

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2852 of 2015

ORDER:

The unsuccessful petitioners/plaintiffs have filed this revision under Article 227 of the Constitution of India against the orders dated 30.06.2015 of the learned Principal Junior Civil Judge, Tirupati of Chittoor District passed in I.A.no.420 of 2015 in O.S.no.302 of 2005 filed under Section 65 of the Indian Evidence Act read with Section 151 of the Code of Civil Procedure, 1908 requesting to receive the Photostat copy of the agreement of sale dated 07.12.1987 (though referred to with the date 07.12.1981 at some places in the material record) (hereinafter referred to as 'the agreement of sale', for short) and permit the petitioners/plaintiffs to lead secondary evidence.

2. I have heard the submissions of the learned counsel for the revision petitioners/ plaintiffs ('the plaintiffs', for brevity) and the learned counsel appearing for the 3rd respondent/3rd defendant ('the 3rd defendant', for brevity) and the learned counsel appearing for the 4th respondent/4th defendant ('the 4th defendant', for brevity) and the learned counsel appearing for the 5th and 6th respondents/5th and 6th defendants ('the 5th and 6th defendants', for brevity). Though respondents 1 and 2 are served, none appears. I have perused the material record.

3. The facts of the case, which lead to the filing of the present revision petition by the petitioners/plaintiffs and their case, in support of their present request, in brief, are as follows:

The suit was filed by the deceased 1st plaintiff for specific performance basing on the agreement of sale executed by the 1st defendant in favour of the 1st plaintiff. The 3rd plaintiff filed his affidavit in lieu of his examination in chief. Out of seven documents, tendered in evidence for marking, two are Photostat copies. One of the said two documents is the agreement of sale under which the 1st plaintiff had purchased the property from the 1st

defendant. The original agreement of sale was filed in the earlier suit for perpetual injunction viz., OS No. 514 of 1988 on the file of the trial Court to prove possession of the plaintiff therein i.e., the 1st plaintiff herein. The said suit was decreed. When the 1st plaintiff, who is the father of the 3rd plaintiff, had applied for the return of the said original agreement of sale with a view to file a suit for specific performance, the District Court gave an endorsement stating that the said original document was destroyed by the Court. With the said endorsement of the said Court, the Photostat copy of the said agreement of sale is filed. Admittedly the original agreement of sale is filed in the said earlier suit; and, the certified copies of the decree and judgment in the said suit are exhibited. The District Court's endorsement is also exhibited. The original agreement existed and that it was destroyed is evident from the above said exhibits. Since the original agreement of sale was destroyed and as it is not possible to obtain a certified copy of the same from the Court and as it is an unregistered document, the Photostat copy of the said agreement of sale is filed as per the provisions of Sections 63 (2) and 65 of the Indian Evidence Act with the request to receive the same on file and permit to lead secondary evidence. If permission is not accorded the plaintiffs suffer serious loss.

4. The respondents 3, 4, 5 and 6 (the defendants 3, 4, 5 and 6) filed counters opposing the application of the plaintiffs. The 3rd defendant contended that she is not a party to the said agreement of sale and that she had not seen it when it was filed in the prior proceedings and that the Photostat copy being sought to be filed is not a true copy of the original agreement of sale and that the Photostat copy was not attested as a true copy by any person who has seen the original or a person competent to attest it and that no body has seen the original and that in the said circumstances it cannot be received on file and that no permission to lead secondary evidence can be granted. The 4th defendant contended that the original agreement is not duly stamped, though required under law to be stamped, and that therefore, the Photostat copy cannot be admitted and that he does not know

about the nature of the document and that the Photostat copy cannot be marked unless the loss of original of the same is accounted for. The defendants 5 and 6 filed a counter stating that nobody had admitted the original agreement in the earlier suit except the deceased first plaintiff and hence, the question of admitting its Photostat copy does not arise and that the original agreement is not registered though required under law to be registered and that the defendants 5 and 6 do not know the nature of the document and that the original agreement allegedly filed in the earlier suit should have been taken return from the Court and that the deceased 1st plaintiff might have created and filed the Photostat copy showing that the alleged original was filed in the earlier suit and that therefore, the Photostat copy of the agreement of sale cannot be received in evidence as secondary evidence.

5. On merits and by the orders impugned, the trial Court having referred to the Section 65 of the Indian Evidence Act and having observed that the plaintiffs had failed to take back the original from the earlier suit record had held that it cannot be said there is no default or negligence on their part and that the fact that the original was destroyed by the Court does not come to the aid of the plaintiffs and that the circumstances or grounds enumerated in Section 65 of the Indian Evidence Act are not satisfied in the case of the plaintiffs and hence, the Photostat copy of the agreement of sale cannot be admitted in evidence. Aggrieved of the said orders, the plaintiffs had preferred this revision.

