

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

WRIT PETITION NO.9504 OF 2012

Sunil s/o Madanlal Agrawal,
Age: 41 years, Occ: Agriculture & Business,
R/o: Raja Bazar, Aurangabad. ...Petitioner

Versus

1. Jawahralal s/o Nandlal Chittarke,
Age: 53 years, Occ: Agricultural & Business,
R/o: Kannad, Tq. & Dist. Aurangabad.
2. Madhukar s/o Trimbak Jadhav,
Age: 50 years, Occ: Agricultural & Business,
R/o: Bahirgaon, Taluka Kannad,
District Aurangabad. ...Respondents

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Mr. Ajit D. Kasliwal, Advocate for the Petitioner.
Mr. K.F. Shingare, Advocate for the Respondents.

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**CORAM : ROHIT B. DEO, J.
RESERVED ON : 23rd JANUARY, 2020.
PRONOUNCED ON : 06th FEBRUARY, 2020.**

JUDGMENT:-

1. Rule. Rule made returnable forthwith. Heard finally with consent of the parties.

2. The petitioner is the plaintiff in Special Civil Suit No.510 of 2010 brought for mandatory injunction, declaration and recovery of possession. Respondent 1 is arrayed as defendant 1 and respondent 2 is arrayed as defendant 2 in the special civil suit.

3. The parties shall be referred by their status and

ranking in the civil suit.

4. The case of the plaintiff is that in June 2005, he availed loan of Rs.1,50,000/- from defendant 1 and as a security executed sale deed of the suit property in favour of defendant 1. A contemporaneous document styled as an agreement was also executed on the same day incorporating the real transaction and the understanding that a deed of reconveyance shall be executed on the repayment of loan.

5. The plaintiff contended that defendant 1 refused to re-convey the suit property, and executed a sale deed purporting to alienate the suit property in favour of defendant 2 on 31.08.2010.

6. The plaintiff, therefore, brought the suit claiming mandatory injunction compelling defendant 1 to reconvey the suit property, seeking declaration that the sale deed dated 21.06.2005 executed by the plaintiff in favour of defendant 1 is a document of security, further declaration that the sale deed dated 31.08.2010 between defendant 1 and defendant 2 be declared as illegal and decree of recovery of possession.

7. During the course of the trial, defendant 1 stated

in the examination in chief that other than sale deed dated 21.06.2005, defendant 1 did not sign another document. In essence, defendant 1 disputed the execution of the contemporaneous agreement which the plaintiff put-forth as a basis of the claim. During cross-examination, defendant 1 was confronted with suit summons Exhibit-7, which purports to bear the signature of defendant 1. The said signature was denied by defendant 1. Defendant 1 further stated that he was not able to identify the signature on vakalatnama Exhibit-9. Defendant 1 was then confronted with the written statement Exhibit-15. However, the learned counsel for the plaintiff called upon defendant 1 to identify the other signature appearing at page 8 of the written statement by hiding signature of the advocate of the defendant. This was objected to by the learned counsel for defendant 1, which objection is sustained by the order impugned.

8. It would be relevant to reproduce paragraph 13 of the cross-examination of defendant 1, which reads thus:

13. I use to sign in only mode. I have some documents at my house whereon I have put my signatures. Summons of this suit has been served upon me. It is true that when the suit summons came to be served upon me I have put my signature as an acknowledgement. I can identify of my said signature if shown to me. Suit summons Exh.7 is now shown to me. It does not bear my signature. (Vakalatnama

