Swami Satyanand Vs Rajiv Ranjan Kumar Singh

Court: Calcutta High Court

Date of Decision: June 11, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 26 Rule 10A
Evidence Act, 1872 â€" Section 45

Citation: (2012) 3 CALLT 600

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: Prabat Mukherjee and Ms. Shabatee Dutta, for the Appellant;Priyabrata Mukherjee, Murari Chakraborty and Mr. Sabita Mukherjee, for the Respondent

Final Decision: Allowed

Judgement

Soumen Sen, J.
This revisional application arises out of an order dated 14th June. 2011 by which an application filed by the

plaintiff/opposite party under Order 26 Rule 10A of the CPC read with section 45 of the Indian Evidence Act on 25th June. 2010 was allowed.

The plaintiff filed a suit for specific performance of a contract directing the defendant to execute the sale deed in favour of the plaintiff. The

defendant petitioner is contesting the suit and filed his written statement. Of the various objection taken, it was contended that agreement for sale is

forged, fabricated and manufactured. The plaintiff in view of such objection raised by the defendant filed an application under Order 26 Rule 10A

read with section 151 of the CPC along with an application u/s 45 of the Indian Evidence Act for appointment of a handwriting expert for

comparison of the signature in the said deed with the signatures in two Powers of Attorney said to have been executed by the defendant. In the

said application, the plaintiff referred to paragraph "5" and "7" of the written statement in which the defendant referred to the institution of criminal

case against the plaintiff and others before the First Class Judicial Magistrate. Bihar being 1157 of 2009 in which the petitioner relied upon an

opinion of a Hand Writing and Finger Print Expert Bureau claimed to have been prepared after examination of the admitted and disputed signature

of the defendant and on such report, it is contended that the said agreement for sale was not signed by Swamy Satyanand. The plaintiff contended

in this application that such report is not tenable in law inasmuch as the said Hand Writing and Finger Print Expert Bureau is not a Government

Agency and the signature of the defendant on the agreement for sale requires a scientific comparison with his signatures appearing in two sets of

power of attorney which were marked as Exhibit 18 and 18/3 in connection with Title Suit No. 123/87 filed before the first Court of Civil Judge.

Senior Division. Bhaua in Bihar. In view of such objection in the written statement the plaintiff filed an application under Order 26 Rule 10A read

with section 45 of the Indian Evidence Act.

2. The defendant contended that the said application is pre mature. There is no scope for obtaining any opinion of a handwriting expert at this stage

since the document has not been tendered in evidence and it is only after the said document is tendered in evidence, there may be a necessity of an

opinion of handwriting expert. It was argued that unless the said document is tendered in evidence and marked as Exhibit, it is not open to the

petitioner to seek appointment of a handwriting expert u/s 45 of the Indian Evidence Act.

3. The Court in allowing the said application has considered that at any stage of the suit, the Court can obtain opinion of an handwriting expert on

disputed signature or handwriting. The defendant already had obtained a report from an examiner of his own choice which report supports his

defence. The Court fell in view of such rival contentions, the plaintiffs application to obtain opinion of an independent Government handwriting

examiner at this very early stage might assist the Court in adjudicating the genuineness of the signature; of the said document. It was on this

consideration, the said application was allowed and the Director. Questioned Documents Examination Bureau. C.I.D., West Bengal Bhabani

Bhaban, Alipore was requested to take steps in the matter.

4. Mr. Prabal Mukherjee, learned counsel appearing on behalf of the petitioner referred to the decision of the Supreme Court in the case of

Shyamal Kumar Roy v. Sushil Kumar Agarwal reported in (2006) II SCC 331 for the proposition that the said instrument is not admissible in

evidence in view of the fact that the same is inadequately stamped. Since this document has not been marked as exhibit and could not be so in view

of a clear bar u/s 36 of the Indian Stamp Act, the trial Court ought not to have passed such an order.

