

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

(Appellate Side)

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.R 2207 of 2016

Sayad Aftabur Rahaman

Vs.

The State of West Bengal & Ors.

For the Petitioner : Mr. Sudipto Maitra,
Mr. Kallol Mondal.

For the OP nos.2 &3 : Mr. Soumyajit Das Mahapatra

For the State : Mr. Narayan Prasad Agarwala,
Mr. Pratick Bose.

Hearing Concluded on : 07.11.2022

Judgment On : 23.11.2022

Rai Chattopadhyay, J.:

1. In this revision petitioner has challenged the judgment dated 14th March 2016, passed by the Additional Chief Judicial Magistrate, Uluberia, Howrah, in Misc. Case No. 343 of 2014 (re-numbered as Misc. Case No.348 of 2015), i.e, a proceeding under Section 127 Cr.P.C,1973, initiated by the present petitioner in the Trial Court.

2. The background, in brief, of the entire case leading to filing of the present revision may be narrated as follows.

3. The petitioner had earlier been directed by the Court to pay monthly maintenance allowance to the tune of Rs. 5000/- to the opposite party no.2 and Rs. 3000/- to the opposite party no.3 being his wife and minor son respectively, in a proceeding under Section 125 Cr.P.C, 1973, being Misc. Case No.67 of 2010. The said order of the court was founded upon the fact and reason that the petitioner was a tax practitioner by profession and was earning sufficiently. There were other grounds that the present opposite party no.2 had no independent source of earning for maintenance of herself and the minor child. A comparative discussion was made regarding status of the parties. After considering all these the Court directed the petitioner to pay maintenance as per the terms as mentioned above.

4. It is submitted that since thereafter the petitioner has been regularly and diligently paying maintenance allowance to the opposite party no.2 and 3 in due compliance with the Court's order as above. It is submitted that the circumstances changed with passing of time and leaving his profession, the petitioner has undertaken service with an employer namely M/s. Raj Refractories Pvt. Limited from the date 2nd May, 2014. This had prompted the petitioner to file a case under Section 127 Cr.P.C, 1973, in the court on 22nd October, 2014 being Misc. Case No.343 of 2014 (re-numbered Misc. Case No.348 of 2015). There he contented inter alia that, his profession shrunk and he lost clients. Thus, he was unable to secure a sufficient income with the passing of time and could not any more carry on in the profession. He also put forth the ground of his not being successful in profession being disturbed and agonised due to several litigations with opposite party no.2 following their matrimonial wrangling. He stated that all these have led him to leave his profession as an income tax practitioner and undertake employment as mentioned above for a monthly salary of Rs.5000/-. He has also stated before the court in his case under Section 127 Cr.P.C, 1973, that excepting salary income as above he has been left with no other source of income and thus his capacity to pay maintenance has substantially been changed and slumped. He further stated that opposite party no.2 has been earning Rs.15000/- per month by imparting tuitions. On all facts and grounds as

above he prayed before the court that necessary order of modification of the maintenance amount may be passed by either decreasing or waiving the same.

5. The wife/opposite party no.2 has contested the case by filing her affidavit in the Court stating inter alia that the case of the petitioner under Section 127 Cr.P.C, 1973, is only an eye wash and based upon facts and statements which are not true. She has stated on affidavit that excepting income from practice the petitioner would also have other sources of income like landed property etc. She has categorically denied and disputed the contention of the petitioner that he has started earning only a paltry amount of Rs.5000/- per month by doing service with the company as named above. She denied petitioner's contention regarding her own income.

6. This being the crux of the case and upon consideration of the evidence on record the Court has passed the judgment dated 14th March, 2016, which is impugned in this revision. In the said judgment the court had proceeded to find impropriety as regards the evidence advanced by the present petitioner regarding his new avocation or income, as claimed by him. Court has disbelieved the appointment letter/income proof cited before it. Court has come to the finding about no change of circumstances in case of the present petitioner so far as his liability to pay the amount of maintenance as per direction of the court, is concerned.

Petitioner's prayer under Section 127 Cr.P.C, 1973 was rejected and the case was dismissed.

7. Mr. Maitra, appearing for the petitioner, while expressing fervid and strong grievances against the impugned judgment, has categorically argued that the same suffers from absolute non-application of mind by the author of it, who has failed to exercise jurisdiction vested in it by law, while delivering the same. It has been submitted that the court has grossly been unsuccessful in appreciating the change in circumstances. Argument has also been made on the point that the reason on which the court has founded its decision, has never been urged by the opposite parties, i.e, the court has erroneously disbelieved the proof of income of the petitioner, particularly in absence of any challenge or objection to the same and this has rendered the court's order to be perverse. It is petitioner's categorical submission that with the income proof document produced and proved by him in court, which has never been disputed or objected to by the opposite parties, Section 94 of Evidence Act would have been applicable and proof of such document or its contents would not have been imperative. The following two judgments are also relied on:-

- (i) General Court-martial & Ors. Vs. Col. Aniltej Singh Dhaliwal, reported in (1998) 2 SCC 756.

- (ii) Kamla Devi vs. Takhatmal Land Another, reported in AIR 1964 SC 859.

- 8.** By referring to Section 94 of the Evidence Act, it has been submitted that in absence of any objection raised as to the contentions of the appointment letter of the petitioner, the court is erroneous in not considering the contention of the same as it is and also has failed to apply its mind that the appointment letter accurately and conclusively indicate the existing fact of his present engagement with the company named above. Such non consideration by the Trial Court, according to the petitioner, is in violation of the said provision of law. The two judgments are relied on to elaborate this point which shall be discussed in due course.
- 9.** Strong objection has been raised on behalf of the opposite party no.2/wife as to the facts and grounds pleaded by petitioner in this revision. It is submitted that petitioner's income has only enhanced and not diminished in any way as stated by him. It is further submitted that the trial court has considered the entire evidence on record both oral and documentary and thereafter has come to a just finding, which may not be interfered with by this court in this revision.
- 10.** Heard submissions. Perused the pleadings and documents including the certified copy of the impugned judgment. There is a very

short point involved in this revision to be determined by this court, i.e., whether the trial court has been just and proper in disbelieving the present income of the petitioner, his appointment letter which is an income proof too and the change in circumstances as pleaded by the present petitioner before it. Petitioner has admitted that previously he has been practicing income tax and earning sufficiently. It is his categorical case that since his practice was not successful and he was not being able to settle down by huddling considerable number of client's base and the reasons he attributed to the disharmonious matrimonial life, he had to opt for a regular income by undertaking employment with M/s. Raj Refractories. He says that he has been working in the said factory since 2nd May, 2014 and earning an amount of Rs.5000/- per month. To prove his income he has exhibited his appointment letter issued to him by the said company. He has also cited a witness, i.e., the manager of the company, to corroborate his statement as above.

11. However, the court has disbelieved the appointment letter and found that to prove appointment to be beyond reasonable doubt the petitioner had to take recourse to more appropriate evidence and found the evidence of the petitioner to be insufficient to duly prove the fact of change in circumstances, he has pleaded before the court.

12. According to Mr. Maitra, who is representing the petitioner, the court has erred in not relying on the contention of the exhibited

appointment letter as the language would have been very clear and indicative about the fact of his engagement and salary with the said company. According to him this is in violation of Section 94 of the Evidence Act. At this stage one may learn the provision itself, which is as follows:-

“94. Exclusion of evidence against application of document to existing facts. – When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to B, by deed, “my estate at Rampur containing 100 bighas.” A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.”

13. Thus, Section 94 of the Act provides for exclusion of evidence regarding contention of a document when language used in a document is plain in itself and accurately applying to the existing fact. These categorically apply in case of admission of the contention of the document as evidence.

14. The judgments relied by Mr. Maitra emphasises on this point in the following manner:-

(1998) 1 SCC 756, - in this judgment the Apex Court has been pleased to hold that Section 98 of the Evidence Act will come into play when there is a document and its language has to be considered with reference to the particular factual situation. It is further been held that the said section will apply only when the execution of the document is admitted and no vitiating circumstance has been put forward against same. The court further went on to find that an admission can be explained by the makers thereof. The Apex Court referred to the previous judgment of Nagubai Ammal vs. B. Shama Rao reported in AIR 1956 SC 593, wherein the Court held that an admission is not conclusion as to the truth of the matter stated therein and it is only a piece of evidence, the weight attached to it must depend upon the circumstances under which it is made.

15. AIR 1964 SC 869 - in this judgment the Hon'ble Apex Court has discussed the rule of construction of documents. The relevant paragraph may be quoted below:-

“Sections 94 to 98 of the Indian Evidence Act afford guidance in the construction of documents; they also indicate when and under what circumstances extrinsic evidence could be relied upon in construing the terms of a document. Section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies

accurately to existing facts. It says that evidence may be given to show that it was not meant to apply to such facts. When a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to a certain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions. Sometimes when it is said that a Court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply, accurately to existing facts. But if the words are clear in the context of the surrounding circumstances, the Court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document."

16. Regarding the appointment letter and its probative value, the Trial Court has held in the impugned judgment that, when objected to, the exhibition of letter of petitioner's alleged appointment containing terms and conditions of his alleged service was mandatorily to be proved beyond all reasonable doubt, with the aid of additional evidence. He weighed the same as a suspicious document, cast in a shadow of doubt thereon and disbelieved the same.

17. Petitioner's contention that the document in question has never been objected to by the opposite party can well be defied by referring to the deposition in the case, which categorically show that at the time of exhibition of the said document, the same has been objected to, as noted

by the court in the evidence. Therefore by following the Apex Court's judgment of 1998, as mentioned above, "vitiating circumstances" do exist in this case as regards the execution of the said document, which is counter productive, so far as application of section 94 of the Evidence act, to this case is concerned.

