

(2013) 03 MAD CK 0094

In the Madras High Court

Case No : S.A. No. 1005 of 2007 and M.P. No"s. 2 and 3 of 2007

G. Govindaraj

APPELLANT

Vs

R. Kothandarama Gokuldoss(died), Smt. Saroja
Ramakrishnan and G.M. Polyester Lamination

RESPONDENT

Date of Decision : 12-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 73

Citation : (2013) 4 MLJ 164

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : S.T.P. Kuilmozhi, for the Appellant; N. Manokaran for R1, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This Second appeal is focussed by the plaintiff animadverting upon the judgment and decree dated 18.9.2006

passed by the I Additional District Judge, Coimbatore in A.S. No. 2 of 2005, reversing the judgment and decree dated 27.4.2004 passed by the

III Additional Subordinate Judge, Coimbatore, in O.S. No. 242 of 1992, which was one for specific performance of an agreement to sell. The

parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

2. Narratively but precisely, broadly but briefly, the relevant facts absolutely necessary and germane for the disposal of this Second Appeal would

run thus:

(a) The appellant herein, as plaintiff, filed the suit for specific performance mainly on the ground that there emerged an agreement to sell as per Ex.

A1, dated 12.6.1991, between the deceased D1-R. Kothandarama Gokuldass-the owner of the land described in the schedule of the plaint and the plaintiff-G. Govindaraj.

(b) According to the plaintiff, since D1 committed default in honouring the agreement to sell, the suit was filed.

(c) D1-R. Kothandarama Gokuldass during his life time filed the written statement resisting the suit on the main ground that Ex. B2-the

Vardhamana letter dated 12.6.1991 was executed by the plaintiff only by way of securing prompt repayment of the loan amount.

(d) Whereupon issues were framed by the trial Court.

(e) Up went the trial, during which, the plaintiff examined himself as P.W.1 and Exs. A1 to A22 were marked on his side. On the defendants' side,

the first defendant examined himself as D.W.1 along with D.W.2 and D.W.3 and Exs. B1 and B2 were marked.

(f) Ultimately the trial Court decreed the suit, as against which the defendants preferred the appeal. Whereupon the appellate Court set aside the

judgment and decree of the trial Court by reversing the findings and dismissed the original suit.

3. Being aggrieved by and dissatisfied with the judgment and decree of the first appellate Court, the plaintiff preferred this Second Appeal on

various grounds inter alia suggesting the following substantial questions of law.

a) Whether the appellate Court is correct in allowing the appeal without considering the bona fide statement of the respondent in execution of the sale agreement dated 12.6.1991?

b) Whether the first appellate Court is correct in allowing the appeal without considering the Ex. A1 in which the specific time limit was fixed for execution of sale deed?

c) Whether the first appellate Court is correct in allowing the appeal without considering the ready and willingness of this appellant to execute the sale deed within the stipulated time?

d) Whether the Court below is correct in came to the conclusion that the respondent herein, borrowed loan from this appellant who have more than sufficient income derived from their properties?

e) Whether the first appellate Court is correct in allowing the appeal without

considering the Ex. A5, A6, A7 and the denial of respondents in production of copy of Vardhamana letter in view of Ex. B8?

f) Whether the first appellate Court is correct in modifying the judgment of trial Court based on the document created by the appellant in the first appeal?

(extracted as such)

4. Heard both sides.

5. The learned counsel for the appellant/plaintiff would pyramid her arguments, which could succinctly and precisely be set out thus:

(i) The first appellate Court, of its own accord simply compared the signatures of the plaintiff in the pre-suit notice and the rejoinder notice of the

plaintiff with that of the disputed signature in Ex. B2 and held as though Ex. B2-the Vardhamana Letter was executed by the plaintiff and dismissed

the suit.

(ii) The trial Court considering the pro et contra, correctly decreed the suit for specific performance.

(iii) The first appellate Court took the case of the defendant for gospel truth and dismissed the suit for specific performance, warranting interference

in second appeal.

6. Per contra, the learned counsel for the first respondent-Saroja Ramakrishnan would pyramid his arguments, the warp and woof of the same

would run thus:

(i) The first appellate Court correctly invoked Section 73 of the Indian Evidence Act and compared the disputed signature in Ex. B2 with the

signature in Ex. A6-the legal notice dated 26.11.1991 and Ex. A22-the rejoinder notice to the reply notice, and held that Ex. B2-the Vardhamana

Letter dated 12.6.1991 is a genuine document and as against the said finding of fact, no substantial question of law would arise.

