

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No.3982 OF 2016,

C.R.P.No.4005 OF 2016

AND

C.R.P.No.4027 OF 2016

COMMON ORDER:

These revision petitions under Article 227 of the Constitution of India are filed challenging the common order dated 01.06.2016 passed in I.A.Nos.708, 710 and 709 of 2016 in P.S.R.O.P.No.949 of 2009 by the X Additional Chief Judge, City Civil Court, Hyderabad, whereby rejected to permit the petitioners to let in secondary evidence, to reopen the evidence of petitioners and to recall RW.1 for the purpose of marking documents.

2. The allegations made in all these revision petitions arises out of the common order, hence, common orders are passed.

3. P.S.R.O.P.No.949 of 2009 was filed under Section 23 of the Andhra Pradesh Societies Registration Act, 2001 to set aside the Resolution No.25 of 2009-10, dated 26.04.2009 passed by the General Body of the respondent society whereby, the membership of the petitioners' were removed from the respondents' society. The respondents filed photo stat copies of document Nos.1 to 25 along with their counter

and there is no reference about those documents in the body of the written statement.

4. Original documents are with the 1st respondent and the same were intended to be filed at the time of examination of RW.1. However, those documents were not filed as they mixed up with other files in the office of respondent Church and in spite of best efforts to trace out the documents, they did not file. Hence, the revision petitioners sought permission to let in secondary evidence by reopening the evidence of RW.1 and recalling him for the limited purpose of marking the documents.

5. The respondents filed counter before the trial Court, *inter alia*, contending that there are no pleadings to prove that the respondents have no intention to bring on record the documents in evidence and accepted in the evidence of RW.1 and that the availability of the original documents etc. It is further contended that several opportunities were given to place those documents and in fact, at one time already recall application was allowed and thereupon they have examined RW.1. Even at that stage also, no efforts were made to bring the documents sought to be introduced as secondary evidence and that there are no grounds to allow the petition and prayed for dismissal of the petition.

6. Upon hearing argument of both counsel, the trial Court dismissed all the three applications refusing to grant leave to mark the documents as secondary evidence and consequentially to reopen and recall applications were rejected.

7. In the present revisions, the petitioners raised several contentions and during arguments, it is contended that the original documents were available with the revision petitioners at the time of filing of written statement and thereby intend to file originals at the time of adducing evidence, but it is misfortunate that the original documents were not traced out on the date of examination of RW.1, hence, those documents could not be exhibited in the said evidence. He further contended that compliance of Order 8 Rule 1-A(2) of CPC does not arise in this case since the original documents were available in this case and that apart the petitioners laid foundation for the loss of original documents in the affidavit, but not in original written statement and in such a case, the petitioners are entitled to let in secondary evidence under Section 65 of the Indian Evidence Act and requested to allow all the three revision petitions setting aside the common order passed by the trial Court.

8. At the stage of admission heard Sri Vivek Jain, learned counsel for the revision petitioner at length.

9. As seen from the written statement filed in the main suit, the revision petitioners made a reference about the documents, the petitioners relied on to prove the defence set up by them in the written statement, but did not explain any reason for non-filing of those original documents. Suddenly, invented the theory of mixing the documents with other documents and failure to trace out those documents after recalling RW.1 once and even when RW.1 was recalled earlier, the petitioners did not evince any interest to file those documents and mark them and that the entire affidavit is silent as to when the original documents were mixed with the other documents and what were the attempts made by the petitioners to trace those documents etc. except making a bald allegation that those documents were mixed with other documents cannot form basis; hence, it is difficult to accept the contention of the petitioners, even otherwise, the petitioners being defendants before the trial Court when relied on those documents in support of their defence set up by them has to file those original documents along with the written statement as required under Order VIII Rule 1-A(1) of CPC. If for any reasons, those documents are in the custody of the petitioners, they must make a substantial statement in compliance of Order VIII Rule 1-A(2) of CPC. It is not their case that those documents were not available at the time of filing written statement, but despite availability of those documents in the custody of the petitioners, conveniently

avoided to file those documents along with the written statement in compliance of requirement under Order VIII Rule 1-A(1) of CPC.

