

(2016) 06 MAD CK 0133

MADRAS HIGH COURT (MADURAI BENCH)

Case No: C.R.P.(MD) No. 1094 of 2016 and C.M.P.(MD) No. 5513 of 2016.

A. Aandisamy Chettiar -
Petitioner/Petitioner/Appellant
@HASH A. Subburaj Chettiar
/Respondent/Respondent

APPELLANT

Vs

RESPONDENT

Date of Decision: June 8, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10A, Order 41 Rule 27

Citation: (2016) 167 AIC 423

Hon'ble Judges: K. Kalyanasundaram, J.

Bench: Single Bench

Advocate: Mr. N. Dilip Kumar, Advocate, for the Petitioner

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Mr. K. Kalyanasundaram, J. - This revision is directed against the order passed by the Sub Court, Virudhunagar in I.A. No. 3 of 2008 in A.S. No. 55 of 2007.

2. The petitioner instituted a suit in O.S.No.92 of 2003 before the District Munsif Court, Virudhunagar against the respondent for permanent injunction. After contest, the suit was dismissed on 05.02.2007. Aggrieved over the Judgment and Decree, the petitioner preferred an appeal in A.S.No.55 of 2007 before the Sub Court, Virudhunagar. In the appeal, the petitioner filed an application in I.A.No.3 of 2008 under Order 26, Rule 10 (A) and Section 151 C.P.C., for expert opinion of the Will, which was marked as Ex.A.4.

3. Originally, the application was allowed. The respondent challenged the order before this Court in C.R.P(MD)No.1787 of 2008. This Court having found that the

petitioner had not availed his opportunity before the trial Court, reversed the order of the Appellate Court. The petitioner challenged the order before the Apex Court in C.A.No.14055 of 2015. The Supreme Court set aside the order passed in the revision and remanded the case for fresh disposal. The relevant portion of the order is extracted below:-

"18. We have considered the argument advanced on behalf of the appellant and also perused the law laid down by this Court as to the exercise of revisional power under Section 115 of the Code in such matters. In **Mahavir Singh and others v. Naresh Chandra and another reported in 2001 (1) SCC 309** explaining the scope of revision in the matters of acceptance of additional evidence by the lower appellate court interpreting expression "or for any other substantial cause" in Rule 27 Order 41, this Court has held as under :-

"The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in **Kessowji Issur v. G.I.P. Rly. [ILR (1907-08) 31 Bom 381]**. It is under these circumstances such a power could be exercised. Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 CPC, have interfered with such an order, particularly when the whole appeal is not before the Court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order 41, Rule 27 CPC, the whole appeal was before it and if the first appellate court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC."

19. In **Gurdev Singh and others v. Mehnga Ram and another reported in 1997 (6) SCC 507**, this Court, on similar issue, has expressed the view as under :-

"We have heard learned counsel for the parties. The grievance of the appellants before us is that in an appeal filed by them before the learned Additional District Judge, Ferozepur, in an application under Order 41, Rule 27 (b), Code of Civil Procedure (CPC) the learned Additional District Judge at the final hearing of the appeal wrongly felt that additional evidence was required to be produced as requested by the appellants by way of examination of a handwriting expert. The High Court in the impugned order exercising jurisdiction under Section 115 CPC took the view that the order of the appellate court could not be sustained. In our view the approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which

was within the jurisdiction of the appellate Court. The reason is obvious. The appellate court hearing the matter finally could exercise jurisdiction one way or the other under Order 41, Rule 27 specially clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. Only on this short question, without expressing any opinion on the merits of the controversy involved and on the legality of the contentions advanced by both the learned counsel for the parties regarding additional evidence, we allow this appeal, set aside the order of the High Court."

20. In view of the law laid down by this Court, as discussed above, regarding exercise of revisional powers in the matter of allowing the application for additional evidence, when appeal is pending before the lower appellate court, the impugned order passed by the High Court cannot be upheld and the same is set aside. However, to do complete justice between the parties, we think it just and proper to direct the first appellate court to decide the application for additional evidence afresh in the light of observations made by this Court regarding principles on which such an application can be allowed or rejected. We order accordingly. We further clarify that we have not expressed any opinion as to the merits of the case. Accordingly, the appeal is disposed of. No order as to costs."

4. As per the direction of the Supreme Court, the Appellate Court taken up the application afresh and dismissed the same holding that the petitioner had not assigned any reason for not taking steps before the trial Court for comparing the signature; the petitioner has not produced contemporaries document to get opinion of handwriting expert and further, the opinion of the expert is not necessary for adjudication of the dispute involved in the appeal. Aggrieved over the order, the present revision is filed.