(ii) In fact, when the defendant filed the application before the trial Court for getting the assistance of a handwriting expert to compare the disputed

signature with the admitted signature of the plaintiff, it was the plaintiff who tooth and nail opposed the same and as against which, C.R.P. was filed

by the defendant and that was also opposed by the plaintiff and this Court, while disposing of the C.R.P. observed that Section 73 of the Indian

Evidence Act could be invoked by the lower Court. As such, the first appellate Court correctly invoked the provisions of Section 73 of the Indian

Evidence Act and compared the disputed signature with the admitted signatures of the plaintiff and held that Ex. B2-the Vardhamana Letter is a genuine document, warranting no interference in second appeal.

7. I would like to fumigate my mind with the following decisions of the Honourable Apex Court:

Union of India (UOI) Vs. Ibrahim Uddin and Another, an excerpt from it would run thus:

59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of

facts or of law. In State Bank of India and Others Vs. S.N. Goyal, , this Court explained the terms ""substantial question of law"" and observed as

under: (SCC p.103, para. 13)

13... The word ""substantial"" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions

of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial

questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as

between the parties.... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A

question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.... There

cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case.

(emphasis added)

8. In the same precedent, the following decisions are found referred to:

(1) Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.,

(2) Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi,

(3) AIR 1947 19 (Privy Council)

(4) (1949) 17 ITR 269

(5) Oriental Investment Co. Ltd. Vs. Commissioner of Income Tax, Bombay,

- (6) Jagdish Singh Vs. Natthu Singh,
- (7) Prativa Devi Vs. T.V. Krishnan,
- (8) Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar,
- (9) Ragavendra Kumar Vs. Firm Prem Machinery and Co.,
- (10) Molar Mal (Dead) Through L.Rs. Vs. M/s. Kay Iron Works(P) Ltd.,
- (11) Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others,
- (12) Dinesh Kumar Vs. Yusuf Ali,
- (13) Jai Singh Vs. Shakuntala,
- (14) Kashmir Singh Vs. Harnam Singh and Another,

9. A mere running of the eye over it would connote and denote, exemplify and demonstrate that unless there is any substantial question of law is involved, the question of upsetting the findings of the courts below would not arise.

10. On perusal of the records and also considering the arguments on both sides, I have formulated the following substantial questions of law to the knowledge of both sides and both sides also have advanced their arguments in connection with the same:

(i) Whether the first appellate Court was justified in comparing by itself the disputed signature of the plaintiff in Ex. B2-the Vardhamana Letter with that of the admitted signatures in Exs. A6-the legal notice dated 26.11.1991 and Ex. A22-the rejoinder notice sent to the reply notice without even referring to any ante litem motam document?

(ii) Whether there is any perversity or illegality in the judgment and decree of the first appellate Court?

11. At this juncture, I would like to refer to the decision of the Hon"ble Apex Court reported in Thiruvengada Pillai Vs. Navaneethammal and

Another, certain excerpts from it would run thus:

16. When there is no doubt that court can compare the disputed handwriting/ signature/finger impression with the admitted

handwriting/signature/finger impression, such comparison by court without the assistance of any expert, has always been considered to be

hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it

goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger

impression and after verifying whether the same characteristics are found in the disputed finger impression. The comparison of the two thumb

impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the

admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature

is of the person who has put the admitted thumb impression. Where the court finds that the disputed finger impression and admitted thumb

impression are clear and where the court is in a position to identify the characteristics of fingerprints, the court may record a finding on comparison,

even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a

guess by a casual perusal.

17. The decision in Murari Lal and Lalit Popli should not be construed as laying a proposition that the court is bound to compare the disputed and

admitted finger impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive

denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy

or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and

admitted finger impressions. Further, even in cases where the court is constrained to take up such comparison, it should make a thorough study, if

necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the

reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The court should avoid

reaching conclusions based on a mere casual or routine glance or perusal.