6. The learned counsel for the plaintiffs reiterated their pleaded case, which is extracted supra, and had submitted as follows:

The plaintiffs, by marking the certified copies of the judgment and decree in the former suit and also the endorsement given by the District Court, had sufficiently established that the original agreement of sale was filed in the earlier suit and that the same was destroyed by the Court and that therefore, they are entitled to seek permission to produce Photostat copy and lead secondary evidence. The observations in the order of the Court below

are erroneous, contrary to facts and legal principles applicable to the case. Unless the Court receives the Photostat copy of the agreement and permits it to be marked by granting leave to adduce secondary evidence, it is not possible to adjudicate the issue involved in the suit. Under Section 63 of the Indian Evidence Act, the copies made from the original by mechanical process, which in themselves insure accuracy of the copy, can be adduced as secondary evidence. Any party is entitled to adduce secondary evidence in a case where the original is shown to have been destroyed. The Court below ought to have seen that unless permission to lead secondary evidence by producing the Photostat copy is granted, it is not possible to prove the execution and the contents of the same by examining the witnesses connected thereto. The Court below ought to have seen that unless permission is accorded to lead secondary evidence it is not possible to prove the document's veracity, legality, validity and probative value. The Court below ought to have seen that the original agreement of sale is not required to be stamped or registered and that even otherwise it can be permitted to be marked after payment of stamp duty and penalty, if any, payable as per the settled law applicable to the facts of the case.

7. Per contra, the learned counsel appearing for the contesting respondents/defendants while reiterating the respective pleaded cases of the respondents/defendants and while supporting the orders of the Court below would contend that the said defendants do not know the nature of the alleged original agreement and that the Photostat copy being sought to be filed is not a true copy of the original agreement of sale and that the Photostat copy was not attested as a true copy by any person who has seen the original or a person competent to attest it and that no body has seen the original and that in the said circumstances it cannot be received on file and that no permission to lead secondary evidence can be granted and that the Court below had rightly refused to receive the Photostat copy on file and rightly did not permit the plaintiffs to adduce and lead secondary evidence as the Photostat copy is not certified as a true copy after comparing it with the original and that the plaintiffs had failed to take back the alleged original from the earlier suit

record with the required promptness and hence, there is default and negligence on their part. It was further submitted that the case of the defendants 5 and 6 is that the Photostat copy is fabricated and that, therefore, in the facts and circumstances, the question of permitting the plaintiffs to lead secondary evidence by producing the Photostat copy of the alleged agreement of sale does not arise for consideration.

7.1 I have gone through the note of submission filed by Sri K. S. Gopala Krishnan, Advocate. He had placed reliance on the following undisputed propositions in the following two decisions: (i) The decision in **Smt. J. Yashoda vs. Smt. K. Sobha Rani**^[1] was relied upon in support of the following proposition: '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.' (ii) The decision in **M. Chandra vs. M. Thangamuthu**^[2] was relied upon in support of the following proposition: 'A party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in any other form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. The exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.'

8. I have bestowed my attention to the facts and the submissions. Having regard to the contentions and rival contentions, it is necessary to refer to the provisions of Sections 63 and 65 of the Indian Evidence Act, which read as

under:

63. Secondary evidence. - Secondary evidence means and includes--

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original,

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it.

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) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

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

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the

documents by any person who has examined them, and who is skilled in the examination of such documents.

8.1 The plaintiffs having contended that the original agreement of sale was filed in the earlier suit that was decreed had produced the endorsement given by the District Court showing that the original was destroyed; they had also exhibited the said endorsement given by the District Court and also the certified copies of the decree and judgment in the former suit to establish their pleaded case. Thus, in the case on hand, a foundation is laid for reception of secondary evidence under Section 65 of the Indian Evidence Act. As per the settled legal position, the plaintiffs can be granted leave to lead secondary evidence by producing the Photostat copy of the agreement of sale, when as per their contentions the original of the same was destroyed. Once it was established *prima facie* that the original that was filed in the earlier suit was destroyed by the Court as per the Rules of destruction, practice and the procedure, barely on the ground of default or negligence in taking return of the original from the Court before it was destroyed, the request cannot be negated. The contesting defendants are opposing the request of the plaintiffs by stating that a Photostat copy, which is not certified as a copy compared with the original or as a true copy, cannot be received in evidence and that the Photostat copy of the alleged original agreement is fabricated.

