

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)Nos.4091 and 4092 of 2014
and M.P.Nos.1,1 of 2014

M.Deivasigamani

.. Petitioner in
both CRPs.

Vs.

A.Jayapaul

.. Respondent in
both CRPs.

PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decretal order dated 05.07.2014 made in I.A.No.140 of 2014 in O.S.No.771 of 2006 and I.A.No.141 of 2014 in O.S.No.775 of 2006 on the file of the Principal District Munsif Court, Vellore.

In both CRPs.

For Petitioner : Mr.A.Gouthaman

For Respondent : Mr.V.Lakshminarayanan

COMMON ORDER

The Civil Revision Petitions are filed against the fair and decretal order dated 05.07.2014 made in I.A.No.140 of 2014 in O.S.No.771 of 2006 and I.A.No.141 of 2014 in O.S.No.775 of 2006 on the file of the Principal District Munsif Court, Vellore.

2.In both the Civil Revision Petitions, the issues and the parties are one and the same and therefore, they are disposed of by this common order.

3.The petitioner is defendant and respondent is plaintiff in two different suits in O.S.Nos.771 and 775 of 2006 on the file of the District Munsif Court, Vellore. The respondent filed the above two suits for recovery of a sum of Rs.61,670/- being the arrears of rent payable to the respondent for the period from March 2003 to 11.08.2005, in both the suits. The petitioner filed written statements in both the suits on 20.04.2007 and is contesting the suits. The petitioner filed I.A.No.140 of 2014 in O.S.No.771 of 2006 and I.A.No.141 of 2014 in O.S.No.775 of 2006 under Section 65(a) of the Indian Evidence Act and Section 151 C.P.C. for marking of

xerox copy of the rental agreement dated 28.07.2005 as secondary evidence.

4. According to the petitioner, the respondent's father V.R. Annamalai Chettiar let out the non residential premises to the petitioner bearing Door Nos. 19/3, 19/D and 19/5, Chunnambukkara street, Vellore and received a sum of Rs.1,50,000/-, Rs.28,000/- and Rs.80,000/- as advance. The said Annamalai Chettiar and petitioner entered into rental agreement dated 28.07.2005. The original rental agreement is in the custody of Annamalai Chettiar and after his death, the same is with the respondent. The petitioner issued notice to the respondent to produce original rental agreement and the respondent denied the existence of said rental agreement. In the circumstances, the petitioner has come out with the present applications.

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5. The respondent filed counter affidavit and denied all the averments made in the said applications and contended that his father Annamalai Chettiar settled the property by the deed of settlement dated 09.04.1958 on his wife Pushpavathiammal,

mother of the respondent and after her lifetime, absolutely to the respondent. The respondent's mother took possession of the property on the same day. His mother filed R.C.O.P.No.12 of 1997 for eviction of the petitioner from the shop No.19/3 and eviction was ordered. Pending E.P., his mother died and the respondent got himself impleaded in the E.P. and took possession of the shop No.19/3 through Court. The respondent filed R.C.O.P.Nos.1 of 2005 and 2 of 2005 for eviction of the petitioner with regard to the shop Nos.19/D and 19. The respondent denied that door No.19/5 was rented out to the petitioner. An eviction was ordered and respondent took possession of the two shops by filing E.P. and let out the said portion to the other tenants. The petitioner has not paid the arrears of rent and therefore, present two suits are filed for recovery of arrears of rent. In all the three R.C.O.Ps. and earlier suit O.S.No.837 of 2005, the petitioner did not mention about the alleged rental agreement dated 28.07.2005 entered into between the petitioner and respondent's father Annamalai Chettiar. The alleged agreement is created by the petitioner for the purpose of this case. Unless the petitioner has proved the existence of original rental agreement, copy of the same cannot be marked as per Section 65(a) of the Indian Evidence Act. Only to escape from the

liability for payment of arrears of rent, the petitioner has created the document and prayed for dismissal of the applications.

6.Before the learned Judge, both the petitioner and respondent did not let in any oral evidence. The respondent has marked 15 documents as Exs.R1 to R15. The petitioner did not let in any documentary evidence.

7.The learned Judge considering the averments made in the affidavit, counter affidavit and documentary evidence filed by the respondent, dismissed the applications in both the suits.