19. The trial court had analysed the evidence properly and had dismissed the suit by giving cogent reasons. The first appellate court reversed it by

wrongly placing onus on the defendants. Its observation that when the execution of an unregistered document put forth by the plaintiff was denied

by the defendants, it was for the defendants to establish that the document was

forged or concocted, is not sound proposition. The first appellate court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate court lost sight of the fact that the party who propounds the document will have to prove it. In this case the plaintiff came to court alleging that the first defendant had executed an agreement of sale in his favour. The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative. The issues also placed the burden on the plaintiff to prove the document to be true. No doubt, the plaintiff attempted to discharge his burden by examining himself as also scribe and one of the attesting witnesses. But the various circumstances enumerated by the trial court and the High Court referred to earlier, when taken together, rightly create a doubt about the genuineness of the agreement and dislodge the effect of the evidence of Pws. 1 to 3. We therefore of the view that the decision of the High Court, reversing the decision of the first appellate Court, does not call for interference.

12. There is also one other decision rendered by me reported in Ganapathy Thevar Vs. Shanmuga Thevar certain excerpts from it would run thus:

14... The Court cannot assume the role of an expert in comparing the disputed handwriting with that of the admitted ones. No doubt, the Court as per Section 73 of the Evidence Act, in certain circumstances could exercise its power with caution. In such an event, it is the bounden duty of the Court to specify clearly as to what are the salient features based on which the finding is arrived at.

15. It is common knowledge that the science of analysing the questioned documents contemplates certain principles and theories. Here, both the Courts below were not objective in analysing the impugned handwriting.

16. No carte blanche is given to any Court to simply compare the disputed handwriting with that of the admitted handwritings and arrive at a subjective satisfaction about the similarities and dissimilarities. There should have been reasons set out for arriving at such conclusion, but here, both the Courts below have not resorted to such a procedure. The subjective satisfaction of both the Courts below cannot be taken in favour of

the defendant.

(iii) The State (Delhi Administration) Vs. Pali Ram,

13. A poring over and perusal of the above precedents would highlight and spotlight the fact that the Court is not expected to assume the role of an

expert and arrive at the conclusion in one way or other relating to the genuineness or otherwise of a document unless extraordinary circumstances

warrant so, and furthermore, once the Court assumes the role of an expert necessarily, the various characteristics as found recognised in the

science of handwriting analysis should be referred to, so to say, at least a famous treatise on handwriting analysis should be referred to and

accordingly, there should be a detailed discussion and pronouncement of judgment thereafter. Mere subjective satisfaction would not be sufficient.

No carte blanche is given to any Court to simply look at the disputed signature with some admitted signatures and give a finding that the Court is

satisfied in one way or the other.

14. A mere reading of the judgment of the first appellate Court would indicate that no such attempt was made, certain excerpts from it would run

thus:

11) Under these circumstances, this Court compared the disputed document and the admitted document. Apart from Ex. B1, the signature of the

respondent is found in his lawyer notice dated 26.11.1991 (Ex. A6) and dated 24.2.1993 (Ex. A22). On comparison of the signature found in the

disputed document Ex. B2, with the signatures found in the admitted documents like Ex. A6 and Ex. A22, this Court finds that there are similarities

the way the initial "s" is signed and the end stroke with underscore. On comparison of the writings on Ex. B1 and Ex. B2 this Court finds

similarities in the way unique words like Ju, inth, (@\$p@. @e;@) are written.

15. Such an observation by the first appellate Court is far from satisfactory and quite antithetical to the precedents cited supra. The valuable civil

right of citizens should not be jeopardized and objectivity is the bedrock of rendering justice.

16. I recollect the famous adage "Justice should not only be done, but it should be seen to be done".

17. Here it appears, the first appellate Court got subjective satisfaction on comparing the disputed signature with the admitted signatures in Ex. A6-

the legal notice, which is the pre-suit notice sent by the plaintiff, and Ex. A22-the rejoinder sent to the reply notice, both containing the signatures of the plaintiff.

18. One cannot assume and presume that the signatures of the plaintiff contained in Ex. A6 and Ex. A22 are signatures without any simulation or embellishment or variation. The very fact that Ex. A6 and A22 emerged bespeak and betoken that the dispute had already started between the parties. In such a case, placing reliance on such sort of signatures would not be just and proper.

19. The plaintiff also is enjoined to furnish the ante litem motam documents, so to say, the documents and signatures emerged anterior in point of time to Ex. B2-the Vardhamana Letter dated 12.6.1991. Over and above that, in this case, it is not the case of D1 that the plaintiff had put his signature alone in Ex. B2, but the entire version in Ex. B2 was scribed by him and signed by him. In such a case, the plaintiff could have very well, in order to show his bona fides, produced such ante litem motam handwritings as well as his signatures to the Court for comparison, but even that has not been done.

