

HON'BLE SRI JUSTICE SURESH KUMAR KAIT

CIVIL REVISION PETITION No.4476 of 2018

ORDER : (Oral)

Vide the present petition, the petitioner has challenged the order dated 3rd July 2018, passed in I.A.No.450 of 2018 in O.S.No.201 of 2015, whereby, the petition filed by the petitioner herein under Order VII Rule 14 and Section 151 CPC to receive the documents for the purpose of marking them as exhibits in 'A' series on behalf of petitioner/plaintiff, has been partly allowed, receiving document Nos.2 and 3 and rejecting document No.1, which is Xerox copy, subjecting to proof and relevancy.

2. Learned counsel appearing on behalf of petitioner submits that in para 15 of the written statement filed by defendant No.1/respondent No.1 herein, he admitted that the principal contractor obtained a memorandum of understanding as if there was understanding in between the plaintiff and the defendant and the plaintiff was retired from the partnership and as if it was dissolved along with other material contractors.

3. On filing the above written statement, the petitioner herein issued notice under Section 66 of the Evidence Act to furnish the original copy of the memorandum of understanding, which was denied by defendant No.1/respondent No.1, in the reply notice. Learned counsel for petitioner further submits that the document

which is at page Nos.10 and 11 of the material papers, is dated 25th April 2010, signed by respondent No.1/defendant No.1. Thus, it seems that the original of the said document is with respondent No.1/defendant No.1. Therefore, the said document is to be marked and thereafter, the petitioner shall lead evidence to prove the same. She further submits that if the petitioner fails to prove the document by leading evidence, it will not prejudice the interest of respondent No.1/defendant No.1.

4. Learned counsel for respondents submits that in para 19 of the written statement filed by defendant No.1, it is stated as under :

“It is submitted that the principal contractor used to take two cheques as security from this defendant in the name of plaintiff and he used to return the said cheques after lapse of some time and again used to take fresh cheques. The cheques that were taken lastly, it appears, were handedover to the plaintiff, to harass this defendant. This defendant reserves his right to file the returned cheques during trial. This defendant did not issue any cheques directly to the plaintiff nor this defendant is due any amount to the plaintiff.”

5. Learned counsel for respondents further submits that no Settlement of Account, dated 25.04.2010, had taken place between the plaintiff and defendant No.1, therefore, the learned trial Court has rightly not allowed to mark the said document on the ground that it is a photo copy.

6. The fact remains that in para 15 of the written statement filed by defendant No.1, it is admitted that the principal contractor obtained memorandum of understanding as if there was understanding in between plaintiff and defendant No.1 and the plaintiff was retired from the partnership and as if it was dissolved along with other material contractors.

7. Thereafter, in reply to the legal notice issued under Section 66 of Evidence Act, defendant No.1 denied to have been in possession of the said document and stated that no such document was ever executed between him and plaintiff. However, in the Xerox copy of the document, which is at page Nos.10 and 11 of the material papers, the signature of respondent No.1/defendant No.1 is shown.

8. As per Clauses (a) and (b) of Section 65 of the Evidence Act, secondary evidence may be given of the existence, condition or contents of a document, 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; when the existence, condition or contents of the original have been proved to be admitted in

writing by the person against whom it is proved or by his representative in interest.

9. Though it is not specifically admitted in para 15 of the written statement filed by defendant No.1 regarding the document dated 25th April 2010, however, it is stated that the principal contractor obtained a memorandum of understanding as if there was understanding in between plaintiff and defendant No.1. It seems, some document got executed by the principal contractor from the plaintiff and defendant No.1, which is not in possession of the petitioner herein.

10. In the case of *Smt.J.Yashoda v. Smt.K.Shobha Rani*¹, the Hon'ble Supreme Court held as under :

“The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the

¹ Appeal (Civil) 2060 of 2007

circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In **Ashok Dulichand v. Madahavlal Dube and Another** [1975(4) SCC 664], it was *inter alia* held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be

ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

11. In the present case, para 15 of the written statement filed by defendant No.1 comes under the requirement under Sub-clauses (a) and (b) of Section 65 of Evidence Act. Therefore, I am of the

opinion that no prejudice would be caused if the document dated 25th April 2010 is marked. No doubt the said document to be marked shall be treated as secondary evidence.

12. I hereby make it clear that if respondent No.1/defendant No.1 is of the view that the document dated 25th April 2010 was never executed by him, he may file an application before the trial Court for sending the same to expert.

13. The revision petition is accordingly allowed. No order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

19th September, 2018

ajr

SURESH KUMAR KAIT, J

