
(2014) 06 KL CK 0214
In the High Court Of Kerala
Case No : RFA. No. 528 of 2005 (E)

Muhammed Yasin

APPELLANT

Vs

P.P. Abdul Majeed

RESPONDENT

Date of Decision : 12-06-2014

Acts Referred:

Evidence Act, 1872 — Section 45, 47, 73
Foreigners Act, 1946 — Section 14, 8(1)
Official Secrets Act, 1923 — Section 3(1)(c)

Citation : (2014) 06 KL CK 0214

Hon'ble Judges : T.R. Ramachandran Nair, J;P.V. Asha, J

Bench : Division Bench

Advocate : T. Krishnan Unni, Sr. Adv, Advocate for the Appellant; K. Ramachandran, Smt. R. Meera, Advocates for R1 to 4, Sri T. Sethumadhavan and Smt. N. Deepa, Advocates for R5, Advocate for the Respondent

Final Decision : Dismissed

Judgement

P.V. Asha, J.—Plaintiff and defendants are the appellants and respondents respectively in this appeal. The suit was filed for specific performance of an agreement for sale. The case of the parties as projected in the court below is as follows.

2. The plaintiff is the son of the sister of late Kunhimammed. Defendants 1 to 3 are the children of late Kunhimammed and 4th defendant is the wife of late Kunhimammed. Ext. A1 agreement of sale was executed on 20.01.1990 by late Kunhimammed in favour of plaintiff agreeing to sell the plaint schedule property having an extent of 4 = acres of land for a consideration of Rs. 2,70,000/-. It was agreed that a sum of Rs. 1,60,000/- was already received by late Kunhimammed on several previous occasions and that the plaintiff paid a sum of Rs. 1,00,000/- on the date of the agreement. It was alleged that the plaintiff was put in possession of the property by executing the agreement and the sale deed was to be executed within a period of six months on payment of

the balance consideration of Rs. 10,000/-. Within this period late Kunhimammed was to get the purchase certificate in respect of the property from the Land Tribunal. Kunhimammed passed away on 28.05.1992. The plaintiff alleged that Kunhimammed was seeking time for obtaining the purchase certificate, even though he approached him with the balance consideration. After the death of Kunhimammed, when he approached the legal heirs of Kunhimammed for execution of the sale deed, they refused to do anything in terms of the agreement and he sent a lawyer notice on 06.01.1993. The defendants sent a reply to the notice denying execution of the sale deed. The suit was filed under these circumstances for specific performance of the agreement dated 20.01.1990.

3. The defendants filed a written statement denying execution of the agreement. They asserted that the signatures found in Ext. A1 were not put by Kunhimammed and it was a forged document. It is stated that there was no circumstance for late Kunhimammed for executing such an agreement and they disputed the signature of Kunhimammed alleging that it was a forged document. The defendants stated that Kunhimammed was an illiterate person who did not know how to write or put his signature. Sri Kunhimammed was in Malaysia till the year 1984 and he was a Malaysian citizen. He could not return to Malaysia, due to illness. Since he was overstaying in India, certain criminal proceedings were initiated against him and the defendant was assisting him in the proceedings. Sri Kunhimammed had two daughters and one son. His daughters were given in marriage in the year 1984 and son was a minor. Therefore, he had entrusted the plaintiff to manage the property, as he was sick and unable to walk due to filariasis. The defendants alleged that the plaintiff had obtained the document in respect of the plaint schedule property under the pretext that the property was to be measured, saying that there was a property dispute and that the document thus entrusted to him by the 4th defendant was not returned. It was further alleged that the plaint schedule property having an extent of more than 4 acres with about 400 coconut trees would have fetched a sum of at least Rs. 4,50,000/- in the year 1990 and there was no necessity for Kunhimammed to receive any amount from the plaintiff.

4. The court below considered the issue regarding execution of the alleged document and receipt of any amount towards consideration.

5. The evidence on record consists of the testimony of PWs. 1 to 3 on the side of the plaintiff, of CW1-the expert witness and that of DW1 on the side of the defendants. The agreement, the notices and the reply notices and the opinion tendered by the expert witness, were marked as Exts. A1 to A4 and X1 to X3.

6. On a consideration of the pleadings and evidence on record, the court below found that the plaintiff could not establish the execution of sale deed by late Kunhimammed. It was further found that there was no evidence to prove the receipt of any amount by Kunhimammed towards consideration. In the above circumstances, on a detailed examination of the evidence on record, the court

below dismissed the suit. This appeal is filed under the above circumstances.

7. We have heard the learned counsel for the appellant and the respondents and considered the pleadings on record, the evidence adduced as well as the findings rendered by the court below.

