

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

**C.O. No. 829 of 2022
Smt. Angur Bala Naskar & Ors.
Vs.
Sri Balaram Halder & Ors.**

For the Petitioners	: Mr. Satyajit Mondal, Mr. Amar Nath Sen, Mr. Pranab Kumar Ghosh, Mr. Shouvik Naskar.
For the Opposite Parties	: Mr. Udayan Charavarty, Ms. Nilanjana Dasgupta, Ms. Sanjukta Bhattacharya.
Heard On	: 31.08.2022.
Judgment	: 15.09.2022.

Subhasis Dasgupta, J:-

Subject matter of challenge in this case is against an order dated 3rd March, 2022, passed by Learned Civil Judge (Junior Division), 3rd Court, Diamond Harbour, South-24-Parganas, in Title Suit No. 75 of 2013, allowing a recalling application, dated 29th August, 2018, filed by the defendants.

Opposite parties/defendants had disclosed in their written statement about existence of one deed, dated 15th May, 1989, allegedly executed by Birendranath Halder, which was denied by the plaintiffs

alleging the said deed to be falsely personified. The reference of such deed in the written statement was put up as defence against the proposed claim of the plaintiffs.

Admittedly, plaintiffs prayed for appointment of government handwriting expert for examination of L.T.I. (Left Thumb Impression) found in the L.T.I. volume book of deed, dated 15th May, 1989, as relied upon the defendants, with other L.T.I. of said executor (Birendranath Halder) found in L.T.I. volume book of sale deed, dated 26th July, 1971.

There was a previous direction by the court below requiring defendants to produce the original deed, as disclosed in the written statement, which was grossly challenged by the petitioners/plaintiffs since beginning.

As the defendants failed to produce the original deed, stating that the original deed was not in the possession of the defendants being lost, the court below proceeded to determine the issue upon appointment of government handwriting expert for comparison of signature of Birendranath Halder, found in two documents, mentioned hereinabove.

It would be worth to mention here that after the defendants failed to cause production of original deed dated 15th May, 1989, the plaintiffs/petitioners produced another certified copy of sale deed, dated 26th July, 1971, allegedly bearing L.T.I. of Birendranath Halder, in the volume book, maintained in the concerned registry office.

Subsequent to the order dated 2nd August, 2018, allowing appointment of handwriting expert, defendants filed recalling application

taking a plea that the document, with which the comparison was sought for, was itself fraudulent, and thus disputed with such document, being produced by the plaintiffs/petitioners.

After the rejection of such prayer, the defendants challenged the same before this Court in C.O. No. 74 of 2019. This Court in C.O. No. 74 of 2019, directed the Trial Court to reconsider the recall application on merits upon giving opportunities of hearing to both sides.

By the order impugned, the court below allowed the recalling application of defendants disputing with the veracity, genuineness and contents of the document, in view of the objection of the defendants alleging the purported document to have been fraudulently prepared and, as such the same could not be relied upon for the proposed comparison.

The court below, while making consideration of the recalling application, came to a finding relying upon a principle that nobody can convey better title/interest, than him himself has, because some excess area of land had been transferred, beyond the title of the transferor. The court below thus was not prepared to accept such document to be admitted and standard one, for the proposed comparison of L.T.I. found on two documents, disclosed here-in-above.

Mr. Satyajit Mondal, learned advocate appearing for the petitioners submitted that the recalling application had been decided upon challenging the genuineness, veracity of such document, which was not at all called for in the present case, for declaration and injunction.

Mr. Mondal further contended that the court below had exceeded his jurisdiction to decide the content and veracity of the purported document, dated 26.07.1971, going deep into the merits of the document by prejudicing the same, which is not permissible under the provisions of Section 73 read with Sections 45 and 47 of the Indian Evidence Act, 1872.

It was thus contended by Mr. Mondal that the certified copy of sale deed, dated 26.07.1971, allegedly executed by Birendranath Halder was produced by petitioners/plaintiffs, following failure of the opposite parties/defendants to produce the original deed dated 15th May, 1989, as disclosed in written statement, though it was relied upon by the defendants, and under such compelling circumstances to set the controversy at rest, petitioners/plaintiffs took reference to sale deed, dated 26.07.1971, for comparison of L.T.I. allegedly found in the L.T.I. volume book of concerned registry office of the same executor/Birendranath Halder.

