

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.06.2019

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.R.P.(PD)No.708 of 2019

and

C.M.P.Nos.4586 and 10840 of 2019

1.S.Venkatasubramaniam

2.S.Saraswathi

3.A.Lakshmi

P.Parvathi (Died)

4.Nandhini

5.Nethra (minor)

6.M/s.KGEYES Residency Pvt.Ltd,
Rep. By Its Managing Director,
Mr.P.V.Sanmugam
Having Office at No.10, II Cross Street,
Raja Annamalaipuram,
Chennai – 600028.

7.S.Srinithi

... Petitioners

Vs.

1.Ramani

2.G.R.Sekar

... Respondents

India praying to set aside the judgment and decree dated 03.01.2019 passed by the learned Trial Judge in I.A.No.11362 of 2018 in O.S.No.5893 of 2013 on the file of the XV Assistant Judge, City Civil Court, Chennai and thereby direct eschewing of the documents marked as Exhibits A3,A4,A6,A7,A8,A9,A19,A20,A21,A25 and A27.

For Petitioners : Mr.R.Parthasarathy

For Respondents : Mr.S.Shankar

ORDER

This civil revision petition is directed against the order rejecting the petition filed by the petitioners / defendants to issue documents marked as Ex.A3, A4, A6, A7, A8, A9, A19, A20, A21, A25, A27 through P.W.1.

2. According to the petitioners, the above said exhibits are xerox copies and though strong objections were made, the documents were allowed to be marked by the Trial Court without considering the admissibility of the documents.

3. The learned counsel for the petitioners, would vehemently contend that the trial Court has thrown out the procedures laid down under Section 65 (a) and 66 of the Indian Evidence Act. The Trial Court

ought not to have marked the xerox documents without considering the admissibility of the same.

4. The Hon'ble Supreme Court in ***State of Rajasthan and others Vs. Khemraj and others [(2000) 9 Supreme Court Cases 241]*** in paragraph 3 held as under:

“ 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.”

5. Following the judgments of this Court in ***The Home Machinery Society of India, rep. by its Secretary Vs. Vepery Auxiliary of the Home Missionary Society of India, rep. by its Secretary Mrs. Rose Fernandes*** [paragraphs 8 and 9 are extracted hereunder:

“It is needless to say that the above order of the Court below marking Exs.A-3 to A-16, of course by recording that they

are marked with objections on the defendants side, cannot be sustained for two reasons. Firstly, there is no application filed by the plaintiff under Section 65(a) of the Indian Evidence Act, Seeking permission to mark those documents, which are admittedly the photocopies, the originals of the same said to be in the custody of other side. Secondly, the above said order also did not discuss the objections raised by the defendants through their memo, dated 16.06.2014. It is well settled that photocopies cannot be marked as a primary evidence. However, if they are sought to be marked as secondary evidence under the circumstances as contemplated under Section 65(a) of the Indian Evidence Act, 1872, then the party who seeks to mark those secondary evidence must file an application under Section 65 (a) of the said Act and seek permission of the Court. In this case, no such application was filed. That being the factual position, I am of the view that the impugned order of the Court below, dated 01.07.2014 marking Exs.A-1 to A-16 (Exs.A-3 to A-16 marked with objection on the side of the defendants), cannot be sustained and consequently, the same is liable to be set aside. Accordingly, the same is set aside.

9. At the same time, it cannot be said that the respondent / plaintiff is remediless. Therefore, the respondent / plaintiff is at

liberty to file an application under Section 65(a) of the Indian Evidence Act, 1872 before the trial Court seeking permission to mark the photocopies of those documents and as and when any such applicatin is filed, it is open for the petitioners / defendants to file their counter affidavit to the said application, and the Court below shall consider the said application and pass orders on the same, on merits and in accordance with law.”

6. Admittedly, in the instant case, even though those documents were not listed along with the plaint under Order 7 Rule 14 C.P.C. no separate petition has been filed to mark them as the secondary evidence. From the judgment of the Hon'ble Supreme Court, it is very clear that the petitioner should adhere the procedure laid down under Section 66 of the Evidence Act to mark the secondary evidence. But he has not filed any such petition supported by an affidavit. The Trial Court ought not to have marked the xerox copies of the memorandum of the agreement and other documents when objections were raised by the defendant. On the other hand, the trial Court should have considered the admissibility of those documents and to applied its mind. The finding of the Trial Court in the instant case seems to be that the truth and veracity of the documents could be decided at the time of judgment.

M. GOVINDARAJ, J.

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7. For the foregoing reasons, the order passed in I.A. No.11363 of 2018 dated 03.01.2019 is set aside. It is open to the respondent to file a petition along with affidavit as contemplated under Section 66 of the Evidence Act and mark the documents before the Court. In the process, the defendant is entitled to file his counter affidavit and contest the admissibility of the same.

8. The Civil revision petition is disposed of with the above observations. The lower Court is directed to consider the application if any, filed by the plaintiff and dispose of the suit as expeditiously as possible, preferably within a period of one month from the date of disposal of the I.A.

18.06.2019

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Note: Issue order copy on 24.07.2019

To
The XV Assistant Judge, City Civil Court, Chennai.

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