

In the High Court at Calcutta
(Civil Revisional Jurisdiction)
Appellate side

S/L No. 5
04.04.2023
Ct-237
(RD)

C.O. 49 of 2023

**Yogesh Sharma @ Jogesh Kumar Sharma
Vs.
Sri Amalesh Chandra Saha**

Mr. Pinaki Ranjan Mitra, Adv.

.... For the petitioner

Mr. Debjit Mukherjee, Adv.
Ms. Susmita Chatterjee, Adv.
Mr. K. Bhattacharya, Adv.

... For the opposite party.

Challenged orders are dated 23.09.2022 and 17.11.2022 passed in Title Suit No. 228 of 2009 (3497 of 2014) by the Learned Civil Judge, Junior Division, 5th Court, Howrah.

Learned Judge by the order dated 23.09.2022 took up the application under Section 45 of the Evidence Act r/w or. 26 r. 10 (A) of Civil procedure Code filed by the petitioner/defendant, for hearing even after giving liberty to the petitioner/defendant for necessary correction under Section 45 of the Evidence Act, 1872 being formal in nature and dispensing with the requirement of filing any formal application for such correction.

But, the learned advocate on behalf of the petitioner/ defendant insisted on adjournment for filing

amendment application. Learned Judge did not allow the adjournment on the ground of earlier adjournment sought for on behalf of the petitioner/defendant. Learned Judge also took note of pendency of the suit for last thirteen (13) years.

However, learned advocate appearing on behalf of the petitioner/defendant disregarded the verbal direction of the Court for correction of the application under Section 45 of the Evidence Act, 1872 and stormed out of the Court room. No option was left to the learned Judge but to take up the application under Section 45 of the Evidence Act for hearing ex parte.

Accordingly, learned advocate on behalf of the respondent/plaintiff was heard and date fixed for passing order.

After careful scrutiny of the order dated 23.09.2022, I find no infirmity or illegality for invoking the power under Article 227 of the Constitution of India.

Now, I propose to take up the order passed by the learned Judge on the application under Section 45 of the Evidence Act, r/w or. 26 r. 10 (A) of the Civil Procedure Code.

Learned Judge relied on the observation of the Hon'ble Court in C.O No. 1235 of 2016 wherein order dated 24.02.2016 allowing the petitioner/defendant to produce the photocopies of development agreement and general power of attorney in evidence, was challenged. By the order dated 24.02.2016 both the documents were marked as exhibit C & D.

Relying on the observation of the Hon'ble High Court in C.O No. 1235 of 2016 learned Judge dismissed the application under Section 45 of the Evidence Act, 1872 r/w or.26 r. 10 (A) of the Civil Procedure Code and exhibit marked on the photocopies of two (2) documents were also struck off.

Learned Advocate, Mr. Pinaki Ranjan Mitra, appearing on behalf petitioner/defendant has contended that original documents were not produce by the plaintiff side in spite of having notice under Section 66 of the Evidence Act, 1872 and the reasons assigned in the order dated 17.11.2022 are not tenable in law.

Per contra, learned advocate, Mr. Debjit Mukherjee, appearing on behalf of the op/plaintiff has focused on admission of those documents as exhibits in absence of originals.

Before going into the merit of this revision application, I find it necessary to recapitulate the order passed by Hon'ble Justice Biswajit Basu in C.O No. 1235 of 2016 as follows:-

"The revisional application under [Article 227](#) of the Constitution of India is at the instance of the plaintiff in a suit for recovery of possession and is directed against the order dated February 24, 2016 passed by the 5th Court of Learned Civil Judge (Junior Division) at Howrah in Title suit no. 228 of 2009 whereby the learned Trial Judge has dismissed an application filed by the plaintiff for non-acceptance of the photocopies of an agreement and a Power of Attorney both dated August 27, 1996, in evidence.

Ms. Pratima Misra, learned Counsel appearing on behalf of the petitioner, submits that the plaintiff when has denied the existence of those documents the learned Trial Judge has committed an error in permitting the defendant to tender the photocopy of those documents in evidence. Mr. Ghose, learned advocate appearing on behalf of the defendant/opposite party, submits that the defendant in his written statement has specifically stated that the original of those documents are in the possession of the plaintiff as such issued a notice under [Section 66](#) of the Evidence Act, 1872 requiring the plaintiff to produce the original of the said documents but the plaintiff replied to the said notice denying the existence of such documents, under such circumstances the learned Trial Judge has rightly allowed the defendant to tender the photocopy of the said documents as the requirement of [Section 65\(a\)](#) of the Evidence Act, 1872 has been satisfied. Heard learned advocate for the parties, perused the materials on record. The plaintiff is seeking recovery of the possession of the property described in the schedule appended to the plaint from the defendant alleging that he was a licensee under the plaintiff and such license has been terminated but the defendant is claiming his right over the said property by virtue of the said agreement.

