

Rajesh Kumar vs.harish Kumar & Another

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Court : Delhi

Decided On : Sep-22-2017

Appellant : Rajesh Kumar

Respondent : Harish Kumar & Another

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

12. h September, 2017 Decided on:

22. d September, 2017 CS(OS) 1786/2009 RAJESH KUMAR Plaintiff
Represented by: Mr. Rajender Agarwal, Advocate. versus HARISH KUMAR &
ANOTHER Defendants Represented by: Mr.Fanish K. Jain, Advocate.
CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA I.A. No.9673/2017 (under
Order XVI Rule 1A read with Section 151 CPC-by defendants) 1. By this
application defendants pray that a handwriting expert be permitted to take
photographs of the signature of the plaintiff on the documents exhibited as Ex.
DW-1/1, DW-
and DW-

from the Court record and compare the same with the admitted signatures of the
plaintiff from the court record in the presence of the parties before the Deputy
Registrar/Joint Registrar and also for directions to the plaintiff to give his specimen
signature/handwriting for comparison, directions to DW-3 Shri Satish Malik, Clerk,
Office of District Town Planner, Sonapat, Haryana to produce the original records

pertaining to Exhibit DW-

and DW-

and directions to the handwriting expert to submit his report before the Court.

2. Plaintiff Rajesh Kumar has filed the present suit against the defendants, that is, Harish Kumar and Rakesh Kumar seeking permanent CS(OS) 1786/2009 Page 1 of 10 injunction, dissolution of the partnership firm M/s. HIFLY INDUSTRIES and rendition of account.

3. In the plaint the claim of Rajesh Kumar is that M/s. HIFLY INDUSTRIES was a partnership firm created vide Partnership Deed dated 18th October, 1993 and all the three persons, i.e. plaintiff and the two defendants were entitled to 1/3rd share of the profit and loss. The partnership was liable to dissolve by giving two months notice in writing by any of the partners to the other partners. After the death of Shri Narinder Kumar, father of the plaintiff and defendants, differences arose between the parties with regard to the joint properties situated at Ashok Vihar, Village Sahibabad Daulatpur and Sadar Bazar. To sort out the differences, efforts were made to mutually settle the division of the joint properties and at one point of time a rough draft was also drawn for settling the joint assets, however, the draft was later on abandoned, not acted upon and torn off, as the valuation done was not in accordance with the market rates. It appears that Harish Kumar and Rakesh Kumar retained copy of the draft unauthorisedly and started misusing the same creating problems for Rajesh Kumar requiring him to file the suit for partition and permanent injunction in respect of properties at Ashok Vihar, Village Sahibabad Daulatpur and the two properties at Sadar Bazar, Delhi being CS(OS) No.44 of 2009 titled Shri Rajesh Kumar Vs. Smt. Sheila Rani & Ors.

4. In the plaint it is further claimed that after filing of the suit Harish Kumar and Rakesh Kumar prevented Rajesh Kumar from looking after the business of the partnership firm M/s. HIFLY INDUSTRIES, thus Rajesh Kumar gave a notice dated 9th June, 2009 to dissolve the firm after expiry of two months. By way of the notice Rajesh Kumar dissolved the Partnership CS(OS) 1786/2009 Page 2 of 10 Firm, called upon Harish Kumar and Rakesh Kumar to wind up the affairs of the partnership and render true accounts of the firm within two months from the date

of receipt of the notice. Since Harish Kumar and Rakesh Kumar neither complied with the terms of notice nor settled the matter, Rajesh Kumar filed the present suit.

5. In the common written statement filed by both the defendants, the pleas taken by Harish Kumar and Rakesh Kumar are that Rajesh Kumar has concealed documents and an oral family settlement between the parties took place on 30th March, 2008 which was reduced in writing on 2nd April, 2008 for the sake of remembrance in respect of all the movable and immovable properties left behind by late Shri Narendra Kumar as well as other joint family businesses and properties of the parties including the partnership business of M/s. HIFLY INDUSTRIES and the family settlement was duly signed by all the parties including mother of the three parties before this Court. The family settlement was partly acted upon also and Rajesh Kumar received a sum of 44,00,000/- pursuant to the family settlement which fact has been concealed. Issues of lack of cause of action and territorial jurisdiction were also raised in the written statement.

6. On 24th November, 2011 issues were settled. Issue Nos. 6 and 7 related to the oral family settlement dated 30th March, 2008 outlines of which were recorded on 2nd April, 2008 and whether M/S Hifly Industries came to the share of Harish Kumar and Rakesh Kumar. Since the onus to prove these two issues was on Harish Kumar and Rakesh Kumar they relied upon said document. After the issues were settled the two suits were clubbed together. CS(OS) 1786/2009 Page 3 of 10

7. Defendants Harish Kumar and Rakesh Kumar were directed to lead the evidence in the first instance, who examined four witnesses including DW-3 Satish Malik, Clerk Office of District Town Planner, Sonapat, Haryana who produced the original records in respect of Ex. DW-

and Ex.DW-3/5, photocopies whereof were placed on record, whereafter Harish Kumar and Rakesh Kumar filed the present application seeking directions as noted above.

