

RAJASTHAN HIGH COURT

Pustimargiya Tritiya Peeth Pranyas

Vs.

Additional District Judge

S.B. Civil Writ Petition No. 4969/2007

(Vineet Kothari, J.)

29.04.2008

JUDGMENT

Vineet Kothari, J.

1. This writ petition has been filed under Article 227 of the Constitution of India by the defendant Shri Pustimargiya Tritiya Peeth ranyas *Sri Dwarkadheesh Mandir, Kankroli* against the order of the learned trial court dated 31.5.2007 whereby the learned trial court while rejecting the application of the plaintiff to tape record the cross-examination of the defendant witnesses, however, directed the defendants witnesses to be produced in the Court for recording of their sample voice to match it with the voice recorded during the course of plaintiffs' witness by the Court in the form of tape recorded voice and to obtain the expert's opinion thereon.

2. Since the case pertains to a suit for specific performance based on an oral agreement, the plaintiff produced tape recording of the conversation between the plaintiff and the defendant on issue No. 1 about existence of oral agreement between the parties. The application filed by the plaintiff was considered by the trial court at the stage when the plaintiff's evidence was closed and the defendant's witnesses had produced their affidavits in defense on which cross-examination was to take place. The learned trial court rejected the said application of the plaintiff on the ground that there was no provision in the Civil Procedure Code for recording of the evidence of the defendant's witnesses or their cross-examination and in the absence of any such provision such application could not be allowed. However, the learned trial court felt that since the plaintiff had produced a tape recorded version in the course of plaintiff's evidence and for matching that voice it was considered expedient that the defendant's witnesses may be directed to get their sample voice recorded at the cost of plaintiff in

the presence of an expert who may give his opinion in the matter.

3. Being aggrieved by the said direction of the learned trial court, the defendants have filed the aforesaid writ petition in this Court challenging the said directions in the impugned order of the learned trial court.

4. Mr. R.K. Thanvi, learned counsel for the petitioner submitted in the first instance that under Order 18 Rule 2 C.P.C. after the plaintiff had closed his evidence, there was no occasion for the learned trial court to recall any such witnesses to prove the evidence of the plaintiff. He submitted that after deletion of Order 18 Rule 17 A by C.P.C. (Amendment) Act, 1999 w.e.f. 1.7.2002 relating to production of evidence not previously known or which could not be produced despite due diligence, the learned trial court could not direct as has been done in the present case to summon the defendant's witnesses to get their voice recorded, though at the cost of the plaintiff for matching the same and obtaining an expert opinion so as to further strengthen or prove the plaintiff's evidence in the form of tape recorded version. Learned counsel for the petitioner Mr. R.K. Thanvi relied upon the following judgments in support of his submissions:-

(a) In *H. Chandrashekar v. Shafiq Ali Khan*,¹ the Court held that if witness is unwilling to lend his sample voice for recording, issue of commission for such purpose amounts to forcing witness to submit himself for test, and issue of such commission in such case, is violative of his constitutional right and it is only where two cassettes with recording of two voices are produced in evidence, can Court examine whether both voices are of one and same person, on analogy of comparing signature, writing or seal with others admitted or proved.

(b) In *Vinod Kumar & Ors. v. The State*² the Delhi High Court held with reference to Section 73, 45 and 146 of Evidence Act that a prosecution witness in criminal trial cannot be called upon to get his voice tape recorded for comparison.

(c) In *Smt. Ningamma & Anr. v. Chkkaiah & Anr.*,³ it was held that compelling person to submit himself to blood test was not authorized by any law.

(d) In *Kulwant Singh v. Makhan Singh*,⁴ it was held that if the plaintiff did not produce a hand writing expert at the time when he led evidence in rebuttal, he cannot be permitted to produce it at belated stage.

(e) In *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra and ors.*⁵ while dealing with case under Representation of People Act 1951, the Hon'ble Supreme Court held that tape records of speeches are 'documents' as defined in

Section 3 of the Evidence Act which stand on no different footing than photographs and they are admissible in evidence on satisfying the certain conditions.