8. Ext. A1 is the agreement based on which specific performance is claimed. The agreement was executed on 20.01.1990. The time stipulated in the agreement was six months. The suit was filed in the year 1993. Ext. A2 is the lawyer notice sent at the instance of the plaintiff demanding specific performance. Kunhimammed, who allegedly executed the agreement, passed away on 28.05.1992. Ext. A2 lawyer notice was issued on 06.01.1993. The case of the plaintiff is that Kunhimammed was seeking time to get the purchase certificate from the Land Tribunal and that after the death of Kunhimammed, even though he approached the legal heirs, they refused to honour the agreement. But there is nothing on record to substantiate his plea.

9. As the execution of the document Ext. A1 agreement was denied by the defendants, the plaintiff took steps for getting the signature of Kunhimammed affixed in the agreement Ext. A1 examined by an expert agency, in comparison to his signatures available in the records of a criminal case namely, C.C. No. 146 of 1990 on the file of Judicial First Class Magistrate Court, Tirur, in which Kunhimammed was a party. The criminal case was filed against Kunhimammed since he was a Malaysian citizen and he did not return to Malaysia even after the permitted time, due to his illness. He had attended the office of the Superintendent of Police and had obtained permission for stay after executing bail bond. On overstaying, Crime No. 280/89 was registered against him u/s 8(1) r/w Section 14 of the Foreigners' Act; he was arrested and produced before the Judicial First Class Magistrate Court, Tirur and he was granted bail. He had executed his vakalat and bail bonds on 03.10.1989 and 30.11.1989 putting his signature. The case was numbered as C.C. 146/90. Plaintiff asserted that the signature of Kunhimammed can be verified from the records before the Judicial First Class Magistrate Court in C.C. No. 146 of 1990 and shall be sent for opinion of an expert. On the basis of application filed by him, records in C.C. No. 146 of 1990 were called for and forwarded to the expert along with Ext. A1 document. The document was sent to Smt. C.V. Jayadevi, a handwriting expert at Bangalore, pursuant to the steps taken by the plaintiff. The report of the expert was marked as Ext. X1 and Smt. C.V. Jayadevi was examined as CW1. The opinion of the expert was not in favour of the plaintiff. The expert reported that the signature in Ext. A1 was not made by Kunhimammed. The plaintiff opposed the opinion of the expert and examined her as CW1. The main ground raised by the plaintiff was that the expert was not conversant with Malayalam alphabets, and that her opinion cannot be relied on. The enlarged form of the signature available in Ext. A1 agreement was marked as Ext. X2. With reference to the signatures and the records sent to the expert, she asserted that the signature affixed in the agreement Ext. A1 cannot be in no circumstances be put

by Kunhimammed. The records in respect of the files in C.C. No. 146 of 1990 on the file of Judicial First Class Magistrate Court, Tirur, which was marked as Ext. X3 did admittedly contain the signature of Kunhimammed. But late Kunhimammed had put only his left thumb impression in the records of the case on 24.12.1990 and 26.03.1991, when the particulars of offence against him was read over to him and while executing the bail bond on 24.12.1991. The writings in the vakalat executed on 3.10.1989 and the bail bonds executed on 3.10.89 and 30.11.89 show that Kunhimammed was not able to write his initials clearly. At the same time the signatures appearing in Ext. A1 agreement were entirely different with each alphabet legible. None of the records in the criminal case did have a signature of Kunhimammed with legible alphabet.

10. In view of the objections raised by the plaintiff against the opinion of expert, the court below examined the signatures affixed in Ext. A1 agreement as well as the documents available in the records relating to C.C. No. 146 of 1990, in which the plaintiff alleged that Kunhimammed had affixed his signatures and sought for comparison. The court below found that there was considerable difference in the style and mode of writing and in the alphabets appearing in Ext. A1 agreement where each alphabet can be picked up. At the same time it was found that in his admitted writings in the vakalat and the bail bond, Kunhimammed was not able to write all the alphabets in his name. On being convinced of the evidently different signatures, the court below found that the opinion of the expert cannot be ruled out.

11. The case of the defendants was that, late Kunhimammed was illiterate and he did not know how to write his name or how to put his signature. It was therefore the burden of the plaintiff to prove the execution of the document as well as affixture of the signatures in it by Kunhimammed, in order to establish his case. Apart from the interested testimony of the plaintiff who deposed as PW1, the evidence available is that of PW2 and PW3 who, according to the plaintiff are the witnesses to Ext. A1 agreement. PW1 deposed that, the agreement was executed and payment of Rs. 1,00,000/- was made in presence of mediators. The presence of mediators is not substantiated. PW2, who is the son of the brother of Kunhimammed, deposed that Kunhimammed has not attended any school. According to him, it was PW3 who wrote the agreement and paid Rs. 1,00,000/- to Kunhimammed. At the same time, according to PW1, it was Kunhimammed who got the agreement prepared. Both PWs 2 and 3 admitted that Kunhimammed was suffering from filaria and was unable to move about.

