

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2018

CORAM :

THE HONOURABLE MR.JUSTICE **N.SESHASAYEE**

C.R.P.(PD).No.4186 of 2011

and

M.P.No.1 of 2011

1. Rajalakshmi
2. Rasitha
3. Rehana
4. Rahul, (Erstwhile Minor)
Son of Gangadharan.

... Petitioners

Vs

Malliga

... Respondent

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India against the Fair and Decreetal Order dated 05.09.2011 in I.A.No.568 of 2011 in O.S.No.623 of 2010, on the file of II Additional Subordinate Judge, Salem.

For Petitioners : Mr.K.Selvaraj

For Respondent : Mr.P.Sathish

ORDER

The respondent in this case has filed the suit for specific performance in which the revision petitioners as defendants 2 to 5 have taken up a

contention that the agreement, on the basis of which the plaintiff/respondent had laid the suit, was executed only to support a loan transaction. To this effect a *Muchalika* was contemporaneously executed on 10.04.2000. It was further alleged that the original *Muchalika* was left in the custody of the respondent, and since the same was not produced despite issuance of a notice under Section 66 of the Evidence Act, the revision petitioner is constrained to produce a photostat copy of the same, and hence have filed I.A.No.568 of 2011 to receive it. The respondent has opposed this application on the ground that the said *Muchalika* is a photostat copy and that unless the same is compared with the original, the same cannot be admitted in evidence.

2. Before the court below, the Revision Petitioner appeared to have contended that the photo copy of the said *Muchalika* was obtained by a mechanical process and hence it is a secondary evidence of the original document. Here, they are consistent in their assertion that the original *Muchalika* was with the petitioner, and inasmuch it has not been produced despite notice, the Revision Petitioners are entitled to produce it under Section 65 of the Evidence Act.

3. This contention was rejected by the Court below on the ground, (a) That the plaintiff has not signed the said *Muchalika*; (b) Revision petitioners in their written statement have not pleaded that the agreement of sale was vitiated on any of the grounds that would vitiate a contract; and (c) To let the revision petitioners produce a copy of the *Muchalika* would amount to letting in parole evidence to disprove the contents of a written document.

4. The learned counsel for the revision petitioners argued that in a suit for specific performance, apart from impugning the very execution of the document on grounds that would vitiate a contract, it is permissible for the defendant to contend that it was executed only to support a loan transaction, its nomenclature notwithstanding. This defense indeed, has been taken up by the Revision Petitioners in their written statement. Necessarily, the Revision Petitioners would be entitled to an opportunity to produce such documentary evidence as are relevant in law. Here, argued the counsel, all that the defendants 3 to 5/Revision Petitioners are required to do as per law is to serve a notice on the plaintiff to produce the original *Muchalika* and it was only on not production by the party who is required to produce fails to do it, the party serving notice can then produce a copy thereof. This

procedure is indisputably complied with, and hence, all that the Court requires to do is to let the defendants/Revision Petitioners produce it in evidence.

5. Countering the same, the learned counsel for the respondent/plaintiff submitted that the plaintiff is not a party, or a signatory to the said *Muchalika*, and the said document is alien to the cause of action for the suit. The learned counsel also submitted that notwithstanding his production, if assuming it is permissible, its genuineness will still be in doubt, till it is compared with the original, and in the current scenario there is no way available to ascertain the genuineness of the said *Muchalika*.

6. The Revision Petitioners in this case have indicated that they have taken up a contention that the sale agreement involved in the suit was executed to support a loan transaction, and also made a mention about the execution of the said *Muchalika* in the written statement, and prior to that in the reply notice. It is not in dispute that the Revision Petitioners have issued a notice to produce the said document to which the plaintiff has responded with an answer that no such document was available with him. Section 66(1) of the Evidence Act

does not insist that a notice for production of original documents must be issued only to the parties to the document, but on the other hand insists that it shall be served on one who is in custody of the said document.

7. So far as the merit of the order is concerned, the learned Trial Judge appeared to have pre-decided the issue and he ought to have waited for the copy of the *Muchalika* to come on evidence. As to the apprehension of the plaintiff/respondent that such xerox copy of the Muchalika might not be genuine and that the genuineness of the contents could not be established in the absence of the original is concerned, the plaintiff does have a weapon in cross-examination and this she can employ at the appropriate stage of the trial.

8. In conclusion, this Court allows the Revision Petition and directs the Trial Court to admit the document in evidence, if it is otherwise admissible. This case appears to be pending for close to 15 years now. The trial court is therefore, directed to conclude the trial and dispose of the matter within a period of three months from the date of receipt of the copy of this order and the defendants/revision petitioners shall offer utmost cooperation in concluding the trial. The Trial Court is

further instructed not to be magnanimous in entertaining requests for adjournments. No Costs. Consequently, connected miscellaneous petition is closed.

04.04.2018

Index:Yes/No

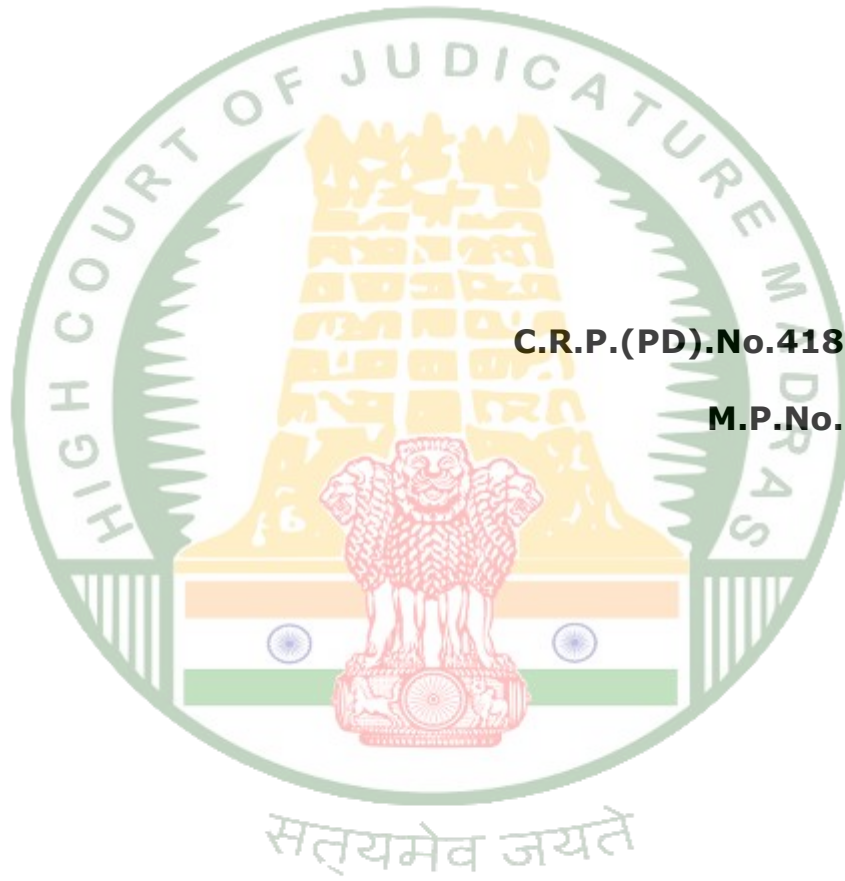
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To
The II Additional Subordinate Judge,
Salem.



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N.SESHASAYEE, J.,
ssn



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