

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NOS. 1763, 2095
AND 2280 OF 2016

COMMON ORDER

The petitioner in these three CRPs is the plaintiff in O.S.No.148 of 2009 on the file of the learned XI Additional District Judge (FTC), Ranga Reddy District at L.B.Nagar. The said suit was filed for partition and separate possession apart from seeking certain declarations.

While so, the petitioner-plaintiff filed I.A.No.725 of 2015 in the suit under Order 18 Rule 17 CPC to recall and examine PW.1 for the purpose of marking in evidence certain documents. I.A.No.726 of 2015 was filed by him under Section 65 of the Indian Evidence Act, 1872 (*hereinafter*, 'the Act of 1872'), seeking permission to mark photocopies of an agreement of sale dated 28.09.1992 along with receipts of various dates and a memorandum of understanding dated 14.02.1996 as secondary evidence. I.A.No.727 of 2015 was filed by him under Order 7 Rule 14(3) CPC seeking leave of the Court to permit him to file the above documents which were not filed along with the plaint. By separate orders dated 21.12.2015, the trial Court dismissed all the three IAs. Aggrieved thereby, he is before this Court under Article 227 of the Constitution. CRP No.2280 of 2016 arises out of the order passed in I.A.No.725 of 2015, while CRP No.1763 of 2016 pertains to the dismissal of I.A.No.726 of 2015 and CRP No.2095 of 2016 relates to the order passed in I.A.No.727 of 2015 filed in the suit.

Heard Sri D.Jagan Mohan Reddy, learned counsel for the petitioner-plaintiff and Sri N.A.Jairaj, learned counsel on caveat for the 6th and 7th respondents/6th and 7th defendants.

Perusal of the orders passed by the trial Court in relation to the three IAs reflects that a reasoned order was passed only in I.A.No.726 of 2015 in O.S.No.148 of 2009 and the other two IAs were dismissed in view of the dismissal of I.A.No.726 of 2015. The reasoned order reads to the effect that the agreement of sale dated 28.09.1992, a photocopy of which was sought to be filed and marked in evidence, was entered into by the joint family of the 1st defendant and other members and in relation thereto,

O.S.No.276 of 2000 was filed before the learned Junior Civil Judge, Bhongir, against the 1st defendant and others, wherein the 1st defendant pleaded that the possession was joint and filed the agreement of sale and receipts in proof thereof. This suit was stated to have been dismissed thereafter, but the petitioner-plaintiff claimed that his attempts to get certified copies of these documents failed as he was informed that the said documents had been returned. He therefore sought leave to file photocopies of the said agreement and receipts as secondary evidence. As regards the memorandum of understanding dated 14.02.1996, the petitioner-plaintiff stated that the original thereof was deposited with a Chartered Accountant but the 1st respondent-1st defendant collected it from the Chartered Accountant, who confirmed the same while deposing as PW.2. The petitioner-plaintiff therefore sought leave to mark a photocopy of this document also as secondary evidence.

The 1st respondent-1st defendant contested the claim of the petitioner-plaintiff denying the claim that documents marked in O.S.No.276 of 2000 were not available in the record. As regards the memorandum of understanding, he denied its return to him by PW.2 through the 7th respondent-7th defendant. He contended that the agreement of sale and the memorandum of understanding were liable to payment of stamp duty and the memorandum of understanding was also compulsorily registrable. He therefore asserted that photocopies of these documents could not be marked in evidence. The trial Court concurred with the objections raised by him and disallowed the plea of the petitioner-plaintiff that he may be permitted to file and mark photocopies of these documents as secondary evidence.

Sri D.Jagan Mohan Reddy, learned counsel, would concede that the memorandum of understanding dated 14.02.1996 would require registration as it effected apportionment of shares amongst the family members. He would however contend that as the original of this memorandum of understanding is not available, it would be open to his client to mark a photocopy thereof. Learned counsel would state that the requirements of law were duly complied with in this regard and therefore, the trial Court ought not to have disallowed the plea of the petitioner-

plaintiff.

He would rely upon the order dated 28.08.2015 passed by this Court in CRP No.2610 of 2015 which was also filed by the petitioner-plaintiff. This revision related to an objection taken by the other side to the marking of a document by the petitioner-plaintiff while deposing as PW.1. The document that he wanted to place on record was the original deed of settlement dated 06.03.1995. However, accepting the objection raised, the trial Court passed order dated 20.04.2015 declaring that the document was inadmissible in evidence for want of registration. This Court ultimately held that though the document in question was compulsorily registrable, it could still be received in evidence for collateral purposes but could not be considered for any purpose other than such collateral purposes. This Court pointed out that the collateral purpose must be independent of the past partition mentioned in the document. The petitioner-plaintiff was further directed to demonstrate before the trial Court the collateral purpose for which this document was to be received.

Sri D.Jagan Mohan Reddy, learned counsel, would therefore contend that as the earlier settlement deed dated 06.03.1995 was permitted to be placed on record in the suit for a collateral purpose, the same principle can be adopted in relation to the memorandum of understanding dated 14.02.1996. Learned counsel however does not dispute the fact that the deed of settlement dated 06.03.1995 was produced in original, whereas the memorandum of understanding is only a photocopy.

Section 65 of the Act of 1872 sets out the cases in which secondary evidence relating to documents may be given. Section 65(a) states to the effect that the secondary evidence may be given of the existence, condition or contents of a document 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 and when, after notice under Section 66 of the Act of 1872, such person does not produce it. Section 66 of the Act of 1872 stipulates that secondary evidence of the contents of a document shall not be given unless the party proposing to give such secondary evidence has previously given notice to produce it to the party in whose possession or power the document is. This legal position is borne out by

the decision of the Supreme Court in ***MST. BIBI AISHA V/s. THE BIHAR SUBAI SUNNI MAJLIS AVAQAF***^[1], wherein it was observed that under Section 65(a) of the Act of 1872, secondary evidence may be given of the contents of a document 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 and when after the notice mentioned in Section 66 of the Act of 1872, such person does not produce it.