5. Mr. N. Dilip Kumar, learned counsel appearing for the petitioner would submit that the suit was filed for bare injunction and the petitioner claims right over the property based on the Will Ex.A.4. When the Will was produced by the petitioner, it was the duty of the Court to send the document for expert opinion and the Court cannot compare the signature on its own to render a finding. The learned counsel has relied upon the judgments in **M. Rani v. A. Bala @ Palaniammal reported in 2015 (2) L.W 381**, **M. Kaliamoorthy v. Dhanuskodi reported in 2015 (1) CTC 256** and **Shanmuga Velar (died) and others v. Rukmani and another reported in 2015 (2) MLJ 263** in support of his contention.

6. In **M. Rani v. A. Bala @ Palaniammal reported in 2015 (2) L.W 381**, a suit laid for recovery of money based on a promissory note and the signature in the document was denied by the defendant. However, no steps was taken to get opinion a handwriting expert. While allowing the Second Appeal, this Court has observed as

follows :-

"21.While appreciating the evidence adduced before it, the Court may encounter a situation to compare the disputed signatures in a document with the admitted signatures in some documents. In such circumstances, under Section 73 of the Indian Evidence Act, Courts have been given powers to do it. It cannot be said that Courts have no such power. It is a statutory power (See **N.S. Arumugan v. Trishul Traders and others (2006 (2) L.W 167)** and **K.S. Satyanarayana v. V.R. Narayana Rao (AIR 1999 SCC 2544)**).

22. Under certain circumstances, the Courts found that such comparison by the Court may not be best suited and, inappropriate."

7. Similarly, while disposing of the Second Appeal, this Court in **M. Kaliamoorthy v. Dhanuskodi reported in 2015 (1) CTC 256**, held as follows :-

"15. Another aspect highlighted by the learned counsel for the appellant was that the Courts below failed to invoke Order 26, Rule 10A of C.P.C., in support of which, he seeks in aid of the decision of this Court in **S. Chinnathai v. K.C. Chinnadura, 2010 (1) MWN (Civil) 413 : 2010 (1) LW 646**, wherein in paragraph 11, it has been held as follows:-

"In the Judgment reported in **Kessarbai v. Jethabhai Jivan, AIR 1928 Privy Council 277**, it has been held that the mere comparison of admitted signatures without expert advice or microscopic examination is dangerous. In the Judgment reported in **O. Bharathan v. K. Sudhakaran and another, 1996 (2) SCC 704**, the Honourable Supreme Court has held that the Court itself should not compare the disputed signatures without the assistance of any expert, when the signatures with which the disputed signatures are to be compared are themselves not the admitted signatures. Similarly, in the Judgment reported in **Kothandapani Padayachi v. Ranganatha Padayachi and others, 1997 (1) MLJ 304**, the Honourable High Court has held that it is advisable to have an assistance of Handwriting expert and the Court shall be slow in venturing on an opinion on the basis of mere comparison. In the Judgment reported in **Dhanakodi Padayachi v. Muthukumaraswami, 1997 (2) MLJ 37**, the Honourable High Court has again held that the Court shall not compare the disputed and base its conclusion thereon."

8. In **Shanmuga Velar (died) and others v. Rukmani and another reported in 2015 (2) MLJ 263**, pending suit, a petition taken out to seek opinion a handwriting expert was rejected. This Court reversed the finding and held thus:-

"6.....But, since an authenticated document, namely certified copy of the registered sale deed dated 25.08.2003 bearing Document No.1520 of 2003 containing the signature as well as the left thumb impression of Shanmuga Velar has been produced, the left thumb impression found in the Will can be compared with the thumb impression found in the said sale deed dated 25.08.2003 and in case

it is found that the thumb impression found therein is that of the person whose thumb impression found in the sale deed dated 25.08.2003 (against the name of the purchaser), then there would not be any impediment for using the said Will also for the purpose of comparing with the disputed document, namely the sale deed dated 21.05.1973."

9. In the instant case, the petitioner instituted the suit against the respondent on 11.04.2003, which was dismissed on 05.02.2007. In the appeal preferred against the Judgment and Decree, the petitioner has filed an application to send the Will, Ex.A. 4 for getting opinion from the handwriting expert. So, in my considered view, the Judgments relied on by the petitioner have not application to the facts of this case.

10. In **Mahavir Singh and others v. Naresh Chandra and another reported in 2001 (1) SCC 309**, the application filed under Order 41, Rule 27 C.P.C was dismissed. The order of the Appellate Court was reversed by the High Court. In **Gurdev Singh and others v. Mehnga Ram and another reported in 1997 (6) SCC 507**, the application filed under Order 41, Rule 27 C.P.C before the Appellate Court was allowed and it was challenged by the aggrieved party before the High Court. Since the orders were reversed, the matters were taken up to the Supreme Court. In both the cases, the Supreme Court has held that the High Court should not have interfered with the orders passed by the Appellate Court under Order 41, Rule 27 C.P.C. The petitioner is bound by the order made by the Supreme Court in this case in C.A. No. 14055 of 2015, referred supra.

11. In such view of the matter, I do not find any merits in this revision. In fine, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is also dismissed.