

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SMT JUSTICE T. RAJANI

CIVIL REVISION PETITION No.2399 of 2018

JUDGMENT: (*per Hon'ble Smt Justice T. Rajani*)

This revision arises out of the order dated 27.11.2017 passed by XXIV Additional Chief Judge, City Civil Court, Hyderabad in IA.No.283 of 2017 in COS.No.72 of 2017, by virtue of which the Court allowed the petition, which was filed by the petitioner therein, to receive copies of certain documents, under Section 65 of the Indian Evidence Act (for short 'the Act').

2. The petition, which was filed before the Court below, was on the ground that the petitioner/plaintiff has referred to and relied upon documents, which were mentioned in the annexure to the plaint, as document Nos.1 to 122 and that he is not in possession of some of the documents in original and that the documents are to be marked as exhibits. The petitioner searched the entire file available with him but the office copies of the documents having been lost during the shifting of the office, during internal transfer of case from one team to another, could not be found. It was mentioned in the petition that the documents, which were proposed to be admitted in evidence are notarized copies of the originals made by mechanical process, which in themselves ensure accuracy of the copies.

The respondent therein filed a counter denying the averments of the petition; denying the genuineness of the documents proposed to

be filed by the petitioner and also denying the fact of loss of files during shifting.

The Court below, by considering that the documents are internal correspondence between third parties and that it is, hence, quite natural that the petitioner would have xerox copies of those documents, allowed the petition.

3. Impugning the said order, this revision is preferred on the grounds that the Court below ought to have seen that the respondent submitted that the office copies of the documents, regarding which secondary evidence was sought to be adduced, were lost and hence there would be not even a remote possibility of tracing out the originals of the documents and that the Court below mechanically allowed the petition. The Court below erred in receiving the documents, the very existence of which was stoutly denied by the defendants and when there is no proof regarding existence and execution of the original documents. The Court below failed to see that the respondent did not show sufficient reason for not filing the original documents. The Court below ought to have seen that most of the photo/xerox copies sought to be marked are the internal office correspondence between the plaintiff and Shambolisugars Ltd., and the existence of original documents is not proved by the plaintiff and hence, they cannot be marked.

4. Heard both sides.

5. The counsel for the revision petitioner raises certain contentions based on Sections 63, 65 and 66 of the Act. In the foremost,

he submits that the copies, which are sought to be marked are, in fact, xerox copies of the documents mentioned therein and hence, the statement made in the petition that they are notarized xerox copies is false and on that premise itself, the order needs to be set aside. He further contends that the respondent failed to prove that the documents were lost and even if it is considered that he has proved that the documents were lost, the pre-condition laid down under Section 65 of the Act i.e. to issue notice to the adverse party under Section 66 of the Act, calling upon it to produce the original, is not fulfilled. Apart from that, with regard to admitting the documents, which are not filed along with the plaint or without seeking permission to file them later, the counsel contends that the same cannot be permitted, in view of order 7 rule 14 of the Civil Procedure Code.

6. The counsel for the respondent, on the other hand, submits that mere admission of the documents would not amount to proof of the documents and hence, there would not be any prejudice to the petitioner, if the documents are allowed to be admitted in evidence. He further contends that the counter filed on behalf of the respondent is not in the form of an affidavit signed by the respondent and hence, it has to be considered that the petition averments are untraversed.

7. From the pleadings and the arguments, the following points arise for consideration:

1. Whether the xerox copies of the documents would amount to secondary evidence.
2. Whether the original documents of the documents, sought to be admitted, are proved as lost.

3. Whether the notice mandated by Section 66 of the Indian Evidence Act is necessary before admitting the documents.
4. Whether the failure of the respondent to seek permission of the court, for filing documents, at a alter stage of filing the plaint, would make the petition liable for dismissal.
5. Whether the power under Article 227 of the Constitution of India need to be exercised in this case.
6. To what result.

POINT No.1:

8. The contention of the petitioner's counsel that the documents are not notarized copies but are only simple xerox copies, is not disputed by the respondent's counsel. His contention is that even xerox copies can be categorised as secondary evidence, according to what is defined in section 63 of the Act. Section 63 of the Act defines secondary evidence, which includes the copies made from the originals by mechanical process, which in themselves ensure the accuracy of the copies and copies compared with such copies. The category of documents, in this case, is argued by the respondent's counsel, as falling under the above definition.

