

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2016

CORAM :

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

Civil Revision Petition (PD) Nos.1665 & 1666 of 2013
and M.P.No.1 of 2013 and CMP.Nos.13554 & 13555 of 2016

C.M.Dhananjaya

.. Petitioner in
both petitions

Vs.

Sri Kalidasa Educational Trust (Registered)
No.519 & 520, Bommanahalli Circle,
Near TVS Motor Co.,
Haridha Post, Hosur Taluk.

Represented by its Trustees
1.H.M.Mariappan
2.G.Veerabhadraiah

.. Respondent in
both petitions

Revisions filed under Article 227 of Constitution of India against
the order dated 28.3.2013 in I.A.Nos.30 & 31 of 2013 in O.S.No.186 of
2004 on the file of Additional District Court, Krishnagiri.

For Petitioner : Mr.M.Ravindran
Senior Counsel
For M/s.Krishna Ravindran

For Respondent: Mr.S.Udayakumar

ORDER

C.R.P.No.1665 of 2013 is directed against the order in I.A.Nos.30 of 2013 in O.S.No.186 of 2004 dated 28.3.2013 on the file of the Additional District Court, Krishnagiri, whereby the trial Court permitted the respondent herein to file a fresh proof affidavit, after withdrawing the proof affidavit filed earlier. C.R.P.No.1666 of 2013 is directed against the order in I.A.No.31 of 2013 in O.S.No.186 of 2004 dated 28.3.2013 on the file of the Additional District Court, Krishnagiri, whereby the trial Court permitted the respondent herein to mark the documents subject to proof and relevancy.

2. Both revision petitions are taken up together and disposed of by this common order. The revision petitioner is the defendant and the respondent is the plaintiff in the suit.

3. The plaintiff-Trust filed the suit for recovery of a sum of Rs.13,73,250/- with interest at the rate of 9% per annum from the date of suit till the date of realisation and for costs. Resisting the suit, the defendant filed the written statement.

4. Pending suit and after filing proof affidavit of G.Veerabadraiah

(General Secretary of plaintiff-Trust) in chief, the plaintiff-Trust filed petitions to permit them to file fresh proof affidavit and to receive the documents annexed in the petition.

5. Resisting both petitions, the defendant filed counter stating that once the evidence is recorded, it cannot be allowed to withdraw and that there is no provision in the Code of Civil Procedure to permit the parties to withdraw the evidence filed in the form of proof affidavit and to replace the same. It is stated that only after cooking up some documents, the plaintiff-Trust filed petition to receive certain documents and the plaint averments are silent about those documents. Moreover, no valid reason is assigned in the affidavit for non-filing of those documents earlier.

6. Upon consideration of the rival submissions, the learned trial Court allowed both the petitions.

7. I heard Mr.M.Ravindran, learned Senior Counsel appearing for the petitioner/defendant and Mr.S.Udayakumar, learned counsel appearing for the respondent/plaintiff-Trust. I have also perused the materials available on record.

8. The plaintiff-Trust filed the suit for recovery of a sum of Rs.13,73,250/- with interest at the rate of 9% per annum from the date of the plaint till the date of realisation. The suit has been taken up for trial and one G.Veerabadraiah, was examined as P.W.1 in chief by way of proof affidavit dated 19.01.2009. The perusal of the proof affidavit shows that Exs.A1 to A4 are to be marked as plaintiff's side documents and the suit was adjourned for cross examination of P.W.1. At this stage, the plaintiff-Trust filed I.A.No.30 of 2013 to permit the plaintiff to file a fresh proof affidavit after withdrawing the earlier proof affidavit. The plaintiff has also filed I.A.No.31 of 2013 to receive and mark some documents stating that the then advocate on record for the plaintiff has filed an incomplete proof affidavit without properly mentioning the details of the documents to be filed and there are mistakes in the proof affidavit already filed. Therefore, the plaintiff-Trust was advised to file a detail proof affidavit by withdrawing the earlier proof affidavit and also to mark certain documents.

9. The trial Court allowed I.A.No.30 of 2013 on the ground that since the defendant has not cross-examined P.W.1, the plaintiff-Trust has right to file a fresh proof affidavit by withdrawing the earlier proof-affidavit.

10. As per Order XVIII, Rule 2 of Code of Civil Procedure, once evidence is recorded it ought not to be allowed to be recalled. Since one of the Trustees of the plaintiff examined himself as P.W.1 by way of proof affidavit in chief, it cannot be changed or withdrawn.

11. It is well settled that no proof affidavit filed under Order XVIII, Rule 4 of Code of Civil Procedure can be allowed to be withdrawn and it is evidence as soon as it is affirmed.

12. A party cannot constantly seek to improve on the evidence it leads. If the plaintiff elects not to offer the deponent of the proof affidavit already filed for cross examination, then it will have the inevitable consequences. Once the proof affidavit is filed, the same cannot be returned.

13. It is evident that the proof affidavit becomes part of evidence and acted upon. Therefore, it can certainly be treated as part of record. Solemn affirmation and signing of the proof affidavit by the deponent/witness would make the same as part of record, notwithstanding the fact that the witness may not have been cross-examined. Once the affidavit becomes part of record, the party who filed it loses the right and prerogative to change or alter it. For all

practical purposes, it is a chief-examination, recorded and certified by the Court itself.

14. In the instant case, the trial Court proceeded on the assumption that the proof affidavit did not become part of record, because PW1 was not cross-examined. Such an approach is untenable, in view of the fact that the proof affidavit was acted upon.