5. Mr. Priyabrata Mukherjee, appearing on behalf of the opposite party on the other hand submitted that there is no time limit for filing an

application u/s 45 of the Act for sending disputed signature to a Handwriting expert for comparison. He further submitted that although such an

application was filed under Order 26 Rule 10A of the Code of Civil Procedure, but in effect the plaintiff wants to have an expert evidence of his

own choice from a Government accredited agency unlike the opinion obtained by the defendant from a private agency. In any event, such opinion

would be considered by the Trial Court and it would always be open to the opposite party to cross-examine such expert if at all the plaintiff

ultimately decides to rely on such evidence. It was submitted that a distinction is to be drawn between an expert appointed by the Court on its own

motion and an expert appointed on the basis of a request of one of the parties to the lis. He relied upon a decision of the Supreme Court in the

case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, for the proposition that the scheme of CPC are grounded on a principle of

natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that

proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in

them. He further submitted that the right of the Court to even direct such examination by an expert at a belated stage has been recognised by

Hon"ble High Court of Andhra Pradesh in the case of Janachaitanya Housing Ltd. Vs. Divya Financiers, The said paragraphs are reproduced

hereinbelow:-

14. In view of the same, we are of the opinion that the Court cannot lay down any hard and fast rules controlling the discretion of the Court to send

the disputed documents/writings for the opinion of the expert or to examine him in support of such opinion. On sending the document to

handwriting expert and on receiving report, parties on showing sufficient cause, may call upon the Court to permit them to examine handwriting

expert or any witness in support or rebut the said opinion.

15. It is apt to quote here the observation of Justice Vivian Bose in his illuminating language dealing with the CPC in Sangram Singh Vs. Election

Tribunal, Kotah, Bhurey Lal Baya,

It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties: not a thing designed

to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be

guarded against (Provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate

it.

16. For the reasons aforementioned, we answer the reference thus: ""No time could be fixed for filing applications u/s 45 of the Indian Evidence Act

for sending the disputed signature or writings to the handwriting expert for comparison and opinion and same shall be left open to the discretion of

the Court: for exercising such discretion when exigencies so demand, depending upon the facts and circumstances of the each case.

6. Mr. Prabal Mukherjee, learned counsel appearing for the petitioner raised the following objections with regard to the direction passed by the

learned Trial Judge for examination of signature of the defendant appearing in the agreement for sale dated 4th March. 2009 with his admitted

signature appearing in other documents:-

(i) The evidence of the plaintiff has not commenced:

(ii) The agreement for sale which is intended to be relied upon is inadmissible in evidence being insufficiently stamped:

(iii) The learned Judge did not specify the documents which are said to be admitted documents and compare the signature with the alleged

agreement for sale.

(iv) In any event, the power of attorney is not part of this proceeding and not an admitted document in this proceeding.

7. It is argued that the petitioner is not opposed to an appointment of a handwriting expert if it requires, but the stage has not come for such

appointment. There are admitted signatures in the Courts below and if at all it is required, the Court should have directed comparison with the

admitted signatures that are available on record. It is submitted that the application is pre-mature. The Court also did not exercise the power suo

motu in sending the said document for comparison. Since the document is not admissible, it cannot be sent to an expert unless the said document is

tendered in evidence and taken on record. In support of the aforesaid submission. Mr. Mukherjee has relied upon the following decisions reported

in Shyamal Kumar Roy Vs. Sushil Kumar Agarwal, Jogamaya Panda and Others Vs. Sailendra Nath Panda and Others, . Kapil Corepacks Pvt.

Ltd. and Others Vs. Shri Harbans Lal (since deceased) through Lrs., and Tarak Nath Sha Vs. Bhutoria Brothers Private Ltd. and Manmal

Bhutoria and Another,

8. In Shyamal Kumar Roy (supra), the Hon''ble Supreme Court was considering the status of an instrument admitted in evidence but inadequately

stamped in the light of the West Bengal Amendment to the Indian Stamp Act. 1990 with effect from 31st January, 1994. It was held that if an

instrument though unstamped is tendered in evidence and is admitted without the other side objecting to it, the right to reopen the issue is lost.