8.Against the said order of dismissal dated 05.07.2014 made in I.A.No.140 of 2014 in O.S.No.771 of 2006 and I.A.No.141 of 2014 in O.S.No.775 of 2006, the present two Civil Revision Petitions are filed by the petitioner.

9.The learned counsel for the petitioner reiterated the averments made in the affidavits filed in support of the applications and contentions raised in the grounds of Civil Revision Petitions. In support of his contentions, the learned counsel for the petitioner has relied on the following judgments:

(i) **2010(3) CivCC 531 (Mangat Ram v. Ashok Kumar Sharma);**

"5. Secondary evidence can be led in the Court under Section 65 of the Indian Evidence Act when the original is shown in power and possession of the person against whom the document is sought to be proved. In the present case, defendant is the son of the petitioner and had been living with the petitioner in the same house and the petitioner after death of his wife has become dependent upon his son. The petitioners averment that the original documents were in possession of the defendant was a plausible averment. The trial Court in this case did not consider Section 65A of the Indian Evidence Act and did not exercise its jurisdiction that secondary evidence can be allowed in those cases where the originals appears to be in possession of power of the opposite party against whom the document is sought to be proved. Bare denial by the opposite party that it did not have the original document would not disentitle the plaintiff/petitioner to prove his title by way of secondary evidence. The secondary evidence can be allowed if the documents appear to be in possession of the opposite party. It is a clear cut case where the Court should have considered that there was every likelihood of the petitioners

averments being correct and the petitioner, therefore, has a right to prove his ownership by way of secondary evidence. The evidentiary value and weight of the evidence led by the petitioner as secondary evidence would have to be decided by the trial Court after the entire evidence was over.

6. In the result, the present petition is allowed and the order of learned trial Court is hereby set aside. Petitioner/plaintiff would be permitted by the trial Court to lead secondary evidence qua his title over the suit property."

(ii) **2014 (3) MWN (Civil) 328 (Srinivasa Naicker v. Kaliappan alias Kalipandi and others);**

"3. ... A reading of the Order 11, Rule 15, CPC makes it clear that when a reference is made to any document in the pleading or Affidavit by one party, the other party to that suit is entitled to, on or before settlement of issues to give notice to that party who mentioned about the document in his pleadings, to produce such document.

4. In this case, in the written statement or in the Affidavit or in the pleadings of the revision petitioner he has not mentioned about the compromise alleged by the first respondent and

therefore the Order 11, Rule 15, CPC cannot be applied. Therefore, the contention of the learned Counsel for the revision petitioner that without complying with the Order 11, Rule 15, CPC, the application filed by the first respondent is not maintainable cannot be accepted. As the document was not referred to by the revision petitioner and it was the case of the first respondent that the original was with the revision petitioner and he was having only xerox copy, he filed the memo for production of original and in that context Order 11, Rule 15, cannot be applied. Further under Section 65 of the Indian Evidence Act, 1872, secondary evidence may be given when the original was shown or appeared to be in the possession or power of the person and the other person after the notice mentioned in Section 66, did not produce the same. Under Section 66 of the Act, secondary evidence of the contents of the documents can not be given unless the party proposing to give such secondary evidence, has previously given to the party in whose possession or power the document is, to produce such document. In this case, a memo was filed directing the revision petitioner to produce the original of the document and the revision petitioner denied the existence of the document and therefore, the first respondent has complied

with the provisions of Section 66 of Indian Evidence Act and therefore, he is entitled to mark the said document as secondary evidence. Considering all these aspects, the Court below allowed those two applications and I do not find any infirmity in the order of the Court below. Nevertheless, if the document requires registration or liable to stamp duty, the same can be considered by the Court below, while the document is to be marked in evidence."

(iii) ***C.R.P.(PD)Nos.2771 and 2772 of 2014, dated 24.11.2017 (Pitchai (deceased) and others v. P.Raji (deceased) and others);***

"9.The point for consideration in the present Civil Revision Petitions is whether the document sought to be produced by the first respondent is secondary evidence as per Section 63(2) of Indian Evidence Act and whether the respondent has complied with the conditions contemplated in Section 65(A) of the Indian Evidence Act. The provisions of the Indian Evidence Act is extracted hereunder:

63.Secondary evidence -

"(2) copies made from the original by mechanical processes which in themselves ensure

the accuracy of the copy, and copies compared with such copies;"

65(A). Special provisions as to evidence relating to electronic record -

"The contents of electronic records may be proved in accordance with the provisions of Section 65-B."

