



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.5904/2024

Santosh s/o Baburao Gayakwad,
Aged 48 years, Business,
Plot No.21, RBI Colony,
Katol Road, Friends Colony, Nagpur.

... PETITIONER

...VERSUS...

1. Punit Pramod Grover,
Aged 52 years, Occ. Service, (dead) by LR's.
1-A Satyarth s/o Punit Grover,
Aged 26 years, occ. Service
2. Smt. Rohini Punit Grover,
Aged 50 years, Housewife,
Both resident of C/o Satpal Kaura,
29, Vijay Nagar, Chhaoni, Nagpur.

...RESPONDENTS

Shri S.B. Mohta, Advocate for petitioner
Shri R.M. Sharma, Advocate for respondent No.2

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 08/01/2025

DATE OF PRONOUNCING THE JUDGMENT: 27/01/2025

JUDGMENT

. Heard learned Counsel for petitioner and learned
Counsel for respondent No.2.

2. The petitioner is challenging the legality of impugned Order dated 26.08.2024 below Ex.141 passed by the Trial Court, in Spl.C.S.No.626/2016 between ***Santosh...Vs..Punit*** and others, thereby allowed the application filed by respondents under Order 26 Rule 10 read with Section 151 of Code of Civil Procedure, 1908, seeking issuance of commission to examine authenticity of signatures of defendants on agreement to sell dated 28.06.2016.

3. The case of the plaintiff before the Trial Court is that the original defendants i.e. Shri Punit Grover and Smt. Rohini Punit Grover entered into an agreement to sell, their immovable property for valuable consideration of Rs.26,51,000/- to petitioner and out of total agreed sale consideration, a sum of Rs.5 Lakhs was paid by petitioner by cash and a sum of Rs.51,000/-was paid by petitioner by Cheque dated 15.07.2016 to the respondents and it was agreed that balance sale consideration would be paid by petitioner to the respondents at the time of execution and registration of the Sale Deed.

4. Even after repeated demand of the petitioner, the

respondents failed to perform their part of contract as envisaged in Agreement to Sell, therefore, the petitioner instituted and filed suit for specific performance of contract against original defendants. The respondents submitted their written statement and claimed that they have not signed any such Agreement to Sell and further alleged that they have not executed any Agreement to Sell in respect of suit property. It is further submitted that the plaintiff has prepared forged document and defendants have never seen any agreement, nor has signed agreement in respect of suit property. The respondents also alleged that petitioner was a tenant at monthly rent of Rs.8400/- and was not paying rent regularly and was in arrears of rent w.e.f. 01.04.2016 onwards and the cheque of Rs.51,000/- issued by petitioner was towards arrears of rent for period 01.04.2016 onwards, covering the period 01.04.2016 to 30.09.2016 (Rs.50,400/-).

5. The respondents moved an application dated 24.01.2024 below Ex. 123 under Order 26 Rule 10A read with Section 151 of C.P.C. seeking issuance of commission to examine the authenticity of alleged signatures of the defendants on agreement

to sell dated 28.06.2016. The learned Trial Court by order dated 06.04.2024, was rejected the application. The respondents made efforts to serve summon upon Sukhpreet Kaur whose report dated 09.11.2016 is filed on record by them.

6. The respondents on or about 12.08.2024 moved an application at Ex.141 under Order 26 Rule 10 read with Section 151 of C.P.C. seeking issuance of commission to examine the authenticity of signatures of defendants on Agreement to Sell dated 28.06.2016. The learned Trial Court, this time observed that the suit involves the question of scientific investigation therefore issuance of the commission is necessary in the interest of justice and allowed the application by its impugned Order dated 26.08.2024. The said order is the subject matter of challenged in the present petition.

7. Learned Counsel for the petitioner contended that the learned Trial Court although having rejected earlier application (Ex.123) filed by respondents praying for identical relief which is prayed for again in application at Ex. 141, it was not open for the learned Trial Court to allow application at Ex.141 as the issue

regarding appointment of handwriting expert was directly and substantially in issue in the previous application at Ex.123 and the same having been rejected by the learned Trial Court on merits. The learned Trial court miserably failed to understand that the said order dated 06.04.2024 below Ex.123 would operate as *Res Judicata*.