10. Earlier, the petitioner No.2 was examined as RW.1 and again recalled and examined further. Even in his further examination, no effort was made to mark those documents i.e. originals, if any, available. In those circumstances, it is difficult to grant permission to let in second any evidence.

11. The petitioners can be permitted to let in secondary evidence in certain circumstances, which are contemplated under Section 65 of the Indian Evidence Act. They are as follows:

“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 case:

(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.

12. The Apex Court in **Rakesh Mohindra v Anita Beri and others**¹ held that the pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish reasons for non-production of primary evidence. Unless, it is established that the original document are lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted. The Apex Court while relying on the

¹ 2016(1) SCJ 457

judgments in **Y.Yashoda v Smt K.Shobha Rani**² and **H. Siddiqui (dead) by L.Rs. v. A.Ramalingam**³ concluded that when the defendant failed to prove the existence and execution of the original documents and also failed to prove that he has even handed over the original of the disclaimer letter dated 24.08.1982 to the authorities. Hence, the Court is of the view that no case is made out for adducing the secondary evidence. The said view expressed by the Court was upheld in para 26 of the judgment. The Apex Court further held that it is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law. Therefore, the secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in case where a party is

² AIR 2007 SC 1721

³ AIR 2011 SC 1492

genuinely unable to produce the original through no fault of that party. Thus, to seek permission of this Court to let in secondary evidence, the petitioner has to comply with the requirements under Section 65 of the Indian Evidence Act. Here, the petitioners conveniently contended that they intended to file those documents at the time of examination of RW.1, though they are available. But no explanation was offered by the petitioners in the entire written statement or in the present affidavit as to what made him not to file those documents along with the written statement in compliance of Order VIII Rule 1-A(1) of CPC. No such practice is permitted, there is every possibility of suppressing originals and the ground that the petitioner could not produce those documents due to mixing up with other files subsequent to filing of written statement. Therefore, there must be a factual foundation regarding availability of the originals with the revision petitioner and they were not filed along with the written statement. But here, except making a bald allegation in the affidavit that those documents were misplaced subsequent to filing of the written statement without explaining the reason for non filing of those documents along with the written statement, filed the present revision invoking Article 227 of the Constitution, which are mandatory in nature. Therefore, I find no ground to grant permission to let in secondary evidence and the trial Court rightly rejected to let in secondary evidence in exercise of its power. Hence,

reopening, recalling and granting leave to let in secondary evidence cannot be granted for foregoing reasons and in view of decision of Apex Court.

13. The other petitions filed to reopen and recall is only a consequence of allowing an application filed by the petitioners to let in secondary evidence seeking leave of the trial Court. But, here as discussed above, no grounds were found to let in secondary evidence.

14. On the other hand in **Vadiraj Naggappa Vernekar (dead) through Lrs. V. Sharadchandra Prabhakar Gogate⁴**, the Apex Court examined the scope of Order 18 Rule 17 CPC as to when the witness can be recalled and held that some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application. The Court has to record reasons and mere filing of an application for recall is not sufficient. In the recent judgment of the Hon'ble Apex Court reported in **M/s.Bagai Construction Through its Proprietor, Lalit Bagai Vs. M/s.Gupta Building Material Store⁵**, Their Lordships Justice P.Sathasivam and Justice Jagdish Singh Khehar held in para 12 as follows:

“After change of various provisions by way of amendment in the CPC, it is desirable that the

⁴ (2009) 4 SCC 410

⁵ AIR 2013 SC1849

recording of evidence should be continuous and followed by argument and decision thereon within a reasonable time. This Court has repeatedly held that court should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151, CPC.”

Hence, reopening, recalling and granting leave to let in secondary evidence cannot be granted for foregoing reasons and in view of law laid down by the Apex Court.

15. In view of the foregoing discussion, the orders under challenge are free from any illegality and do not call for interference of this Court while exercising powers under

Article 227 of the Constitution of India, which is supervisory in nature.

16. In the result, the revision petitions are dismissed at the stage of admission. There shall be no order as to costs.

As a sequel, miscellaneous petitions, if any, pending in the appeal shall stand closed.

M.SATYANARAYANA MURTHY,J

16.09.2016
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