Section 63 (2) deals with two kinds of copies viz., (i) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy; and (ii) copies compared with such copies.

8.2 In the decision in **M/s. Hindustan Construction Co. Ltd. v. The Union of India**^[3], the Supreme Court while observing that the word ‘copy’ as such is not defined in the Indian Evidence Act had held as follows:

“But we get an idea of what a copy is from the provisions of S.63 of the Evidence Act. That Section *inter alia* defines what secondary evidence means and includes, namely – (i) certified copies as provided in S.76 of Evidence Act, (ii) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies and (iii) copies made from or compared with the original. Obviously, therefore, a copy means a document prepared

from the original which is an accurate or true copy of the original. In Webster's New World Dictionary, the word "copy" means "a thing made just like another, full reproduction or transcription". What the word "copy" in S.14(2), therefore, requires is that it must be a full reproduction of the original and that it should be accurate or true. When a document is an accurate or true and full reproduction of the original it would be a copy."

8.3 Further, in **Nawab Singh v. Inderjit Kaur**^[4], the facts are as follows:

In a suit for perpetual injunction, the appellant therein moved an application seeking production of a rent note from the custody of the respondent. However, the said application was rejected by the trial Court. Later, he moved an application seeking leave of the Court for production of secondary evidence of the rent note. That application was also rejected by the trial Court and the appellant's further application was dismissed by the High court. The Supreme Court noted that the prayer of the appellant has been rejected mainly on the ground that the copy of the rent note sought to be produced by the appellant was of a doubtful veracity. In this factual background of the cited case, the Supreme Court had held as follows:

"The trial Court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence. The appellant has alleged the original rent note to be in possession of the respondent. The case was covered by clause (a) of Section 65 of the Indian Evidence Act, 1872....."

In our opinion, the ends of justice would be satisfied if the appellant is allowed an opportunity of adducing secondary evidence but subject to terms."

8.4 In the decision in **Murtaza Moosavi v. Hemenra V Shah and another**^[5], the question was about the tenant's entitlement to file as secondary evidence, the Photostat copy of a register containing entries of collection of rents from the tenants. The tenant's application to lead secondary evidence was opposed on two grounds, viz., Photostat copies cannot be received in evidence and that the same are fabricated. When the Rent Controller dismissed the said application of the tenant on the ground that the ingredients of Section 65 of the Act are not satisfied, this Court having referred to the precedential guidance in the decision in **Nawab Singh** (4

supra) of the Supreme Court had allowed the revision of the tenant and had granted leave to adduce secondary evidence by producing the Photostat copy of the rent register by observing that the validity, legality and probative value of such evidence will have to be gone into separately by the learned Rent Controller at the time of hearing of the case. Therefore, on the ground that the document produced is a Photostat copy and that it is not of truthful veracity, the requests for permission to produce the Photostat copy of the document and leave to lead secondary cannot be refused when a foundation is laid and the legal and procedural requirements are duly complied with and are satisfied.

9. Having regard to the facts, the legal position obtaining and the discussion coupled with reasons supra, this Court finds that in the facts and circumstances of the case, the trial Court ought to have permitted the plaintiffs to produce the Photostat copy of the agreement of sale and ought to have granted leave to lead secondary evidence, by relegating the aspects of consideration of the validity, legality, veracity and probative value of such evidence and the adjudication of the said issues involved in the suit to a later stage of hearing.

10. Viewed thus, this Court finds that there is acceptable merit in the revision and that the order impugned calls for interference.

11. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. Accordingly, I.A.No.420 of 2015 in O.S.no.302 of 2005 on the file of the trial Court is allowed and the plaintiffs are permitted to produce the Photostat copy of the subject agreement of sale and are granted leave to lead secondary evidence. However, the genuineness, the validity, the legality and probative value of such evidence shall be considered by the trial Court at an appropriate later stage of adjudicating the issues involved in the *lis*. It is made clear that the aspects as to 'whether or not the original, if any, is duly stamped and whether or not such original is compulsorily registrable and whether or not any stamp duty and penalty are collectable and if collectable, the same can be collected on the Photostat copy' are left

open for appropriate consideration by the trial Court at a stage when the Photostat copy comes to be first tendered in evidence pursuant to these orders.

No costs.

Miscellaneous petitions pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

04th July, 2016
Vjl

[\[1\]](#) AIR 2007 SC 1721

[\[2\]](#) (2010) 9 SCC 712

[\[3\]](#) AIR 1967 SUPREME COURT 526

[\[4\]](#) (1999) 4 Supreme Court Cases 413

[\[5\]](#) 2006 (3) ALD 697