

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2018

CORAM:

The HONOURABLE **MS. JUSTICE V.M.VELUMANI**

C.R.P.(PD)No.3887 of 2017
and C.M.P.No.18164 of 2017

P.Nachimuthu ... Petitioner

Vs.

P.Udayakumar ... Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decretal order dated 12.09.2017 made in I.A.No.715 of 2017 in O.S.No.95 of 2010 on the file of the Sub Court, Dharapuram.

For Petitioner : Mr.J.Sudhakaran

For Respondent : Mr.S.Saravanan

ORDER

The Civil Revision Petition is filed against the fair and decretal order dated 12.09.2017 made in I.A.No.715 of 2017 in O.S.No.95 of 2010 on the file of the Sub Court, Dharapuram.

2.The petitioner is the defendant and respondent is the plaintiff in O.S.No.95 of 2010 on the file of the Sub Court, Dharapuram. The respondent filed said suit for recovery of money claiming a sum of Rs.4,45,842/- being the balance amount payable by the petitioner in respect of house constructed by the respondent in the land belonging to the petitioner. The petitioner filed written statement and is contesting the suit. According to the respondent, he is a Civil Engineer. The petitioner approached the respondent to construct a house in the land belonging to the petitioner and it was agreed that cost of construction is Rs.1,000/- per sq.ft. An agreement dated 10.03.2009 was prepared as per the agreed terms. The respondent signed the same and it was given to the petitioner, who is residing in Chennai. The petitioner promised to sign the same and hand over the agreement to the respondent. The petitioner failed to hand over the said agreement duly signed, but paid a sum of Rs.2,00,000/- by way of cheque to the respondent and asked the respondent to proceed with construction. The petitioner was paying the instalment amount as agreed upon and hence respondent did not insist upon the original agreement to be returned to him duly signed. The petitioner denied the existence of the alleged agreement and claim of the respondent. The trial commenced and suit was posted for cross-examination of the

respondent, at that stage, the respondent filed present I.A.No.715 of 2017 under Order 65(a) of the Evidence Act, 1872, for permission to file xerox copy of the agreement dated 10.03.2009.

3.According to the respondent, he sent the agreement to the petitioner for signature, who is residing at Chennai, but the petitioner did not return the agreement and retained the same. In view of the above facts, the respondent sought for permission to file xerox copy of the agreement dated 10.03.2009.

4.The petitioner filed counter and stated that there is no signature of the petitioner in the agreement and the same is not valid. There is no proof for the respondent for having sent the document to the petitioner and prayed for dismissal of the application.

5.The learned Judge considering the averments made in the affidavit, counter affidavit and materials available on record, allowed the application to give an opportunity to the respondent to prove his case and held that the petitioner will have an opportunity to cross-examine the respondent and prove his contents made in the counter.

6. Against the said order dated 12.09.2017 made in I.A.No.715 of 2017 in O.S.No.95 of 2010, the present Civil Revision Petition is filed by the petitioner/defendant.

7. The learned counsel for the petitioner contended that earlier, the respondent filed I.A.No.499 of 2017 under Order XIII Rule 1 C.P.C. for a direction to the petitioner to produce the original agreement dated 10.03.2009. The said application was dismissed by order dated 18.07.2017 holding that the respondent has not proved having sent the document to the petitioner. The learned Judge did not consider the contention of the petitioner that there is no original agreement dated 10.03.2009. The alleged agreement dated 10.03.2009 is not signed by the petitioner and the same is not acted upon. Secondary evidence cannot be produced in the absence of primary evidence. The learned Judge erred in allowing the application filed under Section 65(a) of the Evidence Act. In support of his contention, he has relied on the following judgment reported in **(2011) 4 SCC 240 (H.Siddiqui (dead) by legal heirs v. A.Ramalingam);**

“12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original

documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The Court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon."

