

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 14935 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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NALINBHAI PARSHOTTAMDAS SHAH....Petitioner(s)

Versus

ASHOKKUAR PARSHOTTAMDAS SHAH....Respondent(s)

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Appearance:

MR JN JADEJA, ADVOCATE for the Petitioner(s) No. 1

HL PATEL ADVOCATES, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 31/03/2015

ORAL JUDGMENT

1. This petition, though stated to be under Articles 226 and

227 of the Constitution of India, can be entertained only under Article 227 in view of the law laid down by the Supreme Court in **Radhe Shyam v. Chhabi Nath**, 2015 (1) GLH 474, wherein it has been held that judicial orders of civil courts are not amenable to writ jurisdiction under Article 226 of the Constitution and that an order of a civil court can be challenged under Article 227 and not under Article 226.

2. This petition is directed against the order dated 6.7.2013 passed by the learned Additional Civil Judge, Halol below Exhibit-92 in Regular Civil Suit No.122 of 2007 whereby the application filed by the petitioner has been rejected.

3. The facts of the case stated briefly are that the petitioner herein instituted a suit being Regular Civil Suit No.122 of 2007 in the court of the learned Civil Judge (JD) at Halol, Panchmahals. In the proceedings of the said suit, the petitioner initially moved an application Exhibit-86 for referring the writing vide Mark 21/3, which had been tentatively marked as an exhibit by the court, for the opinion of a handwriting expert. The said application came to be rejected by the trial court. Being aggrieved, the petitioner filed a petition before this court being Special Civil Application No.7665 of 2012. By judgment and order dated 3.7.2012, the said petition came to be dismissed. However, while dismissing the petition, this court observed as follows:-

"As a parting note two points are required to be noted, firstly that the observations made herein, while dismissing this petition in limine, may not prejudice the merit of either side, secondly, when the court has already given tentative Exhibit to the writing concerned and the court is within its power to take recourse to the provisions

of Section 73 of the Indian Evidence Act for examining itself the writing by calling for the specimen writing from either side. Such an exercise can be done by the court in accordance with law well established on the issue."

4. Subsequently, the petitioner filed an application Exhibit-92 before the trial court to the effect that in terms of the above observation made by the High Court, with a view to see that no prejudice is caused to either of the parties and in the interest of justice, specimen signatures of the defendant in respect of the writings on the covering at Exhibit 21/3 be obtained for the purpose of comparing the writing of the defendant with that on the said Exhibit. By the impugned order dated 6.7.2013, the said application has been rejected.

5. Mr. J .N. Jadeja, learned advocate for the petitioner assailed the impugned order by submitting that the High Court while dismissing the above referred petition filed by the petitioner against the order passed on the petitioner's application Exhibit-86 had observed that the court has already given tentative Exhibit to the writing concerned and the court is within its power to take recourse to section 73 of the Indian Evidence Act for examining by itself the writing by calling for the specimen writing from either side. Such an exercise can be done in accordance with law well established on the issue. It was submitted that, therefore, it would be necessary for the trial court to call for the specimen writing of the defendant for the purpose of comparing the writing on the tentative exhibit. It was submitted that the trial court was, therefore, not justified in rejecting the application filed by the petitioner by stating that no direction had been issued by the High Court to obtain such specimen signatures.

6. On the other hand, Ms. Dharitri Pancholi, learned advocate for M/s. H.L. Patel Advocates for the respondent, opposed the petition by submitting that the present petition is on the same cause of action as the previous petition being Special Civil Application No.7665 of 2012 filed by the petitioner and hence, the petition itself does not deserve to be entertained. It was submitted that the application Exhibit-92 filed by the petitioner is in the nature of a delaying tactic and hence also, the trial court was justified in rejecting the same. It was submitted that granting the present application would result into multiplicity of proceedings and would be in breach of the doctrine of finality of judgment, inasmuch as, the previous order passed by the trial court rejecting the application Exhibit-86 filed by the petitioner has attained finality by virtue of the order dated 3.7.2012 passed by this court whereby the petition filed by the petitioner had been dismissed. It was submitted that there being no infirmity in the impugned order, the petition is required to be dismissed.

