

THE HONOURABLE Dr. JUSTICE G. RADHA RANI**CRIMINAL REVISION CASE No.1522 of 2018****ORDER:**

This criminal revision case is filed by the petitioners-complainants aggrieved by the order in Crl.M.P. No. 658 of 2018 in C.C.No.53 of 2017 on the file of II Special Magistrate at Hasthinapuram, Ranga Reddy District dated 10-05-2018.

2. The complainants filed the case against the respondents-accused for the offence under Section 138 of Negotiable Instruments Act (for short 'NI Act'). The case of the complainants was that they intended to purchase a semi finished Flat No. C4 in 5th floor in Anaghaatra Abode at Shivam Road, New Nallakunta, Vidya Nagar, Hyderabad and approached the accused and entered into an agreement of sale with the accused for a purchase price of Rs.32.00 lakhs and paid an advance of Rs.10.00 lakhs, on the condition that in case if loan was not granted by Life Insurance Corporation Housing Finance Limited (LIC-HFL) for whatever reason, the amount should be refunded and the accused Nos.1 and 2 agreed to the said condition. The agreement of sale dated 07-03-2016 was executed by A2 representing the D.A.G.P.A holder Smt. M. Prema and Sri Mayuri Vijaya Gopal. The accused issued receipts for Rs.10.00 Lakhs (Rs.7.00

Lakhs on M/s.Bhargavarama Constructions and Rs.3.00 Lakhs on M/s Wolfram Builts). Subsequently LIC-HFL had not granted loan to the complainants on the ground that the builder had obtained permission from GHMC for 5 floors only but constructed 6th floor, for which there was no permission, and to grant the loan, the LIC-HFL would require BRS/occupancy certificate. On that the complainants asked A1 and A2 to refund the advance of Rs.10.00 Lakhs paid by them, as loan was not granted by LIC-HFL, but the accused postponed refund of money. The complainants got issued a legal notice dated 22-09-2016 to arrange for execution of sale deed. They came to know that the said flat was sold out to some other persons and a sale deed was registered on 20th August 2016 in their favour. When the complainants informed that they would be taking legal action, the accused 1 and 2 issued two postdated cheques, (1) Cheque No.007492 dated 20-01-2017 for Rs.7.00 Lakhs drawn on Oriental Bank of Commerce, Malkajgiri Branch, Secunderabad signed and issued by A.V Ravindranath, Proprietor of M/s.Bhargavarama Constructions and (2) Cheque No.008548 dated 20-01-2017 for Rs.3.00 Lakhs issued by Prajyot Amancharla, Partner, M/s Wolfram Builts. When the complainants presented the said cheques both the cheques were returned unpaid by the banker for the reason “Payments stopped by the drawer” vide cheque return memos dated 07-02-2017.

3. The complainants lodged a report before Nallakunta P.S. on 20-02-2017 against A1 and A2. The police registered the case for the offences under Sections 406 and 420 of IPC. The complainants issued cheque dishonor notice to the accused 1 and 2 on 22-02-2017. On the assurance given by the accused, the complainants presented the said cheques again on 10-04-2017, but the same were also returned unpaid on 12-04-2017 for the same reason “payment stopped by the drawer”. The complainants got issued legal notice on 06-05-2017 to A1 and A2. As the accused transferred Rs.3.00 Lakhs cheque amount to the account of the complainants, the complainants not made M/s. Wolfram Builts and Sri Natarajan as accused.

4. The case was tried by the II Special Magistrate, Cyberabad. During the course of trial, the complainants filed the photocopy of the agreement of sale but the same was not marked by the court below, being a photocopy. After the evidence of complainants was closed, the accused during their evidence filed the original agreement of sale dated 07-03-2016. The same was marked as Exhibit D1. The complainants noticed that in the said document at point No.5 next to “The completed flat will be registered and handed over only if the above agreed amount is paid completely” some other words were inserted as “**within forty five days. Else advance will be forfeited**”. Their contention was that the said words

were not there in the photocopy of agreement of sale dated 07-03-2016 filed by them, the respondents-accused forged the document and submitted it as genuine document before the court.

5. The complainants filed a petition under Section 45 of Indian Evidence Act, to send the document marked as Ex.D1 for expert opinion to the Telengana Forensic Science Laboratory, Red Hills, Hyderabad for the purpose of ascertaining the forgery by comparing the second line of point No.5 in page No.2 of Ex.D1 after the standard words “amount is paid completely” with the questioned words, ***“within forty five days. Else advance will be forfeited”*** with respect to the characteristics i.e. lining, ink, age, slant, darkness, thickness, etc., to prove that Ex.D1 was a false document. The said petition was numbered as Crl.M.P. No.658 of 2018. On giving opportunity to the respondents to file their counter and on hearing both the counsel, the trial court dismissed the petition observing that the handwriting expert could only compare the handwritings on the disputed document by comparing with handwritings on the admitted documents, but as the photocopy of the agreement of sale relied by the learned counsel for the complainants was not marked and it was distinct and different from the original agreement of sale, the same could not be sent to FSL.

6. Aggrieved by the said dismissal of the petition, the complainants preferred this revision contending that the trial court had not appreciated the plea taken by them or their submissions with regard to manipulating the alleged agreement of sale dated 07-03-2016 by the respondents No.2 and 3, the same was illegal, the order passed by the court was irregular and it ought to have allowed the petition for just adjudication.

7. The respondents No.2 and 3 filed their counter contending that the revision petitioners could not seek an expert opinion, as the defense taken by them was only that the revision petitioners themselves had withdrawn from the deal, the case filed was not under the provisions of Specific Relief Act, but under Section 138 of NI Act, which was a summary proceeding. The cheque was handed over by them to the revision petitioners in the police station with an endorsement on the reverse side of the cheque “not for presentation”. The revision petitioners did not pay the balance sale consideration within 45 days as per the terms and conditions of agreement of sale dated 07-03-2016 which expired on 24-04-2016. On 06-05-2016, the revision petitioners sought refund from the respondents by returning the original agreement of sale dated 07-03-2016, thereafter only the respondents disposed the said flat to third parties on 20-08-2016. The revision petitioners forcibly took the cheques from them by

calling them to the police station by using police force, the respondents handed over the cheques with the interference of the police but even then endorsed on the reverse side of the cheques as “not for presentation and not for payment.” The revision petitioners foisted a false case against them. Upon their harassment they filed a Writ Petition vide W.P No.9008/2017 and this court vide order dated 15-03-2017 directed the police not to harass the respondents. The revision petitioners suppressed the fact of their issuing reply notices on 08-03-2017 and on 28-06-2017 to their notices dated 22-02-2017 and 06-05-2017 respectively. The revision petitioners agreed to purchase the flat at the rate of Rs.32.00 Lakhs, but the respondent was forced to sell the same at Rs.27.00 Lakhs only. They incurred a loss of Rs.5.00 Lakhs. It was clearly mentioned in the agreement of sale that the purchaser shall compensate any delay in the payment and that the completed flat would be registered and handed over only if the agreed amount would be paid completely within 45 days. The claim made by the revision petitioners was not an enforceable one. The second agreement dated 09-03-2016 would disclose the total cost of the flat as Rs.56.00 Lakhs. The revision petitioners were hiding the said fact in their statement. As the matter was civil in nature, filing the petition under Section 138 of NI Act itself was not permissible and the case was liable to be quashed. The revision petitioners were making unnecessary and unwarranted allegations against them

for the first time that too after three years of the transaction and prayed to dismiss the petition.

8. Heard the learned counsel for the revision petitioners/complainants and the learned counsel for the respondents No.2 and 3-A1 and A2.

9. As seen from the facts of the case, when the complainants sought to file a photocopy of the agreement of sale dated 07-03-2016, the trial court objected for the same, as it was a photocopy and not the original. As seen from the counter filed by the respondents in this case, the original agreement of sale was returned to them by the complainants on 06-05-2016. As such, the original agreement of sale is admittedly in the possession of the respondents. The contention of the complainants was that there was a tampering in the said document and certain words which were not there earlier were incorporated subsequently and sought to send the said documents to FSL for comparison. Before the trial court, the respondents contended that the trial court itself had ample discretionary powers to compare the draft under Section 73 of Indian Evidence Act. But the draft to be compared was not a handwriting, but was a printed matter typed from a computer.

10. The learned counsel for the respondents relied upon the judgment of Madras High Court in **T.P. Mani v. Krishnan**¹ on the aspect that trial judge can invoke the powers under Section 73 of Indian Evidence Act, to compare the signature of the defendants in the disputed documents with the admitted signature available in the court and in such circumstances, it was premature for the petitioners to file an application for sending the documents for expert opinion.

11. The Hon'ble Apex Court in **RudragoudaVenkannagouda v. Basangouda Dannappagouda**² held that:

“comparison of the handwriting by the Court with the other documents not challenged as fabricated, upon its own initiative and without the guidance of an expert and even with it is at all times hazardous and recognizably inconclusive”.

