

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

C.R.P.No.4004 of 2014

ORDER:

Heard Sri M.A.K.Mukheed, learned counsel for the petitioner and Sri S.Bal Chand, learned counsel for the respondents.

2. This Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.26-09-2014 in I.A.No.215 of 2013 in R.C.No.277 of 2008 of the I Additional Rent Controller, Hyderabad.

3. Petitioner herein is the tenant of the respondent in respect of a non-residential premises /shop bearing No.4-2-577/1, Badichowdi, Sultan Bazaar, Hyderabad.

4. The respondents, who are mother and daughter, filed R.C.No.277 of 2008 on 18-08-2008 before the I Additional Rent Controller, City Civil Court, Hyderabad seeking eviction of the petitioner on the grounds of (i) willful default in payment of rents from June 2008 to August 2008, (ii) alleged unauthorized subletting of a portion of the R.C. schedule premises by erecting a kiosk, (iii) Creating nuisance, (iv) *bona fide* personal need and requirement of the respondents, (v) the petitioner has secured alternative accommodation and (vi) 1st respondent being a widow.

5. The petitioner filed a counter opposing the eviction petition contending that the tenancy was created in the year 1999 and claimed that she had paid a sum of Rs.9,60,000/- as Pagadi and advance deposit to 1st respondent. She further contended that a rental agreement was executed by the respondents in 1999, that it's original was in the custody of respondents and that only a photo copy was handed over to her.

6. She filed I.A.No.215 of 2013 under Section 65 (a) of the Indian Evidence Act, 1872 seeking permission to lead secondary evidence of the rental agreement dt.10-08-1999 and a receipt dt.10-08-1999 allegedly issued by the respondents for a sum of Rs.9.60,000/-. Photocopies of these two documents were filed along with this application.

7. In the affidavit in support of this application, it was stated that the original rental agreement dt.10-08-1999 recorded that a sum of Rs.9,60,000/- was paid in cash as an interest free deposit on the specific request of the respondents and that it had to be refunded by the respondents to the petitioner at the time of vacating the leased premises. She alleged that the said amount was paid in cash which was acknowledged by a receipt executed by the respondents but the original receipt given to her was lost on account of shifting of her residence in April 2013. She further contended that when 1st

respondent was cross examined as P.W.1 on 31-01-2011, she categorically admitted her signature on the photo copy of the rental agreement, but since objection was raised by the learned counsel for the respondents, the photo copy was not marked by the Court. She further contended that she got issued notice under Section 66 of the Indian Evidence Act, 1872 to the counsel for the respondents to produce the original rental agreement dt.10-08-1999, but the same was not complied with by the respondents and a reply was given by the respondents through their counsel though admitting that at the inspection of the tenancy, the petitioner had got drafted a rental agreement and also obtained the respondents' signature on the same, the original of it was with the petitioner and was not with the respondents. In the reply notice, it was also stated that the respondents were unaware whether the said rental agreement is dt.10-08-1999 or not. She therefore contended that once the execution and signatures are admitted, there cannot be any hurdle to mark the photo copy of the above documents which are not within the custody and control of the petitioner.

8. Counter affidavit was filed by the respondents opposing this application and reiterating the stand taken in the reply notice issued by them stating that although at the time of inception of the tenancy, the husband of the petitioner got drafted rental agreement and

obtained signatures of the respondents, the original of the said rental agreement was in the custody of the petitioner; that she wanted the same to be filed before the Government authorities for obtaining licence for carrying on business from the R.C. schedule premises; and that in spite of respondents' request, copy thereof was not furnished, although the petitioner had assured that she would furnish such a copy. It was reiterated that the respondents were unaware of the said rental agreement dt.10-08-1999. It was denied that the respondents had any personal necessity for the amount of Rs.9,60,000/- and that since they have never received the said amount, the question of passing any receipt did not arise. It was denied that the original or the photo copy of the rental agreement dt.10-08-1999 was signed by either the 1st respondent or her daughter and that the said rental agreement was prepared by the respondents. It was also denied that the petitioner had paid a sum of Rs.9,60,000/- to the respondents in cash and it was contended that the question of refund the said amount at the time the petitioner vacates the R.C. schedule premises, does not arise. It was denied that the respondents had executed any agreement on 10-08-1999 or that the signatures appearing on the photo copy filed along with the above I.A. belong to them. It was alleged that the petitioner was wantonly not filing the forged and fabricated original receipt since the petitioner is aware that full truth come out

