

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.551 of 2012

ORDER:

The unsuccessful petitioners/plaintiffs filed this revision under Article 227 of the Constitution of India against the orders dated 23.12.2011 of the learned II Additional Junior Civil Judge, Tadepalligudem, West Godavari District, passed in I.A.no.1893 of 2011 in O.S.no.449 of 2006 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 partition list dated 16.05.1974 and permit the petitioners/plaintiffs to lead secondary evidence.

2. I have heard the submissions of the learned counsel for the petitioners/plaintiffs (hereinafter, 'the plaintiffs') and the learned counsel for the respondents/defendants (hereinafter, 'the defendants'). I have perused the material record.

3. The facts of the case, which led to 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 plaintiffs 2 and 3 are brothers and the 1st plaintiff is their mother. The plaintiffs brought the suit against the defendants for mandatory injunction. The original partition list, dated 16.05.1974, executed amongst the 1st defendant and his brothers is in the custody of the 1st defendant. It is specifically pleaded in the plaint that the said original partition list is in the custody of the 1st defendant. However, the 1st defendant stated in his written statement that the partition is not reduced into writing. He did not specifically deny the custody of the partition list with him. Hence, the plaintiffs filed the photostat copy of the partition list stating that it is given by the 1st defendant. The 2nd plaintiff filed his affidavit in lieu of his examination-in-chief. The

learned counsel for the defendants raised an objection for marking the photostat copy of the partition list stating that it is inadmissible in evidence. Therefore, a notice under Order XII Rule 8 of the Code to produce the original partition list was served through the counsel upon the 1st defendant. Having denied the custody of the same, the 1st defendant failed to produce the same. Hence, the plaintiffs filed the subject petition to permit them to file photostat copy of the partition list and lead secondary evidence.

4. The 1st defendant in his counter stated that there was no written partition as alleged by the plaintiffs and that the alleged written partition deed copy was concocted by the plaintiffs to support their false plea and that no document such as the original partition list is in the custody of the defendants and it is vividly explained in the written statement that the partition is not reduced into writing. It is also urged that the photostat copy of a partition list cannot be marked and that in the facts and circumstances of the case, the question of permitting the plaintiffs to adduce secondary evidence does not arise.

5. On merits and by the orders impugned, the trial Court having referred to the provision of Section 65 of the Indian Evidence Act and having referred to the contents of photostat copy of the partition list executed amongst three persons out of which, the 1st defendant is said to be one of the executants, had *inter alia* held that under illustration (b) and (c) to Section 65, a copy shall be compared with the original and that the photostat copy of the partition list cannot be admitted in evidence without compliance of Sections 63 and 65 of the Indian Evidence Act. Aggrieved of the said orders, the plaintiffs preferred this revision.

6. The learned counsel for the plaintiffs would contend as follows:

The case of the plaintiffs in the plaint is that the original partition list is with the 1st defendant and that a copy of the same was given to them.

Therefore, the plaintiffs had filed the photostat copy of the partition list along with the plaint. When an objection was raised for marking the photostat copy of the partition list in the evidence of PW1, a notice to produce the original document was issued through the counsel to the 1st defendant by duly following the procedure established by law. Despite such notice, the existence of partition deed is falsely denied and the original partition list is not produced. The photostat copy of the partition list is a copy obtained by mechanical process, which in itself insures its accuracy. Since the defendants had denied the execution of a written partition list and its custody, the plaintiffs have no option but to seek permission to adduce secondary evidence by producing the photostat copy of the partition list. Unless the Court receives the photostat copy of the partition list 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 be in possession or power of the person against whom the document is sought to be proved. In the instant case, the plaintiffs are from the beginning contending that a partition list is executed and that the original partition list is in the custody of the 1st defendant. The court below ought to have seen that the oral evidence of partition list by examining the scribe and the attestors is possible if only the photostat copy is permitted to be filed. The observation of the trial Court while dismissing the petition that the plaintiffs are at liberty to prove the partition deed as per law is erroneous, as such evidence is impermissible unless the photostat copy is permitted to be filed as the instant case is not a case where the original is lost/destroyed and a copy of it is also not at all available. 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 the original partition list is not required to be stamped or registered as it is a document of the year 1974.