8. Per contra, the learned counsel for the respondent reiterated the averments made in the plaint and affidavit filed in the application and contended that the learned Judge after considering the materials on record in order to give an opportunity to the respondent to prove his case permitted the respondent in marking of the xerox copy of the agreement dated 10.03.2009. The learned Judge has rightly held that the petitioner will have an opportunity to cross-examine the respondent with regard to the agreement dated 10.03.2009 and

prayed for dismissal of the Civil Revision Petition. In support of his contention, he relied on the judgment reported in **2015 (1) CTC 187 The Home Missionary Society of India, represented by its Secretary, No.15, Swamiar garden, Ponnamman medu, Chennai-600 110 and others v. Vepery Auxiliary of the Home Missionary Society of India, represented by its Secretary Mrs. Rose Fernandes, No.12-A, Ritherdon road, Vepery, Chennai-7.**

"8.It is needless to say that the above order of the Court below marking Exs.A3 to A16, of course by recording that they are marked with objections on the defendants' side, cannot be sustained for two reasons. Firstly, there is no application filed by the plaintiff under Section 65(a) of the Indian Evidence Act, seeking permission to mark those documents, which are admittedly the photocopies, the originals of the same said to be in the custody of other side. Secondly, the above said order also did not discuss the objections raised by the defendants through their memo, dated 16.06.2014. It is well settled that photocopies cannot be marked as a primary evidence. However, if they are sought to be marked as secondary evidence under the circumstances as contemplated under Section 65(a) of the Indian Evidence Act, 1872, then the party, who seeks to mark those secondary evidence must file an

application under Section 65(a) of the said Act and seek permission of the Court. In this case, no such application was filed. That being the factual position, I am of the view that the impugned order of the Court below, dated 01.07.2014 marking Exs.A1 to A16 (Exs.A3 to A16) marked with objection on the side of the defendants), cannot be sustained and consequently, the same is liable to be set aside. Accordingly, the same is set aside.

9.At the same time, it cannot be said that the respondent/plaintiff is remediless. Therefore, the respondent/plaintiff is at liberty to file an application under Section 65(a) of the Indian Evidence Act, 1872 before the trial Court seeking permission to mark the photocopies of those documents and as and when any such application is filed, it is open for the petitioners/defendants to file their counter affidavit to the said application and the Court below shall consider the said application and pass orders on the same, on merits and in accordance with law."

9.Heard the learned counsel for the petitioner as well as respondent and perused the materials available on record.

10.The respondent filed present application for permission to mark xerox copy of the agreement dated 10.03.2009 on the ground

that the original agreement is with the petitioner. The petitioner denied the same. It is pertinent to note that earlier, the respondent filed I.A.No.499 of 2017 for a direction to the petitioner to produce the original agreement and the said application was dismissed on 18.07.2017 holding that the respondent failed to prove that the said agreement was sent to the petitioner at Chennai. The respondent has not challenged the said order.

11. Section 65 of the Evidence Act enumerates the circumstances under which the secondary evidence can be allowed; one of the conditions is that original is in possession of the person, against whom the document is sought to be proved and the said person after notice under Section 66 of the Evidence Act failed to produce the same. In the present case, on earlier occasion, the trial Court has held that the respondent failed to prove that original is with the petitioner and in such circumstances, the petitioner cannot be directed to produce the original. As the respondent failed to prove that the original is with the petitioner, he is not entitled to file and mark xerox copy of the said agreement. The learned Judge failed to consider Section 65 of the Evidence Act and erroneously allowed the application on the ground that the respondent must be given an opportunity to prove his case.

In view of the same, the impugned order passed by the learned Judge is liable to be set aside and it is hereby set aside.

