

(2013) 11 MAD CK 0113

In the Madras High Court

Case No : C.R.P. (PD) . No. 3617 of 2013 and M.P. No. 1 of 2013

M/s. Dhanalakshmi Mills Ltd.

APPELLANT

Vs

R. Krishnamurthy, S. Krishnamurthy and M. Murugesan

RESPONDENT

Date of Decision : 29-11-2013

Acts Referred:

Citation : (2014) 2 LW 579

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : Gupta and Ravi, for the Appellant; A.R.L. Sundaresan, for Ramalingam and Associates for R1, for the Respondent

Final Decision : Dismissed

Judgement

S. Tamilvanan, J.—This Civil Revision has been preferred under Article 227 of the Constitution of India, against the Order and Decretal order, dated 27.06.2013 made in I.A. No. 1400 of 2009 in O.S. No. 881 of 2008 on the file of the II Additional District Court, Coimbatore. The petitioner herein is the first defendant in the suit, that was filed by the first respondent, as plaintiff against the petitioner and the respondents 2 and 3, seeking specific performance of the contract, alternatively to return a sum of Rs. 7,20,14,593/- with subsequent interest on the principal amount, Rs. 3,37,50,000/-.

2. During the pendency of the said suit, Interlocutory Application in I.A. No. 1400 of 2009 was filed by the petitioner/D1 under Order 26 Rules 10A and 10B, seeking appointment of Advocate-commissioner to take possession of the original Minutes Book of the Board of Directors of the appellant company and deliver the same to the Forensic Department of the State of Tamil Nadu and secure a report, to find out whether or not the last three lines at page 87 and last two lines of page 93 of the Minutes Book purporting to be minutes of the Board Meeting of the applicant company held on 30.03.2005 and 23.05.2005 respectively were interpolated or fudged or forged or backdated.

3. The petitioner/D1 has averred in the affidavit that the said suit was filed, seeking specific performance of contract, based on an agreement, dated 10.01.2004 entered into between the first respondent/plaintiff on the one hand and respondents 2 and 3 on the other hand to sell certain properties of Dhanalakshmi Mills Ltd. The petitioner/D1 has stated that the petitioner/D1 was not a party to the alleged agreement, dated 10.01.2004, however, the first respondent/plaintiff has sought the relief, based on plaint document No. 4, purported to be a resolution passed by the Board of Directors of the applicant company on 30.03.2005, allegedly ratifying the said agreement of sale, dated 10.01.2004, that was purported to have been forwarded to the first respondent under the cover of a letter, dated 15.04.2005 of the Administrative Director of the petitioner company.

4. The petitioner has stated in the affidavit that in the Board's Resolution, dated 30.03.2005 of the petitioner company, as incorporated in the Minutes Book at pages 87-90, a portion has been deliberately incorporated and backdated with malafide intention, though the applicant company had never passed such resolution and on that ground, seeking an order for appointment of Commissioner, in order to ascertain expert opinion.

5. It is seen from the accompanying affidavit pertaining to the Interlocutory Application, that the petitioner herein is stated as Dhanalakshmi Mills Ltd., and the deponent has described himself as the Managing Director of the applicant, however, he could have signed on behalf of the Public Limited Company, a legal person, by affixing the seal of the company. It being an affidavit filed in the name of a Public Limited Company, the deponent could have fixed the seal of the company, stating that the company is represented by its Managing Director. However, the reasons best known to the petitioner, the seal of the company is not available therein, only C.R. Sethuramalingam, S/o. C. Rangasamy Chettiar, stating himself as Managing Director of the applicant, in the inner portion of the affidavit has signed.

6. In the affidavit, it is stated that in the minutes of the company, the following portion has been interpolated or fudged or forged or backdated, which reads as follows:

The Chairman informed the Board the strategic investor has entered into an Agreement of sale, dated 10-01-2004 with one R. Krishnamurthy to discharge the debts and has sought for ratification-so ratified.

The affidavit further reads that as per the Plaint Document No. IV, identical similar interpolation of words 4. Chitrahara Traders Rs. 50,00,000 (Sale of Machineries of "A" mill only) has been made in the Minutes Book at Page 93 in relation to the Minutes of the Meeting of the Board of Directors of the company held on 23.05.05 recorded at pages 91 to 97.

