

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

SATURDAY, THE 11TH DAY OF AUGUST 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A.Nos.6383 & 6384 of 2017

in

C.S.No.220 of 2009

C.S.NO.220 OF 2009:

M/s.Kapoor Imaging Private Limited,
Rep. by its Managing Director Mr.Sunilkumar,
No.6, III Street,
Balaji Nagar, Royapettah,
chennai - 600 014

.... Plaintiff

-Versus-

1. M/s.Kodak Polychrome Graphics Asia
Export Pte. Ltd.
Rep. by its Director,
No.151, Lorong Chuan Ex. 05-01
Lobby a New Techpark,
Singapore-556741

2. M/s.Kodak (India) Private Limited,
[Formerly known as M/s.Kodak Graphic
Communication (India) Private Limited]
Rep. by its Director,
Kalpataru Synergy,
Off. Western Express Highway,
Vakola, Santacruz East,
Mumbai - 400 050

*3. M/s.Kodak (Singapore) Pte. Limited,
No.151, Lorong Chuan,
05-01, New Tech Park,
Singapore - 556741
Represented by its Power Agent
Mr.Balachandra Bhaskar Nikumb
*(Defendant No.3 impleaded as per
order dated 17/12/2009 in A.No.6814 of 2009)

... Defendants

A.Nos.6383 & 6384 of 2017:

M/s.Kapoor Imaging Private Limited,
Rep. by its Managing Director Mr.Sunilkumar,
No.6, III Street,
Balaji Nagar, Royapettah,
chennai - 600 014

...

....Applicant/Plaintiff

-Versus-

1. M/s.Kodak Polychrome Graphics Asia
Export Pte. Ltd.
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Represented by its Power Agent
Mr.Balachandra Bhaskar Nikumb

*(Defendant No.3 impleaded as per
order dated 17/12/2009 in A.No.6814 of 2009)

... Respondents/Defendants

A.No.6383 of 2017:

Application praying that this Hon'ble Court be
pleased to permit the applicant to re-call Pw1 and mark
Xerox copies of letter dated 30.10.2006, 11.12.2006 and
20.04.2008 and invoice dated 15.11.2008 as mentioned in
para -3 of the application.

A.No.6384 of 2017:

Application praying that this Hon'ble Court be
pleased to permit the applicant to file the affidavit of
Mr.R.Rajagopalan, the applicant's Accounts Manager and
Systems In-charge, in support of the affidavit of PW-1
dated 08.12.2016, in compliance with Section 65B of the
Indian Evidence Act, 1872.

These Applications coming on this day before this
court for hearing the court made the following order:

<https://hcservices.ecourts.gov.in/hcservices/> A Nos.6383 & 6384 of 2017 have been filed by the
plaintiff in O.S.No.220 of 2009.

2. A.No.6383 of 2017 has been filed by the plaintiff seeking permission to recall P.W.1 and mark xerox copies of letter dated 30.10.2006, 11.12.2006 and 20.04.2008 and invoice dated 15.11.2008. The first letter had been issued by M/s.Dinakaran to the plaintiff. The second letter had been issued by M/s.NPT Offset Private Limited to the plaintiff. The third letter had been issued by Spectra Graphics to the plaintiff. The invoice had been raised by the Plaintiff Kapoor Imaging Private Limited on M/s.S.M.A. Sirajuddin.

3. A.No.6384 of 2017 has been filed by the petitioner/plaintiff seeking permission to file an affidavit of Mr.R.Rajagopalan, Accounts Manager and Systems in-charge in support of the affidavit of P.W.1 dated 08.12.2016 in compliance with section 65B of the Indian Evidence Act, 1872.

4. The suit in C.S. No.220 of 2009 has been filed by the plaintiff M/s.Kapoor Imaging Private Limited represented by its Manager against one M/s.Kodak Polychrome Graphics Asia Export Private Limited represented by its Director and M/s.Kodak (India) Private Limited (formerly known as M/s.Kodak Graphic Communication (India) Private Limited) represented by its Director and M/s.Kodak (Singapore) Private Limited represented by its Power Agent. The 3rd defendant had been impleaded by order dated 17.12.2009 in A.No.6814 of 2009. The suit has been filed seeking a judgment and decree, directing the defendants to pay to the plaintiff a sum of Rs.2,15,37,054/-together with interest and also for costs of the suit.

5.The defendants had entered appearance and had filed their written statement. The issues in the suit had also been framed as early as 27.06.2014. On that date, this Court has directed both sides to file affidavit of

documents and give the list of witnesses within a period of three weeks and a further two weeks' time was given for inspection of the documents. It was further directed that thereafter, the matter should be posted before the learned Additional Master-IV, High Court, Madras for recording evidence. On 15.11.2016, it was noted that the witness for the plaintiff had not appeared for recording of evidence. It was thereafter observed that commencing of evidence must be on 01.12.2016, failing which, the matter would be posted for further orders. Again, a short time was sought by the plaintiff. However, the trial commenced on 05.12.2016. On that date, the evidence of PW-1 was recorded and Ex-P1 to Ex-P19 were marked. On 18.12.2016, further documents till Ex-P24 were marked. The matter was then posted for cross examination of the plaintiff's witnesses.