20. The first appellate Court in one sentence would refer to two letters "p/ e; @ and hold as though they are similar without any discussion as evinced supra. In fact, both sides in unison would detail and delineate, portray and parody the facts to the effect that during the pendency of the case before the trial Court, the trial Court itself called upon the plaintiff to furnish his writings and his signature and whereupon Ex. B1 emerged in the presence of the learned Judge.

21. It is a common or garden principle of law that if a person is called upon to make any writings for comparison certainly there is likelihood of himself indulging in variation in putting his signature as well as in scribing the versions. The procedure adopted by the trial Court in getting such versions scribed by the plaintiff and signed by him as per Ex. B1 is far from satisfactory and it does not have the back up of the law.

22. Over and above that, the first appellate Court simply placed reliance on Ex. B1, which cannot to be dignified with the title of a legal exemplar document for comparison purpose. As such, the judgment rendered by the first appellate Court is liable to be set aside.

23. The next question that would arise for consideration is as to what would be the net result.

24. The learned counsel for the plaintiff would long for getting the trial Court's judgment restored forgetting for a moment that the trial Court did

not choose to get the assistance of an handwriting expert, however, it resorted to getting Ex. B1 executed by the plaintiff, which, as already

observed by me supra, was not correct.

25. At this juncture I recollect the following maxim:

In re dubia magis infitatio quam affirmatio intelligenda

In a doubtful matter, the negation is to be understood rather than the affirmation. When evidence is lacking and is sketchy and patchy in the case,

only the negative could be presumed and not the affirmative.

26. In such a case, I could cite the following maxims:

(i) *Affirmatis est probare* He who affirms must prove.

(ii) *Affirmanti, non neganti incumbit probatio*. The burden of proof lies upon him who affirms, not upon one who denies.

27. It is the duty of the person who affirms a particular fact to prove it and he cannot call upon the other side to prove the negative aspect.

28. The plaintiff on whom the burden of proof lies, should have taken steps to establish before the Court the same, but the plaintiff did not do so.

On the other hand, when the defendant wanted to voluntarily prove the genuineness of Ex. B2-the Vardhanama Letter, the plaintiff tooth and nail

objected to the taking of the assistance of a handwriting expert. Hence, in this factual matrix, the trial Court's judgment also cannot simply be

restored by allowing the second appeal.

29. Not to put too fine a point on it, on balance, the judgment and decree of the first appellate Court has to be set aside and the matter has to be

remitted back to the first appellate Court. Accordingly, the judgment and decree of the first appellate Court are set aside and the matter is remitted

back to the first appellate Court with the following mandates:

The first appellate Court, namely, the District and Sessions Judge, Coimbatore, shall send the disputed signature to the handwriting expert for

getting his opinion. The plaintiff is enjoined and hereby mandated to furnish before the first appellate Court the contemporaneous or authentic ante

litem motam writings as well as his signatures for taking them as exemplars for comparing the same with the writings as well as signature in Ex. B2-

the Vardhamana Letter. If for any reason, the ante litem motam writings of the plaintiff could not be furnished, at least contemporaneous or the ante

litem motam signature of the plaintiff should be furnished to the Court for comparison. Whereupon, at the cost of both the plaintiff and the

defendants, an Advocate Commissioner shall be appointed:

(a) To carry the relevant documents in connection with this case personally in a sealed cover;

(b) and produce the same before the Forensic Expert;

(c) leave it in his custody under his acknowledgment for as many days as the Forensic Expert may require;

(d) collect the record from the Forensic Expert on the day as may be fixed by him;

(e) bring it back and lodge it with the Court.

The Forensic Expert is directed to complete the examination of the records in any event, within a week after the depositing of the same by the

Advocate Commissioner with him.

30. After getting such opinion from the Forensic Expert, both sides should be given opportunity to file objections, if any. The expert also shall be

examined as Court witness, and opportunity also shall be given to both sides to cross-examine the expert, if they so desire. The first appellate

Court shall take all endeavors to see that the matter is disposed on merits untrammelled and uninfluenced by any of the observations made by this

Court in deciding this Second Appeal, within a period of three months from the date of receipt of a copy of this order. In the result, the Second

Appeal is disposed of accordingly. However, there is no order as to costs. Both sides shall appear before the first appellate Court, namely, the I

Additional District Judge, Coimbatore, on 5.4.2013. Consequently, connected miscellaneous petitions are closed.