7. Learned counsel appearing for the petitioner submitted that the sale agreement entered into between the first respondent/plaintiff and the

respondents/defendants 2 and 3 was not ratified by Dhanalakshmi Mills, public limited company, the petitioner herein. However, as stated above, in the Minutes Book at Page Nos. 87 and 93, interpolations were made, as if resolutions were passed on 30.03.2005 and 25.03.2005 respectively and the same were incorporated in the Minutes Book of the company. With the above averments, the petitioner/first defendant, filed the Interlocutory Application to seek appointment of Advocate-commissioner under Order 26 Rules 10A and 10B, seeking the relief as stated in the Application.

8. Mr. A.R.L. Sundaresan, learned Senior counsel appearing for the first respondent/plaintiff submitted that the petitioner, became a sick company and was referred to Board of Industrial and Financial Reconstruction (BIFR) in Case No. 105 of 1993. Hence, the company was in need of funds to revive its function again. The respondents 2 and 3 had come forward to invest money in the petitioner-company, as strategic investors, pay off the liabilities and take over the company with all its assets, including the land, which is the subject matter of the suit. In this regard, the respondents 2 and 3 entered into an agreement of sale, dated 10.01.2004 with the first respondent to make substantial advance amount and offering to sell the suit property, after getting due clearance from the BIFR and also completing other formalities, which are legally required.

9. According to the learned Senior counsel for the first respondent, the agreement was ratified by the petitioner company in the Board meeting held on 30.03.2005. After filing of the suit for the first time, Thiru. C.R. Sethuramalingam, came forward with the plea on behalf of the petitioner company that the agreement between the first respondent and the respondents 2 and 3 had not been ratified and that the petitioner has come forward with a new case of forgery, interpolation on the entries in the Minutes of the meeting and he further submitted that it is not the case of the petitioner that the Minutes Book was in the custody of the first respondent/plaintiff to interpolate or forge or to make any entry in the said Minutes Book.

10. Learned Senior counsel appearing for the contesting first respondent also drew the attention of this Court to the xerox copy of the Minutes of the meeting, dated 30.03.2005. As per the Minutes Book, Page No. 87 of the Dhanalakshmi Mills Ltd., the proceeding of the meeting of the Board of Directors was held on Wednesday, 30th March 2005 at 5 p.m., it is further stated in the minutes that six Directors of the company were present and they signed in the minutes, which is not in dispute and the allegation is that a portion was added subsequently in the minutes, however, no such allegation was raised by the other Directors, who also have signed the minutes book.

11. As per the Minutes Book entry, Thiru. C.R. Sethuramalingam is stated as one of the six Directors of the company. One Y. Anand Kumar is stated as Administrative Director. In the Minutes at Page No. 87, the last portion of the page is admittedly written by the very same person, who wrote the earlier portion of the minutes, which is not in dispute. It has been written at the last

portion of the minutes as follows:

The Chairman informed the Board the strategic investor has entered into an Agreement of sale, dated 10-01-2004 with one R. Krishnamurthy to discharge the debts and has sought for ratification-so ratified.

12. As contended by the learned Senior counsel appearing for the first respondent from the very sight itself, it cannot be said that the last portion of the minutes could have been inserted or fudged or forged. Except Thiru. C.R. Sethuramalingam, other 5 Directors have not raised any such allegation of interpolation or forgery in the Minutes Book. In the accompanying affidavit, the deponent has simply stated that he is the Managing Director of the company, however, in the Minutes Book, he was stated himself only as one of the six Directors. The copy of the agreement has not been produced by the petitioner, though he has stated himself as Managing Director of the company.

13. As per the findings of the Court below by the impugned order, admittedly the disputed portion of the Minutes Book was also written by the same person using the same ink and there is no change in the handwriting and therefore, there could be no possibility of interpolation. It is not clearly stated in the affidavit filed by C.R. Sethuramalingam, who has preferred this Revision, on behalf of the company, as to why the other Directors have not supported his claim of interpolation in the Minutes of the meeting.

14. Admittedly, there is no allegation of forged signatures in the minutes raised by the petitioner herein and the hand writing of the Minutes is also admittedly by the same person, who wrote the earlier portion of the Minutes of the meeting. It is also seen from the impugned order that even the original Minutes Book was not produced by the petitioner. In the aforesaid circumstances, one of the Directors, Thiru. C.R. Sethuramalingam has filed the Interlocutory Application, seeking an order under Order 26 Rules 10A and 10B, seeking appointment of Advocate-commissioner to take possession of the original Minutes Book of the Board of Directors of the appellant company and deliver the same to the Forensic Department of the State of Tamil Nadu.

