

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.11.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)Nos.2771 & 2772 of 2014
& M.P.No.1 of 2014

Pitchai (deceased)

- 1.Manjula
- 2.Gokulakrishnan
- 3.Gopi Lakshmi
- 4.Ragavan

.. Petitioners in
both the C.R.Ps'

Vs.

1.P.Raji (Deceased)

2.Suresh

3.The Junior Engineer,
Tamil Nadu Electricity Board (Rural)
Kaveripakkam.

4.The Assistant Divisional Engineer (Rural),
Kaveripakkam.

5.The Superintending Engineer,
Tamil Nadu Electricity Board (Rural),
Vellore – 9.

6.Sabesh

7.Rani

8.Lakshmi

9.R.Selvan

10.Ganga

11.R.Kumari

.. Respondents
in both the C.R.Ps'

(RR6 to 11 brought on record as LRs
of the deceased R1 viz P.Raji vide Court
order dated 23.11.2017 made in
C.M.P.No.20173 of 2017)

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India against the fair and decretal orders dated 19.12.2013 made in I.A.Nos.419 & 420 of 2013 in O.S.No.92 of 2006 respectively on the file of the District Munsif Court, Sholinghur.

For Petitioners : Mr.K.Prem Kumar
 For R1 : Died
 For R2 to R5 : Not ready in notice
 For R6 to R11 : Mr.A.Gowtham

COMMON ORDER

These Civil Revision Petitions are filed against the fair and decretal orders dated 19.12.2013 made in I.A.Nos.419 & 420 of 2013 in O.S.No.92 of 2006 respectively on the file of the District Munsif Court, Sholinghur.

2.The issues and parties involved in both the Civil Revision Petitions are one and the same. Therefore, disposed of by this common order.

3.The petitioners are respondents 3 to 6 and first respondent is the plaintiff, second respondent is the first defendant and respondents 3 to 5 are the defendants 7 to 9 in O.S.No.92 of 2006. Originally, first respondent filed the said suit against the second respondent and one Pitchai/second defendant. Pending suit,

the second defendant died. The petitioners were brought on record as defendants 3 to 6 by the order dated 15.02.2010, made in I.A.No.36 of 2009. By the order dated 01.07.2012, made in I.A.No.368 of 2011, the respondents 3 to 5 were brought on record as defendants 7 to 9. The second respondent and the deceased second defendant filed written statement on 20.03.2007, additional written statement by the second respondent on 18.11.2012 and are contesting the suit. The first respondent filed rejoinder on 07.12.2012. For that rejoinder, the second petitioner/4th defendant filed additional written statement on 17.08.2013. The first respondent through his counsel issued notice under Order 12 Rule 8 C.P.C to produce the original agreement dated 27.06.2006 executed between the first respondent and deceased second defendant. The petitioners sent reply through their counsel stating that there is no such agreement dated 27.06.2006. In the additional written statement itself they have denied the existence of the said agreement and that they are unable to produce the same. Subsequently, the first respondent filed I.A.No.419 of 2013 under Section 63(2) of Indian Evidence Act to mark the Xerox copy of agreement dated 27.06.2006 executed between the first respondent and deceased second defendant as Ex.A14 and I.A.No.420 of 2013 under Order VII Rule 14(3) C.P.C, to excuse the delay in filing said documents. According to the first respondent, pending suit there was a panchayat held and the first respondent and deceased second

defendant entered into an agreement dated 27.06.2006 in respect of the borewell in the suit property, electric motor and pumpset installed therein. After the agreement, deceased second defendant retained the original agreement dated 27.06.2006 and handed over the said xerox copy to the first respondent. On 24.06.2007, the deceased second defendant made an endorsement in the xerox copy of the agreement. The said endorsement is original. The first respondent stated that he has mentioned the agreement and endorsement in the rejoinder filed by him. He issued notice through Advocate under Order XII Rule 8 C.P.C to the counsel for the deceased second defendant to produce the original agreement dated 27.06.2006 before the Court. The petitioners issued reply stating that there is no such agreement. The first respondent filed I.A.No.419 of 2013 under Section 63(2) of Indian Evidence Act and I.A.No.420 of 2013 under Order VII Rule 14(3) C.P.C and stated that original agreement is with deceased second defendant and he may be permitted to produce and mark the xerox copy of the said agreement as secondary evidence to prove his case.

