and indignity to Indian Women. The zealous guardian namely judiciary is under a duty to educate the people through legal services authority by organizing public meetings and seminars *etc.* It has to stop and prohibit performing the ceremony by purohits which violates the articles of Indian Constitution of India as well as fundamental rights of Indian Women.

A CRITICAL STUDY - SECTION 45 VIS-A-VIS 73 OF EVIDENCE ACT

(1) Whether Comparison of the disputed handwriting/finger impression with the admitted one without the assistance of any expert is hazardous and risky ?

(2) Whether dismissal of Petitions under Section 45 of the Evidence Act in a routine way leads to injustice and renders Section 45 non-est is valid ?

By

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As a Sequel to a catena of decisions of the Honourable High Court of Andhra Pradesh on the subject covered by

2006 (3) ALD 673; 2007 (3) ALD 145;
2004 (5) ALD 700

Laying down leading to the dismissal of the petitions under Section 45 of the Evidence Act either due to non-availability of the signatures of contemporary period for comparison or due to the belated stage at which the application was filed or on the ground that such an application cannot be ordered as a matter of course; and on the basis of prejudged conclusion that the opinion of an expert is not conclusive but only a piece of evidence; an honest endeavour is made for reconsideration of the principles, as it is felt denial of opportunity of an expert opinion renders the existence of Section 45 *non-est.*

It is true signature includes thumb mark. But adverting to thumb impressions in *Jaspal Singh v. State of Punjab*, AIR 1979 SC 1708, His Lordship Justice *Fazal Ali* speaking for the Bench of the Supreme Court expressed the view "the science of identifying thumb impression is an exact science and does not admit of any mistake or doubt" In *Muralilal v. State of M.P.*, AIR 1980 SC 531. Dealing with the science of identification of finger prints, the Supreme Court held, "The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger prints has attained near perfection and the risk of an incorrect opinion is practically non-existent." Comparing the fingerprints identification with the identification of handwriting, the Supreme Court held, "on the other hand, the science of identification of handwriting is not nearly so perfect and the risk, is therefore higher" This bedrock of law is followed by His Lordship Justice M.*N. Rao* in *T. Venkata Subbamma v. Union Bank of India*, 1989 (1) Law Summary 234, and further held when the science of identification of finger prints has attained perfection, there is no reason whatsoever to discard the evidence tendered by the expert.

Without maintaining or drawing the distinction between signature and thumb

impressions, the subordinate judiciary is dismissing the petitioners under Section 45 of the Evidence Act in a routine way and the Honourable High Court too are confirming the dismissal, leading to denial of justice of another reasonable opportunity even in respect of disputed thumb impressions, which require the assistance of an expert with respect to the study and comparison of ridge characteristics under a microscopic sense

Section 45 of the Indian Evidence Act, 1872 relates to 'opinion of experts'. It provides *inter alia* that when the Court has to form an opinion as to identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in questions as to identity or handwriting or finger impressions are relevant facts. Section 73 provides that in order to ascertain whether a finger impression is that of the person by whom it purports to have been made any finger impression admitted to have been made by that person, may be compared with the one, which is to proved. These provisions have been the subject-matter of several decisions of the Supreme Court and High Courts.

In the *State (Delhi Administration) v. Pali Ram*, 1979 (2) SCC 158, the Supreme Court held that a Court does not exceed its power under Section 73 if it compares the disputed writing with the admitted writing of the party so as to reach its own conclusions.

But the Court cautioned :

"*Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing even without the aid of the evidence of any handwriting expert, the judge should as a matter of prudence, and caution, hesitate to base his finding with regard to identity of a handwriting which forms the sheet anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other, and the prudent course is to obtain the opinion and assistance of the expert.*"

This caution was reiterated in *O. Bharatna v. Sudhakaran*, 1996 (2) SCC 704 = 1996 (2) ALD (SCSN) 43. Again in *Ajait Savant Majagvai v. State of Karnataka*, 1997 (7) SCC 110, referring to Section 73 of the Evidence Act, The Supreme Court held :

"*The section does not specify by whom the comparison shall be made. However looking to the provisions of Act, it is clear that such comparison may either be made by an 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.*

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 no power to compare the disputed signature with the admitted signature, as the power is clearly available under Section 73 of the Act."

