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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.04.2018

Delivered on : 21.08.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.438 of 2018

and

C.M.P. (MD) Nos.1919 and 2337 of 2018

1.C.Radha Krishnan

2.R.Gireesh Kumar

3.R.Syam Murari

.. Petitioners

vs.

R.Jagan Mohan

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order passed in I.A.No.487 of 2017 in O.S.No.6 of 2013, dated 12.12.2017 on the file of the District Judge, Kanyakumari District @ Nagercoil.

For Petitioners

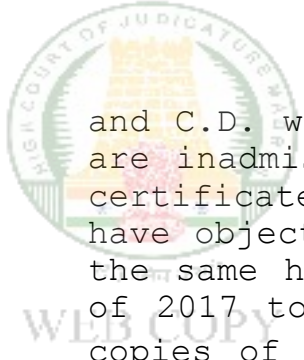
: Mr.D.Saravanan

For Respondent

: Mr.V.Meenakshi Sundaram for
Mr.R.Murugan

ORDER

The Petitioners are defendants in a Suit and the respondent herein as a plaintiff filed the suit in O.S.No.6 of 2013 on the file of the learned Principal District Court, Kanyakumari District at Nagercoil for partition of 1/4th share and rendition of accounts of business. The case of plaintiff is that the 1st defendant is the father. The plaintiff and defendants 2nd, 3rd are his sons. They constituted Joint Family and run the Business and accrued the properties but leaving the plaintiff, others joint in one hand to defeat the right. In the suit, he produced some documents along with petition to receive the same which was allowed. Thereafter for examining the witness an Advocate Commissioner was appointed and during the examination of the witness the photo copy of a document



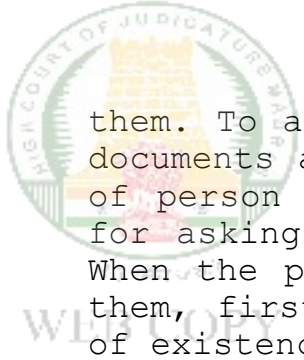
and C.D. were about to be marked. As those photo copy of documents are inadmissible in evidence and the C.D. cannot be marked without certificate and an affidavit narrating the contents, the defendants have objected the same but the Advocate Commissioner did not accede the same hence the petitioners have filed a petition in I.A.No.487 of 2017 to direct the Advocate Commissioner not to mark the photo copies of documents and C.D. That application was contested by 1st respondent herein and the court below dismissed the application and the same is challenged in this Civil Revision Petition.

2.The Learned Counsel for the Petitioner contended that the order passed earlier by this Court was restricted only to receive the documents as the Petition filed was only to receive documents, which were not filed along with plaint. The said order will not qualify for marking the document since the marking of document is always subject to admissibility. Further he contended that the Petitioner have given a suitable reply stating that the original of photo copy is not available with them and photo copies are filed without any substance. Further the C.D. which was produced is also not admissible in evidence without a certificate and an affidavit narrating the content of the C.D. He relied upon a judgment reported on 2017 (5) CTC 207 in the case of Somu Vs. State of Haryana and another Judgment of this Hon'ble Court in Karupasamy and another Vs State of Tamil Nadu reported in 2017 (4) CTC 413 for the purpose of admissibility of electronic record. He relied another judgment in 2016 (3) MWN (CIVIL) 256 in the case of Dhanalakshmi Vs Muniyammal @ Senthamarai and another for the proposition that the Xerox Copy of the documents are not admissible in evidence.

3.Per Contra, the Learned Counsel for the Respondent submitted that the Trial Court has rightly dismissed the petition, in view of the earlier order passed by this Court for receiving the Documents and since the documents are original of photocopy, which are in custody of the petitioner herein, the photocopy were offered in evidence, after giving notice to the petitioner to produce the original and on denial of custody of those documents with them. Further he submitted that for marking the C.D. certificate is not mandatory.

4.I heard Mr.D.Saravanan, learned counsel for the petitioners and Mr.V.Meenakshi Sundaram for Mr.R.Murugan, learned counsel for the respondents and the entire materials available on record are perused.

