

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **16.03.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP (PD) Nos.634 and 680 of 2017
and
C.M.P.Nos.3245 and 3443 of 2017

CRP.PD.No.634 of 2017 :

M/s.Raj Trust
rep. by one of the Beneficiaries through
his Power of Attorney Mr.Raghava
Office at 13th Floor, Raheja Towers,
26-27, M.G.Road,
Bangalore 560 001.

.. Petitioner

VS

1. M/s.Ferani Hotels (P) Limited
rep. by its Director Mr.Gopal L Raheja,
Construction House 'B',
Opposite to Telephone Exchange,
623 Linking Road, Khar West,
Mumbai-400 052.
2. M/s.K.Raheja Development Corporation
(KRDC) rep. by its Partner,
M/s.Ivory Properties and Hotels (P) Limited,
duly rep. by its Authorized representative
Mr.B.Sudharasanam,
Having its Office at Plot No.30, Block G,
Opp. SIDBI Bandra Kurla Complex,
Bandra East Mumbai-400 051.

3. M/s.K.Raheja Hotels & Estates Pvt. Ltd.,
rep. by its Authorised Signatory Mr.K.K.Balu,
Having its Registered Office at
13th Floor, Raheja Towers, 26-27,
M.G.Road, Bangalore-560 001.

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and final order dated 02.12.2016 passed by the learned I Additional Subordinate Judge of Coimbatore in I.A.No.879/2016 in O.S.No.65/2012 C/w O.S.No.747 of 2009 and O.S.No.699/2009.

CRP.PD.No.680 of 2017 :

M/s.K.Raheja Development Corporation
(KRDC) rep. by its Partner,
M/s.Ivory Properties and Hotels (P) Limited,
duly rep. by its Authorized representative
Mr.B.Sudharasanam,
Having its Office at Construction House 'A',
24th Road, Khar, Mumbai-400 052.

.. Petitioner

vs

1. M/s.Ferani Hotels (P) Limited
rep. by its Director Mr.Gopal L Raheja,
Construction House 'B',
Opposite to Telephone Exchange,
623 Linking Road, Khar West,
Mumbai-400 052.

2. M/s.K.Raheja Hotels & Estates Pvt. Ltd.,
 rep. by its Authorised Signatory Mr.K.K.Balu,
 Having its Registered Office at
 13th Floor, Raheja Towers, 26-27,
 M.G.Road, Bangalore-560 001.

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and final order dated 02.12.2016 passed by the learned I Additional Subordinate Judge, Coimbatore in I.A.No.254/2016 in O.S.No.747 of 2009 c/w O.S.Nos.699/2009 & 65/2012.

For Petitioner : Mr.T.V.Ramanujam
 in both CRPs. Senior Counsel for
 M/s.S.Subashiny

For Respondent : Mr.P.S.Raman
 in both CRPs. Senior Counsel for
 M/s.Rank Associates

COMMON ORDER

Since the issue involved in both these Civil Revision Petitions are one and the same, both were tried together and are disposed of by this common order.

2. The CRP.PD.No.634/2017 has been filed against the fair and final order dated 02.12.2016 passed by the learned I Additional Subordinate Judge, Coimbatore in I.A.No.879/2016 in O.S.No.65/2012 C/w O.S.No.747 of 2009 and O.S.No.699/2009.

3. The **CRP.PD.No.680/2017** has been filed against the fair and final order dated 02.12.2016 passed by the learned I Additional Subordinate Judge of Coimbatore in rejecting the memo in I.A.No.254/2016 in O.S.No.747 of 2009 c/w O.S.Nos.699/2009 and 65/2012.

4. The short facts of the case are as follows:

(i) The petitioner in CRP PD.No.634 of 2017 is a sub-lessee in respect of the Schedule-B property under the 2nd respondent. As per the order passed by the Bombay High Court on 16.11.2016, Mr.Justice R.G.Vaidyanatha (Retired) has been appointed as an Administrator of all the assets of the Raj Trust (Petitioner) including the premises sub-leased to the petitioner.

