

THE HONOURABLE SRI JUSTICE SANJAY KUMAR
AND
THE HONOURABLE SRI JUSTICE M.GANGA RAO

CIVIL REVISION PETITION No.7421 of 2018

ORDER: (per Hon'ble Sri Justice Sanjay Kumar)

The petitioner in this civil revision petition, filed under Article 227 of the Constitution, is the second defendant in C.O.S.No.29 of 2017 on the file of the learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad (*for brevity*, 'the Commercial Court'). It filed the present revision aggrieved by the order dated 14.11.2018 passed by the Commercial Court allowing I.A.No.450 of 2018 filed therein by the first respondent-plaintiff under Section 65 of the Indian Evidence Act, 1872 (*for brevity*, 'the Act of 1872').

Heard Ms.Vani, learned counsel representing Mr.A.Venkatesh, learned counsel for the petitioner-second defendant, and Mr.Gopal G.Naik, learned counsel for the first respondent-plaintiff. The second respondent in this revision, being the first defendant in the suit, is shown as not a necessary party.

C.O.S.No.29 of 2017 was filed for recovery of a sum of Rs.8,57,05,740/- in relation to a joint venture between the first respondent-plaintiff and the second respondent-first defendant on the strength of Memorandum of Understanding dated 14.06.2008. As the petitioner-second defendant took over the assets and liabilities of the second respondent-first defendant thereafter, the suit was instituted against it in the capacity of a successor-in-interest. The first respondent-plaintiff filed the subject I.A. praying that photocopies of the documents, *viz.*, the Memorandum of Understanding dated 14.06.2008 and the exchange of correspondence between it and the second respondent-first

defendant, being the letters dated 01.06.2010 and 14.06.2010, should be received as secondary evidence. In the affidavit filed in support of this application, the first respondent-plaintiff stated as follows:

“4. It is an undisputed fact that the existence of Memorandum of Understanding between the parties. The plaintiff prior to the filing of suit wrote letters i.e., 1-6-2010 to the defendant asking them to pay the suit amount and in turn the Defendants replied the said notice by sending a reply notice dt.14-06-2010. There is no dispute with regard to the said correspondence also. The petitioner/plaintiff filed the copies of the said MOU dated 14-06-2008 and letter dt.1-6-2010 and reply dated 14-06-2010 along with the suit but the originals of the said documents were not traced out in the office of the plaintiff. The petitioner undertakes to produce the originals as and when traced out. Hence the present petition is filed for leading secondary evidence. Unless this Hon’ble Court permit to lead secondary evidence the petitioner will suffer heavy loss.”

The petitioner-second defendant filed a counter-affidavit contesting the subject I.A. Therein, it alleged that the originals of the documents in question were being deliberately withheld and pointed out that the very foundation of the suit was the Memorandum of Understanding dated 14.06.2008 and the correspondence. While admitting that there was a Memorandum of Understanding executed between the first respondent-plaintiff and the second respondent-first defendant, it asserted that the liability thereunder was being denied and copies of the documents could not be relied upon as there was no scope for verification as to their authenticity and veracity. Thereupon, the Commercial Court passed the order under revision on 14.11.2018. This order, brief as it is, is reproduced hereunder:

“Perused the record. Both the parties are admitted about the existence of the documents. Respondent contended that the originals are with the petitioner. Where as petitioner contended that it were misplaced. admittedly copies of those documents are with the respondent, if any manipulation certainly the

respondent can agitate the same. Hence petition allowed and received the documents Under Sec. 65 of Indian Evidence Act.”

At the outset, it may be noted that the petitioner-second defendant never admitted that it had copies of the documents in question whereby any manipulation therein could be pointed out by it. On the other hand, as referred to *supra*, the counter-affidavit of the petitioner-second defendant was to the effect that there was no possibility of verifying the authenticity and veracity of the documents in question. This statement clearly demonstrated that the petitioner-second defendant was not in possession of the documents in question or copies thereof.

That apart, Ms.Vani, learned counsel, would rely upon case law in support of her contention that the subject application was bereft of the required pleadings and therefore, the Commercial Court ought not to have accepted the documents in question as secondary evidence.

Section 63 of the Act of 1872 defines ‘secondary evidence’ and it states that secondary evidence would mean and include copies made from the original by mechanical processes and copies compared with such copies, as per sub-section (2) thereof, and also copies made from or compared with the original, in terms of sub-section (3). Illustrations (a) and (b) to this Section are of significance as they point to the requirement of the copy being made from the original itself and not from a copy thereof.

In *ASHOK DULICHAND V/ s. MADAHAVLAL DUBE*¹, a Three-Judge Bench of the Supreme Court found, in the context of Section 63 of the Act of 1872 with regard to production of a photostat copy, that it was nowhere stated in the affidavit filed in support of the application that the original document of which a photostat copy was sought to be filed was in

¹ AIR 1975 SC 1748

the possession of a particular person and there was no material on record to indicate the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photostat copy was taken. The Supreme Court accordingly agreed with the finding of the High Court that the photostat copy was not above suspicion and could not, therefore, be accepted as secondary evidence.

In *U. SREE V/ s. U. SRINIVAS*², the Supreme Court observed that secondary evidence relating to the contents of a document would be inadmissible unless the non-production of the original is accounted for, so as to bring it within one or the other cases provided for in the Section. Secondary evidence must be authenticated by foundational evidence that the copy is in fact a true copy of the original and the Supreme Court observed that mere admission of a document in evidence would not amount to its proof and therefore, it would be the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making an endorsement thereon.

A Division Bench of this Court in *BADRUNNISA BEGUM V/ s. MOHAMOODA BEGUM*³, held that a photocopy of a copy of the original could not be treated as secondary evidence.

In the light of the aforesaid settled legal position, the affidavit filed in support of the subject I.A. is found to be woefully lacking. No mention was made therein as to whether the photostat copies sought to be produced were made directly from the original documents or from copies thereof. As rightly pointed out by Ms.Vani, learned counsel, when these documents formed the sheet-anchor of the suit, it was for the first respondent-plaintiff to explain as to why the originals are not available for

² AIR 2013 SC 415

³ AIR 2001 AP 394

production before the Court. A mere undertaking to the effect that the originals would be produced as and when traced out would not do and all the more so, when the application was filed on the strength of a casually drafted affidavit bereft of requisite details to establish the status of the photostat copies and as to how they qualified as secondary evidence.

Though Sri Gopal G.Naik, learned counsel, would point out that the petitioner-second defendant filed a written statement admitting the execution of the Memorandum of Understanding dated 14.06.2008, it is clear that this aspect was brought out by the petitioner-second defendant also in its counter filed in the subject I.A.. That admission, by itself, would not be sufficient for the first respondent-plaintiff to adduce photostat copies of the said documents as secondary evidence without first satisfying the legal requirements and fulfilling the procedure to do so. The Commercial Court ignored these vital aspects and being under the misconception that the petitioner-second defendant had copies of the documents in question, whereby it could point out any manipulation having been done by the first respondent-plaintiff, the Commercial Court allowed the I.A.

However, as we find that the first respondent-plaintiff did not strive to establish the foundational particulars for maintaining the application to treat the copies of the documents as secondary evidence in terms of Section 63 of the Act of 1872, the Commercial Court was not justified in allowing the said application.

The civil revision petition is accordingly allowed setting aside the order dated 14.11.2018 passed by the Commercial Court in I.A.No.450 of 2018 in C.O.S.No.29 of 2017.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

M. GANGA RAO, J

31st December, 2018
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