

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

C.R.P.Nos.4384 & 4385 of 2015

Between:

C.R.P.Nos.4384 & 4385 of 2015

Sri Kathi Narsinga Rao

.....Petitioner

and

Kodi Supriya and another

.....Respondents

Date of Judgment pronounced on : 29-09-2016

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/No
2. Whether the copies of judgment may be marked
to Law Reporters/Journals: : Yes/No
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/No

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! Counsel for the petitioner : Sri B. Sudhakar Reddy

^ Counsel for the respondents : Sri T.V.S. Kumar

? Cases referred

1. 2003 (6) SCC 641
2. 2004 (2) ALT 271
3. 2004 (1) ALD 387
4. AIR 1961 SC 1655
5. 2011 (4) SCC 240
6. 2010 (4) SCC 329
7. 2011 (11) SCC 275
8. 2016 (3) ALD 162 (SC)
9. (2013) 14 SCC 1
10. 2009 (4) SCC 410
11. AIR 1969 SC 253
12. 2009 (2) ALD 284
13. (2010) 8 SCC 423
14. AIR 2001 SC 1158
15. (2003) 8 SCC 752
16. (2013) 10 SCC 758
17. (2004) 7 SCC 107
18. (2010) 4 SCC 491
19. (2010) 9 SCC 712

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**CIVIL REVISION PETITION Nos.4384 & 4385 of 2015****COMMON ORDER:**

The revision petitioner in both the revisions by name Sri K.N. Rao, who is the 1st defendant in O.S.No.396 of 2008 on the file of II Additional District Judge, Visakhapatnam, the suit filed was by the plaintiff Smt. K.Supriya for the relief of permanent injunction restraining the defendants viz., revision petitioner and another by name K.Rama Rao, no other than his brother, in respect of part of schedule property of Ac.1-74 cents in survey No.350/8 of Timmapuram Hamlet of Kapulupada, Bheemunipatnam Mandal, Visakhapatnam District. It is the claim that the property originally belong to Kayeta Simhadri S/o. Chinna Appadu. It is the claim that after death of Simhadri supra, his sons K. Simhadri and his minor sons Muralidhar and Sridhar, along with sons of Simhadri and minors represented by father and Appalanaidu and S/o. Appalanaidu by name K.Gowri Siva Prasad minor represented by father succeeded the property of which Government acquired Ac.0-12 cents for laying road running between Viskhapatnam to Bheemunipatnam and the land thereby divided into 2 parts after excluding the acquired road as Ac.1-30 cents on west of the road and Ac.0-32 cents on the east of the road and out of which the plaintiff claimed purchased 630 square yards out of the extent covered by the west of the road by unregistered sale deed dated 13.08.1984 and since then in possession and enjoyment and one Smt. V. Nagamani, N.S. Raju and K.B. Raju also purchased each 630 square yards land from said vendors on even date and the land purchased by K.B. Raju was sold to the plaintiff, Nagamani

and NSN Raju under 3 separate sale deeds for each on 1/3rd share viz., 210 square yards each dated 29.04.1987 and plaintiff's sale deed is document No.928/1987 and having obtained possession since then that extent of 210 square yards also along with 630 square yards in possession of the plaintiff. It is further averred that P.I.Punan, P. Subiramaiah, Dilip Kumar Pal and Satyanarayana each also purchased Ac.0-13 cents of land from the said vendors which is west of the land sold by Bangar Raju and one M. Venku Reddy also purchased Ac.0-32 cents of land lying to the east of the road from said vendors and besides above persons purchased the respective extents, of the site owners in 1986 though to develop a residential layout by clubbing their respective extents commonly and a naval officer by name Masthannaiah and his wife one of the owners of the plots took initiative and applied for layout from HUDA though not fructified for some of the owners transferred from Vizag.