6. At that stage, A.No.1243 of 2017 came to be filed by the defendants. In the said application, the defendants had sought to eschew Ex-P2, Ex-P6, Ex-P7, Ex-P10, Ex-P23, Ex-P5, Ex-P8, Ex-P9, Ex-P10 and Ex-P11. These documents were sought to be eschewed since the xerox copies of the said documents had been filed. Reasons were given with respect to each one of the said documents. That application came to be considered by this court on 30.06.2017. After considering the rival contentions, this Court had held as follows:

"In fine, the application is partly allowed and the documents marked as Ex.P.6, Ex.P.7 and Ex.P.23, Ex.P.10 Series (xiv) and Ex.P.23 are ordered to be eschewed. With respect to other documents, Ex.P.2, Ex.P.5 Series, Ex.P.8 Series (ii, iii, iv, vi, viii, ix), Ex.P.9 Series, (i), (ii), (iii), Ex.P.10 Series (xiv), Ex.P.11 Series (v, vi, viii, xv) and Ex.P.12 the learned Additional Master is directed to verify

and substitute the same".

7. After the said order had been passed, the present applications came to be filed by the plaintiff. In the applications, now under consideration, the deponent of the affidavit stated that the said four documents, which are a letter dated 30.10.2006. from M/s.Dinakaran, a letter dated 11.12.2006 from M/s.NPT Offset Private Limited, a letter dated 20.04.2008 from M/s.Spectra Graphics and an invoice dated 15.11.2008 raised by the plaintiff on S.M.A.Sirajudeen, had been directed to be eschewed on the ground that the same were marked without filing an application to receive the documents as secondary evidence as contemplated under Section 65 of the Indian Evidence Act. It had stated that inspite of best efforts, the originals of the documents mentioned above could not be traced. It had been stated that these documents are essential to prove the case of the plaintiff.

8. It had therefore been stated that permission should be granted to file xerox copies of the said documents. It had been further stated in A.No.6384 of 2014 that the affidavit of the Accounts Manager and System Incharge may also been taken on record in compliance with Section 65B of the Indian Evidence Act in relation to the electronic records produced.

9. The respondents who are the defendants had filed their counter affidavit in the suit. In the counter affidavit, they have stated that the plaintiff is attempting to mark documents that have already been eschewed. It had been stated that seeking leave to mark secondary document is a mandatory prerequisite. That permission should have been sought at the relevant time before the documents had been marked as exhibits. It had also been stated that the filing of an affidavit of the

Accounts Manager and Systems in-charge after the marking of documents through P.W.1 cannot be permitted. It had been further stated that the documents are third party documents and irrelevant to the present case. It had been stated that the reasons given for non-production of the originals are vague and cannot be accepted by the Court. It had been further stated that the affidavit produced does not comply with the requirements under Section 65B of the Indian Evidence Act and it had therefore been stated that the applications must be dismissed.

10. Heard Mr. R. Parthasarathy, learned Counsel for applicant/plaintiff and Mr.R. Senthil Kumar for the respondents/defendants.

11. The present applications had been filed by the applicant/plaintiff seeking permission to mark xerox copies of the four documents. Three of the documents are letters said to have been received by the plaintiff. The other document is an invoice raised by the plaintiff on a third party. The only reason given for non-production of original is that the plaintiff could not trace the originals. Much earlier, the evidence of P.W.1 was recorded by the Additional Master-III, High Court, Madras and Ex.P.1 to Ex.P.24 had been marked through P.W.1. Among the documents marked, several documents were xerox copies. Consequently, the defendants had taken out A.No.1243 of 2017 seeking to eschew the documents which were xerox copies. Each one of the documents were examined by this Court. This Court by order dated 30.06.2017 had specifically ordered that Ex.P.6 which was letter dated 30.10.2006, Ex.P.7 which was letter dated 11.12.2006, Ex.P.10 series (xiv) which was letter dated 20.04.2008 and Ex.P.23 which was invoice dated 15.11.2008 be eschewed. This Court had specifically observed that before producing secondary evidence, leave of the Court should have been obtained by filing an application. It was observed that the

applicant had failed to follow the said procedure.

12. It is therefore seen that a final pronouncement had been made to eschew the documents which had already been marked as P.6, P.7, P.10 Series (xiv) and P.23. This Court had categorically held that the said documents are inadmissible in law. They are secondary documents namely, xerox copies and permission to file such documents had not been obtained from the Court.

13. Section 61 of the Indian Evidence Act is as follows:

"Proof of contents of documents : The contents of documents may be proved either by primary or by secondary evidence"

14. Section 62 relates to primary evidence and Section 63 relates to secondary evidence and Section 64 deals with proof of documents by primary evidence. Section 65 deals with case in which secondary evidence relating to documents may be given. Section 65(c) is as follows:

"65(c) 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;"

15. However, before marking secondary evidence permission from the Court explaining why the primary evidence could not be produced and also that the reason for producing the secondary evidence is not because of default or negligence of the party producing it has to be pleaded. In the instant case, the plaintiff had not sought permission before marking the above documents.