7. A perusal of the application Exhibit-92 filed by the petitioner reveals that it has been stated therein that this court by an order dated 3.7.2012 made in Special Civil Application No.7665 of 2012, had, while dismissing the petition observed that as a parting note two points are required to be noted, firstly that the observations made therein, while dismissing the petition in limine, may not prejudice the merits of either side, secondly, that the court has already given tentative Exhibit to the writing concerned and the court is within its power to take recourse to the provisions of section 73 of the Indian Evidence Act for examining itself the writing by calling for the specimen

writing from either side. Such an exercise can be done by the court in accordance with the law well established on this issue. The petitioner, accordingly, in terms of the above observations prayed for more than one specimen handwriting of the defendant of the writing contained on the covering page Exhibit 21/3 be obtained under the supervision of the court. The trial court, while rejecting the said application had observed that the High Court has not given any mandatory direction to the trial court and that in view of the order passed by the predecessor Judge on Exhibit-86, the trial court does not have the authority to pass any order contrary thereto. The trial court has observed that when the defendant, in his evidence, while giving tentative Exhibit-1 had stated that the handwriting was not his, the predecessor Judge, at that time, while recording the evidence, had not thought it fit to examine any witness or to obtain the specimen handwriting under section 73 of the Indian Evidence Act, and hence, a successor Judge does not have the authority to pass any order contrary to such order.

8. From the reasoning adopted by the trial court in the impugned order, it is apparent that the trial court has failed to understand the purport of the order dated 3.7.2012 passed by this court in Special Civil Application No.7665 of 2012. While dismissing the petition filed by the petitioner against the order passed on the petitioner's application Exhibit-86 for referring the Exhibit for the opinion of a handwriting expert, this court had specifically observed that it is well within the power of the trial court to take recourse to section 73 of the Indian Evidence Act for examining by itself the writing by calling for specimen writing from either side. Therefore, though this court had not

issued any direction to the trial court to call for specimen writing, the court had left it open to the trial court to take recourse to the provisions of section 73 of the Indian Evidence Act. The trial court was, therefore, not justified in stating that in view of the order passed below application Exhibit-86, the trial court had no authority to pass any order for obtaining specimen signature under section 73 of the Indian Evidence Act, inasmuch as the reasoning assigned by the trial court is not in consonance with the order dated 3.7.2012 passed by this court. In any case, for the purpose of comparing the handwriting on the document marked tentatively as Exhibit 1, it would be necessary for the trial court to have specimen handwriting of the concerned party, in the absence of which, it would not be possible for the trial court to examine by itself the writing on the tentative exhibit.

9. Insofar as the contentions raised by the learned advocate for the respondent are concerned, the present petition challenges the order passed by the trial court below Exhibit-92 whereas the present Special Civil Application No.7665 of 2012 had been filed challenging the order passed by the trial court below Exhibit-86. Under the circumstances, it cannot be said that the present petition is in respect of the same cause of action as the previous petition. While it is true that the order passed by this court in the above referred petition did not give any direction to the trial court to obtain specimen signatures under section 73 of the Indian Evidence Act, the trial court has misread the said order while holding that in view of the previous order passed on the application Exhibit-86, the trial court could not issue any directions for obtaining specimen signatures.

10. As regards the contention that the present petition results into multiplicity of proceedings, this court fails to understand as to how the obtaining of specimen handwriting would result into multiplicity of proceedings. Such contention, therefore, does not merit acceptance.

11. Insofar as breach of doctrine of finality of judgment is concerned, as noted hereinabove, the previous petition being Special Civil Application No.7665 of 2012 had been filed against the order passed by the trial court on the application Exhibit-86 whereas the present petition has been filed challenging the order passed below Exhibit-92. Under the circumstances, none of the contentions put forth on behalf of the respondent merit acceptance.

12. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned order dated 6.7.2013 passed by the learned Additional Civil Judge, Halol below Exhibit-92 in Regular Civil Suit No.122 of 2007 is hereby quashed and set aside. The petitioner's application Exhibit-92 is hereby allowed in terms of paragraph 12(A) thereof. Rule is made absolute accordingly with no order as to costs.

(HARSHA DEVANI, J.)

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