8. It is further contended that the learned Trial Court has observed about the case of respondents, but the learned Trial Court misdirected itself by allowing the application at Ex.141 without properly considering and appreciating the fact that on earlier occasion, for similar reasons, the application was filed by the respondents seeking identical relief which was rejected by the Trial Court by giving specific finding that when there are direct witnesses to the document and scribe of the document, it will not be just and proper to send the document for scientific investigation. Hence the said impugned order needs interference by this Court and also needs to set aside.

9. Learned Counsel for petitioner relied on following citations:

- 1) *Satyadhyan Ghosal and others Vs. Smt. Deorjin Debi and another AIR 1960 SC 941*
- 2) *Barkat Ali Vs. Badri Narain 2008 Law Suit (SC) 168*
- 3) *Shivaji Vishnu Kshirsagar and ors. Vs. Sayaji Vitthal Kshirsagar and anr. 2012(1) ALL MR 320*
- 4) *Athut Upendra Raikar Vs. Surya Upendra Raikar (since deceased) through his legal representatives 2006(4) Bom.C.R. 830*

10. Learned Counsel for the respondent contended that the allegation of prolonging the matter against the present respondents are false because it is the petitioner who is in possession of the suit property and enjoying the same without paying any rent. It is further submitted that the second application for the appointment of Commissioner does not attract the principle of the *res judicata*. It is submitted that the first order dismissing the application for appointment of Commissioner was rejected on technical grounds and mainly due to availability of one Handwriting Expert on record. It is submitted that however since in spite of the possible efforts, the whereabouts of the said Handwriting Expert could not be traced, the present respondents have rightly moved the application for

appointment of Handwriting Expert for the second time. The learned Trial Court has rightly appreciated the facts and passed an appropriate order which needs no interference. Hence prayed for the dismissal of present petition.

11. Learned Counsel for respondent No.2 Shri Sharma relied on following citations:

- 1) *Paramveersingh Santoshsingh Saini Vs. Tarachand s/o Tulsidas Puniyani (D) thr. Legal Heir 2015 (5) Mh.L.J.*
- 2) *Meghji B. Nishar and another Vs. Umrila Lakshmilal Pittle and others 2016 SCC OnLine Bom 1615*
- 3) *Rama Avatar Soni Vs. Mahanta Laxmidhar Das and others (2019) 11 SCC 415*
- 4) *Shrikant Waman Pawaskar and others Vs. Deepali Dinanath Pawaskar 2019(6) Mh.L.J.*

12. Heard learned Counsel for both the parties, considered impugned order and citations relied on by the parties. It is a matter of record that respondents submitted a Handwriting expert report dated 09.11.2010 purported to have been prepared and issued by

Sukhpreet Kaur (Handwriting Expert), claiming to have examined and compared questioned signature on agreement to sell dated 08.06.2016, which is placed on record as Annexure - 'D'. Though this report was placed on record, the respondents have not examined the concerned Handwriting Expert instead filed application on 24.01.2014 below Exhibit 123, under Order 26 Rule 10A read with Section 151 of the C.P.C., seeking issuance of commission to the Deputy Director/Deputy Superintendent of Police (FP), Fingerprint Bureau or any other Handwriting Expert to examine the authenticity of the alleged signatures of the defendants on agreement to sell dated 28.06.2016.

13. The petitioner herein filed his reply and pointed out to the Court that defendant in her cross-examination deposed that he used to sign in different manner every time. She has also admitted that signature of defendant Nos.1 and 2 appeared on Exhibit 72 i.e. agreement to sell. Though there was Handwriting Expert report on record, instead of examining the concerned Handwriting Expert, he applied for appointment of Commissioner under Order 26 Rule 10 A of the C.P.C.

14. The learned Trial Court by order dated 06.04.2014 below Exhibit 23 rejected the same. The learned Trial Court observed that the evidence of plaintiff and defendant No.2 have already been recorded and present application has been filed at the stage of evidence. The agreement to sell is attested by the witnesses. Plaintiff has examined one of the witness below Exhibit 103. The defendants themselves have filed one expert Handwriting opinion along with lis Exhibit 18 on 09.11.2016. However, the defendants have not examined the concerned witness to prove the document.