9. The counsel for the petitioner relied on a decision of the Supreme Court in ASHOK DULICHAND v. MADHAVALAL DUBE¹. In the said decision, the photostat copy of the manuscript of the offending leaflet was the subject matter. The Supreme Court observed that in the affidavit, the petitioner did not state that the original was in possession of the successful candidate and no affidavit was produced

¹ (1975) 4 SCC 664

to show such possession; neither the circumstances in which the photostat copy of the original was made were explained nor who was in possession of original at that time was shown. It held that the copy was also not above suspicion and consequently, it upheld the opinion of the High Court to conclude that no foundation has been laid by the appellant for leading evidence in the shape of photostat copy. As can be understood by us, what flows from the decision is, that if a party succeeds in laying a foundation for leading secondary evidence, a photostat copy can also be admitted in evidence.

10. The decision in *H. SIDDIQUI v. A. RAMALINGAM*² relied upon by the counsel for the petitioner is also on the same aspect, wherein it was held that admitting the signature in photostat copy of the document does not amount to admitting the contents of the document; where original documents are not produced at any time, nor any factual foundation laid for giving secondary evidence, it is impermissible to allow a party to adduce secondary evidence; secondary evidence must be authenticated by foundational evidence that the alleged copy is, in fact, a true copy of the original; secondary evidence relating to contents of documents is inadmissible until non-production of original is accounted for; in the instant case, the trial Court inferred that there is a specific admission by the respondent that he had executed power of attorney in favour of his brother since he admitted the signature on photocopy of power of attorney; admission of a document or its contents may not necessarily lead to drawing any inference until contents thereof have some

² (2011) 4 SCC 240

probative value. Hence, drawing inference by the trial Court without determining the probative value of such admission was held as unwarranted. The ruling is however, not specific on the aspect of admissibility of xerox copies.

11. The decision of this Court in KATAKAM VISWANATHAM v. KATAKAM CHINA SRI RAMA MURTHY³ was also taken help of by the counsel for the petitioner, to contend that the xerox copies cannot be admitted in evidence. In the above decision, this Court upheld that typed copy of a document cannot be admitted as secondary evidence unless the conditions enumerated in Section 65 of the Act are shown to exist. The ruling does not speak about the admissibility or otherwise of xerox copies.

12. A decision of this Court in ENKAY TEXOFOOD INDUSTRIES LTD. v. STATE OF ANDHRA PRADESH (CRLP.No.5195 of 2014 dated 22.04.2015) permitted xerox copies to be marked. The objection of the petitioner therein was taken note of by the Court, the objection being that the photostat copy of a cheque is easily tamperable by mechanical process and if the same is allowed to be marked as exhibit, the accused may not be able to send the document for comparison to FSL to establish their defence plea. The Court observed that mere allowing the complainant to mark the photostat copy of the document does not mean accepting its contents to be true; the burden is on the complainant to prove the contents of the cheque; it is only after the complainant discharges his evidentiary burden, that the onus shifts to

³ 2004 (3) ALD 338

the accused; the accused can establish their defence by various other means which are legally permissible to them; so merely on the apprehension that the accused will lose the opportunity to send the document to FSL, the complainant cannot be restrained from establishing his case by producing the secondary evidence. The Court also considered the cases relied upon by the petitioners therein and distinguished them on facts, while dismissing the criminal petition.

14. Hence, from the above, it can be understood that the Courts have been permitting admission of xerox copies into evidence, but the nature of the documents and the probative value of the documents and possibilities of tampering the documents have to be taken into consideration, before permitting xerox copies into evidence.

Hence, we answer this point accordingly.

