Sunil Chowdhury Vs Arup Kumar Ghosh

Court: Calcutta High Court

Date of Decision: Dec. 16, 2005

Acts Referred: Evidence Act, 1872 â€" Section 45, 73

Citation: AIR 2006 Cal 109 : (2006) 2 CHN 347

Hon'ble Judges: Bhaskar Bhattacharya, J; Arun Kumar Bhattacharya, J

Bench: Division Bench

Advocate: S.P. Roy Chowdhury and Ranjit Ghosal, for the Appellant;Sudhis Dasgupta, Amjad Ali, Harish Tandon and N.K. Das, for the Respondent

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.
The first appeal is at the instance of a defendant in a suit for declaration, permanent injunction and recovery of

possession and is preferred against the judgment and decree dated 25th June, 2003 passed by the learned Judge, 11th Bench, City Civil Court at

Calcutta in Title Suit No. 1616 of 1999 thereby passing a decree of declaration that the defendant therein was a licensee in respect of the suit

property and permanent injunction restraining him from running any coaching centre in the suit room or from using the suit room for business

purpose. The learned Trial Judge further passed a decree for khas possession in favour of the plaintiff by evicting the defendant.

2. The respondent filed the aforesaid suit being Title Suit No. 1616 of 1999 thereby praying for declaration that the appellant was a licensee in

respect of the suit premises and his licence had been duly revoked and that he was not entitled to use the said room for running coaching centre or

for any business purpose with a prayer for permanent injunction restraining the appellant from running coaching centre in the suit room or using the

property for any business purpose or from handing over the same to any third party. The respondent further prayed for recovery of khas

possession of the suit property by evicting the appellant therefrom.

3. The case made out by the plaintiff may be summarised thus:

(a) The plaintiff is one of the Trustees of Smt. Rakshkali Dasi Trust Estate and by virtue of such Office as Trustee, he is entitled to reside in the

property and accordingly, he is residing there with his family. The other two trustees are staying outside Calcutta.

(b) The defendant was a private tutor of the son of the plaintiff and while the defendant was such a private tutor, he was accommodated in a room

situated in the ground floor of the suit building and the defendant became residential private tutor of the son of the plaintiff and thus, the status of the

defendant was that of a mere licensee, such license being given in consideration of the defendant''s service as private tutor of the son of the plaintiff.

(c) After the conclusion of the career of the plaintiff''s son as a student, the defendant approached the plaintiff from time to time to extend the

period of license for using and occupying the said room and considering the good relation between the parties, the plaintiff extended the said

licence from time to time free of cost. Taking undue advantage of the said licence, the defendant started teaching a few students in the said room.

On protest by the plaintiff, the defendant assured him to discontinue private teaching but could not keep the promise.

(d) As the defendant continued to use and occupy the said room and converted the same to a coaching centre, the plaintiff urged the defendant to

vacate the room and shift his coaching centre from the said room. The defendant, however, took shelter of a political party.

(e) Having no other alternative, the plaintiff by a notice dated 28th June, 1999 sent through an advocate revoked the said licence and called upon

the defendant to deliver vacant possession of the room immediately, but in spite of such notice, the defendant refused to vacate. Hence the suit.

4. The aforesaid suit was contested by the appellant by filing written statement thereby denying all the material allegations made in the plaint and his

defence may be summed up thus:

(i) From 7th November. 1.978 the defendant had been staying in the suit property as a tenant under the plaintiff on a monthly rental of Rs. 75/-

payable according to the English b2 Calendar month and he started teaching the son of the plaintiff up to Class VII for 5/6 years. The defendant

spent a lot of money to repair the room. He repaired the suit property several times and paid rent to the plaintiff who did not give him any receipt

on the plea of enhancement of the municipal tax.

(ii) Subsequently, rent was increased from Rs.75/- to Rs. 200/- and the electricity charges were also enhanced from Rs. 65/- to Rs. 150/- and

altogether he had been paying Rs. 350/- per month to the plaintiff.

(iii) The defendant never converted the suit room into a coaching centre as alleged and he had been all along staying there with his family.

(iv) The defendant never granted rent receipt but he took advance by granting a receipt on acceptance of Rs. 5,000/-.

5. The defendant also made counter-claim for a declaration that he was a tenant under the plaintiff and for injunction restraining the plaintiff not to

interfere with the installation of domestic electric meter in the meter box of the suit property.

