

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.2925 OF 2015

ORDER:

The revision petitioner is the 1st defendant among two defendants in the suit for partition maintained by sole plaintiff and the defendants are no other than the brother and sister of the plaintiff and the plaint schedule property consists of two items and the contest of defendant No.1 particularly supported by 2nd defendant-their sister is that the father and mother of the parties are the owners of the respective properties and they did not die intestate but for testate having executed a separate deeds, one by the father and the other by the mother for the respective two plaint schedule items in favour of 1st defendant and while so, the plaintiff filed I.A.Nos.903 to 905 of 2014 to reopen the evidence of him by permitting his recall for the purpose of adducing a secondary evidence, which is the Photostat copy of the notarized affidavit of the proceedings bearing No.2721/ULC/1977 before the Special Officer and competent authority under the Urban Land Ceiling Act.

It is the claim that the original affidavit of the xerox notarized copy was filed before the Urban Land Ceiling authorities and when sought for certified copies under Memo-Ex.A-17, it is shown as records destroyed after statutory preservation of one or two years.

The defendants opposed the application saying that there is no foundation for the secondary evidence to permit. The court, after hearing both sides, allowed the petition saying even the memo does not reveal as to particulars of the documents field are destroyed, thereby it can neither be believed nor be disbelieved. However, to believe or not to believe the same requires adducing evidence. Further, the lower court observed the genuinity of the document could be considered, the document if exhibited since document is sought is a notarized one and the memo referred when reveals the destruction of concerned records. Such observation is mainly impugned in the revision.

Heard both sides and perused the material on record. The learned counsel for the parties reiterated their respective stand from the done.

It is the further submission of the learned counsel for revision respondent/plaintiff that when three applications were disposed of, a single revision is not maintainable. This submission in fact has no legs to stand for the reason the revision petitioner/1st defendant particularly no way disputes either the order of reopen or the order of recall, but for the order positively saying there is a material as if destruction of record therein. The impugned affidavit was also filed in showing there is no foundation for it.

No doubt, the foundation to be laid down is during course of evidence, thereby where a secondary evidence is sought to be adduced, it is always open to raise the objection by opposite party as to not only subject to admissibility and relevancy but also subject to proof as to the foundation to the adducing of the secondary evidence. Needless to say the other submission of the revision petitioner is that if at all it could be proved, it is only by summoning the original notarised register.

In this revision it need not be gone into but for left open to raise for final decision of the trial court if at all from any right of the party to adduce such secondary evidence is subject to laying a foundation about original was in existence and now presently not available and on what basis to come to such conclusion. In this regard all such contents are to be left open for final decision by trial court as per the expression of the Apex Court in **BIPIN**

SHANTIAL PANCHAL Vs. STATE OF GUJARAT^[1], which is very clear that, where any evidence is sought to be adduced by the other party but for touching stamp duty and registration, all other aspects generally to be left upon to exist subject to objection as to relevancy, admissibility and also proof and to decide finally therefrom. A direction is given in the expression in this regard to all courts to follow to mark subject to objection and decide ultimately. No doubt, it is laid down by the Apex Court in **RVEE GOUNDER**

Vs. RVS TEMPLE^[2] that there are two aspects in relation to adducing of evidence one is a procedural aspect and the other is substantive one and so

far as nature of primary or secondary evidence is concerned, it is procedural one other than nature of proof of substantial one and if no objection taken while marking on the secondary evidence, it is not left upon to take subsequently as same is as good as original evidence. However, no objection taken regarding proof that does not amount to waiver. Here once the court mark for permitting to adduce the so called Xerox copy of the notarized affidavit, subject to objection on admissibility, relevancy including on proof, it has to be ultimately decided from the foundation to be laid.

Accordingly, the revision is disposed of. No order as to costs.

Consequently, pending miscellaneous petitions, if any, shall stand dismissed.

Dr.JUSTICE B. SIVA SANKARA RAO

Dt.11.08.2016
Prv

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[\[1\]](#) AIR 2001 SC 1158

[\[2\]](#) 2003 (8) Supreme Today-194 at 196