

HONOURABLE SRI JUSTICE P. NAVEEN RAO

CIVIL REVISION PETITION No.3950 of 2011

Date :2.10.2017

Between :

Syed Salar S/o Syed Usman
32 years Ayyappanagar
Vijayawada, Krishna district

Petitioner

And

Nazeerunnisa W/o Abdul ghani
37 years
E No. 15-28,
Sannatnagar, Kanuru panchyat
Penamaluru mandal, Krishna district

Respondents

The Court made the following:



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ORAL ORDER :

Revision petitioner is plaintiff. Plaintiff instituted suit for specific performance of agreement dated 22.12.2007 and to direct the defendant to execute proper sale deed by receiving the balance sale consideration concerning the suit schedule property. In the said suit, defendant filed I.A.No. 587 of 2011 seeking to produce the original sale agreement dated 20.12.2007, which according to him is in the custody of plaintiff.

2. For the sake of convenience parties are referred to as they are arrayed in the suit.

3. The averments made in the affidavit filed in support of the said I.A. would disclose that according to defendant, plaintiff approached the defendant to sell the subject property for a total consideration of .38,16,000/- and defendant agreed to sell the property as requested by plaintiff and defendant executed two sale agreements on 20.12.2007 and 22.12.2007 for .20,70,000 and . 17,46,000 respectively for a total sale consideration of .38,16,000.

4. According to defendant, the original sale agreements dated 20.12.2007 and 22.12.2007 are in the custody of plaintiff and only photo copies are available with defendant, therefore, she filed I.A seeking direction to plaintiff to produce the original sale agreement dated 20.12.2007. Further averment made in the affidavit is that in the event of plaintiff failing to produce the same, the Court may grant option to the defendant under Section 65 of the Indian Evidence Act and permit the defendant to mark the document/agreement dated 20.12.2007 on behalf of defendant in the evidence.

5. This plea of the defendant was opposed by the plaintiff. The categorical assertion of the plaintiff is that there was no such agreement entered into and no such agreement is subsisting and that plaintiff do not have the same in as much as the same was never executed. Both sides relied on precedent decisions in support of their contentions.

6. Though, as per the prayer in the I.A. and the submissions made appear to be on production of the original sale agreement dated 20.12.2017, it appears the arguments are also advanced on the issue of admissibility of the photo copy of agreement of sale dated 20.12.2007 as secondary evidence. The trial Court by the order against which this revision is filed, permitted the defendant to mark the document as secondary evidence subject to proof of relevancy and further observed that legality of the said document can be decided at an appropriate stage.

7. Notice served on respondent but no appearance is filed.

8. Learned counsel for petitioner Sri P Durga Prasad submits that when plaintiff has categorically denied existence of agreement of sale dated 20.12.2007 and the defendant was only relying on photo copy of the said agreement of sale, the same cannot be admissible in evidence even as secondary evidence. The parameters for marking a photo copy of the document relied on by the defendant is not satisfied, therefore, the trial Court erred in granting the relief in favour of defendant to mark non existent document. In support of his contention, he placed reliance on judgment of this Court in **Smt K Neelamma Vs.B Suryanarayana and others¹**, **Namburu Bulli Veera Bhadra Prasad and others Vs. Vegi Venkata Satyanarayana (died) and others²** and judgment of Supreme Court in **Smt J Yashoda Vs. Smt K Shobha Rani³**.

¹ 1990 (2) ALT 171

² 1998 (1) ALT 663

³ 2007 AIR SCW 2713

9. In **Smt J Yashoda**, Supreme Court exhaustively considered the issue of admissibility of the document under Section 65 of the Indian Evidence Act. In the said decision also the documents sought to be received and marked as secondary evidence were photo copies. The High Court held that the photo copies cannot be received as secondary evidence in terms of Section 63 of the Indian Evidence Act and accordingly allowed the revision. The said decision of the High Court was affirmed by the Supreme Court.

9.1. The Supreme Court held as under:

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

.....

8. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided 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 the said Section 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. In Ashok Dulichand v. Madahavlal Dube and Anr. MANU/SC/0278/1975MANU/SC/0278/1975:[1976]1SCR246, it was inter alia held as follows:

After hearing the learned Counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those

clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court.”

10. In **K Neelamma**, learned single judge of this Court has taken the same view.

11. As seen from the material on record, there is no averment in the affidavit filed in support of the I.A that the original document is in custody of plaintiff and the photo copy relied upon by the defendant was taken from the original document and no material is brought on record to show that the original document is in possession of the plaintiff. There is no explanation offered by the defendant as to in what circumstances the photo copy was prepared and when the original document was executed. The person in whose presence the original document was executed is also not stated. Vague plea is raised by the defendant to contend that two agreements of sale were executed on 20.12.2007 and 22.12.2007 respectively and that defendant is in possession of the photo copies only. It is not stated as to how the photo copy is in the hands of the defendant and when the photo copy came into

the hands of the defendant and how the original copy is kept in the custody of plaintiff. Thus, the averments in support of the claim to treat the document in the custody of the defendant as secondary evidence, is not valid and parameters for admission of such document as secondary evidence are not satisfied. Therefore, the trial Court erred in allowing the petition and granting the relief in favour of the defendant. The order under revision is set aside. The revision is accordingly allowed. No costs. Having regard to the same, miscellaneous petitions, if any pending, are closed.

DATE: 02.11.2017
TVK

P NAVEEN RAO,J



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