and it was contended that the petitioner had not explained as how she had obtained photo copy of the alleged receipt. It was denied that the respondents had executed the so called original receipt of the said amount. It was pleaded that the respondents are illiterate ladies and had not faced any litigation previously and for the first time, the 1st respondent had come to give evidence and that out of fear and puzzlement, she had deposed in her evidence about the signature said to be her signature on the photo copy of a rental agreement confronted to her.

9. By order dt.26-09-2014, the Court below dismissed the said application. It observed that when photo copy of a document was confronted to her, 1st respondent no doubt admitted her signature on it, but the same had not been marked due to objection of the respondents' counsel at the time her evidence was recorded in 2011; the photo copy of the rental agreement dt.10-08-1999 now filed by the petitioner contains four pages; and it is not clear which signature was shown to P.W.1 at the time her evidence was recorded and which was admitted by P.W.1. It observed that on a perusal of evidence of P.W.1, it cannot be ascertained that the same photo copy of the rental agreement, which is now sought to be marked as secondary evidence, had been shown to P.W.1 during her evidence.

10. It also observed that the petitioner should

prove the existence, condition or contents of the original and should necessarily plead who executed these documents, in whose favour they were executed, what were their contents and who their attestors were. Since these details were not mentioned in the counter filed by the petitioner in the R.C., she cannot be permitted to lead secondary evidence.

11. Challenging the same, this Revision Petition is filed.

12. Learned counsel for the petitioner contended that the order passed by the Court below is unsustainable and that the document which had been confronted to P.W.1 during her cross examination was the photo copy of the rental agreement dt.10-08-1999 which is now sought to be marked as secondary evidence by the petitioner; that the petitioner had issued notice under Section 66 of the Evidence Act, 1872 to the respondents to produce the original rental agreement and the receipt for the sum of Rs.9,60,000/- on 24-04-2013; since neither the petitioner nor the respondents denied the existence of the rental agreement, and the 1st respondent, as P.W.1, in her cross examination had admitted her signature on the photo copy of the rental agreement dt.10-08-1999, and since the original of the said document was with the respondents and not with the petitioner, the petitioner should be allowed to mark the

photo copy of the rental agreement as well as receipt for Rs.9,60,000/- since the original of the said receipt was lost while in the custody of the petitioner. He relied upon the decisions reported in **Nawab Singh Vs. Inderjit Kaur**^[1] and **Murtaza Moosavi Vs. Hemendra V.Shah and another**^[2].

13. Learned counsel for the respondents on the other hand refuted the above contentions and sought to contend that there was no material placed by the petitioner to show that the document which was confronted to P.W.1 during her cross examination and the document which she allegedly admitted her signature was the photo copy of the rental agreement dt.10-08-1999; the photocopy of the rental agreement now sought to be marked by the petitioner is dt.10-08-1999; even though the period of lease is 11 months therein, in view of the A.P. amendment to the Registration Act, 1908, even such a rental agreement requires registration; it is also insufficiently stamped; therefore, when the very original of the rental agreement itself could not have been admitted in evidence, therefore there is no question of permitting a photo copy of such rental agreement to be marked in evidence. He contended that Section 35 of the Indian Stamp Act, 1899 imposed a bar on the reception of any original document and forbade the reception of secondary evidence and