15. Learned counsel appearing for the petitioner, in support of his contention, relied on the following decisions:

1. Chandran Udayar Vs. Kasivel,
2. N. Chinnasamy Vs. P.S. Swaminathan,
3. Palaniammal, Vasanthamani and Mahalingam Vs. Palaniswami, Karuppannan, Palaniammal, Suppayee and Rajeswari,
4. Bhagirati Sahu and others Vs. Akapati Bhaskar Patra,

16. In Chandran Udayar Vs. Kasivel, , this Court (M. Venugopal, J.), has held that an expert opinion is nonetheless opinion evidence. As a matter of fact, the power of Court to compare the signature should be sparingly be used with caution and

that the opinion of the handwriting expert is relevant, as per Section 45 of Indian Evidence Act, but is not a conclusive proof for deciding any issue.

17. In *The State (Delhi Administration) Vs. Pali Ram*, , the Hon''ble Apex Court has held as follows:

It is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may from its own judgment by its own observation of those materials. Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking, such issues are for the Court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence.

18. In *Palaniammal, Vasanthamani and Mahalingam Vs. Palaniswami, Karuppannan, Palaniammal, Suppayee and Rajeswari*, , this Court (M. Chockalingam, J.), has held that merely because of the reason that the trial Court has compared the admitted signature and the disputed signature, invoking Section 73 of the Evidence Act, there is no bar or ban for the first appellate Court sending the documents for canvassing the expert's opinion. Even if there is any delay, which could not be a reason to dismiss the petition and the Court can award reasonable cost to the other side, if there is delay caused by the person seeking the relief.

19. In *N. Chinnasamy Vs. P.S. Swaminathan*, , this Court (S. Rajeswaran, J.), held that when the defendant disputes the signature in document relied on by plaintiff, it is for plaintiff to take steps for examination of disputed signature by sending the document along with the documents containing the admitted signature of the party, whose signature is said to be available in the disputed document, to handwriting expert. The defendant therein filed written statement disputing signature in agreement, however, five years thereafter filed application seeking an order to send document for comparison by expert with the admitted signature, wherein the dismissal of the application by the trial Court was upheld by this Court.

20. In *Bhagirati Sahu and others Vs. Akapati Bhaskar Patra*, , relying on the decision rendered by the Hon''ble Supreme Court in *The State (Delhi Administration) Vs. Pali Ram*, , has held that Court is empowered to appoint an Advocate-Commissioner under Order 26 Rule 10(A) CPC for sending document to handwriting expert for comparison of his signature.

21. The Hon''ble Supreme Court in *The State (Delhi Administration) Vs. Pali Ram*, has held as follows:

The matter can be viewed from another angle also. Although 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 with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert.

22. In this case on hand, admittedly the suit was filed by the first respondent/plaintiff against the petitioner and the respondents 2 and 3, seeking specific performance of the contract, with an alternative relief, based on an alleged agreement entered into between the plaintiff and the defendants in the suit. Admittedly, the property belongs to M/s. Dhanalakshmi Mills Ltd., The Court below has to consider the genuineness and validity of the alleged agreement for sale and decide the relief sought or. In the Interlocutory Application in I.A. No. 1400 of 2009, the petitioner herein has sought an order to send the original minutes of the petitioner, Public Limited Company to verify certain entries made therein. A copy of the minutes was produced, wherein signatures of six Directors are available, which is not in dispute, including C.R. Sethuramalingam, who filed the Interlocutory Application, stating himself as Managing Director of the company. Admittedly in the minutes book, where he has signed only as one of the Directors of the company. He has not been stated himself as Managing Directors but only as Director. Similarly, there is no dispute with regard to the handwritings available in the minutes book.

23. Learned counsel appearing for the petitioner has not disputed the fact that the alleged subsequent entry was made by the very same person, who wrote the alleged earlier portion of the minute and therefore, it is crystal clear that neither the signature nor the handwriting has to be compared by any expert. The original minute was not produced by the petitioner, as contended by the learned Senior counsel appearing for the first respondent for the reasons best known to the petitioner.

24. It is also not in dispute that the other Directors signed in the minutes book have not disputed the entries available in the minutes, saying that the same were made subsequently without their knowledge. On the facts and circumstances, it was argued by the learned Senior counsel that the petition filed by the revision petitioner herein itself is not legally maintainable and therefore, that was rightly dismissed. The decisions referred to by the learned counsel for the petitioner herein are not applicable to the facts and circumstances of the case.