66.Rules as to notice to produce -

"Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, (or to his attorney or pleader), such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-

- (1)When the document to be proved is itself a notice;*
- (2)When, from the nature of the case, the adverse party must know that he will be*

required to produce it;

(3)When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4)When the adverse party or his agent has the original in Court;

(5)When the adverse party or his agent has admitted the loss of the document;

(6)When the person in possession of the document is out of reach of, or not subject to, the process of the Court."

10.As per Section 63(2), copies made from the original by the mechanical process is secondary evidence and copies compared with the copies made by mechanical process are also secondary evidence. In the present case, the respondent is seeking to mark the xerox copy which is a copy made from the original by mechanical process. In addition to that, the first respondent is claiming that the deceased second defendant made an endorsement on 24.06.2007 in the bottom of the xerox copy which is original endorsement. Therefore, the xerox copy sought to be marked is a secondary evidence as contemplated under Section 63(2) of the Indian Evidence Act.

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

11. The petitioner is seeking to mark xerox copy of the rental agreement dated 28.07.2005 entered between the respondent's father Annamalai Chettiar and petitioner. According to the petitioner, original rental agreement was with Annamalai Chettiar till his death and after his lifetime, the same is with the respondent. The respondent denied the existence of the said rental agreement dated 28.07.2005 and contended that the petitioner has fabricated alleged rental agreement for the purpose of the suits in order to avoid payment of arrears of rent. The respondent contended that the property was settled to his mother on 09.04.1958 for her lifetime and subsequently, to the respondent absolutely. On the date of settlement, respondent's mother took possession of the property and filed R.C.O.P.No.12 of 1997 for eviction of the petitioner from the shop No.19/3 and eviction was ordered. Subsequently, respondent filed R.C.O.P.Nos.1 and 2 of 2005 for eviction of the petitioner from the shop Nos.19/D and 19 and obtained an order of eviction and took possession of three shops through Court by way of filing E.P. The respondent has marked the said documents to

substantiate his claim. The respondent has also filed orders obtained in R.C.O.Ps. filed by his mother as well as by him and delivery of possession to the respondent. In addition to that, the respondent also filed earlier proceedings in O.S.No.837 of 2005. In all the above proceedings, the petitioner has not mentioned about the existence of the rental agreement dated 28.07.2005.

12.Further, it is pertinent to note that the R.C.O.Ps. filed by the mother of the respondent and respondent are for eviction of the petitioner on the ground of wilful default. In those proceedings, the petitioner has not mentioned about the existence of the rental agreement that he has paid rent to the father of the respondent and that he has not committed wilful default and sought for the said document to be marked. In the circumstances, the judgments relied on by the learned counsel for the petitioner do not advance the case of the petitioner. In view of the above facts, the contention of the respondent that unless the petitioner proves the existence of original rental agreement and said agreement in possession of the respondent, the petitioner is not entitled to mark xerox copy of the document, has considerable force.

13.The learned Judge has considered all the above facts in proper perspective and dismissed the application by giving cogent and valid reason. There is no irregularity or illegality warranting interference by this Court with the order of the learned Judge dated 05.07.2014.

14.In the result, the Civil Revision Petitions are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