Exh.9 is shown to the witness. The witness has stated that he is not able to identify the signature on the said Vakalatnama.) (Learned Advocate for the plaintiff has referred page No.8 of the written statement Exh.15 to the witness by hiding signature portion of the Advocate of the defendant and called upon the witness to identify the other signatures on the said page. Learned Advocate for the defendant has raised objection that when the W.S. is part and parcel of the the court proceeding it is not necessary to hide particular portion of said page No.8 and it cannot be permitted to do so. Learned Adv. Shri S.R. Nehri has submitted that if the entire document i.e. W.S. is permitted to go through to the witness and if he knows the document he will get alert and there is no possibility of getting spontaneous answer from the witness. On considering the rival contentions I am of the opinion that when the document itself is the part and parcel of the proceeding it would not be just and proper to hide certain portion bearing signature of the defendant. Unless the witness go through the document he will not be in a position to answer whether the document bears his signature or not. If by hiding certain portion of the document the witness is called upon to answer any question in respect of the signature on the document in that case it will be nothing but the game of "hide and seek" which will not be helpful to the court to come to the right conclusion. Hence permission to hide some portion of the document is not permitted.)

9. The plaintiff is assailing the order whereby the Trial Court did not permit the counsel for the plaintiff to hide

the signature of the counsel for the defendant 1 while calling upon defendant 1 to identify the other signature. The learned counsel for the plaintiff would submit that such a course and manner of cross-examination is a legitimate weapon in the arsenal of the cross examiner, and in view of the provisions of Section 146 of the Indian Evidence Act, 1872, any question which would test the veracity of the witness, is lawful. The learned counsel for the plaintiff invited my attention to the decision of the learned Single Judge in Syed Karamt Husain Vilayat Hussain Vs. Dr. Shaikh Abdul Bari Shaikh Shamsuddin and Others in Writ Petition No.8991 of 2012 and in particular to the following observations.

“2. The petition is filed to challenge the ruling given by the Civil Judge, Senior Division, Aurangabad when the evidence of Defendant No.3 was being recorded at Exhibit 111 in Special Civil Suit No. 448 of 2007. During crossexamination, the learned Counsel for plaintiff showed only signature part of one document to the witness and asked question as to whether he can identify his own signature. Objection was taken by learned Counsel for defendants to this question put up in crossexamination. Contention was raised that unless and until complete document is shown, such question cannot be put to the witness.

3. The suit is filed for relief of specific performance of contract of sale and defendant has taken defence that so called agreement of sale does not bear his signature. In view of the nature of defence taken,

such question was put up in crossexamination to the witness. The veracity of witness can be tested by putting such question and the Court cannot disallow such question. This Court holds that the Trial Court has committed error in refusing to permit learned Counsel for plaintiff to put the question the way in which it was put i.e. by showing only signature part of the document. Such ruling cannot sustain in law.”

10. The learned counsel for the plaintiff further invited my attention to the decision of the Hon’ble Supreme Court in “M/s. Kapil Corepacks Pvt. Ltd and Ors Vs. Shri. Harbans Lal (since deceased) Through Lrs, 2010 (8) SCC 452”, to buttress the submission that inferentially it is discernible from the said decision that it is permissible to confront a witness with the signature on an exhibited document, without disclosing the rest of the document.

11. While the decision of the learned Single Judge does support the submission of the plaintiff, no inference can be drawn from the decision in *M/s. Kapil Corepacks Pvt. Ltd and Ors*, that a witness can be confronted only with the signature without disclosing remaining portion thereof, if the document is accepted. The Hon’ble Supreme Court was considering the provisions of Order 10 Rule 2 and in that context observed thus:

“22. The object of the examination under Order 10 Rule 2 of the Code is to identify the matters in

controversy and not to prove or disprove the matters in controversy, nor to seek admissions, nor to decide the rights or obligations of parties. If the court had merely asked the second appellant whether he had executed the agreement/receipt or not, by showing him the document (by marking the document for purposes of identification only and not as an exhibit), it might have been possible to justify it as examination under Order 10 Rule 2 read with Order 12 Rule 3A of the Code. But any attempt by the Court, either to prove or disprove a document or to cross-examine a party by adopting the stratagem of covering portions of a document used by cross-examining counsel, are clearly outside the scope of an examination under Order 10 Rule 2 of the Code and the power to call upon a party to admit any document under Order 12 Rule 3-A of the Code. What the High Court has done in this case is to 'cross-examine' the second appellant and not examine him as contemplated under Order 10 Rule 2 of the Code. We therefore hold that the purported examination under Order 10 Rule 2 of the Code, by confronting a party only with a signature on a disputed and unexhibited document by adopting the process of covering the remaining portions thereof is impermissible, being beyond the scope of an examination under Order 10 Rule 2 of the Code.