6. At the time of hearing of the suit, the plaintiff himself gave evidence and apart from the plaintiff, one Purushottam Chatterjee, an expert of

handwriting appointed by the Court at the instance of the plaintiff also deposed in his favour observing that the alleged receipt of Rs. 5,000/- did

not bear the signature of plaintiff. On behalf of the defendant, he himself and one Naren Dutta in whose presence the advance of Rs. 5,000/- was

allegedly paid to the plaintiff gave evidence.

7. As indicated earlier, the learned Trial Judge by the judgment and decree impugned herein decreed the suit in favour of the plaintiff thereby

holding that defendant was a mere licensee and not a tenant. Consequently, a decree for permanent injunction and that of recovery of possession

were also granted in favour of the plaintiff. It, however, appears from the judgment and decree passed by the learned Trial Judge that the counter

claim of the defendant was not specifically decided.

8. Being dissatisfied, the defendant has come forward with the present appeal challenging the judgment and decree passed by the learned Trial

Judge.

9. Mr. Roy Chowdhury, the learned senior advocate appearing on behalf of the appellant has, at the very outset, drawn attention of this Court to

the materials on record and has contended that no prudent man will ever believe the case of the plaintiff that although the son of the plaintiff ceased

to be a student of the defendant in the year 1982 as admitted by the plaintiff, he permitted his client to stay in the property without any payment of

rent and that too without taking the charge of consumption of electricity. According to Mr. Roy Chowdhury, silence on the part of the plaintiff for

long seventeen years in instituting the suit even after the son of the plaintiff ceased to be a student of the defendant indicated that it was a case of

tenancy. Mr. Roy Chowdhury next drew attention of this Court to the alleged document by which the plaintiff received Rs. 5,000/- from the

defendant. Mr. Roy Chowdhury submits such document was not written on a blank paper but in the printed letter-head of the plaintiff and plaintiff

having failed to produce any evidence disclosing how the plaintiffs letter-head could come in the hand of the defendant the learned Trial Judge

erred in disbelieving the said receipt. Mr. Roy Chowdhury points out that the handwriting expert compared the signature appearing in the disputed

document with the alleged signatures of the plaintiff appearing in the documents supplied by the plaintiff where the syllable ""A"" was written in a

different way whereas the plaintiffs own handwriting in the plaint and the vakalatnama filed before this Court would indicate that the plaintiff had

written the syllable ""A"" in the same way as written in the said receipt. Mr. Roy Chowdhury submitted that the Court by exercising its power u/s 73

of the Evidence Act was entitled to compare the disputed signature with the ones appearing in the plaint and vakalatnama to ascertain whether it

was the plaintiff who signed the document while accepting the sum of Rs. 5,000/-.

10. Mr. Roy Chowdhury next contends that it appears from evidence that the plaintiff was staying in the suit property along with his family

members at least from 1980 and the suit having been filed in the year 1999, it is impossible to believe the case of the plaintiff that the defendant

being in destitute condition was accommodated in the property as a licensee. Mr. Roy Chowdhury further submits that exclusive possession

coupled with the fact that defendant had been staying for a long period without any protest from plaintiff indicated that this is a case of tenancy. In

other words, Mr. Roy Chowdhury contends that while arriving at the conclusion that the defendant was a mere licensee, the learned Trial Judge

did not follow the well-accepted principles which are required to be followed in this type of case.

11. The aforesaid contentions of Mr. Roy Chowdhury are seriously disputed by Mr. Dasgupta, the learned senior advocate appearing on behalf of

the respondent. Mr. Dasgupta submits that the document relied upon by the defendant itself will show that amount of rent stated in the evidence

was not tallying with the one indicated in the receipt. Mr. Dasgupta further contends that the learned Trial Judge having relied upon the expert''s

report and evidence, this Court should not interfere with such finding of fact recorded by the learned Trial Judge.

12. Mr. Dasgupta next contends that the parties being the member of same political party had good relation and there is nothing unusual in such a

situation to give shelter to the defendant. Mr. Dasgupta further contends that if the plaintiff refused to grant rent receipt in spite of payment of rent,

it was the duty of the defendant to approach the Rent Controller for the purpose of compelling the plaintiff to issue the rent receipts and in the

absence of such endeavour by the plaintiff, it should be presumed that his defence of tenancy is an afterthought defence. Mr. Dasgupta, thus, prays

for dismissal of this appeal.