2. It is further averred that in 1995 plaintiff constructed house with asbestos sheets in the south east side of the plaintiff schedule item No.1 property and she also let out the asbestos roof house in 1995 to one V.R. V.G.K.Rao running Lakshmi Transport business therein with telephone connection and she obtained electricity connection and engaged a watchman and paying electricity charges, house tax etc. It is further averred that while so on 23.06.2005 defendant Nos.1 and 2 without any manner of right came to the schedule properties and attempted to trespass which could be resisted by watchman of the plaintiff in maintaining the suit claim for permanent injunction therefrom. The defendants resisted the suit with contest in their written

statement. It is from the respective pleadings and after settlement of issues mainly in relation to the entitlement or not of the suit relief by the plaintiff, trial was commenced and K.Janardana Reddy no other than husband of the plaintiff deposed before the Court by examination in chief and cross examination and in his evidence already Exs.A1 to A24 were marked which includes original GPA dated 04.11.2008, original registered sale deeds dated 13.08.1984 and 29.04.1987, electricity bills, receipts, house tax demands and receipts, copies of the police complaint including certified copy of the commissioner report in earlier suit O.S.No.1422 of 2005, FMB, Adangal, photographs and certified copy of the decree and judgment respectively in O.S.No.1167, 1227 and 1422 of 2005, RDO orders in RC.Nos.2965 and 2966 of 2008 dated 19.09.2009 and was cross examined by the defendants at length on 22.07.2013, 29.07.2013 and 10.02.2015 including with reference to Exs.A1 to A24 supra. A perusal of the record shows this suit along with O.S.Nos.397 and 395 of 2008 are under common trial. A perusal of the record further shows the earlier litigation covered by the suits referred supra and also O.S.No.707 of 2005.

3. It is while stood thus, the plaintiff on 04.06.2015 (nearly 4 months after completion of cross examination of PW.1 dated 10.02.2015) filed the 2 applications covered by the 2 revisions viz., I.A.Nos.670 and 671 of 2015, one is to reopen the evidence and the other is to receive the certified copies of the documents enclosed to the petition which are 18 in number viz., Award No.8 of 1980 dated 12.01.1981, house hold card of K.Simhadri S/o. Simhadri one of the vendors, driving license of said Simhadri, letter addressed to MRO by P. Subbiramayya, K. Simhadri S/o. Simhadri in favour of

P.Subbiramaya to issue land possession certificate, adangal/pahani No.3 account dated 04.10.2005, certificate issued by Tahsildar (Land Acquisition) Revenue, Visakhapatnam dated 24.09.2008, land tax receipt issued to Simhadri S/o Simhadri supra, settlement fair adangal and pahani, endorsement of the Tahsildar viz., Award No.8/80 dated 10.12.1980 (in co-relation to document award No.8/80 dated 12.01.1981), voucher for payment, said certificate of K. Narsinga Rao (1st defendant), another certificate in relation to 1st defendant K. Narsing Rao studied in AVN College, registration of motor vehicle of 1st defendant and likewise the details of the 2nd respondent K.Rama Rao and death certificate of father of K.Rama Rao (2nd defendant) and certificate issued by MRO in 2004 etc. The averments in support of the application to receive the documents by reopening the evidence to further examine the PW.1 in relation to the documents is that, there are 3 suits clubbed together viz., OS.Nos.395 to 397 of 2008, plaintiff could not file the certified copies of some of the documents earlier in PW.1's evidence supra due to non-availability at that time and later came to know about 1st defendant filed O.S.No.1422 of 2004 for permanent injunction against P.Subbiramaya for an extent of Ac.1-24 cents, which includes the plaint schedule property and NSN Raju filed OS.No.1167 of 2005 against the defendants herein for Ac.0-13 cents which is let out and the plaint schedule also included and TI Punnan filed OS.No.1227 of 2005 against the defendants for another Ac.0-13 cents, which is also part of the same survey number and layout and 1st defendant's suit supra was ended in dismissal and the suits of TI Punnan and NSN Raju supra were decreed, holding that the defendants herein

are not owners of the land in S.No.350/8 of Kapulupada Village, that the defendants obtained pattadar passbooks with false allegations for the schedule property and other properties and plaintiff filed appeal before the RDO, Visakhapatnam against it and RDO, Vizag, passed orders on 19.09.2009 cancelling the pattadar passbooks standing in the name of the defendants and all the documents are necessary for the suit lis which are the certified copies, hence may be received to exhibit on the plaintiff's side evidence, thereby requires to receive by reopening the matter.