(ii) It is stated that on 01.04.1992, the 2nd respondent

entered into a Lease Agreement of the suit Schedule "A" property with the 1st respondent. The lease is without any limitation. It is to be noted that the Lease Agreement did not stipulate the tenancy period. The respondents 2 and 3 continued to be in possession of the suit property and the rent was regularly received by the 1st respondent till February, 2009.

(iii) While so, in March 2009, the 1st respondent refused to accept the payment of rent. In this regard, notices were exchanged between both the parties. Later on, on 09.06.2009, the 1st respondent herein issued a Legal Notice stating that the suit schedule property is in its possession whereas the 2nd respondent has given a reply notice dated 10.07.2009 that suit schedule property is in the possession of the 2nd respondent and the tenancy has not been terminated and in fact, they have been paying the rent for the suit schedule property till date.

(iv) Therefore, the 2nd respondent has filed a suit in O.S.No.699/2009 on the file of the I Additional Subordinate Judge, Coimbatore against the 1st respondent seeking for

permanent injunction restraining the respondent herein from evicting them without due process of law. In the mean time, the 1st respondent also filed I.A.No.549/2009 seeking the same relief in which an order of status quo was granted in respect of the suit schedule property. Subsequently, the said order was set aside by the appellate court.

(v) The 2nd respondent had also filed I.A.No.550 of 2009 in O.S.No.699 of 2009 for appointment of an Advocate Commissioner to take inventory of the physical features of the suit property which was ordered. Based on the Advocate Commissioner's Report, O.S.No.747/2009 was filed against the 1st respondent seeking a relief of declaration of their tenancy rights.

(vi) Subsequently, the petitioner, being a sub-tenant of the 2nd respondent herein, has filed a suit in O.S.No.65 of 2010 on the file of the District Munsif, Coimbatore and as per the orders of this Court in Tr.C.M.P.No.214 of 2011, all the three suits are being tried together jointly before the learned I

Additional Sub-Judge, Coimbatore.

(vii) Whereas, the petitioner in CRP PD No.680 of 2017 is the lessee in respect of the suit schedule property under the first respondent and this petitioner sub-let the property in favour of the petitioner in CRP PD No.634 of 2017.

(viii) The petitioner filed a civil suit in O.S.No.747 of 2009 against the first respondent seeking declaration to establish their tenancy rights and permanent injunction restricting the first respondent from trespassing into the suit property and construct any building.

(ix) It is stated that the petitioner as well as the second respondent had kept all the documents in their custody at the suit scheduled property. When the suit was posted for trial, the petitioner in order to prove its case had to rely upon the lease agreements, correspondences and other documents.

(x) Since all the documents were destroyed during the

demolition of the suit scheduled property, they have filed the above application seeking to receive the photocopy of the documents as secondary evidence in both the suits separately.

5. Both the interlocutory applications were resisted by the first respondent herein by contending that it is false to state that they had clandestinely trespassed into the suit property and demolished the building. Further, it was stated that the above said allegations are made by the petitioners only to shirk their responsibility in producing the originals or the certified copies of the records, which they seek to rely upon to establish their case. It is their contention that the petitioners were not at all present in the suit property. It is also stated that the petitioners could very well obtain a certified copy from the Arbitral Tribunal and could have produced the same. Accordingly, they contended that the documents sought to be produced by the petitioners were not at all destroyed by them and that they have not made out any ground for production of secondary evidence.

6. The Court below, after hearing both sides, had dismissed

both the applications by holding that the documents sought to be marked has been shown by the plaintiff in the plaint as if they are in originals and that they have never stated that the documents listed along with the plaint are xerox copies. It has further held that the plaintiff has not raised any plea that the documents that are now sought to be marked are destroyed in the alleged demolition and that the plaintiff could have very well got certified copies of all the documents, which they are now seeking to mark as secondary evidence from the concerned authorities. It is also held that when the suit was filed in the year 2010, they could have taken steps all these years for getting the certified copies from the authorities concerned. Without doing so, the petitioners have come up with the above applications after a period of six years, which would go to show that only to drag on the proceedings, the above applications have been filed.

7. Aggrieved by the said order of dismissal, the above two civil revision petitions have been preferred.

8. Heard both sides and perused the materials available on

record.

9. In I.A.No.879 of 2016 in O.S.No.65 of 2012, the petitioner has sought permission of the Court to mark the following documents as secondary evidence.