8. In support of the application, learned counsel for Harish Kumar and Rakesh Kumar contends that since Rajesh Kumar is denying his handwriting on the document Ex.DW-

and signatures on Exhibit DW-

and DW- 3/5, it is vital that opinion on the three documents regarding handwriting and signatures of Rajesh Kumar are sought from the handwriting expert. It is further contended that this Court has jurisdiction to direct Rajesh Kumar to give his specimen handwriting besides the admitted ones and in case he fails to do so an adverse inference is required to be drawn. Reliance is placed on the decision reported as AIR 1975 AP88(1)M.Narayanaswami vs. V.Yangatanna; 1986 Orissa 218 Shashi Bhusan Pati & Anr. Vs. State Bank of India & Anr; AIR1999 Gauhati 101 Shyam Sunder Chowkhani alias Chandan and Ors. vs. Kajal Kanti Biswas and Ors.; AIR1986P&H174Sheo Narain & Anr. vs. Rawat and Ors.; and 2003 (3) CCC532(P & H) Abdul Sattar Vs. Bashir.

9. Countering the argument, learned counsel for the plaintiff submits that having examined four witnesses, defendants did not name the handwriting expert in the list of witnesses and the present application has been filed to fill the lacuna in the case of defendants, hence the present application be dismissed. CS(OS) 1786/2009 Page 4 of 10 10. Document Ex. DW-

photocopy whereof is on record and original is in sealed cover notes three endorsements claimed by the defendants to be in the handwriting of Rajesh Kumar which shows that pursuant to the oral family settlement Rajesh Kumar accepted certain amounts by way of cheque. Though Rajesh Kumar accepts signature on Ex. DW-1/1, however, he denies the three endorsements in his handwriting. Further, Rajesh Kumar also denies his signatures on Exhibits DW- and Ex. DW-3/5. One of the modes to prove that the family settlement was acted upon is proof of payment of amount to Rajesh Kumar. However, if the defendants so desire to prove their case by showing that there were endorsements in the handwriting of Rajesh Kumar on the oral family settlement Ex. DW- which fact was admitted vide documents Ex. DW- and Ex.DW-

the defendants would be within their right to prove the same by leading evidence. The evidence of the defendants has not yet concluded hence it cannot be held that the examining of the handwriting expert or re- examination of DW-3 is just to fill up the lacunas. Dealing with similar situation Andhra Pradesh High Court in the decision report as M.Narayanaswami (supra) held 4. No doubt in para 2 of Section 73 of the Evidence Act reference is made only to a person present in Court and it

is to enable the Court to compare a direction to write any words or figures etc. may be given by it. But in the first paragraph of Section 73 it is provided that in order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved and in paragraph 8 it is provided that the section applies to thumb impression also. CS(OS) 1786/2009 Page 5 of 10 Therefore this provision enables a Court to compare signature or writing or thumb impression in question with the one which is to be proved or admitted to be of the person concerned. It is provided under Section 45 of the Evidence Act that when the Court has to form an opinion as to identity of handwriting or finger impressions, the Court can obtain the opinion of an expert. For obtaining the opinion of an expert certainly the disputed and the undisputed things must be sent to him for the purpose of comparison. As provided under the proviso to Order 3, Rule 1 of the Code of Civil Procedure, a Court can always order a party to appear in Court in person though it is provided under the rule that appearance may be made or done by the party in person or by recognised agent or by a pleader. Therefore as provided under the proviso to Order 3, Rule 1 though a party is appearing by a recognised agent or by a pleader in a case, the Court can always direct a party to appear in Court in person when the need arises. When power is given to a Court as provided under Section 78 of the Evidence Act to compare any signature, writing or thumb impression and for that purpose as provided under Section 45 of the Evidence Act it can take the assistance of an expert, there is no reason why as provided under Order 3, Rule 1, C. P. C. the Court cannot direct a party to appear in Court in person and give his signature, handwriting or thumb impression, as the case may be, to enable the Court to compare the same with the disputed ones. Otherwise the parties and the Court would be helpless if the admitted signature, handwriting or thumb impressions are not available otherwise. When the Court can direct a party present in Court to write or give thumb impression for the purpose of comparison and when he is not present there is no reason why the court cannot direct the party to the present in Court for that purpose by reason of the power given to it under the proviso to Order 3, Rule 1, C. P. C.