4.The second petitioner/4th defendant filed counter and denied all the allegations made in the affidavits filed in support of the applications. According to the second petitioner, there is no such agreement dated 27.06.2006 entered into between the first respondent and deceased second defendant. The second defendant

never entered into any agreement with the first respondent and they have already stated the same in the additional written statement and also through reply to the counsel for the first respondent through the notices issued under Order 12 Rule 8 C.P.C. The first respondent has not issued notice as contemplated under Section 66 of Indian Evidence Act. The first respondent has not explained the delay in filing the applications and prayed for dismissal of both the applications.

5. The learned Judge, considering all the averments made in the affidavits, counter affidavits and materials available on record, allowed both the applications, holding that the contentions of the first respondent is that in the panchayat, agreement was entered into and original was given to the deceased second defendant and the xerox copy of the agreement was given to the first respondent and in the xerox copy produced by the first respondent, there is original endorsement made on 24.06.2007 in the bottom of the xerox copy by deceased second defendant and hence the genuineness of the agreement and relevancy of the agreement can be decided only at the time of appreciating the evidence.

6. Against the said orders dated 19.12.2013 made in I.A.Nos.419 & 420 of 2013 in O.S.No.92 of 2006 respectively, the

present two Civil Revision Petitions are filed by the petitioners.

7. The learned counsel for the petitioners reiterated the averments made in the counter affidavits and contentions made in the grounds of revision. The contentions of the learned counsel for the petitioners is that the first respondent has not explained the delay of 7 years in filing the document. The learned Judge failed to consider that the first respondent has not given any reason for the delay of 7 years. The learned Judge has erroneously interpreted Section 63(2) and Section 65(A) of Indian Evidence Act. The learned Judge failed to see that the first respondent has not complied the condition mentioned under Section 65(A) of the Indian Evidence Act. The learned Judge has committed grave error in allowing to mark the xerox copy of the agreement which is fabricated and forged for the purpose of suit after the death of the second defendant.

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8. The learned counsel for the respondents reiterated the averments made in the affidavits and submitted that the first respondent has mentioned the agreement and original endorsement in the rejoinder filed by him. The first respondent also issued notice under Order XII Rule 8 C.P.C through his counsel to provide the original document. The petitioners have denied the existence of the said agreement and denied having the said original agreement with

them. By issuing the notice, the first respondent has complied the condition contemplated under Section 65(A) and 63(2) of Indian Evidence Act. In the xerox copy of the agreement, the deceased second defendant on 24.06.2007, made an endorsement which is the original endorsement. In the circumstances, the first respondent is entitled to mark the xerox copy of the agreement with original endorsement as secondary evidence. The order of the learned Judge is valid and relied on two judgments reported in:

(i) 2014(1) CTC 216 (J.S.Godwin & another Vs. J.S.Jashmin Stellah):

“24.From the cumulative reading of the said sections, it is made clear to the Court that as per Section 63 of the said Act, secondary evidence can be produced if primary evidence is not available. However a document must be proved by primary evidence. If a party wants to produce secondary evidence, he has to fulfil the conditions mentioned in Sections 65 & 66 of the said Act.

25.Even though in the written statement filed on the side of the defendants, a mere averment is found place to the effect that the original of Ex.B28 is under the custody of the plaintiff, no attempt has been made so as to direct her to produce the same. Section 66 of the Indian Evidence Act, 1872 says that secondary evidence cannot be admitted, unless notice to produce original is given.

26.In the instant case, no attempt has been made on the side of the appellants/defendants. Since no attempt has been made on the side of the appellants/defendants and since all the legal formalities mentioned supra, have not been complied with, the Court cannot place its reliance upon Ex.B28. Even

the Court can say that Ex.B28 should not be marked by the Trial Court.”