13. After hearing the learned Counsel for the parties and after going through the materials on record we find that the plaintiff-respondent in his

evidence has admitted that the appellant was inducted in the suit property in the middle part of seventies. It is also admitted by the plaintiff that the

defendant was teaching the son of the plaintiff from the year 1975-76 and at that point of time, the defendant was residing at 6, Jadunath Dey

Road in a mess. However, it is a definite case of the plaintiff that he inducted defendant in the property not as a tenant but as a licensee in view of

the fact that he was the private tutor of his son. It is also admitted by the plaintiff that the defendant acted as private tutor of his son till 1984 and

the rate of tuition fee was Rs. 50/- from very beginning till 1984. In his cross-examination the plaintiff, however, admitted that he told the defendant

to vacate the suit room in the year 1982 for the first time and thereafter he asked him to vacate on many occasions. The plaintiff has further stated

in his cross-examination that defendant used to take electricity from the neighbours, meaning, that he never gave electricity to the defendant. The

plaintiff has further admitted that at the time of deposition the defendant was residing with his family in the suit room and his family consists of his

wife and daughter aged about 20 years who was then studying in the College. The plaintiff has further asserted that when the said daughter of the

defendant came to reside in the property she was a school student.

14. From the aforesaid evidence we find that plaintiff has made out a case that at the time of induction as a licensee the defendant was alone and

was staying in a mess. Subsequently, he married and the daughter was born but when the said daughter was a school student, she started residing

in the property with his family. The plaintiff has further tried to maintain that he merely permitted the defendant to stay in the property without any

payment of money and even did not supply electricity to the suit room and the defendant used to get electricity from a neighbour. The defendant

has produced the birth certificate of his daughter disclosing that on 19th November, 1981, at the time of birth of the daughter, he was a resident of

the suit property and the place of birth of the daughter is also the suit property.

15. The aforesaid document falsifies the case of the plaintiff that the daughter came to reside in the property when she was a school student. The

plaintiff did not adduce any evidence showing the place of residence of the wife and daughter of the defendant till the daughter became a school

student as alleged. We are unable to believe the statement of the plaintiff that defendant was permitted to stay without any electricity, although there

is electric connection in house. The plaintiff, we have already indicated, could not disclose the name of the neighbour who allegedly supplied the

electricity. It is, therefore, apparent that defendant was inducted in the property with right to use electricity in the seventies.

16. We further find that although according to the plaintiff he asked the defendant to vacate for the first time in the year 1982 and the son of the

plaintiff ceased to be a student of the defendant from 1984, the plaintiff did not take any step for eviction of the defendant for the next fifteen years

till the year 1999 when for the first time an advocate''s notice was given. It is also admitted case that defendant was put into exclusive possession

of the suit property.

17. From the aforesaid material it is clear that the defendant not only had been using the suit property from the seventies but from the early part of

eighties, he started living with his wife and the daughter was also born in that room.

18. From the aforesaid fact we are convinced that the plaintiff has made a deliberate false statement that the defendant was residing as licensee

without any payment of fees. The plaintiff being admittedly one of the trustees cannot be expected to permit the defendant to consume electricity

free of cost even though from 1984, he was no longer the private tutor of his son.

19. As regards the disputed receipt filed by the defendant, it appears that the learned Trial Judge has disbelieved the said receipt by solely relying

upon the evidence of PW-2, the handwriting expert. According to the learned Trial Judge, the receipt having been found to be forged according to

the opinion of the expert, the defence of the defendant that he was a tenant and was inducted in the property after receiving a sum of Rs. 5,000/-

should be disbelieved.

20. It is now settled law that the opinion of a handwriting expert unlike that of a finger print expert is generally of a frail character and its fallibilities

have been quite often noticed. The Court, therefore, should be wary to give too much weight to the evidence of a handwriting expert.

21. However, there is neither any rule of law nor any rule of prudence which has crystallised into rule of law that the opinion evidence of

handwriting expert must never be acted upon unless substantially corroborated. But having due regard to the imperfect nature of science of

identification of handwriting, the approach should be one of caution. Reasons for opinion must be carefully probed and examined and all other

relevant evidence must also be considered. In appropriate cases, corroboration may be sought. In cases, where the reasons of opinion are

convincing and there is no reliable evidence throwing doubt, the uncorroborated testimony of a handwriting expert may, however, be accepted.

22. At this juncture we should also take note of two particular sections of the Evidence Act, namely, Section 45 and Section 73 dealing with the

procedure for evaluating the veracity of handwriting.

