



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.01.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M. VELUMANI**CRP (MD) .No.1482 of 2016**

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Ayyankalai

: Petitioner

Vs.

1.Nakkan@Mayandi

2.P.S.Periyasamy

3.Aandi

4.Selvarasu

5.Ayyachamy

6.Periapandi

7.Pandi

8.Ponnuthai

9.Pommakkal

Veerammal (died)

10.Ponnuthai

11.Shanmugam

12.Inspector, Boodhan Board

Tamil Nadu Boodhan Board,

Office of the District Collector,

Dindigul District, Dindigul

: Respondents

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 18.07.2016 passed in I.A.No.265 of 2016 in O.S.No.135 of 2008 on the file of the District Munsif, Nilakkottai.

For Petitioner : Mr.S. Subbiah

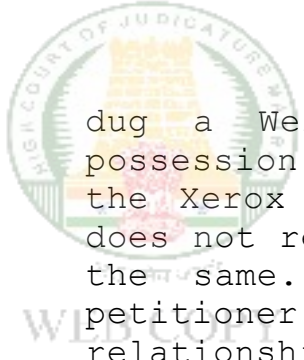
For Respondents : Mr. N. Dilipkumar for R1 to R11

ORDER

This Civil Revision Petition is filed to set aside the fair and decreetal order dated 18.07.2016 passed in I.A.No.265 of 2016 in O.S.No.135 of 2008 on the file of the District Munsif, Nilakkottai.

2. The petitioner is the plaintiff. The respondents are the defendants in O.S.No.135 of 2008 on the file of the District Munsif, Nilakkottai. The respondents filed written statement and contesting the suit and trial commenced and PW.1 was examined. At that time, the petitioner filed I.A.No.265 of 2016 for permitting him to file Xerox copy of the document as per Sections 65(A) and 66 of Indian Evidence Act.

3. According to the petitioner, the suit property was purchased by his father on 10.1.1986 by the officials of the Boomidhan Board. In the said S.No.201/1, the petitioner's father



dug a Well and obtained electricity connection and was in possession and enjoyment of the property. His father handed over the Xerox copy of the allotment order and informed him that he does not remember, to whom, he gave the original and where he kept the same. After death of his father, the brothers of the petitioner released their share to the petitioner and due to the relationship, no sale deed was executed and registered. Along with suit, he filed Xerox copy of the allotment order, dated 10.01.1986. The petitioner filed I.A.No.496 of 2015 to implead the Boomidhan Board. Subsequently, Boomidhan Board was impleaded as 13th defendant. The respondents did not file any counter.

4. The learned Judge considering all the materials and also considering the Judgements rendered by this Court dismissed the application holding that the petitioner has not complied with provisions of Indian Evidence Act for marking a document as secondary evidence.

5. Against the said order of dismissal, the present Civil Revision Petition has been filed.

6. The learned counsel appearing for the petitioner submitted that the learned Judge did not properly appreciate Sections 63 and 65 of Indian Evidence Act and failed to establish the scope of Sections 65(A) and 65(C) of the Indian Evidence Act. The learned Judge is not correct in saying that the secondary evidence can be let in only when the original is lost or destroyed or the person, who is in possession of the said document failed to produce the same in to the Court. The learned Judge failed to see that the documents sought for is a public document within meaning of Section 74 of the Act r/w. Sub Section (g) of the said Act. The learned Judge failed to see that the petitioner has stated that original document dated 10.01.1986 was lost.

7. The learned counsel appearing for the respondents filed counter affidavit and submitted that petitioner is not entitled to mark the Xerox copy of the documents as secondary evidence, as he has not complied with the provisions of Indian Evidence Act. He further submitted that Xerox of the document is a fabricated one. There are lot of manipulation and corrections in the Xerox copy of the order produced by the petitioner. The Xerox copy of the document sought to be marked is a Public document and therefore, only a certified copy of the document can be marked.