4. The defendant opposed the petitions through the counter affidavit of 1st defendant stating that there are no valid reasons in the affidavit of the deponent in support of the petition to receive the documents or to recall PW.1 to exhibit the documents much less any petition for reopen filed and the case is coming after 10.02.2015 for the plaintiff's further evidence and having changed the advocate by plaintiff later cause filed the present petition on 04.06.2015 in the suits pending since 2006 for original No.707/2005 since renumbered and the earlier chief affidavits nowhere stated about the documents and thereby there are no grounds to receive the documents or to recall PW.1 for its marking by allowing the petition apart from the documents sought to be received to exhibit, though certified copies, those are not the certified copies of the original, but copies of the copies marked in another suit and thereby inadmissible for neither primary nor secondary evidence; apart from no foundation as per Sections 61 to 66 of the Evidence Act laid to receive the documents to exhibit as secondary evidence, thereby cannot be received and the affidavit averments of plaintiff came to know of the documents after

completion of PW.1's evidence is not correct for plaintiff's husband was DW.7 in OS.No.1422 of 2004 and thereby sought for dismissal of the petitions.

5. The counter filed was on 06.07.2015 and pursuant to which the lower Court passed the common orders in both the petitions with the observation that the Apex Court in **Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others**¹ held the procedure to follow whenever objections raised during the stage of recording evidence in relation to admissibility of any evidence in order to save time of the Court to record subject to objection and proceed with the evidence and in the subsequent expression of this Court following the same in **Mulla Alamsabgari Dastigiri Vs. B.Pullamma**², it was reiterated of marking of documents for any objection raised is subject to objection by left open to decide at the final stage by recording the finding which is the procedure to follow. In the case on hand also it is not in dispute with relation to any stamp duty requirement and in view of the above expressions objection to raise is always left open while marking to decide finally by recording a finding and when petitioner in the supporting affidavit of the petitions stated the documents earlier could not be filed and later obtained certified copies from the suit records of OS.No.1422 of 2004 etc., the reasons for earlier non filing since explained and as held in **Rajah RVGK Ranga Rao Vs. Nizams Sugars Limited**³, mere delay in filing is not a ground to reject, when it is not a deliberate non-filing in preventing party to produce evidence and when certified copies of the documents, judgment

¹ 2003 (6) SCC 641

² 2004 (2) ALT 271

³ 2004 (1) ALD 387

and decree and relevant books produced, liberal view could be adopted and dismissing of the petition held unsustainable and in view of the above expressions and from the delay explained by the petitioner for earlier non filing in the present filing to receive, permitted to receive the documents and permitted to recall pw.1 for exhibiting the documents by further examination.

6. It is said orders dated 24.07.2015 impugned in the 2 revisions with the selfsame grounds raised in the counter filed before the lower Court and also in saying court ignored the factum of those are neither primary nor secondary evidence to admit and marking of document subject to objection is contrary to the settled expressions; that the 4 Judge Bench of the Apex Court in **Javer Chand And Others vs Pukhraj Surana**⁴ held that once document is marked as exhibit without objection on admissibility or otherwise, same later cannot be questioned and same was not considered by the lower court in allowing the application instead of dismissing from said decision and the other decisions placed reliance of **H. Siddiqui (D) By Lr vs A. Ramalingam**⁵, **Tukaram S.Dighole vs Manikrao Shivaji Kokate**⁶, that were not even referred in the order in arriving to the conclusion to receive even no foundation laid to adduce secondary evidence that is required to decide while marking, apart from no plea in relation to the documents to receive at this belated stage after PW.1's evidence, that too by recall of PW.1 for further examination to exhibit and hence to allow the revisions by setting aside the orders.

⁴ AIR 1961 SC 1655

⁵ 2011 (4) SCC 240

⁶ 2010 (4) SCC 329

7. The learned counsel for the revision petitioner referred the expressions supra in support of the said contentions in the course of hearing.