In *Murali Lal v. State of Madhya Pradesh*, 1980 (1) SCC 704, the Supreme Court indicated the circumstances in which the Court may itself compare disputed and admitted writings, thus :

"*The argument that the Court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the Court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as some times said, we are afraid it is one of the hazards to which judge and litigant must express themselves whenever it becomes*

necessary. There may be cases where both sides calls an expert, and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases it become the plain duty of the Court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the Court is not expert where there are expert opinions, they will aid the Court. Where is none, the Court will have to seek guidance from authoritative text Books and the Court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence."

This landmark decision of the Supreme Court *Murali Lal* was followed in *Lalit Popli v. Canara Bank and others*, 2003 (3) SCC 583.

The Supreme Court in 2008 SAR (Civil) P.293 was pleased to observe

(i) There is no doubt that a Court can compare the disputed handwriting signatures finger impressions with the admitted handwriting/signature finger impressions with the admitted handwriting/signatures/finger impressions, such comparison by Court without the assistance of any expert has always been considered to be hazardous and risky. When it is said there is no bar to a Court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion of finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression.

(ii) The comparison of the two impressions cannot be casual or by a mere glance. Further a finding in the judgment that there appeared to be no marked difference between the admitted thumb impression and the disputed thumb impression, without anything more cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. When the Court finds that the disputed finger impression and admitted thumb impression are clear and where the Court is in a position to identify the characteristics of finger prints, the Court may record a finding on comparison, even in the absence of an expert opinion. But where the disputed thumb impression is smudgy, vague or very light, the Court should not hazard a guess by a casual perusal. The decision in *Muralilal's* case (supra) and *Lalit Popli's* case (supra), should not be constructed as laying a proposition that the Court is bound to compare the disputed and admitted finger impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is very vague or smudgy or not clear, making it difficult for comparison, the Court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further even in cases where the Court is constrained to take up such comparison it should make a thorough study, if necessary with the assistance of the Counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it choose to record a finding thereon. The Court should avoid reaching conclusions based on a mere casual or routine glance or perusal."

In view of the ratio of the decision in 2008 S.A.R.(Civil) S.C. P.286 *Tiruvangada Pillai v. Navaneetthammal and another* (supra), it is respectfully submitted comparison of the disputed handwriting/finger impression with the admitted one without the assistance of the expert is hazardous and risky and the Courts should not take the risks of a hazardous role of an expert.

In 2004 ALD Digest Part March @ 156 Kerala

It is held "It is not advisable for a Judge should take up on himself the task of comparing the admitted writing and the disputed one find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert.

It is respectfully submitted a Court of Law, cannot exercise it's a discretion *de hors* the statutory law, its discretion must be exercised in terms of the existing statute, and it is therefore submitted for reconsideration of the decisions covered by 2006 (3) ALD 673, 2007 (3) ALD 145 and 2004 (5) ALD 700 as it appears the various views of the Supreme Court (supra) are not brought to the knowledge of the Honourable High Court which however appear to have been impliedly over ruled by 2008 SAR (Civil) 286 of the Supreme Court.

WHETHER THE MAXIMS, EX TURPI CAUSA NON ORITUR ACTIO' AND EX DOLO MALO NON ORITUR ACTIO' DO NOT APPLY TO CASE WHERE THE PLAINTIFF PLEADS IGNORANCE OF A STATUTORY PROHIBITION ?

By

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1. The meaning of the age old legal maxim *Ex turpi' causa, non oritur actio*' is 'no cause of action would arise out of an act of turpitude'; and the meaning of the maxim '*Ex dolo malo non oritur actio*' is 'No Court will lend its aid to a man, who founds his cause of action upon an immoral or an illegal act.'

2. While implementing the said maxims, the Courts used to uphold that a party to an illegal contract cannot invoke the aid of a Court to have such a contract carried into effect, as law will no tolerate any part to violate any moral or legal duties; and that, if from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* on the transgression of a positive law of the country, the Court says he has no right to be assisted and it is upon that ground the Court goes, not for the sake of the defendant, but because, it will not lend its aid to such a plaintiff.

3. In *Immani Appa Rao v. G. Ramalinga Moorthy*, AIR 1962 SC 370, The Apex Court adopted the rule enunciated by Lord *Mansfield*, CJ., in *Holman v. Johnson*, (1775) 1 Cowp. 341, as the true principle which should govern the decision in such cases founded on *ex turpi causa.*

Mansfield C.J. said thus :

> "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake,