

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 27.11.2019

Pronounced On : 10.12.2019

CORAM:

THE HON'BLE Mr. JUSTICE R.PONGIAPPAN

Civil Revision Petition (PD) No.4504 of 2013
and M.P.No.1 of 2013

Srisanth

.. Petitioner

Vs

1. Samlal
2. Viswanathan
3. S.Gantha
4. R.Subramaniam
5. P.Maya
6. P.Asha @ Keerthi
7. Bhagavan @ Kumar

.. Respondents

[RR2 to 7 remained exparte before the lower Court, hence, notice to RR 2 to 7, is dispensed with, vide Court order dated 27.11.2019, made in CRP(PD) No.4504 of 2013 (RPAJ)]

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the Fair and Decreetal order dated 18.09.2013 made in I.A.No.464 of 2013 in O.S.No.64 of 2005, on the file of the Second Additional Sub Court, Erode District.

For Petitioner : Mr.N.Manokaran

For Respondents : Mr.T.Murugamanickam, Sr. Counsel
for Ms.Zeenath Begum (for R1)

ORDER

The plaintiff in OS No.64 of 2005, on the file of the II Additional Subordinate Court, Erode District, is the petitioner herein.

2. Before the said Court, the petitioner herein, as a plaintiff filed a suit in OS No.64 of 2005, as against the respondents herein, seeking the relief of partition and separate possession. When the suit was pending for trial, the revision petitioner/plaintiff gave a notice to the defendants to cause production of the original Will dated 14.06.1984, alleged to be executed by the mother of the plaintiff, by saying that the said Will is in the custody of the respondents/defendants. The respondents/defendants have denied the alleged execution and stated that the Will dated 14.06.1984 is not in their custody. Hence, the revision petitioner/plaintiff filed an interlocutory application in IA No.464 of 2013, praying the Court below to receive and mark the photostat copy of the Will dated 14.06.1984, executed by the mother Bahagibai, on the side of the plaintiff.

3. The learned II Additional Subordinate Judge, Erode, after affording an opportunity to the defendants/respondents herein, by order dated 18.09.2013, dismissed the prayer sought for by the revision petitioner/plaintiff. Aggrieved over the said finding the petitioner is before this Court with the present Civil Revision Petition.

4. In the affidavit filed by the revision petitioner/plaintiff in support of the petition filed before the trial Court under Sections 63 and 65 of Indian Evidence Act, 1872, he has stated that his mother Bahagibai, when

she was in a sound and disposing state of mind, out of free will and volition, bequeathed her house property in favour of the revision petitioner/plaintiff and to the 2nd defendant Biharilal, in equal moieties. As the original of the said Will is with the respondents/defendants, he could produce only the photostat copy of the said Will. Further, he has stated that when notice was given to the respondents/defendants to cause production of the said Will for evidence, the respondents/defendants have denied the custody of the Will dated 14.06.1984 and therefore, it is just and necessary for the revision petitioner/plaintiff, to file the interlocutory application, praying the Court below to receive and mark the photostat copy of the Will dated 14.06.1984, executed by his mother Bhagibai, as exhibit on the side of the plaintiff.

5. Resisting the claim made by the revision petitioner/plaintiff, the defendant/1st respondent in the Civil Revision Petition, filed a counter before the trial Court, in which, he denied the case of the revision petitioner/plaintiff. He has specifically stated that no such Will was executed by Bhagibai as alleged by the revision petitioner/plaintiff and it is a fraudulent one. Further, he denied that the said Will is with the respondents/defendants. According to them, no such Will is available with the respondents/defendants.

6. In this connection, while at the time of passing the impugned order, the learned II Additional Subordinate Judge, Erode, has relied on the judgment of our Hon'ble Apex Court in **Smt.J.Yashoda Vs. Smt.K.Shobha Rani**, reported in AIR 2007 SC 1721 : 2007 (5) SCC 730 and has held that the revision petitioner/plaintiff has not proved the custodian of the Will and that when the execution of the Will itself is disputed, the photostat copy of the Will cannot be accepted, as a secondary evidence. Ultimately, he dismissed the interlocutory application filed by the revision petitioner.

7. Today, when the Civil Revision Petition came up for hearing, the learned counsel appearing for the revision petitioner/plaintiff was present and would contend that in the written statement filed by the respondents/defendants, there is no specific denial about the original Will. It is the duty of the respondents/defendants to produce the original Will dated 14.06.1984, immediately, on receipt of the notice issued by the revision petitioner/plaintiff. If, the respondents/defendants refused to produce the original, the plaintiff / revision petitioner, is entitled to mark the photostat copy of the secondary evidence, as per Sections 63 and 65 of Indian Evidence Act, 1872.

8. On the other hand, the learned senior counsel appearing for the 1st respondent/defendant would contend that in the counter filed before the

trial Court, the respondent has clearly stated that no will is available in the custody of the respondents/defendants. Hence, it is for the revision petitioner/plaintiff to prove that the respondents/defendants are the custodian of the alleged Will. In the absence of any proof, he is not entitled to mark the photostat copy of the Will dated 14.06.1984, as the secondary evidence and thereby, the impugned order passed by the trial Court, is well within the purview of the law.

9. Upon considering the arguments advanced by either side, it is true that before treating the photostat copy of the Will as exhibit, a duty is cast upon the revision petitioner / plaintiff to prove that the respondents/defendants are the custodian of the said alleged Will. The said attempt has to be made only at the time of marking the document.

10. In the judgment of **Smt.J.Yashoda Vs. Smt.K.Shobha Rani**, reported in **AIR 2007 SC 1721 : 2007 (5) SCC 730**, our Hon'ble Apex Court has held as follows:

“8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. 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 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..."

11. So, according to the verdict of our Hon'ble Apex Court, before considering the photostat copy of the Will dated 14.06.1984, the revision

petitioner/plaintiff must fulfill the conditions laid down in Section 65 of the Indian Evidence Act, 1872. However, only at the time of trial, the revision petitioner/plaintiff is having the opportunity to comply with the condition stated above. In otherwise, denial to receive the document itself is unwarranted.

12. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section.

13. Mere admission of a document in evidence does not amount to its proof. The Court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. More so, the Court should have borne in mind that admissibility of a document or contents thereof may not necessarily lead to drawing any inference unless the contents thereof have some probative value.

14. In the judgment of *State of Bihar Vs. Radha Krishna Singh*, reported in (1983) 3 SCC 118, our Hon'ble Apex Court has held as follows:

“40. ...Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil.”

15. So, in the said circumstances, it is necessary for the Court below to give opportunity to the revision petitioner/plaintiff for proving that the respondents/defendants are the custodian of the said document. As already observed, mere marking of the document cannot be held that the contents of the document, is proved. Therefore, this Court is of the considered opinion that to prove the circumstances in which the alleged Will dated 14.06.1984, is in the custody of the respondents/defendants, an opportunity must be given to the revision petitioner/plaintiff, for which, exhibiting the photostat copy of the Will dated 14.06.1984, is necessary.

16. The learned senior counsel, who appeared on behalf of the 1st respondent/defendant had submitted that contents in the alleged Will dated 14.06.1984, does not relate to the suit mentioned property and thereby, receiving the said document as exhibit, is unnecessary.

17. It is true that subject matter of the Will relates to Door No.H134, Periyar Nagar, Erode, and the said property is not the scheduled property in the suit filed by the plaintiff.

18. In this regard, the learned counsel appearing for the revision petitioner/plaintiff would contend that Will is for other properties also. Hence, it cannot be held that the Will is not related to the suit scheduled property.

19. Whatever may be, as already stated, only after fulfilling the conditions found in Section 65 of the Indian Evidence Act, 1872, the Will dated 14.06.1984, can be treated as secondary evidence and therefore, the order dated 18.09.2013 made in I.A.No.464 of 2013 in O.S.No.64 of 2005, on the file of the II Additional Subordinate Court, Erode District, is set aside.

20. The learned II Additional Subordinate Judge, is directed to give an opportunity to the revision petitioner/plaintiff, for fulfilling the conditions laid under Section 65 of the Indian Evidence Act, 1872, after marking the Will dated 14.06.1984 as the Exhibit and to decide the question of admissibility of the document in secondary evidence, before making endorsement thereof.

21. With the above directions, the Civil Revision Petition is allowed.

No costs. Consequently, the connected Miscellaneous Petition is closed.

10.12.2019

Speaking/Non-speaking order

Index: Yes/No

Internet: Yes

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To

The II Additional Sub Court, Erode District.



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R.PONGIAPPAN, J.,

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Pre-delivery order in
CRP (PD) No.4504 of 2013
and M.P.No.1 of 2013

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