

A.No.1243 of 2017
in C.S.No.220 of 2009

P.KALAIYARASAN, J.

This application has been filed by the applicants/D2 and D3 seeking to eschew the documents listed out in the annexure to the Judge's summons.

2. It is averred in the application that despite the objections being raised by the learned counsel for the applicants/D2 and D3, certain documents were marked, which are photocopies, incomplete and/or illegible documents, incomplete e-mail correspondence. Without leave of the Court, by filing an application under Section 65 of the Indian Evidence Act, 1872 [hereinafter referred to as "the Act"], photocopies have been marked as Ex.P6, Ex.P7, Ex.P10 Series and Ex.P23. Ex.P2, Ex.P5, Ex.P8 to Ex.P11 Series are incomplete documents and/or illegible documents. The e-mail correspondence in these exhibits are either internal e-mail correspondence and/or e-mail correspondence between the applicants and the third party customers and the prints have not been generated by the 1st respondent/plaintiff as averred in PW1's affidavit dated 08.12.2016. Therefore, the above exhibits are to be eschewed.

3.The 1st respondent/plaintiff in his counter contends that the 1st respondent/plaintiff is producing the affidavit of their Accounts Manager and Systems in charge in support of the evidence of PW1 dated 08.12.2016 in

compliance with Section 65B of the Act. The 1st respondent/plaintiff was able to locate the original letter dated 26.08.2008 and is producing the same to be substituted for the photocopy marked as Ex.P10. With respect to Ex.P6 and Ex.P7, the originals have been misplaced and therefore, he filed the photocopies. For the documents pointed out by the applicants/D2 and D3 as not containing date and time and the recipients, the 1st respondent/plaintiff has now furnished complete e-mail communication. This application has been filed only to drag on the proceedings and therefore, it is to be dismissed.

4. The documents marked as Ex.P5 to Ex.P12, Ex.P18, Ex.P20, Ex.P22 and Ex.P23 are sought to be eschewed mainly on three grounds.

[i] Photocopies of documents [secondary evidence] which have been marked and/or inadmissible evidence.

[ii] Incomplete documents and/or illegible have been marked.

[iii] E-mail correspondence not falling under the aforementioned categories have been marked.

5. Photocopies of the letters dated 30.10.2006 and 11.12.2006, two letters in Ex.P10 Series i.e., vide letter dated 20.04.2008 [Sl.No.xiv] and 26.08.2008 [Sl.No.xvi] and Ex.P23 invoice dated 15.11.2008 have been marked. Along with the counter, the 1st respondent/plaintiff filed the original letter dated 26.08.2008. With respect to other three documents, the 1st respondent/plaintiff has not produced the originals.

6. Learned counsel appearing for the applicants/D2 and D3 contends that without an application to receive the secondary evidence under Section 65 of the Act, photocopies should not have been marked.

7. Learned counsel appearing for the 1st respondent/plaintiff per contra contends that Section 65 of the Act does not stipulate to file any application to lead secondary evidence. Section 65 of the Act provides under what circumstances, the secondary evidence may be allowed.

8. Learned counsel appearing for the applicants/D2 and D3 placed reliance of the Judgment of the Hon'ble Supreme Court in the case of *State of Rajasthan and Others Vs Khemraj and Others* reported in [2000]9 SCC 241 and contended that an application seeking permission under Section 65 of the Act to lead secondary evidence is necessary. The Hon'ble Supreme Court in the above judgment has held as follows :

"In the face of the pleadings of the appellants and the defects noticed by the trial court, no fault can be found with the orders of the trial court or of the High Court. However, it appears appropriate to us, in the interest of justice, to permit the appellant to file a fresh application in the trial court for seeking permission under Section 65 of the Evidence Act to lead secondary evidence supported by a proper affidavit and giving full details necessary to attract the provisions of Section 65 of the Evidence Act."

9. Further, here, in the Original Side, recording of evidence is entrusted with Additional Masters and they are not empowered to pass any judicial order, even with respect to admissibility of evidence. Therefore, for leading secondary evidence, leave of the Court is to be obtained by filing an application. The applicant has failed to follow the procedure.

10. Eschewing Sl.No.[xvi] in Ex.P10 Series, with respect to the other photocopies which have been marked as Ex.P6, Ex.P7 and Ex.P23, Ex.P10 Series [xiv & xvi] and Ex.P23 are ordered to be eschewed.

11. As far as Ex.P2 is concerned, it is contended by the applicants/ D1 and D2 that it is only a working sheet prepared by the plaintiff. Ex.P2 is no doubt a chart prepared by the plaintiff and the same has been signed by him and therefore, it can be marked as an exhibit. Marking of a document is different from proving the same. With respect to Ex.P8 [iv], it is contended that the said attachment is a stand alone document. According to the respondent, the above attachment forms part of Ex.P11 [10 Series] and the same has been wrongly placed along with the said e-mail. Therefore, the attachment mentioned by the applicants/ D2 and D3 is ordered to be treated as an attachment in Ex.P11 [10 Series].

12. With respect to other exhibits, namely, Ex.P5 Series, Ex.P8 Series [ii, iii, iv, vi, viii, ix], Ex.P11 Series [v, vi, viii, xv], the respondent/plaintiff

contends that he has furnished original printout with highlighting of the said e-mail communication along with fresh printout of the said e-mail in complete shape for substituting the incomplete and illegible communication already marked. Therefore, the above illegible and incomplete exhibits are ordered to be substituted with the printouts now filed by the respondent.

13. In fine, the application is partly allowed and the documents marked as Ex.P6, Ex.P7 and Ex.P23, Ex.P10 Series [xiv] and Ex.P23 are ordered to be eschewed. With respect to other documents, Ex.P2, Ex.P5 Series, Ex.P8 Series [ii, iii, iv, vi, viii, ix], Ex.P9 Series [i], [ii], [iii], Ex.P10 Series [xiv], Ex.P11 Series [v, vi, viii, xv] and Ex.P12 the learned Additional Master is directed to verify and substitute the same.

30.06.2017

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