Section 36 would operate even if a document has been improperly admitted in evidence. It is of little or no consequence as to whether a document

has been admitted in evidence on determination of a question as regards admissibility thereof or upon dispensation of formal proof therefor. If a

party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise

an objection thereto at the appropriate stage. He may not do so only at his peril. Objection as regards admissibility of a document, thus,

specifically is required to be taken that it was not duly stamped. On such objection only, the question is required to be determined judicially.

9. But, if no objection is raised in regard to the admissibility of the said document one cannot at a later stage be permitted to turn round and

contend that the said document is inadmissible in evidence. Where, without going into the sufficiency of stamp duty an instrument is allowed to be

taken in evidence but with an endorsement ""objected, allowed subject to objection"" the right to object remains open and can be judicially

determined at the appropriate stage.

10. In Jogamaya Panda (supra) it was held that where an expert opinion has been received, the trial Judge ought to have deferred the recording of

evidence of the plaintiff in the suit till the handwriting expert is examined with regard to his report. In the said case, on an application filed by the

defendant, the disputed signature of the defendant appearing in the agreement for sale was referred to an handwriting expert for comparing the

same with the admitted signature of the said defendant and for his opinion. The handwriting expert submitted his report which, however, was

objected to by the petitioner and he filed an objection against the acceptability of the said report. On an application filed by the Trial Judge after

considering his objection against the said report first, before commencement of the trial. The Trial Judge refused to adjourn the hearing of the suit

and ordered that such objection is to be considered in course of peremptory hearing of the said suit. The said order was under challenge before the

learned single Judge in Jogamaya Panda (supra).

11. Kapil Corepacks Pvt. Ltd. (supra) was relied upon for the proposition that in deciding an issue concerning ''forgery'' the same is required to be

determined with reference to the expert evidence and after the evidence of both the plaintiff and the defendants are tested in cross-examination. It

was also held that an admission of a signature is not an admission of execution of a document.

12. In the said decision, the Hon''ble Supreme Court was considering the nature and object of Order 10 Rule 2 of the Code of Civil Procedure. It

was held that the object of the examination under Order 10 Rule 2 CPC is to identify the matters in controversy and not to prove or disprove the

matters in controversy, nor to seek admissions, nor to decide the rights or obligations of parties. Any attempt by the court, either to prove or

disprove a document or cross-examine a party by adopting the stratagem of covering portions of a document used by the cross-examining counsel,

are clearly outside the scope of an examination under Order 10 Rule 2 CPC and the power to call upon a party to admit any document under

Order 12 Rule, 3-A CPC.

13. In Tarak Nath Sha (supra) it was held that once a document is properly admitted the contents of that document are also admitted in evidence

though those contents may not be conclusive evidence. The Division Bench was also considering the ''power of the Court to compare signatures in

exercise of power u/s 73 of the Evidence Act and held that the Court is not an handwriting expert. The Court does it only through its visual

experience. The comparison of signatures by expert is a piece of evidence. The opinion of the expert is not binding on the Court. Ordinarily, the

Court should not take upon itself the responsibility of comparing signatures when disputed. Those are matters of intrinsic technicalities requiring

some amount of technical expertise. A signature apparently may look alike but when examined by experts, various flaws may be detected. But

without such expert examination, the Court cannot for sure accept the signature of the author denying it.

14. In Thiruvengada Pillai Vs. Navaneethammal and Another, . the Hon''ble Supreme Court was considering the nature and scope of sections 45,

47 and 73 of the Evidence Act, 1872, it was held that when there is a positive denial by the person who is said to have affixed his finger impression

and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the Court should

hesitate to venture a decision based on its own comparison of the disputed and admitted finger impression. Further, even in cases where the court

is constrained to take up such comparison, it should make a thorough study, if necessary with the assistance of counsel, to ascertain the

characteristics, similarities and dissimilarities. The Court should avoid reaching conclusions based on a mere casual or routine glance or perusal.

