

HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No.4241 OF 2017

ORDER:

This Civil Revision Petition is arising out of the order, dated 02.08.2017, passed in I.A.No.501 of 2017 in O.S.No.134 of 2014 on the file of Motor Accidents Claims Tribunal – cum – IV Additional District Judge, Vizianagaram. The petitioner is the defendant, who filed the aforesaid petition, under Section 65 of the Evidence Act and Order VIII Rule 1-A C.P.C., to receive the photostat copy of stamped memorandum of understanding entered into between the parties to mark it as an exhibit on his side. The respondent herein is the plaintiff, who has filed the suit for specific performance of contract. The said petition was dismissed by the trial Court and therefore, the present revision petition is filed.

2. Heard the arguments of learned counsel for the petitioner and learned counsel for the respondent.

3. Learned counsel for the petitioner submits that the original of Memorandum of Understanding (for short, 'MOU') was misplaced in the office of the petitioner – defendant and in spite of best efforts, the petitioner could not trace it and could only secure a photostat copy of the same. Therefore, the petitioner intended to adduce secondary evidence, and filed the present petition under Section 65 of the Evidence Act before the trial Court. Learned counsel for the petitioner

referred to paragraph No.8 of the written statement filed in the suit, which is as under:

“As admitted by the Plaintiff, on 05.03.2014, defendant got an Agreement of sale-cum-GPA registered bearing document No.875/2014, in its name with respect to the lands mentioned therein and it was informed to the Managing partner of plaintiff before as a matter of courtesy and understanding. On the same day i.e., 05.03.2014, the Managing Partner of the Defendant, the Managing Partner of Plaintiff firm, got the their understanding of the Managing Partner of Plaintiff investing Rs.5,00,00,000/- reduced into writing as a document with the nomenclature MEMORANDUM OF UNDERSTANDING Dt.05.03.2014, which has been very conveniently suppressed by Plaintiff from being disclosed as it would run contra to its claim. The original of MOU dated 05.03.2014 is very unfortunately missing in the office of this defendant and this defendant believes that the document might have been lost when the office was shifted from R.R. Enclave, Shivaji Park to Seethammadhara, Visakhapatnam. The defendant is still searching for the said document and if it is found, the same would be filed during the time of trial.”

4. Learned counsel for the petitioner referring to above paragraph submits that on 05.03.2014, the Managing Partner of the petitioner and the Managing Partner of the respondent firm entered into an understanding that the Managing Partner of respondent shall invest Rs.5,00,00,000/- (Rupees five crores) and the same was reduced into a document with a nomenclature, “Memorandum of Understanding”, dated 05.03.2014. It is further submitted that the photostat copy of the document filed before the Court was not

received in the evidence. Therefore, sought for setting aside the order relating to receiving the document by trial Court.

5. Learned counsel for the respondent submits that the petitioner has not laid any foundation in his written statement as per the provision under Section 65 of the Evidence Act. Placing reliance on two decisions reported in **Ganji Satyanarayanamurthi v. S. Satyanarayana Raju and others**¹ and **Suddapalli Lakshmi Saroja v. Vishnubotla Murli Krishna and others**², it is submitted that the party who intends to rely upon secondary evidence, it is required to lay foundation therefor. As the petitioner has not laid any foundation in the written statement, except stating that the document is misplaced in his office, and he made efforts and could not secure it, nothing is offered to prove his efforts. Since the burden on the petitioner has not been discharged, the trial Court has rightly dismissed the petition under Section 65 of the Evidence Act.

6. It is further contended that the trial Court has dismissed the petition on the ground that the document is a photostat copy, which is sought to be received in the evidence, and that photostat copy cannot be sent for the opinion of expert for analysing the disputed signature in the photostat copy, as the respondent has disputed his signature in the MOU. The other contention is that even if the photostat copy of

¹ 2015 (4) ALD 4

² 2014 (5) ALT 439

the document is received in the evidence, that cannot be sent for impounding as the photostat copy cannot be impounded. Therefore, the trial Court has properly considered all the aspects and rightly dismissed the petition.

7. In this regard, the learned counsel for the petitioner further submitted that admissibility, proof and relevancy of the document can be decided at the time of marking of the document during the trial. Therefore, the petitioner has filed the petition under Section 65 of the Evidence Act to prove that the original document was lost and the photostat copy was taken by a mechanical process out of the original. It is further submitted that since the petition was dismissed by the trial Court, he could not lead secondary evidence under Section 65 of the Evidence Act to prove that the photostat copy was obtained from the original document.

8. At the outset, it is obvious that the petitioner had taken a plea in the written statement that the document sought to be marked in the evidence was a MOU and it was a photostat copy. As the petitioner has lost the original MOU in his office, he wanted to receive the photostat copy of the said document in his evidence. The document was, dated 05.03.2014. The truth or otherwise of the said document can be decided after the trial. As rightly contended by the learned counsel for respondent, photostat copy cannot be sent to expert for comparison of disputed signature therein. It is also equally clear that

the photostat copy cannot be sent for impounding, if any, impounding is required. On the other hand, the learned counsel for petitioner submitted that the document 'MOU' was executed on a stamp paper of Rs.100/- and it does not require to be impounded as the stamp duty under Article 6 of the Indian Stamp Act was paid. Therefore, the second contention of learned counsel for respondent has no force as to whether the MOU is admissible in evidence or not. However, the question could be decided after marking the document by the trial Court. In the interest of justice, the trial Court may mark the said document in the evidence of the witnesses produced by the petitioner but, however, subject to proof and relevancy. Therefore, an opportunity to be given to the petitioner to adduce evidence to prove his photostat copy of document as required under Section 65 of the Evidence Act. Section 65 of the Evidence Act reads as under:

65. Cases in which secondary evidence relating to documents may be given:- 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, 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) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved by his representative in interest;

(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;

- (d) when the original is of such a nature as not to be easily movable;
- (e) when the original is a public document within the meaning of section 74;
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India) to be given in evidence;
- (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

9. In view of the provision under Section 65 of the Evidence Act, the petitioner is entitled for an opportunity to prove his Photostat copy of the document in a secondary evidence. The trial Court has declined to give permission to the petitioner to prove by secondary evidence.

10. With these observations, the order passed by the trial Court is set aside, directing to give an opportunity to the petitioner to lead his evidence under Section 65 of the Evidence Act, and on consideration of the evidence, the document may be received in the evidence. This exercise should be completed within a period of ten (10) days from the date of receipt of a copy of this order. The trial Court is directed to dispose of the suit expeditiously, the trial Court

shall not get influenced by any of the observations made in this order, while disposing of the petition under Section 65 of the Evidence Act and the suit.

11. Accordingly, the Civil Revision Petition is allowed. Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed. There shall be no order as to costs.

November 03, 2017.
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GUDISEVA SHYAM PRASAD, J



HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD



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