(ii)2013 (3) CTC 405 (Srinivasa Naicker Vs. Kaliappan alias

Kalipandi and others):

“4.In this case, in the written statement or in the affidavit or in the pleadings of the revision petitioner he has not mentioned about the compromise alleged by the first respondent and therefore the order 11, Rule 15, C.P.C cannot be applied. Therefore, the contention of the learned counsel for the revision petitioner that without complying with the Order 11 Rule 15, C.P.C the application filed by the first respondent is not maintainable cannot be accepted. As the document was not referred to by the revision petitioner and it was the case of the first respondent that the original was with the revision petitioner and he was having only xerox copy, he filed the memo for production of original and in that context Order 11 Rule 15, cannot be applied. Further under Section 65 of the Indian Evidence Act, 1872, secondary evidence may be given when the original was shown or appeared to be in the possession or power of the person and the other person after the notice mentioned in Section 66, did not produce the same. Under Section 66 of the Act, secondary evidence of the contents of the documents cannot be given unless the party proposing to give such secondary evidence, has previously given to the party in whose possession or power the document is, to produce such document. In this case, a Memo was filed directing the Revision Petitioner to produce the original of the document and the revision petitioner denied the existence of the document and therefore, the first respondent has complied with the provisions of Section 66 of Indian Evidence Act and therefore, he is entitled to mark the said document as

secondary evidence. Considering all these aspects, the Court below allowed those two applications and I do not find any infirmity in the order of the Court below. Nevertheless, if the document requires registration or liable to Stamp duty, the same can be considered by the Court below, while the document is to be marked in evidence.”

9.The point for consideration in the present Civil Revision Petitions is whether the document sought to be produced by the first respondent is secondary evidence as per Section 63(2) of Indian Evidence Act and whether the respondent has complied with the conditions contemplated in Section 65(A) of the Indian Evidence Act. The provisions of the Indian Evidence Act is extracted hereunder:

63.Secondary evidence -

“(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;”

65(A). Special provisions as to evidence relating to electronic record -

“The contents of electronic records may be proved in accordance with the provisions of Section 65-B.”

66.Rules as to notice to produce – *“Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, (or to his attorney or pleader), such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of*

the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-

- (1) When the document to be proved is itself a notice;*
- (2) When, from the nature of the case, the adverse party must know that he will be required to produce it;*
- (3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;*
- (4) When the adverse party or his agent has the original in Court;*
- (5) When the adverse party or his agent has admitted the loss of the document;*
- (6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.”*

10.As per Section 63(2), copies made from the original by the mechanical process is secondary evidence and copies compared with the copies made by mechanical process are also secondary evidence. In the present case, the respondent is seeking to mark the xerox copy which is a copy made from the original by mechanical process. In addition to that, the first respondent is claiming that the deceased second defendant made an endorsement on 24.06.2007 in the bottom of the xerox copy which is original endorsement. Therefore, the xerox copy sought to be marked is a secondary evidence as contemplated under Section 63(2) of the Indian Evidence Act.

11. Section 65 mentions the cases in which secondary evidence relating to documents may be given. As per the Section 65(A), when original appears to be in possession or power of the person against whom the document is sought to be proved and when after notice mentioned in Section 65, such person does not produce it, the xerox copy can be marked as secondary evidence. In the present case, the first respondent contended that the original agreement dated 24.06.2006 is with the deceased second defendant. The first respondent gave notice to the petitioners to produce the said agreement. The first respondent has stated that notice is given under Order XII Rule 8 C.P.C instead of Section 66 Indian Evidence Act. Quoting wrong provision or not mentioning correct provision will not be fatal to the parties who issued the same. In the present case, notice was given to produce the documents. The petitioners denied existence of the agreement. Considering the above facts, I hold that first respondent has complied with conditions for marking secondary evidence and the order of the learned Judge does not warrant any interference. In the result, these Civil Revision Petitions are liable to be dismissed.

