HIGH COURT OF MADHYA PRADESH

BENCH GWALIOR

SINGLE BENCH:

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

Second Appeal No.167/2001

.....Appellants: **Raja Bhaiya & Ors.**

Versus

.....Respondents : **Badal Singh & Anr.**

Shri Sanjay Dwivedi, Counsel for the appellants.

Shri M.P.S. Raghuvanshi, Counsel for the respondent No.1.

Date of hearing : 22/08/2019

Date of Judgment : 22/08/2019

Whether approved for reporting: Yes

Law Laid down :

Significant paragraph numbers:

J U D G M E N T

(22/08/2019)

This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 15-2-2001 passed by Additional District Judge, Mungawali, District Guna in Civil Appeal No. 11A/1999, thereby setting aside the judgment and decree dated 3-2-1999 passed by Civil Judge Class-I, Mungawali, District Guna in Civil Suit No.

5A/1995.

2. This appeal was admitted on following Substantial Questions of Law :

> 1. Whether the Judgment and Decree passed by the Lower Appellate Court is perverse and contrary to the record?
> 2. Whether the evidence of P.W.1 Shankarlal Prajapati is reliable and on that basis the decree passed by the Trial Court can be set aside?

3. The necessary facts for the disposal of the present appeal in short are that appellants/plaintiffs filed a suit for specific performance of contract. It was their case that the defendant no.1/respondent no.1 is the owner and in possession of agricultural land bearing Khasra No.353:1 area 3.135 hectares of land situated in village Ruhana Pargana Mungawali, District Guna. On 30-3-1994, he entered into an agreement to sell the said land for a consideration amount of Rs. 50,000/- out of which an amount of Rs. 40,000/- was paid and it was agreed that the remaining amount of Rs. 10,000/- would be paid at the time of execution of sale deed. Since, the rin pustika as well as the name of the respondent No.1 was not mutated in the revenue records, therefore, the sale deed could not be executed on 30-3-1994, however, the possession of the land was handed over to the plaintiffs, and they are in possession of the same. The plaintiffs had requested the respondent no.1 and had also sent registered notice, to execute the sale deed, after taking the remaining amount, but the respondent No.1 did not perform his part of contract. The plaintiffs are still ready and willing to perform their part of contract.

Accordingly, the suit was filed.

4. The respondent No.1, filed his written statement and denied the plaint averments. He specifically denied that he had ever executed an agreement to sale. He further denied that any money was paid to him. Neither the possession of the land in dispute has been parted away with the appellants/plaintiffs nor any agreement to sell was executed. The respondent no.1 had not given his photograph to the plaintiffs, and it appears that it was affixed at a later stage. The agreement to sell is a concocted and forged document. It was further pleaded that the total area of Kh. No. 353:1 is 9.823 hectares. Earlier, Karan Singh was the owner of the said land. 20 Bigha of land out of this Khasra number was sold by Karan Singh to wife and children of Govind Singh Lodhi. Thereafter, the Karan Singh sold 11 bigha and 10 biswa of land to the plaintiffs and the disputed property was sold by Karan Singh to the respondent No.1. A false suit was also filed by the plaintiffs against Karan Singh which was dismissed. From thereafter, the plaintiffs were trying to grab the property of the respondent No.1. Thus, it was prayed that the suit filed by the plaintiffs/appellants be dismissed.

5. The Trial Court after framing issues and recording evidence, decreed the suit.

6. Being aggrieved by the judgment and decree passed by the Trial Court, the respondent No.1 filed an appeal, which has been allowed by judgment and decree dated 15-2-2001 passed by Additional District Judge, Mungawalia, District Guna and has dismissed the suit filed by

the appellants.

7. Challenging the judgment and decree passed by the First Appellate Court, it is submitted by the Counsel for the appellants, that Shankerlal (P.W.1) did not support the case of the plaintiffs and accordingly he was declared hostile. Initially, the evidence of Shankarlal (P.W.1) was deferred for the reason, that he had not brought the stamp register, but later on also, he did not bring the stamp register, therefore, an adverse inference should be drawn against the respondent No.1. Further, the Court in exercise of power under Section 73 of Evidence Act, should have compared the signatures of the respondent No.1 on its own.

8. *Per contra*, it is submitted by the counsel for the respondent No.1 that the appellants never filed an application for sending the disputed signatures of the respondent no.1 to the handwriting expert. Further, Shankarlal (P.W.1) was the witness of the appellants, and he has narrated the truth. Even if the examination in chief is considered, then it is clear that his evidence runs contrary to the evidence of Nathan Singh (P.W.2). The execution of the agreement to sell Ex. P.1, has not been proved.

9. Heard the learned counsel for the parties.

10. It is the contention of the counsel for the appellants that since, the evidence of Shankerlal (P.W.1) was deferred, and thereafter, he was won over by the respondent No.1, therefore, he did not support the case of the plaintiffs. Therefore, his evidence given in examination-in-chief, should be given more preference. Further, Shankarlal (P.W.1) did not

produce the stamp register, therefore, in the light of the fact that since, he had joined hands with the respondent No.1, therefore, an adverse inference should be drawn against the respondent No.1.