23. According to Section 45, when the Court has to form an opinion upon a foreign law or of science or art, or as to identity of handwriting or

finger impressions, the opinion upon that point of the persons specially skilled in such subject is relevant fact. In this connection Illustration (c) given

to Section 45 is pertinent and the same is quoted below:

(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 different persons are relevant.

24. Section 73 of the Evidence Act on the other hand authorises the Court in order of ascertain whether a signature, writing etc. by the person by

whom it purports to have been written or made, to compare the same with any signature, writing etc. admitted or proved to the satisfaction of the

Court to have been written or made by that person although that signature, writing etc. has not been produced or proved for any other purpose.

25. The aforesaid Section 73 further authorises the Court to direct any person present in Court to write any words or figures for the purpose of

enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

26. The Supreme Court of India in the case of The State (Delhi Administration) Vs. Pali Ram, held that a sample writing taken by Court under the

second paragraph of Section 73 is in substance and reality the same thing as admitted evidence within the meaning of the first paragraph of Section

73. According to the Apex Court, Section 73 is to be read as a whole in the light of Section 45.

27. From the aforesaid law on the question of acceptance of opinion of the handwriting expert it is clear that in order that the opinion of a

handwriting expert is accepted, the Court must be convinced that the sample signature which was compared with the disputed document must be

to the satisfaction of the Court written by the same person unless admitted by the person who asserts the disputed signature to be genuine. The

word ""admitted"" appearing in Section 73 or Illustration (c) to Section 45 of the Evidence Act means not the admission of the person whose

signature is disputed in the legal proceedings but it must be the admission of the person who claims that the disputed signature was written by the

person by whom it purports to have been written and such person will signify to the Court that he has no objection if those sample signatures are

compared with the original one. The word ""admission"", if construed to be the admission of the person by whom it purports to have been written, it

will lead to disastrous effect because such person will deliberately admit some document not really written by him to be in his handwriting so that

on examination by the expert it would not be tallying with the disputed document and consequently, he will be benefited by the report.

28. In this case, it appears from the record that before sending the sample signatures alleged to have been written by plaintiff, the consent of

defendant was not taken nor was the Court itself satisfied that the sample signatures appearing in those documents were really proved to be

signatures of plaintiff.

In this connection following orders passed by the learned Trial Judge are relevant and those are quoted below:

Order dated 7.5.2002.

Both side file hazira and present.

Perused the above application.

Heard learned advocate for both sides.

Let Sri P. Chatterjee, of 77B, Durga Charan Doctor Road, Cal-14 be appointed as handwriting expert, to examine the signature of the plaintiff in

respect of the purported document filed by the defendant and to submit a report by 12.6.2002. Inform the handwriting expert by issuing a letter.

Order dated 12.6.2002.

Today is fixed for report by handwriting expert. Learned lawyers for the parties appear. The expert filed a petition praying for further document to

comparing etc. Copy served upon both sides. Plaintiff filed sanctioned plan and Income Tax challan and statements (7 Numbers) for comparing

signature of plaintiff for (?) comparison.

The above documents along with (?) receipt dated 7.11.78 marked ""X"" for identification be handed over to the expert for examination. He is also

directed to resubmit the documents along with report on 5.7.2002 positively.

30. From those orders, we are unable to convince ourselves that the sample signatures supplied by the plaintiff were really signed by plaintiff as the

Court itself did not record its satisfaction nor did the defendant admitted those signatures to be that of the plaintiff. Those documents were Income

Tax challan, statements of account of the business of one Kali Ghosh alias Arup Ghosh and a sanctioned plan issued by Corporation of Calcutta in

the year 1975. From the said sanctioned plan, the number of the premises for which such sanctioned plan had been granted is not legible and no

evidence had been adduced showing that the plaintiff is the owner of such premises. Similarly, the Income Tax documents appear to be of one Sri

Kali Ghosh alias Arup Ghosh and no evidence had been adduced showing that Kali Ghosh of No.5, New Bowbazar Lane and Sri Arup Ghosh, of

3, Bowbazar Orphanage Lane, the plaintiff, is the same person.

31. In the absence of appropriate evidence showing that Kali Ghosh and the plaintiff is the same person, we cannot rely upon the signatures

appearing in those documents as the sample signatures of the plaintiff.