Exhibit Nos.	Date	Details of documents
A1	01.04.1992	Lease Agreement between M/s.K.Raheja Construction Ltd. and M/s.K.Raheja Development Corporation
A2	03.04.1992	Lease Agreement between M/s.K.Raheja Development Corporation and M/s.K.Raheja Estates and Hotels (P) Ltd.,
A3	03.04.1992	Lease Agreement between M/s.K.Raheja Development Corporation and M/s.Raj Trust
A4	25.09.2009	Arbitration Proceedings
A5	10.05.2010	Certified copy of the order by the Bombay High Court in Notice of Motion No.839 of 2010 in Suit No.2135 of 2001
A6	06.10.2010	Original Power of Attorney in favour of M.Raghava, executed by Neel Raheja
A7	13.07.2010	Order copy by the Madras High Court granting Status quo in CRP No.2562 of 2010 in M.P.No.2010

Whereas in I.A.No.254 of 2016 in O.S.No.747 of 2009, the following documents were sought to be marked.

Exhibit Nos.	Date	Details of documents
A1	01.04.1992	Lease Agreement between M/s.K.Raheja Construction Ltd. and M/s.K.Raheja Development Corporation
A2	03.04.1992	Lease Agreement between M/s.K.Raheja Development Corporation and M/s.K.Raheja Estates and Hotels (P) Ltd.,
A3	03.04.1992	Lease Agreement between M/s.K.Raheja Development Corporation and M/s.Raj Trust
A4	09.06.2009	Letter by Defendant to M/s.K.Raheja Development corporation
A5	25.05.2009	Cheques (returned by post) by defendant Advocates payment of rent periodically
A6	10.07.2009	Office copy of reply legal notice sent by plaintiff's counsel to defendant's counsel
A7	24.09.2009	Covering letter sent by Advocate Mr.Kishore D.Abichandani
A8	25.09.2009	Arbitration Proceedings
A9	20.11.2009	Certified true copy of the resolution passed dated 20.11.2009
A10	08.12.1996	Partnership Deed
A11		Certified copy of the plaint in O.S.No.699 of 2009 on the file of the 1st Additional Subordinate Judge of Coimbatore
A12		Petition and orders in I.A.No.549 of 2009 in O.S.No.699 of 2009, 1st Additional Sub Court, Coimbatore
A13		Petition and order in I.A.No.550 of 2009 in O.S.No.699 of 2009.

10. It is the contention of the petitioners that the building was demolished on 19.11.2009 and the debris were removed on

27.11.2009 and therefore, the original documents, which were kept in the demolished building were destroyed. Therefore, they have sought for marking of the said document. However, from the perusal of the papers, it is seen that certain documents have been notarized by the petitioner on 21.11.2009 through their lawyer at Mumbai and Coimbatore, which would go to show that the originals or certified copies of the documents, which are now sought to be marked as secondary evidence are in the custody of the petitioners. Further, the documents listed as Exs.A1 to A4 in I.A.No.879 of 2016 and Exs.A1, A2 and A3 I.A.No.254 of 2016 are the lease agreements entered into between the parties, which are registered documents; further Exs.A4 to A7 in I.A.No.879 of 2016 and Exs.A8 to A13 in I.A.No.254 of 2016 are only court proceedings for which, the petitioners could get the certified copies from the Arbitral Tribunal and the same can be filed as secondary evidence. Exs.A4 to A7 in I.A.No.254 of 2016 are the communication between the parties, which they have to prove in the manner known to law.

11. The trite proposition of law is that in a civil court, a mere un-authenticated photocopy of a document cannot be

produced as evidence. Normally a certified copy of the document can be produced as secondary evidence. But in the present case the petitioner is seeking to mark the lease agreement, returned cheques and the communication between the parties as secondary evidence. The petitioner, at the time of filing the suit in the year 2010, has not stated in the plaint averments that they are not holding the originals and only the xerox copies of the documents are only available with them. It is the case of the plaintiff that the originals were destroyed while the building was demolished; however, they had obtained notarization of the documents, two days before the said demolition took place. Therefore, the plaintiff cannot be permitted to take advantage of his own wrong.