15. The principles that the Court should apply before exercising any power under sections 45, 47 and 73 of the Evidence Act have been succinctly

explained in Barindra Kumar Ghose & Ors. v. The Emperor reported in XIV CWN 1114 at page 1117, the relevant portions whereof are

reproduced hereinbelow:-

A document may be used in evidence for the purpose of affecting some one with knowledge of its contents regardless of whether the contents are

true or false, or for the purpose of proving the truth of that which it contains. But from the fact that a document may be relevant for the first

purpose it by no means follows that it is relevant also for the second.

Excluding exceptional cases, a statement made in a private document is not by itself proof of its truth or any more admissible to prove the truth of

the matter stated than an oral statement by the same person would be.

But at the same time a statement whether oral or written can be used against a person to prove the truth of the matter slated, if, as against him, it

can be regarded as an admission. But the facts must be proved by virtue of which it can be regarded as an admission.

It the admission was actually written by him and it is on this ground that it is sought to be used, then the fact that it was so written must be proved

by those methods which the law allows.

The ordinary methods of proving handwriting are: (1) by the admission of the person against whom the document is tendered; (2) by calling as a

witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the handwriting by virtue of section 47

of the Evidence Act: (3) by a comparison of handwriting as provided by section 73 of the Evidence Act.

Section 73 of the Evidence Act does not sanction the comparison of any two documents but requires that the writing with which the comparison is

to be made shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the

standard must purport to have been written by the same person, that is to say the writing itself must state or indicate that it was written by that

person.

A comparison of handwriting as a mode of proof is at all times hazardous and inconclusive, and specially when it is made by one not conversant

with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts.

Opinions of experts on handwriting are useful in so far as the appearances on which they rely are disclosed and can thus be supported or criticized,

whereas an opinion formed by the Judge in the privacy of his own room is subject to no such check.

16. The same principle was reiterated in Suresh Chandra Sanyal v. The King-Emperor reported in 16 CWN 812 in which it was held that the one

thing required for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should

be proved beyond question or doubt to be that of the person alleged. The evidence of an expert in handwriting is inadmissible if there is no

comparison with proved or admitted handwriting in open Court in the presence of the party affected.

17. There may be a situation where the Court may direct an accused to give his specimen handwriting in order to enable the same to be compared

by the handwriting expert. This aspect of the matter was considered in The State (Delhi Administration) Vs. Pali Ram, in which the Hon''ble

Supreme Court held that a sample writing taken by the Court under the second paragraph of section 73, is, in substance and reality, the same thing

as admitted writing'' within the purview of the first paragraph of section 73, also. The first paragraph of the section provides for comparison of

signature, writing, etc. purporting to have been written by a person with others admitted or proved to the satisfaction of the Court to have been

written by the same person. But it does not specifically say by whom such comparison may be made. Construed in the light of the English Law on

the subject, which is the legislative source of this provision, it is clear that such comparison may be made by a handwriting expert (section 45) or

by one familiar with the handwriting of the person concerned (section 47) or by the Court. The two paragraphs of the section are not mutually

exclusive. They are complementary to each other. Section 73 is, therefore, to be read as a whole in the light of section 45.

18. In addition to section 73, there are two other provisions resting on the same principle, namely, section 165, Evidence Act and section 540 Cr.

PC 1898, which between them invest the Court with a wide discretion to call and examine any one as a witness, if it is bona fide of the opinion that

his examination is necessary for a just decision of the case.

19. While there is no doubt that Court can compare the disputed'' handwriting/signature/finger impression with the admitted

handwriting/signature/finger impression, such comparison by Court without the assistance of any expert, has always been considered to be

hazardous and risky. When it is said that there is no bar to a court to compare the disputed signature with the admitted signature, it goes without

saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted signature and after

verifying whether the same characteristics are found in the disputed signature. The comparison of the signatures cannot be casual or by a mere

glance. Where the court finds that the disputed signature and admitted signature are clear and where the court is in a position to identify the

characteristics of the signature, the court may record a finding on comparison, even in the absence of an expert''s opinion.