8. In support of his contention, the learned counsel for the respondents relied on the following Judgments:-

(i) In the Judgement reported in **2003(1) CTC 33 (The Tamil Nadu Industrial Investment Corporation Limited., Vs. N.Swaminathan and two others)**, wherein, in paragraph nos. 3 to 6, it is held follows:-



3. On a reading of Section 65(c) of the Indian Evidence Act, I find that only in the event of the petitioner establishing to the satisfaction of the trial Court that the documents were either lost or destroyed, the petitioner could be permitted to mark the copies of those documents by way of secondary evidence. Reliance was placed upon by the learned counsel for the petitioner in (Balaji Seafoods Exports (India) Ltd. v. Mac Industries Ltd.) and (Marwari Kumhar and others v. Bhagwanpuri Guru Ganeshpuri and another) in support of her contention. Even in the above referred to judgments also, it has been made clear that in the event of the party satisfying the stipulations contained in Section 65(c) of the Act, they would be entitled for marking of copies of the documents by way of secondary evidence. Unfortunately, in the case on hand, a reading of the affidavit filed in support of the petition and the relevant averment contained in para 3, which is to the following effect, "I state that the defendant have admitted the execution of all the aforesaid documents in his written statement. I state that there was a shift of office premises. During the course of shifting the said documents were misplaced. All the efforts to trace out the documents were ended in vain. Therefore this petitioner was not able to produce the said documents in the original form before this Hon'ble Court during the course of trial."

would disclose that the petitioner has come forward with the said averment in the most casual manner while contending that the primary documents, based on which the suit claim wholly rests, such as hypothecation deed, deed of guarantee as well as memorandum, by which the first respondent deposited the title deeds, were all misplaced.

4. It is not even the contention of the petitioner that the documents were lost once and for all or destroyed by the petitioner. In fact, there is no detail as to who was entrusted with the custody of those documents; at what point of time, shifting of the premises took place and from which place to which place. There is also no detail as to at whose instance any search was made and as to what further action was taken against the personnel concerned, who were entrusted with the custody of those valuable documents. Thus, the petitioner's affidavit, in support of its application, was lacking in material particulars.

5. In fact, no steps were taken by the petitioner to establish to the satisfaction of the Court below that the documents were really lost or destroyed in the course of the official business transaction of the petitioner. In such circumstances, the petitioner had absolutely no right to invoke Section 65(c) of the Evidence Act in order to seek for marking of xerox copies of the documents to



support its suit claim. The Court below has rightly held that even according to the petitioner, the documents were only misplaced and not lost once and for all and that nothing was placed before the Court to show that earnest efforts were taken for tracing out the documents and that in spite of such efforts, the petitioner could not trace out the same.

6. Therefore, I do not find any illegality or irregularity in the order of the Court below in rejecting the petitioner's application for marking of xerox copies. As the rights of the parties are to be determined based on those relevant material documents, with reference to which the petitioner seeks permission of the Court by filing xerox copies, it is incumbent upon the trial Court to take extreme care and caution to see whether the petitioner was really placed in such an extreme situation, where it was not in a position to produce the originals in order to permit the petitioner to rely upon the xerox copies of those documents. It will have to be borne in mind that xerox copies will not always tally with the originals and we cannot rule out the possibility of any interpolation being made in the xerox copies. In other words, xerox copies being inferior in character vis-a-vis originals, the dispensation of filing of the originals can be considered only under exceptional circumstances and not as a matter of routine. Hence, no fault can be found with the perception of the Court below, while rejecting the petitioner's application filed under Section 65(c) of the Indian Evidence Act.

(ii) In the Judgement reported in **2014(1) CTC 216 (J.S.Godwin and another Vs. J.S.Jashmin Stellah)**, wherein in paragraph no.24 it is held as follows:-

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 and 66 of the said Act.

(iii) In the Judgement reported in **2006(5) CTC 36 (K.Ashraff Vs. S. Gangaraman)**, wherein in paragraph nos.9,11,12 and 14 it is held as follows:-

9. Section 65 of the Evidence Act deals with the case in which secondary evidence may be given of the existence, condition, or contents of a document in the following cases :

"(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) ;

(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; ...
"

11. Considering the plea of marking xerox copies of the said documents, on the ground that the originals were misplaced, this Court in 2002 (4) L.W. 147 (The Tamilnadu Industrial Investment Corporation Ltd., Chennai Transport Branch vs. N.Swaminathan and two others) in paragraph 6, has held as follows :

it is incumbent upon the Trial Court to take extreme care and caution to see whether the petitioner was really placed in such an extreme situation, where it was not in a position to produce the originals in order to permit the petitioner to rely upon the xerox copies of those documents. It will have to be borne in mind that xerox copies will not always tally with the originals and we cannot rule out the possibility of any interpolation being made in the xerox copies. In other words, xerox copies being inferior in character vis-a-vis originals, the dispensation of filing of the originals can be considered only under exceptional circumstances and not as a matter of routine.