12. The other attesting witness to Ext. A1 agreement was examined as PW3. PW3 also deposed that the agreement was already prepared and he put his signature as soon as he reached the house of Kunhimammed. PW3 deposed that he saw Kunhimammed putting his signature for the first time. At the same time, either PW2 or PW3 did not state anything regarding the presence of any mediators at the time when they affixed their signatures. According to PW1-

the plaintiff, the agreement was ready when he reached the house of Kunhimammed on 20.01.1990 and he paid the cash of Rs. 1,00,000/- in the presence of mediators. PW3 does not know how the agreement was got prepared or who prepared it. According to them, an agreement is to be prepared at the instance of the purchaser. But both of them had deposed that they affixed their signatures in the agreement which was already prepared and they came to know about the agreement only on the date of agreement. The document which consisted of 7 items of property was said to be prepared and signed before noon. The stamp paper is seen purchased in the name of Kunhimammed on 20.01.1990. How the agreement was prepared and could be executed before noon, by Kunhimammed who was physically weak is not explained by any of the witnesses. None of these witnesses deposed anything about the previous transactions of the plaintiff with Kunhimammed or as to the payments effected by the plaintiff prior to 20.01.1990. It is an admitted fact that late Kunhimammed was doing business in Malaysia till 1984 when he returned. Sri Kunhimammed was having sufficient landed property. His 2 daughters were given in marriage before December, 1984. The plaintiff, who is an income tax payee, did not prove the source from which he could effect payment of Rs. 1 lakh on 20.01.1990 also. Nothing was brought on record to prove that Kunhimammed was in need of any financial assistance from the plaintiff or having any necessity to sell his properties.

13. From the evidence of all the witnesses including PW1, it is seen that Kunhimammed had become sick on account of filaria. He was unable to move about, his eye sight as well as the audibility had become poor and he finally succumbed to his illness on 28.05.1992. The plaintiff being the sister's son of Kunhimammed and who was admittedly helping him in the conduct of a criminal case as well as in managing his properties, had therefore every possibility to get the document from the wife of Kunhimammed as alleged in the written statement and as pleaded by DW1.

14. At any rate, the plaintiff did not adduce any evidence to prove the payment of Rs. 1,60,000/- during the period 1984-89 as alleged by him. There is nothing on record to show that Kunhimammed was in need of any funds either during the period 1984-89 or on the date of the agreement, 20.01.1990. There was nothing to show how a sum of Rs. 1,00,000/- paid to Kunhimammed on 20.01.1990 was utilised. The plaintiff could not also establish any reason for approaching the defendants or to file the suit after a period of more than 3 years of the execution of the alleged agreement.

15. The evidence available on record is found to have been analysed by the court below correctly and the findings thereon are found to have been rendered on the basis of proper analysis. The main attack as against the opinion of the expert is made relying on the decisions reported in Gulab Chand and Another Vs. Satya Vrat and Others on the ground that the expert who compared the signature was not well conversant in Malayalam. In para 6 of the judgment reported in Gulab

Chand v. Satya Vrat (supra), it was held that even where the disputed signature is sought to be proved by expert evidence on comparison with the admitted signatures of a person that evidence is of very little evidentiary value because the science of judging handwriting by comparison is not very precise, and cannot be relied upon unlike the science of comparing disputed finger prints and thumb impressions with the admitted finger prints and thumb impressions. In the judgment reported in State of Himachal Pradesh Vs. Jai Lal and Others, , the Honourable Supreme Court held in para 18 as follows:

An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions.

The Honourable Supreme Court held that the report submitted by an expert does not go in evidence automatically, but he is to be examined as a witness in Court and to face cross examination. We find that the action of the court below was perfectly justified and in accordance with Section 45 and 47 read with Section 73 of the Evidence Act. The Hon'ble Supreme Court, in the judgment Lalit Popli Vs. Canara Bank and Others, , while considering the case of dismissal of a Bank employee, for misusing his official position, by getting the chequebook issued in the account no of a customer and utilising the cheque-leaves by forging the signature and in encashing the cheques fraudulently, considered the evidentiary value of the opinion of expert as well as the power of the court to arrive at opinion by its own comparison. In para 13 of the judgment it was held:

13. It is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas u/s 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experiences. In both the cases, the court is required to satisfy itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible u/s 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. It is clear that even when an expert's

evidence is not there, the court has power to compare the writings and decide the matter.