15. The learned Trial Court further observed while rejecting the application that when there are no means to prove the document, then in that case, at the last resort the Court has to refer the document for expert opinion. However, when there are direct witnesses to the document i.e. attesting witnesses and the scribe of the document, in that case, it will not be just and proper to send the document for scientific investigation by issuance of a commission to the concerned authority. As such, application came to be rejected on 06.04.2024. However, similar application is moved on 12.08.2014

with additional submission that though the report of Handwriting Expert is on record, attempts were made to serve witness summons, returned back unserved with an endorsement 'moved'. Therefore, he again moved an application for referring the matter to Handwriting Expert. The reply was filed by the petitioner and submitted that the application is hit by principle of *Res Judicata*.

16. After considering the contentions, the learned Trial Court allowed the application and held that it is necessary to issue commission for proper adjudication of the matter and to avoid the multiplicity of the proceeding. It is also observed that after rejection of application Exhibit 123, the defendants made attempt to serve the witness/ Handwriting Expert, however, same could not serve and summons returned back with remark 'door closed'. The defendant also served summons through WhatsApp and affidavit to that effect was filed and allowed the application. While passing the order, there is no reference to the judgment cited by the respective parties.

17. Learned Counsel for the petitioners relied on ***Barkat Ali***

(supra), which was also cited before the Trial Court. The Hon'ble Apex Court held in paragraph No.8 as under:

“8. The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same Court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage.”

18. The learned Counsel for petitioner also relied on *Satyadhayan Ghoshal and Ors. (supra)*, wherein the Hon'ble Apex Court held in paragraph No.8 as under:

“8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?”

19. Learned Counsel for petitioner also relied on *Shivaji*

Vishnu Kshirsagar and Ors. (supra) of this Court. In the said matter, it was undisputed position that the application filed by the respondent No.1 in the Trial Court, was rejected by the Trial Court by order dated 01.03.2000. Though it is the case of respondent No.1 that the said Will Deed is crucial to the adjudication of the lease between the parties and though it was the case of the respondent No.1 that the said Will Deed is bogus and the signatures are forged. The respondent No.1 did not carry the matter further and let the matter rest after the said order dated 01.03.2000. The suit was dismissed, thereafter. In appeal filed by the respondent No.1, he again filed an application for referring the matter to the Government Handwriting Expert, which came to be allowed. The State Examiner of documents by his report has opined that it is not possible to express a definite opinion as regards the identity or otherwise of the redenclosed signatures at Exhibit-Q-1 with signatures at exhibits N-1 to N-6 for want of contemporary natural signatures. After period of two years, appellant again filed for referring the matter to a private Handwriting Expert. The application came to be rejected on the ground that it is hit by the principles of *Res Judicata* and impugned order came to be set aside.

It is held by Hon'ble Apex Court, it is well settled that there has to be a finality in respect of the issue which is a subject matter of trial and the same cannot be allowed to be kept open indefinitely.

20. Learned Counsel for petitioner also relied on ***Atehut Upendra Raikar (supra)***, in support of his contention that it is the duty of the Court to analyse the facts of the decision cited and to arrive at a finding as to how those facts are different from the facts before the Court below. There is no discussion on any of the citation referred by the present petitioner by the learned Trial Court. The Hon'ble Apex Court in ***Atehut Upendra Raikar (supra)*** observed in paragraph No.12 as under:

“12. It is necessary for the lower Court to analyse the facts of the decision cited and to arrive at a finding as to how those facts are different from the facts before the Court below or if there is any other reason for distinguishing the said decision and only thereupon the lower Court can say that the decision is not applicable to the facts of the case. It is always to be remembered that the decision of this Court is binding on all the lower Courts either in the State of Goa or in the State of Maharashtra. On this count also the impugned order is unsustainable.”

21. Learned Counsel for respondent contended that the earlier application was rejected on the ground that though Handwriting Expert opinion placed on record by the defendant, they have not examining the said witness and, therefore, it is rejected only for formal defect.