5. On the side opposite Mr. J.P. Joshi, learned counsel appearing for the plaintiff-respondent urged that there is nothing illegal or improper in the impugned order of the learned trial court so as to call for interference of this Court under Article 227 of the Constitution of India. He submitted that if to advance the cause of justice, in view of the fact that the plaintiff had led evidence in the form a tape recorded version of the oral agreement of which specific performance was sought in the suit filed by the plaintiff, in order to match voice of the defendant if the court had directed the defendant's witness to get their sample voice recorded in the presence of an expert at the cost of the plaintiff, it was only meant for satisfaction of the Court to advance the cause of justice and, therefore, technical objection like one taken by the defendant-petitioner in the present case that it should not have been done at the stage after the closure of the plaintiff's evidence cannot be sustained and the writ petition filed by the petitioner deserves to be dismissed. He also relied upon various judgments including the one of coordinate Bench of this Court in case of *Naveen Kumar v. A.D.J. (F.T.) No.2, Bhilwara & Ors.*,⁶ It would be appropriate to reproduce Para 4 and 7 of the said judgment :-

"4. The learned trial Court, after considering the objections as raised on behalf of the present petitioner, has observed that the original sale deed was earlier not produced before the Court and, of course, the original document was brought before the Court by the Bank and the plaintiff could have made such prayer earlier but for this minor mistake, it would not be proper to reject the application particularly when the defendant's evidence has not started and he could be compensated by way of costs. The learned trial Court also observed that though the plaintiff has already closed his evidence and he would be required to be extended further opportunity of evidence but if the expert would state a report on the basis of the original document, the same would serve the cause of justice and would assist the determination of the matter properly. The learned trial Court, in order to avoid unnecessary delay, has directed that instead of sending the documents, the plaintiff would call the expert in the Court for taking photographs etc. of the disputed and the admitted signatures and thumb impressions and such expert/experts would file necessary report/s within seven days and they would be produced by the plaintiff on his cost and expenses. The learned trial court has also imposed costs of Rs. 1,000/- on the plaintiff,

allowing Rs. 750/- to the petitioner and has directed other Rs. 250/- to be deposited in legal aid."

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"7. It is to be imbibed that the rules of procedure are ultimately intended to subserve the cause of justice and any procedure adopted by the learned trial Court that advances the cause of justice like permitting of further evidence, while seeking answers to the contentious questions, remains within its jurisdiction. It cannot be said that by the procedure adopted by the learned trial Court, the petitioner is put to any prejudice for the expert's report now to be obtained and placed before the Court would obviously remain subject to scrutiny in accordance with law and then, the Court has taken care to award reasonable cost to the petitioner for the delay being caused now. There appears no reason or cause to consider any interference at the instance of the petitioner in this matter. The writ petition fails and is, therefore, rejected."

6. The learned counsel for the respondent-plaintiff also relied upon the decision of the Punjab and Haryana High Court in *M/s. Punjab Steel Corporation, Batala & Ors. v. M.S.T.C. Ltd.*,⁷ in which it was held as under :-

"16. Plaintiff could not be barred from adducing evidence to rebut the evidence led by the defendants on issue Nos. 3, 4 and 5. Plaintiff could not be barred from leading evidence by way of reply generally on the whole case. While leading their evidence, the defendants led evidence to prove issue Nos. 3, 4 and 5. In addition, they led evidence to disprove issue Nos. 1 and 2. Plaintiff had to be given an opportunity to rebut the evidence led by the defendants on these two aspects of the case. The use of the words in Order 18, Rule 3, Civil Procedure Code, that the party beginning, will then be entitled to reply generally on the whole case", suggests that while leading rebuttal evidence, the plaintiff can lead evidence to rebut the evidence led by the defendants on the issues, the onus of which lay on him plus to rebut the evidence which defendants had led to rebut the evidence led by the plaintiff on the issues, the onus of which lay on the plaintiff."

