

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 5098 of 2017

ORDER:

1) Aggrieved by the order dated 10.07.2017 passed in O.S.No.786 of 2010 by the I Additional Senior Civil Judge, Rajamahendravaram, wherein an objection raised by the defendants with regard to marking of Photostat copy of the agreement dated 18.07.2008, on the ground that the Xerox copy cannot be admitted in evidence, was accepted, the present Civil Revision Petition is filed by the plaintiffs.

2) The plaintiffs filed the suit for the following reliefs:-

- i) To declare that the sale deed dated 18.07.2008 and agreement dated 18.07.2008 together constitutes mortgage transaction.
- ii) For passing preliminary decree for rendition of all accounts by the defendants 1 and 2.
- iii) For awarding damages for destroying the plaint schedule.
- iv) For passing final decree redelivering the document and possession.
- v) For costs of the suit.
- vi) For such relief or reliefs which the Hon'ble court deems fit and proper under the circumstances of the case.

3) In the said suit, the plaintiffs/petitioners filed I.A.No.117 of 2014 to receive and mark Xerox copy of agreement dated 18.07.2008 as a secondary evidence, was allowed. When an objection was raised

by the learned counsel for the defendant with regard to marking of the Photostat copy of the agreement dated 18.07.2008 as to its admissibility and also as to whether it requires registration, the trial court took up the matter to determine whether the Photostat copy of document dated 18.07.2008 is admissible as secondary evidence under Section 65 of the Indian Evidence Act. After hearing both sides, the trial court held that the contention raised by the learned counsel for the plaintiffs that Ex.A-1 and the proposed Ex.A-2, which according to them is an agreement dated 18.07.2008 have to be read together as they are contemporaneous, does not appear to be sound, since the condition effecting the sale as a mortgage was not embodied in Ex.A-1-sale deed itself, as required by the proviso to Section 58 (c) of the Transfer of Property Act. Therefore, it is held that the document dated 18.07.2008 cannot be received into evidence. Challenging the said order, the present Civil Revision Petition is filed by the plaintiffs.

4) Learned counsel for the petitioners would submit that the agreement dated 18.07.2008 is in the form of a mortgage by conditional sale. He further submits that since the original agreement is in the possession of opposite party and as he is denying the custody of the original, there is no scope for securing the original document, as such he sought making of the Photostat copy of the agreement.

5) Learned counsel for the respondents took an objection for marking of the Photostat copy of the agreement dated 18.07.2008 as it is a Xerox copy and cannot be admitted in evidence and also the said document being in nature of mortgage by conditional sale, requires registration.

6) On perusal of the material available on record, the point for consideration is "Whether the application filed by the petitioners for adducing secondary evidence can be allowed?"

7) As per the averments made in the application filed by the petitioners, the respondents are contending that the agreement dated 18.07.2008 is not executed by them and that the original is also not in their custody. Since the respondents are denying the custody of the original, there is no scope for them to secure the original document for producing the same before the court. From the averments of the petition, it is clear that there is no evidence to show that the petitioners have complied with the requirements contemplated under Section 66 of the Indian Evidence Act before adducing secondary evidence under Section 65 of the Evidence Act. More so, the averments made in the application are vague.

8) Before proceeding further, it would be relevant to extract Section 65(a) of the Evidence Act, which is as under:-

"65(a) when the original is shown or appears to be in the possession or power-

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it; and when, after the notice mentioned in Section 66 such person does not produce it;"

9) As envisaged under Section 66 of the Act, a notice is required to be given before adducing secondary evidence under Section 65 of the Evidence Act. In the instant case the application does not disclose issuance of notice as required under Section 66 of the Evidence Act. As such the mandatory requirement of issuance of notice before filing an application for production of secondary evidence has not been complied with.

10) In **Koneru Srinivas and another v. G.Sarala Kumari**¹ this court observed as under:-

"Xerox copy of the agreement can be received as a secondary evidence when petitioners/plaintiffs in a suit for specific performance on agreement of sale got issued a notice under section 66 of the Evidence Act to produce original document. The question pertaining to custody of original and efforts made by concerned party to procure the same, can be subject matter of evidence."

11) As such before filing of an application for production of secondary evidence, the mandatory requirement has not been complied with. It also reveals that the application filed by the petitioners is under Section 151 CPC, which cannot be invoked when there is a specific provision contemplated under the Act. Therefore, viewed from any angle, the application filed by the petitioners to adduce secondary evidence cannot be sustained, as it suffers from legal infirmity.

¹ 2013(1) ALD, 635

12) However, in *State of Rajasthan and others v. Khamraj and others*², the Apex Court held as under:

"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."

13) Having regard to the above, the C.R.P. is disposed of, keeping it open to the petitioners to file a fresh application seeking permission under Section 65 of the Evidence Act to lead secondary evidence after complying with the mandatory requirement of issuance of notice under Section 66 of the Evidence Act, in which event the same shall be dealt with in accordance with law. There shall be no order as to costs. Miscellaneous Petitions, if any, pending in this Civil Revision Petition, shall stand closed.

JUSTICE C. PRAVEEN KUMAR

Dt:05.01.2018

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² AIR 2000 SC 1759