8. Whereas it is the submission of the learned counsel for the revision 1st respondent/plaintiff that the impugned common order of the lower Court holds good and for this Court while sitting in revision within the limited scope there is nothing to interfere and hence the revision petitions are liable to be dismissed.

9. Heard at length and perused the material on record covered by the facts and propositions referred supra.

10. In fact plaintiffs evidence is not closed; thus practically there is no requirement of filing any application to reopen the plaintiff's side evidence but for recall of PW.1 if at all to exhibit the documents and to receive the documents on explaining cause for the earlier non filing.

11. So far as earlier non filing whether explained or not concerned, what the counter contest of the revision petitioner/1st defendant before the lower Court as referred supra speaks is PW.1 was examined as DW.7 in OS.No.1422 of 2004 and he is supposed to know about the documents filed therein and could have been filed earlier and there is no plea and whisper in the earlier evidence of him about the documents and thereby the documents cannot be received at the belated stage. The documents proposed to be filed which are the certified copies are no doubt from mostly exhibited in OS.No.1422 of 2004 and therefrom these are the certified copies obtained from the Court. The date of issuing the certified copies

shows during March 2015 or so. It is very clear therefrom to say it is subsequent to the PW.1's cross examination evidence continued during 2013-2015 ended by 10.02.2015. Once these are the certified copies obtained from the very court and the affidavit averments in support of it show that plaintiff came to know about those documents after completion of the evidence of PW.1 and obtained certified copies and non filing for the same are necessary to receive to exhibit through PW.1 by recall, as rightly concluded by the Court below the delay in filing document is explained and said conclusion of the lower Court, from the expression placed reliance at Para 10 of Ranga Rao supra, for this Court while sitting in revision so far as receiving of documents concerned practically there is nothing to interfere.

12. Coming to recall of PW.1 for marking of the documents, in view of the reasons supra and when it is exhibited and when these are the documents with relevancy shown from the above in relation to the suit lis in support of the claim of the plaintiff against the defendants, once that is necessary as felt by the Court, it is within the scope of Order 18 Rule 17 CPC and thus there is nothing even to sit against the order recalling PW.1. No doubt it shall be for any limited purpose on the area of further examination as held by this Court referring to the expressions of the Apex Court in **K.K. Velusamy vs N. Palaanisamy**⁷ and **Ram Rati vs. Mange Ram**⁸ in CRP.Nos.5349 and 5350 of 2015 dated 26.08.2016 between **Badana Mutyalamma and another Vs. Palli Appala Raju**, the practice convenient is to ask the relevant questions in

⁷ 2011 (11) SCC 275

⁸ 2016 (3) ALD 162 (SC)

seal cover to permit by recall of witness if at all to consider from relevancy to decide. Here that difficulty does not arise when the recall purpose is very limited in saying only to exhibit the documents which are listed with the petition to receive by further chief examination as referred supra from most of the documents when related to the lis and when the court felt relevant and necessary to receive, there is nothing against the discretion exercised by the lower Court to sit in revision. Even coming to the expression in **Bagai Construction Vs. Gupta Building Material Store**⁹ it was on the application filed for submission of the documents which were in possession of the party for purpose of recall after evidence of both sides and at the belated stage of arguments the power held cannot be exercised, has no application to the facts on hand. Apart from said expression, by referring to the earlier expressions of the Apex Court in **KK Veluswamy supra, Vadiraj Naggappa Vernekar Vs. Sharadchandra Prabhakar Gogate**¹⁰ the latest expression of the Apex Court subsequent to that in Ram Rati supra referred to Velu Swamy Vadiraj Supra speaks that the basic purpose under Order 18 Rule 17 CPC postulates to enable the court to clarify even any position or doubt and the Court may either *suo motu* or on request of any party recall any witness and at any stage in this regard and Court may permit the parties by examining the said witness for said purpose to the extent permitted, though such power cannot be invoked to fill up the gaps and any prejudice caused or not thereby to a party is also a ground for consideration. That power of the Court is also stretched to the power under Section 165 of the Evidence Act.