22. Learned Counsel for respondent No.2 also relied on ***Paramveersingh Santoshsingh Saini (supra)***, however facts involved in the matter before the Hon'ble Apex Court are distinguishable. While rejecting the application, they were held not maintainable due to non-compliance of the requirement of Section 17 of the Act. In absence of any adjudication on merits, the rejection of the earlier two applications would not operate as constructive *res judicata* and the subsequent application that was filed after complying with the provisions of Section 17 of the Act was required to be considered on merits. However, in my view, in the present matter, the earlier application was not rejected only on the ground that defendant failed to examine witness on report of Handwriting Expert. It is also held that when there was no means to prove the document, then in that case, as a last resort the Court has to refer the document for

expert opinion. However, when there are direct witnesses to the document i.e. attesting witnesses and the scribe of the document, in that case, it will not be just and proper to send the document for scientific investigation by issuance of a commission to the concerned authority.

As such the learned Trial Court ought not to have been allowed the subsequent similar application only on the ground that the defendant tried to serve thereafter witness summons to the Handwriting Expert. The position would be the same that there are direct witness to the documents.

23. There is no dispute about the view in ***Shrikant Waman Pawaskar and others (supra)***, wherein it is held that since the rejection of first suit on the ground that the same was premature and not of on merits, the findings rendered in the first suit are not binding on the parties, as well as, on the trial Judge in the second suit on the ground of *res judicata*.

24. Learned Counsel for the respondent also relied on ***Rama Avatar Soni (supra)***, however it is in respect of Will, the

procedure to prove the Will and the document or the document other than Will are different from the facts in the present appeal that there are no any attesting witness examined in the said matter before the Hon'ble Apex Court. In my considered opinion, it is of no help to the respondent.

25. Learned Counsel for the respondent also relied on ***Meghji B. Nishar and another (supra)***, wherein this Court held in paragraph No.8 as under:

“8. The issue therefore which arises for consideration is whether the appointment of an expert to submit a report is warranted. No doubt under Section 73 of the Evidence Act the Court has powers to compare hand writing or signature with the disputed signature but as held by the Apex Court in a catena of judgments that though there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding solely on such comparison. The Apex Court therefore has issued a note of caution. The Trial Court in my view has without there being any hand writing expert's report on record erred in comparing the signature and then recording a finding as regards signature

of the Defendant No.2. By doing the same, the Trial Court has virtually concluded the Defendant No.2 without a trial. In my view, the Trial Court has also erred in drawing an inference based on the fact that in the cause title the name of Meghraj appeared and the signature appeared as Meghji. The Trial Court was only concerned with the issue as to whether the hand writing expert was required to be appointed and therefore was not required to make any observation on merits of the case of the Defendant No.2.”

However, the facts involved in the present matter are not similar. The contention of the defendant therein that the ex-party decree which was passed on the basis of bailiff report that summons was duly served is illegal as no such summons was served nor their signatures are there on the report. There was no question of any examination of attesting witnesses and Court has compared the signatures on its own. In view thereof, the above referred observations made by the Court.

26. Thus in my considered view, the order passed below Exhibit 141 is patently illegal as it is hit by principles of *res judicata*. When it is observed by learned Trial Court while rejecting application Exhibit 123, “when there was no means to prove the

document, then in that case, as a last resort the Court has to refer the document for expert opinion. However, when there are direct witnesses to the document i.e. attesting witnesses and the scribe of the document, in that case, it will not be just and proper to send the document for scientific investigation by issuance of a commission to the concerned authority.

27. It is a matter of record that this order was not challenged by the defendant and it has attained finality. Thus earlier exhibit 123 was not rejected only on the technical ground, in view of the judgment in ***Barkat Ali (supra)***, principles of *res judicata* not only apply in respect of the separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same Court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage. The said citation is not at all discussed by the learned Trial Court though cited. As such, the order passed by the learned Trial Court below Exhibit 141 is liable to be set aside. Accordingly, I proceed to pass the following order:

ORDER

- (i) The Writ Petition is allowed
- (ii) The impugned order dated 26.08.2024 below exhibit 141 in Special Civil Suit No.626/2016 passed by 18th Joint Civil Judge, Senior Division, Nagpur, is hereby quashed and set aside.

The Writ Petition stands disposed of in above terms. No orders as to costs.

R.S. Sahare

(Smt. M.S. Jawalkar, J.)