7. *Per contra*, the learned counsel for the defendants while reiterating the pleaded case of the defendants and while supporting the orders of the Court below would contend that no such partition list is in existence and that the defendants are from the beginning contending that the partition is not reduced into writing and that the Court below had rightly refused to receive the copy of the partition list on file and rightly did not permit the plaintiffs to lead secondary evidence as the photostat copy is not certified as a true copy after comparing it with the original, if any. He would further submit that the case of the defendants is that the photostat copy of the partition list is fabricated and therefore in the facts and circumstances, the question of permitting the plaintiffs to lead secondary evidence by producing the photostat copy of the alleged partition list does not arise for consideration.

8. I have bestowed my attention to the facts and submissions. Having regard to the 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 [India] to be given in evidence;

(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 there is a partition list and that the original partition list is with the 1st defendant and that they were given a photostat copy, first issued a notice through the counsel to produce the original document and later filed the present petition to receive the photostat copy and permit the plaintiffs to lead secondary evidence as the 1st defendant having denied the existence of the partition list failed to produce the same. 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 partition list, when, as per their contentions, the original of the same is in the possession or power of the 1st defendant against whom the document is being sought to be proved and as the 1st defendant does not produce it after a notice to produce document is duly served. The defendants are opposing the request of the plaintiffs on the ground 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 partition list is fabricated.

8.2 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.

8.3 In the decision in *M/s. Hindustan Construction Co. Ltd. v. The Union of India*¹, 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.”

8.4 Further, in *Nawab Singh v. Inderjit Kaur*², 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 appeal 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

¹ AIR 1967 SUPREME COURT 526

² (1999) 4 Supreme Court Cases 413

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.”

8.5 The decision in J.Yashoda v. K.Shobha Rani³, the Supreme Court held that when the conditions laid down in Section 65 of the Indian Evidence Act are fulfilled, secondary evidence can be admitted. In the instant case, this Court noted that the necessary conditions are fulfilled. In the decision in Murtaza Mooosavi v.Hemenra v. Shah and another⁴, 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 of the Supreme Court in Nawab Singh (2nd supra) allowed the revision of the tenant and 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.

8.6 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.

³ (2007) 5 Supreme Court Cases 730

⁴ 2006 (3) ALD 697

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 partition list and ought to have granted leave to lead secondary evidence, by relegating the aspect of consideration of the validity, legality, veracity and probative value of such evidence and the adjudication of the said issues involved to a later stage of hearing.

10. In the light of the ratios in the afore-stated decisions of the Supreme Court and in view of the fact that the questions with regard to the genuineness, the validity, the legality and probative value of such evidence are left open to be considered by the trial Court at an appropriate later stage of adjudicating the issues involved in the *lis* and as 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 registerable and whether or not any stamp duty and penalty are collectable and if collectable, the same can be collected on the photostat copy' are also left open for appropriate consideration by the trial Court at a later stage when the photostat copy comes to be first tendered in evidence pursuant to these orders, no prejudice would be caused to the defendants if the plaintiffs are permitted to lead secondary evidence keeping in view the precedential guidance in the decisions of the Supreme Court. Hence, the decisions in (i) *Sunkara Surya Prakash Rao v. Madireddi Narasimha Rao* [2009 (3) ALD 388], (ii) *E.Venkat Reddy and another v. E.Yadgir Reddy and others* [AIR 1973 ANDHRA PRADESH 398], (iii) *Jupudi Kesava Rao v. Pulavarthi Venkata Subba Rao and others* [AIR 1971 Supreme Court 1070], and (iv) *H.Siddiqui by L.Rs v. A.Ramalingam* [(2011) 4 Supreme Court Cases 240] will have to be considered by the trial Court while dealing with the above aspects which are left open.

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

12. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. Accordingly, I.A.No.1893 of 2011 in O.S.no.449 of 2006 on the file of the trial Court is allowed and the plaintiffs are permitted to produce the photostat copy of the partition list 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

27th August, 2016
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