25. In support of his contention, learned Senior counsel appearing for the first

respondent relied on the following decisions:

1. S. Gopal Vs. D. Balachandran,

2. Yash Pal Vs. Kartar Singh,

26. In Mrs. Kalyani Baskar Vs. Mrs. M.S. Sampornam, , the Hon"ble Supreme Court has held as follows:

"Fair trial", includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence 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 u/s 243 Cr.P.C. without naming any persons 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 handwriting 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 such circumstances, the order of the High Court impugned in this Appeal upholding the order of the Magistrate is erroneous and not sustainable.

27. In S. Gopal Vs. D. Balachandran, , this Court (M. Jeyapaul, J.) has held that age of ink cannot be determined by expert with scientific accuracy and it was found by this Court in the decision, that filing such a petition to find out the age of the ink would create only further confusion. Hence, no expert opinion would be required to find out the age of the ink.

28. In Yash Pal Vs. Kartar Singh, , the Punjab and Haryana High Court has also taken a similar view that the age of the ink cannot be determined on the basis of writing. If the ink is manufactured five years before the date of the execution of the document and use of the same effectively on a particular date for the first time would not resolve any controversy, but it would create only confusion.

29. In the instant case, according to the petitioner, the proceedings of the meeting was recorded in the minutes and the same was signed by six Directors, however, by using the same handwriting and ink, the alleged interpolation was made. Even if the said allegation is true, as the ink is same, the age of the ink cannot be decided by any expert, as the ink used for the alleged interpolation is the same. As decided by this Court and Punjab and Haryana Court in the decisions referred to above, seeking such a relief to find out the age of the ink would create only confusion and cause unreasonable delay.

30. It cannot be disputed that the Court has power to seek expert opinion,

however, it has to be decided judiciously, to meet the ends of justice, under Order 26 Rule 10A CPC. In this case, there is no allegation of any forged signature being made. Even the handwriting is not in dispute and it is settled that the age of the ink cannot be verified, when the same ink has been used.

31. In the instant case, the petitioner herein filed the Interlocutory Application, as if he is the Managing Director of the company, challenging the entry available in the minutes. In the minutes, Thiru. C.R. Sethuramalingam, has signed as one of the six Directors. The other Directors have not raised any allegation, based on the entries made in the minutes and therefore, the petitioner has no locus standi to raise such a plea, on behalf of the petitioner's company to file the application. As there was no dispute with regard to the signatures, handwriting and the ink used for making the entries in the minutes book, the purpose of seeking the document to be sent would be to find out the age of the ink. The very same ink was used by the scribe for writing the alleged interpolation, however, as found by the Court below, there was no interpolation or different writing, so as to adjust the space in the minutes book and further, the minute is only collateral document for the alleged agreement entered into between the petitioner and the defendants in the suit. The original of the minutes was also not produced by the petitioner.

32. It is relevant to refer Order 26 Rule 10A CPC., deals with Commission for scientific investigation, which reads as follows:

Order 26 Rule 10A. Commission of scientific Investigation: (1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of Rule 10 of this Order shall, as far as may be, apply to relation to a Commissioner appointed under this rule, as they apply in relation to a Commissioner appointed under Rule 9.

33. When there is no scope for scientific investigation, Commissioner cannot be appointed, under Order 26 Rule 10A CPC. On the facts and circumstances of the case on hand, it is clear that the age of the ink could not be decided by any expert, as the same ink was used by the scribe, who wrote the minutes of the meeting. It is also relevant that five other Directors, who have admittedly signed have not raised any plea of subsequent interpolation or forgery, hence, the application filed under Order 26 Rule 10A CPC is not legally sustainable. Except causing delay in the disposal of the suit, allowing the petition would not serve any other purpose and there is no scope for scientific investigation.

34. It is crystal clear that the plea of the petitioner is totally unsustainable, seeking an order under Order 26 Rule 10A CPC., to send the document to decide the age of the ink, though the petitioner has not specifically stated anything to decide the age of the ink, a perusal of the petition would show that the relief

sought for is the same. Hence, this Court finds no error or infirmity in the impugned order, so as to warrant any interference by this Court, invoking Article 227 of the Constitution of India and accordingly, this Civil Revision Petition deserves to be dismissed. In the result, this Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is also dismissed. The Court below is directed to dispose the suit, solely on merits, uninfluenced by the findings of this Court, if any in this order. No costs.