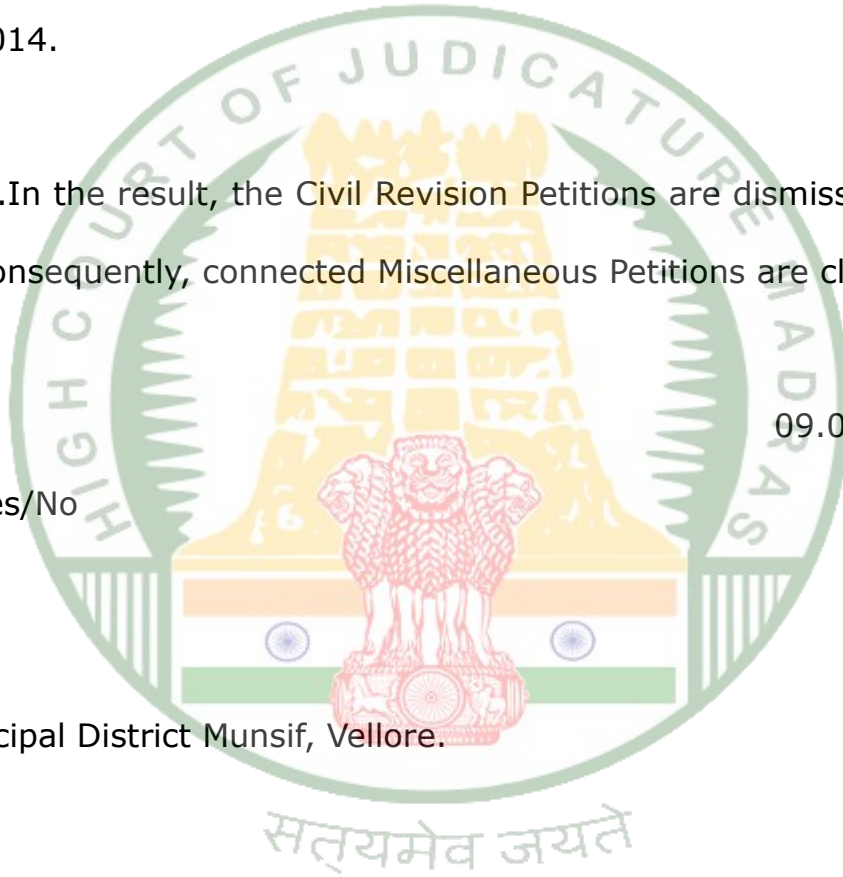
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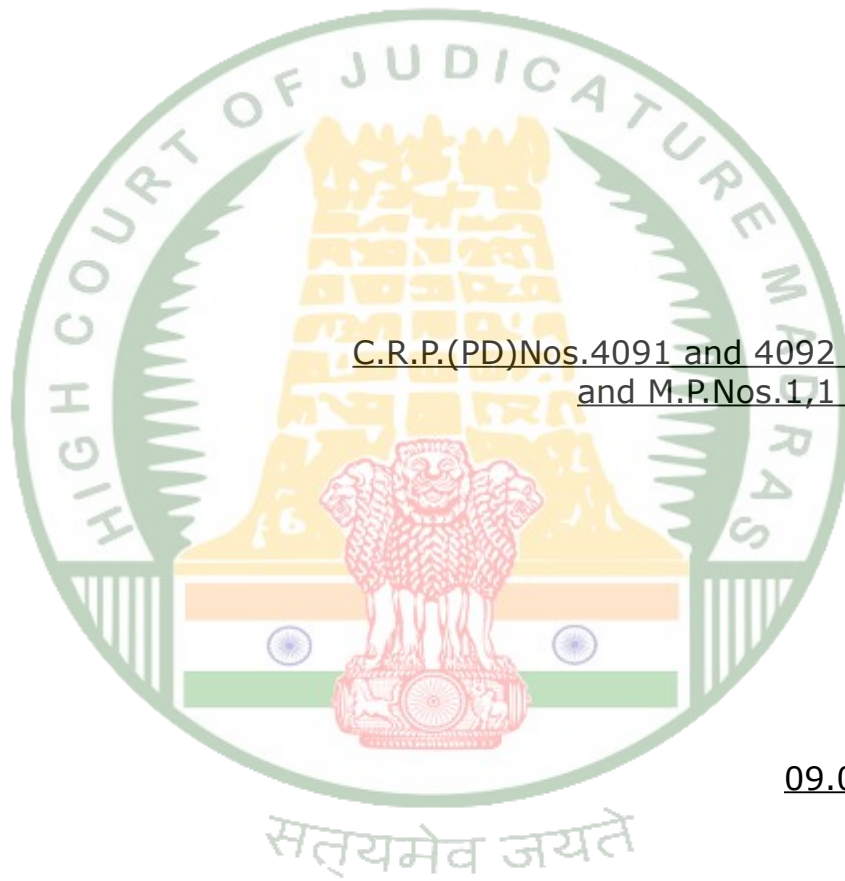
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V.M.VELUMANI,J.

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