

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27-04-2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1415 of 2017
and C.M.P.No.6557 of 2017

Murugesan ... Petitioner

Vs.

1.Arumugham

2.Jayalakshmi

3.Chamundeswari

4.Shanmugham ... Respondents

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India against the fair and decretal orders dated 04.10.2016 in I.A.No.1433 of 2012 in O.S.No.539 of 2010 on the file of the Principal Subordinate Judge, Tiruppur.

For Petitioner : Mr.C.R.Prasanan

For Respondent : Mr.P.Valliappan

ORDER

This Civil Revision Petition is filed against the fair and decretal orders dated 04.10.2016 in I.A.No.1433 of 2012 in O.S.No.539 of 2010 on the file of the Principal Subordinate Judge, Tiruppur.

2. The petitioner is the plaintiff and the respondents are the defendants in the suit in O.S.No.539 of 2010 on the file of the Principal Subordinate Judge, Tiruppur. The petitioner/plaintiff filed the above suit against the respondents/defendants for partition. The respondents/defendants filed written statement and are contesting the suit. The petitioner was examined as PW1 and was also cross-examined. The petitioner examined one Dhandapani as PW2. PW2 was not available for cross-examination on number of occasions. Hence, after taking number of adjournments, the petitioner filed I.A.No.1433 of 2012 to permit him to produce the Audio CD alongwith the memory card in which the conversation between the PW2 and the 4th defendant on 02.10.2012 is recorded and mark the same as exhibit.

3. The petitioner has stated that PW2 had conversation with the 4th defendant in which the 4th defendant had admitted that the petitioner/plaintiff has share in the suit property. The 4th respondent/defendant filed counter affidavit, adopted by the respondents 1, 2 and 3 denying the averments made by the petitioner. It is further stated that the alleged memory card and the audio CD are fabricated one and that PW1 in his chief examination on 16.11.2012 has not whispered any information or disclosed any materials facts, which is now put forward in the present application.

4. The learned Trial Judge, considering all the materials on record, the grounds on which the petitioner has sought for the relief of partition, dismissed the application holding that even if the 4th respondent/defendant has admitted that the petitioner is also having a share in the suit property, that will not advance the case of the petitioner and the parties have to prove their case. Aggrieved against the order of dismissal, the present Civil Revision Petition is filed.

5. The learned counsel for the petitioner submitted that the petitioner had produced the original memory card alongwith Audio CD and copy of the statement namely conversation between P.W.2 and the

4th respondent/defendant which are primary and secondary evidence, which can be marked as per Section 62 & 65 of the Evidence Act. The petitioner also produced phone bill from Airtel to prove the conversation between PW2 and 4th respondent and the 4th respondent has not denied the recording of conversation between them. The petitioner has taken all care for producing the electronic document and if the court entertains the doubt about the genuineness of the same, the Court can obtain information from experts under Section 79 (A) of the Information Technology Act, 2000.

6. The learned Trial Judge, ought to have marked the document subject to objection by the respondents and ought to have decided the genuineness and relevancy of the same, after conclusion of the trial. The Court below did not follow the procedure laid down by the Hon'ble Apex Court by marking of document and has given a finding with regard to the document, without marking of the document. It is always open to the 4th respondent to prove that the conversation is not relevant to the suit.

7. The learned counsel for the petitioner, placed reliance upon the following judgments in support of his contention.

(a) 1985 (Supp) Supreme Court Cases 611
[Ram Singh & Ors. v. Col.Ram Singh]

(b)2005 (5) CTC 102 [Gurusamy and ors. v. Santhanam]

(c) 2012 (4) CTC 743 [Essaki Ammal @ Chitra v.
Veerabhadra @ Kumar]

(d) 2014 (5) CTC 118 [Udhyakumar @ Kumar v.
G.Kishore Kumar]

(e) 2014 (10) SCC 473 [Anvar P.V. v. P.K.Basheer & Ors.]

