

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.5274 of 2015

ORDER:

This Civil Revision Petition is filed under Article 227 of Constitution of India by the petitioner/plaintiff, challenging the order in I.A.No.180 of 2015 in O.S.No.231 of 2012 passed by the II Additional Senior Civil Judge, Kakinada, refusing permission to let in secondary evidence by order, dated 30-09-2015.

I.A.No.180 of 2015 is filed by the petitioner/plaintiff seeking permission under Section 65 of Indian Evidence Act to permit him to adduce secondary evidence as the deed of dissolution, dated 26-05-1996 dissolving the marriage by customary divorce was misplaced and Photostat copy of deed was filed into the Court and requested to permit him to mark the same as secondary evidence but the trial Court dismissed the petition on the ground that producing Photostat copy of deed, dated 26-05-1996 is not sufficient and rejected the request.

Aggrieved by the order, the present revision is filed on various grounds mainly on the ground that when the original was not traced despite many efforts, the petitioner can be permitted to adduce secondary evidence and if he is not allowed to marke, it will cause serious prejudice to the

petitioner and it is difficult for him to defend the suit and prayed to set aside the order passed by the trial Court while granting permission to let in secondary evidence.

Learned counsel for the petitioner Sri K. Chidambaram during hearing would contend that the daughter of the petitioner filed a petition before Human Rights Commission, where the petitioner herein engaged a counsel and entrusted original divorce deed, dated 26-05-1996 dissolving the marriage between himself and respondent herein and the same was taken back from the counsel at Hyderabad and handed over to the counsel before the trial Court, who in turn misplaced the same. Therefore, the original deed of divorce cannot be traced and Photostat copy of the dissolution deed was already filed along with the plaint and unless it is marked it is difficult for the petitioner and requested to grant leave to adduce secondary evidence.

Sri A.K. Kishore Reddy, learned counsel for the respondent disputed to grant leave urged by the petitioner before this Court while supporting the order in all respects.

In view of the specific ground urged before this Court it is necessary to advert to the contents of the affidavit filed along with this petition seeking leave of this Court to adduce secondary evidence. It is asserted in the affidavit that the deed of dissolution of marriage was executed on 26-05-1996

and customary divorce was obtained. The daughter of the petitioner lodged complaint against the defendant before Human Rights Commission of A.P., Hyderabad and while preparing the said complaint the petitioner handed over the original dissolution deed to his counsel Bokka Satyanarayana of Hyderabad and he took the same from his counsel at Hyderabad and delivered the same to his advocate in trial Court in O.S.No.231 of 2012 and the same was misplaced. So, the leave urged before this Court by the petitioner is on the allegation made by him in paragraph No.3 of his affidavit. However, it is incumbent upon the petitioner to file the original document along with his pleading in compliance of Order VII Rule 14 of Code of Civil Procedure.

Order VII Rule 14 Clause (1) of Code of Civil Procedure mandates that where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such document in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

According to Order VII Rule 14 Clause (2) of Code of Civil Procedure, where any such document is not in the possession or power of the plaintiff, he shall, where possible, state in whose possession or power it is. But in this case as

per the allegations made in the affidavit, the document was handed over to the counsel at Hyderabad by name Bokka Satyanarayana and in turn took back the document and handed over the counsel in the trial Court but the affidavit is totally silent when the document was handed over, taken back and handed over to the present counsel before the trial Court, therefore, in absence of any details it is difficult to believe such contention. However, there must be a foundation in the pleadings to adduce secondary evidence but the question of laying foundation in the pleadings does not arise since the incident of misplacement of the document took subsequent to filing of the complaint and the petitioner did not annex the original dissolution deed as required under Order VI Rule 14 Clause (1) of Code of Civil Procedure.

Section 65 of Indian Evidence Act permits secondary evidence. According to Clause (a) of Section 65 of Indian Evidence Act, 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, the Court may grant leave to adduce secondary evidence. Clause (c) of Section 65 of Indian Evidence Act further

contemplates that 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, the Court may permit to adduce secondary evidence.

What is secondary evidence is defined under Section 63 of Indian Evidence Act, which includes certified copies given under the provisions hereinafter contained, copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies, copies made from or compared with the original, counterparts of documents as against the parties who did not execute them and oral accounts of the contents of a document given by some person who has himself seen it.

In the present case, a Photostat copy of the document was filed along with the complaint and on account of loss of document, subsequent to the filing of complaint in the office of present counsel appearing in the trial Court he could not produce the original and it is covered by Section 65 Clause (c) of Indian Evidence Act. But a Photostat copy is inadmissible in evidence in view of judgment of Hon'ble Apex Court reported in **U. Sree v. U. Srinivas**¹. In paragraph Nos.17 and 18 of the judgment the Hon'ble Apex Court held that mere

¹ (2013) 2 Supreme Court Cases 114

admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. In the case at hand, the learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned and there was a denial, the secondary evidence is admissible. In the considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of the Supreme Court. If the principle laid down in the above judgment is applied to the present facts of the case a Photostat copy cannot be received and admitted in evidence as secondary evidence.

In another judgment reported in ***Kaliya v. State of Madhya Pradesh***², the Hon'ble Apex Court held that only on being satisfied that original Dying Declaration was not traceable, rightly permitted to adduce secondary evidence by way of production of its carbon copy and cannot be found fault. In the facts of the above judgment the Court satisfied about loses of original but not on account of default or neglect. The carbon copy is different from Photostat copy.

² (2013) 10 Supreme Court cases 758

In ***Tukaram S. Dighole v. Manikrao Shivaji Kokate***³, the Hon'ble Apex Court has considered the permissibility to adduce secondary evidence i.e., cassette produced before the Court and disallowed the petition on the ground that the secondary evidence is not admissible until non-production of primary evidence is satisfactorily proved. However, Section 65 (e) of Indian Evidence Act carves out an exception to the extent that when original document is a "public document" secondary evidence is admissible even though original evidence is still in existence and available.

But here it is not a case the document sought to be received is a "public document". Therefore, declining to grant permission or leave to the petitioner to adduce secondary evidence i.e., receiving and marking of Photostat copy is in accordance with law. In view of the law declared by the Hon'ble Apex Court, a Photostat copy cannot be received as secondary evidence and merely because the document is filed along with the plaint, no authenticity can be attached to such document since Photostat copy is inadmissible as observed in ***U. Sree***'s case referred supra, therefore, declining leave by the trial Court cannot be faulted and consequently I find no grounds to reverse the finding given by the trial Court.

³ (2010) 4 Supreme Court Cases 329

Accordingly, the Civil Revision Petition is dismissed.

There shall be no order as to costs.

The Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

July 05, 2017

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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