5.There are two issues arises in this revision. The first one is, when the respondent has offered the photocopy of documents with an allegation that the original are with the Petitioners and despite notice given to produce the documents, it was not done so by giving a reply stating that the original are not available with



them. To answer this issue the court has to see first, whether the documents alleged are in existence and the same is the primary duty of person who produces the photocopy. It cannot be granted simply for asking or simply on the ground a notice to produce was given. When the petitioners say that no such documents are available with them, first the existence of documents must be proved. In the case of existence of documents are not disputed the notice to produce and the reply would satisfy the requirement for marking secondary evidence. When the existence of document itself not proved there is no purpose would serve on mere complying formality of notice to produce and reply thereon. In the present case the existence of photocopy of original is not admitted and the respondent has not proved the existence of original documents in compliance of Section 65 Indian Evidence Act. The judgment relied upon 2016 (3) MWN 256 applies to the present case in respect of marking of photocopy. Therefore the issue No.1 is answered in favour of the petitioner.

6.The second issue is relating to marking of and admissibility of C.D. without a certificate and proof of its content through affidavit. It is useful to refer Section 65(B) of the Indian Evidence Act as follows:

"S.65(B) Admissibility of electronic records :-

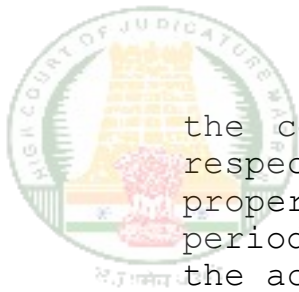
(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities,

(c) throughout the material part of the said period,



the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

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(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.



(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

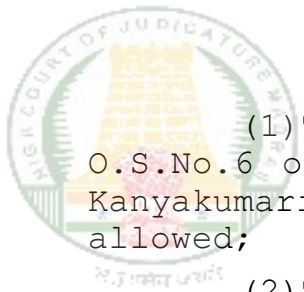
Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

7.The plain reading of above provision of sub clause 4 makes its mandatory to produce the certificate identifying electronic record contenting the statement and manner in which it was produced. Therefore, unless the certificate is produced as required under the Indian Evidence Act the electronic record is not admissible in evidence. Here the question is not with regard to the procedural aspect, which can be waived. But it is substantial one, should be mandatorily complied as provided under Section 65 (B) of the Indian Evidence Act.

The object of inserting above section itself only to enable the parties to produce the evidence with the compliance of the condition prescribed therein. As such without compliance of the same it cannot be admitted in evidence. The Judgment relied by petitioners' counsel reported in 2017 (5) CTC 207 and 2017 (4) CTC 413 squarely applies to the present case and therefore without any hesitation this Court hold that the issue No. 2 also in favour of the petitioner.

8.In view of answering issues, in favour of the petitioner, this Court set-aside the order impugned herein by allowing the Civil Revision Petition. However the order shall restrict only which respect of marking of photo copy and electronic document as such the Advocate Commissioner can record the evidence and mark the documents if it is filed in original subject to admissibility and proof.

<https://hcservices.ecourts.gov.in/hcservices>, the revision petition is allowed on the following terms:



(1) The Impugned Order passed in I.A.No.487 of 2017 in O.S.No.6 of 2013 on the file of learned Principal District Court, Kanyakumari District at Nagercoil is set-aside and the revision is allowed;

(2) The Court below and the Advocate Commissioner is directed not to mark the photocopy of documents offered in evidence and also the C.D., i.e. the electronic evidence;

(3) The exercise of recording of evidence shall be completed within a period of two weeks from the date of receipt of a copy of this order and the suit shall be disposed of on merits within a period of two months thereafter. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/
Assistant Registrar(CO)

/True copy/

Sub Assistant Registrar(CS-II)

To

The District Judge,
Kanyakumari District @ Nagercoil.

+1cc to Mr.R.Murugan, Advocate, SR.No. 79399
+1cc to Mr.R.SARAVANAN, Advocate, SR.No. 80033

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