(f) 2016 (1) CTC 149 [R.S.Raja Kannappan v.
K.R.Periakaruppan and Ors.]

(g) Judgment of this Court in CRP (PD) No.2657 of 2007

8. The learned counsel for the caveator submitted that the document sought to be marked is a fabricated one. Proof affidavit filed on 16.11.2012 by P.W.2 did not speak about the conversation P.W.2 had with 4th respondent on 02.10.2012 and recording of the same. The petitioner has to substantiate and prove his case that properties are purchased out of income of joint family property and the mother of the parties did not have any independent income to

purchase the property. The CD and Memory Card alleged to have recorded the conversation between P.W.2 and the 4th respondent/defendant is not relevant to decide the issue in the suit.

9. Heard the learned counsel appearing for the petitioner and perused the records.

10. The petitioner had filed I.A.No.1433 of 2012 for permission to mark the memory card and Audio CD containing the conversation of PW2 with the 4th respondent during which the 4th respondent has alleged to have admitted that the petitioner has share in the suit property. The 4th respondent has denied having admitted in conversation that the petitioner has share in the suit property. It is well settled law that whenever a document is sought to be marked and the other party objects the same, the document has to be marked subject to proof and relevancy. The evidence produced by a party cannot be shut down at the threshold itself. The court has to decide the genuineness and relevancy of the document only after conclusion of the trial, by appreciating the evidence let in by the parties. On such appreciation, the court can either accept or reject the same and deliver the judgment. Under Order 13 Rule 3 of C.P.C., the court has power

to reject a document at any stage of the suit on recording reason for the same.

11. In all the judgments relied upon by the learned counsel for the petitioner, it has been held that electronic evidence can be marked and relied upon, provided the party producing the same, proves the genuineness of the same and comply the ingredients and conditions in the Evidence Act. It is sufficient to extract the relevant portion of the judgment reported in *1985 (Supp) Supreme Court Cases 611 [Ram Singh & Ors. v. Col.Ram Singh]*

32. Thus, so far as this Court is concerned the conditions for admissibility of a tape recorded statement may be stated as follows :

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence - direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of con text and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of [Evidence Act](#).

(5) The recorded cassette must be carefully sealed and kept in safe or official custody. (6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

214.....*About the acceptance and reliability of evidence on tape-recording, one should proceed very cautiously. In this connection on the analogy of mutilated document if the tape-recording is not coherent or distinct or clear, this should not be relied upon.*

The petitioner must comply with the conditions imposed in the said judgment in order to mark the CD and Memory Card. If the petitioner fails to comply with the said conditions, the court can reject the CD and Memory Card. It is open to the respondents to get expert opinion on the CD and Memory Card to prove that the same are not genuine and fabricated one. By marking the CD and Memory Card, it cannot be said that the petitioner has proved his case. It is for the learned Judge to appreciate the CD and Memory Card and decide

whether the same is irrelevant to prove the case of the petitioner or not.

12. In view of the well settled principles, as per the judicial pronouncement, the order of the learned Trial Judge dismissing the application is liable to be set aside and it is accordingly set aside.

13. In the result, this Civil Revision Petition is allowed setting aside the fair and decretal orders dated 04.10.2016 in I.A.No.1433 of 2012 in O.S.No.539 of 2010 on the file of the Principal Subordinate Judge, Tiruppur. No costs. Consequently, connected Miscellaneous Petition is closed.

14. In view of the above, the learned Principal Subordinate Judge, Tiruppur is directed to mark the alleged document sought to be marked by the petitioner, subject to proof and relevancy and give a finding at the time of delivering the judgment, either accepting or rejecting the same, after appreciating the evidence let in by the parties.

27.04.2017

Speaking/Non-speaking order
Index : Yes
rgr

V.M.VELUMANI, J.
rgr

To

The Principal Subordinate Judge,
Tiruppur.

C.R.P.(PD)No.1415 of 2017

27.04.2017

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