23. In this case the appellant-defendants denied having signed/executed any agreement/receipt in favour of the respondents. In the examination under Order 10 Rule 2, the Court did not ask the second appellant whether he had signed the document or not, by showing the document. What was done was confrontation of a signature alone

without disclosing the document. When so confronted, the second appellant admitted the signature shown as his signature. But that is not an admission of execution of agreement/receipt. The specific case of the appellants in the written statement was that the agreement/receipt dated 7-9-2003 was a *clever forgery*. If a signature is a *clever forgery*, there is a likelihood of the same passing the normal scrutiny of the person to whom it is attributed. Similar is the position in regard to stamping the name of the company.”

12. The learned counsel for defendant 1 has brought to my notice a decision of learned Single Judge in H.N. Rai and Ors Vs. Ajay Mohan and Ors, 2008(5) Bom.C.R. 893 and in particular to the following observations.

“8. I have heard the learned Counsel for the parties and perused the material on record. In my view this method of cross-examination by asking the respondent No. 1 to identify his signature by covering the rest of the matter on the document, would not be fair to the respondent No. 1 and the impugned order cannot be faulted in disallowing this method of cross-examination. It is taken note of that the said agreement is of the year 1969. The petitioners have not been able to substantiate that it is permissible for them to adopt this mode of cross-examination. No doubt the petitioners are entitled to cross-examine the witness to impeach his credibility, however, while cross-examining the witness, it is not permissible to the adverse party to transgress any areas whereby the means

adopted are unfair and unjust and may cause prejudice or injustice to the witness, insofar as the procedure adopted during cross-examination. Merely because the entire case of the parties rests on any document, does not mean that the party can permitted to resort to any mode of cross-examination. If this mode of cross-examination is permitted, then, besides being unfair to the witness, in every matter wherever identification of signatures are involved, the parties would want to adopt this mode, which would have serious ramifications on the system."

13. The decision in *H.N. Rai and Ors Vs. Ajay Mohan and Ors*, was not brought to the notice of the learned Single Judge who decided *Syed Karamt Husain Vilayat Hussain Vs. Dr. Shaikh Abdul Bari Shaikh Shamsuddin and Others* in Writ Petition No.8991 of 2012. The cleavage of opinion is manifest. However, notwithstanding that two diametrically opposite views are taken by two learned Single Judges, I am not inclined either to request the Hon'ble the Chief Justice for constituting a larger bench or to interfere with the order impugned.

14. This petition is preferred in November 2012. This Court issued notice on 22.11.2012 and stayed the proceedings in the suit. The record reveals that no serious attempt is made by either the plaintiff or the defendant 1 to

have the petition heard. The petition came up before me for admission on 09.01.2020 and with consent was finally heard. The passage of more than 7 years from the order impugned, makes the exercise of assessing the correctness or otherwise of the objection to the course adopted by the cross examiner academic and in a sense a exercise in futility. The plaintiff, in any event, has brought on record that defendant 1 denied his own signature on the suit summons and the vakalatnama. The defendant 1 was sought to be confronted with his signature on the written statement by not disclosing the signature of his advocate. It would be naive to expect that defendant 1 would not have become wise and alert to the intent of the cross examiner. Even if it is assumed that the order impugned was not correct, in writ jurisdiction, the High Court is not obligated to correct every error. Considering the passage of 7 years, and the obvious futility of the exercise, I decline to interfere in writ jurisdiction.

15. The petition is dismissed. Rule is discharged.

16. Trial Court is requested to dispose of the suit within a year.

(ROHIT B. DEO, J.)