

HON'BLE SRI JUSTICE R. SUBHASH REDDY

CIVIL REVISION PETITION Nos.1379 & 1557 of 2015

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COMMON ORDER :

Both these civil revision petitions are filed under Article 227 of the Constitution of India, aggrieved by the order dated 12.03.2015, passed by the XII-Additional Chief Judge, City Civil Court, Hyderabad in I.A.No.2 of 2015 in O.S.No.2 of 2007, as such, they are heard together and are disposed of by this common order.

2. Defendant No.2 in the suit in O.S.No.2 of 2007 is petitioner in C.R.P.No.1379 of 2015 and defendants 11 to 14 are the petitioners in C.R.P.No.1557 of 2015. Respondent No.1 in both these revisions, has filed the aforesaid suit for specific performance of agreement of sale dated 25.01.2006 allegedly executed by defendants 1 and 2. Defendant No.1 is the father-in-law of the plaintiff and defendant No.2 is the brother of defendant No.1. Defendant No.1 died during the pendency of the suit, as such, his legal representatives are brought on record as defendant Nos.3 to 10. Subsequently, defendant No.5 also died and his legal representatives are brought on record as defendant Nos.11 to 14. By the aforesaid impugned order, the trial Court has allowed the petition in I.A.No.2 of 2015, filed by the 1st respondent/plaintiff, permitting him to mark the Xerox copy of the agreement of

sale dated 25.01.2006 obtained by mechanical process, as an exhibit in the suit, as secondary evidence. In the suit, it is the case of 1st respondent-plaintiff that defendants 1 and 2 have entered into agreement of sale with him on 25.01.2006 for sale of 635 square yards of land in the property bearing No.22-7-486/487, situated at Purani Haveli, Hyderabad, for a consideration of Rs.72,00,000/- and they have received Rs.22,00,000/- on the date of agreement and the original copy of agreement of sale was with defendant No.1 and the Xerox copy of the agreement, which was available with the plaintiff, was filed along with the plaint. In the plaint, it is stated that the copy of original be summoned at the time of trial or petitioner will lead secondary evidence under Section 65 of the Evidence Act. It is stated that in the agreement of sale, the exact extent of land was not shown deliberately as much as defendant No.2 has already sold an extent of 82 square yards of land to one Syed Zahid Ali and a further portion of 82 square yards along with other portion was also sold to plaintiff by defendants 1 and 2 by registered sale deed dated 24.06.2006. It is the allegation of plaintiff that though respondents have agreed to sell the entire property by showing the boundaries of the property, they failed to convey the entire property as agreed, as such, the 1st respondent/plaintiff is entitled for specific performance of execution of sale deed as modified by oral agreement dated 31.03.2006.

3. During his life time, defendant No.1 has filed written statement and after his death, his legal representatives i.e. defendants 3, 4, 7, 9 and 10 have filed separate written statement. In the plaint, though the 1st respondent has claimed that the suit document is with defendant No.1, in the written statement filed by defendants 3, 4, 7, 9 and 10, they have pleaded that defendant No.2 had taken away the said agreement of sale from defendant No.1.

4. In view of the denial of claim of plaintiff by the original defendant, the plaintiff got issued notice to defendant No.2 to produce the copy of the original agreement of sale dated 25.01.2006, for which, it was replied that there was no such agreement of sale. After giving such notice and on receipt of reply from defendant No.2, the 1st respondent/plaintiff has filed I.A.No.2 of 2015 under Section 65 of the Indian Evidence Act, to permit him to mark the Xerox copy of agreement of sale dated 25.01.2006 as secondary evidence. Counter affidavit is filed opposing the said application and the Court below, by impugned order, has allowed the petition by recording a specific finding that the validity of the document can be determined at the time of trial.

5. In these civil revision petitions, it is contended by Sri Vedula Venkata Ramana, learned Senior Counsel appearing for petitioner that though there are no

foundational facts, the Xerox copy of agreement of sale, dated 25.01.2006, is permitted to be marked as secondary evidence by the trial Court. It is submitted that in the absence of any proof of comparison with the original, the Xerox copy cannot be permitted as secondary evidence. In support of his argument, the learned counsel has placed reliance on the judgment of a learned Single Judge of this Court in the case of **K.Neelamma v. B.Suryanarayana & others**^[1], on a Division Bench judgment of this Court in the case of **Badrunnisa Begum v. Mohamooda Begum**^[2] and on the judgment of Hon'ble Supreme Court in the case of **Siddiqui (died) by LRs. v. A.Ramalingam**^[3].

6. On the other hand, it is submitted by the learned counsel appearing for 1st respondent/plaintiff that the Xerox copy of agreement of sale dated 25.01.2006, is a copy made from the original by mechanical process which ensures accuracy of the document, as such, no further comparison is necessary. It is submitted that as the plaintiff has pleaded in the plaint itself that the document was with defendant No.1 which was allegedly taken away by defendant No.2 subsequently, after giving notice, when the same is not produced by defendant No.2, the petition is filed in I.A.No.2 of 2015 for marking the copy of document as secondary evidence. It is submitted that

as the original document is retained and withheld by defendant No.2 by making false allegations, it is always open for the plaintiff to lead secondary evidence.