The defendant has a counterclaim in the suit by which he is seeking eviction of the plaintiff from the property described in the schedule appended to the written statement with counterclaim. The defendant is claiming his right over the said property by virtue of the said agreement.

Therefore, the relevancy of the said agreement on the fact in issue is established.

The plaintiff filed the said application in the midst of the cross-examination of P.W. 1 when the photocopy of the said documents were shown to the said witness.

The move the plaintiff for not accepting those documents in evidence is absolutely pre-mature, inasmuch as the said documents are yet to be tendered in evidence for being exhibited in the suit. The defendant only by giving a notice under [Section 66](#) of the Indian Evidence Act, 1872 cannot take aid of [Section 65\(a\)](#) thereof to get the photocopy of the said documents exhibited in the said suit. It is apposite to the context to quote the following passages from the 19th edition of 'SARKAR ON LAW OF EVIDENCE' :-

"The good sense of the rule that though notice be given, it must always be first shown that the original is in the adversary's hand or under his control, is self-evident; for otherwise the party calling for document might foist upon the Court an alleged copy of an original which never had any existence. The possession may be proved by showing that the document was last seen in the adversary's hands; or by calling his solicitor, who may be compelled to testify to its possession; or by the admission of his counsel or presumptively, by showing that it belongs exclusively to him, or would in the ordinary course of business be in his custody. The adversary may, on the other hand, interpose evidence to disprove the possession; but he cannot escape the effect of the notice by voluntarily parting with the document after the notice, or even perhaps before, unless he discloses the name of the transferee. Section 65 does not require that in all case it must be definitely proved that the document is in the possession of the other side, it being sufficient if it

is proved that it appears to be in his possession. To prove possession of a document, it is necessary to establish some element of knowledge on the part of the person said to be in possession. The element of knowledge can be established from the attendant circumstances.

"This notion of detention by the opponent involves three essential elements: (a) possession, or more broadly, control, by the opponent; (b) demand, or notice made to him by the proponent, signifying that the document will be needed; and (c) failure, or refusal, by the opponent, to produce them in court....."

Therefore, the defendant although by the order impugned has been permitted to produce the said documents in evidence, but such permission will not authorize him to get the photocopy of those documents exhibited in the suit, till the procedure indicated above is exhausted. C.O 1235 of 2016 is disposed of with the above observations. There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."

Hon'ble Mr. Justice Biswajit Basu dealt with issue of admissibility of the document in terms of 65 of the Indian Evidence Act, only.

From that point of view the credibility of document can be taken into account even at the time of writing judgement if those documents were admitted in evidence as exhibits. Considering that particular aspects Hon'ble Mr. Justice Biswajit Basu did not interfere with the order of acceptance of photocopies of agreement of power of attorney in disposing the revision application

being no. CO 1235 of 2016.

When an application is received by the learned Judge of the Court, Section 73 of the Indian Evidence Act, 1872 has empowered learned court to compare with the disputed signature with the admitted signature in order to come to its own conclusion though taking the aid of hand writing expert to have the expertise to scientifically compare such hand writing with reasons his always safe. Expert opinion could give much more clarity for arriving at a decision upon the truth and genuineness of disputed documents.

When a party to the suit denies the signature in particular document which is very much relied on by the other parties to the suit, it is for the party relying on the document to take steps for examination of the disputed signature by sending the document to hand writing expert.

In this case it is not disputed that signatures of Opposite party/plaintiff in the documents viz. agreement and power of attorney were denied by the Opposite party/plaintiff himself in course of cross-examination. Consequently, the application under Section 45 of the Indian Evidence Act, 1872 was filed by the petitioner/defendant for examination of those documents by hand writing expert.

Learned Judge refused the prayer of the application under section 45 of the Evidence Act, 1872 on two scores ____ one is that original documents were not filed another is the documents were not admitted in evidence

in compliance with the procedure prescribed in the Evidence Act, 1872.

It is not advisable, I am of the opinion, for sending the original document to the hand writing expert leaving a chance of missing of the original documents. Therefore, I am of the humble view that there was no reason to reject the application under Section 45 of the Indian Evidence Act, 1872 on the ground of non submission of original documents. On receipt of the application under Section 45 of the Indian Evidence Act, 1872 it is the duty of the Court to send the photocopy of the disputed document along with an admitted document to the hand writing expert for opinion.

In the aforesaid view of the matter order dated 17.11.2022 cannot be said to be sustainable in law.

Accordingly, the revision application being no. CO 49 of 2023 stands allowed in part. The order dated 17.11.2022 stand set aside.

Learned Judge is requested to re-hear the application under Section 45 of the Evidence Act, 1872 filed by the petitioner/defendant according to law and also to give an opportunity to the petitioner/defendant to prove the documents during evidence according to law envisaged in the Evidence Act, 1872.

With the aforesaid observation the revision application stand disposed of.

Let a copy of this order be communicated to the Learned Civil Judge, Junior Division, 5th Court, Howrah.

All parties are directed to act on a server copy of this order downloaded from the official website of this Court.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Bibhas Ranjan De)