The Court, while rejecting the prayer for marking the xerox copy of the alleged document, further observed that the averments, during the course of shifting the office, the documents were misplaced" has been made in a casual manner.

12. In 2006 (1) MLJ 699 (K.Mohammed Rafee vs. A.G.Akbar Sherief), this Court has held as follows:

"Only in exceptional circumstances, only when the original is not available, in the interest of justice, the Court can permit the party to file the xerox copy."

In the above case, this Court declined the plea to mark the xerox copy of the unregistered document even for collateral purposes, when the original was available.

13. In Rathinambal vs. P.Rajasekaran and others (2006 (2) CTC 177), this Court considered as to whether a xerox copy of a Will can be marked as a secondary evidence in the absence of pleadings that the original was with the plaintiff therein and that



it was not even shown as a document in the list of documents. Held that the refusal to grant permission to let in secondary evidence is justified.

14. As stated supra, the averment in the petition to receive the documents is that, the documents enlisted hereunder are mixed up with other documents" and hence he was unable to produce them along with the written statement. There is absolutely no pleading as to whether there was any bonafide search. The words lost or destroyed are clear, unambiguous and are susceptible to only one meaning. "Mixed up with other documents" does not mean lost to invoke section 65 (c) of the Evidence Act. The said Section contemplates that secondary evidence is not permissible for any reason arising from his own default or neglect. In the above said circumstances, xerox copy of the unregistered Lease Deed, dated 07.07.1989 cannot be received as evidence, much less for collateral purposes.

(iv) In the Judgement reported in **2012(2) MLJ 370 (K.V. Venkataraman Vs. N. Venkatakrishnan)**, wherein in paragraph nos.16 and 17 it is held as follows:-

16. At this juncture, it is appropriate to consider Section 65(a) of Indian Evidence Act, which is as follows:-

65. Cases in which secondary evidence relating to documents may be given....

(a) when the original is shown or appears to be in the possession of power-
of the person against whom the document is sought to be proved, or of any person out of reach of, not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after notice mentioned in Section 66, such person does not produce it."

17. The learned counsel for the respondent has relied upon the following decisions of the Apex Court in

(I) Smt. J. Yashoda Vs. Smt. K. Shobha Rani (supra), wherein, in para 9 it held as follows:

"Under Section 64, documents are to be provided (sic proved) by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in Section 65 must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-



production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

9. I have heard the learned counsels appearing on either side and perused the materials available on record.

10. The petitioner is seeking to mark the Xerox copy of the document dated 10.01.1986. According to the petitioner, the said document was issued to his father on 10.01.1986 by the Boomidhan Board. The petitioner's father handed over only Xerox copy of the document as his father did not have the original and did not know where he kept original and to whom, he has given the original.

11. The learned Judge considered all the materials on record and judgments of this Court and held that the petitioner has not proved that he is entitled to the benefits of provisions of Indian Evidence Act, with regard to marking of the document as secondary evidence. In the circumstances the judgments relied on by the learned counsel for the respondents are squarely applicable to the facts of the present case to hold that the learned Judge has not committed any illegality or irregularity.

12. In the circumstances, the learned Judge considered all the materials on record in proper perspective and has given cogent and valid reasons for dismissing the Interlocutory Application in I.A.No.265 of 2016 in O.S.No.135 of 2008 on the file of the District Munsif, Nilakkottai, dated 18.07.2016. Further, the learned Judge has exercised his power conferred on him properly and there is no irregularity or illegality warranting interference by this Court.

13. In the result, the Civil Revision Petition is dismissed. No costs.

Sd/-

Assistant Registrar (Records)

/True copy/

Sub Assistant Registrar

To

The District Munsif, Nilakkottai.

Copy To:

The Section Officer, V.R Section,

Madurai Bench of Madras High Court, Madurai.

+1 CC to Mr.N.Dilip Kumar, Advocate, SR No. 1892

+1 CC to Mr.S.Subbiah, Advocate, SR No. 2224.

TRP

PSM/KP/SAR2/04.04.2017/7P/5C