12.In the result, the Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

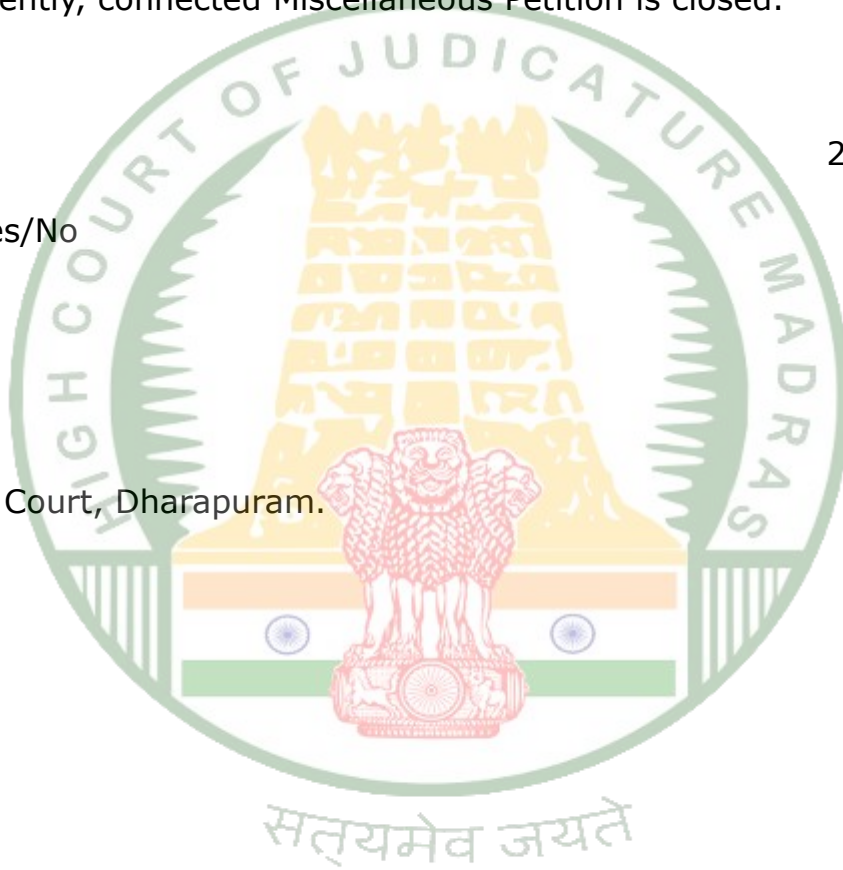
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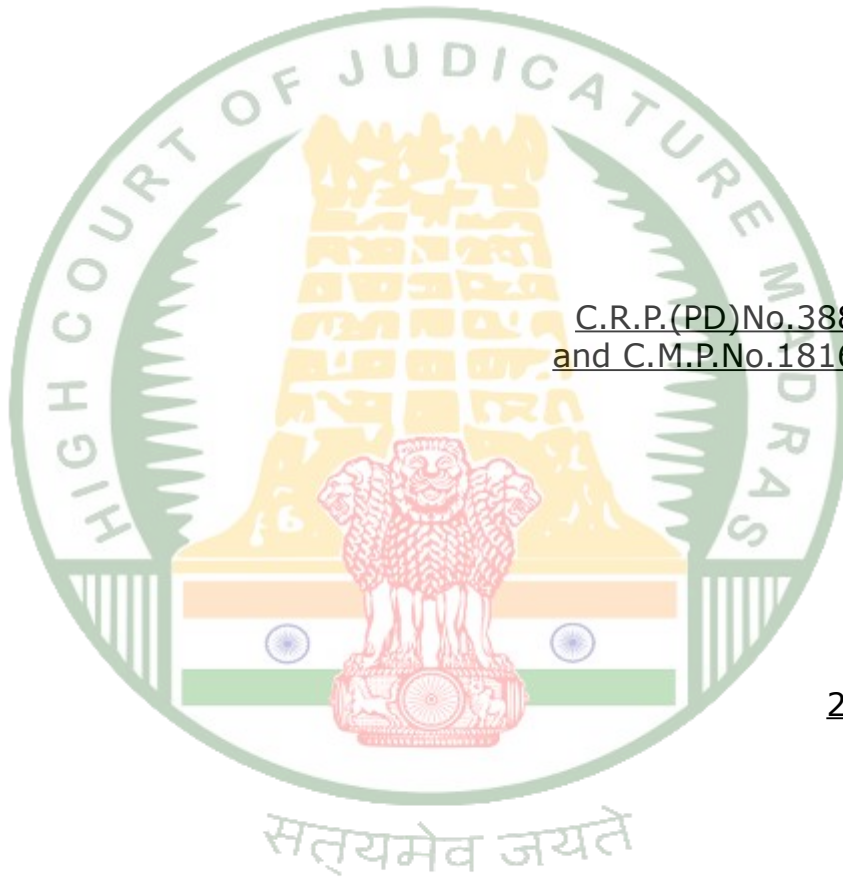
The Sub Court, Dharapuram.



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V.M.VELUMANI,J.

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