Section 36 only lifted with bar in the case of a original unstamped or insufficiently stamped document to which no exception as to admissibility was taken at the first stage, but Section 36 did not create any exemption in the case of secondary evidence which a copy would undoubtedly be. He also pointed out that the said rental agreement is drafted on Rs.100/- stamp paper purchased on 13-03-1995 and on the pages 1 to 3 thereof there is a signature purporting to be that of 1st respondent found, while on the last page, there is no signature of 1st respondent, and thus even the original of the rental agreement dt.10-08-1999 seems to be of doubtful veracity. He also contended that since the very receipt of the sum of Rs.9,60,000/- is denied, there is no question of respondents issuing any receipt acknowledging receipt of the said sum of Rs.9,60,000/- and the photo copy of the receipt is also not admissible in evidence. He relied upon the decision in **The Rajah of Bobbili Vs. Inuguganti China Sitarasami Garu** ^[3], **State of Bihar Vs. M/s.Karam Chand Thapar and Brothers Ltd** ^[4] and **Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao and others** ^[5].

He therefore prayed that the Revision Petition be dismissed.

14. I have noted the submissions of both sides.

15. From the facts narrated above, it is clear that

in the counter filed by the petitioner in the R.C. a plea was raised by the petitioner that at the time of inception of the tenancy in the year 1999, a sum of Rs.9,60,000/- was paid by the petitioner to the respondents as Pagidi and advance deposit of rent and that at that time, a rental agreement was also executed.

16. According to the petitioner, the original of the rental agreement was in the custody of the respondents and only a photo copy was handed over to the petitioner. Petitioner claims that the photo copy of the original of the rental agreement was not traceable.

17. During the cross examination of P.W.1 which was conducted on 31-01-2011, no doubt a photo copy of rental deed was shown to P.W.1 and she admitted her signature on the photo copy thereof, but the learned counsel for the respondents had objected for marking it and therefore, the said photo copy of the rental deed, which was confronted to the 1st respondent, was not marked.

18. In view of the above, there is a doubt as to whether the document, which had been confronted to P.W.1, was in fact the photo copy of the rental agreement dt.10-08-1999, which is now sought to be marked as an additional evidence by the petitioner.

19. It was only on 24-04-2013, more than two years after the cross examination of P.W.1 was done, that

the notice under Section 66 of the Indian Evidence Act was got issued by the petitioner to the respondents' counsel to produce the photo copy of the original of the rental agreement dt.10-08-1999.

20. In a reply dt.29.5.2013 there to, the learned counsel for the respondents had stated that no doubt at the inception of the tenancy, a rental agreement was got drafted by the petitioner and signatures of the respondents were obtained, but the original of the said rental agreement was taken by the petitioner as she wanted the same to be filed before various government authorities for obtaining licence to carry on the business. It was also stated in the said reply that in spite of the request of the respondents, the petitioner had not furnished to them copy of the original rental agreement although this was assured by the petitioner. It was further stated that the respondents were unaware whether the said rental agreement is dt.10-08-1999. Thus, there is a clear denial by the respondents about the execution of the original of the rental agreement dt.10-08-1999 itself.

21. Although the learned counsel for the respondents had sought to contend that the contents of the rental agreement dt.10-08-1999 itself are doubtful veracity, the said contention cannot be countenanced in view of the judgment of the Supreme Court in **Nawab Singh** (1

supra), wherein the Supreme Court has held that the veracity of the document sought to be produced as secondary evidence cannot be gone into while deciding whether or not to permit a party to adduce secondary evidence of said document.

22. Learned counsel for the petitioner contended that when a person denies the allegation that he has custody of the original document, the same by itself may not in a given case divest the jurisdiction of the trial Court under Order 11 Rule 14 CPC and that the Court has to conduct a *prima facie* enquiry and then arrive at a finding as to whether a party is in possession of the document and relied on **Murtaza Moosavi** (2 supra) laying down this principle.

23. I am of the opinion that the said principle or the said decision will have no application to the present situation where the petitioner has failed to prove the very execution of the original of the rental agreement dt.10-08-1999 or the original receipt for Rs.9,60,000/- allegedly executed by the respondents.

24. Section 65 of the Evidence Act no doubt permits secondary evidence relating to document being given under certain circumstances.

25. In **J.Yashoda Vs. K.Shobha Rani**^[6], the Supreme Court held that secondary evidence as a

general rule, is admissible only in the absence of primary evidence and that in order to enable a party to produce secondary evidence it is necessary for the party to prove the existence and execution of the original document. It also held that the conditions laid down in the said section must be fulfilled before secondary evidence can be admitted and the 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 the other of the clauses provided for in that Section.