7. In this case, it is to be noticed that defendant No.1 is none other than the father-in-law of plaintiff and defendant No.2 is the brother of defendant No.1. During the life time of defendant No.1, he has filed written statement denying the execution of sale deed, but the legal representatives of defendant No.1 i.e. defendants 3, 4, 7, 9 and 10, after coming on record, have filed a separate written statement pleading that such agreement of sale was taken away by defendant No.2. In the very plaint itself, the 1st respondent/plaintiff has pleaded that defendants 1 and 2 have jointly executed the agreement of sale, dated 25.01.2006 and such original agreement of sale was with defendant No.1, whereas, the legal representatives of defendant No.1, in their written statement, have stated that the document was taken away by defendant No.2. In view of such stand, a notice was sent by the 1st respondent/plaintiff to defendant No.1 to produce the original agreement of sale, but as he filed reply denying the existence of such document, the plaintiff has filed the petition in I.A.No.2 of 2015 to allow him to mark the Xerox copy of the document as secondary evidence. In **K.Nelamma's** case (1 supra), a learned Single Judge of this Court has dismissed the revision petition, confirming

the order passed by the trial Court, when the explanation offered by the party that the original was lost, was not satisfactory. In the judgment in **Badrunnisa Begum's** case (2 supra), a Division Bench of this Court has held that when a copy of the copy of the agreement is filed and when the same is not compared with the original document, it is held that such document is not admissible in evidence. Further, in **Siddiqui's** case (3 supra), the Hon'ble Supreme Court has held that in a case where original documents are not produced at any time, nor, any factual foundation has been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. It is further held that until the non-production of the original is accounted for, so as to bring it within one or the other cases as provided for in Section 65 of the Evidence Act, secondary evidence cannot be permitted.

8. Whether a copy of the document which is sought to be marked as secondary evidence is fit into the definition of 'secondary evidence' as defined under Section 63 of the Evidence Act and whether the party has made out the circumstances which fit into Section 65(a) of the Act, are the matters to be considered having regard to the facts and circumstances of each case. In this case, the petitioner want to file Xerox copy of the agreement of sale dated 25.01.2006, which is taken from the original by

mechanical process. "Secondary evidence" is defined under Section 63 of the Evidence Act. Under Section 63(2), the copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, can be marked as secondary evidence. Apart from the same, Section 63(2) also provides that copies which are compared with the copies taken by mechanical process, can also be admitted as secondary evidence.

In view of the clear provision under the 1st limb of Section 63(2) of the Evidence Act, it is clear that a copy made from the original by mechanical process, which ensures accuracy of the copy, can be admitted as secondary evidence. Section 65 of the Evidence Act deals with the cases in which secondary evidence relating to documents may be given, namely, when original is shown or appears to be in possession of a person against whom the document is sought to be proved or in possession of any person out of reach to the process of the Court and when after the notice issued under Section 66, such person does not produce it. In the case on hand, there is factual foundation in the plaint itself that the document is with defendant No.1 and subsequently, after his death, his legal representatives have taken specific stand that the document was taken away by defendant No.2. Defendant No.2, inspite of serving notices by the plaintiff, has not produced the original and denied the existence of such document. In view of the clear provision under Section 65

of the Act, not only in cases where original is shown, but where it appears to be in possession of a person against whom the document is sought to be proved, secondary evidence can be permitted. At the same time, merely because secondary evidence is permitted, that by itself, does not amount to proving the document and after permitting the document to be produced in secondary evidence, again, the document is to be proved having regard to the defence of the defendants in the written statement. As it is pleaded that the document is in possession of defendant no.2 and the same is not produced inspite of giving notice on behalf of 1st respondent/plaintiff, this Court is of the view that the judgments relied on by the learned Senior Counsel for petitioner as referred above, will not support the case of petitioner and the order passed by the trial Court permitting the plaintiff to file the agreement of sale dated 25.01.2006, as secondary evidence, is in conformity with the provisions under Sections 63 and 65 of the Evidence Act.

9. For the aforesaid reasons, this Court does not find any ground to interfere with the impugned order passed by the trial Court, in exercise of revisional jurisdiction under Article 227 of the Constitution of India. Both the revision petitions are accordingly dismissed. No order as to costs.

Pending miscellaneous applications, if any, shall

stand closed.

R. SUBHASH REDDY, J

7th August 2015
ajr

[\[1\]](#) CRP.No.2336 of 1989, dt.22.01.1990.
[\[2\]](#) 2001 (3) ALD 11 (DB)
[\[3\]](#) AIR 2011 SC 1492