12. The Hon'ble Apex Court in **Fakhruddin v. State of Madhya Pradesh**³, held that:

“where an expert opinion is given, the Court must see for itself with the assistance of the expert and come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that Court may accept the facts proved only when it is satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness”.

13. An expert can furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own

¹ 2007(3) M.L.W. 196

² AIR1938 Bom 257

³ AIR 1967 SC 1326

independent judgment. But if there is no help of the expert and if the court itself takes upon it the task of comparison, the same would be hazardous. Particularly when the draft to be compared is not even a handwriting but a computer printout, technical assistance might be required. In such cases the court taking upon it the task of comparison under Section 73 of Indian Evidence Act is not advisable.

14. The ground on which the trial court rejected the petition was that:

“Since the original agreement of sale marked under Ex.D1 is dated 07.03.2016 and alleged Xerox Copy of the agreement of sale is dated 09.03.2016 which is distinct and different, it can be said that the alleged Xerox copy of the agreement of sale is not the copy of the agreement of sale under Ex.D1. Moreover the alleged copy of agreement of sale is not marked, as it is Xerox copy. Therefore it cannot be looked into.”

Since the original agreement of sale in possession of the respondents is not tallying with the contents of the photocopy with the petitioners/ complainants herein they sought for referring the matter to an expert. If they were one and the same, there is no necessity for the petitioners to seek an expert opinion. Hence the observation of the trial court in this regard is patently illegal.

15. The trial court further observed that:

“The handwriting expert could only compare the handwritings and finger impressions on the disputed document by comparing with the handwritings and finger impressions existing on the admitted documents.”

Since the agreement of sale filed by the complainants was a photocopy, the court observed that the same could not be considered as an admitted document and could not be sent for comparison. This observation is also not correct. Even a photocopy can be sent for comparison if necessary.

16. As per Section 65 of Indian Evidence Act, if the party states that the original is in possession of the opposite party and gives notice to produce the original, photocopy also can be admitted as secondary evidence. Thus as the original document is admittedly in the possession of the respondents, the photocopy of it which was in the possession of the petitioners also can be marked and sent to the expert for comparison. The observation of trial court in this regard is also not proper. The comparison need not be done by a handwriting expert or a fingerprint expert as the draft involved was not a handwriting or a finger print. The FSL can determine as to who was the technical person who can compare the same and give a report.

17. In the present case though the respondents admitted their signatures on the cheque, were relying upon the agreement of sale dated 07-03-2016 and were contending that there was a stipulation in the agreement that the balance sale consideration should be paid within 45 days as per the terms and conditions of the agreement, as such the petitioners could not seek for enforcement of the

agreement, and there was no legally enforceable debt for which the cheques were issued. A reverse onus would lie upon the respondents/accused to rebut the presumption under Section 139 of NI Act. The respondents are taking the assistance of this document termed as agreement of sale dated 07-03-2016 to rebut the said presumption. As such the onus would again shift to the complainant to adduce evidence to challenge the said contention. The petitioners were contending that the said document was a forged document and that the respondents were attempting to file it as a genuine document. As such it was necessary for them to prove that it was a forged document and that some words which were not there in the original were subsequently incorporated by the respondents. To prove the same, it is necessary to send the document to an expert.

18. The trial court committed an error in rejecting the petition. If the photocopy of the document in possession of the petitioners is not comparable, the FSL itself would report the same. The court by itself dismissing the petition is depriving the petitioners an opportunity to prove their case.

19. The learned counsel for the petitioners relied upon the judgment of the Hon'ble Apex Court in **Kalyani Bhaskar vs M/s Sampooram**⁴ where in it was held that:

“Section 243 (2) is clear that a Magistrate holding an inquiry under the Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a hand-writing expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the hand-writing expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defense is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 Cr.P.C. without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) Cr.P.C. refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque, in question, for the opinion of the hand-writing expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable.”

⁴ 2006 LawSuit (SC) 1165

20. Hence considering the facts of the case and the judgments of the Hon'ble Apex Court as extracted above, it is considered fit to allow the revision by setting aside the impugned order.

21. Accordingly, the criminal revision case is allowed setting aside the order dated 10-05-2018 passed in Crl.M.P. No.658 of 2018 in C.C. No.53 of 2017 by the II Special Magistrate at Hasthinapuram, R.R. District

Dr. G. RADHA RANI, J

October 26, 2022
KTU