⁹ (2013) 14 SCC 1

¹⁰ 2009 (4) SCC 410

13. Here there is nothing to show by receiving and exhibiting the documents what prejudice that to be caused to the defendants, that too when these documents are the certified copies obtained from Court proceedings of another suit being public documents within the meaning of Section 74 read with 77 of the Evidence Act to exhibit.

14. Now coming to the contention that these are the certified copies to the certified copies and not certified copies to the original, and thereby not admissible as secondary evidence even concerned; the Apex Court in **Pribi Aisha Vs. Bihar SS MA Vaquf**¹¹ held with reference to Section 63 Illustration C of the Evidence Act that even certified copy to a certified copy also comes within the meaning of secondary evidence to admit. Here once it is the certified copy to the certified copy obtained from Court and these are the public documents there is nothing to doubt on genuineness of the documents in question apart from any such objections for exhibiting public documents even is left open, that too for most of the documents the defendants were parties in earlier proceedings either before the revenue authorities or before the Civil Court.

15. Now even coming to the admissibility of the document in secondary evidence otherwise concerned, since clarified that a certified copy to a certified copy also from the expression of the Apex Court comes under secondary evidence, the question of marking a document in secondary evidence foundation laid or not to decide is only during marking and not while receiving. Even PW.1 recall permitted and received all documents, such objection

¹¹ AIR 1969 SC 253

is left open to raise while marking. In this regard no doubt the learned counsel for the revision petitioner placed reliance on the Single Judge expression of this Court in **Mahendra Investment Advisors Private Limited and Others Vs. Md. Abdul Asad Aleem and Others**¹², where it was held that, Xerox copies of pattadar passbooks and Xerox copies of memo which are copies of original documents in custody of opposite party; though notice had been issued since not produced when sought for marking so also the GPA and the copies of the original sale deeds in custody of opposite parties, the dismissal of the application to receive the same by the lower Court held unsustainable by allowing the revision saying Xerox copies of pahanis being copies to copies cannot be received but for if at all to obtain certified copies from the relevant records to exhibit by permitting to that extent. In fact the expression of the Apex Court in Aisha supra is very clear in this regard of certified copies to the certified copies are within the meaning of secondary evidence admissible. It is no doubt subject to foundation. Thereby the expression of this Court in Mahendra Investment Advisors Supra, no way prevail over the expressions of the Apex Court supra. Coming to the expression in **Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and Others**¹³, where it was no doubt observed that admissibility of document held to be decided at the stage of admission by marking, instead of leaving to be decided subsequently. The facts therein were Xerox copy of the trade mark registration certificate (which is in fact the suit document) without production of original even objected by opposite party from the trial Court permitted to mark

¹² 2009 (2) ALD 284¹³ (2010) 8 SCC 423

subject to objection on proof and admissibility held wrong procedure. In fact it was observed that from same is the suit document and no foundation as to what happened to the original to receive as Xerox copy of the suit claim which is the trademark registration certificate, it was observed that lower appellate Court having received the document under Order 41 Rule 27 CPC without exhibit and without opportunity to the other side to rebut the evidence simply relied on it by discussing the same as if admitted in evidence that was found fault. Thereby the expression in *Shalimar Chemicals supra* confine to the facts for no law laid down of in any case secondary evidence cannot be permitted subject to objection. In fact the earlier expression of the Apex Court in **Bipin Shantilal Panchal vs State Of Gujarat And Another**¹⁴ particularly Para 12 and Navjot Sandhu @ Afzalguru supra holding any objection (other than on stamp duty and registration) is while marking be kept open for decision finally including on secondary evidence admissibility. Above two expressions of the Apex Court not came for consideration in *Shalimar Chemical Supra*.

