
(2009) 07 AP CK 0042
In the Andhra Pradesh High Court
Case No : C.R.P. No. 995 of 2009

Pidikiti Sasikala

APPELLANT

Vs

Kothamasu Lakshmi Mohan Rao @ Mohan Rao and Others

RESPONDENT

Date of Decision : 24-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 10, Order 26 Rule 10, Order 26 Rule 10A, Order 26 Rule 9, 115
Evidence Act, 1872 — Section 3, 4, 45, 5

Citation : (2009) 6 ALD 519 : (2010) 1 ALT 335 : (2010) 1 BC 475 : (2010) 6 RCR(Civil) 944

Hon'ble Judges : B. Prakash Rao, J

Bench : Single Bench

Advocate : P. Vijaya Kiran, for the Appellant; None appeared, for the Respondent

Judgement

B. Prakash Rao, J.—In this revision filed u/s 115 of the CPC the petitioner who is the decree-holder seeks to assail the correctness of the orders passed in E.A. No. 367/2008 in E.A. No. 562/2002 in E.P. No. 20/2002 in O.S. No. 316/1987, on the file of I Additional Senior Civil Judge, Guntur dated 27-1-2009 dismissing an application filed by him purportedly under Order 26 Rule 10-A of the CPC read with Section 45 of the Evidence Act, where he sought for a direction to send for Ex.B-66 in O.S. No. 66/1982 on the file of the same court to be considered with the disputed signature of Ex.A-1, which is an agreement of sale dated 14-3-1980 executed by the judgment-debtor in favour of his sister and to send for opinion of the handwriting expert regarding the signatures of the notary of Kodali Venkata Ratnam Chowdary.

2. The facts, which gave rise to the present request on behalf of the petitioner are that, in the suit filed for recovery of amount on the foot of promissory note and after the same was decreed, an execution was laid by the petitioner wherein certain claims were set forth on the basis of an agreement of sale and therefore during the pendency of the enquiry with the said claim referring to the checkered events, which has led to the present claim and the correctness thereof, the

petitioner had sought for the expert opinion by way of comparison of the documents above mentioned. It would be very apt to refer to the reasons given in the affidavit sworn to by the petitioner in support of the present application, which narrates as follows:

I filed the above suit for recovery of the suit amount under promissory note executed by JDR. My father-in-law is a Cine Exhibitor at Guntur and the 1st JDR is also a exhibitor at Nudurupadu and applied for a loan, and equitable mortgage was executed by the J.Dr. furnishing the theater at Nudurupadu owned by him as security. But the said theater was under mortgage of Film Development Corporation and as amount due by J.Dr. is not sufficient cannot be realized as the debut due to corporation exceeds, the value, I filed an application for attachment before judgment of his house at Guntur and attachment was made absolute. The theater over which equitable created was sold by Film Development Corporation and debut was not discharged a such I filed an application to transfer to EP where the property is situated.

I further submit that subsequently J.Dr. died his L.Rs. were added and 2nd respondent was already on record. Even at the state of preliminary decree as they were added as L.Rs. of J.Dr. who died pending suit and they never raised any objection regarding the ownership of 1st defendant/J.Dr. After the death of 1st J.Dr. when the execution was taken out a false and untenable claim application was filed contending that the 1st defendant executed an agreement of sale in favour of his sister and the sister again executed a unregd. Will in favour the (claimants) petitioners, in claim petition purporting to bequeathing the property concerned under the forged agreement and both of them purported to be notarized by late Kodali Venkata Ratnam Chowdary who died 5 years ago. I submit that the signature that of the notary or manipulated and brought into existence subsequent to decree, with the signature of notary purported to have been of Notary are forged and faked. Late Kodali Venkata Ratnam Chowdary attested a Hiba of past partition relating to suit O.S. No. 66/82 on the file of this Court and also deposed in O.S. No. 66/82 on the file of this Court as D.W.2. The memorandum of Hiba was signed by Kodali Venkata Ratnam Chowdary as notary on 18-3-1980 and he also deposed as D.W.2 in the said suit. The signature of late Kodali Venkata Ratnam Chowdary purported to be on Ex.A-1 is alleged to be on 16-8-1979, while the admitted documents on which he signed dt. 14-3-1980 nearer to the disputed document. The said suit O.S. No. 66/82 was disposed recently by Hon''ble High Court of Andhra Pradesh and the record was received by District Court, Guntur and the said document marked as Ex.B-66, containing the attestation of Kodali Venkata Ratnam Chowdary, Notary is nearer the manipulated document i.e., Ex.A-1 dt.16-8-1979.

3. The said application was contested by way of a counter filed on behalf of the respondents 1 to 3 herein stating that there is no necessity to send for the expert opinion, and more so, when the documents are not in the custody or record of the present Court and therefore the very application as has been filed

and framed is not maintainable. That apart, the several objections have been taken on merits, which is not necessary to be considered at this stage.

4. Considering the case on both sides, the Court below rejected the application mainly on the ground that the document which is sought to send for expert opinion along with the include document for comparison is not in the custody of the said court, and therefore, it necessarily has to call for and summon from other Court and the power of which is not vested with the Court. In support, the Court below placed reliance on the reported decision of a learned Single Judge of this Court in *G. Sunitha Vs. Election Commissioner of Andhra Pradesh and Others*, and did not accede to the request of the petitioner, hence this revision.

5. After taking into consideration the submissions made from both sides and on perusal of the material available on record, the short point which arises for consideration is as to whether on the facts and circumstances a Court has power to send for any document for the purpose of expert opinion where such document is not in its custody, but is a part of the record in another proceeding of the Court. Before going into the said aspect, there is no dispute to the aforesaid material facts, especially, that the document which is being sought to be sent for an expert opinion is not in the custody of the Court, it is that document being a part of the record in another suit in another Court, which is now sought to be sent for the purpose of comparison and obtaining a report. The Law in this connection, which requires to be referred to, is mainly Section 45 of the Evidence Act, which reads as follows:

45. Opinions of experts.- When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impression] are relevant facts. Such persons are called experts.