26. This decision was followed in **U.Sree Vs. U.Srinivas**^[7] where the Court also observed that mere admission of a document in evidence does not amount to its proof. It also observed that secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It also held that merely because there is a denial by the other party of the document summoned to produce it, secondary evidence is not admissible.

27. In **Benga Behera and another Vs. Braja Kishore Nanda and others**^[8], the Supreme Court also held that to adduce secondary evidence of a document invoking Section 65 (c) of the Evidence Act, the loss of the original has to be proved beyond all reasonable doubt.

28. Having regard to the above legal position, in the present case, the very existence and execution of the original of the rental agreement dt.10-08-1999 or the original receipt of Rs.9,60,000/-cannot be said to have been established by the petitioner. Also as regards the photo copy of the receipt dt.10-08-1999 for the sum of Rs.9,60,000/-, it cannot be said that the petitioner has been able to establish its loss beyond reasonable doubt.

29. That apart, the State Legislature had amended the Indian Registration Act, 1908 by AP Act No.4 of 1999 with effect from 01-04-1999 making all leases of immovable property irrespective of their duration compulsorily registerable. The rental agreement dt.10-08-1999, even if such original existed would have been executed after 1.4.2009. Even according to the petitioner, the original of the rental agreement dt.10-08-1999 is not a registered document. Section 49 of the Registration Act, 1908 prohibits receiving in evidence documents required by law to be registered and which are not registered.

30. Therefore, when the original of the rental agreement dt.10-08-1999 itself would not be admissible in evidence for want of registration, the question of permitting the petitioner to mark photo copy thereof does not arise.

31. Similarly, a lease deed containing a recital about advance is required to be properly stamped under Article 31 of the Indian Stamp Act, 1899 and for the

security deposit 5% stamp duty in addition to 3% on the amount payable under the lease has to be paid as stamp duty. It is not disputed by the learned counsel for the petitioner that the original of the rental agreement is only on Rs.100/-stamp paper. So it is an inadequately stamped document.

32. In **The Rajah of Bobbili** case (3 supra) the Privy Council held that what can be validated under Section 35 of the Indian Stamp Act, 1899 was only the original when it is unstamped or insufficiently stamped and that the photo copy of such an instrument cannot be validated.

33. In **M/s.Karam Chand Thapar and Brothers Ltd.**

(4 supra), the Supreme Court held that only the original of a document could be validated by paying deficiency and penalty under Section 35 of the Indian Stamp Act, 1899 and that the said provision has no application to secondary evidence and secondary evidence of the contents of such original cannot be given.

34. Similar view was taken in **Jupudi Kesava Rao** (5 supra), where the Supreme Court has held that Section 35 imposed a bar on the reception of any original document and forbade the reception of secondary evidence. The Supreme Court observed that Section 36 only lifted that bar in the case of an original unstamped or

insufficiently stamped document to which no exception as to admissibility was taken at the first stage. It however held that it did not create any exemption in the case of secondary evidence which a copy would undoubtedly be.

35. Having regard to the above legal position and the facts of the present case, I do not find any error or infirmity in the order dt.26-09-2014 passed by the I Additional Rent Controller, Hyderabad in I.A.No.215 of 2013 in R.C.No.277 of 2008.

36. Therefore, the Civil Revision Petition is without any merit and the same is accordingly dismissed. No costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 27-10-2015

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[\[1\]](#) AIR 1999 S.C. 1668

[\[2\]](#) 2006 (3) ALD 697

[\[3\]](#) ILR 23 Madras 99 (P.C.) = 1899 (26) Indian Appeals 262

[\[4\]](#) AIR 1962 S.C. 110 (1)

[\[5\]](#) (1971) 1 S.C.C. 545

[\[6\]](#) (2007) 5 S.C.C. 730

[\[7\]](#) (2013) 2 S.C.C. 114

[\[8\]](#) (2007) 9 S.C.C. 728