5. In this connection, Sri Challa Sitaramayya, the learned counsel for the respondent, has cited some decisions in support of his contention opposing the power of the Court to direct his client to be present in Court for the purpose of CS(OS) 1786/2009 Page 6 of 10 that case giving his left hand thumb impression. In Appavoo Asary v. Sornamal, AIR1933 Mad 821 the question arose as to whether the Court case give a direction under Order 3, Rule 1 C. P. C. to a party to enable the opposite party to examine him as a witness. In that connection, the Madras High Court said that where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness, the proper procedure to adopt is the one under Order 16 and not the one under the proviso to Order 3, Rule 1 C. P. C. The Court also observed that no Court of law would be justified in ordering a party to appear in Court on an application filed under Order 3 Rule 1 except for very good reasons. Therefore, even according to this decision for good reason the Court can always direct a party to appear in Court in person. Another decision relied on by the learned counsel is State v. Poonamchand, AIR1958 Bom 207. In the prosecution after examining some witnesses made an application to secure the attendance of all the accused in Court and then direct them to write over their signatures as well as writings for the purpose of comparison. The trying Magistrate allowed that application to take the specimen of the handwriting of the accused in the Court for comparison and then to seek a further report of the handwriting expert on that point. Against the order of the Magistrate when a revision was taken to the Sessions Judge, he recommended to the High Court to set aside the order for the reason that the power to take such evidence conferred by Section 73 of the Evidence Act is now controlled by Article 20(3) of the Constitution and that the second para of Section 73 of the Evidence Act also has no application because it deals with cases of person present in Court where the Court requires it for its own purpose to take such writing etc. for the purpose of comparison. When the matter was thus referred to the High Court, the Bombay High Court agreed with that view. It is true paragraph 2 of Section 73 of the Evidence Act may not in terms apply. As already discussed above, there are other provisions in Paragraph I of Section 73 and Section 45 of the Evidence Act and Order 3, Rule 1 C.P.C. which read together would certainly enable a CS(OS) 1786/2009 Page 7 of 10 Court to direct a party to appear in Court in person for the

purpose of giving either thumb impression or writing or signature for purpose of comparison. In the decision *Ayyandan v. Thanamal* AIR1920 Mad 213 it was held by the Madras High Court that when to prove the defendants lunacy the plaintiff applied to the Court for her personal appearance in Court, Order 3, Rule 1 is wide enough to enable the Court to direct any party to the suit to appear in person, whether he be a minor or a major or of sound or unsound mind, and the order may be made at any stage of the suit. When such an order is given to the guardian of a lunatic or minor defendant, it is in effect an order to the defendant to appear in person and failure to comply with it will enable the Court to act under Order 9, Rule 12, C. P. C.

6. Therefore, I am of the opinion that by reason of the provisions contained in Sections 73 and 45 of the Evidence Act and Order 3, Rule 1 C. P. C., the Court can direct a party to be present in Court to give signature, handwriting or thumb impression for the purpose of comparison either by itself or for purpose of obtaining the opinion of an expert by sending the same to him. Therefore the civil revision petition is allowed and the application filed by the petitioner to direct the respondent to be present in court and give his left hand thumb impression is ordered. I direct the parties to bear their respective costs in this civil revision petition.

11. Similar view was expressed in the decision report as *Sheo Narain* (supra) wherein it was held:

3. There can, thus, be no manner of doubt that the Court was indeed empowered to call upon a party to give his specimen thumb impressions and this request could not be declined merely on the ground that it had been made by a party to the litigation and could be used as evidence by such party. CS(OS) 1786/2009 Page 8 of 10 12. Even this Court in the decision reported as 2013 SCC Online Del 4106 *Shobha Jolly v. Suraj S.J.*

Bahadur & Anr., issued directions for examination of the admitted handwriting and signatures of the defendants therein by the FSL.

13. Considering the nature of controversy between the parties and that examination and comparison of the handwriting of Rajesh Kumar as noted in Ex. DW-1/1, Ex. DW- and Ex. DW-

is necessary for the just decision of the case, following directions are issued: i. Director FSL is directed to depute responsible officer to take the photographs of the originals of Ex. DW-1/1, Ex. DW- and Ex. DW-3/5. The Director FSL will intimate in advance the date and time when the officer of FSL can take the photographs of the documents noted above and directions will be issued by the Joint Registrar to DW-3 Satish Malik to be present in Court along with originals of Ex. DW- and Ex. DW-

so that photographs thereof can be taken. ii. The officer of the FSL will also take photographs of the admitted signatures of Rajesh Kumar on the Vakalatnama, affidavits and other documents filed in this Court. iii. Rajesh Kumar would also give his specimen signature/handwriting to the officer of FSL. After receiving the specimen signature/handwriting of Rajesh Kumar and the photograph from the originals of Ex. DW-1/1, Ex. DW- and Ex. DW-3/5, Director, FSL will get the same examined and submit the report to this Court within three months. CS(OS) 1786/2009 Page 9 of 10 14. Harish Kumar and Rakesh Kumar would bear the entire expenses of this exercise and the same will be conducted in the presence of the concerned Joint Registrar.

15. I.A. No.9673/2017 under Order XVI Rule 1A read with Section 151 CPC filed by defendants is disposed of. (MUKTA GUPTA) JUDGE SEPTEMBER22 2017 yo CS(OS) 1786/2009 Page 10 of 10