----- 1. Ins. by Act 3 of 1891, Section 5. 2. Ins. by Act 5 of 1899, Section 3. For discussion in Council as to whether "finger impressions" include "thumb impressions", see Gazette of India, 1898, Pt VI, p.24. 3. Ins. by Act 18 of 1872, Section 4. 24 Illustrations (a) The questions is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant. (b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant. (c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two documents were written by the same

person or by different persons, are relevant.

6. On a reading of the above, it contemplates power of the Court to send for the opinion of an expert where there is a dispute. Coming to the provision under which the present application is filed viz., 10-A of Order 26 Rule of the Code of Civil Procedure, which reads as follows:

10-A. Commission for 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 in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.

7. The aforesaid provision contemplates a commission for scientific investigation. It squarely depends on the expediency and necessity in the interest of justice for making such an exercise. Ultimately, the attempt is only to find out truth behind the respective versions. The learned Single Judge of this Court in the aforesaid decision in *Mir Khairuddin v. K. Somireddy and Ors.* referring to both the aforesaid provisions and, especially, the expression used in the later provision viz., Rule 10-A of Order 26 of the CPC to the effect "... any scientific investigation which cannot ... be conveniently conducted before the Court..." and therefore the learned Single Judge was of the opinion that unless and until the document is before the same Court and the said Court has to form an opinion upon an issue inter alia as to the identity of the handwriting in the matter pending before it, such power cannot be exercised. Further, it was also observed that the aforesaid provisions are not available to send the document, which is filed in another suit for handwriting expert even if other suit is pending before the said court before which such application is made.

8. In *Lakshmi and Anr. v. Chinnammal @ Rayyammal and Ors.* (2) 2009 (3) ALT 46 (SC) the Supreme Court of India while considering the aforesaid provisions and the manner in which such exercise is to be done, read along with Rule 10 of Order 13 of the Code of Civil Procedure, and held that Court may send for papers from its own records or from other Courts. It was observed as follows:

11. Furthermore, the learned Trial Judge himself had allowed a similar application so far as the opinion of the handwriting expert was concerned. It is, therefore, difficult to comprehend as to on what basis a similar prayer made by the appellant in regard to the opinion of the finger print expert could be held to be not maintainable.

12. If bringing on record a document is essential for proving the case by a party ordinarily the same should not be refused; the Court's duty being to find out the

truth. The procedural mechanics necessary to arrive at a just decision must be encouraged. We are not unmindful of the fact that the court in the said process would not encourage any fishing enquiry. It would also not assist a party in procuring a document which he should have himself filed.

13. There cannot furthermore be any doubt that by calling for such documents, the Court shall not bring about a situation whereby a criminal proceeding would remain stayed as it is a well settled principle of law that where a Civil proceeding as also a criminal proceeding is pending, the latter shall get primacy.

9. Ultimately, the apex Court in the aforesaid decision has observed that the trial Court in the said case should have acceded to the prayer of the appellants therein where they sought for report of the expert from the Court of judicial magistrate as regards the purported signatures of the parties, and in the similar circumstances, the trial Court therein refused the request, which was made on the same lines on the ground that there is no empowerment of the civil Court to direct the production of document which are not in the custody.

10. At the outset, having regard to the principles as laid down by the apex Court, necessarily, it follows that the decision of the learned Single Judge of this Court in the aforesaid case in *Mir Khairuddin v. K. Somireddy and Ors.* (supra) does not depict the correct position of law.

11. Further, another aspect that has a very relevant bearing on the question is that in the said decision of this Court in *Mir Khairuddin v. K. Somireddy and Ors.* (supra) before the learned Single Judge apparently Rule 10 of Order 13 of the CPC has not been brought to the notice nor came up for consideration. For convenient sake Rule 10 of Order 13 of the CPC reads as follows:

10. Court may send for papers from its own records or from other Courts.-(1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purpose of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

12. The aforesaid provision amply contemplates that the Court has discretion to send for either from its own record or from any other Court. This itself sufficiently narrates the power to make an exercise even in regard to the document or record from other Court and in spite of the fact that those

documents are not in the custody of its own.

13. In view of the same, necessarily, it follows that wherever such exercise is to be done, and if warrants, on the facts and circumstances, both the provisions viz., Rule 10-A of Order 26 of CPC and Rule 10 of Order 13 of the CPC has to be read together. That apart, Rule 10-A of the Order 26 cannot stand alone on its own without falling back to the basic procedural aspect as contemplated under the various other provisions of the Code of Civil Procedure. The entire Code is one and the different provisions made thereunder are only to aid the parties in making a fair trial with ample powers, authority and jurisdiction.

14. In the aforesaid circumstances, it has to be held that the Court while exercising the powers for the purpose of any commission or sending for expert opinion, the same can as well be exercised even in respect of the document which is not in custody of its own.

15. In the result, the revision is accordingly allowed. The order in E.A. No. 367/2008 in E.A. No. 562/2002 in E.P. No. 20/2002 in O.S. No. 316/1987, on the file of I Additional Senior Civil Judge, Guntur dated 27-1-2009 is set aside. The Court below is directed to send the document Ex.B-66 in O.S. No. 66/1982 to be considered with the disputed signature of Ex.A-I, which is an agreement of sale dated 14-3-1980 executed by the judgment-debtor in favour of his sister for opinion of the handwriting expert regarding the signatures of the notary of Kodali Venkata Ratnam Chowdary. No costs.