Consequently, this Court by order dated 30.06.2017 had eschewed the documents.

16. In Oxford Advanced Learner's Dictionary New 9th Edition, the word "Eschew" had been defined as "*to deliberately avoid or keep away from*". The word had not been defined in Black's Law Dictionary 10th Edition. In Google Weblight.com, the word "Eschew" had been defined as "*avoid and stay away from deliberately ; stay clear of*". It had also not been defined in P.Ramanatha Iyers Advanced Law Lexicon Advanced 5th Edition.

17. The plaintiff had however, not filed any appeal against the order of this Court in A.No.1243 of 2017 dated 30.06.2017 eschewing the said exhibits. On the other hand, the plaintiff seeks the Court to revisit the said order by filing the present two applications. In fact, the plaintiff has filed the application giving an explanation for not marking the primary documents and therefore seeks permission to file the secondary documents. In support of this contention, the learned counsel for the plaintiff relied on the very judgement which had been quoted in the order dated 30.06.2017, **State of Rajasthan and Others Vs. Kamaraj and Others reported in (2000) 9 SCC 241,**

"It had been stated that the plaintiff can file a fresh application for seeking permission under Section 65 of the Evidence Act to lead secondary evidence and giving details necessary to attract the provisions of Section 65 of the Evidence Act".

18. The learned counsel for the plaintiff also relied on **2000(9) SCC 241, State of Rajasthan and others Vs. Khemraj and others.** The said judgement deals with a situation under Section 65(a) of the Indian Evidence

Act, when was alleged that the documents are in the possession of the other side. In that event, the permission was granted to file necessary affidavit, seeking permission to file secondary evidence. The learned counsel for the applicant relied on paragraph-3 of the said Judgement which reads as follows:

"In the face of the pleadings of the appellants and the defects noticed by the trial Court, no fault can be found with the orders of the trial Court or of the High Court. However, it appears appropriate to us, in the interest of justice, to permit the appellant to file a fresh application in the trial Court for seeking permission under Section 65 of the Evidence Act to lead secondary evidence supported by a proper affidavit and giving full details necessary to attract the provisions of Section 65 of the Evidence Act "

Placing heavy reliance on the above passage, it was insisted that this Court should permit the plaintiff to file an affidavit and should also consider the reasons given in the said affidavit. In the instant case, the plaintiff has filed the present applications more as a formality. The attitude is, since a reason has to be given, I am giving a reason. Since a permission has to be sought, I am seeking permission. Unfortunately, the touch of bonafide required to maintain the sanctity of judicial proceedings is absent in the application.

19. On the other hand, the learned counsel for the respondent relied on **2002(4) L.W.147, The Tamil Nadu Industrial Corporation Limited., Chengai Transport Branch, represented by its Branch Manager, C-48, II Avenue, III Floor, Anna Nagar, Chennai-40.** In that case there was a

shifting of office premises. At that time documents were misplaced and it was therefore sought that xerox copies may be accepted by the Court. However, the learned Single Judge of the Madras High Court in that particular case had not accepted that reason. It was held that,

"In fact, no steps were taken by the petitioner to establish to the satisfaction of the Court below that the documents were really lost or destroyed in the course of the official business transaction of the petitioner. In such circumstances, the petitioner had absolutely no right to invoke Section 65(c) of the Evidence Act in order to seek for marking of xerox copies of the documents to support its suit claim. The Court below has rightly held that even according to the petitioner, the documents were only misplaced and not lost once and for all and that nothing was placed before the Court to show that earnest efforts were taken for tracing out the documents and that in spite of such efforts, the petitioner could not trace out the same".

20. In the present case, the applicant had suffered an adverse order not only because they had not filed any application seeking permission to mark secondary documents. The plaintiff has not taken the order dated 30.06.2017 an appeal. The order had worked itself out. This Court had declared that the documents have to be eschewed. Once a definite pronouncement had been made it would be highly inappropriate to once again revisit the said order. The plaintiff cannot claim ignorance of the fundamental provision to seek permission before filing secondary documents. Having not done so and having suffered an adverse order, the plaintiff cannot be permitted to file an application just because an application has to be filed and then seek permission to

file xerox copies of documents which have been eschewed from the records.

21. I hold that the plaintiff had not come to Court with clean hands or with true reasons. It appears to be an affidavit more for the sake of formality than for the sake of compliance with the provisions of the Law. In the present applications, the plaintiff has sworn to an affidavit only because they were found fault with that they had not filed such application earlier. The plaintiff cannot take judicial proceedings for granted and in such a casual manner. A pronouncement eschewing documents has its own sanctity and cannot be revisited for the mere asking. Even otherwise the reasons given that the letters could not be traced is a very weak reason to be given by a Private Limited Company wherein it is expected that records must be maintained with due diligence. I am not able to convince myself to accept those reasons.

22. All the reasons stated above, I hold that the plaintiff's applications will have to be dismissed.

23. A.Nos.6383 & 6384 of 2017 are dismissed. No costs.

Sd/-C.V.K.J
11.08.2018

//Certified to be a true copy//

Dated this the th day of 2018.

KY/20.08.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.