POINT No.2:

15. The contention of the counsel for the petitioner with regard to the failure of the respondent to prove that the original documents, sought to be admitted, were lost, is vehement and is based on the fact that no dates were mentioned in the petition with regard to the shifting of the office of the respondent and other details. The method and manner in which the fact that original documents were lost has to be proved is not laid down anywhere, but by virtue of the decisions rendered in the cases coming before the Courts, the Courts have been upholding and rejecting certain modes of proof, by considering other circumstances. The counsel for the respondent relied on a decision of

the Supreme Court in RAKESH MOHINDRA v. ANITA BERI⁴ wherein the facts dealt with by the Supreme Court are that, for the purpose of seeking permission to prove the letter of disclaimer executed by one Justice Tek Chand by way of secondary evidence, the defendant summoned the record of GLR from the Office of DEO, Ambala, who is stated to be custodian of the record. According to the appellant therein, at the time of sanction of mutation with respect to the suit property, the appellant had filed the original affidavits of the co-sharers along with the letter of disclaimer executed by Justice Tek Chand with one photostat set, which was lying in the office of DEO, Ambala. For the purpose of deciding the application under Section 65 of the Act, the appellant therein examined the official concerned, to produce the record available in the said office. On the basis of the evidence given by the witness, who produced the record and the evidence of the defendant, the trial Court allowed the application and admitted the letter of disclaimer to be used as secondary evidence. The Supreme Court by extracting Section 65 of the Act held “The preconditions for leading secondary evidence are that such original document could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party seeking to produce secondary evidence must establish for the non-production of primary evidence and unless it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of

⁴ (2016) 16 SCC 483

that document cannot be accepted.” The Supreme Court, by relying on its earlier decision in *EHTISHAM ALI v. JAMNA PRASAD* [AIR 1922 PC 56] wherein the same question came up for consideration, which is with regard to admissibility of secondary evidence in case of loss of primary evidence. It was held that it is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of the document in secondary evidence. The observations of the Supreme Court in *EHTISHAM ALI’s case*, extracted by the Supreme Court, are as under:

“It is no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed.”

16. In *RAKESH MOHINDRA’s case* (1 supra) the loss of original documents was proved by summoning the witness, who is the custodian of the record containing the said document. This Court went a step ahead while deciding CRP.No.692 of 2009 dated 08.04.2010 (*SMT. SATTAMMA v. CH. BHIKSHAPATI GOUD*) and held that an affidavit affirming that the original documents are lost would entitle the party to adduce secondary evidence. The reason which weighed with the Court while deciding as such is, that the respondent therein was only seeking to adduce evidence subject to acceptance or rejection of any document by the Court at any later stage of proving the photostat of the document beyond the preponderance of probabilities.

17. In this case also, the respondent filed his affidavit and affirms that the documents were lost while the office was being shifted and the case files were being transferred from one team to another. We are also inclined to accept the above approach adopted by this Court and consider the sworn affidavit of the respondent as sufficient to prove the fact of loss of originals.

The point is accordingly answered.

POINT No.3:

18. Having held that a xerox copy of the document can be marked subject to examination of probative value and having held that the affidavit of the respondent would suffice to prove the loss of original, we are now confronted with the question as to whether all the documents proposed to be marked by the respondent can be permitted as secondary evidence or whether there are any preconditions to be fulfilled by the respondent, before admitting the same as secondary evidence.

19. The counsel for the petitioner firmly argues that the soundness of the principle underlying Section 65 (a) of the Act, which requires a notice mentioned in Section 66 of the Act to be given to the person, who is shown to be in possession of the originals of the documents, the copies of which are sought to be admitted, cannot be ignored or belittled, only on the premise that the documents, anyhow, need to be proved and hence no prejudice would occur.

20. It would, at this stage, be beneficial to extract Section 65(a) of the Act, as under:

65. Cases in which secondary evidence relating to documents may be given.- Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-

(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;

21. A reading of the above provision would show that the notice under Section 66 of the Act is necessary when the original is shown to be in possession of the person against whom the document is sought to be proved or is in possession of any person out of reach or not subject to the process of the Court or of any person who is legally bound to produce it. In order to seek dispensation of notice under Section 66 of the Act, the respondent should succeed in proving that the original document is in his own possession and is not in possession of a person against whom it is sought to be proved or is not in possession of any person out of reach or not subject to the process of the Court or any person legally bound to produce it. The documents, sought to be admitted in this case are of different categories. The table contains the list of 32 documents. The first document is the purchase order placed by the plaintiff on Cargill International S.A., Geneva, a copy of which can be expected to be available with the respondent. So also the documents at Sl.Nos.3, 5, 6, 7, 10 and 13. Items 2, 4, 8, 9, 11, 12, 14 to 21, 24, 25, 29 are the documents for which also copies can be expected to be available with the petitioner. Items 22,