The petitioner-plaintiff claimed that he addressed a letter to the counsel for 7th respondent-7th defendant to secure the document, but the reply received was to the effect that the said document had not been collected from the Chartered Accountant by the 7th respondent-7th defendant. Reliance was placed by Sri D.Jagan Mohan Reddy, learned counsel, upon the deposition of the Chartered Accountant (PW.2) who stated that, as he was a well wisher of the family and also their Chartered Accountant, the original of the memorandum of understanding dated 14.02.1996 was kept with him. He however stated that upon the oral request made by the 1st respondent-1st defendant over phone, he handed over the original of the memorandum of understanding to the 7th respondent-7th defendant a few years back. He further stated that he had informed the petitioner-plaintiff to this effect on his request under letter dated 19.08.2011. In his cross-examination, PW.2 stated that he handed over the original of the memorandum of understanding to the 6th respondent-6th defendant in the year 2009 and conceded that he did not obtain any receipt from the 6th respondent-6th defendant while handing over the document to him. The letter dated 19.08.2011 of PW.2 however states that the document was handed over to the 7th respondent-7th defendant.

The trial Court also refused permission to the petitioner-plaintiff to mark as secondary evidence, photocopies of the agreement of sale dated 28.09.1992 and the receipts of various dates. Sri D.Jagan Mohan Reddy, learned counsel, would contend that as the originals of these documents were taken from the Court by the 1st respondent-1st defendant who failed to produce them despite notice, the legal burden upon his client stood

discharged and that he could therefore be permitted to file secondary evidence.

Given the aforestated facts, the issue before this Court is whether the petitioner-plaintiff made out a case to permit him to file and adduce photocopies of documents in question as secondary evidence.

Though the notice said to have been issued under Section 66 of the Act of 1872 is not placed on record, the reply dated 21.09.2015 addressed by the counsel for the 1st respondent-1st defendant is made available and reflects that the counsel denied the allegation of the petitioner-plaintiff that the original memorandum of understanding dated 14.02.1996 was obtained by his client from the custody of the Chartered Accountant. The counsel further asserted therein that the said original document was not in the custody of his client, and therefore the question of producing the same did not arise.

Section 65(a) of the Act of 1872 would come to the aid of the person who is left only with a photocopy of the relevant document as the person against whom the contents of the said document are sought to be proved and who has the original thereto fails to produce it despite notice. It must therefore be proved at the outset that the person in question has the original of the relevant document and secondly, that despite notice, he failed to produce it.

In the present case, there is no proof or evidence that the 1st respondent-1st defendant or any of the other respondents-defendants have physical possession of the original of the memorandum of understanding dated 14.02.1996. Significantly, PW.2, the Chartered Accountant, admitted in his cross-examination that the 6th respondent-6th defendant got issued a notice dated 08.10.2012 to him and that the same was marked as Ex.B.6. He also admitted that he did not respond to this notice. As pointed out *supra*, PW.2 claimed at one stage that he had given the document to the 7th respondent-7th defendant but in his cross-examination he averred that he gave it to the 6th respondent-6th defendant. There is therefore no consistency in his stand and that apart, his claim that he returned the document in question upon an oral request without even securing due receipt therefor is unbelievable. He admitted

that the original of the document was kept with him for safekeeping owing to his being a well wisher of the family members apart from being their Chartered Accountant. The document was therefore kept in his safe custody as he was an independent third party known to all members of the family. It is highly improbable that he would have parted with the original of the document without taking necessary precautions. The petitioner - plaintiff therefore failed to cross the first hurdle of proving that the original of the memorandum of understanding dated 14.02.1996 was with the respondents-defendants and more particularly, the 1st respondent-1st defendant or the 7th respondent -7th defendant. Without first demonstrating the custody of the original being with them, purported compliance with Section 66 of the Act of 1872 is of no avail to the petitioner-plaintiff.

Significantly, in **KESHAVA REDDY V/s. BAL REDDY**^[2], a learned Judge of this Court held that a person, who wants to rely upon Section 65(a) of the Act of 1872, must first establish as to the existence of the original document then only issue notice as required under Section 66 of the Act of 1872.

In so far as photocopies of the agreement of sale dated 28.09.1992 and the receipts are concerned, there is no evidence adduced by the petitioner-plaintiff as to where the originals of these photocopies are at present. The reply dated 21.09.2015 issued by the counsel for the 1st respondent-1st defendant denied the allegation of the petitioner-plaintiff that the said documents had been taken from the Court by the 1st respondent-1st defendant. Without establishing as to where the originals of these documents are presently and in whose possession, the petitioner-plaintiff cannot resort to issuance of a notice under Section 66 of the Act of 1872 and straightaway seek to file and adduce secondary evidence of such documents.

This Court therefore finds no illegality in the orders passed by the trial Court refusing to receive and mark in evidence photocopies of these documents as secondary evidence. In consequence, the dismissal of the three IAs by the trial Court warrants no interference.

The civil revision petitions are devoid of merit and are accordingly dismissed. Pending miscellaneous petitions shall also stand dismissed in

the light of this final order. No order as to costs.

SANJAY KUMAR, J

12th AUGUST, 2016

PGS

[\[1\]](#) AIR 1969 SC 253

[\[2\]](#) 2016 (2) ALT 219