12. The learned Senior counsel appearing for the respondents would submit that they have got no objection for marking of the certified copies of the documents, which are court proceedings, by the petitioners.

13. Section 63 of the Indian Evidence Act, 1872 specifically

lays down what can be termed as secondary evidence and Section 65 of the Act lays down the situation in which secondary evidence can be filed. A photo copy is not admissible in evidence as it is specifically barred under Section 63 of the Indian Evidence Act, 1872.

14. Section 65 of the Indian Evidence Act deals merely with the foundation that has to be laid for the reception of secondary evidence. One of the circumstances under which the Section allows the secondary evidence is when the originals were destroyed or lost. Therefore, the secondary evidence itself must be of the nature as described in Section 63 of the Evidence Act. A true copy of the document will not be admissible under Section 63 unless it is shown that it had been made from or compared with the original. There must also be sufficient proof of the search for the original to render the secondary evidence admissible.

15. It is a cardinal rule in the law of evidence that the best

available evidence should be brought before the Court. Once an oral contract is reduced to writing, it is not open to any of the parties thereto to prove the terms of the contract by referring to any original oral agreement as Section 91 would stand in the way and would preclude the party from proving the terms of the transaction otherwise than by the deed itself.

16. At this juncture, I would like to refer to the judgment of the Hon'ble Apex Court reported in **(2001) 3 SCC 1 (Bipin Shantilal Panchal Vs. State of Gujarat and another)** wherein it is held that any objection raised while marking the document pertaining to the insufficiency of stamps, the same shall be adjudicated immediately. Only when the document is not registrable the same may be received in evidence subject to its proof and relevancy. The relevant paragraphs are as follows:

"13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection.

But the fall out of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realized through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an

objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

[emphasis supplied]

17. Applying the aforesaid principles to the case on hand, the following order is passed:

- (i) The documents, which are shown as Exs.A1 to A4 in

I.A.No.879 of 2016 and Exs.A1, A2 and A3 I.A.No.254 of 2016 by the petitioners are the lease agreements entered into between the parties, if they are registered documents, the same may be permitted to be marked as evidence, however, subject to its proof, admissibility and relevancy. It is also made clear that if the said documents are insufficiently stamped, the Court below is directed to take up the said documents and decide the same immediately, before proceeding further in the matter. Similarly, Exs.A4 to A7 in I.A.No.254 of 2016, which are the communications exchanged between the parties, viz., returned cheques, reply legal notice, covering letter, etc., may also be permitted to be marked subject to its proof, admissibility and relevancy.

(ii) Inasmuch as the following documents, being the court proceedings, the petitioners are permitted to mark the same as secondary evidence by obtaining certified copies from the Arbitral Tribunal.

Exs.A5, A6 and A7 in I.A.No.879 of 2016 in O.S.No.65 of 2012

A5	10.05.2010	Certified copy of the order by the Bombay High Court in Notice of Motion No.839 of 2010 in Suit No.2135 of 2001
A6	06.10.2010	Original Power of Attorney in favour of M.Raghava, executed by Neel Raheja
A7	13.07.2010	Order copy by the Madras High Court granting Status quo in CRP No.2562 of 2010 in M.P.No.2010

and Exs.A9 to A13 in I.A.No.254 of 2016 in O.S.No.747 of 2009

A9	20.11.2009	Certified true copy of the resolution passed dated 20.11.2009
A10	08.12.1996	Partnership Deed
A11		Certified copy of the plaint in O.S.No.699 of 2009 on the file of the 1st Additional Subordinate Judge of Coimbatore
A12		Petition and orders in I.A.No.549 of 2009 in O.S.No.699 of 2009, 1st Additional Sub Court, Coimbatore
A13		Petition and order in I.A.No.550 of 2009 in O.S.No.699 of 2009.

19. With the above observation and direction, both these civil revision petitions are disposed of. No costs. Consequently, the connected miscellaneous petitions are closed.

16.03.2017

vj2

Index: yes/No

Internet: yes

PUSHPA SATHYANARAYANA,J.,

vj2

To
The I Additional Subordinate Judge of Coimbatore

CRP PD Nos.634 and 680 of 2017

16.03.2017

<http://www.judis.nic.in>