

(2009) 06 KAR CK 0103
In the Karnataka High Court
Case No : Writ Petition No. 7043 of 2009

P.T. Shylesh, P.T. Kiran and H. Punitha Rao

APPELLANT

Vs

Smt Ambikapathi and Others

RESPONDENT

Date of Decision : 04-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10A
Evidence Act, 1872 — Section 68, 69, 71

Citation : (2009) ILR (Kar) 2911 : (2009) 4 KCCR 3062 : (2010) 8 RCR(Civil) 446

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : K.S. Nagaraja Rao and Associates, for the Appellant; M.S. Varadarajan, for R1 to R3, for the Respondent

Judgement

H.N. Nagamohan Das, J.—Petitioners are the plaintiffs and respondents 1 to 3 are defendants 1 to 3 before the trial Court In this order for convenience, the parties are referred to their status before the trial Court.

2. Plaintiffs filed O.S. No. 4507/1998 against the defendants herein and others for partition and separate possession of their share in the plaint schedule properties. The defendants 1 & 2 in their written statement have taken a specific contention that the common propositor S.T. Ambekar during his lifetime bequeathed the schedule properties under a will dated 14.09.1987. The plaintiffs denied the execution of the will. After completion of evidence on both the side, the plaintiffs filed an I.A. under Order 26 Rule 10-A CPC for appointment of handwriting expert as a Court Commissioner to compare the disputed signature on the will with that of the admitted signature of Ambekar. The trial Court under the impugned order rejected the application filed by the plaintiffs on two grounds. Firstly, on the ground that the burden of proving the will is on the defendants, therefore, the plaintiff need not take the trouble of sending the disputed signature on Ex.D2 to the handwriting expert Secondly, by relying on a judgment by Kerala High Court in R. Saraswathy Vs. P. Bhavathy Ammal and

Another, that u/s 68, 69 and 71 a procedure is laid down with regard to the proof of will and therefore there is no need for sending the disputed signature for an handwriting expert.

3. Heard arguments on both the side and perused the entire writ papers,

4. Ex.D2 is the will dated 14.09.1987 said to have been executed by S.T. Ambekar. The plaintiffs dispute the signature of S.T. Ambekar on the will Ex.D2. On the other hand, the attestors to the will deposed that in their presence S.T. Ambekar affixed his signature on Ex.D2. Sri. Varadarajan, learned Counsel for the defendants relying on R. Saraswathy's case contends that in the event of appointment of a handwriting expert and securing a report will result in conflicting of versions before the trial Court and therefore there is no need for appointment of a Court Commissioner. I decline to accept this contention of the learned Counsel for the defendants. u/s 68, 69 & 71 of the Evidence Act, a procedure is laid down with regard to admission of a will in evidence. The evidence of attesting witness is not necessarily conclusive proof of the will. It is always open to give other evidence to rebut the evidence of attesting witnesses or to disprove their evidence. Merely because the scribe and attesting witness to the will have deposed that in their presence, the attestor affixed his signature in their presence is not the conclusive proof of the will. I am not inclined to subscribe to the view taken by the Kerala High Court in R. Saraswathy's case.

5. The Supreme Court in the case of Fakhruddin v. the State of Madhya Pradesh reported in AIR 1967 SC 1326 held as under:

The writing may be proved to be in the hand writing of a particular individual by the evidence of a person familiar with the hand writing of that individual or by the testimony of an Expert competent to the comparison of hand writings on a scientific basis. A third method is comparison by the Court with the writing made in the presence of the Court of admitted or proved to be the writing of the person. Both u/s 45 and Section 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its observation that it is safe to accept the opinion whether of the expert or other witness. The Supreme Court in an appeal also is entitled to call for the writings for making a comparison thereof. Ram Chandra and Another Vs. State of Uttar Pradesh, and Ishwari Prasad Mishra Vs. Mohammad Isa, and Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, , Ref.