32. The plaintiff realised the aforesaid defect and accordingly, on 4th September, 2002 filed an application for recalling PW-1 for the purpose of

proving (i) whether the plaintiff had put any signature on the two documents namely, sanctioned plan and balance sheet and whether those

documents are signed by the plaintiff.

33. The learned Trial Judge, however, by order dated 16th January, 2003 rejected such application on the misconception that the plaintiff prayed

for recalling PW-2, the handwriting expert although the plaintiff really prayed for recalling himself who earlier appeared as PW-1. The learned Trial

Judge was of the view that already PW-2 having deposed before Court and had also been cross-examined by the defendant over all the

documents including the signatures, there was no reason to recall PW-2 once again. The learned Trial Judge by the said order marked Income Tax

challan as Ext.-7 series and municipal plan marked as Ext.- 8 although those were not formally proved.

34. The aforesaid order is quoted hereunder:

At this stage it transpires that plaintiff prays for recalling the witness, P.W.2, for marking the documents sent to the expert towards admitted

signature. Learned lawyer for the defendant challenged the said petition and objected to the same.

Now, it transpires that those two documents, one municipal plan and another Income Tax challan showing signatures of the plaintiff were already

taken in as an admitted signature and sent to expert for his opinion for comparison with the disputed document and that was done by the expert,

and accordingly, expert already deposed before this Court, cross-examination was made by the learned lawyer for the defendant over all the

documents including the admitted signature time to time. As such, I find no reason to recall P.W.2 once again since the question of admitted

signatures were already placed into cross-examination before defence lawyer. So, there is no need for recalling that witness, P.W.2, instead I mark

those documents. The Income Tax challans marked Ext.7 series and the municipal plan, marked Ext.8. Those are examined by the expert in

comparison with the disputed document in "A" series.

The petition preferred by the plaintiff for recalling the witness, P.W.2, is thus disposed of without any order.

The plaintiff already closed his case. The defendant prays for adjournment for defence witness. Accordingly, fix 5.2.2003 for further evidence of

the defendant.

35. After going through the aforesaid order we find that the approach of the learned Trial Judge was totally erroneous and he could not without

evidence produced by plaintiff mark those documents as Ext.-7 series and Ext.- 8 respectively.

36. From the aforesaid fact we are of the view that no reliance can be placed upon the report of the handwriting expert when the sample signatures

with which the disputed document was verified had not been taken in accordance with the provisions contained in Sections 45 and 73 of the

Evidence Act. We, therefore, do not find sufficient ground to rely upon the opinion of the expert and propose to exclude it from our consideration.

37. It is true that the Court itself also can compare the admitted signature with the disputed document but such procedure is hazardous one.

Although after comparing the signatures of the plaintiff appearing in the vakalatnama and in the plaint with that on the disputed document we are of

the view that those resemble with the signature appearing in the disputed document, we are not arriving at any final conclusion on the aforesaid

question as it would be unsafe to compare such signature without the help of the expert. However, having regard to the fact that alleged signature

was taken on the letter-head of the plaintiff and the plaintiff having failed to explain how the letter-head could go in the hands of defendant, we are

of the opinion that this is a cogent circumstance justifying an inference that the plaintiff took the money by putting signature on the said document.

38. We also do not find any reason why the defendant after leaving his secured accommodation in a mess should come to the suit property for

staying without any electricity as a licensee as claimed by the plaintiff. We have already pointed out that long period of stay without any objection

even after the period when the son of the plaintiff was no longer- a student indicates that it was a case of tenancy. Therefore, even if the disputed

document is a forged one, the surrounding circumstances justify the conclusion that it was a case of tenancy and not a license without electricity as

alleged by the plaintiff.

39. In view of our finding that even in the absence of the said receipt, the defendant has established his tenancy over the suit property from the

surrounding circumstances on the basis of other materials on record, we do not find any reason to unnecessarily remand the matter back to the

Trial Court for the purpose of giving an opportunity to the plaintiff to prove Ext.-7 series and Ext.-8 afresh and to direct re-examination of the

disputed receipt with those signatures by a handwriting expert.

40. We, therefore, set aside the judgment and decree passed by the learned Trial Judge and allow the appeal with a finding that the appellant is a

tenant in respect of the suit property at a monthly rental of Rs. 350/- claimed by defendant.

41. The appeal is, thus, allowed. In the facts and circumstances, there will be, however, no order as to costs.

Arun Kumar Bhattacharya, J.

42. I agree.