7. The learned counsel for the respondents Mr. Joshi also relied upon the case of *Dial Singh Narain Singh v. Rajpal Jagan Nath and ors* ⁸ in which it was held as under :-

"For a use of an earlier tape-recorded statement, the identification of the taped voices is a crucial matter and indeed such proper identification is the *sine qua non* for the use of the earlier taperecording. Where the voice is denied by the

alleged maker thereof, a comparison of the same becomes inevitable and the proper identification of voices must be proved by a competent witness. The recording, of the voice of a witness for the purpose of comparison with and identification of his earlier recorded voice can, therefore, be allowed by the Court and such comparison is neither expressly nor impliedly prohibited under any statute."

8. In *Balwant Singh & Ors. v. Dalip Kuar & Ors.*,⁹ the Punjab and Haryana High Court in Para 7 held as under :-

"7. The rules of Order 18 regulating the leading of additional evidence, rebuttal evidence and power of the Court to summon evidence at any stage must be construed and read in conjunction with each other to achieve the object of this procedural law. It is basic rule of law that where end of justice demands the procedural law should be construed liberally to achieve such ends rather than to scuffle the parties right at the trial stage and prevent them from leading complete evidence in support of their case. This would be more true in the cases where such evidence relates to the issue to be determined by the Court.

9. I have heard learned counsels at length and perused the record and judgments cited at the bar.

10. In the considered opinion of this Court, the impugned order of the learned trial court dated 31.5.2007 does not call for any interference by this Court under Article 227 of the Constitution of India. If the trial court is satisfied that the expert opinion may be relevant and necessary which Section 45 of Evidence Act permits and for that purpose the defendants voice should be tape recorded which can be matched by an expert and his opinion be procured at the cost of plaintiff, it is for the learned trial court to consider it to be so in the interest of justice and to advance the cause of justice and to arrive at the truth and if the trial court so directs the defendants to produce themselves before the trial court for recording of their voice in the presence of an expert at the cost of the plaintiff, this Court sees no prejudice caused to the defendants nor any miscarriage of justice in the same. The objection raised by the defendant-petitioner in the present case in the light of Order 18 Rule 3 and deletion of Order 18 Rule 17A is only technical objection. The contention of learned counsel for the petitioner that it is rather premature for the defendant to scuttle the process directed by the learned trial court for securing sample voice of the defendant and expert opinion thereon and it is only if an opinion comes on record that the two voices match then only possibly the plaintiff may be required to prove the said report of the expert and

any objection of the defendants to that can be raised at that stage but at the present stage it is only premature for defendant to say so, appears to be justified. In the impugned order, the learned trial court has directed merely to advance the cause of justice since the plaintiff produced the tape recorded version in his own evidence and in order to match the voice, the trial court felt that the defendant's witnesses voice may also be got recorded to compare the same and an expert opinion therein may be obtained at the cost of the plaintiff, this Court sees nothing wrong in that. The extracted portions of case laws cited above clearly support the arguments raised on behalf of the respondent-plaintiff. The efforts of the defendant-petitioner to delay the trial and to avoid compliance with such directions of the learned trial court only shows that the defendants are apprehensive of their case. There is no breach of any fundamental right or constitutional right as such, if the defendant's voice is got tape recorded by the learned trial court. Therefore, the case laws relied upon by the defense about the blood sample and in the criminal trial not to compel the prosecution witness to get the voice tape recorded are of no relevance in the present case. The Karnataka High Court judgment relied upon by the learned counsel for the petitioner on the contrary supports the case of the respondent wherein it has been held that if two cassettes with recording in two voices produced in the evidence, the Court can examine whether the voice are of one and the same person on the analogy of comparing signature right etc.

11. Accordingly, this writ petition is found to be devoid of merit and the same is dismissed with no order as to costs.

Petition dismissed.

Cases Referred.

1. (2000)6 Kar.L.J.237
2. 1981 CrL. L. J. 927
3. AIR 2000 Kar 50
4. 1992(2) RRR 422: AIR 1993 Punjab and Haryana 106
5. AIR 1975 SC 1788
6. 2008(1) DNJ (Raj.) 218
7. 2001(4) RCR(Civil) 565 : AIR 2001 Punjab and Haryana 331
8. AIR 1969 Punjab and Haryana 350
9. 1998(2) RCR(Civil) 352 : AIR 1999 Punjab and Haryana 93