20. It is settled law that an expert is not a witness of fact and his evidence is only advisory in character. An expert becomes an expert in view of he

is having acquired a special knowledge and experience in the said signs on which he is required to give his opinion. The law of evidence is designed

to ensure that Court considers only that evidence which enables it to reach a reliable conclusion. Evidence of expert is admissible when (i) expert is

heard. (ii) he must be within a recognized field of expertise, (iii) his evidence must be based on reliable principles, and (iv) he must be qualified in

that discipline. It is needless to mention that without examining expert as a witness, no reliance can be placed on his opinion alone. (Ramesh

Chandra Agrawal Vs. Regency Hospital Ltd. and Others,

21. The handwriting expert is a competent witness whose opinion evidence is recognized as relevant under the provisions of the Evidence Act. The

Courts have been wary in placing implicit reliance on such opinion evidence and have looked for corroboration but that is not to say that it is a rule

of prudence of general application regardless of the circumstances of the case and the quality to of expert evidence. There is no doubt that section

73 empowers the court to see for itself whether on a comparison of the two sets of writing/signature, it can safely be concluded with the assistance

of the expert opinion that the disputed writings are in the handwriting of the executants of the document. Although the section specifically

empowers the Court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court

should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of

specimen/admitted writings is not of high standard.

22. In this application in deciding the propriety of the said order it has to be seen as to whether the learned Court below was justified in

entertaining the said application and directing appointment of an expert to examine the said signatures, It has to be kept in mind that the trial has not

begun and the subject document is yet to be tendered and produced in evidence. Moreover, the petitioner has raised serious objection with regard

to the admissibility of the said document on various grounds including insufficiency of stamp duty paid on the said document. The documents, with

which the questioned document is directed to be compared and examined, is also not on record. In my view, when such issues are involved and

the question of admissibility of the said document on the ground that the said document is forged, fabricated and insufficiently stamped has to be

considered at the stage of marking such document as an exhibit and which issue is required to be decided at the stage when the said document is

sought to be tendered as an exhibit in view of the judgment of the Hon"ble Supreme Court reported in Smt. Dayamathi Bai Vs. Sri K.M. Shaffi,

and Shalimar Chemical Works Ltd. Vs. Surendra Oil and Dal Mills (Refineries) and Others,) the Trial Judge at the stage of admission of such

documents and marking the said documents as exhibits could examine the said question and pass appropriate orders in exercise of its power u/s

45, 47 and 73 of the Indian Evidence Act. 1872.

23. In the facts and circumstances of the case, it was open for the plaintiff to obtain any expert opinion on the questioned documents independently

for the purpose of establishing its claim in the suit but at this stage having regard to the fact that there are serious questions raised with regard to the

admissibility of the said document, the trial Court could not have, before deciding the said issue, directed appointment of an expert to compare the

signatures with any other admitted signatures as was directed in the impugned order dated 14th June, 2011. The opposite parties urged that the

original of the said agreement has been filed in the Court and, accordingly, without any order being passed by the learned Court, the said document

cannot travel beyond the precinct of the Court premises even if the plaintiff wants the said document to be examined by an expert. There is some

substance in the said argument. Since the said document is in the custody of the Court, it would be open for the opposite parties to file

appropriate-application before the Trial Court for any such examination of such questioned document by any such person or institution claiming to

be an expert on the field as the Trial Court may think fit and proper and upon such application being made, the Trial Court would consider the said

prayer of the opposite parties in accordance with law. The Court at this stage cannot form any opinion with regard to the genuineness of the

signature. In the course of the trial it would always be open for the Court even suo motu to have an expert opinion on the questioned documents if

the Court finds it relevant and required for proper adjudication of the issues involved in the suit. The power that has been exercised by the Trial

Court at this stage could be exercised after the said document is produced in evidence either at the instance of the parties or suo motu.

24. The learned Counsel for the petitioner, to my mind, is correct in his contention that the stage has not arrived for the Court to have an expert

opinion on such questioned documents and signatures. The said order if allowed to stand may be prejudging the issue and would result in

miscarriage of justice. In view of the aforesaid, the revisional application succeeds. However, there shall be no order as to costs.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.