23, 26, 28, 30 and 31 are the correspondence between two third parties, of which probably the petitioner may not have the copies. No explanation is found in the petition, with regard to the probability of the copies of the above documents being with the petitioner. In Ehtisham's case the Apex Court observed that the law is well settled that if a party wishes to lead secondary evidence the court is obliged to examine the probative value of the document produced in the court or their contents and decide the question of admissibility of a document in secondary evidence and at the same time the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the document falls under section 65(a) of the Act, notice under section 66 of the act becomes necessary. Hence, the notice under Section 66 of the Act is required to be given to the party in whose possession the original or the copies of the documents are, for production of such copies.

The point is answered accordingly.

POINT No.4:

23. The counsel assails the order for yet another reason, it being that the respondent failed to seek permission as required under order 7 and hence the impugned order is liable to be set aside. He bases his argument on a ruling of this Court reported in between KATAKAM VISWANATHAM V. KATAKAM CHINA SRIRAMA MURTHY⁵ and others. But there is no ruling made, with regard to the argued aspect. This court was distinguishing between the documents filed under rule

⁵ 2004 (3) ALD 338

14 of order 7 and order 13 rule 1 of Civil Procedure Code. The decision touches upon the manner in which leave has to be granted for filing documents at a belated stage to the plaint. The respondent, by this petition, only seeks permission to adduce secondary evidence of certain documents. Leave required under order 7 rule 14 of CPC can, if required, be obtained after the permission to adduce secondary evidence, is accorded. The impugned order, hence, need not be set aside on that count.

The point is answered accordingly.

POINT No.5:

24. Having held that xerox copies of documents can be admitted in evidence; having held that notice under Section 66 of the Act is required when the documents are in possession of third parties and the persons mentioned in Section 65(a) of the Act; having observed that some of the documents mentioned in the table shown in the petition are in possession of third parties and hence, notice under Section 66 of the Act is required, we have to now examine whether the order of the Court below, allowing the petition in toto, needs any interference.

25. This revision is under article 227 of the Constitution of India. The maintainability of this petition is not disputed by both the counsel. But the scope of entertainment of such petition needs to be examined. There is no quarrel that the law is well settled that the power under Article 227 can be exercised only in exceptional cases i.e. to keep the Courts within the bounds of law, but not to merely correct the

errors. In STATE HARIYANA & ORS. VS. MONOJ KUMAR⁶ Reported in 2010 (2) Indian Civil Cases 602, the Hon'ble Apex Court viewed:-

"More than half a Century ago, the Constitution Bench of this Court in Nagendra Nath Boru and Another v. Commissioner of Hills Division and Appeals, Assam & Others AIR 1958 SC 398 settled that power under Article 227 is limited to seeing that the Courts below function within the limit of its authority or jurisdiction. This Court placed reliance on Nagendra Nath's case in a subsequent judgment in Niburan Chandra Bag v. Mahendra Nath Ghugu AIR 1963 SC 1895. The Court observed that jurisdiction conferred under Article 227 is not by any means appellate in its nature for correcting errors in the decisions of subordinate Courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority ..."

26. The counsel for the petitioner in order to contend that the error committed by the Court below is as exceptional as to warrant interference by this Court by exercising the power under Article 227 of the Constitution of India, relies on a decision of the Supreme Court in SHALIMAR CHEMICAL WORKS LIMITED v. SURENDER OIL AND DAL MILLS⁷. In the said case, the Supreme Court considered the marking of xerox copies by the trial Court as a serious mistake and it held that the trial court should not have marked as exhibits, the xerox copies of the certificates of registration of trade mark, in the face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility and the

⁶ 2010(2) Indian Civil Cases 602

⁷ (2010) 8 SCC 423

appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.