Reliance was placed by Mr. Mondal on a decision reported in **(2016) 5 WBLR (Cal) 534**, delivered in the case of **Joydeb Dutta VS. Atin Law** that mere raising a denial disputing with a signature of a document would not be sufficient enough to reject a prayer for handwriting expert.

Reliance was further placed on a decision reported in **AIR 2016 Calcutta 157** delivered in the case of **Jashoda Choudhury Vs. Tarak Choudhury & Ors.** that the court has got necessary discretion to order for scientific investigation, like appointment of handwriting expert, for deciding a question, which requires scientific investigation, and which

cannot be conveniently decided by court, without such scientific investigation.

Taking reference to such decision, Mr. Mondal submitted that simple denial thereby disputing with such purported document, dated 26.07.1971, for the proposed comparison by handwriting expert, would not absolve the defendants of their liability to prove that the author of such purported document was somebody else, other than Birendranath Halder.

Profit was sought to be obtained by Mr. Mondal from a decision reported in **2012 (12) SCC 406** rendered in the case of **Ajay Kumar Parmar Vs. State of Rajasthan** to embolden the stand of petitioner that though there is no legal bar to prevent the court from comparing signatures, or handwriting by using its own eyes to compare the disputed writing with the admitted writing, and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard, and must refrain from playing the role of an expert, for the simple reason that the opinion of the court also may not be conclusive. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it.

Taking recourse to such decision, Mr. Mondal submitted that even in the absence of any legal impediment in Section 73 of Evidence Act, those two documents under reference ought not be compared by the court

in bare eyes, and ordinarily the court should seek guidance from an expert without undertaking the task of comparison.

Mr. Udayan Chakravarty, learned advocate appearing for the opposite parties/defendants replied supporting the order of the court below that the document, with which the proposed comparison was sought for, was itself a fraudulent, on the simple score that the transferor of such deed conveyed properties than he actually held, as per his lawful title to the property.

Mr. Chakravarty, thus submitted that the purported deed, dated 26.07.1971, produced by the plaintiffs being fraudulent one with manifest discrepancy shown in the title of the transferor (vendor) to the property, the said document could not be regarded to be a standard admitted document in view of the objection of the defendants disputing with the veracity and genuineness of such document.

Having considered the submissions of both sides, the only issue requiring address is whether the recalling application was appropriately decided or not, in accordance with the law.

In a suit for declaration and injunction filed by the petitioners/plaintiffs, opposite parties/defendants submitted the written statement disclosing a deed, dated 15th May, 1989, allegedly executed by one Birendranath Halder. The petitioners/plaintiffs challenged such deed alleging the same to have been prepared making false personification.

Defendants were directed to produce the original deed, who are the legal heirs of author of such deed, dated 15th May, 1989. Defendants failed

to produce the original deed taking a plea that the said document had been lost from their custody. Certified copy of the deed, however, put in evidence. The original volume book of the deed was directed to be produced, but it could not be produced for non-availability of folio paper of 1989, as disclosed by DW-3 in his evidence.

There was no original signature of the executor of such deed, found in the volume book. Petitioners/plaintiffs challenged the execution of deed, dated 15th May, 1989. As the defendants failed to cause production of the original deed, dated 15th May, 1989, taking a plea that the same went missing, the petitioners proceeded to challenge the execution of the deed, dated 15th May, 1989, as disclosed by defendants in their written statement, upon furnishing a certified copy of deed, dated 26.07.1971, with a prayer for comparison of signature of Birendranath Halder, found in the L.T.I. book of deed dated 26.07.1971 with L.T.I. volume book deed dated 15th May, 1989.

The settled proposition of law is that plaintiff has to establish its own case, but the case of the plaintiff may not be allowed to be established taking the defects or weakness of defence case.

It is the case of the petitioners that upon disclosing the deed, dated 15th May, 1989, defendants proceeded to cloud the title of the petitioners/plaintiffs, without causing production of the original deed.