15. Therefore, I find that the trial Court was not right in allowing I.A.No.30 of 2013 and also the procedure adopted by the trial Court in I.A.No.30 of 2013 is illegal. However, in the interest of justice and in order to afford an opportunity, liberty is given to the plaintiff to file an additional proof affidavit instead of replacing the original proof affidavit.

16. Insofar as I.A.No.31 of 2013 is concerned, the plaintiff pleaded that since some of the documents were with their Auditors, the same could not be filed in time and now they traced those documents and filed them in the form of application under Order VII, Rule 14 of the Code of Civil Procedure seeking to condone the delay in filing the documents in time.

17. According to the defendant, there is no whisper about the documents to be received in evidence and those documents are fabricated and if the same are received in evidence, it will divert the proceedings in the suit.

18. In its order, the trial Court observed that subject to proof and relevancy, the documents annexed in the petition can be marked by further observing that if the documents are marked, no prejudice would be caused to the defendant.

19. Rule 14 of Order VII is substituted under C.P.C. Amendment Act. As per the amended provision where a plaintiff sues upon a document in his possession, he shall enter such document or documents in a list and shall produce it in Court when the plaint is presented by him and shall deliver document and a copy thereof to be filed in the Court. Under C.P.C. Amendment Act, where the document is not produced at the time of presenting the plaint, the same cannot be received in evidence without leave of the Court.

20. In the instant case, the plaintiff sought leave of the Court by filing petition to mark certain documents. It is pertinent to note that in the affidavit filed in support of the petition, the plaintiff has set out

reasons for not producing the documents earlier when the suit was originally filed. Moreover, the trial Court has also observed that "subject to proof and relevancy of document", the same can be marked in evidence. The said approach of the trial Court is reasonable, which warrants no interference.

21. In the result:

(a) C.R.P.No.1665 of 2013 is allowed by setting aside the order passed in I.A.No.30 of 2013 in O.S.No.186 of 2004 on the file of the Additional District Court, Krishnagiri.

(b) C.R.P.No.1666 of 2013 is dismissed by confirming the order passed in I.A.No.31 of 2013 in O.S.No.186 of 2004 on the file of the Additional District Court, Krishnagiri.

(c) The plaintiff is permitted to file an additional proof affidavit instead of replacing the original proof affidavit within two weeks from the date of receipt of a copy of this order.

(d) The trial Court is directed to dispose of the suit on receipt of the additional proof affidavit, on day today basis without giving any adjournment to either party, within a period of two months thereafter.

(e) Both parties are hereby directed to co-operate for early disposal of the suit.

(f) No costs.

(g) Consequently, M.P.No.1 of 2013 and CMP.Nos.13554 and 13555 of 2016 are closed.

20.12.2016

Note: Issue order copy on 21.02.2018
vs

Index : Yes
Internet : Yes

To

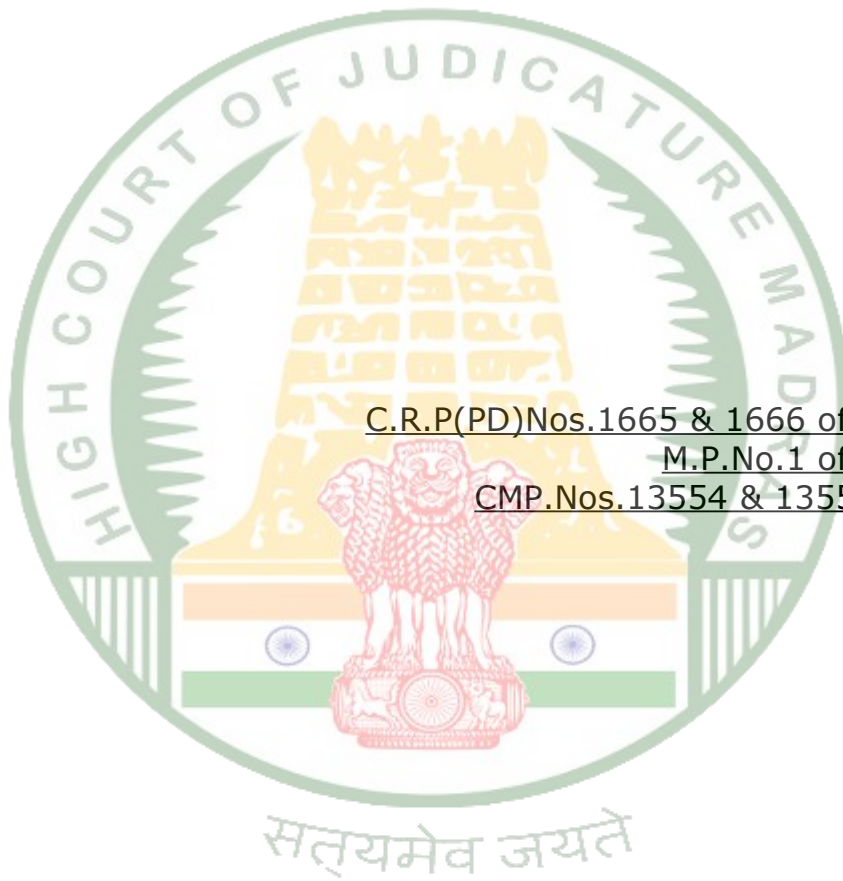
The Additional District Court,
Krishnagiri.



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M.V.MURALIDARAN,J.

VS



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