

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

C.R.P.No.4305 of 2014

ORDER:

This Revision Petition is filed challenging the order dt.10-11-2014 in O.S.No.104 of 2007 of the Senior Civil Judge, Chirala overruling the objection of the petitioner-plaintiff therein for marking of five documents mentioned in the chief examination affidavit of D.W.1.

2. Along with the chief examination affidavit of D.W.1, the respondents sought to mark five certified copies of sale deeds contending that these documents are relating to the adjacent owners of the plaint schedule property. The petitioner-plaintiff objected to the same on the ground that the condition laid down in Section 65 (a) of the Indian Evidence Act, 1872 (for short 'the Act') has not been complied with.

3. By the impugned order dt.10-11-2014, the Court below observed that these documents are the documents of adjacent owners of the plaint schedule property; so the respondents would not be in possession of the same and the condition in Section 65 of the Act that when the original is in possession of others, secondary evidence can be received, is satisfied.

4. Challenging the same, this Revision Petition

is filed.

5. Learned counsel for the petitioner contends that under Section 65 (a) of the Act, it is mandatory for a person who intends to adduce secondary evidence to serve a notice in the manner mentioned in Section 66 of the Act to the person having custody of the original thereon to produce it; that such notice had not been given by the respondents/defendants; and no leave to file these documents as mandated by Order VIII Rule 1-A (3) CPC has also been sought to mark these documents since these documents had not been filed along with the written statement by the respondents.

6. Learned counsel for the respondents on the other hand contended that the Court below did not commit any error in allowing the marking of these documents. He placed reliance on clause (e) of Section 65 of the Act which permitted secondary evidence to be given of the existence, condition or contents of a document when the original is a public document within the meaning of Section 74. He also contended that under Order XVIII Rule 4 CPC, these documents can be marked in evidence because they have already been filed by the respondents along with counter affidavit in the interlocutory application for injunction in the suit.

7. Admittedly the documents in question are certified copies of sale deeds of adjacent owners of the

plaint schedule property. Therefore, original of the document would be in the custody of the said persons.

8. Section 65 (a) and (e) of the Indian Evidence Act, 1872 state:

“Section 65 - Cases in which secondary evidence relating to documents may be given,-
Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;”

(b)

(c)

(d)

(e) when the original is a public document within the meaning of section 74”

9. Since original is in the custody of the owner of the adjacent property, it is incumbent on the part of the respondents to serve a notice in the manner indicated in Section 66 on the person having its custody. This is made clear also by Section 66 of the Act. It says that secondary evidence of the contents of the documents referred to in Section 65 (a) of the Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose

possession or power the document is, (or to his attorney or pleader) such notice to produce it as is prescribed by law.

10. In **Smt. J.Yashoda Vs. Smt. K.Shobha Rani**^[1], the Supreme Court has held in paras 7 to 9 as follows:

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section [63](#) is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section [65](#) deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section [64](#), documents are to be provided by primary evidence. Section [65](#), however permits secondary evidence to be given of the existence, condition or contents of documents

under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.....”

11. In my considered opinion, Section 74 of the Act would not have any application because the original of the sale deed is not a ‘public document’ within Section 74 of the Act since its custody will be not with the Sub Registrar but with the owner of the property in question. The original of the sale deed is a private document between the parties to it.

12. So the respondent was bound to comply with Section 66 of the Act before seeking to adduce secondary evidence in the form of certified copies of sale deeds of the neighbouring owners.

13. Also, the documents in question were not filed along with written statement by the respondents although they appear to have been filed along with the counter filed to the interim injunction application filed by the petitioner.

14. Therefore, it would incumbent on the part of the respondents to seek leave of the Court under Order VIII Rule 1 A (3) CPC. Admittedly this has also not been done.

15. In this view of the matter, the Order dt.10-11-2014 in O.S.No.104 of 2007 of the Court below is set aside. Liberty is given to the respondents to file an application under Order VIII

Rule 1 A (3) CPC seeking leave to file these documents and also to file an application under Section 65 (a) of the Act after complying with Section 66 of the Act, if they intend to mark these documents.

16. The Civil Revision Petition is allowed with the above observations. No costs.

17. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 22-06-2015

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[\[1\]](#) AIR 2007 S.C. 1721 (1)