(See Murari Lal v. State of M.P.1)

16. In Ajay Kumar Parmar Vs. State of Rajasthan, , the Hon''ble Supreme Court was considering the question on the dissimilarity found in signatures of the prosecutrix in the papers before the Chief Judicial Magistrate and the signatures on the FIR and the medical report. It was held that the opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different. While reminding to be careful in entering upon such tasks, it was held that where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

17. The evidentiary value of expert opinion was considered by the Hon''ble Supreme Court again in Safi Mohd. Vs. State of Rajasthan, , wherein the appellant assailed the conviction Section 3(1)(c) of the Official Secrets Act, 1923. Main attack was on the experts'' opinion of Air Force Officers, which was relied on, in the light of the judgment reported in State of Himachal Pradesh Vs. Jai Lal and Others, . But the apex court repelled that contention and held as follows:

36. The contentions urged by the learned counsel on behalf of the appellant that PW 27 and PW 32 are not expert witnesses in terms of Section 45 of the Evidence Act by placing reliance upon the decisions of this Court referred to supra are misplaced and they do not support the case of defence for the reason that the learned Sessions Judge after careful scrutiny of the ocular evidence and the written submission has rightly come to the correct conclusion about the said document seized from the appellant. The said finding and reasons recorded by the learned Sessions Judge in his judgment on the charge framed against the appellant has been re-examined by the High Court by applying its mind consciously and concurred with the said finding of fact by assigning valid reasons. Therefore, the same cannot be termed erroneous in law on the grounds urged by the learned counsel for the appellant and interfered with by this Court in exercise of its jurisdiction by placing reliance upon the decision of this Court referred to supra as they are misplaced and do not support the case of the appellant.

18. In the present case, the expert was examined with reference to the documents sent for comparison and she has pointed out the difference noticed in each alphabet. Apart from that, the court below has also examined the relevant documents and found that the signature appearing in Ext. A1 cannot be that of Kunhimammed. The enlarged form of the signatures available in Ext. A1

agreement, which was marked as Ext. X2, evidently shows the legible form of each alphabet in the name of Kunhimammed in each of the pages of Ext. A1 agreement which was marked as Ext. D1 series. The signature admittedly available in the vakalat executed by Kunhimammed in respect of the criminal case, C.C. No. 146 of 1990 is evidently different from what is seen in Ext. D1 series/Ext. A1 agreement. We had also perused all the records containing the signatures of Kunhimammed and we did not find any impropriety in the findings rendered by the court below.

19. It is also pertinent to note that it is an admitted fact that Kunhimammed had been physically weak, unable to move about, with poor eye sight, coupled with impaired hearing for a long time and especially at the time of the alleged execution of the agreement Ext. A1. It has also come out in evidence that he was not a person who was literate. Either in the vakalat or in the bail bond executed by him he was not found to have put his signatures with any of the alphabets correctly or completely or legibly. But a mere glance on the signatures appearing in each pages of Ext. A1 agreement will show that the signatures are put legibly, correctly and completely. Therefore, the findings arrived at by the expert or the court below cannot be said to be faulted on the ground that the expert was not acquainted with the alphabets in Malayalam language. We are of the view that the court below has arrived at a finding on a correct analysis of the evidence on records.

20. Coming to the question of consideration also, the plaintiff could not establish the passing of consideration of either Rs. 1,60,000/- prior to the date of execution or on the date of execution by any reliable piece of evidence. The court below has correctly found that the testimony of PWs 2 and 3 who allegedly attested the agreement on 20.01.1990 cannot be relied on. Nothing is brought out on record to prove the payments effected before 20.01.1990 or how the amount received were paid and utilised. The plaintiff was not in a position to bring out any circumstance which necessitated Kunhimammed to sell any of his properties, at a time when he had already given his daughters in marriage and was having sufficient assets.

21. The plaintiff failed to establish any reason for his silence for about three years in seeking specific performance of the agreement which was executed on 20.01.1990. The time stipulated in the agreement was only 6 months. The plaintiff has failed to establish his claim for execution of sale deed by a decree of specific performance.

22. It has come out in evidence that the 4 = acres of property covered by the agreement was liable to fetch a consideration of at least double the amount at the time of agreement and that the said property was one lying adjacent to the plaintiff's school. No circumstance is proved on record to show the necessity to part with the property for the consideration of Rs. 2,70,000/- as claimed by the plaintiff.

In the above circumstances, we do not find any grounds to interfere with the judgment and decree of the court below and hence we dismiss the appeal. No costs.