12. Accordingly, these Civil Revision Petitions are dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed.

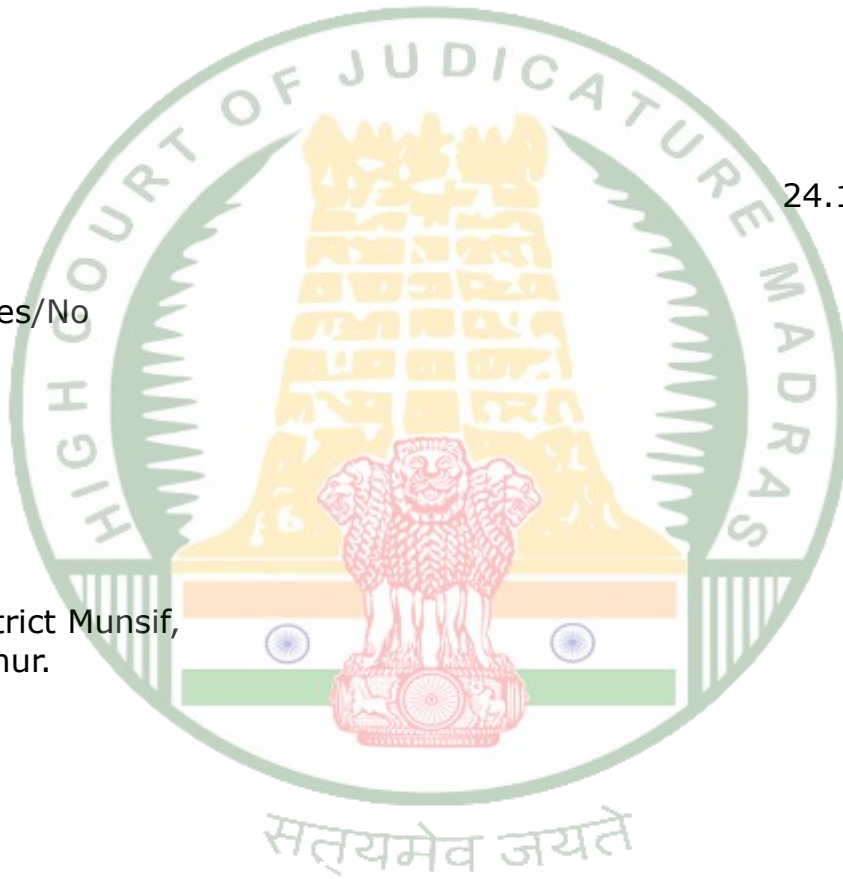
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Index: Yes/No

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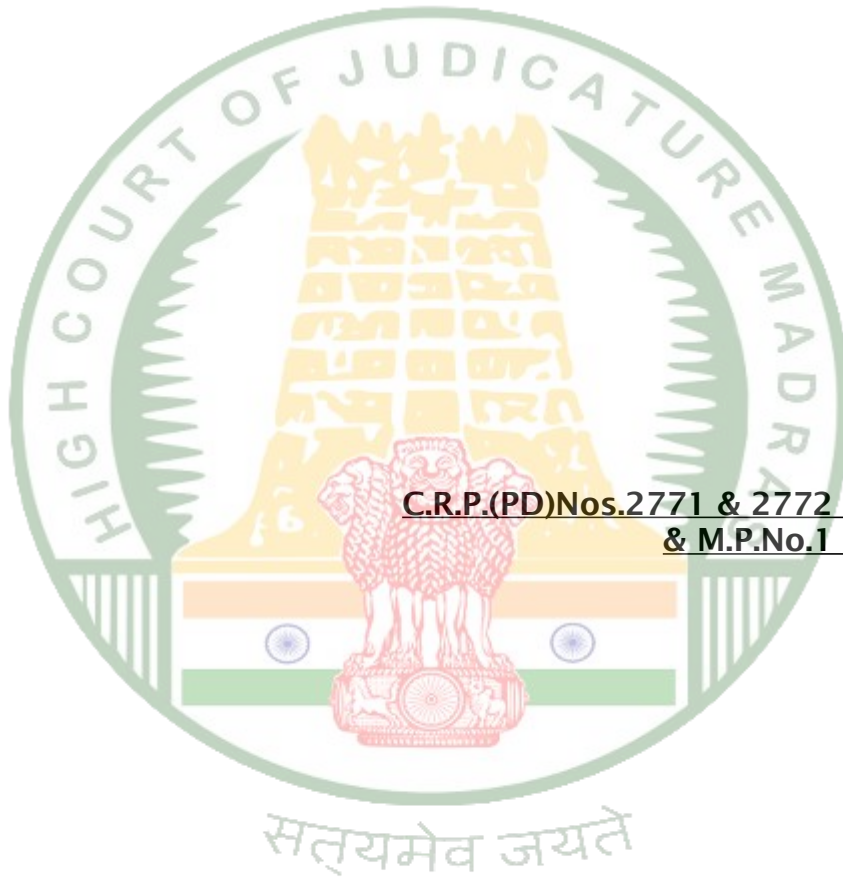
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V.M.VELUMANI,J.

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C.R.P.(PD)Nos.2771 & 2772 of 2014
& M.P.No.1 of 2014

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24.11.2017