The only explanation offered by defendants regarding non-production of original deed, dated 15th May, 1989, is about missing of original deed from their custody. To prove missing of such deed from their

custody, no missing diary was lodged subsequently by the defendants with the concerned police station.

Therefore, the primary obligation to produce the original deed dated 15th May, 1989, could not be discharged by the defendants, though they proceeded to dispute the proposed claim of petitioners/plaintiffs in a suit for declaration and injunction.

Under a compelling circumstances, the then prevailed at the moment, petitioners/plaintiffs produced certified copy of a purported sale deed, dated 26.07.1971, allegedly executed by Birendranath Halder, with a prayer for comparison of L.T.I. found in such document with L.T.I. found in the L.T.I. book, deed dated 15th May, 1989, allegedly executed by the self-same executor/Birendranath Halder.

It was so done by the petitioners for the due burden of the defendants not being duly discharged, and consequently burden being shifted to the petitioners for denial of the claim of petitioners to the subject property, upon disclosing deed dated 15.05.1989, in written statement.

It would be profitable here to refer the provisions mentioned in Section 73 of the Indian Evidence Act, 1872, which deals with the comparison of signature, writing or seal admitted or proved, and the same may be reproduced hereinbelow:

“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 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.]”

In view of conspicuous provisions mentioned in Section 73 of the Indian Evidence Act, that 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 be produced or proved for any other purpose; neither the nomenclature of document, nor the contents of a document requiring comparison would matter much. It is the signature or L.T.I. of a person found on a document is of highest significance.

The defendants disputed with the purported document, dated 26.07.1971, being produced by plaintiffs taking a ground that it was not at all admitted by the defendants. The basis of denial of purported document, dated 26.07.1971, is oral assertion only, and there is no cogent document, or supporting evidence to support such denial.

The only qualification being imposed upon the court below, while allowing comparison of signature by handwriting expert, is to ensure that any signature, writing or seal must be admitted, or proved to the satisfaction of the court to have been written, or made by the person, that may be compared with one, which is to be proved.

The word used as “*any*” preceding the words 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, as appearing in Section 73 of Indian Evidence Act, 1872 makes it abundantly clear that neither the nomenclature of the document, nor the content of a document, nor the legality, validity, authenticity or veracity of the document is required to be gone into, while making consideration of the prayer for comparison of signature/L.T.I. of two documents.

True it is that defendants did not admit the purported document, dated 26.07.1971, produced by the petitioners/plaintiffs, but the basis of denial of such document is oral assertion only, without any supportive evidence, such mere denial would not automatically establish the plea of defendants, in the absence of any cogent or convincing evidence.

When the court below upon due discharge of discretion vested to the court, what is abundantly found in Section 73 of the Indian Evidence Act, has allowed comparison of the two documents, due to the failure of defendants to cause production of original deed, dated 15th May, 1989,

such discretion being lawfully exercised, would not suggest for any revisit of such prayer in aid of a recalling application filed by defendants.

Any objection to such order of comparison by handwriting expert not being objectively testified by cogent and supportive evidence, would pave the way for drawing adverse presumption against the opposite parties, on the score that taking a mere denial, the opposite parties have been resisting the discretion exercised by the court below, while making order of comparison of signatures/L.T.I.s by expert, in order to unfold the actual state of affairs.

Since primary obligation to produce the original deed, dated 15.05.1989, from the custody of defendants, being legal heirs of transferor of such deed, could not be discharged, upon taking a plea that the said document went missing from their custody, another document was produced by plaintiffs for proposed comparison, and explanation offered by defendants for non-production of original deed taking plea of missing seems to be not acceptable for the peculiarity of circumstances involved in this case.

The revisional application is disposed of upon setting aside the order impugned dated 03.03.2022, giving further opportunity to opposite parties to produce any other admitted document for the proposed comparison, by handwriting expert within two (2) weeks after reopening of Puja Vacation of the court below, failing which, the two documents referred in order dated 2nd August, 2018, passed by court below, may be sent to handwriting expert for comparison and opinion, subject to deposition of

cost, if any, passed by court below for the purpose within three (3) days thereafter, without making any reference to the opposite parties.

The revisional application is thus disposed of.

Parties are directed to make communication of this order to the learned court below.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis.

(Subhasis Dasgupta, J.)