18. The documentary evidence is required to be proved in accordance with law. Under the Act, the Court usually accepts a fact as proved when after considering the document and the evidence before it, it comes to a conclusion that what is stated in the document is believable based on what the document on the face of it states along with what a witness to the document states about the contents and the manner in which the document was prepared/authored. This is the heart of the matter and it is when the court believes not only in the existence but also truth of the contents, appreciates its value as a believable piece of evidence.

19. At the stage of evaluation of the document, the Court looks at two basic aspects, one, the existence of the document and secondly the proof of contents being sufficiently deposed to by a witness having requisite knowledge of the contents thereof. On being satisfied with both these criteria the document in question will be believed. At the stage of exhibiting documents the truth of what is stated in the document is not considered and is left open to final evaluation at the trial after cross-examination is conducted and the entire testimony of the witness on the

document is weighed. It is then that the Court concludes if the document speaks the truth or not and decides what weightage is to be given to it for arriving at a final decision in the matter.

20. Necessity to prove the contents of the document is not for the reason to know that something is stated in the same but to ascertain whether what is stated in the same is correct. That can only be proved by somebody who knows about the document itself or who was a party to make the document or had verified the document or approved it or signed it with knowledge of its contents. This only would satisfy the requirement of direct evidence under sections 60 to 62 of the said Act.

21. It is not enough only to depose that letter of appointment was issued. What is crucial is the content of and that can only be proved by the person who authored the same on the basis of knowing the facts stated therein. Therefore what must be shown if the document is sought to be proved sufficiently is to give direct evidence under section 60 of the said Act by a person who is aware of the source and origin of the facts stated therein. A reading of the evidence must show that the witness has personal knowledge of the entire mechanism and the decision making process for the said document coming into being and the contents thereof. He should be able to depose sufficiently and withstand the cross examination over the particular document originated under his hand or he has been a direct witness of the document being originated and has full

knowledge of the transaction the document intended to make and has actually made. Only in such a situation, the probative value of the said document would be sufficient, to enable the court to believe its existence and contents.

22. It is profitable to note the following observation of the Apex Court, made in a case reported in **(2003) 8 SCC 745 [Narbada Devi Gupta vs. Birendra K. Jaiswal]** :

“16. The legal position is not in dispute that mere production and making of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, i.e, by evidence of those persons who can vouchsafe for truth of the facts in issue”.

23. This being the settled position of law, the argument advanced that principle under section 94 of the Act would govern the admissibility of the appointment letter, as produced before the Court by the petitioner, does not appear to be founded on the settled laws and does not inspire confidence of this court unto the same. It is more particularly so, when the evidence of the parties in the Trial Court show at the time of production of the said letter in court, objection has been raised thereto. Petitioners contention, that only the original letter of appointment has been served to him as an appointee does not convince, in so far as, until and unless its acceptability and probative value could be established in a

court, by following the methodology to do that as provided in law, it would not be a piece of evidence in a court of law.

24. Record shows that neither the petitioner nor the other witness who has been examined on petitioner's behalf (manager), could advance evidence as to their knowledge about the source and origin of the letter of appointment, desired to be proved in the court, be it the very existence of the same or the contentions thereof. It is thus found that the Trial Court has discernably and objectively considered the evidence on record, in its proper perspective to disprove the probative value of the letter of appointment, produced by the petitioner before it.

25. Thus this document, in absence of any direct evidence as to the same, cannot be treated as a primary piece of evidence. It has also not been able to satisfy the criteria to be treated as a secondary evidence in view of the law laid down by the Apex Court in a judgment reported in **(2011)4 SCC 240 [H. Siddiqui vs A. Ramalingam]**, as follows :

“12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is

inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] , State of Rajasthan v. Khemraj [(2000) 9 SCC 241 : AIR 2000 SC 1759] , LIC v. Ram Pal Singh Bisen [(2010) 4 SCC 491 : (2010) 1 SCC (L&S) 1072 : (2010) 2 SCC (Civ) 191] and M. Chandra v. M. Thangamuthu [(2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907] .)”

26. It shall not be out of place to mention that neither the petitioner, who has produced and exhibited the appointment letter in court, nor the other witness (manager) have ever deposed to have authored or be a part or witness of the process of its origin or have any direct knowledge of its source.

27. Hence, any infirmity and/or illegality can hardly be found in the impugned judgment dated 14th March, 2016, when the Trial Court dismissed petitioner’s case disbelieving his evidence as to the change in circumstances.

28. Accordingly this revision merits no success.

29. On the discussion as above, CRR 2207 of 2016 is dismissed.

30. It is made clear that the petitioner shall continue to pay maintenance to the concerned opposite parties, duly and regularly, in compliance with the earlier order of the court, until prayer for enhancement of the same, if any, is finally decided by the Trial Court.

31. Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon usual undertaking.

(*Rai Chattopadhyay, J.*)