16. In fact from the expression in *Bipin Shantilal* there was a direction as guidance to be followed by all Courts while marking documents including on secondary evidence as subject to objections by let open to decide ultimately on the objection while recording the evidence, unless it touches stamp duty and registration to decide instantly. In fact *Shalimar Chemicals supra* particularly at Para 10 internal Para 20, the expression of the Apex Court in **RVE Venkatachala Gounder Vs. Arulmigu**

¹⁴ AIR 2001 SC 1158

Viswesaraswami and V.P. Temple¹⁵, referred and relied which speaks about objections as to admissibility of documents in evidence may be classified into 2 classes, one is objection that the document which is sought to be proved is inadmissible and the other towards the mode of proof. In the case of objection as to admissibility, it is only a procedural aspect, if not raised while marking, it is not open to raise later including on secondary evidence for as good as primary evidence. Whereas objection as to mode of proof even not raised while marking unless it is proved it cannot be considered in evidence for which there is no waiver, thereby even no objections raised on mode or method of proof there is no waiver to consider document proved or not from objection can be raised on proof at any time but for on the objection as to nature of document for its admissibility if not raised while marking that amounts to waiver.

17. Once such an objection is left open to raise and to mark subject to that objection to consider ultimately, that to be followed by all courts is the law laid down in **Bipin Shanti lal Panchal supra** that was not came for consideration in **Shalimar Chemicals supra**. For marking the documents through PW.1 further examination to be recorded by Court, but not to permit by any further chief affidavit, any objection is left open to the defendants while marking to raise for the Court to mark subject to objection. So far as the other expressions placed reliance in **Kaliya Vs. State of Madhya Pradesh**¹⁶, what is laid down therein is that a party must adduce primary evidence and only in exceptional cases

¹⁵ (2003) 8 SCC 752

¹⁶ (2013) 10 SCC 758

secondary evidence is permissible and secondary evidence can be adduced where original is lost or destroyed or where party averred the evidence cannot for any other reason not arisen for his own fault be produced within reasonable time and on facts held when original dying declaration held by the Court was not traced, trial Court when rightly permitted the prosecution to lead secondary evidence by production of copy, thereby it is admissible and can be looked into. What was observed further in **Kaliya Supra** at Para 13 referring to **REV Gounder supra** by relying upon it and expressions referred therein is that when a party gives evidence a certified copy or secondary evidence without proving circumstances entitling, the opposite party must raise objection at the time of such admission and if no objections raised at that point of time, he is precluded to raise later, however such mere admission does not amount to proof of the contents, for marking of exhibit on a document does not dispense with proof which is required to prove as laid down in **REV Gounder supra** and also following the same in **Dayamati Bai (Smt.) Vs. K.M. Shaffi**¹⁷ and following the same later in **LIC Vs. Ram Pal Singh Bisen**¹⁸. It also referred in Para 14, the other expression in **M.Chandra Vs. M.Thangamuthu**¹⁹, saying if secondary evidence is admissible it may be adduced in any form in which it may be available whether by production of copy, duplicate copy of a copy or by oral evidence of the contents or any other form. It is emphasized that, exceptions to the rule requiring primary evidence are designed to

¹⁷ (2004) 7 SCC 107¹⁸ (2010) 4 SCC 491¹⁹ (2010) 9 SCC 712

provide relief in a case where a party is genuinely unable to produce the original for no fault of that party.

18. From these expressions, even once the certified copy to a certified copy is within the meaning of secondary evidence and any objection to exhibit secondary evidence though in Shalimar Chemicals Supra says to decide instantly for admissibility, from the earlier expressions categorically held directing all courts to follow particularly from Bipin Shanti Lal supra and in Afzal Guru supra that but for objections on stamp duty and registration to decide instantaneously any other objection raised while marking is to record as subject to objection to decide ultimately at the end of trial and not to decide instantaneously and thus against said conclusion arrived by the lower Court, there is nothing to sit in revision against the impugned orders of the lower Court.

19. Accordingly and in the result, both the revision petitions are dismissed, however any objection while marking is left open to raise on relevancy, admissibility and proof for the Court to mark subject to such objection and to decide ultimately in final disposal of the matter.

20. Consequently, miscellaneous petitions, if any shall stand dismissed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 29.09.2016

Note: L.R. Copy to be marked

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