27. In support of the contention, that the unless it is proved by the respondent that the original of the copies proposed to be filed by it in the Court are not in existence, secondary evidence cannot be permitted at all, the learned counsel for the petitioner relies on a decision of the Supreme Court in *J. YASHODA v. K. SHOBA RANI*⁸. The Supreme Court held that secondary evidence, as a general rule is admissible only in the absence of primary evidence; if the original itself is found to be inadmissible through failure of the party who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. It further held that essentially secondary evidence is an evidence which may be given in the absence of that better evidence which the law requires to be given first, when a proper explanation of its absence is given; the definition under Section 63 of the Evidence Act is exhaustive as the section declares that secondary evidence “means and includes” and then follow the five kinds of secondary evidence. It was also held that the rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced only means that, so long as the higher or superior evidence is within the possession of a person or may be reached by a person, that person shall give no inferior proof in relation to it. Section 65 of the Act deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to

⁸ (2007) 5 SCC 730

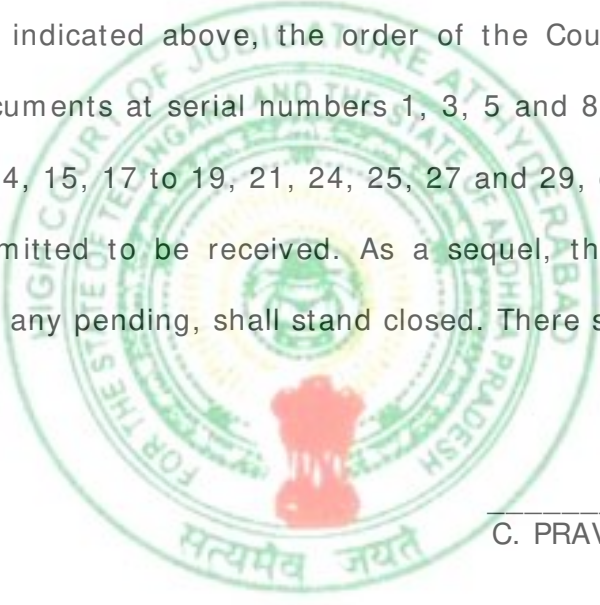
produce secondary evidence it is necessary for the party to prove existence and execution of the original document.

28. In the light of the above legal position, the xerox copies of the documents, the originals of which are shown to be with the respondent and which are shown to have been lost, can be received in evidence. Both the parties agree upon the documents at Sl.Nos.1, 3, 5 and 8 to 12, to be the documents, the originals of which would be with the respondent. Hence, the order of the Court below to the extent of admitting those documents can be sustained.

29. With regard to the other documents, the counsel for the petitioner submits that the originals are never in possession of the respondent and hence, the copies of the same cannot be marked. But the counsel for the respondent submits that documents at Sl.Nos.2, 4, 8, 9, 11, 12, 14 and 15 also can be received in evidence as they are the documents, the copies of which would be with the respondent. Though the counsel for the petitioner opposes the said contention saying that the originals of the letters addressed to the respondent by Shambolisugars Ltd. would be with Shambolisugars Ltd. and hence, the copies cannot be permitted, we see, that when it is a letter addressed to the respondent, it becomes the original letter containing the signature of Shambolisugars Ltd. and hence, the same can be permitted to be taken in evidence so also the bill of entry, the original of which would be with the petitioner. Hence, the documents at Sl.Nos.2, 4, 8, 9, 11, 12, 14, 15, 17 to 19, 21, 24, 25, 27 and 29 can also be permitted to be taken in evidence. The debit advice by Deutsch Bank is also issued to the respondent, hence, the original can be

expected to be with the respondent. The documents at Sl.Nos.22, 23, 26, 28, 30 and 31 are the documents, the originals of which are not pleaded to be with the respondent and they are correspondence between two third parties. Hence, the said documents cannot be permitted to be taken in evidence without following the procedure prescribed under Section 65(a) of the Act. The documents at Sl.Nos.20 and 32 are the tables prepared by the petitioner and the same cannot be considered as documents also. Hence, they cannot be admitted in evidence.

The civil revision petition is allowed in part. To the extent indicated above, the order of the Court below stands modified. Documents at serial numbers 1, 3, 5 and 8 to 12 and 2, 4, 8, 9, 11, 12, 14, 15, 17 to 19, 21, 24, 25, 27 and 29, of the impugned order are permitted to be received. As a sequel, the miscellaneous applications, if any pending, shall stand closed. There shall be no order as to costs.



C. PRAVAEEN KUMAR, J

T. RAJANI, J

July 13, 2018
DSK