

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.06.2018

Coram

The Honourable Mr.Justice M.M.SUNDRESH

and

The Honourable Mr.Justice N.ANAND VENKATESH

Original Side Appeal No.141 of 2017
& C.M.P.Nos.9554 of 2017, 1544, 1545 and 1546 of 2018

1.S.Subramanian

2.S.Gomathy ... Appellants

Vs.

1.S.T.Tamilarasan

2.S.Sabapathi

3.Uma Mageshwari Respondents

Original Side Appeal is filed under Order XXXVI Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 06.01.2017 made in Application No.4455 of 2016 in C.S.No.809 of 2010.

For Appellants : Mr.C.Umashankar
For Respondents : Mr.S.Ravichandran for
Mr.J.Balagopal for R1

R2-died

No appearance for R3

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH,J.)

This appeal has been filed by the appellants/applicants/plaintiffs being aggrieved over the order passed by the learned single Judge in dismissing the application by seeking to produce the xerox copy of the sale agreement dated 27.03.2008 as the secondary evidence in the suit.

2. The appellants filed a suit for specific performance. The first respondent is the owner of the property. He has executed a power deed in favour of the second respondent, who is stated to be the Manager. According to the appellant, the first respondent himself, as the owner, executed the agreement of sale. However, the original copies were taken by the respondent on the pretext of preparing the sale deed in his capacity as the power holder. In those circumstance, an application was filed inter alia stating that what has been given to the appellant is only a xerox copy as the original is being retained by the respondent. The averment in the application to the aforesaid extent has also been reiterated earlier in the plaint itself. Thus, the appellant sought for permission to produce the xerox copy of the sale deed as secondary evidence. The first respondent denied the very execution of the sale deed. However, in the written statement filed, the second respondent while acknowledging the execution of the agreement, has taken a plea that it was duly cancelled thereafter. The learned single Judge dismissed the application filed stating that there is no acceptable cause to mark the xerox copy of the agreement of sale. Incidentally, it has been held that execution has to be proved by examining the attesor, which has not been resorted to by the applicants. Aggrieved over the same, the present appeal has been filed.

3. The learned counsel appearing for the appellants would submit that it is not as if a xerox copy of the agreement of sale can be accepted as secondary evidence in all circumstance. It is a case where the parameters imposed under Section 65 of the Indian Evidence Act, 1872, have been satisfied for accepting the document as the secondary evidence. Therefore, the appeal will have to be allowed, particularly, in the light of the stand taken by the second respondent. There is no need to examine the attesting witness at this stage, since the document does not require attestation under Section 72 of the Indian Evidence Act, 1872.

4. The learned counsel appearing for the first respondent would submit that as the very execution itself is denied, no interference is required.

5. We find merit in the submission made by the learned counsel appearing for the appellants. Accordingly, the appellants have taken a clear stand that the originals are with the second respondent. This, coupled with the stand taken in the written statement by the second respondent would show that the appeal deserves to be allowed. The observation of the learned single Judge with regard to the attestation required cannot be sustained in the eye of law. Section 72 of the Indian Evidence Act, 1872, does not contemplate the present situation. Further,

what the appellants seek is to mark the document as the secondary evidence. Therefore, it is for the learned single Judge to decide on the proof, admissibility and relevancy at the relevant point of time. On a reading of Section 65 of the Indian Evidence Act, 1872, we are of the view that it is not axiomatic that no xerox copy would not be admitted in evidence in all circumstances. Section 65 of the said Act carves out an exception. The averments made by the appellants are not within the rigour of Section 65 of the Evidence Act. After all, what the appellants want is marking of the document. The decisions relied upon by the learned single Judge do not have an application to the case on hand. Accordingly, the order passed by the learned single Judge is set aside. Consequently, the original side appeal stands allowed and connected civil miscellaneous petitions are closed. No costs. However, we make it clear that this order will not stand in the way of the first respondent taking his defence including the proof, admissibility and relevancy of the document. Taking note of the fact that suit is pending from 2010, the learned Additional Master No.I is directed to complete the evidence within a period of six weeks from the date of receipt of a copy of this order. The Registry is directed to post the matter before the Additional Master No.I for recording evidence.

Sd/-
Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

raa

To

1. THE SUB ASSISTANT REGISTRAR,
ORIGINAL SIDE,
HIGH COURT, MADRAS.

2. THE I ADDITIONAL MASTER COURT,
HIGH COURT, MADRAS.

+1cc to Mr.C.UMASHANKAR, Advocate, S.R.No.37154
+1cc to Mr.R.GOWRI, Advocate, S.R.No. 37342

O.S.A.No.141 of 2017

VG II(CO)
TR(21/06/2018)