11. Shankarlal (P.W.1) in his examination-in-chief has stated that on the instructions of respondent No.1, he had drafted an agreement to sell on 30-3-1994. This agreement was executed for a consideration amount of Rs. 50,000/-. The respondent No.1 had informed that he has received an amount of Rs. 40,000/- in his house and the remaining amount shall be paid at the time of execution of sale deed.

12. Nathan Singh (P.W.2) has stated that an amount of Rs. 40,000/- was paid by the appellant No.1 to the respondent No.1. Thereafter, in cross-examination, this witness has stated that the amount was paid about 1 hour prior to execution of agreement to sell. This witness has not stated that the amount was paid in the house of the respondent No.1. On the plain reading of the evidence of Nathan Singh (P.W.2), it is clear that according to this witness, the amount of Rs. 40,000/- was paid at the time of execution of agreement to sell. Whereas it is the case of Rajabhaiya (P.W.1) [wrongly written as P.W.1] that he had given an amount of Rs. 40,000/- in the Tahsil premises. Rajabhaiya (P.W.1) has not stated that money was paid 1 hour prior to execution of agreement to sell, Ex. P.1. In fact, this witness has stated that after the agreement to sell was executed, only thereafter, the amount was paid. Thus, there is material discrepancy in the evidence of the witnesses, on the issue on payment and place of payment of Rs. 40,000/-.

13. Further Shankarlal (P.W.1) in his examination-in-chief itself, had stated that the witnesses had not signed the agreement to sell in his presence, whereas Nathan Singh (P.W.2) has stated that the agreement to sell was drafted by Shankarlal and he was present and the said document was signed. Thus, the presence of attesting witnesses has also not been proved by the appellants.

14. It is next contended by the counsel for the appellants, that since, Shankarlal (P.W.1) did not bring his stamp register deliberately, therefore, an adverse inference should be drawn against the respondent No.1. However, the counsel for the appellants, fairly conceded that no direction was ever issued by the Trial Court, to produce the Stamp Register. Under these circumstances, this Court is of the considered opinion, that the provisions of Section 89 of Evidence Act, would not come into play. Since, Shankarlal (P.W.1) was the witness of the appellants, therefore, an adverse inference has to be drawn against the appellants, because on the first day, the evidence of Shankarlal (P.W.1) was deferred because on the question put by the counsel for the respondent No.1, this witness had admitted that he had not brought the stamp register. But it is not out of place to mention that while deferring the evidence of Shankarlal (P.W.1), neither the Court had issued any direction to him to produce the stamp register nor any such prayer was made by the appellants, but in fact, it was the respondent no.1 who was insisting that the stamp register is required.

15. It is next contended by the counsel for the appellants, that where

the signatures were denied by the respondent No.1, then the Trial Court should have examined the signatures on its own by exercising power under Section 73 of Evidence Act.

16. Considered the submission made by the counsel for the appellants. It is an admitted position, that the appellants did not file an application for sending the disputed signature to the handwriting expert for its comparison with admitted signatures. Whenever, a report by a handwriting expert is given, then such an expert can be cross-examined by the other party. Therefore, in the considered opinion of this Court, it was the duty of the appellants to file an application under Section 45 of Evidence Act, but they did not deliberately do so. No explanation has been given as to why no such application was filed. The Trial Court should be slow in taking the task of comparing the signatures or handwriting on its own, because in a given case, such a comparison made by the Court, would deprive the effected party to cross-examine the expert. The Supreme Court in the case of **Ajit Savant Majagvai Vs. State of Karnataka** reported in **(1997) 7 SCC 110** has held as under :

> **37.** This section consists of two parts. While the first part provides for comparison of signature, finger impression, writing etc. allegedly written or made by a person with signature or writing etc. admitted or proved to the satisfaction of the Court to have been written by the same person, the second part empowers the Court to direct any person including an accused, present in court, to give his specimen writing or fingerprints for the purpose of enabling the Court to compare it with the writing or signature allegedly made by that person. The section does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act,

> it is clear that such comparison may either be made by a handwriting expert under Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself.
>
> **38.** As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under Section 73 of the Act. [See: *State (Delhi Admn.)* v. *Pali Ram*.]

The Supreme Court in the case of **Ajay Kumar Parmar Vs. State of Rajasthan** reported in **(2012) 12 SCC 406** has held as under :

> **28.** The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or

handwritings for providing a decisive weight or influence to its decision.

17. Thus, this Court is of the considered opinion, that where the appellants did not file an application for comparison of the disputed signatures by an expert, then the Trial Court did not commit any mistake in not taking over the task of comparing disputed signatures of the respondent no.1 with that of admitted signatures.

18. No other argument was advanced by the counsel for the appellants.

19. In view of the above discussion, this Court is of the considered opinion, that the Substantial Questions of Law cannot be answered in affirmative, accordingly, they are answered in negative.

20. Resultantly, judgment and decree dated 15-2-2001 passed by Additional District Judge, Mungawali, District Guna in Civil Appeal No. 11A/1999 is hereby affirmed.

21. The appeal fails and is hereby **Dismissed.**

(G.S. AHLUWALIA)
Judge
22/08/2019

(alok)