A division bench of this Court in the case of Sri. S.B. Ittigi and Smt. Leelavathi

Mahale Vs. Smt. S.V. Sulochana, Mahantappa Karibasappa Kalligud, Whannamallappa Sharanappa Kalligud and Sharanappa Karibasappa Kalligud, held as under:

A combined reading of Section 73 of the Evidence Act and the decisions referred to above makes it clear that the Court has the power to compare the disputed signature with the admitted signature. When the Court entertains a slightest doubt with regard to the signatures then the Court shall hesitate to compare the signature particularly in criminal matters. In the instant case; there is dispute signature of testator in the will dated 14.04.1983, Ex.P52. There are undisputed signature of testator in Ex.D-2(a)(b), Ex.D-2(a)(b), Ex.D-7(a)(b)(c) and Ex.D-8(a). Both the plaintiff and the defendants have not taken steps to secure the opinion of a handwriting expert. Under those circumstances, the Court has the power to compare the disputed signature with the undisputed signature u/s 73 of the Act.

Further learned single Judge of this Court in the case of Achyut and Another Vs. Smt. Nanda and Others, held as under:

Admittedly, the suit filed by the plaintiff is for partition and separate possession of the suit schedule properties. It is the case of the plaintiff as also defendant No. 3 that the properties are their ancestral properties. However, defendant Nos. 1 and 2 contend that there is a prior partition of the properties as per the memorandum of partition - Ex.D1 dated 29.04.1999. Defendant No. 3 in her evidence has denied her signature on the said document. Whether the signature in dispute is the signature of defendant No. 3 or not has to be answered by an expert after comparing the same with the admitted signature. This question has to be scientifically analyzed, examined and considered by an expert and then, he has to give his opinion after scientifically testing the same. The burden is on defendant Nos. 1 and 2 to establish that the disputed signature is of defendant No. 3. Therefore, the Court below was not right in rejecting the application filed by defendant Nos. 1 and 2.

6. In view of the law declared by the Supreme Court and this Court, the report of a handwriting expert is not conclusive evidence. The report of handwriting expert is subject to objections and his cross-examination. Further it is obligatory on the part of the trial Court to consider the report of the handwriting expert with other evidence available on record. Under the impugned order, the trial Court has not stated that it can compare the disputed and admitted signature of S.T. Ambekar by exercising its power u/s 73 of the Evidence Act is erroneous. In view of the rival contention between the parties, denial and admission of the signature of S.T. Ambekar on the dispute document Ex.D2 the will, the appointment of an handwriting expert is necessary in the facts and circumstances of this case. After conclusion of evidence on both the side and when the matter was set down for arguments, the plaintiffs filed the application for appointment of Commissioner. The stage at which the application is filed by the plaintiffs is the appropriate stage for appointment of a Court Commissioner.

7. It is settled position of law that Court Commissioner cannot be appointed to collect the evidence in a case. After completion of evidence on both the side, if there is ambiguity in the evidence so adduced, then the Court may appoint a Commissioner for the purpose of clarification of such an ambiguity. In the instant case, the evidence on record establishes the fact that defendants relied on Ex.D2 the will said to have been executed by S.T. Ambekar. On the other hand, plaintiffs denied the signature of S.T. Ambekar on the will Ex.D2. Therefore, there is ambiguity in the evidence on record before the trial Court In order to clarify such an ambiguity in the evidence, the report of Court Commissioner may be of some assistance to the trial Court to find out the truth. As already pointed, the report of the handwriting expert is not the conclusive proof of execution of the will and the same is required to be read with the other evidence on record.

7. For the reasons stated above, the following:

ORDER

I) The writ petition is hereby allowed. The impugned order dated 28.02.2009 in O.S. No. 4507/1998 passed by the XX Add. City Civil Judge, Bangalore is hereby quashed.

II) The application filed by the petitioners/plaintiff under Order 26 Rule 10-A CPC is hereby allowed. The trial Court to name the Court Commissioner, fix the Commissioner fee and issue the Commissioner warrant and to secure the report within a time frame.

III) After providing an opportunity to both the parties, the trial Court to proceed to decide the matter as expeditiously as possible.

Ordered accordingly.