handwriting experts in the context of varying the signature of the attesting witness. He relies on ***The State (Delhi Administration) v/s. Pali Ram,***¹ to submit that as the matter of prudence the Court

1(1979) 2 SSC 158

should never base its finding with regard to the identity and handwriting on the basis of comparison made by itself. He submits that in any case, such comparison has to be made at the stage of final hearing and not at any earlier stage. He, therefore, submits that the impugned order warrants interference.

4. In Writ Petition No. 14264 of 2017 challenge to the impugned order dated 13.11.2017 below Exhibit 66 by which the Petitioner had applied for recall of Plaintiff No.2's attesting witness for cross-examination.

5. Insofar as Writ Petition No. 14264 of 2017 is concerned, the learned Counsel for the Petitioner submits that attesting witness should have been recalled at least in order to furnish his signature which could be then compared with the signature on Exhibits 60 and 61. He submits that the Trial Judge failed to exercise jurisdiction vested in it by dismissing application at Exhibit 66.

6. Mr. Sachin Padaye, learned Counsel for the Respondent defends the impugned order on the basis of the reasoning reflected therein. He submits that the attesting witness was cross-examined and during the course of such cross-

examination, all these issues were never raised. He submits that the petition as only filling to lacuna and this cannot be permitted.

7. The rival contention now fall for determination.

8. Insofar as the first impugned order dated 13.11.2017 made below Exhibit 67 is concerned, the learned Trial Judge, was justified in rejecting the reliefs prayed for in the application made by the Petitioner. This is because the attesting witness had presented himself for cross-examination and was infact cross-examined on behalf of the Petitioner. In the course of cross-examination, the dispute which is now sought to be raised, was not raised. The Trial Judge has appreciated material on record in correct perspective and therefore, there is no reason made out to interfere with the impugned order, insofar as, it denies the reliefs prayed for at Exhibit 67. In fact, the same reasoning will apply insofar the impugned order dated 13.11.2017 made below Exhibit 66 is concerned. There is accordingly, no case made out to interfere with the impugned order made below Exhibit 66 as well.

9. However, on one aspect clarification is necessary. In the impugned order dated 13.11.2017 made below Exhibit 67, the

Trial Judge has purported to exercise the powers under Section 73 of the Evidence Act, though, the reference is made under Section 83 of the Evidence Act. On the basis of such exercise, the Trial Judge has recorded a finding to the following effect:-

“ On comparing the same both the signatures seem to be the same and replicate each other.”

10. The learned Counsel for the Petitioner submits that the aforesaid finding if taken as conclusive, will debar the Petitioner from examining handwriting experts to prove to the contrary. It is in this context, the learned Counsel for the Petitioner relies upon the observation in the **Pali Ram** (supra) in which, the Hon'ble Supreme Court has observed that, though, ultimately, it will be for the learned Trial Judge to come to the conclusion on the issue of disputed signature as a matter of prudence and caution, the finding regards disputed handwriting should not be based solely on the comparison made by the learned Trial Judge by exercising powers under Section 73 of the Evidence Act.

11. According to me, the aforesaid finding made by the learned Trial Judge is only tentative and *prima facie*. The finding was in the context of dealing with the Petitioner's

application at Exhibit 67, which, even otherwise deserves dismissal. Therefore, the finding, is not required as regarded as conclusive finding on the issue of disputed handwriting/signature.

12. With the aforesaid clarification, the apprehension expressed by the learned Counsel for the Petitioner really does not survive. The Petitioner will undoubtedly be at liberty to examine the handwriting experts, and thereafter it is for learned Trial Judge to examine the effect of not only the evidence of the handwriting experts, but also thereafter, make a comparison in respect of the disputed signature. This is because in paragraph 33 of **Pali Ram** (supra), the Hon'ble Supreme Court has held that since even where proof of handwriting which is in nature of comparison, exists, a duty is cast on the court to compare two admitted writing to the disputed one to verify and reach its own conclusion.

13. With the aforesaid clarification, these petitions are disposed of. There shall be no order as to costs.

14. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)